

CALCULATING AVERAGE WEEKLY WAGE UNDER ILLINOIS WC LAW:

AN ANALYSIS OF SECTION 10 OF THE ILLINOIS WORKERS' COMPENSATION ACT

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INTRODUCTION

The calculation of the average weekly wage pursuant to the Illinois Workers' Compensation Act would be expected to be a simple mathematical issue. In fact, there are numerous issues which make calculating the average weekly wage difficult. A simple reading of the statute will not help with the average weekly wage calculation. One must understand the statute and also case law to be able to properly calculate the average weekly wage. Even with *full* knowledge of the statute and case law, reasonable minds can disagree on how to calculate the average weekly wage.

The calculation as to the average weekly wage is critical since it forms the basis for all workers' compensation indemnity benefits. In order to determine the amount of compensation owed, one must first calculate the average weekly wage. The temporary total disability rate is set at 66 2/3% of the average weekly wage. The permanent partial disability rate is set at 60% of the average weekly wage. The TTD and PPD rates are subject to minimums as set forth in the statute and maximums which change semi-annually for TTD (1/15 and 7/15) and annually for PPD (7/1). A schedule showing minimum and maximum rates is attached to this article as an appendix.

The Statute Itself

The section of the Act that controls the average weekly wage calculation is contained in Section 10. The 2006 amendments to the Illinois WC Act did not change Section 10. Section 10 of the Workers' Compensation Act sets forth the following provisions for calculating wages:

The compensation shall be computed on the basis of the "Average

weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last *full* pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation.

I. DETERMINING THE TIME PERIOD.

The general rule of thumb is that the average weekly wage is based on the earnings of the petitioner in the year (52 weeks) prior to the accident. The date of the accident is the relevant date for determining when to begin the calculation. It is irrelevant if petitioner continued to work after the date of the accident. Earnings after the date of the accident are not considered in the average weekly wage calculation.

In calculating the time period, the calculation begins with the last full pay period prior to the date of the accident. It doesn't necessarily begin the day prior to the accident. For example, if petitioner is paid on a monthly basis and is injured June 15, 2007, you would look to his earnings during the period June 2006 through May 2007. You must remember that various payment periods exist for different employments. Petitioner may be

paid weekly, bi-weekly, twice a month, monthly, etc. You should be especially careful as to an employer who pays wages two times a month. It will appear that an employee has 24 pay periods when in fact the earnings cover 52 weeks. The total earnings should be divided by 52 not 48.

The relevant period of time is 52 weeks. This is an advantage to employers since generally employees receive raises in the year prior to the accident. The statute includes 52 weeks of earnings and allows an averaging of the earnings during that time. It is to the employer's disadvantage to simply take the current hourly earnings and multiply by 40. It is to the employer's benefit to average the total earnings in the entire 52 weeks prior to the accident.

II. WHAT CONSTITUTES EARNINGS?

The statute says that the average weekly wage is to include "the actual earnings of the employee..." excluding overtime and bonus. The actual earnings of the employee include all payments made for wages. This would include all regular wages as well as incentive pay, vacation pay, holiday pay, sick pay, shift differential, and cost of living adjustments. Earnings also include the value of a car or the use of an apartment. It does not include expenses incurred by the employee while working that are reimbursed to the employee.

The earnings do not include unemployment compensation. *Illinois-Iowa Blacktop, Inc. v. Industrial Commission*, 180 Ill.App.3d 885, 536 N.E.2d 1008 (1989). The earnings do not include fringe benefits. *Ogle v. Industrial Commission*, 284 Ill.App.3d 1093, 673 N.E.2d 706 (1996).

A. Bonuses

The statute says that bonuses are excluded from the average weekly wage calculation. The case decisions have regularly excluded semi-annual or annual bonuses. However, bonuses which are actually incentive pay or production pay are included as part of wages.

B. Overtime

The statute also specifically states that overtime is to be excluded from the average weekly wage calculation. However, the statutory language has partially overturned by court decision. Under current case law, overtime pay is never included in the average weekly wage calculation. However, overtime hours should be included in the average weekly wage calculation at the straight time rate if the employee proves that the overtime hours are mandatory and consistent.

