



# Louisiana Workers Compensation

## Chapter 8

### *Average Weekly Wage*

When an employee is disabled as the result of a job accident, the employee is entitled to workers' compensation disability benefits. Disability benefits are paid periodically, usually weekly or bi-weekly,<sup>1</sup> but generally are calculated on a weekly basis.<sup>2</sup> The amount of an employee's periodic disability benefits payment, generally referred to as the "compensation rate," is based on the employee's pre-injury weekly earnings, or "average weekly wage."

La. R.S. 23:1021(13) recognizes five classes of wages or employment for calculating average weekly wage:

- (1) Hourly Wages
- (2) Monthly Wages
- (3) Annual Wages
- (4) Seasonal Employment
- (5) Other Wages (employees paid on a unit, piecework, commission or other basis).

The Louisiana Workers' Compensation Act also contains a specific provision concerning the treatment of fringe benefits. *La. R.S. 23:1021(13)(f)*. Louisiana courts have created special rules concerning Independent Contractors and employees that are paid a combination of fixed wages (hourly, monthly or annual) and other wages (unit, piecework or bonus).

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<sup>1</sup> Compensation payments are to be made as near as possible to the time that wages were payable before the job accident. *La. R.S. 23:1201(A)(1)*. As discussed more fully in the next chapter, Supplemental Earnings Benefits (SEB) may be paid monthly, but only after the employer has established the employee's post-injury wage earning capacity. *La. R.S. 23:1221(3)(a)(i) and(ii)*.

<sup>2</sup> SEB is calculated monthly, but the SEB calculation still uses average weekly wage because, for the purpose calculating the monthly SEB rate, Average Monthly wage = (Average Weekly Wage x 52)/12. *La. R.S. 23:1221(3)(a)(i)*.

## (1) HOURLY WAGES

For the purposes of calculating average weekly wage, hourly employees are divided into four classifications:

- (i) Full-time employees
- (ii) Employees who are offered full-time employment but regularly, and at their own discretion, work less than forty hours per week
- (iii) Part-time employees
- (iv) Part-time employees employed by two or more employers in successive employment (moonlighting employees).

*La. R.S. 23:1021(13)(a)*. Some rules apply to all hourly employees, however.

### General Rules for Hourly Employees

The average weekly wage of hourly employees is based on the employee's hours or earnings<sup>3</sup> in the four full weeks before the job accident. *La. R.S. 23:1021(13)(a)(i-iv)*. If, at the time of the accident, the employee has not worked four full weeks, average weekly wage is based on the average hours that the employee worked in each full week that the employee worked before the job accident. See, Fusiler v. Slick Construction Co., 94-11 (La. App. 3 Cir. 6/1/94), 640 So.2d 788 (*when the employee had only completed two full weeks of employment before his job accident, his average weekly wage was based on the average hours that he worked in those two weeks*).

*What constitutes a "full week?"*

Some courts have held that the four "full" weeks preceding a job accident do not include weeks in which the employee's hours were abnormally low. See, Doucet v. Crowley Mfg., 96-1638 (La. App. 3 Cir. 04/30/97); 693 So. 2d 328 (*vacation week and week in which the plant was closed were not "full" weeks and, therefore, were not used to calculate average weekly wage*); Breuhl v. Hercules Concrete Pumping, 94-2311 (La. App. 4 Cir. 05/16/95); 656 So. 2d 1055 (*vacation weeks and an abnormally low week – the employee worked only six hours when he usually worked seventy— were not "full" weeks to be included in the calculation of average weekly wage*).

In Hargrave v. State of Louisiana, 2010-0044 (La. 01/19/11); 54 So. 3d 1102, the Louisiana Supreme Court acknowledged these cases but, on the facts presented, chose not to address whether the cases were rightly decided. Based on language Hargrave, however, the decisions in Doucet and Breuhl are questionable. The court found that, "because Mr. Hargrave did not work more than forty hours during the four weeks prior to his accident, his average weekly wage is calculated based on his normal forty-hour week, and there is no need to look to the actual hours worked." 34 So.3d at

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<sup>3</sup> The average weekly wage of most hourly employees is based on average hours. For full-time employees who regularly and at their own discretion work less than forty hours, however, average weekly wage is based on average earnings.

