

### **III. AVERAGE WEEKLY WAGE**

***Presented By:***

***James M. Voelker***

*Heyl, Royster, Voelker & Allen, P.C.*

*Bank One Building, Suite 600*

*124 S.W. Adams Street*

*Peoria, IL 61602*

*Fax: (309) 676-3374*

*Phone: (309) 676-0400*

*Email: [jvoelker@hrva.com](mailto:jvoelker@hrva.com)*

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### III. AVERAGE WEEKLY WAGE

#### A. The Statute

##### **(820 ILCS 305/10) (from Ch. 48, par. 138.10)**

Section 10. The basis for computing the compensation provided for in Sections 7 and 8 of the Act shall be as follows:

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. 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. 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.

(Source: P.A. 81-1482)

#### B. The Importance of AWW Calculations

The calculation of the average weekly wage under section 10 of the Act has a dramatic impact on the value of a claim.

**Example #1:** Part time McDonalds worker lifts 100 lb. bag of french fries and suffers a low back herniation, has a laminectomy and is released without restrictions.

AWW:	\$ 115.00
PPD Rate:	80.90
15% MAW:	6,067.50

**Example #2:** Full time iron worker lifts a 25 lb. bag of tools and suffers a low back herniation, has a laminectomy and is released without restrictions.

AWW:	\$ 960.00
PPD Rate:	516.15
15% MAW:	38,711.25

### C. Full-Time Employment

If the claimant worked full-time during the 52 week period prior to the injury, the calculation of the average weekly wage under the Act is straightforward. Simply divide the total regular earnings by 52.

#### Statutory Excerpt (820 ILCS 305/10)

“Average weekly wage” . . . 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 . . .

**Example:** Petitioner works for the employer a full 52 weeks prior to the accident and earned a total of \$39,000 in regular wages with no overtime. The average weekly wage calculation is as follows:  $\$39,000 / 52 = \$750$

### D. Less Than Full-Time Employment

Most claimants do not work a full 52 weeks prior to the injury. Many claimants work partial weeks and partial days. The language in section 10 of the Act is poorly written which has resulted in inconsistent interpretations of the Act.

#### Statutory Excerpt (820 ILCS 305/10)

[I]f 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.

### E. History

The current version of section 10 of the Act was enacted in 1981 (P.A. 81-1482). The amendment to section 10 as it now exists has nullified the distinction which previously existed between seasonal or intermittent employment and other employment. *Smith v. Industrial Comm'n*, 170 Ill. App. 3d 626, 525 N.E.2d 81, 121 Ill. Dec. 275 (3d Dist. 1988). The case law cited below outlines the different interpretations of the operative language of section 10.

Even prior to the amendment, the courts recognized that the purpose of section 10 is to compensate the claimant and make the injured employee whole. The purpose is not to provide a windfall. *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 52, 454 N.E.2d 307, 310, 73 Ill. Dec. 447 (1983).

*Illinois-Iowa Blacktop, Inc. v. Industrial Comm'n*, 180 Ill. App. 3d 885, 536 N.E.2d 1008, 129 Ill. Dec. 958 (3d Dist., Apr 7, 1989), *appeal denied*, 545 N.E.2d 111, 136 Ill. Dec. 587 (1989) – This case involved a petitioner who worked for the respondent on a seasonal basis, typically from April through December of each year. Petitioner worked exclusively for the respondent for 15 years. He collected unemployment during the off months. During the 52 weeks before the accident, the petitioner worked 20 weeks. At arbitration, the average weekly wage was computed by dividing the number of weeks actually worked (20) into the petitioner's non-overtime earnings.

The respondent argued that calculating by deducting lost time from the average weekly wage denominator, while paying workers' compensation benefits the year-round, gives the petitioner a compensation award greater than the income he earned while working. The respondent contended that the total earnings should have been divided by 52.

The appellate court affirmed the arbitrator's calculation and acknowledged a slight windfall to claimant.

**Result:** Total earnings divided by number of weeks in which petitioner performed any work.

*Peoria Roofing & Sheet Metal Co. v. Industrial Comm'n*, 181 Ill. App. 3d 616, 537 N.E.2d 381, 130 Ill. Dec. 314 (3d Dist., Apr. 12, 1989) – In this case, the petitioner had worked for the respondent for nine years prior to the work accident. During the 52 weeks preceding the accident, the petitioner, who was considered a full-time employee, only worked a total of 134 days during 43 calendar weeks. Petitioner's total earnings during the 43 weeks of work was \$17,859.50.

