Advanced Rate Questions:

Beyond the 13 Weeks

The Basics of Rate Calculation

- In most states, the weekly rate is calculated using two thirds of the average weekly wage.
- In Iowa, the weekly benefit rate is calculated using 80% of the employee's weekly "spendable earnings" at the time of the injury. (IC §85.37)
    - "Spendable Earnings" is the amount remaining after payroll taxes are deducted from gross weekly earnings. (IC §85.61(9))
    - "Gross Weekly Earnings" are recurring payments to the employee for employment *before* any authorized or lawfully required deduction or withholding of funds by the employer, *excluding* irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits. (IC §85.61(3))
- Iowa Code §85.36 (1-12) dictates Iowa Workers' Compensation Rate.

Average Weekly Wage (AWW) & Gross Earnings

- "Average Weekly Wage," or weekly earnings, is the gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar. (IC §85.36)
- "Gross earnings" are recurring payments by the employer to the employee for employment, before authorized or lawfully required deductions or withholding of funds by the employer, **EXCLUDING:**
    - ✓ Irregular bonuses
    - ✓ Retroactive pay
    - ✓ Overtime Rate
    - ✓ Reimbursement for expenses
    - ✓ Expense allowances
    - ✓ Employer's contribution for welfare benefits

Basis of Computation: Iowa Code §85.36

- 85.36(1) Employee Paid Weekly:
  - In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings are used as the employees average weekly wage (AWW).
    - Example: Jill earns $300 per week every week so her AWW is $300
- 85.36(2) Employee Paid Bi-weekly:
  - In the case of an employee who is paid on a biweekly pay period basis, one-half of the biweekly gross earnings are used as the employees AWW.
    - Example: Bob earns $800 bi-weekly so his AWW is $400 ($800/2)
- 85.36(3) Employee Paid Semi-monthly:
  - In the case of an employee who is paid on a semimonthly pay period (2 per month), the semimonthly gross earnings are multiplied by 24 and then divided by 52 for the AWW
    - Example: Lana is paid $1,000 on the 1st and 15th of every month. ($1,000 x 24 paychecks in year = $24,000/52 weeks = $461.54) Her AWW is $461.54
- 85.36(4) Employee Paid Monthly
  - In the case of an employee who is paid on a monthly pay period basis, the monthly gross earnings are multiplied by 12 and then divided by 52 to determine the employees AWW
    - Example: Jim is paid $4,000 per month. ($4,000 x 12 months = $48,000/52 weeks = $923.08). His AWW is $923.08.
- 85.36(5) Employee Paid Yearly
  - In the case of an employee who is paid on a yearly pay period basis, the weekly earnings shall be the yearly earnings divided by fifty-two.
    - Example: Kim earns $60,000 per year, therefore her AWW is $1,153.85 ($60,000/52 weeks = $1,153.85
- 85.36(6) Employee Paid Daily, Hourly, or by Output (Most frequently used section and most confusing)
  - In the case of an employee who is paid on a daily, or hourly basis, or by output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have

earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

- An employee who is paid a salary plus commission has his or her rate calculated pursuant to Iowa Code Sec. 85.36(6) as well.
    - Oberreuter v. Moorman Manufacturing, File No. 1041484 (App. Dec. April 1999). Thirteen weeks of commissions prior to the date of injury are included and averaged. The average commission is then added to the base rate established by the claimant's salary to determine the AWW.

- 85.36(7) Employee Employed Less Than 13 Calendar Weeks
    - In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
    - If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has
    - The emphasis under §85.36(7) is the number of hours worked, and the employer has *some* discretion when it comes to choosing similarly-situated employees to determine the AWW under § 85.36(7).
    - Case Law re: 85.36(7)
        - In Maldnado v. Performance Contractors, Inc., each party presented rate calculations based upon the wages of different co-workers.
        - The Deputy reasoned that cherry picking co-workers by each side to achieve a higher or lower average gross income was not the intent of statutory language referencing to use work available to co-workers in similar occupations. The Deputy declined to use any wage records for either of two co-workers chosen by the parties as there was no evidence that they were the same level of pipefitter or had the same duties or tasks as Claimant, and so the need for overtime could not be determined. There was no showing that either co-worker was comparable to claimant's work availability as a B level pipefitter.
        - The Deputy utilized the last alternative in Iowa Code section 85,36(7), because there was only one representative work week.

