

Parsons, Jeremy

WAGES (RCW 51.08.178)

*Work that fluctuates throughout the year

While the asphalt worker's hours varied throughout the year, RCW 51.08.178(1) should be used to calculate his wage at the time of injury. RCW 51.08.178(1) does not state specifically how the Department is to calculate the number of hours a worker is normally employed, and the employer hasn't shown that the result using a 6-month period to determine hours is significantly different from using a 12-month period. The Department's method (using a 6-month period to avoid penalizing the worker for time he was on strike) was reasonable.*In re Jeremy Parsons*, BIIA Dec., 19 22500 (2021)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: JEREMY T. PARSONS

DOCKET NO. 19 22500

CLAIM NO. SZ-85884

DECISION AND ORDER

Jeremy Parsons was injured while working for Lakeside Industries, Inc. The Department of Labor and Industries allowed his workers' compensation claim, but Lakeside appealed the Department's calculation of Mr. Parsons' monthly wage for time-loss compensation purposes because the amount was based upon a six-month period that did not include the company's slowest times. Lakeside failed to show that using the shorter period to calculate Mr. Parsons' wages was unreasonable. The order on appeal is **AFFIRMED**.

DISCUSSION

Lakeside Industries is an asphalt paving company that does highway construction. On October 31, 2018, Jeremy Parsons was working for Lakeside as a mechanic oiler at the company's asphalt plant when he injured his right hand and lost his pinky finger and the ends of most of the other fingers. The dispute in this appeal is over the correct manner in which to calculate Mr. Parsons' wages at the time of injury.

The highway paving industry in Washington has slow periods and busy periods, with work usually slow from November to mid-February when the weather is wet, increasing gradually to a peak from mid-June to July. But October may be busy, too, because Washington State and the various municipalities responsible for road work try to finish major jobs before the weather typically is cold and rainy. Most paving work, Mr. Parsons said, stops from the end of November until February.

RCW 51.08.178(1) provides that an injured worker's compensation during a period of disability is based upon the monthly wages that the worker was receiving from all employments at the time of injury. But if the wages are not fixed each month, the monthly wages are determined by multiplying the worker's daily wage by a factor that depends upon the number of days normally worked per week:

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;

- 1 (f) By twenty-six, if the worker was normally employed six days a week;
2 (g) By thirty, if the worker was normally employed seven days a week.
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4 . . . The daily wage shall be the hourly wage multiplied by the number of hours the
5 worker is normally employed. The number of hours the worker is normally employed
6 shall be determined by the department in a fair and reasonable manner, which may
7 include averaging the number of hours worked per day.
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9 Mr. Parsons' work hours were not fixed. According to Lynne Kuntz, a Department
10 self-insurance program compliance representative, the Department typically uses a three-month
11 period to determine the average number of hours a worker worked, but because Mr. Parsons was
12 away from work as a result of a strike at the end of August and beginning of September 2018, the
13 Department used a six-month period between February 18, 2018, and August 18, 2018, to estimate
14 the number of hours he worked each day and the number he averaged each month.
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18 Mr. Parsons' rate of pay varied, and the Department used the rate of \$43.27 an hour because
19 he was not paid any rates higher than that when working the minimum eight hours. The Department
20 determined that Mr. Parsons worked an average of 191.75 hours a month, and Lakeside contributed
21 \$7.82 an hour for his health care coverage.
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24 The Department and Lakeside agree that Mr. Parsons worked an average of five days a week
25 each month. But Lakeside argues that the Department's determination of the number of hours
26 Mr. Parsons was normally employed was unfair and unreasonable because Mr. Parsons has never
27 actually worked as much in a year as the Department found was normal. Lakeside asserts that,
28 because Mr. Parsons' hours varied so much throughout the year, the Department should have used
29 the 12-month period before Mr. Parsons was injured to calculate his wage for purposes of time-loss
30 compensation. Lakeside further asserts that the Department compounded its error by multiplying the
31 average number of hours Mr. Parsons worked each day by the average number of days he worked
32 a week, then multiplying that number by 22.
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38 Our hearings judge relied, in part, upon our decision in *In re Roy Hall*,¹ in concluding that
39 RCW 51.08.178(1) allows averaging only to calculate the hours worked per day, not per month. But
40 our hearings judge misperceived Mr. Parsons' argument, which is not the same as what Roy Hall
41 argued, and *Hall* is not controlling.
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¹ BIIA Dec., 07 12838 (2008).

