Cronk, Wesley

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) – Compensation

Hours a worker is required to remain on the employer's premises waiting for work assignments constitutes "hours the worker is normally employed" under RCW 51.08.178(1) and therefore are included in wage calculations. ***….In re Wesley Cronk*, BIIA Dec., 14 14972 (2015)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WESLEY F. CRONK	)	**DOCKET NOS. 14 14972, 14 14973 & 14 14974**
	)	
CLAIM NO. AV-96619	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Wesley F. Cronk, by
Michael Lind Law Office, per
Michael S. Lind

Employer, Midway Muffler & Radiator, Inc., by
Washington Retail Association, per
Maria A. Justin, Senior Claims Analyst

Department of Labor and Industries, by
The Office of the Attorney General, per
Kay A. Germiat

In Docket No. 14 14972, the claimant, Wesley F. Cronk, filed an appeal with the Board of Industrial Insurance Appeals on April 17, 2014, from an order of the Department of Labor and Industries dated March 25, 2014. In this order, the Department paid time-loss compensation benefits from March 12, 2014, through March 25, 2014, in the amount of $492.80, at the rate of $1,056.00 a month and $35.20 a day. The Department order is **REVERSED AND REMANDED.**

In Docket No. 14 14973, the claimant, Wesley F. Cronk, filed an appeal with the Board of Industrial Insurance Appeals on April 17, 2014, from an order of the Department of Labor and Industries dated March 26, 2014. In this order, the Department affirmed the orders issued on March 12, 2014, and March 13, 2014. In the March 12, 2014 order, The Department paid time-loss compensation benefits from February 25, 2014, through March 11, 2014, in the amount of $528.00, at the rate of $1,056.00 a month and $35.20 a day. In the March 13, 2014 order, the Department set the wage for the job-of-injury based on $16.00 an hour, 5 hours a day, and 5 days a week, for a total gross wage of $1,760.00 a month. The marital status eligibility was determined to be single with no children. The Department order is **REVERSED AND REMANDED**.

In Docket No. 14 14974, the claimant, Wesley F. Cronk, filed an appeal with the Board of Industrial Insurance Appeals on April 17, 2014, from an order of the Department of Labor and Industries dated March 28, 2014. In this order, the Department determined that the claimant received time-loss compensation benefits in the amount of $2,759.68 from January 7, 2014, through February 24, 2014; was entitled to $1,724.80; and, must pay the Department $1,034.88. The overpayment resulted because of a change in reported gross wages and the order corrected

and superseded the payment orders dated January 29, 2014, February 11, 2014, February 18, 2014, and February 25, 2014. The Department order is **REVERSED AND REMANDED**.

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 an April 7, 2015 Proposed Decision and Order in which the industrial appeals judge affirmed the March 25, 2014, March 26, 2014, and March 28, 2014 Department orders.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

DECISION

This appeal is before the Board because of a dispute regarding Mr. Cronk's wage at the time of his industrial injury. It is undisputed that he was normally employed 5 days a week and his hourly wage was $16 an hour. The dispute centers on the number of hours he was normally employed a day. In calculating the wage rate, the Department relied on the employer's payroll records covering the entire period of Mr. Cronk's employment. Mr. Cronk agrees that the records accurately reflect the wages he was paid, and that if the Department is only required to include paid hours in its calculation, the wage determination is correct. But he argues that the Department should have included "wait time" hours of work that the employer required him to be at the work site but failed to pay him. Because we find that "the hours the worker is normally employed" as used in RCW 51.08.178(1) includes time the employer requires the worker to remain on the employer's premises waiting for work assignments, we reverse the orders on appeal and remand to the Department to recalculate Mr. Cronk's wage to include the "wait time" hours in the calculation of his daily wage.

Mr. Cronk was employed as a mechanic for Midway Muffler & Radiator, Inc., (aka Bucky's), when he sustained an industrial injury to his back. The parties agree that RCW 51.08.178(1) is the appropriate subsection for calculating the wage Mr. Cronk was receiving at the time of injury and that he was normally employed 5 days a week with an hourly wage of $16. The parties agree that he was only paid for time spent working on customers' vehicles and that he had to clock in and out throughout his shift based on the availability of work assignments.

Bucky's has 16 locations. Its accountant, Anthony Maddox, testified that the clock-in/clock-out method of recording hours for hourly employees was the way the company did business. Across all locations, Bucky's employed 30 salaried mechanics and 35 hourly mechanics.

The latter were only paid for hours working on a customer's vehicle they were not paid for wait time between work assignments.

Floyd Montgomery testified that he was the only salaried mechanic at the Bucky's location where Mr. Cronk was employed as an hourly mechanic. The only other salaried employee at that location was Mary Giancoli, the manager.

