# Silva, Ignacio

## SCOPE OF REVIEW

**Time-loss compensation**

In an appeal from a determination that RCW 51.08.178(2) is the appropriate section for calculation of wages, the Board's scope of review extends to a determination of whether subsection (1) should be used to calculate wages. **….*In re Ignacio Silva*, BIIA Dec., 01 16231 (2003)**

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**
**STATE OF WASHINGTON**

| | | |
|---|---|---|
| **IN RE: IGNACIO M. SILVA** | ) | **DOCKET NOS. 01 16231 & 01 20029** |
| | ) | |
| **CLAIM NO. N-661484** | ) | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Ignacio M. Silva, by
Law Office of Steven L. Busick, per
Steven L. Busick

Employer, Marley Orchards Corp., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Jeffrey L. Adatto and Samuel W. Jordan, Assistants

Docket No. 01 16231 pertains to an appeal filed by the claimant, Ignacio M. Silva, with the Board of Industrial Insurance Appeals on June 11, 2001, from an order of the Department of Labor and Industries dated April 12, 2001. The order affirmed a Department order dated June 23, 1995, which determined the claimant received $10,732.80 when entitled to $2,257.50, and demanded the claimant reimburse the Department $8,475.30, assessed from September 16, 1994 through May 31, 1995, which overpayment resulted because of a change in reported gross wages; and the claim remained open. **REVERSED AND REMANDED.**

Docket No. 01 20029 pertains to an appeal filed by the claimant, Ignacio M. Silva, with the Board of Industrial Insurance Appeals on September 12, 2001, from an order of the Department of Labor and Industries dated August 28, 2001. The order affirmed a Department order dated April 11, 2001, that denied time loss compensation from October 7, 1995 through August 24, 2000, as there is no medical certification; and also affirmed a Department order dated April 13, 2001, that set the time loss compensation rate at $366.58 per month, including appropriate cost of living increases, based on the entitlement of a worker who is single with 0 dependents with wages at time of injury of $437.68 per month, and, since treatment is no longer necessary and there is no permanent partial disability, closed the claim. **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 claimant to a Proposed Decision and Order issued on July 17, 2002, in which the orders of the Department dated April 12, 2001 and August 28, 2001, were reversed and remanded to the Department with direction to recalculate the claimant's time loss compensation in accord with RCW 51.08.178 in consideration that Mr. Silva's employment was not exclusively seasonal in nature and on the basis of the entitlement of a worker who has 5 dependent children; to issue an order that pays any underpaid benefits due Mr. Silva following such recalculation, while affirming the Department order dated April 11, 2001; and close the claim.

The Board has reviewed the evidentiary rulings in the record of proceedings. No prejudicial error was committed. The rulings are affirmed.

Our industrial appeals judge determined that the claimant waived the issue of total permanent disability. The record reveals that the claimant only agreed to waive the issue of entitlement "to an award for permanent **partial** disability." 3/12/01 Tr. at 5 (emphasis ours). The parties fully litigated whether Mr. Silva was totally disabled through the date of the August 28, 2001 order affirming the prior order closing the claim.

The evidence shows that as of August 1, 1995, Mr. Silva had reached maximum medical improvement. Our industrial appeals judge's analysis, which found the claimant was not temporarily totally disabled from October 7, 1995 through August 24, 2000, and April 5, 2001 through August 28, 2001, also supports the conclusion that Mr. Silva was not permanently totally disabled from August 1, 1995 through August 28, 2001. We amend the findings of fact and conclusions of law to include the permanent total disability issue.

We adopt our industrial appeals judge's rationale for finding that the Department improperly calculated Mr. Silva's time loss compensation rate. The Department has not proven that Mr. Silva was an exclusively seasonal worker. In the Proposed Decision and Order, our industrial appeals judge declined to conclude that RCW 51.08.178(1) should be used to calculate Mr. Silva's wages. The order indicated that to do so was beyond the Board's scope of review pursuant to the holding in *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793 (1997). We believe, however, that when the Supreme Court issued *Avundes v. Department of Labor & Indus.,* 140 Wn.2d 282 (2000), it adopted an approach for proper determination of the worker's wage that does not preclude the Board from concluding that RCW 51.08.178(1) applies in this claim.

