

Guaragna (Williams), Deborah

TIME-LOSS COMPENSATION (RCW 51.32.090)

Intermittent employment

General laboring work on construction-type projects for 40 to 60 hours a week which is generally available on a continuous basis is full time employment rather than part-time or intermittent. ...*In re Deborah Guaragna (Williams)*, BIIA Dec., 90 4246 (1992)

[dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 92-2-01080-5.]

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 or intermittent 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 laboring work for a temporary services agency 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 Deborah Guaragna (Williams)*, BIIA Dec., 90 4246 (1992) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Clark County Cause No. 92-2-01080-5.]

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

IN RE: DEBORAH GUARAGNA) DOCKET NO. 90 4246
(WILLIAMS))
CLAIM NO. M-008780) DECISION AND ORDER

APPEARANCES:

Deborah J. Guaragna (Williams), by
Baker & Brintnall, per
Lee A. Baker

Employer, Qualified Personnel, Inc.,
None

Department of Labor and Industries, by
Office of the Attorney General, per
Art E. DeBusschere, Assistant, and Steve LaVergne, Paralegal

This is an appeal filed by the claimant on September 20, 1990 from an order of the Department of Labor and Industries dated August 3, 1990 in which the Department computed the wages for the claimant payable at the minimum compensation rate based on RCW 51.08.178(2), on the basis that the claimant's current employment or relationship to employment was essentially part-time or intermittent. The compensation rate was calculated on unmarried plus four dependents for a total of \$322.22 per month. **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 July 24, 1991 in which the order of the Department dated August 3, 1990 was affirmed.

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 controversy in this matter regarding the computation of Mrs. Williams' time-loss compensation benefits focuses on the 1988 amendments to RCW 51.08.178. (Laws of 1988, ch. 161 § 12, attached as Exhibit A to this Decision and Order). The 1988 amendments made several changes in the method for determining injured workers' monthly wages for purposes of RCW Title 51. Among other things, the statute, as amended, provides that the monthly wage for workers whose current employment or relationship to employment is essentially part-time or intermittent, shall be

1 determined by averaging the wages earned over any period of twelve successive calendar months
2 preceding the injury which "fairly represents the claimant's employment pattern."

3 The 1988 amendments provide a specific method for determining the monthly wage for part-
4 time or intermittent workers. We note that RCW 51.08.178(1), which precedes the 1988 amendments,
5 historically as well as textually, also provides a method for computing a monthly wage for workers,
6 some of whom may have a non-standard employment pattern. Specifically, this section provides not
7 only for those who work five days a week but also one, two, three, four, six or seven days per week.
8 Thus, RCW 51.08.178(1) could arguably be used to determine the monthly wage of a part-time
9 worker. However, we believe the Legislature intended the 1988 amendments to provide the basis for
10 determining the nature of a worker's employment, not just the number of days actually worked in a
11 given time period.
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13 Each statute should be read so as to give effect to the purpose of the statute. Newschwander
14 v. Board of Trustees of the Washington State Teachers' Retirement System, 94 Wn.2d 701 (1980);
15 Cramer v. Van Parys, 7 Wn. App. 584 (1972). Therefore, if we are to try and apply RCW
16 51.08.178(2)(b)¹ (the part added by the 1988 amendment) we must determine the nature of the
17 employment or the worker's individual relationship to the employment. ". . . (b) the worker's current
18 employment or his or her relation to his or her employment is essentially part-time or intermittent, . . ."
19 RCW 51.08.178(2)(b). Thus "part-time" or "intermittent" is determined by looking at the nature of the
20 work actually performed at the time of injury or is determined by the worker's participation in or
21 relationship to the employment. If either the worker's current employment or the worker's relationship
22 to employment is essentially "part-time" or "intermittent", then the twelve-month averaging method as
23 set forth in RCW 51.08.178(2) is used to determine the monthly wage. On the other hand, if the
24 worker is not within the scope of RCW 51.08.178(2)(b) as an essentially part-time or intermittent
25 worker, then RCW 51.08.178(1) provides the method for computing the worker's monthly wage. We
26 believe that this inquiry is required to give effect to each section of the statute and to the statute as a
27 whole.
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42 ¹This appeal focuses on subsection (b) of RCW 51.08.178(2). There appears to be no issue alleging
43 that Mrs. Williams' employment falls under subsection (a) dealing with work that is "exclusively
44 seasonal in nature".
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1 The question presented in this case and the issue which is squarely before us is whether Mrs.
2 Williams was a part-time or intermittent worker as those terms are used in RCW 51.08.178(2)(b). If
3 Mrs. Williams was within the definition of those terms then the statutory twelve-month averaging period
4 must be used to determine her monthly wage. If, on the other hand, she was not a part-time or
5 intermittent worker within the meaning of RCW 51.08.178(2)(b), then the method as set forth in RCW
6 51.08.178(1) must be used to determine her monthly wage.
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9 Mrs. Williams began work with Qualified Personnel, Inc. (QPI) on November 2, 1988. QPI is a
10 labor exchange, providing labor for various contractors. QPI's primary contract is with General
11 Electric. QPI recruits and supplies various types of personnel across the United States. Once on a
12 QPI list of workers, a worker could reasonably expect to be called for further employment. However,
13 there would be no guarantee of further jobs nor any guarantee of the duration of any future
14 employment with QPI as a laborer. Mrs. Williams was hired by QPI to assist in a PCB cleanup in the
15 Spokane area. After approximately six days of employment, she became ill and filed an application for
16 benefits. The claim was allowed. The specific job assignment as a laborer on the PCB cleanup in
17 Spokane was of a relatively short duration. The entire project lasted approximately nine weeks. Mrs.
18 Williams' prior work history consisted of work as a housecleaner.
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20 Based on these facts, the Department classified Mrs. Williams as a part-time or intermittent
21 worker pursuant to RCW 51.08.178(2)(b) and used the averaging method provided in the statute to
22 average her wages over twelve months. As a result, Mrs. Williams' time-loss compensation was
23 computed at the minimum compensation rate. Her time-loss compensation rate was not based on the
24 monthly wage at the time of her injury with QPI.
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26 We believe the proper analysis to be used in determining whether Mrs. Williams was an
27 essentially part-time or intermittent worker requires that we look first to the type of work being
28 performed, and secondly, the relationship of the worker to the employment.
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30 In reviewing the facts presented in this record, we find that Mrs. Williams was engaged in
31 general laboring work. The record establishes that Mrs. Williams was working between 40 and 60
32 hours a week as a laborer for QPI, performing general laboring and cleaning work on the PCB cleanup
33 project. We believe the nature of the work performed by Mrs. Williams was not essentially "part-time"
34 or "intermittent." Instead, we believe the type of work Mrs. Williams performed, that is, general
35 laboring work on a construction-type project for 40 to 60 hours a week, is generally available on a
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1 continuous basis and constitutes full-time employment. We next turn to Mrs. Williams' relationship to
2 her employment.

