IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON--DIVISION I

NO. 72631-5-I

ANDRIY SKRINNIK, APPELANT

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

RESPONDENT

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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Andriy Skrinnik

Pro Se

2246 Yew Street Rd.

Bellingham,WA, 98229

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I. INTRODUCTION

Appellant requests review in this workers' compensation case on appeal from the Board of Industrial Insurance Appeals ("BIIA"). The sole issue in this case is the calculation of his monthly wages at the time he became disabled due to his claim-related medical conditions. The Industrial Insurance Act ("IIA") sets forth a statutory procedure for determining an injured worker's wages at the time he or she is injured or becomes disabled, which then sets the rate of the injured worker's compensation during periods of disablement. *See* RCW 51.08.178. Establishing Appellant 's correct monthly wage is vital because it sets the rate of disability compensation for the life of his claim.[1] Where—as is the case here—the worker is disabled for an extended period of time, an incorrectly low wage order can have disastrous consequences for the economic stability of the worker and his or her family. It is thus of paramount importance that Appellant 's wage be established correctly.[2]

This case presents a unique set of circumstances, which are not directly addressed through the relevant statutes, regulations, or any judicial interpretations thereof. At the time he became disabled, Appellant was the sole shareholder and employee of a corporation designated a Subchapter S corporation through the Internal Revenue Service ("IRS").[3] He thus paid himself a fixed salary (his social security wage base); any additional profits from the corporation were thus either capitalized or passed through to him as a bonus. The Department of Labor & Industries ("DLI") issued an order (colloquially known in workers' compensation parlance as a "wage order") which set Appellant 's monthly wage at the time of his disablement at $968.66 per month. The Board of Industrial Insurance Appeals reversed the Department's order on the grounds that Appellant 's monthly wage could not be reasonably and fairly determined using the evidence in the record, and ordered DLI to calculate his wage under RCW 51.08.178(4) (comparison to similarly situated workers). DLI appealed to Whatcom County Superior Court and Appellant cross-appealed. Appellant appeals from those Findings and Judgment. CP 6. The Verbatim Report of Proceedings from the less than one hour hearing in the lower has been

provided, but this case is not one of witnesses testimony and the issues concern few original source documents provided.

Appellant holds that the un-rebutted facts of his case demonstrate a fixed monthly wage at the time of his disablement of $4,000. But RCW 51.08.178(3) also directs DLI to average any bonuses paid to the worker over the course of the twelve months prior to his or her disablement. In this case, the corporate profit distribution to Appellant should be treated as a bonus under RCW 51.08.178(3), and the average monthly value of his "bonuses" ($3,078.63) should be added to reach a total monthly wage of $7,078.63 at the time Appellant became disabled. Stripped of its pedantry, Appellant 's argument is simple: where it is the product of one's labor, an S corporation's profit distribution to its shareholder-employee is a "bonus" in both the common and technical meaning of the term.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 The trial court erred in ignoring adequate evidence of contemporaneous, filed, and paid tax returns as evidence of income of Q1 2002, in not following the law by using the previous 12 months of income before the 3/2002 inability to work, in finding that using only 2001 income is the "fairest and most reasonable method" of determining income, and in not at least using the high monthly wage rates of employees engaged in similar occupations allowed per the law.

Issues Pertaining to Assignments of Error

No. 1 Did the trial court erred in ignoring adequate evidence of contemporaneous, filed, and paid tax returns as evidence of income of Q1 2002, in not following the law by using the previous 12 months of income before the 3/2002 inability to work, in finding that using only 2001 income is the "fairest and most reasonable method" of determining income, and in not at least using the high monthly wage rates of employees engaged in similar occupations allowed per the law?

III. STATEMENT OF THE CASE

Appellant incorporates by reference the facts as they are laid out in the CP 1 Certified Appeal Board Record ("CABR") [4] and the procedural history in CP 6 Findings 1.7-1.12. The underlying facts of this case are not in serious dispute. Appellant filed two claims for

occupational diseases which arose out of his employment. His claims were accepted separately in 2009 by DLI for conditions relating to his low back and bilateral knees.[5] *See* CP 1 CABR at 85-86. The uncontested evidence establishes that Appellant emigrated from the Ukraine in 1990, and worked for various companies before starting his own enterprise in the mid to late '90s. CP2 Trans. at 8-11. In 1998 he in incorporated the business as Any Construction Work (ACW) and elected through the Internal Revenue Service to have his business treated as a Small Business Corporation.[6] Appellant functioned as the sole shareholder, executive officer, and employee of ACW, Inc. *Id.* at 11. He last worked in March of 2002, when his back and knee conditions progressed to the point that he was unable to continue working. *Id.* at 13. As a result of his disabilities, he was forced to cancel his company's remaining jobs in order to focus on treating his medical conditions. *Id.*

On October 11, 2010, DLI issued orders in both of Appellant 's claims in which it determined that his monthly wage at the time he became disabled was $968.66.On December 10, 2010, the Department issued two further orders in both of Appellant 's claims which adjusted the rate of his disability compensation pursuant to his receipt of Social Security Disability benefits. CP 1 CABR at 2-3. Appellant timely appealed all four orders, and the cases were consolidated by the BIIA. Hearings were held on August 23, 2011, in front of Industrial Appeals Judge Mitchell Harada. Appellant represented himself, and presented his own testimony in addition to that of his wife. DLI presented the testimony of Sherryl Whitcomb, an employee of DLI. *See* CP 2 8/23/2011 Trans. At hearing, a number of Appellant 's personal and business tax records were admitted. CP 2 8/23/2011 Trans. at 15, 57; Exs. 1-7.

