

Shearer, Kay

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

While working for one employer the worker was paid two hourly rates, depending on the day of the week worked. The wages at the time of the injury should be calculated as if the worker held jobs with two different employers at two different wages. A worker who averaged more than 36 hours of work a week is not essentially part-time within the meaning of RCW 51.08.178(2). The wage should be calculated using RCW 51.08.178(1). ...*In re Kay Shearer, BIIA Dec., 96 3384 (1998)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 98-2-15876-OKNT.]

Scroll down for order.

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

1 **IN RE: KAY R. SHEARER**) **DOCKET NO. 96 3384 & 96 3385**
2)
3 **CLAIM NO. T-806111 & T-713076**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Claimant, Kay R. Shearer, by
8 Davidson, Czeisler, Kilpatric, Zeno, P.S., per
9 James E. Sedney

10
11 Self-Insured Employer, Fred Meyer, Inc., by
12 Law Offices of Deborah J. Lazaldi, per
13 Deborah J. Lazaldi and Craig A. Staples
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15 This matter involves two consolidated appeals from closing orders of the Department of
16 Labor and Industries issued in two different claims, as follows:

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19 **Claim No. T-806111, Docket No. 96 3384:**

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21 This is an appeal filed by the claimant, Kay R. Shearer, on May 16, 1996, from an order of
22 the Department of Labor and Industries dated March 12, 1996, in which the Department affirmed a
23 prior order dated August 21, 1995, that closed the claim with time loss compensation benefits as
24 paid to May 9, 1994, and with no permanent partial disability award. **REVERSED AND**
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29 **REMANDED.**

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31 **Claim No. T-713076, Docket No. 96 3385:**

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33 This is an appeal filed by the claimant on May 16, 1996, from an order of the Department of
34 Labor and Industries dated March 12, 1996, that affirmed a prior order dated July 27, 1995, that
35 closed the claim with time loss compensation as paid to May 5, 1995, and with direction to the self-
36 insured employer to pay a permanent partial disability award equal to a Category 2 of permanent
37 cervical and cervico-dorsal impairments. **REVERSED AND REMANDED.**
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43 **PROCEDURAL AND EVIDENTIARY RULINGS**

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45 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
46 and decision on timely Petitions for Review filed by the self-insured employer, Fred Meyer, Inc.,
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1 and the claimant, Kay R. Shearer, to a Proposed Decision and Order issued on October 31, 1997,
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3 in which the orders of the Department dated March 12, 1996, were reversed and remanded to the
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5 Department with the following directions:
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7 In the appeal assigned Docket No. 96 3384 (Claim No. T-806111) (hereafter referred to as
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9 the "carpal tunnel claim"), the claim was remanded to the Department with direction to recalculate
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11 the claimant's base wages taking her shift differential, and holiday, vacation, sick, and funeral leave
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13 into consideration, and to further recalculate and pay her time loss compensation benefits based
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15 thereon for all periods for which she has been paid time loss compensation under this claim, less
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17 prior benefits paid for time loss compensation, and to pay loss of earning power benefits for the
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19 period between May 5, 1995 through March 12, 1996, using the difference between her
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21 recalculated base wages and minimum wage for that period, and to, thereupon, close the claim.
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23 In the appeal assigned Docket No. 96 3385 (Claim No. T-713076) (hereafter referred to as
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25 the "neck/shoulder claim"), the claim was remanded to the Department with direction to recalculate
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27 the claimant's base wages taking her shift differential, and holiday, vacation, sick, and funeral leave
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29 into consideration, and to further recalculate and pay her time loss compensation benefits based
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31 thereon for all periods for which she has been paid time loss compensation under this claim, less
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33 prior benefits paid for time loss compensation, to pay a Category 2 of permanent cervical and
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35 cervico-dorsal impairments, less prior awards, and to, thereupon, close the claim.
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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that,
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39 with one exception, no prejudicial error was committed and the rulings are affirmed. The one
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41 erroneous ruling that was prejudicial affected the claimant and occurred in the record of
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43 proceedings dated May 30, 1997, at page 16, line 21. The self-insured employer's vocational
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45 witness, Ms. Fehrenbacher, testified that Ms. Shearer called an unidentified claims person and
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47 withdrew from a cashier training class due to "finances." This testimony was objected to as

1 hearsay. It was not a statement made directly to the witness, so it was actually hearsay on hearsay
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3 from an unidentified source. No foundation was laid that would reasonably lead to the conclusion
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5 that there was an applicable exception. It is, on balance, more prejudicial than probative. The
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7 objection to the testimony is sustained and all reference to "finances" as the reason for Ms.
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9 Shearer's withdrawal from cashier training is stricken from the record.

