

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRENDA STROMQUIST,)
)
 Claimant,)
)
 v.)
)
 A FULL LIFE AGENCY,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST)
 INSURANCE CORP.,)
)
 Surety,)
 Defendants.)
 _____)

IC 2004-518853

**ORDER ON PETITION
FOR
DECLARATORY RULING**

Filed December 21, 2007

On September 11, 2007, Defendants filed a Petition for Declaratory Ruling seeking clarification of Idaho Code § 72-419(9) regarding the computation of an average weekly wage when an employee is working for two employers. Claimant did not respond.

Pursuant to Judicial Rules of Practice and Procedures (JRP) Rule 15, the Commission may rule when any person presents an actual controversy over the construction, validity or applicability of a statute, rule, regulation or order. In the present case, Defendants request a declaratory ruling addressing the application of Idaho Code § 72-419(9). The petition has presented two different methods of computing Claimant’s average weekly wage. Defendants have shown that an actual controversy exists. Defendants have also shown that they have an interest which is directly affected by Idaho Code § 72-419(9). Having been presented a matter

proper for declaratory ruling, the Commission will act pursuant to Rule 15(F)(3), JRP, and issue a written ruling which shall have the force and effect of a final order or judgment.

Background

The present case concerns the proper average weekly wage (AWW) calculation for a claimant with concurrent employment. Claimant, Brenda Stromquist, worked concurrently for two employers, Full Life and Dynamic, preceding her industrial accident on August 16, 2004 at Full Life. Defendant Full Life admits having knowledge of Claimant's concurrent employment. Defendants accepted Claimant's claim and began paying related medical expenses, as well as time loss benefits.

Both Full Life and Dynamic paid Claimant wages fixed by the hour and for a varying number of hours . Thus, Claimant's pay for both employers falls within the parameters of Idaho Code § 72-419(4)(a), which is used when an employee's wages are fixed by the day, hour or by the output of the employee.

The issue at hand is the proper method of calculating the AWW for a claimant with concurrent employment, when both employers compensate claimant with wages fixed by the day, hour or by the output, pursuant to Idaho Code §§ 72-419(9), -419(4)(a).

Idaho Code § 72-419

Idaho Code § 72-419 explains the ways in which a determination of average weekly wage is computed. The relevant portions of Idaho Code § 72-419 are set for below.

72-419. DETERMINATION OF AVERAGE WEEKLY WAGE. Except as otherwise provided in this law, the average weekly wage of the employee at the time of the accident causing the injury or of manifestation of the occupational disease shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(4)(a) If at such time the wages are fixed by the day, hour or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) his wages (not including overtime or premium pay) earned in the employ of the employer in the first, second, third or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the time of accident or manifestation of the disease.

(9) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of such employment prior to the injury, the employee's wages from all such employers shall be considered as if earned from the employer liable for compensation.

Discussion

The following chart represents Claimant's wages for the year preceding her industrial accident, as calculated pursuant to Idaho Code § 72-419(4)(a).

Quarter	Full Life	Dynamic	Total quarterly earnings
1 - 8/18/03-11/16/03	\$8,529.71	\$0.00	\$8,529.71
2 - 11/17/03-02/15/04	\$5,582.45	\$2,664.00	\$8,246.45
3 - 02/16/04-05/16/04	\$2,679.39	\$6,346.75	\$9,026.14
4 - 05/17/04-08/15/04	\$2,327.52	\$6,452.53	\$8,780.05

Defendants assert that the AWW should be calculated by selecting the quarter with the highest total earnings and divide that total by 13. In this case, the 3rd quarter has Claimant's highest total quarterly earnings, \$9,026.14. Therefore, Defendants content that Claimant's AWW is \$694.32. ($\$9,026.14 / 13 = \694.32).

Historically, the AWW involving concurrent employment paying out according to Idaho Code § 72-419(4)(a) was calculated by selecting the quarter with highest earning for each

employer. In this case, the 1st quarter has the highest earning for Employer Full Life, \$8,529.71. The 4th quarter has the highest earnings for Employer Dynamic, \$6,452.53. The total of the two employers' highest individual quarters totals \$14,982.24. Therefore, historically Claimant's AWW is \$1,152.48. ($\$14,982.24 / 13 = \$1,152.48$).

The historical view on calculating Claimant's AWW is arguably supported by *Earl v. The News Journal*, 1994 IIC 1240, 94 IWCD 7789. In *Earl*, the claimant's concurrent employment AWW was calculated by finding the two weekly earnings and then adding them together. The distinction in *Earl* is that the claimant's wages were determined by applying different subsections of Idaho Code § 72-419. The claimant's earnings from The News Journal were computed pursuant to Idaho Code § 72-419(4) because her wages were fixed by the hour. While the claimant's earnings as a school bus driver were computed pursuant to Idaho Code § 72-419(3) because her wages were fixed by the year.

Applying the concurrent employer subsection in the *Earl* case, treating all the wages as if earned only from the liable employer, could only be accomplished by finding two separate weekly earnings. The two different payment methods require the application of different subsections of Idaho Code § 72-419. But the *Earl* case does not fit the present facts, because both of the employers in this case compensate Claimant using wages fixed by the hour and calculated applying Idaho Code § 72-419(4)(a).

Idaho Code § 72-419(9) instructs us to treat an employee's wages from all concurrent employers as if earned from the employer liable for compensation. "In essence, 72-419(9) converts the wages received from all other employers into wages earned from defendant employer and both situations should be treated equally." *Madeleine2003*, 2003 IIC 0296. In this

_Participated but did not sign_____

R.D. Maynard, Commissioner

_____/s/_____

Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2007 a true and correct copy of **Order on Petition for Declaratory Ruling** was served by regular United States Mail upon each of the following persons:

SCOTT HARMON
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BOISE ID 83707-6358

BRENDA STROMQUIST
PO BOX 1042
SPIRIT LAKE ID 83869

_____/s/_____