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Workers' Compensation Alert

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Supreme Court of Ohio Requires Industrial Commission to Consider Adequacy of Job Search by Seasonal Worker before Excluding Periods of Unemployment from Calculation of Average Weekly Wage

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In Ohio's workers' compensation system, a claimant's average weekly wage ("AWW") is used as the basis for determining compensation. Ohio Revised Code Section 4123.61 governs the calculation of the AWW. As a general rule, a claimant's AWW is equal to his or her average weekly wage for the year preceding the injury (or the date the disability due to the occupational disease begins). An exception to the general rule provides that any period of unemployment due to any cause "beyond the employee's control" should be excluded from the calculation. The main objective of the AWW amount is to do substantial justice to the claimant, but at the same time not provide a windfall.

A claimant with a period of unemployment during the year preceding the injury has an incentive to exclude such period of time when calculating the AWW because it will result in a higher amount. The Court's recent decision in *State ex rel. Warner v. Indus. Comm.*, 2012-Ohio-1084, will make it more difficult for a claimant to exclude periods of unemployment from the calculation of his or her AWW.

In *Warner*, the claimant, Rick D. Warner, was injured on September 7, 2007, while working on a paving crew. Mr. Warner's employer, Central Allied, was in the business of paving roadways, which was seasonal-type work. Mr. Warner would apply for unemployment compensation during winter layoffs. After his workers' compensation claim was allowed, Mr. Warner requested temporary total disability ("TTD") compensation, which required the calculation of his AWW. For the year prior to September 7, 2007, Mr. Warner worked for Central Allied for 30 weeks and had been unemployed for 22 weeks. Mr. Warner requested that his AWW be calculated in one of two ways: (1) exclude his 22 weeks of unemployment, as well as the unemployment compensation he received; or (2) include the 22 weeks as well as the unemployment compensation he received during such time.

The Industrial Commission rejected Mr. Warner's recommendations, finding that his 22 weeks of unemployment should be included, and his unemployment wages excluded, because his unemployment was a "lifestyle" choice (i.e., his weeks of unemployment were not beyond his control). Mr. Warner subsequently sought a writ of mandamus in the Franklin County Court of Appeals. The Court found the Industrial Commission abused its discretion by not including Mr. Warner's unemployment compensation because such amount was federally taxable. The Court also took issue with the Industrial Commission's finding that Mr. Warner did not provide evidence that he had looked for other work during his period of unemployment because his receipt of unemployment compensation was conditional upon proof of a search for jobs. Central Allied and the Industrial Commission filed appeals to the Supreme Court of Ohio.

The Supreme Court of Ohio had to determine whether the Industrial Commission abused its discretion. The Court first determined whether Mr. Warner's 22 weeks of unemployment were beyond his control. Mr. Warner argued his 22 weeks of unemployment were beyond his control because he did not voluntarily choose to remain unemployed as evidenced by his receipt of unemployment compensation. Relying upon its 2004 decision in *Baker Concrete*, the Court rejected Mr. Warner's argument because Ohio's unemployment and workers' compensation systems are independent, and therefore, the receipt of unemployment compensation does not automatically mean a claimant's unemployment was beyond his control. Central Allied and the Industrial Commission argued that Mr. Warner's 22 weeks of unemployment were not beyond his control because he anticipated the winter layoff. The Court rejected the argument, again relying on *Baker Concrete*: "Foreseeability of job loss does not necessarily render seasonal unemployment voluntary." The Court ultimately remanded the matter back to the Industrial Commission because it "never addressed the adequacy of [Mr.] Warner's job search"

The Court also determined whether Mr. Warner's unemployment compensation should not have been included in the AWW calculation. The Court ruled that federal taxability of unemployment compensation has no bearing on whether such compensation should be included in the AWW calculation. The Court cautioned that inclusion of unemployment compensation could create a windfall for the claimant where the Industrial Commission determined that the period of unemployment was beyond the claimant's control.

The *Warner* decision is a great additional defense tool for companies that employ seasonal workers because it further solidifies the burden imposed upon a claimant when trying to exclude weeks of unemployment compensation for reasons beyond his or her control. The mere fact of unemployment is insufficient to exclude those weeks from the AWW calculation. Instead, the claimant must show what efforts were made to prove why the unemployment was beyond his or her control.

Every claim is fact-specific. To find out how *Warner* may impact one of your pending claims, please contact Mark A. Shaw or Garrett M. Cravener in Eastman & Smith Ltd.'s Columbus office by calling 614-564-1445.

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