Appellant testified that he paid himself $12,000 in salary in the first quarter of 2002, and that he did not work after March of 2002. *Id.* at 16-17. In 2001 Appellant paid himself what was referred to as a "bonus" of $22,566 from the profits of his business; in the first quarter of 2002 he similarly paid himself a "bonus" of $20,019. *Id.* at 27-28. Ms. Whitcomb, DLI's witness, testified that she believed that the DLI orders on appeal were incorrect. *Id.* at 66. In her estimation, Appellant 's annual wage at the time of his disablement was $46,566. *Id.* at 67. She

reached that figure by averaging the income paid to Appellant by ACW, Inc., in 2001 alone. *Id.* at 70-71. Ms. Whitcomb testified that she did not take Appellant 's 2002 income into consideration because she did not have "proof" that it represented only his first quarter earnings. *Id.* at 81-82. She testified further that she could not use the earnings from one quarter because "the statute" required her to average a twelve month period of employment. *Id.* at 84.

In a Proposed Decision & Order, Judge Harada agreed with Ms. Whitcomb's formulation. CP 1 CABR at 88. Appellant , now represented by an attorney, filed a petition for review of Judge Harada's PD&O. CP 1 CABR at 59-64. DLI filed a response. *Id.* at 31-48. The BIIA granted the petition for review, and in a final Decision & Order, reversed Judge Harada's PD&O. *Id.* at 2-9. The BIIA determined that Appellant 's wages were not "fixed," and remanded the case to DLI. *Id.* at 7. On remand, DLI was instructed to determine the number of hours per day, and days per week, that Appellant worked and apply the average hourly wage paid to similarly situated workers to his average work hours to come up with his monthly wage. *Id.* The order relating to the offset of Social Security Disability benefits was reversed as well pending the final outcome of the wage order.[7] DLI appealed to Whatcom County Superior Court and Appellant cross-appealed. Appellant timely appealed the Findings and Judgment (CP6) to this court.

IV. SUMMARY OF ARGUMENT

I am requesting a review of the calculation of my wage for time loss compensation benefits. Each judge who reviewed this matter remanded to the Dept. of Labor & Industries (The Department) to determine the hourly wage to be used to calculate my monthly benefits. The dispute concerns the interpretation of the calendar year of employment. I, as Claimant maintain that it involves the last three quarters of 2001 and the first quarter of 2002. That was the last year I worked for 12 consecutive months. I have not been able to work since March 2002.

RCW 51.08.178 (3) states:

"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."

There is no dispute regarding my wage information for 2001, and 2002; this issue on appeal is whether, based on this information, the Board incorrectly determined what subsection of RCW 5 1.08.178 should be applied to calculate my monthly wages and how RCW 51.08.178 subsections should be applied to calculate my wages. The Department may consider whether the wage can be reasonably and fairly determined using a "reasonable" method which "may include averaging" of worker's business income. The law requires only using any twelve successive calendar months, regardless of whether the income is high or low. The Department acknowledged the accuracy of my income in 2001 and 2002 and they suggested averaging the wage.

Just to illustrate the point, let's bring the example of a small auto body shop that makes $5,000 profit a month repairing cars. Their business gradually grows through the years. In 2001 the owner of the shop takes a risk and decides to rebuild antique cars. He takes his business to a different level. Then he cuts down on the work that he was doing in the previous year from eight hours to five hours and spends his time working on the antique car. In 2001 his income went slightly down, but the following year he got paid more because he was working on antique cars, which commanded a higher income and caused his profit to increase. Say, in 2002 he was injured. Would the law consider his higher income or ignore it because it is higher?

The same thing happened with me in a different area of employment. In the previous years I worked as a sub-contractor, and the following year I increased my insurance and bond

and got a general contractor's license. In 2001 I increased my liability insurance from $300,000 to $1,000,000, which allowed me to bid on bigger commercial jobs with would bring me a greater profit. All supporting documents are in the records of the Department of Labor and Industries. That is why my income is slightly lower in 2001 in comparison to previous years. In 2002 the results of my smart investments and risks started paying off. This is why it is fair for my wages to be averaged, as the law allows. The overall difference in calculating my benefits would equal approximately $800 per month more compared to the previous years.

Would it be fair to calculate the lowest income and disregard the higher income? The law states in RCW 51.08.178 (3) that if a person is injured, the figures used are to be the twelve months immediately preceding the injury. So my 12 month period should be calculated from Apr., 2001, through March 31, 2002. My income was calculated in the same manner by a tax accountant for 2001 and 2002. I received a monthly salary and bonuses in addition, and my salary for 2002 should be calculated just as easily as my salary in 2001. Judge Garrett was confused and tried to calculate my daily wage rate. I had a monthly salary, so it shouldn't be a problem. The law requires you to calculate hourly rates for seasonallpart-time employees. This is an error in her ruling. Refer to the law of seasonal employees, RCW 5 1.08.178 (1)(2) **She erred in stating that there was insufficient information in calculating my income for 2002 based on the daily rates.** See CP 6 Findings of Fact and Conclusions of Law and Judgment at 3, line 21(1.15). RCW 51.08.178 requires the last four calendar quarters from the date of injury and not the prior calendar year. Judge Garrett ignored or overruled the previous ruling by Board of Industrial Appeal judges, who had worked on similar cases for combined years of experience of more than 100 years.

