

House, Margaret

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) – Unemployment compensation

Unemployment compensation benefits are not wages paid by an employer and are not consideration of a like nature as part of the contract of hire within the meaning of RCW 51.08.178.***In re Margaret House, BIIA Dec., 13 25663 (2015)*** [Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 15-2-07277-9.]

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1 part-time for the City of Roy, Ms. House applied for and received unemployment compensation
2 based on the reduction in her hours. She sustained an industrial injury on October 4, 2010, while
3 working for the City of Roy. Upon receiving time-loss compensation benefits based on wages she
4 received when her hours were reduced, Ms. House ceased to receive unemployment
5 compensation. In December 2010, the City informed Ms. House that her position was being
6 eliminated due to budgetary constraints.

7 The sole issue presented by the appeal is whether the Department should include
8 Ms. House's unemployment compensation benefits by considering them to be of like nature as
9 wages as of the date of her industrial injury when calculating her time-loss compensation rate. The
10 relevant portion of the time-loss compensation statute, RCW 51.08.178(1) is:

11 For the purposes of this title, the monthly wages the worker was receiving from all
12 employment at the time of injury shall be the basis upon which compensation is
13 computed The term "wages" shall include the reasonable value of board, housing,
14 fuel, or other consideration of like nature received from the employer as part of the
contract of hire.

15 In finding for Ms. House, the industrial appeals judge discussed several Washington court
16 cases that bear on the computation of wages for time-loss compensation benefits. These cases
17 are mostly relevant to the issue of whether employer contributions or payments for unemployment
18 benefits should be included in the wage calculation as other consideration of like nature. Our Court
19 of Appeals, Division One addressed employer payments for unemployment compensation in
20 *Ferenčak v. Department of Labor & Indus.*, 142 Wn. App. 713 (2008). The court held that the
21 payments made by employers for unemployment compensation coverage were not wages for the
22 purposes of industrial insurance.

23 Mr. Ferenčak appealed a decision by this Board finding that unemployment compensation
24 payments made by an employer should not be included as part of a worker's wage calculation. In
25 referring to payments made by employers for federal social security (disability and retirement
26 benefits); for Medicare; employer-paid premiums or taxes for unemployment compensation; and for
27 employer-paid industrial insurance premiums or taxes, a unanimous Board held that:

28 These are not, under the *Gallo* and *Cockle* analyses, a wage equivalent paid to the
29 worker, nor are they benefits critical to the worker's basic health and survival at the time
30 of injury. Rather, the payments are payments required by law to governmental entities.¹

31 ¹ *In re Ivan Ferenčak*, Docket Nos. 02 21795, 02 22295, 02 22296, 02 22794, 02 23491, 02 23492, 02 23698,
32 03 15795, 03 16196, 03 16790, 03 17975, 03 18398, 03 19097 & 03 20291, (October 18, 2005), at 7.

1 Referring to its decision in *Erakovic*² the court of appeals stated that:

2 Ferenčák fails to explain why a different analysis should apply to employer payments for
3 unemployment compensation, we affirm the Board's decision to exclude these
4 payments from the wage calculation.³

5 *Ferenčák* resolves the question of the status of employer payments for unemployment
6 compensation left unspecified but implied by *Erakovic*.

7 The dispute in Ms. House's case stands in contrast to the *Ferenčák* decision because the
8 focus is the unemployment benefit itself rather than the value of the employer contributions to the
9 program that provides those benefits.

10 Ms. House was receiving unemployment compensation benefits at the time of her industrial
11 injury. However, unemployment compensation benefits were not available thereafter to Ms. House
12 because she could not work due to her industrially related injury. This highlights the different
13 purposes of industrial insurance and unemployment compensation. Industrial insurance should
14 assist an injured worker who cannot work due to the injury while unemployment compensation
15 should help a worker who can work but cannot find work.⁴

16 The policy purpose of unemployment compensation under Title 50 of the Revised Code of
17 Washington was explained in another Washington Supreme Court case in *Loran v. Dairyland Ins.*
18 *Co.*, 105 Wn.2d 1002 (1985) where the worker, Loran, had been out of work but was receiving
19 unemployment compensation benefits. The benefits were terminated because Loran was injured in
20 an automobile accident and could no longer work—a similar result to Ms. House. Loran made a
21 claim against the defendant insurance company for income continuation benefits. The policy
22 provided that Loran could receive 85 percent of his income from work if he was injured. The
23 Supreme Court summarized the issue and holding:

24 The pertinent issue presented by this appeal is whether the loss of unemployment
25 compensation benefits is a 'loss of income from work.' We conclude that it is not.⁵

26 The Court noted that Title 50 repeatedly refers to unemployment compensation as benefits
27 and not income. Unemployment compensation alleviates economic uncertainty due to
28 unemployment and provides benefits to assist with that uncertainty. The money received is not
29 income. We readily acknowledge that *Loran* is not dispositive of the issue presented to us here.

