Computation of Wage Loss During the Depression Under the Workmen's Compensation Acts

Michael Levin

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SINCE the enactment of the Wisconsin Workmen's Compensation Act, many of the vexatious problems of personal injury litigation between employer and employee have been eliminated, and thefield of law governing the relationship of master and servant has been materially affected. The questions of liability and non-liability, the defenses of fellow servant, assumption of risk, and contributory negligence are no longer before the courts. Through this statute the state has endeavored to eliminate the troublesome and expensive luxury known as personal injury litigation, substituting, in effect, a system whereby every employee may receive reasonable recompense for injuries accidentally sustained in the course of his employment, without recourse to a lawsuit and the resulting friction.

The simple hypothesis underlying the theory of the Workmen's Compensation Act was that industry should bear the economic loss of individuals and their families brought about by injuries or death occurring within the scope of employment. The theory is predicated upon two basic conclusions; that the loss occasioned by human injury or death should be added to the costs of the industry responsible for such loss, and that, instead of spending large sums for the investigation and litigation incidental to a prolonged dispute over claims, it would be far more practical to direct such money to a useful purpose, that is, to indemnify the persons who have suffered the physical and economic loss. It was obvious that the prevailing haphazard tactics which existed between employer and employee prior to this legislation, fostering as they did a bitter and resentful relationship between the parties, did little to assuage the hardships born by victims of industrial accidents.

The realization of the growing need for a more logical solution of these problems brought about the passage of the Compensation Act, and as the public grew to understand and accept the principle of employer liability in industrial accidents, there came a demand for inclusion of the more intangible field of occupational disease. Having imposed upon industry the liability for work accidents through the stripping away of defenses in master and servant actions, it followed logically that, as a corollary to the Compensation Act, the matter of indem-

1 Wis. Laws 1911, c. 50.
2 See Borgnis v. Falk, 147 Wis. 327, 337, 133 N.W. 209 (1911).
nity for occupational disease should be included therein. It seemed reasonable that if industry should rightfully bear the burden of industrial accidents, it should just as rightfully bear the cost of occupational disease. In 1919 the Wisconsin Legislature enacted such a law.

The problem of interpreting this law became a matter for judicial decision, and attempts to sustain it have severely taxed the resourcefulness of the courts. Unlike the more easily administered accident compensation measure, the problem of indemnity for occupational disease has not, and perhaps never will become a simple or clearly defined matter. The time and place of an accident are easily established. There is now no serious question as to the constitutionality or justice of employer liability for industrial accidents, and it is no longer difficult to determine where such liability shall attach. But as to indemnity for occupational disease, serious questions still exist. No clearly recognized right can be said to exist whereby the worker is entitled to compensation for damages resulting from occupational disease. In Wisconsin this right is purely statutory, finding no premise or analogy in the common law. It has been suggested that the risk of such disability should be born by the worker as well as the employer, as it is a risk inherent and incidental to the occupation which the worker has voluntarily chosen. Theoretically, this doctrine may seem tenable, but when analyzed in the light of present day realities such reasoning becomes mere sophistry. Nor can it be said that an administrative board, even with the advantage of medical advice, is able unerringly to determine whether a diseased condition resulted entirely from a present employment. The query arises as to whether it is proper to impose full liability upon the present employer, or should the previous employer bear the burden of the award if it is shown that such employment contributed to the injury? If so, from what principle or law does such liability derive, and for how long shall potential liability continue in respect to a former employer? Coupled with these questions is the problem of determining damages, intangible and conjectural as they necessarily are, keeping in mind the constitutional questions involved in the method of computation and amount awarded, ever considering the elements of continuous or discontinuous employment. It thus becomes evident that the courts have had to abandon certain established principles and chart

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3 "Occupational disease as well as industrial accidents is a part of the expenses and ravage of industry." See Wis Granite Co. v. Ind. Comm., 208 Wis. 270, 273, 242 N.W. 191 (1932).

