

# BELOW THE RED LINE

WORKERS' COMPENSATION UPDATE  
"WE'VE GOT YOU COVERED!"

May 2023

## A WORD FROM THE PRACTICE CHAIR

I did something recently that I have not done for 25 years. I took two consecutive weeks off of work. The last time I did that was for my honeymoon when I took my bride to Italy. We brought back wonderful memories and pledged to each other if we were ever blessed to have children, then we would take them back to Italy with us and celebrate our 25th wedding anniversary. Although a little rain did fall, the Tomasos had a glorious time, and my children were able to experience Italy for the first time. Normally, I would not dare take that much time off of work, but my wife deserved every bit of my time and attention and the incredible wine and food we experienced. So, for those of you who missed me while I was gone ... I missed you too. I am getting caught up now, but if you need anything immediately, please call me and let's talk.

I know this is the May 2023 newsletter ... but as I am drafting this a bit late (sorry, everyone!), it is technically June. This is a month I have been looking forward to for a long time. Our Claims Handling Seminar is coming up, and the Team here at Heyl Royster is chomping at the bit to see you, talk about workers' compensation, and share some time with you. We have timely and informative topics lined up for you. I promise you won't be disappointed with the content. We are ready to go and will talk to you soon!

This month's newsletter was authored by Maria Mengarelli, one of our associates in the Edwardsville office, who began her career with us in 2021. She is covering Section 10 of the Act, and if you are familiar, that covers the incredibly important topic of average weekly wage. As you know, the average weekly wage is what drives the value of a claim from an indemnity standpoint. Getting the calculations right and making sure we are not dealing with an unnecessarily high rate is always a must so we can ensure exposure is in the range we expect it to be. If you ever have problems with your average weekly wage calculations, then I can report a Heyl Royster workers' compensation attorney is just a phone call or e-mail away. Contact us, and we can help make sure your numbers reflect how to properly calculate the injured workers' wages.

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## FEATURE ARTICLE

### AVERAGE WEEKLY WAGE: CALCULATION PURSUANT TO STATUTE UPHELD

BY MARIA MENGARELLI

On April 21, 2023, the Illinois Workers' Compensation Commission Appellate Court ruled in *Employco USA, Inc. v. Illinois Workers' Compensation Comm'n*, 2023 IL App (1st) 220906WC-U. While this order was filed under Supreme Court Rule 23, meaning it may not be cited as precedent, it still offers helpful advisory information. Here, the appellate court held that the average weekly wage may only be calculated by the four methods outlined in the Workers' Compensation Act (the Act).

This case arises from Hector Del Bosque's injury while working at Employco USA, Inc. On March 11, 2020, Del Bosque was sitting on the floor against a shipping crate, eating his lunch, when a forklift hit the crate, pushing the claimant two to three feet. As a result, he sustained injuries to his low back and left ankle.

Del Bosque had been working for Employco for approximately three weeks at the time of the accident. He had worked 32 hours in those three weeks; 24 hours at a regular rate of \$47.35 per hour and 8 hours at a double-time rate of \$94.70 per hour. Overtime was not mandatory.



An arbitration hearing was held, finding that the claimant sustained an accident with injuries, and the claimant's average weekly wage was \$505.07. The arbitrator calculated the claimant's average weekly wage (AWW) by multiplying his regular pay rate,

\$47.35, by the 32 hours that he worked in the three weeks before the accident for a total of \$1,515.20. They then took the \$1,515.20 and divided it by three weeks for an AWW of \$505.07. The arbitrator found that neither party provided evidence of the number of hours the claimant was required to work in a day.

Both the claimant and Employco filed petitions for review of the arbitration decision. The Commission modified the arbitrator's \$505.07 average weekly wage calculation, finding the claimant's correct AWW to be \$1,894.00. In calculating the AWW, the Commission first multiplied the claimant's regular hourly wage rate, \$47.35, by the number of hours that the claimant was paid at his regular rate of pay, 24 hours, in the three weeks prior to the accident to arrive at the sum of \$1,136.40. The Commission found that the only testimony that was in evidence were 8-hour workdays, and that evidence was un rebutted. The Commission found that \$1,136.40 was the equivalent of three workdays at the claimant's regular rate of pay. The Commission divided \$1,136.40 by three to arrive at a daily pay rate of \$378.80 and multiplied that sum by five to get an average weekly wage of \$1,894.00.