Regarding bonuses, they are an additional amount of money that can be rewarded and averaged to the time a worker was employed and they could be paid any time.

RCW 5 1.08.178 (4) states that where the worker's wage is not fixed or "cannot be reasonably and fairly determined," the Department can engage in mathematical calculations to attempt to determine a worker's wage. There is no need to try to determine my wages, there is ample data by which it can be reasonably and fairly determined. They should have calculated my benefits based on the last year I earned income, as required by the law. According to my calculations, this should have been $66,943.50, based on the L & I ruling. Adding my wages from the last three quarters of 2001 ($34,924.50) to my wages from the first quarter of 2002 ($32,019.00) results in total wages for the 12-month period of $66,943.50. The Department's assertion that they are somehow unable to perform this simple math equation is incomprehensible. The Department witness apparently calculated the figure $34,924.50 stipulated to, but then the Department asserts that it was "precluded" from using this number because it would not be "reasonable and fair" to combine various quarters from two calendar years. This is based upon what? How does it make any difference whatsoever whether the quarters are within the same calendar year? A twelve month period is a twelve month period no matter whether the months fall within a calendar year or not.

The $66,943.50 figure was calculated over my last four quarters of employment, which consisted of three quarters in 2001 and the first quarter in 2002. I earned substantially more in the first quarter of 2002 because I took on more commercial jobs and I re-invested in better equipment. I also increased my bond insurance, which allowed me to bid on larger commercial jobs. If I got injured in November of 2001, by the Department's rationale, they would have to pay my time loss benefits based upon my $100,000.00 wages in 2000 because that is the last full

calendar year for which there is a tax return. Just as the Department's manipulation of the numbers in this case have under estimated my actual earnings, the Department's job is not to manipulate the numbers and estimate where the actual wages are able to be fairly and reasonably determined. In this case, the actual numbers are very easy to determine based upon the evidence presented.

The only other option as provided in RCW 5 1.05.178 provides in (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." RCW 51.08.178 (4) does not empower the Department to devise alternative methods for calculating an injured worker's monthly wage that are separate and apart from the statute. Subsection (4) limits the Dept. to one method. It requires the Dept. to compute the monthly wage "on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed." RCW 5 1.08.178 (4) does not authorize the Dept. to average profit and loss of a sole proprietor's business over a twelve-month period in order to calculate a monthly wage. I was employed full time and was not a seasonal employee. The Dept. of Labor and Industries must compare a similar employee engaged in a similar field of employment and not to calculate an hourly or daily wage, as used by Judge Garrett.

The Department of Employment Security has archives for records of similar employees. I was managing the construction company. The US Dept. Of Labor Bureau of Labor Statistics Occupational Employment staistics for category 11-9021 Construction Managers managing,coordinating and supervising construction process , as I was doing in Q1 2002 in doing the lucrative contract to tile the Belevue Club pool with my workers under me, reports that as of May 2005 (when I first applied to L&I from the 2002 inability to work) this category in

Washington State had an hourly mean wage of $50.04 and an annual mean wage of $104,080, making a reporting quarter at $26,000. [31] The court should take judicial notice of this official government information,relied up by governments and courts alike. The Department should have at least used this number under RCW 51.08.178 (4) analysis and it was error by the lower court to deny using this method (CP 6 at 1.13) " because his wages could be determined fairly and reasonably" while in the next Finding at CP6 1.16 rule that, to the contrary, the 2002 income was "insufficient" to permit a "fair and reasonable determination of his daily wage rate" for Q1 2002 . Which one is it ? It has to be one or the other. And then the court found at CP6 1.14 that they should not use my industries' construction manager wages because I should be making more than just that $26,000 for the quarter because of the court's concern that my number should be much higher because as the owner of the company I should also get a share of corporate profits and so looking at the lower contrstuction manger figure "would not fully recognize" my compensation—and therefore the court in allegedly trying to be fair to me threw out all my higher 2002 Q1 income and left me with 2001 income lower that my peers or owners of companies made in 2002. In trying to bend over backwards to help me, the court hurt me and did not follow any of the statutory methods of determination of income and to my detriment. This court should rectify this in justice.

V. ARGUMENT

This is a case arising under the Industrial Insurance Act ("IIA"). Passed in 1911, the IIA has been described as the "great compromise" between employers and employees. *Stertz v. Indus. Ins. Comm'n*, 91 Wn. 588, 590, 158 P. 286 (1916). Acknowledging that the injured worker's hitherto remedy had "been uncertain, slow, and inadequate," the legislature provided for "sure and certain relief for workers, injured in their work, and their families and

dependents . . . regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation." RCW 51.04.010. "[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn. 2d 467, 470, 745 P.2d 1295 (1987). Moreover, RCW 51.08.178, the statute governing the outcome of this case, "should be construed liberally in a way that is most likely to reflect a worker's *lost earning capacity*, with doubts resolved in favor of the worker." *Dep't of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 271, 976 P.3d 637 (1999) (emphasis added), *aff'd* 140 Wn. 2d 282 (2000).