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11 In its Petition for Review, the self-insured employer specifically challenges the admission
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13 into evidence of the union contract governing the wages and conditions of Ms. Shearer's
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15 employment at Fred Meyer, Inc. Ms. Shearer asserts that her regular monthly wage includes shift
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17 differential pay. The contract sets forth this arrangement. She asserts that, in calculating her
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19 average hours worked pursuant to RCW 51.08.178, the self-insured employer should have
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21 included all hours for which she was paid as if she had worked, including holiday, sick pay, and
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23 funeral leave pay. These items are contracted in the union agreement. The agreement is relevant
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25 to the determination of Ms. Shearer's wage at injury and was, therefore, properly admitted. We
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27 would state, however, that the union contract between the employer and the claimant's union would
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29 not be relevant in our attempt to ascertain the meaning or intent of any language included in the
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31 statute by the Legislature.

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33 On a procedural level, the self-insured employer seeks review of the industrial appeals
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35 judge's decision to allow Ms. Shearer to reopen her case for presentation of evidence on the issue
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37 of how her time loss compensation rate was calculated. The claimant's Notice of Appeal is
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39 sufficiently broad to include an appeal over this issue. The issue was timely raised in these
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41 appeals of orders closing the claims, because the Department never issued an appealable order
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43 setting forth the basis on which the time loss compensation rate was calculated. The issue was not
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45 pursued at scheduling or before the claimant rested. The attorney for the claimant candidly admits
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47 that this was his oversight. However, he raised the issue over a month before the self-insured

1 employer's case was set to begin. The issue is largely a question of law and required a minimal
2 additional factual basis. The industrial appeals judge entertained a motion for reopening, after
3 which she directed the inclusion of the issue and further testimony from the claimant. While the
4 self-insured employer asserts that there was not "good cause shown" for reopening, the matter is
5 within the discretion of the industrial appeals judge. The self-insured employer was not prejudiced
6 by the exploration of the issue, either in terms of time to prepare or time for presentation of
7 evidence. There is no indication this was anything but an honest oversight that, with fairness, was
8 properly dealt with by our industrial appeals judge.

16 DECISION

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19 The substantive issues raised in the Petitions for Review include what factors are to be
20 considered in the calculation of Ms. Shearer's monthly wage for purposes of computing her time
21 loss compensation benefits; her entitlement to further time loss compensation beyond May 5, 1995;
22 her entitlement to and the duration of loss of earning power benefits beyond May 5, 1995; the
23 calculation of loss of earning power benefits; and, whether the claimant is entitled to further awards
24 for permanent partial impairment.

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27 We have granted review primarily to address issues relating to the calculation of the
28 claimant's monthly wage under RCW 51.08.178. However, a brief evidentiary summary will help to
29 illustrate our reasoning in these appeals and our resolution of the other issues.

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32 In 1993, Ms. Shearer suffered a cervical injury that resulted in a permanent partial disability
33 equal to Category 2 of WAC 296-20-240 for cervical-dorsal impairments. (Claim No. T-713076,
34 Docket No. 96 3385). While being treated for that injury, she was also diagnosed as suffering from
35 right carpal tunnel syndrome, for which she underwent surgery in 1994. She claims that she
36 sustained a further permanent partial disability as a result of the carpal tunnel condition. The
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1 parties agree that the industrial injury involved in the neck/shoulder claim and the carpal tunnel
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3 condition prevent Ms. Shearer from returning to her job as a meat wrapper at Fred Meyer.

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5 Ms. Shearer worked varying hours per week. Her wages depended on the day of the week
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7 and the time of day, as the union contract provides for shift differentials. Her base wage on
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9 weekdays was \$12.40 per hour. She frequently worked Sundays and received the differential pay
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11 for those days, which was \$18.60 per hour. In the 26-week period prior to her neck/shoulder injury
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13 of February 1, 1993, she averaged 36.1 hours per week, that included compensation for paid hours
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15 of vacation, funeral and holiday leave.