3 While the type of work in which a worker engages may be full-time, if the worker establishes a
4 relationship with that employment which is essentially "part-time" or "intermittent", then RCW
5 51.08.178(2) mandates that the worker's wage be determined by the twelve-month averaging method.
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8 We do not believe Mrs. Williams had an essentially "part-time" or "intermittent" relationship to
9 her employment. Again, there is nothing essentially "part-time" or "intermittent" about general laboring
10 work on a construction project. In classifying Mrs. Williams' relationship to her current employment
11 with QPI as intermittent, the Department's focus appears to be on her relationship to: 1) past
12 employments; 2) her relationship with a specific employer; and 3) the availability of future employment.
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15 The record indicates that Mrs. Williams' past employment may have been intermittent in nature
16 as that word is used in RCW 51.08.178(2)(b). However, subsection (b) clearly contemplates an
17 analysis of the current employment situation. Although her precise work history is not available in this
18 record, she testified that "I worked for S & J Cleaning off and on for approximately two years before
19 1988". 4/12/91 Tr. at 16. This statement indicates an intermittent relationship with her prior employer.
20 Unfortunately the record is poorly developed regarding a more extensive history of her prior
21 employment relationships beyond her statements about S & J Cleaning. While past work history may
22 have some relevance in understanding a worker's present or current relationship to his or her current
23 employment, the mere fact that a worker may have a past history of part-time or intermittent work is
24 insufficient, in and of itself, to classify a worker's current relationship to employment as part-time or
25 intermittent! Other relevant factors, such as the worker's intent, as well as the nature or type of current
26 employment, also bear on Mrs. Williams' relationship to employment at the time of her industrial injury.
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29 The claimant correctly points out that RCW 51.08.178(2)(b) is specifically directed to whether
30 the worker's current employment or relationship to employment is essentially part-time or intermittent.
31 However, we do not believe it is appropriate to only focus on the worker's relationship to the present
32 employer. While the relationship with the current employer may be relevant in resolving the worker's
33 relationship to employment, other factors, including the worker's intent, as well as the nature of the
34 current employment (for example, whether the employment is typically a full-time employment), also
35 bear on the determination.
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1 With regard to the question of intent, the following statements by Mrs. Williams in response to
2 questions concerning her intent to work on a full-time basis are persuasive regarding her relationship
3 to her employment as a general laborer:
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5 Q. And what was your long-term intent in relation to this kind of work?

6 A. Because of the job that I was performing at the time was not sustaining my
7 household, I knew about construction work. I do (sic) that I could do it. I
8 knew that it would be full-time. I knew that I could make a good living and
9 support my children, and that's what I planned on doing. I wanted to get
10 experience so that later on I could go on to work at the shipyards. 4/12/91
11 Tr. at 10.

