

Take Five: A Review of N.C. Gen. Stat. § 97-2(5) And Recent Developments on Average Weekly Wage

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THE BASICS OF CALCULATING AVERAGE WEEKLY WAGE

METHOD #1 Under N.C. Gen. Stat. § 97-2(5)

If the injured worker has been in the employ of the employer for at least 52 weeks prior to the date of the injury AND the injured worker has not lost more than seven continuous days during one or more periods of time, even if those periods of time are not in the same week, then the injured worker's average weekly wage is the quotient of the total wages earned by the injured worker over the 52 weeks prior to the date of injury when divided by 52.

METHOD #2 Under N.C. Gen. Stat. § 97-2(5)

If the injured worker has been in the employ of the employer for at least 52 weeks prior to the date of the injury and the injured worker HAS lost more than seven continuous days during one or more periods of time, even if those periods of time are not in the same week, then the injured worker's average weekly wage is the quotient of the total wages earned by the injured worker over the 52 weeks prior to the date of injury divided by the number of weeks, including fractional weeks, after deducting the periods of more than seven continuous days.

METHOD #3 Under N.C. Gen. Stat. § 97-2(5)

If the injured worker HAS NOT been in the employ of the employer for at least 52 weeks prior to the date of the injury, then the injured worker's average weekly wage is the quotient of the total wages earned by the injured worker over the actual number of weeks, including fractional weeks, over which the injured worker was in the employ of the employer, provided that the results are fair and just to both the injured worker and the employer.

METHOD #4 Under N.C. Gen. Stat. § 97-2(5)

If the injured worker was not in the employ of the employer for at least 52 weeks prior to the date of injury AND use of Method #3 is impractical because of the shortness of the period of time that the injured worker was in the employ of the employer OR because of the “casualness” of the employment, then recourse may be made to the wages that were being “earned by a person of the same grade and character employed in the same class of employment in the same locality or community.”

METHOD #5 Under N.C. Gen. Stat. § 97-2(5)

If “exceptional circumstances” exist that would make application of Methods #1, #2, #3, or #4 unfair, either to the injured worker or the employer, then some other method that would as nearly as possible approximate what the injured worker would have been earning but for the injury may be used.

- Temporary Worker Average Weekly Wage
- Occupational Disease Average Weekly Wage
- Per Diems
- Self-Employed Plaintiffs

TEMPORARY EMPLOYEE: Calculating
Average Weekly Wage for a
Temporary Employee

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

One week into a 7 week temporary job paying \$625.00 per week, plaintiff suffered a back injury and filed a claim for workers' compensation benefits.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

Deputy Commissioner Griffin and Full Commission both found that plaintiff's average weekly wage was \$625.00.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

The Court of Appeals determined that the use of the first 4 methods under N.C. Gen. Stat. § 97-2(5) was inappropriate, and looked to Method 5 to calculate plaintiff's average weekly wage.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

Court of Appeals focused on the fact that plaintiff would have earned \$625.00 per week for no more than 7 weeks and remanded the case to the Industrial Commission for determination of a fair average weekly wage.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

On remand, the Industrial Commission agreed with the Court of Appeals that Method 5 was appropriate.

The Industrial Commission calculated plaintiff's average weekly wage by multiplying \$625.00 by 7 weeks, and then dividing that number by 52.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

The lesson from Tedder is that, under N.C. Gen. Stat. § 97-2(5), the calculation of the average weekly wage needed to be fair and just to **both** parties and accurately reflect what the employee would have been earning, but for the injury.

Tedder v. A & K Enterprises,
__ N.C. App. __, 767 S.E.2d 98 (2014)

The critical inquiry is the intended length of the employee's employment. If the employment period is for a finite period, Tedder applies to hold that the gross wages are to be divided by 52. Based on the holding in Tedder, this finite period of employment would need to be outlined at the time of hire.

OCCUPATIONAL DISEASES: Calculating Average Weekly Wage in an Occupational Disease Claim

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)
Plaintiff worked for Starr Davis prior to his death and was exposed to asbestos. He eventually retired in July, 1991 because of multiple sclerosis, which was unrelated to his employment. At the time of his retirement, plaintiff's average weekly wage was \$606.36.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

In 1994, plaintiff was diagnosed with asbestosis and filed an occupational disease claim. Plaintiff's average weekly wage at the time of diagnosis was \$0.00, as he already retired. Plaintiff's claim was found to be compensable, and he was awarded benefits based on his 1991 average weekly wage of \$606.36.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

In February, 2010, plaintiff was diagnosed with lung cancer and died soon after. Plaintiff's widow filed a death claim, and defendant-employer agreed to pay her \$30.00 per week, as plaintiff's average weekly wage was \$0.00.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

The Full Commission, however, found that plaintiff's lung cancer was caused by his asbestos exposure and awarded benefits based on plaintiff's 1991 average weekly wage figure of \$606.36. Defendants appealed this decision.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

The Court of Appeals affirmed the Full Commission's decision, using Method 5 to determine a fair calculation of average weekly wage.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

The Court of Appeals held that, when an occupational disease is not diagnosed until after the employee has retired, the statutory minimum should not apply. The average weekly wage should instead be based on the wages the employee earned while working.