- 85.36(8) Earnings Are Not Fixed
  - If at the time of the injury the hourly earnings have not been fixed or cannot be ascertained, the earnings for the purpose of calculating the rate shall be taken to be the usual earnings for similar services where such services are rendered by paid employees.
- 85.36(9) Part-time or Underpaid Employees
  - If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in the locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from **all** employment during the twelve calendar months immediately preceding the injury. In addition, overtime and premium pay **are** included when determining the rate of compensation pursuant to Iowa Code §85.36(9).
  - Case Law re: 85.36(9), considerations for part time vs. full time
    - There was a dispute as to whether Claimant was a full-time employee or a part-time employee. The parties disputed the rate at which weekly benefits should be paid to claimant. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.
    - Deputy Grell concluded that Claimant was clearly a part-time employee based on her hours in comparison to other full-time employees working in the same position. As such, Deputy Grell stated that Claimant's weekly rate should be calculated pursuant to Iowa Code section 85.36(9), requiring that the sum of all claimant's earnings for the 12 months preceding the injury date be divided by 50 to reach an average gross weekly earnings. Stevens v. Eastern Star Masonic Home, File No. 5049776, (Arb. Dec. August 2016)
    - In cases where all employees in a certain job work less than 40 hours, like a security guard, the same logic can be applied: in comparison to other employees, if they all work 32 hours per week, for example, then 32 hours per week would be considered full time.

Preventing Incorrect Calculations

- Understand the code and calculate rate correctly the first time is very important in saving the insurance carrier and employer money.

- Understand the way an employee is paid prior to calculating the rate to ensure the correct subsections are being used.
    - Full Time vs. Part Time
    - Paid based on an hourly, daily, out put, weekly, bi-weekly, semi-monthly, monthly, or on a yearly basis.
- Obtain all of the payroll records to determine actual hours worked, pay rates, and representative vs. non-representative weeks in the calculation.
- Determine whether any bonuses were received and what the bonuses were for to determine whether they should be included or excluded from the rate
- Determine the correct number of exemptions to be used by talking with the employee and employer.

Common Rate Calculation Mistakes

- Using only gross earnings
- Forgetting about extra benefits (per diem vs. reimbursements)
- Including irregular bonuses / Excluding regular bonuses
- Using the wrong §85.36 sub-section
- Using unrepresentative weeks
- Including or excluding weeks with holiday/vacation/sick leave
- Excluding weeks where no work was available
- Using proper pay rates if there was a raise
- Not using similarly situated employees hours
- Improperly calculating part-time employees wages
- Forgetting to use the minimum and maximum benefit rates

Consequences of Incorrect Rate Calculations

- In the case of an underpayment…
    - Interest
        - At 10% Interest Rate (For all injuries before 7/1/17)
        - At 1 year treasury constant maturity rate plus 2% (For all injuries after 7/1/17)

- Penalty up to 50% of the underpayment

- In the case of an overpayment…
  - May be unable to recoup the loss

Impact of 2017 Legislative Changes on Rate

- Section 85.34(4) – *Credits for excessive payments.*
  - If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86 the excess paid by the employer shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2 any future weekly benefits due for an injury to that employee, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

- Section 85.34(5) – *Recovery of employee overpayment.*
  - If an employee is paid any weekly benefits in excess of that requires by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a any current or subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.
- Section 535.3, subsection 1, Code 2017, is amended to read as follows:
  - a. Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13, except for interest due pursuant to section 85.30 for which the rate shall be ten percent per year.
  - b. Notwithstanding paragraph "a", interest due pursuant to section 85.30 shall accrue for the date each compensation payment is due at an annual rate equal to the one-year treasury

contant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defending Your Rate Calculation

- Newer decisions show that cases in which Claimant raises a rate issue with justification, which was not responded to by the insurance adjuster or defense counsel, can result in penalty benefits and bad faith damages.
- It is important to ensure a lower rate calculation has foundation and has been properly justified by the defense and re-evaluated each time the employee brings up a different issue relating to the rate.

