Johnson, Teresa

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

RCW 51.08.178 does not allow the Department to calculate a seasonal worker's rate of time-loss compensation on the basis of the worker's "average monthly wage" for the year prior to the date the injury occurred. The statute requires that the time-loss compensation rate be based upon a monthly wage, which is the product of the daily wage at the time of the injury and the statutory multiplier associated with the number of days per week the worker is normally employed. The only "averaging" possibly permitted by statute would relate to the number of hours per day or days per week which the worker was "normally" employed. **….*In re Teresa Johnson*, BIIA Dec., 85 3229 (1987)** [special concurrence] [*Editor's Not*e: See later statutory amendment of RCW 51.08.178, Laws of 1988, ch. 161, § 12, p. 699.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: TERESA M. JOHNSON	**DOCKET NO. 853229**
CLAIM NO. J-395594	**DECISION AND ORDER**

APPEARANCES:

Claimant, Teresa M. Johnson, by
Law Offices of David B. Vail & Associates, per
R. Eugene Vernon

Employer, Industrial Forestry Association, by
Rolland & O'Malley, per
Thomas O'Malley and
Bobbie Hanna, Claims Manager

Amicus Curiae, James L. Groves Company, by
William L. Hebeler, General Counsel

Department of Labor and Industries, by
The Attorney General, per
Christa L. Thompson, Assistant

This is an appeal filed by the claimant on December 30, 1985 from an order of the Department of Labor and Industries dated November 19, 1985 which affirmed a prior Department order dated August 13, 1985 which recalculated the rate of time-loss compensation and determined there was an overpayment to be deducted from future awards in the sum of $1,271.52. Reversed and remanded.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petition for Review filed by the employer and the Department of Labor and Industries to a Proposed Decision and Order issued on January 22, 1987 in which the

order of the Department dated November 19, 1985 was reversed and the claim remanded to the Department with direction to pay time-loss compensation to the claimant based upon her hourly wage and hours worked at the time of her industrial injury.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. Subsequent to the issuance of our Order Granting Petition for Review a Motion for Permission to file Amicus Curiae Brief was filed by the James L. Groves Company. We find that no party will be prejudiced by our consideration of the Brief of Amicus Curiae and that Motion is therefore granted.

The issues presented on this appeal are (1) whether the principle of res judicata precludes the Department from attempting to readjust the rate of time-loss compensation when the original rate of compensation had been established by an order which had become final and (2) whether the Department may calculate a worker's "monthly wage" (as used in determining the rate of time-loss compensation)by taking a monthly average of the worker's income earned in the year immediately prior to the industrial injury.

The Proposed Decision Order adequately sets forth the evidence presented by the parties, but for our purposes a brief recitation of the material facts is in order. Teresa M. Johnson was injured on March 7, 1984 while in the course of her employment with Industrial Forestry Association, a company engaged in the business of growing tree seedlings for reforestation. The company operates mainly from December through May, planting the seedling crop in the spring and lifting and packing

the crop during the winter. Because of this growing cycle, Industrial Forestry Association has layoff periods during the summer and early fall when only a few employees are retained to do irrigation, weeding or frost control.

Teresa Johnson began working for Industrial Forestry Association in 1978. In 1982 she became an equipment operator, which involves driving a tractor and hauling trees in from the field. As an equipment operator she earned $8.38 per hour. However, she was often required to work as a nursery worker, for which she was paid only $7.51 an hour. An average day might have required her to work a few hours as an equipment operator and a few hours as a nursery worker. Her rate of pay would depend upon the duties she was performing at any given time. However, there were many days she would work the full day as an equipment operator, and other, but fewer, days that she would work the full day as a nursery worker. On the date of her injury she was employed as an equipment operator and had performed full-time in that capacity for almost six weeks prior to her injury.

Due to the seasonal nature of her employment, Ms. Johnson had regular layoff periods generally lasting about three months per year. She never worked a full 12 months during any year she was employed by Industrial Forestry Association and more often than not she did not work September, October, and November. Layoff periods were not entirely predictable, however, and would vary to some degree from year to year.

A review of Ms. Johnson's earnings for the year prior to her March 7, 1984 industrial injury also reveals that there were periods involving less than a full layoff when she did not work 40 hours per week. These

appear to have been more a result of her working less than five days per week rather than less than eight hours per day. At the time of her injury, however,she was working Monday through Friday on a shift which was generally from 7:45 a.m. to 4:15 p.m., or 8:00 a.m. to 4:30 p.m. For almost six weeks prior to her injury she had worked on such a full-time basis.

