

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. FEDEX	:	Case No. 09-918
GROUND PACKAGE SYSTEM, INC.,	:	
	:	Appeal from the Court of Appeals
Appellant,	:	for Franklin County, Ohio,
	:	Tenth Appellate District
vs.	:	Case No. 07AP-959
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	
et al.,	:	
	:	
Appellees.	:	

**BRIEF OF APPELLEE,
INDUSTRIAL COMMISSION OF OHIO**

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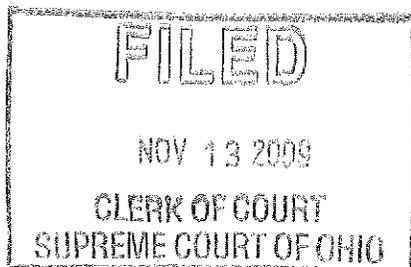


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INTRODUCTION

The issue here has the potential to dramatically alter the long-standing and firmly-established calculation of the average weekly wage (“AWW”) and the full weekly wage (“FWW”) which serve as the basis for an award of disability compensation in a workers’ compensation claim. Appellant FedEx Ground Package System, Inc. (“FedEx”) challenges the determinations made by the appellee Industrial Commission of Ohio (“Industrial Commission”) that set the AWW and the FWW in the workers’ compensation claim of appellee Christopher Roper (“Roper”).

FedEx, which is a self-insuring employer under the workers’ compensation system, unilaterally determined the AWW and FWW under which its compensation responsibility to Roper was to be paid. In the consideration of a dispute between FedEx and Roper with regard to these figures, the Industrial Commission included in its calculation the wages Roper received from Integrated Pest Control (“Integrated”) prior to the October 24, 2006, date of injury, rather than just basing the calculations on the wages Roper received in the year prior from FedEx, as FedEx had done. Thus, this case does not question the propriety of Roper’s entitlement to temporary total disability compensation, or whether his entitlement under the workers’ compensation laws should instead have been for a wage loss. Rather, FedEx’s case focuses solely on the Industrial Commission’s inclusion of the wages from Integrated in the calculation of the AWW and FWW for this claim.

The orders of the Industrial Commission addressing this issue, first by a District Hearing Officer (“DHO”) and then by a Staff Hearing Officer (“SHO”), both relied on the “special circumstances” provision in R.C. 4123.61 to include the wages from Integrated in the AWW and FWW determinations, and set the AWW at \$417.05 and the FWW at \$457.36. While still

maintaining the propriety of the ultimate dollar-amount determinations, the Industrial Commission, in the court below, recognized that the reasoning employed by its hearing officers was not appropriate – this case does not require implementation of the “special circumstances” provision of R.C. 4123.61. As the calculations themselves are neither contrary to law nor an abuse of discretion, though the reasoning employed by the hearing officers was faulty, the court of appeals appropriately denied the writ sought by FedEx.

STATEMENT OF FACTS

Roper began working at FedEx in December of 2004 as a package handler, working 20 to 25 hours per week. [Supplement to the Briefs, page 22 (“Supp. #”)]. In April of 2006, Roper began concurrent employment at Integrated Pest Control as a wildlife control operator. (Supp. 40). Prior to his employment with Integrated, Roper was self-employed as a wildlife control operator. (Supp. 7, 40).

On October 24, 2006, Roper was injured in the course of his employment with FedEx. (Supp. 22). FedEx, which is self-insured under the workers’ compensation laws, certified the validity of the claim for “lumbar strain/sprain with L4-5 disc protrusion.” (Supp. 23).

FedEx calculated the AWW for the claim as \$160.45, by dividing Roper’s total earnings with them during the year prior to the date of injury (\$8,343.55) by 52. (Supp. 2). For the FWW, FedEx used \$250.80 which Roper earned during the week prior to the date of injury, in its calculations. (Supp. 2).

Temporary total disability compensation was not payable until January 24, 2007, since FedEx had been able to initially accommodate Roper’s medical restrictions. On April 11, 2007, Roper moved that his AWW and FWW be reset by the Industrial Commission. (Supp. 42). Following a hearing on May 15, 2007, a DHO issued an order setting the AWW and FWW at

\$417.05 and \$457.36, respectively. (Supp. 52). The DHO relied, in part, on the “special circumstances” provision of R.C. 4123.61.

FedEx appealed and the matter came before an SHO who also found special circumstances were warranted, and affirmed the calculations. (Supp. 66). Both hearing officers had used wages earned by Roper from Integrated in periods prior to the injury in calculating the AWW and FWW. (Supp. 40).

FedEx filed a cause of action in mandamus to challenge the findings of the Industrial Commission which included wages from Integrated. The appellate court’s magistrate recommended that the writ sought by FedEx be denied. FedEx objected, contending that *State ex rel. Smith v. Indus. Comm.* (1933), 127 Ohio St. 217, prohibits the aggregation of wages from dissimilar concurrent employment in the determination of the AWW, and that the magistrate further erred in concluding that the standard for “special circumstances” for AWW and FWW has been met.