A. The Basic Formula of RCW 51.08.178

There are three basic formulas under the IIA for calculating an injured worker's gross monthly wages[8] at the time of injury or disablement. RCW 51.08.178(1) provides the formula for full-time employees, subsection (2) provides the formula for "exclusively seasonal" and "part-time or intermittent" employees, and subsection (4) provides a backstop provision in cases where the injured worker's monthly wages cannot be "reasonably and fairly determined." The statute itself provides that "[f]or the purposes of [Title 51], 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."[9] RCW 51.08.178(1) (emphasis added). The use of the term "at the time of injury" requires some explanation in this case, as Appellant 's claims were accepted by DLI as occupational diseases rather than acute injuries.[10] In the case of occupational diseases, RCW 51.32.180 provides that "the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim." Thus, Appellant 's last wages at ACW, Inc.—his company—form the basis of his wages under his

workers' compensation claims because that was his last employment, and he was forced to cease that employment due to his condition.[11]

The default provision of RCW 51.32.178 is sub-section (1), which "must be used unless the Department establishes it does not apply." *Dep't of Labor & Indus. v. Avundes*, 140 Wn. 2d 282, 290, 996 P.2d 593 (2000). Here there has been no contention or offer of proof by DLI that Appellant was a part-time, seasonal, or intermittent employee. Thus, the only question is whether sub-section (1) or (4) applies.

Appellant believes that his wages should be calculated utilizing subsection (1) because he was a full-time employee and his monthly wage was "fixed" and can be "reasonably and fairly determined." Moreover, the profits from his corporation which passed through to him, since they were the products of his labor, should be treated as "bonuses" under sub-section (3), averaged, and added to his fixed monthly wage.

B. DLI Impermissibly and Incorrectly Averaged Appellant 's Past Earnings to Come up With a Figure Which Does not Reflect his Earning Capacity at the Time of his Injury

"[T]he monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed." RCW 51.08.178(1). Under sub-section (1), the only permitted averaging of an injured worker's wages pertains to the number of hours worked per day, and even then only "[i]n cases where the worker's wages are not fixed by the month." RCW 51.08.178(1). In this case, DLI has consistently argued that Appellant 's 2001 income should be averaged somehow in order to establish his monthly wage. *See, e.g.,* CP 1 CABR at 46-47. DLI disregards Appellant 's income from the first quarter of 2002 on the grounds that "the Department believed the first quarter earnings of 2002 would be the same as the last three quarters of 2001." *Id.* at 47. DLI's analysis is flawed.

First of all, DLI's argument blatantly disregards the statutory mandate that the injured worker's wages "at the time of injury" (in this case, disablement) are the basis for time-loss

compensation under the IIA. "[T]he purpose of time-loss compensation is to reimburse workers for their lost earning capacity." *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 691, 162 P.3d 450 (2007) (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wn. 2d 801, 16 P.3d 583 (2001)). An averaging of a worker's income at some point in the (albeit recent) past, before he became disabled, does not accurately reflect his lost earning capacity at the time of his disablement.

DLI also completely ignores tax records and receipts from 2002 which support a higher earnings capacity than in 2001, but strangely states that "it can be asserted that the Department believed the first quarter earnings of 2002 would be the same amount as the last three quarters of 2001." CP 1 CABR at 47. In essence, DLI's argument is that Appellant 's *demonstrated* earnings in the first quarter of 2002 should be disregarded in favor of an *extrapolation* into 2002 of what he made *on average* in 2001. Not only is DLI's argument logically flawed, it also runs afoul of the general rule against averaging a full-time worker's wages.

The Department's position is apparently that "it is unreasonable to calculate a worker's wages based on a cobbling together of various tax records, particularly given the complete lack of any documentation that would substantiate the assertion that the business was not operated during anything other than the first quarter of 2002." CP 1 CABR at 45. But, of course, DLI uses Appellant 's tax records to determine what it asserts is his monthly wage. *Id.* at 46; *see also* CP 2 8/23/2011 Trans. at 68-72. It is unclear why the Department would assert in one instance that tax records are an unreliable source of an individual's income, but in the very next breath base its proposed outcome on those same tax records.[12]

There is ample documentation to substantiate the assertion that Appellant did not work after March of 2002. Appellant 's *unrebutted* testimony was that he stopped working in March of 2002 due to his disabilities. *See* CP 2 8/23/2011 Trans. at 10-11; 13 16-17; 27-28; 39. Lest one has any doubt as to the veracity of Appellant 's testimony, he submitted documentation in the form of his quarterly Department of Revenue tax records showing that he only did business in

the first quarter of 2002. *See* CP 2 Ex. 4-7. DLI asserted that Appellant presented no evidence that he did not work beyond March of 2002, but in fact he did, and DLI offered no any evidence that contradicts Appellant 's testimony—it offers only its own allegations and conclusions. The lower court here also erred in ignoring sufficient government tax records of Appellant's 2002 Q1 income and did not specify what was lacking in the records. Finding 1.16 in CP6. Because March of 2002 was the last time Appellant worked before his occupational conditions became disabling, it is his income during that timeframe which is to be used in computing his monthly wages "at the time of injury," not an average of what he earned in a prior year.[13] RCW 51.08.178; RCW 51.32.180.

C. Appellant 's Monthly Wage at the Time his Condition Became Disabling was "Fixed" Within the Meaning of RCW 51.32.178(1)

Having established that the reference timeframe for calculating Appellant 's monthly wage per RCW 51.08.178 is March, 2002—the point at which his condition became disabling—it is necessary to establish that his monthly wage was fixed at that time. The default method, sub-section (1), provides for the calculation of wages on a *monthly* basis, unless the wage is not "fixed by the month." In this case, analysis of Appellant 's tax records and business structure reveal that his monthly wage in March, 2002, was $4,000.