1107. This statement suggests that the statute compensates for abnormally low weeks, at least for full time employees, by creating a forty-hour presumption, which is discussed below, not by ignoring those weeks.<sup>4</sup>

A year earlier, in Clay v. Our Lady of Lourdes Medical Center, Inc., 09-1219 (La. App. 3 Cir. 06/02/10); 38 So.3d 1196, the Third Circuit Court of Appeal reached a similar conclusion, rejecting the earlier cases that had omitted from the average weekly wage calculation weeks in which the employee worked abnormally low hours. The issue in Clay was whether a vacation week in which the employee worked no hours should be included in average weekly wage calculation. The Clay court noted that:

*reaching back to capture non-vacation weeks is an unnecessary step where the employee is a forty-hour, full time employee who gets the presumption under 12(a)(i) of a forty-hour work week in calculating his or her AWW.*

38 So.3d at 1204. In other words, the statute protects an employee against abnormally low weeks by applying a forty-hour presumption. The statute does not authorize a court to omit weeks that the court finds contain abnormally low hours. Clay similarly dismissed the argument that a week with abnormally low hours is not a “full week” under the statute. The court explained that:

*the term "four full weeks" means using a normal, full-week pay period, such as Monday through Friday, rather than starting the calculation, say, in mid-week on the day before the accident; and it does not mean that you have to use non-vacation weeks if the employee is a full time, forty-hour employee.*

Id.

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<sup>4</sup> *But see, Davis v. Boise Cascade Co.*, 149 So.3d 331 (La. App. 3<sup>rd</sup> Cir. 10/1/14), in which the court excluded a week in which the employee worked 33 hours as not a “full week” because one day of that week was shortened due to a power outage.

*The Week of the Accident is Not Included in the AWW Calculation*

Average weekly wage is based on the four weeks preceding the job accident. The week of the accident is not included.<sup>5</sup> Usually, because of the job accident, the employee does not work the full week in which the accident occurred. For that reason, including the week of the accident would result in an average weekly wage that did not accurately reflect the employee's average earnings.

Example:

Week of Accident	20 hours
Week 1 Before Accident	30 hours
Week 2 Before Accident	47 hours
Week 3 Before Accident	50 hours
<u>Week 4 Before Accident</u>	<u>33 hours</u>

The employee's average hours for calculating average weekly wage is 40 ((30+47+50+33] divided by 4). The week of the accident, in which the employee worked only twenty hours, is not included. The result would be the same even if, instead 20 hours, the employee worked 50 hours in the week of the accident. Regardless of whether it would increase or decrease average weekly wage, the week of the accident is not included in the average weekly wage calculation.

*Average Weekly Wage is set as of the Date of Accident*

Average weekly wage is set as of the date of the accident. For example, average weekly wage is based on the hourly rate at the time of the accident, even if that hourly rate was temporarily higher or lower than usual. For that reason, when an employee was injured on second day of work under a federal contract, which paid a higher hourly rate than the employee's regular employment with the same employer, the employee's average weekly wage was based on the higher hourly rate at the time of the accident, not the employee's usual hourly rate with the employer. Thibodeaux v. Stamm-Scheele, Inc., 97-1461 (La. App. 3 Cir. 04/15/98), 711 So.2d 426. And, conversely, when an employee's hourly rate increased after the date of the accident, the employee's average weekly wage was still based on the lower hourly rate in effect at the time of his accident. Bonnette v. Travelers Ins. Co., 367 So. 2d 1261 (La. App. 3<sup>rd</sup> Cir. 1979)/. Similarly, when, before he became disabled, an employee continued to work and earned more after his accident than he did before his accident, the employee's average weekly wage still was based on his pre-injury earnings, not his higher post-injury earnings. Vincent v. I.E. Miller of Eunice, Inc., 95-1699 (La. App. 3 Cir. 12/11/96); 685 So. 2d 471.