30 ² *Erakovic v. Department of Labor & Indus.* 132 Wn. App. 762 (2006).

31 ³ *Ferenčák*, at 726.

32 ⁴ *Gallo v. Department of Labor & Indus.* 155 Wn.2d 470, 490 (2005).

⁵ *Loran*, at 1379.

1 However, the supreme court explained the policy purpose of unemployment compensation and
2 characterized payments under this policy as a statutory "benefit" as opposed to something
3 cognizable as wages or pay for work.

4 Scholarly authority rejects unemployment compensation benefits as wages for workers'
5 compensation purposes. The authors of the treatise, *Larson's Workers' Compensation Law* state:

6 Unemployment benefits received during "down-times" during the year prior to the injury,
7 while otherwise employed by the employer, are not "wages" and, accordingly, are not
8 used to compute the average weekly wage.⁶

9 A case from Pennsylvania agrees with Larson. The Commonwealth Court of Pennsylvania
10 (an intermediate appellate court) addressed unemployment compensation benefits in a workers'
11 compensation case. The court, citing a Pennsylvania Supreme Court decision in *Reifsnyder v.*
12 *Workers' Compensation Appeals Board*, 584 Pa. 883 (2005) stated:

13 [th]e Workers' Compensation system operates to insure a worker against the
14 economic effects of a workplace injury, not against the economic effects of variations in
15 the business cycle ... Under *Reifsnyder* unemployment compensation benefits are
16 expressly excluded from (wage) calculations.⁷

17 Unlike Pennsylvania we have no court decision expressly excluding unemployment
18 compensation benefits from wage calculations. However, we conclude that unemployment benefits
19 are not "wages" and cannot be included in the wage calculation at the time of injury.

20 We acknowledge the distinction between payments for unemployment compensation by an
21 employer and unemployment compensation benefits received by an eligible recipient. Based on
22 the case law, available unemployment compensation payments by an employer are not includable
23 in the wage calculation for industrial insurance purposes. Ms. House argues that she was receiving
24 unemployment compensation benefits when she was injured and those benefits should be wages,
25 especially because she received those benefits because of the change in employment status with
26 the employer she was working for at the time of her industrial injury. However, Ms. House cites no
27 compelling authority in her post hearing brief for her position. The unemployment benefits were not
28 received from the employer nor were they wages as considered by RCW 51.08.178. Because they
29 were not received from the employer we cannot consider them consideration of like nature which
30 could require inclusion in the wage calculation. Nor can we conclude the unemployment benefits
31 are properly considered to be wages.

31 ⁶ *Larson's Workers' Compensation Law*, § 93.01(2)(a)&(b), (2012).

32 ⁷ *Lenzi v. Workers' Comp. Appeal Bd.*, 29 A.3d 891 (Pa. Commw. Ct. 2011)

1 To summarize our decision, payment by employers for unemployment compensation
2 benefits are not includable in the wage rate calculation for temporary total disability benefits, that is,
3 time-loss compensation benefits. Further, benefits received for unemployment compensation are
4 not wages paid by an employer and are not consideration of like nature as part of the contract of
5 hire. Neither the employer's payments for unemployment compensation nor the unemployment
6 benefits are wages within the meaning of RCW 51.08.178.

7 **FINDINGS OF FACT**

- 8 1. On February 13, 2014, an industrial appeals judge certified that the
9 parties agreed to include the Jurisdictional History in the Board record
10 solely for jurisdictional purposes.
- 11 2. Margaret M. House sustained an industrial injury on October 4, 2010,
12 when she was lifting a bench and felt pain in her back.
- 13 3. On October 4, 2010, Ms. House was married with one dependent child;
14 earned \$13.05 an hour; worked 4 hours a day; and worked 5 days a
15 week for a total wage of \$1,148.40 a month.
- 16 4. Ms. House was receiving unemployment compensation from the
17 Employment Security Department at the time of her industrial injury.
18 Unemployment compensation benefits stopped when Ms. House
19 sustained an industrial injury because she was no longer available for
20 work and was not capable of performing or obtaining reasonably
21 continuous gainful employment.
- 22 5. The unemployment compensation benefits paid to Ms. House prior to
23 her industrial injury were not made as the result of a contract for hire
24 with the employer, the City of Roy, and were not payments for board,
25 housing, fuel, or other consideration of like nature.
- 26 6. Unemployment compensation payments were paid to Ms. House by the
27 Employment Security Department. The Employment Security
28 Department was not an employer of Ms. House at the time of the
29 industrial injury on October 4, 2010.
- 30 7. The Department of Labor and Industries correctly calculated
31 Ms. House's wages and temporary total disability benefits or time-loss
32 compensation benefits.

