# Lomeli, Alfredo

## TIME-LOSS COMPENSATION (RCW 51.32.090)

**Seasonal employment**

A worker, whose work transcends the seasons and is not defined by the seasons, cannot have such work classified as exclusively seasonal in nature. **….*In re Alfredo Lomeli*, BIIA Dec., 90 4156 (1992)**

**Wages – Intermittent/seasonal, full-time, or other usual wages paid others (RCW 51.08.178(1), (2), or (4))**

Factors to determine whether a worker is a seasonal worker within the meaning of RCW 51.08.178(2) include the type of work performed, the worker's relationship to the work as evidenced by the employment situation at the time of injury and the parties' intent. Thus, a worker who engaged in general farm labor and whose work history was essentially full time and who intended to continue full time employment is a full time employee entitled to wage calculation under RCW 51.08.178(1). **….*In re Alfredo Lomeli*, BIIA Dec., 90 4156 (1992)**

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

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| **IN RE: ALFREDO F. LOMELI** | ) | **DOCKET NO. 90 4156** |
| | ) | |
| **CLAIM NO. K-541508** | ) | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Alfredo F. Lomeli, by
Jerry M. Makus, Attorney

Employer, Byerley Farms, Inc., by
Richard Byerley, Owner

Department of Labor and Industries, by
Office of the Attorney General, per
Sharon Brown and Cameron Mitchell, Assistants, and Jane Downey, Paralegal

This is an appeal filed by the claimant, Alfredo F. Lomeli, on September 17, 1990 from an order of the Department of Labor and Industries dated September 6, 1990 which determined that the claimant's time-loss compensation was to be based on a gross average wage of $1,837.26, and provided that the claimant was entitled to time-loss compensation for the period October 1, 1988 through June 29, 1990 in the amount of $29,496.49, and further provided that the claimant had been paid time-loss compensation for the above period in the amount of $29,027.88, leaving a balance due to the claimant for time-loss compensation for the above period in the amount of $468.61. **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 a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on July 19, 1991, in which the order of the Department dated September 6, 1990 was reversed and the matter remanded to the Department with instructions to recompute claimant's time-loss compensation in accordance with the provisions of RCW 51.08.178(2) and (3).

The controversy in this matter regarding the computation of Mr. Lomeli's time-loss compensation benefits focuses on the 1988 amendments to RCW 51.08.178. (Laws of 1988, ch. 161, § 12, attached as Exhibit "A" to this Decision and Order). The 1988 amendments made several changes in the method for determining injured workers' monthly wages for purposes of RCW Title 51. Among other things, the statute, as amended, provides that for workers whose employment or relationship to employment is "essentially part-time or intermittent", or whose employment is

"exclusively seasonal in nature", the monthly wage shall be determined by averaging the wages earned over any period of twelve successive calendar months preceding the injury, which "fairly represent the claimant's employment pattern."

The 1988 amendments provide a specific method for determining the monthly wage for seasonal, part-time or intermittent workers. We note that RCW 51.08.178(1), which precedes the 1988 amendments, historically as well as textually, also provides a method for computing a monthly wage for a worker who works one, two, three, four, five, six, or seven days per week. Thus, RCW 51.08.178(1) could arguably be used to determine the monthly wage of a part-time worker. However, we believe the legislature intended the 1988 amendments to provide the basis for determining the nature of the employment. The statute should be read so as to give effect to the purpose of the statute. Newschwander v. Board of Trustees of The Washington State Teachers Retirement System, 94 Wn.2d 701 (1980); Cramer v. Van Parys, 7 Wn. App. 584 (1972). Therefore, as we read the statute, we must first determine, pursuant to RCW 51.08.178(2) (the 1988 amendment), the nature of the worker's employment or his or her relationship to the employment. If the worker's employment or relationship to employment is essentially part-time or intermittent or the employment is exclusively seasonal, then the twelve-month averaging method as set forth in the statute is used to determine the monthly wage. On the other hand, if the worker is not within the scope of RCW 51.08.178(2) as a seasonal, part-time, or intermittent worker, then RCW 51.08.178(1) provides the method for computing the worker's monthly wage.

In the present case three different methods are presented and urged by the parties to compute Mr. Lomeli's monthly wage.

Mr. Lomeli believes RCW 51.08.178(1) applies, and his monthly wage should be computed based on the "wages the worker was receiving from all employment at the time of injury." Mr. Lomeli does not believe he is within the scope of RCW 51.08.178(2) in that he is neither a seasonal, part-time or intermittent worker.