The Department originally established the rate of time-loss compensation based upon information that Ms. Johnson was working eight hours per day, five days per week, at the rate of $8.38 per hour. On August 13, 1985 the Department issued an order reducing the compensation rate based upon a computation of an "average monthly wage". The Department arrived at this "average monthly wage" by taking a monthly average of Ms. Johnson's gross earnings for the 12 months prior to the date of her March 7, 1984 injury.

It is Ms. Johnson's contention that the Department is precluded from now attempting to recalculate the rate of compensation on an "average monthly wage" method since orders paying time-loss compensation at the original rate were not timely set aside by the Department, or appealed by the employer. Had the issue of the basis of the time-loss compensation rate been squarely before the Department in any of the orders issued prior to August 1985, there might have been some merit to Ms. Johnson's contention. However, no previous order of the Department ever detailed or explained the underlying basis for the time-loss rate. Further, the Department took its action to revise the time-loss rate based on new information indicating the intermittent and seasonal nature of Ms.

Johnson's employment. We also believe that the overpayment statute, RCW 51.32.240(1), allows the Department to revise the rate of time-loss compensation and establish an overpayment if one is found to exist. That statute provides:

> "Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by fraud, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived."

Our Supreme Court has specifically upheld the validity of RCW 51.32.240(1) and has allowed the recoupment of workers' compensation benefits which were subsequently determined to have been incorrectly paid. Rhodes v. Department of Labor and Industries, 103 Wn.2d 895 (1985). To hold that the principle of res judicata prevents the Department from correcting an inaccurate rate of compensation if not corrected within sixty days of the date of an order paying time-loss compensation would, we feel, render the overpayment statute meaningless. RCW 51.32.240(1) expressly permits the recoupment of overpayments made "within one year" of the making of the payment. This clearly contemplates an underlying authority to revise an order of payment which would otherwise be considered final 60 days after the date it was communicated to a party.

In any event, while we do not believe the Department is barred from correcting a mistake in the calculation of the rate of time-loss

compensation, we must conclude that the Department's recalculation in the instant case was in error.

A worker's time-loss compensation rate is calculated according to the provisions of RCW 51.08.178. That statute provides:

> (1) 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:
> . . .
> (e) By twenty-two, if the worker was normally employed five days a week;
> . . .
> The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer, but shall not include overtime pay, tips, or gratuities. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed.
> . . . (emphasis added)

It is clear that the "monthly wages" calculation required by this statute is quite straightforward. There is no dispute that at the time of injury Ms. Johnson was earning $8.38 per hour. Furthermore, it also seems beyond dispute that, whenever employed, Ms. Johnson was normally employed eight hours per day. Her daily wage at the time of the injury is, according to RCW 51.08.178(1), simply the product of her hourly wage at the time of injury and the hours per day she was normally employed. Her monthly wage is simply a product of her daily wage and the statutory multiplier associated with the number of days per week she was normally employed. Clearly, at the time of her injury, Ms. Johnson was normally employed five days per week.

No statute, or regulation promulgated pursuant to statutory authority, permits deviation from the calculation method set forth in RCW 51.08.178. The "average monthly wage" procedure here espoused by the Department is a method without any support in law. Any argument in favor of such a method must be presented to the Legislature, and neither the Department nor this Board has authority to "enact" such a method.

To our mind, the only "averaging" possibly permitted by RCW 51.08.178 would be that which is necessary to determine how many days per week or hours per day a worker is "normally" employed. The Department has made no attempt to recalculate Ms. Johnson's wages according to any such criteria. Furthermore, the evidence indicates that Ms. Johnson had been employed five days per week and eight hours per day almost six weeks prior to the date of her injury. We must, therefore, conclude that at the time of the injury Ms. Johnson was normally employed five days per week and eight hours per day, and at a wage of $8.38 per hour.

After consideration of the Proposed Decision and Order and the Petitions for Review filed thereto and a careful review of the entire record before us, including the briefs of the parties and of Amicus Curiae and the Claimant's Response to Petition for Review, we are persuaded that the order of the Department is incorrect and should be reversed.

FINDINGS OF FACT

1. On March 23, 1984 an accident report was filed alleging an industrial injury occurring to the claimant on March 7, 1984 while in the course of employment with Industrial Forestry Association. On April 13, 1984 a Department order was issued whereby time-loss compensation was paid on an interlocutory basis. On April 25, 1984 a Department order was issued which corrected and superseded a prior Department order and paid time-loss compensation on a determinative basis.