Except for oil changes, none of the work was scheduled. It was all walk-in business. As the sole salaried mechanic, Mr. Montgomery was first in line for any work that came in the door. If he was busy, an hourly worker would be assigned and could clock in. Ms. Giancoli testified that Mr. Cronk could leave if there was no work. She stated that Mr. Montgomery could handle the workload if the hourly employees were not available. Mr. Cronk, however, testified that if he left the premises and was not available for work assignments as they came he would be fired. Mr. Cronk testified that some of his waiting time was spent cleaning the premises. Ms. Giancoli admitted that Mr. Cronk cleaned periodically when he was off the clock, but she did not ask him to do so.

At the Bucky's location where Mr. Cronk worked, Ms. Giancoli testified that the hourly workers had staggered shifts. She did not challenge Mr. Cronk's testimony that his shift began at 8:00 a.m. Despite that start time, the payroll records corroborate Mr. Cronk's testimony that there were many days when he did not clock in at 8:00 a.m. because as he testified, there was no work for him.

The controlling statute regarding wage determination under the Washington Industrial Insurance Act is RCW 51.08.178. Subsection 1 of the statute provides the method to determine Mr. Cronk's monthly wage at the time of injury. For wages not fixed by the month, the monthly wage is calculated by multiplying the daily wage the worker was receiving by a multiplier depending on the number of days the worker was normally employed each week. Because Mr. Cronk worked 5 days a week, the multiplier used is 22. The statute also states that the daily wage shall be the hourly wage multiplied by the number of hours the worker is "normally employed." There is no definition of hours "normally employed" in the Industrial Insurance Act. Nor have we been able to find any case law interpreting the hours "normally employed" language of RCW 51.08.178(1). We must determine is whether uncompensated "wait time" is included in the definition of hours "normally employed" in the calculation of the daily wage under RCW 51.08.178(1).

Appellate cases in Washington have addressed "wait time" in employment situations. These cases provide guidance on how to address "wait time" in wage calculation under the Industrial Insurance Act.

In *Superior Asphalt & Concrete Co. v Labor & Industries*, 112 Wn. App. 291 (2002) two employers challenged the Department of Labor and Industries citation for a violation of the prevailing wage act. The employers hired drivers to pick up and deliver road material to public works job sites. The employers paid prevailing wages to the drivers for wait time and delivery time but did not pay the prevailing wage for loading time and driving time. In determining that the drivers were entitled to prevailing wages for the drive time and the loading time, the court addressed the validity of the Department rules describing the prevailing wage act, WAC 296-127-018. The rule stated that the prevailing wage act pertained to delivery, spreading, and waiting time. The court found the rule a valid exercise of the Department's rule making authority and applied the language of the rule in deciding the issue.

In *Martini v. Employment Security Department,* 98 Wn App 791 (2000) a worker was denied unemployment compensation benefits because he quit his job. The worker was a driver for the employer. The worker established that he was not compensated for 30 minutes of wait time on over 90 percent of his trips and was not compensated for time spent cleaning, fueling, inspecting, and maintaining his vehicle. The court found that the facts presented a clear violation of the Washington Minimum Wage Act because the worker was not guaranteed a minimum wage and the employer knew of the facts giving rise to the violation. The court held that employer's violation of the minimum wage act was reasonably related to the termination of employment and the worker was entitled to unemployment compensation benefits.

In *Lindell v. General Electric Co*. 44 Wn.2d 386 (1954) a group of guards at the Hanford nuclear plant in eastern Washington brought an action against the employer for unpaid wages for a 30-minute lunch period. The action was brought under the federal Fair Labor Standards Act. The question before the court was whether the 30-minute lunch period was compensable work time. The court noted the "highly slanted" testimony on both sides regarding the activities of the workers during the lunch period but found that the guards were in a different position than guards and patrolmen in ordinary plants. Based on the facts, the court found that during the lunch period the guards were not free agents and under no restrictions. They were subject to being called out on a moment's notice. The court stated that the guards "were not waiting to be engaged, they had been

engaged to wait." The court held that the 30-minute lunch period was predominately for the employer's benefit and the guards were entitled to compensation for the lunch period.

These court decisions provide a basis for our analysis of the "hours the worker is normally employed" language of RCW 51.08.178(1). In *Superior Asphalt* the court looked to the Department's rule defining work under the prevailing wage statute. The court found the rule a valid exercise of the Departments authority and applied the definitions in deciding what work activity was within the definition of the prevailing wage statute. In *Martini* the court found that uncompensated wait time was part of the hours worked by the worker and that failure to compensate the worker for those hours violated the minimum wage act. In *Lindell* the court determined that the facts supported a finding that the worker had to remain on the employer's premises, was subject to being called out on a moment's notice, and that the time spent waiting was predominantly for the employer's benefit.

The Department has published rules under the authority of Chapter 49.12 RCW, Industrial Welfare which address the definition of hours worked. WAC 296-126-002(8) defines "Hours worked" as "all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place."

