Jones, Fred

DEPARTMENT

Rules

Rules enacted by the Department that interpret RCW 51.08.178 are interpretive rules and do not have the force of law when disputed in the course of an appeal. ***….In re Fred Jones*, BIIA Dec., 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

Employer contributions pursuant to a union contract, earmarked for health and welfare benefits, need not be included in the wage calculation so long as the benefit continues. ***….In re Fred Jones*, BIIA Dec., 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

The payment of monies to various trusts, pursuant to a union contract, must be analyzed in terms of whether the payment is "in-kind compensation," critical to health and survival, consistent with the holding in *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). ***….In re Fred Jones*, BIIA Dec., 02 11439 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 03-2-04618-7.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRED L. JONES	**)**	**DOCKET NO. 02 11439**
	)	
CLAIM NO. Y-386396	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Fred L. Jones, by
Rumbaugh Rideout & Barnett, per
Terry J. Barnett

Employer, Swinerton Builders of Oregon, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Steve Puz, Assistant

The claimant, Fred L. Jones, filed an appeal with the Board of Industrial Insurance Appeals on February 11, 2002, from an order of the Department of Labor and Industries dated February 4, 2002. In its order, the Department calculated the claimant's time loss compensation rate based on a married individual with no dependents and wages at the time of injury of $4,185.28 per month. The Department order is **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 February 19, 2003, in which the industrial appeals judge reversed the order of the Department dated February 4, 2002, and remanded the claim to the Department with direction to recalculate Mr. Jones' time loss compensation rate based on these facts: Mr. Jones is a married individual with no dependents; his hourly wage rate is $26.03, plus employer paid health insurance benefits, and he worked 8.9 hours per day. The Department was also directed to take such further action as indicated by the facts and the law.

The Board has reviewed the evidentiary rulings in the record of proceedings. We hereby admit, as Board Exhibit No. 7, the employer's agreement to abide by the terms of the union's Master Agreement. This document was offered by the employer without objection but was not addressed in the proposed decision. With that exception, no prejudicial error was committed and the rulings are affirmed.

We have granted review primarily to address the claimant's contention that his time loss rate was incorrectly calculated. The following is a summary of those facts necessary to explain our decision.

On August 16, 2001, Fred Jones was hired by Swinerton Construction to work as a union carpenter on a Clark County job. Prevailing wage was required. On October 18, 2001, he was injured in the course of his employment. Mr. Jones last worked on November 30, 2001.

Jim Christensen, a Department employee who helps determine prevailing wage per RCW 39.12, testified that prevailing wage might be paid in any combination of cash and fringe benefits. As of the date of injury, Mr. Jones' prevailing wage of $33.52 was a combination of cash and in-kind benefits, as set forth in the union's collective bargaining Master Agreement. Swinterton Builders entered into an agreement to abide by the terms of the union's Master Agreement.

Mr. Jones asks this Board to treat as "wages" the employer-paid contributions to the vacation, union dues, H&W (health, life, death and dismemberment insurance), pension, and training trust funds. He first argues that, because prevailing wage can be satisfied through combined cash and in-kind benefits, the hourly prevailing wage amount (the gross wage) should be used as the time loss "wages." This argument is without merit. RCW 51.08.178(1), and the courts' construction of the statutory term "wages," control the calculation of an injured workers' hourly rate. The prevailing wage statute is irrelevant.

Schedule A to both contracts shows the breakdown of gross wages. Mr. Jones, a "Group 1" carpenter, was paid a base wage of $23.78. In addition, the employer paid, into the appropriate trust accounts, contributions per hour worked by Mr. Jones for vacation ($1.25), union dues ($1.00), Health and Welfare (H&W) ($3.28), pension ($3.81), and training ($ .40). His total gross wage was $33.52. The base wage, vacation contribution, and union dues were considered "taxable." The balance of contributions was not taxed.