The Industrial Commission, too, filed objections to the magistrate’s decision based on the magistrate’s conclusion that “special circumstances” had been met. The Industrial Commission’s position was that, though the mathematical determinations for the AWW and FWW were accurate, there was no need to resort to the special circumstances provision of R.C. 4123.61 to justify the determinations. Rather, in the present opinion of the Industrial Commission, the calculations were the standard for AWW and FWW.

The court of appeals held that the Industrial Commission did not abuse its discretion in the determinations. The court further agreed that there was no need to resort to the special circumstances provision, when the standard calculations were appropriate for this case. From that determination, FedEx appeals as of right to this Court.

LAW AND ARGUMENT

A. Standard of Review

For a writ of mandamus to issue, the relator – here FedEx – must demonstrate a clear legal right to the relief sought, and that the respondent – here the Industrial Commission – had a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. To establish a basis for mandamus relief, FedEx must show that the Industrial Commission acted contrary to law or grossly abused its discretion by issuing an order that is not supported by evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79. The Court has firmly recognized:

It is basic law, without need of citation, that the Industrial Commission has considerable discretion in the performance of its duties; that its actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; and that so long as there is some evidence in the file to support its findings and orders, this court will not overturn such.

State ex rel. Stephenson v. Indus. Comm. (1987), 31 Ohio St.3d 167, 170.

The determination of disputed facts is within the final jurisdiction of the Industrial Commission, subject to correction by an action in mandamus on a showing of a gross abuse of its discretion. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St.2d 396. The Court has held that a writ of mandamus will not be granted if an order of the Industrial Commission is supported by “some evidence.” *State ex rel. Pass v. C.S.T. Extraction Co.* 74 Ohio St.3d 373, 376, 1996-Ohio-126.

Abuse of discretion “implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.” *State ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590. An abuse of discretion will be found only when there exists no evidence upon which the Industrial Commission could have based its factual determination.

State ex rel. Commercial Lovelace Motor Freight v. Lancaster (1986), 22 Ohio St.3d 191, 193. Here, the law and facts both unquestionably support the AWW and FWW calculations made by the Industrial Commission. Thus, FedEx has not established an entitlement to a writ of mandamus.

B. Industrial Commission's Proposition of Law No. 1:

The standard calculation for the AWW for a workers' compensation claim is the injured worker's total wages in the year prior to the date of injury, divided by 52.

1. The "special circumstances" provision of R.C. 4123.61 is inapplicable to the facts of this claim.

FedEx claims an entitlement to "a writ of mandamus because the Industrial Commission abused its discretion when it adjusted Roper's AWW and FWW based upon special circumstances." *Merit Brief of FedEx*, p. 4. The Industrial Commission, as it did in the court below, concedes that the explanation or reasoning set forth in its hearing officers' orders inappropriately relied on the "special circumstances" provision of R.C. 4123.61 as the basis for the calculations of AWW and FWW. See, *State ex rel. FedEx Ground System, Inc. v. Indus. Comm.*, Franklin App. No. 07AP-959, 2009-Ohio-1708, ¶¶13, 14. The facts presented do not warrant "special circumstances" to justify the calculations. As the appellate court upheld, the AWW and FWW figures remain mathematically correct, though for reasons different than that expressed by the SHO, i.e., right result, wrong reason. Accordingly, the resultant AWW of \$417.05 and the FWW as \$457.36 are in full accordance with the law and should not be disturbed by this Court in mandamus.

The SHO indicated primary reliance for the decision on a finding of "special circumstances," a concept contained in the final paragraph of R.C. 4123.61:

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of

workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable him to do substantial justice to the claimants.

In support of its request for a writ of mandamus, FedEx avers that the facts of this claim are not "special circumstances." With this, the Industrial Commission agrees – the setting of the AWW, as well as the FWW, in this claim do not suggest a need to apply R.C. 4123.61's "special circumstances" provision. "Special circumstances" applies only in extraordinary situations, for example where a claimant has only worked a few days before being injured. *State ex rel. Clark v. Indus. Comm.* (1994), 69 Ohio St.3d 563. The "standard calculation" is the norm, with "special circumstances" reserved for only the uncommon situation. *State ex rel. Cawthorn v. Indus. Comm.* (1997), 78 Ohio St.3d 112, 114.

The Industrial Commission's concession that the reasoning employed by its hearing officers was flawed, however, does not support a writ that would disturb the AWW and FWW calculations here. The extraordinary relief provided by mandamus should not be used to command the performance of a vain act. *State ex rel. Rodriguez v. Indus. Comm.* (1993), 67 Ohio St.3d 210, 214. Rather, as explained above, the AWW/FWW determinations should be upheld because they are in full accordance with law and not an abuse of the discretion by the Industrial Commission.