Case Law re: Employer's Matching Contributions

- Evenson v. Winnebago Industries, No. 14-2097 (Iowa June 3, 2016), the Supreme Court concluded that an employer's matching contributions to a 401(k) plan are not weekly earnings for rate purposes.
  - Although the portion an employee chooses to contribute to the plan comes from his or her wages, the added contribution from the employer's match does not.
  - The Court concluded that 401(k) contributions are "welfare benefits" as described in the statute and are thus excluded from consideration of "gross earnings."

Overtime Pay

- Overtime **hours** are included in the rate calculation but at the **straight** rate of pay not the overtime rate.
- Example:
  - Carla is paid $10 per hour and is paid overtime at $15 per hour. If she worked 50 hours in one week, her payroll records would show that she earned $550
  - ($10 x 40 hours = $400; $15 x 10 hours = $150).
  - When calculating her AWW, all hours worked at the overtime rate of $15 per hour are taken at the straight rate of $10 per hour. Thus, Carla's AWW should be $500 ($10 x 50 hours).
  - That is a $50 difference!

Bonuses

- GENERAL RULE
  - Regular Bonuses = included in AWW
  - Irregular Bonuses = excluded from AWW

- Applied very inconsistently at the agency level due to the lack of guidance from the Supreme Court and Court of Appeals.
  - Burton v. Hilltop Care Ctr.: The IA Supreme Court held that the factors considered in prior decisions, including the Noel decision in the Court of Appeals, do not present an exclusive or exhaustive list. Instead, their relevance to any one case is highly dependent on the facts of that case.

- Factors:
  - Tied to production or output of the employee (considered wages)
  - Employee has a reasonable expectation to receive the bonus
  - Bonus occurs on a regular basis (e.g., monthly, quarterly, yearly)
  - Whether it varied in amount
  - Subject to a condition precedent (e.g., being an active employee in November of the preceding year or meeting a certain quota)
  - Whether the bonus is voluntary, discretionary, and/or can be discontinued by the employer for any reason

- Factoring a Bonus into a Rate Calculation
  - Bonuses are included in the AWW at a pro rated weekly amount.
  - In Draayer v. Pella Corp Commissioner Godfrey held that the bonus should be factored into the average weekly wage calculation even though the bonus was not paid in the 13 weeks prior to the injury because the "date of injury should not be a game of chance for inclusion or exclusion of a significant portion of annual earnings of a worker."
- Case Law re: Bonuses
  - Noel received a Christmas bonus ranging from 7.5% to 15% of her annual wages. In order to receive the bonus, she had to have been an active employee in November of the previous year. The bonus was voluntary and could be discontinued by the employer for any reason.
    - Irregular: The Court of Appeals found important that the bonus varied in amount and was dependent on several conditions precedent. Noel v. Rolscreen Co., 475 N.W.2d 666 (Ia. Ct. App. 1991).
  - A seed salesman was paid a base salary plus a bonus if he sold more seeds in one year compared to the previous year. The bonus varied in amount each year. He did not receive the bonus every year.
    - Regular. Sands received the bonus in 23 out of the 25 years he worked for the company and his bonus was tied to performance. The only years he did not receive the bonus were due to weather conditions and economic conditions.

Penalty not warranted due to reliance on Noel. Sands v. Mycogen Seeds/Dow Chemical, File Nos. 1120804; 1191128 (App. Dec. May 2002).

- Ellis received a $1,000 sign-on bonus. The bonus was not paid on a yearly or regular basis.
  - Irregular. Sign-on bonuses that are paid on a one-time basis at the beginning of an employee's employment are irregular. Ellis v. Wells' Dairy, Inc., File No. 5009376 (Arb. Dec. June 2005).

