# Below the Red Line

## Heyl Royster

### Workers' Compensation Newsletter

*A Newsletter for Employers and Claims Professionals* *November 2010*

## A WORD FROM THE PRACTICE GROUP CHAIR

This month our author is Attorney Dana Hughes, who works out of our Rockford and Chicago locations. She represents employers and workers' compensation carriers in Northern Illinois from the Mississippi River to Lake Michigan. Dana has been a member of our practice team since joining the firm.

Her topic is the issue of average weekly wage. Our Illinois state legislature has never utilized a "bright line" test for average weekly wage calculation. Rather, the attempted refinement of Section 10's average weekly wage calculation has been left to the Commission and courts. We hope that Dana's discussion gives you guidance in what is an important analysis – the AWW calculation directly affects workers' compensation claim exposure.

Last month my partners Bruce Bonds and Craig Young and I were invited to speak at the Second Annual Workers' Compensation Conference that was presented by the Illinois Chamber of Commerce. Our presentation, "Are You a Criminal or Creative Employer?", discussed the independent contractor problems facing employers. To complicate matters, this question is not merely a workers' compensation dilemma; the Internal Revenue Service, the Illinois Department of Labor, and the Illinois Department of Employment Security each have their own set of factors and guidelines on this issue. If your company would like more information on this subject, please let us know.

Also, Brad Elward of our appellate practice group was a presenter on workers' compensation appeals at the October 11 ISBA/Law Ed Series *Advanced Workers' Compensation Seminar* in Chicago, along with Justice William Holdridge who serves on the Workers' Compensation Commission Division of the Appellate Court.

Please have a wonderful Thanksgiving!

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## CMS Delays Implementation of Section 111 (SCHIP) Reporting for Liability Settlements with no Ongoing Responsibility for Medical

On November 9, 2010, CMS issued an alert stating that the required submission of liability insurance (including self-insurance) initial claims reports is extended from the first calendar quarter of 2011 to the first calendar quarter of 2012. The deadline for reporting, commencing January 2011, remains unchanged for no fault insurance or workers' compensation claims. In addition, the reporting thresholds exempting nominal settlements from reporting are extended by one year for both liability and workers' compensation settlements. The CMS alert may be viewed at: https://www.cms.gov/MandatoryInsRep/Downloads/RevTimelineTPOC110910.pdf

## This Month's Feature Author:

A native of Rockford, Illinois, **Dana Hughes** worked as a judicial law clerk for the Fifteenth Judicial Circuit in Ogle County. Her writings have been published in the Kane County Bar Journal and the Northern Illinois University Law Review. Following graduation from NIU Law School in 2006, Dana joined our Rockford office. She focuses her practice on workers' compensation and civil litigation defense. Dana also defends employers in third-party claims and intervenes in third-party cases on behalf of employers/carriers to protect Section 5b lien rights. Also, Dana is an arbitrator for the Seventeenth Judicial Circuit Court's court-annexed arbitration system, and serves on the Board of Directors of the Winnebago County Bar Association.

# AVERAGE WEEKLY WAGE: THE FIRST STEP IN DETERMINING BENEFITS

The claimant's average weekly wage (AWW) can have a substantial impact on the value of a claim. Indeed, an employee's AWW is the starting point for determining the rate at which the employer will pay temporary total disability (TTD) benefits and ultimately permanency benefits, whether they be on the basis of a percentage loss of use of a body part, Section 8(e) specific loss, Section 8(d)(2) person-as-a-whole loss, Section 8(d)(1) wage differential award, or permanent total disability pursuant to Section 8(f).

Given its importance, one of the first tasks when reviewing a workers' compensation case is to determine and document the appropriate AWW rate. What follows are some initial questions that must be asked when sitting down to calculate average weekly wage. The answers to these questions will be critical to determining the proper method for calculation and also for determining what earnings must be included in the calculation.

In the discussion which follows, remember that the Commission's AWW rate determination is considered a fact question and is reviewed on appeal under a manifest weight of the evidence standard of review. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 231-32, 756 N.E.2d 822 (2001). To overturn such a finding, an opposite result must be clearly apparent.

## The Act Itself

Section 10 of the Illinois Workers' Compensation Act sets forth the means for calculating average weekly wage:

> 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.