On September 12, 1984 a Department order was issued whereby time-loss compensation was terminated as paid and no permanent partial disability was paid and the claim was closed.

On March 18, 1985 an application to reopen for aggravation of condition was filed on behalf of the claimant. On April 9, 1985 the Department issued an order reopening the claim effective February 27, 1985 for authorized treatment and actions as indicated. On June 27, 1985 a Department order was issued to reflect an adjustment of the compensation rate effective July 1, 1985, the new rate being $1,048.92. On August 13, 1985 the Department issued an order stating the employer has supplied complete wage information to establish an average monthly wage of $575.66 and that repayment of time-loss compensation for the period of May 27, 1985 through July 26, 1985 at a correct rate in the sum of $805.07 less time-loss compensation as previously paid for the same period in the sum of $2,076.59, the amount of overpayment being deducted from future awards in the sum of $1,271.52. On August 14, 1985 the Department issued a determinative order paying time-loss from July 27, 1985 through August 10, 1985 less deduction for overpayment. On September 17, 1985 the Department issued an order paying time-loss compensation on a determinative basis. On September 23, 1985 the claimant filed a protest and request for reconsideration with the Department from the August 13, 1985 order. On November 6, 1985 the claimant filed a protest and request for reconsideration from the September 17, 1985 Department order. On November 19, 1985 the Department issued an order paying time-loss compensation on a determinative basis with deductions for overpayment. On November 19, 1985 the Department issued an order affirming the terms of the August 13, 1985 order. On December 30, 1985 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals from the November 19, 1985 order which reaffirmed the terms of the August 13, 1985 order. That appeal was assigned Docket No. 85 3229 by a Board order issued on January 28, 1986 which granted the appeal and ordered hearings be held on the issues raised therein.

2.On March 7, 1984 the claimant, Teresa Johnson, was employed at Industrial Forestry Association as an equipment operator.

3.On March 7, 1984 the claimant, while in the course of her employment with Industrial Forestry

Association, was injured. That claim was accepted and benefits provided.

4.At the time of her injury the claimant was earning $8.38 per hour as an equipment operator.

5.At the time of her injury and for several weeks prior thereto the claimant was working Monday through Friday from 8:00 a.m. to 4:30 p.m. or 7:45 a.m. to 4:15 p.m.

CONCLUSIONS OF LAW

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

2.The Department order dated November 19, 1985 which affirmed the terms of the order of August 13, 1985 which recalculated the claimant's time-loss compensation based on an "average monthly wage" and demanded reimbursement in the sum of $1,271.52 is incorrect and is reversed and the claim is remanded to the Department with directions to pay time-loss compensation to the claimant based upon her hourly wage and hours per day and days per week worked at the time of her industrial injury, in accord with the mandate of RCW 51.08.178(1).

It is so ORDERED.

Dated this 26th day of August, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/_____
SARA T. HARMON Chairperson

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

/S/_____
PHILLIP T. BORK Member

SPECIAL CONCURRING STATEMENT

I have signed the foregoing Decision and Order in view of the requirements of RCW 51.08.178, which obviously do not permit any calculation of an "average" monthly wage based on annualizing the wages of a part-time, intermittent, or seasonal worker. In this respect, Washington is distinctly in a small minority of jurisdictions. See generally Larson's Workers' Compensation Law, Vol. 2, Secs. 60.00, 60.11(a), and 60.22(a).

> I am very sympathetic to the position of the Department and the employer that Ms. Johnson is able to receive monthly time-loss compensation substantially in excess of the actual average monthly wage she had been receiving for a number of years and would likely continue to be receiving. This does not appear in accord with the basic principle, as expressed in Larson's treatise (Sec. 60.00), that:DPW2@@. ...Since the entire objective is to arrive at as fair an estimate as possible of claimant's future earning capacity, a claimant who has made only part-time earnings should have his wage basis figured on part-time wages only, if the employment itself or his relation to it is inherently a part-time one and likely to remain so; otherwise his earnings should be converted to a full-time basis..." (emphasis added)

The averaging method here attempted by the Department appears to achieve this fairness. However, it has no statutory support in our present law, and I accordingly concur in our decision to reverse it.

Dated this 26th day of August, 1987.

/S/_____
PHILLIP T. BORK, Member