- Burton was hired in December of 2002 and received an annual bonus in 2003, 2004, and 2005. The bonus was $200 in 2004 and $250 in 2005. She was injured in January of 2006 and did not receive a bonus that year. The employer testified the bonus was a "thank you" for being part of their team. Evidence at hearing showed Claimant received the bonus during years when Claimant's supervisor had been critical of her performance.

  - Regular: The Supreme Court noted the factors previously listed are not an exhaustive list, and the commissioner's determination that the bonus was regular was not irrational, illogical, or wholly unjustified. Burton v. Hilltop Care Center, 813 N.W. 250 (Iowa 2012).

- Bell was paid a weekly salary of $1,150 and two bonuses: an annual Christmas bonus, and a variable weekly bonus based upon sales. Bell received a Christmas bonus each year but the amount varied annually at the discretion of his employer. Bell received weekly "sales" bonuses in 7 of the 13 weeks prior to the injury.

  - Christmas bonus? Irregular: "The year-end bonus, being 'irregular' as to amount, is barred from inclusion in gross weekly earnings."

  - Sales bonus? Irregular: Deputy Rasey considered the "dual nature" of the sales bonuses. In one sense, they were irregularly awarded (not every week) and irregular as to the amount. In another sense, they were not bonuses at all, but wages loosely based on production, although paid in a wholly discretionary amount. Bell v. All Drive Transmission, File No. 5038731 (Arb. Dec. Sep. 2013).

- In Ratliff v. Quaker Oats, Claimant received a quarterly bonus and annual bonus, which Claimant sought to include in the rate calculation. Defendants argued on appeal that there was no evidence in the record to establish that those bonuses were "regular" and therefore should not be included in the rate.

  - Regular: On appeal the Commissioner included both bonuses in the rate because despite the lack of testimony that the bonuses were regular, Claimant pointed out in his briefs that the agency previously included those bonuses in calculating the rate in another case involving the same Defendant. Ratliff v. Quaker Oats Company, File No. 5046704 (App. Dec. January 2017).

- Claimant received income from profit sharing, which Defendants argued constituted an irregular bonus. Profit sharing was based upon three variables: (1) hours worked, (2) average earnings of the worker, and (3) company profitability. These three factors were

to measure how hard the employee was working to make the company profitable as outlined in the collective bargaining agreement. Defendants also argued that the profit sharing was "retroactive pay", as some of the factors that it was based on may have accrued prior to the date of injury.

- Regular: The Deputy narrowly interpreted an 'irregular bonus' to be limited to bonuses not based upon measurements of the workers' productivity or value and subject to the discretion or feelings of the employer. The Deputy concluded that an "irregular bonus" could not possibly refer to a compensation system which uses a complex formula to assess the worker's productivity paid at regular intervals. Specifically, that the profit sharing payments in this case were a critical portion of the agreement between the company and the union as to how the workers at Deere were paid under the CBA. The Deputy also concluded that retroactive pay was not applicable. Cunningham v. John Deere Davenport Works, File No. 5040048; 5040049; 5047427 (Arb. Dec. April 2016)

– Claimant received annual bonuses each spring. There was no evidence presented at hearing that the bonus income was irregular. Claimant contended that the bonus income should be included in determining her entitlement to temporary partial disability benefits.

- The Deputy concluded that bonus income should be included when determining Claimant's entitlement to TPD benefits; the conus income Kramer received following her injury should be included in her actual earnings for purposes of determining her entitlement to TPD benefits. The Deputy instructed that the bonus should be divided by 52 to determine the weekly gross income and applied to TPD benefits for the year that the bonus accrued (the year prior to the payment of the bonus). Kramer v. Kraft Foods, File No. 5052150 (Arb. Dec. Sept. 2016).

Other Types of Pay

- Raises
  - In a case where an employee receives a raise during the thirteen weeks preceding his or her injury, the actual earnings are used and not Claimant's rate of pay at the time of the injury.
  - Example: If Claimant received a raise from $10 to $11 per hour during the third week immediately preceding the injury, Claimant's first 10 weeks would use the hourly pay rate of $10, and the remaining 3 weeks would use the hourly pay rate of $11.
- Tips
  - When determining the AWW for a worker who receives tips as part of the work income, please remember the following:

- If the worker receives tips, ask for copies of the most recent tax return to see what income is declared in addition to wages listed on the W-2;
- Inquire with the employer whether any tips are reflected on the W-2 issued by the employer;
- Inquire with management as to whether co-employees share tips and what accounting records reflect payment of tips to employees; and
- Determine what instructions, if any, are given to the employees regarding declaration of tip income.

