

# BELOW THE RED LINE

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

OCTOBER 2022

### A WORD FROM THE PRACTICE CHAIR

You may very well be experiencing a Halloween candy hangover this week. The weather in my neck of the woods was not ideal for trick-or-treaters, but that only meant those who braved the rainy conditions went away with more candy. My wife's post-Halloween battle cry is, "get all that candy out of my house," so the kids who showed up received extra to make sure there were no leftovers. I may or may not have stored some candy in a place only I know about at home - no judging, please. A special shout out to the young girl dressed as Black Panther who showed up at my door, grabbed all the pink Laffy taffy in the bowl, and then declared me her Halloween night hero. It's the small things that make life so great. I hope you also enjoyed this Halloween dressing up, taking your kids around, or watching the parade of trick-or-treaters come to your door.

One aspect of our relationship that you should expect, and frankly demand, is a constant effort by your Heyl Royster attorney to handle succession planning. As a senior partner at Heyl Royster, it is incumbent upon me and any attorney with significant experience to train the next generation of attorneys. We are tasked to mentor young attorneys who work with us on your files. Our job is to teach them the lessons we have learned over the many years of practice before the Commission, and we endeavor to make these attorneys better than the original model. We do this with you in mind. Our clients

demand we train the next generation so that there is a seamless passing of the baton when our senior attorneys retire. Please know this happens daily as it is an essential element of who we are as a firm because planning for the future is important to all of us.

Speaking of mentoring, this month's article is co-written by my partner and our newsletter's editor, [Amber Cameron](#). Amber is a partner in the Edwardsville office who works in Zone One (southern Illinois) and spearheads our State of Missouri workers' compensation team. I had the privilege of mentoring Amber when she first joined Heyl Royster. I can honestly say she has become an exceptional attorney who I believe has proven you can outperform your mentor. I get to thank her here for all of her efforts yesterday, today, and for many tomorrows. The subject matter she is touching on this month is the proper calculation of average weekly wage and Section 10 of the Act. Bonuses play a key component these days in compensation packages. It is important to determine when a bonus is included in earnings and when to exclude it from wage calculations. Amber looks at the *Alvarado* case to help explain the key takeaways on this subject matter. I consider this topic important because the average weekly wage rate will always drive the value of a claim for indemnity reasons.

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## FEATURE ARTICLE

### **BONUSES AND CALCULATION OF AVERAGE WEEKLY WAGE**

**By Jessica Bell & Amber Cameron**

The Petitioner's average weekly wage (AWW) can have a substantial impact on the value of a workers' compensation claim as it is used to determine both the temporary total disability (TTD) benefit rate and ultimately the permanent partial disability (PPD) rate. Given its importance, one of the first tasks when reviewing a workers' compensation claim is to calculate and document the appropriate AWW rate. When a Petitioner's wages include overtime, holiday pay, fringe benefits or bonuses, it is critical to determine what earnings should be included in the AWW calculations.



Section 10 of the Illinois Workers' Compensation Act sets forth the means for calculating average weekly wage, but it can be confusing to interpret and has led to inconsistent decisions in the courts. It states, in part:

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.

820 ILCS 305/10.

There is case law to help interpret Section 10 and the calculation of average weekly wage when the Petitioner missed work, worked less than 52 weeks before the accident, had concurrent employment at the time of the accident, or worked overtime. This article will discuss a recent Rule 23 Order of the Illinois Appellate Court discussing bonuses received by the petitioner and the calculation of AWW.

***Alvarado as next of Friend of Alvarado v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 191105WC-U**

Maria Alvarado filed a workers' compensation claim as wife of Evaristo Alvarado, who died in a forklift accident while working for his employer, Menards. At arbitration, the parties agreed that the sole issue in dispute was whether funds paid to the decedent by his employer pursuant to a profit-sharing program were "wages" or a "bonus" under Section 10 of the Act for the purposes of calculating the decedent's average weekly wage.

Decedent began working for the employer in June 2004. He worked on a part-time basis until June 2005, when he quit. He returned, working full time, in August 2005 and continued until his death in March 2012.

Claimant testified that her husband would receive a check from his employer every February as part of the employer's "Instant Profit Sharing" (IPS) Plan. To qualify for the IPS payment, an employee needed to work a certain number of hours during the preceding year. Decedent did not receive an IPS payment in 2005, as he worked part-time and did not work enough hours to meet the eligibility requirements. Decedent did receive an IPS payment every year thereafter, including in February 2012 just before he died for \$7,717.76.