Employco sought judicial review of the Commission decision in the circuit court of Cook County. On May 18, 2022, the circuit court confirmed the Commission's decision. Employco then appealed to the Appellate Court, arguing the Commission erred in altering the average weekly wage from \$505.07 to \$1,894.00. Employco argued, relying on the Supreme Court's decision in *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 234-37 (2001) that the proper way to calculate the average weekly wage is by multiplying the claimant's regular hourly pay rate, \$47.35, by the 32 hours he worked and then dividing that by three weeks.

In *Sylvester*, the Supreme Court outlined the four



methods of calculating AWW in Section 10 of the Workers' Compensation Act:

(1) The employee's actual earnings in the employment in which s/he was working at the time of their injury during the 52 weeks prior to the date of injury, excluding overtime and bonuses, divided by 52;

(2) If the employee lost five or more calendar days during the 52 weeks to the date of injury, whether or not in the same week, then the employee's earnings are divided by the number of weeks and parts thereof remaining after the time lost has been deducted;

(3) Where the employment prior to the injury extended is over a period of less than 52 weeks, the employee's earnings during that period are divided by the number of weeks and parts thereof during which the employee actually earned wages; and

(4) If the employment has been of such short duration or the casual nature or terms of the employment make it impractical to use one of the three preceding methods of computation, regard shall be had to the average weekly amount which during the 52 weeks prior to the employee's injury 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.

*Sylvester*, 197 Ill. 2d at 230-31; see also 820 ILCS 305/10.

Here, Del Bosque only worked for Employco for three weeks before the injury. Therefore, the third calculation method in Section 10 of the Act is to be applied in determining the claimant's average weekly wage. Under the third method, the claimant's earnings, exclusive of overtime and bonus, are divided by the number of weeks and parts thereof during which the claimant actually earned wages.

The record showed that the claimant earned \$1,894.00 for 32 total work hours during the three weeks. Twenty-four hours were paid at an hourly rate of \$47.35, and eight (8) hours were paid at a double-time hourly rate of \$94.70. There is no explanation in the record as to why the claimant was paid at a double-time rate, but it was clear that it was not for overtime work. Therefore, the \$47.35 per hour the claimant was paid over his regular hourly rate was determined to be a bonus. Excluding the bonus portion of the double-time pay for those eight (8) hours, he was paid \$1,515.20 for 32 hours worked in the three weeks before the accident. By using the third method of the calculation, \$1,515.20 must be divided by the three weeks he worked, resulting in an average weekly wage of \$505.07. The Appellate Court found that the arbitrator's calculation of the average weekly wage was correct, and the Commission's calculation of the claimant's average weekly wage was inconsistent with the Act's plain language.

Two takeaways are prevalent with the *Employco* case: (1) average weekly wage must be calculated in one of the four ways described in the Act, and (2) it is imperative to explain differences in an employee's pay in order to determine what is to be included in the calculation of AWW. Here, the claimant worked some periods at a double-time rate, but there was no explanation of the reason for the increase in hourly pay. If payroll had been carefully explained, confusion could have been avoided.

Average weekly wage calculations can be confusing, and an early miscalculation can be costly as the claim progresses. Please feel free to contact any of our workers' compensation attorneys should you have any questions on this topic or any other workers' compensation issues.



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### Maria Mengarelli

#### **Associate in Edwardsville, IL**

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***Maria understands a lawsuit's impact on a client and the nervousness and uncertainty of what it brings. She approaches each case calmly and clearly, laying out the road ahead.***

Maria understands a lawsuit's impact on a client and the nervousness and uncertainty of what it brings. She approaches each case calmly and clearly, laying out the road ahead. She believes in honesty, not hiding the difficulties, and finds truth in the adage that there are three people you should never lie to: your doctor, priest, or lawyer.

