

Redd, Jamie

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

When calculating the worker's loss of earning power benefits, the Department must include the average wages earned for seasonal and intermittent work as well as the wage with the employer of injury. Loss of earning power is the difference between earning power at the time of the injury and present wages. It is not the difference between wages at the time of injury and present wages. Loss of earning power benefits take into account earning power from all employments. ...*In re Jamie Redd*, BIA Dec., 12 18516 (2013)

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

1 **IN RE: JAMIE M. REDD**) **DOCKET NO. 12 18516**
2 **CLAIM NO. AM-95288**) **DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Claimant, Jamie M. Redd, by
6 Walthew Law Firm, per
7 Thomas A. Thompson

8 Employer, Department of Corrections Center/Women,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Beverly Norwood Goetz, Assistant

13 The claimant, Jamie M. Redd, filed an appeal with the Board of Industrial Insurance Appeals
14 on August 1, 2012, from an order of the Department of Labor and Industries dated July 23, 2012.
15 In this order, the Department affirmed its March 16, 2012 order in which it demanded repayment of
16 \$5,016.79 on the basis that such payments were induced by willful misrepresentation. The
17 Department order is **REVERSED AND REMANDED**.

18 **DECISION**

19 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
20 review and decision. The Department and claimant filed timely Petitions for Review of a Proposed
21 Decision and Order issued on July 24, 2013, in which the industrial appeals judge reversed and
22 remanded the Department order dated July 23, 2012, and remanded this matter to the Department
23 to issue an order finding Jamie M. Redd did not obtain time-loss compensation benefits through
24 willful misrepresentation and to recalculate Ms. Redd's loss of earning power benefits.

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

27 Although we agree with the industrial appeals judge that the Department failed to
28 demonstrate willful misrepresentation on the part of Ms. Redd, we grant review to address how the
29 Department is to calculate Ms. Redd's loss of earning power benefits for the periods of time she
30 was able to work at secondary employment.

31 On August 20, 2010, Ms. Redd suffered an industrial injury while employed at the
32 Department of Corrections. Her claim was accepted and benefits were provided. While employed

1 at the Department of Corrections (DOC), Ms. Redd had outside employment as an on-call mental
2 health counselor with Transitional Resources. In addition, she worked as an assistant basketball
3 coach at Pacific Lutheran University during basketball season. These jobs were intermittent and
4 seasonal.

5 When Ms. Redd filled out her Application for Benefits she did not include her employment at
6 Transitional Resources (TR) or Pacific Lutheran University (PLU) on the form. When the
7 Department calculated her earnings for the purpose of determining her time-loss compensation
8 benefits, the Department based her time-loss rate on her wages at DOC only. She now contends
9 the Department should have included her wages at PLU and TR as part of her wage calculation.
10 Although the record indicates Ms. Redd was working only at her DOC job in August 2010 at the
11 time of the industrial injury RCW 51.08.178 requires the Department to include Ms. Redd's earnings
12 from coaching and counseling at other times of the year as part of her time-loss compensation
13 benefits rate based on her average monthly earnings from these seasonal and intermittent jobs.
14 The Department did not do this because Ms. Redd failed to include her other employment on her
15 Application for Benefits. We note that Ms. Redd's time-loss compensation benefits rate is not res
16 judicata because the order setting this rate calculates her time-loss rate only as the "wage for the
17 job of injury" rather than for all employment. See *Jemal M. Said*, Dckt No. 10 17965 (October 5,
18 2011). This is true even though subsequent time-loss payment orders may have become final
19 because these orders do not recite the basis for the time-loss amounts being paid.

20 We now turn to the calculation of Ms. Redd's loss of earning power benefits. When
21 Ms. Redd began picking up hours at TR and when she started her coaching work at PLU, she did
22 not report the income to the Department and continued to draw her full time-loss compensation
23 benefits. The Department does not contend Ms. Redd was able to return to work at DOC, but
24 whatever limitation she had did not prevent her from working her other jobs.

25 In December 2011 Ms. Redd and her claims manager had a discussion about loss of earning
26 power benefits at which time Ms. Redd informed the claims manager about her other employment.
27 This prompted an investigation that resulted in the March 16, 2012 order, a "willful
28 misrepresentation" order demanding repayment of \$3,344 plus a 50 percent penalty of \$1,672. The
29 Department did not contend that Ms. Redd was capable of working at the DOC and thus admitted
30 she would have been entitled to loss of earning power benefits at the time. The question presented
31 is how the benefit is to be calculated.

1 Mr. Alan Gruse testified for the Department. He is the Department employee who issued the
2 overpayment order in this case and calculated Ms. Redd's loss of earning power benefit. Mr. Gruse
3 agreed that his figures were incorrect because he did not perform the loss of earning power
4 calculation on a month-by-month basis and the Department stipulated the calculation was incorrect.
5 We agree the calculation is incorrect but for a more fundamental reason. Although we are
6 confused how Mr. Gruse arrives at the basis for his loss of earning power calculation, clearly he did
7 not include Ms. Redd's income from her TR and PLU jobs as part of the basis for determining her
8 earning power.

9 When calculating Ms. Redd's loss of earning power, the Department must include the
10 average PLU and TR wages along with her DOC salary as the basis for her earning power benefit.

