

alert

VOLUME 10 ISSUE 4

July 2000

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SECOND SYLVESTER APPELLATE COURT DECISION REVERSES PRIOR SYLVESTER APPROVAL OF TOTAL-WEEKS-WORKED FORMULA

In our May, 2000 Newsletter "Alert," we described the April 21, 2000 appellate court finding in the Sylvester case. That decision expressed approval of the "total-weeks-worked formula" rather than the "full-weeks-worked formula." At that time, we reported the calculations to you as follows:

Pertinent Earnings Information

Weeks in year:	52
Total Earnings for year:	\$18,228.55
Number of weeks in which claimant worked during the year:	48
Total days worked during the year:	131

Full-Weeks-Worked Formula

$131 \text{ days} = 26.2 \text{ full weeks}$ ($131 \div 5$) the claimant worked during the previous 52 weeks.

$\$18,228.55 \div 26.2 \text{ weeks} = \695.75 per week, which was the claim made as the average weekly wage.

Total-Weeks-Worked Formula

48 weeks in which the claimant worked during the previous 52 weeks.

$\$18,228.55 \div 48 = \368.43 , which the employer contended should be the average weekly wage.

As a result of the above factual situation, the arbitrator, the Industrial Commission, the circuit court and the initial appellate court Sylvester opinion approved the "total weeks" rather than the "full weeks" formula, thereby arriving at an average weekly wage of \$368.43, instead of the \$695.75 claimed.

Court Reverses Itself

On June 28, 2000, the appellate court withdrew its April 21, 2000 opinion. In the most recent decision, the appellate court adopted the "full weeks" formula, thereby finding for the petitioner. In its reasoning, the court reviewed the four methods of calculation of the average weekly wage, as described in Section 10. The methods are as follows:

1. Employment for the full 52 weeks, in which case the actual earnings are used.
2. Employment with loss of five or more calendar days during 52 weeks, at which time the earnings for 52 weeks are divided by the number of weeks or parts thereof.
3. Employment of less than 52 weeks, with earnings divided by the weeks or parts thereof;

4. Employment which is short or casual, in which case the average weekly wage used is determined by the 52 weeks earned by a person in the same grade and same work for the same number of weeks for the same employer.

The court concluded that the factual situations in methods 1, 3 and 4, did not apply and utilized the second method.

The proof presented here follows the second method, that the claimant lost 5 or more days in the 52-week period. The evidence is clear that the time lost was not due to the fault of the employee. As stated above, the claimant worked only for respondent as a roofing foreman. He was on call to work at all times by respondent, never refused to work when called, had no other employment, and was not self-employed.

But, did not the first Sylvester opinion express concern about the employee's possible windfall if the full-week formula were used? The court has now stated:

With respect to windfall, our decision does provide claimant with an income that is somewhat higher than he realized prior to his injury, but such an increase does not automatically put claimant in a situation more advantageous than the one prior to his injury, nor does it provide claimant with a substantial windfall as envisioned in (other Section 10 cases).

The court noted that it had denied claims where the windfall had exceeded five to ten times the pre-injury wage. The court concluded:

A claimant's average weekly wage requires a fact-driven analysis.

thereby suggesting that the result will be determined by the facts in each case.

EDITOR'S NOTE: Clearly, the court relied on a number of factors concerning Sylvester's employment.

1. The claimant worked only for respondent as a working foreman.
2. The claimant never refused to work when called.
3. The time lost was not due to any fault of the claimant.
4. The claimant did not receive a "substantial" windfall over his pre-injury wage.

We have now returned to the methods previously utilized to calculate the average weekly wage when parts of weeks are involved. If all of the above four requirements are met, the full weeks formula will be applied.

Frank J. Wiedner
Editor