2. The wages from the injured worker's other employment in the year prior to injury are properly included in the determination of the AWW.

FedEx's specific challenge to the AWW/FWW determinations is whether Roper's wages from Integrated in the 12 months before the October 24, 2006, injury should be included in the calculation of the AWW, and whether the Integrated wages from the six weeks before the injury should be used in the calculating the FWW. FedEx argues that these sums should not be included since they do not represent a wage from employment similar to that Roper performed at FedEx.

Precise formulae for the calculations of AWW and FWW are provided neither by statute nor formal rule. Interestingly, though the calculations of AWW and FWW are an integral part of the operation of the Ohio workers' compensation system, this Court has rarely been called upon to address the issue of the formula which should be followed. In *State ex rel. Smith v. Indus. Comm.* (1933), 127 Ohio St. 217, the case primarily relied upon by FedEx, the Court addressed Section 1465-84, General Code, the predecessor to R.C. 4123.61. At that time, the statute read, *in toto*:

The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

Based upon the statutory language then in existence, the Court concluded that “average weekly wage” did *not* include the earnings of secondary employment not connected with the employment in which the injury was sustained. Rather, only the wages *at the time of injury* served as the basis for the calculation.

Just months after the release of *Smith*, the Court again looked at Section 1465-84, General Code, in *State ex rel. Kildow v. Indus. Comm.* (1934), 128 Ohio St. 573, from a different approach – the time factor: how far back should the wages be reviewed to determine a weekly average. There, the Court held that the single-sentence statute “is vague and indefinite, as no basis for determination is fixed.” *Id.* at 578. The Court questioned: “Must you go back one week, two weeks, six weeks or six months in order to determine ‘average weekly wage * * * at the time of injury’?” *Id.* Significantly, these cases were based on the legislation adopted in the early years of a workers’ compensation program in Ohio.

The early General Code provision setting forth the “average weekly wage” concept underwent major amendment “only four years after the *Smith* decision was released,” and it has been suggested that “the amendment was intended to correct the harsh impact of the *Smith* case.”

[*State ex rel.*] *Lipsky v. Barry, Adm'r.*, Franklin App. No. 90AP-07, 1990 Ohio App. LEXIS 5538, at [*7]. In 1937, in addition to the “special circumstances” provision, the General Assembly also added to Section 1465-84, General Code:

In death claims, permanent total disability claims, permanent partial disability claims and claims for impairment of earnings, the claimant’s or the decedent’s *average weekly wage for the year preceding the injury shall be the weekly wage upon which compensation shall be based.* In ascertaining the average weekly wage for the year previous to the injury, any period of unemployment due to sickness, industrial depression, strike or lockout, shall be eliminated.

117 Laws of Ohio 252. (Emphasis added.) (Appendix, App-1.)

The Industrial Commission maintains that *all wages* from the injured worker’s employments earned in the one-year period prior to the date of injury should be included in the AWW calculations. In its consideration of the terms of R.C. 4123.61, this Court stated in *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, 287:

In calculating this figure, two considerations dominate. First, the AWW must do substantial justice to the claimant. Second, it should not provide a windfall.

In *Wireman*, the Court expressly recognized that the varying situations surrounding one’s employment prompt a “need to carefully examine AWW questions on a case-by-case basis.” *Id.* at 288. There, thus, is not a hard-and-fast rule as to the calculation, leaving it instead to the function of the Bureau of Workers’ Compensation (“BWC”) or the Industrial Commission to determine in accordance with procedural policies.

The BWC’s policy and procedure, shown at its website¹, explains:

When setting the AWW, include *all earnings from all employers* for whom the injured worker was employed at the time of injury.

The AWW is calculated using the gross earnings (from all employers) for 52 weeks prior to the date of injury/disability (including overtime pay).

¹ <http://www.ohiobwc.com/basics/infostation/InfoStationContent.asp?Item=1.2.3.17.3.2>

(Emphasis in original text.) Justification for the process of including all wages from all employments is contained in the fourth paragraph of R.C. 4123.61, which states:

In death, permanent total disability, permanent partial disability claims, and impairment of earnings claims, the claimant's or the decedent's *average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the weekly wage upon which compensation shall be based.* In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins *any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.*

R.C. 4123.61. (Emphasis added.) The first sentence of this paragraph does not restrict the formula to only the wages from the job at which the injury occurred. In fact, the statement is broad: the average weekly wage *for the entire year preceding the injury* is the weekly wage upon which compensation shall be based. No words limit the formula to only a consideration of the wages earned at the employment where injured, and restricting the computation to only those wages would call for reading into the statute limiting words that are not there, which a court cannot do. *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 288.

