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Joseph P. Hennessey

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WORKMEN'S COMPENSATION—"WORK WEEK"

In *House v. Anaconda Copper Mining Company*,¹ claimant received an industrial injury while in defendant's employ. The State Industrial Accident Board awarded him \$21 per week, determined by multiplying the daily wage by six. Claimant was only employed five days a week: this was the usual work week in the mining industry. The Montana Supreme Court affirmed the action of the Board.

Section 2874 of the Workmen's Compensation Act² defines "week" as, "... six working days, but includes Sundays."

Section 2875³ defines "wages" as:

"... the average daily wages received by the employee at the time of the injury for the usual hours of employment in a day, and overtime is not to be considered. . . ."

Section 2912⁴ provides:

"... For an injury producing temporary total disability 50% of the wage received at the time of the injury shall be awarded. . . ."

Defendant contended that Section 2912, basing compensation on the actual wages received at the time of injury, was alone applicable.

The Court reasoned that under defendant's contention an employee injured the first day on the job would have his award computed on the basis of one day's wage. And in the case of two employers, one employing 200 men for three days a week, the other 100 men six days a week, the former would pay out just half as much as the latter, although the man hours worked would be the same, as would the industrial risks. The Court further indicated that Section 2912 could not be read alone, since if the actual wage were to be the guide, overtime would be counted, and that would nullify the provisions of Section 2875. Finally, the Court reasoned that the Act is intended to provide compensation in the nature of insurance,⁵ rather than damages, and to avoid inequalities and chance determinations in the awards made by the Board.

Justices Anderson and Morris dissented on the ground that the contract of employment between employer and employee should determine full-time employment. \$26.25 was

¹(1942)..... Mont....., 126 P. (2d) 814.

²R. C. M. 1935, §2874.

³R. C. M. 1935, §2875.

⁴R. C. M. 1935, §2912.

⁵*Betor v. National Biscuit Co.* (1929) 85 Mont. 481, 280 P. 641; *Kerns v. Anaconda Copper Min. Co.* (1930) 87 Mont. 546, 289 P. 563.

earned weekly on a five-day basis here, and 66 $\frac{2}{3}$ percent of that is \$17.50, rather than the sum of \$21 arrived at by the majority.

Thus, the majority opinion uses an arbitrary six-day period, irrespective of days actually worked each week, so producing certainty and ease of administration; the minority bases the compensation on the contract of employment. The extreme position of defendant's counsel was adopted in neither opinion.

It is believed that, while there is merit in both the majority and minority viewpoints, neither is entirely correct for all cases.

Most compensation statutes base compensation on the average weekly wage;⁶ some on the contract of employment;⁷ some on an outright insurance basis.⁸

On principle, it is believed that for an incapacitating injury, what the employee would have earned during the period of disability rather than what he had actually earned during

⁶With slight variations as to the mode of figuring what constitutes an average work week, the following twenty-eight states have adopted this as their basis for determining the amount of compensation to be paid. The first five states in this category definitely state that the average work week shall control: N. C. CODE (1939), §8081 (1) (e); TENN. CODE (1932), §6852; VA. CODE (1930), §1887 (2); IND. ANN. STAT. (Burns, 1933), §40-1701 (c); S. C. LAWS 1941, p. 1395. Although using a different method of computation, these statutes also arrive at an average work week: CON. LAWS N. Y. (McKinney, 1938), Book 64, §14; OKLA. STAT. (1931), §13355; TEXAS CIVIL STAT. (Vernon), Art. 8309, §1; ILL. REV. STAT. (1935), Ch. 48, ¶208, §8; IOWA CODE (1931), §1390, §1397 (1) (3); UTAH REV. STAT. (1933), §42-1-70 (5); GEN. LAWS R. I. (1938), Ch. 300, Art. 2, §13; REV. STAT. MAINE (1930), Ch. 55, §2 IX (a) (b); ANN. LAWS MASS. (1942), Vol. 4, Ch. 152, §1 (1); IDAHO CODE ANN. (1932), §43-1118; COMP. LAWS N. D. SUPP. (1925), Ch. 5, §396 (a) (2); OHIO GEN. CODE (Page, Lifetime ed.), §1465-84; PUBLIC LAWS VERMONT (1933), §6529; ARK. STAT. SUPP. (1942), p. 1090, §12; ALA. CIV. CODE (1923), §7551, §7546; CARROLL'S KY. STAT. (Baldwin's Revision, 1930), §4905; MD. ANN. CODE (1939), Art. 101, §80; W. VA. OFFICIAL CODE (1931), Ch. 23, Art. 4, §14; PUBLIC LAWS N. H. (1926), Ch. 178, §19, §21; FLA. LAWS (1935), Vol. 1, Ch. 17481, §2 (11); CALIF. GEN. LAWS (1923), Act 4749, §9 (2), §12 (1); GEN. STAT. KANS. ANN. (1935), Ch. 44, Art. 5, §511 (1); PENNA. STAT. ANN. (Purdon), Title 77, Ch. 5, §582. Average monthly wages are used as a basis in some states: ARIZ. CODE ANN. (1939), §56-952; NEV. COMP. LAWS (Hillyer, 1929), §2706. An even greater extreme is reached by using average yearly wages: REV. STAT. MO. (1929), §3320 (a).

⁷CONN. GEN. STAT., SUPP. (1941), Ch. 230, §704f; GA. CODE (1926), §3154 (32), §3154 (2); COMP. STAT. NEBR. (1929), §48-117, §48-121, §48-126; COMP. STAT. N. J., SUPP. (1930), §236-11, §236-12; S. D. CODE (1939), §64.0405, §64.0404; N. M. STAT. ANN., SUPP. (1933), §156-117, §156-112 (m); COLO. SESSION LAWS (1937), Ch. 275, §47(b); WIS. STAT. (1939), §102.11; LA. GEN. STAT. (Dart), §4398.

