Average Weekly Wage – Calculation and Pitfalls

Arising Out of and in the Course of…?

New Law Update

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THE CALCULATION OF THE AVERAGE WEEKLY WAGE IN WORKERS' COMPENSATION

TTD & TPD PITFALLS

Avoiding Pitfalls

One of the first things we have to contend with in dealing with a workers' compensation claim is: What is the claimant's average weekly wage? This item needs to be identified at the beginning of the claim. Today, we are talking about the Average Weekly Wage and how it is calculated. We will also talk about ways to avoid pitfalls and methods to better control the payment of weekly benefits especially in temporary partial disability payments situations.

The Code Section the controls the average weekly wage is O.C.G.A.§ 34-9-260. Within that Code Section there are 3 separate and distinct models for computing a employee's Average Weekly Wage.

- Utilizing the wages for substantially the whole of 13 weeks immediately proceeding the injury. You add the 13 weeks of gross wages including any per diem or additional benefits (excluding healthcare paid by the employer) and divide it by 13.

The Court of Appeals has held that you cannot use an employee's earnings for 11 weeks preceding the date of accident. It therefore appears that you can use 12 or 13.

- If you cannot find substantially the whole of 13 weeks of benefits of the claimant, during that period prior to the accident, then you must look to a similarly situated employee and obtain that employee's 13 weeks of income prior to the claimant's date of accident.

- If you are not able to satisfy either one of the top 2 tests, then you must utilize the claimant's contractual rate times what is considered a full time work week.

There are all kinds of problems with these seemingly simple rules.

- If your claimant has also worked a similarly concurrent employment (or job that is similar), then you must add that average weekly wage to the average weekly wage from the job where he was actually injured. This is usually a fact situation and involves the analysis of the similar concurrent job and whether it is like the job the claimant was performing at the time of the loss. If you do not include the concurrent wages in the Average Weekly Wage, you cannot use the concurrent wages as a reason to subsequently reduce claimant's benefits.

- There are several things which are included in the Average Weekly Wage. They include uniforms provided by the employer at the employer's expense, a per diem paid to the employee by the employer for work performed, the cost of a hotel or lodgings if included as part of the claimant's work duties and other items which might be relevant to the employee's work with the employer. What is interesting is that the provision of health benefits by the employer is not considered in calculating the Average Weekly Wage.

- The State Board Rules requires that a WC-6 must be filled out by the employer or the insurer and submitted to the State Board IF the claimant is not being paid the maximum workers' compensation rate for his date of accident.

- As a practice tip, it would be best to have the WC-6 before you institute benefits and then submit it as the same time you submit the initial WC-1 if that 1 reflects the initial payment of benefits.

What to do when you have a claimant return to work but make less than the average weekly wage:

- The claimant is entitled to Temporary Partial Disability benefits under §34-9-262 in the current maximum amount of $383.00. That amount is calculated by taking the claimant's average weekly wage as determined by the original WC-6 and subtracting the claimant's weekly wages (gross) from his light duty or return to work restricted job. You then take 2/3 of that amount and pay that as a weekly temporary partial disability benefit.

- If the claimant is not on any type of restrictions and makes less than his Average Weekly Wage upon his return, then no temporary partial would be due.

One of the biggest problems that insurers have is when the employer pays on a monthly basis or does not provide weekly paystubs for the claimant in a timely fashion. There is a way to avoid this problem.

- You must push hard to have the employer provide you with the weekly paystubs so you know what the claimant's gross wages are for each week following the institution of Temporary Total Disability Benefits. You can then, on a weekly basis for 13 weeks, pay a Temporary Partial Disability check that will change week to week.

- However, once you have 13 weeks of wages following the claimant's return to work, you may take the average of the claimant's wages for the prior 13 weeks and subtract that average from the original Average Weekly Wage. You then take 2/3 of the difference and you may pay that Temporary Partial Disability amount for the following 13 weeks. You would then repeat the process at the end of the second 13 week period and you would recalculate and if you have a different Temporary Partial Disability number, you would then start paying that on automatic pay for the following 13 weeks. This avoids problems caused by late reporting from the insured and avoids any 15% late payment penalties that attorneys are always searching for when they obtain a claim that is being paid and the claimant has returned to work.

