Papson, Janet

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages – Intermittent/seasonal, full-time, or other usual wages paid others (RCW 51.08.178(1), (2), or (4))

The worker did not have a recent work history that allowed for calculation of a fair and reasonable wage under RCW 51.08.178(2). Calculation under subsection (2) would result in a wage substantially less than the actual wages. Calculation under subsection (1) would result in a wage calculation significantly higher than the wage the worker would have earned had the worker not been injured. Under the circumstances, subsection (4) should be applied to determine the wage based on the usual wages paid others engaged in similar occupations. **….*In re Janet Papson*, BIIA Dec., 01 15138 (2003)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JANET N. PAPSON	)	**DOCKET NO. 01 15138**
	)	
CLAIM NO. W-465268	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Janet N. Papson, by
Walthew, Warner, Thompson, Eagan & Keenan, P.S., per
Jonathan K. Winemiller

Self-Insured Employer, Enumclaw School District No. 216, by
Reeve Shima, P.C., per
Elizabeth K. Reeve

The claimant, Janet N. Papson, filed an appeal with the Board of Industrial Insurance Appeals on May 14, 2001, from an order of the Department of Labor and Industries dated May 8, 2001. The order calculated time loss compensation benefits based upon RCW 51.08.178(2), and upon the conclusion that the claimant was an intermittent worker. **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer, to a Proposed Decision and Order issued on July 10, 2002, in which the order of the Department dated May 8, 2001, was reversed and the claim remanded to the Department with direction to calculate the claimant's time loss compensation benefits according to RCW 51.08.178(1).

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issue in this appeal is what is the appropriate subsection of RCW 51.08.178 to apply to Ms. Papson's circumstances in order to determine her "wage" for purposes of establishing the rate of her time loss compensation benefits. The Department determined that her wage should be calculated under subsection (2), based on a characterization of her employment as intermittent. Our industrial appeals judge concluded that her wage should be calculated under subsection (1). We differ in our conclusion from that of the Department and our industrial appeals judge, and conclude that Ms. Papson's wage should be determined using the method contained in RCW 51.08.178(4). We will discuss those facts necessary to explain our decision.

Ms. Papson was hired by the self-insured employer, the Enumclaw School District (School District) as a bus driver for the 1999-2000 school year. She was injured on December 9, 1999, while driving her bus in the course of her employment. The route she was driving on the day of her injury had been assigned to her for only one week. She was paid on an hourly basis at a rate of $12.03 per hour. Her normal driving time was 5 days per week, 4.5 hours per day. Before her school bus driving job, Ms. Papson was last employed between September 1997 and January 1998 and had earned $3,152.11 over the previous 12 successive calendar months preceding the industrial injury.

The majority of the School District's bus drivers work only during the school year, with a handful of drivers retained to work through the summer months. Ms. Papson's stated intent was to work throughout the year. The testimony of Ms. Cathy Aden, Ms. Cheri Alderson, and Ms. Bonnie Miller, however, indicated the intent of the employer was to hire Ms. Papson for only the school year. Summer school bus driving was historically done by those high on the seniority list, as there were only a few positions available during the summer. Ms. Papson was near the bottom of the seniority list; she could not have any reasonable expectation to be employed throughout the year as a school bus driver for the School District.

We must determine the appropriate subsection of RCW 51.08.178 to apply in order to fairly and reasonably determine Ms. Papson's wage at the time of injury. To resolve the question of whether subsection (1) or subsection (2) applies, the Washington Supreme Court indicated, "[T]he Department must first determine whether the type of employment is essentially 'intermittent' within the meaning of the statute." *Department of Labor & Industries v. Avundes,* 140 Wn.2d 282, 290 (2000). Subsection (1) must be used unless it is established that it does not apply. The court adopted a two-part test for determining which subsection to apply. The analysis requires a scrutiny of the type of work being performed and, secondly, an examination of the relationship of the worker to the employment. *Avundes*, at 287. As this record reveals, the type of work, driving a school bus, can be either seasonal or year round employment, depending on the seniority of the driver. This alone, however, is not determinative. We must also consider the second part of the *Avundes* test, the relationship of Ms. Papson to her employment. The record does not reflect a history of consistent employment. The parties stipulated that before beginning training with the School District in July of 1999, she had last worked from September 1997 through January of 1998. The

record also established there was little likelihood she would be hired to drive a school bus during the summer. She almost certainly would only work during the 9-month school year.

Employment is seasonal in nature when it is dependent on a period of the year that is characterized by a particular activity. *Double D Hop Ranch v. Sanchez,* 133 Wn.2d 793 (1997). Seasonal employment is but one type of intermittent employment. *School District No. 401 v. Minturn*, 83 Wn. App. 1 (1996). Ms. Papson was hired to work as a school bus driver for the school year or "season." We conclude that Ms. Papson's relationship to her employment, working 4.5 hours per day, 5 days per week, during the 9-month school year, should be classified as seasonal or intermittent. Although she may have hoped to work for the summer as well, the reality of the situation dictated that she would not receive a summer route, given her low level of seniority. For that reason, subsection (2) would normally be applied, and Ms. Papson's compensation would be based upon averaging of a preceding 12-month period of earnings. This calculation, however, must result in a "wage" that fairly represents her earning capacity.