820 ILCS 305/10.

As you can see, Section 10 is *not* an abundantly clear piece of legislation and can be confusing to interpret, which has lead to inconsistent decisions in the Courts.

In 2001, in an effort to clarify this section, the Illinois Supreme Court in *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 756 N.E.2d 822 (2001), broke Section 10 down into a more workable formula using four methods. According to that case, AWW is to be determined as follows:

(1) By default, average weekly wage is "actual earnings" during the 52-week period preceding the date of injury, illness or disablement divided by 52.

(2) If the employee lost five or more calendar days during that 52-week period, "whether or not in the same week" then the employee's earnings are divided not by 52, but by "the number of weeks and parts there of remaining after the time so lost has been deducted".

(3) If the employee's employment began during the 52-week period, the earnings during employment are divided by "the number of weeks and parts thereof during which the employee actually earned wages;"

(4) Finally, if the employment has been of such short duration or the terms of the employment of such casual nature that it is "impractical" to use one of the three methods mentioned above to calculate average weekly wage, 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.

*See, e.g., Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 230-31, 756 N.E.2d 822 (2001).

Under *Sylvester*, an employer's first task is to decide in which category it's employee falls.

## The First Inquiry – How Much Did The Claimant Work?

Few claimants will have worked 40 hours per week for the full 52 weeks prior to their injury, all the while never missing a day or working any overtime. In fact, a claimant who worked full time for the employer during the 52-week period prior to his alleged work injury is probably an exception rather than the rule.

Nevertheless, Section 10 provides that, if the claimant worked full time for the employer during the 52-week period prior to the injury, then the calculation of his average weekly wage is simple and straightforward. In that scenario, the claimant's total earnings are divided by 52, rendering the appropriate AWW rate. This process is referred to as "Method One."

### Example

*Jeff was an exemplary employee and worked every day of the past 52 weeks prior to his work accident, earning $77,000 in that period. To calculate his AWW, we simply divide the $77,000 by 52 to reach an AWW of $1,480.77.*

Because this scenario is more likely the *exception* rather than the rule, we offer the following additional questions to assist you in navigating Section 10 and in computing the claimant's average weekly wage.

## What If The Claimant Worked During The Prior 52 Weeks But Missed More Than 5 Days?

As *Sylvester* explained, if the employee lost five or more calendar days during that 52-week period, whether or not in the same week, then the employee's earnings are divided not by 52, but "by the number of weeks and parts thereof remaining after the time so lost has been deducted." This scenario is referred to as "Method Two" and is the most frequently encountered scenario in workers' compensation cases.

### Examples

*Jenna worked as a fill-in secretary and worked a total of 155 days during the 52-week period prior to her accident, i.e. Jenna missed more than 5 days of work. To calculate her AWW, we divide the 155 days worked by 5 (the number of work days in a work week), arriving at 31 weeks. We then divide her total earnings of $14,750 by 31 weeks and arrive at an AWW rate of $475.81.*

*Doug worked construction and earned $35,850 in the 52-week period prior to his accident. He never worked a full week and his work time was recorded in hours per day. He worked a total of 1,580 hours, which translates into 197.50 days (1,580/8). 197.50 days divided by 5 work days yields 39.50 weeks. Doug's AWW rate is $907.60.*

## How Do We Determine If The Claimant Lost Time?

Under the second method, a critical question in computing the AWW rate is whether the claimant lost five or more work days in the 52-week period prior to the injury. In *Farris v. Industrial Comm'n*, 357 Ill. App. 3d 525, 829 N.E.2d 372 (4th Dist. 2005), the claimant was a full time employee for the employer in the 52 weeks preceding the alleged workers' compensation injury. In the 52 weeks

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preceding the injury, all parties agreed that the claimant worked 181.25 days. The claimant testified that he missed work while caring for his critically-ill infant daughter and that he had also been occasionally laid-off due to lack of work. The arbitrator refused to subtract the time claimant lost due to caring for his sick child, finding that the claimant chose to be with his child rather than work; thus, the lost time should not be deducted from total weeks and parts thereof worked by the claimant. According to the arbitrator, the claimant had worked 44 weeks, which reflected only the eight weeks he was laid-off. The arbitrator relied on the definition of lost time from *Illinois-Iowa Blacktop, Inc. v. Industrial Comm'n*, 180 Ill. App. 3d 885, 891, 536 N.E.2d 1008 (3d Dist. 1989), which defined lost time as time lost to the extent not due to the fault of the employee. The employer had argued that work was available on the days that the claimant took off to care for his child and that those days should be counted in the AWW determination.