The IPS payments were included on employee's W-2 as "wages, tips, and other compensation." Evidence at arbitration revealed the details of the IPS program were laid out in an IPS booklet provided to employees. The IPS booklet described the payments as "discretionary," and specifically indicated that the IPS program did not guarantee any particular amount of compensation would be paid, and that the employer reserved the right to reduce, modify, or withhold awards for any reason. Further, eligibility for an IPS payment required: (1) the employee needed to be paid for hours worked on or after December 15th of the W-2 year; (2) the employee must have achieved a thousand hours paid during the W-2 year; and (3) the employee's work unit must have achieved the profit requirements set by the program.

IPS payments were paid as a percentage of profitability based on an employee's individual unit. If the unit was not profitable, they did not receive an IPS payment for that year. IPS payments increased with the employee's length of service, maxing out after a certain period of time. IPS payments were not based upon the volume or quality of an individual employee's work and an individual employee would not be excluded based upon a performance review.

The arbitrator found the IPS payment was part of decedent's wages and should be included in the calculation of his average weekly wage. The arbitrator likened the IPS payments to a production bonus, as both were considered an important part of the compensation package offered to employees, both required the employee to meet certain eligibility requirements, and both were paid as consideration for work performed by the employee, either in whole or in part. The arbitrator acknowledged the IPS payments were labeled "discretionary," but found they were not "bonuses" to exclude because: (1) the employer never exercised any discretion in making the decedent's IPS payments for the work that he performed, which contributed to the employer's profitability every year; (2) the decedent received ever-increasing IPS

payments on a yearly basis; (3) decedent received the incentive payments pursuant to the IPS program based on his increasing work production; and (4) the claimant's widow testified that they expected the IPS payment as part of his earnings every year.

On appeal, the Commission reversed, deciding the IPS payment was essentially a bonus and should



not be included in the calculation of AWW. The Commission specifically noted the IPS payments were not tied to individual performance but were dependent upon the profitability of an entire unit, they were discretionary, and they could be cancelled or amended at any time without notice.

However, the circuit court reversed the Commission's decision and found the IPS payments were wages, and not a bonus, because: (1) the payments were not provided gratuitously; (2) payments were provided in consideration for the work performed by members of a unit; (3) the decedent paid taxes on the payments; and (4) the payments were designed to incentivize the decedent to work more hours and to increase his productivity.

On appeal, the Appellate Court first addressed the proper standard of review to apply. *Alvarado as Next of Friend of Alvarado v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 191105WC-U. The claimant argued a *de novo* standard applied



because the sole question presented involved a legal issue rather than a factual issue, the issue was one of statutory construction, and all the material facts were undisputed and susceptible to only one reasonable inference.

The employer argued the review should be under the manifest weight of the evidence standard because the issue of whether the IPS payments were a bonus or wage was a question of fact and the determination of whether the payments constituted a bonus or wage based on an interpretation of the IPS program could result in different inferences.

The Appellate Court agreed with the employer and applied a manifest weight standard of review. While the Appellate Court noted the material facts were undisputed, they were still capable of more than one reasonable inference, which required a manifest weight standard to be applied. *Id.* ¶¶ 38-39.

The Appellate Court found the Commission's determination that the IPS payments were a bonus and therefore excluded from the AWW calculation was not against the manifest weight of the evidence. The Appellate Court specifically quoted the I.P.S. Program manual, which stated: (1) the I.P.S. program *is a discretionary program*; (2) the employer "reserves the right to amend or cancel the I.P.S. program in whole or in part at any time without notice"; (3) the employer "also reserves the right to reduce, modify, or withhold awards based on such factors as regulatory events, changes in business conditions, individual performance or any other reason"; (4) the IPS program is a statement of the employer's intentions and *does not constitute a guarantee that any particular amount of compensation will be paid*; and (5) the program does not create a contractual relationship or any contractually enforceable rights between the employer and the employee. *Id.* ¶ 41

While Illinois law says that bonuses are not to be included in the calculation of average weekly wage, what qualifies as a bonus can sometimes be hard to determine, even for the courts. The Appellate Court

helped to clarify the difference between a bonus payment and wages with its analysis in *Alvarado*.

The Appellate Court noted it was the *discretionary nature* of the IPS payments that made them a bonus and not wages. Further, unlike wages, the IPS payments were not given as consideration for the employee's work and the fact that the employer had exercised its discretion in a certain manner in the past did not transform the IPS payments into mandatory earnings to be included in AWW calculations.

In computing average weekly wage in cases where a worker has received bonus pay, it is important to evaluate the reason the bonus was received. If it is discretionary in nature and could be deemed a gift, generally it will not be considered compensation, and therefore excluded from AWW calculations. If the bonus is payment for the claimant doing a job, then generally it will be included in the average weekly wage calculations.

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.



## ABOUT THE AUTHORS



Heyl Royster Partner [Jessica Bell](#) joined the firm in 2015 with extensive workers' compensation defense experience, having appeared before the Illinois Workers' Compensation Commission representing employers and insurance companies across the state. Focusing her practice

on the defense of insurance clients and employers in workers' compensation matters, Jessica speaks with businesses directly to help them understand the Workers' Compensation system and handling claims within their industry.