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17 Ms. Shearer did not finish high school. She obtained her GED while her worker's
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19 compensation claims were being administered. Her work history consists of lumber yard
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21 production work, assembly line work, and meat wrapping. She has no cashier, computer, or
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23 keyboard experience. As a result of her industrially related conditions, she should not perform
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25 repetitive motions with her right hand (as in constant computer or cashier work) and has to be
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27 careful about positioning her neck. The record is clear that, as of May 5, 1995, she could perform
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29 entry-level customer service desk work with minimal cashier or computer requirements.

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31 We agree with our industrial appeals judge that the claimant is not entitled to any further
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33 award for permanent partial disability. No evidence was presented that her impairment related to
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35 her neck/shoulder injury was in excess of the Category 2 cervical impairment for which the
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37 Department ordered an award. We also agree with our industrial appeals judge that the claimant
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39 had no permanent impairment as a result of her carpal tunnel condition. For the reasons offered
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41 by our industrial appeals judge, we agree that the testimony of Dr. Bruce Wheeler is most
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43 persuasive that the claimant suffered no ratable permanent impairment as a result of the carpal
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45 tunnel condition.
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1 We further agree that our industrial appeals judge was correct in concluding that, as of
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3 May 5, 1995, the claimant was able to engage in gainful employment, and was therefore no longer
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5 entitled to temporary total disability benefits. While the claimant's industrially related conditions
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7 preclude her from returning to her job as a meat wrapper, they did not preclude her from engaging
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9 in other employment as a customer service clerk.

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11 The fact the claimant is unable to return to her job at the time of injury, and is limited to
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13 employment that will most likely only pay minimum wage, does raise the issue of the claimant's
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15 entitlement to loss of earning power benefits. We agree that the claimant was entitled to loss of
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17 earning power benefits from May 5, 1995, based on the fact she was only able to return to work
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19 paying a minimum wage. However, we disagree with our industrial appeals judge as to the
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21 duration of those benefits. We also agree with the claimant that loss of earning power benefits
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23 should be based on a comparison to the wage being paid meat wrappers during the period for
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25 which loss of earning power benefits are being claimed, and not the wage paid at the time of injury.

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27 These two claims were initially closed by the Department on July 27, 1995 (the
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29 neck/shoulder claim) and August 21, 1995 (the carpal tunnel claim). Following timely protests by
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31 the claimant, the Department entered orders on March 12, 1996, affirming the prior orders in both
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33 claims. Our industrial appeals judge ordered the payment of loss of earning power benefits (under
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35 the carpal tunnel claim) from May 5, 1995 through March 12, 1996. As the self-insured employer
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37 correctly points out, the dates of "legal fixity" in these claims were initially established as July 27,
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39 1995 and August 21, 1995. We have held that a worker cannot obtain loss of earning power
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41 benefits beyond the date of legal fixity, and that the protest of a closing order otherwise
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43 establishing the date of legal fixity will not operate to artificially extend the duration of entitlement to
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45 loss of earning power benefits. *In re Douglas Weston*, BIIA Dec., 86 1645 (1987). To establish
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47 entitlement to benefits beyond the date of legal fixity, as established by the initial closing order, the

1 worker must first establish that his or her condition was not medically fixed as of that time. *In re*
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3 *Maria Chavez*, BIIA Dec., 87 0640 (1988). The evidence suggests that the claimant's
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5 neck/shoulder condition was medically fixed as of July 27, 1995, and that her carpal tunnel
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7 condition was medically fixed as of August 21, 1995. Hence, those dates are the ending dates for
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9 the duration of loss of earning power benefits under these claims. The claimant is only entitled to
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11 loss of earning power benefits for the period May 5, 1995 through August 21, 1995.¹

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13 Evidence was presented by the claimant that the base wage rate for the claimant's job at the
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15 time of injury increased as of May 1995, from \$12.40 per hour to \$13.60 per hour. She correctly
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17 points out that if she is entitled to loss of earning power benefits after May 5, 1995, her benefits
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19 should be calculated based on a comparison of her post-injury earning capacity to the new wage
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21 being paid for the job held at the time of injury. Under *Hunter v. Department of Labor & Indus.*, 43
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23 Wn.2d 696 (1953), it is proper to consider the increase in earnings paid for the employment at the
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25 time of injury, in order to arrive at the earnings the worker would have received had she not
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27 experienced the injury.