The petitioner argued that his average weekly wage should be computed by dividing the number of days worked (134) into his total earnings of \$17,859.50 which would work out to daily earnings of \$133.28. Those earnings would then be multiplied by five (representing the total number of days in a work week), for an average weekly wage of \$666.40.

The respondent took the position that the number of weeks worked (43) should simply be divided into total earnings of \$17,859.50, creating an AWW of \$413.34.

The Industrial Commission and appellate court agreed with the petitioner. In arriving at its holding, the appellate court noted:

The respondent's interpretation of the emphasized section 10 language strains the plain meaning of the phrase 'and all parts thereof.' It effectively equates all calendar weeks during which the petitioner did any work, regardless of how many days he worked during the week. Whereas one day is, in fact, only a fraction of a work week, the respondent would seek to have one isolated day in a calendar week regarded as a 'week,' not as a fractional 'part thereof.'

Under the respondent's analysis, any employee who 'lost five or more calendar days,' but nonetheless worked in every calendar week, would have his average weekly wage calculated based on a 52-week year, just as under the initial provision of section 10.

**Peoria Roofing and Sheet Metal Co. v. Industrial Comm.**, 181 Ill. App. 3d 616, 620, 537 N.E.2d 381, 383-4, 130 Ill. Dec. 314 (1989).

**Result:** (Total earnings / Total days worked) \* 5 – Note that the logic expressed in *Illinois-Iowa Blacktop* decided five days earlier was not followed.

**Cook v. Industrial Comm'n**, 231 Ill. App. 3d 729, 596 N.E.2d 746, 173 Ill. Dec. 122 (3d Dist. 1992) held that it was proper to calculate claimant's average weekly wage by dividing total wages by the number of weeks worked rather than petitioner's hourly wage formula interpretation of section 10 which would create a windfall to a claimant.

The petitioner, during the year preceding the injury, worked 24 different weeks for the employer and the majority of those weeks were not full 40 hour weeks. The court distinguished the computation of average weekly wage in short or casual employment cases and where probable regular earnings are used to determine the wage. The court rejected *Peoria Roofing & Sheet Metal Co. v. Industrial Comm'n*, 181 Ill. App. 3d 616, 537 N.E.2d 381, 130 Ill. Dec. 314 (3d Dist. 1989) holding that this case was not in line with *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 454 N.E.2d 307, 73 Ill. Dec. 447 (1983), where the court construed the predecessor to section 10 observing the purpose of the Act was to compensate or make whole and not provide a windfall. The court found that the petitioner's formula for calculating average weekly wage by dividing total wages by plaintiff's hourly rate to arrive at actual hours worked and then dividing the hours by an eight hour workday to arrive at a figure representing full days worked, which figure was to be divided by a five day week to determine the number of full weeks worked, which was divided into total wages produced a windfall and was not a proper construction of section 10.

**Result:** Total earnings divided by number of weeks in which petitioner performed any work. *Peoria Roofing* rejected *Iowa-Illinois Blacktop* followed.

**Ricketts v. Industrial Comm'n**, 251 Ill. App. 3d 809, 623 N.E.2d 847, 191 Ill. Dec. 257 (4th Dist. 1993) – The court held that where employment is non-continuous or less than "full-time" earnings may be divided by an entire workweek even if the employee worked only a portion of the week. The *Ricketts* court affirmed the reasoning in the *Cook* decision which rejected the formula method of calculating petitioner's wage by multiplying his union scale hourly wage by eight hours for five days. The court reaffirmed that this gross windfall is to be avoided. The court found there is no presumption that a workweek for every employee is 40 hours, and the burden of establishing the nature of the workweek is the employee's burden.

**Result:** Total earnings divided by number of weeks in which petitioner performed any work.

**D.J. Masonry v. Industrial Comm'n**, 295 Ill. App. 3d 924, 693 N.E.2d 1201, 230 Ill. Dec. 450 (1st Dist. 1998) – The Commission determined that, after subtracting time lost due to inclement weather and work being unavailable, petitioner, a regular employee of the respondent, worked 204 days out of a 260-day work year. The Commission divided the 204 days by a five-

day work week to reach the number of five-day weeks worked, 40.8, during the 52-week year. They then divided this figure into the \$23,496.88 total earnings and arrived at an average weekly wage of \$575.90. The same result would have been reached by simply multiplying the petitioner's hourly rate of \$14.40 times 40 hours per week.