The second sentence sets forth further details of the scope of the AWW calculation. This sentence delineates periods of time of unemployment beyond the worker's control that are to be *excluded* from the AWW calculation. It follows that, since the General Assembly was quite specific as to what is *not* to be included, all wages and periods of time that are not eliminated are to be *included* in the AWW calculation.

The general procedure of including all wages from all sources in the AWW calculation is discussed in Fulton, *Ohio Workers' Compensation Law*, 3d ed., 2008, §9.2, at page 298. After observing that the 1937 amendment to the General Code predecessor to R.C. 4123.61 added the language "for the year preceding," significantly broadening the scope of the formula, the author states:

Based upon this supposition of employment for the entire year, the Bureau of Workers' Compensation advises its claims examiners to determine the average weekly wage by dividing *the total earnings for the year* prior to the date of injury or disability by fifty-two. The calculation should be *based upon wage information from all employers during the prior year* as well as any extra allowances for tips, laundry, room and board, housing, rent or other goods and services which may have been part of the claimant's remuneration.

Fulton, at 298. (Emphasis added.)

Here, all of the wages from Roper's employment earned in the period October 24, 2005, through October 24, 2006, *should* appropriately be included in the AWW calculations. There was no reason to resort to the "special circumstances" provision of R.C. 4123.61, for that is a concept generally recognized as being applicable for the determination of the AWW in "uncommon situations." *Cawthorn*, at 114; *Wireman*, at 288. Working part-time is not *per se* a "special circumstance." *Wireman*, at 289. While Roper's multiple part-time employments are not a "special circumstance," the AWW calculation itself remains to be appropriate and in accordance with the procedures and policies that are, and have been, normally applicable.

3. FedEx's illustrations do not command a reading of R.C. 4123.61 that all wages are not to be included in the AWW calculation.

FedEx presents several scenarios which, in its opinion, display an unfairness to the employer under the appellate court's ruling that all wages are to be included in the AWW/FWW calculations, leaving the employer responsible to pay more in disability compensation than what its wages to the injured worker would have been. FedEx writes: "They should not be required to pay greater benefits for temporary disability than the maximum benefits that would be due on the basis of wages that the claimant was receiving in their employ." *Merit Brief of FedEx*, p. 12. But FedEx's scenarios are applicable only if the employer is self-insured for purposes of workers' compensation; disability compensation awards for an employer that is a contributor to the State Insurance Fund are paid directly by the Bureau of Workers' Compensation, and not the employer.

While FedEx's hypotheticals posit situations where disability compensation paid may be more than the wage from a single employer, they, nonetheless, are within the parameters and expectations of the complex workers' compensation system, which cannot always maintain precision.

Moreover, FedEx's argument is flawed because it accepts that concurrent wages will be included in the calculations if the injured worker had been engaged in other *similar* employment, as referenced in *Smith*. If an employee is injured while working part-time for FedEx, and is also employed full- or part-time by United Parcel Service, FedEx apparently acknowledges that the AWW/FWW should be the collective sum of the similar-work wages. This would result in FedEx's payment of disability compensation at a rate more than its individual wage responsibility to the worker – the basis of FedEx's primary challenge. Another imperfection in FedEx's theory exists if its full-time worker reduces his or her status to that of part-time. While wages may have been \$1000 per week in the first 11 months of the applicable prior year's wages, the wage was reduced to \$500 per week after the change. If injured, AWW would be approximately \$960 per week and temporary total disability compensation would be two-thirds of that amount: \$640. This compensation rate paid by the self-insured employer is clearly more than the \$500 that the employer would have paid the injured worker in salary.

Concern over a disparity between the wage and disability compensation is further diminished since the AWW figure is not the actual rate for the award of disability compensation. First, the actual compensation payment is two-thirds of the AWW. Second, there are statutory caps on the amount of disability compensation based on the statewide average weekly wage. See, R.C. 4123.56(A), 4123.57(A), 4123.58(A). Thus, the differential is not necessarily to the extent that might be suggested.

FedEx is not required to be a self-insuring employer. As a self-insuring employer, FedEx has assumed the direct responsibility for the payment of disability compensation for its injured workers, as opposed to the payment of a premium, based on its payroll, to the BWC for insurance coverage for work-related injuries and diseases. Self-insurance, provided by R.C. 4123.35, is not a unilateral election made by an employer or a requirement. Rather, self-insurance is a *privilege* which is afforded by the BWC to employers that can qualify and meet certain responsibilities.

Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and *who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof*, upon a finding of such facts by the administrator, *may be granted the **privilege** to pay individually compensation*, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer.

R.C. 4123.35(B). (Emphasis added.) See also, *St. Paul Fire and Marine Ins. Co. v. Indus. Comm.* (1987), 30 Ohio St.3d 17, 19. If FedEx does not want to pay compensation based on AWW and FWW that includes all wages, it may relinquish its self-insured status and instead pay premiums to the State Insurance Fund, where the impact of the compensation payments to its injured workers, based upon the injured workers' total wages in the year prior, may not be nearly as severe.

