

## Uhri, Jerry

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### [TIME-LOSS COMPENSATION \(RCW 51.32.090\)](#)

#### Wages (RCW 51.08.178) - Compensation

The worker was injured in the course of his employment as an owner of a convenience store. He did not formally collect wages but took "draws" out of the store's monthly gross profit. His wages could not be fairly determined in this circumstance. As a result, time-loss calculation should be determined pursuant to RCW 51.08.178(4), using the usual wage paid other employees in like or similar occupations. ...*In re Jerry Uhri*, **BIIA Dec., 93 6908 (1995)** [*Editor's Note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 95-2-00555-2.]

Scroll down for order.



1 by the claimant to a Proposed Decision and Order issued on  
2 December 13, 1994, in which the order of the Department dated  
3 August 19, 1993, was affirmed.

4 The Board has reviewed the evidentiary rulings in the record of  
5 proceedings and finds that no prejudicial error was committed and said  
6 rulings are hereby affirmed.

7 **DECISION**

8 We have granted review because we disagree with the result reached  
9 in the Proposed Decision and Order. The only issue presented by this  
10 appeal is whether the Department correctly recalculated Mr. Uhri's time  
11 loss compensation rate based on the information available, resulting in  
12 the demand for reimbursement in the amount of \$7,562.63.

13 On April 21, 1994, our industrial appeals judge issued an order  
14 determining that the August 19, 1993 Department order was not  
15 communicated to Mr. Uhri until sometime after November 4, 1993,  
16 finding that Mr. Uhri's Notice of Appeal was timely, and that the Board  
17 had jurisdiction. We agree with this determination.

18 The facts elicited at the hearing in this matter are fairly  
19 simple. Mr. Uhri was injured in the course of his employment as owner  
20 of a convenience/grocery store. Presumably, Mr. Uhri elected coverage  
21 under the Industrial Insurance Act pursuant to RCW 51.12.110 (elective  
22 adoption). An employer who elects coverage for him or herself is  
23 subject to all the provisions of Title 51, and is entitled to all of  
24 its benefits.

25 Mr. Uhri suffered an industrial injury at his store on  
26 September 1, 1992, and was paid time loss compensation benefits from

03/30/95

1 September 9, 1992, through February 17, 1993, based on his reported  
2 wages of \$2,500.00 per month. Mr. Uhri testified to working seven days  
3 a week, fifteen to sixteen hours per day. He stated that he informed  
4 the Department that his monthly income was \$2,200.00, because that was  
5 the store's gross profit per month. However, Mr. Uhri did not formally  
6 pay wages to himself; he took "draws" from time to time. On his 1992  
7 tax return, Mr. Uhri did not claim any wages, salary, or tips. Gross  
8 profit to his business was calculated at \$27,127.00 and net profit was  
9 \$1,081.00. He testified that his net profit was reduced because he  
10 elected to put money (some \$26,000.00) back into his business.

11 Linda Cochran, Workers' Compensation Adjudicator III, testified  
12 for the Department. She was unaware of any statute or regulation that  
13 specified a method to calculate time loss compensation benefit rates  
14 for self-employed workers such as Mr. Uhri. She stated that it seemed  
15 more appropriate to base Mr. Uhri's time loss compensation rate on a  
16 wage equal to the adjusted gross income of his business (\$11,652.00).  
17 In Ms. Cochran's opinion, gross income from the business was not an  
18 accurate reflection of Mr. Uhri's earnings. When asked what she did to  
19 determine what Mr. Uhri's earnings were at the time of injury, Ms.  
20 Cochran stated that, "[I]f it's not a normal wage salary situation we  
21 have to go back for the 12 months preceding the injury to look to try  
22 to get some proof of what he actually did make; what his wages were."  
23 8/31/94 Tr. at 11.

24 We are confused by Ms. Cochran's testimony regarding the method  
25 used by the Department to calculate Mr. Uhri's wages. However, it is  
26 clear that whatever method the Department used is not authorized by

1 statute.

2 RCW 51.08.178 is the only legislative directive to the Department  
3 concerning computation of time loss compensation rates. This statute  
4 provides, in relevant part:

5 (1) For the purposes of this title, the  
6 monthly wages the worker was receiving from  
7 all employment at the time of injury shall be  
8 the basis upon which compensation is computed  
9 unless otherwise provided specifically in the  
10 statute concerned. In cases where the  
11 worker's wages are not fixed by the month,  
12 they shall be determined by multiplying the  
13 daily wage the worker was receiving at the  
14 time of injury:

15 . . .

16  
17  
18 (2) In cases where (a) the worker's  
19 employment is exclusively seasonal in nature  
20 or (b) the worker's current employment or his  
21 or her relation to his or her employment is  
22 essentially part-time or intermittent, the  
23 monthly wage shall be determined by dividing  
24 by twelve the total wages earned, including  
25 overtime, from all employment in any twelve  
26 successive calendar months preceding the  
27 injury which fairly represent the claimant's  
28 employment pattern.

