Zimmerman, Wendy

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))

An intermittent worker, as contemplated by RCW 51.08.178(2), engaged in duties on the
date of manifestation which were clearly related to contracted, but not commenced, full-
time employment should have wages determined under RCW 51.08.178(4) when using
subsection (2) would result in a wage that does not reflect lost earning capacity. ....In re
Wendy Zimmerman, BIIA Dec., 08 19330 (2009)

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IN RE: WENDY ZIMMERMAN
CLAIM NO. SB-89697

DOCKET NO. 08 19330

DECISION AND ORDER

APPEARANCES:

Claimant, Wendy Zimmerman, by
Law Offices of Robyn L. Pugsley P.S., per
Robyn L. Pugsley

Self-Insured Employer, NE Washington Worker's Compensation Co-Op, by
Evans, Craven & Lackie, P.S., per
Gregory M. Kane

The claimant, Wendy Zimmerman, filed an appeal with the Board of Industrial Insurance Appeals on October 6, 2008, from an order of the Department of Labor and Industries dated August 28, 2008. In this order, the Department affirmed its May 20, 2008 order. In the May 20, 2008 order, the Department based the claimant's wage at time of injury on average monthly wages from June 1, 2003, through May 31, 2004. The Department calculated wages of $20,192.43 divided by 12, resulting in an average monthly wage of $1,682.70 per month, with additional health care benefits of $367.63 per month, for total gross wages of $2,050.33 per month, married and with one child. The Department order is REVERSED AND REMANDED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on October 15, 2009, in which the industrial appeals judge reversed and remanded the order of the Department dated August 28, 2008. All contested issues are addressed in this order.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because we disagree slightly with the analysis provided by our industrial appeals judge and the findings and conclusions stemming from that analysis.

Wendy Zimmerman was a teacher for the Nine Mile Falls School District between 2002 and 2007. During the 2002-2003 and 2003-2004 school years, she was employed in a two-thirds time position at the high school. Her salary during the 2003-2004 school year was $19,703.18. The school district also paid $367.63 per month for health care benefits. On August 18, 2004, the Nine
Mile Falls school board voted to employ Ms. Zimmerman full-time as a fourth grade teacher during the 2004-2005 school year.

On August 28, 2004, Ms. Zimmerman was working in a portable classroom preparing for the 2004-2005 school year when she was exposed to substances which caused her to develop chronic obstructive pulmonary disease. Under the negotiated agreement between the school district and Ms. Zimmerman's union, Ms. Zimmerman could have submitted a request to be paid for her work that day and she would have been paid. Ms. Zimmerman did not submit such a request. As a consequence, she received no wages for her work that day. Ms. Zimmerman continued to work for the school district as a teacher, on a full-time basis, until November 2007, when her condition caused her to stop working.

The question presented by this case is, "What is the appropriate method for determining Ms. Zimmerman's wage rate for the purposes of calculating time-loss compensation benefits?" The term wages is defined by RCW 51.08.178, which states:

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

(a) By five, if the worker was normally employed one day a week;
(b) By nine, if the worker was normally employed two days a week;
(c) By thirteen, if the worker was normally employed three days a week;
(d) By eighteen, if the worker was normally employed four days a week;
(e) By twenty-two, if the worker was normally employed five days a week;
(f) By twenty-six, if the worker was normally employed six days a week;
(g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked each day.

(2) 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.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker’s monthly wages.

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

We agree with our industrial appeals judge to the extent he found Ms. Zimmerman's wage should be calculated using subsection (4) of RCW 51.08.178. Ms. Zimmerman was clearly employed on an intermittent basis with the school district. She worked nine months of every year, although her salary was paid over twelve months. Because of the intermittent nature of her relationship with her employment, and the fact that she was not actually paid any wages for her work on August 28, 2004, it would not be appropriate to apply subsection (1) of RCW 51.08.178. We find that applying subsection (2) of RCW 51.08.178 would not result in a wage which fairly and reasonably represents her lost earning capacity because Ms. Zimmerman was not employed full-time in the period immediately preceding the date of manifestation of her occupational disease, but was engaged in duties on the date of manifestation which were clearly related to full-time employment with the school district.

