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)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: JOSE PEÑA	DOCKET NOS. 13 12765 & 13 18467
CLAIM NO. AP-47921	DECISION AND ORDER

APPEARANCES:

Claimant, Jose Peña, Pro Se

Employer, FPI Management, None

Department of Labor and Industries, by The Office of the Attorney General, per Shara Delorme

In Docket No. 13 12765, the claimant, Jose Peña, filed an appeal with the Board of Industrial Insurance Appeals on February 28, 2013, from an order of the Department of Labor and Industries dated February 14, 2013. In this order, the Department issued a demand for overpayment totaling \$2,488.05, assessed for March 18, 2012, through September 19, 2012, based on a change in Mr. Peña's reported gross wages. The Department order is **REVERSED AND REMANDED**.

In Docket No. 13 18467, the claimant, Jose Peña, filed an appeal with the Board of Industrial Insurance Appeals on February 28, 2013, from an order of the Department of Labor and Industries dated December 21, 2012. In this order, the Department affirmed its order of September 25, 2012, in which it calculated Mr. Peña's gross wage to be \$3,993.27 a month, and a status of married with three dependent children. 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 claimant filed a timely Petition for Review of a Proposed Decision and Order issued on July 1, 2014, in which the industrial appeals judge reversed and remanded the orders of the Department dated February 14, 2013, and December 21, 2012.

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 to revise the calculation of overtime made by our industrial appeals judge within the Proposed Decision and Order and to modify the findings of fact and conclusions of law based on that change.

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

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

¹RCW 51.08.178(1).

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

 The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals. 2. The Department orders dated February 14, 2013, and December 21, 2012, are incorrect and are reversed. These matters are remanded to the Department with instructions to recalculate the claimant's wages and temporary total disability benefits consistent with the findings of fact above; thereupon recalculate the overpayment due for the period of March 18, 2012, through September 19, 2012; and for further action as indicated.

Dated: October 9, 2014.

BOARD OF INDUSTRIAL INSURAI	NCE APPEALS
<u>/s/</u> DAVID E. THREEDY	Chairperson
<u>/s/</u> FRANK E. FENNERTY, JR.	 Member
<u>/s/</u> JACK S. ENG	Member