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29 We now turn to the issues concerning the calculation of the claimant's "monthly wages"
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31 under RCW 51.08.178. We have assumed, and there is no indication to the contrary, that the
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33 claimant's monthly wage should be the same under both claims (i.e., that the date of injury under
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35 the neck/shoulder claim would have also been the date of manifestation under the carpal tunnel
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37 claim (RCW 51.32.180)).

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39 The employer takes the position that the phrase monthly wages "at the time of injury" in
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41 RCW 51.08.178(1) means the pay rate at the exact moment the employee was injured. Therefore,
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46 ¹ The industrial appeals judge ordered the payment of loss of earning power benefits only under the carpal tunnel claim.
47 The evidence would suggest that loss of earning power benefits would have been payable under either or both of these
claims, as both the neck condition and carpal tunnel condition preclude her return to work as a meat wrapper. No party
has objected to the award of loss of earning power benefits under the carpal tunnel claim, as opposed to the
neck/shoulder claim. Since the compensation rate would be the same under either claim, and a duplication of benefits

1 an employee like Ms. Shearer who receives one rate of pay when working between 8:00 a.m. and
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3 6:00 p.m. on weekdays and a different rate of pay when working other regularly scheduled hours,
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5 should receive time loss compensation benefits calculated on the hourly wage at the moment of
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7 injury. In Ms. Shearer's case, she was injured while earning her base wage. Fred Meyer based
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9 her time loss compensation rate on her \$12.40 base rate, with no provision for lost differential pay.
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11 This has a significant impact on the claimant, as the shift differential for her usual Sunday
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13 employment was time and one-half, or \$18.60 per hour.

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15 As our industrial appeals judge pointed out in the Proposed Decision and Order,
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17 RCW 51.08.178(1) begins by plainly stating that the basis for payment of time loss compensation
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19 shall be "the *monthly* wages the worker was receiving from *all* employment at the time of injury."
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21 While the statute goes on to direct various methods of determining the daily wage from which the
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23 monthly wage is to be derived, the clear intent of the statute is that the time loss compensation rate
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25 take into account the worker's anticipated *monthly* income, not merely the rate on one specific day.
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27 The corollary to this conclusion, of course, is that had Ms. Shearer been injured on a Sunday, as
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29 opposed to a "non-premium" day, it would be just as inaccurate to suggest that her daily wage "at
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31 the time of injury" should be predicated on an hourly wage rate of \$18.60, when for most of her
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33 work hours she was paid at a lesser rate.

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35 The difficulty arises, however, because RCW 51.08.178(1) directs the computation of the
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37 monthly wage by multiplying the daily wage by the statutory multiplier assigned to the number of
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39 days per week the worker is normally employed. The daily wage, in turn, is to be calculated by
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41 multiplying the number of hours per day the worker is normally employed, by the worker's "hourly
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43 wage." In this case, and for a substantial number of her working hours, the claimant had two
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45 different hourly wages--a circumstance that is simply not contemplated by the statute.
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would not be permitted, but the duration of loss of earning power benefits would extend to August 21, 1995, in the carpal

1 The self-insured employer argues that since the statute only references a single hourly rate,
2 any wage calculation should, therefore, be based only on the base rate of \$12.40 per hour. We
3 disagree. Rather, we observe that RCW 51.08.178(1) requires consideration of a worker's income
4 from "all employment." Thus, a worker who is employed by two or more employers must have the
5 income from all employers included in the monthly wage, even though the injury for which the claim
6 was filed occurred with only one employer. Under that requirement, it is apparent that a worker
7 employed with one employer four days per week at \$12.40 per hour, and with another employer
8 one day per week at \$18.60 per hour, would have a monthly wage calculated based on the
9 combination of the two separate employments and wage rates. We think the calculation of the
10 monthly wage of the worker employed with one employer, but with two hourly wage rates due to
11 shift pay differentials, should result in the same monthly wage as the worker earning the same
12 income but with two different employers. In order to arrive at a fair yet accurate determination of
13 the monthly wage, we therefore conclude that where a substantial number of a worker's hours are
14 paid at multiple hourly rates, the worker's monthly wage under RCW 51.08.178(1) should be
15 calculated as if the worker had been employed by multiple employers. In this case, that would
16 require a determination of the number of days per week and hours per day the claimant was
17 normally employed at \$12.40 per hour, as well as a determination of the number of days per week
18 and hours per day the claimant was normally employed at \$18.60 per hour.