4 Wis. Laws 1919, c. 457 (effective July 5, 1919), c. 458.

5 "The right of an employee to compensation for an occupational disease hangs by a slender thread. * * * It has required no little judicial ingenuity to save the right in many cases where the legislature * * * seemed to intend compensations to be paid." See Nordberg Mfg. Co. v. Ind. Comm., 210 Wis. 398, 403, 245 N.W. 680 (1933).
new law in order to preserve for the worker that protection which the legislature seemed to intend.

The recent depression has created many situations of re-employment and new employment, and the medical examinations necessarily conducted have revealed many instances of previously unsuspected occupational disease among workers in fairly hazardous industries, particularly foundries, granite quarries, and the like. It was found that a portion of these workers were suffering from silicosis and tuberculosis, superinduced by pneumonoconiosis developed in the course of their employment. Claims were filed in these cases, and the wide publicity given the matter induced other workers, engaged in the same or similar occupations, to seek medical attention, with a resulting flood of claims for occupational illness. Awards granted to claimants for occupational diseases have been so large that liability insurance companies have sought to withdraw coverage in industries where silicosis and like diseases develop.6

An introduction to the problems existing under the act including recent developments in the growing field of occupational disease, is necessary to a complete portrayal of the problem of computing wage loss during the depression. This matter had never before been serious, but the depression brought certain complications. Previously, in order to bring both parties under the act, it was necessary to establish only the relationship of employer and employee, coupled with an injury or occupational disease arising out of this relationship.7 When the parties were found to come within the scope of the act, the statutory scheme applied, the annual wage being computed as three hundred times the average daily wage, and where no other questions were involved the award was made promptly and paid. However, as industrial activity became staggered, as employment declined to new low levels, as Congress and the various legislatures attempted to distribute employment among the greatest number of workers, a serious question arose concerning the best method of wage computation.8 The Wisconsin statute and the statutes of other states had carefully provided for computation under the previously existing circumstances, but such methods, as interpreted during times of continuous employment, were found inapplicable to depression conditions. The courts, therefore, were obliged to abandon the previously applied schemes and search further

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7 See Conveyor Corp. v. Ind. Comm., 200 Wis. 512, 228 N.W. 118 (1930).
8 The earliest case considering these questions in this country was Andrejewski v. Wolverine Coal Co., 182 Mich. 298, 148 N.W. 684 (1914). Of occupational disease it is said in Wis. Granite Co. v. Ind. Comm., 208 Wis. 270, 242 N.W. 191 (1932): "When occupational disease was made compensable under the machinery and pursuant to the provisions set up for the compensation of industrial accidents, the arising of anomalous situations became inevitable."
into the statutes for a method with which to cope with these new conditions.\(^9\)

The Wisconsin Act, similar for the most part to those of other states, provides three general methods for the computation of an employee's average annual earnings. a) If he has been employed in the same type of work for substantially all of the preceding year, such earnings shall amount to three hundred times his average daily wage.\(^10\) b) If he has not been so employed, his earnings shall amount to three hundred times the average daily wage of an employee of the same or similar class engaged in the same or similar employment and locality for substantially all of the preceding year.\(^11\) c) If the foregoing methods cannot fairly and reasonably be applied, then the employee's earnings are to be ascertained as that sum which reasonably represents his annual earning capacity in the employment in which he was injured, taking into consideration his previous earnings and the earnings of other employees in the same or most similar employment in the same locality.\(^12\) The average daily wage used in computation under the first and second methods is to be determined on the basis of an eight hour day, unless a day of fewer hours has been established through agreement or custom.\(^13\) The average weekly wage, upon which basis the amount of weekly compensation is determined under the act, consists of one fiftieth of the average annual earning;\(^14\) and the percentage of such weekly wage given as compensation must bear a reasonable relation to the loss of earning capacity in the employment at the time of the injury or disability.\(^15\)

The first method of computing average annual wage covered a great proportion of the cases arising prior to the depression. In times of continuous employment there is little turnover and consequently little shifting from job to job, and thus most of the claimants were workers of long standing whose records of wages extended back over a period of many years. It was not difficult to determine the earnings of workers in this classification. But as employment became staggered and intermittent, the number of workers in this class declined. Great numbers of men accepted jobs of temporary duration; others continued working at the same job, but only during periods when the industry

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\(^9\) "Exactly as these laws were passed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, * * * so has the depression brought about many serious problems for determination by the court. It might well be said that lawyers not only have been required to 're-learn the law,' but 'learn new law.'" Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911).

