

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

1 IN RE: TERRI L. REYNOLDS) DOCKET NO. 09 22421
2 CLAIM NO. SA-07440) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Jamie M. Moore
4

5 APPEARANCES:

6 Claimant, Terri L. Reynolds, by
7 Williams, Wyckoff & Ostrander, PLLC, per
8 Douglas P. Wyckoff

9 Self-Insured Employer, Chevron Corp., by
10 Wallace Klor & Mann, P.C., per
11 Lawrence E. Mann and Brad G. Garber

12 In Docket No. 09 22421, the claimant, Terri L. Reynolds, filed an appeal with the Board of
13 Industrial Insurance Appeals on December 7, 2009, from an order of the Department of Labor and
14 Industries dated November 17, 2009. In this order, the Department affirmed its order of April 23,
15 2009. The April 23, 2009 order set the worker's wage based on \$9.50 per hour, 8 hours per day,
16 9 days per month for a monthly wage of \$684, with no additional wages; and declared the worker's
17 total gross wage is \$684 per month; married with one child. The Department order is **REVERSED**
18 **AND REMANDED.**

19 **PROCEDURAL AND EVIDENTIARY MATTERS**

20 On February 23, 2010, and October 29, 2010, the parties agreed to include the Jurisdictional
21 History, as amended, in the Board's record. That history establishes the Board's jurisdiction in this
22 appeal.

23 The claimant, Terri L. Reynolds, presented her own testimony and the testimony of
24 Shanna Winters, at the August 3, 2010 hearing. The self-insured employer presented the
25 testimony of Kristi Milkovich and David J. Durbin, at the August 3, 2010 hearing.
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1 **ISSUE**

- 2 1) Was the Department correct when it calculated the claimant's wages
3 based upon a two-day-per-week work schedule pursuant to
4 RCW 51.08.178?¹

5 **EVIDENCE PRESENTED**

6 Terri L. Reynolds

7 Terri L. Reynolds was 56 years old at the time of her August 3, 2010 testimony. In 2008, at
8 a job fair at the employment office, Ms. Reynolds applied for a job as a customer service
9 representative (CSR) with Chevron Corporation (Chevron). She applied for both full-time and
10 part-time work, took a drug test, and was interviewed by Dave Durbin, the Centralia, Washington
11 store manager. Ms. Reynolds was hired, and understood that she was to work swing shift (2:00 in
12 the afternoon to 10:00 in the evening) four to five days per week.

13 On June 9, 2008, Ms. Reynolds started work as a CSR at station number 1104 in Centralia.
14 CSR job duties included making coffee, cleaning up, stocking shelves, cooking food, and selling
15 gasoline. The station was open 24 hours per day.

16 The first week Ms. Reynolds worked Monday through Friday, and had the weekend days off.
17 For the first two days of her employment, Ms. Reynolds attended Chevron training in Puyallup. For
18 the next three days, Ms. Reynolds was in training with Kathalyn Heater from 6:00 a.m. to 2:30 p.m.
19 in the Centralia store. The following week Ms. Reynolds worked again with Ms. Heater on the day
20 shift. Ms. Reynolds went on swing shift on Monday, June 23, 2008.

21 On June 24, 2008, just after the end of her work shift, and while she was completing
22 work-related paperwork behind the counter at the station, Ms. Reynolds lost her balance, fell, and
23 sustained an injury to her right knee, left shoulder, and head. She was dizzy and shaken.
24 Ms. Reynolds consulted with Chevron nurses and continued to work her assigned swing shift for
25 the rest of the week after her injury.

26 The following week, Ms. Reynolds was scheduled for work from 10:00 a.m. to 2:00 p.m. on
27 Monday to attend a meeting, and then worked the day shift from 6:00 a.m. to 2:30 p.m. on Tuesday
28 and Wednesday.

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31 ¹The claimant argues she was hired as a full-time employee on June 8, 2008, at \$9.50 per hour, injured on June 24, 2008, and
32 entitled to a fixed rate wage calculation. The self-insured employer argues the claimant was hired as a part-time employee on
June 9, 2008, at \$9.50 per hour, injured on June 24, 2008, and that her wages should be calculated as a part-time, rather than a
full-time employee, or, in the alternative, cannot be reasonably and fairly determined and must be calculated based on the usual
earnings of part time employees with like or similar wages.

1 Her knee, shoulder, and head continued to hurt. Ms Reynolds testified that eight days after
2 her injury, she sought medical care with Dr. Sherfey, an orthopedic surgeon who had performed
3 Ms. Reynolds' previous knee surgery in 2006, and with Dr. Woods. Ms. Reynolds was put on light
4 duty by her doctor.