Mr. Jones could withdraw from the amount accrued in the vacation trust (including interest) on a quarterly, twice a year, or yearly basis, depending on how he set up the benefit. He had access to the money whether or not he took vacation and could spend it as he wished. In contrast, the union dues, H&W, pension, and training payments were not accessible to Mr. Jones as cash. There is no evidence that Mr. Jones was vested or qualified for pension plan benefits.

According to James Smith, trust manager, the H&W trust account funds three separate benefits: health insurance, life insurance, and death and dismemberment insurance. An employee who works in excess of the number of hours necessary for entitlement to the H&W benefits may bank his hours toward continuing these benefits, for up to nine months, after he is laid off. An injured worker retains his full H&W benefits for six months after an industrial injury without need for further employer contribution.

The claimant characterizes all of the trust payments as "money wages." We disagree with this approach. The consideration paid to an injured worker by his employer can be "cash" or "in-kind." See *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 807 (2001). "In-kind" is defined as, "[g]iven in goods, commodities, or services rather than money." *The American Heritage® Dictionary of the English Language*, 4th Ed., 2000. In *Cockle*, the Supreme Court further defined in-kind benefits as either "fringe" or "nonfringe."

In-kind, nonfringe forms of "wages," are those described in RCW 51.08.178(1) as "of like nature" to "board, housing and fuel." Pursuant to *Cockle,* in-kind consideration fits within the definition of wages only where it is "a readily identifiable and reasonably calculable in-kind component of her [the claimant's] lost earning capacity at time of injury . . .." Moreover, the consideration must be nonfringe, *i.e.*, "critical to protecting workers' basic health and survival." *Cockle,* 142 Wn.2d. 801, 805. The threshold focus in a *Cockle* analysis must be the determination of the form of consideration paid, because only in-kind consideration is subject to the *Cockle* test for inclusion as "wages."

Based on the quality of the consideration paid, the only "monetary" component of Mr. Jones' compensation, other than his $23.78 per hour base pay, is the $1.25 per hour vacation payment. There is no significant difference between the paycheck earnings and the vacation earnings, other than the slightly delayed payout of vacation money. Although Mr. Jones could not access the funding between his pre-arranged "draws," it remained a source of cash funds that he could use as he pleased. When his paychecks stopped, so did the $1.25 per hour payment. Therefore, $1.25 should be added to the $23.78 base wage rate.

The balance of the trust payments are earmarked for specific goods, commodities or services and therefore must be analyzed as "in-kind." The union dues payments were discontinued

when Mr. Jones' paychecks stopped. These payments are readily identifiable and reasonably calculable components of Mr. Jones' pre-injury earning capacity. However, union dues are not critical to his basic health and survival. Mr. Jones testified that he had previously worked non-union jobs but preferred the higher wage of union employment. The union dues payment by the employer does not meet the *Cockle* test for inclusion in the hourly wage calculation. Similarly, training benefits, which are tied to union membership, are not critical to basic health and survival.

The employer's H&W contribution pays for health care, plus life insurance and death and dismemberment insurance, including extended benefits. A necessary element of proof for any claimant seeking inclusion, as wages, of employer-paid in-kind benefits is evidence that the benefits were discontinued during the period of disability. *In re Jerry Olsen,* Dckt. No. 99 20855 (November 1, 2000). Here, the evidence shows that as of February 11, 2002 (the date of the order on appeal), Mr. Jones was within the 6-month post-industrial injury period where H&W benefits continue. "Banked hours" may have allowed these benefits to continue even longer. Should Mr. Jones lose the H&W benefits during a period of disability, this would constitute a "change of circumstances" as contemplated by RCW 51.28.040, and Mr. Jones could petition the Department to determine his entitlement to an adjusted wage.

Mr. Jones also seeks inclusion of the employer's contribution to pension benefits. He has not proven that he was vested and entitled to pension benefits as of the date of injury. Further, a majority of the Board has previously rejected inclusion of pension benefits. See, e.g., *Ronald Tucker*, Dckt. No. 00 11573 (June 22, 2001) (finding that pension benefits are not of "like nature" with benefits such as food, shelter, fuel, and health care).

Finally, we note that the Department recently promulgated rules addressing wage rate determinations. The rules, submitted by the Department as Supplemental Legal Authority on May 15, 2003, were effective June 15, 2003.

