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.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JEANETTA A. STEPP	**)**	**DOCKET NO. 87 2734**
	)	
CLAIM NO. J-603591	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jeanetta A. Stepp, by
Calbom & Schwab, per
Janis M. Whitener-Moberg

Employer, Taplett Fruit Company, by
Darrell Worley, Production Manager

Department of Labor and Industries, by
Office of the Attorney General, per
Gary McGuire, Paralegal, Jeffrey Boyer and LeAnn McDonald, Assistants

This is an appeal filed by the claimant, Jeanetta A. Stepp, on July 31, 1987 from an order of the Department of Labor and Industries dated June 24, 1987, which corrected and superseded orders and notices dated February 27, 1987, April 6, 1987, April 30, 1987, May 6, 1985 (sic), May 21, 1987, June 8, 1987 and two orders dated March 19, 1987. The order stated further as follows: The claimant was paid time loss compensation for the period January 13, 1987 through June 10, 1987 in the amount of $2,316.25 based upon a monthly earning of $708.00 and a compensation rate of $533.48; the employer provided the Department with payroll data indicating that the claimant averaged 25.15 hours weekly for the 13 weeks employed and her average monthly pay was $415.04 or a compensation rate of $283.86; the claimant was thus entitled to time loss in the amount of $1,439.50 for the above- noted period; an overpayment therefore exists in the amount of $876.75 which is due and payable to the Department; however, the claimant has contended time loss for the period of September 4, 1986 through and including January 8, 1987, which was certified by her attending physician and this is payable at $1,182.74 using the correct compensation rate; and, therefore, payment was ordered made to the claimant in the amount of $305.99 as the balance figured when $876.75 (time loss overpayment for January 12, 1987 through June 10, 1987) was subtracted from $1,182.74 (time loss compensation for September 4, 1986 through January 8, 1987). The order of June 24, 1987 also stated that further time loss would be paid at the monthly rate of $283.86. **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 November 4, 1988 in which the order of the Department dated June 24, 1987 was reversed and the claim remanded to the Department with directions to substitute the number $336.60 for the number $283.86 in the order and with directions to the Department to redetermine any overpayment which may have occurred during the applicable period and the Department's entitlement to reimbursement for such overpayment.

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

The claimant, Jeanetta A. Stepp, suffered an industrial injury when she fell from a ladder on June 27, 1985 during the course of her employment with R. F. Taplett Fruit Company. At issue in this appeal is a dispute between the Department and the claimant over the manner in which the Department calculated the claimant's monthly wages at the time of injury for the purpose of determining the rate of her time loss compensation. Since our understanding of the facts concerning the claimant's employment agreement at the time of injury differs in significant respect from what is described in the Proposed Decision and Order, we first briefly describe our understanding of those relevant facts.

The claimant, Ms. Stepp, began working for this employer in March, 1985 on an as-needed, part time basis at an hourly wage rate of $3.75. The number of days per week and hours per day worked fluctuated considerably until June 27, 1985, when a dramatic increase in days per week and hours per day she was to work occurred. On that date, which was also the date Ms. Stepp was injured, she began performing for the same employer "thinning" duties, which would require her to work 9 hours per day for 5 days of the week, plus an additional 5 hours on Saturday. The work at thinning was expected to last from 3 to 5 weeks.

It appears, from the testimony elicited at hearing, that the Department and the employer have meant to raise an issue of fact as to whether the claimant's days per week and hours per day were effectively increased. The claimant was originally hired for mowing and raking work with this employer by Walter Stepp, who was the manager in charge of general care of Omak Orchard where the claimant worked, and who had hiring and firing authority. Walter Stepp was claimant Jeanetta A. Stepp's fiance and at times referred to himself as her husband, although they were not legally married. Mr. Stepp also arranged with the claimant the increase in her days per week and hours per day worked, which began on June 27, 1985.

Darrell Worley, the production manager and field man for Taplett Fruit Company, testified that the company had a policy requiring that managers not hire family members unless it was discussed first with himself or the owner. He further indicated that the company did not hire any relatives as full-time employees but rather used relatives only on an as-needed temporary basis. However, after a thorough review of the testimony, we are convinced that Ms. Stepp's days per week and hours per day were effectively increased with full and complete authorization by this employer. Mr. Worley testified he gave approval for the increased hours and days in Ms. Stepp's case.

The claimant also testified, as did Walter Stepp, that there were plans to continue her full-time on "irrigation" duties, for an additional two months or so, after "thinning" duties were terminated. Walter Stepp did not, however, testify that this latter plan was discussed with either Mr. Worley or with the company owner. Mr. Worley testified that, although it would have been Walter Stepp's option if he wanted to confer with him regarding placing Jeanetta Stepp on irrigation duties after the thinning was over, he would not have given Walter Stepp the authority to place Jeanetta Stepp on irrigation duties.

