

2002 Work Comp Seminar



Calculating the Correct Compensation Rate

1:45-2:15 p.m.

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I. INTRODUCTION: THE STATUTORY BASIS

Inasmuch as the whole of workers' compensation is a creature of law, any analysis of an injured worker's proper benefit rate in Iowa -- as is true of all other questions and issues in this area of the law -- must begin with and remain rooted in this state's statutes.

Statutory Construction ("to be liberally construed")

Our review * * * is controlled by the principles * * * which we have applied to the workers' compensation act. Foremost is that which acknowledges the act is to be liberally construed in the employee's favor. [Citation omitted]. Any doubt in its construction is thus resolved in favor of the employee. [Citation omitted].

Teel v. McCord (Teel), 394 N.W.2d 405, 407 (Iowa 1986).

II. STATUTORY RATE BASIS: 80% OF "WEEKLY SPENDABLE EARNINGS" -- MAXIMUMS & MINIMUMS

A. TEMPORARY BENEFITS (TTD & HP)

85.37 Compensation schedule.

If an employee receives a personal injury causing temporary total disability, or causing a permanent partial disability for which compensation is payable during a healing period, compensation for the temporary total disability or for the healing period shall be upon the basis provided in this section. The weekly benefit amount payable to any employee for any one week shall be upon the basis of **eighty percent of the employee's weekly spendable earnings**, but shall not exceed an amount, rounded to the nearest dollar, equal to * * * * **two hundred percent**¹ * * * of the statewide

¹The two hundred (200%) percent lid is also statutorily placed on death benefits. See Iowa Code § 85.31(1)(d) ("as determined by the division of job service of the department of workforce development under the provisions of section 96.19, subsection 36, and in effect at the time of the injury").

weekly wage² as determined above. Total weekly compensation for any employee shall not exceed eighty percent per week of the employee's weekly spendable earnings. The **minimum** weekly benefit amount shall be equal to the weekly benefit amount of a person whose gross weekly earnings are **thirty-five percent of the statewide average weekly wage**,³ or to the spendable weekly earnings of the employee, whichever are less. [Emphasis added].

A. PERMANENT BENEFITS

85.34 Permanent Disabilities

(2) *Permanent partial disabilities.* Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1. The compensation shall be in addition to the benefits provided by sections 85.27 and 85.28. The compensation shall be based upon the extent of the disability and upon the basis of **eighty percent per week of the employee's average spendable weekly earnings**, but not more than a weekly benefit amount, rounded to the nearest dollar, equal to **one hundred eighty-four percent**⁴ of the statewide average weekly wage paid employees * * *. The **minimum** weekly benefit amount shall be equal to the weekly benefit amount of a person whose gross weekly earnings are **thirty-five percent**⁵ of the **statewide average weekly wage**. [Emphasis added].

COMMENT: While the definitions set out in Iowa Code §§ 85.31(1)(d), 85.34(2) & 85.37 constitute the very cornerstones of Iowa's law with respect to rate determination, those statutes offer little

²According to the current *Iowa Workers' Compensation Manual* -- effective: July 1, 2001, to June 30, 2002 -- the "[s]tatewide average weekly wage is \$534.72." See p. V (reproduced herein at p. Y). Accordingly, the highest weekly rate at which an injured worker can currently receive temporary benefits is \$1,069.00 [\$534.72 x 200%]. See *id.*

³According to the current *Iowa Workers' Compensation Manual*, "35% of statewide average weekly wage is \$187.00." See p. V (reproduced herein at p. Y)

⁴According to the current *Iowa Workers' Compensation Manual*, the "[m]aximum weekly rate for PPD benefits is 984.00 [\$515.48 x 184%]." See p. V (reproduced herein at p. Y).

⁵See *supra* note 3.

practical guidance in how to actually wrestle an individual worker's weekly benefit rate calculation to the mat. For that understanding, we need to turn to other provisions of the Iowa's law to see how an individual's weekly benefit rate is spun out of his or her earnings.

III. RATE DETERMINATION: THE DEFINING ELEMENTS

- A. "GROSS EARNINGS";
- B. MARITAL STATUS; and
- C. EXEMPTIONS.

III-A. GROSS EARNINGS (the beginning point):

1. STATUTORY BASIS: 85.36 Basis of computation.

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. **Weekly earnings means gross salary, wages, or earnings⁶** of an employee to which such

⁶ Subsection 3 of Iowa Code § 85.61 ("Definitions") inscribes the meaning of "gross earnings" as follows: "*Gross earnings*' means recurring payments by employer 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.**" (Emphasis added).

