

NO. 47045-4-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

SANDRA A. WITZEL,

Appellant

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES
STATE OF WASHINGTON,

Respondent.

**DEPARTMENT OF LABOR AND INDUSTRIES
BRIEF OF RESPONDENT**

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I. INTRODUCTION

The Department of Labor and Industries pays time loss compensation based on the worker's actual wages, not speculative wages. Sandra Witzel worked five days a week, eight hours a day, and earned \$28 per hour during her employment with Robert Half International, Inc. When she filed a claim to receive benefits under the Industrial Insurance Act, RCW Title 51, the Department calculated her monthly time loss compensation based on the actual wage she was earning. This was in accordance with RCW 51.08.178(1), which specifies how to calculate benefits based on a worker's actual (fixed) wages.

Witzel claims her wages were not fixed because she could be assigned to higher-paying work in the future under her employment contract. She wants her wages to be calculated under RCW 51.08.178(4), which applies only when a worker's wage is not fixed and cannot be reasonably and fairly determined.

Both the Board of Industrial Insurance Appeals and superior court rejected her argument and affirmed the Department's method of calculation. Substantial evidence supports the superior court's finding that Witzel earned a fixed monthly wage, which supports its conclusion that her wage rate should be calculated under RCW 51.08.178(1). This Court should affirm.

II. ISSUE

1. Did substantial evidence support the superior court's findings that Witzel had a fixed monthly wage where she testified that she earned \$28 per hour, worked eight hours per day, five days per week and where there was no evidence that either her work assignment or monthly wage would change?
2. Should this Court deny Witzel's request to remand this case where she had the burden of proof below and failed to present evidence on issues that she now complains are absent from the record?

III. STATEMENT OF THE CASE

A. **Witzel Earned \$28 Per Hour for Eight Hours Per Day, Five Days Per Week for Over Two Months**

Following a ten-month period of unemployment in California, Witzel relocated to Washington in 2010, seeking employment. BR Witzel 11.¹ In January 2011 she signed an employment contract with Robert Half International, Inc. Ex. 2.² Witzel was hired as a consultant "to provide, on an as needed basis, such financial services as may be required . . . from time to time" by clients of Robert Half. Ex. 2 at ¶ 1(a). For compensation, she was to "be paid weekly, only for hours actually worked, at an hourly rate to be determined at the time of placement with each Client or start of new project." Ex. 2 at ¶ 2(a).

¹ "BR Witzel" refers to the transcript of Witzel's testimony contained in the Certified Appeal Board Record.

² Exhibits are contained in the Certified Appeal Board Record.

Witzel was assigned to two separate projects during her employment with Robert Half. BR Witzel 18-19. The first was a two-week project, starting in December 2010, that paid her \$28 per hour. BR Witzel 18. Her next project began in April 2011 and again paid her \$28 per hour. BR Witzel 18-19. She worked eight hours per day, five days per week, and was not paid any other benefits. Ex. 3, 4. During this time she was “applying for and/or looking for [other] consulting positions” but was not successful. BR Witzel 19-20, 24.

While still working on this project, she filed a claim for benefits for an occupational disease on June 15, 2011.³ Ex. 3. Her diagnosis was bilateral carpal tunnel syndrome and right hand sprain. Ex. 3. On her claim for benefits, Witzel listed her wages as \$28 per hour, eight hours per day, five days per week. Ex. 3, 4. The Department allowed the claim and determined that June 15, 2011, was the date of manifestation of the occupational disease.⁴ CP 2. The Department then issued an order, setting her wage rate at \$4,928.00 per month for purposes of her time loss compensation. Ex. 4. The monthly rate was calculated under

³ An occupational disease is a disease or infection that “arises naturally and proximately out of employment.” RCW 51.08.140. While an industrial injury is a “sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result.” RCW 51.08.100. This case involves only an occupational disease.

⁴ Date of manifestation means the date the occupational disease “requires treatment or becomes totally or partially disabling, whichever occurs first.” RCW 51.32.180(b); WAC 296-14-350(2). Witzel does not dispute the date of manifestation in this case.

RCW 51.08.178(1) by multiplying her daily wage of \$224 (\$28 per hour x 8 hours) by 22, which is the statutory multiplier for a worker who normally works five days a week. Ex. 3, 4; *see* RCW 51.08.178(1).

B. The Board and Superior Court Determined That the Department Correctly Calculated Witzel's Wage Rate

Witzel appealed the calculation of her wage rate to the Board and was the only witness at the evidentiary hearing. BR 29; BR Witzel 1-34. She claimed that her work on the project that began in April was “temporary,” but she did not testify when that project would be completed, what type of projects she might be assigned to in the future, or what her wage might be for those potential future projects. BR Witzel 18-19. Nor did she present evidence regarding the usual wages of other consultants in her relevant labor market. The Board determined that the Department correctly calculated Witzel's time loss compensation benefits. BR 2, 15-19. The industrial appeals judge rejected Witzel's argument that RCW 51.08.178(4) applied and noted that Witzel could not prove a loss of earning capacity:

Ms. Witzel, in fact, had not earned her consultant level wage for nearly 16 months prior to the injury. Under these facts, it is hard to accept that claimant has proven that L&I finding her fixed wage at \$28 an hour, works an injustice in her case but rather fairly represents her then current earning capacity. . . . Conceivably, her earning capacity as a subchapter S Corporation was in excess of \$110 an hour. But, setting her wage at this level would give her an unexpected and unearned windfall especially compared to

other workers who have accepted lesser wage rates, in some cases due to a poor economy.

