Non-Traditional Employment Relationships and the Average Weekly Wage Problem

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I. Introduction

Long-tenured employment relationships, where an employee may spend his or her entire career with one company, increasingly appear to be relics of the past, rendered incompatible with the current economy which requires a more flexible workforce. This new economy is evidenced in many ways, but perhaps none more so than in the rise of part-time, seasonal, contract, and assignment-based work. These are becoming preferred types of employment relationships, what we call in this article "non-traditional employment relationships," among employees and employers alike.

Research shows that many modern workers prefer "freelance" or temporary employment as a way of supplementing their income, building flexibility into their work schedules, or even to avoid having to make a long-term commitment to any particular enterprise.[1] Employers, on the other hand, reap the benefit of being able to review an employee's performance for a period of time before making a permanent hiring decision.[2] The readers of this article are likely to know that these symbiotic goals are accomplished in large part by way of staffing companies that place workers on assignment with employers to perform work seasonally, part-time, or on an as-needed basis.

The legal challenges presented by non-traditional employment relationships are plentiful and varied. The challenge that is the focus of this article, however, arises in the workers' compensation context, where a particular question has garnered renewed attention as a result of the North Carolina Court of Appeals' decision in Tedder v. A&K Enterprises, __ N.C. App. __, 767 S.E.2d 98 (2014). In that case, the Court was grappling with the difficult question of how to appropriately calculate weekly disability benefits for a claimant who was injured only one week into a limited, seven week assignment to work as a package deliverer.

As is explored in more detail below, the Workers' Compensation Act provides several methods for calculating a claimant's pre-injury average weekly wage (AWW) which is then used to calculate weekly disability benefits. However, these statutory methods anticipate a long-tenured employment relationship where the claimant would have been employed on a consistent basis into the future but for the injury, which was clearly not the case in Tedder. To the extent that the Act does not anticipate this kind of situation, the law leaves it to the Industrial Commission's discretion to decide how to fairly and justly calculate the AWW, and this lack of statutory guidance has resulted in varied results from case-to-case – particularly among cases involving non-traditional employment relationships.

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[1] See generally, Julie Bort, Business Insider, 39 Ways the American Workforce is Dramatically Changing in 2015 (Jun. 4, 2015), http://www.businessinsider.com/39-ways-the-american-workforce-is-changing-2015-6) James O'Brien, Mashable, 5 Ways the Workforce Will Change in 5 Years (Aug. 25, 2014), http://mashable.com/2014/08/25/workforce-in-5-years/#0gtEtJDX3uq9; American Staffing Association, Staffing Industry Statistics, https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/

[2] Id.

An employer's response in these situations should not be to surrender the issue, and complacently accept a discretionary outcome. Rather, we suggest that the issue should be tackled by identifying guiding principles, which have been set forth in prior appellate case law, to arrive at a fair and just AWW.

II. The Guiding Principles of AWW Calculation

a. Only Consider Income from the Employer of Injury

In arriving at an AWW, the Commission may only consider income that the claimant received from the employer of injury.[3] The Commission may not consider any income that the claimant received from secondary or concurrent jobs that he or she may have held at the time of the injury. This principle is particularly important because, for obvious reasons, employees in non-traditional employment relationships are more likely to have secondary or concurrent jobs.

b. Follow the Statutory Hierarchy for Calculating the AWW

Section 97-2(5) of the Workers' Compensation Act sets forth five methods for calculating the AWW. They are as follows:

> [Method 1:] the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . , divided by 52;
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> [Method 2:] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
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> [Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.
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> [Method 4:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being

[3] McAninch v. Buncombe County Sch., 347 N.C. 126, 132-33, 489 S.E.2d 375, 379 (1997); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966).

> earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
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> [Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.[4]

These calculation methods are hierarchical with a clear preference for using the first method.[5] This hierarchical preference continues such that method two is preferable to method three and method three to method four, etc.[6] Thus, there must be some reason to reject a method that is preferred in terms of the hierarchy versus the method being used.[7] Indeed, the Industrial Commission is prohibited from using method five unless it finds that all of the other methods would produce an unjust and unfair result.[8]

c. Test Whether the AWW Will Achieve its Primary Purpose

As articulated by the North Carolina Supreme Court in Joyner v. A.J. Carey Oil Company, the primary purpose of the AWW calculation is to approximate the wages that the employee would have been earning but for the work-related injury.[9] The statutory methods for calculating the AWW do not always achieve this result, and when they do not, attention should be given to how to modify the calculation method to effectuate this purpose.