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<sup>5</sup> See, for example, Ben v. Holtrachem, Inc., 2000-635 (La. App. 3d Cir. 11/2/00), 772 So.2d 326, 329.

*AWW generally is based Average Hours, not Average Earnings<sup>6</sup>*

With one exception, which is discussed further below in this Chapter, the average weekly wage of hourly employee is based on the employee's average hours, not the employee's average earnings.

Example:

A Full-time employee is paid \$12.00 an hour for regular time and \$18.00 an hour for overtime.<sup>7</sup> In the four full weeks preceding the accident, the employee works the following hours and earns the following amounts:

Week 1	30 hours	(\$360.00)
Week 2	47 hours	(\$606.00)
Week 3	50 hours	(\$660.00)
Week 4	33 hours	(\$396.00)
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Total	160 hours	(\$2,022.00)
Average	40 hours	(\$505.50)

The employee's average weekly wage is his average hours (40) times his hourly rate of pay (\$12.00), or \$480.00. As this example shows, the employee's average weekly wage may be different from the employee's average earnings.

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<sup>6</sup> For some reason, the Louisiana legislature decided to use actual earnings, rather than hours, for one classification of hourly employees (see the section below concerning La. R.S. 23:1021(13(a)(ii))), but the average weekly wage of all other hourly employees is based on the hours worked rather than the wages earned.

<sup>7</sup> Overtime is discussed more fully below.

**La. R.S. 23:1021(13)(a)(i) - Full-Time Employees**

The average weekly wage of a full-time employee paid on an hourly basis is the hourly rate multiplied by (1) the average actual hours worked in the four full weeks preceding the accident; or (2) forty hours, whichever is greater. *La. R.S. 23:1021(13)(A)(i)*.

*Forty-Hour presumption*

If a full-time employee averages less than forty hours in the four full weeks preceding the job accident, the employee's average weekly wage is the hourly rate times forty. This is referred to as the "forty-hour presumption."

Example:

A Full-time employee is paid \$12.00 an hour for regular time and \$18.00 an hour for overtime. In the four full weeks preceding the accident, the employee works the following hours and earns the following amounts:

Week 1	40 hours	(\$480.00)
Week 2	42 hours	(\$516.00)
Week 3	39 hours	(\$468.00)
Week 4	33 hours	(\$396.00)
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Total	154 hours	(\$1,860.00)
Average	38.5 hours	(\$465.00)

Because the employee was a full-time employee, the employee is given credit for at least forty hours per week. Therefore, the employee's average weekly wage is forty times the hourly rate of pay (\$12.00), or \$480.00, even though the employee averaged less than forty hours and less than \$480.00 per week in the four weeks preceding the accident.

The forty-hour presumption applies if the employer classifies the employee as a full-time employee, even if the employment customarily provided less than forty hours per week. Clark v. Schwegmann Giant Supermarket, 96-2301 (La. App. 4 Cir. 01/13/99); 740 So. 2d 137. *See also*, Shortt v. Wal-Mart Store, 95-978 (La. App. 3 Cir. 1/31/96), 670 So.2d 369.

*Overtime*

Louisiana courts have rendered conflicting decisions regarding overtime. Two courts have held that, if an employee averages more than forty hours in the four full weeks preceding the accident, average weekly wage is calculated as follows:

$$\begin{array}{r} 40 \\ + \quad \text{average hours over 40} \end{array} \times \begin{array}{r} \text{hourly rate of pay for regular time} \\ \text{hourly rate for overtime} \end{array} \\ = \text{employee's average weekly wage}$$

Example:

A Full-time employee is paid \$12.00 an hour for regular time and \$18.00 an hour for overtime. In the four full weeks preceding the accident, the employee works the following hours and earns the following amounts:

Week 1	45 hours	(\$570.00)
Week 2	41 hours	(\$498.00)
Week 3	35 hours	(\$410.00)
Week 4	47 hours	(\$606.00)
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Total	168 hours	(\$2,094.00)
Average	42 hours	(\$523.50)

The employee's average weekly is \$516.00 ([40 x \$12.00] + [2 x \$18.00]). The overtime rate applies only to the average hours that the employee worked over forty. Thus, even though the employee worked a total of 13 overtime hours, or an average of 3.25 overtime hours per week, the employee was credited with only two overtime hours in calculating average weekly wage because the employee averaged forty-two total hours per week.