The statute has not changed for years. The statute clearly states that overtime is to be excluded. However, the appellate court essentially changed the statute and included overtime hours at the straight time rate in the case of *Edward Hines Lumber Co. v. Industrial Commission*, 215 Ill.App.3d 659, 575 N.E.2d 1234 (1990). In the *Edward Hines Lumber* case, petitioner was employed as a yardman for a lumber company. The evidence showed that he was required to work 10 hours a day, six days a week. The evidence was that petitioner had a mandatory 60-hour work week. In addition, the employer could require even more hours. In fact, petitioner averaged 67 hours per week in the year prior to the accident. Petitioner was paid regular wages for 40 hours. Petitioner was paid overtime (time and a half) for all hours over 40. The employer

argued that the AWW should be based on 40 hours a week. The court disagreed and stated that 40 hours was not a regular week for all employees. The court stated that the regular week varied by the employment. The court calculated the average weekly wage to be 67 hours times the hourly rate.

Based on the *Edward Hines Lumber* case, the Commission began including overtime hours in the wage calculation frequently. We continued to fight the inclusion of overtime hours AWW calculation. In determining whether or not to include overtime hours, we contended that the Commission should consider whether the overtime was mandatory or voluntary. We contended that the Commission should evaluate the regularity and consistency of the overtime hours. If the wage records show the same number of overtime hours every week, the Commission should be more likely to include the overtime hours in the average weekly wage calculation. If the number of overtime hours varies week per week, we argued the Commission should be less likely to include overtime hours.

After over a decade of fighting, Appellate Court decisions began to support our position. In the case of *Edward Don Company v. Industrial Commission*, 344 Ill. App. 3d 643 (2003), the Court reversed a Commission wage calculation which included overtime hours in the AWW calculation. In the *Edward Don* case, the claimant was employed as a truck driver for 16 weeks prior to the accident. During the 16 weeks of employment, claimant worked overtime hours in 15 weeks. The overtime hours were not mandatory. The number of overtime hours varied each week. The number of hours varied from 0 to 7.8 hours. Nevertheless, the Commission included the overtime hours in the AWW calculation. The appellate court disagreed. Since the number of hours worked each week

varied, the court ruled that the overtime was not “consistent.” The court found that the fact that the overtime hours were not mandatory was very significant. The court concluded that the overtime hours were not part of claimant’s regular hours of employment. The court overturned the Commission’s calculation stating “we find that the Commission erred in including the claimant’s overtime hours at his regular rate of pay in calculating his average weekly wage.”

The ruling in the *Edward Don* case was upheld and reiterated in a subsequent case, *Freesen, Inc v. Industrial Commission*, 348 Ill. App. 3d 1035 (2004). The facts in *Freesen* were similar. Petitioner proved that he worked overtime in 22 of the 45 weeks he worked prior to the accident and the Commission included his OT hours in the wage calculation. The Appellate Court reversed and held that the overtime would be excluded because there was “no evidence that (1) he was required to work overtime as a condition of his employment, (2) he consistently worked a set number of overtime hours each week, or (3) the overtime hours he worked were part of his regular hours of employment.”

Despite these decisions, petitioner’s attorneys continue to claim inclusion of OT hours in the AWW calculation. They claimed that the *Edward Don* and *Freesen* decisions were aberrations and were merely decided in the employer’s favor because petitioner’s attorney’s in those cases failed to offer sufficient proof. The Commission still ignored the *Edward Don* and *Freesen* decisions and continued to include OT hours in the wage calculation if the employee proved either the OT hours were mandatory or consistent.

Three years later, in March 2007, the appellate court issued yet another decision on this issue. In the case of *Airborne Express, Inc. v. Illinois Workers’ Compensation Commission*, 372 Ill.App.3d 549 (2007), the claimant proved that his regular work week

consisted of five eight-hour days. He further proved that he worked overtime in 31 of the 32 weeks that he worked for the employer prior to the injury, but the number of overtime hours he worked ranged from as few as 0.8 hours in one week to as many as 28.43 hours in another week. The employer testified that overtime was necessary to fulfill its operational needs. The employer testified that overtime was awarded to employees on a seniority basis. Only if the employer's overtime hours were not satisfied on a voluntary basis was overtime mandated. Overtime if mandated was filled on a reverse seniority basis. Generally, employees who were forced to work overtime fell in the lower 20% to 25% in the seniority list. Petitioner proved that he was in the upper 30% of the seniority list. Based on those facts, the Commission's inclusion of overtime hours was reversed and overtime hours were excluded from the average weekly wage calculation.