BR 18.

Witzel then appealed to the superior court, which affirmed the Board. CP 1-3. The superior court found that, on the date of manifestation, Witzel earned \$28 per hour and that her work schedule was eight hours per day, five days per week. CP 2. It further found that she earned a fixed monthly wage of \$4,928.00 per month. CP 2. The court in turn concluded that her wage rate should be calculated under RCW 51.08.178(1). CP 3. Witzel now appeals to this Court.

IV. STANDARD OF REVIEW

In an industrial insurance case, it is the decision of the superior court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009).⁵ The court reviews the superior court's decision under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 179-81.

This Court's review of the superior court decision is limited to examining the record to see if substantial evidence supported the findings

⁵ The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW Title 51. RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180.

made after the superior court's de novo review, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Applying the deferential substantial evidence standard, the Court views the evidence in the light most favorable to the prevailing party. *Rogers*, 151 Wn. App. at 180.

This Court generally will not review a superior court's factual finding unless there is an explicit assignment of error to that finding. RAP 10.3(g); *Browning v. Browning*, 46 Wn.2d 538, 539-40, 283 P.2d 125 (1955). The unchallenged finding becomes a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-09, 828 P.2d 549 (1992). If the assignment of error is directed to a conclusion of law, that "does not bring up for review the facts found upon which the conclusion is based." *W. Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc.*, 66 Wn.2d 513, 518, 403 P.2d 833 (1965); *Browning*, 46 Wn.2d at 539-40 (error assigned to a "holding" will be treated as an objection to the conclusion of law). In such cases, this Court's review is limited to

determining whether the superior court's conclusions flow from the unchallenged findings. *Ruse*, 138 Wn.2d at 5.

V. ARGUMENT

A. **Substantial Evidence Supported the Finding That Witzel Earned a Fixed Monthly Wage on June 15, 2011, Because She Reported That She Worked Eight Hours Per Day, Five Days Per Week, and Earned \$28 Per Hour**

Because Witzel had a fixed wage, the trial court correctly applied RCW 51.08.178(1) to establish her wage rate for time loss compensation benefits. Witzel does not assign error to any specific findings by the superior court, including the finding that she earned a fixed monthly wage or had gross wages of \$4,928 from all employment on June 15, 2011. *See* App. Br. 1; RAP 10.3(g). Those findings are therefore verities on appeal. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 808-09. Witzel merely assigns error to the superior court's "holding," or conclusion of law, that her wage rate should be calculated under RCW 51.08.178(1). But these unchallenged findings establish that her fixed monthly wage must be calculated under the default provision of RCW 51.08.178(1). The conclusion of law flowed correctly from the findings, and this alone is sufficient for this Court to affirm.

In any event, substantial evidence supported the superior court's finding that Witzel had a fixed monthly wage on June 15, 2011. She testified that \$28 per hour was her hourly rate for the entire time she

worked for Robert Half. BR Witzel 18-19. She reported that she worked eight hours per day, five days per week. Ex. 3. This testimony supported the superior court's findings that she earned a fixed monthly wage.

Ignoring her actual wages, Witzel relies on her employment contract for the notion that her wages were not fixed. *See* App. Br. 7. The contract provided that she would be paid only for hours actually worked and that her compensation would be based on the particular work project. Ex. 2 at ¶ 2(a). This contract language simply makes her wage contingent upon the eventual assignment. But in this case, there is no contingency. We know exactly what her assignment was; and we know exactly what her compensation was—Witzel voluntarily accepted to work on a project that paid her \$28 per hour. That was her same wage rate on the date of manifestation.

Witzel's wages were fixed. She had been working full time on the same project for over two months when she filed her claim for an occupational disease. BR Witzel 19, Ex. 3. And she was paid the same rate of \$28 per hour for her work on an earlier project. BR Witzel 18. So Witzel was paid the same fixed rate of \$28 per hour throughout the entire course of her employment. She was also looking, unsuccessfully, for other consulting work during the same time period of her employment with Robert Half. BR Witzel 19-20. So not only was she paid the same rate

throughout her employment, but she was paid the same rate while trying unsuccessfully to earn a higher wage. Her employment pattern was eight hours a day, five days a week, as it had been for over two months. These facts provide substantial evidence of the trial court's finding that she earned a fixed monthly wage.

B. When a Worker's Wages Are Fixed, RCW 51.08.178(1) Applies to Calculate a Worker's Wages

The trial court correctly applied RCW 51.08.178(1) to establish Witzel's wage rate for time loss compensation benefits because she had a readily determinable fixed wage rate at the time of injury. Time loss compensation is a wage substitute benefit paid to a worker who is injured or develops an occupational disease in the course of employment. RCW 51.32.090; RCW 51.16.040 (Department pays time loss compensation for occupational diseases in the same manner as industrial injuries). The amount of time loss compensation is based on the worker's monthly wage rate. RCW 51.08.178. Once the wage rate is determined under RCW 51.08.178, the worker receives a fixed statutory percentage of that amount until able to return to work. RCW 51.32.090(1). The purpose of time loss compensation is to reflect a worker's lost earning capacity. *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997).⁶

⁶ The wage rate is also used to calculate pension benefits and death benefits. RCW 51.32.050, .060.