Our review of the case law regarding "wait time" and the definition of hours worked contained in WAC 296-126-002 convince us that the time an employer requires an employee to remain on the premises waiting for work assignments is compensable as hours worked. If Mr. Cronk was required by his employer to remain on the premise for work assignment he would be entitled to compensation for the wait time hours. It logically follows that if he would be entitled to compensation for the wait time hours, these hours would be included in the calculation of his wage under RCW 51.08.178(1). Wait time hours where the worker must remain on the employer's premises waiting for work assignments is within the meaning of "hours the worker is normally employed" as used in RCW 51.08.178(1). We turn now to facts before us.

We note the "highly slanted" testimony on both sides regarding the "wait time" hours. But we realize Bucky's business model depends on the hourly workers being available to take the work the salaried workers cannot handle. If Mr. Montgomery, a salaried worker, could perform all the work by himself, as Ms Giancoli testified, there would be no need to hire hourly mechanics like Mr. Cronk, nor would he have earned the money he did, as shown by the employer's payroll records. There would also be no need to hire any of the other hourly mechanics at the other Bucky's locations if the salaried mechanics could handle the workload. The hourly mechanics are a

necessary part of the enterprise as evidenced by the fact that they were each paid for up to 32 hours of work a week, according to Mr. Maddox.

Exhibit No. 1, Mr. Cronk's timesheet, covers 100 days. On at least 58 days, the time between clock out and clock back in was 90 minutes or less. Ms. Giancoli's contention that workers could leave during those short periods off the clock is not credible. We are not persuaded that Mr. Montgomery could have performed all of the work in a day if all the hourly workers were free to leave. Ms. Giancoli admitted Mr. Cronk did unpaid clean-up work when he was clocked out. We accept Mr. Cronk's testimony he would be fired if he left the premises during his work shift and was not available to take work assignments as they came in. We find on this record that Bucky's required Mr. Cronk to be on duty on Bucky's premises waiting for work assignments during his shift. If he left, he did so risking termination of his employment. Like the guards in *Lindell v. General Electric Co*., Mr. Cronk was subject to being called to a work assignment on a moment's notice. As the guards were engaged to wait, so was Mr. Cronk. The time Mr. Cronk spent waiting on the employer's premises benefitted the employer. The Department must include "wait time" hours in the calculation of Mr. Cronk's daily wage under RCW 51.08.178(1).

FINDINGS OF FACT

1. On July 2, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Wesley F. Cronk sustained an industrial injury to his back on January 6, 2014, during the course of his employment with Midway Muffler and Radiator, Inc., (Bucky's).

3. On January 6, 2014, Mr. Cronk was single, had no children, and was normally employed five days a week with an hourly wage of $16 an hour.

4. Mr. Cronk was required by his employer to start his shift at 8:00 a.m. and remain on the premises for the duration of his shift. Mr. Cronk was prohibited from clocking in at the beginning of his shift unless work was available for him. Mr. Cronk could only clock in prior to working on assigned work and had to clock out when the work assignment was complete.

5. Mr. Cronk was not compensated for the "wait time" between work assignments but had to remain on the premises during the "wait time." The requirement that Mr. Cronk remain on the premises for the duration of his shift while not being compensated benefitted his employer. Mr. Cronk was subject to being called to a work assignment on a moment's notice.

6. The Department did not use the time Mr. Cronk had to wait for work assignments during his shift in determining how many hours Mr. Cronk was normally employed when calculating his daily wage.

CONCLUSIONS OF LAW

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

2. The Department incorrectly calculated the wages Mr. Cronk was receiving at the time of injury under RCW 51.08.178(1)(e).

3. The time Mr. Cronk had to wait for a work assignment on the employer's premises during his work shift constitutes hours normally employed for determining his daily wage under RCW 51.08.178(1).

4. In Docket No. 14 14972, the March 25, 2014 Department order is incorrect and is reversed. This matter is remanded to the Department to recalculate Mr. Cronk's wage at the time of injury to include wait time hours Mr. Cronk had to remain on the employer's premises in determining Mr. Cronk's daily wage and recalculate Mr. Cronk's time-loss compensation benefits for the period March 12, 2014, through March 25, 2014.

5. In Docket No. 14 14973, the March 26, 2014 Department order is incorrect and is reversed. This matter is remanded to the Department to recalculate Mr. Cronk's wage at the time of injury to include wait time hours Mr. Cronk had to remain on the employer's premise in determining Mr. Cronk's daily wage and recalculate Mr. Cronk's time-loss compensation benefits for the period February 25, 2014, through March 11, 2014.

6. In Docket No. 14 14974, the March 28, 2014 Department order is incorrect and is reversed. This matter is remanded to the Department to recalculate Mr. Cronk's wage at the time of injury to include wait time hours Mr. Cronk had to remain on the employer's premise in determining Mr. Cronk's daily wage and to redetermine the overpayment of time-loss compensation benefits, if any.

Dated: August 10, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEDY Chairperson

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