Gable, Yong

TIME-LOSS COMPENSATION (RCW 51.32.090)

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

Where the worker had a work history and pattern of employment demonstrating an intermittent attachment to the labor market and had been hired as a temporary but full-time worker the employment is essentially that of a defined duration and matches the definition of "intermittent employment" contained in RCW 51.08.178(2). *Citing School Dist. No. 401 v. Minturn*, 83 Wn. App. 1 (1996) and *Double D Hop Ranch v. Sanchez*, 82 Wn. App. 350 (1996). ***….In re Yong Gable*, BIIA Dec., 95 4228 (1997)** [dissent] [*Editor's Note:* The Supreme Court reversed *Double D Hop Ranch v. Sanchez* on the interpretation of "seasonal" worker. *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793 (1997). The Board's decision was appealed to superior court under Spokane County Cause No. 97-2-02309-7.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: YONG GABLE	**)**	**DOCKET NO. 95 4228**
	)	
CLAIM NO. T-499793	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Yong Gable, by
Solan, Doran, Milhem & Hertel, per
James T. Solan

Self-Insured Employer, Providence Services (Sacred Heart Medical Center), by
Annan & Fairley, per
John D. Fairley

Department of Labor and Industries, by
The Office of the Attorney General, per
O. Marie Palachuk, Assistant

The self-insured employer, Sacred Heart Medical Center, filed an appeal with the Board of Industrial Insurance Appeals on September 8, 1995, from an order of the Department of Labor and Industries dated August 1, 1995. The order affirmed a Department order dated March 10, 1995, that determined the claimant worked an average of 37.17 hours per week and directed the self-insured employer to pay time loss compensation benefits to the claimant as a full-time worker. **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 self-insured employer to a Proposed Decision and Order issued on August 16, 1996, in which the order of the Department dated August 1, 1995, that affirmed an order dated March 10, 1995, and directed the self-insured employer to pay time loss compensation calculated on wages of a full-time worker, was affirmed.

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

The sole issue in this appeal is whether the claimant's wages at the time of injury should be computed under the provisions of RCW 51.08.178(2)(b), that require a 12-month averaging of wages where the worker's current employment, or her relation to employment, is essentially part-time or intermittent. The employer contends that Ms. Gable was an intermittent worker at the time of her injury and that her wages should be calculated pursuant to RCW 51.08.178**(2).** The claimant and the Department contend that she was a full-time worker whose wages should be computed under the provisions of RCW 51.08.178**(1)**. We have granted this appeal to discuss the facts in light of two recent Court of Appeals decisions dealing with this issue: *Double D. Hop Ranch v. Sanchez,* 82 Wn. App. 390 (1996), and *School Dist. No. 401 v. Minturn,* 83 Wn. App. 1 (1996).

Ms. Gable was born in Korea in 1952 and lived there until 1990 when she moved to the Spokane area. She has four children. In 1989, she married her present husband, who was a US serviceman at the time. She cannot read or speak English well. Her husband does not speak Korean. She did not complete elementary school in Korea, but did attend a hairstyling course in Korea for six months.

Ms. Gable's employment history in Korea was not extensive. She did not work until her first husband died. She then worked at a beauty shop, cleaning and washing towels. Her employment history since coming to the United States has been, first, as cleaner for the Air Force for a two or three month period, two to three days a week. The next job she had was at Scollard's Cleaners from September 29, 1992 through January 10, 1993, where she was paid a little over $5 an hour. She left this job because her husband was a gambler and she did not think it fair that he gambled with monies she earned.

On June 15, 1993, Ms. Gable, with the help of her husband, submitted an application for employment at Sacred Heart Hospital in the laundry or housekeeping department. On the

application, Ms. Gable applied for work on any shift, including weekends, and indicated that she was available immediately. She listed her education as having completed high school. On June 21, 1993, she was hired as a temporary worker to fill in for people on summer vacation. She signed a statement acknowledging that she was hired on a temporary basis. While she was unable to read the statement herself, she indicated that before she signed the statement, it was read to her. She and her husband understood that she was hired as a temporary but full-time worker, although she hoped that she would be hired on a regular basis after three to six months if she performed well. On October 22, 1993, Ron Garrity, the director of the laundry department, informed Ms. Gable in writing that her services would no longer be needed after November 5, 1993, and thanked her for filling in for their permanent employees.

The Industrial Insurance Act provides an injured worker with monthly wage-replacement benefits, or time loss compensation, during periods when the worker is totally temporarily disabled as a result of an industrial injury. RCW 51.32.090. Time loss compensation is calculated based on the worker's wages. RCW 51.08.178.

In 1988, the Washington Legislature amended RCW 51.08.178, and added subsection (2) that provides that if a worker's employment is seasonal, part-time, or intermittent, wages that are the basis for time loss are calculated using a 12-month averaging method. If a worker's employment is not seasonal, part-time, or intermittent, wages are calculated using subsection (1).