In support of its arguments, FedEx also incorrectly advocates standards used in other states. FedEx directs the Court, on page 11, to a recognized commentator of workers' compensation law on a national level, who indicates that the majority of jurisdictions have adopted a "similar employment" rule for the AWW calculation. Professor Larson's treatise presents a detailed discussion of the wage basis when the injured worker has engaged in

concurrent employment. He explains that there are four different doctrines surrounding the average weekly wage when there is concurrent employment, some of which are established by express statute, and others not. Larson, *Larson's Workers' Compensation Law*, §93.03[1][a]. He recognizes, as FedEx wrote, that the majority rule is that earnings may be combined only if the employments were "related" or "similar." Id. Larson, however, notes that this holding is "by a very narrow numerical margin." Id. He writes: "A substantial and growing minority rule is that the earnings may be combined whether or not the employments were related or similar." Id. The footnote to this statement references many industrial states in this category, including Illinois, Michigan, New York and Pennsylvania.

Professor Larson is critical of the "related employment" rule, writing:

The rule refusing to combine earnings from concurrent employments unless they are "similar" or "related" is unnecessary from the point of view of statutory construction, unsound as a matter of accomplishing the purposes of the legislation, inhumane from the point of view of the claimant, and logically absurd as to the distinctions on which it is based.

Larson, §93.03[1][c]. It is fundamental that, when interpreting or construing statutes, courts give due deference to an interpretation by an administrative tribunal which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command. *State ex rel. McLean v. Indus. Comm.* (1986), 25 Ohio St.3d 90, 92. The doctrine subscribed to by the Ohio agencies responsible for implementation of the workers' compensation program, even if not presently that of the majority of states, nonetheless, is viable and legitimate. As explained above, it furthers the primary purpose of workers' compensation law, to support the injured worker during his disability.

C. Industrial Commission's Proposition of Law No. 2:

The FWW for a workers' compensation claim is the higher of two calculations: (1) gross wages including overtime pay earned over the six week period prior to the date of

injury divided by six, or (2) the employee's gross wages earned for the seven days prior to the date of injury excluding overtime pay.

R.C. 4123.56(A) provides that, for the first 12 weeks of total disability, a qualifying injured worker's entitlement to temporary total disability compensation is 72% of the employee's "full weekly wage," subject to statutory maximum and minimum amounts. This is differentiated from the "average weekly wage" that is used in the determination of temporary total disability compensation after the first 12 weeks. R.C. 4123.56(A). A succinct analysis of the theory behind the FWW is found in *Fulton*:

The "full weekly wage" concept is employed to solve an administrative problem which might otherwise have caused delay in the payment of compensation to injured workers. The legislative history is illuminating. In 1978, the General Assembly amended the statute [R.C. 4123.56] to prescribe payment of temporary total disability compensation at a weekly rate of 72 percent of the claimant's average weekly wage for the first twelve weeks. This therefore required the ascertainment of the claimant's average wages for the whole year before compensation could be paid. The General Assembly amended R.C. §4123.56 in 1979 to restore the full weekly wage as the basis for calculating the first twelve weeks of temporary total disability benefits.

Fulton, supra, at 306. Therefore, the underlying purpose of the statutory change to use the FWW for the first 12 weeks of total disability, as opposed to the AWW, was to avoid delay in getting a compensation award to the claimant, by quickly ascertaining a representative period of the claimant's earnings from the few weeks or days immediately prior to the injury.

As with AWW, no statutory formula exists for the establishment of the FWW. Rather, the General Assembly has left the criteria for the FWW within the province of the administrative body charged with such responsibilities; in other words, the BWC or the Industrial Commission, depending on the posture of a claim. *State ex rel. Taylor v. Indus. Comm.*, Franklin App. No. 05AP-803, 2006-Ohio-4781, ¶¶9, 11; *State ex rel. Village of Huntsville v. Indus. Comm.*, Franklin App. No. 04AP-281, 2004-Ohio-6615.

With the express purpose of eliminating the then-existing confusion and uncertainty, and providing for uniformity in the treatment of all claims, the Industrial Commission and the BWC entered into Joint Resolution R80-7-48 on June 4, 1980, to address the calculation of the FWW. That policy provides that the FWW is to be the higher of two calculations: (1) gross wages (including overtime pay) earned over the aforementioned six week period divided by six, or (2) the employee's gross wages earned for the seven days prior to the date of injury (excluding overtime pay). *Taylor*, supra at ¶11; *Village of Huntsville*, supra at ¶40. See also, *State ex rel. Powell v. C.R. O'Neil & Co.*, 116 Ohio St.3d 22, 2007-Ohio-5504, at ¶10. The BWC's policy and procedure² states:

When setting the FWW, include *all earnings from all employers* from whom the injured worker was employed at the time of injury.

