
IN THE SUPREME COURT OF ILLINOIS

RONALD SYLVESTER,)	
)	
Appellee,)	Appeal from the Appellate Court
)	of Illinois, Fourth District,
)	Industrial Commission Division
)	No. 4-99-0363 WC. There heard
)	on Appeal from the Circuit Court
)	of the Eleventh Judicial Circuit
)	McLean County
vs.)	
)	No. 1998-MR-140
)	
THE INDUSTRIAL COMMISSION OF)	
ILLINOIS and ACME ROOFING &)	The Honorable Luther Dearborn,
SHEET METAL CO.)	Judge Presiding
)	
Appellant)	

**BRIEF OF THE APPELLEE
RONALD SYLVESTER**

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

STATUTES INVOLVED.....

ARGUMENT.....

1. § 10 OF THE WORKERS COMPENSATION ACT MEANS WHAT IT SAYS

820 ILCS § 305/10.....

A. ACT REQUIRES THE DEDUCTION OF DAYS MISSED

Peoria Roofing and Sheet Metal Company v. Industrial Commission (1989) 181 Ill.App.3d 616, 130 Ill.Dec. 314,316, 537 N.E.2d 381,383.....

D.J. Masonry Co. v. Industrial Commission (1998) 295 Ill. App.3d 924, 230 Ill. Dec. 450, 693 N.E.2d 1201.....

Illinois-Iowa Blacktop v. Industrial Commission (1989) 180 Ill.App.3d 885, 129 Ill. Dec.958, 963, 536 N.E.2d 1008,1012.....

Insulated Panel Co. v. Industrial Commission (2001) 2nd District, N. 2-00-0404WC.....

B. “ACTUAL EARNINGS” IS DEFINED BY STATUTE

820 ILCS § 305/10.....

C. THERE IS NO DISPUTE OVER THE NUMBER OF DAYS WORKED AND WORK DAYS MISSED

D. EMPLOYERS ATTEMPTED DEFINITION OF LOST TIME BIZARRE

II. A WORK WEEK FOR SYLVESTER WAS FIVE DAYS

A. UNION CONTRACT DEFINES THE WORK WEEK

3. ALLEGATIONS OF WINDFALL CRUEL AND MISLEADING

A. SYLVESTER’S INJURIES BELIE EMPLOYER’S CLAIM OF WINDFALL

B. WINDFALL ARGUMENT BASED ON FALSE ASSUMPTION

R.A. Cullinan & Sons v. Industrial Commission (1991) 216 Ill.App3d 1048, 159 Ill.Dec. 180,186, 575 N.E.2d 1240,1246.....
Illinois-Iowa Blacktop v. Industrial Commission (1989) 180 Ill.App.3d 885, 129 Ill. Dec.958, 963, 536 N.E.2d 1008,1012.....
Zanger v. Industrial Commission (1999) 306 Ill.App.3d 887, 240 Ill.Dec. 80,83, 715 N.E.2d 767,770.....
Paoletti v. Industrial Commission (1996) 279 Ill.App.3d 988, 216 Ill.Dec. 447, 665 N.E.2d 507.....
Hasler v. Industrial Commission (1983) 97 Ill.2d 46, 73 Ill. Dec. 447, 454 N.E.2d 307.....

IV. SYLVESTER WAS EMPLOYED OVER 52 WEEK PERIOD

Hasler v. Industrial Commission (1983) 97 Ill.2d 46, 73 Ill.Dec. 447, 454 N.E.3d 307.....

V. RULING OF APPELLATE DECISIONS ARE CONSISTENT

Peoria Roofing and Sheet Metal Company v. Industrial Commission (1989) 181 Ill.App.3d 616, 130 Ill.Dec. 314,316, 537 N.E.2d 381,383.....
D.J. Masonry Co. v. Industrial Commission (1998) 295 Ill. App.3d 924, 230 Ill. Dec. 450, 693 N.E.2d 1201.....
Sylvester v Industrial Commission (2000) 314 Ill. App3d 1100, 247 Ill.Dec. 696, 732 N.E.2d 751.....
Ricketts v. Industrial Commission (1993) 251 Ill.App.3d 809, 191 Ill.Dec. 257, 623 N.E.2d 847.....
Cook v. Industrial Commission (1992) 231 Ill.App.3d 729, 173 Ill.Dec. 122, 596 N.E. 2d 746.....
McDaneld v. Industrial Commission (1999) 307 Ill.App.3d 1045, 241 Ill.Dec. 151,156, 718 N.E.2d 722,727.....

