Section K

Issues Unique to Part Time Employees

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Why Does It Matter?

- Primarily a concern when determining an employee's average weekly wage
- Also come up in the determination of whether an employee-employer relationship exists, i.e. whether the employee is an independent contractor or not.

Iowa Code § 85.36 (6)

6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have have earned had the employee worked when work was available to other employees of the employer n a similar occupation. A week which does not fairly reflect the employee's customary earning shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code § 85.36 (7)

- 7. In the case of an employee who has been in the employee of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by th eemployer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

Iowa Code § 85.36(9)

- 9. If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Defense Argument

- Usually wants to argue Iowa Code § 85.36 (9) applies.
- The leading authority on this particular rate issue is *Swiss Colony, Inc. v. Deutmeyer,* 789 N.W.2d 129 (Iowa 2010). The Court stated:
  - Instead, in section 85.36(9), the legislature necessarily recognized that the forty-hour week is not the standard for every industry within the state by making "earnings" the operative factor. As a result, section 85.36(9) is applicable only where a claimant earns less than the usual weekly earnings of a full-time adult laborer in his or her "line of industry." Id. at 135.
- Employer characterizes employee as "part-time"
- Being a "part-time" employee is not enough

- Practically speaking
- *Deutmeyer*- Commissioner found that claimant was a part-time employee because he didn't work 40 hours a week- only 30 hours a week.
- Bright line rule that less than 40 is part-time.
- Not so fast
- 85.36(9) uses the term "earnings"
- Full and part-time employees are distinguished based on earnings- NOT HOURS
- Commissioner needs to make finding that the employee either makes no wages or less that the usual weekly earnings of the regular full time adult laborer **in the line of industry** and **in that locality.**

What evidence does defendant need? Pay records for another general laborer in their employ?

- ***Kayser v. Farmers Cooperative Society,* 2012 Iowa Workers' Compensation Commissioner, March 13, 2012. Defendants presented testimony that other adult laborers working full time did work more hours than claimant. According to pay records, claimant worked 10-15 hours less than other employees, thus justifying application of 85.36 (9).**

- Cannot just say employee only works 4 hours a day so they are part-time

- Lopez v. Midstates Horse Shows, Inc., 776 N.W.2d 302 (Iowa Ct. App. 2009)
- Commissioner found: "Claimant demonstrated that he had no desire to return to work after his retirement at age sixty-five and described himself as semi-retired…[A] semi-retired worker would earn less than a person who is available full-time." This was sufficient factual finding that the Claimant would earn less than the usual weekly earnings of a regular full-time laborer thus justifying application of 85.36(9). However, this case has been criticized since it came before the *Swiss Valley* case.

- Menard, Inc. v. Jones, 822 N.W.2d 122 (Iowa Ct. App. 2012)
- Not enough evidence of how much laborers in the field made so case was remanded. The agency simply found that the Claimant worked 4 hours a day and must have been a part-time worker. Not enough.
- Court said they could see where this premise came from- a reasonable fact-finder could assume that an employee who was semi-retired and was paid on an hourly basis, as Jones was, earned less than Menards' full-time laborers. Citing *Lopez* case
- However, Court said Lopez was decided before *Swiss Colony.*
- *James Harrell v. Denver Findley & Sons, Inc.* Office of Iowa Workers' Compensation Commissioner January 6, 2020 (accord)

Claimant's Argument

- What you see is not what you get:
- Just because an employer "labels" an employee part-time, doesn't mean that 85.36 (9) applies.
- Employer has the burden to show claimant's earnings or hours were less than the wages or hours of regular full-time laborers in the line of industry in which claimant was injured.
- If the employer does not meet that burden, then must apply different method of calculating, i.e. 85.36 (7).

What Does This Mean????

- Employer's burden to show claimant's earnings or hours were less than the wages or hours of regular full-time laborers in the line of industry in which claimant was injured.
- If the employer cannot prove it, do not apply 85.36(9).