(Emphasis in original text.)

In calculating the FWW here, the SHO used Roper's gross wages from both FedEx and Integrated for the six weeks before the date of injury, and divided by six. This actual amount determined by the SHO is fundamentally correct, and should not be disturbed in mandamus.

On page 19 of its brief, FedEx claims entitlement to a writ based on the Industrial Commission's reliance on the "special circumstances" provision of R.C. 4123.61 and "erroneously adjust[ing] Roper's FWW based upon a *rescinded* Industrial Commission resolution." (Emphasis added.) In the court below, the Industrial Commission recognized that its hearing officers mistakenly relied on the "special circumstances" provision in the determination of FWW. Nonetheless, FedEx argues that Industrial Commission/Bureau of Workers' Compensation Joint Resolution R80-7-48 is "no longer effective," citing to *State ex*

² <http://www.ohiobwc.com/basics/infostation/InfoStationContent.asp?Item=1.2.3.17.3.1>

rel. Taylor v. Indus. Comm., Franklin App. No. 05AP-803, 2006-Ohio-4781. It is now FedEx which is mistaken.

FedEx misconstrues *Taylor*. In that case, Ms. Taylor's argument – similar to FedEx's here – was premised on her assertion that the joint resolution had been rescinded by the enactment of Am.Sub.H.B. 107. *Taylor*, at ¶¶12 and 33. The court of appeals rejected Taylor's argument, stating: "the commission did not rescind this joint resolution." *Id.* at ¶12. The adoption of H.B. 107, effective October 20, 1993, merely substituted "bureau of workers' compensation" for "industrial commission" in R.C. 4123.61. Thus, the agency responsible for determining FWW was changed, and not the underlying policy statement. *Id.* at ¶14. See also, the court's adoption of its magistrate's conclusions:

Under H.B. 107, responsibilities for the calculation of the AWW were transferred from the commission to the bureau. With the exception of substituting the bureau for the commission, new R.C. 4123.61 contains identical language to the former version. It is undisputed that the responsibility for adopting FWW guidelines now rests with the bureau and not the commission. However, to conclude that this change in the agency responsible for determining the FWW somehow changed the FWW determination from a discretionary one, and to say that R.C. 4123.61 now requires that the FWW be established as relator's anticipated wages for the week following her injury, is completely unsupported.

Id. at ¶34.

There is no express statutory or regulatory provision for the calculation of the FWW for a claim. Rather, it remains within the discretion of the agency charged with making such determinations, and that agency's interpretation of the calculation must be afforded due deference. *McLean*, *supra*. R.C. 4123.52 gives the Industrial Commission the continuing jurisdiction to make modifications or changes to prior determinations "as, in its opinion is justified." Here, the initial determination of FWW was made not by the BWC or the Industrial Commission, but rather by FedEx under its self-insuring employer responsibilities. Roper was

not obligated to let that determination go unchallenged. The dispute between Roper and FedEx was presented to the Industrial Commission in accordance with R.C. 4121.34(B)(3), and the matter came before and was decided by the Industrial Commission's hearing officers. FedEx's Proposition of Law No. II has no merit.

CONCLUSION

The law and the facts of this case support the AWW and FWW calculations as made by the Industrial Commission. Though the reasoning expressed in the Industrial Commission's administrative orders for including the wages from Integrated was misguided, the calculations otherwise are correct and should not be disturbed by the Court.

Accordingly, the decision and judgment of the court of appeals should be affirmed, with the writ of mandamus sought by FedEx denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellee, Industrial Commission of Ohio, was served by regular U.S. Mail, postage prepaid, upon John T. Landwehr, Nicole A. Flynn, Mark A. Shaw, counsel for Appellant, EASTMAN & SMITH LTD, One SeaGate, 24th Floor, P.O. Box 10032, Toledo, Ohio 43699-0032, and Theodore A. Bowman, counsel for Appellee Christopher J. Roper, GALLON, TAKACS, BOISSONEAULT & SCHAFFER CO., L.P.A., 3516 Granite Circle, Toledo, Ohio 43617-1172, on this 13th day of November, 2009.



GERALD H. WATERMAN (0020243)
Assistant Attorney General

APPENDIX

(Amended Substitute House Bill No. 80)

AN ACT

To amend sections 1465-79, 1465-81 and 1465-84 of the General Code, pertaining to the workmen's compensation law.

Be it enacted by the General Assembly of the State of Ohio:

SECTION I. That sections 1465-79, 1465-81 and 1465-84 be amended to read as follows:

Compensation in cases of temporary disability.

Sec. 1465-79. In case of temporary disability, the employe shall receive sixty-six and two-thirds per cent of his average weekly wages so long as such disability is total, not to exceed a maximum of eighteen dollars and seventy-five cents per week, and not less than a minimum of *** eight dollars per week, unless the employe's wages shall be less than *** eight dollars per week, in which event he shall receive compensation equal to his full wages; but in no case to continue for more than six years from the date of the injury, nor to exceed three thousand, seven hundred and fifty dollars.