Appellant 's company, ACW, Inc., elected to be treated as a Small Business Corporation pursuant to Subchapter S of the Internal Revenue Code. In order to elect S corporation[14] status, the entity must have less than one hundred shareholders, and its shareholders must be individuals, estates, or certain other exempt organizations. 26 U.S.C. § 1361(b). Generally speaking, the main benefit of electing Subchapter S status for a small business owner is that the vast majority of the business's income is not taxed before it passes through to the shareholder. *E.g.*, 26 U.S.C. § 1363. In this case, Appellant was the owner, sole employee, and sole shareholder of ACW, Inc. CP 2 8/23/2011 Trans. at 11-12. He thus paid himself a wage, and any leftover profits of the corporation were passed through to him in the form of distributions. The

key distinction between wages and distributions in this context is that payroll taxes (FICA & FUTA) must be paid on wages, but not on distributions.

Historically, the amount that the taxpayer/business owner chooses to allocate to wages versus distributions has been a thorny issue for the IRS. An owner-operator such as Appellant must pay himself a *reasonable* salary, and may not re-classify his wages as "distributions" in order to avoid federal payroll taxes. [15] Moreover, "the characterization of funds disbursed by an S corporation to its employees or shareholders turns on an analysis of whether the payments at issue were made as remuneration for services performed." *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1018 (8th Cir. 2012) (internal quotations omitted).

Here, Appellant paid himself wages for compensation for his services to the company. In 2000 and 2001, he paid himself a total salary each year of $24,000, or $2,000 per month. *See* CP 2 Exs. 1 & 2.[16] There has been no argument that this was not a "reasonable" salary in accordance with the tax laws. In the first quarter of 2002, Appellant paid himself wages of $12,000, or $4,000 per month. CP 2 Ex. 3. As Appellant testified, ACW was a growing business; the company's gross revenue rose steadily and unrelentingly from $83,326 in 1999 to $107,956 in 2001, and $73,542 in the first quarter of 2002 alone. CP 2 8/23/2011 Trans. at 44. In late 2001 Appellant increased the company's bond from $300,000 to $1,000,000 transcript in order to bid on larger state and public works projects. *Id.* at 45.

Given the requirement that Appellant pay himself a "reasonable" wage as the company's sole employee, it makes perfect sense that his monthly wage would increase commensurate with the company's growing revenue. There is no indication in any of the records that Appellant worked beyond March of 2002, his tax records clearly show he was paid a salary of $12,000 for the first three months of 2002, and other records show that his business had no earnings beyond the first quarter of 2002.[17] The Court should thus find that Appellant , when his condition became disabling, earned a monthly salary of $4,000. Using an earlier monthly salary from 2000 or 2001 unfairly disregards Appellant 's increased earnings capacity in 2002, and certainly does

not accord with the statutory directive to consider "the monthly wages the worker was receiving from all employment *at the time of injury*." RCW 51.08.178(1). It bears repeating that RCW 51.08.178 "should be construed liberally in a way that is most likely to reflect a worker's lost earning capacity, with doubts resolved in favor of the worker." *Avundes*, 95 Wn. App. at 271.

Appellant 's monthly at the time he became disabled was $4,000, but that does not end our inquiry. In addition to his wages, of course, he paid himself distributions when his company was doing well enough to afford it. Those distributions should be classified as bonuses, averaged, and added to his monthly wages to come up with his total monthly income.

D. Appellant 's Distributions from his Company Count as Bonuses for Purposes of RCW 51.08.178(3) and Should be Averaged and Added to his Monthly Wages

RCW 51.08.178(3) requires that the injured worker's bonuses over the course of the twelve months prior to his injury or disablement be averaged and added to his gross monthly wage. The question presented by this case is whether the profit distributions paid from ACW, Inc., to Appellant count as bonuses under that statute. No judicial or BIIA case has dealt with that precise question. An analysis of the plain meaning of the word, relevant case law, and prior decisions by the BIIA leads to the conclusion that a "bonus" is a payment made by the employer to the employee in consideration of work or services performed. Stated in the negative, a bonus is *not* the result of passive activities such as investment, or quasi-passive activities such as would be the case if Appellant merely acted as a shareholder of ACW, Inc., and collected dividends without directly managing the business's affairs. But here Appellant could not receive additional profit distributions from his company unless he successfully pursued jobs, completed the work, and collected payment which exceeded the sum total of his business expenses and his salary. As such, those profit distributions are a direct product of his efforts, and should be treated as bonuses.

The term "bonus" as it is used in RCW 51.08.178 is not defined elsewhere in the IIA. "Title 51 RCW is a self-contained system governing procedures and remedies for injured

workers." *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 294, 253 P.3d 430 (2011).[18] Words which have technical meaning in other contexts may not have the same meaning when used in the IIA. *See Hill*, 161 Wn. App. at 295-96 ("labelling [something] as a gratuity under chapter 72.09 RCW does not determine its categorization under . . . RCW 51.08.178."). Here, referring to the payments made by ACW, Inc., to Appellant as "profit distributions" does not mean that they are not *also* "bonuses" under RCW 51.08.178(3).[19]

The primary duty of a court in construing the meaning of a statute is to give effect to legislative intent. "If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent." *Hill*, 161 Wn. App. at 293. "To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries." *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn 2d 869, 877, 784 P.2d 507 (1990). Due deference should be given, of course, to "closely related statutes and the underlying legislative purposes." *Hill*, 161 Wn. App. at 293. The legislative intent underlying RCW 51.08.178, and indeed all provisions of the IIA, is to provide "sure and certain relief for workers injured in their work," and all provisions "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from" such injuries. RCW §§ 51.04.010 & 51.12.010.

