

**Peña, José**

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**TIME-LOSS COMPENSATION (RCW 51.32.090)**

**Wages (RCW 51.08.178) - Compensation for overtime pay**

RCW 51.08.178(1) only allows the inclusion of overtime hours to determine the number of hours normally worked. The statute does not allow inclusion of overtime pay as part of the wage calculations. ....*In re José Peña, BIIA Dec., 13 12765 (2014)*

Scroll down for order.



1 The industrial appeals judge appropriately reviewed the correct statutes and legal principles  
2 when discussing calculation of Mr. Peña's "wages" within the meaning of RCW 51.08.178.  
3 However, overtime **pay** cannot be included in the calculation of the wage, but the number of hours  
4 that overtime was worked can be included in determining the number of hours **normally**  
5 **employed**.<sup>1</sup> In the Proposed Decision and Order the industrial appeals judge incorrectly calculated  
6 an additional wage using the overtime hours and added that amount to the monthly wage rather  
7 than using the overtime hours to adjust the hours normally employed. Having reviewed the  
8 evidence, including the pay stubs that constitute Exhibit 2, we conclude that the figures used in the  
9 Proposed Decision and Order are correct except for the number of overtime hours within the  
10 three-month period before the industrial injury, and therefore the monthly average of those  
11 numbers. In our review of the exhibit, we find 73.50 overtime hours worked in the three-month  
12 period prior to the industrial injury.

13 Like our industrial appeals judge, we conclude the Department's method of averaging the  
14 overtime over three months was reasonable and appropriate because of substantial monthly  
15 differences for overtime Mr. Peña worked. We included all hours reported in the paystubs dated  
16 August 20, 2010, through November 12, 2010. The August 20, 2010 paystub included days of work  
17 outside the three-month period. Because only one hour of overtime was reported we conclude that  
18 it was likely worked all at once. Because the majority of the work days fell within the three-month  
19 period, we conclude the overtime more likely was worked within that period. We note that  
20 Mr. Peña's pay rate for that month was at \$16 an hour (his raise to \$17 an hour did not take place  
21 until September 2010). As for the November 12, 2010 pay stub, it covered hours worked during the  
22 two-week period of October 24, 2010, through November 6, 2010. We cannot include hours  
23 worked after the date of injury when calculating Mr. Peña's wage rate. But because his industrial  
24 injury occurred on Friday, November 5, 2010, and his work pattern supports a finding he would not  
25 have worked the next day, a Saturday, we include the entire overtime (22.75 hours) recorded on  
26 that paystub as part of the calculation of the average overtime hours he worked.

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47 <sup>1</sup>RCW 51.08.178(1).

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Mr. Peña worked overtime during the three months prior to the industrial injury a total of 72.50 hours at \$17 an hour and one hour at \$16 an hour. Together those figures add up to 73.50, for a monthly average of overtime 24.5 hours. This differs from the 21.83 hours a month that Tracey Jacobsen, claims consultant, testified she used in calculating overtime hours. 24.5 hours a month should be used as part of the calculation of the hours Mr. Peña was normally employed.

We reverse both Department orders and remand the matter to the Department with instructions to recalculate the claimant's wages and temporary total disability benefits and recalculate the overpayment due for time-loss compensation benefits paid from March 18, 2012, through September 19, 2012. Once the overpayment amount is recalculated we urge Mr. Peña to contact the Department and negotiate a repayment schedule.

**FINDINGS OF FACT**

1. On May 30, 2013 (Docket No. 13 12765), and on July 24, 2013 (Docket No. 13 18467), an industrial appeals judge certified that the parties agreed to include the Jurisdictional Histories in the Board record solely for jurisdictional purposes.
2. Jose Peña sustained an industrial injury on November 5, 2010, when he attempted to disconnect a washing machine from a water line, felt a blow to his hip, and fell, breaking his glasses.
3. On November 5, 2010, Jose Peña was married, had three dependents, and earned \$17 an hour. Prior to September 2010, his base pay rate was \$16 an hour. Mr. Peña's base work schedule was 8 hours a day, five days a week. Besides his regular schedule he worked an average of 24.5 hours per month overtime.
4. Besides his regular wages, Mr. Peña's employer paid \$418 a month for his health care benefits, which continued until payment of these benefits ended on September 30, 2012. The employer also paid Mr. Peña an average of \$212.16 a month in bonuses.

**CONCLUSIONS OF LAW**

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