Compensation in cases of permanent total disability.

Sec. 1465-81. In cases of permanent total disability, the award shall be sixty-six and two-thirds per cent of the average weekly wages, and shall continue until the death of such person so totally disabled, but not to exceed a maximum of eighteen dollars and seventy-five cents per week and not less than a minimum of *** eight dollars per week, unless the employe's average weekly wages are less than *** eight dollars per week at the time of the injury, in which event he shall receive compensation in an amount equal to his average weekly wages.

The loss of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, shall prima facie constitute total and permanent disability, to be compensated according to the provisions of this section.

Basis for computation of benefits.

Sec. 1465-84. The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits.

In cases of temporary total disability the compensation for twelve (12) weeks from and after the injury shall be based on the full weekly wage of the claimant at the time of the injury; providing, that when a factory, mine or other place of employment is working short time, in order to divide work among the employees, the commission shall take that fact into consideration when determining the wage for the first twelve (12) weeks of temporary total disability.

Compensation for all further temporary total disability shall be based as provided herein for permanent disability claims.

In death claims, permanent total disability claims, permanent partial disability claims and claims for impairment of earnings, the claimant's or the decedent's average weekly wage for the year preceding the injury shall be the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, any period of unemployment due to sickness, industrial depression, strike or lockout, shall be eliminated.

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying the above provisions the commission, in determining the average weekly wage, in such cases, shall use such method as will enable it to do substantial justice to the claimants.

Repeal.

SECTION 2. That existing sections 1465-79, 1465-81 and 1465-84 be, and the same are hereby repealed.

FRANK R. UIBLE,
Speaker of the House of Representatives.

KEITH LAWRENCE,
President pro tem. of the Senate.

Passed April 8, 1937.

Approved April 21, 1937.

MARTIN L. DAVEY,
Governor.

The sectional numbers in this act are in conformity to the General Code.

HERBERT S. DUFFY,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 22nd day of April, A. D. 1937.

WILLIAM J. KENNEDY,
Secretary of State.

File No. 66.

4121.34 District hearing officers - jurisdiction.

(A) District hearing officers shall hear the matters listed in division (B) of this section. District hearing officers are in the classified civil service of the state, are full-time employees of the industrial commission, and shall be persons admitted to the practice of law in this state. District hearing officers shall not engage in any other activity that interferes with their full-time employment by the commission during normal working hours.

(B) District hearing officers shall have original jurisdiction on all of the following matters:

(1) Determinations under section 4123.57 of the Revised Code;

(2) All appeals from a decision of the administrator of workers' compensation under division (B) of section 4123.511 of the Revised Code;

(3) All other contested claims matters under this chapter and Chapters 4123., 4127., and 4131. of the Revised Code, except those matters over which staff hearing officers have original jurisdiction.

(C) The administrator of workers' compensation shall make available to each district hearing officer the facilities and assistance of bureau employees and furnish all information necessary to the performance of the district hearing officer's duties.

Effective Date: 09-29-1997

4123.35 Payment of premiums by employers.

(A) Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers' compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay semiannually a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator, and a receipt or certificate certifying that payment has been made, along with a written notice as is required in section 4123.54 of the Revised Code, shall be mailed immediately to the employer by the bureau of workers' compensation. The receipt or certificate is prima-facie evidence of the payment of the premium, and the proper posting of the notice constitutes the employer's compliance with the notice requirement mandated in section 4123.54 of the Revised Code.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor is liable for the unpaid premium due from any subcontractor with respect to that part of the payroll of the subcontractor that is for work performed pursuant to the contract with the employer.

Division (A) of this section providing for the payment of premiums semiannually does not apply to any employer who was a subscriber to the state insurance fund prior to January 1, 1914, or who may first become a subscriber to the fund in any month other than January or July. Instead, the semiannual premiums shall be paid by those employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them.

The administrator shall adopt rules to permit employers to make periodic payments of the semiannual premium due under this division. The rules shall include provisions for the assessment of interest charges, where appropriate, and for the assessment of penalties when an employer fails to make timely premium payments. An employer who timely pays the amounts due under this division is entitled to all of the benefits and protections of this chapter. Upon receipt of payment, the bureau immediately shall mail a receipt or certificate to the employer certifying that payment has been made, which receipt is prima-facie evidence of payment. Workers' compensation coverage under this chapter continues uninterrupted upon timely receipt of payment under this division.

Every public employer, except public employers that are self-insuring employers under this section, shall comply with sections 4123.38 to 4123.41, and 4123.48 of the Revised Code in regard to the contribution of moneys to the public insurance fund.