We note that the reliability of Mr. Worley's latter testimony is somewhat diminished in that it involves Mr. Worley, at hearing on this matter after the issues are drawn, speculating upon what he might have decided had Walter Stepp conferred with him regarding continuing the claimant full time beyond the thinning season. We note that Mr. Worley had given his authorization for the claimant's increased hours for thinning work and that plans had been made between the claimant and Walter Stepp for continuing at increased hours in irrigation work, on which topic Mr. Worley indicated he would have been open to discussion. In light of these facts, we find that it is simply unclear whether the claimant, had she not been injured, would have continued at increased hours with this employer for an additional two months beyond the five week period for thinning or would have returned to an as-needed, part time basis.

As a basis for setting the rate of time loss compensation, the Department, as indicated in its order of June 24, 1987, utilized a method whereby it arrived at what it considered to be the claimant's average monthly wage for the 13 weeks during which the claimant had been employed by Taplett Fruit Company. The Proposed Decision and Order rejected the Department's method and arrived at an average number of hours per day and days per week worked in order that these figures could be utilized in the statutory formula contained in RCW 51.08.178 (1). The Proposed Decision and Order arrived at these averages from a two week period, noting that a payroll record admitted as Exhibit 2 shows the number of hours per day and the number of days worked only during that two week period.

During one of these two weeks, the claimant worked six days and during the other 4 days, for an average of five days per week. During the two weeks she worked a total of 68 hours on 10 days, averaging to 6.8 hours per day. The Proposed Decision and Order, then, employing the statutory formula multiplied the hourly wage, $3.75, times 6.8 hours per day times 22 [the statutorily prescribed multiplier for a five day work week assigned in RCW 51.08.178(1)(e)] to arrive at a monthly wage of $561.00.

The claimant contends that her rate of time loss compensation should be based upon a calculation of monthly wage utilizing a wage rate of $3.75 per hour, nine hours per day for five days per week and five hours per day, one day per week.

We agree with the Proposed Decision and Order insofar as it rejects the average monthly wage procedure utilized by the Department. We have previously held, under RCW 51.08.178 as it read at the time of Ms. Stepp's industrial injury, that such a method was without any support in the law. In re Teresa M. Johnson, BIIA Dec. 85 3229 (1987). See, also our recent decision In re Ubaldo Antunez, Dckt. No. 88 1852 (May 3, 1989).[1]

We do not, however, reject too readily the averaging method utilized in the Proposed Decision and Order in the present case to determine the hours per day and/or days per week which the claimant was "normally employed" at the time of her injury. In Johnson and in Antunez, we noted that RCW 51.08.178(1) utilized the language "normally employed" with reference to both the number of hours per day and days per week which should be used in the statutory formula for arriving at monthly wages upon which time loss compensation is computed. In Johnson, we held open the possibility that averaging to determine the days per week or hours per day a worker is "normally employed" might, in certain circumstances, be permissible under the statute as it then read. In Antunez, we similarly stated that the closest possible adherence to the statutory formula may require averaging to arrive at the number of hours per day or days per week which a worker is "normally employed". In the

[1] We noted in Antunez that RCW 51.08.178, subsequent to our holding in Johnson, was amended in several respects by Laws of 1988, Ch. 161, §12. One change added the language: "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 per day." The amended statute also allows for averaging month- ly wages over a 12 month period "[i]n 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 employment is essentially part-time or intermittent...." As in Antunez, these changes are worthy of note, but we will not apply them retrospective- ly. Labor & Indus. v. Metro Hauling, 48 Wn App 214 (1987). We fur- ther note that the claimant's employment in the present case, as in Antunez, was neither exclusively seasonal nor 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.

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

> ...2. According to, constituting, or not deviating from an established norm, rule or principle; conformed to a type, standard or regular form;...
>
> 5. Econ. Pertaining or conforming to a more or less permanent standard, deviations from which, on either side, on the part of the individual phenomena are to be regarded as self-corrective...

(Emphasis supplied).

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

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

In the present case, Ms. Stepp's hours per day and days per week did fluctuate persistently through the period from her hire in March, 1985, until she was to begin full time employment with increased hours per day and days per week on June 27, 1985. However, at the time of her injury, on June 27, 1985, these fluctuations could no longer be considered to persist. Ms. Stepp had entered into a new understanding with her employer, that understanding being that she would work nine hours per day for five days of the week and five hours on an additional day, Saturday. And, unlike Antunez, there was not a clear understanding between Ms. Stepp and her employer that she was to return to

her prior as-needed, part time employment after a period of increased hours per day and days per week. Ms. Stepp, in fact, testified that she expected to continue working in "thinning" for a period of from three to five weeks, and then, after that, continue full time as an irrigator.