29  
30 (3) If, within the twelve months immediately  
31 preceding the injury, the worker has received  
32 from the employer at the time of injury a  
33 bonus as part of the contract of hire, the  
34 average monthly value of such bonus shall be  
35 included in determining the worker's monthly  
36 wages.

37  
38 (4) In cases where a wage has not been fixed  
39 or cannot be reasonably and fairly determined,  
40 the monthly wage shall be computed on the  
41 basis of the usual wage paid other employees  
42 engaged in like or similar occupations where  
43 the wages are fixed.

44  
45 In all claims involving computation of time loss benefits, the  
46 Department is required to apply RCW 51.08.178. It is unrebutted that

1 Mr. Uhri was not paid wages which were fixed by the month, nor was he  
2 being paid a daily wage. Therefore, subsection (1) of the statute does  
3 not apply.

4 Subsection (2) is not applicable because Mr. Uhri was not engaged  
5 in exclusively seasonal work, nor was his relation to his employment  
6 essentially part-time or intermittent.

7 Subsection (3) does not apply in Mr. Uhri's case because there is  
8 no evidence of bonus being involved in his case.

9 It is subsection (4) which we believe is appropriate for use in  
10 calculating Mr. Uhri's time loss compensation rate. We are convinced  
11 that Mr. Uhri's wages are not reasonably and fairly determined based on  
12 the evidence used by the Department--i.e., his tax returns. Gross  
13 income to a business does not equal wages. In fact, gross income to a  
14 business is capable of being manipulated in many ways, quite legally,  
15 by the business owner. In point of fact, it would be foolish for a  
16 business owner, such as Mr. Uhri, not to make the bottom line (gross  
17 and/or net income from business) as small a figure as possible. To do  
18 otherwise is to voluntarily pay more income and/or business tax. The  
19 incentives inherent in the Internal Revenue Code which militate against  
20 an accurate reflection of business income on tax returns makes the  
21 Department's reliance on tax returns as a basis to determine wages  
22 unreasonable.

23 The record reflects some reluctance on the part of Ms. Cochran and  
24 the Department to calculate Mr. Uhri's time loss compensation benefits  
25 at a rate inconsistent with wages claimed on his income tax report.  
26 However, as indicated above, the bottom line for purposes of income tax

1 for sole proprietors and business owners is subject to substantial  
2 manipulation. Certainly, Mr. Uhri paid workers' compensation premiums  
3 with the expectation that benefits would be payable at a reasonable  
4 rate if he were to qualify for those benefits. It is not the province  
5 of the Department, nor of this Board, to pass judgment or exact  
6 retribution on workers based on perceived manipulations of the Internal  
7 Revenue Code. We are constrained from doing so by the statute. RCW  
8 51.08.178 determines how wages are to be computed for the basis of  
9 compensation expressly "for the purposes of this Title".

10 Professor Larson points out the difficulties inherent in  
11 calculating a wage basis on profit or loss of a business:

12 Generally, profits from a business, whether  
13 commercial or farm, are not considered as  
14 wages for purposes of establishing average  
15 wage. But close questions have arisen in  
16 connection with corporate officers, who may  
17 also be stockholders, whose remuneration is  
18 not fixed but depends to some extent on the  
19 fortunes of the business. One court has held  
20 that the employee's share of profits was not  
21 the correct measure, but that the test should  
22 be the wage of another employee performing  
23 similar duties. When an amount of  
24 remuneration is specified, which can be taken  
25 in either cash or stock, the fact that the  
26 employee postponed exercising his option was  
27 held not to alter the fact that specified  
28 amount was an economic benefit which could  
29 form the basis of an average wage. But when  
30 the agreement was that the manager would be  
31 paid only when there were enough profits to  
32 bear the cost, this was found to be too  
33 speculative a contingency to construct an  
34 average wage upon--especially since, at the  
35 time in question, the corporation had not yet  
36 had any profits.  
37

38 (Footnotes omitted.) 2 A. Larson, The Law of Workmen's Compensation, §  
39 60.12(e).

1 In Mr. Uhri's case, where his wage has not been fixed, and cannot  
2 be reasonably and fairly determined based on his income tax return, RCW  
3 51.08.178 requires his monthly wage to be computed on the basis of the  
4 usual wage paid other employees engaged in like or similar occupations  
5 where the wages are fixed. From an administrative point of view, the  
6 statute dictates an uncomplicated means for determining Mr. Uhri's  
7 compensation rate. Following the statute need not be unduly  
8 burdensome. In this case, for example, the Department might survey the  
9 wages of managers of comparably-sized grocery stores or similar  
10 occupations to determine the usual wage paid other employees engaged in  
11 similar occupations where wages are fixed.

12 After consideration of the Proposed Decision and Order, claimant's  
13 Petition for Review filed thereto, and a careful review of the entire  
14 record before us, we hereby make the following findings of fact and  
15 conclusions of law.

