

Stepp, Jeanetta

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

RCW 51.08.178 requires the Department to base the calculation of time-loss compensation on the worker's monthly wage at the time of injury. The pre-1988 statute does not permit the averaging of wages over a several month period in order to determine the "monthly wage."*In re Ubaldo Antunez*, BIIA Dec., 88 1852 (1989); *In re Rod Carew*, BIIA Dec., 87 3313 (1989); *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989); *In re Jeanetta Stepp*, BIIA Dec., 87 2734 (1989)

The only averaging permitted by RCW 51.08.178 (before 1988 amendments) is in determining the number of hours per day or days per week the worker was "normally employed" at the time of injury.*In re Ubaldo Antunez*, BIIA Dec., 88 1852 (1989); *In re Jeanetta Stepp*, BIIA Dec., 87 2734 (1989)

Scroll down for order.

1 issued on November 4, 1988 in which the order of the Department dated June 24, 1987 was reversed
2 and the claim remanded to the Department with directions to substitute the number \$336.60 for the
3 number \$283.86 in the order and with directions to the Department to redetermine any overpayment
4 which may have occurred during the applicable period and the Department's entitlement to
5 reimbursement for such overpayment.
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9 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
10 prejudicial error was committed and said rulings are hereby affirmed.
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12 The claimant, Jeanetta A. Stepp, suffered an industrial injury when she fell from a ladder on
13 June 27, 1985 during the course of her employment with R. F. Taplett Fruit Company. At issue in this
14 appeal is a dispute between the Department and the claimant over the manner in which the
15 Department calculated the claimant's monthly wages at the time of injury for the purpose of
16 determining the rate of her time loss compensation. Since our understanding of the facts concerning
17 the claimant's employment agreement at the time of injury differs in significant respect from what is
18 described in the Proposed Decision and Order, we first briefly describe our understanding of those
19 relevant facts.
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22 The claimant, Ms. Stepp, began working for this employer in March, 1985 on an as-needed,
23 part time basis at an hourly wage rate of \$3.75. The number of days per week and hours per day
24 worked fluctuated considerably until June 27, 1985, when a dramatic increase in days per week and
25 hours per day she was to work occurred. On that date, which was also the date Ms. Stepp was
26 injured, she began performing for the same employer "thinning" duties, which would require her to
27 work 9 hours per day for 5 days of the week, plus an additional 5 hours on Saturday. The work at
28 thinning was expected to last from 3 to 5 weeks.
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31 It appears, from the testimony elicited at hearing, that the Department and the employer have
32 meant to raise an issue of fact as to whether the claimant's days per week and hours per day were
33 effectively increased. The claimant was originally hired for mowing and raking work with this employer
34 by Walter Stepp, who was the manager in charge of general care of Omak Orchard where the
35 claimant worked, and who had hiring and firing authority. Walter Stepp was claimant Jeanetta A.
36 Stepp's fiance and at times referred to himself as her husband, although they were not legally married.
37 Mr. Stepp also arranged with the claimant the increase in her days per week and hours per day
38 worked, which began on June 27, 1985.
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1 Darrell Worley, the production manager and field man for Taplett Fruit Company, testified that
2 the company had a policy requiring that managers not hire family members unless it was discussed
3 first with himself or the owner. He further indicated that the company did not hire any relatives as
4 full-time employees but rather used relatives only on an as-needed temporary basis. However, after a
5 thorough review of the testimony, we are convinced that Ms. Stepp's days per week and hours per day
6 were effectively increased with full and complete authorization by this employer. Mr. Worley testified
7 he gave approval for the increased hours and days in Ms. Stepp's case.
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11 The claimant also testified, as did Walter Stepp, that there were plans to continue her full-time
12 on "irrigation" duties, for an additional two months or so, after "thinning" duties were terminated.
13 Walter Stepp did not, however, testify that this latter plan was discussed with either Mr. Worley or with
14 the company owner. Mr. Worley testified that, although it would have been Walter Stepp's option if he
15 wanted to confer with him regarding placing Jeanetta Stepp on irrigation duties after the thinning was
16 over, he would not have given Walter Stepp the authority to place Jeanetta Stepp on irrigation duties.
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21 We note that the reliability of Mr. Worley's latter testimony is somewhat diminished in that it
22 involves Mr. Worley, at hearing on this matter after the issues are drawn, speculating upon what he
23 might have decided had Walter Stepp conferred with him regarding continuing the claimant full time
24 beyond the thinning season. We note that Mr. Worley had given his authorization for the claimant's
25 increased hours for thinning work and that plans had been made between the claimant and Walter
26 Stepp for continuing at increased hours in irrigation work, on which topic Mr. Worley indicated he