VI. SENATOR COMMENTS CONCERN PART TIME EMPLOYEES

Hasler v. Industrial Commission (1983) 97 Ill.2d 47, 73 Ill.Dec. 447, 454

N.E.2d 307.....
Illinois-Iowa Blacktop v. Industrial Commission (1989) 180 Ill.App.3d 885,
129 Ill. Dec.958, 963, 536 N.E.2d 1008,1012.....

CONCLUSION.....

STATUTES INVOLVED

820 ILCS § 305/10

“The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury (**FIRST METHOD**) during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52.

(SECOND METHOD) but if the injured employee *lost 5 or more calendar days* during such period, *whether or not in the same week*, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining *after the time so lost has been deducted*.

(THIRD METHOD) Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed.

(FOURTH METHOD) Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be made to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.... 802 ILCS §305/10

(Sylvester makes reference in his argument to the four methods listed in §10. They are listed here as First, Second, Third and Fourth for identification).

ARGUMENT

I. §10 OF THE WORKERS COMPENSATION ACT MEANS WHAT IT SAYS

§10 of the Illinois Workers Compensation Act sets out four methods for calculation of the average weekly wage. The Arbitrator, Industrial Commission, Trial Court and Appellate Court agree that the second method of determining average weekly wage from §10 should be used. This appeal is concerned with the second method. Compliance with the proper method of calculation under §10 is a legal issue.

A. ACT REQUIRES THE DEDUCTION OF DAYS MISSED

Where the language of a statute is certain and unambiguous, the only thing to do is what the language says to do. *Peoria Roofing and Sheet Metal Company V. Industrial Commission (1989)* 181 Ill.App.3d 616, 130 Ill.Dec. 314,316, 537 N.E.2d 381,383. The calculation of the average weekly wage under the second method is a straightforward four-step process for full time employees:

- step 1: determine that five or more days have been lost in the prior 52 weeks;
- step 2: deduct the days lost in the prior 52 weeks.
- step 3: determine the number of weeks and parts thereof remaining.
- step 4: divide the actual earnings by the weeks and parts thereof remaining.

The Employer agrees to deduct a week if Sylvester did not work in that week. In fact, from the Arbitrator to the Appellate Court, no effort has been made to include the four weeks that Sylvester performed no work and received no pay. If a five day week of work is lost, it should be deducted. Yet, when a part of a week is lost, the Employer wants to count that whole week, not deduct the time lost.

The statute talks in terms of lost days, not lost full weeks. A day is only a fraction of a work week. A fractional part of the work week is not the same as a full work week. *Peoria Roofing and Sheet Metal Company v. Industrial Commission (1989)* 181 Ill.App.3d 616, 130 Ill.Dec. 314,316,

537 N.E.2d 381,383. The statute makes it clear that the days lost do not have to be in the same week (*whether or not in the same week*). When the statute refers to “*the time so lost*” being deducted, it is referring to the “*five or more calendar days*”. *D.J. Masonry Co. v. Industrial Commission* (1998) 295 Ill. App.3d 924, 230 Ill. Dec. 450, 693 N.E.2d 1201. § 10 has been simplified and since it is unambiguous, the only function of the court is to enforce the law as enacted by the legislature. *Illinois-Iowa Blacktop v. Industrial Commission v. Industrial Commission* (1989) 180 Ill.App.3d 885, 129 Ill. Dec.958963, 536 N.E.2d 1008,1012.

The statute treats all lost work days the same. It does not matter whether 5 days in a row are missed in a calendar week or days are missed at various times in less than 5 day increments. They have the same value - one day. It is the “days so lost” that are deducted and that leaves the days that were worked. This produces “*the remainder of such 52 weeks*” that shall be divided into the actual earnings. *Insulated Panel Co. v. Industrial Commission* (2001) 2nd District, N. 2-00-0404WC

When the division is made, it will not always result in an even number of weeks. That’s why the statute includes the language “*and parts thereof*”. In this case Sylvester worked 131 days or 26 and 1/5 weeks. The Employer misreads this section to suggest that you count the 5 day weeks that are worked and count the less than 5 day weeks that are worked and combine the two. This strained interpretation would never produce a fraction of a week. If only entire weeks can be subtracted, there is no need for the legislature to make reference to “*parts thereof remaining*”. The Legislature recognized that the figure would not always be entire weeks, but could just as easily be full weeks, plus a fraction of a week. Thus, the language “*weeks and parts thereof remaining*”. There is no reason to deduct days, if we are going to turn around and count partial weeks as whole weeks.