Despite the *Airborne Express* decision, the Commission continued to include overtime hours in the average weekly wage calculation. I just completed litigation on this issue on behalf of Dominick's Finer Foods, a large grocery store chain. I successfully proved that overtime hours should not have been included for a warehouse employee of Dominick's even though petitioner's overtime was mandatory, because the overtime was not consistent. The decision was entered December 4, 2007 in the case of *Dominick's Finer Foods v. Illinois Workers' Compensation Commission and Jose Orozco*, No. 1-07-0429WC. In the *Dominick's* case, petitioner admitted that his regular work week was five eight-hour days. He testified that overtime was mandatory and he never volunteered for overtime. In the 52 weeks prior to the accident, petitioner worked overtime in 33 weeks. His overtime hours varied from as few as one extra hour to as many as 15.25 extra hours. I argued that even if petitioner's overtime was mandatory, it was not consistent and therefore should not

be included in the average weekly wage calculation.

The court adopted my argument and ruled for the first time specifically that in order to include overtime hours in the average weekly wage calculation, the overtime must be both mandatory and consistent. The court held: “Overtime includes those hours in excess of an employee’s regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week. Thus, if an employee’s overtime shares either of the aforementioned characteristics, it falls within the definition, and the overtime should not be included in the calculation of the employee’s average weekly wage.” This decision should finally end the Commission’s rulings including overtime hours wherein the overtime hours are either mandatory or consistent. This decision should finally reduce the number of Commission decisions including overtime hours in the average weekly wage calculation. In order to include those hours, the employee must prove that his overtime hours are both mandatory and consistent.

This decision should make everyone reevaluate wage statements and make recalculations. Any overpayments made as a result of an improper calculation should be claimed as credit against current TTD or future PPD.

C. Exclusion of Overtime for Seasonal Workers

The overtime rule set forth in the *Edward Hines Lumber* case does not apply to seasonal workers, especially construction workers. See *R. A. Cullinan & Sons v. Industrial Commission*, 216 Ill.App.3d 1048, 575 N.E.2d 1240 (1991); *Illinois-Iowa Blacktop, Inc. v. Industrial Commission*, 180 Ill.App.3d 885, 536 N.E.2d 1008 (1989). In cases involving

seasonal workers, especially construction workers, the court has refused to include overtime hours even at the straight time rate. Many seasonal workers work very long hours for very short periods of time. It would be unfair to include their regular and overtime hours in the average weekly wage calculation when they work for so few weeks out of the year. The courts have consistently excluded overtime hours for seasonal workers. This exclusion should be considered for all construction workers. However, it must be recognized that all construction trades are not necessarily seasonal.

III. HOW TO DO THE CALCULATIONS.

The manner of performing the calculation as to the average weekly wage will vary depending on the status of the employee. Regular full-time employees are treated differently from part-time employees.

A. Regular, full-time employees.

The statute provides four different ways for calculating the average weekly wage depending upon the length of the employment. This methodology of calculation was summarized in the case of *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 756 N.E.2d 822 (2001).

1. For an employee who has been employed for a full year and has not "lost" any time from work, the calculation as to the average weekly wage is to take the total earnings and divide by 52 representing the number of weeks in the year prior to the accident. That's the first method of calculation.

2. The second method of calculating is required if the employee "lost" five or more calendar days during the year prior to the accident. In that circumstance, the total

earnings are not divided by 52 but instead by the weeks and parts thereof remaining after the lost time is deducted. For example, if an employee lost 15 days in the year prior to the accident, the average weekly wage would be equal to the actual earnings divided by 49, since the 15 lost days would account for 3 weeks (5 days is considered a work week).