27 would have been open to discussion. In light of these facts, we find that it is simply unclear whether
28 the claimant, had she not been injured, would have continued at increased hours with this employer
29 for an additional two months beyond the five week period for thinning or would have returned to an
30 as-needed, part time basis.
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35 As a basis for setting the rate of time loss compensation, the Department, as indicated in its
36 order of June 24, 1987, utilized a method whereby it arrived at what it considered to be the claimant's
37 average monthly wage for the 13 weeks during which the claimant had been employed by Taplett Fruit
38 Company. The Proposed Decision and Order rejected the Department's method and arrived at an
39 average number of hours per day and days per week worked in order that these figures could be
40 utilized in the statutory formula contained in RCW 51.08.178 (1). The Proposed Decision and Order
41 arrived at these averages from a two week period, noting that a payroll record admitted as Exhibit 2
42 shows the number of hours per day and the number of days worked only during that two week period.
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1 During one of these two weeks, the claimant worked six days and during the other 4 days, for an
2 average of five days per week. During the two weeks she worked a total of 68 hours on 10 days,
3 averaging to 6.8 hours per day. The Proposed Decision and Order, then, employing the statutory
4 formula multiplied the hourly wage, \$3.75, times 6.8 hours per day times 22 [the statutorily prescribed
5 multiplier for a five day work week assigned in RCW 51.08.178(1)(e)] to arrive at a monthly wage of
6 \$561.00.
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10 The claimant contends that her rate of time loss compensation should be based upon a
11 calculation of monthly wage utilizing a wage rate of \$3.75 per hour, nine hours per day for five days
12 per week and five hours per day, one day per week.
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14 We agree with the Proposed Decision and Order insofar as it rejects the average monthly wage
15 procedure utilized by the Department. We have previously held, under RCW 51.08.178 as it read at
16 the time of Ms. Stepp's industrial injury, that such a method was without any support in the law. In re
17 Teresa M. Johnson, BIIA Dec. 85 3229 (1987). See, also our recent decision In re Ubaldo Antunez,
18 Dckt. No. 88 1852 (May 3, 1989).¹
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22 We do not, however, reject too readily the averaging method utilized in the Proposed Decision
23 and Order in the present case to determine the hours per day and/or days per week which the
24 claimant was "normally employed" at the time of her injury. In Johnson and in Antunez, we noted that
25 RCW 51.08.178(1) utilized the language "normally employed" with reference to both the number of
26 hours per day and days per week which should be used in the statutory formula for arriving at monthly
27 wages upon which time loss compensation is computed. In Johnson, we held open the possibility
28 that averaging to determine the days per week or hours per day a worker is "normally employed"
29 might, in certain circumstances, be permissible under the statute as it then read. In Antunez, we
30 similarly stated that the closest possible adherence to the statutory formula may require averaging to
31 arrive at the number of hours per day or days per week which a worker is "normally employed". In the
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39 ¹ We noted in Antunez that RCW 51.08.178, subsequent to our holding in Johnson, was amended in several
40 respects by Laws of 1988, Ch. 161, §12. One change added the language: "The number of hours the worker is normally
41 employed shall be determined by the Department in a fair and reasonable manner which may include averaging the
42 number of hours worked per day." The amended statute also allows for averaging month- ly wages over a 12 month period
43 "[i]n cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or
44 his or her relation to his or her employment is essentially part-time or intermittent...." As in Antunez, these changes are
45 worthy of note, but we will not apply them retrospective- ly. Labor & Indus. v. Metro Hauling, 48 Wn App 214 (1987). We
46 fur- ther note that the claimant's employment in the present case, as in Antunez, was neither exclusively seasonal nor
47 intermittent. And, although Ms. Stepp's relation to her employment had been part-time for a period, it could not be
characterized as "essentially part-time" at the time of her injury of June 27, 1985. By that time, the work had become
full-time.

1 latter case, noting that "normally" is not statutorily defined, we turned to the ordinary usage of that
2 word. Webster's International Dictionary, 2d Ed., at 1665, defines "normal" in part as follows:

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4 ...2. According to, constituting, or not deviating from an established norm,
5 rule or principle; conformed to a type, standard or regular form;...

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7 5. Econ. Pertaining or conforming to a more or less permanent standard,
8 deviations from which, on either side, on the part of the individual
9 phenomena are to be regarded as self-corrective...

10 (Emphasis supplied).

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12 Webster's Third New International Dictionary, at 1540, (1986) defines "normal" as either
13 "according to, constituting, or not deviating from an established norm, rule or principle: conformed to a
14 type, standard or regular pattern: not abnormal: REGULAR ... (~working hours)", or "approximating the
15 statistical norm or average."