The Department's rules consist of five new sections, WAC 296-14-520, 296-14-522, 296-14-524, 296-14-526, 296-14-528 and 296-14-530. There is no explicit statutory authority to promulgate rules interpreting RCW 51.08.178 ("Wages"). The Department must rely on the authority provided in RCW 51.04.020(1), which allows the director to "[e]stablish and adopt rules governing the administration of [Title 51]." The rules are properly characterized as "interpretive," as that term is defined in the Washington Administrative Procedures Act (APA):, Title 34 RCW

> An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.

RCW 34.05.328 (5)(c)(ii). The authority for the rules' substance must therefore derive from existing law. We note that the Department specifically references *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801(2001) as authority, from which we infer that the rules interpret RCW 51.08.178 in light of the Department's interpretation of the Supreme Court decision in *Cockle.*

Interpretive rules promulgated under the federal Administrative Procedures Act do not have the force of law. *Winans v. W.A.S., Inc.,* 112 Wn.2d 529, 537 (1989). We find no Washington case law specifically adopting the federal treatment of interpretive rules. However, the Washington State Legislature, in RCW 34.05.001 of the state APA, did indicate its intent that the law be interpreted "consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." RCW 34.05.001. Commentators have suggested that the federal and Washington State's APAs are sufficiently similar and therefore, similar to the federal statute, Washington State's interpretive rules do not have the force of law. See *Washington Administrative Law Practice Manual* § 7.02(c). We conclude that the Department's new rules represent the Department's interpretation, only, rather than legislation with the force of law.

We find the Department's interpretive rules generally consistent with RCW 51.08.178, the *Cockle* decision and our Board precedents, which control the resolution of the present appeal. The following discussion is limited to those aspects of the rules that we find directly applicable to the case at bar.

WAC 296-14-522 breaks down wages into three categories:

> (1) The **gross cash wages** paid by the employer for services performed. "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law. Tips are also considered wages but only to the extent they are reported to the employer for federal income tax purposes.
>
> (2) **Bonuses** paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation.
>
> (3) **The reasonable value of board, housing, fuel and other consideration of like nature** received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.

(Emphasis added).

We agree that RCW 51.78.178 and the *Cockle* decision recognize these three forms of "wages." Regarding "cash wages," we question the correctness of the language limiting gross cash wages to the amount paid before "mandatory deductions required by state or federal law." "Gross" is not defined in this rule. Where an agency does not define a particular term used in a rule, it is appropriate to resort to the dictionary definition. *Maplewood Estates, Inc. v. Department of Labor & Indus*., 104 Wn. App. 299, 306 (2000). "Gross" means "exclusive of deductions." *Webster's II New College Dictionary* at 491(1995). The gross wage should be determined exclusive of deductions. "Gross cash wage" is that portion of the gross wage that is "cash," and not "in-kind," compensation.

In Mr. Jones' case, his gross wage is the total of all forms of compensation ($33.52). To determine the gross *cash* wage portion, the value of those items earmarked for purchase of "in-kind" items (training, pension, H&W, union dues) are deducted. Remaining are the "gross cash wages." Although not applicable to Mr. Jones, the other forms of "wages" (bonuses and "like nature" consideration) would be added to the gross cash wage.

The "cash wages" definition also speaks in terms of payments "made directly to the worker." To the extent that section (1) of WAC 296-14-522 may be interpreted to exclude any payment (including vacation pay) made through a trust fund, we disagree. The money held in Mr. Jones' vacation fund is nearly identical to a bank account in which a paycheck is deposited. The trust held the employer's vacation contribution in an interest-bearing account that Mr. Jones could periodically access whether or not he took a vacation.

Section (3) of WAC 296-14-522 separately includes as "wages" those fringe benefits that satisfy the "of like nature" test. This section of the new rule includes an exception that excludes, from the "wages" definition, employer payments into trust funds for benefits that do not satisfy the "of like nature" test:

> Payments for items other than board, housing, fuel or other consideration of like nature made by the employer to a trust fund or other entity for fringe benefits do not constitute wages.

