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.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DEBORAH GUARAGNA (WILLIAMS)	**)**	**DOCKET NO. 90 4246**
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

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

The 1988 amendments provide a specific method for determining the monthly wage for part-time or intermittent workers. We note that RCW 51.08.178(1), which precedes the 1988 amendments, historically as well as textually, also provides a method for computing a monthly wage for workers, some of whom may have a non-standard employment pattern. Specifically, this section provides not only for those who work five days a week but also one, two, three, four, six or seven days per week. Thus, RCW 51.08.178(1) could arguably be used to determine the monthly wage of a part-time worker. However, we believe the Legislature intended the 1988 amendments to provide the basis for determining the nature of a worker's employment, not just the number of days actually worked in a given time period.

Each statute should be read so as to give effect to the purpose of the statute. Newschwander v. Board of Trustees of the Washington State Teachers' Retirement System, 94 Wn.2d 701 (1980); Cramer v. Van Parys, 7 Wn. App. 584 (1972). Therefore, if we are to try and apply RCW 51.08.178(2)(b)[1] (the part added by the 1988 amendment) we must determine the nature of the employment or the worker's individual relationship to the employment. ". . . (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, . . ." RCW 51.08.178(2)(b). Thus "part-time" or "intermittent" is determined by looking at the nature of the work actually performed at the time of injury or is determined by the worker's participation in or relationship to the employment. If either the worker's current employment or the worker's relationship to employment is essentially "part-time" or "intermittent", then the twelve-month averaging method as set forth in RCW 51.08.178(2) is used to determine the monthly wage. On the other hand, if the worker is not within the scope of RCW 51.08.178(2)(b) as an essentially part-time or intermittent worker, then RCW 51.08.178(1) provides the method for computing the worker's monthly wage. We believe that this inquiry is required to give effect to each section of the statute and to the statute as a whole.

[1]This appeal focuses on subsection (b) of RCW 51.08.178(2). There appears to be no issue alleging that Mrs. Williams' employment falls under subsection (a) dealing with work that is "exclusively seasonal in nature".

The question presented in this case and the issue which is squarely before us is whether Mrs. Williams was a part-time or intermittent worker as those terms are used in RCW 51.08.178(2)(b). If Mrs. Williams was within the definition of those terms then the statutory twelve-month averaging period must be used to determine her monthly wage. If, on the other hand, she was not a part-time or intermittent worker within the meaning of RCW 51.08.178(2)(b), then the method as set forth in RCW 51.08.178(1) must be used to determine her monthly wage.

Mrs. Williams began work with Qualified Personnel, Inc. (QPI) on November 2, 1988. QPI is a labor exchange, providing labor for various contractors. QPI's primary contract is with General Electric. QPI recruits and supplies various types of personnel across the United States. Once on a QPI list of workers, a worker could reasonably expect to be called for further employment. However, there would be no guarantee of further jobs nor any guarantee of the duration of any future employment with QPI as a laborer. Mrs. Williams was hired by QPI to assist in a PCB cleanup in the Spokane area. After approximately six days of employment, she became ill and filed an application for benefits. The claim was allowed. The specific job assignment as a laborer on the PCB cleanup in Spokane was of a relatively short duration. The entire project lasted approximately nine weeks. Mrs. Williams' prior work history consisted of work as a housecleaner.

Based on these facts, the Department classified Mrs. Williams as a part-time or intermittent worker pursuant to RCW 51.08.178(2)(b) and used the averaging method provided in the statute to average her wages over twelve months. As a result, Mrs. Williams' time-loss compensation was computed at the minimum compensation rate. Her time-loss compensation rate was not based on the monthly wage at the time of her injury with QPI.

We believe the proper analysis to be used in determining whether Mrs. Williams was an essentially part-time or intermittent worker 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 Mrs. Williams was engaged in general laboring work. The record establishes that Mrs. Williams was working between 40 and 60 hours a week as a laborer for QPI, performing general laboring and cleaning work on the PCB cleanup project. We believe the nature of the work performed by Mrs. Williams was not <u>essentially</u> "part-time" or "intermittent." Instead, we believe the type of work Mrs. Williams performed, that is, general laboring work on a construction-type project for 40 to 60 hours a week, is generally available on a

continuous basis and constitutes full-time employment. We next turn to Mrs. Williams' relationship to her employment.

