

Lomeli, Alfredo

TIME-LOSS COMPENSATION (RCW 51.32.090)

Seasonal employment

A worker, whose work transcends the seasons and is not defined by the seasons, cannot have such work classified as exclusively seasonal in nature. ...*In re Alfredo Lomeli*, BIIA Dec., 90 4156 (1992)

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 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 engaged in general farm labor and whose work history was essentially full time and who intended to continue full time employment is a full time employee entitled to wage calculation under RCW 51.08.178(1). ...*In re Alfredo Lomeli*, BIIA Dec., 90 4156 (1992)

Scroll down for order.

1 "exclusively seasonal in nature", the monthly wage shall be determined by averaging the wages
2 earned over any period of twelve successive calendar months preceding the injury, which "fairly
3 represent the claimant's employment pattern."
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6 The 1988 amendments provide a specific method for determining the monthly wage for
7 seasonal, part-time or intermittent workers. We note that RCW 51.08.178(1), which precedes the
8 1988 amendments, historically as well as textually, also provides a method for computing a monthly
9 wage for a worker who works one, two, three, four, five, six, or seven days per week. Thus, RCW
10 51.08.178(1) could arguably be used to determine the monthly wage of a part-time worker. However,
11 we believe the legislature intended the 1988 amendments to provide the basis for determining the
12 nature of the employment. The statute should be read so as to give effect to the purpose of the
13 statute. Newschwander v. Board of Trustees of The Washington State Teachers Retirement System,
14 94 Wn.2d 701 (1980); Cramer v. Van Parys, 7 Wn. App. 584 (1972). Therefore, as we read the
15 statute, we must first determine, pursuant to RCW 51.08.178(2) (the 1988 amendment), the nature of
16 the worker's employment or his or her relationship to the employment. If the worker's employment or
17 relationship to employment is essentially part-time or intermittent or the employment is exclusively
18 seasonal, then the twelve-month averaging method as set forth in the statute is used to determine the
19 monthly wage. On the other hand, if the worker is not within the scope of RCW 51.08.178(2) as a
20 seasonal, part-time, or intermittent worker, then RCW 51.08.178(1) provides the method for computing
21 the worker's monthly wage.
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24 In the present case three different methods are presented and urged by the parties to compute
25 Mr. Lomeli's monthly wage.
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28 Mr. Lomeli believes RCW 51.08.178(1) applies, and his monthly wage should be computed
29 based on the "wages the worker was receiving from all employment at the time of injury." Mr. Lomeli
30 does not believe he is within the scope of RCW 51.08.178(2) in that he is neither a seasonal, part-time
31 or intermittent worker.
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34 The employer, Byerley Farms, believes the worker's monthly wage should be computed by use
35 of RCW 51.08.178(2) (the 1988 amendment) and Mr. Lomeli should be determined to be either a
36 seasonal, part-time, or intermittent worker. Thus, the employer believes the monthly wage should be
37 calculated by the twelve-month averaging method set forth in RCW 51.08.178(2).
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40 The Department of Labor and Industries urges the use of a method different from any method
41 set forth in the statute. The Department believes it is correct to simply average the wages earned in
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1 the calendar year of the injury in order to determine the worker's monthly wage. Mr. Lomeli earned
2 gross wages of \$16,535.30 in 1988. Since Mr. Lomeli was injured in September, the ninth month of
3 1988, and earned no wages in the remaining months of 1988, the Department divined that his gross
4 wages for the year should be divided by nine, the number of the month in which he was injured. Using
5 this odd reasoning, Mr. Lomeli's average monthly wage for 1988 equals \$1,837.26. This is the
6 monthly wage set forth in the Department order dated September 6, 1990, which is the order under
7 appeal. Although not abandoning this rather creative approach to calculating monthly wages, the
8 Department also suggests to us that, perhaps, the statutory method could also be used to determine
9 Mr. Lomeli's monthly wage for purposes of calculating his time-loss compensation under the Industrial
10 Insurance Act!