\(^10\) Wis. Stats. (1933) § 102.11 (2) (a).

\(^11\) Wis. Stats. (1933) § 102.11 (2) (b).

\(^12\) Wis. Stats. (1933) § 102.11 (2) (c).

\(^13\) Wis.-Stats. (1933) § 102.11 (2) (d).

\(^14\) Wis. Stats. (1933) § 102.11 (1).

\(^15\) Wis. Stats. (1933) § 102.11 (5).
operated; and still others found steady but part-time employment. The first method of computation was inapplicable in circumstances such as these, for the essential element, continuous employment upon an eight hour basis, was lacking.

It was thought by some that the second method, that of basing the computation upon the experience of a worker of the same or similar class, could be used in these situations, but a consideration of the consequences attending such computation dispels the idea. Certain industries have succeeded throughout the entire period of the depression in giving their employees full time employment, while other industries engaged in the same or a similar business have not been as fortunate. Now consider the problem brought about by an injury to a worker employed by an industry resuming operations after a prolonged period of inactivity and where such operations are known to be of temporary duration. Would it be equitable to base compensation upon the employment experience of workers engaged in similar employment in a similar industry which had operated continuously? Consider the case of a night watchman, taken on under a share-the-work plan after several years of unemployment, and injured shortly after his employment. Is it equitable to base compensation in this case upon the employment experience of the full time, higher paid watchman whom the additional workers had displaced, multiplying by three hundred his average daily wage to determine the average annual earnings of the part time, temporary employee? The Wisconsin court has held, in instances such as these, that the proper method for computation is that outlined under (c), that the alternative employee whose record was taken as the standard was not an employee of the same class, therefore not subject to comparison. Compensation under (b) is computed on the same basis as that under (a), considering that the circumstances are such that while the employee has not worked at the job in which the injury was

16 "The true test is ** what were his earnings in a normal week regard being had to the known and recognized incidents of the employment. If work is discontinuous, that is an element which cannot be overlooked." Anslow v. Carrick Chase Colliery Co., Ltd., [1909] A.C. 435, 78 L.J.K.B. 679, 25 T.L.R. 570, 2 B.W.C.C. 365.

17 "In determining what 'reasonably represented' deceased's earning capacity, the commission entirely disregarded 'the previous earnings of the employee.' It considered that the previous watchman was an employee of the same or most similar class, and took his annual earnings as the sole measure of the earning capacity of the deceased 'at the time of his injury' in disregard of the stated terms of his employment and the existing absence of opportunity to procure constant and regular employment." Allis-Chalmers Mfg. Co. v. Ind. Comm., (Wis. 1935) 255 N.W. 887. Speaking of the matter of awarding compensation upon a full-time basis in cases where claimants' employment had been intermittent and discontinuous during the preceding year, it is said, "To apply subdivision (b) ** would give rise to grave questions as to the constitutionality of the statute." Marshall v. Andrew F. Mahoney Co., 56 F. (2d) 74 (C.C.A. 9th, 1932), quoted with approval in Allis-Chalmers Mfg. Co. v. Ind. Comm., (Wis. 1934) 255 N.W. 887.
sustained during substantially the whole of such preceding year, nevertheless there was opportunity and ability to do such work either on behalf of the employer where he was employed, or for some other employer in the same industry and neighborhood. The plan presupposes a condition of continuous employment available to the injured employee or actually experienced by some other employee, and therefore is not suitable to conditions of discontinuous employment.