**Result:** (Total earnings / Total days) \* 5

*Sylvester v. Industrial Comm'n*, 314 Ill. App. 3d 1100, 732 N.E.2d 751, 247 Ill. Dec. 696 (4th Dist. 2000), *appeal granted*, 192 Ill. 2d 710 (2000).

**Facts:** Claimant testified that he was employed by respondent for nineteen years and, at the time of injury, was a roofing foreman earning \$21 per hour. If the weather permitted and the respondent had work available, claimant would work. It is uncontradicted that he was on call with respondent if work was available. He did not call respondent for work. Respondent called claimant. He had no other employment, and he was not self-employed. The wage summary confirmed that claimant would be called to work five-hour stints during the time when full-time work was not available and claimant was receiving unemployment compensation. Although the parties did not agree as to the meaning of the collective bargaining agreement, they did agree that a workweek is 40 hours. During the winter season, claimant regularly worked less than 40 hours and received unemployment compensation. As a condition to receiving unemployment compensation, claimant testified that he could work no more than five hours per week. The payroll records verified that he generally worked for respondent, while receiving unemployment compensation, performing emergency repairs or to patch leaks, until the weather broke and he could return to full-time work. Claimant submitted a wage summary in which he calculated his average weekly wage at \$695.75. Claimant did not testify as to the formula that he used to calculate this figure. However, it appeared from claimant's brief and the wage summary submitted by both parties, that claimant counted the total number of days worked during the previous 52 weeks, which totaled 131. Claimant then divided 131 by 5 (representing a full workweek) to arrive at 26.2. Next, claimant divided what he perceived as his total earnings for the previous 52 weeks, \$18,228.55, by 26.2, and arrived at an average weekly wage of \$695.75.

On May 30, 1997, the arbitrator entered her award. The arbitrator found that, during the year prior to claimant's injury, Acme paid claimant for working 48 of 52 weeks. The arbitrator determined that claimant earned \$17,684.41 during this period and divided that amount by 48, arriving at an average weekly wage totaling \$368.43. On November 13, 1998, the Commission affirmed and adopted the decision of the arbitrator. On April 14, 1999, the circuit court confirmed the determination of the Commission. On May 5, 1999, claimant filed a notice of appeal to the appellate court.

### **Sylvester #1**

On May 2, 2000, the court issued a favorable decision to respondent. The appellate court held that the average weekly wage under section 10 of the Act should be calculated using what it coined as the "total-weeks-worked" formula. The court recognized the different results in its previous decisions, some of which adopted the "full weeks worked" formula which is favorable to petitioners. The court specifically rejected the "full weeks worked" formula and used the "total-weeks-worked" formula which divides a claimant's earnings over the previous 52 weeks

by the total number of weeks in which claimant worked at least one day. The “full weeks worked” formula by contrast divides the total days worked over the previous 52 weeks by 5 (representing a full 5-day workweek) and divides that into the total earnings during the previous 52 weeks. The court held that the “full weeks worked” formula provided petitioners with an unfair windfall. It held that the “total-weeks-worked” formula most accurately represented a claimant’s earning capacity at the time of his or her accident and was most appropriate.

**Result:** Total earnings divided by number of weeks in which petitioner performed any work.

## **Sylvester #2**

On June 28, 2000, the court denied a petition for rehearing filed by the petitioner but also recalled its initial decision. The second and final decision reversed the Industrial Commission and held that there are four different ways to calculate the average weekly wage under the Act. The court abandoned the nomenclature created in the first decision of “total-weeks-worked formula” and “full weeks worked formula.” The court identified the following four different methods to calculate a claimant’s average weekly wage:

- (1) 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.
- (2) If the employee who has lost 5 or more calendar days during such 52 weeks prior to injury, 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. It defined “time lost” to the extent not due to the fault of the employee.
- (3) 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.
- (4) 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 was being or would have been earned by a person in the same grade of employment at the same work for each of such 52 weeks for the same number of hours per week by the same employer.

The court held that the first method did not apply because the parties agreed that claimant worked only 48 weeks of the previous 52 weeks. It held that the second method applied and cited *Illinois-Iowa Blacktop, Inc. v. Industrial Comm’n*, 180 Ill. App. 3d 885, 536 N.E.2d 1008, 129 Ill. Dec. 958 (3d Dist. 1989), *appeal denied*, 545 N.E.2d 111, 136 Ill. Dec. 587 (1989), for the proposition that “time lost” refers to missed work to the extent it was not due to the fault of the employee. No distinction was made between the second and third methods. The fourth method obviously did not apply.