*See, for example:*

*Fagan v. Delta Steel & Constr. Co.*, 449 So. 2d 1143 (La. App. 3 Cir. 1984). "Mr. Fagan was paid \$4 per hour for the first forty hours per week and \$6 for every hour after that. . . . for the four full weeks prior to Mr. Fagan's injury he worked twenty hours, fifty-five and one-half hours, forty-one and one-half hours, and forty-nine and one-half hours, for an average of forty-one and 625/1000 hours. Thus, Mr. Fagan's average weekly wage at a rate of \$4 for the first forty hours and \$6 for each hour after that is \$169.75." 449 So.2d at 1146.

*Skinner v. Boise Southern Co.*, 364 So. 2d 223 (La. 3<sup>rd</sup> Cir. 1978). "The plaintiff was regularly paid an hourly wage rate of \$ 3.50 for straight time and \$ 5.25 for overtime. For the four full weeks preceding the date of injury he worked and was compensated on the above basis for a total of 168.50 hours. Thusly, under the statute he is entitled to the

payment of compensation calculated as follows:

168.50 hours divided by 4 = 42.125	
"average actual hours worked"	
40 hours @ \$ 3.50 =	\$ 140.00
2.125 hours @ \$ 5.25 =	11.16
"Average weekly wage"	\$ 151.16
66 2/3% x \$ 151.16 =	\$ 100.76

In more recent decisions, the Third Circuit, without specifically overruling its prior decisions, held that, when an employee works overtime in the four weeks prior to a job accident, average weekly wage is calculated as follows:

$$\begin{array}{r} \text{average regular hours} \times \text{hourly rate of pay for regular time} \\ + \text{average overtime hours} \times \text{hourly rate for overtime} \\ = \text{employee's average weekly wage} \end{array}$$

Harris v. The Langston Company, 94-1266 (La. App. 3 Cir. 4/5/95); 653 So. 2d 789, and Parker v. Nabors Drilling, 99-1651 (La. App. 3 Cir. 04/12/00); 756 So. 2d 728. Parker can be distinguished from the earlier cases because of the employee's non-traditional work schedule. (The employee worked seven days on and seven days off. Overtime was a substantial portion of his income. Including his off weeks in the calculation without distinguishing between regular time and overtime would have resulted in an average weekly wage that did not accurately the employee's pre-injury earnings). Harris, however, cannot be distinguished. The court, without discussing the prior decisions, just interpreted the statute differently.

Although Harris and Parker are the more recent decisions, Fagan and Skinner are more consistent with the statute. Using the Harris and Parker calculation, the result will always equal the average earnings. Therefore, the Harris and Parker courts, in effect, replaced the hourly calculation provided for in the statute with their own calculation based on average earnings.<sup>8</sup>

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<sup>8</sup> The Louisiana Supreme Court, although addressing a different issue, cited Skinner with approval in Allor v. Belden Corp., 393 So.2d 1233 (La. 1981). ("Overtime pay must be figured in the Section 1201(7) (a) calculation and often varies from week to week causing at least as complicated calculations as the production percentage involved here. See, e. g., Skinner v. Boise Southern Co., 364 So.2d 223 (La.App.3d Cir. 1978).")

**La. R.S. 23:1021(13)(a)(ii) - Full-time employees who regularly,  
and at their own discretion, work less than forty hours.**

If a full-time employee regularly chooses to work less than forty hours, the employee is not entitled to the forty-hour presumption. Instead, the employee's average weekly wage is based on the employee's average total earnings for the four weeks preceding the date of the accident. La. R.S. 23:1021(13)(A)(ii). This is the only classification of hourly employees that uses average earnings rather than average hours to calculate average weekly wage.