Jessica likes to be proactive; she understands that just because her clients are on the defense and initially only responding to something the other side does, doesn't mean that is our role for the duration of the case. She finds significant advantages in anticipating the other side's arguments and taking action on behalf of her clients instead of always waiting and responding. By being more proactive, Jessica can flip the script and put the ball in her client's court to move the case the way they want.

A mother of three, Jessica and her husband Andrew find themselves in the throes of running kids to and from sporting events and activities. Jessica enjoys baking and cooking when she gets a moment to herself, but her favorite "me time" hobby is reading thrillers, suspense, or crime fiction.



[Amber Cameron](#) concentrates her practice on workers' compensation and toxic tort litigation. A partner working out of the firm's Edwardsville and St. Louis offices, her workers' compensation defense practice represents employers of all sizes at dockets in southern Illinois and throughout Missouri.

She also devotes a portion of her practice to defending asbestos personal injury suits and representing the firm's clients at depositions, hearings, and procedural matters.

Prior to joining Heyl Royster in 2015, Amber was a staff attorney at the Illinois Workers' Compensation Commission, where she assisted Commissioners in deciding workers' compensation claims. At the Commission, she drafted hundreds of opinions on review and on remand, gaining advanced knowledge in workers' compensation law. Amber gained additional experience while working at a mid-sized defense firm in the St. Louis Metro East area, where she represented clients in defense of workers' compensation and human rights claims throughout Illinois and Missouri.

Amber earned her law degree and a certificate in dispute resolution from the University of Missouri-Columbia School of Law. As a law student, she served as Vice-Justice of the Lawson Chapter of Phi Alpha Delta Law Fraternity and excelled in legal writing, winning Best Brief in the Board of Advocates Moot Court Competition. Amber is editor of the firm's Workers' Compensation Newsletter, *Below the Red Line*.

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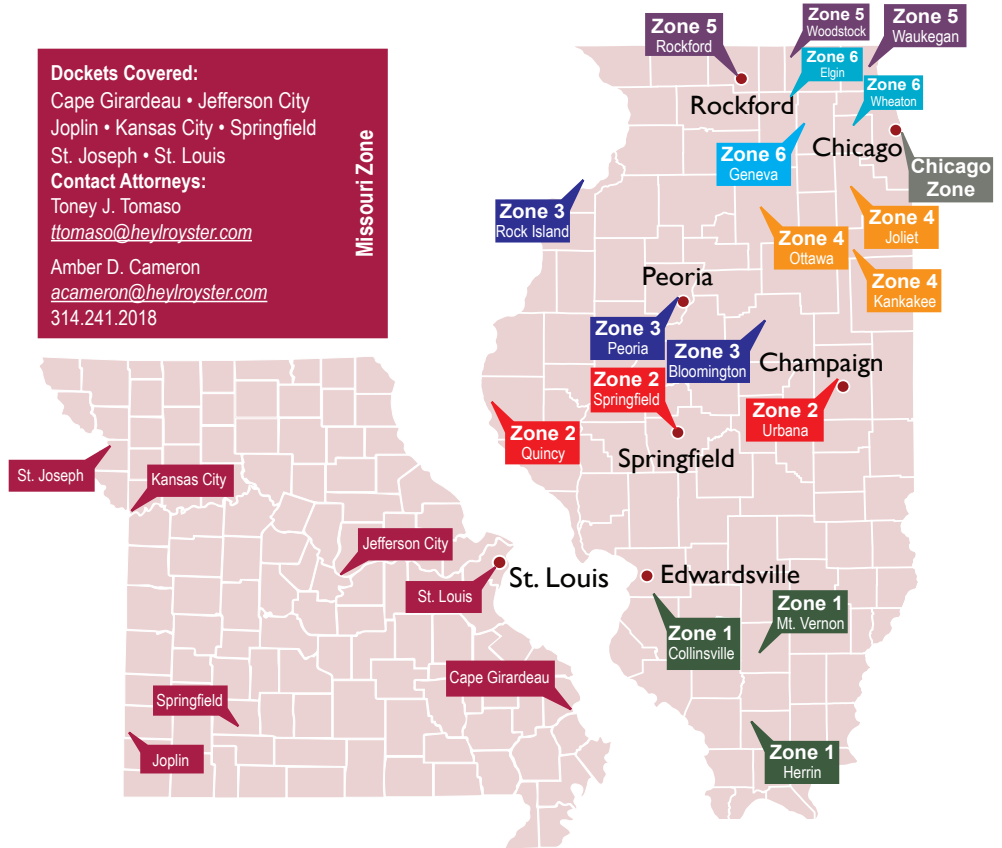
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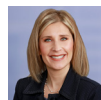
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