

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.]

Scroll down for order.

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

1 **IN RE: YONG GABLE**) **DOCKET NO. 95 4228**
2)
3 **CLAIM NO. T-499793**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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

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

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15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 O. Marie Palachuk, Assistant
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20 The self-insured employer, Sacred Heart Medical Center, filed an appeal with the Board of
21 Industrial Insurance Appeals on September 8, 1995, from an order of the Department of Labor and
22 Industries dated August 1, 1995. The order affirmed a Department order dated March 10, 1995,
23 that determined the claimant worked an average of 37.17 hours per week and directed the
24 self-insured employer to pay time loss compensation benefits to the claimant as a full-time worker.
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30 **REVERSED AND REMANDED.**

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32 **DECISION**

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34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed
36 Decision and Order issued on August 16, 1996, in which the order of the Department dated
37 August 1, 1995, that affirmed an order dated March 10, 1995, and directed the self-insured
38 employer to pay time loss compensation calculated on wages of a full-time worker, was affirmed.
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44 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
45 no prejudicial error was committed and the rulings are affirmed.
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1 The sole issue in this appeal is whether the claimant's wages at the time of injury should be
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3 computed under the provisions of RCW 51.08.178(2)(b), that require a 12-month averaging of
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5 wages where the worker's current employment, or her relation to employment, is essentially
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7 part-time or intermittent. The employer contends that Ms. Gable was an intermittent worker at the
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9 time of her injury and that her wages should be calculated pursuant to RCW 51.08.178(2). The
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11 claimant and the Department contend that she was a full-time worker whose wages should be
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13 computed under the provisions of RCW 51.08.178(1). We have granted this appeal to discuss the
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15 facts in light of two recent Court of Appeals decisions dealing with this issue: *Double D. Hop*
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17 *Ranch v. Sanchez*, 82 Wn. App. 390 (1996), and *School Dist. No. 401 v. Minturn*, 83 Wn. App. 1
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19 (1996).

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

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

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

1 application, Ms. Gable applied for work on any shift, including weekends, and indicated that she
2 was available immediately. She listed her education as having completed high school. On
3 June 21, 1993, she was hired as a temporary worker to fill in for people on summer vacation. She
4 signed a statement acknowledging that she was hired on a temporary basis. While she was unable
5 to read the statement herself, she indicated that before she signed the statement, it was read to
6 her. She and her husband understood that she was hired as a temporary but full-time worker,
7 although she hoped that she would be hired on a regular basis after three to six months if she
8 performed well. On October 22, 1993, Ron Garrity, the director of the laundry department,
9 informed Ms. Gable in writing that her services would no longer be needed after
10 November 5, 1993, and thanked her for filling in for their permanent employees.
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21 The Industrial Insurance Act provides an injured worker with monthly wage-replacement
22 benefits, or time loss compensation, during periods when the worker is totally temporarily disabled
23 as a result of an industrial injury. RCW 51.32.090. Time loss compensation is calculated based on
24 the worker's wages. RCW 51.08.178.
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29 In 1988, the Washington Legislature amended RCW 51.08.178, and added subsection (2)
30 that provides that if a worker's employment is seasonal, part-time, or intermittent, wages that are
31 the basis for time loss are calculated using a 12-month averaging method. If a worker's
32 employment is not seasonal, part-time, or intermittent, wages are calculated using subsection (1).
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37 As noted above, two divisions of the Washington State Court of Appeals have recently
38 provided direction in analyzing when RCW 51.08.178(2) should be used to determine the injured
39 worker's wages for the purposes of calculating the time loss compensation rate. In *Double D. Hop*
40 *Ranch*, the court, in dealing with seasonal employment, stated that the inquiry was not whether "a
41 general farm laborer's work" was exclusively seasonal, but rather, whether the particular worker's
42 "work history or career pattern" was exclusively seasonal. 82 Wn. App. at 395-396.
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1 The *Minturn* court, in deciding whether a school district employee should have the wage rate
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3 calculated pursuant to Section 1 or 2 of RCW 51.08.178, accepted the Department's definition of
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5 "intermittent" as employment that is not regular or continuous in the future, that may be full-time,
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7 extra-time, or part-time, and has definite starting and stopping points with recurring time gaps. The
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9 *Minturn* court expressed concern that the analysis under RCW 51.08.178 should "reflect reality
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11 (i.e., *Minturn's* actual monthly wages)." 83 Wn. App. at 8. The court was concerned that the rate
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13 of time loss should realistically reflect the actual loss in expected wages, and not result in a
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15 putative monthly wage that is greater than the worker's real or actual monthly wage.

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

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

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39 RCW 51.08.178(2).

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

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

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

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17 2. Ms. Gable was born in Korea in 1952 where she lived until 1990. She
18 left school before completing high school. She did not work in Korea
19 until after her first husband died, and then went to work as a cleaner in
20 a beauty shop. In 1989, she married a US serviceman and came to the
21 United States in 1990. Since 1990 she has worked part-time for the
22 military as a housekeeper for a two to three month period, and in a
23 drycleaner from September 29, 1992 to January 10, 1993.
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25 3. On June 21, 1993, Ms. Gable was hired as a temporary employee by
26 Sacred Heart Medical Center in the laundry department to fill in for
27 vacationing employees. She was aware that she was not a regular
28 employee, but hopeful of becoming one in the future. On
29 September 2, 1993, Yong Gable suffered an industrial injury while in the
30 course of her employment. On October 22, 1993, Ms. Gable was
31 notified by Sacred Heart that her services were no longer needed after
32 November 5, 1993.

