

## CHAPTER 128 BENEFITS – CALCULATION OF AVERAGE WEEKLY WAGE

### §128.1. Average Weekly Wage: General Provisions.

- (a) The average weekly wage (AWW) calculation for an injured employee (employee) shall be calculated depending on whether the employee was employed in one of the following five courses of employment:
  - (1) full-time (see §128.3 of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, And For Temporary Income Benefits For All Employees));
  - (2) part-time (see §128.4 of this title (relating to Average Weekly Wage Calculation For Part-Time Employees));
  - (3) seasonal (see §128.5 of this title (relating to Average Weekly Wage Calculation for Seasonal Employees));
  - (4) school district employed (see §128.7 of this title (relating to Average Weekly Wage for School District Employees)); and
  - (5) multiple employment (see Texas Labor Code §408.042 and subsection (h) of this section).
- (b) Except as provided by §128.7, an employee's wage, for the purpose of calculating the AWW, shall include:
  - (1) all pecuniary wages (as defined by §126.1 of this title (relating to Definitions Applicable to All Benefits)) paid by the employer to the employee even if the employer has continued to provide the wages after the date of injury (in which case these wages could be considered post-injury earnings under §129.2 of this title (relating to Entitlement to Temporary Income Benefits)); and
  - (2) all nonpecuniary wages (as defined by §126.1 of this title) paid by the employer to the employee prior to the compensable injury but not continued by the employer after the injury (though only during a period in which the employer has discontinued providing the wages).
- (c) An employee's wage, for the purpose of calculating the AWW, shall not include:
  - (1) payments made by an employer to reimburse the employee for the use of the employee's equipment, for paying helpers, for reimbursing actual expenses related to employment such as travel related expenses (e.g. meals, lodging, transportation, parking, tolls, and porters), or reimbursing mileage up to the state rate for mileage; or
  - (2) any nonpecuniary wages continued by the employer after the compensable injury. However, except as provided by §128.7 of this title and Texas Labor Code §408.042(e), if the employer discontinues providing nonpecuniary wages, the AWW shall be recalculated and these discontinued nonpecuniary wages shall be included.
- (d) The AWW shall be calculated using gross wages.
- (e) If a carrier determines or is notified that the employee's AWW is different than what the carrier had previously determined (either as a result of subsection (c)(2) of this section, receipt of an updated wage statement, or by operation of other adjustments permitted/required under this title), the carrier shall adjust the AWW and begin payment of benefits based upon the adjusted AWW no later than the first payment due at least seven days following the date the carrier receives the new information regarding the AWW.
  - (1) If, as a result of the change, the carrier owes additional benefits to a claimant for benefits previously paid at a lower AWW but the carrier is not currently paying indemnity benefits, the carrier shall make payment in this amount within seven days of the date the carrier received the new information.
  - (2) If, as a result of the change, the carrier finds that it has overpaid benefits to a claimant, the carrier may recoup the overpayment as follows:
    - (A) If the claimant's benefits ARE NOT concurrently being reduced to pay approved attorney's fees or to recoup a commission approved advance, the carrier may recoup the overpayment under

this subsection in an amount not to exceed 25% of the benefits the claimant is entitled to based upon the new AWW.