19 The employer also takes the position that, in determining the number of hours a worker is
20 employed, hours paid, but not worked, for funeral, holiday, vacation, and sick leave, should be
21 deducted from total hours. In this case the employer computed the monthly wage by taking the
22 total hours earned by Ms. Shearer over the 26 week (6-month) period prior to the neck/shoulder
23 injury of February 1, 1993, deducting for hours representing paid funeral leave, and holiday leave,
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tunnel claim, we will not disturb the decision to pay loss of earning power benefits under that claim.

1 but including hours of paid vacation leave, to arrive at an average of 34.40 hours per week. (Exhibit
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3 11, at 3). It then multiplied that figure by the base wage of \$12.40 per hour, and further multiplied
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5 that figure by 4.4 (weeks per month) to arrive at a monthly wage.² In determining the monthly wage
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7 under RCW 51.08.178(1), we think it is inappropriate and confusing to exclude from any average
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9 hours computation any hours attributable to time off for paid funeral, holiday, sickness or vacation
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11 leave. Such leave benefits are part of the compensation package from the employer, and while
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13 paid leave does not represent hours actually worked, it does represent leave paid in lieu of work.
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15 We do not think, for example, that an individual who is normally employed 5 days per week and 8
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17 hours per day should be considered regularly employed for less than 40 hours per week simply
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19 because that worker might take one or two weeks of paid vacation per year. Indeed, to subtract
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21 such paid leave hours from the total hours worked would effectively understate the worker's true
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23 hourly wage. It would require an upward adjustment of the hourly wage to reflect the value of the
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25 paid leave benefit package. For example, a worker who earns \$10 per hour for a 40-hour work
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27 week, but earns and takes 2 hours of annual leave in each work week, is actually earning \$400 per
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29 week for 38 hours of work, or \$10.53 per hour.

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31 Our industrial appeals judge, in an apparent attempt to ensure that hours of vacation time,
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33 holiday leave and funeral leave were included in the monthly wage computation, and drawing from
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35 language in the union contract, directed the self-insured employer to treat the claimant as a
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46 ² It is noted that there are inconsistencies in the calculations. The employer seems to have left a large portion of
47 vacation leave in the reported hours, but excluded vacation leave for the pay period ending January 2, 1993. There is
also a discrepancy in the "Average Hour Worksheet" (Exhibit 11, at 2) suggesting that the total weekly average was
34.55 hours.

1 "full-time employee" working 40 hours per week. We do not see that whether the worker is
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3 characterized as a "full-time" employee, as opposed to something other than full-time, has any
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5 statutory significance. There is nothing in RCW 51.08.178 that requires special treatment for a
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7 "full-time" employee. Indeed, the only similar reference is in RCW 51.08.178(2), that requires
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9 averaging of wages over a prior 12-month period for those workers whose employment pattern is
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11 characterized as "essentially part-time." The 26-week summary of Ms. Shearer's employment
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13 pattern suggests that she worked an average of 36.1 hours per week. Regardless of whether such
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15 a level of employment could or should be characterized as "full-time," does not make any
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17 difference. We conclude, and need only conclude, that a person who averages 36.1 hours of work
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19 per week is not "essentially part-time" within the meaning of RCW 51.08.178(2), and therefore, the
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21 monthly wage for such individual should be calculated using the method set forth in
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23 RCW 51.08.178(1).