16 **FINDINGS OF FACT**

- 17 1. On September 1, 1992, the Department of Labor  
18 and Industries received an application for  
19 benefits alleging an industrial injury  
20 sustained by the claimant, Jerry W. Uhri, on  
21 September 1, 1992, while in the employ of Coal  
22 Creek General Store.

23  
24 On November 17, 1992, the claim was allowed as  
25 an aggravation of a preexisting condition.  
26

27 On March 17, 1993, the Department issued an  
28 order which stated: The worker received time  
29 loss compensation of \$8,858.30; he or she was  
30 entitled to time loss compensation of  
31 \$1,295.67; therefore, the worker must pay  
32 Labor and Industries \$7,562.63; The  
33 overpayment resulted because: Mr. Uhri was  
34 paid time loss based on an incorrect  
35 undocumented wage rate. According to present  
36 documentation, he is entitled to time loss at



1 the minimum rate for the entire period of  
2 9/9/92 thru [sic] 2/17/93 in the amount of  
3 \$1,295.67. He was paid \$8,858.30,  
4 constituting an overpayment of \$7,562.63.  
5

6 The March 17, 1993 Department order was  
7 affirmed by an order dated August 19, 1993,  
8 which was communicated to the claimant after  
9 November 4, 1993.  
10

11 On November 18, 1993, the claimant filed a  
12 Notice of Appeal with the Board of Industrial  
13 Insurance Appeals from the August 19, 1993  
14 Department order.  
15

16 On January 14, 1994, the Board issued an order  
17 granting the appeal subject to proof of  
18 timeliness, assigning Docket 93 6908, and  
19 directing that proceedings be scheduled.  
20

- 21 2. On September 1, 1992, Jerry W. Uhri suffered  
22 an industrial injury in the course of his  
23 employment with Coal Creek General Store.  
24
- 25 3. The basis for the Department's recalculation  
26 of wages resulting in the March 17, 1993  
27 Department order, was Mr. Uhri's business's  
28 adjusted gross income (\$11,652.00) for the  
29 year 1992, as stated on Mr. Uhri's joint  
30 income tax return.  
31
- 32 4. In his capacity as owner of the Coal Creek  
33 General Store, Mr. Uhri was not paid wages  
34 fixed by the month, nor was he paid a daily  
35 wage.  
36
- 37 5. Mr. Uhri took draws from the business from  
38 time to time.  
39
- 40 6. As owner of the Coal Creek General Store, Mr.  
41 Uhri worked seven days a week, fifteen to  
42 sixteen hours per day on a year around basis.  
43
- 44 7. As owner of the Coal Creek General Store, Mr.  
45 Uhri did not receive a bonus as part of his  
46 remuneration.  
47

#### 48 **CONCLUSIONS OF LAW**

49

- 50 1. The Board of Industrial Insurance Appeals has  
51 jurisdiction over the parties and the subject  
52 matter of this appeal.

- 1  
2 2. Mr. Uhri was not paid a daily wage or a wage  
3 fixed by the month within the meaning of RCW  
4 51.08.178(1).  
5  
6 3. Mr. Uhri's employment at the Coal Creek  
7 General Store was not exclusively seasonal in  
8 nature, nor was his employment or his relation  
9 to his employment essentially part-time or  
10 intermittent within the meaning of RCW  
11 51.08.178(2).  
12  
13 4. Mr. Uhri was not paid a bonus as part of his  
14 remuneration at the Coal Creek General Store  
15 within the meaning of RCW 51.08.178(3).  
16  
17 5. Mr. Uhri's time loss compensation rate cannot  
18 be reasonably and fairly determined within the  
19 meaning of RCW 51.08.178(4), based on  
20 information contained in his income tax  
21 returns.  
22  
23 6. The August 19, 1993 Department order that  
24 affirmed the March 17, 1993 Department order  
25 which stated that the worker received time  
26 loss compensation of \$8,858.30; the worker was  
27 entitled to time loss compensation of  
28 \$1,295.67; therefore, the worker must pay the  
29 Department \$7,562.63; The overpayment resulted  
30 because: the claimant was paid time loss  
31 based on an incorrect undocumented wage rate,  
32 and according to present documentation the  
33 claimant is entitled to time loss at the  
34 minimum rate for the entire period of  
35 September 9, 1992, through February 17, 1993,  
36 in the amount of \$1,295.67; the claimant was  
37 paid \$8,858.30, constituting an overpayment of  
38 \$7,562.63, is incorrect, and this matter is  
39 remanded to the Department with instructions  
40 to calculate the claimant's time loss  
41 compensation rate according to RCW  
42 51.08.178(4).  
43

44 It is so **ORDERED**.

45  
46 Dated this 30th day of March, 1995.

47  
48 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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51 /s/ \_\_\_\_\_  
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S. FREDERICK FELLER                      Chairperson

/s/ \_\_\_\_\_

FRANK E. FENNERTY, JR.                      Member

/s/ \_\_\_\_\_

ROBERT L. McCALLISTER                      Member