On review, the Commission modified the arbitrator's decision on average weekly wage, holding that the second method set forth in *Sylvester* required all lost time to be subtracted, resulting in several weeks and parts thereof less than that found by the arbitrator. Under the Commission's determination, the lost time was to include the days missed caring for the claimant's daughter, and thus the correct method required dividing the 181.25 days by 5, which equaled 36.25 weeks. The employer appealed the issue all the way to the Appellate Court, which ultimately affirmed the Commission's interpretation of Section 10. The Court held that the Commission properly determined the amount of weeks and parts thereof *actually worked*. The Court refused to penalize the claimant for caring for his child, and found that the lost time was not actually caused by the claimant.

In other words, *Farris* left open the issue of what actually constituted "lost time" and the role played in that determination by the claimant's so-called "fault."

## What If Employment Began Within The Prior 52-Week Period?

In *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331 (1st Dist. 2005), the claimant had been working for the employer for 5 months prior to his alleged workers' compensation injury. The parties agreed that the third method of calculating the claimant's average weekly wage was applicable. In *Greaney*, the claimant was a full time employee, scheduled to work a full work week in each of the 17 weeks in which he was employed by the employer. The claimant never worked a full work week.

In performing the average weekly wage calculation using "Method Three," the Appellate Court divided the number of days the claimant actually worked prior to the injury divided by the number of days in a full work week to arrive at the number of weeks and parts thereof by which the claimant's pre-injury wages are to be divided. The claimant worked 59 days in the 17 weeks prior to his injury, meaning he worked 11.80 weeks. The Court held that the phrase "weeks and parts thereof" did not differ when using the third method of calculation than when using the second method of calculation.

Likewise, the Appellate Court applied Method Three to a school teacher whose employment contract was set at 39 weeks. In *Washington Dist. 50 Schools v. Illinois Workers' Compensation Comm'n*, 394 Ill. App. 3d 1087, 917 N.E.2d 586 (3d Dist. 2009), the claimant had worked as an elementary school teacher for 19 years. During the year preceding her injury, she worked 39 weeks (the regular school year), and was paid a salary of $40,416.48. Under her contract, she had the option of accepting her salary spread out over the 52-week calendar year, which meant she received checks in the amount of $777.24.

The Commission calculated her AWW rate at $1,036.32 by dividing her salary by the 39 weeks she worked for the school district. The employer argued that the total salary should have been divided by 52 weeks. The Appellate Court affirmed the Commission, finding: (1) the Third Method of Section 10 applied because she did not work a full calendar year and (2) her total salary was properly divided by the 39 weeks. By using the 39

weeks, the court's methodology yielded the claimant a significant windfall, as the 52-week total of her AWW rate equaled $53,888.64, some $13,472.16 extra.

Placing this ruling is a benefits context, the claimant's TTD benefits based off of the $1,036.32 equal $691.23, while her TTD benefits based on the actual pay of $777.24 equal $518.42, a difference of $172.81 per week. Likewise, if one assumed a 20 percent of a person award as permanency, the difference in awards is $62,180 versus $46,635.

## What If The Employment Has Been Of Such Short Duration Or The Terms Of The Employment Are Of Such A Casual Nature That Is It Impractical To Use One Of The Three Methods Mentioned Above To Calculate Average Weekly Wage?

In this scenario, regard shall be given to the average weekly wage 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. This method, known as "Method Four," is also referred to as the "commensurate pay method," essentially looks to what a similarly-situated employee would earn in that same job. The claimant can use a co-worker or reference a worker in the same line of work.

Method Four was used most recently in *Copperweld Tubing Products Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 931 N.E.2d 762 (1st Dist. 2010), to determine the amount the claimant would have been able to earn as a millworker had he not suffered a work accident as part of the Court's determination of an appropriate Section 8(d)(1) wage differential award.

