

From: Don Drinko
Date: Wed 6/13/2012 4:21 PM
Question: **Is unemployment compensation to be factored into the calculation of the average weekly wage?**

Many employees, particularly in construction or seasonal jobs, regularly receive unemployment benefits. Recently, the Supreme Court of Ohio dealt with the issue of how unemployment compensation should be dealt with in terms of calculating the average weekly wage in a workers' compensation claim.

In *State ex rel. Warner v. Indus. Comm.*, 131 Ohio St.3d 366, 2012-Ohio-1084, the claimant was a construction worker that has had periods of unemployment each year as the result of seasonal layoffs. After being injured on the job, the claimant sought temporary-total-disability compensation, which required the calculation of his average weekly wage ("AWW"). Typically, the AWW is calculated by dividing total wages for the year prior to injury by 52 weeks. However, R.C. §4123.61 permits the Commission to exclude from the calculation any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control. In the year prior to the injury, the claimant had worked 30 weeks and was unemployed for 22 weeks due to the seasonal layoff. The claimant submitted two calculations, the first solely based on the 30 weeks he had worked, and an alternative calculation for 52 weeks, including the amounts he received from unemployment. A Staff Hearing Officer rejected both calculations, finding that the seasonal layoff was not "unforeseen" and represented a lifestyle choice. Therefore, the period of unemployment should not be disregarded as it was not beyond the employee's control. This prompted a mandamus action with the Tenth District Court of Appeals by the claimant. The Tenth District reversed, finding that the Commission abused its discretion in failing to include claimant's unemployment compensation because it was federally taxable as income under the Internal Revenue Code, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that foreseeability of job loss does not necessarily render seasonal unemployment voluntary. Further, when applying for unemployment benefits, the claimant had to show that he was looking for another job in order to receive the compensation. While the receipt of unemployment benefits is not conclusive, the Court affirmed the order requiring further consideration by the Commission on the issue. However, the Court reversed the lower court's determination on the issue of the calculation of wage loss benefits, and held that the claimant's wages earned from the employer should be divided by 52 unless the claimant can show that he was not able to be employed during the entire period of unemployment. (If such is shown, the total wages should be divided by 30 to produce the average weekly wage.) Lastly, the Commission was ordered to exclude the amount of unemployment compensation from the wage total.

In my experience the Industrial Commission is very amenable to excluding periods of unemployment, particularly when unemployment is paid. If you would like to submit a question

to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

Donald G. Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com

Adam P. Sadowski, Esq.
Gallagher Sharp
420 Madison Ave., Suite 1250
Toledo, OH 43604
Direct Dial 419.241.4864
asadowski@gallaghersharp.com