The employer, Byerley Farms, believes the worker's monthly wage should be computed by use of RCW 51.08.178(2) (the 1988 amendment) and Mr. Lomeli should be determined to be either a seasonal, part-time, or intermittent worker. Thus, the employer believes the monthly wage should be calculated by the twelve-month averaging method set forth in RCW 51.08.178(2).

The Department of Labor and Industries urges the use of a method different from any method set forth in the statute. The Department believes it is correct to simply average the wages earned in

the calendar year of the injury in order to determine the worker's monthly wage. Mr. Lomeli earned gross wages of $16,535.30 in 1988. Since Mr. Lomeli was injured in September, the ninth month of 1988, and earned no wages in the remaining months of 1988, the Department divined that his gross wages for the year should be divided by nine, the number of the month in which he was injured. Using this odd reasoning, Mr. Lomeli's average monthly wage for 1988 equals $1,837.26. This is the monthly wage set forth in the Department order dated September 6, 1990, which is the order under appeal. Although not abandoning this rather creative approach to calculating monthly wages, the Department also suggests to us that, perhaps, the statutory method could also be used to determine Mr. Lomeli's monthly wage for purposes of calculating his time-loss compensation under the Industrial Insurance Act!

The Department's method of averaging as used in Mr. Lomeli's case is without statutory authority and appears to circumvent the legislative directive, and therefore cannot be accepted. While the Department has been creative in its search for a method to determine the monthly wage of injured workers, its approach loses all persuasive weight when it chooses to ignore statutory directives, regarding the calculation of monthly wages. We have rejected previous attempts by the Department to circumvent statutory directives regarding calculation of monthly wages, and will also do so here. See In re Teresa M. Johnson, BIIA Dec., 85 3229 (1987), In re Rod E. Carew, BIIA Dec., 87 3313 (1989), In re Dennis G. Roberts, BIIA Dec., 88 0073 (1989), In re Jeanetta A. Stepp, BIIA Dec., 87 2734 (1989), and In re Ubaldo Antunez, BIIA Dec., 88 1852 (1989).

The legitimate question presented in this case, and the issue which is squarely before us, is whether Mr. Lomeli is as seasonal, part-time, or intermittent worker as those terms are used in RCW 51.08.178(2). If Mr. Lomeli is within the definition of those terms, then the statutory twelve-month averaging method must be used to determine his monthly wage. If, on the other hand, Mr. Lomeli is not a seasonal, part-time, or intermittent worker within the meaning of RCW 51.08.178(2), then the method as set forth in RCW 51.08.178(1) must be used to determine his monthly wage.

This case was presented on a stipulation of facts. Our determination of whether Mr. Lomeli's employment status is seasonal, part-time, or intermittent must be based on the facts submitted. The pertinent information we have gleaned from the stipulation of facts which we believe bears upon the determination of his status as a part-time, intermittent or seasonal worker is as follows:

1. Mr. Lomeli worked for the employer, Byerley Farms, from January 1983 through September 1988.

2. For 1983 Mr. Lomeli worked from January to December.

3. For 1984 he worked from January to December.

4. For 1985 he worked March to November.

5. For 1986 he worked March to December.

6. For 1987 he worked March to November.

7. For 1988 he worked March 14, 1988 to September 30, 1988.

8. He was injured on September 30, 1988.

9. Mr. Lomeli was also paid a bonus as a part of his contracted employment. The bonus was in the sum of $1,505.30 and was paid on September 30, 1988.

By reviewing the payroll records which are attached to the stipulation of facts filed by the parties, we have been able to determine the number of hours Mr. Lomeli worked for 1985, 1986, 1987, and 1988. For 1985 Mr. Lomeli worked at least 2,020 hours. For 1986 Mr. Lomeli worked at least 2,117 hours. For 1987 Mr. Lomeli worked at least 2,041 hours. For the 6 1/2 months that Mr. Lomeli worked in 1988 he worked 1,924 hours. The stipulation of facts also indicates that Mr. Lomeli worked 199 days in the 201-day period from March 14 to September 30, 1988, at an average of 9.6 hours per day. His hourly wage was $7.50. Although not specifically set forth in the stipulation of facts, again, our careful review of the payroll records attached to the stipulated facts convinces us that Mr. Lomeli was working as a general farm laborer for Byerley Farms.

The proper analysis to be used to determine whether Mr. Lomeli was an exclusively seasonal worker or a worker who was essentially part-time or intermittent, requires that we look first to the type of work being performed, and secondly, the relationship of the worker to the employment.