– Case Law re: Tips

- Deboer v. HyVee, Inc. File no: 5061529 12/5/2018 Deputy Walsh
  - Claimant was challenging the rate calculation at hearing. Claimant worked three part time jobs, one of which was as a bartender. Deputy Walsh allowed claimant to include her recollection of tips earned in 2015 as part of her wages. There was no documentation of the tips earned since it was all cash income. Claimant testified she worked as a bartender 10-12 hours per week and earned a total of $2,800 over the course of 2015, which was approximately $55 per week. Deputy Walsh found that number to be a "modest and reasonable estimate".

Representative Weeks

- Iowa Code Sec. 85.36(6) often produces average weekly wages that are debatable. In most instances, the dispute concerns whether a particular week is "representative."
- Potential Issues:
  – Representative v. unrepresentative weeks
  – Overtime pay, premium pay, vacation pay, premium pay
  – Whether work was available
  – Raises and tips
- 40 hour work week
  – Ruth worked less than forty hours during seven of the thirteen weeks immediately prior to the injury date. Her reduced work schedule was the result of unanticipated occurrences that caused her to miss work on certain days for personal reasons.
    - The Iowa Supreme Court affirmed the district court's holding that only 40-hour work weeks were to be considered because these "unanticipated occurrences . . . caused her to miss work on certain days." Thilges v. Snap-On Tolls Corp., 528 N.W.2d 614 (Iowa 1995), at 619.

- Sandra established she was never scheduled for less than 40 hours unless it was under medical restrictions.
    - The Iowa Supreme Court affirmed that if a 40 hour week is customary for a particular employee, that must be the basis of computation. Weishaar v. Snap-On Tools Corp, 582 N.W. 2d 177 (Iowa 1998).
- Faye had a history of short weeks littered with excused and unexcused absences. Faye argued that all short weeks should be unrepresentative.
    - The deputy did not agree. It could not be established that the employee typically worked a 40 hour work week and therefore weeks with less than 40 hours were used in the calculation. Hoeft v. Fleetgaurd, File No. 1221505 (Jan. 31, 2002).

- 40 hour work week
    - Donald almost exclusively worked overtime. In the thirteen weeks preceding his date of injury, he worked overtime all weeks except three. Two of those weeks were excluded were when Claimant did not work at all and received vacation pay. The deputy commissioner found Claimant customarily worked overtime and excluded the one week in which claimant only worked 40 hours.
        - On appeal Commissioner Cortese II, disagreed with excluding the one 40 hour work week as not representative. Commissioner Cortese believed 40 hours per week to be considered full-time employment. And therefore any week of 40 hours or more was to be considered representative, regardless of how little or how much overtime was worked during that week. Ratliff v. Quaker Oats, Company File No. 5046704 (App. Dec. January 2017).
- Unusually low earning week
    - Claimant argued to remove one low week from his rate calculation which was substantially lower than his other weeks. His employer testified that the low week was either due to Claimant's choice to work less hours or a lack of available work. Defendants presented evidence that Claimant took on several half-jobs that week, demonstrating that he was available to work but personally chose to work less that week. Claimant testified that the work week in question was particularly slow and as a result he was unable to work a normal work week.
        - Deputy concluded that Defendants' evidence to demonstrate that Claimant chose to work less that week was speculative. He concluded that the week did not fairly reflect Claimant's customary earnings and therefore should be excluded from his rate calculation. Cosenza v. Automotive Enterprises, File No. 5047579 (Arb. Dec. July 2016).
- Short weeks due to work availability