11 The Department's method of averaging as used in Mr. Lomeli's case is without statutory
12 authority and appears to circumvent the legislative directive, and therefore cannot be accepted. While
13 the Department has been creative in its search for a method to determine the monthly wage of injured
14 workers, its approach loses all persuasive weight when it chooses to ignore statutory directives,
15 regarding the calculation of monthly wages. We have rejected previous attempts by the Department
16 to circumvent statutory directives regarding calculation of monthly wages, and will also do so here.
17 See In re Teresa M. Johnson, BIIA Dec., 85 3229 (1987), In re Rod E. Carew, BIIA Dec., 87 3313
18 (1989), In re Dennis G. Roberts, BIIA Dec., 88 0073 (1989), In re Jeanetta A. Stepp, BIIA Dec., 87
19 2734 (1989), and In re Ubaldo Antunez, BIIA Dec., 88 1852 (1989).

20 The legitimate question presented in this case, and the issue which is squarely before us, is
21 whether Mr. Lomeli is as seasonal, part-time, or intermittent worker as those terms are used in RCW
22 51.08.178(2). If Mr. Lomeli is within the definition of those terms, then the statutory twelve-month
23 averaging method must be used to determine his monthly wage. If, on the other hand, Mr. Lomeli is
24 not a seasonal, part-time, or intermittent worker within the meaning of RCW 51.08.178(2), then the
25 method as set forth in RCW 51.08.178(1) must be used to determine his monthly wage.

26 This case was presented on a stipulation of facts. Our determination of whether Mr. Lomeli's
27 employment status is seasonal, part-time, or intermittent must be based on the facts submitted. The
28 pertinent information we have gleaned from the stipulation of facts which we believe bears upon the
29 determination of his status as a part-time, intermittent or seasonal worker is as follows:

- 30 1. Mr. Lomeli worked for the employer, Byerley Farms, from January 1983
31 through September 1988.

2. For 1983 Mr. Lomeli worked from January to December.
3. For 1984 he worked from January to December.
4. For 1985 he worked March to November.
5. For 1986 he worked March to December.
6. For 1987 he worked March to November.
7. For 1988 he worked March 14, 1988 to September 30, 1988.
8. He was injured on September 30, 1988.
9. Mr. Lomeli was also paid a bonus as a part of his contracted employment. The bonus was in the sum of \$1,505.30 and was paid on September 30, 1988.

By reviewing the payroll records which are attached to the stipulation of facts filed by the parties, we have been able to determine the number of hours Mr. Lomeli worked for 1985, 1986, 1987, and 1988. For 1985 Mr. Lomeli worked at least 2,020 hours. For 1986 Mr. Lomeli worked at least 2,117 hours. For 1987 Mr. Lomeli worked at least 2,041 hours. For the 6 1/2 months that Mr. Lomeli worked in 1988 he worked 1,924 hours. The stipulation of facts also indicates that Mr. Lomeli worked 199 days in the 201-day period from March 14 to September 30, 1988, at an average of 9.6 hours per day. His hourly wage was \$7.50. Although not specifically set forth in the stipulation of facts, again, our careful review of the payroll records attached to the stipulated facts convinces us that Mr. Lomeli was working as a general farm laborer for Byerley Farms.

The proper analysis to be used to determine whether Mr. Lomeli was an exclusively seasonal worker or a worker who was essentially part-time or intermittent, requires that we look first to the type of work being performed, and secondly, the relationship of the worker to the employment.

In reviewing the facts presented in this record, we find that Mr. Lomeli was engaged in general farm laboring work. In fact, this record establishes that Mr. Lomeli had engaged in general farm laboring work in his first two years for this employer (1983 and 1984) for full twelve-month calendar years. Therefore we believe the type of work being performed by Mr. Lomeli was neither seasonal nor essentially part-time or intermittent by definition. Instead, we believe the type of work Mr. Lomeli performed, based in part upon his lengthy prior work history with this employer, was full-time, general farm laboring work. The nature of the work required by the employer was full-time employment. We next turn to Mr. Lomeli's relationship to this employment.

While the type of work in which a worker engages may be full-time, if the worker then establishes a relationship with that employment, which is either seasonal or essentially part-time or intermittent, then