- (B) If the claimant's benefits ARE concurrently being reduced to pay approved attorney's fees or to recoup a commission approved advance, the carrier may recoup the overpayment under this subsection in an amount not to exceed 10% of the benefits the claimant is entitled to based upon the new AWW.
  - (C) If the carrier wishes to recoup the overpayment in an amount greater than that permitted by this subsection, the carrier may attempt to enter into a written agreement with the claimant or, if unable to do so, contact the commission. In determining whether to approve an increase in the recoupment rate, the primary factor the commission will consider is the likelihood that the entire overpayment will be recouped. The rate should be set such that it is likely that the entire overpayment can be recouped. The commission may also consider the cause of the overpayment and the financial hardship that may reasonably be created for the claimant.
- (f) The carrier shall provide notice to the employee and the commission of any adjustments to the AWW and its affect on benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements). In addition, if the carrier elects to recoup an overpayment under subsection (e) of this section, the carrier's notice to the employee shall identify the amount that was overpaid.
- (g) Additional adjustments to the AWW may be made in specific circumstances for seasonal employees and school district employees (see §128.5 and §128.7 of this title, respectively), and for employees who are also minors, apprentices, trainees, or students on the date of injury (see §128.6 of this title (relating to Average Weekly Wage Adjustment For Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students)).
- (h) For employees injured on or after July 1, 2002, who are employed by more than one employer on the date of injury and the employee submits the wage information from the other employer(s) in the form and manner prescribed by §122.5 of this title (relating to Employee's Multiple Employment Wage Statement), the carrier shall calculate the AWW using the wages from all the employers in accordance with this section. The employee's AWW shall be the sum of the AWWs for each employer.
- (1) The portion of the AWW that is based upon employment with the "Claim Employer" (as the term is defined in §122.5 of this title) shall be calculated in accordance with the rule in this chapter which would be used to calculate the employee's AWW if the employee did not have multiple employment.
    - (A) This portion of the AWW may be different for calculating Temporary Income Benefits (TIBs) than it is for calculating other types of benefits as provided in other sections of this title (such as where the wages may be adjusted for a part-time employee under §128.4 of this title).
    - (B) This portion of the AWW shall be adjusted if the Claim Employer discontinues providing a nonpecuniary wage that the employer had previously continued after the date of injury.
  - (2) The portion of the employee's AWW based upon employment with each "Non-Claim Employer" (as the term is defined in §122.5 of this title) shall be calculated in accordance with §128.3 of this title (relating to Average Weekly Wage Calculations for Full-Time Employees, and for Temporary Income Benefits for All Employees) except that the employee's wages from the Non-Claim Employer(s) shall only include those wages that are reportable for federal income tax purposes.
    - (A) This portion of the AWW of an employee whose employment was limited by the Non-Claim Employer to less than full-time but whose employment was not so limited as a regular course of conduct shall be adjusted to the weekly wage level the employee would have attained by working a full-time workweek at the employee's average rate of pay.

- (B) Once calculated correctly, the portion of the AWW based upon employment with the Non-Claim Employer(s) does not vary by benefit type.

*The provisions of this §128.1 adopted to be effective January 11, 1999, 15 TexReg 118; amended to be effective May 16, 2002, 27 Tex Reg. 4036.*

**§128.2. Carrier Presumption of Employee's Average Weekly Wage.**

- (a) An insurance carrier (carrier) shall promptly initiate the payment of income benefits as required by the Workers' Compensation Act (Act). To expedite payment, the carrier shall presume that multiplying the employee's hourly rate times the average number of hours in the employee's standard work week, or, if such information is not available, that the employer's last payment to the employee for personal services based on a full week's work (a partial work week shall be prorated for a full week) accurately reflects the employee's average weekly wage (AWW) until:
- (1) the employer files a complete wage statement required by §120.4 of this title (relating to Employer's Wage Statement); or
  - (2) the correct AWW is determined by other evidence (such as that described in subsections (b) and (c) of this section), if the employer does not file a complete wage statement or if the employee files an Employee's Multiple Employment Wage Statement in accordance with §122.5 of this title (relating to Employee's Multiple Employment Wage Statement).
- (b) In the absence of a properly completed wage statement, the carrier shall calculate the correct wage by using available wage information in a manner which is fair, just, and reasonable, and which involves a methodology that allows the closest approximation of a calculation based upon a 13 week average as required by this chapter (for example, pecuniary wages would be included regardless of whether the employer continues them and earnings after the date of injury would not be included). Subsection (c) of this section provides examples of how to do this.
- (c) This subsection provides a non-inclusive list of methods that carriers can use to calculate the correct AWW using evidence other than a complete wage statement. There may be other, similar but unlisted methods that are also appropriate in a given situation.
- (1) For a salaried employee, paid on monthly or semi-monthly basis, whose salary has not changed in the 13 weeks prior to the compensable injury, the carrier may presume that the AWW is equal to 3 months of wages divided by 13.
  - (2) For an employee on whom the carrier receives 14 weeks of wage information but is unable to identify the amount of the wages paid in the 14<sup>th</sup> week (thus leaving 13 usable weeks), the carrier may presume that the AWW is equal to the 14 weeks of wages divided by 14.
  - (3) For an employee on whom the carrier receives less than 13 weeks of wage information because the employee was not employed with the employer for 13 weeks prior to the injury, the carrier may presume that the AWW is equal to the amount of wages paid divided by the number of weeks for which the wages were earned.
- (d) Upon receipt of a properly completed wage statement the carrier shall recalculate the AWW in accordance with the applicable rule(s).
- (e) If, at the time that income or death benefits first accrue, the carrier has not received a complete wage statement as required by §120.4 of this title (relating to Employer's Wage Statement), the carrier shall notify the employer that the wage statement is now required under the Statute and Rules.
- (f) If a carrier receives a wage statement that indicates that the employee was provided nonpecuniary wages prior to the date of injury but that does not indicate whether the employer is going to continue them or not, the carrier shall assume that the nonpecuniary wages are not being continued by the employer until and unless the carrier is able to verify that the nonpecuniary wages are being continued by the employer.