RCW 51.08.178 specifies how the Department should calculate the wage rate. It is divided into four subsections. RCW 51.08.178(1) is the default provision for calculating a worker's wages that must be used unless a different subsection explicitly applies. *Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290, 996 P.2d 593 (2000); *see Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 298, 253 P.3d 430 (2011) (inmate's wages were properly calculated under RCW 51.08.178(1) even though actual wages at the time of the injury were well below the state and federal minimum wage). It states that the worker's monthly wages from all employment shall be basis for the wage rate, and that when the monthly wages are not fixed by the month, the daily wage is used to calculate the monthly wages:

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:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;

- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week

RCW 51.08.178(1).⁷ RCW 51.08.178(2) applies only when the worker's employment is exclusively seasonal or essentially part-time or intermittent. RCW 51.08.178(3) applies only when the worker's compensation includes a bonus. And RCW 51.08.178(4) describes an alternative way of calculating wages that applies only "in cases where a wage has not been fixed or cannot be reasonably and fairly determined."

Although RCW 51.08.178(1) is the default subsection, the first step in determining the applicable subsection is to determine if RCW 51.08.178(2) applies. *Avundes*, 140 Wn.2d at 290. RCW 51.08.178(2) does not apply in this case because Witzel's employment on the date of manifestation was full time; it was not seasonal, part-time, or intermittent. Witzel does not contend the Department should have calculated her wages under this subsection. RCW 51.08.178(3) also does not apply because Witzel never received a bonus. Only RCW 51.08.178(1) and (4) are at issue in this case.

⁷ A copy of RCW 51.08.178 in full is attached to this brief.

RCW 51.08.178(1) applies here. The statute establishes the basic principle in workers' compensation law that time loss compensation is "determined by reference to a worker's wage at the time of injury."⁸ *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005); 5 Arthur Larson, *Workmen's Compensation Law* (2012) § 93.01(1)(f) ("In the application of the various wage-basis formulas, the wage at the time of injury normally controls."). Here RCW 51.08.178(1) applies because, on the date of manifestation, Witzel was receiving readily determinable wages. In this case, the superior court found that the date of manifestation was June 15, 2011. CP 2 at ¶ 1.4. It also found that, on that date, Witzel earned \$28 per hour with no additional benefits, and worked eight hours per day, five days per week. CP 2 at ¶ 1.6. This was the wage rate she self-reported to the Department. Ex. 3, 4. Based on that wage rate, the superior court found that Witzel earned a fixed monthly wage of \$4,928. CP 2 at ¶¶ 1.5, 1.6. The monthly total was calculated under RCW 51.08.178(1) by multiplying her normal daily wage (\$224) by 22 because she was normally employed five days a week. *See* RCW 51.08.178(1)(e).

⁸ RCW 51.08.178(1) refers to the time of "injury" but the statute applies equally to occupational disease claims. *See* RCW 51.16.040. When an occupational disease is involved, the rate of compensation is established as of the "date of manifestation" of the occupational disease. RCW 51.32.180(b); WAC 296-14-350(2); *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994) ("the counterpart to the date of injury is date of manifestation."). The date of manifestation is equivalent to the date of injury under RCW 51.08.178.

These findings are uncontested by Witzel and, in any event, are supported by substantial evidence. The findings required the superior court to apply the default provision of RCW 51.08.178(1) to calculate Witzel's time loss compensation. The superior court did so correctly, and this Court should affirm.

C. Because Witzel's Wages Were Fixed and Could Be Reasonably and Fairly Determined, the Wage Calculation Method in RCW 51.08.178(4) Does Not Apply

Witzel nevertheless suggests the superior court erred in finding that her wages were fixed. *See* App. Br. 6-7. She argues her wages should have been calculated under RCW 51.08.178(4) because her employment contract did not set forth a specific wage and therefore she argues her wages were not fixed. *See* App. Br. 7. There is no legal support for that proposition.

RCW 51.08.178(4) applies only if the worker's wages have "not been fixed or cannot be reasonably and fairly determined." RCW 51.08.178(4). If this subsection applies, then the worker's monthly wage rate is "computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed." *Id.*

RCW 51.08.178(4) does not apply in this case because Witzel had a "fixed" wage rate on the date of manifestation. Witzel's argument incorrectly assumes that if a wage could *possibly* or *potentially* change in

the future, then it is not fixed. But that would mean a wage could never be fixed. Workers' wages routinely change when they receive raises or cost of living adjustments or when they change positions or an increase their hours. But the relevant legal question is not, as Witzel's argument implies, what the worker's wage will be in the future or whether the worker's wage was fixed in perpetuity. Rather, it is well-established that the relevant legal question is whether the worker's wages were fixed *on the date of manifestation* of the occupational disease. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994); WAC 296-14-350(2).

Witzel received \$224 per day for the entire time she worked at Robert Half, including the two months immediately preceding her claim. This daily wage did not "fluctuate depending on the assignment." *Contra* App. Br. 7. It was her fixed wage that she reported to the Department. That it might change in the future is legally irrelevant as to the question of what her wages were on June 15, 2011.