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18 In Antunez, we indicated that instances in which averaging might be required to arrive at the
19 hours per day and/or the days per week which a worker is "normally employed" might involve
20 persistent fluctuations in hours per day or in days per week. Such persistent fluctuations did not occur
21 in Mr. Antunez' employment; rather, he had worked for a period of time at eight hours per day and five
22 days per week and then, during the period of injury, increased to ten hours per day and seven days
23 per week. It had been understood between Mr. Antunez and his employer that the period of increased
24 hours per day and days per week was to last only approximately three weeks and that he would, after
25 this period of increase, return to the lower number of hours per day and days per week. In view of
26 this, we decided that Mr. Antunez was "normally employed" for the lower number of hours per day and
27 days per week, viewing this as the more "permanent" arrangement, "deviations from which, on either
28 side" were "self-corrective" by way of the understanding between Mr. Antunez and his employer.
29 Thus, in Antunez, we were able to arrive at the hours per day and days per week which the claimant
30 was "normally employed" without the need to resort to averaging to arrive at these figures.

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38 In the present case, Ms. Stepp's hours per day and days per week did fluctuate persistently
39 through the period from her hire in March, 1985, until she was to begin full time employment with
40 increased hours per day and days per week on June 27, 1985. However, at the time of her injury, on
41 June 27, 1985, these fluctuations could no longer be considered to persist. Ms. Stepp had entered
42 into a new understanding with her employer, that understanding being that she would work nine hours
43 per day for five days of the week and five hours on an additional day, Saturday. And, unlike Antunez,
44 there was not a clear understanding between Ms. Stepp and her employer that she was to return to
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1 her prior as-needed, part time employment after a period of increased hours per day and days per
2 week. Ms. Stepp, in fact, testified that she expected to continue working in "thinning" for a period of
3 from three to five weeks, and then, after that, continue full time as an irrigator.
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5 Thus, we find that as of June 27, 1985, the date of Ms. Stepp's injury, the "established norm" or
6 "more or less permanent standard" was that she would work nine hours per day for five days of the
7 week and five hours per day on an additional day, Saturday. To find otherwise in the circumstances of
8 this particular case would lead to unfair treatment. Since there was no understanding that she would
9 return to as-needed, part time work after only a brief period, we do not find any measurable relevant
10 distinction between Ms. Stepp's increased hours per day and days per week and those which would
11 have been worked by a brand-new employee hired full time to perform the thinning and irrigation work.
12 In these circumstances, Ms. Stepp should not be penalized for having previously worked for this same
13 employer on an as-needed, part time basis, since she was not working on that basis at the time of her
14 injury. Averaging the hours per day and days per week worked over a two week period as in the
15 Proposed Decision and Order, or any other period, to arrive at the hours per day and days per week
16 which Ms. Stepp was "normally employed", is neither necessary nor justified.
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18 At the time of her industrial injury, then, Ms. Stepp was employed nine hours per day for five
19 days of the week and five hours per day an additional day, Saturday, at the wage of \$3.75 per hour.
20 Because she did not work the same number of hours each of the six days, we must necessarily
21 average the hours worked per day over this period in order to adhere to the statutory formula. Over
22 the six days Ms. Stepp was to work 50 hours which, when divided by six, equals 8.3 hours per day.
23 Under RCW 51.08.178(1), her monthly wages for purposes of computing time loss compensation are
24 figured by multi-plying the hourly wage, \$3.75, times the number of hours per day she was normally
25 employed, 8.3, arriving at a daily wage of \$31.12, which is multiplied by 26 [the statutory multiplier
26 contained in RCW 51.08.178 (1)(f) for workers who are normally employed six days a week] or a
27 monthly wage of \$809.12.²
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40 ² Our decision in Johnson, supra, in which we rejected the average monthly wage method used by the
41 Department, but held open the possibility of averaging to determine hours per day and days per week a claimant is
42 "normally employed", was published and made available to the public as a significant decision pursuant to RCW 51.52.160.
43 Nevertheless, in the present case, neither the Department nor the employer presented evidence sufficiently specific such
44 that average hours per day and/or average days per week could be derived by taking into account the entire period of Ms.
45 Stepp's actual employment from March, 1985, through the known anticipated 5 week period of increased hours. Thus,
46 even if we were to find that it was understood that Ms. Stepp's increased employment at "thinning" would terminate after 5
47 weeks, we would be limited to deriving her average hours per day and days per week from a total 7 week period. The
result would be virtually the same. During the 2 week period prior to the injury, Ms. Stepp worked a total of 68 hours on 10