In Joyner, the Court was asked to review the AWW calculation of an employee who had been hired to work as a seasonal, part-time truck driver.[10] Because the plaintiff had worked for only 10 weeks prior to his injury, the Commission had divided his gross earnings ($234.00) by 10 to arrive at an AWW of $23.40 for the employment of injury.[11] The problem identified by the Court was that the Commission was, in effect, assuming that the plaintiff would have continued to earn $23.40 per week indefinitely into the future but for his injury even though, given the seasonal nature of the job, he would actually have averaged less than that amount.[12]

Thus, the Court concluded that the calculation was unfair to the employer because it failed to account for both the peak periods of work (when the plaintiff would have earned a lot) and the slack periods (when he would have earned little or had no earnings at all).[13] To put this another way, the calculation incorrectly treated the plaintiff's part-time seasonal position as if it were a continuous job with consistent wages.[14] The Court held that under the catchall provision (currently method 5 in the statute) the Commission should have combined the plaintiff's wages

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[4] N.C. Gen. Stat. § 97-2(5) (2016).
[5] McAninch, 347 N.C. at 129, 489 S.E.2d at 377; Hensley v. Caswell Action Comm., Inc., 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979).
[6] See Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971).
[7] Tedder, __ N.C. App. at __, 767 S.E.2d at 102.
[8] Boney v. Winn Dixie, Inc., 163 N.C. App. 330, 334, 593 S.E.2d 93, 97 (2004).
[9] 266 N.C. 519, 522, 146 S.E.2d 447, 449 (1966).
[10] Id. at 519-20, 521, 146 S.E.2d at 448, 449.
[11] Id. at 520, 146 S.E.2d at 448.
[12] Id.
[13] Id.
[14] Id. at 522, 146 S.E.2d at 450.

during his 10 weeks of employment with the wages of another part-time truck driver who had worked during the other 42 weeks of the year, and divided the sum by 52.[15] This would have allowed the Commission to more accurately approximate the wages that the employee would have been earning but for the work-related injury, thus achieving the primary purpose of the AWW calculation.

III. Applying the Guiding Principles of AWW Calculation to Non-Traditional Employment Relationships

Employers who are trying to calculate the correct AWW for a non-traditional employment relationship should work through the hierarchy of methods set forth above in § 97-2(5).[16]

a. Method One

The first method is *only* applicable when the employee has worked "*continuously* during the 52 weeks preceding the injury."[17] Consequently, this method will almost always be inapplicable in temporary employment situations.[18] It may, however, be applicable to other non-traditional employment relationships such as those of part-time, seasonal, or as-needed employees who have had a relationship with the employer of injury for at least one full year. When it is applicable, the first method should be used.

b. Method Two

Where the first method is not applicable because the employee has not worked continuously for the employer during the 52 weeks preceding the injury, the second method may also be inapplicable for the same reason. The case law is unsettled on this question.[19]

Regardless, however, employers should generally argue against using the second method in cases involving non-traditional employment relationships because it will tend to incorrectly inflate the AWW. The reason for this is simple. The second method requires the Commission to remove from the calculation any period of eight days or more when an employee was not earning any income from the employer, and to divide the gross earnings only by the remaining weeks. This has the same problematic effect as was recognized by the Supreme Court in Joyner, *supra*, in that removing the weeks when the claimant was not being paid ignores the "slack periods" in the claimant's earnings. Therefore, in cases involving non-traditional employment relationships, the second method may need to be avoided.

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[15] Id. at 522-23, 146 S.E.2d at 450-51.
[16] See Section II(b) *supra*.
[17] Thompson v. STS Holdings, Inc., 213 N.C. App. 26, 32, 711 S.E.2d 827, 830 (2011) (emphasis added).
[18] See, e.g., Boney v. Winn Dixie, Inc., 163 N.C. App. 330, 593 S.E.2d 93 (2004) (holding it error to apply the first method for a part-time employee with a "fluctuating schedule"); Postell v. B & D Construction Co., 105 N.C. App. 1, 411 S.E.2d 413 (1992) (concluding that method one was not applicable where the employee was not continuously employed during the 52 weeks prior to his injury); Denning v. N.C. Dept. of Agric., No. COA10–1587, 2011 WL 4917011, at *3 (N.C. App. Oct. 18, 2011) (method one "clearly anticipate[s] that…employment…was ongoing for fifty-two weeks," prior to injury).
[19] Denning, 2011 WL 4917011, at *3 (holding that method two is not applicable where the employment does not extend a full 52 weeks prior to injury); see also Kubick v. Guilford Cty. Schools, I.C. NO. W15176, 2011 WL 2742326, at *2 (N.C. Ind. Com. July 12, 2011).

