Frost-Kaczynski, Glenda

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))

In making a determination whether wages should be paid under RCW 51.08.178(1) or (2), the focus must be on the worker's relationship to employment, not merely the worker's relationship to the employer. A school teacher who works for the school district under a nine-month contract and continues employment as an educator during the summer has established a relationship to employment that requires wages be calculated pursuant to subsection (1). ***….In re Glenda Frost-Kaczynski,* BIIA Dec., 05 15420 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 06-2-01542-0.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GLENDA FROST-KACZYNSKI	**)**	**DOCKET NO. 05 15420**
	)	
CLAIM NO. W-834984	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Glenda Frost-Kaczynski, by
Casey & Casey, P.S., per
Gerald L. Casey and Carol L. Casey

Self-Insured Employer, Bremerton School District No. 100-C, by
Thomas G. Hall & Associates, per
Joseph A. Albo

This is an appeal filed by the claimant, Glenda Frost-Kaczynski, on May 19, 2005, from an order of the Department of Labor and Industries dated May 16, 2005. In this order, the Department determined the claimant's monthly wage at the time of injury or occupational disease as $4,400.79, plus an additional $380.08 per month for the amount of health care benefits that had been paid by the self-insured employer. 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 2, 2006, in which the industrial appeals judge reversed and remanded the order of the Department dated May 16, 2005, with directions to issue an order in which the Department establishes the claimant's monthly wage for time loss compensation purposes by applying subsection 2 of RCW 51.08.178, by taking the average of the twelve-month period from November 1, 2001 to October 31, 2002, including the cost of employer-provided health care insurance in the amount of $380.08 per month; and establishing the claimant's monthly wage as $4,780.87.

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

We have granted review because we disagree with the legal analysis set forth by our industrial appeals judge in his Proposed Decision and Order. Although he reversed the Department order under appeal, our industrial appeals judge affirmed the Department decision that Ms. Frost-Kaczynski, as a teacher for the Bremerton School District, was a seasonal or intermittent employee. The industrial appeals judge's focus in his Proposed Decision and Order is on the

nine-month teaching contract with the self-insured employer. Based on this nine-month contract, our industrial appeals judge found that Ms. Frost-Kaczynski is a seasonal employee. The correct focus should be on the claimant's relationship to employment. This record supports a finding that the claimant's relationship to employment is not seasonal, part-time, or intermittent, and we find that Ms. Frost-Kaczynski's wage should be calculated under subsection 1 of RCW 51.08.178.

In the Proposed Decision and Order, the industrial appeals judge makes a correction for the period of time used to average wages under subsection 2 of RCW 51.08.178, but in all other respects he affirms the Department's order in which the Department used subsection 2 of RCW 51.08.178, and averaged the claimant's wage from the self-insured employer over a twelve-month period. The only issue raised in this appeal is whether the claimant's wage should be calculated under subsection 1 or subsection 2 of RCW 51.08.178.

RCW 51.08.178 is titled **"Wages"—Monthly wages as basis of compensation—Computation thereof.** This statute provides for a number of ways to calculate the wages of an injured worker for the purposes of paying time loss compensation. Subsection 1 of RCW 51.08.178, provides that

> the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed, unless otherwise provided . . .

Subsection 2, of RCW 51.08.178, provides an alternative method for calculating the monthly wage for the injured worker in situations where the worker's employment is exclusively seasonal or essentially part-time or intermittent. Under subsection 2 of the statute, the exclusively seasonal or essentially part-time or intermittent worker has his or her wages determined by averaging the total wages earned over a twelve-month period.

The record before us establishes that Ms. Frost-Kaczynski had a nine-month teaching contract with the Bremerton School District. The record also establishes that for several years prior to the date of this industrial injury, she worked for two other schools teaching classes during the summer. She anticipated continuing this summer employment during the summer following her industrial injury.

The nature of the summer employment Ms. Frost-Kaczynski was normally engaged in was contract-teaching. In the summer prior to her industrial injury, she received $3,660 from one of the schools, and $9,496 from the other school for her summer teaching work. Finally, this record indicates that Ms. Frost-Kaczynski was able to deduct expenses for federal tax purposes, which

apparently exceeded the amount of money she was paid by the schools for her summer teaching work. Her federal tax return established a loss for tax purposes from her summer contract work.

In the Proposed Decision and Order, our industrial appeals judge focuses on the relationship the worker has with the self-insured employer school district. Our industrial appeals judge finds that because of this seasonal relationship with the Bremerton School District, Ms. Frost-Kaczynski is a seasonal employee and, as such, must have her wages computed under the provisions of RCW 51.08.178(2). Our industrial appeals judge agreed with the Department that the wages received for the nine-month period from the Bremerton School District should be divided by twelve under the provision of RCW 51.08.178(2) because Ms. Frost-Kaczynski is a seasonal employee. We disagree with this analysis.

