Antunez, Ubaldo

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)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: UBALDO ANTUNEZ	**)**	**DOCKET NO. 88 1852**
	)	
CLAIM NO. K-608872	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ubaldo Antunez, by
Prediletto, Halpin, Cannon, Scharnikow & Bothwell, P.S., per
Gomer L. Cannon

Employer, Roza Farms, Inc., by
None

Department of Labor and Industries, by
The Attorney General, per
John R. Wasberg, Assistant, and Gary W. McGuire, Paralegal

This is an appeal filed by the claimant on May 5, 1988, from an order of the Department of Labor and Industries dated March 15, 1988 which adjusted the rate of time-loss compensation to add consideration of dependents on the claim and paid time-loss compensation for the period September 7, 1987 through January 26, 1988 less a deduction made for prior time-loss compensation paid during the same period. **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 Department of Labor And Industries to a Proposed Decision and Order issued on November 7, 1988 in which the order of the Department dated March 15, 1988 was reversed and the claim remanded to the Department with direction to pay time-loss compensation to the claimant based upon wages of $8.00 per hour, ten hours per day and seven days per week pursuant to RCW 51.08.178(1), less prior awards, and to take such other and further action as may be indicated by the law and the facts of the case.

The claimant, Ubaldo Antunez, sustained a head injury and fracture of his right clavicle on September 6, 1987 in the course of his employment for Roza Farms. 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 his rate of time-loss compensation. The matter was submitted by the parties for issuance of a Proposed Decision and Order by our mediation review judge, based upon stipulated facts and consideration of

the Department claim file. Since the Proposed Decision and Order adequately states the relevant facts, we will only briefly summarize these here.

Prior to August 26, 1987, the claimant worked 40 hours per week at a rate of $4.65 per hour. Then, pursuant to a mutual understanding between the claimant and his employer, the claimant was to work seven days per week, ten hours per day, at $8.00 per hour, for the period August 26, 1987 through September 16, 1987. Although the stipulation and Department file are not absolutely clear, it appears that the latter arrangement, involving increased working hours and an increased rate of pay, was only temporary.

As a basis for setting the rate of time-loss compensation, the Department utilized an averaging method to calculate the claimant's average monthly wage within a period of one year. First, it multiplied the 25 days of increased wages times 7 hours per day times $8.00 per hour to arrive at the figure of $1400 earned during the period of increased wages. Next, the Department multiplied 48 weeks times 5 days per week times 8 hours per day times $4.65 to arrive at the figure of $8,928.00 for earnings during the remainder of the year. The sum of $8,928 plus $1400 (or $10,328) was then divided by 12 to arrive at an average monthly wage of $863.67.

The Proposed Decision and Order held that the claimant's monthly wages should be computed based solely upon the $8.00 per hour, ten hours per day and seven days per week, which the claimant was working "at the time of his injury." In so ruling, the Proposed Decision and Order stated that this Board has held that the statute (RCW 51.08.178) in effect on the date of this injury does not permit the "average monthly wage" procedure employed by the Department. In re Teresa M. Johnson, BIIA Dec. 85 3229 (1987). The Department argues that an averaging method is warranted in the present case because the controlling statute directs the Department to compute time-loss compensation on the wages at which a claimant was normally employed at the time of injury rather than simply whatever the wages were at the time of injury. The Department contends that the average monthly wage method it utilized is the preferred, if not the only, method by which it can arrive at a determination of the wage at which the claimant was "normally employed."

The direction to utilize monthly wages as the basis for compensation and the method for computing monthly wages is provided in RCW 51.08.178, which, prior to 1988, read in relevant part:

> (1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases 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 injury:
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> . . .
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> (e) By twenty-two, if the worker was normally employed five days a week;
>
> . . .
>
> (g) By thirty, if the worker was normally employed seven days a week.
>
> The term "wages" shall include the reasonable value of board, housing, fuel or other consideration of like nature received from the employer, but shall not include overtime pay, tips, or gratuities. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed.

