

BRUYNS Fred H * DCBS

From: Bin Chen 
Sent: Thursday, April 26, 2018 9:40 AM
To: BRUYNS Fred H * DCBS
Subject: RE: Invitation to rulemaking meeting and request for advice

Importance: High

Hi Fred:

In preparation for the rulemaking meeting next Monday, I want to send you an email to outline one of my concerns regarding the temporary rule that is currently in effect.

The current temporary version of the rule on the calculation of irregular wages (Subsection 4), provides, in relevant part:

(b) If, on the date of injury or verification of disability caused by occupational disease, the worker had been employed by the employer at injury for four weeks or more, the insurer must average the worker's irregular wages for the period up to 52 weeks of employment before the date of injury or verification of disability caused by occupational disease, subject to the following:

(A) The insurer may not include any gap in earnings of more than 14 days that was not anticipated in the wage earning agreement, when calculating the average wages;

(B) If the worker began work under a new wage earning agreement in the 52 weeks before the date of injury or verification of disability caused by occupational disease (and there is no subsequent pay increase or decrease), the insurer must average wages only for the weeks worked under the most recent wage earning agreement; and

(C) When there has been a change in the worker's wage earning agreement due only to an increase or decrease in the pay rate during the 52 weeks before the date of injury or verification of disability caused by occupational disease, this is not a "new wage earning agreement." In this situation, the insurer must calculate the worker's average weekly hours worked at each pay rate since a new wage earning agreement went into place, but not to exceed 52 weeks. The average weekly hours worked at each pay rate must then be multiplied by the pay rate(s) at the time of injury or verification of disability caused by occupational disease to determine the worker's average weekly wage for these wages. If there are irregular wages not paid at an hourly rate, the worker's average weekly wage under this paragraph must be added to the average of all of those other irregular wages paid at something other than an hourly rate.

I will provide the following scenario to help illustrate the potential conflict in the application of subsections (B) and (C). Let's say claimant begins working as a crew member at a fast food restaurant as of January 1, 2017 making \$10.50/hr. Claimant is subsequently promoted to a manager position with additional responsibilities with an increased pay to \$15.00/hr on May 1, 2017. Claimant then receives a pay increase as of July 1, 2017 to \$17.50/hr. Claimant gets injured on September 1, 2017.

At first glance it would seem that either subsection (B) or (C) could apply. Since there is a new wage earning agreement on May 1, 2017 (since that's the only trigger for application of subsection (B)), the carrier would be required by subsection (B) to average wages since the May 1, 2017 new wage earning agreement (when claimant was promoted to manager). However, in this scenario, the new wage earning agreement was followed by a wage increase on July 1, 2017, and subsection (C) would require the carrier to average claimant's weekly hours since the July 1, 2017 pay increase and multiple the average weekly hours by \$17.50/hr. The two different methods of calculation likely would not provide the same result.

It seems to me that the language "rate since a new wage earning agreement went into place" in (4)(b)(C) implies the Department intended for subsection (C) to apply in this scenario, which would make sense. However, I would like to see some language in the

permanent rule that clearly states in the event there is a new wage earning agreement followed by a pay increase or decrease, the subsection (C) method (i.e., multiplied the average weekly hours worked by the wage at injury) would apply. I think the proposed language in red text in parentheses outlined above could give the carrier more of a bright-line rule and avoid unnecessary litigation over time loss disputes in the long run.

Thank you for your attention to this matter.

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