Webster's defines "bonus" as "a sum of money granted or given to an employee, an agent of a company, a returned soldier, etc., over and above his regular pay, *usually in appreciation for work done, length of service, accumulated favors, etc.*"[20] Black's defines a "bonus" variously as "[a] premium or extra or irregular remuneration *in consideration of offices performed* or to encourage their performance, and a "[g]ift *in recognition of officer's past successful direction of corporate affairs*."[21] The common thread amongst these definitions is that a bonus represents consideration, or appreciation, of the individual's body of work rather than the by-product of a passive investment. Here it is not seriously contested that Appellant paid himself distributions based upon the success of his business—a direct result of his own efforts as a businessman and laborer. Accordingly, his profit distributions can quite credibly be described as bonuses in the

plainest and most commonsense meaning of the word. But given DLI's discussion of the *Malang*[22] case in its prior briefing, a few words on the profits of sole proprietorships are necessary.

DLI argued to the BIIA that the *Malang* case stands for the proposition that, in a business structure such as Appellant 's, it is "appropriate to use averaging of a sole proprietor's business profits when calculating the 'wages'" of a claimant like Appellant . CP 1 CABR at 39. Notwithstanding the fact that RCW 51.08.178 only allows for averaging of wages in very specific circumstances, in truth, the *Malang* case says absolutely nothing about the substantive method for calculating an injured worker's wages.[23] Nonetheless, Appellant concedes, as DLI argued to the BIIA, that when calculating "the wages of a sole proprietor, it is fair to use the businesses [*sic*] business profits rather than a hypothetical and fictional wage to calculate the claimant's 'wages' at the time of his injury." CP 1 CABR at 42. But Appellant was not a "sole proprietor" in the legal sense of the term.[24] "A sole proprietorship is a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity, and has no separate legal existence distinct from the operator of the business." *Canal Ins. Co. v. Herrington*, 846 F. Supp. 2d 654, 659 (S.D. Miss. 2012).[25] Appellant was employed by—and paid by—ACW, Inc., a legally distinct corporate entity.[26] All of the money paid to him by ACW, Inc., was subject to taxation. The only real question is whether the amounts reported[27] as distributions to Appellant , above and beyond his wages, count as bonuses.

As a general proposition, income from return on *investments* is not considered "wages" for purposes of RCW 51.08.178. *See Kuhnle v. Dep't of Labor & Indus.*, 12 Wn. 2d 191, 198, 120 P.2d 1003 (1942).[28] While Washington courts have not had the opportunity to pass upon the characterization of distributions from an S corporation to a sole shareholder-employee, BIIA cases support Appellant 's proposed test for distinguishing between passive investment income and profit distributions includible as "wages." Interpreting *Kuhnle*, the BIIA stated in *In re John Berg* that "a return on an investment, even if the owner must attend to it as a business proprietor, is not a wage for benefits compensation purposes." Dckt. No. 02 23331 (May 25, 2004). The

BIIA held in *Berg* that the injured worker's business profits would not all count towards establishing his monthly wage. Crucial to the BIIA's decision was the fact that "[h]is business gain for the year may have been the result of a number of factors other than Mr. Berg's personal efforts." Thus, according to the BIIA, whether business gains count as income turns on whether they were the result of the worker's "efforts." "When Mr. Berg's evidence did not describe a direct relationship between his work and the business profit, he failed to satisfy his burden of proof," the BIIA concluded, and "the Department correctly excluded Mr. Berg's corporate profits from Mr. Berg's wages."

On the other hand, in *In re Markle*, Dckt. No. 01 12418 (July 17, 2002), the BIIA was faced with determining whether profit distributions from a husband and wife partnership enterprise were imputable as wages to the husband and claimant. In *Markle*, the couple operated a chimney sweeping business together, which was completely unrelated to the claimant's employment of injury. Testimony at the BIIA by a vocational expert allocated all of the profits of the business to Mr. Markle's wife as either wages or fees for bookkeeping services. The BIIA disagreed, finding that "[c]learly Mr. Markle contributed to the net profit of the business that he and his wife operated." The BIIA remanded the case to DLI to determine Mr. Markle's "share of any distributed earnings of the corporation [which] should then be considered by the Department as his earnings for the purpose of calculating time loss compensation or loss of earning power benefits."

In a later case, *In re Robert Starks*, Dckt. No. 03 17335 (Nov. 16, 2004), the BIIA was called upon to clarify its decision in *Markle*. In addition to his employment of injury, Mr. Starks owned two family businesses and worked as a DSHS caregiver for approximately 16 hours per weekend for an elderly woman. Mr. Markle's employer argued to the BIIA that all of his additional income should count as "wages," and thus reduce his disability payments commensurate with his continued business income and earnings through DSHS. The BIIA disagreed, distinguishing *Markle* on the grounds that "Mr. Markle actually performed physical labor in his chimney cleaning business," and that "after his industrial injury, Mr. Markle

continued to work in his chimney cleaning business and to supervise individuals." Noting that the claimant in *Starks* "performed no duties other than receiving the money for the rentals and depositing it into a bank account," the BIIA held that "the passive rental monies Mr. Starks [received] should not be attributed to him as earnings from gainful employment." The BIIA did determine that the earnings from Mr. Starks's DSHS caretaker position counted as wages, though with little analysis, noting only that it was a "very sedentary non-stressful caregiver job."