Amazingly in both decisions, the court held that the result it reached in *Sylvester* was not inconsistent with any of its prior rulings.

Unfortunately, the court did not finish by stating how the actual calculation should be made. The court held that the second of the four methods should be used. The mechanics of the second method was clarified in *Insulated Panel Co. v. Industrial Comm'n*, 318 Ill. App. 3d 100, 743 N.E.2d 1038 (2d Dist. 2001). In this case, claimant fell and broke his leg while on a day-long sightseeing excursion on the island of Maui, Hawaii. At that time, he was traversing lava rocks. He and two other employees of respondent, including respondent's president, were in Hawaii on business to install an industrial freezer. The Commission found the case compensable. With respect to the wage issue, respondent argued in favor of the wage calculations made by the arbitrator in which total earnings were divided by the 51 weeks in which claimant worked. Petitioner claimed that the Commission calculated the wage properly by dividing total earnings by the total days worked and multiplying that number by five. The court cited *Sylvester* and stated that the Commission correctly followed the second statutory method and affirmed the Commission's calculations.

**Result:** Total earnings / (Total days worked / 5)

### **Sylvester #3 (Final Decision)**

Leave to appeal to the Illinois Supreme Court was granted on November 29, 2000. The Court issued its decision on July 19, 2001. The Illinois Supreme Court addressed the calculation of the average weekly wage under the Illinois Workers' Compensation Act for the first time since *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 454 N.E.2d 307, 73 Ill. Dec. 447 (1983). The Illinois Supreme Court affirmed the appellate court in a decision that favors employees. *Amici curiae* briefs were filed by the Illinois Manufacturers Association; National Roofing Contractors Association; Onesource Building Services, Inc.; Yellow Freight System; Cambridge Integrated Services Group, Inc.; West Bend Mutual Insurance Company; and Custard Claims Management Services, Inc.

The Court identified four different methods to calculate the average weekly wage under section 10 of the Act.

- 1) Actual earnings divided by 52.
- 2) If the employee lost five or more calendar days during the year prior to the accident, the actual earnings are divided by "the number of weeks and parts thereof during which the employee actually earned wages."
- 3) If the employee's employment began during the 52-week period, the earnings during that period 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 that it is "impractical" to use one of the three above methods, then the wages of a comparable employee in the same grade of employment shall be used.

The Supreme Court applied method number two to the facts of this case.

Interestingly, the Supreme Court reviewed the case *de novo*, meaning it did not defer to the Industrial Commission as it normally does. It stated that a *de novo* review was appropriate because the issue was solely a matter of statutory construction.

The Supreme Court adopted the holdings of *D. J. Masonry*, 295 Ill. App. 3d 924, and *Peoria Roofing*, 181 Ill. App. 3d 616, and rejected *Cook*, 231 Ill. App. 3d 729, and *Ricketts*, 251 Ill. App. 3d 809. It held that neither *Cook* nor *Ricketts* involved a question of statutory construction. It found that both cases had been decided on the insufficiency of evidence introduced by the claimant in each case.

The court acknowledged a 32% windfall to petitioner, meaning the petitioner would receive 32% more in TTD than he would have received in regular earnings.

The wage calculation in *Sylvester* was made as follows:

Petitioner's wages during the previous 52 weeks, as determined by the arbitrator, were \$17,684.41. Dividing this number by 26.2 results in an average weekly wage of \$674.98. But TTD payments are only 66 2/3% of average weekly wage. (820 ILCS 305/8(b)(2)). 66 2/3% of \$674.98 is approximately \$450 per week, or \$23,400 per year. This is approximately 32% greater than \$17,684.41. ( $\$23,400 - \$17,684 = \$5,716$ ;  $\$5,716 / \$17,684.41 = 0.32$ , or 32%.)

## F. Overtime Pay and Bonus

### Statutory Excerpt (820 ILCS 305/10)

"Average weekly wage" . . . 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 . . .

"Overtime pay" is generally excluded from average weekly wage determinations. According to *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666, 575 N.E.2d 1234, 159 Ill. Dec. 174 (1st Dist. 1990), "overtime," as used by the Act, means "(1) compensation for any hours beyond those the claimant regularly works each week, and (2) extra hourly pay above the claimant's normal hourly wage." In *Edward Hines Lumber Co.*, petitioner was not a seasonal worker and worked under a union contract which provided that he work whatever hours were demanded by his employer. The court found that the petitioner averaged 67 hours per week. Petitioner's average weekly wage was thus calculated at his straight-time pay rate for 67 hours which amounted to \$878.27.