Additionally, Witzel appears to believe that she need only prove that her wages were not "fixed" under RCW 51.08.178(4). App. Br. at 6. But the statute only allows for RCW 51.08.178(4) to apply if the claimant can prove both that the wages were not "fixed" *and* "cannot be reasonably and fairly determined." Even if she could prove her wages were not fixed, which she has not, she cannot prove the reasonably and fairly prong.

Certainly it is reasonable and fair to determine a wage based on the actual wage received by the worker for over two months on the date of manifestation.

The plain terms of the statute govern as to which subsection applies. Witzel incorrectly asserts that RCW 51.08.178(4) is used if “neither subsection (1) or subsection (2) is equitable.” App. Br. 4. She cites no legal authority for this position and there is none. To the contrary, the plain language of RCW 51.08.178(4) makes clear that it applies only in limited circumstances when “a wage has not been fixed or cannot be reasonably and fairly determined.” When, as here, the worker has been earning the same daily wage for over two months, her wage is fixed and can be reasonably and fairly determined, and the default provision of RCW 51.08.178(1) applies.

D. Washington Courts Affirm That the Department Should Use Actual Wages to Determine the Wage Rate

Washington appellate courts have never applied RCW 51.08.178(4) where the worker was receiving an actual wage on the date of manifestation. To the contrary, the courts have regularly affirmed that actual wages on the date of manifestation are the proper measure of lost earning capacity, and should be calculated under RCW 51.08.178(1). *See, e.g., Gallo*, 155 Wn.2d at 481; *Double D Hop Ranch*, 133 Wn.2d at 796 (time loss benefits must be based on monthly wages the worker was

receiving at the time of injury). In *Hill*, the court rejected an argument, similar to Witzel's, that RCW 51.08.178(4) should be applied to substitute for the actual wages received on the date of injury. *Hill*, 161 Wn. App. at 297-98. The worker in *Hill* was an inmate who earned \$0.85 per hour, far below the state and federal minimum wage. *Id.* The court nevertheless held the inmate's wages were properly calculated under RCW 51.08.178(1), rather than RCW 51.08.178(4), because the relevant inquiry is into the actual wages received by the worker.

The requirement to calculate time loss compensation based on the actual wage on the date of manifestation appropriately carries out the Industrial Insurance Act's intent. Time loss compensation is intended to reflect lost earning capacity. *See Avundes*, 140 Wn.2d at 290; *Double D Hop Ranch*, 133 Wn.2d at 798; 5 Larson, *Workmen's Compensation Law* at § 93.01(1)(g). But determining the proper wage rate has never required speculation about potential future earnings. *See* 5 Larson, *Workmen's Compensation Law* at § 93.02(2)(c) ("the purpose of the wage calculation is not to arrive at some theoretical concept of loss of earning capacity"); 2 *Modern Workers Compensation* § 200:4 (Westlaw 2015) (time loss compensation "cannot be based on speculation" or assumptions that the worker may be promoted). Time loss compensation is based on what the worker actually did earn, not what the worker could earn—potential

compensation is entirely outside the statutory scheme. The lynchpin of Witzel's argument is her potential future wages should be considered as this reflects her purported lost earning capacity. Appellant's Br. 5-6. But Witzel cannot prove a loss of earning capacity. Her earning capacity on the date of manifestation—the time used under RCW 51.08.178(1)—was what she was actually earning: \$28 per hour, eight hours per day, five days per week. She had not earned any higher wage for at least 16 months. BR 18; BR Witzel 11. To count future speculative wages would be to provide her with more than her earning capacity. In the words of the industrial appeals judge, it would give her an “unexpected and unearned windfall.” BR 18.

Board decisions provide further authority that the Department correctly calculated Witzel's wage rate under RCW 51.08.178(1) and not under RCW 51.08.178(4).⁹ The most instructive Board case on this issue is *In re Chester Brown*, No. 88 1326, 1989 WL 164604 (Wash. Bd. Ind. Ins. Appeals June 29, 1989). The worker in that case claimed that he had the potential to receive a wage increase subsequent to his industrial injury. *Id.* at 2. As in Witzel's case, the worker in *Brown* presented no evidence

⁹ This Court may consider decisions published by the Board as persuasive authority. *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 887, 288 P.3d 390 (2012). The decisions are non-binding, but the Board's interpretation of the Act is entitled to “great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). A copy of the *Brown* decision is attached to this brief.

that the wage increase would occur. *Brown*, 1989 WL 164604 at 2. He nevertheless argued that his earning “potential,” rather than his actual wage at the time of injury, should be the basis for calculating his time loss compensation. *Id.* The Board rejected that argument, stating “Time-loss payments are based solely on certain percentages of the *actual* wages earned at the time of injury. Thus, [the worker’s] actual wage at the time of his injury, and not what he was potentially able to earn, is the correct figure to use when calculating his loss of earning power compensation.” *Id.* *Brown* reveals the fallacy in Witzel’s argument that speculative future earnings should substitute for actual, earned wages. *See also In re Janet Papson*, No. 01 15138, 2003 WL 21002049 (Wash. Bd. Ind. Ins. Appeals Jan. 27, 2003) (school bus driver’s unsupported, subjective expectation for summer employment did not justify time loss calculation that included such wages).