The *Avundes* Court stated:

> In summary, when determining which section applies, the Department must first determine whether the type of employment is 'essentially intermittent' within the meaning of the statute. If the type of work is intermittent, subsection (2) applies. If the type of employment itself is not intermittent, the inquiry shifts to whether the worker's relation to the work is intermittent. The Department must consider all relevant factors, including the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history. While making this determination, the Department must be mindful that the default provision is subsection (1); it must be used unless the Department establishes it does not apply.

*Avundes* at 290. The Court affirmed the Court of Appeals conclusion that subsection (1) applies to the calculation of Mr. Avundes' wages. By indicating that subsection (1) is the default provision and specifying the factors the Department must consider in determining which subsection applies, the Court requires that the Department inquire into all factors necessary for a decision whether subsection (1) or subsections (2)(a) or (2)(b) apply. The Department, by necessity, had to consider the applicability of all the subsections of RCW 51.08.178 when it determined Mr. Silva's wage. Because the Department has had the opportunity to determine the applicability of each subsection, the Board has authority to conclude that subsection (1) applies. *See Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).

Also, the evidence proves that Mr. Silva had five dependents under age 18, not zero (as determined by the Department). The Department's error in calculating the time loss compensation rate renders moot any issue regarding whether the Department had authority to demand repayment in its April 12, 2001 recoupment order.

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

## FINDINGS OF FACT

1. On September 30, 1994, the Department of Labor and Industries received an application for benefits, which alleged that Ignacio M. Silva sustained an industrial injury on September 15, 1994, in the course of his employment with Marley Orchards Corp.

On November 15, 1994, the Department issued an interlocutory order that set the time loss compensation rate at $1,248 per month, based on the entitlement of a worker who is single with 0 dependents and has wages at time of injury of $2,080 per month, and paid the claimant time loss compensation for the period from September 19, 1994 through September 21, 1994.

On December 5, 1994, the Department issued a determinative order that paid the claimant time loss compensation for the period from November 4, 1994 through November 30, 1994.

On June 23, 1995, the Department issued an order that determined the claimant received $10,732.80 when entitled to $2,257.50, and demanded the claimant reimburse the Department $8,475.30, assessed from September 16, 1994 through May 31, 1995, which overpayment resulted because of a change in reported gross wages, and the claim remained open. On August 21, 1995, the claimant filed with the Department a Protest and Request for Reconsideration of the order dated June 23, 1995.

On April 11, 2001, the Department issued an order that denied time loss compensation from October 7, 1995 through August 24, 2000, as there was no medical certification.

On April 12, 2001, the Department issued an order that affirmed the order dated June 23, 1995.

On April 13, 2001, the Department issued an order that set the time loss compensation rate at $366.58 per month, including appropriate cost of living increases, based on the entitlement of a worker who is single with 0 dependents with wages at time of injury of $437.68 per month and, since treatment was no longer necessary and there is no permanent partial disability, closed the claim.

On June 8, 2001, the claimant placed in the U.S. mail a Protest and Request for Reconsideration of the Department orders dated April 11, 2001 and April 13, 2001, which was received at the Department on June 11, 2001.

On June 11, 2001, the claimant filed with the Board of Industrial Insurance Appeals a Notice of Appeal of the Department order dated April 12, 2001. On July 26, 2001, the Board issued an order that granted the appeal, under Docket No. 01 16231, and directed that further proceedings be held.

On August 28, 2001, the Department issued an order that affirmed the Department orders dated April 11, 2001 and April 13, 2001.

On September 12, 2001, the claimant filed with the Board of Industrial Insurance Appeals a Notice of Appeal of the Department order dated August 28, 2001. On October 8, 2001, the Board issued an order that granted the appeal, under Docket No. 01 20029, and directed that further proceedings be held.

2. On September 15, 1994, Ignacio M. Silva sustained an industrial injury in the course of his work as an apple picker employed by Marley Orchards Corp., when he fell approximately 5 feet from an 8-step ladder and landed head first on the ground.

