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Vacation Pay in IRB Calculations: Not Always Straightforward

By John-Paul Strasler, CA•IFA, Insignia Forensic Group Inc.



John-Paul Strasler

Scenario: an adjuster receives the following Employer's Confirmation Form (OCF-2):

Part 4 Applicant's Income		Gross Weekly Income Last 4 Weeks Before Accident				Gross Income for Last 52 Weeks Before Accident		Self Employed: Gross Income
		Week 1	Week 2	Week 3	Week 4	No. of Weeks Worked	Gross Income	
Salary								
Tips, Commissions								
Other Monetary Compensation								
Total		625. ⁰⁰	625. ⁰⁰	625. ⁰⁰	625. ⁰⁰			

OCF-2 (1/1/04)
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Figure 1

On the surface, things appear straightforward: the claimant earned \$625 per week in the four weeks prior to the accident. Can the adjuster proceed to calculate the IRB with this information? Not until the manner in which the claimant's vacation pay is earned and paid is determined, as well as whether any vacation pay is included in the four weekly figures. Otherwise, the IRB amount may be overstated or understated, perhaps significantly.

For salaried employees, an annual income is usually spread out over the year's pay periods, so that a pay stub during a vacation period looks

the same as any other pay stub. For hourly and other employees, however, vacation pay is either included with each pay cheque or paid out periodically, and when the employee takes vacation, it is considered unpaid time off.

Factoring vacation pay into IRB calculations can be quite complex, and over the years numerous FSCO decisions have dealt with how vacation pay should be calculated and allocated to the period of analysis. The FSCO decisions have not established a single method in this regard, as the approach depends on the facts of the specific scenario. The following is a synopsis of sever-

Part 4 Applicant's Income

What was the applicant's actual gross income for the period before the accident date checked ("2" above)? If the employee worked only part of the period, list the gross income received from you during this period.

	Gross Weekly Income Last 4 Weeks Before Accident				Gross Income for Last 52 Weeks Before Accident		Self-Employed Gross Income
	Week 1	Week 2	Week 3	Week 4	No. of Weeks Worked	Gross Income	
Salary	/	/	/	/			
Tips, Commissions	/	/	/	/			
Other Monetary Compensation	/	/	/	/			
Total	1,215.00	1,511.00	5,070.00	1,378.00			

OCF-2 (11/94)
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Figure 2

al key decisions, illustrating the different approaches that have been taken with regards to vacation pay.

Nguyen and Progressive Casualty (OIC A-004698, August 31, 1994)

Mr. Nguyen was employed by a fence company, and due to the seasonal nature of the work, he was laid off over the winter. Mr. Nguyen was not entitled to any vacation time, but instead received 4% of the income that he earned over the previous twelve months as vacation pay.

Mr. Nguyen's accident occurred in December around the time of the annual layoff. In the four weeks prior to the accident, Mr. Nguyen received his regular wages, plus a lump-sum payment of his annual vacation pay. His Employer's Confirmation Form (OCF-2) would resemble Figure 2 (amounts are for

illustrative purposes only).

At issue was how to allocate the vacation pay. Mr. Nguyen claimed that the entire amount of vacation pay he received during the four weeks before the accident should be included in the calculation of his gross income for the four weeks. The Arbitrator disagreed, stating that "it better reflects the reality of Mr. Nguyen's earnings profile to allocate the money at the rate that it accrues, than to attribute it exclusively to the four weeks when it was paid." Therefore, only vacation pay of 4% of Mr. Nguyen's wages in the four-week period prior to the accident was included in calculating his income from employment for this period.

It is noteworthy that the Nguyen decision was adopted by Justice Forget of the Ontario Court (General Division) in his April 21, 1995, decision in *Descarie v.*

Personal Insurance Company of Canada, 23 O.R. (3rd) 457. In that case, Mr. Descarie, a construction worker, was subject to a mandatory two-week annual vacation that occurred during the first two weeks of the four-week period preceding the accident. Mr. Descarie received vacation pay for these two weeks just prior to the four-week period, and submitted that it should be allocated to the first two weeks of the four-week period preceding the accident. However, Justice Forget disagreed, concluding that "the reality of the plaintiff's earning profile dictates that his vacation pay be allocated at the rate at which it accrued." Therefore, only the vacation pay that accrued during the four-week period preceding the accident was included in Mr. Descarie's four weeks' income, not the vacation pay received prior to the four-week period.

Ford and Wawanesa (Appeal P00-00005, August 4, 2000)

At the time of his accident in August 1995, Mr. Ford was employed on a full-time basis. Mr. Ford had taken a vacation in one of the four weeks prior to the accident, and a dispute arose as to what portion, if any, of the vacation pay he received for that week should be



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included in his four-week income for IRB purposes. His OCF-2 would resemble Figure 1 above (amounts are for illustrative purposes only).

The Arbitrator, relying on the Nguyen decision discussed above, decided that the vacation pay received by Mr. Ford should be treated as income as it accrued, rather than when it was received, as this approach "better reflects Mr. Ford's earnings profile."

Mr. Ford successfully appealed this decision. On appeal, the Director's Delegate distinguished the facts of Mr. Ford's situation from those of Mr. Nguyen's, stating that

Mr. Ford's vacation pay was in no sense a windfall. It was not paid on top of other income, but as part of his regular work schedule, which included vacation time. Consequently, I see no reason the "income when received" approach cannot be adopted. However, the two approaches cannot be mixed. If Mr. Ford's income includes the vacation pay he received, it cannot also include his accrued vacation pay.

Therefore, the vacation received by Mr. Ford in the four-week period was included in his four weeks' income.