c. Method Three

The third method is a particularly inviting method in cases involving non-traditional employment relationships because it applies where the employee worked "fewer than 52 weeks" prior to injury.[20] Nevertheless, the third method can create the same problem as the second method.[21] Take, for example, the bus driver in Conyers v. New Hanover County Schools who worked only when school was in session.[22] The Court of Appeals held that it was error for the Commission to divide her gross earnings by the number of weeks that she actually worked during the school year and to ignore the "slack period" (i.e. the summer) when she was not being paid by the school system when calculating her AWW.[23] Instead, the Court held that her gross wages should be divided by 52 weeks.[24] Similarly, method three may be inappropriate in other cases involving non-traditional employment relationships even though the claimant may have been paid in fewer than all 52 weeks prior to his or her injury.

d. Method Four

Application of the fourth method to non-traditional employment relationship cases usually fails for a lack of evidence because it can be difficult to find a sufficiently similarly situated employee to the injured claimant.[25] Their employment situations are often just too different to be meaningfully compared. That being said, there are occasions where the fourth method is very useful, particularly where the employee has been working for such a short period of time prior to injury that looking to another employee is necessary. For instance, in Munoz v. Caldwell Memorial Hospital, a home health care nurse was injured just three days into her new job with the employer.[26] The Court of Appeals agreed with the Commission's use of method four in that situation.[27]

If the fourth method is going to be used in a non-traditional employment relationship case then the employer should be careful to find an employee who is similarly situated in all respects that might affect the employee's earnings. For example, assume that there are two employees (Employee A and Employee B) who do the same type of work on an assembly line, and Employee A is injured on-the-job. Assume also that Employee A is only on a temporary placement by a staffing company while Employee B is a full-time employee of the client company who has worked in the same position for many years. Even though both employees perform the same work, an argument may exist that they are not "similarly situated" for purposes of calculating an AWW because, while it would be reasonable to expect Employee B to have continued earning wages from the client indefinitely into the future, the same expectation may not apply to Employee A given the temporary nature of his assignment. Therefore, using Employee B's wage information to calculate Employee A's AWW under method four may overestimate Employee A's lost income.

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[20] N.C. Gen. Stat. § 97-2(5).
[21] See, e.g., Thompson v. STS Holdings, Inc., I.C. No. 888350, 2010 WL 37740, at *6 (Ind. Com. Jan 5, 2010) aff'd at 213 N.C. App. 26, 711 S.E.2d 827 (2011).
[22] 188 N.C. App. 253, 254, 654 S.E.2d 745, 747 (2008).
[23] Id. at 260-61, 654 S.E.2d at 751.
[24] Id. at 261, 654 S.E.2d at 751. See also Postell v. B & D Construction Co., 105 N.C. App. 1, 3, 411 S.E.2d 413, 414 (1992).
[25] See, e.g., Postell v. B & D Construction Co., 105 N.C. App. 1, 411 S.E.2d 413 (1992); Denning v. N.C. Dept. of Agric., I.C. No. 799667, 2011 WL 4917011, *1 at *3 (N.C. App. Oct. 18, 2011) *3; Thompson, 2010 WL 37740, at *7.
[26] 171 N.C. App. 386, 387, 614 S.E.2d 448, 449-50 (2005).
[27] Id. at 394-95, 614 S.E.2d at 454; see also Stevens v. Magnum, I.C. No. 824082, 2001 WL 933751 (Ind. Com. July 2, 2001).

e. Method Five

In light of the discussion above, there will be situations where methods one through four will be inappropriate for calculating the AWW of an employee in a non-traditional employment situation. This will require the Commission to use the fifth method, which means that the Commission will have to find a mathematical formula that will "'most nearly approximate the amount which [the employee] *would be earning* were it not for the injury.'"[28] In this regard, what is most important is putting an emphasis "on the result, not the precise means by which the result is obtained."[29] However, the recent case of Tedder v. A&K Enterprises, mentioned at the beginning of this article, proves that the Commission will not always reach the right result in these cases.