Subsection 6 within that same Code section sets out what is included as a "lawfully required deduction or withholding": "*Payroll taxes*' means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:

- a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, **as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age** to which the employee is entitled on the date on which the employee was injured. (Emphasis added) (Federal taxes).

employee would have been entitled **had the employee worked the customary hours for the full pay period⁷ 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:

2. Determining the "Weekly Earnings"

[a] Salaried Employees

- (1) In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings.
- (2) In the case of an employee who is paid on a biweekly pay period basis, one-half of the biweekly gross earnings.
- (3) In the case of an employee who is paid on a semimonthly pay period basis, the semimonthly gross earnings multiplied by twenty-four and subsequently divided by fifty-two.
- (4) In the case of an employee who is paid on a monthly pay period basis, the monthly gross earnings multiplied by twelve and subsequently divided by fifty-two.
- (5) In the case of an employee who is paid on a yearly pay period

b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, **as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age** to which the employee is entitled on the date on which the employee was injured. (Emphasis added) (State taxes).

c. An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which the employee was injured. (Social Security taxes).

⁷Iowa Code § 85.61(5) defines a pay period as follows: "*Pay period*" means that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered."

basis, the weekly earnings shall be the yearly earnings divided by fifty-two.⁸

NOTE: Although the statutory language is not explicit, subsections (1)-(5) refer to “salaried” individuals: to those workers who are exempt from overtime.

[b] Hourly Employees

(6) In the case of an employee who is paid on a daily or hourly basis, or by the 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. (Emphasis added).

NOTE: This subsection implicitly sets out a consecutive process to be followed in the case of a short-workweek “for reasons personal to the employee”: [1] look to similarly situated employees to determine what hours they worked; and [2] if that is not possible, then discard the non-customary week and substitute for it “the closest previous week with earnings that fairly represent the employee’s customary earnings.”

[c] The Recent-Hire

(7) 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, not including overtime or

⁸In Moore v. Posters ‘N Things, Ltd., the Commissioner held that the fact that an employee did not complete the work-year and earn the entire yearly salary for which she contracted did not affect the rate. See 4 Iowa Comm’r Rep. 252 (1984) (app. dec.); see also Teel, 394 N.W.2d at 407 (“to be liberally construed in the employee’s favor”).

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 been in the employ of the employer.

See Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 160 (Iowa 1994) (“This claimant did not produce evidence of what a truly similar employee would have earned. In view of the lack of evidence on that matter, it would be difficult to formulate a fairer test for a wage basis than to average the wages actually received by the employee.”).

See White v. AG Processing, Inc., No. 1052795, __ (July __, 1998) (app. dec.) (“Since claimant only worked eight full weeks prior to his injury date, and since claimant did not produce evidence concerning the wages of similarly situated employees, for the 13 weeks prior to claimant’s injury date, the correct method for calculating claimant’s gross weekly wages is to divide the total amount of claimant’s earnings by the number of weeks he actually worked.”).

[d] The Vineyard Worker [Matthew 20:1-16]

(8) 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 compensation shall be taken to be the usual earnings for similar services where such services are rendered by paid employees.

[e] The Low-Paid Worker

[e-1] Part-Time or Low-Waged Full-Time Workers

(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 that 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.

[e-2] Volunteer Fire Fighters, etc.

(a). In computing the compensation to be allowed a volunteer fire fighter, emergency medical care provider, reserve peace officer, volunteer ambulance driver, volunteer emergency rescue technician as defined in section 147A.1, or emergency medical technician trainee, the earnings as a fire fighter, emergency medical care provider, reserve peace officer, volunteer ambulance driver, volunteer emergency rescue technician, or emergency medical technician trainee shall be disregarded and the volunteer fire fighter, emergency medical care provider, reserve peace officer, volunteer ambulance driver, volunteer emergency rescue technician, or emergency medical technician trainee shall be paid an amount equal to the compensation the volunteer fire fighter, emergency medical care provider, reserve peace officer, volunteer ambulance driver, volunteer emergency rescue technician, or emergency medical technician trainee would be paid if injured in the normal course of the volunteer fire fighter's, emergency medical care provider's, reserve peace officer's, volunteer ambulance driver's, volunteer emergency rescue technician's, or emergency medical technician trainee's regular employment or an amount equal to **one hundred and forty percent**⁹ of the statewide average weekly wage, whichever is greater. (Emphasis added).

[e-3] Apprentice/Trainee

(b) If the employee was an apprentice or trainee when injured, and it is established under normal conditions the employee's earnings should be expected to increase during the period of disability, that fact may be considered in computing the employee's weekly earnings.

[e-4] New Injury While Receiving Temporary Benefits

(c) In computing the compensation to be paid to any employee

⁹Remember that according to the current *Iowa Workers' Compensation Manual* the current statewide weekly wage is \$534.72. See p. V (reproduced herein at p. Y). Thus volunteer fire fighters, for example, who are injured in the line of duty are to be compensated as though they had been earning \$748.61 [$\$534.72 \times 140\%$], unless their gross earnings at their "regular employment" were higher.

who, before the accident for which the employee claims compensation, was **disabled**¹⁰ and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

Paragraph "c" of this subsection shall not apply to compensable injuries arising under the second injury compensation Act.