In reviewing the facts presented in this record, we find that Mr. Lomeli was engaged in general farm laboring work. In fact, this record establishes that Mr. Lomeli had engaged in general farm laboring work in his first two years for this employer (1983 and 1984) for full twelve-month calendar years. Therefore we believe the type of work being performed by Mr. Lomeli was neither seasonal nor essentially part-time or intermittent by definition. Instead, we believe the type of work Mr. Lomeli performed, based in part upon his lengthy prior work history with this employer, was full-time, general farm laboring work. The nature of the work required by the employer was full-time employment. We next turn to Mr. Lomeli's relationship to this employment.

While the type of work in which a worker engages may be full-time, if the worker then establishes a relationship with that employment, which is either seasonal or essentially part-time or intermittent, then

RCW 51.08.178(2) mandates that the worker's wage be determined by the twelve-month averaging method. Again, based on the record presented to us, we can find no basis to support a finding that Mr. Lomeli has attached himself to his employment with Byerley Farms on a seasonal basis. We believe the term "seasonal", as used in RCW 51.08.178, must be meant to have its common meaning that is, work which is dependent on a season of the year. Black's Law Dictionary at 1212 (5th ed. 1979); Webster's Third New International Dictionary at 2049 (1986); State v. Roadhs, 71 Wn.2d 705 (1967). After 1984 Mr. Lomeli worked from March to November, or from March to December, for the years of 1985, 1986, and 1987, and appears to have been following that pattern for 1988, were it not for the industrial injury. Mr. Lomeli worked most, if not all, of three seasons of the year, spring, summer, and fall, and even worked a portion of the winter season. We believe a worker such as Mr. Lomeli, whose work is such that it transcends the seasons and is clearly not defined by the seasons, cannot have such work classified as "exclusively seasonal in nature."

Nor do we believe that this record establishes that Mr. Lomeli is essentially a part-time or intermittent worker. As we have indicated, there is nothing "essentially part-time" or "intermittent" about general farm laboring work. As previously noted, Mr. Lomeli was able to engage in that type of work, with this particular employer, on a full-time basis in 1983 and 1984. The question still to be answered is whether the periods of employment that Mr. Lomeli worked in 1985, 1986, 1987, and 1988, establish a full-time employment relationship or whether these periods reflect an "essentially part-time" or "intermittent" relationship to his employment.

We note that someone working a "standard" 40 hours a week for 52 weeks in a calendar year would work 2,080 hours. As previously indicated, Mr. Lomeli exceeded that figure for 1986 by working 2,117 hours. In 1985 Mr. Lomeli worked at least 2,020 hours, a mere 60 hours less than a worker working a "standard" 40 hours in 52 weeks. In 1987 Mr. Lomeli worked at least 2,041 hours, or 39 hours less than the "standard" 40 hours in 52 weeks. Furthermore, in just 6 1/2 months of 1988, his hours had reached 1,924, closely approaching the "standard" work hours for a full calendar year. Given the number of hours Mr. Lomeli worked in each year, the type of work he was performing, and his work history with this employer, we are not persuaded that the mere fact he did not work for approximately two to three months in mid-winter is sufficient to classify him as an "essentially part-time" or "intermittent" worker, as those terms are used in RCW 51.08.178(2).

We believe the facts in this record establish that Mr. Lomeli was a full-time worker employed in general farm laboring work for Byerley Farms. Therefore his monthly wage must be determined

pursuant to the provisions of RCW 51.08.178(1). Since he was working seven days a week, RCW 51.08.178(1) requires Mr. Lomeli's daily wage that he "was receiving at the time of the injury" be multiplied by 30 in order to arrive at the monthly wage.

Additionally, since the record indicates Mr. Lomeli received a bonus in the sum of $1,505.30, RCW 51.08.178(3) requires that this bonus be divided by twelve and the resulting figure be included in his monthly wage.

In summary, in appeals involving application of RCW 51.08.178(2) we will look at both the nature of the employment and the workers' relationship to the employment in a combined test to determine the appropriate calculation of temporary total disability benefits (time-loss compensation). Neither inquiry alone will resolve a given set of facts, for it is possible that a worker could have an "essentially part-time" or "intermittent" relationship to a full-time position. Conversely, a worker could have a full-time relationship to an exclusively seasonal employment. In the present appeal it is clear that the employer may have had a varying need for Mr. Lomeli's services but that need was nonetheless full-time. Further, it was Mr. Lomeli's practice to be available to the employment to the extent the employer required. Thus, Mr. Lomeli's employment was full-time in nature and his relationship to the employment was likewise full-time.

