

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.]

Scroll down for order.

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

7 RCW 51.08.178(1) specifically provides that the number of hours a worker is normally
8 employed shall be determined by the Department in a fair and reasonable manner, which may
9 include averaging the number of hours worked per day. We previously determined that the only
10 averaging permitted by subsection (1) of the statute was averaging similar to that used by our
11 industrial appeals judge, that is to say, we determined the statute permitted averaging the number
12 of hours per day and days per week to determine the number of hours a worker was "normally
13 employed." See, *Ubaldo Antunez*, BIIA Dec., 88 1852 (1989). Among other changes to
14 RCW 51.08.178, amendments in 1988 reflected our holding in *Antunez* and specifically permitted,
15 but did not require, averaging of hours worked per day to calculate the hours "normally worked."

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

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

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

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

24 Because Ms. Stedman was "normally employed" full-time, we conclude that her daily wage
25 should have been calculated based on eight hours per day, five days per week, with a wage of
26 \$21.24 per hour, plus monthly health care benefits of \$844.28. We remand this matter to the
27 Department to recalculate the claimant's time-loss compensation benefits rate using these figures.

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1 **FINDINGS OF FACT**

- 2 1. On January 25, 2007, the Department of Labor and Industries received
3 an Application for Benefits in which the claimant, Maggie R. Stedman,
4 alleged she incurred an industrial injury to the claimant on January 24,
5 2007, during the course of her employment with General Construction
6 Co. The claim was allowed and benefits were provided. On June 9,
7 2009, the Department issued an order in which it determined the
8 claimant's time-loss compensation benefits based on total gross wages
9 of \$3,611.64 per month. On June 16, 2009, the Department received
10 the claimant's protest to the June 9, 2009 order. On August 28, 2009,
11 the Department issued an order in which it directed the claimant to
12 repay the self-insured employer an overpayment of time-loss
13 compensation benefits. On September 4, 2009, the Department
14 received the claimant's protest to the August 28, 2009 order, and it was
15 placed in abeyance. On November 30, 2009, the Department issued an
16 order in which it reversed the June 9, 2009, and August 28, 2009 orders
17 and determined the claimant's total gross wages of \$4,370.12 per
18 month. This amount was based on \$21.24 per hour times 166 hours per
19 month with health care benefits of \$844.28 per month as a single
20 individual with three dependents. On December 10, 2009, the Board
21 received the claimant's appeal from the November 30, 2009 order. On
22 December 15, 2009, the Board received the self-insured employer's
23 appeal from the November 30, 2009 order. On December 23, 2009, the
24 Board granted the claimant's appeal under Docket No. 09 22981, and
25 agreed to hear the appeal. On December 23, 2009, the Board granted
26 the self-insured employer's appeal under Docket No. 09 23486, and
27 agreed to hear the appeal.
- 28 2. Ms. Stedman sustained an industrial injury on January 24, 2007, during
29 the course of her employment with General Construction Co.
- 30 3. At the time of her industrial injury, Ms. Stedman was a married individual
31 with three dependents. She earned \$21.24 per hour, and her
32 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.

29 **CONCLUSIONS OF LAW**

- 30 1. The Board of Industrial Insurance Appeals has jurisdiction over the
31 parties to and the subject matter of these appeals.
- 32 2. Ms. Stedman was normally employed eight hours a day, five days a
week within the meaning of RCW 51.08.178(1).

- 1 3. Ms. Stedman's hours should not be averaged when her schedule
2 reflected a permanent standard or established norm of working full-time
3 or eight hours per day, five days per week.
4 4. The November 30, 2009 order of the Department of Labor and
5 Industries is incorrect and is reversed. The claim is remanded with
6 direction to calculate the claimant's time-loss compensation benefits rate
7 as a married individual with three dependents, based on a full time
8 schedule of five days per week, eight hours per day, with an hourly
9 wage of \$21.24, and self-insured employer paid health care benefits of
10 \$844.28 per month.

11 Dated: November 18, 2010.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13 /s/ _____
14 DAVID E. THREEEDY Chairperson

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