[e-5] Prison Inmate Workers

(d) If the employee was an inmate as defined in section 85.59, the inmate's actual earnings shall be disregarded, and the weekly compensation rate shall be as set forth in section 85.59.¹¹

¹⁰In Ransford v. Waste Management of Iowa (Ransford), Deputy Trier – who recognized there is “little decisional precedent dealing with this issue” – ruled that “the word ‘disabled’ in this section means “disabled” in the sense of being unable to work and entitled to temporary total, temporary partial, or healing period compensation at the time of the second injury.” See Nos. 1199665 & 1231644, pp. 12, 13 (Oct. 14, 2000) (arb. dec.). The Carrier had attempted to creatively mold the words contained in this section to obtain a credit or apportionment of the **permanency** (PPD) benefits which Mr. Ransford was receiving at the time of his second injury. It should be noted in this regard, moreover, that Iowa Code § 85.33(5) specifically provides that “[i]f an employee sustains an injury arising out of an in the course of employment **while receiving temporary partial disability benefits**, the rate of weekly compensation benefits shall be based on the employee’s weekly earnings at the time of the injury producing temporary partial disability.” (Emphasis added). It is not, therefore, crystal clear how these two Code sections are to be ultimately reconciled, although as Deputy Trier correctly points out: “The workers’ compensation statutes are usually designed and applied in such a manner as to preserve the status quo for the injured employee.” See Ransford, Nos. 1199665 & 1231644 at p. 13; see also Teel, 394 N.W.2d at 407. (“to be liberally construed in the employee’s favor”).

¹¹While the whole of Iowa Code § 85.59 needs to be considered, that section basically provides that “[t]he weekly rate for such permanent disability is equal to **sixty-six and two-thirds percent** of the state average weekly wage paid employees as determined by the department of workforce development under section 96.19, subsection 36, and in effect at the time of the injury.” (Emphasis added). Recalling that the current average weekly wage has been determined to be \$534.72, inmates are to compensated at the weekly rate of \$356.48 [$\$534.72 \div 3 \times 2$]. See *Iowa Workers’ Compensation Manual*, p. V (reproduced herein at p. Y). Generally “payment of benefits to an inmate shall commence as of the time of the inmate's release from the institution either upon parole or final discharge.” See Iowa Code § 85.59.

[f] Proprietors, Partners, etc.

(10) If a wage, or method of calculating a wage, is used for the **basis of the payment of a workers' compensation insurance premium** for a proprietor, partner, limited liability company member, or officer of a corporation, the wage or the method of calculating the wage is determinative for purposes of computing the proprietor's, partner's, limited liability company member's, or officer's weekly workers' compensation benefit rate. (Emphasis added).

[g] Elected Officials

(11) In computing the compensation to be allowed an elected or appointed official, the official may choose either of the following payment options:

(a) The official shall be paid an amount of compensation based on the official's weekly earnings as an elected or appointed official.

(b). The earnings of the official as an elected or appointed official shall be disregarded and the official shall be paid an amount equal to **one hundred forty percent**¹² of the statewide average weekly wage.

[h] Professional Athletes

(12) In the case of an employee injured in the course of performing as a professional athlete, the basis of compensation for weekly earnings shall be one-fiftieth of total earnings which the employee has earned from all employment for the previous twelve months prior to the injury.

III-B. MARITAL STATUS

1. Recall that Iowa Code § 85.61 defines “gross earnings” as “recurring payments by and employer to the employee for employment, before any **authorized or lawfully required deduction** or withholding[.]” (Emphasis added). Among those deductions are payroll taxes which are potentially built – among other elements – upon the individual’s marital status.

¹²§748.61. *See supra* note 9.

2. Common Law Marriage.

Iowa does recognize common law marriages. Contrary to popular belief, however, the analysis of whether a common law marriage exists does not include a specific durational element (i.e. a specific term of years). The proof elements of a common law marriage are set out in In re Marriage of Winegard as follows:

There are three elements requisite to a common law marriage: (1) intent and agreement in praesenti to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife. * * * * The burden of proof lies on the party asserting its existence, and **such a claim of marriage will be regarded with suspicion**, there being no public policy in Iowa favoring common law marriage.

278 N.W.2d 505, 510 (Iowa 1979) (emphasis added).

In an earlier case – In re Marriage of Winegard – the Court had set out a number of fact findings which were supportive of a finding that a common law marriage had existed:

The report discloses the following bearing on the existence of the marital relationship: (1) Sally's intent and belief with respect to her relationship with John; (2) opinions of various witnesses that the community generally regarded the parties as married; (3) continuous cohabitation by the parties since April of 1971; (4) John's failure to deny his alleged marriage; (5) John's acquiescence in Sally's use of his name and her representations to the community they were in fact married; (6) Sally's receipt of a wedding band from John; (7) hotel registrations and travel reservations where in the parties were listed as Mr. and Mrs. John Winegard; (8) receipt of wedding gifts without objection by John; (9) payment by John of retail charge account incurred by Sally as Mrs. John Winegard; (10) mail received and sent by the parties as Mr. and Mrs. John Winegard; (11) John's consent to Sally's ownership of and designation as beneficiary un an insurance policy on his life wherein Sally was referred to as "insured's wife;" and (12) checks endorsed by John directing payment to the order of "Sally Winegard."

