Saltz, Lucian

APPEALABLE ORDERS

Informal letters

RES JUDICATA

Informal letter

Wages at time of injury

Where a worker received a letter determination stating that the rate of time-loss compensation was correct and that a separate order would affirm earlier orders but the worker did not appeal the order subsequently issued, the Board concluded that the order was not res judicata regarding the rate of time-loss compensation for the periods set forth in the order since the letter determination had been appealed. ***….In re Lucian Saltz*, BIIA Dec., 92 4309 (1993)**

THIRD PARTY ACTIONS (RCW 51.24)

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

Where a worker is characterized as "temporary" but was on call every day of employment and worked a substantial number of hours and drove many miles for the employer, the worker was a full-time employee and should be paid time-loss compensation accordingly. **….*In re Lucian Saltz*, BIIA Dec., 92 4309 (1993)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LUCIAN R. SALTZ	)	**DOCKET NOS. 92 4309 & 92 4310**
	)	
	)	
	)	**AMENDED DECISION AND ORDER**
CLAIM NO. M-517769	)	**(Amends 11/18/93 Decision)**

APPEARANCES:

Claimant, Lucian R. Saltz, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab and Kathleen G. Kilcullen

Employer, Danny Boy Trucking, by
Tim Evans, General Manager

Department of Labor and Industries, by
The Attorney General, per
Shara J. DeLorme, Assistant, and Jean Jelinek, Paralegal

These are appeals filed by the claimant, Lucian R. Saltz, on August 3, 1992. The first, assigned Docket No. 92 4309, referred to a letter determination of July 7, 1992. That letter indicated the correct time loss compensation rate had been used and advised that a separate order affirming time loss compensation orders dated October 24, 1991, December 2, 1991, March 3, 1992, April 21, 1992 and April 22, 1992 would be issued. The Department, in fact, issued an order dated July 8, 1992, which affirmed time loss compensation orders dated October 24, 1991, December 2, 1991, March 3, 1992, April 21, 1992 and April 22, 1992. **REVERSED AND REMANDED**.

The second, assigned Docket No. 92 4310, appealed a July 6, 1992 Department order that determined the claimant should receive five semi-monthly time loss compensation payments for the period beginning July1, 1992. **REVERSED AND REMANDED**.

EVIDENTIARY AND PROCEDURAL MATTERS

The Notice of Appeal in the appeal assigned Docket No. 92 4309 specifically referred to the July 7, 1992 letter. Upon reviewing the appeal and noting that an order was issued on July 8, 1992 addressing the various time loss compensation orders referred to in the July 7, 1992 order, our then acting Executive Secretary contacted counsel for the claimant. Counsel was advised that the appeal was being treated only as an appeal of the letter of July 7, 1992 and that it would be necessary to file an amended Notice of Appeal in order to address any issues raised by the order of July 8, 1992. This is consistent with WAC 263-12-080, which permits this Board to require a party filing a Notice of

Appeal to "correct, clarify or amend the same." Counsel, however, did not submit an amended Notice of Appeal at any time before the hearing.

Despite the failure to amend the appeal, our industrial appeals judge permitted the parties to present evidence related to the substance of the July 6, 1992 order (Docket No. 92 4310), the July 7, 1992 letter (Docket No. 92 4309) and the undocketed July 8, 1992 order. The Proposed Decision and Order affirmed the July 7, 1992 letter, the July 6, 1992 order and, without explanation as to how this Board acquired jurisdiction, the July 8, 1992 order.

RCW 51.52.060 permits any person "aggrieved by an order, decision, or award" of the Department to appeal that determination to this Board. In this instance, the claimant filed an appeal only from two determinations of the Department, the July 6, 1992 order (Docket No. 92 4309) and the July 7, 1992 letter (Docket No. 92 4310).

The July 7, 1992 letter expressly indicated:

> Therefore, it has been determined that no error has been made and your time loss rate is correct. Under separate (sic) cover an order is being issued affirming the order and notices dated 10/24/91, 12/02/91, 03/03/92, 04/21/92, and 04/22/92.

To the extent the letter determined that the time loss compensation rate was correct, it constituted a final decision of the Department which may be a proper subject of an appeal to this Board. RCW 51.52.060.

