

Stephens, Diana

RETROACTIVITY OF STATUTORY AMENDMENTS

Wages (RCW 51.08.178)

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

The 1988 amendments to RCW 51.08.178, which permit the averaging of wages to determine a worker's time-loss rate, do not apply to a claim for an injury which occurred prior to the time the amendments took effect.*In re Diana Stephens*, BIIA Dec., **89 0717 (1990)**

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: DIANA K. STEPHENS**)
2)
3 **CLAIM NO. K-002774**)
4)
 DOCKET NO. 89 0717
 DECISION AND ORDER

5 **APPEARANCES:**

6
7 Claimant, Diana K. Stephens, by
8 Tom G. Cordell

9
10 Employer, American Legion, Chief Moses Post 209, by
11 Richard Zornes and William Rigsby, Board Members, and
12 Petie Greenwalt, Manager

13
14 Department of Labor and Industries, by
15 Office of the Attorney General, per
16 Venita M. Lang, Assistant, and Gary McGuire, Paralegal

17
18 This is an appeal filed by the claimant on March 8, 1989 from an order of the Department of
19 Labor and Industries dated February 10, 1989 which adhered to the provisions of a Department order
20 dated November 14, 1988, which adjusted the claimant's compensation rate due to the addition of
21 wages earned in a second job she had at the time of her industrial injury. Time loss compensation
22 was paid for the period from April 2, 1988 through November 2, 1988 less a deduction for prior time
23 loss compensation paid for the same period. **REVERSED AND REMANDED.**

24
25
26
27 **DECISION**

28 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
29 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
30 Proposed Decision and Order issued on February 27, 1990 in which the order of the Department
31 dated February 10, 1989 was reversed and the claim was remanded to the Department "to calculate
32 Ms. Stephens' time-loss compensation benefits in accordance with the formula provided".

33
34
35 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
36 prejudicial error was committed and said rulings are hereby affirmed.

37
38 The claimant, Diana K. Stephens, injured her back on August 29, 1986 while employed by the
39 American Legion as a bartender. At the time of her injury, she was also working, part-time, for The
40 Turf, a restaurant in Moses Lake, Washington.

41
42 The issue presented in this appeal is the correct rate of compensation Ms. Stephens should
43 have received for the period from April 2, 1988 through November 2, 1988. The Department
44

1 determined Ms. Stephens' rate of compensation, in part, by dividing the amount earned during 1986
2 from The Turf by 12.
3

4 RCW 51.08.178 provides the statutory basis for computing wages for the purpose of
5 determining a worker's time loss compensation rate. The current statute (as amended in 1988) allows
6 the Department to average a worker's wages if that person is a part-time worker. RCW 51.08.178(2).
7 However, the statute in effect at the time of Ms. Stephens' injury did not permit such averaging. In re
8 Teresa Johnson, BIIA Dec. 85 3229 (1987). Prior to the 1988 amendment, RCW 51.08.178 provided
9 that a worker's time loss compensation rate would be calculated by multiplying the daily wage the
10 worker was receiving at the time of injury by the appropriate multiplier, depending on the number of
11 days per week that the worker was "normally employed". The daily wage was the product of the
12 hourly wage multiplied by the number of hours the worker was "normally employed." There is no
13 question that the Department failed to comply with the prior version of RCW 51.08.178, i.e., the
14 version of the statute which is clearly applicable to this claim.
15
16
17
18
19
20

21 Unfortunately, the record before us is not entirely clear with respect to Ms. Stephens' monthly
22 wage from her employment with The Turf. It is clear that there is no dispute as to the wages earned
23 and hours worked by the claimant for the American Legion. Ms. Stephens did not protest the orders
24 paying time loss until her employment at The Turf was factored in by the November 14, 1988
25 Department order. Furthermore, a review of the record, including the claimant's Memorandum of
26 Authorities and the Notice of Appeal, does not indicate any dispute regarding wages at the American
27 Legion job.
28
29
30

31 On the other hand, the record as to the days normally worked by Ms. Stephens at The Turf is
32 ambiguous. Instead of obtaining the requisite information from the employer at the outset, the
33 Department simply divided the wages on Ms. Stephens' W-2 form by 12. Even the Department would
34 have to concede that that method was incorrect since claimant only worked at The Turf through
35 August 1986 (eight months, not twelve) and the industrial injury precluded her from continuing to work
36 beyond that date.
37
38
39

40 The claimant herself testified that at the time of the injury she was working thirty hours per week
41 at The Turf and earning \$4.65 per hour. According to her co-worker, Pamela Tea, a normal shift was
42 ten hours. Claimant further stated that until August 1986 (that is, from January 1985 through July
43 1986) her normal schedule was ten to twenty hours per week and her increased hours in August of
44
45
46
47