In *Department of Labor & Indus., v. Avundes*, 140 Wn.2d 282 (2000), the Washington State Supreme Court unanimously adopted this Board's test for resolving the question of the application of subsection 1 or subsection 2 of RCW 51.08.178, when calculating a worker's wage. The *Avundes* test requires a two-prong analysis. The first prong of the analysis is to look at the type of work being performed. Here, in Ms. Frost Kaczynski's case, teaching is clearly not seasonal or intermittent work by definition. Teachers can, and do, teach year-round. The second prong of the test is to look at the relationship the worker has to his or her employment. The court in *Avundes* went further to state that the test, focusing on the worker's relationship to employment, correctly follows from the Supreme Court's holding in *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793 (1997). *Double D Hop Ranch* stands for the proposition that the worker's compensation benefits should reflect a worker's "lost earning capacity."

The court in *Avundes* also noted that the default provision in calculating wages under our Industrial Insurance Act is subsection 1 of RCW 51.08.178. This section applies unless there is evidence to establish that it does not apply.

The facts in this record establish that Ms. Frost-Kaczynski had a nine-month contract with the self-insured employer, Bremerton School District, to teach. She had a prior history of teaching during the summer with other schools, and she had an expectation to continue that employment in the summer following her industrial injury. These facts lead to only one conclusion, Ms. Frost-Kaczynski worked year-round. Her relationship to employment is not exclusively seasonal or essentially part-time or intermittent. Her wages must be calculated under RCW 51.08.178(1).

The self-insured employer argues that Ms. Frost-Kaczynski did not make a profit on her summer teaching work as reflected in her federal tax filings. If Ms. Frost-Kaczynski's relationship to her employment was either exclusively seasonal, or essentially part-time or intermittent, then the inquiry into the amount of money she earned over a twelve-month period would be relevant in calculating her wages under subsection 2 of RCW 51.08.178. However, because we find, based on the facts in this record, that her relationship to employment was not exclusively seasonal or essentially part-time or intermittent, we need only focus on her wage at the time of the industrial injury as set out in subsection 1 of RCW 51.08.178.

Finally, calculating Ms. Frost-Kaczynski's wages under subsection 1 of RCW 51.08.178 more closely reflects her lost earning capacity as opposed to averaging the monthly salary from the self-insured employer for the nine-month contract over a twelve-month period. The Department order is incorrect and is reversed. This matter is remanded to the Department with directions to calculate Ms. Frost-Kaczynski's monthly wages under the provisions of RCW 51.08.178(1).

FINDINGS OF FACT

1. On June 21, 2004, the Department of Labor and Industries received an Application for Benefits in which the claimant, Glenda Frost-Kaczynski, alleged she sustained an industrial injury or occupational disease on May 26, 2004, while in the course of her employment with the self-insured employer, Bremerton School District No. 100-C. On January 5, 2005, the Department issued an order in which it allowed the claim as an industrial injury or an occupational disease. On May 16, 2005, the Department issued an order in which it established the claimant's monthly wage at the time of injury as being $4,400.79, plus an additional $380.08 per month for the amount of health care benefits that had been paid by the employer. On May 19, 2005, the claimant filed a Notice of Appeal to the Department order dated May 16, 2005, with the Board of Industrial Insurance Appeals. On June 16, 2005, the Board granted the appeal and assigned it Docket No. 05 15420.

2. On May 26, 2004, Glenda Frost-Kaczynski sustained an industrial injury or an occupational disease while in the course of her employment with the self-insured employer, Bremerton School District No. 100-C, as a school teacher, a position she has held since 1983. Teaching school is not exclusively seasonal or essentially part-time or intermittent work.

3. For several years prior to the industrial injury of May 26, 2004, the claimant worked for the self-insured employer, Bremerton School District No. 100-C, during the nine-month school term and engaged in contract teaching with other schools during the summer months when the self-insured employer's school was not in session. Ms. Frost-Kaczynski intended to continue the summer employment during the summer following the industrial injury.

4. Ms. Frost-Kaczynski's employment and her relationship to employment were not exclusively seasonal or essentially part-time or intermittent.

CONCLUSIONS OF LAW

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

2. On May 26, 2004, Ms. Frost-Kaczynski's employment and her relationship to employment was not exclusively seasonal or essentially part-time or intermittent, as contemplated by RCW 51.08.178(2).

3. The Department order dated May 16, 2005, is incorrect and is reversed. This claim is remanded to the Department with direction to calculate and pay Ms. Frost-Kaczynski's monthly time loss compensation pursuant to the provisions of RCW 51.08.178(1), and to take such further action as required by the facts and the law.

It is so **ORDERED**.

Dated this 2nd day of June, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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