Howden and Pafco (Appeal P00-00028, June 22, 2001)

At the time of her accident in October 1998, Ms. Howden was employed on a full-time basis and was entitled to five weeks paid vacation per year. After the accident, Ms. Howden's employment terminated, and her unused vacation was paid out in the following year.

Ms. Howden claimed that her gross income should be increased by 10% to reflect the rate at which her vacation pay accrued during the four weeks. The Arbitrator rejected this argument on the basis that



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under the collective agreement between Ms. Howden's employer and her union,

- Her vacation was not cumulative from year to year.
- She was only entitled to cash out her accrued vacation if she was terminated (which did not happen in the four weeks).
- Ms. Howden could not waive her vacation and draw double pay (therefore, her accrued vacation had no cash value to her in respect of the four-week period).

Accordingly, the Arbitrator excluded Ms. Howden's accrued vacation pay from the calculation of her income from employment.

On appeal, the Director's Delegate focused on the specific facts of Ms. Howden's situation; in particular, that

- Ms. Howden was paid her full salary for the four weeks.
- Under the collective agreement, vacation time had to be taken within the vacation year.
- Vacation pay was not payable unless Ms. Howden took a paid vacation day in lieu of working or was terminated, neither of which happened in the four weeks prior to the accident.
- At the time of the accident, Ms. Howden was well on her way to having taken the vacation time to which she was entitled in the year before the accident, i.e., paid vacation was included in her annual income, not on top of it.

The Director's Delegate upheld the Arbitrator's decision that applying the accrual method over the four weeks did not reasonably reflect Ms. Howden's earnings picture, and that the accrued vacation pay paid out after the accident was not pre-accident income from employment.

Brooks and Wawanesa (FSCO A00-000790, March 6, 2002)

At the time of her accident, Ms. Brooks was employed on a contract basis and was not entitled to a paid vacation. She was remunerated on an hourly basis and received an additional 4% for vacation pay on each pay cheque (which distinguished her situation from Mr. Nguyen's, in that she received her vacation pay as it accrued, not as a lump sum).

The Arbitrator decided that the 4% vacation pay paid to Ms. Brooks should be included in her income from employment for IRB purposes, as her "earnings picture...included the payment of vacation pay in each pay period. Vacation pay had a cash value to Ms. Brooks."

Simpson and Allstate (Appeal P01-00057, June 6, 2003)

At the time of her accident in May 2000, Ms. Simpson was employed on a full-time basis. Ms. Simpson was entitled to five weeks vacation per year, equivalent to 10% of her wages, and could carry forward unused vacation from year to year. At the time of the accident, she had accrued vacation pay of \$3,124.42, which, Ms. Simpson testified, represented her unused vacation pay accrued over 25 years.

Ms. Simpson submitted that since, at the time of the accident, she would have been entitled to cash out the entire amount of her unpaid vacation pay on termination of her employment, and since she was entitled to take the equivalent amount of vacation (approximately six weeks), the entire amount should be included in her pre-accident income. The Arbitrator accepted her position; in comparing Ms. Simpson's situation to Ms. Howden's, discussed above, it was

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noted that unlike Ms. Howden, Ms. Simpson did not have to take her vacation pay each year in the form of paid vacations. The Arbitrator stated that Ms. Howden was permitted to take her vacation pay in the form of contributions to her vacation account.

Since Ms. Simpson elected to have her income calculated based on the four weeks, rather than the 52 weeks, before the accident, the addition of the accrued vacation pay substantially increased her benefit entitlement.

Allstate appealed this decision on the basis that Ms. Simpson neither received the accrued vacation pay nor took any vacation in the four weeks before the accident.

On appeal, the Director's Delegate overturned the decision, on the basis that the Arbitrator confused vacation contributions/credits and vacation pay. According to the Director's Delegate, Ms. Simpson's contributions to her vacation account were deferred payments that she could use in the future for vacation pay, and were not income until they were paid. Accrued vacation pay is not income; it is deferred income. The Director's Delegate acknowledged, however, that there will be exceptions to this general rule, for example, where the employee is not entitled to a paid vacation, but receives an additional amount for vacation pay, as in Nguyen and Brooks.

Conclusion

Although the decisions differ, the common ground is the necessity of considering the facts of the specific situation and, in particular, the claimant's "earnings profile." In the case of a salaried employee or others whose normal work cycle includes a paid vacation, the general approach is to recognize vacation




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pay as income as it is received. For employees who are not entitled to a paid vacation but who either have their vacation pay added to their regular wages each pay period or paid in a lump sum, vacation pay is recognized as income as it accrues.

In summary, when handling accident benefit claims, adjusters should determine how the claimant receives vacation pay, especially when the IRB is based on the four weeks' income. If the claimant's vacation pay is paid out periodically and vacation time is considered an unpaid leave, as in *Nguyen and Brooks*, then the adjuster should inquire as to

- whether any vacation pay was received in the four-week period prior to the accident, as in Figure 2 above, so that the necessary adjustment can be made for the amount earned prior to the four week period
- whether the salary amounts reported on the OCF-2 include vacation pay earned in the four-week period, and if not, the amount (e.g., 4%) that needs to be added.

John-Paul Strasler, CA•IFA, is the principal of Insignia Forensic Group Inc. and has specialized in insurance claims quantification and forensic accounting for over 12 years. He is a Chartered Accountant designated by the Canadian Institute of Chartered Accountants as a specialist in investigative and forensic accounting and has given expert evidence at FSCO. For any queries regarding this article, or to request a vacation pay questionnaire, please contact John-Paul Strasler at (416) 626-9688, 1 866 324-9688 or jpstrasler@ExpertClaimsAnalysis.com.

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