⁸WYO. REV. STAT. (1931), §124-120; ORE. CODE ANN. (1930), Vol. 3, 49-1827; REV. STAT. WASH. (Remington, 1932), Book 4, §2679.

a given period prior to disability, should be the test. Practically, this must be measured by the past in some form. Permanent disabilities should be differentiated from temporary disabilities. The workman who loses an arm (a permanent disability) has future earning capacity equally reduced whether at the time he was working one day a week (a depression period) or six days a week (a prosperity period); and the depression may well be followed by a period of prosperity, when he would be able to get full-time work absent the injury. The problem with reference to temporary disabilities, most of which will terminate within eight weeks or less, is different. If conditions are such that the injured employee may not return to full-time work, but may obtain compensation equal to or larger than the wages at part-time work, there is danger that the healing period will be prolonged, and that compensation will be for a period of unemployment rather than actual injury. As to temporary disabilities, therefore, it would seem that compensation might well be based on what the employee was earning at the time of the injury, or on the contract of employment, while as to permanent disabilities and accident resulting in death, an arbitrary five or six day multiplication of the daily wage as a method of arriving at the weekly wage is not without justification.

In some cases, the employee has been on a full-time basis throughout the preceding year. In others, the employment is by nature intermittent or seasonal. In still other cases, the employment is on a part-time basis because of an unusual condition in the industry not normally existing.

For full-time employment, the following methods have been set up in the various acts: (1) Divide the earnings for the year preceding by 52;⁹ (2) Multiply the average daily wage at the time of the injury by 300 and divide by 52;¹⁰ (3) Divide the earnings for the six months preceding the injury by 26;¹¹ (4) Multiply the average daily wage for six months preceding injury by $5\frac{1}{2}$, 6, $6\frac{1}{2}$, or 7,¹² according to the number of days in the employee's customary week. If employment is

⁹North Carolina, Tennessee, Virginia, Indiana, South Carolina, *supra* note 6.

¹⁰New York, Oklahoma, Texas, Illinois, Iowa, Utah, Massachusetts, and Maine (uses 250 days as a year), *supra* note 6.

¹¹Rhode Island, *supra* note 6.

¹²California, Kansas, Pennsylvania, *supra* note 6. Also the states that hold that a week constitutes $5\frac{1}{2}$ days: REV. CODE DEL. (1935), Ch. 175, 6117 §47; MINN. STAT. (Mason, 1927), Ch. 23A, §4274, as interpreted in *Modin v. City Land Co.* (1933) 189 Minn. 517, 250 N. W. 73. And the one state that sets it at 6 days: COMP. LAWS MICH. (1929), Ch. 150, §8427.

stable and continued, it makes no great difference as to which of these plans is adopted.

Where the employment is naturally intermittent or seasonal, there is much authority that the actual wages determined by the contract of employment should be the basis of compensation. This view has been applied in New York to bricklayers,¹² and under the Federal Act to longshoremen.¹⁴ In the latter case, a longshoreman worked 182 days out of the year, and the United States Circuit Court of Appeals said it would be unfair to apply a mere theoretical earning capacity having no regard to the actual facts of the case, paying to the employee more to remain idle than he could earn while at work.

As to cases where the employment is not normally seasonal, but the employee is on a part-time basis because of some unusual or abnormal condition in the industry which is temporary in character, the New York court has also based its award upon actual earnings on a part-time basis during the year immediately preceding the injury. In *Remmert v. Weidenmeyer*,¹⁵ the rule was applied to a baker who had worked six days a week for ten years until the year preceding the injury, when he was allowed to work as needed, from one to three days a week, because the bakery was closed.

As indicated, past earnings are used as a basis for determining the probable basis of future earnings occasioned by the industrial injury. In the case of a minor,¹⁶ whose wages may be expected to increase, California has adopted the standard of what he would probably be able to earn after attaining twenty-one, but allowing \$3 a day for six days a week if probable earnings cannot reasonably be determined. Even for the minor, however, if the injury is temporary, it is believed that compensation should be based on a wage actually earned, thereby adhering to distinctions already indicated.

Thus, while the fixed rule of the Montana Court has some authority to support it, and is easy of administration, it is believed that a position more nearly that of the dissenting judges in the case is the weight of authority and correct on principle for cases of temporary disability. Most statutes are more precise on this point than is the Montana Act.

A measure of judicial legislation is present in the case. It would seem that the existing Act does not necessarily re-

¹²*Littler v. Fuller Co.* (1918), 223 N. Y. 369, 119 N. E. 554.

¹³*Marshall v. Mahoney Co.* (1932), 54 F (2d) 74.

¹⁴(1933) 237 App. Div. 147, 261 N. Y. S. 345, 262 N. Y. 534, 188 N. E. 52.

¹⁵CALIF. GEN. LAWS (1923), Act 4749, §12 (c).

quire an inflexible result. In view of the possibilities of malingering involved, the Legislature might well re-examine the problem, and attempt some segregation in the law to be applied to different types of cases.

—Joseph P. Hennessey.

CUMULATIVE INDEX

Volumes I-IV

The lack of an adequate index materially lessens the value of a legal publication. Since the first four issues of the Review constitute sufficient material for binding, it is thought that a comprehensive index may be appropriate at this time.

It is proposed, therefore, to establish a uniform system of numbering the various issues, in order to facilitate reference and citation. In the future, each yearly publication is to be numbered as a volume. Thus the 1940 issue will be cited as Volume I, and the present 1943 issue as Volume IV. Volumes I to IV inclusive will be bound together