- Thomas testified that he typically worked 50 hours a week in his construction job but acknowledged that due to weather he would sometimes work fewer hours.
    - In this circumstance, the short weeks were included because there was no work available. Bachman v. Midwest Elevator Company, File No. 5004351 (Dec. 20, 2004).
- David, an injured roofer, worked short weeks when the weather conditions were bad but long weeks when the weather conditions were good.
    - Accordingly, both short and long weeks were included in the computation of the average weekly wage. Alcott v. Waterloo Building Maintenance, File No. 1128213 (App. Dec. Aug. 14, 2001).
- Weeks where the employee does not work at all will not be included in the rate calculation.
    - "Exclusion of weeks where Claimant earned no money was entirely appropriate and without question as such could not demonstrate claimant's ability to earn." Handy v. Guarantee Roofing and Siding, File Nos. 1167215 & 1194170 (April 4, 2000) at 40.

- Holiday Pay, Vacation, or Sick Leave -
    - Any weeks with an usual event such as vacation, sick leave, or a holiday that **alters** the number of work hours that would have occurred is an unrepresentative week.
        - In Marsh v. Cedar Graphics, Inc., File No. 5019857 (Arb. Dec. Dec. 17, 2007), the claimant testified that he supplemented his weekly income during short weeks when no work was available with paid vacation or holiday days. He argued these paid vacation/holiday weeks should be included because they simply enabled him to maintain a more consistent personal cash flow. Deputy Commissioner Heitland rejected this argument and held that "[w]hen a week's wages includes vacation or holiday hours, that week is considered unrepresentative and is replaced by one that does not include vacation or holiday hours. The fact [the] claimant here may have used vacation hours to supplement his weekly income and maintain a more even personal cash flow does not change the actual number of hours of work the employer provided in that week."
    - The Commission does not, however, automatically exclude weeks of vacation or holiday pay as unrepresentative.

- Gall v. Maytag Corp., File No. 5013691 (App. Dec. May 26, 2006): Claimant was paid $11.82 per hour whether he worked or was on holiday leave or on vacation. Thus, the presence of holiday hours or vacation hours did not affect his AWW.

- Gaylord v. Quaker Oats, File No. 5010059 (Arb. Dec. June 3, 2005): Claimant was paid 8 hours of holiday pay on Memorial Day although he did not work that day. The week containing Memorial Day was found to be representative because it did not alter the normal number of work hours for that week and he was not paid a holiday premium (e.g., double time).

- Fluctuation in weekly hours

  – Both claimant and defendants utilized section 85.36(6) to compute claimant's rate of compensation, but disagreed as to which 13 weeks to use. Defendants utilized the 13 weeks immediately preceding the work injury, while Claimant proposed exclusion of several weeks, resulting in one needing to reach back two additional months before reaching 13 weeks of representative earnings.

    - The Deputy concluded that only one of the weeks of the 13 weeks immediately preceding the work injury should be excluded as unrepresentative . Claimant's pay stubs demonstrated that his hours varied from 28.5 to 44 hours, and given the variation, it was not appropriate to exclude weeks simply because Claimant earned less than he did in other weeks. Additionally, Claimant did not provide a testimonial basis for a determination that the weeks in question were not customary. Pruismann v. Iowa Talklines, Inc., File No. 5053398 (Arb. Dec. Feb.2017)

Exemptions & Marital Status

- Since the weekly benefit rate is based on the gross weekly earnings after deducting payroll taxes, the employee's marital status and number of exemptions must be determined.

- The date of injury is controlling for determining the number of exemptions.

- Marital Status

  – If an employee is married but separated at the time of the injury, the Claimant is still entitled to claim their spouse as an exemption for the purpose of calculating the rate.
  – Common law marriage: no hard and fast rule, but can they produce the tax records to back up their claim?

- Exemptions
  – The number of exemptions used to determine rate is the number the worker could claim on his or her tax returns.
  – Children who are actual dependents count as exemptions until they are 18 years of age unless they go to college and supported at least 50% by the injured employee and then

they are covered until they are finished with college or until they are 25 years old, which ever occurs first.