We note also that WAC 296-14-524 specifically excludes union dues from "'consideration of a like nature' to board, housing and fuel," consistent with our decision here.

Having resolved the *Cockle* issues raised in this appeal, we now address Mr. Jones allegation that the Department miscalculated the "hours per day" component of the time loss rate. Vickie Kennedy, the Department's program manager for policy and quality coordination, testified that since Mr. Jones' overtime was fairly regular, "the Department would look at a representative

time period and come up with an average or an expected number of overtime hours and include that in the calculation of the worker's wage at the time of injury." 12/2/02 Tr. at 27.

The Department's policy is consistent with RCW 51.08.178. Pursuant to Section (1) of the statute, "the term 'wages' . . . shall not include overtime pay" for purposes of calculating the time loss rate under that section. However, "[t]he number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day." Although overtime **pay** cannot enter into the calculation, averaging the hours, including overtime, is consistent with the statutory language requiring a fair and reasonable calculation. This policy is reflected in WAC 296-14-530, one of the new wage calculation rules.

Mr. Jones' pay stubs for pay periods in 2001 reflect his hours worked for each full-week pay period: 50 (August 25), 42.5 (September 2), 33 (September 9), 44 (September 23), 48 (September 30), 42 (October 7), 51 (October 14), and 49 (October 21). This averages out to 44.9 hours per week, or 8.98 (9) hours a day. The time loss calculation in the Department order on appeal was based on full-time work, eight hours per day, five days a week. The Department should include the average nine hours per day in the wage calculation.

The Department order of February 4, 2002 is reversed, and this claim is remanded to the Department with directions to issue an order that recalculates the claimant's time loss rate based on married with no dependents with an hourly rate of $25.03, nine hours per day, five days per week.

FINDINGS OF FACT

1. On November 13, 2001, the Department of Labor and Industries received an application for benefits alleging an industrial injury to the claimant on October 18, 2001, during the course of his employment with Swinerton Builders of Oregon, Inc. The claim was allowed and benefits paid. On February 4, 2002, the Department issued an order that determined the claimant's time loss compensation rate that was based on a married individual with no dependents and with monthly wages at the time of injury of $4,185.28. On February 11, 2002, the Board received the claimant's appeal from the February 4, 2002 order and it was assigned Docket No. 02 11439.

2. On October 18, 2001, Fred L. Jones sustained an industrial injury while in the course of his employment with Swinerton Builders.

3. As of October 18, 2001, Mr. Jones' base wage was $23.78. In addition, by agreement with Mr. Jones' union, his employer compensated Mr. Jones by paying the following amounts into union trust accounts for

each hour worked: $1.25 for vacation; $1.00 for union dues, $3.28 for health and welfare (health insurance, life insurance, and death and dismemberment insurance), $3.81 for pension, and $ .40 for training. The resulting gross wage, $33.52, met the prevailing wage requirement.

4. As of October 18, 2001, Mr. Jones had the ability to periodically withdraw the funds from the vacation trust, including interest, whether or not he took vacation time, and he could use these funds as he pleased.

5. As of October 18, 2001, Mr. Jones' gross cash wage included his base pay ($23.78 per hour) plus the $1.25 per hour vacation pay, for a total of $25.03 per hour.

6. As of October 18, 2001, the employer's contribution to the union trust fund for Mr. Jones' union dues, health and welfare, pension, and training, were in-kind consideration.

7. From October 18, 2001 through at least February 4, 2002, Mr. Jones retained his health and welfare benefits.

8. As of October 18, 2001, Mr. Jones was not vested in his pension plan and had no entitlement to these benefits.

9. Union dues and training benefits are not critical to Mr. Jones' health and survival.

10. As of October 18, 2001, Mr. Jones averaged nine hours of work per day and he worked five days per week.

CONCLUSIONS OF LAW

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

2. The prevailing wage laws, RCW 39.12, have no applicability to determining a worker's wages for purposes of RCW 51.08.178.

