BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CLAUDE A. DAVIS	**)**	**DOCKET NO. 19 15155**
	)	
CLAIM NO. BC-22917	**)**	**DECISION AND ORDER**

Claude Davis injured his back loading and unloading passengers on an amusement ride while working for the employer, Funtastic Rides, for several weeks during the summer of 2018. The Department allowed his claim for an occupational disease and issued a wage rate order pursuant to RCW 51.08.178(2) for seasonal and intermittent employees that used the calendar year 2016 as its basis, asserting that that time period most accurately reflected Mr. Davis's employment pattern and during that year, Mr. Davis earned an average of $1,105.41 a month. Our industrial appeals judge increased Mr. Davis's monthly wage rate to $1,557.25 based on his earnings from September 15, 2017, through September 14, 2018. The Department does not object to that change, but suggests amendments to the Findings of Fact and Conclusions of Law. The claimant argues that time-loss compensation he received due to an injury earlier in the 2018 year should be included in his annual earnings, or that wages that he would have earned were it not for the earlier injury be "imputed" to him. RCW 51.08.178 does not allow the adoption of either of Mr. Davis's proposed alternatives. We affirm our industrial appeals judge's wage rate, but amend the findings and conclusions. The Department order is **REVERSED AND REMANDED** to calculate Mr. Davis's wage rate using the period of September 15, 2017, through September 14, 2018.

DISCUSSION

This appeal raises issues pertinent to the determination of Claude Davis's wage rate. Mr. Davis sustained a back injury while working for employer Funtastic Rides on September 15, 2018, and the Department allowed his claim as an occupational disease with a date of manifestation of October 10, 2018.

The first issue is whether Mr. Davis should be considered a seasonal/intermittent employee while he was working for Funtastic Rides in September, 2018. Mr. Davis and the Department submitted a stipulation in which they agreed that the Department had used RCW 51.08.178(2) for seasonal employees in its wage rate calculation. In a post-hearing brief, Mr. Davis acknowledged that he did not intend to work full-time at Funtastic and that he does not dispute the Department's use of subsection (2) to generate its wage order. However, in his Petition for Review, Mr. Davis says that he did not concede that only subsection (2) would apply to him, and argues that subsection (1) could also be used.

We agree that Mr. Davis's job of loading and unloading passengers on amusement rides in Washington was seasonal. There was no evidence that this job exists in Washington in the winter. However, that is not the end of the inquiry as to whether Mr. Davis was a seasonal employee for wage calculation purposes.

RCW 51.08.178(1) is the "default provision" for determining wage rates and shall be used "unless otherwise provided specifically in the statute concerned."[1] Our supreme court established a two-part test in the *Avundes* case for determining whether subsection (1) or subsection (2) applies.[2] The first part of the test is whether the type of work was essentially seasonal or intermittent. If so, then subsection (2) applies. If the type of work was not intermittent or seasonal, we then look at the second part of the *Avundes* test which engages in a more detailed evaluation of the claimant's relationship to his employment. If either the type of work itself is seasonal/intermittent, or the claimant's relationship to his employment is seasonal/intermittent, then subsection (2) applies.[3] That is the case here because the job itself was seasonal, as Mr. Davis acknowledged. Mr. Davis also acknowledged that he did not contest the use of subsection (2).[4] Even if the type of work was not acknowledged as seasonal, under the second part of the *Avundes* test Mr. Davis has an intermittent connection to the work force. The employment history reflected by Employment Security Department records for January 1, 2010, through December 31, 2019, reflect an intermittent attachment to the workforce.[5] Therefore, Mr. Davis's wage rate should be determined using subsection (2).

Mr. Davis's wages during the year prior to the date of manifestation of his occupational disease in this claim were lessened due to an industrial injury that he suffered in January 2018. His claim was allowed for that injury, and he received time-loss compensation until he was able to return to work in June 2018. Mr. Davis argues that had it not been for the January 2018 injury, he would have been working full-time continuously until the September 2018 injury with Funtastic. Therefore, he says, the wage rate order in this case should include the wages from the previous employer that he **would have earned** had he not been injured there. Alternatively, he argues that the current wage rate order should include his time-loss payments he received from January to June 2018 for the other injury.