12 Q. Was your plan to rely on this type of work intended for any limited period
13 of time?
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15 A. It was not for a limited period of time. I made a decision. I made a career
16 change. I would not have quit my prior job just on a hunch, or a guess that
17 I may work here and there. I was guaranteed plenty of work. I'm sorry I
18 was injured on my first job. I had four kids to support. The only job that I
19 could have done was this at the time because I knew the welding. I knew
20 the background, or go on welfare, which I'd already done previously to that
21 with my ex-husband, Michael, and I did not want to go on the welfare. I
22 did not want to submit my kids to that. 4/12/91 Tr. at 14.
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24 Abandonment of part-time or intermittent work in favor of a full-time relationship with
25 employment is indicative of an intent by the worker to be employed full-time. Under such
26 circumstances the past work history of part-time or intermittent work should not be used as a basis for
27 determining the current working relationship!
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29 The testimony presented by Mrs. Williams regarding her intent to work full-time as a general
30 laborer on construction projects is un-rebutted. Her reasons for seeking a full-time employment
31 relationship in general laboring construction work, that is, the desire to support her four children and
32 avoid the dependent nature of welfare, rings true.
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34 While it appears that the Department relied in part on past employment relationships in this
35 case, and disregarded Mrs. Williams' intent, it also appears that the Department has focused on the
36 future availability of employment in classifying Mrs. Williams as an intermittent worker. We have found
37 nothing in the legislative history or in the reading of RCW 51.08.178(2)(b) which suggests that the
38 future availability of employment is an appropriate criteria to use in determining that the worker's
39 relationship to her current employment is essentially part-time or intermittent. General laboring work
40 on construction projects usually requires that the worker seek a new relationship with an employer
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1 once each project is completed. In doing so, the worker may have periods of unemployment. We do
2 not believe that working from job to job in construction type work² should be considered per se part-
3 time or intermittent work merely because there may be periods of non-work in between job
4 assignments. Construction work, or any other work, that may require the worker to establish an
5 employment relationship with several different employers, back to back or in succession, should be
6 viewed as essentially full-time work and not essentially part-time or intermittent, unless rebutted by the
7 Department. We do not believe the Department may speculate that a worker will not have work
8 available continuously in the future and, based on such speculation, classify the worker as "part-time"
9 or "intermittent." We do not believe the statute intended this result. We do not believe that this
10 method "fairly represents" the worker's monthly wage or "employment pattern."

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15 In any event, Mrs. Williams' future employment would not have been with a different employer
16 because she would have continued to work with QPI! QPI would have developed new projects and
17 assigned people employed by them to those projects. While it is certainly possible that QPI may not
18 have been able to offer Mrs. Williams continuous employment after the current project was completed,
19 the relationship between QPI and Mrs. Williams was, nevertheless, continuing in nature.

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23 We have examined the available legislative history of the 1988 amendments to RCW
24 51.08.178 (House Bill 1396) and we have been unable to locate any information which is especially
25 helpful in resolving the issue in this appeal. In arguments to the industrial appeals judge, as well as in
26 the Petition for Review, the claimant relies on Rozner v. Bellevue, 116 Wn.2d 342 (1991) for the
27 proposition that statements made by Representative Art Wang in his letter to the claimant's counsel
28 dated April 10, 1991 are appropriate and should be relied upon by this Board to correctly interpret the
29 1988 amendments to RCW 51.08.178. The claimant urges us to consider Representative Wang's
30 letter as a part of the legislative history.

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35 Claimant's reliance on Rozner v. Bellevue is misplaced. The court's decision in Rozner v.
36 Bellevue does not support claimant's position regarding Representative Wang's letter of April 10, 1991
37 as legislative history. The decision in Rozner v. Bellevue simply supports the use of traditional
38 legislative history to aid the court in interpreting ambiguous statutory language. In Rozner, the court
39 examined traditional legislative history, including the Governor's veto message. While the court in
40 Rozner looked at subsequent legislative enactments following the Governor's veto to ascertain the

