Stedman, Maggie

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))

Averaging hours worked per day pursuant to RCW 51.08.178(1) should only be used in limited circumstances. Minor variations in hours worked should be considered self-correcting rather than representative of a change in full-time status. Averaging is the exception rather than the norm when establishing the number of hours worked. ***….In re Maggie Stedman*, BIIA Dec., 09 22981 (2010)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No.10-2-00039-6.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MAGGIE R. STEDMAN	)	**DOCKET NOS. 09 22981 & 09 23486**
	)	
CLAIM NO. W-745018	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Maggie R. Stedman, by
Rumbaugh, Rideout, Barnett & Adkins, per
Stanley J. Rumbaugh

Self-Insured Employer, General Construction Co., by
Wallace, Klor & Mann, P.C., per
Drew D. Dalton, and John L. Klor

Department of Labor and Industries, by
The Office of the Attorney General, per
Zebular Madison, Assistant

The claimant, Maggie R. Stedman, filed an appeal with the Board of Industrial Insurance Appeals on December 10, 2009, from an order of the Department of Labor and Industries dated November 30, 2009 (Docket No. 09 22981). In that order, the Department reversed orders dated June 9, 2009, and August 28, 2009, and calculated the claimant's gross wage as $4,370.12 per month.

On December 15, 2009, the employer, General Construction Co., also appealed the November 30, 2009 Department order (Docket No. 09 23486). The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on September 7, 2010, in which the industrial appeals judge reversed and remanded the November 30, 2009 Department order. The employer filed a response to the claimant's Petition for Review on October 1, 2010.

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 grant review to address the calculation of the claimant's daily wage pursuant to RCW 51.08.178(1). The statute provides that a worker's daily wage shall be the hourly wage multiplied by the number of hours the worker is "normally employed." Our industrial appeals judge determined that the claimant, Maggie Stedman, worked an average of 7.17 hours per day, five days per week. This figure was calculated by averaging the claimant's hours over the twelve months preceding the injury.

RCW 51.08.178(1) specifically provides that the number of hours a 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. We previously determined that the only averaging permitted by subsection (1) of the statute was averaging similar to that used by our industrial appeals judge, that is to say, we determined the statute permitted averaging the number of hours per day and days per week to determine the number of hours a worker was "normally employed." See, *Ubaldo Antunez*, BIIA Dec., 88 1852 (1989). Among other changes to RCW 51.08.178, amendments in 1988 reflected our holding in *Antunez* and specifically permitted, but did not require, averaging of hours worked per day to calculate the hours "normally worked."

Although this method of averaging is permitted by RCW 51.08.178(1), the method should be utilized only in limited circumstances. Whether an averaging method is needed is dependent on the circumstances that define the hours and days a worker is employed. We previously defined "normally employed" as a "more or less permanent standard" or "established norm". *In re Jeanetta Stepp,* BIIA Dec. 87 2734 at 7 (1989). We also stated that the use of the averaging method should be reserved for employment situations with "persistent fluctuations in the number of hours per day or days per week." *Antunez* at 6. A worker can be considered "normally employed" eight hours a day five days a week despite occasional variations from the normal work schedule. A minor variation in a worker's schedule does not require that the Department resort to averaging in order to determine the hours worked per day. Minor variations should be generally considered self-corrective rather than representative of a change in full-time status. *Antunez* at 7. When the statutory provision is viewed in this light, the use of an averaging method should remain the exception rather than the norm when establishing the number of hours normally employed.

Averaging is not required in this case in order to calculate the hours and days Ms. Stedman was normally employed. We find only minor variations, not persistent fluctuations, in the hours or days. Ms. Stedman was employed as a carpenter with General Construction Co. on a full-time basis. She was scheduled to work eight hours per day, five days per week. While she was occasionally sent home if a project finished early, the intention of both the claimant and her employer was that she was scheduled to work full time. The employer's choice to have the crew leave early if a project was completed represents the type of self-correcting change contemplated by *Antunez*. The minor changes in Ms. Stedman's schedule due to leave or project completion are not persistent schedule fluctuations that justify averaging under the statute. The circumstances of her employment establish a norm of full-time employment.

