

Alternative Methods for Calculating Average Weekly Wage in South Carolina

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Media Contact

Erica Gianetti

Marketing & Communications Supervisor

erica.gianetti@mgclaw.com

The Workers' Compensation Act defines an average weekly wage as "the earnings of the injured Employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury." S.C. Code Ann. §42-1-40. The primary method for calculating average weekly wage, as provided in S.C. Code Ann. §42-1-40, has been interpreted by South Carolina Courts to contemplate the "usual" job situation with one Employer. *See Forrest v. A.S. Price Mechanical*, 644 S.E.2d 784 (S.C. Ct. App. 2007). However, the Statute provides both a primary method of calculation of an average weekly wage, as well as alternative methods of calculation when the primary method is unavailable because "the employment, prior to the injury, extended over a period of less than fifty-two weeks" or unless "for exceptional reasons" it would be unfair to utilize the primary method.

The seminal case of *Forrest v. A.S. Price Mechanical* and its progeny, *Pilgrim v. Eaton and Revis*, 703 S.E.2d 241 (S.C. Ct. App. 2010), shed additional light upon the directives for calculating a correct average weekly wage and compensation rate. In *Forrest*, the Court of Appeals noted S.C. Code Ann. §42-1-40 provides that when exceptional reasons make one of the standard approaches for calculation of average weekly wage unfair to either 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." In expanding on the directives of *Forrest*, *Pilgrim* spells out the precise methods which must be employed to calculate a correct average weekly wage and compensation rate. In *Pilgrim*, the Court of Appeals held that the provisions of S.C. Code Ann. §42-1-40 must be employed sequentially, in that first the primary method of calculation must be used, but if such method proves "impracticable" one may move to the first, second or third alternative methods of calculation. *Id.* at 245. However, "the third alternative method of calculation may not be used unless the first or second methods are 'impracticable.'"

The primary method of calculation is to utilize the fifty-two weeks of payment immediately preceding the date of injury, in the employment in which Claimant was working at the time of the injury, excluding the quarter in which the injury occurred, to arrive at an average weekly wage. If such data is unavailable because Claimant's employment extended over a period of less than fifty-two weeks, making the calculation impracticable, the first alternative method is to be employed. The *Pilgrim* Court noted, in quoting the Statute, "in such a situation, the Commission must use 'the method of dividing the earnings during that period by the number of weeks and parts thereof during which the Employee earned wages.'" Furthermore, the *Pilgrim* Court noted this method of calculation "shall be followed, as long as results fair and just to both parties will be obtained." Therefore, the *Pilgrim* Court reasoned, if the Commission chooses to use the first alternative method of calculation of the average weekly wage, two conditions must exist: (1) the alternative must be "practicable" and (2) the calculation must yield a result which is "fair and just to both parties." Importantly, before the Commission may use any of the alternative calculations, the Commissioner must find, and the record must clearly show, that the necessary conditions exist to use an alternative method for calculating the average weekly wage.

The second alternative calculation involves utilizing a similar Employee's wages to arrive at an average weekly wage. The Statute requires the Commission to consider "the average weekly amount which...was being earned by a person of a same grade and character employed in the same class of employment in the same locality or community." S.C. Code Ann. §42-1-40. The third and final alternative for calculating average weekly wage is to be employed only when "exceptional reasons" exist that make it "unfair, either to the Employer or the Employee, to use the primary or first and second alternative methods." Furthermore, Section 42-1-40 provides that the third alternative method may not be used unless the first or second methods are impracticable.

In summary, both the South Carolina Worker's Compensation Statute and applicable case law note that the objective of the calculation of average weekly wage is to arrive at a fair approximation of Claimant's earnings had he not suffered an injury. However, the methods of calculation dictated by S.C. Code Ann. §42-1-40 must be employed methodically and sequentially, and may not be haphazardly applied.

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ABOUT THE AUTHOR

Allison Nussbaum is an attorney with McAngus Goudelock & Courie. Ms. Nussbaum may be reached at 543.576.2925 or at allison.nussbaum@mgclaw.com.

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