3. The value of Mr. Jones health and welfare benefits cannot be included, in whole or in part, in the calculation of his "wages" through February 4, 2002, as contemplated by RCW 51.08.178.

4. The value of Mr. Jones' vacation benefit is properly included in the calculation of his "wages" as contemplated by RCW 51.08.178.

5. The value of Mr. Jones union dues and training benefits are not properly included in the calculation of his "wages" as contemplated by RCW 51.08.178.

6. The value of Mr. Jones' pension benefit is not properly included in the calculation of his "wages" as contemplated by RCW 51.08.178.

7. The February 4, 2002 order of the Department of Labor and Industries is incorrect and is reversed. This claim is remanded to the Department to recalculate Mr. Jones' time loss compensation based on a married individual with no dependents with an hourly rate of $25.03 for an average nine hours per day and five days per week, and to take such further action as is indicated by the facts and the law.

It is so **ORDERED**.

Dated this 28th day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member

DISSENT

I dissent. I agree with the majority that Mr. Jones' $1.25 per hour vacation payment is part of his cash wage, but strongly disagree with the exclusion of the other payments made by the employer to the union trust on Mr. Jones' behalf. The claimant's Petition for Review persuasively argues that the entirety of the compensation paid to Mr. Jones was a money wage that is not subject to the *Cockle* analysis. Mr. Jones was not paid any in-kind compensation. Rather, the employer compensated Mr. Jones in his paychecks and with the additional payments to trust accounts that the claimant, through his bargaining representative, designated. The union trust, in turn, provided Mr. Jones with the various benefits that the majority erroneously characterizes as "in kind."

The *Cockle* decision acknowledged this principal when it cited with approval United States Supreme Court Justice Thurgood Marshall's dissent in *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs:*

> For the purposes of determining a worker's earning power, there is no principled distinction between direct cash payments and payments into a plan that provides benefits to the employee. If the employer had agreed to pay some fixed amount of money to its employees who, in turn, paid the amount into benefit funds, that amount would satisfy the majority's definition of wages since the benefit has "a present value that can be readily converted into a cash equivalent on the basis of [its] market value." In my view, the result should not change simply because the company agrees to eliminate an unnecessary transaction by paying the contributions directly to the trust funds.

Cockle at 818, citing *Morrison-Knudsen Constr. Co.,* 461 U.S. 624, 642 (1983) (Marshall, J., dissenting).

Mr. Jones' cash wage is the full $33.52 that his employer was paying for Mr. Jones' work at the time of injury. The record in this matter establishes that Mr. Jones was working on a prevailing wage job when injured. The employer was required to pay $33.52 to all similarly situated workers, union members or not. The amounts paid by the employer to various trusts are voluntary deductions, taken from the worker's paycheck as a result of the union contract, and are part of the bargained-for wage. Had the union agreement, negotiated on behalf of its members, not required the employer to pay the sums into various trusts, the amounts would be included in Mr. Jones' gross wages.

The correctness of this approach is most obvious when one considers that the employer's payments for vacation and union dues were considered "wages" for federal income tax purposes. It is patently unfair to disregard these sums for purposes of time loss compensation, while those same payments are taxed as if part of Mr. Jones' cash wages. Union dues payments and vacation pay (which was included by the majority) should be included in the wage calculation if only for the reason that it is inequitable to deduct federal tax on a payment that is not considered "wages" for purposes of time loss compensation.

Even if the money paid by the employer into the trust for these benefits is considered "in kind" and subject to the *Cockle* test, that money should qualify as "wages." Pension benefits are critical to protecting a worker's basic health and survival. They replace wages after retirement and provide the means to live beyond the working years. Similarly, life, death and dismemberment, and

disability insurance replace the income that is eliminated through the worker's death or disability. Skills training maintains a worker's job competitiveness and the ability to earn wages.

This appeal should be remanded to the Department to correct the hours per day component of the wage calculation and also, to include the value of the vacation, health and welfare, union dues, training and pension benefits as "wages."

Dated this 28th day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
FRANK E. FENNERTY, JR. Member