B. “Actual Earnings” is Defined By Statute.

Sylvester does not object to the “*actual earnings*” being divided by the proper number of

weeks to determine the average weekly wage. Sylvester's actual earnings in the previous 52 weeks were \$17,684.41 (C. 146-148). This figure is obtained by subtracting the bonus of \$150 received at Christmas as required by §10 (C. 146-148). The \$17,684.41 was earned over a period of 131 work days or 26.2 weeks. This produces an average weekly wage of \$674.98. The dispute is not over the amount of the earnings, but the period of time to divide into that amount.

The "*actual earnings*" are averaged in accordance with the Act. The calculation is:

“ $\frac{\text{dollars earned in remainder of 52 weeks}}{\text{weeks and parts left after lost time deducted}} = \text{Average weekly wage}$ ”

C. There is No Dispute Over The Number Of Days Worked and Work Days Missed.

Petitioner's Exhibit 6 (C. 146-148) lists the number of days that Sylvester worked each week. Sylvester testified that he calculated the number of days he worked in each week from May 17, 1991 through May 22, 1992. (C-23,24) There is no evidence to the contrary. The Employer's factual summary of this exhibit is accurate. Sylvester worked 5 days in 13 of the weeks, 4 days in 5 of the weeks, 3 days in 6 of the weeks, 2 days in 3 of the weeks, 1 day in 22 of the weeks, and did not work in 4 of the weeks. (Sylvester admits one extra week was unintentionally included.)

D. Employers Attempted Definition of Lost Time Bizarre

The Employer recognizes that the obvious interpretation of the second method of § 10 produces the average weekly wage that Sylvester advocates. To avoid that result, they argue that lost time relates to being sick, in need of medical treatment or not working when a fellow employees does. The *lost time* refers to *calendar days* not worked. It is that simple, not sick days, not days off, but calendar days off. The Employer's logic fails again when they agree that four weeks should be subtracted because Sylvester didn't work at all in those weeks. If the Employer's idea is meritorious, why do they continue to allow a 4 week deduction? Sylvester was not sick during those weeks. Obviously, the language of the statute has meaning whether a full or partial week is missed. The truth is, it has meaning

when 5 or more days are missed over the prior year.

II. A WORK WEEK FOR SYLVESTER WAS FIVE DAYS

A. Union Contract Defines The Work Week.

“..., the regular work week may consist of ten hours or less than 10 hour work days, Monday through Friday, with a make-up day on Saturdays;...” Article X, United Union of Roofers contract with Employer (C. 181).

. Because §10 speaks in terms of days, as opposed to hours, Sylvester’s work week is defined in days instead of hours. Based on the language from the union contract, Sylvester’s testimony and the work history, his work week is five days.

The union contract says that the regular work week is Monday through Friday with a make up day on Saturday. Monday through Friday is five days. If one of those days is missed, it can be made up on Saturday. That is a five-day work week. Sylvester testified that it was his understanding there was a 40 hour work week, 8 hours a day, five days a week. (C. 43) Finally, Sylvester worked no more than five days in any week in the prior year.. See Petitioner’s Exhibit 6 (C. 146-148). The 13 weeks that Sylvester worked five days were full weeks of work. Any work that was less than five days was a partial week of work.

Petitioner’s Exhibit 6 (C. 146-148) and Respondent’s Exhibit 1 (C. 198-204) are the pay records of Sylvester for the prior 52 weeks. They are prepared in seven-day intervals ending on Friday and list the earnings that Sylvester made for each 7 day period.

The work week is a set period of time for every employee. It does not vary for purposes of § 10, but rather, is must be a repeating time period that ends on the same day, 52 times a year. Sylvester’s work week was 5 days long. Work weeks can vary in length by employment. Not everyone works a five-day week. Firemen that work 24 hours in a row and than are off 48 hours would have a different number of days comprising a work week than a roofer would. While a

presumption might exist that a typical work week is five days, contrary evidence could certainly demonstrate a different period.

III. ALLEGATIONS OF WINDFALL CRUEL AND MISLEADING

A. Sylvester's Injuries Belie Employer's Claim of Windfall

The Employer makes a harsh argument in suggesting that Ron Sylvester will experience a windfall as a result of the calculation of his average weekly wage. They claim his receiving workers compensation payments is more advantageous to him than working.

Ron Sylvester suffered the amputation of his right leg and a serious ankle fracture to his left foot from a 16 foot fall. He did not receive a total permanent disability award, but rather an award of 100% loss of his right leg and 65 % loss of his left foot. This ends his 19 year employment as a working roofer.(Petitioner's Exhibit 1, C.99) Having a workers compensation claim was no advantage over working for Ron Sylvester.