It would seem, at first glance, that the method of computation offered under (c) would provide the solution of this problem of wage computation, but here, too, there are certain situations not adequately covered. This plan doubtless was included to take care of conditions existing in seasonal industries, and while some of the problems involved in seasonal employment are found to exist during depression periods, not all of the issues are identical. Seasonal employment, as such, is fairly constant, that is, the periods of activity and inactivity recur regularly throughout the years. A standard and a norm is not difficult to establish. The workers engaged in such industries have similar employment records, and the matter of computation is not a great problem. Since corresponding industries have like periods of activity and comparisons may be accurately made between the workers of similar industries, the average annual earning capacity of an injured employee is not hard to determine under these circumstances. But in the event that the work is staggered and the employment is part time and intermittent, or that there have been frequent shifts in employment, or that the injury occurred while the employee was performing work which gave no employment sufficiently continuous to estimate annual earnings, what standard could be used as a basis for computing the average annual earning capacity mentioned in the act? When the law was enacted it was necessary to evolve some basis for computation. It was deemed fair and proper at that time that computation should be on the basis of average annual earnings during the preceding year. Whether this basis is fair and just under depression conditions is a question for the legislature, but it cannot be disputed that, in order to preserve the fundamental, underlying principle of the present act, that of compensation for actual economic loss, some such standard must be maintained.

A startling illustration of what may happen under other methods of computation is found in North End Foundry v. Ind. Comm., (Wis. 1935) 258 N.W. 439. Here five employees, working respectively 13, 15, 16, 21½ and 38 per cent of the preceding year, claimed compensation for loss of earning capacity through occupational disease. The Commission awarded compensation on the maximum basis with the result that one of the claimants received an award six and one-half times greater than his earnings during the previous year. (On appeal the Circuit Court directed an award on the basis of previous earnings. The judgment on the awards was set aside in the Supreme Court on other grounds.)
The court, in considering this problem, has held that the compensation must bear a reasonable relation to the loss sustained by the employee or his dependants by reason of the injury or death. This, in effect, is the very essence of the statute. The act contemplates compensation for loss of earning capacity actually sustained, not insurance or damages for injury. Earning capacity, the loss of which constitutes the compensable factor, is defined by the court as "willingness to work coupled with the opportunity to work." If this earning capacity is partially or totally impaired by reason of an injury sustained during the course of employment, the employer is liable to the full extent of such loss. But the loss, as computed, must be actual. Potential earning capacity may not be considered where the record shows the actual capacity at the time of the injury. If such capacity appears low because of past inability to obtain continuous employment, it is not within the scope of administrative power to arbitrarily increase such capacity to an amount more nearly reasonable in the light of normal conditions. This essential, "the opportunity to work," is a risk to be born by the worker, not the employer, and where earning capacity is decreased because of discontinuous employment, this is a factor to be considered in a determination of the actual loss sustained by virtue of the injury.

21 Presque Isle v. Ind. Comm., 200 Wis. 446, 228 N.W. 589 (1930).

23 See note 17 supra.
25 "Reduction in earning capacity occasioned by general business conditions and not due to the injury should not be considered. The statute contemplates that compensation is to be paid for diminished capacity to earn wages; and the employee, in common with others, must bear the loss resulting from business depression." Capone's Case, 239 Mass. 331, 132 N.E. 52 (1921). See also Littler v. Fuller Co., 223 N.Y. 369, 119 N.E. 554 (1918); San Martin v. Rock & Sons, (Vt. 1934) 172 Atl. 635; Sugars v. Ohio Match Co., (Idaho 1933) 23 P. (2d) 743 (The element of discontinuous employment must be considered). The rule is applied under varying circumstances in
The second factor to be considered in determining the average annual earnings of the injured employee is the previous earning record of other employees of the same or similar class, in the same or similar employment in the same or neighboring locality. This element fits squarely into the situation of seasonal employment and affords an expeditious and reasonable method of computation under those circumstances. It is not, however, particularly adapted to the conditions found to exist during a period of depression. Employment during a depression is not equal for men of the same class engaged by the same employer, to say nothing of the inequality of employment existing among men of the same class employed by divers employers. To premise a standard or a rule upon such dissimilar employment experiences would be to open the way to unjust and capricious awards. It would then be possible to compute the average annual earnings of a worker, unemployed for substantially the whole of the preceding year, upon a basis which included the experience of a worker employed during a substantial portion of the preceding year. Obviously such computation would defeat the end intended by the legislature, and so the Wisconsin court has ruled.