Ms. Stedman completed a three-week unpaid apprentice training program prior to beginning her position as a carpenter. While she was permitted to collect unemployment during this period, the parties agreed that it would be unjust to average the unemployment compensation into her wage calculation. This illustrates the difficulty with averaging the wages of a full-time worker. All of the parties recognized that averaging the unemployment wage for the training program would be inconsistent with the statutory mandate that the daily wage be determined in a fair and reasonable manner. Under these circumstances, the hours Ms. Stedman was normally scheduled to work, rather than an average of the actual hours worked, should govern the wage calculation. Once the worker establishes that they were "normally employed" full-time, hours should not be averaged under the statute.

The employer raised the issue of including the claimant’s vacation and leave pay when averaging her hours. Because averaging was not the proper method for determining Ms. Stedman’s hours, this issue need not be further addressed.

Because Ms. Stedman was "normally employed" full-time, we conclude that her daily wage should have been calculated based on eight hours per day, five days per week, with a wage of $21.24 per hour, plus monthly health care benefits of $844.28. We remand this matter to the Department to recalculate the claimant's time-loss compensation benefits rate using these figures.

FINDINGS OF FACT

1. On January 25, 2007, the Department of Labor and Industries received an Application for Benefits in which the claimant, Maggie R. Stedman, alleged she incurred an industrial injury to the claimant on January 24, 2007, during the course of her employment with General Construction Co. The claim was allowed and benefits were provided. On June 9, 2009, the Department issued an order in which it determined the claimant's time-loss compensation benefits based on total gross wages of $3,611.64 per month. On June 16, 2009, the Department received the claimant's protest to the June 9, 2009 order. On August 28, 2009, the Department issued an order in which it directed the claimant to repay the self-insured employer an overpayment of time-loss compensation benefits. On September 4, 2009, the Department received the claimant's protest to the August 28, 2009 order, and it was placed in abeyance. On November 30, 2009, the Department issued an order in which it reversed the June 9, 2009, and August 28, 2009 orders and determined the claimant's total gross wages of $4,370.12 per month. This amount was based on $21.24 per hour times 166 hours per month with health care benefits of $844.28 per month as a single individual with three dependents. On December 10, 2009, the Board received the claimant's appeal from the November 30, 2009 order. On December 15, 2009, the Board received the self-insured employer's appeal from the November 30, 2009 order. On December 23, 2009, the Board granted the claimant's appeal under Docket No. 09 22981, and agreed to hear the appeal. On December 23, 2009, the Board granted the self-insured employer's appeal under Docket No. 09 23486, and agreed to hear the appeal.

2. Ms. Stedman sustained an industrial injury on January 24, 2007, during the course of her employment with General Construction Co.

3. At the time of her industrial injury, Ms. Stedman was a married individual with three dependents. She earned $21.24 per hour, and her self-insured employer provided $844.28 per month for her health care benefits.

4. Ms. Stedman was scheduled to work eight hours per day, five days per week.

5. Ms. Stedman was occasionally sent home early when a project was completed. She also took leave. These slight variations in her schedule were self-correcting and do not constitute persistent fluctuations in the hours worked.

CONCLUSIONS OF LAW

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

2. Ms. Stedman was normally employed eight hours a day, five days a week within the meaning of RCW 51.08.178(1).

3. Ms. Stedman's hours should not be averaged when her schedule reflected a permanent standard or established norm of working full-time or eight hours per day, five days per week.

4. The November 30, 2009 order of the Department of Labor and Industries is incorrect and is reversed. The claim is remanded with direction to calculate the claimant's time-loss compensation benefits rate as a married individual with three dependents, based on a full time schedule of five days per week, eight hours per day, with an hourly wage of $21.24, and self-insured employer paid health care benefits of $844.28 per month.

Dated: November 18, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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