The hardship in Sylvester's case is compounded by the fact a credit was given for what was found to be overpayments on 180 weeks of temporary total disability. Sylvester was paid TTD, at a rate of \$560 per week, for approximately 180 week. The Employer then reduced the TTD to \$228.66 per week, for the last 50 weeks. The Arbitrator accepted the rate suggested by the Employer, producing a substantial credit. The credit was so substantial in fact, that the balance owed to Sylvester, for his 300.75 weeks of permanent disability, representing 100 percent loss of the right leg and 65 percent loss of left foot, was a total final payment of \$5,250 (C. 13-16).

B. Windfall Argument Based on False Assumption.

Although not defined by the Employer, they call it a windfall any time an employees average weekly wage, when multiplied times 52, exceeds the "*actual earnings*" in the prior 52 weeks. The second method of §10 will always produce a higher yearly amount when calculated over 52 weeks than the "*actual earnings*", because a denominator smaller than 52 is used to divide into the "*actual*

earnings". (§ 10 "actual earnings")

Using this definition of windfall, even the Employer's figures produce a higher yearly amount. Sylvester's "*actual earnings*" were \$17,648.41 (C. 146-148). The Employer divided that by 48 to produce an average weekly wage of \$368.43. The average weekly wage multiplied by 52 weeks totals \$19,158.36. This example shows the concept of any windfall is ludicrous. Multiplying the average weekly wage by 52 does nothing more than produce a red herring, not evidence of a windfall.

The fallacy in the windfall concept is in the assumption that the "*average weekly wage*" has a precise correlation to the yearly income an employee receives. It never was intended to, so it is not surprising that it does not. Too much has been excluded for it to represent the money that the employee lives on each year. The "*average weekly wage*" is an artificial calculation designed to produce an income while the employee is temporarily disabled and a sum of money for permanent disability from a formula.

The Act excludes several income sources that an employee actually receives when not disabled. Income from bonus and overtime rates are specifically excluded in § 10. *R.A. Cullinan & Sons v. Industrial Commission (1991) 216 Ill.App3d 1048, 159 Ill.Dec. 180,186, 575 N.E.2d 1240,1246.* By case law, self-employment income, unemployment compensation, health insurance and other fringe benefits are excluded when determining the "*actual earnings.*" *Zanger v. Industrial Commission (1999) 306 Ill.App.3d 887, 240 Ill.Dec. 80,83, 715 N.E.2d 767,770 and Paoletti v. Industrial Commission (1996) 279 Ill.App.3d 988, 216 Ill.Dec. 447, 665 N.E.2d 507.* Income from a second job is excluded if the employer is unaware of that employment. (820 ILCS 305/10) The Employer has created an artificially low figure and called anything above that a windfall. It is a meaningless and illogical comparison that proves nothing.

All these provisions benefit the Employer. The only provision that benefits the employee is the lost time deduction. *R.A. Cullinan & Sons v. Industrial Commission (1991) 216 Ill.App3d 1048,*

159 Ill.Dec. 180,186, 575 N.E.2d 1240,1246. As it was noted in *Illinois-Iowa Blacktop v. Industrial Commission*, this section has benefits and disadvantages for both business and labor. In this case, the employer has excluded Sylvester's unemployment compensation and bonus. Sylvester recognizes that the language of the Act allows that to be done. By the same token, the Employer should follow the rest of the Act and calculate the average weekly wage after "*the time so lost has been deducted.*"

This Court could not have known that it's minor reference to the term "windfall" in *Hasler v. Industrial Commission* (1983) 97 Ill.2d 46, 73 Ill. Dec. 447, 454 N.E.2d 307 would be adopted by employers and proposed as the ONLY RULE to be followed in computing the average weekly wage. It has now become a hollow buzz word. The Employer would have us believe "windfall" will override clear legislative language and require the courts to legislate from the bench striking any legislation that benefits the employee, such as the deduction of "*the time so lost.*"

One would expect the Employer to be satisfied with the exclusion of bonus, overtime, unemployment, health insurance, fringe benefits and self employment income from the determination of the average weekly wage. These are all actual money losses the employee experiences when he is unable to work. The full income the employee lost while not working, is normally far more than workers compensation benefits. These losses must be considered before suggesting it is more advantageous, financially, to be injured than to be employed.

Finally, the Employer and the Amici Curiae suggest that roofers are paid higher than factory workers because they work a seasonal job. This is totally outside the record and speculation without foundation. It would be just as easy to speculate that roofers make what they are paid because it is hot (or cold), dangerous, physical, demanding labor.