Whether an employee falls within this classification is a factual question that varies from case to case. Because it serves to decrease the amount of an employee's benefits, however, courts apply it restrictively. To reduce a full-time employee's average weekly wage below the forty-hour presumption, an employer must show that the employee regularly, not occasionally, refused to work when employment was both available and offered.

An employee that misses work because of sickness will not fall within this classification. A construction worker that works less than forty hours because of bad weather will not fall within the statute. See, Baldwin v. Greater Lakeside Corporation, 93-CA-768 (La. App. 5 Cir. 1/25/94), 631 So. 2d 1238. (*Full-time roofer that worked as many hours as offered but, usually due to bad weather, did not regularly work 40 hours per week was entitled to the forty-hour presumption*). On the other hand, a construction worker who is continuously offered employment but does not work because of transportation problems or other personal reasons will fall within this classification and, therefore, will not be entitled to the forty-hour presumption. See, Brown v. K-Mart, 99-149 (La. App. 5 Cir. 06/01/99), 738 So. 2d 69. (*Employee who routinely arrived late to work and, with employer's permission, left before her shift was over was not entitled to the forty-hour presumption*).

To fall within the classification of La. R.S. 23:1021(13)(a)(ii), a full-time employee must work less than forty hours both (1) regularly and (2) at their own discretion. To deny a full-time an employee the benefit of the forty-hour presumption, the employer must establish a pattern of conduct on the employee's part. An employee that only occasionally worked less than forty hours at their own discretion is still entitled to the forty-hour presumption. An employee that worked less than forty hours at their own discretion during the four weeks prior to a job accident is entitled to the forty-hour presumption unless the employer can show that the employee regularly worked less than forty hours at their own discretion. See, Johnson v. Louisiana Container Company, 2002-382 (La. App. 3 Cir. 10/02/02), 834 So. 2d 1052 (*Employee that worked less than forty hours a week in the four weeks prior to his job accident was still entitled to forty-hour presumption because Employer did not introduce sufficient evidence that the employee regularly worked less than forty hours*).

### **La. R.S. 23:1021(13)(a)(iii) - Part-Time Employees**

A part-time employee is an employee who knowingly accepts employment that (1) provides for less than forty hours a week, and (2) is classified by the employer as a part-time employee. *La. R.S. 23:1021(11)*. The average weekly wage of a part-time employee paid on an hourly basis is the hourly rate multiplied by the average actual hours worked in the four full weeks preceding the job accident. *La. R.S. 23:1021(13)(A)(iii)*. This is the same calculation as the calculation for a full-time employee, but the forty-hour presumption does not apply.

In determining whether an employee is a part-time employee, Louisiana courts look to the employer's classification of the employee, whether the employee knowingly accepted part-time employment and the employee's work history. If the employee usually worked significantly less than forty hours a week, and the employer considered the employee to be part-time, Louisiana courts usually find that the employee was a part-time employee. See, *Bolyer v. Epic Packaging*, 32,069 (La. App. 2 Cir. 06/16/99), 740 So. 2d 739. (*even if employee had a reasonable belief that she was full time when hired, at some point that belief became unbelievable*).

### **La. R.S. 23:1021(13)(a)(iv) - Part-Time Employees employed by two or more employers in successive employment (Moonlighting Employees)**

When a moonlighting employee, i.e., an employee that holds more than one job, is injured while performing a part-time job, the employee's average weekly wage is the employee's hourly rate times (1) the average actual hours worked for all employers; or (2) forty hours, whichever is less. *La. R.S. 23:1021(13)(A)(iv)(bb)*.

The hourly rate used is the hourly rate paid by the employer with whom the employee was working at the time of the injury. *La. R.S. 23:1021(a)(iv)(bb)*.

Example:

Employee works 20 hours per week for Employer A earning \$12.00 an hour, and 10 hours per week with Employer B earning \$8.00 an hour. Employee is injured while working for Employer B. Employee's average weekly wage is \$240.00 (30 hours x \$8.00).