The Supreme Court indicated in *Avundes* and *Double D Hop Ranch* that benefits should reflect the worker's lost earning capacity. Using Ms. Papson's work history, however, does not fairly represent her true wage-earning capacity. The only work history in the record is the short period between September 1997 and January 1998. That is both remote and not a complete 12-month period upon which the Department could base an average. Using subsection (2), without a reasonable work history upon which to average her wage, Ms. Papson would be relegated to $283 per month for time loss compensation, the statutory minimum. This rate is patently unfair when considering that her actual wages for a month in which she worked 4.5 hours per day, 5 days per week would equal $1,190.97. To use subsection (2) in this case, we believe would work an injustice. Ms. Papson would be paid benefits based on a wage that does not reasonably reflect her earning capacity at the time of her industrial injury.

Similarly, the computation method contained in subsection (1) of the statute would also result in a wage that does not reasonably and fairly represent her earning capacity. If the method contained in subsection (1) is used, she would have her benefits based on a monthly wage of $1,190.97, the calculation would produce $14,291.64 for an annual wage. This method is unfair when it is considered that the School District would have only paid her $10, 718.73 if she had been able to work the entire school year. Ms. Papson would be paid benefits based on a wage that does not reasonably reflect her earning capacity at the time of her industrial injury.

Application of either subsection (1) or subsection (2) does not result in a fair, representative wage on which to base the rate of time loss compensation. In order to maintain fairness in the process, we believe RCW 51.08.178(4) must be used. Subsection (4) is applied when a wage has not been fixed or cannot be reasonably and fairly determined. It requires the Department to determine what a representative wage would be for the kind of job performed by the injured worker at the time of the injury. We believe it would be a rather reasonable task for the Department to determine the usual monthly wage for employees who do the same kind of driving as Ms. Papson did at the time of her injury, and use that figure for her monthly wage in the calculation of compensation under the Act.

We also note that our industrial appeals judge, in Finding of Fact No. 2, stated that Ms. Papson had sustained injury to her arms, neck, and back as a result of the motor vehicle accident, which occurred on December 9, 1999. The specific portions of Ms. Papson's body that may have been injured during the December 9, 1999 motor vehicle accident were not part of the issue before the Board. The only issue before the Board was the method to be used in calculating Ms. Papson's time loss compensation rate. The Department had not decided the issue of which parts of her body were affected, and the Board may not do so. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970). We have, therefore, modified Finding of Fact No. 2.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On January 24, 2000, the Enumclaw School District No. 216, a self-insured employer, received an application for benefits from the claimant, Janet N. Papson, regarding injury to her arms, neck, and back, allegedly caused by an industrial injury on December 9, 1999, during the course of her employment with Enumclaw School District No. 216. On August 9, 2000, the self-insurer issued an order closing the claim with medical benefits only, as provided. The claimant filed a protest and request for reconsideration of the August 9, 2000 order on August 25, 2000. On October 17, 2000, the Department issued an order that canceled the order of August 9, 2000, and ordered that the claim remain open. On May 8, 2001, in response to a request to resolve the dispute over the calculation of the rate for time loss compensation benefits, the Department of Labor and Industries issued an order setting the time loss compensation rate based upon the Department's assessment that the

claimant was an intermittent worker who was married and had two dependents. On May 14, 2001, the claimant filed a Notice of Appeal from the Department's order of May 8, 2001, with the Board of Industrial Insurance Appeals. On June 13, 2001, the Board issued an order granting the appeal, assigning the appeal Docket No. 01 15138, and ordering that further proceedings be held in this matter.

2. The claimant was a school bus driver who, on the date of her industrial injury, was driving an assigned route, which she drove 5 days a week, 4.5 hours a day. Her rate of pay was $12.03 per hour. On December 9, 1999, she sustained an injury as a result of a motor vehicle accident that occurred while in the course of her employment with Enumclaw School District No. 216.

3. The nature of the claimant's employment with Enumclaw School District No. 216 was that of driving a school bus for a school district that operated year-round, with the work of driving a school bus year-round available to a few drivers based on seniority. It was the claimant's intention to bid on and obtain a summer bus route. Given her low seniority, it was not reasonable for her to anticipate summer employment as a school bus driver. Her employment history does not suggest she finds other employment during the summer.

4. At the time of Ms. Papson's injury, her relationship to her employment with the Enumclaw School District No. 216 was that of a seasonal or intermittent worker.

5. Ms. Papson's work history does not include employment history that reasonably and fairly represents her earning capacity for 12 successive calendar months preceding the industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.

2. Ms. Papson was, at the time of her injury, an intermittent or seasonal worker, as contemplated by RCW 51.08.178(2). However, her work history cannot be appropriately defined to give a reasonable and fair representation of her lost wage-earning capacity. The Department must use RCW 51.08.178(4) to calculate her rate of time loss compensation benefit.

3. The order of the Department of Labor and Industries dated May 8, 2001, is reversed. The matter is remanded to the Department with directions to calculate Ms. Papson's rate of time loss compensation benefit according to RCW 51.08.178(4).

It is so ORDERED.

Dated this 27th day of January, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member