5 Ms. Reynolds explained she was off work until the July 17, 2008, as the employer
6 determined a light-duty job. When she returned to work, Ms. Reynolds was scheduled for work
7 during the day for eight hours per day, on Tuesdays and Wednesdays. She sat on a metal chair at
8 a card table just inside the door, greeted people, and offered credit card applications.
9 Ms. Reynolds worked this light-duty schedule until September 2, 2008. On September 3, 2008,
10 Ms. Reynolds had knee surgery. She has not returned to work since that time.

11 Ms. Reynolds understood that Kelly Tock took her place at store 1104, working the 2:00 p.m.
12 to 10:30 p.m. swing shift, five days per week. Ms. Reynolds testified that Chevron's company
13 handbook provides that an employee working more than 32 hours per week is considered a
14 full-time employee. Ms. Reynolds considered herself a full-time employee. Ms. Reynolds testified
15 there were no other CSRs working only two days per week while she worked for Chevron.
16 Ms. Reynolds asserted Chevron reduced her work hours to a part-time schedule following her
17 light-duty restriction.

18 In her testimony, Ms. Reynolds reviewed the employer's time sheets and schedules and
19 testified that they were inaccurate. Ms. Reynolds testified she was no longer in training as of
20 June 23rd, in her third week of employment. Ms. Reynolds was paid weekly, and received training
21 wages for her first week of employment, as well as mileage reimbursement for travel to Puyallup.
22 Ms. Reynolds had no knowledge of being in any type of probationary period.

23 Shanna Winters

24 Shanna Winters is employed by the law firm representing Ms. Reynolds in this appeal,
25 Williams, Wyckoff & Ostrander. Ms. Winters is a claims analyst, and her job duties entail
26 researching workers' compensation claims and providing detailed analysis. Before working for the
27 law firm, Ms. Winters worked in a variety of positions for the Department of Labor and Industries for
28 17 years, lastly as a claims consultant in the legal services division. Ms. Winters testified to her
29 familiarity with statutes, regulations, case law, and Department policy concerning wage setting
30 orders.

31 Ms. Winters reviewed documents from the employer and from the Department in relation to
32 Ms. Reynolds' industrial insurance claim. Ms. Winters testified to her belief that the Department, in

1 its April 23, 2009 order, set Ms. Reynolds' wage pursuant to RCW 51.08.178(1). The order
2 referenced "9 days per month," a term found only in the first clause of the statute.

3 In her analytical work, Ms. Winters reviewed approximately one year's worth of Centralia
4 store payroll records provided by Chevron. She looked at the total number of CSRs employed each
5 week, the total CSR work hours reported each week, and calculated the average weekly hours
6 worked by a CSR each week at more than 40 hours.

7 Ms. Winters noted the Centralia store "team member" schedules showed Ms. Reynolds to
8 have a full-time, five day per week work pattern before her injury and a significantly decreased work
9 pattern following her injury. Further, other CSRs had an over forty hours per week average work
10 pattern, and no other CSR had a two day per week work pattern. Ms. Winters opined the
11 employer's records showed a CSR staffing pattern of full-time workers. Lastly, Ms. Winters testified
12 that her analysis of the employer records revealed CSR employee Kelly Tock took over for
13 Ms. Reynolds, working swing shift, full-time, five days per week.

14 Ms. Winters understood that after that order was issued, the employer in this case made a
15 "like or similar" contention for establishing the wage. In relation to this contention, the employer
16 provided the Department with wage information for other employees. However, the wage
17 information provided was for wages paid after Ms. Reynolds' date of injury. Ms. Winters testified to
18 her belief that the appropriate wages to consider in a wage setting order are those based on a date
19 of injury wage, or if that cannot be used, then wages prior to the date of injury.

20 On cross-examination Ms. Winters conceded she had no information about Chevron's hiring
21 process or intent in hiring Ms. Reynolds. Ms. Winters also acknowledged that Ms. Reynolds agreed
22 to work part-time, but noted her schedule was never less than full-time prior to her injury.
23 Ms. Winters opined that the Department order was correctly set under RCW 51.08.178(1), but with
24 an incorrect number of days worked per week.