11 RCW 51.32.090 provides in relevant part:

12 (3)(a) As soon as recovery is so complete that the present earning power of the
13 worker, at any kind of work, is restored to that existing at the time of the occurrence of
14 the injury, the payments shall cease. If and so long as the present earning power is
15 only partially restored, the payment shall:

16

17 (ii) For claims for injuries occurring on or after May 7, 1993, equal eighty
18 percent of the actual difference between the worker's present wages and earning
19 power at the time of injury, but:

20 RCW 51.32.090 discusses the difference between a worker's present wages and his or her
21 earning power at the time of injury. The calculation required by statute is the differential between
22 earning power at the time of injury and present wages. It is not the difference between wages at
23 the time of injury and present wages. Earning power and not wages at the time of injury is the yard
24 stick for measuring loss of earning power benefits. We note that had it not been for the industrial
25 injury, Ms. Redd would have been earning her DOC wages plus her TR wages plus her PLU wages
26 at various times of the year. It is appropriate that her loss of earning power benefits should take
27 into account her earning power from all her employments.

28 Based on our review of the record of proceedings, the Proposed Decision and Order, and
29 the Petitions for Review filed by the Department and the claimant, we enter the following Findings
30 and Conclusions:

31 **FINDINGS OF FACT**

- 32 1. On September 19, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

1 2. On August 20, 2010, Ms. Redd sustained an injury during the course of
2 her employment with the Department of Corrections when she was
3 assaulted by a prisoner.

4 3. At the time of her August 20, 2010 injury Ms. Redd had no employment
5 outside of the Department of Corrections. During other months of the
6 year in 2010 and 2011 she had seasonal and intermittent employment
7 as an assistant coach for Pacific Lutheran University and as an on-call
8 counselor for Transitional Resources. The amount Ms. Redd earned
9 from those periodic employments varied from month to month.

10 4. In the September 21, 2010 order, the Department determined as
11 follows:

12 The worker's wage is set by taking into account the following:

13 The wage for the job of injury is based on the monthly salary of
14 \$3,875.00.

15 Additional wages for the job of injury include:

16 Health care benefits	\$746.39 per month
17 Tips	None per month
18 Bonuses	None per month
19 Overtime	None per month
20 Housing/Board/Fuel	None per month

21 Worker's total gross wage is \$4,621.39 per month.

22 Workers marital status eligibility on the date of this order is single
23 with no children.

24 5. There was no reference to or question regarding Ms. Redd's other
25 employment in the September 21, 2010 order or the accompanying
26 cover letter.

27 6. Ms. Redd had never applied for or received time-loss compensation
28 benefits under the Industrial Insurance Act before the August 20, 2010
29 industrial injury.

30 7. Notwithstanding circumstantial evidence to the contrary, the Department
31 did not present clear, cogent, and convincing evidence that Ms. Redd
32 specifically intended to wrongfully obtain or induce continued payment
of, time-loss compensation benefits by failing to disclose her periodic
counseling and coaching work in October 2010 and certain months
thereafter.

8. The calculation of Ms. Redd's loss of earning power benefit should have
as a basis Ms. Redd's income from all employment to accurately reflect
her earning power. This is to be based on her DOC wages and the
average monthly income from her seasonal/intermittent employment at
Transitional Resources and Pacific Lutheran University.

1 9. The Department's calculation of the amount of overpayment that
2 resulted from Ms. Redd's failure to inform the Department of her periodic
3 counseling and coaching earnings in October 2010 and certain months
4 thereafter is incorrect.

4 **CONCLUSIONS OF LAW**

- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the
6 parties and subject matter in this appeal.
- 7 2. In the September 21, 2010 order the Department of Labor and
8 Industries determined only the gross monthly wage Ms. Redd was
9 receiving from the Department of Corrections at the time of her injury.
10 Her potential earnings from counseling and coaching at other times of
11 the year were not included as part of this calculation.
- 12 3. Ms. Redd did not induce the Department of Labor and Industries to pay
13 time-loss compensation benefits for the period September 24, 2010,
14 through October 7, 2011, by willful misrepresentation within the meaning
15 of RCW 51.32.240(5).
- 16 4. Within the meaning of RCW 51.32.090, Ms. Redd's earning power for
17 purposes of determining her loss of earning power benefit must include
18 as its basis her wage at the Department of Corrections plus her average
19 monthly income from her employments at Transitional Resources and
20 Pacific Lutheran University.
- 21 5. The Department order dated July 23, 2012, is incorrect and is reversed.
22 This matter is remanded to the Department with direction to issue an
23 order in which it finds that for the period September 24, 2010, through
24 October 7, 2011, Ms. Redd did not obtain or induce continued payment
25 of time-loss compensation benefits through willful misrepresentation.
26 The Department is also directed to recalculate Ms. Redd's loss of
27 earning power benefits to include her average monthly earnings from
28 Transition Resources and Pacific Lutheran University along with her
29 wages from the Department of Corrections as the basis for her earning
30 power at the time of injury, and to take such further action as is required
31 by the facts and the law.

24 Dated: October 25, 2013.

25 BOARD OF INDUSTRIAL INSURANCE APPEALS

26
27 /s/
28 DAVID E. THREEDY Chairperson

29
30 /s/
31 FRANK E. FENNERTY, JR. Member