3. Pre-existing the industrial injury, Mr. Silva had a mild scoliosis (a curvature to the left) of his spine that is probably congenital and some epiphyseal sclerosis (a mild wear change) at L5-S1. These pre-existing conditions were not proximately caused or aggravated by the industrial injury of September 15, 1994. In the course of his life's work as a farm laborer, Mr. Silva had sustained occasional trauma to his body but none that prevented him from working 8 hours a day as an apple picker.

4. The medical condition proximately caused by Mr. Silva's industrial injury of September 15, 1994, is diagnosed as a lumbar sprain-strain. The condition is fixed and stable, having reached maximum medical improvement as of August 1, 1995.

5. Mr. Silva has no compensable permanent residual impairment caused by his industrial injury. Mr. Silva does have some chronic pain symptoms. However, he magnifies those symptoms both with respect to his level of pain and his ability to move his spine, walk, and sit.

6. Ignacio Silva is a 41-year-old man who speaks Spanish and has limited ability to communicate in the English language. He has worked since 1976 as a farm laborer primarily with fruit crops of apples, grapes, and cherries in California, Oregon, and Washington. He was a farm foreman in Oregon for approximately 10 years ending in March 1994. At the time of his injury on September 15, 1994, Mr. Silva had worked for approximately 2 weeks for Marley Orchards Corp., as an apple picker. The duties of an apple picker require the ability to climb a ladder, pick the fruit, descend the ladder with a bag containing 50 pounds of fruit, carry the bag and dump it into a bin, and repeat that procedure approximately 80 times in a day.

7. During the periods October 7, 1995 through August 24, 2000; and April 5, 2001 through August 28, 2001, Mr. Silva was not precluded by the residuals of his industrial injury from obtaining or performing gainful employment as a fruit harvest worker or farm laborer.

8. Although Mr. Silva was picking apples at the time of injury, his employment was not exclusively seasonal in nature. He is a general farm laborer with experience in the cherry, apple, and grape crops. Work exists most of the year in vineyards, and cherry and apple orchards, for persons with Mr. Silva's experience. Prior to his injury, Mr. Silva intended to perform that work throughout the year.

9. At the time of injury, Mr. Silva had 5 dependent children under age 18.

10. In the April 12, 2001 order affirming the June 23, 1995 order, the Department calculated the amount of time loss compensation allegedly overpaid with reference to its findings that the claimant's work was exclusively seasonal in nature and that he was without dependents at the time of injury.

## CONCLUSIONS OF LAW

1. The appeals were timely filed, and the Board of Industrial Insurance Appeals has jurisdiction over the subject matter and the parties to each appeal.

2. As of August 1, 1995, Mr. Silva's lumbar strain-sprain, proximately caused by his industrial injury of September 15, 1994, was medically fixed and had reached maximum medical improvement, and was not in need of further proper and necessary medical treatment within the meaning of RCW 51.36.010.

3. During the periods October 7, 1995 through August 24, 2000, and April 5, 2001 through August 28, 2001, Mr. Silva was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.

4. During the periods October 7, 1995 through August 24, 2000, and April 5, 2001 through August 28, 2001, Mr. Silva was not a permanently totally disabled worker within the meaning of RCW 51.08.160.

5. As of August 28, 2001, the claimant's medical condition, proximately caused by his industrial injury, was best described by Category 1, WAC 296-20-280.

6. At the time of his industrial injury, Mr. Silva's employment was not exclusively seasonal in nature within the meaning of RCW 51.08.178(2). The proper calculation of his wages is pursuant to RCW 51.08.178(1).

7. In Docket No. 01 20029, the order of the Department of Labor and Industries dated August 28, 2001, is incorrect and is reversed.

In Docket No. 01 16231, the order of the Department of Labor and Industries dated April 12, 2001, is incorrect and is reversed.

This matter is remanded to the Department with directions to recalculate the claimant's time loss compensation pursuant to RCW 51.08.178(1), taking into account that Mr. Silva's employment was not exclusively seasonal in nature and on the basis of the entitlement of a worker who has 5 dependent children; to issue an order that pays any underpaid benefits due Mr. Silva following such recalculation; to affirm the Department order dated April 11, 2001; and to thereupon close the claim.

It is so **ORDERED.**

Dated this 28th day of January, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member