Other Board decisions that have applied RCW 51.08.178(4) lend no support to Witzel’s argument. Almost exclusively, the Board has found that there was no fixed wage only in cases where the worker was receiving *no* regular wage. Frequently, this involves workers who are self-employed. *See, e.g., In re Lorraine Marquardt*, No. 06 17674, 2007 WL 3054904 (Wash. Bd. Ind. Ins. Appeals Aug. 8, 2007) (preschool operator and teacher was receiving no self-employment income or wages at the time of

injury); *In Re Jerry W. Uhri*, No. 93 6908, 1995 WL 565948 (Wash. Bd. Ind. Ins. Appeals March 30, 1995) (convenience store owner never received fixed daily or monthly wages but took “draws” from the gross profits on an irregular basis); *In re Roy Hall*, No. 07 12838, 2008 WL 4596299 (Wash. Bd. Ind. Ins. Appeals June 26, 2008) (self-employed carpenter received no fixed hourly, daily, or monthly wages at the time of injury); *In re Wendy Zimmerman*, No. 08 19330 2009 WL 6268519 (Wash. Bd. Ind. Ins. Appeals Dec. 30, 2009) (teacher whose date of manifestation occurred during the summer was receiving no wages at the time). In contrast to those workers, Witzel was receiving an actual, regular, and fixed hourly wage on the date of manifestation of her occupational disease that established the proper measure of her lost earning capacity.

Ignoring these authorities, Witzel cites to the principle of liberal construction and asks this Court to construe RCW 51.08.178 in her favor. App. Br. 5. But the liberal construction rule only applies when the court is interpreting an ambiguous statute. *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). The statute in this case is not ambiguous. *Hill*, 161 Wn. App. at 295 (under its plain language, RCW 51.08.178(1) is the default provision for calculating time loss compensation wages). When a worker has a daily fixed wage, as Witzel

had here, RCW 51.08.178(1) is clear that this wage is multiplied by 22 when the worker was normally employed five days a week. There is no statutory ambiguity that needs to be resolved but rather this a case of factual sufficiency where liberal construction does not apply. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787; *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012).

E. This Court Should Deny Witzel's Request for a Remand Because She Failed to Satisfy Her Burden to Prove Her Wages Were Not Fixed

Witzel asks this Court to remand this case “with directions to the Department to make a factual determination under RCW 51.08.178(4) and apply it to Witzel.” App. Br. 7. But, as discussed above, that subsection does not apply, and she cites no legal support for this remedy.

The only issue before this Court is whether substantial evidence supported the superior court's findings of fact and whether the superior court's conclusions of law flow from those findings. *Ruse*, 138 Wn.2d at 5. A party must present its evidence at the Board when appealing a Department order. *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969). Claimants are held to strict proof of the right to receive benefits under the Industrial Insurance Act. *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744, *review denied*, 337 P.3d 325 (2014). The superior court only considers evidence that was

submitted at the Board, and cannot remand to the Board to take further evidence. RCW 51.52.115; *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940).

Witzel bore the burden of proof at the Board hearing. RCW 51.52.050. She rested her case solely on her own testimony and employment contract. She presented no evidence on issues that she now complains are absent from the record, including “her expected future earnings” and the earnings of other consultants.¹⁰ Witzel had her opportunity to demonstrate why her wages were not fixed and she failed. Now on appeal to this Court, she cannot rescue her case by requesting a remand for additional “factual determinations” and effectively transferring the burden of proof to the Department. Substantial evidence supported the superior court’s findings in this case. A remand would be improper.

VI. CONCLUSION

The superior court found that Witzel was earning a fixed monthly wage on the date of manifestation. The monthly wage was based on the undisputed wages she was actually earning on the date of manifestation of her occupational disease: \$28 per hour, eight hours per day, five days per week. That finding was supported by substantial evidence, and the

¹⁰ She asserts, without citation to the record, that her hourly pay of \$28 “does not represent” the earnings of other Robert Half consultants. App. Br. 7. But this is not supported by the record as she presented no admissible evidence on this point.

superior court correctly applied RCW 51.08.178(1) to calculate Witzel's time loss compensation. This Court should affirm the superior court.

RESPECTFULLY SUBMITTED this 27th day of May 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Thomas V. Vogliano", written in a cursive style.

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APPENDIX A

West's Revised Code of Washington Annotated

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.08. Definitions

West's RCWA 51.08.178

51.08.178. "Wages"--Monthly wages as basis of compensation--Computation thereof

Effective: July 22, 2007

Currentness

(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:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven 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 as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be

considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

Credits

[2007 c 297 § 1, eff. July 22, 2007; 1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

Notes of Decisions (91)

West's RCWA 51.08.178, WA ST 51.08.178

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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APPENDIX B

1989 WL 164604 (Wash.Bd.Ind.Ins.App.)

Board of Industrial Insurance Appeals

State of Washington

IN RE: CHESTER BROWN

DOCKET NO. 88 1326

CLAIM NO. H-678016

June 29, 1989

SIGNIFICANT DECISION

APPEARANCES:

*1 Claimant, Chester Brown, by Law Offices of David B. Vail, per David B. Vail
Employer, Schaben Logging Company, Inc., by None
Department of Labor and Industries, by The Attorney General, per Lynn D. W. Hendrickson, Assistant

DECISION AND ORDER

This is an appeal filed by the claimant on April 6, 1988 from an order of the Department of Labor and Industries dated April 1, 1988 which adhered to the provisions of a Department order dated December 18, 1987 which paid an award for permanent partial disability equal to 15% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, and closed the claim with time loss compensation as paid. 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 November 30, 1988 in which the order of the Department dated April 1, 1988 was reversed and the claim remanded to the Department to pay the claimant an award for permanent partial disability equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, less prior awards, and to pay the claimant certain loss of earning power benefits from July 1, 1986 through April 1, 1988.