IV. SYLVESTER WAS EMPLOYED OVER 52 WEEK PERIOD

For the first time, the Employer suggests in its brief to this Court that Sylvester may fit into method three or four of §10. There simply is no evidence that Sylvester's employment was noncontinuous and less than full-time. Sylvester worked 19 years for this employer (C. 44). A look at the wage summary (Petitioner's Exhibit 6, C. 146-149) shows that 52 weeks before his injury, Sylvester was working for the Employer. Contrary to the employer suggestion that his employment is casual in nature, Sylvester testified he worked when weather allowed. He was a full time employee and comes under the second provision of §10. Like the claimant in *Hasler v. Industrial Commission* (1983) 97 Ill.2d 46, 73 Ill.Dec. 447, 454 N.E.3d 307, he was not engaged in two occupations, worked for the same employer for 19 years and the fact that he did not work everyday did not make his employment intermittent.

V. RULING OF APPELLATE DECISIONS ARE CONSISTENT

The Industrial Commission Division of Illinois Appellate Courts has written several opinions on the meaning of the second method of §10. As pointed out in the *Sylvester v Industrial Commission* (2000) 314 Ill. App3d 1100, 247 Ill.Dec. 696, 732 N.E.2d 751,

“We conclude that these cases, for the most part, are reconcilable. In each case, we conducted fact specific inquiries and addressed whether the commissions factual determination of the claimant's average income was against the manifest weight of the evidence.”

The Employer's reliance on *Ricketts v. Industrial Commission* (1993) 251 Ill.App.3d 809, 191 Ill.Dec. 257, 623 N.E.2d 847 is misplaced. *Rickett's* worked a total of 4 days over a three week period. This is a fourth method case and is a classic example of casual employment that by reason of the shortness of time it is impractical to use any of the first three methods.

Although the Industrial Commission used the third method, the Court concludes:

“when the employment is noncontinuous or less than “full- time,” earnings may be divided by an entire work week even if the employee works only a portion of the week. *Rickett's* 191 Ill.Dec 257, 259

Cook v. Industrial Commission (1992) 231 Ill.App.3d 729, 173 14Ill.Dec. 122, 596 N.E. 2d 746 contains confusing *dicta*. The real reason the employee failed in *Cook* was because of an inadequacy of proof relating to earnings and work schedule. The only evidence of earnings was a list of 24 separate dates with an amount the petitioner was paid next to each date. There was no verification of his hourly wage, usual work week or customary work hours. All other language in *Cook* is *dicta*.

Like *D.J. Masonry and Peoria Roofing*, Sylvester introduced evidence of the exact number of days he worked during the previous year. From that number the Commission should have determined the total number of weeks he actually worked. If no evidence is presented of the number of days actually worked, the employee will have no complaint if entire weeks are used.

McDaneld v. Industrial Commission (1999) 307 Ill.App.3d 1045, 241 Ill.Dec. 151,156, 718 N.E.2d 722,727.

When an employee clearly showed that more than five days were missed in the previous 52 weeks and submitted clear evidence of the lost time, the Appellate Court has deducted the days missed. When the employee failed to submit clear evidence of lost time, the number of weeks in which the employee performed work was used. If an employee fails to give the lost time evidence to the Industrial Commission, the Industrial Commission will not have that facts to deduct any days when calculating the average weekly wage. It is the employee's job to submit that evidence, and failing to do so results in using the number of weeks in which the employee performed work.

VI. SENATOR COMMENTS CONCERN PART TIME EMPLOYEES

Nothing in the legislative history of the amendment of September 15, 1980 refutes Sylvester's argument. The Employer accurately recites a comment from the Senate debate relating to part time workers. That comments suggests that a part time worker will be paid on the basis of his part time

earnings. That is what the fourth alternative of § 10 states. The court in *Illinois-Iowa Blacktop* thought the Amendment of §10 was the legislatures response to the problem that was later addressed in *Hasler v. Industrial Commission* (1983) 97 Ill.2d 47, 73 Ill.Dec. 447, 454 N.E2d 307. See *Illinois-Iowa Blacktop* 129 Ill.Dec. 958, 536 N.E.2d 1008,1012 The debate is silent as to the second method . All that can be said about the legislative intent in passing of the September 15, 1980 amendment is that “it was a bipartisan effort produced by the hard work of the staff on both sides of the aisle” See *Illinois Iowa Blacktop v. Ind Comm.* 129 Ill.Dec 958, 536 N.E.2d 1008,1012

CONCLUSION:

The decision of the Appellate Court should be affirmed. The statute is clear that the determination of the average weekly wage in Sylvester’s instance requires the deduction of the days of work that are lost. That will determine the weeks and parts there of to divide into the actual earnings.

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