3. The third method of calculation involves a full-time employee who has not been employed for a full 52 weeks. In that circumstance, the actual earnings are divided by the weeks and parts thereof during which the employee actually earned wages. This calculation is similar to the second method in that only days worked are considered in the calculation. If an employee has not been employed for 52 weeks prior to the accident, he is still entitled to have “lost” days deducted from the calculation of weeks worked. The total earnings are to be divided by only the weeks and parts thereof actually worked. See *Bobby L. Anders v. Industrial Commission*, 332 Ill.App.3d 501, 773 N.E.2d 746 (2002). In the *Anders* case, petitioner was employed on a full-time basis for 22 weeks prior to the accident. However, the claimant lost eight days from work. Therefore, in doing the wage calculation, the Commission took total earnings and divided by 20.4 weeks. The court based its decision on *Sylvester*. The court noted that significance of the fact that there was no dispute that the petitioner worked full-time and was employed continuously from the date of hire up to the date of the accident.

4. The fourth method of calculation is used if the employee has been employed for such a short time prior to the accident that there are insufficient earnings to calculate the AWW. The Act provides that if an employee has been employed only very briefly, the average weekly wage calculation is based on the earnings of a similar

employee. In that case, the employer should identify one or two similar employees and obtain a wage statement for each showing their earnings in the year before the accident. The Commission will then use one of those wage statements to form the basis for the wage calculation.

A significant amount of litigation has been generated over the question of what constitutes a “lost” day. Employers have contended that the proper way to calculate wages is to simply take the actual earnings and divide by 52 for a full-time employee who is employed for the year prior to the accident. The issue has been litigated most frequently with respect to construction workers. Construction workers have extremely high hourly earnings. However, they typically do not work 40 hours a week 52 weeks out of the year. They frequently are off work because of bad weather, lack of work, or many other reasons. Employers contend that it is unfair not to take total earnings and divide by 52. However, the Supreme Court recently ruled against employers in the case of *Sylvester v. Industrial Commission*, 197 Ill.2d 225, 756 N.E.2d 822 (2001). In the *Sylvester* case, the employee was employed as a roofer foreman for a roofing and sheet metal company on a full-time basis. He worked for the employer for the full year prior to the accident. However, according to his wage records, he only worked 131 days. The primary reason he did not work was because of bad weather. Petitioner was generally laid off in the winter and filed for unemployment. However, petitioner’s wage statement showed earnings in 48 of 52 weeks. The employer contended that the wage should be total earnings divided by 48. The court disagreed and determined that the proper wage calculation was to take total earnings and divide by 26.2 weeks, the actual number of weeks and parts thereof worked by petitioner. (131 divided by 5 = 26.2 weeks).

This case essentially stands for the proposition that a "lost day" is any day during the year that an employee does not work. The court states, "The clear meaning of this language is that time which an employee does not work must be factored out of the calculation of the average weekly wage. In other words, if in a particular week an employee works on Monday, but not Tuesday through Friday, the latter four days must be 'deducted' in calculating his average weekly wage."

It must be remembered that the evidence in the *Sylvester* case was that petitioner was a full time employee and would have worked every day but for bad weather. There is no evidence that petitioner did not work on his own volition. Employers can still argue that a lost day is a day petitioner did not work through no fault of his own.

The average weekly wage calculation is governed by a fairness standard. It is proper to simply take the total earnings and divide by the total weeks in which there are earnings if the claimant fails to prove the number of days worked. See *Cook v. Industrial Commission*, 231 Ill.App.3d 729, 596 N.E.2d 746 (1992) and *Ricketts v. Industrial Commission*, 251 Ill.App.3d 809, 623 N.E.2d 847 (1993).

The Supreme Court has stated that the average weekly wage calculation should not result in a windfall for the claimant. See *Hasler v. Industrial Commission*, 97 Ill.2d 46, 454 N.E.2d 307 (1983).

The average weekly wage calculation when done in this manner often leads to absurdly high results for construction workers. See *Peoria Roofing and Sheet Metal Co. v. Industrial Commission*, 181 Ill.App.3d 616, 537 N.E.2d 381 (1989), *Illinois-Iowa Blacktop v. Industrial Commission*, 180 Ill.App.3d 885, 536 N.E.2d 1008 (1989).

Consequently, in cases where the petitioner is full-time and employed for the full

year prior to the accident, the Commission will calculate the average weekly wage by taking only the weeks and parts thereof actually worked and dividing that into the actual earnings. The average weekly wage just calculated will likely be far in excess of the employee's actual earnings on a 52-week basis. Nevertheless, the courts have decided this is not too big a windfall for claimants.

