

## **Zimmerman, Wendy**

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### **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))**

An intermittent worker, as contemplated by RCW 51.08.178(2), engaged in duties on the date of manifestation which were clearly related to contracted, but not commenced, full-time employment should have wages determined under RCW 51.08.178(4) when using subsection (2) would result in a wage that does not reflect lost earning capacity. ...*In re Wendy Zimmerman*, BIIA Dec., 08 19330 (2009)

Scroll down for order.



1 Mile Falls school board voted to employ Ms. Zimmerman full-time as a fourth grade teacher during  
2 the 2004-2005 school year.

3 On August 28, 2004, Ms. Zimmerman was working in a portable classroom preparing for the  
4 2004-2005 school year when she was exposed to substances which caused her to develop chronic  
5 obstructive pulmonary disease. Under the negotiated agreement between the school district and  
6 Ms. Zimmerman's union, Ms. Zimmerman could have submitted a request to be paid for her work  
7 that day and she would have been paid. Ms. Zimmerman did not submit such a request. As a  
8 consequence, she received no wages for her work that day. Ms. Zimmerman continued to work for  
9 the school district as a teacher, on a full-time basis, until November 2007, when her condition  
10 caused her to stop working.

11 The question presented by this case is, "What is the appropriate method for determining  
12 Ms. Zimmerman's wage rate for the purposes of calculating time-loss compensation benefits?" The  
13 term wages is defined by RCW 51.08.178, which states:

14 (1) For the purposes of this title, the monthly wages the worker was receiving from all  
15 employment at the time of injury shall be the basis upon which compensation is  
16 computed unless otherwise provided specifically in the statute concerned. In cases  
17 where the worker's wages are not fixed by the month, they shall be determined by  
multiplying the daily wage the worker was receiving at the time of the injury:

- 18 (a) By five, if the worker was normally employed one day a week;
- 19 (b) By nine, if the worker was normally employed two days a week;
- 20 (c) By thirteen, if the worker was normally employed three days a week;
- 21 (d) By eighteen, if the worker was normally employed four days a week;
- 22 (e) By twenty-two, if the worker was normally employed five days a week;
- 23 (f) By twenty-six, if the worker was normally employed six days a week;
- 24 (g) By thirty, if the worker was normally employed seven days a week.

25 The term "wages" shall include the reasonable value of board, housing, fuel, or  
26 other consideration of like nature received from the employer as part of the contract of  
27 hire, but shall not include overtime pay except in cases under subsection (2) of this  
28 section. As consideration of like nature to board, housing, and fuel, wages shall also  
29 include the employer's payment or contributions, or appropriate portions thereof, for  
30 health care benefits unless the employer continues ongoing and current payment or  
31 contributions for these benefits at the same level as provided at the time of injury. . . .  
The daily wage shall be the hourly wage multiplied by the number of hours the worker  
is normally employed. The 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 each day.

32 (2) In cases where (a) the worker's employment is exclusively seasonal in  
nature or (b) the worker's current employment or his or her relation to his or her

1 employment is essentially part-time or intermittent, the monthly wage shall be  
2 determined by dividing by twelve the total wages earned, including overtime, from all  
3 employment in any twelve successive calendar months preceding the injury which  
4 fairly represent the claimant's employment pattern.

5 (3) If, within the twelve months immediately preceding the injury, the worker has  
6 received from the employer at the time of injury a bonus as part of the contract of hire,  
7 the average monthly value of such bonus shall be included in determining the worker's  
8 monthly wages.

9 (4) In cases where a wage has not been fixed or cannot be reasonably and  
10 fairly determined, the monthly wage shall be computed on the basis of the usual wage  
11 paid other employees engaged in like or similar occupations where the wages are  
12 fixed.

13 We agree with our industrial appeals judge to the extent he found Ms. Zimmerman's wage  
14 should be calculated using subsection (4) of RCW 51.08.178. Ms. Zimmerman was clearly  
15 employed on an intermittent basis with the school district. She worked nine months of every year,  
16 although her salary was paid over twelve months. Because of the intermittent nature of her  
17 relationship with her employment, and the fact that she was not actually paid any wages for her  
18 work on August 28, 2004, it would not be appropriate to apply subsection (1) of RCW 51.08.178.  
19 We find that applying subsection (2) of RCW 51.08.178 would not result in a wage which fairly and  
20 reasonably represents her lost earning capacity because Ms. Zimmerman was not employed  
21 full-time in the period immediately preceding the date of manifestation of her occupational disease,  
22 but was engaged in duties on the date of manifestation which were clearly related to full-time  
23 employment with the school district.

24 In addition, we believe Ms. Zimmerman's case is similar to that of Janet Papson. *In re Janet*  
25 *Papson*, BIIA Dec., 01 15138 (2003). Ms. Papson was a bus driver who had a sporadic history of  
26 employment immediately prior to her employment as a bus driver. We found that basing  
27 Ms. Papson's wages on her earlier sporadic employment, as required under RCW 51.08.178(2),  
28 would work an injustice given the large disparity between that wage and Ms. Papson's bus driving  
29 wages. Similarly, using subsection (2) to calculate Ms. Zimmerman's wage would result in a wage  
30 substantially lower than Ms. Zimmerman was contracted to earn during the 2004-2005 school year.