1 RCW 51.08.178(2) mandates that the worker's wage be determined by the twelve-month averaging
2 method. Again, based on the record presented to us, we can find no basis to support a finding that
3 Mr. Lomeli has attached himself to his employment with Byerley Farms on a seasonal basis. We
4 believe the term "seasonal", as used in RCW 51.08.178, must be meant to have its common meaning
5 that is, work which is dependent on a season of the year. Black's Law Dictionary at 1212 (5th ed.
6 1979); Webster's Third New International Dictionary at 2049 (1986); State v. Roadhs, 71 Wn.2d 705
7 (1967). After 1984 Mr. Lomeli worked from March to November, or from March to December, for the
8 years of 1985, 1986, and 1987, and appears to have been following that pattern for 1988, were it not
9 for the industrial injury. Mr. Lomeli worked most, if not all, of three seasons of the year, spring,
10 summer, and fall, and even worked a portion of the winter season. We believe a worker such as Mr.
11 Lomeli, whose work is such that it transcends the seasons and is clearly not defined by the seasons,
12 cannot have such work classified as "exclusively seasonal in nature."
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15 Nor do we believe that this record establishes that Mr. Lomeli is essentially a part-time or
16 intermittent worker. As we have indicated, there is nothing "essentially part-time" or "intermittent"
17 about general farm laboring work. As previously noted, Mr. Lomeli was able to engage in that type of
18 work, with this particular employer, on a full-time basis in 1983 and 1984. The question still to be
19 answered is whether the periods of employment that Mr. Lomeli worked in 1985, 1986, 1987, and
20 1988, establish a full-time employment relationship or whether these periods reflect an "essentially
21 part-time" or "intermittent" relationship to his employment.
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24 We note that someone working a "standard" 40 hours a week for 52 weeks in a calendar year
25 would work 2,080 hours. As previously indicated, Mr. Lomeli exceeded that figure for 1986 by working
26 2,117 hours. In 1985 Mr. Lomeli worked at least 2,020 hours, a mere 60 hours less than a worker
27 working a "standard" 40 hours in 52 weeks. In 1987 Mr. Lomeli worked at least 2,041 hours, or 39
28 hours less than the "standard" 40 hours in 52 weeks. Furthermore, in just 6 1/2 months of 1988, his
29 hours had reached 1,924, closely approaching the "standard" work hours for a full calendar year.
30 Given the number of hours Mr. Lomeli worked in each year, the type of work he was performing, and
31 his work history with this employer, we are not persuaded that the mere fact he did not work for
32 approximately two to three months in mid-winter is sufficient to classify him as an "essentially part-
33 time" or "intermittent" worker, as those terms are used in RCW 51.08.178(2).
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36 We believe the facts in this record establish that Mr. Lomeli was a full-time worker employed in
37 general farm laboring work for Byerley Farms. Therefore his monthly wage must be determined
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1 pursuant to the provisions of RCW 51.08.178(1). Since he was working seven days a week, RCW
2 51.08.178(1) requires Mr. Lomeli's daily wage that he "was receiving at the time of the injury" be
3 multiplied by 30 in order to arrive at the monthly wage.
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6 Additionally, since the record indicates Mr. Lomeli received a bonus in the sum of \$1,505.30,
7 RCW 51.08.178(3) requires that this bonus be divided by twelve and the resulting figure be included in
8 his monthly wage.
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10 In summary, in appeals involving application of RCW 51.08.178(2) we will look at both the
11 nature of the employment and the workers' relationship to the employment in a combined test to
12 determine the appropriate calculation of temporary total disability benefits (time-loss compensation).
13 Neither inquiry alone will resolve a given set of facts, for it is possible that a worker could have an
14 "essentially part-time" or "intermittent" relationship to a full-time position. Conversely, a worker could
15 have a full-time relationship to an exclusively seasonal employment. In the present appeal it is clear
16 that the employer may have had a varying need for Mr. Lomeli's services but that need was
17 nonetheless full-time. Further, it was Mr. Lomeli's practice to be available to the employment to the
18 extent the employer required. Thus, Mr. Lomeli's employment was full-time in nature and his
19 relationship to the employment was likewise full-time.
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22 The final issue raised by the parties deals with the Department's authority to demand
23 recoupment of any time-loss compensation previously but erroneously paid to Mr. Lomeli. We are
24 uncertain as to whether any overpayment for time-loss compensation will result, once the Department
25 recalculates the monthly wage of the worker as required by RCW 51.08.178(1). However, it appears
26 that both the Department and the claimant agree that in regard to any possible overpayment, the
27 Department is precluded from making a claim for recoupment, pursuant to RCW 51.32.240, more than
28 one year after the date any overpayment was made. We agree that this is the law.
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31 After consideration of the Proposed Decision and Order and the Petition for Review filed
32 thereto and a careful review of the entire record before us, we are persuaded that the Department
33 order of September 6, 1990 is in error and that the order should be reversed and the matter remanded
34 to the Department with instructions to compute the claimant, Alfredo F. Lomeli's monthly wage,
35 pursuant to RCW 51.08.178(1) as a full-time worker, employed seven days a week.
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38 **FINDINGS OF FACT**

