# Minturn, Mary

## TIME-LOSS COMPENSATION (RCW 51.32.090)

**Seasonal employment**

The term "seasonal" equates to the actual seasons of the year. Thus, a worker's employment which is based on a 180-day school year cannot be classified as exclusively seasonal in nature. **….*In re Mary Minturn*, BIIA Dec., 90 3572 (1992)** [dissent] [*Editor's Note*: Reversed, *sub nom School District No. 401 v. Mary Ann Minturn*, 83 Wn. App 1 (1996).]

**Wages – Intermittent/seasonal, full-time, or other usual wages paid others (RCW 51.08.178(1), (2), or (4))**

Factors to determine whether a worker is a part-time, intermittent or seasonal worker within the meaning of RCW 51.08.178(2) include the type of work performed, the worker's relationship to the work as evidenced by the employment situation at the time of injury and the parties' intent. Thus, a worker who operated a school bus 5.5 hours per day, routinely worked extra hours for other school activities and whose 180-day contract assured renewal for each succeeding school year is a full time employee entitled to wage calculation under RCW 51.08.178(1). **….*In re Mary Minturn*, BIIA Dec., 90 3572 (1992)** [dissent] [*Editor's Note*: *Reversed, sub nom School District No. 401 v. Mary Ann Minturn*, 83 Wn. App 1 (1996).]

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

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| **IN RE: MARY ANN MINTURN** | **)** | **DOCKET NO. 90 3572** |
| | **)** | |
| **CLAIM NO. T-025154** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Mary Ann Minturn, Pro Se

Self-Insured Employer, School District #401, by
Hall & Keehn, per
Gary D. Keehn and Janet L. Smith, Attorneys

Department of Labor and Industries, by
The Attorney General, per
Deborah Bellam, Assistant

This is an appeal filed by the self-insured employer, School District #401, on July 2, 1990 from an order of the Department of Labor and Industries dated June 22, 1990 which ordered the self-insured employer to pay time loss benefits based upon a monthly time loss rate of $ 1,121.58 with adjustment to all benefits previously paid from the date of injury based upon a review of wage information relating to the claimant, Mary Ann Minturn. This information indicated that the claimant's time loss compensation should be calculated on hours worked for the school year 1988-89, total hours 1,373.75, X hourly wage of $ 9.95 = $ 13,668.81 ÷ contracted days of 185 = $ 73.885 (per day) X 22 (work days) = $ 1,625.48 (gross wage per month) X (conjugal status) 69% = $ 1,121.58 (time loss rate per month). The Department order is **AFFIRMED**.

## 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 to a Proposed Decision and Order issued on November 12, 1991 in which the order of the Department dated June 22, 1990 was reversed and remanded, and directed the Department to pay time loss compensation to the claimant as a seasonal worker according to the mandate of RCW 51.08.178(2).

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 self-insured employer appealed the Department's method of computing Ms. Minturn's time loss compensation benefits pursuant to RCW 51.08.178(1), contending that the time loss compensation rate should be calculated according to subsection (2) of that statute. As a secondary

issue, the employer contends that the hours Ms. Minturn worked in excess of regularly scheduled hours should not be included in the calculation of monthly wages under subsection (1) because they constitute overtime.

The 1988 amendments to RCW 51.08.178 provide for several changes in the method for determining injured workers' monthly wages for purposes of determining monthly time loss compensation under Title 51. Among other things, the statute, as amended, provides that workers whose current employment or relationship to employment is essentially part-time or intermittent, or whose employment is exclusively seasonal in nature, shall have the monthly wage determined by averaging wages earned over any period of twelve successive calendar months preceding the date of injury which fairly represents the claimant's "employment pattern."

Although RCW 51.08.178(1) provides a method for computing a monthly wage for a worker who works 1, 2, 3, 4, 5, 6, or 7 days per week, and could arguably be used to determine the monthly wage of a part-time worker, we believe the Legislature intended the 1988 amendments to require an alternate way of computing the monthly wage when the worker's employment or relationship to employment is essentially part-time or intermittent, or the employment is exclusively seasonal.

In the case before us, the issue is whether time loss compensation paid to a contract school bus driver, such as Ms. Minturn, should be based on subsection (1) or (2) of RCW 51.08.178. In order to answer this question we start with an inquiry whether the description of her employment falls within subsection (2) or, in other words, whether the nature of her employment is exclusively seasonal or whether such employment is essentially part-time or intermittent. Last, we inquire whether Ms. Minturn's relationship with her employment is essentially part-time or intermittent. We note that the terms seasonal, part-time, or intermittent are not defined by statute.

The record establishes that Ms. Minturn had worked for School District #401 as a school bus driver since 1984. Because of her on-the-job injury on January 4, 1990, and her subsequent inability to work for several months, the Department did not look at the 1989-90 school year as the basis for computing her rate of time loss, but instead used the 1988-89 school year.