25 Kristi Milkovich

26 Kristi Milkovich is a senior claims adjuster with Broadspire, the third party administrator for
27 Chevron Corporation. Ms. Milkovich took over administration of Ms. Reynolds' claim in
28 September 2009. Ms. Milkovich explained that, after requesting an allowance order for
29 Ms. Reynolds' claim, there was some dispute as to her wage. Ms. Milkovich confirmed her
30 understanding the Department calculated Ms. Reynolds' wage based on part-time employment.
31 Ms. Milkovich confirmed the employer provided only post-injury wage data in response to the
32 Department request for "like" wage and employment information. Ms. Milkovich also confirmed that

1 the job posting provided by the employer to the Department for the job at issue, was dated
2 March 25, 2009.

3 David J. Durbin

4 David J. Durbin has worked for Chevron for 22 years. Mr. Durbin was the site manager for
5 the Chevron Centralia store up until about one year prior to his August 3, 2010 testimony. In 2008,
6 Mr. Durbin hired Ms. Reynolds as a CSR to work at the Centralia station.

7 Mr. Durbin testified extensively to the recruitment process he used to fill Centralia store
8 positions, including posting job listings online at WorkSource. He reviewed a job listing dated
9 November 19, 2008, and testified that it represented the advertisement when Ms. Reynolds was
10 hired because he always used the same advertisement.

11 Mr. Durbin tried to staff the Centralia store with six to ten CSR employees. He explained it
12 was best to have a total of ten CSR employees at a time, three to four full-time employees and four
13 to five part-time employees, in order to have sufficient back-up staffing to accommodate employee
14 vacation requests. At the time he hired Ms. Reynolds, Mr. Durbin intended to hire two part-time
15 people, each working 8 to 30 hours per week. He always hired new employees part-time to allow
16 for schedule flexibility. Some part-time employees then worked their way into full-time positions.

17 Mr. Durbin first testified Ms. Reynolds applied for part-time work, but conceded on
18 cross-examination that Ms. Reynolds' job application indicated her desire for part-time or full-time
19 work. At the time Ms. Reynolds was hired, there were part-time employees in the Centralia store.
20 However, Mr. Durbin agreed he sometimes needed part-time people to work full-time because the
21 store was open 24 hours per day and they were short-handed. According to Mr. Durbin, as of
22 June 2008, CSR employees Ms. Roach, Ms. Flynn, Ms. Reynolds, and Ms. Bosson, were all
23 part-time employees. Kelly Tock was hired part-time, but following her training she worked full-time
24 for the ensuing weeks. Mr. Durbin agreed Chevron's policy provided an employee working more
25 than 32 hour per week is moved into full-time status.

26 Mr. Durbin explained Chevron's initial training was provided over three days in Puyallup.
27 Following the Puyallup training, a new CSR employee would have a maximum of three additional
28 days of in-store training. Mr. Durbin later testified that the in-store training was for a maximum of
29 four days. 8/3/10 Tr. at 95. Newly hired employees were expected to work full-time for their first
30 two weeks to complete the training process.

31 Ms. Reynolds' training was extended to three weeks because she was not picking up the
32 system. Mr. Durbin's intention was for Ms. Reynolds to work two days per week following her

1 training. Mr. Durbin believed Ms. Reynolds understood new employees have a 90-day probationary
2 period. However, the Chevron probationary period requirements were not set forth in any manual.

3 Mr. Durbin explained that on Ms. Reynolds' date of injury, the person scheduled to work with
4 her had gotten ill, and as a result Ms. Reynolds had been alone at the store for the first time.
5 Mr. Durbin noted that Ms. Reynolds was injured on Tuesday. On Wednesday he posted the
6 schedule for the following work week, which provided Ms. Reynolds would attend a meeting on
7 Monday, and then work two regular days on Tuesday and Wednesday. Mr. Durbin testified
8 Ms. Reynolds was injured during her training period, and did not start her regular employment. He
9 also testified that, following her injury, Ms. Reynolds never returned to her regular job, she only
10 worked light duty.

11 Mr. Durbin corroborated Ms. Reynolds' testimony about the nature of the light duty work, but
12 indicated that the light duty work did not change her intended work hours, only the time of day she
13 was working. Mr. Durbin denied ever representing to Ms. Reynolds that her job would consist of
14 eight hours per day for four to five days per week.

15 DISCUSSION

16 It is undisputed that Ms. Reynolds was injured while employed by Chevron, and that she is
17 entitled to time-loss compensation and other benefits. The sole issue raised by this appeal
18 concerns Ms. Reynolds' status as a part-time or full-time employee and the method to be used in
19 determining her "monthly wages . . . at the time of injury" under the provisions of RCW 51.08.178.
20 The Industrial Insurance Act was written to provide sure and certain relief to injured workers.
21 *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467 (1987). All doubts are to be resolved in
22 favor of the injured worker. *Dennis* at 470. The overarching objective of Title 51 RCW is to reduce
23 to a minimum the suffering and economic loss arising from injuries and/or death occurring in the
24 course of employment. *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). The
25 remedial nature of the worker's compensation system and the current statute require a wage loss
26 calculation that reflects the injured worker's actual "lost earning capacity." *Cockle* at 822, quoting
27 *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798 (1997).

