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MINNESOTA WORKERS' COMPENSATION: AVERAGE WEEKLY WAGE AND WAGE LOSS BENEFITS

I. AVERAGE WEEKLY WAGE

a. Purpose
  i. The Employee's average weekly earnings during the 26 weeks preceding the date of injury
  ii. Starting point for determining extent of exposure for wage loss benefits
  iii. Important to be accurate, if not correct, can lead to over/underpayments
  iv. Meant to reflect the injured Employee's expectation of future earnings

b. Calculation (Minn. Stat. 176.011, Subd. 8a)
  i. Standard v. Statutory
    1. Look to gross wages over the 26 weeks before DOI
    2. See Examples attached
  ii. What Wages are Included?
    1. Tips and Gratuities (if accounted for by the Employer)
    2. Overtime (if "regular" or "frequent")
    3. Sick Leave Pay
    4. Vacation and Holiday Pay
    5. Bonuses (if tied directly to Employee's performance)
    6. Value of Room/Board (per diem)
  iii. Not Included
    1. Pension/Profit Sharing (Non-taxable benefits)
    2. Employer contributions to insurance policies
    3. Mileage Reimbursement

c. Special Scenarios
  i. Two or more Employers
    1. Add AWWs together if multiple jobs still held on DOI
  ii. Minors/Apprentices
    1. Entitled to the maximum compensation rate, but for injuries after October 1, 1992, there must be permanent total disability
  iii. Seasonal Workers/Construction/Mining
    1. Entitled to five-day work week presumption, even if worked less than that during 26 weeks
    2. Multiply daily wage by five days to find AWW

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AVERAGE WEEKLY WAGE EXAMPLES

Example #1:

If Employee's schedule and amounts of earnings are regular, the AWW is fairly straightforward. In this scenario, the Employee's hourly wage is multiple by weekly hours.

- Ex: Employee works a very regular schedule of 40 hours per week, every week with no more and no less, at $10.00/hour.
    - Here, the Employee's AWW is 40 hours/week x $10.00/hour = $400.00

Example #2:

Unfortunately, most Employees do *not* work a regular schedule due to a variety of reasons.

- Under the statutory method, the AWW is determined by the following:
    - Average Daily Wage x Average Number of Days Worked Per Week

The **average daily wage** is determined by adding together all of the Employee's includable earnings over the course of the 26 weeks preceding the date of injury. Then, you divide that number by the total number of days in which the wages (includes vacation and holiday pay) were earned.

- Ex: Employee earns $10,000 total during the 26 weeks preceding the injury. He/she worked a total of 96 days.
    - Here, the average daily wage is ($10,000 / 96) = $104.17
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The **average number of days worked per week** is determined by taking the total number of *days* the Employee actually performed work in the 26 weeks preceding the date of injury and dividing it by the number of *weeks* in which the Employee actually performed said duties.

- Ex: Employee worked 96 total days in 24 of the 26 weeks before the injury. The Employee did not work at all during 2 of those weeks.
    - Here, the average number of days worked per week is (96/24) = 4

The final step is to multiply $104.17 x 4 to get the Average Weekly Wage of $416.68.

Example #3 (Most Common):

In other cases, it is difficult or even impossible to receive day-by-day wage records. Typically, wage records are broken down into pay periods without indicating the # of days worked.

In these situations, the AWW is determined by dividing **total gross earnings** during the 26 weeks pre-injury by the **number of weeks the Employee worked in that 26-week period**.

- Ex: Employee earned $10,000 and worked 25 of the 26 weeks (not paid during one week)
    - Here, the AWW is $10,000 / 25 weeks = $400