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.

The issues and evidence presented by the parties are adequately set forth in the Proposed Decision and Order and will not be reiterated at length here.

Chester Brown was injured on March 31, 1980 when he fell and injured his left shoulder while employed as a logger with Schaben Logging Company. He returned to work but, after three weeks, aggravated the shoulder and subsequently had surgery in 1982. He never returned to his profession as a logger. At the time of his injury he earned \$ 12.87 per hour.

Mr. Brown was retrained by the Department of Labor and Industries and on October 1, 1986 was hired by Grays Harbor County to work on a road crew as a flagger and general worker. The parties stipulated on the record that Mr. Brown earned \$ 7.00 per hour from July 1, 1986 until October 1, 1986 while he was being trained. After he was officially hired, on October 1, 1986, he earned \$ 1,524 per month until April 1, 1987 when his salary was raised to \$ 1,584 per month. He continued to earn this salary until January 1, 1988 when he received another raise to \$ 1,688 per month which he earned until April 1, 1988.

The issues presented by Mr. Brown's appeal concerned the degree of permanent disability of his left shoulder on the closing date of the claim, and whether he was entitled to loss of earning power benefits after he was hired by Grays Harbor County until the date his condition was found to be fixed and permanent by the Department. See, In re Douglas G. Weston, BIIA Dec., 86 1645 (1987).

*2 We have reviewed the record and agree with the findings and conclusion of the Industrial Appeals Judge that the degree of permanent disability of Mr. Brown's left shoulder, causally related to his industrial injury, is equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder.

Mr. Brown's Petition for Review does not argue with this conclusion, but only deals with the issue of loss of earning power benefits. Mr. Brown presents two points which he believes were either not considered or were incorrectly considered by the Industrial Appeals Judge in calculating loss of earning power benefits.

Mr. Brown alleges that if he can prove he had the ability to earn more money than he was actually earning at the time of his injury, then that earning capacity, rather than his actual wage at the time of injury, should be considered the basis for the calculation of loss of earning power benefits. Mr. Brown does not offer any Board or Court decisions in support of this theory of law. This Board has, in the past, always considered the claimant's actual wages at the time of injury rather than a 'potential' ability to earn money, as the basis for computing loss of earning power benefits.

In In re Howard L. Dyer, BIIA Dec., 15,763 (1962), in discussing loss of earning power, we specifically spoke of post-injury and pre-injury earnings, not 'potential' earnings capability. In In re Douglas G. Weston, BIIA Dec., 86 1645 at 4-5 (1987) the wage earned at the time of injury, not what the claimant allegedly could have earned, was the basis used in calculating loss of earning power. (See Finding of Fact No. 5, in Weston).

RCW 51.32.090(3) permits a claimant to recover the proportional difference in time-loss payments when he has a reduced earning capacity. Time-loss payments are based solely on certain percentages of the actual wages earned at the time of injury. Thus, Mr. Brown's actual wage at the time of his injury, and not what he was potentially able to earn, is the correct figure to use when calculating his loss of earning power compensation.

Mr. Brown's other contention is that the Industrial Appeals Judge incorrectly considered the claimant's pay raises while he was employed by Grays Harbor County. Mr. Brown cites Hunter v. Department of Labor and Industries, 43 Wn.2d 696, 263 P.2d 586 (1953) in support of this contention. We do not agree that Hunter precludes consideration of Mr. Brown's subsequent raises. In Hunter, the claimant was employed as a lineman for Puget Sound Power & Light Company when he was injured. After the injury, Mr. Hunter was no longer able to be employed as a lineman and was employed by the same employer as a meter journeyman, which paid less than his former employment. Due to this circumstance, the Department awarded him loss of earnings power benefits.

Subsequently, there was a general wage raise for Puget Sound employees and Mr. Hunter earned as much as he had at the time of his injury. The Department terminated his payments. On appeal the Board recognized the fact that linemen had also received raises and still earned more than meter journeymen. For that reason the Board and the Court reinstated Mr. Hunter's loss of earning power benefits. The facts in this case are not analogous to the facts in Hunter. The only evidence as to what Mr. Brown made as a logger was the \$12.87 per hour rate he earned at the time of his injury. No evidence was presented as to subsequent raises received by loggers. Therefore, the \$12.87 figure must be used as the basic wage rate in determining the proportionate time loss compensation he is to receive.

*3 It is proper to consider what a worker's earnings were at the time of his industrial injury and to establish the extent of increase, if any, which has occurred in earnings paid for such employment since the industrial injury in order to arrive at the earnings which a worker would have received had he or she not experienced the industrial injury. This was what occurred in Hunter and was the basis for Mr. Hunter being able to continue to receive loss of earning power benefits, even after he received a raise while working as a meter journeyman after his industrial injury.