## Other Considerations In Determining Average Weekly Wage

### Concurrent Employment – Did the Claimant Have Another Job?

Section 10 provides that, if a claimant was working concurrently and the employer had knowledge of the concurrent employment prior to the injury, the claimant's wages from all employers shall be considered in the AWW rate calculation as if earned from the employer liable for compensation. The courts have broadly construed concurrent employment to generally favor inclusion of additional wages in the claimant's average weekly wage.

Once it is determined that the claimant was working concurrently, and that the employer had knowledge of the concurrent employment, the next question becomes what is the proper method of calculating the average weekly wage given the concurrent employment. In *Mason Mfg., Inc. v. Industrial Comm'n*, 331 Ill. App. 3d 575, 772 N.E.2d 349 (4th Dist. 2002), the claimant's primary employer was Norfolk and Southern Railroad. He had a secondary job at Mason, working occasionally, 4-5 times during the five years preceding the injury. When he worked for Mason, he would work several days to several weeks. When was injured, he was in his fourth day of employment for Mason for that period. Prior to that prior period of employment, the claimant had not worked for Mason for several years.

It was undisputed that Mason was aware of the claimant's primary employment with the railroad and that his wages from both employers were to be considered in the average weekly wage calculation. However, the parties disagreed on the method by which the concurrent wages would be used in calculating the claimant's average weekly wage.

Mason contended that the total wages should be added together and divided by the total weeks in which the claimant actually worked. Conversely, the claimant contended that his average weekly wage should be calculated for each employer separately, and then adding the two average weekly wage calculations together to determine the claimant's average weekly wage for purposes of benefits and his workers' compensation injury against Mason. Clearly, the claimant's proposed calculation would result in a windfall to the claimant.

The Court agreed with the claimant and stated, "we believe that in cases of concurrent employment, the better practice is to determine the average weekly wage of each job separately, by the method appropriate to that job, then add the averages together to determine the average weekly wage." *Mason*, 331 Ill. App. 3d at 579. Applying that rationale, the Court found that the third method, as articulated in Section 10 and in *Sylvester* was appropriate.

The Court acknowledged that the average weekly wage calculation ultimately affirmed would result in a substantial windfall to the claimant and that such a windfall had been criticized in the past appellate decisions.

*See Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 596 N.E.2d 746 (3d Dist. 1992) (The Court rejected the claimant's average weekly wage calculation, finding that the claimant's interpretation of Section 10 would result in a windfall to the claimant allowing the claimant to receive substantially more per week than he actually earned while employed); and *Village of Winnetka v. Industrial Comm'n*, 250 Ill. App. 3d 240, 621 N.E.2d 150 (1st Dist. 1993). Nevertheless, the Court let the determination stand.

In *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 813 N.E.2d 119 (2004), the Supreme Court addressed concurrent employment in the context of a seasonal worker. In *Flynn*, the claimant was primarily a union asphalt worker. The claimant typically did asphalt work from March through November or December, due to the weather-dependent nature of the work. During the offseason, he maintained an on-call status with the asphalt companies. He would sometimes be called back to work by the asphalt companies during the offseason.

In the offseason, the claimant never applied for unemployment compensation. Rather, he worked on a farm and sometimes worked in other temporary jobs. In one offseason, the claimant plowed snow for a local township. In the course of that employment, he suffered a severe eye injury, which restricted him from returning to work in the asphalt trade. He sought wage differential benefits based on his AWW rate as an asphalt worker.

The arbitrator found that the claimant was entitled to wage differential benefits based on his average weekly wages as an asphalt worker. On review, the Commission reversed and found that the claimant was not employed concurrently by the township and the asphalt companies. The Commission fixed his AWW rate was $56 per week for the township and found his earnings as an asphalt worker as irrelevant.

Although affirmed by the circuit and appellate courts, the Supreme Court disagreed. Framing the issue as "What are a seasonal employee's relevant earnings in determining his compensation for an injury which occurred during temporary offseason work?", the Court held that when an employee is working for two or more employers concurrently, wages from all employers shall be considered as if earned from the employer liable for compensation. The plain language of Section 10, along with the purpose of the Act, lead to a conclusion that when a worker is concurrently employed, all of his earnings must be considered when calculating a Section 8(d) wage differential award.