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25 We have held that, aside from RCW 51.08.178(2), averaging is only permissible to
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27 determine the number of hours per day, and days per week, that a worker is "normally" employed.
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29 *In re Ubaldo Antunez*, BIIA Dec., 88 1852 (1989). In this case, the best evidence of the number of
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31 days and hours Ms. Shearer was employed at the time of injury is the 26-week summary of hours
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33 worked per week (Exhibit 11) and the wage stubs detailing the nature of the work in 21 of those
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35 weeks (Exhibit 12). These, together with the claimant's testimony, suggest that she was normally
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37 employed five days per week. The wage stubs would also suggest that in 16 of 21 of those weeks
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39 (or 75% of the time) she worked on Sunday. In the 21 weeks represented by wage stubs, the
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41 claimant averaged 6.1 hours of work for each Sunday. This leaves an average of 30 hours per
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43 week worked in the remaining 4 "non-premium" workdays, or an average of 7.5 hours per day.
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1 Thus we calculate the claimant's monthly wage as follows:

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3 Sundays (1 day per week @ \$18.60 per hour):

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5 6.1 hours per day x \$18.60 per hour = \$113.46, daily wage
6 5 [RCW 51.08.178(1)(a)] x \$113.46 = **\$567.30**, monthly wage

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8 Non-premium days (4 days per week @ \$12.40 per hour):

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10 7.5 hours per day x \$12.40 per hour = \$93 daily wage
11 18 [RCW 51.08.178(1)(d)] x \$93 = **\$1,674.00**, monthly wage

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13 Total Monthly Wage:

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15 $\$567.30 + \$1,674.00 = \mathbf{\$2,241.30}$

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17 We, therefore, direct that the claimant's time loss compensation under these claims be
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19 computed based on a monthly wage of \$2,241.30 per month, and that time loss paid under the
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21 claims be repaid at the revised amount, less amounts previously paid at the lesser rate.

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23 **FINDINGS OF FACT**

- 24
25 1. **Claim No. T-806111, Docket No. 96 3384:** On December 8, 1993, the
26 claimant, Kay R. Shearer, filed an accident report with the Department
27 of Labor and Industries alleging that she had sustained an occupational
28 disease arising out of her employment with Fred Meyer, Inc. The claim
29 was allowed and benefits were paid.

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31 On August 21, 1995, the Department issued an order closing the claim
32 with time loss compensation as paid to May 9, 1994, and with no award
33 for permanent partial disability.

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35 On September 25, 1995, the claimant filed a protest and request for
36 reconsideration of the order of August 21, 1995, and on
37 March 12, 1996, the Department issued an order affirming the order of
38 August 21, 1995. The order dated March 12, 1996, was communicated
39 to the claimant on March 15, 1996.

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41 On May 16, 1996, the claimant filed a Notice of Appeal of the order
42 dated March 12, 1996, with the Board of Industrial Insurance Appeals.
43 On June 14, 1996, the Board issued an order granting the appeal
44 subject to proof of timeliness, assigning it Docket No. 96 3384, and
45 directing that proceedings be held on the issues raised in the Notice of
46 Appeal.
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1 2. **Claim No. T-713076, Docket No. 96 3385:** On February 5, 1993, the
2 claimant, Kay R. Shearer, filed an accident report with the Department
3 of Labor and Industries alleging that she had sustained an industrial
4 injury during the course of her employment with Fred Meyer, Inc. The
5 claim was allowed and benefits were paid.
6

7 On July 27, 1995, the Department issued an order closing the claim with
8 time loss compensation as paid to May 5, 1995, and directing the self-
9 insured employer to pay a permanent partial disability award equal to a
10 Category 2 of permanent cervical and cervico-dorsal impairments.
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12 On September 22, 1995, the claimant filed a protest and request for
13 reconsideration of the order of July 27, 1995, and on March 12, 1996,
14 the Department issued an order affirming the order of July 27, 1995.
15 The order dated March 12, 1996, was communicated to the claimant on
16 March 15, 1996.
17

18 On May 16, 1996, the claimant filed a Notice of Appeal of the order
19 dated March 12, 1996, with the Board of Industrial Insurance Appeals.
20 On June 14, 1996, the Board issued an order granting the appeal
21 subject to proof of timeliness, assigning it Docket No. 96 3385, and
22 directing that proceedings be held on the issues raised in the Notice of
23 Appeal.
24