The qualification in the act providing for computation on the basis of an eight hour day is not mandatory in the sense that it must be applied to computation under depression conditions. It provides that an eight hour day shall be used as the standard, unless a day of fewer hours has been established through agreement or custom. Many employers throughout the depression voluntarily adopted share-the-work plans in order that a greater number of workers might be self-supporting. These plans necessitated a reduction in the daily hours worked per man. The courts, in most instances, have held that this reduction in daily hours was created either by law or by agreement, and have directed that compensation be awarded for loss of earning capacity as it existed at the time of the injury. In the absence of an express statutory provision to the contrary, this is the most reasonable and just interpretation. To hold otherwise would be to work a palpable injustice and raise a serious question as to the constitutionality of the

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26 "The insurance carrier, who has rights and obligations under the statute, may charge premiums only on the basis of the current payroll; and yet if other years of greater or less activity were permitted to lessen or increase its obligations, the result would be not only unjust to the carrier or to the claimant, as the case might be, but the very solvency of the insurance carrier might be jeopardized." Bodowski v. Atlas Steel Casting Co., 237 App. Div. 667, 263 N.Y.S. 255 (1933).

27 Builders' Mutual Casualty Co. v. Ind. Comr., 213 Wis. 246, 251 N.W. 446 (1933).
statute. It is just as obvious that it would be improper to compute the average annual wage upon the basis of some other workers' employment experience. The only fair method, the only method which substantially carries out the purpose of the statute, is that method which results in a figure most nearly approximating the true or actual loss suffered by the employee. As pointed out previously, there was no standard of employment during the depression. Few workers had like records of employment. Thus it was necessary to determine the contract or agreement of employment existing between the injured employee and the employer at the time of the injury, and, in conjunction with the previous earnings of that employee, compute the wage loss upon these factors alone.

The courts, in their attempts to retain the original purpose of the act, have been forced to apply as best they could a law which was not drafted in contemplation of depression conditions. The vague and indefinite character of the act, as applied to the conditions under discussion, has placed the courts in a delicate position. Faced with constitutional restrictions upon their powers, they have attempted to stay within the prescribed limits in their efforts to establish a method at once practicable and legal. This has been particularly difficult in connection with the problem of occupational diseases. Though from a sociological viewpoint it may be more desirable to administer compensation in these cases according to some other plan, the legislature has failed to provide the necessary method. The complicated problems attending the matter of occupational disease have occasioned great concern and no little specious reasoning on the part of the courts. The difficulty here has been to determine just when disability begins and where liability shall attach. Since the courts cannot originate law, they have been forced to apply the strict interpretation of the term "disability." Thus the "time of the accident" in cases of occupational disease is held to be that time when the employee is forced to quit work because of his affliction. It may be suggested that potential disability began long in advance of this actual disability, perhaps during a period when the average annual earnings of the employee were greatly in excess of the amount at the "time of the accident." It may also be suggested that such potential disability began under another employer, and if so such other employer should contribute proportionately in the award. This situation is not uncommon during depression conditions, but in the absence of a contrary intent in the act the employer under whom the "accident" occurred is held to full liability. Unable to apply the existing statutes otherwise, the courts have persistently called attention to the need for more definite legislation upon these matters.28

