Best Practices for Adjusters No. 2
FRUSTRATIONS WITH FRINGE BENEFITS

Every adjuster accepts that the fringe benefits that an employee receives from their employer are to be investigated and considered when calculating the Average Weekly Wage. It is unfortunate that most training that is offered rarely provides more direction than simply stating that fringe benefits are to be included in the calculation. Parker & Landy, LLC would like to take this opportunity to provide you with a better understanding of fringe benefits in the calculation of the Average Weekly Wage. This topic is frequently overlooked, yet also frequently leads to the risk of a $2,000.00 penalty being assessed, due to a miscalculation of the Average Weekly Wage, and further, if your calculations were too low, you could also invite an additional $2,000.00 penalty for underpayment of the indemnity benefits.

DISCLAIMER GIVEN THE LAW

Is this the **right** answer to how you are to calculate fringe benefits? Unfortunately, the courts are not consistent enough to say that this is the absolute right answer. Despite the research that went into this memorandum, the best that we can say it considers the various arguments over the years raised by both sides and tries to reach a consensus as to the most correct answer available. But always remember, when it comes to a penalty claim for improper calculation, you can be wrong and avoid a penalty if your position is "reasonable." While basing your decision on these rules is not a guarantee that you can avoid that penalty, your defense against that penalty position will be much stronger if you can later point to these rules and cases as guiding your decision.

WHY DO WE INCLUDE FRINGE BENEFITS?

The short answer is that the Workers' Compensation Act states that fringe benefits must be included. Under LSA-R.S. 23:1021(13)(f), we find the following language:

> **(f) Income tax.** In the determination of "wages" and the average weekly wage at the time of the accident, no amount shall be included for any benefit or form of compensation which is not taxable to an employee for federal income tax purposes; however, any amount withheld by the employer to fund any nontaxable or tax-deferred benefit provided by the employer and which was elected by the employee in lieu of taxable earnings shall be included in the calculation of the employee's wage and average weekly wage including but not limited to any amount withheld by the employer to fund any health insurance benefit provided by the employer and which was elected by the employee in lieu of taxable

earnings shall be included in the calculation of the employee's wage and average weekly wage.

This provision is not entitled "fringe benefits," however, this 1999 provision and a later 2001 amendment was passed by our legislature in an effort to codify the prior court decisions that addressed the need to include the value of fringe benefits in the average weekly wage. Case law addressing fringe benefits, both prior to and after this statute was passed, has unfortunately been inconsistent and difficult to follow. However, this case law has provided some areas of consistency, from which we can arrive at the following general rules:

WHAT FRINGE BENEFITS ARE INCLUDED?

The first step is to determine which fringe benefits are offered by the employer, and to determine the details of how, why, when, and with what frequency the employer provides the benefit. Then, it is essential to determine if that benefit is to be included in your Average Weekly Wage calculation.

The general consensus is that there are, in fact, two types of fringe benefits to be considered for possible inclusion, after the 2001 amendment to the Act:

(1) Any benefit other than an employee's regular pay that is taxable to an employee for federal income tax purposes is typically the main category of fringe benefits to be considered. Unfortunately, this type of benefit requires that you consult the Internal Revenue Service (IRS) to determine which benefit is taxable, and those rules change annually. Available online, you will need to refer to the IRS "Publication 15-B, Employer's Tax Guide to Fringe Benefits" for the appropriate year the benefit was paid. Common examples include mileage paid to an employee or a per diem. If that taxable benefit was provided in the four full weeks prior to the accident, the amount paid to the employee is added to the individual week, before you calculate the gross earnings for that period. For those workers that will have their average weekly wage calculated, based on their earnings in the four full weeks prior to the accident, you must include any annual or sick leave used by the employee in those four weeks prior to the accident. While some may argue that unused benefits, such as vacation benefits, that are not used are "taxable" and therefore should be included, the Louisiana Supreme Court in *Hargrave v. State ex. rel Dept. of Transp. and Development*, 54 So.3d 1102 (La. 1/19/11) held that such an interpretation is too broad. The Legislature likely did not anticipate that "potentially" taxable benefits should be included. Ordered by the Supreme Court to follow *Hargrave*, the Third Circuit Court of Appeals in *Clay v. Our Lady of Lourdes Medical Center, Inc.*, 71 So.3d 539 (La. App. 3 Cir. 7/12/11) held that only those benefits used in the four full weeks prior to the accident were to be included. Unused benefits that were accruing, such as sick leave, were not to be included unless used and taxed in those four full weeks.

- Bonuses are covered under this category, but the calculation is different. If the bonus is paid during the four full weeks prior to the accident, it would be included but you need to divide the bonus for the time period it covers. For example, a $5,000.00 Christmas bonus is considered an annual bonus, and it must be converted to a weekly value if the bonus was received in the four full weeks in your calculation. Thus, that bonus equates to $96.15 per week, as that is the result arrived at by dividing $5,000.00 by 52 weeks. Then, $96.15 that is added to your Average Weekly Wage. Relying upon the ruling in the ***Clay*** case, there is an argument that benefits accruing are not included unless they are taxed within those four full weeks. *Bonuses and how they are to be calculated have not been addressed since Clay, so this suggestion has not yet been tested before the courts.*

- The most common benefits you may encounter include mileage for employees who travel for work, as well as per diem, and meal reimbursements. The items are taxable and generally included.