33 **CONCLUSIONS OF LAW**

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36 1. The Board of Industrial Insurance Appeals has jurisdiction over the
37 parties and the subject matter of this appeal.
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39 2. The laundry job at Sacred Heart Medical Center for which Ms. Gable
40 was hired was essentially intermittent with a definite stopping point. Ms.
41 Gable's relation to her employment and attachment to the labor market
42 was essentially intermittent. Her monthly wage for the purposes of
43 determining her rate of time loss compensation should be determined
44 pursuant to RCW 51.08.178(2) as an intermittent worker.
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46 3. The order of the Department of Labor and Industries dated
47 August 1, 1995, that affirmed an order of March 10, 1995, that directed
the self-insured employer to calculate the rate of time loss

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

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8 Dated this 1st day of April, 1997.
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS
11

12 s/s _____
13 S. FREDERICK FELLER Chairperson
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15 s/s _____
16 JUDITH E. SCHURKE Member
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18 **DISSENT**
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20 I dissent.
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22 This worker, who had performed eleven weeks of regular continuous work with this
23 employer, was correctly classified, by the Department as a full-time worker within the meaning of
24 the statute. The fact that she was, in the words of the employer, "hired as a temporary worker," or
25 even that she signed a statement to that effect, is totally irrelevant to the issue at hand.
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27 My review of RCW 51.08.178(2) discloses no reference to "temporary" employment
28 situations such as this. The statute refers to employments that are seasonal, essentially part-time,
29 or intermittent. These are the only circumstances in which the Department is authorized to average
30 past wages in computing an injured worker's time loss compensation rate. By focusing on Ms.
31 Gable's past work history, the majority fails to consider the nature of her employment *at the time of*
32 *the industrial injury*, that was full-time. It is irrelevant, in my mind, whether the employer intended
33 that Ms. Gable's employment be "temporary" as the statute does not authorize the Department to
34 average past wages when determining the time loss compensation rate for "temporary" workers.
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1 Neither *Double D. Hop Ranch* nor *Minturn* have any application in this case. *Double D. Hop Ranch*
2 involved a seasonal worker, and, as noted by the majority, the *Minturn* court accepted the
3 Department's determination that the claimant was engaged in "intermittent" employment.
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7 The *Minturn* court expressed concern that the analysis under RCW 51.08.178 should "reflect
8 reality." 83 Wn. App. at 8. In other words, the injured worker's time loss compensation rate should
9 be based on actual monthly wages. Ms. Gable, at the time of her industrial injury and for the
10 preceding eleven weeks, was working full-time (37 hours per week). At the time of her industrial
11 injury, Ms. Gable was earning approximately \$1200 per month. To pay her time loss compensation
12 based on an average monthly wage of \$471 per month is an injustice and does not reflect the
13 reality of Ms. Gable's situation.
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21 The fact that the employer gave Ms. Gable an "A" on her evaluation, reflects the fact that
22 she was motivated and worked hard. Ms. Gable was working an average of 37 hours per week
23 before the industrial injury caused her to work fewer hours. Aside from the fact that I do not believe
24 that the Legislature ever contemplated the unfair result in cases such as this, I question interpreting
25 the statute in such a way that can only encourage employers to hire workers on a temporary basis
26 in order to avoid paying time loss compensation rates based on actual monthly wages.
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33 I understand the majority may believe their decision is mandated by the results in *Double D.*
34 *Hop Ranch* and *Minturn*. But I do not believe the result here to be so directed. Indeed, I see
35 serious inconsistencies between the interpretations of RCW 51.08.178(2) as reflected in the
36 decisions of the two divisions of the Court of Appeals. It is my sincere hope that the Supreme
37 Court intervenes to resolve these inconsistencies, taking into account each and every word of this
38 statute. For example, neither division of the Court of Appeals addressed the concept of a worker's
39 "relation" to employment. RCW 51.08.178(2). That word alone suggests an analysis of a worker's
40 intent with regard to employment totally ignored by the Court of Appeals and the majority in Ms.
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1 Gable's appeal. This Board has addressed the analysis of RCW 51.08.178(2) in several of our
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3 earlier significant decisions. I still consider these decisions to reflect the intent of the Legislature
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5 when RCW 51.08.178(2) was passed. See, for example, *In re Deborah Guaragna (Williams)*, BIIA
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7 Dec., 90 4246 (1992), and *In re Mary Ann Minturn*, BIIA Dec., 90 3572 (1992).
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9 I agree with the result reached in the Proposed Decision and Order, and would affirm the
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11 Department order requiring the self-insured employer to pay time loss compensation to the
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13 claimant as a full-time worker, based on the wages paid at the time of her injury.
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15 Dated this 1st day of April, 1997.
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18 s/s _____
19 FRANK E. FENNERTY, JR. Member
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