In Tedder, the plaintiff was temporarily hired to work as a package delivery driver for a seven week period while a full-time employee was on medical leave.[30] Prior to being hired by the defendant-employer, the plaintiff had worked in a low-paying seasonal job for only a few months and been unemployed for two years prior to that.[31] The Court of Appeals agreed with the Commission that, under the circumstances, methods one through four would not produce a correct AWW in this situation,[32] but it disagreed with the formula devised by the Commission under method five. The Commission had taken the anticipated gross wages that the plaintiff would have received had he worked all seven weeks of his assignment, and divided the sum by seven, yielding an AWW of $625.[33] In rejected this calculation, the Court concluded that the AWW would have constituted a financial windfall because it would have resulted in the payment of disability benefits far in excess of the total that he would have made on his temporary work-assignment.[34] The Court reasoned that "[t]he purpose of the average weekly wage calculation is to approximate what the employee would be earning were it not for the injury, not to provide an earnings safety net for the chronically unemployed or underemployed."[35] Therefore, the Court held that the Commission should have divided the anticipated total gross wages, not by 7 weeks, but by 52 weeks instead.[36] On remand, the Full Commission adopted this proposed calculation.[37]

IV. Conclusion

When it comes to calculating an accurate AWW, this is not always an easy task in the context of a non-traditional employment relationship because not every case will fall squarely into one of the first four methods provided by the statute. Even if, at first glance, the circumstances appear to meet one of the first four methods, additional consideration should be given to whether there is a more "fair and just" way to calculate the AWW. Moreover, when it becomes necessary to devise an entirely new mathematical formula to arrive at an accurate AWW under method five, the focus should be on achieving a fair approximation of the income

[28] Boney, 163 N.C. App. at 334, 593 S.E.2d at 97.
[29] Thompson, 213 N.C. App. at 33, 711 S.E.2d at 831.
[30] Id. at __, 767 S.E.2d at 99, 100.
[31] Tedder, __ N.C. App. at __, 767 S.E.2d at 99.
[32] ___ N.C. App. ___, 767 S.E.2d 98, 103 (2014).
[33] Id. at __, 767 S.E.2d at 103.
[34] Id. at __, 767 S.E.2d at 103, 104.
[35] Id. at __, 767 S.E.2d at 100.
[36] Id. at __, 767 S.E.2d at 100.
[37] Tedder v. A&K Enterprises, I.C. File No. X41641, 2015 WL 1966854, at *8 (N.C. Ind. Comm. Apr. 29, 2015).

lost by the injured worker *subsequent to* the injury rather than on his or her earnings *prior to* the injury.

It is also important to conduct a thorough analysis of the AWW calculation at the outset of a claim. Often an AWW issue is not appreciated until after an I.C. Form 60 has been filed and benefits have commenced. Once an I.C. Form 60 is filed, it is considered an award of the Commission,[38] and while it is not impossible to adjust the AWW at this point, the Commission is unlikely to allow an adjustment to be made (if at all) until after an evidentiary hearing. Therefore, representatives of the employer and the carrier/third-party administrator should work together to ensure that an appropriate AWW has been calculated before benefits issue.

In this regard, the claims adjuster should not rely solely upon the employee to provide information about his or her earnings prior to injury, but should instead consult with the employer-contact to understand the nature of the employee's job. It should always be asked whether the job was temporary, seasonal, part-time, etc. At the same time, employers are in the best position to spot these potential issues because they will always have a more complete understanding of the nature of the employment. Consequently, employers should identify and communicate these potential issues to the adjustor as early as possible after the first report of injury is made, so that a decision can be made about whether to investigate further.

Finally, if compensability of the claim has been determined in the employee's favor, ensuring that the employee is not being overcompensated as a result of a questionable AWW calculation is always a good cost containment strategy to consider.

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[38] See N.C. Gen. Stat. §97-82(b) (2016); Perez v. American Airlines/AMR Corp., 174 N.C. App. 128, 135, 620 S.E.2d 288, 293 (2005); Calhoun v. Wayne Dennis Heating & Air Cond., 129 N.C. App. 794, 798, 501 S.E.2d 346, 349 (1998).