In the present appeal, Mr. Brown failed to produce any evidence to establish the basic wage rate he would have received had he remained employed as a logger after his industrial injury. Had he done so, we would have taken that into consideration in arriving at the base earning rate from which loss of earning power compensation could be computed. However, we are unable

to use any wage rate other than that contained in the record as the basic wage rate from which to compute Mr. Brown's loss of earning power capacity.

As a practical matter, the Department has already determined Mr. Brown's wage at the time of injury in order to pay him time loss compensation. In the absence of any evidence indicating that loggers' wages have increased since Mr. Brown's industrial injury, the Department should use the same calculation to compute Mr. Brown's loss of earning power rate as was used to compute his time loss compensation rate.

It is also proper to use the wage increases Mr. Brown received while employed by Grays Harbor County in determining the proper proportionate payments since, as Mr. Brown's wage increased, he regained that portion of his lost earning power based on the established basic wage rate. There is nothing in Hunter which would lead us to any other conclusion. RCW 51.32.090 specifically states that ' . . . so long as the present earning power is only partially restored, the payments shall continue in the proportion which the new earning power shall bear to the old.' For payments to Mr. Brown to be made in this statutorily mandated fashion, his raises must be included.

The record supports the Industrial Appeals Judge's decision that Mr. Brown should be awarded loss of earning power benefits. Dr. Ray Broman and Dr. John Huddlestone testified that, due to the condition of Mr. Brown's left shoulder, he should not return to logging. Steve Duschesne, a vocational rehabilitation counselor, did not know of a job Mr. Brown was capable of performing on a reasonably continuous basis that would pay him more than he earned while employed by Grays Harbor County.

The evidence presented as to Mr. Brown's earnings as a logger and his subsequent earnings from Grays Harbor County also support the Industrial Appeals Judge's decision in that Mr. Brown's earning power was diminished more than 5% from July 1, 1986 through December 17, 1987.

Based on these facts it is clear that Mr. Brown did suffer a loss of earning power pursuant to RCW 51.32.090(3), from July 1, 1986 through December 17, 1987. However, Findings of Fact Nos. 10 through 15 and Conclusions of Law Nos. 4 and 5, in the Proposed Decision and Order do not conform to the record or the law and must be corrected.

*4 The parties stipulated, on the record, to Mr. Brown's rate of pay while at Grays Harbor, from his date of hire until the closing date of this claim. Tr. 9/6/88 at 11. For some reason the Industrial Appeals Judge did not use these rates in reaching his decision. This was incorrect and new Findings of Fact incorporating the correct dates and wages will be entered herein.

The Industrial Appeals Judge also ordered that the loss of earning power payments should extend to April 1, 1988, the final closing date of the claim (proposed Finding of Fact No. 15 and proposed Conclusion of Law No. 4). This is also incorrect in that loss of earning power payment can only be made up to the time Mr. Brown's condition was found to be fixed and permanent by the Department, which was December 18, 1987 when the Department issued an order awarding Mr. Brown a permanent partial disability award equal to 15% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder. In re Douglas G. Weston, BIIA Dec., 86 1645 (1987). Mr. Brown did not present evidence that his condition was not fixed and stable on December 18, 1987 and, therefore, no further loss of earning power benefits can be paid beyond that date.

Conclusion of Law No. 5 is also incorrect in that the Industrial Appeals Judge ordered the Department to pay the claimant the difference between his pre and post injury earnings. Loss of earning power benefits can only be awarded in the percentage of temporary total disability compensation which is proportionate to the percentage of lost earning power. RCW 51.32.090(3).

Thus, after a review of the entire record, we conclude that the Department order dated April 1, 1988 is incorrect and should be reversed and the claim should be remanded to the Department to award the claimant a permanent partial disability award equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder. Further, the claimant should be awarded loss of earning power benefits in such proportion as the Department determines, based on the below-stated Findings of Fact.

FINDINGS OF FACT

1. On April 16, 1980 an accident report was filed with the Department of Labor and Industries alleging that the claimant, Chester Brown, had suffered an industrial injury to his left shoulder on March 31, 1980 while in the employ of Schaben Logging Company, Inc. On July 22, 1980 the Department issued an order allowing the claim and closing it for medical treatment only. On February 25, 1982 an application to reopen the claim on grounds of aggravation of condition was filed. On March 9, 1982, the Department issued an order reopening the claim effective December 21, 1981 for authorized treatment and action as indicated. On February 17, 1983 the Department issued an order directing that the claimant should be paid an advance of \$4,000.00 on an award for permanent partial disability. On August 1, 1985 the Department issued an order terminating time-loss compensation effective July 31, 1985, based on a recent vocational evaluation and on medical information in the claim file which the Department determined to show that Mr. Brown was capable of reasonably continuous gainful employment. The order also held the claim open for authorized medical treatment and further action as indicated. On August 9, 1985 the claimant protested and requested reconsideration of the August 1, 1985 Department order.

*5 On August 23, 1985 the Department issued an order granting two semi-monthly time-loss compensation payments for the month of August, 1985. On December 18, 1987, the Department issued an order granting the claimant an award for permanent partial disability equal to 15% of the amputation value of his left arm at or above the deltoid insertion or by disarticulation at the shoulder, and closed the claim with time loss compensation as paid.