257 N.W.2d 609, 616-17 (Iowa 1977): see also Price v. City of Des Moines, No.900497, p. 15 (May 20, 1995) (arb. dec.) (McManus) (use of last name, cohabitation for 17 years, holding themselves out to community as husband and

wife, filing joint tax returns); Lawyer & Higgs, *Iowa Workers' Compensation: Law & Practice*, § 12-2, 121 (3d ed. 1999) (“Under some circumstances tax records have been held determinative of marital status and entitlement to exemptions.”) (case cited).

3. Determined at the Time of Injury.

An individual worker’s rate does not change, even if he or she would become estranged or divorced subsequent to the workplace injury at issue. Similarly, a marriage which takes place after the date of injury does not affect the benefit rate.

4. Marital Status is a Legal Status.

An injured worker’s marital status is not mechanically dissolved by either physical separation or belief. In Colvin v. Polk County A.R.P., the Deputy ruled as follows:

Even though claimant intended to be divorced in the late 1980's, she was not officially divorced until after the date of injury [December 10, 1990]. It is found that she was married at the time of the injury, and entitled to two exemptions. There is no provision under the state or case law that deems a divorce final based on the intent of a party.

See No. 973219, 6 (August 31, 1999) (app. dec). This holding was ultimately affirmed on appeal by District Court Judge Reade, who addressed Defendants’ argument, *inter alia*, that Ms. Colvin had represented herself as being “single” on her tax forms by citing to Iowa Code § 85.61(6):

“Payroll taxes” are defined in Iowa Code § 85.61(6) * * * [which allows deductions] “**as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.**” [Citation omitted]. The section does not state the number of exemptions the employee actually claimed, rather the maximum the employee could have claimed. * * * Furthermore, “this law is for the benefit of the working person and should be, within reason, liberally construed.” Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993).

Polk County ARP v. Colvin, AA 3339, 9 (Oct. 19, 2000) (emphasis added)n (unreported case); *see also supra* note 6.

III-C. EXEMPTIONS

1. As noted earlier, Iowa Code § 85.61(6) defines “payroll taxes” as

(a). An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, **as though the employee had elected to claim the maximum number of exemptions** for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured. (Emphasis added) (Federal taxes).

(Emphasis added); *see also* 876 I.A.C. rule 8.8 (“Payroll tax tables”).

- A. The injured worker is entitled to one exemption.
- B. Injured workers who are married are entitled to an additional exemption for their spouses, regardless of whether they are estranged or not living together. *See supra* pages K-L (§ III-B(4)).
- C. The payroll documents which employees complete to indicate how many deductions they want withheld cannot be used as the basis for rate determination. *See* Iowa Code § 85.61(6) (“as though the employee had elected to claim the maximum number of exemptions”).
- D. Injured workers who are – or whose spouses are – over the age of 65 or who are blind are entitled to additional exemptions. *See id.*
- E. Determined at the Time of Injury.
An individual worker’s rate does not change, even if he or she has a child following a workplace injury; nor does the rate change if a child ceases being dependent. The test would appear always to be whether the injured worker as a tax payer could have claimed the child as a dependent **at the time of the injury at issue**. *See* Iowa Code § 85.61(6) (“on the date on which the employee was injured”).

F. Any individual – adult or child, related or unrelated -- who is being supported by the injured worker in a matter which satisfies the test for “actual dependency for purposes of the tax codes qualifies that worker for an additional exemption, as long as the test was satisfied on the date of the injury at issue. *See* Iowa Code § 85.61(6) (“actual dependency”).

G. The “best evidence” with respect to the number of exemptions to which an injured worker is entitled lies in that person’s tax records. In Rosenbaum v. Dakota Pork, the Commissioner observed:

With regard to the rate of compensation the best evidence of whether claimant is entitled to two or three exemptions has not been introduced into evidence. As shown in section 85.61(6) of the Code the actual exemptions to which the person is entitled for income tax dependency under the Internal Revenue Code is controlling. The record shows without controversy that this claimant paid child support for his son who was born in 1981 but the record fails to show whether or not he was entitled to a dependency exemption for income tax purposes for that child the workers’ compensation laws are to be applied in a light favorable to the employee. Under agency precedent it is inferred that if the injured worker paid child support that he is entitled to claim the child as an exemption. The inference fails if there is evidence to the contrary but no such evidence is in the record. [Citations omitted].

No. 944709, __ (March __, 1997) (app. dec.)