Lipe v. Starr Davis Co.,
___ N.C. App. ___, 767 S.E.2d 539 (2014)

The critical takeaway from Lipe is that the Industrial Commission will calculate average weekly wage using an employee's wages at the time of retirement or last day worked, not the wages at the time of diagnosis. Based on Lipe, this method of calculating average weekly wage gives a fair result.

PER DIEMS: Under what circumstances
are Per Diem Allocations included in the
Average Weekly Wage Calculation?

N.C. Gen. Stat. § 97-2(5) on Per Diems

Wherever allowances of any character are made to an employee **in lieu of wages are specified part of the wage contract**, they shall be deemed a part of his earnings.

Greene v. Conlon Construction Co., 184
N.C. App. 364, 646 S.E.2d 652 (2007)

The Court of Appeals defined per diem payments made “in lieu of wages” as those made “in place of payment for labor or services.”

Greene v. Conlon Construction Co.,
184 N.C. App. 364, 646 S.E.2d 652 (2007)

The Court of Appeals held that per diem payments were made “in lieu of wages” where:

- 1) The per diem amount was not based on actual expenses;
- 2) The per diem amount was paid weekly regardless of whether expenses were incurred; and
- 3) The employee had complete discretion in spending the allowance.

Thompson v. STS Holdings, Inc., 213 N.C. App. 1, 711 S.E.2d 827 (2011)

The Court of Appeals held that per diem payments were NOT made “in lieu of wages” where payments were:

- 1) Adjusted according to the cost of living in a given location;
- 2) Intended to directly reimburse the employee for cost of living expenses incurred while traveling for work;
- 3) Limited to work at locations greater than 50 miles from the employee’s permanent residence; and
- 4) Calculated based on the maximum allowable tax rate set by the Federal Government Services Administration.

Federal GSA Per Diem Rates

<http://www.gsa.gov/portal/content/104877>

Calculation is done with a standard rate in each state, as well as specific rates for major cities in each state, for lodging (by month) and for meals and incidental expenses.

Myres v. Strom Aviation, Inc., I.C. No. Y26909
(Full Commission, July 10, 2015)

The Full Commission concluded that the per diem provided to an employee was NOT “in lieu of wages” because the employer (1) followed IRS/Federal Government Services Administration guidelines allowing the payments to be treated as tax-deductible business expenses without further proof of actual expenses from the employee, and (2) adjusted the amount paid depending on the employee’s location.

SELF-EMPLOYED PLAINTIFFS: Is their average weekly wage based on their gross income, net income, or something in between gross and net income?

Calculating Average Weekly Wage of a Self-Employed Plaintiff

Because of the nature of a sole proprietor's business, the Court of Appeals has used Method 5 to calculate average weekly wage.

Calculating Average Weekly Wage of a Self-Employed Plaintiff

The Court of Appeals has held that, in order to approximate the amount which the injured sole proprietor employee would be earning were it not for the injury, plaintiff's average weekly wage is best ascertained by using the net income (gross income less expenses incurred in earning such income) divided by the number of weeks the plaintiff worked in the 52 weeks immediately preceding the injury.

Calculating Average Weekly Wage of a Self-Employed Plaintiff

While the Commission is not required to deduct expenses incurred by the self-employed plaintiff in determining average weekly wage under method five, it may do so in order to produce a fair result.

Calculating Average Weekly Wage of a Self-Employed Plaintiff

As an alternative to the “net income” calculation, courts have also indicated that the Industrial Commission may look to the cost the employer would incur to pay someone else to perform the self-employed claimant’s pre-injury position.

This calculation would likely only be used when the “net income” method is either impractical or unfair.

Calculating Average Weekly Wage of a Self-Employed Plaintiff

As an alternative to the “net income” calculation, courts have also indicated that the Industrial Commission may look to the cost the employer would incur to pay someone else to perform the self-employed claimant’s pre-injury position.

This calculation would likely only be used when the “net income” method is either impractical or unfair.

Calculating Average Weekly Wage of a Self-Employed Plaintiff

PRACTICE POINTER: Always obtain the self-employed plaintiff's tax return to determine the net income reported by the self-employed plaintiff.

ANY QUESTIONS?