

FILED
COURT OF APPEALS
DIVISION II

2015 MAR 27 PM 1:12

STATE OF WASHINGTON

BY U
DEPUTY

NO. 47045-4-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA A. WITZEL,

Plaintiff/Appellant.

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES.

Defendant/Respondent.

BRIEF OF APPELLANT

Scott, Kinney, Fjelstad & Mack, PLLC
JAY C. KINNEY, WSBA #14053
Attorneys for Appellant Sandra Witzel
600 University St., Suite 1928
Seattle, Washington 98101
(206) 622-2200

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
A. Issues Pertaining to Assignments of Error.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	3
A. Ms. Witzel's monthly wages should be set using RCW 51.08.178(4).....	3
IV. CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 811, 16 P.3d 583 (2001), citing <i>Dennis v. Dep't of Labor & Indus.</i> , 109 Wn.2d 467, 470 (1987).....	5
<i>Dep't of Labor & Indus. v. Avundes</i> , 140 Wn.2d 282, 290, 996 P.2d 593 (2000).....	4
<i>Double D Hop Ranch v. Sanchez</i> , 133 Wn.2d 793, 798, 947 P.2d 727 (1997).....	6
<i>Kilpatrick v. Dep't of Labor & Indus.</i> , 125 Wn.2d 222, 915 P.2d 519 (1994).....	6

RCW

RCW 51.08.178.....	1 - 6
RCW 51.12.010.....	5
RCW 51.32.050.....	3
RCW 51.32.060.....	3
RCW 51.32.090.....	3

SECONDARY AUTHORITIES

<i>Vol. 2, Larson's Workers' Compensation</i> , 2006 Desk Edition, Sec. 93.01(1)(g)	6
--	---

I. ASSIGNMENT OF ERROR

1. The Superior Court erred in holding that the appellant's monthly wages should be set under RCW 51.08.178(1) instead of 51.08.178(4).

A. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. What is the correct method to determine monthly wages when an employee developed an occupational disease while performing lower wage, temporary work for a new employer while waiting for assignment to her usual higher wage occupation which had been contracted for, but was temporarily unavailable?

2. When an employment contract specifies that the employee's wages will vary based on the particular temporary assignment, are the wages "fixed"?

II. STATEMENT OF THE CASE

Robert Half Management Resources (hereafter, "Robert Half"), the employer, hired Ms. Witzel on January 20, 2011. The parties signed an "Hourly Employment Agreement" for her to work as a consultant, providing its clients "financial services." (Certified Appeal Board Record, exhibit 2).¹ Ms. Witzel's usual occupation was as a business consultant,

¹ The contract stated, "Consultant agrees to provide, on an as needed basis, such financial services as may be required by Robert Half Management

performing high level accounting, finance and internal audit duties. Robert Half was going to place her in similar positions. (Witzel BIIA testimony, p. 13; hereafter “Witzel”). Section 2 of the Hourly Employment Agreement Robert Half governs compensation. It states in part:

Consultant shall be paid weekly, only for hours actually worked, at an hourly rate determined at the time of placement with each Client or start of new project...

Her first assignment, a data entry clerk position, paid \$28 per hour (Witzel, p. 18). This was a temporary assignment (Witzel, p. 19-20). The contract did not set a fixed wage rate for each and every assignment.

Ms. Witzel had a history of carpal tunnel problems and worried the assignment would soon cause CTS; she had no intention of working as a data entry clerk for very long. “I really didn’t want to reinjure myself. So I tried to avoid repetitive work at any cost.” (Witzel, p. 26, in colloquy). She performed the job for approximately two and a half months, and developed bilateral carpal tunnel syndrome and a right wrist sprain from the constant keyboarding work. The department allowed the claim, with a date of manifestation of June 15, 2011. On October 19, 2012, the

Resources from time to time. All work performed and services provided hereunder shall be under the direction and supervision of client(s) of Robert Half Management Resources (“Client”).”

department issued one of its standard “wage” orders, based on her earnings as a data entry clerk.