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II. WAGE LOSS BENEFITS

a. TEMPORARY TOTAL DISABILITY (Minn. Stat. 176.101, Subd. 1)
   i. Definition
      1. A Wage Loss Benefit when a work injury totally incapacitates an Employee from working at an occupation
   ii. Threshold
      1. Causal Connection between Impairment and Unemployment
         a. Look to Employee's skills, nature of impairment, work restrictions, etc.
      2. Inability to find and hold Employment
         a. Employee is required to conduct diligent job search and not refuse reasonable/suitable job offers
   iii. Calculation
      1. Each week of temporary total disability amounts to a wage loss benefit of 2/3 of the Employee's Average Weekly Wage
      2. Maximum and Minimum
         a. Determined by date of injury (See Table)
         b. Injuries on/after 10/1/2017, max = $1,061.82; min = $130
            i. If AWW is less than $130, compensation rate is AWW (See 2-6 in Basic Adjuster's Training Guide)
   iv. Three-Day Waiting Period
      1. No TTD or TPD benefits are awarded in the first three calendar days after the date that the Employee's disability commences
      2. BUT if the Employee's disability continues for ten calendar days or longer, the TTD/TPD benefits are computed from the date that the disability commenced, which would include the first three days
   v. Caps
      1. Maximum of 130 total weeks of TTD
      2. Can stop and start, cumulatively count total number of weeks
   vi. Common Defenses
      1. Terminated for Misconduct
      2. Withdrawal From Labor Market
      3. Inadequate Job Search
         a. No bright-line rule (applications, interviews, searches, etc.)
      4. Refusal of Job Offer
      5. 90 Days Post Notice of MMI
      6. 130 Weeks have been paid
      7. "*Jewison* Defense"
         a. Employee misrepresents physical condition when hired
         b. Employer relies on misrepresentation
         c. Causal connection between misrepresentation and subsequent injury

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b. <u>TEMPORARY PARTIAL DISABILITY (Minn. Stat. 176.101, Subd. 2)</u>

- i. Threshold Elements
    1. Work-related injury
    2. Loss of earning capacity
    3. Causally related to the work disability
    4. Employee is still able to work subject to the disability (look to work restrictions, light duty jobs, etc.)
- ii. Calculation
    1. 2/3 of the difference between the Employee's Average Weekly Wage and the Employee's post-injury earnings
        - a. Week-by-week basis calculation is most common
        - b. Can also be calculated by aggregate average over period of time if wages are irregular by week
        - c. Example:
            - i. AWW = $500, Post-Injury Week Earnings = $400; Difference = $100; 2/3 x $100 = $66.67 TPD
    2. Same Maximum as Temporary Total Disability
    3. No Minimum
- iii. Caps
    1. Maximum = 225 Weeks Total Paid, or
    2. If 450 Weeks have passed since the date of injury
        - a. This is important for injuries/cases that "come back" or re-open down the road
- iv. Common Defenses
    1. Back to Work with no Restrictions or Permanency
    2. No Wage Loss
    3. Ability to Earn Higher Wage
        - a. Ex: job offer; if the Employee is able to earn more than what he/she is earning after the injury
        - b. Diligent job search not required, but lack of one may help in proving an Employee's ability to earn a higher wage
    4. Loss not Attributable to Injury

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c. <u>PERMANENT TOTAL DISABILITY (Minn. Stat. 176.101, Subd. 4 and 5)</u>
   i. Threshold (Two Types)
      1. Statutory ("Severity" Claims)
         a. Loss of both eyes, both arms, both legs, complete paralysis, etc.
      2. Vocational – Three Different Thresholds (most of litigation is here)
         a. 17% PPD Rating of the Whole Body, or
         b. 15% PPD Rating of the Whole Body if the Employee is at least 50 years old at the time of the injury, or
         c. 13% PPD Rating of the Whole Body if the Employee is at least 55 years old at the time of the injury and has not completed grade 12 or obtained a GED certificate
            i. An Employee can still have sporadic and insubstantial income and still be entitled to PTD
            ii. Can combine pre-existing permanent non-work related injuries to reach thresholds
            iii. Note: A+B Formula for multiple permanency ratings
               1. A + B (1-A) =
   ii. Calculation
      1. Similar to TTD, but higher minimum (65% SAWW)
      2. Maximum: 102% of statewide average weekly wage
   iii. No Cap
   iv. Tools
      1. WCRA Calculator (Google "WCRA Calculator")
         a. Comp Calc for to-date exposure
         b. Present Value to determine future exposure
   v. Offset of Government Benefits After $25,000 of PTD has been paid
      1. Social Security Disability
      2. Social Security Retirement
      3. State Retirement Benefits
      4. PERA Benefits
      5. Police and Fireman Relief Association Benefits
   vi. Common Defenses/Limitations
      1. Retirement Presumption of Age 67
         a. Benefits presumed to cease when the Employee turns 67
         b. Can be rebutted by the Employee with substantial evidence
      2. In some cases, the lack of a diligent job search or withdrawal from labor market