On January 19, 1988 the claimant protested and requested reconsideration of the December 18, 1987 Department order. On March 18, 1988 the Department issued an order holding its December 18, 1987 order in abeyance. On April 1, 1988 the Department issued an order holding that the claim should remain closed pursuant to the December 18, 1987 Department order. On April 6, 1988 the claimant filed his Notice of Appeal with the Board of Industrial Insurance Appeals. On April 20, 1988 the Board issued an order granting the appeal, assigning it Docket No. 88 1326 and directing that further proceedings be held in the matter.

2. On March 31, 1980, the claimant, Chester Brown, injured his left shoulder during the course of his employment as a logger with Schaben Logging Company.

3. At the time of his injury, Mr. Brown earned \$12.87 per hour as a logger.

4. The claimant, Chester Brown, is a forty-four year old, left-handed man with a seventh grade education and work experience in various areas of the logging industry, which required heavy bending, heavy lifting, stooping, heavy pulling, and working on rough and steep terrain. Mr. Brown is unable to read or write. He can neither read nor understand technical manuals. He functions at an intellectual level below that of any grade in elementary school. As a result of the industrial injury of March 31, 1980 claimant is unable to return to his prior employment as a logger.

5. From July 1, 1986 through September 30, 1986 claimant received on-the-job training as a member of a road crew for Grays Harbor County. His job on the road crew involved flagging, some shoveling, and some pre-leveling. Co-workers and his supervisor on the road crew aided Mr. Brown whenever his work at that job became physically too demanding.

6. From July 1, 1986 through December 17, 1987, as the result of his March 31, 1980 industrial injury, and taking into account his age, education, intellectual level, work experience, and physical restrictions, the claimant, Chester Brown, was precluded from full-time work as a hook tender or as a worker in any aspect of the logging industry. Between those dates, Mr. Brown was precluded from any job generally available in the State of Washington for which he had any qualifications by way of education, experience, or intellect, which would have paid him more than his job as a worker on a road crew for Grays Harbor County, Washington.

7. From July 1, 1986 through September 30, 1986 the claimant, Chester Brown, earned \$7.00 per hour as a trainee on a road crew for Grays Harbor County.

*6 8. From October 1, 1986 through March 31, 1987 the claimant, Chester Brown, earned \$ 1,524.00 per month as a worker, on a road crew, for Grays Harbor County. Mr. Brown's earning capacity during this time was \$ 1,524.00 per month.

9. From April 1, 1987 through December 17, 1987 the claimant, Chester Brown, earned \$ 1,584.00 per month as a worker, on a road crew, for Grays Harbor County. Mr. Brown's earning capacity during this time was \$ 1,584.00 per month.

10. From July 1, 1986 through December 17, 1987, the claimant, Chester Brown, suffered a loss of earning power greater than 5% of his earning capacity at the time of his industrial injury, based on the wages he earned while employed by Schaben Logging Company at the time of his injury.

11. As of April 1, 1988, Chester Brown had a left shoulder condition causally related to his March 31, 1980 industrial injury diagnosed as a contusion injury to the left shoulder with status postoperative degenerative arthritis, primarily in the acromioclavicular joint. By December 18, 1987 and continuing until April 1, 1988 this condition was fixed and stable and not in need of further curative treatment.

12. As of April 1, 1988, Chester Brown had a permanent physical impairment causally related to his industrial injury equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. From July 1, 1986 through December 17, 1987, the claimant, Chester Brown, was entitled to benefits for loss of earning power as a result of his left shoulder condition causally related to his March 31, 1980 industrial injury, pursuant to RCW 51.32.090(3).
3. On December 18, 1987, and continuing until April 1, 1988, the claimant had suffered a permanent partial disability within the meaning of RCW 51.08.150 and was entitled to compensation therefor equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder pursuant to RCW 51.32.080.
4. The order of the Department of Labor and Industries dated April 1, 1988, which adhered to the provisions of a Department order dated December 18, 1987 which paid a permanent partial disability award equal to 15% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, and closed the claim with time loss compensation as paid, is incorrect and is reversed and the claim is remanded to the Department with directions to award the claimant loss of earning power benefits in such proportion as the Department determines based on the above-stated Findings of Fact and Conclusions of Law and close the claim with a permanent partial disability award equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, less the prior award.

*7 It is so ORDERED.

Dated this 29th day of June, 1989.

SARA T. HARMON
Chairperson
FRANK E. FENNERTY, JR.
Member
PHILLIP T. BORK
Member

1989 WL 164604 (Wash.Bd.Ind.Ins.App.)

NO. 47045-4-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

SANDRA A. WITZEL,
Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**DECLARATION OF
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served true and correct copies of the Department of Labor and Industries' Brief of Respondent, and this Declaration of Service, to all parties on record as follows:

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Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division II
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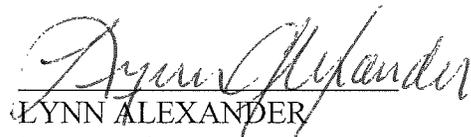
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DATED this 27th day of May, 2015 at Seattle, WA.

A handwritten signature in cursive script, appearing to read "Lynn Alexander", is written over a horizontal line.

LYNN ALEXANDER
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WASHINGTON STATE ATTORNEY GENERAL

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