CASE LAW UPDATES

The past year has provided some interesting new law and I would like to point to some of the more interesting cases and summarize their holdings:

Ocmulgee EMC v. McDuffie, 302 GA App. 640, 806 S.E. 2d 546 (October 16, 2017).

In this case, the question was whether an employer must show the availability of suitable employment to justify the suspension of workers' compensation benefits, after already establishing that an employee's work-related aggravation to a pre-existing condition has ceased to be the cause of the employee's disability.

The Court's holding was that when an employee has a pre-existing condition that limits his work capacity before the on-the-job injury, as soon as the effects of the on-the-job injury cease, the employer's responsibility for workers' compensation also ceases. We do not have to show the existence of suitable light duty at that point.

Sanchez v. Carter, 343 GA App. 187, 806 S.E. 2d 638 (October 17, 2017).

The issue in the *Sanchez* case is the entitlement to dependency benefits in a meretricious relationship. In this particular case, the Court held that "one who is not married to an employee, but who is living with the employee at the time of his death, is not entitled to dependency benefits, despite actual dependency, on the grounds that such payments should not grow out of a meretricious relationship." The Court held in the *Sanchez* case that they were bound by the holding in the *Williams* case (cited) and therefore the issue of dependency is decided still upon the *Williams* case (cited as ***Williams v. Corbett***, 260 GA App., 668, 398 SE 2nd 1 (1990)).

Lingo v. Early County Gin, Inc., A18A0267, 2018 WL2454710 (June 1, 2018).

The question was whether the Superior Court erred when it reversed the Board's ruling that the employer was entitled to avail itself of the rebuttable presumption that the injury was caused by a controlled substance pursuant to O.C.G.A. 34-9-17(b)(2).

The holding in this case was the Court of Appeals confirmed the legal presumption of causation set forth in the Willful Misconduct Statute requires compliance for the chain of custody and collection criteria set forth in the Drug Free Workplace Act.

In this case, the employer failed to preserve or properly identify a qualified person certified or employed by a laboratory certified the by the National Institute on Drug Abuse, the College of American Pathologists, or the Georgia Department

of Community Health; a qualified person certified or employed by a collection company.

In other words, the chain of custody has to be established and it is a way for the employee to get out from under the burden that is placed on them by testing positive for drugs at the time of the accident.

ARISING OUT OF AND IN THE COURSE OF…?

Cartersville City Schools v. Johnson, 345 GA App. 290, 812 S.E. 2d, 605 (2018)

There is always a struggle in analyzing the workers' compensation case to determine if the injury arose out of and in the course of the employment. That is the standard required under the Workers' Compensation Act. There have been numerous cases over the years, including ***Chaparral Boats***.

In short, the ***Johnson*** decision holds that in determining whether an injury "arises out of" the employment, the focus should be on the causal link between the injury and the employee's work-related conditions or activity, and an employee must show that the injury was either caused by an activity related to his or her job, or that the injury resulted from some special danger of the employment. *Johnson* holds that injuries caused, at least in part, by activities and movements such as standing, walking, and turning are compensable as arising out of the employment, if such activities and movements are in some way related to the employment. Such injuries and accidents are not idiopathic.

Discussion of Facts of Cartersville v. Johnson

The employee, in ***Johnson*** was moving quickly to a position in front of her students. The configuration of her desk and the other furniture in the room required her to sharply turn as she navigated through a narrow space between her desk and a table causing her to place acute stress on her knee resulting in the injury she sustained. The Court held that the Superior Court in reversing the case held that the Appellate Division erroneously endorsed the standard that would allow the term "idiopathic" to apply to "any injury that would be incurred off-site, " and declared, "simply because an injury could occur elsewhere does not make it automatically "idiopathic" [and thus non-compensable]."

The Court of Appeals has established what they believe in ***Johnson*** to be the proper legal framework for determining whether an accident "arises out of" the employment has been made clear-whether there is a causal link between the injury and the employees work-related conditions or activity.

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