H. Child Support Payments.

In an arbitration decision involving an injured worker who was not – by his dissolution decree – entitled to claim the three oldest of his six children as a deduction but could claim the three youngest, the Deputy Commissioner ruled:

It is the spendable weekly earnings that determine the rate of compensation, not whether or not a person pays child support. The statutory language controls. This agency has long followed a rebutted presumption or inference that if the injured worker pays child support that the worker is entitled to the exemption. The presumption is effectively rebutted, however,

when there is direct evidence in the record of the case that the injured worker, despite paying child support, is not entitled to an income tax exemption for the person for whom the child support is being paid. Thompson v. Seed & Grain Construction, File No. 1059299 (App. December 28, 1998), Rosenbaum v. Dakota Pork, File No. 944709 (App. March 21, 1997), Rhodes v. Torgerson Construction Co., File No. 1012085 (App. January 31, 1995), Keeling v. Cedar Rapids Community School, File No. 891809 (App. February 26, 1993). The record in this case clearly shows that Fred is not entitled to exemptions for his three older children.

Ransford v. Waste Management of Iowa, Nos. 1199665 & 1231644, 10-11 (Oct. 24, 2000) (arb. dec.) (Trier).

III-AA. THE HOURLY EMPLOYEE (The Most Frequent Case).

In the case of an employee who is paid on a -basis, or by the output¹³ 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.

Iowa Code § 85.36(6) (emphasis added).

¹³Truck drivers who are paid by the mile are considered to be paid by "output." See Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 159 (Iowa 1994) ("The parties agree that Hanigan was paid by the mile or 'output.'").

1. TRAPS FOR THE UNWARY (THE HOURLY EMPLOYEE)

[a] THE REPRESENTATIVE WORKWEEK.

[i] Controlling Spirit:

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means 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,¹⁴ computed or determined as follows and then rounded to the nearest dollar:

See Iowa Code § 85.36 (emphasis added). The controlling nature of this statutory preamble is underlined in the arbitration decision of Watson v. Smart Industries as follows:

* * * * Consequently, given the intent set forth in the introductory paragraph of Iowa Code section 85.36, use of any method of computation which would not result in a reasonable approximation of the worker's customary earnings from employment would be contrary to the express intent and the purposes of the statute. **The various subsections are not a hierarchy of choices (the first one to apply is to be applied first)**. Likewise, use of a particular subsection is not dictated by rigid rules concerning how or when a person is paid or how much he or she works in a given week. The subsections are only various alternatives which may be utilized by this agency to arrive at customary earnings. The ultimate objective is to chose a rate

¹⁴In his benchmark treatise, Arthur Larson observed:

Consistent with the remedial nature of workers' compensation laws, statutes for computation of wage bases are meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss.

2 A. Larson, Workmen's Compensation Law § 60.11 at 10-22.

that fairly reflects claimant's probable future earning loss. Nos. 1088721 & 1046275, 9 (Apr. 10, 1997) (arb. dec.) (Walshire) (emphasis added).

[ii] Burden of Proof

In Accordino v. Bridgestone/Firestone – an Arbitration Decision which was summarily affirmed by the Commissioner – the Deputy Commissioner stated the following with respect to an injured worker who typically worked forty hours each week: “The record does not reflect why she worked but 32 hours during the weeks ending August 20 and September 3, but since it does not, **claimant has failed to show they are nonrepresentative.**” No. 971023, 2 (Aug. 11, 1994) (emphasis added) (Rasey); *see also* Iowa R. App. P. 14(f)(5) (“Ordinarily the burden of proof on an issue is upon the party who would suffer loss if the issue were not established.”).

Accordino, however, was decided before Thilges v. Snap-On Tools Corp. (Thilges) in which the Supreme Court made the following observation:

Although petitioner in fact worked less than forty hours during seven of the thirteen weeks immediately prior to the injury date of July 8, 1987, it also appears that this was the result of **unanticipated occurrences** that caused her to miss work on certain days. The customary hours for the full pay period for her job were, as the district court determined, a forty-hour week.¹⁵

528 N.W.2d 614, 619 (Iowa 1995) (emphasis added).

NOTE: Nowhere in its decision does the Thilges Court set out or discuss the evidence underpinning its finding that each of the claimant's short weeks was the result of an “unanticipated occurrence[.]” *See id.*

¹⁵As noted by the Court, “The commissioner arrived at [a lower gross earnings average] by including in his determination several weeks in which petitioner worked less than forty hours.” Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 619 (Iowa 1995) (“The district court reversed this determination, holding that only forty-hour weeks should be considered.”).

Although the bones of its analysis are not fully fleshed-out, clearly underpinning the Court's conclusion in Thilges is the recognition that a trier of fact may make a presumption – assuming that such a presumption is supported by the payroll records – in favor of the employee regarding an injured worker's representative workweek: in Ruth Thilges' case, forty hours. See id. In fact, in an earlier case, the Court had expressly used the term "reasonable presumption" in a similar context:

The Commissioner apparently concluded that Tasler's earnings as of February 6, 1988, remained constant through the date of injury, February 3, 1989. Since no evidence was offered by Oscar Mayer to rebut this reasonable presumption,¹⁶ we are persuaded that this inference is supported by substantial evidence.

Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 830 (Iowa 1992).

In a case which closely followed the Thilges decision in time, a Deputy Commissioner applied the "reasonable presumption" as follows:

[I]t is determined that claimant's calculation is the most correct calculation of claimant's gross weekly earnings based on the evidence available to the deputy with no evidence from employer to rebut the presumption that these were not representative wages on the date of injury.