(2) The second category of benefit to be considered is any amount that is withheld by the employer to fund any nontaxable, or tax-deferred, benefit. This type of benefit would also need to be included in the calculation of the Average Weekly Wage if that fringe benefit was "[voluntarily] elected by the employee in lieu of taxable earnings." If a benefit is offered to the employee as a condition of employment, and the employee's receipt of the benefit is voluntary, and if it is accepted by the employee, then the law requires you to include what the employer paid for that benefit. The law presumes that had that benefit not been offered, the money spent by the employer for that benefit would have gone to the employee as taxable wages. As an example, consider employees who sign up for a long-term disability policy or health insurance. The employee who refuses the benefit would presumably earn slightly more in each check, as there is nothing removed from their check to help pay for that policy. So the amount that would otherwise have been spent of the fringe benefit already appears in the employee's normal earnings, since they did not elect to receive that benefit. For the employee who accepts the coverage or the benefit, the law presumes that the contribution made by the employer for that policy, is a fringe benefit that must be included in the Average Weekly Wage calculation. It would, in effect, place employees who elected to receive the benefit in the same situation as those who did not. While each employer may handle these benefits differently, the law can rarely address every situation, so such rules are designed to deal with the most common situations that may arise.

- One issue that has not yet been addressed is how the 2010 Affordable Care Act will affect this second category of fringe benefits. Since larger employers are now required to provide medical coverage, where it was previously voluntary, does the employer's contribution still need to be included? As there is no clear rule yet, we advise that in most instances, the employer's cost of health insurance be included

if not for the only reason of avoiding the potential penalty associated with miscalculation and underpayment.

- The most common examples of this category of benefits includes health policies, disability policies, vision policies, dental policies, etc. Arguably, the employer's 401(K) matching value, expressed as a weekly value, should be included as those employer contributions represent a tax-deferred benefit under this second category, and its election is voluntary. It is not clear if the courts will again limit this benefit category to instances when the benefit was actually received or paid during the specific time the average weekly wage is being calculated.

CALCULATING THE VALUE OF THE BENEFIT

Calculating the Average Weekly Wage, with the inclusion of the fringe benefits, is rather easy when compared to the determination of what amount is to be included. You simply identify (1) the value of the benefit paid to the employee or the amount of the contribution made by the employer for a benefit elected by the employee and (2) consider the period over which the payment covers (weekly, monthly, annually, etc.). Once you know how much is paid and for what period of time it covers, you convert that amount into a weekly benefit and add it to the Average Weekly Wage.

For example, the employer pays $11.56 per month for a qualifying fringe benefit. You now must convert that value into a weekly value. In Louisiana, you multiply the monthly value by twelve ($138.72) to provide an annual value and then divide by 52 weeks ($2.67) for the weekly value. If your calculation of the Average Weekly Wage based upon the gross wages is $794.02, you simply add $2.67 to the calculation, and arrive at the proper Average Weekly Wage of $796.69, including fringe benefits.

Some benefits are paid daily, such as per diem. These are often significant amounts, and you need to see what, if any, per diem was paid during the four full weeks, as that employee may have only been entitled to a per diem for one of the four weeks. If an employee received per diem pay, you add that amount to each individual week of the four full weeks, prior to the accident. Then, identify the gross earnings for the Average Weekly Wage.

COMMON QUESTIONS

The lack of clarity in the wording of the statute and the case law has led to certain issues that will need to be addressed or even reconsidered. As well, changes in our tax law will lead to further developments in this topic.

- "I thought we needed 26 weeks of fringe benefits?" – In the past, many fringe benefits were calculated as a form of unit, commission, or other benefits under LSA-R.S. 23:1021(d), and so you were required to request 26 weeks' worth of these benefits. However, the ***Hargrave*** case discussed earlier held that hourly employees will have their

fringe benefits calculated using the four full weeks, implying that the underlying Average Weekly Wage calculation method, will also guide how the fringe benefits will be included and calculated.

    - Many of the Wage Summary forms continue to ask your clients for 26 weeks of benefits. Be sure to ask, not only for the wage records but also for the fringe benefit records and information. Also, keep in mind that the fringe benefit calculation will likely be made on the same schedule (hourly, weekly, monthly, annually, other, etc.) as the cash earnings.

- "What if the employee pays for a benefit, but the employer contributes nothing?" – Then, that benefit is not included, as the employer is not contributing anything for that benefit. The employees without that benefit have not received compensation in lieu of that employee's election
- "What do I ask for from the client?" – Apart from the questions associated with how the employee was paid, you need to ask for (1) any benefit other than direct wages paid by the employer to the employee during the four full weeks prior to the accident (assuming it is an hourly worker) and (2) the amount paid by the employer for any benefit provided to the employee as part of their employment. For each, you will also need to request the payment or contribution schedule to convert that benefit into a "weekly" benefit. Do not merely ask for "fringe benefits" that are offered, as the phrase may be confusing and have different meanings to different employers.
    - You might want to consider preparing internally, or with our assistance, a brief explanation that can be provided to each employer at the time of the request. Having a written explanation will prevent miscommunication and may assist the employer in becoming proficient enough, in time, to provide you with the correct information in advance, and prior to incurring potential penalty claims.

CONCLUSION

Does reading this make you an expert? No. This area of law is very confusing, and the courts have hardly been consistent. At best, this is designed to be a solid guide to allow you to discuss the issues with your employers. Though some limited areas have been resolved in certain factual scenarios, there are many remaining questions to be answered by the courts. We are aware that a court's review of a calculation may lead to assessments of penalties for miscalculating the Average Weekly Wage and underpaying indemnity. Therefore, if you are not sure of whether or how to include a particular benefit, consider playing it safe and including it. If it is determined later that it should not have been included, then simply acknowledge the overpayment, adjust the Average Weekly Wage, and treat it like any other overpayment credit.

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