The final issue raised by the parties deals with the Department's authority to demand recoupment of any time-loss compensation previously but erroneously paid to Mr. Lomeli. We are uncertain as to whether any overpayment for time-loss compensation will result, once the Department recalculates the monthly wage of the worker as required by RCW 51.08.178(1). However, it appears that both the Department and the claimant agree that in regard to any possible overpayment, the Department is precluded from making a claim for recoupment, pursuant to RCW 51.32.240, more than one year after the date any overpayment was made. We agree that this is the law.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto and a careful review of the entire record before us, we are persuaded that the Department order of September 6, 1990 is in error and that the order should be reversed and the matter remanded to the Department with instructions to compute the claimant, Alfredo F. Lomeli's monthly wage, pursuant to RCW 51.08.178(1) as a full-time worker, employed seven days a week.

## FINDINGS OF FACT

1. On October 14, 1988 an application for benefits was received alleging an industrial injury to the claimant on September 30, 1988. On October 11, 1989 the Department issued an order changing the rate of the time-loss

compensation. On May 21, 1990 claimant filed a protest and request for reconsideration challenging the rate for time-loss compensation. On July 2, 1990 the Department issued an interlocutory order terminating time-loss compensation as of June 29, 1990 and on July 18, 1990 claimant filed a protest and request for reconsideration of that order.

On September 6, 1990 the Department issued an order determining claimant's average monthly wages at $1,837.26. On September 17, 1990, the claimant filed a notice of appeal from the Department's order of September 6, 1990. On October 26, 1990, the Board issued an order granting the appeal, assigned Docket No. 90 4156 and directed further proceedings be held on the issues raised therein.

2. Claimant, Alfredo F. Lomeli, worked as a general farm worker for Byerley Farms, Inc., from January 1983 to September 30, 1988. For the years 1983 and 1984 claimant worked from January to December. For the years 1985, 1986, and 1987 claimant commenced working in March. Claimant worked until November in the years 1985 and 1987 and until December in the year 1986. In 1985 Mr. Lomeli worked 2,020 hours. In 1986 Mr. Lomeli worked 2,117 hours. In 1987 Mr. Lomeli worked 2,041 hours. In 1988 Mr. Lomeli worked from March 14, 1988 to September 30, 1988, and worked 1,924 hours in that period. At the time of his industrial injury Mr. Lomeli was working seven days a week at an average of 9.6 hours per day. Mr. Lomeli was paid $7.50 an hour at the time of the injury.

3. Alfredo F. Lomeli was employed as a general farm worker for Byerley Farms. At the time of his industrial injury, Mr. Lomeli's employment was not exclusively seasonal and Mr. Lomeli worked full-time through at least three different seasons of the year during every year while he was employed with Byerley Farms. At the time of his industrial injury, Mr. Lomeli's relationship to his employment with Byerley Farms was neither seasonal nor essentially part-time or intermittent. Mr. Lomeli was essentially a full-time worker for Byerley Farms at the time of his industrial injury.

4. On September 30, 1988 claimant received a bonus in the amount of $1,505.30 for the period of time January 1, 1988 through September 30, 1988 as part of his contract of hire. The amount of claimant's bonus depended on the profitability of the farm.

## CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. At the time of his industrial injury, the claimant, Alfredo F. Lomeli, was not a worker whose employment was exclusively seasonal in nature or whose current employment or relationship to employment was essentially part-time or intermittent as set forth in RCW 51.08.178(2). Therefore Mr. Lomeli's monthly wages shall not be computed pursuant to RCW 51.08.178(2). Mr. Lomeli's monthly wages shall be determined by

computation methods set forth in RCW 51.08.178(1) as a worker working seven days a week at an average of 9.6 hours per day with an hourly wage of $7.50.

3. In computing the monthly wage, the Department is also required to include the bonus received by Mr. Lomeli in the amount of $1,505.30, pursuant to RCW 51.08.178(3).

4. The Department's order of September 6, 1990 is reversed and this matter is remanded to the Department with instructions to re-compute claimant's monthly wage in accordance with the provisions of RCW 51.08.178(1) and (3), as a full-time worker employed seven days a week and to consider the bonus received by Mr. Lomeli in the sum of $1,505.30.

It is so **ORDERED**.

Dated this 13th day of January, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member