In the 1988-89 school year, Ms. Minturn was regularly scheduled for 5.5 hours per day, Monday through Friday. She worked a total of 1,373.75 hours, with an annual income of $ 13,668.81, and an hourly wage rate of $ 9.95. By contract, she worked 180 days per year, and was paid for 10 holidays, for a total of 190 days per year. Her pay, however, was prorated over a twelve-month period, so she had income deferred from the school year which was paid to her during the summer months.

The evidence shows that 8 hours per day is not the norm for school bus drivers. For 1988-89 Ms. Minturn had a basic contract for 5.5 hours per day, Monday through Friday, with the ability to bid for extra hours based upon her seniority. Ms. Minturn consistently worked extra hours beyond her regularly scheduled 5.5 hours, and for the 1988-89 school year she worked an additional 338.25 hours, paid at the regular $ 9.95 hourly wage.

Like the industrial appeals judge, we do not agree with the employer's contention that the extra hours should be considered "overtime" hours and therefore excluded from her "wages" under subsection 1. Overtime hours typically are hours in excess of forty hours per week, and by her contract with the School District are paid at time-and-a-half. Ms. Minturn received the regular hourly wage rate for the extra hours, and there is no indication that her hours exceeded forty hours per week.

In analyzing whether the contract school bus driver employment was essentially part-time, we conclude that she was normally employed five days a week for seven and a half hours per day. We reach this conclusion by dividing 338 hours (the extra hours per day she worked in the 1988-89 school year) by 180 days (the number of days worked) = 1.8 hours (extra hours per day beyond her contract hours of 5.5). It is difficult to consider the nature of Ms. Minturn's job to be part-time work when during the months of her employment she worked 5 days a week, approximately 7½ hours per day.

The next issue we consider is whether the nature of Ms. Minturn's employment was "essentially intermittent." Intermittent implies a stopping, and starting again, at intervals. However, at the end of each contract year, Ms. Minturn is assured by the school district that she will be hired for the next or following school year. By receiving such assurances Ms. Minturn is then not entitled to unemployment compensation benefits. The underlying implication is that she is not "unemployed" during the summer months, and is assured of ongoing employment at the School District commencing at the beginning of the following school year. Although she does not drive a school bus during the summer interval, Ms. Minturn receives wages during those months that have been prorated. For these reasons, we are persuaded that the nature of the employment with this employer is not "essentially intermittent," as she has continuous and continuing employment with the School District and is paid on a monthly basis.

Nor are we persuaded that her relation to employment was either part-time or intermittent. Neither the School District nor Ms. Minturn, apparently, viewed her employment as anything but ongoing as she continued to get renewed contracts for each subsequent school year. Ms. Minturn did not seek alternate employment, but was content to be an employee of the District. In looking at both

the nature of the school bus driving employment and Ms. Minturn's established relationship to that employment, we must conclude that she was neither part-time nor intermittent.

The most problematic consideration, and the one we reserve to the last, is whether Ms. Minturn's school bus driver employment should be classified as "exclusively seasonal" in nature. Both the self-insured employer and the Department in their supporting written materials remind us that the terms or words of a statute must be accorded their ordinary meaning. The word they focus on is the definition of "seasonal". We note, however, that the statute includes the modifier "exclusively", which has the effect of emphasizing the limited use of "seasonal" as used in subsection 2 of RCW 51.08.178. It appears that "seasonal" must include the addition of "exclusively" in trying to determine the ordinary meaning of both words as used in context.

On the one hand, the Department argues that "seasonal" or "exclusively seasonal" must be read narrowly to equate very nearly to actual seasons of the year. On the other hand, the self-insured employer argues for an expanded definition of "exclusively seasonal", in order to avoid an anomalous result of paying more in wage replacement benefits than Ms. Minturn may arguably be entitled to. The problem with the self-insured employer's approach is that to use an expanded definition would force a change in the ordinary meaning of the words "exclusively seasonal".

We believe the term "seasonal" as used in RCW 51.08.178 (especially in light of the modifier "exclusively"), must be meant to have its common meaning, that is, work which is dependent on a season of the year. Black's Law Dictionary, at 1212 (5th ed. 1979); Webster's III New International Dictionary, at 2049 (1986); State v. Roadhs, 71 Wn.2d 705 (1967). Driving a school bus obviously is dependent upon the days that school is in session. However, the contract for school bus drivers requires 180 days of work (at 5 days per week), which is not based on a certain season. Looking at the nature of this occupation, it could be carried on throughout an entire year and not necessarily carried on only at certain "seasons". We are persuaded that a worker such as Ms. Minturn, whose work is not based on the seasons but is based on a contract of employment which is not defined by the seasons, cannot have such work classified as "exclusively seasonal in nature." We decline to expand the definition of seasonal to include the concept of a "school season" which encompasses, in fact, most of the calendar year. Cf. In re Alfredo F. Lomeli, Dckt. No. 90 4156 (January 13, 1992).