Even though the employee earned more per hour working for Employer A, average weekly wage is based on the hourly rate with Employer B because the employee was injured working for Employer B.

If the employee averaged less than forty hours with the employer for whom the employee was working at the time of injury, but more than forty hours with both employers combined, the employer's hourly rate is multiplied by forty to determine the average weekly wage.

Example:

Employee works 20 hours per week with Employer A earning \$12.00 an hour, and 30 hours per week with Employer B earning \$8.00 an hour. Employee is injured While working for Employer A. Employee's average weekly wage is \$480.00 (40 hours x \$12.00).

Even though the employee worked 50 hours a week with both employers, the part-time employee's average actual hours cannot exceed 40 for the purpose of calculating average weekly wage.

## **(2) MONTHLY WAGES**

The calculation for employees who receive a monthly salary is:

(Monthly wage x 12) divided by 52.

*La. R.S. 23:1021(13)(b).*

## **(3) ANNUAL WAGES:**

The calculation for employees who receive an annual salary is:

Annual salary divided by 52.

*La. R.S. 23:1021(13)(c).*

#### (4) SEASONAL EMPLOYMENT

Seasonal employment is employment that customarily operates during regularly recurring periods of less than forty-four weeks annually. *La. R.S. 23:1021(13)(A)(v)(aa)*. The average weekly wage of an employee engaged in seasonal employment is the employee's annual earnings divided by 52. If the employee was not engaged in the seasonal employment more than one year prior to the accident, however, the employee's annual earnings for the purpose of calculating average weekly wage is the average annual earnings of other employees of the same employer or most similar class working for a neighboring employer engaged in the same or similar employment. *La. R.S. 23:1021(13)(A)(v)(aa)*.

The annual earnings used to calculate average weekly wage of a seasonal employee are the employee's annual earnings in all employment, not just the seasonal employment. See, Bennett v. Rapides Parish School Board, 05-0803 (La. App. 3 Cir. 02/22/06), 923 So. 2d 843 (*teacher's income in all employment, including summer job, were included in average weekly wage*).

#### (5) UNIT, COMMISSION OR OTHER BASIS

The average weekly wage of an employee paid on a unit, commission or other basis is the employee's average earnings from the employer in the twenty-six weeks before the job accident divided by 26.<sup>9</sup> If the employee worked for the employer less than twenty-six weeks, average weekly wage is based on the number of weeks that the employee worked with the employer before the job accident.

*La. R.S. 23:1021(13)(d)*.

#### (6) FRINGE BENEFITS

In calculating average weekly wage, no amount is included for any benefit or form of compensation that is not taxable to the employee for federal income tax purposes. *La. R.S. 23:1021(13)(f)*, effective August 15, 1999. However, any amount withheld by an employer to fund any nontaxable or tax deferred benefit elected by the employee in lieu of taxable earnings is included in the employee's average weekly wage. *La. R.S. 23:1021(f)*, effective August 15, 2001. The 2001 amendment clarified that tax deferred earnings, such as earnings that the employee invests in a 401(k), or tax-exempt earnings, such as earnings placed in a medical spending account, are included in the calculation of average weekly wage.

In Hargrove v. State of Louisiana, 2010-0044 (La. 01/19/11), 54 So. 3d 1102 the Louisiana Supreme Court resolved a dispute among Louisiana's appellate courts and held that vacation time and sick leave that is accrued but not used during the period for calculating average weekly wage (for

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<sup>9</sup> La. R.S. 23:1021(13)(d) actually presents a convoluted formula that requires determining the average daily wage and the average days worked per week. That result, however, is just the average earnings during the twenty-six weeks before the accident. The formula is unnecessary.

example, during the four weeks preceding an hourly worker's job accident) are not included in the calculation of average weekly wage. Some courts had calculated the value of sick leave and vacation time accrued in the four weeks preceding the accident and included that amount in the average weekly wage. The Louisiana Supreme Court, however, held that accrued vacation and sick leave is not taxable until used and, therefore, is not included in average weekly wage unless it is used in the four weeks preceding the job accident.