See Price v. The City of Des Moines, No.900497, ___ (May 20, 1995) (arb. dec.) (McManus); but see Stevens v. First Midwest Corp., 1000215, 17 (Oct. 5, 1995) (arb. dec.) (McGovern) (short workweek included: "Claimant could not state why he believe the week was a short week.").

¹⁶Upon reflection, a presumption in favor of the injured worker on the question of whether a given workweek was representative or non-representative – (whether a short workweek was the result of the worker's being "absent * * * for reasons personal," see Iowa Code § 85.36(6)) – is that few workers maintain personal, contemporary records indicating the reason they might have been absent from work on a given day. In contrast, employers are required by law to maintain detailed payroll and time records for wage and hour and tax purposes. See Viers v. Allied Products Corp., No. 910392, 4 (Sept. __, 1993) (arb. dec.) (Trier). Thus it would appear that on the narrow issue of whether a specific short workweek should be characterized as "representative" the employer should logically bear the burden of proof to rebut a reasonable presumption deduced from the pay records. See Crosser v. Iowa Dep't of Public Safety, 240 N.W.2d 682, 685 (Iowa 1976) ("[There is an] inference which arises where, without satisfactory explanation, relevant evidence within the control of a party whose interests would naturally call for its production is not produced. In such circumstances it may be inferred the evidence would be unfavorable.") (citations omitted).

[iii] “Reasons Personal”

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 [1] 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 [2] replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code § 85.36(6) (emphasis and numbering added).

[b] Wage Exclusions

Recall that Iowa Code § 85,61(3) defines “gross earnings” as

recurring payments by employer 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.

(Emphasis added).

[i] Irregular Bonuses.

In Noel v. Rolscreen, the Iowa Court of Appeals was asked to decide whether a Christmas bonus should have been included in an injured worker's rate. *See* 475 N.W.2d 666 (Iowa Ct. App. 1991). The circumstances of the bonus at issue were summarized by the Court as follows:

The Christmas bonus is defined in the employee handbook as anticipated bonus. The bonus is a future payment given if the employee satisfies the condition precedent to receiving it. The payment of the bonus is not contingent upon the business showing a profit or reaching a particular profit margin. Employees may not use the expected bonus or borrow against it until the precedent conditions are met. The Christmas bonus is paid from the

general operating account of the employer and not from an account earmarked for the employee. The bonus program is a voluntary program that can be discontinued by the employer for any reason. The program can be changed or altered in any manner or replaced with another fringe benefit plan at the employer's discretion.

See id. at 667. In this case, the Court ruled:

The employee handbook describes the Christmas bonus as a bonus of varying amounts, and is dependent on several conditions for amount. It is subject to a condition precedent, varies in amount, and **is not fixed in terms of entitlement or amount** until late in the fiscal year.

See id. at 668 (emphasis added).

[ii] **Overtime** (the premium portion).

876 I.A.C rule 8.2 specifically addresses overtime as follows:

The word "overtime" as used in Iowa Code section 85.61 means amounts due in excess of the straight time rate for overtime hours worked. Such excess amounts shall **not** be considered in determining gross weekly wages within Iowa Code section 85.36. Overtime hours at the straight time rate are included in determining gross weekly earnings. (Emphasis added).

NOTE: Shift differential is also considered to be a premium pay and is not included in calculation of gross wages. *See Lawyer & Higgs, § 12-3, p. 122 (3d ed. 1999) (cases cited).*

[iii] **Expense Allowances.**

In Kolsto v. Management Leasing, Inc., the Deputy did not allow the inclusion of expense reimbursement dollars into the benefit rate calculation, summarily ruling: "The expenses are not used to calculate the weekly benefit rate." *See No. 1039893, 13 (Mar. 23, 1995) (arb. dec.) (McGovern).*

A far more elaborate discussion with respect to how expense reimbursements are handled appears in D. & C. Express, Inc. v. Sperry (Sperry). See 450 N.W.2d 842, 844-45 (Iowa 1990). Sperry, a truck driver – an owner-operator who had leased his truck to the Defendant employer – was paid a fixed percentage of the gross hauling revenues his truck generated each week. See *id.* at 843. An issue arose over how to pull the “wages” -- which were conceptually included in the average weekly gross revenues of \$955.00 which were generated during the relevant period -- apart from the “expenses,” inasmuch as Sperry was showing “a net loss on his income tax return” for the year in which he was injured. See *id.* at 844-45. Although its discussion is more wide-ranging, the Court’s ultimately concluded that “[i]t is not absurd to deduct known expenses to arrive at actual wages.” See *id.* at 845. It is also noteworthy that the Court held in this case that “[t]he burden is on [Sperry] to show his actual earnings.”¹⁷ See *id.* at 845.

[iv] Employer’s Contribution for Welfare Benefits.