25 3. Kay R. Shearer is a 44-year-old woman whose formal education
26 extends through the tenth grade. She has obtained a GED. On
27 February 1, 1993, during the course of her employment as a meat
28 wrapper with Fred Meyer, she was walking out of a freezer while
29 carrying a tray of meat when she tripped over a pallet laying on the
30 floor, which caused her to fall. The claimant sustained a cervical strain,
31 proximately caused by the industrial injury.
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33 4. The claimant's duties as a meat wrapper required her to wrap meat with
34 plastic wrap that involved repetitive motion with her arms and hands.
35 This repetitive motion was a distinctive condition of employment. As of
36 February, 1993, the claimant suffered from carpal tunnel syndrome in
37 her right arm and wrist, that arose naturally and proximately out of her
38 employment as a meat wrapper for Fred Meyer.
39

40 5. No time loss orders have been issued in Claim No. T-806111, or Claim
41 No. T-713076, that bear the requisite appeal language and provide a
42 clear explanation as to how the claimant's base wage rate was
43 calculated.
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45 6. The employer/employee relationship at Fred Meyer is set forth in a
46 Collective Bargaining Agreement. That agreement provides that certain
47 core working hours are paid at a so-called "base rate." These hours are
 8:00 a.m. to 6:00 p.m. Work performed outside of these hours is paid at

1 a higher rate, that varies according to the day of the week and the hours
2 outside the core hours the worker works. This is referred to as a "shift
3 differential" or "shift premium." Shift premiums are paid even if the
4 hours worked are within a normal 40-hour work week, as a shift
5 differential is different from overtime. In a given month, a worker for
6 Fred Meyer might work some variable number of hours for which he or
7 she would be paid a shift differential. The number of hours worked for
8 which there is a shift premium varies for each worker from month to
9 month. The Collective Bargaining Agreement also sets forth that
10 employees are to have paid vacation, sick, funeral, and holiday leave in
11 varying amounts depending on hours worked and/or years of service of
12 the employee.
13

- 14 7. At the time of injury and on the date of manifestation of her occupational
15 disease, and for the 26-week period prior thereto, the claimant was
16 employed an average of 36.1 hours per week, that was neither
17 intermittent nor essentially part-time employment. She was normally
18 employed on Sundays, at an average of 6.1 hours per day, and at a
19 wage rate of \$18.60 per hour due to the shift differential. She was
20 normally employed an additional 4 days per week, at an average of 7.5
21 hours per day, and at a base wage rate of \$12.40 per hour.
22
- 23 8. Between May 5, 1995 and March 12, 1996, the claimant was not able to
24 return to her job at the time of injury, that of meat wrapper, which
25 inability was proximately caused by residual effects of her occupational
26 disease of carpal tunnel syndrome.
27
- 28 9. Between May 5, 1995 through August 21, 1995, when the Department
29 issued an order assessing her degree of permanent impairment, the
30 claimant was capable of reasonably continuous gainful employment,
31 given her education, training, and physical capabilities, taking into
32 consideration her impairment proximately caused by her industrially
33 related condition of carpal tunnel syndrome, as a customer service
34 clerk.
35
- 36 10. The claimant, had she worked as a customer service clerk, would have
37 earned an hourly wage equal to the minimum wage during the period
38 May 5, 1995 through August 21, 1995. This reduction in earning power
39 was proximately caused by her occupationally related disease of carpal
40 tunnel syndrome. Prior to contracting the occupational disease of
41 carpal tunnel syndrome, she made at least \$12.40 an hour as a base
42 rate. During the period May 5, 1995, the job she held at the time of
43 injury was paying a base rate of \$13.60 per hour.
44
- 45 11. As of August 21, 1995, and continuing through March 12, 1996, the
46 claimant's carpal tunnel syndrome condition, proximately caused by her
47 occupational disease that is the basis for Claim No. T-806111, was fixed
and stable and not in need of further treatment.

1
2 12. As of August 21, 1995, and continuing through March 12, 1996, the
3 claimant sustained no permanent impairment proximately caused by her
4 occupational disease that is the basis for Claim No. T-806111.
5

6 13. As of July 27, 1995, and continuing through March 12, 1996, the
7 claimant's neck and shoulder condition, proximately caused by the
8 industrial injury of February 1, 1993, was fixed and stable, and not in
9 need of further treatment. (Claim No. T-713076)
10

11 14. As of July 27, 1995 and continuing through March 12, 1996, the
12 claimant sustained permanent impairment, proximately caused by the
13 industrial injury of February 1, 1993, equal to a Category 2 of the
14 categories of permanent cervical and cervico-dorsal impairments.
15 (Claim No. T-713076).
16