The crucial distinction in addressing whether business profits are wages/bonuses for purposes of RCW 51.08.178 is thus whether those profits are a direct result of the labors of the injured worker, or whether they are the result of passive or semi-passive investment activities. The BIIA decisions cited herein support that distinction. *Berg* stands for the proposition that passive investment-type income is not "wages," while *Markle* and *Starks* support the notion that business income which is a product of the worker's direct actions (especially labor) counts as wages.[29] In the case of a passive or semi-passive enterprise, DLI might rightfully determine that business profits are not "wages." That issue, though, is not before this Court, as there is no evidence in the record that Appellant 's business profits reflect anything other than the fruits of his labor. He was the sole shareholder, executive officer, and employee of the business. Every dollar earned by ACW, Inc., was a product of his labor, business acumen, and careful calculation. As such, the distributions paid to him by ACW, Inc., should be categorized as bonuses.

The issue then becomes how to determine "the average monthly value of such bonus." RCW 51.08.178(3). That, fortunately, is a simple exercise[30] in mathematics. Appellant received profit distributions in the amount of $22,566 in 2001. CP 2 Ex. 2. In the first quarter of 2002, he received $20,019 in profit distributions. Since RCW 51.08.178(3) requires application of the monthly average of bonuses received "within the twelve months immediately preceding the injury," it is fair to determine the average monthly value of his 2001 bonus, and average that against his first quarter 2002 bonus. Dividing the 2001 profit distributions by twelve results in an average monthly 2001 bonus of $1,880.50. Multiplied by nine equals $16,924.50. Adding nine

months' worth of average bonuses to the three months of 2002 bonuses equals a total bonus in the twelve months immediately preceding Appellant 's disablement of $36,943.50. The average monthly value of Appellant 's bonuses is thus $3,078.63, which should be added to his base monthly wage of $4,000, resulting in a gross monthly wage of $7,078.63 under RCW 51.08.178. This figure fairly and accurately reflects Appellant 's lost wage-earning capacity at the time of his disablement. It is grounded in fact and law; easily calculable; and not excessive in light of the significant business records Appellant offered in proof of these numbers and the trajectory of his business.

Request for Attorney Fees and Costs

Appellant requests all reasonable attorneys fees and costs under RCW 51.52.130 (for appellate decisions reversing or modifying or granting additional relief to a worker or sustaining a worker's right to relief), all statutes, court rules, and case law applicable to this appeal or available through the court's equitable powers. If the court does not award any of these, appellant requests that the attorneys fees and costs on appeal be reserved for determination of reasonableness by the trial court after any remand.

VI. CONCLUSION

Therefore, Appellant requests that the court remand this case for new trial and other relief just and equitable. The BIIA order on appeal should be reversed and this claim remanded to the lower court and Department of Labor & Industries with instructions to calculate Appellant 's gross monthly wages at the time of injury at $7,078, and revise its order offsetting Social Security benefits in light of the corrected wage order.

Dated this 27 day of March, 2015.

Respectfully submitted,

Andriy Skrinnik, Pro Se
Appellant

[1] *See, e.g.*, Marley v. Dep't of Labor & Indus., 125 Wn. 2d 533, 886 P.2d 189 (1994) (Unappealed orders of the Department of Labor & Industries are *res judicata* for the life of the worker's claim, even if facially and obviously incorrect, so long as the Department acted within its subject matter jurisdiction).

[2] Bearing in mind, of course, that the Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010.

[3] 26 U.S.C. § 1361 *et seq.*

[4] The CP 1 Certified Appeal Board Record is the sole source of evidence in appeals from orders of the BIIA. *See* RCW 51.52.110 & .115.

[5] Appellant admitted that he did not elect workers' compensation coverage for himself as a sole proprietor. *See* CP 2 8/23/2011 Trans. at 12. Though the record here does not clearly state as much, Appellant 's claim was allowed pursuant to Fankhauser v. Dep't of Labor & Indus., 121 Wn. 2d 304, 307, 849 P.2d 1209 (1993) (last injurious exposure rule does not bar occupational disease claims where last occupational exposure occurred during non-covered employment so long as some exposure occurred during covered employment).

[6] Technically and colloquially referred to as an "S corporation," and explained in greater detail below.

[7] Presumably neither party contests the fact that the offset order should be reversed and remanded in light of his newly calculated wage order.

[8] For purposes of the IIA, "wages" is defined quite broadly. *See* WAC 296-14-522:

The term "wages" is defined as:

(1) The gross cash wages paid by the employer for services performed. "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law. Tips are also considered wages but only to the extent they are reported to the employer for federal income tax purposes.

(2) Bonuses paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation.

(3) The reasonable value of board, housing, fuel and other consideration of like nature received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.

[9] Once the wage is determined under RCW 51.08.178, the injured worker's compensation for any period of temporary or permanent disability is paid pursuant to the schedule found at RCW 51.32.060. Generally speaking, an injured worker without a spouse or children is entitled to sixty percent of his gross monthly wages per RCW 51.08.178 during any period of temporary or permanent total disability as it is defined in the IIA. The payments for temporary total disability are referred to as "time-loss" payments.

[10] *See* RCW 51.08.140; *cf.* RCW 51.08.100.