Maria Mengarelli, an Associate attorney in our Edwardsville office, joined the firm in 2021. Serving on several practice group teams, Maria had an early opportunity in her career to try her first solo case. Thankful for Heyl Royster's vast wealth of experienced, bright attorneys willing to share their knowledge and provide case law direction, Maria successfully obtained a favorable ruling. She recognized that she had found a firm that would allow her to represent her clients in the best way possible as she furthers her tenure in the legal practice.

A graduate of Southern Illinois University School of Law, Maria was a member of the trial team competing in intramural mock trial competitions. She attributes this experience to help her develop a firm foundation of the ins and outs of trials, witness testimony, and the rules of evidence. Additionally, while in law school, Maria researched common law versus trial law in Kenya and South Africa, allowing her a unique opportunity to bring her Linguistics undergraduate degree into her law school studies.

Dedicated to the community, Maria has taught for AmeriCorps Jumpstart, partnered with Meals on Wheels, and participated in Habitat for Humanity. Moving to Edwardsville during the COVID lockdowns, Maria continues to explore the area and is looking forward to becoming active in her new community.



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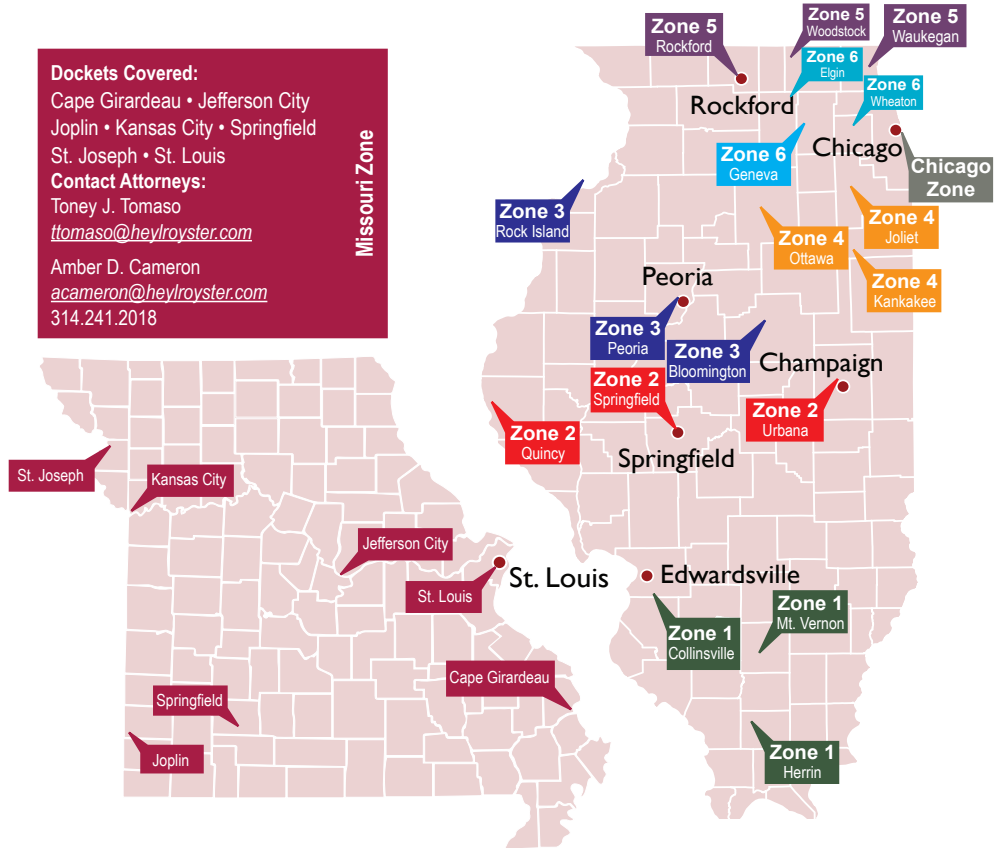
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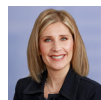
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