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[1] *Watson v. Labor & Indus.,* 133 Wn. App 903, 912 (2006).
[2] *Dept of Labor & Indus. v. Avundes,* 140 Wn.2d 282, 290 (2000); *Watson at* 912.
[3] *Watson* at 913.
[4] Claimant's Post-Hearing Brief and Motion for Directed Verdict, at 5.
[5] Ex. 3.

However, RCW 51.08.178 does not provide for taking into consideration time-loss payments, or the "imputation" of wages that might have been earned. The Washington Court of Appeals has ruled that the wage rate statute does not include unemployment benefits because they are not wages.[6] Washington courts have routinely held that “wages” consist of some form of consideration received from the employer in exchange for performed work."[7] Like the unemployment benefits discussed in *House,* time-loss compensation payments are not a form of consideration received in exchanged for performed work. In its *House* decision, the court said that the statutory language of RCW 51.08.178 "prevails over general policy considerations," and that the question of whether the statute should be amended is one for the Legislature.

Mr. Davis argues that the *House* case is distinguishable from his own because those were unemployment benefits, and these are time-loss payments, and because Margaret House's wage rate was determined under subsection (1), and his case is under subsection (2). We do not find that either of those distinctions make a difference.

Finally, Mr. Davis argues that his motion for a directed verdict was improperly denied when the Department canceled its witnesses. The admitted exhibits in this appeal include Mr. Davis's Employment Security Department records from 2010 through 2019 that document his earnings. With those exhibits as part of the record, the Department decided that it did not need to call its witnesses, which it had the right to do. Mr. Davis's directed verdict motion was properly denied.

We conclude that our industrial appeals judge was correct in using RCW 51.08.178(2) to determine Mr. Davis's wage rate, and that the rate should be $1,557.25 a month because the 12-month period immediately preceding the industrial injury better represents Mr. Davis's employment pattern than the calendar year 2016, as had been used by the Department.

DECISION

In Docket No. 19 15155, the claimant, Claude A. Davis, filed an appeal with the Board of Industrial Insurance Appeals on May 23, 2019, from an order of the Department of Labor and Industries dated April 2, 2019. In this order, the Department set Mr. Davis' wage rate at $1,105.4 a month, using RCW 51.08.178(2). This order is incorrect and is reversed and remanded to the Department to set the wage rate at $1,557.25 a month, using RCW 51.08.178(2), single with no dependents.

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[6] *House v. Dep't of Labor & Indus.,* 199 Wn. App. 1 (2017).
[7] *House, at* 5.

FINDINGS OF FACT

1. On August 19, 2019, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Claude A. Davis suffered an injury on September 15, 2018, while working for Funtastic Rides. The Department allowed his claim as an occupational disease of the lower back, arising naturally and proximately out of the distinctive conditions of his employment, with a date of manifestation of October 10, 2018.

3. On September 15, 2018, Mr. Davis was single with no dependents, earning $12 an hour, and working eight hours a day, five days a week.

4. At the time of his employment with Funtastic Rides, Mr. Davis's relationship with the work force was essentially intermittent.

5. September 15, 2017, through September 14, 2018, is the period of twelve successive calendar months preceding the injury that most fairly represents Mr. Davis's employment pattern. During that period, he earned an average of $1,557.25 a month.

CONCLUSIONS OF LAW

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

2. Mr. Davis's wage rate is properly determined pursuant to RCW 51.08.178(2).

3. The Department order dated April 2, 2019 is reversed, and remanded to the Department to issue an order that establishes the claimant's wage rate based on his average monthly wage of $1,557.25 from September 15, 2017, through September 14, 2018, single with no dependents.

Dated: September 2, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Addendum to Decision and Order
In re Claude A. Davis
Docket No. 19 15155
Claim No. BC-22917

Appearances

Claimant, Claude A. Davis, by Vail, Cross and Associates, per Kevin J. Margado

Employer, Funtastic Rides Co. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Wilson Sosa Padilla

Petitions 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 claimant and Department filed timely Petitions for Review of a Proposed Decision and Order issued on June 1, 2020, in which the industrial appeals judge reversed and remanded the Department order dated April 2, 2019.