- (g) In the event that the claimant or the carrier believes that the AWW computed by following the calculations in this rule does not reflect the true AWW, the claimant and carrier may enter into a written agreement on the AWW or request a benefit review conference.

*The provisions of this §128.2 adopted to be effective January 11, 1999, 15 TexReg 118; amended to be effective September 1, 1993, 18 TexReg 5213; amended to be effective May 16, 2002, 27 TexReg 4036.*

**§128.3. Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees.**

- (a) All income benefits for full-time employees are based upon an average weekly wage calculated according to this rule. A full-time employee is one who regularly works at least 30 hours per week and that schedule is comparable to other employees of that company and/or other employees in the same business or vicinity who are considered full-time.
- (b) Temporary income benefits are based on an average weekly wage which is calculated according to this rule for all employees. However, the average weekly wage for determining temporary income benefits of seasonal employees may be periodically adjusted as set out in §128.5(c) of this title (relating to Average Weekly Wage Calculation for Seasonal Employees).
- (c) The average weekly wage for impairment income, supplemental income, lifetime income, and death benefits shall be calculated according to this section concerning full-time employees, §128.4 of this title (relating to Average Weekly Wage Calculation for Part-Time Employees), or §128.5 of this title (relating to Average Weekly Wage Calculation for Seasonal Employees). The average weekly wage for an employee who is also a minor, an apprentice, a trainee, or a student shall be adjusted for determining these income benefits (but not temporary income benefits), according to the procedure described in §128.6 of this title (relating to Average Weekly Wage Adjustment for Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students).
- (d) If an employee has worked for 13 weeks or more prior to the date of injury, or if the wage at time of injury has not been fixed or cannot be determined, the wages paid to the employee for 13 weeks immediately preceding the injury are added together and divided by 13. The quotient is the average weekly wage for that employee.
- (e) If an employee has worked for less than 13 weeks prior to the date of injury, the wages paid to that employee are not considered. Instead, the wages used for the average weekly wage calculation are those paid by the employer to a similar employee who performs similar services, but who earned wages for at least 13 weeks. If there is no similar employee at the employer's business, the calculation is based on wages paid to a similar employee who performed similar services in the same vicinity, for at least 13 weeks. When a similar employee is identified, the wages paid to that person for the 13 weeks immediately preceding the injury are added together, and divided by 13. The quotient is the average weekly wage for the injured employee.
- (f) For purposes of computing average weekly wage under subsection (e) of this section, the following definitions apply:
- (1) a similar employee is a person with training, experience, and skills and wages that are comparable to the injured employee. Age, gender, and race shall not be considered;
  - (2) similar services are tasks performed or services rendered that are comparable in nature to, and in the same class as, those performed by the injured employee, and that are comparable in the number of hours normally worked.
- (g) If the methods set forth in this rule cannot be applied reasonably due to the irregularity of the employment or, if the employee has lost time from work, without remuneration, during the said 13-week period due to illness,

weather, or other cause beyond the control of the employee, the commission may determine the employee's average weekly wage by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

*The provisions of this §128.3 adopted to be effective January 11, 1991, 16 TexReg 118.*