Ms. Witzel appealed the wage decision to the Board of Industrial Insurance Appeals. Ms. Witzel was the only witness to testify; the Department of Labor and Industries did not present any witnesses. The Board also considered documentary evidence. The Board upheld Department’s decision. Ms. Witzel appealed to Kitsap County Superior Court. The Court reviewed the record of proceedings from the Board of Industrial Insurance Appeals and listened to arguments of counsel on November 12, 2014, and entered Findings of Fact, Conclusions of Law and a Judgment upholding the decision of the Board of Industrial Insurance Appeals on December 2, 2014.

III. ARGUMENT

A. Ms. Witzel’s monthly wages should be set using using RCW 51.08.178(4)

Time loss, loss of earning power, pension and death benefits² are based on a worker’s monthly “wages,” as defined in RCW 51.08.178. This statute sets out three methods to calculate monthly wages. The methods generally depend on the characterization of the worker, or her work, as

² RCW 51.32.050, .060 and .090

either regular, seasonal or intermittent.³ The three methods are (1) all wages at the time of injury; (2) a 12-month average of all wages, including overtime; and (3) a representative wage of those in similar employment in “cases where a wage has not been fixed or cannot be reasonably and fairly determined.” Once the monthly wage is determined, the worker receives a varying percentage of it depending on marital status and the number of dependents.

The first step in the process is to determine if the worker was engaged in either exclusively seasonal or intermittent work under subsection (2). If not, the worker is usually treated as a regular part-time or full-time worker under subsection (1).⁴ If neither (1) nor (2) is equitable, subsection (4) is utilized. Subsection (4) applies in cases “where a wage has not been fixed or cannot be reasonably and fairly determined,” and directs the monthly wage to be set on the basis of the usual wage paid other employees “engaged in like or similar occupations where the wages

³ For 60 years following the enactment of the “Compensation of Injured Workmen” act in 1911, the legislature firmly fixed all compensation rates. Laws of 1911, ch. 74§ 5 at 356. The legislature added a definition of “wages” to the act in 1971, making compensation in most cases proportional to a worker’s actual monthly wages, from all employment, at the time of injury. RCW 51.08.178(2), added in 1988, provides an alternative method to establish an injured worker’s wage where his employment is “exclusively seasonal” or “essentially part-time or intermittent.” Section (4), a catch-all provision, allows for the use of a representative wage when the worker’s monthly wages cannot be fairly set.

⁴ Dep’t of Labor & Indus. v. Avundes, 140 Wn.2d 282, 290, 996 P.2d 593 (2000).

are fixed.” RCW 51.08.178(4). As such, it qualifies subsections (1) and (2), and gives additional statutory authority to the judicial holdings that the monthly wage must be set at a level that most likely reflects a worker’s lost earning capacity.

The principle of liberal construction is a common thread in the cases interpreting RCW 51.08.178. As one court aptly observed, the statute is “hardly a model of clarity.”⁵ Another court spoke of the need to harmonize “these potentially irreconcilable provisions.”⁶ The courts have been mindful of “the guiding principle” in construing provisions of the Industrial Insurance Act: “the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.”⁷

To carry out the Legislature’s intent, the courts have construed RCW 51.08.178 “in a way that will most likely reflect a worker’s lost earning capacity.”⁸ The “purpose of worker’s compensation benefits is to

⁵ Avundes, 95 Wn.App. 265, 271 (1999).

⁶ Avundes, 140 Wn.2d 282m 287 (2000).

⁷ Cackle v. Dep’t of Labor & Indus., 142 Wn.2d 801, 811, 16 P.3d 583 (2001), citing Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 470 (1987). See also RCW 51.12.010: “This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.”