In addition, we believe Ms. Zimmerman’s case is similar to that of Janet Papson. In re Janet Papson, BIIA Dec., 01 15138 (2003). Ms. Papson was a bus driver who had a sporadic history of employment immediately prior to her employment as a bus driver. We found that basing Ms. Papson's wages on her earlier sporadic employment, as required under RCW 51.08.178(2), would work an injustice given the large disparity between that wage and Ms. Papson’s bus driving wages. Similarly, using subsection (2) to calculate Ms. Zimmerman’s wage would result in a wage substantially lower than Ms. Zimmerman was contracted to earn during the 2004-2005 school year.

We find that using RCW 51.08.178(4) to determine Ms. Zimmerman's wages is the best way to comply with the Supreme Court's mandate as stated in Double D Hop Ranch v. Sanchez, 133 Wn.2d 793 (1997), to ensure that the wage rate most accurately reflects Ms. Zimmerman's lost earning capacity. Therefore, we conclude Ms. Zimmerman’s wages should be determined under RCW 51.08.178(4). Her wages should be equivalent to those of a teacher with her education and
experience, employed by Nine Mile Falls School District on a full-time basis for the 2004-2005 school year. In addition, the school district should include the amount of healthcare benefits provided by the school district. Finally, the time-loss compensation benefits rate should be based upon Ms. Zimmerman's family status of married with two dependent children.

**FINDINGS OF FACT**

1. On September 7, 2006, the claimant, Wendy Zimmerman, filed an Application for Benefits with the Department of Labor & Industries, in which she alleged she had a chronic obstructive pulmonary disease condition arising naturally and proximately out of distinctive conditions of her employment with Nine Mile Falls School District, due to exposure to fiberglass, which condition became manifest on August 28, 2004. On March 7, 2007, the Department issued an order in which it allowed the claim; in that order the Department directed the self-insured employer to pay all medical benefits and time-loss compensation benefits as may be indicated.

On May 20, 2008, the Department issued an order calculating the claimant’s monthly wages by averaging her income from wages from June 1, 2003, to May 31, 2004. The Department found wages of $20,192.43, divided by 12 months, for an average monthly wage of $1,682.70. The Department considered additional healthcare benefits of $367.63 per month, for total gross wages of $2,050.33 per month, with the claimant married with one child. The May 20, 2008 order was communicated to the claimant on May 23, 2008. On July 22, 2008, the claimant placed into the possession of the United States Postal Service her Protest and Request for Reconsideration from the May 20, 2008 order.

On August 28, 2008, the Department issued an order in which it affirmed its May 20, 2008 order. On October 6, 2008, the claimant filed her Notice of Appeal with the Board of Industrial Insurance Appeals, from the Department’s August 28, 2008 order. On October 15, 2008, the Board granted the appeal under Docket No. 08 19330, and agreed to hear the appeal.

2. In August 2004, Wendy Zimmerman was preparing her 4th-grade classroom for the upcoming school year. She was exposed to substances which caused her to develop chronic obstruction pulmonary disease (COPD). The disease arose naturally and proximately out of distinctive conditions of her employment and manifested on August 28, 2004.

3. Ms. Zimmerman was not paid for her work on August 28, 2004, but could have requested payment from the school district. If she had requested payment, she would have been paid pursuant to the negotiated agreement between the school district and the teachers which provided for payment of two days of work performed prior to the school year in order to prepare her classroom.
4. As of the date of manifestation of her occupational disease, Ms. Zimmerman's wage, as to the salary portion of the wage calculation, should be calculated based upon what other teachers, with Ms. Zimmerman's education and experience, employed by the school district on a full-time basis for the 2004-2005 school year, would have been paid. Her wage should also include the amount of employer-provided health care benefits such teachers would have received during the 2004-2005 school year.

5. As of the date of manifestation of her occupational disease, Ms. Zimmerman was married with two dependent children.

CONCLUSIONS OF LAW

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

2. The order of the Department dated August 28, 2008, is incorrect and is reversed. The claim is remanded to the Department with directions: to determine Ms. Zimmerman's wage as of the date of manifestation of the occupational disease pursuant to RCW 51.08.178(4), such that Ms. Zimmerman's wages would be equal to those of any teacher with Ms. Zimmerman's education and experience, employed full-time with the Nine Mile Falls School District during the 2004-2005 school year, including any employer-provided healthcare benefits available to such teachers; and to find Ms. Zimmerman's family status, as of the date of manifestation of her occupational disease, to be married with two dependent children.

DATED: December 30, 2009

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
THOMAS E. EGAN             Chairperson

/s/
FRANK E. FENNERTY, JR.       Member

/s/
LARRY DITTMAN                Member