#### **§128.4. Average Weekly Wage Calculation for Part-Time Employees.**

- (a) The average weekly wage used to determine temporary income benefits for all part-time employees shall be calculated according to the basic calculation described in §128.3(d), (e), or (g) of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees).
- (b) For purposes of calculating average weekly wage for all other income and death benefits, part-time employees are considered in two different categories: those who worked part-time as a regular course of conduct, and those who did not. A "regular course of conduct" for part-time work shall be determined by reviewing the work history of the employee for the 12-month period preceding the injury. If the employee only worked part-time during that period, the employee is presumed to have worked part-time as a regular course of conduct unless such presumption is rebutted by credible evidence.
- (c) For an employee who worked part-time as a regular course of conduct, §128.3(d), (e), or (g) of this title (relating to Average Weekly Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees) shall be used to calculate average weekly wage to determine impairment income, supplemental income, lifetime income, and death benefits.
- (d) The average weekly wage for a part-time employee who did not work part-time as a regular course of conduct shall be calculated by using one of the two methods in subsection (e) or (f) of this section, depending upon the length of time the person was employed.
- (e) For an employee who worked for the employer for 13 or more consecutive weeks before the date of injury, the person calculating benefits shall derive the average weekly part-time wage, and then adjust upward to a full-time average weekly wage, by this method:
  - (1) add together the wages for the 13 weeks immediately preceding the date of injury and divide the total by 13;
  - (2) then add together the number of hours worked by the employee during the same 13 weeks, and divide the total hours by 13 to calculate the average weekly number of hours worked. The adjustment factor is the ratio of the number of full-time hours generally worked by similar employees in the same employment, over the average weekly number of hours worked by the injured employee. (Example: if the usual full-time hours for the employment is 40, and the average number of hours worked by the injured part-time employee is 30, then the adjustment factor derived is 40/30, or 1.334.) For purposes of the adjustment factor, it shall be presumed that a full-time work week is 40 hours, unless and until evidence establishes that use of a different number of hours would be more just;
  - (3) finally, multiply the result of paragraph (1) of this subsection by the adjustment factor derived in paragraph (2) of this subsection; the product is the average weekly wage for this injured employee.
- (f) For an employee who worked for the employer less than 13 weeks or whose wage at the time of injury cannot be fixed or determined, the average weekly wage will be calculated by using the method described in §128.3(e) of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees), based upon identification of a similar employee performing similar employment full-time.

*The provisions of this §128.4 adopted to be effective January 11, 1991, 16 TexReg 118.*

**§128.5. Average Weekly Wage Calculation for Seasonal Employees.**

- (a) A seasonal employee is an employee who as a regular course of conduct engages in seasonal or cyclical employment which may or may not be agricultural in nature, that does not continue throughout the year.
- (b) The average weekly wage used to determine temporary income benefits for seasonal employees shall be determined according to the procedure described in §128.3(d) or (e) of this title (relating to Average Weekly Wage Calculation for Full-Time Employees, and for Temporary Income Benefits for All Employees), subject to the periodic adjustment described in this rule.
- (c) The average weekly wage for computing temporary income benefits may be increased or decreased to more accurately reflect the seasonal nature of the employment, if such an adjustment would more accurately reflect the wages the employee could reasonably have expected to earn during the period that temporary income benefits are paid. Evidence of earnings shall be submitted at the time an adjustment is requested. The evidence should include proof of the employee's earnings in corresponding time periods of previous years. In case of a dispute, the commission shall set a benefit review conference to consider whether an adjustment should be made.
- (d) The average weekly wage used to determine impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for a seasonal employee shall be calculated by:
  - (1) adding together the total wages received by the employee in the 12 months preceding the date of injury and dividing the result by 50; or
  - (2) if it is impractical to compute the average weekly wage as provided by paragraph (1) of this subsection, another fair, just, and reasonable method as determined in a benefit review conference if requested by the person claiming income benefits or the insurance carrier.

*The provisions of this §128.5 adopted to be effective January 11, 1991, 16 TexReg 118.*

**§128.6. Average Weekly Wage Adjustment for Certain Employees Who Are Also Minors, Apprentices, Trainees, or Students.**

- (a) In order to adjust average weekly wage under this rule, for purposes of computing impairment income, supplemental income, lifetime income, and death benefits, an injured employee must come within one of the following definitions, on the date of injury:
  - (1) a minor is an employee less than 18 years of age and not emancipated by marriage or judicial action, and is also an apprentice, trainee, or student;
  - (2) an apprentice is an employee learning a skilled trade or art by practical experience under the direction of a skilled crafts person or artisan;
  - (3) a trainee is an employee undergoing systematic instruction and practice in some art, trade, or profession with a view towards proficiency in it; and
  - (4) a student is an employee enrolled in a course of study or instruction in a high school, college, university, or other institute of higher education or technical training.
- (b) The average weekly wage used to determine temporary income benefits for a minor, apprentice, trainee, or student shall be computed according to §128.3 of this title (relating to Average Weekly Wage Calculation for Full-Time Employees and for Temporary Income Benefits for All Employees), and may not be adjusted. The

basic average weekly wage for other income and death benefits shall be calculated depending upon whether the employee worked full-time, part-time, or as a seasonal employee, and may be adjusted as described in this section.