28 The court in *Wis. Granite Co. v. Ind. Comm.*, 214 Wis. 328, 252 N.W. 155 (1934), calls attention to the lack of specific statutory direction concerning
Where the methods outlined under (a) and (b) were not applicable, computation of wage loss during the depression has been administered under a modified form of method (c). Where circumstances have permitted, the average annual earnings have been computed on the basis of the previous earnings of the injured employee coupled with the earning records of other employees of the same class in the same employment in the same locality. Where circumstances were not such as to admit of a strict application of this method, the computation was on the basis of the previous earnings of the employee and the conditions of his employment at the time of the accident. In the last analysis, the courts have directed that the award must be consistent with the actual impairment of earning capacity, i.e., the actual economic loss suffered by reason of the accident. In the majority of states the methods outlined under (a) and (b) have been disregarded except in instances where continuous employment was experienced by the principle employee or available to him and experienced by others. There exists a minority group in which compensation has been awarded on a maximum basis. Average annual earnings in some of these states have been computed as three hundred times the daily wage, disregarding entirely the fact that the injured employee may have been unemployed for substantially all of the preceding year. In other states the average daily compensation under depression conditions, particularly citing the vagueness as to occupational disease.


30 The earlier Utah case of *State Road Comm. v. Ind. Comm.*, 56 Utah 252, 190 Pac. 544 (1920) declares that no person can have an earning capacity greater than the opportunities afforded by employment, but in *Morrison-
wage has been computed upon the basis of an eight hour day. It may be said that in some of these states computation has been such because of statutory direction, but in others it has been in apparent disregard of the stated terms of the statutes, which generally provide that due regard must be given to previous earnings and the terms of the employment at the time of the accident. States administering their acts in this manner have lost sight of the original purpose of this legislation. Under these methods of computation there is no longer compensation for loss actually sustained, but rather a scheme of insurance guaranteeing to the worker an award based upon a full time employment which he did not enjoy prior to the accident.

Under the circumstances, it seems that the better reasoning is that if employment was not staggered, if it was not intermittent, and if it was not discontinuous, it would not be fair to invoke that provision of the statutes which gives minimum compensation but, by the same token, where there is no work available, and the regular employment of the employee is intermittent, staggered, and occasional, certainly it is unfair to allow compensation on the basis of full time employment. Where statutory provisions permit recovery of compensation on the full time basis, even though employment is irregular, no fault can be found with the decision of the courts, but where the statute specifically provides that awards shall be allowed only on the basis which "reasonably represents the actual earning capacity at the time of the injury or disability," then fairness, equity, and a reasonable consideration of the statute dictate that compensation should be allowed on the basis of actual earnings during the preceding year in accordance with the method of making calculations as specified by statute, not, however, below its minimum recovery provision.

Merrill & Co. v. Ind. Comm., 81 Utah 363, 18 P. (2d) 295 (1933), by virtue of an amendment providing that the average weekly wage be computed by multiplying the daily wage by three hundred and dividing by fifty-two, the previous holding was overthrown and computation was made upon the maximum basis.

Rylander v. Smith & Sons, Inc., 177 La. 716, 149 So. 434 (1933) (Compensation was granted on a full-time basis by virtue of a statutory provision.) Cf.: Durrett v. Unemployment Relief Adm., (La. 1934) 152 So. 138 (Here the court avoided the effect of the statute, holding that it applied only in the absence of an agreement limiting the number of work-days per week); Suire v. Union Sulphur Co., (La. 1934) 155 So. 517 (A code limiting working hours, adopted under the federal act, takes precedence over the statute and compensation must be based on the mandatory week of 4½ days). Georgia Power Co. v. McCook, 48 Ga. App. 121, 172 S.E. 78 (1933) (Compensation granted on full-time basis because of statute); Aetna Life Ins. Co. v. Ind. Comm., 130 Cal. App. 488, 19 P. (2d) 273 (1933); Cal. Casualty & Indemnity Exchange v. Ind. Comm., 135 Cal. App. 476, 27 P. (2d) 782 (1933) (In the last two cases, however, it does not affirmatively appear that the claimants were unable to secure employment additional to that shown by the record).
