Workmen's Compensation Law, Average Daily Wages. Coal Miners, Average Daily Wage of. Average Daily Wage, How Arrived At. Compensation, Manner of Arriving at.

In view of the silence of the law upon the subject of ascertaining the average daily wages of employees who work at piece work, tonnage or means other than a fixed daily stipend, arbitrary rules for determining the question must be adopted.

Subject considered and rules of guidance in such cases laid down and recommended for adoption by the Board.

June 11, 1915.

Hon. A. E. Spriggs,
Industrial Accident Board,
Helena, Montana.

Dear Sir:

Pursuant to a conference had by your honorable board with representatives of the Montana State Coal Operators Association, and United Mine Workers of America, you have requested this office for an opinion respecting the computation of wages received by coal miners, as a basis for fixing the compensation to be allowed employees injured in the course of their employment.

It is represented that coal miners in this state do not receive fixed daily wages, but mine coal for a fixed price per ton, which varies slightly in different localities, depending upon the character and workability of the coal veins,—this variation being calculated to reflect equitably upon the miners, so as to enable them to earn approximately the same wage wherever employed. It is agreed the coal miners in this state, do not operate continuously throughout the year; but that the average number of working days is approximately two hundred and forty annually. It is contended upon the part of the operators that the rule to be adopted by the Board to ascertain the weekly wage upon which compensation is to be based is, to determine the workman's total earning capacity for the mining period of two hundred forty days, or coal mining year, and use fifty-two as the divisor of the total, which in turn will give the average weekly earnings for a calendar year. On the other hand it is contended by the mine workers that the average wage shall be ascertained by taking the actual number of days a miner has been employed during a certain period of time,—as for instance during a year. The total amount earned by him during such time should then be divided by the exact number of days of actual employment, and the result would be the average daily wage; and the sum thus ascertained multplied by the numeral six; would give the weekly wage, forming the basis of compensation to the injured workman.

An examination of various compensation laws of other states, discloses that usually specific provision is made for ascertaining the average wage where contract or piece work furnishes the basis of wages, and where no fixed daily stipend is paid the workman. Our law is apparently silent upon the subject. Several sections, however, shed light upon the subject. Section 6 (w) defines the word "week" as meaning

six working days, including Sundays, and Section 6 (v) defines the term "wage" as meaning the average daily wages received by the employee at the time of the injury, or for the usual hours of employment in a day, but overtime is not to be considered. Sections 16 (a), (b), (c), (d) and (i), are all couched in similar language, and fix the amounts to be paid an injured employee for the specified injuries with which these sections deal. For the sake of brevity, Section 16 (a) is quoted. It reads as follows:

> "For an injury producing temporary total disability, fifty per centum of the wages received at the time of the injury, subject to a maximum compensation of ten dollars per week and a minimum compensation of six dollars per week; provided, that if at the time of injury, the employee received wages of less than six dollars per week, that he shall receive the full amount of such wages per week. Such compensation shall be paid during the period of disability, but not, however, in any event, exceeding 300 weeks."

In view of the incompleteness of the law upon the subject, it is manifest that to ascertain the wage received by the employee at the time of the injury, some arbitrary standard must be adopted and resorted to, as furnishing a reasonable rule for guidance in this matter. It must be conceded, the policy of the law is to give to all employees equal protection, whether the employment be for a fixed daily, weekly, or monthly wage, or be based upon the results attained, as in the case under consideration. There are a number of instances attending the mining of coal where a fixed daily wage is paid. In such cases it manifestly would be idle, if not ridiculous, to contend, because the employment is not continuous throughout the year, that, perforce, the average daily wage received at the time of the injury is not the fixed amount actually paid the workman per day, but the average per diem earned in a calendar year, based upon two hundred forty working days.

It is quite manifest the employer is liable to the employee for injury occurring only during the time the employment continues. If, for instance, the coal operators elect to be bound by the provisions of Plan No. 2, certainly, in view of the two hundred forty days mining period, they would be obligated to pay premiums to the insurance companies, indemnifying them for eight months, or two hundred forty working days, and not for a calendar year of twelve months, for it is only during the working period that the employer may possibly become liable for injuries sustained by an employee. Likewise, if the employer elects to be bound by Plan No. 3, his assessments are based upon his total annual pay roll, and not upon what the pay roll might be if the mines were operated continuously (Section 40 (a) and Section 40 (t)). The phrase "Five per centum of the wages received at the time of the injury" does not contemplate continuity of employment for any definite antecedant period, and its true interpretation is not contingent upon any fixed or possible working period in any industry during any calendar year. Where the wages received are in their nature uncertain or speculative, as in the case of coal miners working for so much per ton, the previous earnings may be resorted to alone for the purpose of striking

a general average, which will reasonably reflect the daily wage earned at the time of the occurrence of the injury.

I am, therefore, of the opinion that a construction of the law, such as is contended for by the operators, would be unjust to the employee, and inequitable in its consequences. Hence, the rules which should guide your Board in instances such as we have under consideration, may be stated succintly as follows:

(a) Whenever the wages received by any employee be in the form of piece work, tonnage, or means other than a fixed daily wage, the average daily wage shall be the total net earnings of the employee for a period preceding the accident, to be determined by the Board, which total shall be divided by the actual number of days worked, and the result multiplied by six which will give the weekly wage, furnishing the basis for compensation.

(b). Whenever, by reason of the shortness of the time during which the employee has been employed, and by reason of the nature of the employment, it is impracticable to compute the average daily wage, as defined in paragraph (a), regard may be had to the average daily wages which are being earned by a person in the same grade, employed at the same work by the same employer, or, if there is no person so employed, then by a person employed by another in the same grade and in the same class of work.

Yours very truly,
J. B. POINDEXTER,
Attorney General.