- Children who are disabled are considered exemptions for life if they continue to be dependent on the injured worker.
- Employees over 65 years of age qualify for an extra exemption.
- Employees who are blind qualify for an extra exemption.
- Tax returns are the best evidence to use at hearing to prove entitlement to exemptions.
- Future children, ie: a situation where an employee is pregnant and will deliver before the end of the year, can technically be claimed as an exemption on tax returns for that tax year, but can NOT be claimed as an exemption for rate purposes.

Minimum & Maximum Benefit Rates

- Avoid overpaying or underpaying benefits by utilizing the minimum and maximum benefit rates in the rate book that applies to the DOI, found on the IWD website.
- For **TTD and HP benefits**, the minimum weekly benefit amount shall be equal to either the weekly benefit amount of a person whose gross weekly earnings are 35% of the statewide average weekly wage OR or the spendable weekly earnings of the employee, WHICHEVER IS LESS. For **death benefits and PPD benefits**, the minimum weekly benefit amount shall be equal to the weekly benefit amount of a person whose gross weekly earnings are 35% of the statewide weekly wage.
- For **TTD, HP, PTD, and death benefits**, the weekly benefit amount shall not exceed a weekly benefit amount equal to 200% of the statewide average weekly wage.
- For **PPD benefits**, the weekly benefit amount shall no be more than a weekly benefit amount equal to 184% of the statewide average weekly wage.

Tough Calculations

- Nurses
  - Must draw a distinction between premium pay and shift differential
  - Nurses are often paid more for shift differential (night shift, weekend shift, etc.) and the way this is labeled on payroll records can be confusing.
  - Pay for certain shifts may be labeled as 'premium', but is really shift differential.
  - Shift differential pay can also be confused with overtime pay rate.
  - When in doubt, consult the employer- they will help to clear up whether a pay category is truly shift differential or another type of excludable pay.
  - Employers- try to be clear with labeling types of pay in payroll records!

- Truck Drivers
  - Often paid by mile or by load
  - If paid by mile, must determine mileage rate and number of miles driven.
  - Weeks can vary significantly based upon load availability, when logs have to be turned in, etc.
  - In order to not have low weeks thrown out, must have justification for low weeks- ie: testimony regarding load availability, evidence that logs can be stacked, etc.
  - May also receive per diem pay- truck drivers are most common instance of per diem pay.
  - Per Diem Pay
    - Similar to reimbursable expenses, a truck driver who is paid a per diem amount to cover the cost of expenses while on the road may not include those costs as part of his or her rate calculation as long as it can be established that the per diem is for actual expenses and not for compensation.
    - For per diem pay or an expense allowance, must be some relationship between the amount of the allowance and the amount of the expense it is intended to cover.
    - Case Law re: Per Diem Pay
      - Wallingford v. Atlantic Carriers it was determined that a $125 "per diem" that was paid to every driver every week but not to any other class of workers and was created to help eliminate the need for receipts from drivers should not be included in the claimant's average weekly wage.
      - In contrast, in Phillips v. C & K Transport it was determined that amounts categorized by the employer as "per diem" pay should be included in the claimant's workers' compensation rate because there was no direct relationship between the "per diem" payment and actual expenses.
      - In Bowers v. Premium Transportation Staffing, Inc. Claimant testified that he received $52/day in per diem but only actually spent $12/day for food and the remaining $40/day was money he kept and should be included in his average weekly wage. The Court of Appeals, giving deference to the commissioner's findings of fact, held the $40.00 was appropriately included in the rate calculation.
- School District Employees
  - School district employees often have a contract for an annual salary that is paid out over a period of ten months.
  - Although this is an annual salary under 85.35(5), because school district employees only work 9-10 months out of the year, their wages are considered to cover the period of time that they are working, not the entire year.

- In order to calculate the AWW for a school district employee, you must take the annual salary divided by the number of months that they work or that the contract pays out – typically 10- and then multiply that monthly rate by 12 to get a full year of wages. Then divide the new 'yearly' amount by 52 to get the AWW.
    - Example: A teacher has a contract that pays her $20,000.00 per year, paid out over 10 months. $20,000.00 divided by 10 equals $2,000.00 per month, times 12 months in a year equals $24,000.00. Divide that by 52 to get the rate- $461.53