⁸ Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727 (1997); Cackle v. Dep’t of Labor & Indus., 142 Wn.2d 801, 811, 807, 16 P.3d 583 (2001)

reflect future earning capacity rather than wages earned in past employment,...”⁹ Washington’s approach is consistent with the national consensus:

The entire objective of wage calculation is to arrive at a fair approximation of the claimant’s probable future earning capacity. This worker’s disability reaches into the future, not the past; the loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of the worker’s life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant’s own earnings is some arbitrary past period has been used as a wage basis.¹⁰

The Supreme Court in *Avundes* echoed this position, directing that the “proper analytical focus is on lost earning capacity.”¹¹

The issue in the case is whether Ms. Witzel’s wage was “fixed” or variable. Section 2 of the Hourly Employment Agreement governs compensation. It states in part:

Consultant shall be paid weekly, only for hours actually worked, at an hourly rate determined at the time of placement with each Client or start of new project...

⁹ *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 915 P.2d 519 (1994). Also see *Avundes*, 140 Wn.2d 282, 289-90: “The proper analytical focus is on lost earning capacity.”

¹⁰ Vol. 2, *Larson’s Workers’ Compensation*, 2006 Desk Edition, Sec. 93.01(1)(g).

¹¹ *Avundes*, 140 Wn.2d 282, 289.

Under Section 2, her wage was not fixed; it would fluctuate depending on the assignment. The Department should have set her monthly wage pursuant to RCW 51.08.178(4), which applies “in cases where a wage has not been fixed or cannot be reasonably and fairly determined.” The monthly wage should reflect her expected future earnings and the earnings of other Robert Half consultants. The Department did not obtain this information or adjudicate this particular question of fact. We do know that the hourly pay for the temporary data entry position does not represent her earning capacity with Robert Half, the earnings of other Robert Half consultants, or her past earnings. The case should be remanded with directions to the Department to make a factual determination under RCW 51.08.178(4) and apply it to Ms. Witzel.

IV. CONCLUSION

For the reasons set forth above, Ms. Witzel respectfully requests that her monthly wage be calculated using RWC 51.08.178(4).

DATED this 26th day of March, 2015

Respectfully submitted,


Jay C. Kinney, WSBA# 14053
Scott, Kinney, Fjelstad & Mack, PLLC
Attorneys for Appellant

NO. 47045-4-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SANDRA A. WITZEL,

Plaintiff/Appellant,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES,

Defendant/Respondent.

CERTIFICATE OF SERVICE BRIEF OF APPELLANT

Scott, Kinney, Fjelstad & Mack, PLLC
JAY C. KINNEY, WSBA #14053
Attorneys for Appellant Sandra Witzel
600 University St., Suite 1928
Seattle, Washington 98101
(206) 622-2200

PROOF OF SERVICE

I, Jessica Matresse, hereby declare that I am and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party nor interested in the above-entitled action, and am competent to be a witness herein.

On this day, I filed with the State of Washington Court of Appeals the following document:

BRIEF OF APPELLANT

And served the same document via legal messenger to the party below:

Thomas Vogliano, WSBA #44977
Assistant Attorney General – L&I Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of March 2015.

SCOTT, KINNEY, FJELSTAD & MACK, PLLC


Jessica Matresse

FILED
COURT OF APPEALS
DIVISION II

2015 MAR 27 PM 1:12

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

SANDRA WITZEL,

Plaintiff,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR & INDUSTRIES,

Defendant.

COURT OF APPEALS NO.: 47045-4-II

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I sent a true and correct copy of the BRIEF OF APPELLANT via legal messenger to:

Washington State Court of Appeals, Division Two
950 Broadway, Suite 300
Clerk's Office
Tacoma WA 98402-4454; and

Thomas Vogliano, WSBA #44977
Assistant Attorney General – L&I Division
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188.

DATED this 26th day of March 2015.


Jessica Matresse

CERTIFICATE OF SERVICE
PAGE 1 OF 1

SCOTT, KINNEY, FJELSTAD & MACK, PLLC
600 UNIVERSITY, SUITE 1928
SEATTLE, WA 98101-4178
TEL: (206) 622-2200
FAX: (206) 622-9671