Ms. Minturn's employment pattern does not fit within RCW 51.08.178(2). Therefore, her wage replacement benefits must be calculated under the provisions of RCW 51.08.178(1).

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Department order of June 22, 1990 wherein the Department directed the self-insured employer to pay time loss compensation benefits based upon a monthly time loss rate of $ 1121.58, with adjustments to all benefits previously paid from the date of injury, is correct and should be affirmed.

## FINDINGS OF FACT

1. On January 23, 1990 a report of accident was filed by the claimant, Mary Ann Minturn, alleging an industrial injury to have occurred on January 4, 1990 while in the course of her employment with School District #401. On January 31, 1990 a Department order was issued allowing the claim for medical treatment and such other benefits as may be authorized or required by law. On June 22, 1990, the Department ordered the self-insured employer to pay time loss compensation benefits based upon a monthly time loss rate of $ 1,121.58, with adjustments to all benefits previously paid from the date of injury.

   On July 2, 1990, the self-insured employer filed a Notice of Appeal with the Board from the June 22, 1990 order. That appeal was assigned Dckt. No. 90 3572, and on August 13, 1990 the Board entered an order granting the appeal and ordering hearings to be held on the issues raised therein.

2. On January 4, 1990 the claimant, Mary Ann Minturn, was employed at School District #401 as a school bus driver. On January 4, 1990, Ms. Minturn, while in the course of her employment with School District #401, was injured. Her claim was accepted and benefits were provided.

   At the time of her injury, Ms. Minturn earned $ 9.95 per hour as a school bus driver. School District #401 bus drivers, including Ms. Minturn, work 180 days per school year and are paid for 10 holidays, for a total of 190 days paid for work.

3. During the 1988-89 school year, Ms. Minturn had regularly scheduled bus runs amounting to 5.5 hours per day, 5 days per week. Sometime during that year the normally scheduled bus runs increased to 5.75 hours per day, 5 days per week.

4. In addition to her normally scheduled bus runs, Ms. Minturn, within the provisions of her contract as a school bus driver, was entitled to bid for extra bus driving runs. These runs are awarded based upon bus driver seniority. Ms. Minturn worked an average of 1.8 additional hours per day on extra runs throughout the 1988-89 school year. These additional hours are not overtime hours but are paid at the straight rate of compensation. During the 1988-89 school year, Ms. Minturn, on average, when totaling her normal hours and her extra bus driving runs, worked 7.5 hours per day for 180 days.

5. At the time of her industrial injury, Ms. Minturn's employment was not exclusively seasonal, nor essentially part-time or intermittent. Ms. Minturn was essentially a full-time worker for School District #401 and had an ongoing continuous employment relationship with the District.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. At the time of her industrial injury, the claimant, Mary Ann Minturn, was not a worker whose employment was exclusively seasonal in nature or whose current employment or relationship to employment was essentially part-time or intermittent as set forth in RCW 51.08.178(2). Therefore, Ms. Minturn's monthly wages shall not be computed pursuant to RCW 51.08.178(2), but shall be determined by computation methods set forth in RCW 51.08.178(1) as a worker working 5 days per week at an average of 7½ hours per day, with an hourly wage of $ 9.95 per hour.
3. The Department order of June 22, 1990 which calculated the claimant's time loss compensation rate according to RCW 51.08.178(1), is correct and is affirmed.

It is so **ORDERED**.

Dated this 5th day of June, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

## DISSENT

I disagree with the Board majority's conclusion that Ms. Minturn was essentially a full-time worker and that she was not a seasonal worker within the meaning and intent of RCW 51.08.178(2).

Our industrial appeals judge's Proposed Decision and Order, in a very well-reasoned analysis, determined that, for the purposes of arriving at the proper monetary level of the claimant's time loss compensation in accordance with the intent prompting the 1988 amendments to RCW 51.08.178, her employment was seasonal in nature, and thus her time-loss compensation should be calculated in accordance with the provisions of subsection (2) of RCW 51.08.178 rather than subsection (1) thereof. I fully concur.

I adopt intoto the Proposed Decision and Order's legal reasoning, statutory analysis, Findings of Fact, and Conclusions of Law. Thus, I would reverse the Department's order of June 22, 1990, and direct the calculation of Ms. Minturn's time loss compensation as a seasonal worker subject to the provisions of RCW 51.08.178(2).

Dated this 5th day of June, 1992.

/s/
PHILLIP T. BORK Member