33 **CONCLUSIONS OF LAW**

- 34 1. The Board of Industrial Insurance Appeals has jurisdiction over the
35 parties and subject matter in this appeal.
- 36 2. The unemployment compensation Margaret M. House was receiving at
37 the time of the industrial injury on October 4, 2010, is not wages and is
38 not consideration of like nature received from an employer as part of the
39 contract of hire within the meaning of RCW 51.08.178.

3. The Department order dated October 7, 2013, is correct and is affirmed.
Dated: March 2, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEDY Chairperson

/s/
JACK S. ENG Member

DISSENT

I respectfully dissent from the majority. I find that under the very specific facts of this case, Ms. House's unemployment compensation should be included as a component of her wage calculation for temporary total disability (time-loss compensation benefits) purposes.

The issue of whether mandatory employer payments for government programs like unemployment compensation, industrial insurance, social security, and Medicare should be included as wages within the meaning of RCW 51.08.178(1), has been resolved in this state through a series of court decisions. Part of the rationale for excluding payments for these benefits from the wage calculation is that they are not earmarked for a specific employee even though the payments are made based on the gross wages of each employee.⁸ However, in the present case, the payments for unemployment compensation were earmarked and paid out to Ms. House. The receipt of these benefits at the time of the industrial injury changes the analysis.

RCW 51.08.178(1) provides that wages shall include the reasonable value of board, housing, fuel, or other consideration of like nature. Our supreme court determined that other consideration of like nature is subject to more than one reasonable interpretation, is ambiguous, and open to judicial interpretation. The court emphasized that compensation must be based on the worker's lost earning capacity at the time of injury, and construed other consideration to mean

⁸ *Erakovic v. Department of Labor & Indus.*, 132 Wn. App. 762 (2006).

1 "readily identifiable and reasonably calculable in-kind components of a worker's lost earning
2 capacity at the time of injury that are critical to protecting workers' basic health and survival."⁹

3 I focus on the supreme court's requirement that other consideration be readily identifiable
4 and critical to protecting workers' basic health and survival. The unemployment compensation is
5 readily identifiable because Ms. House was actually receiving the benefit. The benefits are
6 manifestly critical to her basic health and survival because of the inequitable hardship placed on her
7 as a result of her industrial injury.

8 As the majority correctly points out, Ms. House was receiving both wages from her employer
9 and unemployment compensation at the time of her industrial injury. This is a very unusual
10 circumstance. Ms. House was entitled to unemployment compensation because her working hours
11 were reduced involuntarily by the City of Roy. In order to reduce her economic loss, due to the
12 reduction in hours, she applied for and received unemployment compensation. Thus, at the time of
13 her industrial injury, she was receiving both wages and unemployment compensation. The
14 unemployment compensation contributed to her total income and was critical to protecting her basic
15 health and survival.

16 Following her industrial injury Ms. House received time-loss compensation benefits based
17 solely on her part-time wages with the City of Roy. Further, because she was medically unavailable
18 for work, her unemployment compensation was terminated. Thus, the industrial injury resulted in
19 greater hardship because she lost benefits she was receiving.

20 Our Industrial Insurance Act provides that its provisions shall be liberally construed for the
21 purpose of reducing to a minimum the suffering and economic loss arising from injuries in the
22 course of employment.¹⁰ The majority focuses on the detail that the unemployment compensation
23 was not actually paid by the City of Roy but by a government agency. Reliance on this one element
24 ignores the mandate to liberally construe the statute to reduce to minimum the suffering and
25 economic loss arising from injuries in the course of employment. Except for this single element, the
26 unemployment compensation actually paid to Ms. House meets the other elements of
27 RCW 51.08.178(1) and the *Cockle* decision to qualify as wages.

28 The unemployment compensation paid to Ms. House was paid because of the reduction in
29 hours with the employer of injury. The employer's actions made Ms. House eligible for
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31 ⁹ *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001).

32 ¹⁰ RCW 51.12.010.

1 unemployment compensation. The City of Roy paid for unemployment compensation benefits for
2 Ms. House as an employee. The value of the benefits is known and identifiable as she was actually
3 receiving the benefits. Like her normal wages, Ms. House ceased to receive unemployment
4 compensation due to her industrial injury. The unemployment compensation benefits were critical
5 to protecting her basic health and survival. As the supreme court said in *Cockle*, "consideration of
6 like nature" to actual wages is subject to more than one reasonable interpretation and is ambiguous
7 and open to judicial interpretation. Under these facts, the value of the unemployment
8 compensation benefits should part of the wage calculation for time-loss compensation purposes
9 and should be considered compensation of like nature within the meaning of RCW 51.08.178(1).

10 Dated: March 2, 2015.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS
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14 /s/ _____
FRANK E. FENNERTY, JR. Member
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