- (c) The average weekly wage of an employee who is less than 18 years of age, but not a minor as defined in this section, shall not be adjusted.
- (d) The average weekly wage used to determine impairment income benefits, supplemental income benefits, lifetime income benefits, or death benefits for an employee defined under subsection (a) of this section shall be adjusted on the basis of this rule if the employee also proves that:
  - (1) the employee's employment or earnings at the time of the injury were limited primarily because of apprenticeship, continuing formal training, or education that can be reasonably calculated to enhance the employee's future wages; and
  - (2) the employee's wages would reasonably be expected to change during the period for which the impairment income, supplemental income, lifetime income, and death benefits are payable not to exceed three years after the date of injury.
- (e) An insurance carrier and the person claiming income benefits may agree to adjust the average weekly wage used to compute impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits for an employee who meets the requirements of subsections (a) and (d) of this section. The adjustment shall not reflect the level of the expected wages for a period in excess of three years after the date of injury.
- (f) If an insurance carrier and the person claiming income benefits dispute the need for, or the amount of, an adjustment for expected wage levels, the commission shall schedule a benefit review conference. The commission shall then consider the evidence submitted by the insurance carrier and the claimant. Objective, documentary, or expert evidence is favored over testimony of interested parties, in determining an expected wage level which is fair and just.

*The provisions of this §128.6 adopted to be effective January 11, 1991, 16 TexReg 118.*

### **§128.7 Average Weekly Wage for School District Employees**

- (a) This rule applies only to school district employees injured on or after December 1, 2001. The calculations in this rule apply to the portion of the employee's average weekly wage (AWW) based upon the employee's employment with the school district where the school district is the "Claim Employer" as that term is used in §122.5 of this title (relating to Employee's Multiple Employment Wage Statement). The AWW of a school district employee injured before December 1, 2001, is computed using the law and commission rules in effect on the date of the injury.
- (b) For determining the amount of temporary income benefits of school district employees under Texas Labor Code Chapter 504, the AWW is computed on the basis of wages earned in a week. "Wages earned in a week" are equal to the amount that would be deducted from an employee's salary if the employee were absent from work for one week and the employee did not have personal leave available to compensate the employee for lost wages for that week. For this calculation "wages" includes only pecuniary wages.
- (c) For determining the amount of temporary income benefits of a school district employee, the AWW shall be computed as follows.
  - (1) For a school district employee working under a written contract with the school district, the AWW shall be computed by dividing the amount the employee would have been paid had the employee fully completed the terms of the contract (including any stipend the employee was earning or scheduled to

receive under the contract) by:

- (A) the number of days that the employee was required to work under that contract and multiplied by five (if the contract has specified the number of work days); or
  - (B) the number of months that the contract was to cover and then dividing the result by 4.34821.
- (2) For a school district employee who is employed on a non-written contract basis (i.e. hourly, daily, salaried, or other basis), the AWW shall be computed by dividing the total gross wages earned in the previous 13-week period immediately preceding the date of injury by 13.
- (d) The AWW for computing temporary income benefits may be increased or decreased to more accurately reflect wages the school district employee reasonably could expect to earn during the period for which temporary income benefits are paid.
- (1) An insurance carrier (carrier) may adjust the AWW based on evidence of earnings.
  - (2) A school district employee may request adjustments by submitting evidence of earnings to the carrier.
  - (3) For a period a school district employee would not have earned wages, the AWW may be adjusted to zero and no minimum benefit payment may be required.
- (e) For determining the amount of impairment income benefits, lifetime income benefits, supplemental income benefits, or death benefits, the AWW shall be computed in accordance with this subsection using only pecuniary wages.
- (1) The carrier shall add together the total wages earned by the school district employee during the 12 months immediately preceding the injury and dividing the result by 50 weeks.
  - (2) If the school district employee provides wage information from other employers for whom the employee worked in the 12 months immediately preceding the injury, these wages shall be included in the calculation of the AWW. Note that for injuries on or after July 1, 2002, the effect of wages from a Non-Claim Employer (as the term is defined in §122.5 of this title (relating to Employee's Multiple Employment Wage Statement)) on the employee's AWW is governed by §128.1(h)(2) of this title (relating to Average Weekly Wage: General Provisions).
- (f) In the event the school district employee and/or carrier believes that the AWW computed based on the calculations in this rule does not reflect the true AWW, the employee and carrier may enter into a written agreement regarding the AWW or request a benefit review conference.

The provisions of this §128.7 adopted to be effective May 16, 2002, 27 TexReg 4036.