1 In so holding, we adopt the Proposed Findings of Fact Nos. 1 and 2, and Conclusions of Law
2 Nos. 1 and 2, as the Board's final Findings of Fact and Conclusions of Law. In addition, we make the
3 following Findings of Fact and Conclusions of Law:
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5 **FINDINGS OF FACT**
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- 7 3. From March, 1985 through June 26, 1985, the claimant was employed on
8 an as-needed, part time basis at an hourly wage of \$3.75 with her hours
9 per day and days per week worked fluctuating. As of June 27, 1985, the
10 claimant and her employer understood that she was employed nine hours
11 per day for five days per week, plus an additional five hours per day on
12 one day of the week, at the hourly wage of \$3.75. This increase in hours
13 per day and days per week worked was not temporary in nature, under the
14 facts disclosed by this record.
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16 4. As of June 27, 1985, the claimant was normally employed nine hours per
17 day, five days per week, and an additional five hours per day one day per
18 week, for an average of 8.3 hours per day, at an hourly wage of \$3.75, for
19 a daily wage of \$31.12.
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21 5. Due to her industrial injury of June 27, 1985 and its sequelae, the claimant
22 was incapable of gainful employment on a reasonably continuous basis for
23 the period September 4, 1986 through June 10, 1987. She was not
24 married and did not have dependents during this time.

25 **CONCLUSIONS OF LAW**
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- 27 3. Pursuant to RCW 51.08.178(1)(f), the monthly wages which claimant was
28 receiving at the time of her industrial injury were \$809.12 per month.
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30 4. The order of the Department of Labor and Industries dated June 24,
31 1987 superseding and correcting the Department orders of February 27,
32 1987, March 19, 1987, March 19, 1987, April 6, 1987, April 30, 1987, May
33 6, 1985 (sic), May 21, 1987, and June 8, 1987 stated the claimant had
34 received time loss compensation for the period January 13, 1987 through
35 June 10, 1987 in the amount of \$2,316.25 based upon a monthly earning
36 of \$708.00 and compensation rate of \$533.48. It stated the employer had
37 provided payroll data indicating the claimant averaged 25.15 hours per
38 week and average monthly pay was \$415.04 for a compensation rate of
39 \$283.86. It stated the claimant was thus entitled to time loss
40 compensation in the amount of \$1,439.50 for the above noted period and

41 work days. During the next 5 weeks, she would have worked a total of 250 hours on 30 work days. Adding these figures,
42 the total for 7 weeks is 318 hours on 40 work days, or 7.95 hours per day. The daily wage would thus be \$3.75 times 7.95,
43 or \$29.81. For this same 7 week period, she worked 4 days one week, 6 days the next, and would have worked 6 days
44 each of the next 5 weeks. Thus, the "averaged" number of days per week would be 40 days divided by 7 weeks, or 5.7
45 days per week. When necessarily rounded off to the nearest whole number of 6 days per week, this requires using the
46 multiplier 26, statutorily prescribed in RCW 51.08.178(1)(f), which is the same statutory multiplier at which we arrived
47 without averaging. Multiplying 26 times \$29.81 arrives at a computed monthly wage of \$775.06. However, we believe the
figure of \$809.12 is a better reflection of claimant's monthly wage, given the substantially increased hours she was
expected to perform, on a more permanent basis, for a considerable period of time from and after June 27, 1985.

1 therefore an overpayment existed in the amount of \$876.75 which was
2 due and payable to the Department. It stated the claimant had contended
3 time loss compensation was payable for the period September 4, 1986
4 through and including January 8, 1987 which had been certified. It also
5 stated the amount was payable at \$1,182.74 using the correct
6 compensation rate. It paid time loss compensation for the period
7 September 4, 1986 through January 8, 1987, less time loss compensation
8 overpayment for the period January 12, 1987 through June 10, 1987 and
9 stated that further time loss compensation was to be paid at \$283.86
10 monthly rate. The order is incorrect and is reversed and the claim
11 remanded to the Department of Labor and Industries with directions to
12 recalculate the claimant's time loss compensation for relevant periods
13 based on a monthly wage at time of injury of \$809.12 and to issue a
14 further order compensating claimant for any underpayment of time loss
15 compensation from September 4, 1986 through June 10, 1987, and
16 stating that time loss compensation will be paid based on wages at the
17 time of injury of \$809.12.

18 It is so ORDERED.

19 Dated this 12th day of June, 1989.

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21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22 /s/
23 _____
24 SARA T. HARMON Chairperson

25 /s/
26 _____
27 FRANK E. FENNERTY, JR. Member

28 /s/
29 _____
30 PHILLIP T. BORK Member