1 1986 were due to the fact that her employer was on vacation. This leads us to believe that once her
2 employer returned, her hours would have returned to ten to twenty per week.
3

4 This being the case, it is apparent that her "normal" hours of employment at the Turf were ten
5 to twenty hours (or one to two days per week), with a daily wage of \$46.50 (10 hours X \$4.65 =
6 \$46.50). See, In re Ubaldo Antunez, BIIA Dec. 88 1852 (1989). The difficulty comes in deciding which
7 multiplier, five (for one day per week) or nine (for two days per week), is appropriate.
8
9

10 Since Ms. Stephens' un rebutted testimony is that she worked between one and two days each
11 week, we conclude that she "normally" worked 1.5 days per week. We round that up to two days per
12 week (See, In re Miguel S. Maya, Dckt. No. 87 1874 (December 2, 1988) at 5) and therefore use a
13 multiplier of nine. The result is that Ms. Stephens' monthly wage from The Turf equals \$418.50. That
14 is the figure which the Department must use in recomputing Ms. Stephens' time loss compensation
15 rate.
16
17
18

19 **FINDINGS OF FACT**

- 20
21 1. On January 23, 1987, the Department of Labor and Industries received an
22 accident report from the claimant, Diana K. Stephens, alleging that she
23 sustained an industrial injury on August 29, 1986 while employed by the
24 American Legion, Chief Moses Post 209.

25 On February 27, 1987, the Department issued a determinative order
26 paying the claimant time loss compensation beginning February 3, 1987.

27 On November 14, 1988, the Department issued an order adjusting the
28 compensation rate due to the addition of wages earned in a second job at
29 the time of the injury. Time loss compensation for the period from April 2,
30 1988 through November 2, 1988 was paid in the amount of \$3,178.08,
31 less a deduction for time loss compensation previously paid for the same
32 period in the amount of \$2,916.48.
33

34 On December 2, 1988, the Department received a protest and request for
35 reconsideration of the November 14, 1988 Department order from the
36 claimant. On February 10, 1989, the Department issued an order
37 adhering to the provisions of the Department order dated November 14,
38 1988.

39 On March 8, 1989, the Board of Industrial Insurance Appeals received a
40 notice of appeal from the February 10, 1989 Department order from the
41 claimant. On March 29, 1989, the Board issued an order granting the
42 appeal, assigning it Docket No. 89 0717, and ordering that further
43 proceedings be held on the issue raised.
44

- 45 2. On August 29, 1986 while in the course of her employment with American
46 Legion, Chief Moses Post 209, Diana K. Stephens experienced an
47 industrial injury to her back while lifting ice buckets.

3. At the time of her industrial injury, the claimant, Diana K. Stephens, was employed, part-time by the American Legion, Chief Moses Post 209, and part-time at The Turf Restaurant.
4. At the time of her industrial injury, the claimant was earning \$4.65 per hour from The Turf.
5. Ms. Stephens was employed at The Turf from January 1985 through August 1986. At the time of her injury, Ms. Stephens was normally employed by The Turf restaurant for ten to twenty hours per week. Her normal shift was ten hours.
6. The Department calculated claimant's monthly wage from The Turf at the time of injury by dividing the figure on her 1986 W-2 form by twelve.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. The amendments to RCW 51.08.178 found at Laws of 1988, ch. 161, § 12, pp 698-699, have prospective effect only and may not be retroactively applied to this injury, occurring on August 29, 1986.
3. Pursuant to RCW 51.08.170 (1980), claimant's monthly wage from her employment at The Turf restaurant was \$418.50. This figure is derived by first determining the daily wage (ten hours X \$4.65 per hour = \$46.50) and then multiplying \$46.50 X nine pursuant to RCW 51.08.178(1)(b), since claimant was normally employed two (1.5 rounded up to two) days per week.
4. The order of the Department of Labor and Industries dated February 10, 1988 which adhered to the provisions of the Department order dated November 14, 1988 which adjusted the compensation rate due to the addition of wages earned in a second job at the time of injury and paid time loss compensation for the period from April 2, 1988 through November 2, 1988, in the amount of \$3,178.08, less a deduction for time loss compensation paid for the same period in the amount of \$2,916.48, is incorrect and is reversed. The matter is remanded to the Department to recalculate and pay time loss compensation to the claimant for the period from April 2, 1988 through November 2, 1988 based on a monthly wage at The Turf Restaurant at the time of injury of \$418.50.

It is so ORDERED.

Dated this 8th day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

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

/s/ _____
PHILLIP T. BORK Member