The precise issue presented in the order of July 8, 1992, that is -- the entitlement to time loss compensation for the periods addressed by the orders dated October 24, 1991, December 2, 1991, March 3, 1992, April 21, 1992 and April 22, 1992 -- is not before this Board based on the appeals from the July 6, 1992 order and the July 7, 1992 letter. The effect of a failure to specifically appeal the July 8, 1992 order is the binding determination that time loss compensation was payable for the periods identified in the order. However, having stated that this issue of the entitlement to time loss is binding as a result of the July 8, 1992 order we, nonetheless, believe that the order is not res judicata on the question of rate of time loss compensation paid for those periods. The July 7, 1992 determination which was, in fact, appealed dealt with the rate of time loss which, of course, must affect any future payment of that benefit. In re Louise Scheeler, BIIA Dec., 89 0609 (1990).

We conclude, therefore, that the terms of the July 7, 1993 letter encompass the time loss compensation rate. To that extent, the Proposed Decision and Order appropriately considered the rate of time loss compensation which should have been used as the basis for the payment of time loss in the July 8, 1993 order.

Accordingly, this Board may not expressly reverse the July 8, 1992 order since it has never been appealed. That order is final in the sense that the claimant is entitled to benefits for the periods covered. The July 8, 1992 order is not res judicata regarding the rate of time loss compensation. It is within our scope of review to identify the correct rate of time loss compensation rate to be used for all periods during which time loss compensation was payable.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are 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 7, 1993 in which the letter of the Department of Labor and Industries dated July 7, 1992 and Department orders dated July 6, 1992 and July 8, 1992 were 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.

This appeal deals with claimant's rate of time loss compensation. We believe that the Department did not follow the statute, RCW 51.08.178(2), in determining Mr. Saltz's rate of time loss and for that reason we will reverse the Department orders on appeal and remand them to the Department to correctly calculate time loss based on the facts of this appeal and the statute.

Lucian Saltz was injured on February 3, 1990 during the course of his employment with Danny Boy Trucking. There is no question that he suffered an industrial injury on that date. As previously stated, the issue is rate of time loss. The Department determined that Mr. Saltz was a "temporary employee" and, using RCW 51.08.178(2), it averaged his wages for the six months prior to the date of his injury.

The statute in question reads as follows:

> In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

RCW 51.08.178(2).

As can be seen by a review of the statute and the Department letter, it does not appear that the Department has followed the statute. First, the statute does not deal with "temporary employees"; it is specifically used in instances where the worker is a seasonal, part-time or intermittent worker, not temporary. Second, the Department apparently has a policy for truck drivers to only average the prior six months rather than the prior twelve months of wages as required by the statute.

We analyze the facts of this case to determine if Mr. Saltz was a full-time employee or if his employment falls within the specific provisions of RCW 51.08.178(2). We have dealt with this statute in prior appeals and have set out the analysis for determining the employment status of a worker. In our decision, In re Alfredo F. Lomeli, BIIA Dec., 90 4156 (1992), we stated that we first determine the nature of the worker's employment and then we determine his or her relationship to employment. More specifically, we stated, "in appeals involving application of RCW 51.08.178(2) we will look at both the nature of the employment and the workers' (sic) relationship to the employment in a combined test to determine the appropriate calculation of temporary total disability benefits."

Using this test, it is obvious that the nature of Mr. Saltz's employment as a truck driver was full-time. The next question deals with his relationship with Danny Boy Trucking. Prior Board cases have considered a variety of factors in determining the answer to this question, including past employment patterns and the worker's intent with regard to future employment.

Mr. Saltz was classified differently than the permanent drivers by Danny Boy Trucking. However, just because a person is a "temporary" employee does not mean that his or her time loss should be calculated pursuant to RCW 51.08.178(2). Both In re Deborah J. Guaragna (Williams), Dckt. No. 90 4246 (March 11, 1992) and In re Ruth A. Hopkins, Dckt. No. 90 5569 (March 13, 1992), dealt with temporary employees whose actual duties were full-time in nature at the time they became entitled to benefits under the Industrial Insurance Act. We found that their work could be characterized as neither part-time nor intermittent, even though the specific job was of limited duration.

It was the intent of both Ms. Williams and Ms. Hopkins to pursue their employment on a continuing basis after their current jobs came to a conclusion. Thus, the permanence or lack of permanency of the job at the time of entitlement to benefits does not determine whether a worker should be classified as part-time or intermittent as contemplated by RCW 51.08.178(2). When

subsection (2) uses the word "employment" we believe that this refers to the worker's employment situation in its totality and not the employment referred by a particular employer at a particular time.