- 39 1. On October 14, 1988 an application for benefits was received alleging an
40 industrial injury to the claimant on September 30, 1988. On October 11,
41 1989 the Department issued an order changing the rate of the time-loss
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1 compensation. On May 21, 1990 claimant filed a protest and request for
2 reconsideration challenging the rate for time-loss compensation. On July
3 2, 1990 the Department issued an interlocutory order terminating time-loss
4 compensation as of June 29, 1990 and on July 18, 1990 claimant filed a
5 protest and request for reconsideration of that order.
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7 On September 6, 1990 the Department issued an order determining
8 claimant's average monthly wages at \$1,837.26. On September 17, 1990,
9 the claimant filed a notice of appeal from the Department's order of
10 September 6, 1990. On October 26, 1990, the Board issued an order
11 granting the appeal, assigned Docket No. 90 4156 and directed further
12 proceedings be held on the issues raised therein.

- 13 2. Claimant, Alfredo F. Lomeli, worked as a general farm worker for Byerley
14 Farms, Inc., from January 1983 to September 30, 1988. For the years
15 1983 and 1984 claimant worked from January to December. For the
16 years 1985, 1986, and 1987 claimant commenced working in March.
17 Claimant worked until November in the years 1985 and 1987 and until
18 December in the year 1986. In 1985 Mr. Lomeli worked 2,020 hours. In
19 1986 Mr. Lomeli worked 2,117 hours. In 1987 Mr. Lomeli worked 2,041
20 hours. In 1988 Mr. Lomeli worked from March 14, 1988 to September 30,
21 1988, and worked 1,924 hours in that period. At the time of his industrial
22 injury Mr. Lomeli was working seven days a week at an average of 9.6
23 hours per day. Mr. Lomeli was paid \$7.50 an hour at the time of the injury.
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- 25 3. Alfredo F. Lomeli was employed as a general farm worker for Byerley
26 Farms. At the time of his industrial injury, Mr. Lomeli's employment was
27 not exclusively seasonal and Mr. Lomeli worked full-time through at least
28 three different seasons of the year during every year while he was
29 employed with Byerley Farms. At the time of his industrial injury, Mr.
30 Lomeli's relationship to his employment with Byerley Farms was neither
31 seasonal nor essentially part-time or intermittent. Mr. Lomeli was
32 essentially a full-time worker for Byerley Farms at the time of his industrial
33 injury.
- 34 4. On September 30, 1988 claimant received a bonus in the amount of
35 \$1,505.30 for the period of time January 1, 1988 through September 30,
36 1988 as part of his contract of hire. The amount of claimant's bonus
37 depended on the profitability of the farm.
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39 **CONCLUSIONS OF LAW**

- 40 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
41 and the subject matter to this appeal.
- 42 2. At the time of his industrial injury, the claimant, Alfredo F. Lomeli, was not
43 a worker whose employment was exclusively seasonal in nature or whose
44 current employment or relationship to employment was essentially part-
45 time or intermittent as set forth in RCW 51.08.178(2). Therefore Mr.
46 Lomeli's monthly wages shall not be computed pursuant to RCW
47 51.08.178(2). Mr. Lomeli's monthly wages shall be determined by

1 computation methods set forth in RCW 51.08.178(1) as a worker working
2 seven days a week at an average of 9.6 hours per day with an hourly
3 wage of \$7.50.

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5 3. In computing the monthly wage, the Department is also required to include
6 the bonus received by Mr. Lomeli in the amount of \$1,505.30, pursuant to
7 RCW 51.08.178(3).

8 4. The Department's order of September 6, 1990 is reversed and this matter
9 is remanded to the Department with instructions to re-compute claimant's
10 monthly wage in accordance with the provisions of RCW 51.08.178(1) and
11 (3), as a full-time worker employed seven days a week and to consider the
12 bonus received by Mr. Lomeli in the sum of \$1,505.30.

13 It is so **ORDERED**.

14 Dated this 13th day of January, 1992.

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17 BOARD OF INDUSTRIAL INSURANCE APPEALS

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19
20 /s/
21 S. FREDERICK FELLER Chairperson

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23
24 /s/
25 FRANK E. FENNERTY, JR. Member

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27
28 /s/
29 PHILLIP T. BORK Member