In *Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444, 646 N.E.2d 312 (2d Dist. 1995), the claimant was also injured in offseason temporary employment as a snow plow driver. At the time of the accident, he had been laid off from his primary employment as a sheet metal worker for a couple of weeks. He testified that the layoff was usual and customary in the line of his employment. The claimant further testified that he was always subject to recall in the offseason. The Appellate Court concluded that fairness to the claimant was an important consideration in whether the claimant's average weekly wage as a sheet metal worker should be taken into account when calculating his recovery for his workers' compensation injury which occurred in the offseason. The Court held that the claimant was working concurrently.

### Did The Employee Work Overtime?

Section 10 unequivocally states that overtime is excluded from the average weekly wage. 820 ILCS 305/10. "Overtime" consists of compensation for hours beyond those the employee regularly works each week and extra hourly pay above the regular hourly wage. *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666, 575 N.E.2d 1234 (1st Dist. 1990) (Claimant required to regularly work 67 hours per week; AWW rate based on a 67 hour work week).

In *Airborne Express, Inc. v. Illinois Workers Compensation Comm'n*, 372 Ill. App. 3d 549, 555, 865 N.E.2d

### Lessons Learned …

If the claimant was actually concurrently employed at the time of the work accident and the employer knew of the other job, the AWW rate should be calculated from each job and added together to reach the AWW rate applicable to the work accident.

Remember that the employer against whom the claim is made must have actual knowledge of the concurrent employment in order for the wages to be included; this should always be confirmed with the employer before the additional wages are added.

979 (1st Dist. 2007), the claimant's regular workweek consisted of five, 8-hour shifts. In the 52 weeks prior to his injury, he worked 32 weeks for the employer, 31 of which he worked overtime. The parties agreed that the employer required overtime work to meet its operational needs, but the claimant himself was not required to work overtime. Rather, he used his seniority to obtain the overtime hours. The evidence further established that although the claimant consistently worked overtime, he did not consistently work a set number of overtime hours each week. The Appellate Court held that the overtime should not be included in the average weekly wage because it was *not mandatory* (a condition of the claimant's employment) *and regular*. The Court went on to say that if it included regular and voluntary overtime in the claimant's average weekly wage, the overtime exclusion in Section 10 would be rendered meaningless.

In *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 673 N.E.2d 706 (1st Dist. 1996), the Appellate Court held that the claimant's average weekly wage should have been based upon his earnings for a 48 hour work week. There, the Court's holding was based upon evidence which established that the claimant's normal work week consisted of 48 hours and his union contract made overtime work mandatory. Moreover, it was not until the claimant had worked 48 hours or more that he was not required to work any additional overtime. The evidence also established that the claimant was only able to work less than 48 hours per week at the employer's discretion.

### Volunteer Firemen, Police And Civil Defense Members

Per the plain language of Section 10, in the case of volunteer firemen, police and civil defense members or trainees, the income benefits shall be based on the average weekly wage in their regular employment. 820 ILCS 305/10.

## Documentation of Wage Information

Proper calculation of the AWW rate can be made easier if accurate wage records are maintained. For employers, this means keeping a file showing the number of days and/or hours worked by each employee, properly listing the employee's wage rate and adjustments, and accurately listing overtime hours and pay. For insurance carriers, these records should be requested from the employer immediately and the appropriate AWW rate confirmed. Where possible, insurance carriers should stress to their insured employers the need to maintain useable wage records for their workforce.

Also, when handling a claim, be sure to inquire as to whether the employer has knowledge of the claimant working a second job. Since a second job can, in some circumstances, dramatically change a claimant's AWW rate, this information must be obtained up front and as early as possible to avoid surprise and to ensure that proper reserves are set for the claim. Remember, a claimant's AWW rate determines his TTD rate and all forms of permanency. Gathering this information early is key to paying benefits at a proper rate and accurately evaluating permanency exposure.

If you have any questions concerning the proper calculation of average weekly wage or any other workers' compensation issue, please contact one of our workers' compensation attorneys.

### Practice Tip

If overtime hours should be included in the AWW rate calculation, it is included at the claimant's regularly hourly rate, also known as the straight time rate.

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