



The Workers' Compensation
Law Seminar

Advanced Rate Questions: Beyond the 13 Weeks

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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)
 - Rate is actually calculated using "Gross Weekly Earnings"; recurring payments to the employee before any deductions
 - Rate Calculation Tables on Iowa Work Comp Website are intended to represent "Spendable Earnings"; the amount remaining after payroll taxes are deducted from gross weekly earnings. (IC §85.61(9))
- Iowa Code §85.36 (1-12) dictates Iowa Workers' Compensation Rate.

Gross Earnings & Average Weekly Wage

- Gross earnings are used to determine an employee's "Average Weekly Wage"
- "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
 - ✓ Premium Pay for Hourly Employees
- Average Weekly Wage is rounded to the nearest dollar.

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 for any reason

Factoring a Bonus into 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.”
- Several case law examples regarding bonuses included in materials

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!

Tough Calculations: Expense Reimbursement Pay

- Most Common Example: Truck Drivers
- Expense reimbursement pay is generally excluded, while per diem pay CAN be included if it is not intended to cover certain expenses.
- 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: Per Diem Pay

- **EXCLUDED:** In 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.
- **INCLUDED:** 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.
- **PARTIALLY INCLUDED, PARTIALLY EXCLUDED:** 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.

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."

Tough Calculations: Shift Differential vs. Premium Pay

- Shift Differential is INCLUDED, while Premium Pay is EXCLUDED.
- Common example: Nurses' wages
- Must draw a distinction between shift differential and premium pay based upon the wage records.
- 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, ie: increased payment for a less desirable shift.
- 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!

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.

Other Types of Pay

- 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”.

Tough Calculations: Salary + Commission

- An employee who is paid a salary plus commission has his or her rate calculated pursuant to Iowa Code Sec. 85.36(6).
 - 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.

Tough Calculations: 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. $\$20,000.00 \div 10 = \$2,000.00$ per month, times 12 months in a year equals \$24,000.00. Divide that by 52 to get the rate- \$461.53

Tough Calculations: New Employees

- Iowa Code 85.36(7) applies to an Employee Employed Less Than 13 Calendar Weeks
 - Rate can be calculated using wages of similarly situated employees
 - If the earnings of other employees cannot be determined, the employee's weekly earnings are determined using the actual weeks that the employee worked
 - 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).

Rate Calculation Example: Similarly Situated Employees

Week	Date	#1	#2	#3	#4	Average	Rate	Gross
1	08/30/03	41.42	40	40	40	40.36	\$11	\$443.96
2	08/23/03	40	40	40	40	40	\$11	\$440.00
3	08/16/03	41.50	40	40	40	40.38	\$11	\$444.18
4	08/09/03	40	40	40	40	40	\$11	\$440.00
5	08/02/03	40	40	40.25	40	40.06	\$11	\$440.66
6	07/26/03	40	40	44.83	40	41.21	\$11	\$453.31
7	07/19/03	40	40	40	40	40	\$11	\$440.00
8	07/12/03	40	40	39	40	39.75	\$11	\$437.25
9	07/05/03	31	32	33	32	32	\$11	\$352.00
10	06/28/03	40	40	40	40	40	\$11	\$440.00
11	06/21/03	40.52	40	40	40	40.13	\$11	\$441.43
12	06/14/03	40	40	40	40	40	\$11	\$440.00
13	06/07/03	40	40	40	40	40	\$11	\$440.00
AWW								\$400.68
RATE M2								See Table

Case Law: Similarly Situated Employees

- In Maldonado 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.
- Because no wage records of other similarly situated employees were available, the Deputy utilized the wages for the one week that Claimant actually worked.

Tough Calculations:

Part Time Employees

- Calculated under Iowa Code 85.36(9)
 - 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).
- Need to gather wage records from ALL employment to calculate rate.

Considerations for Part Time Employees

- 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.
- Stevens v. Eastern Star Masonic Home, File No. 5049776, (Arb. Dec. August 2016)
 - 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
- 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.

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.”
- Improperly including non-representative weeks without justification can result in an incorrect calculation
- Common Issues:
 - Customary 40 hour work weeks
 - Unusually low earning weeks (must be excluded if no justification)
 - Short Weeks due to work availability (can be included if justified)
 - Holiday Pay, Vacation, or Sick Leave (excluded if personal and alters hours; not automatically excluded if it does not alter customary earnings)
 - Fluctuation in Weekly Hours (present complete wage records to justify)

Example: Representative Weeks

- Doug is paid \$29.65 per hour and typically (“customarily”) works between 30 and 45 hours per week.
- Which weeks are representative?
- The unpaid holiday and sick time caused the weeks of 12/31/07 and 1/7/08 to be unrepresentative. Therefore, we must replace them with 2 additional representative weeks.

<u>Week</u>	<u>Date</u>	<u>Hour s</u>	<u>Rate</u>	<u>Gross</u>
1	03/10/08	40.00	\$29.65	\$1,186.00
2	03/03/08	40.00	\$29.65	\$1,186.00
3	02/18/08	41.75	\$29.65	\$1,237.89
4	02/11/08	40.00	\$29.65	\$1,186.00
5	02/04/08	38.00	\$29.65	\$1,126.70
6	01/28/08	32.00	\$29.65	\$948.80
7	01/21/08	32.00	\$29.65	\$948.80
8	01/14/08	40.00	\$29.65	\$1,186.00
-	01/07/08	22.50	-	Not Rep Holiday
-	12/31/07	16.00	-	Not Rep Sick
9	12/24/07	38.25	\$29.65	\$1,134.11
10	12/17/07	41.50	\$29.65	\$1,230.48
11	12/10/07	39.00	\$29.65	\$1,156.35
12	12/03/07	41.00	\$29.65	\$1,215.65
13	11/26/07	34.00	\$29.65	\$1,008.10
TOTAL			Gross	\$13,802.08
AWW			/13	\$1,061.70
Rate				See RateTable

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.

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

Common Rate Calculation

- 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

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.

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 & Marital Status

- 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.

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.

Questions?