Thus, we find that as of June 27, 1985, the date of Ms. Stepp's injury, the "established norm" or "more or less permanent standard" was that she would work nine hours per day for five days of the week and five hours per day on an additional day, Saturday. To find otherwise in the circumstances of this particular case would lead to unfair treatment. Since there was no understanding that she would return to as-needed, part time work after only a brief period, we do not find any measurable relevant distinction between Ms. Stepp's increased hours per day and days per week and those which would have been worked by a brand-new employee hired full time to perform the thinning and irrigation work. In these circumstances, Ms. Stepp should not be penalized for having previously worked for this same employer on an as-needed, part time basis, since she was not working on that basis at the time of her injury. Averaging the hours per day and days per week worked over a two week period as in the Proposed Decision and Order, or any other period, to arrive at the hours per day and days per week which Ms. Stepp was "normally employed", is neither necessary nor justified.

At the time of her industrial injury, then, Ms. Stepp was em-ployed nine hours per day for five days of the week and five hours per day an additional day, Saturday, at the wage of $3.75 per hour. Because she did not work the same number of hours each of the six days, we must necessarily average the hours worked per day over this period in order to adhere to the statutory formula. Over the six days Ms. Stepp was to work 50 hours which, when divided by six, equals 8.3 hours per day. Under RCW 51.08.178(1), her monthly wages for purposes of computing time loss compensation are figured by multi-plying the hourly wage, $3.75, times the number of hours per day she was normally employed, 8.3, arriving at a daily wage of $31.12, which is multiplied by 26 [the statutory multiplier contained in RCW 51.08.178 (1)(f) for workers who are normally employed six days a week] or a monthly wage of $809.12.[2]

[2] Our decision in Johnson, supra, in which we rejected the average monthly wage method used by the Department, but held open the possibility of averaging to determine hours per day and days per week a claimant is "normally employed", was published and made available to the public as a significant decision pursuant to RCW 51.52.160. Nevertheless, in the present case, neither the Department nor the employer presented evidence sufficiently specific such that average hours per day and/or average days per week could be derived by taking into account the entire period of Ms. Stepp's actual employment from March, 1985, through the known anticipated 5 week period of increased hours. Thus, even if we were to find that it was understood that Ms. Stepp's increased employment at "thinning" would terminate after 5 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

In so holding, we adopt the Proposed Findings of Fact Nos. 1 and 2, and Conclusions of Law Nos. 1 and 2, as the Board's final Findings of Fact and Conclusions of Law. In addition, we make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

3. From March, 1985 through June 26, 1985, the claimant was employed on an as-needed, part time basis at an hourly wage of $3.75 with her hours per day and days per week worked fluctuating. As of June 27, 1985, the claimant and her employer understood that she was employed nine hours per day for five days per week, plus an additional five hours per day on one day of the week, at the hourly wage of $3.75. This increase in hours per day and days per week worked was not temporary in nature, under the facts disclosed by this record.

4. As of June 27, 1985, the claimant was normally employed nine hours per day, five days per week, and an additional five hours per day one day per week, for an average of 8.3 hours per day, at an hourly wage of $3.75, for a daily wage of $31.12.

5. Due to her industrial injury of June 27, 1985 and its sequelae, the claimant was incapable of gainful employment on a reasonably continuous basis for the period September 4, 1986 through June 10, 1987. She was not married and did not have dependents during this time.

CONCLUSIONS OF LAW

3. Pursuant to RCW 51.08.178(1)(f), the monthly wages which claimant was receiving at the time of her industrial injury were $809.12 per month.

4. The order of the Department of Labor and Indus-tries dated June 24, 1987 superseding and correcting the Department orders of February 27, 1987, March 19, 1987, March 19, 1987, April 6, 1987, April 30, 1987, May 6, 1985 (sic), May 21, 1987, and June 8, 1987 stated the claimant had received time loss compensation for the period January 13, 1987 through June 10, 1987 in the amount of $2,316.25 based upon a monthly earning of $708.00 and compensation rate of $533.48. It stated the employer had provided payroll data indicating the claimant averaged 25.15 hours per week and average monthly pay was $415.04 for a compensation rate of $283.86. It stated the claimant was thus entitled to time loss compensation in the amount of $1,439.50 for the above noted period and

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work days. During the next 5 weeks, she would have worked a total of 250 hours on 30 work days. Adding these figures, 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, 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 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 days per week. When necessarily rounded off to the nearest whole number of 6 days per week, this requires using the multiplier 26, statutorily prescribed in RCW 51.08.178(1)(f), which is the same statutory multiplier at which we arrived 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.

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

It is so ORDERED.

Dated this 12th day of June, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____

SARA T. HARMON Chairperson

/s/_____

FRANK E. FENNERTY, JR. Member

/s/_____

PHILLIP T. BORK Member