17 **CONCLUSIONS OF LAW**
18

19 1. The Board of Industrial Insurance Appeals has jurisdiction over the
20 parties and the subject matter of both appeals. Both appeals were
21 timely filed.
22

23 2. No time loss orders were issued in either Claim No. T-806111 or Claim
24 No. T-713076, that have a res judicata effect with regard to the
25 calculation of the claimant's base wage rate, and, thus, her time loss
26 compensation rate.
27

28 3. For purposes of calculating the claimant's wage rate, hours for which
29 she was paid holiday, sick, vacation, and funeral leave should not be
30 excluded from hours worked when calculating the days per week or
31 hours per day the claimant was normally employed, as they represent
32 benefits paid in lieu of work under the employment contract, and their
33 exclusion would understate the hours per day and days per week the
34 claimant was normally employed.
35

36 4. The claimant's employment with her employer and her relation to her
37 employment was neither essentially part-time nor intermittent, and her
38 monthly wage at the time of injury must, therefore, be calculated under
39 the method outlined at RCW 51.08.178(1). Further, since a substantial
40 number of the hours the claimant was normally employed were paid at a
41 higher hourly rate because of a shift differential, her monthly wage
42 calculation must take such shift differential into account, by determining
43 the number of hours per day and days per week the claimant was
44 normally employed at such higher wage rate, and adding the computed
45 monthly wage at such rate to the monthly wage determined for the
46 number of hours per day and days per week the claimant was normally
47 employed at the base wage rate.

- 1 5. At the time of injury applicable to both Claim Nos. T-806111 and
2 T-713076, the claimant's monthly wage was \$2,241.30 per month, as
3 she was normally employed 4 days per week, for 7.5 hours per day at
4 \$12.40 per hour, and she was normally employed 1 day per week for
5 6.1 hours per day at \$18.60 per hour.
6
7 6. Between May 5, 1995 and March 12, 1996, the claimant was not totally,
8 temporarily disabled within the meaning of RCW 51.32.090.
9
10 7. Between May 5, 1995 and August 21, 1995, the claimant was entitled to
11 loss of earning power benefits pursuant to RCW 51.32.090.
12
13 8. With regard to Claim No. T-806111, Docket No. 96 3384, the
14 March 12, 1996 Department order, that affirmed a prior order dated
15 August 21, 1995, that closed the claim with time loss compensation
16 benefits as paid to May 9, 1994, and with no permanent partial disability
17 award is reversed, and this matter is remanded to the Department with
18 direction to establish the claimant's monthly wage, taking her Sunday
19 shift differential into account, and fixing her monthly wage under
20 RCW 51.08.178(1) as \$2,241.30 per month, pay her time loss
21 compensation benefits based thereon for all periods for which she has
22 been paid time loss compensation under this claim, less prior benefits
23 paid for time loss compensation paid at a lesser rate, pay loss of
24 earning power benefits for the period between May 5, 1995 through
25 August 21, 1995, based on a comparison of the wages paid for the job
26 of meat wrapper for such period and the minimum wage for that period,
27 and to, thereupon, close the claim, as paid, without award for
28 permanent impairment.
29
30 9. Relative to Claim No. T-713076, Docket No. 96 3385, the March 12,
31 1996 Department order, that affirmed a prior order dated July 27, 1995,
32 that closed the claim with time loss compensation benefits as paid to
33 May 5, 1995, and directed the self-insured employer to pay a permanent
34 partial disability award equal to a Category 2 of permanent cervical and
35 cervico-dorsal impairments is incorrect, and is reversed and this matter
36 is remanded to the Department with direction to establish the claimant's
37 monthly wage, taking her Sunday shift differential into account, and
38 fixing her monthly wage under RCW 51.08.178(1) as \$2,241.30 per
39 month, pay her time loss compensation benefits based thereon for all
40 periods for which she has been paid time loss compensation under this
41 claim, less prior benefits paid for time loss compensation at the previous
42 rate, pay an award for permanent impairment equal to Category 2 of
43 permanent cervical and cervico-dorsal impairments, less prior awards,
44 and to, thereupon, close the claim as paid.
45

46 It is so **ORDERED**.

47 Dated the 16th day of June, 1998.

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BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
JUDITH E. SCHURKE Member