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44 ²or, we would add, in any field of work with a similar employment pattern.
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1 legislative intent, the court did not rely on post-enactment statements of individual legislators regarding
2 legislative intent. Such post-enactment statements by individual legislators has been consistently
3 rejected. City of Spokane v. State, 198 Wash. 682 (1939). Additionally, we doubt very much that
4 Representative Wang would approve of counsel's use of the April 10, 1991 letter as "legislative
5 history" to be used by this Board, or the courts, in interpreting the 1988 amendments to RCW
6 51.08.178. See, Wang, Legislative History in Washington, 7 U.P.S. Law Review, 593-594 (1984).
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9 In summary, we believe the facts of this case indicate that Mrs. Williams' employment at the
10 time of her industrial injury was not, by its nature, part-time or intermittent. Nor do we believe that her
11 relation to employment was part-time or intermittent. Insofar as the Department tried to demonstrate
12 that Mrs. Williams had not had a history of full-time employment, we believe that her statements
13 regarding her intent to work continuously are relevant and persuasive.
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16 While the availability of the work with QPI in the future may have been uncertain in some ways,
17 her relationship to her current employment should not be considered essentially part-time or
18 intermittent because of that future uncertainty.
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21 The Department order in this matter should be reversed and this matter remanded to the
22 Department with instructions to compute Mrs. Williams' monthly wage pursuant to RCW 51.08.178(1)
23 based upon her actual wage at the time of her injury with QPI.
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25 **FINDINGS OF FACT**

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27 1. On November 2, 1988, Deborah Williams sustained an industrial injury
28 during the course of her employment with Qualified Personnel, Inc. (QPI).
29 The Department of Labor and Industries received Mrs. Williams'
30 application for benefits on December 7, 1988. On February 21, 1989, the
31 Department issued an order accepting Mrs. Williams' claim.

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33 On April 24, 1990, the Department issued an order determining that it had
34 overpaid Mrs. Williams' time-loss compensation for the reason that
35 payments were based on an inaccurate correctable wage. The
36 Department received Mrs. Williams' protest and request for
37 reconsideration of its April 24 order on June 21, 1990.

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39 On August 3, 1990, the Department issued an order which determined
40 that based on Mrs. Williams' monthly wage per RCW 51.08.178(2) her
41 time-loss compensation rate would be the minimum compensation rate.
42 On September 22, 1990, the claimant filed a notice of appeal with the
43 Board of Industrial Insurance Appeals from the Department's August 3,
44 1990 order.

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46 2. The claimant, Deborah Williams, was employed by QPI on November 2,
47 1988 as a general laborer. The claimant had established an intent to work
continuously and she had established a full-time relationship with her

1 current employment on a full-time basis as a general laborer. Deborah
2 Williams' relationship to her employment on November 2, 1988 was not
3 part-time or intermittent.

- 4 3. On November 2, 1988, at the time of her industrial injury, Deborah
5 Williams' weekly work schedule was ten hours a day, six days a week.

6 **CONCLUSIONS OF LAW**

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8 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
9 and the subject matter to this appeal.
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11 2. On November 2, 1988, Deborah Williams' employment and her relation to
12 her employment with QPI was not part-time or intermittent as
13 contemplated by RCW 51.08.178(2).
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15 3. The Department's August 3, 1990 order which determined that based on
16 Mrs. Williams' monthly wage per RCW 51.08.178(2) her time-loss
17 compensation rate would be the minimum compensation rate, is incorrect
18 and is hereby reversed and this matter remanded to the Department with
19 instructions to recompute Mrs. Williams' monthly time-loss compensation
20 rate based on RCW 51.08.178(1) as a full-time worker working ten hours a
21 day, six days a week.

22 It is so **ORDERED**.

23 Dated this 11th day of March, 1992.

24 BOARD OF INDUSTRIAL INSURANCE APPEALS

25
26 /s/
27 S. FREDERICK FELLER Chairperson

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29 /s/
30 FRANK E. FENNERTY, JR. Member

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32 **DISSENT**

33 I disagree with the Board majority's determinations that the claimant's employment with QPI
34 and her relation to that employment was a full-time relationship on a full-time basis, and that her
35 relation to such employment was not intermittent as contemplated by RCW 51.08.178(2). True
36 enough, her temporary employment during this particular industrial cleanup project, for its quite limited
37 duration, was full-time on each work-day worked.

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39 However, based on the entirety of the evidence in the record, it is clear to me that no full-time
40 employment relationship on an ongoing basis was established by reason of her being hired for the
41 duration of this one project. Regardless of her professed long-term "intent" to work on a full-time
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1 basis, the facts are that the job was temporary and of limited duration; that, although she might
2 reasonably have expected to be called by QPI for employment on future "temporary help" projects,
3 there was no guarantee of this; and that there was no guarantee of duration of any future employment.
4 Inevitably, there would be periods when no such employment was offered or available. Mrs. Williams
5 was well aware of these facts.
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8 As concluded by our industrial appeals judge's Proposed Decision and Order with
9 considerable further analysis, the claimant's employment with QPI and/or her relation to her
10 employment must be characterized as essentially "intermittent" under the statute; it clearly meets the
11 dictionary definition of that word, "starting and stopping at intervals."
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14 I adopt the Proposed Decision and Order's evidentiary summary, statutory analysis, findings,
15 and conclusions. Accordingly, I would affirm the Department's order of August 3, 1990.
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17 Dated this 11th day of March, 1992.
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20 /s/ _____
21 PHILLIP T. BORK Member
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