[11] *See* CP 2 8/23/2011 Trans. at 13. Notably, DLI conceded at the BIIA that Appellant 's wages should be calculated with reference to his last employment through ACW, Inc. *Id.* at 8.

[12] *See* CP 1 CABR at 12 ("Since Appellant provided the Department with his 1120S tax forms, actual business records, it is more fair and reasonable for the Department to rely on his records when calculating his 'wages' . . . .").

[13] DLI's apparent position on this point is that Appellant "chose to go into business for himself, and to take the risks associated with that path." CP 1 CABR at 42. It is not clear what the risks of Appellant 's business ventures have to do with the calculation of his wages at the time he was rendered incapable of working, as the IIA clearly and unambiguously states that his earnings at the time of his injury provide the basis for payment of workers' compensation benefits.

[14] The use of the term "corporation" in this section of the Code is non-technical, as in fact an LLC may also elect to be treated as a Small Business Corporation pursuant to Subchapter S. *See* Rev. Rul. 88-76, 1988-2 C.B. 360.

[15] *See, e.g.*, Rev Rul. 74-44, 1974-1 C.B. 287 (where shareholder is also employee, IRS requires a "reasonable" salary be paid, and reserves the right to treat income designated as distributions or dividends as "wages" subject to FICA and FUTA taxes).

[16] Particularly see line 7 of the 2000 1120S form. The exhibits in the CP 1 CABR are labelled A, B, and C, but the BIIA in CP 2 labeled the same documents 1, 2, 3, etc.

[17] Beyond exhibits 4-7, Appellant 's wife, who did some of the company's bookkeeping, testified that when they failed to pay the state quarterly taxes they were penalized heavily. CP 2 8/23/2011 Trans. at 51-52. There is no indication in the record that they were ever penalized by the Department of Revenue for failing to pay taxes owed in any quarter of 2002. Presumably if anyone had such records available to them it would be the Department of Labor & Industries as a state agency which had oversight over Appellant 's company. None were produced, and none of the testimony seriously casts into doubt the veracity of Appellant 's and his wife's testimony and documentation they provided.

[18] *Quoting* Brand v. Dep't of Labor & Indus., 139 Wn. 2d 659, 989 P.2d 1111 (1999) (internal quotations omitted).

[19] Notably Appellant consistently refers to the distributions as bonuses throughout his testimony.

[20] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 169 (1989) (emphasis added).

[21] BLACK'S LAW DICTIONARY 226 (4th Ed. 1968) (emphasis added).

[22] *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 162 P.3d 450 (2007). *See generally* CP 1 CABR at 39-43.

[23] In *Malang*, the only question decided upon by the court was whether Ms. Malang was her own employer or not. *See* Malang, 139 Wn. App. at 692 ("We vacate the superior court's order directing the BIIA to calculate Malang's wages from her gross commissions . . . . To correctly calculate her time-loss compensation award, L&I must apply the statutory provisions to determine whether she or Crescent is the "employer" that gave consideration for her services.")

[24] No such issue is present in this case thanks to the fiction of corporate personhood; notwithstanding the fact that Appellant was the sole employee, officer, and shareholder, ACW, Inc., was still his employer for all legal purposes, and existed as a legally distinct entity. Although DLI argued to the BIIA that "[i]t cannot be credibly argued, and Appellant has not suggested, that a business entity separate from ACW paid him 'wages,'" that argument misses the mark. *See* CP 1 CABR at 42. The very essence of the corporation is that it is a legal entity separate from the individual(s) who fund and run it; DLI appears to ignore the legal distinction between Appellant and his company, and thus reaches the conclusion that the company's deductions should be factored out of the money it paid to Appellant when calculating his wages.

[25] *Quoting* Black's Law Dictionary (9th ed. 2009) (internal quotations omitted).

[26] *E.g.*, Sparks Farm, Inc. v. Comm'r, 56 T.C.M. (CCH) 464, 473 (1988)("[A] corporation is a separate legal entity, separate and distinct from the shareholder, even a sole shareholder."); *see also* Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 607 (6th Cir. 2005) ("[A] corporation is a separate legal entity from its shareholder even where there is only one shareholder in the corporation.") (internal quotations omitted); Halverson v. Funaro, 263 B.R. 892, 898 (B.A.P. 8th Cir. 2001) ("A Subchapter S corporation is an entity separate and apart from its owner.").

[27] *See* CP 2 Ex. 3. Form 1120S line 21 reports that the company paid, beyond $12,000 in salary, $20,019 in ordinary income to Appellant .

[28] ("The return on any capital he may have, although augmented by his personal attention in looking after the business in which it is invested, clearly is not an element to be considered in the administration of the compensation act.")

[29] This is not to say that in all scenarios investment income is not wages. There may indeed be situations where investment income is the result of the worker's "efforts." Fortunately, the outcome of this case does not turn on the characterization of any investment income.

[30] Unless, of course, one takes as dim a view of our profession as Judge Posner: "Innumerable are the lawyers who explain that they picked law over a technical field because they have a 'math block.'" *Jackson v. Pollion*, No. 12-2682 (7th Cir. Oct. 28, 2013).

[31] See http://www.bls.gov/oes/2005/may/oes119021.htm : US Dept of Labor Bureau of labor Statistics:

Occupational Employment and Wages, May 2005

11-9021 Construction Managers

Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers, and constructors who manage, coordinate, and supervise the construction process.

State	Employment	Hourly mean wage	Annual mean wage	Percent of State employment
Washington	2,770	$50.04	$104,080	0.104%