

SOUTH CAROLINA Workers' Comp LAW BLOG



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Courts Focus on Importance of Average Weekly Wage



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June 23, 2011

When thinking of a timely topic for this week's blog, I reviewed published workers' comp decisions in South Carolina during the past year, and one case really stood out from the others.

In *Pilgrim v. Eaton & Revis*, 391 S.C. 38, 703 S.E.2d 241 (Ct. App. 2010), the court specifically addressed and emphasized the requirements of determining average weekly wage (AWW) pursuant to S.C. Code Ann. § 42-1-40. This is the first time in approximately nine years one of the appellate courts has thoroughly reviewed and analyzed the statutory requirements for determining AWW.

Once I receive a new file, one of the first forms I look for is the Form 20 Wage Statement. In many cases, the form has already been completed by an employer representative or by the carrier. If you are responsible for completing these forms, keep reading because as outlined in *Pilgrim*, it is not as easy as it may look.

In *Pilgrim*, Claimant injured his back when he fell off of a roof. Claimant had worked only three days for a total of 29.5 hours at the time of accident. He earned \$18.00 per hour. In making an award for temporary benefits, the Single Commissioner calculated Claimant's AWW by multiplying \$18.00 per hour over a 40-hour work week, for a total of \$720.00. (Prior to this case, I would have argued this is a fair and standard method of calculating AWW. The Court of Appeals had a different view.)

The Court of Appeals found this method did not comply with § 42-1-40 and remanded the case for a proper calculation. In reaching its decision, the Court closely analyzed § 42-1-40 and held the Commission must make "specific factual findings to justify using one of the three alternative methods."

For a quick review, the statute requires parties to calculate AWW using total wages paid during the four quarters prior to the work accident. Divide the total by 52 weeks, or the actual number of weeks paid, whichever is less. However, if a claimant worked less than 52 weeks or for "exceptional reasons," this method would be unfair, the statute provides the following three alternate methods for calculating AWW:

(1) If Claimant worked less than 52 weeks prior to injury, divide total earnings by numbers of weeks worked. This method "shall be followed" as long as:

- a. Results are "fair and just to both parties." § 42-1-40.
- b. This method is "practicable." See *Pilgrim*, 391 S.C. at 46, 703 S.E.2d at 245, fn 7.

(2) If Claimant worked for too short of a time or if his employment was "casual" in nature or terms, and it is impracticable to use the other methods, AWW is based on that of a similar employee ("person of the same grade and character employed in the same class of employment in the same locality or community").

(3) If none of the other options are available due to “exceptional reasons” that make it “unfair either to the employer or employee,” calculate AWW using “such other method ... as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

The court declined to rule whether the burden for determining AWW fell on the claimant or the defendants. However, in analyzing whether a burden even exists, the court mentioned that the regulations place the burden on the employer to calculate the compensation rate, complete a Form 20 and provide wage information. Pilgrim, 391 S.C. at 49-50, 703 S.E.2d at 247. See S.C. Reg. § 67-1603(A)-(B).

Based on the Pilgrim decision, the Court of Appeals strictly adheres to and applies § 42-1-40 when determining AWW. The law is not settled as to whether the burden for proving AWW lies with the claimant or employer, but based on the court’s analysis in Pilgrim, the employer currently bears the weight of the responsibility in providing and calculating wages. Because the employer ultimately issues the check for TTD based on the AWW reflected on the Form 20 (or Form 15), carriers and employer’s representatives need to carefully review wage information in all new files and thoroughly review the statute before calculating AWW. It is much better to pay at the correct compensation rate initially than be required to pay an underpayment at the close of the case.

Until next time....Anne Marie

About Anne Marie Hempy

Anne Marie Hempy is an associate practicing in the areas of Workers’ Compensation and Defense Litigation. While in law school, Anne Marie worked as a law clerk for Collins & Lacy and served as an Articles Editor for the South Carolina Law Review. Prior to joining Collins & Lacy as an associate, Anne Marie served as a law clerk to the Honorable G. Ross Anderson, Jr., United States District Court, District of South Carolina and worked for a defense firm, where she practiced in the area of Professional Liability Defense.

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