28 It is further undisputed that Ms. Reynolds applied for either part-time or full-time work with
29 Chevron; that she was hired as a customer service representative; that she was paid \$9.50 per
30 hour for her work; and that she did not return to her regular job after being restricted to light-duty
31 work.

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1 The employer contends that Ms. Reynolds' wage should be calculated as a part-time
2 employee². In support of its contention, the employer offered evidence of its intent to hire
3 Ms. Reynolds as a part-time employee; of her hiring as a part-time employee; and of her training
4 status at the time of her industrial injury. Further, the employer provided David Durbin's testimony
5 that no full-time employees were ever hired at the Centralia store. However, Mr. Durbin
6 acknowledged numerous part-time Chevron employees at the Centralia store worked forty or more
7 hours per week on a regular basis because the store was short-handed or understaffed.

8 The claimant contends that her wage should be calculated on a full-time employee basis. In
9 support of her contention, the claimant testified she understood her hiring to be for full-time work,
10 four or five days per week, eight hours per day, 32 to 40 hours per week total. The claimant also
11 provided testimony and copies of her Chevron paystubs showing that training wages were paid only
12 for the first week of her work, and regular wages were paid thereafter. The year-to-date figures on
13 the paystubs corroborate the claimant's testimony regarding her work hours.

14 RCW 51.08.178 provides direction concerning time-loss compensation rate calculation and a
15 worker's wages. In all claims involving time-loss compensation benefit computation, the
16 Department must apply the statute, which provides, in relevant part:

17 (1) For the purposes of this title, the monthly wages the worker was
18 receiving from all employment at the time of injury shall be the basis
19 upon which compensation is computed unless otherwise provided
20 specifically in the statute concerned. In cases where the worker's wages
21 are not fixed by the month, they shall be determined by multiplying the
22 daily wage the worker was receiving at the time of the injury:

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

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

² While there was limited evidence introduced about the employer providing "like or similar" employee wage data to the Department, perhaps to facilitate wage setting pursuant to RCW 51.08.178(4), this argument was not fully developed by the employer, and is not addressed herein.

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

5 Further direction is found in case law. In *Department of Labor & Indus. v. Avundes*,
6 140 Wn.2d 282 (2000), the Court established a two-prong test to determine which section of the
7 statute governs when determining an injured worker's wage. First, one looks to the type of work
8 being performed; and secondly, the relationship of the worker to his or her employer. After
9 determining whether the nature of the work being performed is essentially part-time or intermittent,
10 the second prong in the analysis is to look at several factors: the nature of the work, the worker's
11 intent, the relationship with the current employer, and the worker's work history. *Avundes* at 287.

12 First, the nature of the type of work of a Chevron customer service representative (CSR) is
13 neither part-time nor intermittent since it is performed on a full-time basis throughout the year as a
14 regular part of retail trade. The work is certainly full-time work, as the store is open 24 hours per
15 day. Further, the employer acknowledged its Chevron Centralia store has at least some full-time
16 CSR employees.

17 Mr. Durbin's testimony was insufficient to rebut Ms. Reynolds' explanation that she was hired
18 as a full-time employee. First, while the work of a CSR can be performed by a worker on a
19 part-time or a full-time basis, the evidence shows that, for this employer, the work of a CSR is
20 essentially full-time work. The employer conceded that, while it may hire part-time employees, the
21 employees are frequently scheduled as full-time employees due to the 24 hour per day nature of
22 the business, and the frequency with which they are understaffed. Even though the employer may
23 have called its employees part-time, the employees were part-time only in name as the evidence
24 offered by the claimant through Ms. Winters' testimony shows the average CSR worked at least
25 40 hours per week.

26 Next, Ms. Reynolds applied to Chevron for part-time or full-time work, and testified credibly
27 that she believed she was hired to work full-time and apparently accepted employment with that
28 intention. I conclude that Ms. Reynolds was led to believe, and reasonably did believe, that she had
29 full-time permanent employment.

30 In looking at the relationship between the worker and the current employer, I note that
31 Ms. Reynolds had been employed less than a full month at the time of her injury. However,
32 Ms. Reynolds was scheduled for full-time work, and had actually performed full-time work for the
entirety of her Chevron employment. It is also notable that, while the employer testified that

1 Ms. Reynolds was still in training status, the claimant's paystubs contradicted this testimony. The
2 paystubs showed one week of training wages, and then all further wages were "regular" wages.