As noted above, two divisions of the Washington State Court of Appeals have recently provided direction in analyzing when RCW 51.08.178(2) should be used to determine the injured worker's wages for the purposes of calculating the time loss compensation rate. In *Double D. Hop Ranch*, the court, in dealing with seasonal employment, stated that the inquiry was not whether "a general farm laborer's work" was exclusively seasonal, but rather, whether the particular worker's "work history or career pattern" was exclusively seasonal. 82 Wn. App. at 395-396.

The *Minturn c*ourt, in deciding whether a school district employee should have the wage rate calculated pursuant to Section 1 or 2 of RCW 51.08.178, accepted the Department's definition of "intermittent" as employment that is not regular or continuous in the future, that may be full-time, extra-time, or part-time, and has definite starting and stopping points with recurring time gaps. The *Minturn* court expressed concern that the analysis under RCW 51.08.178 should "reflect reality (i.e., Minturn's actual monthly wages)." 83 Wn. App. at 8. The court was concerned that the rate of time loss should realistically reflect the actual loss in expected wages, and not result in a putative monthly wage that is greater than the worker's real or actual monthly wage.

Taking guidance from *Minturn,* we must conclude that Ms. Gable's employment matches the definition of intermittent employment as accepted by the Court of Appeals. In our earlier significant decisions addressing the applicability of RCW 51.08.178(2), we have given some weight to a worker's intent with regard to future employment.

> 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. (Emphasis ours.)

RCW 51.08.178(2).

We viewed the idea of "relation to . . . employment" as a broader inquiry taking into consideration the worker's past employment. The analysis of the divisions of the Court of Appeals deciding both *Minturn* and *Double D. Hop,* are not focused on the worker's relation to employment other than in terms of employment history. Limiting the analysis of intermittent employment to that set forth by the Court of Appeals, it is clear Ms. Gable's employment pattern is essentially intermittent.

The facts clearly demonstrate that Ms. Gable's current employment was intermittent and that her broader relation to employment was also essentially intermittent. In analyzing her relation to

employment, we conclude that her *work history* and *pattern of employment* demonstrate an intermittent attachment to the labor market, usually during periods when her husband is not employed. She has not worked more than four continuous months since coming to the United States in 1990, and then only for two employers other than Sacred Heart Medical Center. She has not sought other employment since the Sacred Heart job ceased despite her physician having released her to return to work.

Moreover, the job she was hired for at Sacred Heart was of defined duration; although she had great hopes that the temporary job would work into regular employment. When she was hired she was fully informed that the nature of the job was temporary, albeit full-time. While she may not have understood that she was filling in for vacationing employees, she was aware that the job was temporary. In spite of Ms. Gable's willingness and desire to continue to work at Sacred Heart after November 5, 1993, the job she was hired for was temporary, and had a projected ending date. Her job at Sacred Heart must be characterized as intermittent because it was limited in duration in light of *Double D. Hop Ranch* and *Minturn*.

Finally, the rate of her time loss compensation should realistically reflect the actual loss in her expected wages, based upon her attachment to the labor market. That can only be accomplished if as an intermittent worker, her rate of time loss compensation is calculated pursuant to RCW 51.08.178(2).

After a review of the Proposed Decision and Order, the Petition for Review, and the entire record, we conclude that the Department order directing the self-insured employer to calculate time loss compensation as a full-time worker, is incorrect. As an intermittent worker, Ms. Gable's rate of time loss compensation should be calculated pursuant to RCW 51.08.178(2).

FINDINGS OF FACT

1. On October 21, 1993, the claimant, Yong Gable, filed an application for benefits with the Department of Labor and Industries alleging an

industrial injury on September 2, 1993, while in the course of employment with Sacred Heart Medical Center. On October 29, 1993, the Department issued an order which allowed the claim and provided benefits. On March 10, 1995, the Department issued an order that determined that the claimant had been engaged in employment an average of 37.17 hours per week and directed the self-insured employer to calculate time loss compensation as a full-time worker. On April 27, 1995, the self-insured employer, Sacred Heart Medical Center, protested the Department order dated March 10, 1995. After holding the order in abeyance, on August 1, 1995, the Department issued an order affirming the Department order of March 10, 1995. On September 8, 1995, the employer filed a Notice of Appeal with the Board from the August 1, 1995 order. On September 14, 1995, the Board granted the appeal directing that proceedings be held, and assigning the appeal Docket No. 95 4228.

2. Ms. Gable was born in Korea in 1952 where she lived until 1990. She left school before completing high school. She did not work in Korea until after her first husband died, and then went to work as a cleaner in a beauty shop. In 1989, she married a US serviceman and came to the United States in 1990. Since 1990 she has worked part-time for the military as a housekeeper for a two to three month period, and in a drycleaner from September 29, 1992 to January 10, 1993.