In Hoff v. Carl Schuler Masonry, the Deputy Commissioner specifically excluded the following wage items from his benefit calculation: payments made by the employer to the health and welfare fund, payments made to the pension fund, payments made to the masonry promotion fund, payments made to the apprenticeship fund, and payments made to the Unicon development fund. See No. 898721, __ (Sept. 23, 1993) (arb. dec.) (O’Malley).

¹⁷In contrast to the reasonableness which characterizes the presumption in the injured worker’s favor with respect to a determination of whether or not a week is representative inasmuch as the employer has access to the actual payroll records, see supra note 16, in this case the employer would not have any information as to what Sperry’s actual expenses might have been. Thus in this context it was reasonable for the Court to saddle Sperry with the “burden * * * to show his actual earnings.” See Sperry, 450 N.W.2d at 845.

[c] Wage Inclusions.

[i] Holiday Pay.

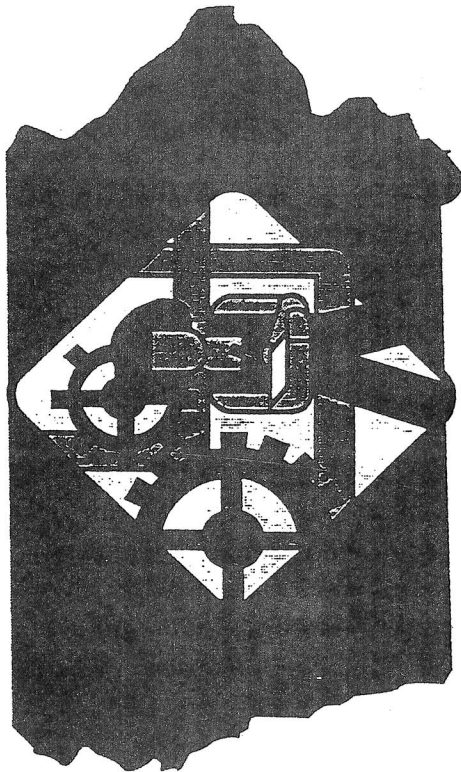
Holiday pay represents a regular payment of wages, as distinguished from an irregular bonus, overtime or premium pay. *See* Lawyer & Higgs, § 12-3, p. 122 (3d ed. 1999) (cases cited), *cited in* Jones v. Armstrong Tire & Rubber Co., Nos 914002 & 1049034, 11 (May 30, 1996) (app. dec.).

[ii] Room and Board.

Because the tax laws allow for the taxation of wage-items other than dollars – e.g. a company home, meat, etc. – the value of such items can be added to an injured worker’s dollar wages to determine his or her gross weekly income. *See* Brown v. Glenwood State School, No. ____, 11 (April __, 1993) (arb. dec.) (Lantz) (“The undersigned believes that the value of the lunch [c]an be considered when calculating her wages.’) (case cited); *see also* Messmore v. Mel Inc., No. 968778, __ (July 12, 1994) (arb. dec.) (Walshire) (hotel room to be valued a customary apartment rent in geographical area).

[iii] Regular Bonuses

Iowa Workers' Compensation Manual



SCHOTT--pg. 22

Includes Benefit Schedule and
Percent (10%) Interest Table

Effective

July 1, 2001 - June 30, 2002

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INTRODUCTION

This booklet has been prepared by the Division of Workers' Compensation to provide information and guidelines in handling Iowa workers' compensation claims. For more detailed information, reference should be made to Iowa Code chapters 85 through 87, 17A and chapter 87B of the Iowa Administrative Code. (References to specific code sections appear in parentheses throughout this booklet.)

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DIVISION OF WORKERS' COMPENSATION
1000 East Grand Avenue
Des Moines, Iowa 50319
515-281-5387
<http://www.iowaworkforce.org/wc>