3 There was no evidence presented regarding the worker's work history in this case by either
4 side. The only work history evidence in this case is the full-time employment with Chevron
5 immediately prior to the industrial injury; and Ms. Reynolds' continued full-time employment until
6 being placed on light duty.

7 Based upon careful consideration of the testimony of the four witnesses and review of the
8 exhibits, the Department order of November 17, 2009, is incorrect and must be reversed. The
9 claim is remanded to the Department with directions to compute Ms. Reynolds monthly wage for a
10 five day per week, 8 hours per day full-time worker.

11 RCW 51.08.178(1) is the default provision and must be implemented unless it is established
12 that it does not apply. Because I have concluded that Ms. Reynolds was a full-time employee, and
13 was paid a daily wage, it is not necessary to analyze whether the "like or similar" provision of
14 RCW 51.08.178(4) applies.

15 **FINDINGS OF FACT**

- 16 1. On September 17, 2008, the claimant, Terri L. Reynolds, filed an
17 Application for Benefits with the Department of Labor and Industries, in
18 which she alleged that she suffered an injury to her right knee, left arm,
19 and head in the course of employment with Chevron Corporation on
20 June 24, 2008. The claim was allowed and benefits were paid.

21 By Department order dated April 23, 2009, the Department set the
22 worker's wage rate by taking into account the following: wages based on
23 \$9.50 per hour, 8 hours per day, and 9 days per month for a monthly
24 wage of \$684, with no additional wages; for a total gross wage of
25 \$684 per month; married with one child.

26 On May 8, 2009, the claimant filed a Protest and Request for
27 Reconsideration with the Department to the April 23, 2009 order. On
28 June 1, 2009, the Department issued an order holding the April 23, 2009
29 order in abeyance. On June 22, 2009, the self-insured employer filed a
30 Protest and Request for Reconsideration with the Department to the
31 April 23, 2009 order. On November 17, 2009, the Department issued an
32 order affirming the April 23, 2009 order.

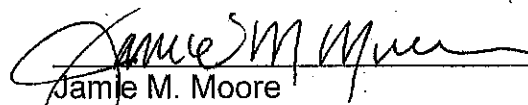
On December 7, 2009, the claimant filed a Notice of Appeal of the
November 17, 2009 Department order with the Board of Industrial
Insurance Appeals. On January 6, 2010, the Board of Industrial
Insurance Appeals granted the claimant's appeal of the November 17,
2009 order, assigned the appeal Docket No. 09 22421, and ordered that
further proceedings be held.

- 1 2. On June 9, 2008, Terri L. Reynolds was hired by Chevron Corporation
2 as a full-time employee at the rate of \$9.50 per hour.
- 3 3. On June 24, 2008, Terri L. Reynolds sustained an injury to her right
4 knee, left arm, and head during the course of her employment with
5 Chevron Corporation.
- 6 4. Terri L. Reynolds' employment with Chevron Corporation as a customer
7 service representative at the time of her industrial injury was not
8 essentially intermittent or part-time in nature or exclusively seasonal in
9 nature.
- 10 5. From June 9, 2008, through June 24, 2008, Terri L. Reynolds worked
11 8 hours a day, 5 days a week, for an average of 40 hours per week for
12 Chevron Corporation.
- 13 6. Terri L. Reynolds, in her capacity as a full-time employee for
14 Chevron Corporation, was paid wages fixed by the month based upon
15 her hourly rate of pay.

CONCLUSIONS OF LAW

- 16 1. The Board of Industrial Insurance Appeals has jurisdiction over the
17 parties to and the subject matter of this appeal.
- 18 2. Terri L. Reynolds was paid a daily wage or a wage fixed by the month
19 within the meaning of RCW 51.08.178(1).
- 20 3. The order of the Department of Labor and Industries dated
21 November 17, 2009, is incorrect. The order is reversed and remanded
22 to the Department with direction to enter an order in which the
23 Department determines Ms. Reynolds' monthly wage rate using her
24 hourly rate of pay of \$9.50 for full-time work of 40 hours per week, with
25 additional wages for healthcare benefits, none; tips, none; bonuses,
26 none; overtime, none; and housing/board/fuel, none; and for such
27 further action as may be indicated by the laws or the facts.

DATED: NOV 03 2010



Jamie M. Moore
Industrial Appeals Judge
Board of Industrial Insurance Appeals