3. On June 21, 1993, Ms. Gable was hired as a temporary employee by Sacred Heart Medical Center in the laundry department to fill in for vacationing employees. She was aware that she was not a regular employee, but hopeful of becoming one in the future. On September 2, 1993, Yong Gable suffered an industrial injury while in the course of her employment. On October 22, 1993, Ms. Gable was notified by Sacred Heart that her services were no longer needed after November 5, 1993.

CONCLUSIONS OF LAW

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

2. The laundry job at Sacred Heart Medical Center for which Ms. Gable was hired was essentially intermittent with a definite stopping point. Ms. Gable's relation to her employment and attachment to the labor market was essentially intermittent. Her monthly wage for the purposes of determining her rate of time loss compensation should be determined pursuant to RCW 51.08.178(2) as an intermittent worker.

3. The order of the Department of Labor and Industries dated August 1, 1995, that affirmed an order of March 10, 1995, that directed the self-insured employer to calculate the rate of time loss

compensation as a full-time worker, is incorrect, and is reversed. This claim is remanded to the Department with direction to issue an order directing the self-insured employer to calculate Ms. Gable's rate of time loss compensation pursuant to RCW 51.08.178(2).

It is so **ORDERED.**

Dated this 1st day of April, 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

s/s_____
S. FREDERICK FELLER Chairperson

s/s_____
JUDITH E. SCHURKE Member

DISSENT

I dissent.

This worker, who had performed eleven weeks of regular continuous work with this employer, was correctly classified, by the Department as a full-time worker within the meaning of the statute. The fact that she was, in the words of the employer, "hired as a temporary worker," or even that she signed a statement to that effect, is totally irrelevant to the issue at hand.

My review of RCW 51.08.178(2) discloses no reference to "temporary" employment situations such as this. The statute refers to employments that are seasonal, essentially part-time, or intermittent. These are the only circumstances in which the Department is authorized to average past wages in computing an injured worker's time loss compensation rate. By focusing on Ms. Gable's past work history, the majority fails to consider the nature of her employment *at the time of the industrial injury*, that was full-time. It is irrelevant, in my mind, whether the employer intended that Ms. Gable's employment be "temporary" as the statute does not authorize the Department to average past wages when determining the time loss compensation rate for "temporary" workers.

Neither *Double D. Hop Ranch* nor *Minturn* have any application in this case. *Double D. Hop Ranch* involved a seasonal worker, and, as noted by the majority, the *Minturn* court accepted the Department's determination that the claimant was engaged in "intermittent" employment.

The *Minturn* court expressed concern that the analysis under RCW 51.08.178 should "reflect reality." 83 Wn. App. at 8. In other words, the injured worker's time loss compensation rate should be based on actual monthly wages. Ms. Gable, at the time of her industrial injury and for the preceding eleven weeks, was working full-time (37 hours per week). At the time of her industrial injury, Ms. Gable was earning approximately $1200 per month. To pay her time loss compensation based on an average monthly wage of $471 per month is an injustice and does not reflect the reality of Ms. Gable's situation.

The fact that the employer gave Ms. Gable an "A" on her evaluation, reflects the fact that she was motivated and worked hard. Ms. Gable was working an average of 37 hours per week before the industrial injury caused her to work fewer hours. Aside from the fact that I do not believe that the Legislature ever contemplated the unfair result in cases such as this, I question interpreting the statute in such a way that can only encourage employers to hire workers on a temporary basis in order to avoid paying time loss compensation rates based on actual monthly wages.

I understand the majority may believe their decision is mandated by the results in *Double D. Hop Ranch* and *Minturn*. But I do not believe the result here to be so directed. Indeed, I see serious inconsistencies between the interpretations of RCW 51.08.178(2) as reflected in the decisions of the two divisions of the Court of Appeals. It is my sincere hope that the Supreme Court intervenes to resolve these inconsistencies, taking into account each and every word of this statute. For example, neither division of the Court of Appeals addressed the concept of a worker's "relation" to employment. RCW 51.08.178(2). That word alone suggests an analysis of a worker's intent with regard to employment totally ignored by the Court of Appeals and the majority in Ms.

Gable's appeal. This Board has addressed the analysis of RCW 51.08.178(2) in several of our earlier significant decisions. I still consider these decisions to reflect the intent of the Legislature when RCW 51.08.178(2) was passed. See, for example, *In re Deborah Guaragna (Williams)*, BIIA Dec., 90 4246 (1992), and *In re Mary Ann Minturn*, BIIA Dec., 90 3572 (1992).

I agree with the result reached in the Proposed Decision and Order, and would affirm the Department order requiring the self-insured employer to pay time loss compensation to the claimant as a full-time worker, based on the wages paid at the time of her injury.

Dated this 1st day of April, 1997.

s/s_____
FRANK E. FENNERTY, JR. Member