1 Roy Hall was a self-employed carpenter doing business as H & H Construction. He elected
2 to have workers' compensation coverage, and after he was injured, because he was not paid a fixed
3 wage, the Department applied Section 4 of RCW 51.08.178 to calculate his monthly wage. That
4 section provides: "In cases where a wage has not been fixed or cannot be reasonably and fairly
5 determined, the monthly wage shall be computed on the basis of the usual wage paid other
6 employees engaged in like or similar occupations where the wages are fixed."
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10 Relying upon what Mr. Hall reported to the Internal Revenue Service as H & H Construction's
11 net profit for the year on its Schedule C (Form 1040) Profit and Loss Business (Sole Proprietorship),
12 the Department calculated his monthly wage by dividing his net profit by 12. Mr. Hall appealed, and
13 like the Department, the hearings judge relied upon the company's Schedule C statement of profit
14 and loss to determine his monthly wage. But, essentially, the hearings judge used the company's
15 gross receipts, instead of its net profit, to calculate his wage. Both Mr. Hall and the Department
16 petitioned for review, and the Board framed the issue as whether the Department's method for
17 calculating Mr. Hall's monthly wage at the time of injury satisfied RCW 51.08.178.
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22 The Board criticized the Department's and the hearing judge's use of the company's Schedule
23 C as the basis for computing Mr. Hall's wage, as well as the Department's use of averaging under
24 Section 4 of RCW 51.08.178. The Board held that Section 4 does not permit the Department to
25 devise its own method for calculating the worker's monthly wage when the wage is not fixed. Rather,
26 that section requires the wage to be computed on the basis of the usual wage paid to employees in
27 similar occupations where the wages are fixed.²
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31 But RCW 51.08.178(1) is the default method for determining monthly wage at the time of injury.
32 If there is no fixed monthly wage, the Department first determines the worker's daily wage because
33 a worker's monthly wage is calculated by multiplying the daily wage by 5 if the worker normally was
34 employed 1 day per week, by 9 if normally employed 2 days per week, and, if normally employed 5
35 days per week, like Mr. Parsons, by 22.³ RCW 51.08.178(1) allows averaging to determine the
36 number of hours worked each day, as follows: "The daily wage shall be the hourly wage multiplied
37 by the number of hours the worker is normally employed. The number of hours the worker is normally
38 employed shall be determined by the department in a fair and reasonable manner, which may include
39 averaging the number of hours worked per day."
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46 ² *In re Roy Hall*, BIIA Dec., 07 12838 (2008).

47 ³ RCW 51.08.178(1).