(B) Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a

finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge employers who apply for the status as a self-insuring employer a reasonable application fee to cover the bureau's costs in connection with processing and making a determination with respect to an application.

All employers granted status as self-insuring employers shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section.

(1) The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the employer by this section:

- (a) The employer employs a minimum of five hundred employees in this state;
- (b) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a business, or any part thereof, situated in this state that has operated for at least two years in this state, also shall qualify;
- (c) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;
- (d) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;
- (e) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.
- (f) The employer's organizational plan for the administration of the workers' compensation law;
- (g) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employees' rights to compensation and benefits; and
- (h) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

The administrator may waive the requirements of divisions (B)(1)(a) and (b) of this section and the requirement of division (B)(1)(e) of this section that the financial records, documents, and data be certified by a certified public accountant. The administrator shall adopt rules establishing the criteria that an employer shall meet in order for the administrator to waive the requirement of division (B)(1)(e) of this section. Such rules may require additional security of that employer pursuant to division (E) of section 4123.351 of the Revised Code.

4123.52 Continuing jurisdiction of commission.

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

Effective Date: 06-14-2000; 2006 SB7 10-11-2006

4123.56 Compensation in case of temporary disability.



(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or

4123.57 Partial disability compensation.

Partial disability compensation shall be paid as follows.

Except as provided in this section, not earlier than twenty-six weeks after the date of termination of the latest period of payments under section 4123.56 of the Revised Code, or not earlier than twenty-six weeks after the date of the injury or contraction of an occupational disease in the absence of payments under section 4123.56 of the Revised Code, the employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.

Whenever the application is filed, the bureau shall send a copy of the application to the employee's employer or the employer's representative and shall schedule the employee for a medical examination by the bureau medical section. The bureau shall send a copy of the report of the medical examination to the employee, the employer, and their representatives. Thereafter, the administrator of workers' compensation shall review the employee's claim file and make a tentative order as the evidence before the administrator at the time of the making of the order warrants. If the administrator determines that there is a conflict of evidence, the administrator shall send the application, along with the claimant's file, to the district hearing officer who shall set the application for a hearing.

The administrator shall notify the employee, the employer, and their representatives, in writing, of the tentative order and of the parties' right to request a hearing. Unless the employee, the employer, or their representative notifies the administrator, in writing, of an objection to the tentative order within twenty days after receipt of the notice thereof, the tentative order shall go into effect and the employee shall receive the compensation provided in the order. In no event shall there be a reconsideration of a tentative order issued under this division.

If the employee, the employer, or their representatives timely notify the administrator of an objection to the tentative order, the matter shall be referred to a district hearing officer who shall set the application for hearing with written notices to all interested persons. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to rules of the Industrial commission.

(A) The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, per week regardless of the average weekly wage, for the number of weeks which equals the percentage of two hundred weeks. Except on application for reconsideration, review, or modification, which is filed within ten days after the date of receipt of the decision of the district hearing officer, in no instance shall the former award be modified unless it is found from medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability. A staff hearing officer shall hear an application for reconsideration filed and the staff hearing officer's decision is final. An employee may file an application for a subsequent determination of the percentage of the employee's permanent disability. If such an application is filed, the bureau shall send a copy of the application to the employer or the employer's representative. No sooner than sixty days from the date

4123.58 Compensation for permanent total disability.

(A) In cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event the employee shall receive compensation in an amount equal to the employee's average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to the Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division.

(C) Permanent total disability shall be compensated according to this section only when at least one of the following applies to the claimant:

(1) The claimant has lost, or lost the use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof; however, the loss or loss of use of one limb does not constitute the loss or loss of use of two body parts;

(2) The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop.

(D) Permanent total disability shall not be compensated when the reason the employee is unable to engage in sustained remunerative employment is due to any of the following reasons, whether individually or in combination:

(1) Impairments of the employee that are not the result of an allowed injury or occupational disease;

(2) Solely the employee's age or aging;

(3) The employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease.

(4) The employee has not engaged in educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain.

(E) Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

4123.61 Basis for computation of benefits.

The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits.

In cases of temporary total disability the compensation for the first twelve weeks for which compensation is payable shall be based on the full weekly wage of the claimant at the time of the injury or at the time of the disability due to occupational disease begins; when a factory, mine, or other place of employment is working short time in order to divide work among the employees, the bureau of workers' compensation shall take that fact into consideration when determining the wage for the first twelve weeks of temporary total disability.

Compensation for all further temporary total disability shall be based as provided for permanent disability claims.

In death, permanent total disability claims, permanent partial disability claims, and impairment of earnings claims, the claimant's or the decedent's average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable the administrator to do substantial justice to the claimants, provided that the administrator shall not recalculate the claimant's average weekly wage for awards for permanent total disability solely for the reason that the claimant continued working and the claimant's wages increased following the injury.

Effective Date: 10-20-1993; 2006 SB7 10-11-2006