Remember that a day's work does not mean 8 hours of work. Any number of hours worked in the day constitute a day. A two-hour day, a four-hour day, etc. constitutes one work day. This is important in calculating wages especially for construction workers. In order to do a proper wage calculation, you need to obtain total earnings, overtime earnings, regular hours, overtime hours, the hourly rate, and the number of days worked in the week. It is not sufficient only to get the hours worked because you can't tell the number of days worked just by the number of hours worked.

Court decisions on wages have generally benefited employees. The courts have said that the Act is to be liberally construed. However, a claimant, in order to get the benefit of the weeks and parts thereof calculation, must prove the actual number of days worked. If petitioner fails to prove this, the Commission is justified in simply taking total earnings and dividing by the total number of weeks in which petitioner received payments. See *McDaneld v. Industrial Commission*, 307 Ill.App.3d 1045, 718 N.E.2d 722 (1999). In that case, petitioner was employed for 44 weeks prior to the accident but his days and hours varied. He testified he was off work for at least five days during that time. The Commission calculated his wage by taking total earnings and dividing by 43. The appellate court affirmed. It is incumbent on petitioner to show regular, full-time work and actual lost days in order to get the benefit of the reduced calculations.

B. Part Time Employees

The rules are different for part-time employees as opposed to full-time employees. For a part-time employee, the average weekly wage calculation is based on the total earnings divided by the number of weeks in which there were earnings. The rules concerning weeks and parts thereof do not apply. Part-time employees do not have the same benefits as to the wage calculation. Part-time employees are not considered to have "lost" days because they are not regularly scheduled to work five days a week.

C. Concurrent Employment

The act contains an additional provision for concurrent employment. The act provides that if a claimant is concurrently employed and the respondent employer is aware of the second employment then the wages of both employers have to be considered in the AWW calculation. In order to get this benefit, petitioner needs to prove concurrent employment. Petitioner must have an actual second employer; self-employment earnings are not considered.

The other employment must be concurrent and not consecutive. The employment generally must be concurrent on the date of the accident. For example, if a claimant is laid off from his primary employer and gets a new job with the respondent employer and is injured, the wages from his primary employer are generally not given consideration. *Flynn v. Industrial Commission*, 791 N.E.2d 1301 (2003); *Zanger v. Industrial Commission*, 306 Ill.App.3d 887, 715 N.E.2d 767 (1999). The significant issue is whether the employment with the respondent employer was a substitute for the primary employment or a supplement to the other employment. An opposite decision was reached in *Jacobs v. Industrial*

Commission, 269 Ill.App.3d 444, 646 N.E.2d 312 (1995). In that case petitioner was laid off from his primary employer on the date of the accident but the Commission still found concurrent employment. The evidence showed that although petitioner had been laid off it was only a temporary seasonal layoff that occurred every year. Since petitioner had been regularly working both jobs prior to the accident, petitioner was concurrently employed.

Another issue is how to “consider” both earnings. Generally, the Commission calculates the wages of each employment separately and then adds the two together. *Mason Manufacturing v. Industrial Commission*, 331 Ill.App.3d 575, 772 N.E.2d 349 (2002). The method of considering the two earnings will vary depending on the length of the concurrent employment. Arguably, the earnings of both employers should simply be added together and the whole sum divided by 52.

CONCLUSION

The calculation of the AWW can be confusing, but it is critical especially for highly paid employees. The TTD maximum are so high now that very few employees ever reach the TTD maximum. Court decisions sometimes don’t help much because they conflict with the plain wording of the statute. The overriding goal is fairness. The calculation is not to provide a windfall to petitioner, but it is difficult to get the court to find that the Commission’s calculation created a windfall for petitioner.

Even the Court admits the statute is difficult. In the *Mason* case in 2002, the court stated, “Determination of the employee’s average weekly wage is often problematic because the methods of determining the average weekly wage set forth in section 10 are somewhat ambiguous and often are not readily applicable to the facts of the case at hand.” Therefore, you should not feel bad if you have a tough time figuring out the AWW using

our statute. The court has a tough time too. Our job would be easier if the Court just interpreted the statute plainly. The court can't complain too much since it created most of the confusion. A change in the statute was expected in 2006 but it didn't happen. It is unlikely that a statutory change will come anytime soon.

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