1 The Department determined Mr. Parsons' daily wage by averaging the number of hours he
2 worked per day over the six-month period from February 18, 2018, to August 18, 2018.
3 RCW 51.08.178(1), however, does not prohibit calculating a daily wage by averaging the number of
4 hours worked per day over a one-year period. The use of either period is allowed, and may be fair
5 and reasonable, depending upon the circumstances, as the Department's witness, Ms. Kuntz
6 testified.
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10 The Department asserts that its ultimate goal is to find a calculation that is fair and reasonable.
11 For that reason, the Department used a period that did not include the time when Mr. Parsons was
12 on strike. Ms. Kuntz asserted that the Department was worried that using a 12-month period to
13 calculate Mr. Parsons' wage could result in a wage lower than what he was actually earning at the
14 time of injury, but her explanation made little sense: "Because the further out you go, the more it
15 doesn't necessarily represent the wages at the time of injury because there's a lot of—of unbroken
16 pay periods." Even if she meant to say there are a lot of periods when Mr. Parsons was not working,
17 her answer makes little sense.
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22 Lakeside argues that, considering the significant fluctuation in the number of hours
23 Mr. Parsons worked throughout the year, determining his daily wage based upon an average that did
24 not include Lakeside's slowest times of the year was unreasonable. But using the 12-month period
25 proposed by Lakeside results in an average of only .52 hours more per month than what the
26 Department determined was Mr. Parsons' average. Lakeside's records help to explain why the
27 numbers are nearly identical. They show that Mr. Parsons' work hours fluctuated between November
28 2017 and October 2018, in part in relation to the weather, but also for other reasons, including medical
29 care and the strike.
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34 Washington's workers' compensation system is "to be designed to focus on achieving the best
35 outcomes for injured workers."⁴ The Department chose a six-month period, in part, to avoid
36 penalizing Mr. Parsons for the time he was on strike. Considering that RCW 51.08.178(1) does not
37 state specifically how the Department is to calculate the number of hours a worker normally is
38 employed, and Lakeside has not shown that the result using a 6-month period to determine
39 Mr. Parsons' hours is significantly different from using a 12-month period, the Department's method
40 was reasonable. The order on appeal is affirmed.
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⁴ RCW 51.04.062.

DECISION

In Docket No. 19 22500, the employer, Lakeside Industries, Inc., filed an appeal with the Board of Industrial Insurance Appeals on November 13, 2019, from an order of the Department of Labor and Industries dated September 18, 2019. In this order, the Department affirmed an order dated July 18, 2019, which established Mr. Parsons' gross monthly wages at the time of injury. This order is correct, and it is affirmed.

FINDINGS OF FACT

1. On February 13, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On October 31, 2018, Jeremy Parsons injured his right hand while working as a mechanic oiler for Lakeside Industries, Inc., a highway paving company, causing him to lose the pinky finger and most of the other fingers on his right hand.
3. On October 31, 2018, Mr. Parsons' monthly wages were not fixed. Between November 1, 2018, and October 31, 2019, the number of hours that Mr. Parsons worked each month fluctuated, depending upon the weather, because paving cannot be done when the weather is wet and cold. He worked as few as 80 hours in December 2017 and as many as 248 hours in October 2018.
4. On the day he was injured, Mr. Parsons was married and had three children.
5. Mr. Parsons' hourly rate of pay varied, and the Department used the rate of \$43.27 an hour to calculate his daily wage because Mr. Parsons was not paid any rates higher than that when he worked a minimum of eight hours.
6. In addition to an hourly wage, Lakeside paid Mr. Parsons health benefits at a rate of \$7.82 an hour.
7. In calculating his daily wage to determine his monthly wage, the Department used a period from February 18, 2018, to August 18, 2018, to determine the average number of hours Mr. Parsons worked each day. The Department concluded that Mr. Parsons worked an average of 8.71590909 hours a day, and he worked an average of five days a week. Multiplying the hours he worked per day by 22, as provided in RCW 51.08.178(1), resulted in a monthly wage of \$8,289.35.

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. The Department determined the number of hours that Mr. Parsons was normally employed when he was injured on October 31, 2018, in a fair and reasonable manner under RCW 51.08.178(1).
3. The Department order dated September 18, 2019, is correct and is affirmed.

Dated: July 16, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson



ISABEL A. M. COLE, Member

**Addendum to Decision and Order
In re Jeremy T. Parsons
Docket No. 19 22500
Claim No. SZ-85884**

Appearances

Claimant, Jeremy T. Parsons, Self-Represented

Self-Insured Employer, Lakeside Industries, Inc., by Hall & Miller, P.S., per Ryan S. Miller

Department of Labor and Industries, by Office of the Attorney General, per Daniel J. Hsieh

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on February 10, 2021, in which the industrial appeals judge affirmed the Department order dated September 18, 2019. The Department filed a timely response to the Petition for Review.

Evidentiary Rulings

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