***Ogle v. Industrial Comm’n***, 284 Ill. App. 3d 1093, 673 N.E.2d 706, 220 Ill. Dec. 562 (1st Dist. 1996) – Where petitioner’s normal workweek was a mandatory 48 hours, the overtime hours should be included in the average wage calculation at straight-time so as to not reflect overtime earnings. Petitioner worked overtime 42 out of 52 weeks, and worked 48 hours each of those weeks.

### **G. Fringe Benefits**

***Ogle v. Industrial Comm’n***, 284 Ill. App. 3d 1093, 673 N.E.2d 706, 220 Ill. Dec. 562 (1st Dist. 1996) – The petitioner claimed the value of his fringe benefits, such as pension contributions, should be included in his AWW. This argument was rejected by the appellate court. In doing so, it was noted that the fringe benefits were paid directly to the petitioner’s union rather than the petitioner. The court further observed that section 10 refers to “salary, wages, or earnings” and does not mention fringe benefits.

### **H. Free Meals**

***Levkovitz v. Industrial Comm’n***, 256 Ill. App. 3d 1075, 628 N.E.2d 824, 195 Ill. Dec. 360 (1st Dist. 1993) – Petitioner was a manager at a restaurant. He ate free meals at the restaurant on the days he worked. The petitioner argued that the value of the meals should be included in his AWW. This was rejected by the appellate court, which found that the meals resembled a “bonus” and should be excluded from the AWW figure. The court further held that vacation pay may be included as part of the employee’s AWW.

### **I. Vacation Pay**

According to the decision in ***General Tire and Rubber Co. v. Industrial Comm’n***, 221 Ill. App. 3d 641, 582 N.E.2d 744, 164 Ill. Dec. 181 (5th Dist. 1991), vacation pay shall be considered as a part of an employee’s average weekly wage. The court stated:

While the Act does not exclude vacation pay, it does specifically exclude overtime pay. Therefore, it can be inferred that if the legislature intended to exclude vacation pay it would have specifically excluded it. . . . [T]here is no contention this case involves a duplication of pay inasmuch as the parties agree the employee did not work during his vacation period.

***General Tire and Rubber Co. v. Industrial Comm’n***, 221 Ill. App. 3d 641, 652, 582 N.E.2d 744, 751, 164 Ill. Dec. 181 (5th Dist. 1991).

### **J. Per Diem and Travel Expenses**

***Swearingen v. Industrial Comm’n***, 298 Ill. App. 3d 666, 699 N.E.2d 237, 232 Ill. Dec. 790 (5th Dist. 1998) – The appellate court held reimbursement payments made to petitioners constituted

real economic gain and was therefore included in the calculation of the average weekly wage. In *Swearingen*, there were two petitioners who were long haul truck drivers. Both were paid approximately \$400 per week and were eligible for one week's vacation pay. The employer testified that it considered 50% of the driver's gross pay as reimbursement for travel expenses. The petitioners testified that they were not reimbursed for lodging, meals or other expenses except fuel and truck-related expenses. One of the petitioners did not pay income taxes on the expense reimbursement portion of the check. The arbitrator determined that the average weekly wage should include the reimbursement payments, but the Industrial Commission reversed. It found that 50% of the wages paid to the petitioners were reimbursement for travel expenses and constituted a fringe benefit which was excluded under section 10 of the Act. The appellate court reversed the Industrial Commission and found that the reimbursement payments constituted real economic gain to the petitioners and, therefore, should be included in the calculation of the average weekly wage. The court stated that unless the reimbursement payments were attributable to actual out-of-pocket expenses, they would be included in the average weekly wage calculation.

#### **K. Volunteers and Civil Defense Employees**

**Statutory Excerpt (820 ILCS 305/10)**

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.

In cases involving volunteer firemen, police and civil defense members or trainees, the average weekly wage shall be based upon the claimant's average weekly wage in their regular employment. Thus, where a volunteer fireman earned a \$260.00 average weekly wage in his factory job, the average weekly wage for his claim as a volunteer fireman would be \$260.00.

#### **L. Concurrent Employment**

**Statutory Excerpt (820 ILCS 305/10)**

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.

Where an employee is working concurrently with two or more employers *and* the employer with whom the injury is charged has knowledge of such concurrent employment prior to the date of the injury, the claimant's wages from all such employers shall be considered as if earned from the employer liable for compensation. An exception to this rule has been created by the Industrial

Commission which holds that any wages earned from farm ownership are not to be considered in a concurrent wage calculation. See *Lyle Schopp v. Dry Grove Township*, 88 IIC 766.

*Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444, 646 N.E.2d 312, 206 Ill. Dec. 945 (2d Dist. 1995) – Concurrent employment includes a full-time occupation as a sheet-metal worker even though the petitioner had been laid off from such work at the time of his injury. Despite a temporary layoff, petitioner's earnings as a sheet-metal worker were included in his wage computation for a work-related injury that occurred while working part-time as a maintenance worker for the respondent. The part-time employer knew petitioner worked concurrently as a sheet-metal worker. The temporary layoff did not sever petitioner's employment relationship because he was subject to recall as a sheet-metal worker.

### **M. Unemployment Benefits**

Unemployment compensation is not considered in computing the average weekly wage even though it may account for a significant part of the annual income of many seasonal workers. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 575 N.E.2d 1240, 159 Ill. Dec. 180 (3d Dist. 1991).

### **N. Farm Income**

Earnings from self-owned farm operations are not included in the calculation of the average weekly wage under section 10. *Anderson v. Newark Community High School Dist. 18*, 89 IIC 0640.

### **O. Profits or Business Income**

*Paoletti v. Industrial Comm'n*, 279 Ill. App. 3d 988, 665 N.E.2d 507, 216 Ill. Dec. 447 (1st Dist. 1996) – The court held that a claimant's business income should not be included in the calculation of average weekly wage. The court stated, "We would be legislating from the bench if we were to hold that 'actual earnings' should be construed to include net profit."

### **P. Tips**

Tips are generally included in the calculation of the average weekly wage. *Kidd v. Village Car Wash*, 89 IIC 0021.

The arbitrators and the Commission usually do not include tips in the wage calculation over and above what is identified on claimant's tax return.

## **Q. Burden of Proof**

In a worker's compensation proceeding, the claimant has the burden of proving by a preponderance of the evidence the elements of his claim which include the average weekly wage. *Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 596 N.E.2d 746, 173 Ill. Dec. 122 (3d Dist. 1992).

## **R. Petitioner's Testimony**

*American Siding & Window Co., Inc. v. Industrial Comm'n*, No. 3-97-0792 WC (3d Dist., May 12, 1998) 6 ILWCLB 2034 (Unpublished) – The appellate court held that the Commission did not err when it relied solely on claimant's testimony in determining average weekly wage.

## **S. Manifest Weight Standard**

The Industrial Commission's determination of a claimant's average weekly wage is an issue of fact which will not be set aside unless it is contrary to the manifest weight of the evidence. *McCartney v. Industrial Comm'n*, 174 Ill. App. 3d 213, 529 N. E. 2d 250, 124 Ill. Dec. 430 (4th Dist. 1988).

## **T. Practice Tip**

Send an AWW Form to the employer that requires a weekly breakdown of the following information:

- Regular wage
- Regular hours
- Overtime wage
- Overtime hours
- Number of days petitioner worked during 52 week period
- Reason claimant lost time
- Statement about whether overtime is mandatory
- Number of hours that make up regular workweek
- Shows the hourly rate for regular and overtime work during each period

**U. Current Wage Rates**

<b>TEMPORARY TOTAL DISABILITY</b>		
<b>Accident Date</b>	<b>Maximum Rate</b>	<b>Min. Rate Death/Permanent Total</b>
1/15/96 to 7/14/96	\$760.51	\$285.19
7/15/96 to 1/14/97	\$767.71	\$287.89
1/15/97 to 7/14/97	\$781.17	\$292.94
7/15/97 to 1/14/98	\$796.97	\$298.87
1/15/98 to 7/14/98	\$815.08	\$305.66
7/15/98 to 1/14/99	\$843.47	\$316.30
1/15/99 to 7/14/99	\$862.80	\$323.55
7/15/99 to 1/14/00	\$885.53	\$332.08
1/15/00 to 7/14/00	\$899.81	\$337.43
7/15/00 to 1/14/01	\$927.06	\$347.65
1/15/01 to 7/14/01	\$956.32	\$358.62
7/15/01 to 1/14/02	\$972.12	\$364.55

<b>MINIMUM RATES</b>		
<b>Status</b>	<b>TTD</b>	<b>PPD</b>
Single	\$100.90	\$80.90
Married, no child	\$105.50	\$83.20
1 child	\$108.30	\$86.10
2 children	\$113.40	\$88.90
3 children	\$117.40	\$91.80
4 or more	\$124.30	\$96.90