The facts of this case show that Mr. Saltz was on call every day he was employed by Danny Boy Trucking. There is no testimony that he ever refused work and there was no limit placed on him by the company as to the number of days or hours that he might work.

An examination of the actual work done by Mr. Saltz shows that during the month and one-half to two months that he worked for Danny Boy Trucking, he worked a substantial number of hours and drove many miles. Prior to his employment with Danny Boy Trucking in December 1989, he had worked numerous jobs, mostly as a truck driver or mechanic. He often worked more than one job at a time, if the situation allowed him to do so.

A complete review of the facts leads us to the conclusion that even though the employer did not consider Mr. Saltz to be a "permanent employee", he was a full-time employee and he should be paid time loss accordingly. Unfortunately, the record is not complete as to Mr. Saltz's wages during the time he was employed by Danny Boy Trucking and for that reason, we are unable to give the Department guidance as to the exact computation that must be used to determine the rate of time loss. The most that we can do is remand the matter to the Department to review the employer's records to determine the wages and time worked, then recompute Mr. Saltz's time loss compensation due under RCW 51.08.178(1).

FINDINGS OF FACT

1. On February 20, 1990, the claimant, Lucian R. Saltz, filed an application for benefits with the Department of Labor and Industries, alleging that he sustained an industrial injury during the course of his employment with Danny Boy Trucking. The claim was allowed and benefits were paid.

   On July 6, 1992, the Department issued an order paying time loss compensation benefits for five semi-monthly periods for the period beginning July 1, 1992.

   The claimant, on August 3, 1992, appealed the July 6, 1992 order to the Board of Industrial Insurance Appeals. The Board, on August 21, 1992, entered an order granting the appeal, assigned it Docket No. 92 4309, and directed that proceedings be held on the issues raised in the Notice of Appeal.

2. On July 7, 1992, the Department issued a letter determination of July 7, 1992, indicating that the correct time loss compensation rate had been used and advising that a separate order affirming time loss compensation orders dated October 24, 1991, December 2, 1991, March 3, 1992, April 21, 1992 and April 22, 1992 would be issued. The Department issued an

order dated July 8, 1992, which affirmed time loss compensation orders dated October 24, 1991, December 2, 1991, March 3, 1992, April 21, 1992 and April 22, 1992.

On August 3, 1992, the claimant filed a Notice of Appeal referring to the July 7, 1992 letter with the Board of Industrial Insurance Appeals. The Board, on August 21, 1992, entered an order granting the appeal, assigned it Docket No. 92 4310, and directed that proceedings be held on the issues raised in the Notice of Appeal.

3. On July 8, 1992, the Department issued an order affirming Department orders dated October 24, 1991, December 2, 1991, February 3, 1992, April 21, 1992 and April 22, 1992. These orders paid the claimant time loss compensation for various time periods based on calculations disputed by the claimant.

4. On February 3, 1990, the claimant, Lucian R. Saltz, was employed by Danny Boy Trucking as a casual driver. This meant that he would fill-in for other drivers when they were unable to drive. He was not limited by the company as to the number of hours or days that he would work, except as to those limits placed on drivers in general by the federal government.

5. During the course of his employment with Danny Boy Trucking, the claimant drove eleven days in December 1989, sixteen days in January 1990 and ten days in February before ceasing work due to his industrial injury. His work was as a long haul trucker and all his trips during the course of his employment were interstate.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. At the time of his industrial injury, Lucian R. Saltz 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 Mr. Saltz's monthly wages shall not be computed pursuant to RCW 51.08.178(2).

3. In the appeal assigned Docket No. 93 4309, the letter determination that the correct time loss compensation rate had been used is incorrect and is reversed and this matter remanded to the Department of Labor and Industries to recalculate the claimant's wages pursuant to RCW 51.08.178(1) and to take such further action as indicated by the law and the facts.

In the appeal assigned Docket No. 93 4310, the Department order dated July 6, 1992, which paid time loss compensation benefits for five semi-monthly periods commencing July 1, 1992 is incorrect and is reversed and this matter remanded to the Department of Labor and Industries with directions to recalculate the claimant's wages pursuant to RCW

51.08.178(1), to pay time loss compensation benefits for the five semi-monthly periods commencing July 1, 1992, less prior amounts paid, and thereafter in accordance with the recalculation, and to take such further action as indicated by the law and the facts.

It is so ORDERED.

Dated this 15th day of December, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/_____
S. FREDERICK FELLER Chairperson

/S/_____
ROBERT L. McCALLISTER Member