

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: Must a hearing officer consider additional outside business income in calculating a claimant's average weekly wage (AWW)?**

Under Ohio's workers' compensation law, most benefits payable to claimants are calculated based upon a figure known as average weekly wage (AWW). Therefore, in most cases it benefits the claimant to achieve the highest AWW possible. R.C. 4123.61 provides that AWW is to be calculated by adding the amount of wages earned in the year prior to the injury and dividing by 52, less any period of unemployment due to "causes beyond the employee's control." The statute further provides that in cases involving "special circumstances," the Administrator shall use such methods as will do "substantial justice" to the claimant. Recently, the Tenth District Court of Appeals was presented with a question about the nature of "wages" used to calculate AWW, and whether profits the claimant is alleged to have earned buying and selling cars should have been incorporated in the calculation of AWW.

*State ex rel. Gunter v. Indus. Comm.*, 2017-Ohio-1571, involved a claimant who was injured on the job after working only ten hours. The claim was allowed, and the claimant sought temporary total disability benefits. The BWC set his AWW at \$159.88 based upon information in the file. The claimant appealed, arguing that his AWW should be set at \$819.45, an amount incorporating self-employment income of \$16,000 from the claimant's side business buying and selling used cars in the year before his injury. The claimant supported this request with his tax returns, statements from purchasers of the cars, and his own calculations. Eventually, a Staff Hearing Officer set the AWW at \$242.41, finding that a period of unemployment in the year before the injury should be excluded, but specifically rejecting the claimant's car sales income. The SHO found that the reported business income from the sale of cars did not account for expenses related to purchase and sale of the vehicles, and thus did not provide "an accurate reflection of the earnings received for his efforts." Incorporating the self-employment income would therefore have artificially increased the AWW and result in a "windfall" to the claimant. When his request for an additional appeal was rejected, the claimant initiated a *mandamus* action in the Tenth District Court of Appeals. A magistrate concluded that no abuse of discretion occurred and that the Industrial Commission was within its discretion to set the AWW as it did, prompting an objection by the claimant.

The Tenth District affirmed the findings of the magistrate and the setting of the AWW at the lower amount. The calculation of a claimant's AWW is to be based upon a claimant's net income following deductions from gross income, not simply upon the amount of money received. *State ex rel. Zingales vi. Indus. Comm.*, 2009-Ohio-1860. The SHO reviewed and considered all evidence, including evidence of gross profits from the sale of seven (7) vehicles in the year before his injury, but those figures did not reflect the claimant's actual earnings, and including them into the AWW calculation would result in a windfall. While the claimant had produced evidence of the sale prices, the gross amount of the sales did not include, for example, the outlay of money for the purchase of the vehicles, the cost of title transfer and insurance, and the cost of improvements to the vehicles before sale. Therefore, to include the gross amount of the sales in calculating AWW would not correctly reflect the fruits of the claimant's labor. The claimant

later tried to supplement the record with an affidavit, but the Industrial Commission was within its discretion to make its decision based upon the evidence it had at the time the issue was presented. Finally, the Court correctly noted that while the car sales income was excluded, the Industrial Commission had invoked the "special circumstances" provision when it excluded 24 weeks during which the claimant was unemployed.

*Gunter* is instructive to employers faced with claims that AWW should be increased based upon alleged additional income from a side business. Employers should demand that before the "special circumstances" provision is invoked, the SHO should consider only evidence of net profits, excluding expenses and costs such as overhead, insurance, and taxes. It is the burden of the claimant to present evidence upon which Industrial Commission can properly calculate AWW, and a failure to produce this evidence should result in such income being excluded.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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