While the type of work in which a worker engages may be full-time, if the worker establishes a relationship with that employment which is essentially "part-time" or "intermittent", then RCW 51.08.178(2) mandates that the worker's wage be determined by the twelve-month averaging method.

We do not believe Mrs. Williams had an essentially "part-time" or "intermittent" relationship to her employment. Again, there is nothing essentially "part-time" or "intermittent" about general laboring work on a construction project. In classifying Mrs. Williams' relationship to her current employment with QPI as intermittent, the Department's focus appears to be on her relationship to: 1) past employments; 2) her relationship with a specific employer; and 3) the availability of future employment.

The record indicates that Mrs. Williams' past employment may have been intermittent in nature as that word is used in RCW 51.08.178(2)(b). However, subsection (b) clearly contemplates an analysis of the current employment situation. Although her precise work history is not available in this record, she testified that "I worked for S & J Cleaning off and on for approximately two years before 1988". 4/12/91 Tr. at 16. This statement indicates an intermittent relationship with her prior employer. Unfortunately the record is poorly developed regarding a more extensive history of her prior employment relationships beyond her statements about S & J Cleaning. While past work history may have some relevance in understanding a worker's present or current relationship to his or her current employment, the mere fact that a worker may have a past history of part-time or intermittent work is insufficient, in and of itself, to classify a worker's current relationship to employment as part-time or intermittent! Other relevant factors, such as the worker's intent, as well as the nature or type of current employment, also bear on Mrs. Williams' relationship to employment at the time of her industrial injury.

The claimant correctly points out that RCW 51.08.178(2)(b) is specifically directed to whether the worker's current employment or relationship to employment is essentially part-time or intermittent. However, we do not believe it is appropriate to only focus on the worker's relationship to the present employer. While the relationship with the current employer may be relevant in resolving the worker's relationship to employment, other factors, including the worker's intent, as well as the nature of the current employment (for example, whether the employment is typically a full-time employment), also bear on the determination.

With regard to the question of intent, the following statements by Mrs. Williams in response to questions concerning her intent to work on a full-time basis are persuasive regarding her relationship to her employment as a general laborer:

> Q. And what was your long-term intent in relation to this kind of work?
>
> A. Because of the job that I was performing at the time was not sustaining my household, I knew about construction work. I do (sic) that I could do it. I knew that it would be full-time. I knew that I could make a good living and support my children, and that's what I planned on doing. I wanted to get experience so that later on I could go on to work at the shipyards. 4/12/91 Tr. at 10.
>
> Q. Was your plan to rely on this type of work intended for any limited period of time?
>
> A. It was not for a limited period of time. I made a decision. I made a career change. I would not have quit my prior job just on a hunch, or a guess that I may work here and there. I was guaranteed plenty of work. I'm sorry I was injured on my first job. I had four kids to support. The only job that I could have done was this at the time because I knew the welding. I knew the background, or go on welfare, which I'd already done previously to that with my ex-husband, Michael, and I did not want to go on the welfare. I did not want to submit my kids to that. 4/12/91 Tr. at 14.

Abandonment of part-time or intermittent work in favor of a full-time relationship with employment is indicative of an intent by the worker to be employed full-time. Under such circumstances the past work history of part-time or intermittent work should not be used as a basis for determining the current working relationship!

The testimony presented by Mrs. Williams regarding her intent to work full-time as a general laborer on construction projects is un-rebutted. Her reasons for seeking a full-time employment relationship in general laboring construction work, that is, the desire to support her four children and avoid the dependent nature of welfare, rings true.

