

## **Means to Lower Average Weekly Wage with Temporary and Seasonal Employees**

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As the calendar turns to the Holiday Season, travelers will flock to their favorite destinations. This added traffic is great for business, but it also can place added stress to hotels, restaurants, and retail establishments. Some of these businesses may look to hire seasonal or temporary employees to relieve some of that stress. With that, there is a trade off as unfamiliar employees may not appreciate the risks or the physical requirements with the new job which may lead to more injuries. In North Carolina, this added potential exposure can be mitigated by taking advantage of their courts' interpretations of the definition of average weekly wage (AWW) found within the North Carolina Worker's Compensation Act.

North Carolina first looks at an employee's wages for the year prior to the work accident to determine the AWW. However, with seasonal or temporary employees, there is not a year of wages to consider. In that context, courts have looked to the additional four methods to determine the average weekly wage with an eye on the "fairness" to both the employee and the employer. In some cases where certain factors are established, they will ultimately land on the fifth method which is known as the catch-all method. This method's intent is to most nearly approximate the amount which the injured employee would be earning were it not for the injury.

In recent years, North Carolina Courts have addressed AWW in the seasonal and temporary employment context and have given Employers a road map with how they can mitigate their indemnity exposure. In *Tedder v. A&K Enterprises* (2014), claimant was hired to work as a seasonal delivery driver to help with the added workload during the Holiday Season.

As the peak season drew to a close, Mr. Tedder hurt his back in a compensable event. Mr. Tedder argued for an AWW that was equal to his weekly pay during his employment whereas his Employer argued that his total earnings expected for the duration of the seasonal assignment should be divided over a year's time. The N.C. Court of Appeals confirmed that under the Workers' Compensation Act, full-time workers must be treated differently than part-time, temporary, causal, or seasonal workers. In order to be fair to both the employer and the employee in computing an average weekly wage, the Workers' Compensation Act requires the average weekly wage to consider both the period that the employee worked, *as well as the period of slack*. In cases where the employment spans less than 52 weeks prior to the injury, the court approved computations where the total amount the worker could have earned in his employment had the injury not occurred be spread over 52 weeks.

The North Carolina Court of Appeals applied *Tedder* in the temporary employee/staffing company context in the *Nay v. Cornerstone Staffing Solutions* (2020). In that case, the court acknowledged that an anticipated hire as a permanent employee was not definite or guaranteed in a temporary employee situation. Nevertheless, the Court also stated that applying Method 5 was unfair when the temporary employee did not have a finite, limited period, or specified end date like the seasonal employee in *Tedder*. Given that there was no finite period expected at the time of hire, the court used Method 3 which divided the employees earnings by the number of weeks worked.

The decision in *Nay* left the door open to argue that if a temp agency has a definite, finite period for a given assignment, *Tedder* may be applied accordingly. This exact argument was recently litigated with success at the Deputy Commissioner level. In *Godinez v. Staffing Support Solutions, LLC* (Opinion and Award filed September 26, 2022), Clamant argued that his AWW

should be \$1,040.00 based on his \$26.00 hourly rate for an anticipated 40-hour work week. This would have equated to yearly earnings of approximately \$54,080.00 per year. Deputy Commissioner Patrick Wooten applied the fifth method instead. Deputy Commissioner Wooten considered the claimant's prior history with the staffing company where he earned \$0, \$4994.00, and \$21,119 in the three previous years, respectively. Deputy Commissioner also considered that the air conditioning project was estimated to last 6-8 weeks and that no further work was expected from the crew assigned to that project. The Deputy also noted that that no other project for another customer was ever promised to the Claimant. With no guarantee of future work beyond the finite period for the anticipated 6-8 week project, the Deputy found that the anticipated earnings by forecasting the total anticipated earnings based on a \$26.00 hourly rate for eight hours/day and 40 hours/week for eight weeks or a total of \$8,320.00 for the life of the project. After dividing the total anticipated earnings across 52 weeks for a year, this resulted in an AWW of \$160.00. Claimant has appealed the decision to the Full Commission.

The development of the AWW case law in the context of part-time, temporary, causal, or seasonal workers is a positive development for employers as it allows them to pay workers' their fair yearly wage rather than an inflated yearly wage that was never anticipated or expected. However, Courts have said that in order for employers to take advantage of this interpretation, there must be a finite, anticipated end date to the employment or project at the time of hire. Otherwise, the employee will be treated as a typical at-will employee whose employment is expected to last indefinitely even if the injury occurs less than a year into the employment relationship.