31 We find that using RCW 51.08.178(4) to determine Ms. Zimmerman's wages is the best way  
32 to comply with the Supreme Court's mandate as stated in *Double D Hop Ranch v. Sanchez*, 133  
Wn.2d 793 (1997), to ensure that the wage rate most accurately reflects Ms. Zimmerman's lost  
earning capacity. Therefore, we conclude Ms. Zimmerman's wages should be determined under  
RCW 51.08.178(4). Her wages should be equivalent to those of a teacher with her education and

1 experience, employed by Nine Mile Falls School District on a full-time basis for the 2004-2005  
2 school year. In addition, the school district should include the amount of healthcare benefits  
3 provided by the school district. Finally, the time-loss compensation benefits rate should be based  
4 upon Ms. Zimmerman's family status of married with two dependent children.

5 **FINDINGS OF FACT**

- 6 1. On September 7, 2006, the claimant, Wendy Zimmerman, filed an  
7 Application for Benefits with the Department of Labor & Industries, in  
8 which she alleged she had a chronic obstructive pulmonary disease  
9 condition arising naturally and proximately out of distinctive conditions of  
10 her employment with Nine Mile Falls School District, due to exposure to  
11 fiberglass, which condition became manifest on August 28, 2004. On  
12 March 7, 2007, the Department issued an order in which it allowed the  
claim; in that order the Department directed the self-insured employer to  
pay all medical benefits and time-loss compensation benefits as may be  
indicated.

13 On May 20, 2008, the Department issued an order calculating the  
14 claimant's monthly wages by averaging her income from wages from  
15 June 1, 2003, to May 31, 2004. The Department found wages of  
16 \$20,192.43, divided by 12 months, for an average monthly wage of  
17 \$1,682.70. The Department considered additional healthcare benefits of  
18 \$367.63 per month, for total gross wages of \$2,050.33 per month, with  
19 the claimant married with one child. The May 20, 2008 order was  
20 communicated to the claimant on May 23, 2008. On July 22, 2008, the  
claimant placed into the possession of the United States Postal Service  
her Protest and Request for Reconsideration from the May 20, 2008  
order.

21 On August 28, 2008, the Department issued an order in which it affirmed  
22 its May 20, 2008 order. On October 6, 2008, the claimant filed her  
23 Notice of Appeal with the Board of Industrial Insurance Appeals, from  
24 the Department's August 28, 2008 order. On October 15, 2008, the  
Board granted the appeal under Docket No. 08 19330, and agreed to  
hear the appeal.

- 25 2. In August 2004, Wendy Zimmerman was preparing her 4th-grade  
26 classroom for the upcoming school year. She was exposed to  
27 substances which caused her to develop chronic obstruction pulmonary  
28 disease (COPD). The disease arose naturally and proximately out of  
distinctive conditions of her employment and manifested on August 28,  
2004.
- 29 3. Ms. Zimmerman was not paid for her work on August 28, 2004, but  
30 could have requested payment from the school district. If she had  
31 requested payment, she would have been paid pursuant to the  
32 negotiated agreement between the school district and the teachers  
which provided for payment of two days of work performed prior to the  
school year in order to prepare her classroom.

- 1 4. As of the date of manifestation of her occupational disease,  
2 Ms. Zimmerman's wage, as to the salary portion of the wage calculation,  
3 should be calculated based upon what other teachers, with  
4 Ms. Zimmerman's education and experience, employed by the school  
5 district on a full-time basis for the 2004-2005 school year, would have  
6 been paid. Her wage should also include the amount of  
7 employer-provided health care benefits such teachers would have  
8 received during the 2004-2005 school year.
- 9 5. As of the date of manifestation of her occupational disease,  
10 Ms. Zimmerman was married with two dependent children.

11 **CONCLUSIONS OF LAW**

- 12 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
13 parties to and the subject matter of this appeal.
- 14 2. The order of the Department dated August 28, 2008, is incorrect and is  
15 reversed. The claim is remanded to the Department with directions: to  
16 determine Ms. Zimmerman's wage as of the date of manifestation of the  
17 occupational disease pursuant to RCW 51.08.178(4), such that  
18 Ms. Zimmerman's wages would be equal to those of any teacher with  
19 Ms. Zimmerman's education and experience, employed full-time with the  
20 Nine Mile Falls School District during the 2004-2005 school year,  
21 including any employer-provided healthcare benefits available to such  
22 teachers; and to find Ms. Zimmerman's family status, as of the date of  
23 manifestation of her occupational disease, to be married with two  
24 dependent children.

25 DATED: December 30, 2009

26 BOARD OF INDUSTRIAL INSURANCE APPEALS

27 /s/ \_\_\_\_\_  
28 THOMAS E. EGAN Chairperson

29 /s/ \_\_\_\_\_  
30 FRANK E. FENNERTY, JR. Member

31 /s/ \_\_\_\_\_  
32 LARRY DITTMAN Member