## **(7) INDEPENDENT CONTRACTORS**

Louisiana courts agree that an independent contractor's overhead cannot be included in the independent contractor's wages for the purpose of calculating average weekly wage. The appellate courts disagree, however, over the method for calculating the independent contractor's average weekly wage.

Some courts determine the independent contractor's gross wages by subtracting the independent contractor's expenses from the independent contractor's gross income. After determining the independent contractor's gross wages, the courts then apply the statutory formula for other wages. Clark v. Bobby L. Clark Trucking, 28,405 (La. App. 2 Cir. 6/26/96), 679 So. 2d 157; France v. A & M Wood Co., 566 So. 2d 106 (La. App. 2 Cir. 1990); and Herrin v. Georgia Cas. & Sur. Co., 414 So. 2d 1323 (La. App. 2 Cir. 1982). Other courts, however, determine the independent contractor's average weekly wage by looking to the prevailing wage for similar work performed by a similarly experienced worker. *See*, Harmon v. LIGA, 94-2614 (La. App. 4 Cir. 4/26/95), 654 So. 2d 815, and Brown v. Vernon Sawyer, Inc., 25,959 (La. App. 2 Cir. 10/26/94), 645 So. 2d 260. In the *Louisiana Civil Law Treatise on Worker's Compensation Law and Practice*, H. Alston Johnson III suggests that the "prevailing wage" cases more accurately distinguish between "wages", which should be included in average weekly wage, and "return on capital", which should not be included in average weekly wage.

## **(8) COMBINATION OF FIXED WAGES AND OTHER WAGES**

Often employees will be paid bonuses or commissions in addition to an hourly wage or salary. Two Louisiana Supreme Court decisions address the calculation of average weekly wage in these situations.

In Allor v. Belden Corp., 393 So. 2d 1233 (La. 1981), the employee was paid a combination of an hourly wage and a production bonus that was included in each paycheck. To calculate the employee's average weekly wage, the court averaged the bonuses over the four weeks preceding the accident and added that amount to the average weekly wage based on the employee's hourly wages. The court specifically declined to apply the calculation for "unit, piecework or commission" to the employee's bonuses. The court held that the "unit, piecework or commission" formula applies only when the employee is paid exclusively on a unit, piecework or commission basis.

In Daigle v. Sherwin-Williams Co., 545 So. 2d 1005 (La. 1989), the court reached a seemingly contradictory result. In Daigle, the employee was paid a bi-weekly salary but also received occasional bonuses. The court held that the average bonuses should be calculated using the “unit, piecework or commission” formula. That figure should then be added to the average weekly wage calculated on a bi-weekly basis.

Although the cases appear to be inconsistent, they can be reconciled to form a workable rule for cases in which an employee is paid a combination of fixed wages and other wages. If, as in Allor, an employee receives a bonus or commission regularly (i.e., weekly, bi-weekly, or monthly), then the average bonus commissions during the four weeks preceding the accident are included in the employee’s average weekly wage. On the other hand, if, as in Daigle, the employee receives bonuses less frequently, then the bonuses or commissions are calculated using the “unit, piecework or commission formula.”<sup>10</sup>

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<sup>10</sup> The Daigle court suggested as much in a footnote of its opinion: “[The Daigle] computation is different from our computation in Allor v. Belden Corporation, 393 So.2d 1233 (La. 1981). In that case plaintiff’s wages were calculated on an hourly basis and his bonuses were concomitantly calculated and included in each weekly paycheck, thus making it unnecessary to separately reduce the bonuses to a weekly basis. Such is not the situation in the instant case. 545 So.2d at 1008, *fn.* 7. See also, Boutte v. Port Barre Mills, 98-255 (La. App. 3 Cir. 6/3/98), 715 So.2d 534 and Clifton v. Ditto’s Apparel, 95-1654 (La. App. 3 Cir. 5/8/96), 673 So.2d 1372, applying Allor and distinguishing Daigle when the employees received regular production bonuses in addition to hourly wages.