(Emphasis supplied.[1])

In Johnson, the Department had also used an "average monthly wage" similar to that utilized here. We held that the "average monthly wage" procedure espoused by the Department was a method without any support in the law. We further suggested that any argument in favor of such a method must be presented to the Legislature, and that neither the Department nor this Board had authority to "enact" such a method.[2] In Johnson, we did state that the only "averaging" possibly permitted by RCW 51.08.178, as it then read, would be that which is necessary to determine how many days per week or hours per day a worker is "normally employed." We continue to believe that, where wages are not fixed by the month, the hourly wage at the time of injury must be utilized in the formula. This is true regardless of whether that hourly wage at the time of injury was the hourly wage at which the worker was "normally employed." We so hold because the modifying language "normally

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[1] RCW 51.08.178 was amended in several respects in 1988. 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 monthly 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 . . .." While these changes are worthy of note here, we will not apply them retrospectively. Labor & Indus. vs. Metro Hauling, 48 Wn. App. 214 (1987). We also note that the claimant's employment in the present case was neither exclusively seasonal nor part-time nor intermittent.

[2] The claimant in Johnson was truly a seasonal worker. As indicated in Footnote No. 1, the Legislature has subsequently amended RCW 51.08.178 to allow for determining the monthly wage by way of averaging when the employment is exclusively seasonal. Again, the employment in the present case was not seasonal.

employed" is utilized in the statute only in reference to hours per day and days per week, and is never utilized in reference to hourly wages.

Thus, we reject the Department's "average monthly wage" method in the present case. For purposes of calculating monthly wages pursuant to the statutory formula, we begin with the understanding that $8.00 per hour will be used in that formula, since that was the claimant's hourly wage at the time of injury. In order to adhere as closely as possible to the statutory formula, we must now determine the number of hours per day and number of days per week which the claimant was "normally employed."

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 is it then read. In Johnson it was beyond dispute that, whenever employed, the claimant was "normally employed" eight hours per day and five days per week. In Johnson, as in the present case, the Department had only utilized the "average monthly wage" procedure and had made no attempt to average the days per week and hours per day to arrive at an approximation of claimant's normal employment. Neither has the claimant in the present case suggested that averaging be utilized to arrive at the number of hours per day and days per week during which the claimant was "normally employed".

In its Petition for Review, the Department notes that "normally" is not statutorily defined and suggests that we turn to the ordinary usage of that word. According to the Department, WEBSTER'S INTERNATIONAL DICTIONARY, 2d Ed., 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 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 some cases the closest possible adherence to the statutory formula may require averaging to arrive at the hours per day and/or the days per week which a worker is "normally employed". Such instances may involve persistent fluctuations in hours per day or in days per week. However, such is not the case here. In the present case, the increase to ten hours per day and seven days per week was to last approximately three weeks, as compared with the remainder of the year in which Mr. Antunez worked only eight hours per day and five days per week. In view of ordinary language usage, we believe it is fair to state that this claimant was "normally employed" eight hours per day and five days per week. Indeed, that was the more "permanent" arrangement, "deviations from which, on either side" were "self- corrective" by way of the understanding between the claimant and his employer.

Thus, in the present case the statutory formula is adhered to most closely by multiplying the hourly wage at the time of injury, $8.00, times Mr. Antunez's normal hours per day, 8, to arrive at the daily wage, $64.00. That figure should then be multiplied by 22, which is the statutory multiplier associated with the claimant's normal employment of five days per week. The monthly wage which the Department should utilize as the basis upon which time-loss compensation is computed is, then, $1408.00.

In so holding, we adopt the proposed Findings of Fact Nos. 1, 2 and 3, and Conclusion of Law No. 1 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

4. At the time of his injury, the claimant's hourly wages were $8.00 per hour. The claimant was normally employed eight hours per day and five days per week.

CONCLUSIONS OF LAW

2. Pursuant to RCW 51.08.178, using the statutory multiplier of 22, claimant's monthly wage from all employment at the time of injury was $1408.

3. The order of the Department of Labor and Industries dated March 15, 1988, which adjusted the rate of time loss compensation to add consideration of dependents on the claim and paid time loss compensation for the period September 7, 1987 through January 26, 1988 less a deduction made for prior time loss compensation paid during the same period, is incorrect insofar as it based time loss compensation on an incorrect calculation of claimant's wages at the time of injury. The order is reversed and the claim is remanded to the Department with direction to pay time-loss compensation, pursuant to RCW 51.08.178(1), on the basis of monthly wages at the time of injury of $1408.00, less prior payments,

and to take such other and further action as may be indicated by the law and the facts of the case.

It is so ORDERED.

Dated this 3rd day of May, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member