GROSS WEEKLY WAGES	NUMBER OF EXEMPTIONS										GROSS WEEKLY WAGES		
	ONE	TWO	THREE	FOUR	FIVE	SIX	SEVEN	EIGHT	NINE	TEN UP			
521.00	S	317.65	326.77	333.62	340.45	347.30	354.10	360.90	367.70	370.97	S	371.58	521.00
522.00	M	325.74	334.92	341.76	348.58	355.40	362.20	369.01	370.35	370.97	M	371.58	522.00
523.00	S	318.22	327.34	334.19	341.03	347.86	354.67	361.48	368.28	371.66	S	372.27	523.00
524.00	M	326.32	335.50	342.34	349.16	355.97	362.77	369.58	371.04	371.66	M	372.27	524.00
525.00	S	318.78	327.91	334.76	341.60	348.43	355.23	362.04	368.84	372.33	S	372.94	525.00
526.00	M	326.89	336.06	342.90	349.73	356.54	363.34	370.14	371.71	372.33	M	372.94	526.00
527.00	S	319.35	328.48	335.33	342.17	349.00	355.80	362.61	369.41	373.01	S	373.62	527.00
528.00	M	327.45	336.63	343.48	350.29	357.10	363.90	370.71	372.39	373.01	M	373.62	528.00
529.00	S	319.92	329.06	335.90	342.74	349.57	356.37	363.18	369.98	373.69	S	374.30	529.00
530.00	M	328.02	337.21	344.06	350.86	357.67	364.47	371.28	373.07	373.69	M	374.30	530.00
531.00	S	320.49	329.63	336.47	343.31	350.14	356.94	363.74	370.54	374.37	S	374.98	531.00
532.00	M	328.59	337.78	344.62	351.42	358.24	365.04	371.85	373.75	374.37	M	374.98	532.00
533.00	S	321.05	330.20	337.04	343.88	350.70	357.50	364.31	371.11	375.04	S	375.66	533.00
534.00	M	329.15	338.34	345.19	351.99	358.80	365.60	372.41	374.42	375.04	M	375.66	534.00
535.00	S	321.62	330.78	337.62	344.46	351.27	358.07	364.88	371.68	375.73	S	376.34	535.00
536.00	M	329.73	338.92	345.77	352.57	359.38	366.18	372.98	375.11	375.73	M	376.34	536.00
537.00	S	322.19	331.34	338.18	345.02	351.84	358.64	365.45	372.25	376.40	S	377.02	537.00
538.00	M	330.29	339.49	346.33	353.13	359.94	366.74	373.55	375.78	376.40	M	377.02	538.00
539.00	S	322.75	331.91	338.75	345.59	352.40	359.20	366.02	372.82	377.08	S	377.70	539.00
540.00	M	330.86	340.06	346.90	353.70	360.50	367.30	374.11	376.46	377.08	M	377.70	540.00
541.00	S	323.33	332.49	339.33	346.17	352.98	359.78	366.58	373.38	377.76	S	378.38	541.00
542.00	M	331.43	340.63	347.46	354.27	361.08	367.88	374.69	377.14	377.76	M	378.38	542.00
543.00	S	323.89	333.06	339.90	346.73	353.54	360.34	367.15	373.95	378.44	S	379.06	543.00
544.00	M	331.99	341.21	348.03	354.83	361.64	368.44	375.25	377.82	378.44	M	379.06	544.00
545.00	S	324.46	333.63	340.48	347.30	354.11	360.91	367.72	374.52	379.12	S	379.74	545.00
546.00	M	332.57	341.78	348.61	355.41	362.22	369.02	375.82	378.50	379.12	M	379.74	546.00
547.00	S	325.03	334.20	341.05	347.87	354.68	361.48	368.29	375.09	379.79	S	380.41	547.00
548.00	M	333.13	342.35	349.17	355.97	362.78	369.58	376.39	379.18	379.79	M	380.41	548.00
549.00	S	325.59	334.77	341.62	348.43	355.24	362.04	368.86	375.66	380.47	S	381.09	549.00
550.00	M	333.70	342.92	349.74	356.54	363.34	370.14	376.95	379.86	380.47	M	381.09	550.00
551.00	S	326.17	335.34	342.19	349.01	355.82	362.62	369.42	376.22	381.15	S	381.77	551.00
552.00	M	334.27	343.50	350.30	357.11	363.92	370.72	377.53	380.54	381.15	M	381.77	552.00
553.00	S	326.74	335.91	342.76	349.58	356.38	363.18	369.99	376.79	381.45	S	382.45	553.00
554.00	M	334.83	344.06	350.87	357.67	364.48	371.28	378.09	381.22	381.83	M	382.45	554.00
555.00	S	327.30	336.48	343.33	350.14	356.94	363.74	370.55	377.36	382.50	S	383.12	555.00
556.00	M	335.40	344.63	351.44	358.24	365.05	371.85	378.66	381.89	382.50	M	383.12	556.00
557.00	S	327.87	337.06	343.90	350.71	357.52	364.32	371.13	377.93	383.19	S	383.81	557.00
558.00	M	335.97	345.20	352.01	358.81	365.62	372.42	379.23	382.58	383.19	M	383.81	558.00
559.00	S	328.43	337.62	344.47	351.27	358.08	364.89	371.70	378.50	383.86	S	384.48	559.00
560.00	M	336.54	345.77	352.58	359.38	366.18	372.98	379.79	383.25	383.86	M	384.48	560.00

C. MAXIMUM AND MINIMUM BENEFIT RATES [85.31, 85.34, 85.37, 85.61(9)]

The Injured employee's weekly benefit rate is based on 80% of the employee's weekly spendable earnings but is not to exceed the maximum allowable weekly rate at the time of the injury.

Maximum weekly rate for TTD, HP, PTD and death benefits is \$1069.00.
Maximum weekly rate for PPD benefits is \$984.00.

The minimum weekly benefit amount for TTD or HP is equal to either the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent (35%) of the statewide average weekly wage OR the spendable weekly earnings of the employee, WHICHEVER IS LESS. The minimum weekly benefit amount for PPD, PTD or death benefits is equal to the weekly benefit amount of a person whose gross weekly earnings are thirty-five percent (35%) of the statewide average weekly wage.

Statewide average weekly wage is \$534.72.
35% of statewide average weekly wage is \$187.00.