While it appears that the Department relied in part on past employment relationships in this case, and disregarded Mrs. Williams' intent, it also appears that the Department has focused on the future availability of employment in classifying Mrs. Williams as an intermittent worker. We have found nothing in the legislative history or in the reading of RCW 51.08.178(2)(b) which suggests that the future availability of employment is an appropriate criteria to use in determining that the worker's relationship to her current employment is essentially part-time or intermittent. General laboring work on construction projects usually requires that the worker seek a new relationship with an employer

once each project is completed. In doing so, the worker may have periods of unemployment. We do not believe that working from job to job in construction type work[2] should be considered per se part-time or intermittent work merely because there may be periods of non-work in between job assignments. Construction work, or any other work, that may require the worker to establish an employment relationship with several different employers, back to back or in succession, should be viewed as essentially full-time work and not essentially part-time or intermittent, unless rebutted by the Department. We do not believe the Department may speculate that a worker will not have work available continuously in the future and, based on such speculation, classify the worker as "part-time" or "intermittent." We do not believe the statute intended this result. We do not believe that this method "fairly represents" the worker's monthly wage or "employment pattern."

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

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

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

[2] or, we would add, in any field of work with a similar employment pattern.

legislative intent, the court did not rely on post-enactment statements of individual legislators regarding legislative intent. Such post-enactment statements by individual legislators has been consistently rejected. City of Spokane v. State, 198 Wash. 682 (1939). Additionally, we doubt very much that Representative Wang would approve of counsel's use of the April 10, 1991 letter as "legislative history" to be used by this Board, or the courts, in interpreting the 1988 amendments to RCW 51.08.178. See, Wang, Legislative History in Washington, 7 U.P.S. Law Review, 593-594 (1984).

In summary, we believe the facts of this case indicate that Mrs. Williams' employment at the time of her industrial injury was not, by its nature, part-time or intermittent. Nor do we believe that her relation to employment was part-time or intermittent. Insofar as the Department tried to demonstrate that Mrs. Williams had not had a history of full-time employment, we believe that her statements regarding her intent to work continuously are relevant and persuasive.

While the availability of the work with QPI in the future may have been uncertain in some ways, her relationship to her current employment should not be considered essentially part-time or intermittent because of that future uncertainty.

The Department order in this matter should be reversed and this matter remanded to the Department with instructions to compute Mrs. Williams' monthly wage pursuant to RCW 51.08.178(1) based upon her actual wage at the time of her injury with QPI.

FINDINGS OF FACT

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

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

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

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

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

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

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. On November 2, 1988, Deborah Williams' employment and her relation to her employment with QPI was not part-time or intermittent as contemplated by RCW 51.08.178(2).

3. The Department's August 3, 1990 order which determined that based on Mrs. Williams' monthly wage per RCW 51.08.178(2) her time-loss compensation rate would be the minimum compensation rate, is incorrect and is hereby reversed and this matter remanded to the Department with instructions to recompute Mrs. Williams' monthly time-loss compensation rate based on RCW 51.08.178(1) as a full-time worker working ten hours a day, six days a week.

It is so **ORDERED.**

Dated this 11th day of March, 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 determinations that the claimant's employment with QPI and her relation to that employment was a full-time relationship on a full-time basis, and that her relation to such employment was not intermittent as contemplated by RCW 51.08.178(2). True enough, her temporary employment during this particular industrial cleanup project, for its quite limited duration, was full-time on each work-day worked.

However, based on the entirety of the evidence in the record, it is clear to me that no full-time employment relationship on an ongoing basis was established by reason of her being hired for the duration of this one project. Regardless of her professed long-term "intent" to work on a full-time

basis, the facts are that the job was temporary and of limited duration; that, although she might reasonably have expected to be called by QPI for employment on future "temporary help" projects, there was no guarantee of this; and that there was no guarantee of duration of any future employment. Inevitably, there would be periods when no such employment was offered or available. Mrs. Williams was well aware of these facts.

As concluded by our industrial appeals judge's Proposed Decision and Order with considerable further analysis, the claimant's employment with QPI and/or her relation to her employment must be characterized as essentially "intermittent" under the statute; it clearly meets the dictionary definition of that word, "starting and stopping at intervals."

I adopt the Proposed Decision and Order's evidentiary summary, statutory analysis, findings, and conclusions. Accordingly, I would affirm the Department's order of August 3, 1990.

Dated this 11th day of March, 1992.

/s/_____
PHILLIP T. BORK Member