BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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

INDUSTRIAL APPEALS JUDGE: Jamie M. Moore

APPEARANCES:

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

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

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

PROCEDURAL AND EVIDENTIARY MATTERS

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

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

ISSUE

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

EVIDENCE PRESENTED

Terri L. Reynolds

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

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

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

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

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

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[1] The 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 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.

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

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

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

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

Shanna Winters

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

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

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

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

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

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

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

Kristi Milkovich

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

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

David J. Durbin

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

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

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

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

> (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:
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> . . .
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> (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.
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> (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.

[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.

> (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.

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

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

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

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

In looking at the relationship between the worker and the current employer, I note that Ms. Reynolds had been employed less than a full month at the time of her injury. However, 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

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

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

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

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

FINDINGS OF FACT

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

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

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

2. On June 9, 2008, Terri L. Reynolds was hired by Chevron Corporation as a full-time employee at the rate of $9.50 per hour.

3. On June 24, 2008, Terri L. Reynolds sustained an injury to her right knee, left arm, and head during the course of her employment with Chevron Corporation.

4. Terri L. Reynolds' employment with Chevron Corporation as a customer service representative at the time of her industrial injury was not essentially intermittent or part-time in nature or exclusively seasonal in nature.

5. From June 9, 2008, through June 24, 2008, Terri L. Reynolds worked 8 hours a day, 5 days a week, for an average of 40 hours per week for Chevron Corporation.

6. Terri L. Reynolds, in her capacity as a full-time employee for Chevron Corporation, was paid wages fixed by the month based upon her hourly rate of pay.

CONCLUSIONS OF LAW

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

2. Terri L. Reynolds was paid a daily wage or a wage fixed by the month within the meaning of RCW 51.08.178(1).

3. The order of the Department of Labor and Industries dated November 17, 2009, is incorrect. The order is reversed and remanded to the Department with direction to enter an order in which the Department determines Ms. Reynolds' monthly wage rate using her hourly rate of pay of $9.50 for full-time work of 40 hours per week, with additional wages for healthcare benefits, none; tips, none; bonuses, none; overtime, none; and housing/board/fuel, none; and for such 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