

NO. 40394-3-II  
COURT OF APPEALS, DIVISION II

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JAMES B. HILL

Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents

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APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY  
The Honorable Anne Hirsch, Judge  
Cause No. 08-2-01789-1

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BRIEF OF APPELLANT JAMES B. HILL

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## I. INTRODUCTION

Appellant, James B. Hill, injured his right knee when he tread on a plastic tarp, underneath which was a paint can, as he stepped off a ladder during the course of his employment performing painting and other construction work on December 10, 2002. He filed a worker's compensation claim. At the time of the injury, Mr. Hill was incarcerated under sentence for multiple convictions, one of which has been subsequently overturned.

The Department of Labor and Industries ("DLI") and the Department of Corrections ("DOC") fought claim allowance until, in 2006, DOC finally admitted that Mr. Hill was a member of the class of inmates covered by this state's Industrial Insurance Act, Title 51 RCW. It was not until thereafter that Mr. Hill received any meaningful treatment for his knee condition.<sup>1</sup>

The only monetary compensation Mr. Hill received for the work he was doing at the time of injury was \$0.85 per hour as a "*gratuity*." He received nothing by way of "wages." But, when determining Mr. Hill's rate of time-loss compensation (wage replacement) benefits, DLI determined that Mr. Hill's wages for the

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<sup>1</sup> Mr. Hill ultimately had a total knee replacement surgery in 2007, and had surgery on the contralateral knee, as well (necessary because the damage to his right knee caused him to overuse the left knee.)

job were \$0.85 per hour, leaving him with a daily compensation rate (22 days per month) of \$9.98 *per day*, or under \$200 per month.

During the period of time when he remained incarcerated, Mr. Hill was not eligible to receive any monetary benefits. See, RCW 51.32.040(3)(a); RCW 72.60.102. But, his sentence was completed and he was released into the civilian world where he was entitled to time-loss compensation because his injury, combined with other relevant factors, rendered him temporarily totally disabled from any sort of labor. He was left with a total income of less than \$200 per month to provide all of life's necessities for himself—something that regrettably is no longer possible in today's civilian economy. He was left destitute and homeless.

The rate of time-loss compensation benefits is governed by RCW 51.08.178. The Department calculated Mr. Hill's rate under subsection 1 of the statute ("wages" at time of injury). Mr. Hill submits that the rate should have been calculated under subsection 4 of the statute (wages comparable to wages received by workers generally when performing that kind of work in the civilian economy). Accordingly, this Court is presented with a case of pure statutory interpretation of RCW 51.08.178, given the facts of the underlying claim.

## **II, ASSIGNMENTS OF ERROR**

Appellant assigns error to the trial court's denial of his Motion for Summary Judgment, and to the trial court's grant of the Department's Motion Cross-Motion for Summary Judgment.

### **a. Issue:**

Did the trial court err in ratifying the Department of Labor and Industries determination of Appellant's time-loss compensation benefits under RCW 51.08.178(1) instead of RCW 51.08.178(4)?

Answer: Yes, it did.

## **III. STATEMENT OF THE CASE**

### **a. Facts.**

There are no material facts in dispute. See, e.g., Department's Memorandum in Support of its Cross-Motion for Summary Judgment, filed in superior court. Appellant adopts the factual recitation in that Memorandum, commencing at page 1, line 22, and continuing through page 2, line 13. CP 33.

Rather than employ civilian union workers, paid at union scale, for remodeling and other construction projects, the Department of Corrections ("DOC") employs inmate labor at nominal "wages" to perform hazardous work. Mr. Hill was paid \$0.85 per hour by DOC while performing carpentry, painting, wiring and general labor on several projects while incarcerated.

On December 10, 2002, while employed in this capacity doing carpentry, painting and other construction work, Mr. Hill was injured when he fell from a ladder. His right knee popped. He requested treatment, but did not receive any.

Eventually, after *pro se* appeal, Mr. Hill's claim was allowed by Department of Labor and Industries ("Department") order dated September 20, 2006. On January 3, 2007, the Department issued an order (under appeal here) setting Mr. Hill's wage rate based on a "wage" of \$0.85 per hour, 7.5 hours per day, 6 days per week, and a status of single, with 3 dependents. Meanwhile, Mr. Hill's net time-loss compensation *payments* are \$9.98 per *day*.

In response to Appellant's Interrogatories, propounded to both the Department of Labor and Industries ("DLI") and the Department of Corrections ("DOC"), the Department of Corrections answered, in response to question 4, "By law, DOC does not pay inmate workers "wages" for Class II, III, and IV work, but a "gratuity" and inmate workers are not employees of DOC . . . . See RCW 72.29.100 and 72.09.111; see also Const. art. II [section] 29." DOC responded similarly to question 5. In response to questions 12 and 13, DOC objected, responding, "Furthermore, DOC objects and cannot answer this request because at no time during his incarceration was Mr. Hill 'performing work for wages for the

Department of Corrections,” and insisted that he was only paid a “gratuity.”

In other responses, DOC explained that because Mr. Hill was not paid a “wage,” it was not obliged to report “wages” or income to the federal Internal Revenue Service. Nor did it report hours worked to the state Employment Security Division. According to DOC’s answer to question 2, it paid premiums to DLI under risk classification 4908 because it determined that Mr. Hill was a Class IV worker.

#### **IV. LAW**

##### **a. Summary Judgment**

Under RCW 51.52.140, the practice in civil cases applies to industrial insurance appeals unless otherwise provided in the chapter. For this reason, summary judgment is appropriate “...if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR56.

The purpose of summary judgment is to secure just, speedy and inexpensive resolution of disputes by avoiding unnecessary trials or at least narrowing the issues to be tried. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980).

Summary judgment is appropriate when there is no genuine issue of material fact. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A material fact is a fact upon which the outcome of the litigation depends. *Jacobson v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

b. Law of the case

A determination of an injured worker's rate of time-loss compensation benefits must be made under RCW 51.08.178. That statute provides, in its entirety:

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

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, **tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes.** The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

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

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

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

(Emphases added.).

The Department has calculated Mr. Hill's time-loss compensation rate under RCW 51.08.178(1). Mr. Hill seeks a determination under RCW 51.08.178(4).

## V. ARGUMENT

It is well-settled that Title 51 RCW "is to be liberally construed in favor of the injured worker to reduce to a minimum the suffering and *economic loss* arising from injuries." *E.g., Kasier Aluminum v. Overdorff*, 57 Wn. App. 291, 293 (1990) (*citing*, RCW 51.12.010; emphasis in original). But, rather than acting to reduce Mr. Hill's economic suffering, the Department has only compounded it by insisting that his correct wage basis should be based upon a "wage" of \$0.85 per hour. A wage of \$0.85 per hour in 2002 was far less than the *minimum* mandated by the Washington Minimum Wage statute, RCW. 49.46.020.

RCW 72.09.111(1) distinguishes between "gross wages" and "gratuities." That is to say, these appear *not* to be equivalent concepts within the scheme of that statute. Mr. Hill's only compensation for his work for DOC was a mere "gratuity." Webster's New Twentieth Century Dictionary (2d. ed., unabridged) defines "gratuity" as follows: "1) a gift; a donation of money given

without compensation; 2. something given in return for service or a favor; a tip.”

RCW 51.08.178(1) speaks only of “wages.” Therefore, *subsection (1) cannot be used to establish Mr. Hills wage basis.* His wage “has not been fixed,” within the meaning of RCW 51.08.178(4). It follows that Mr. Hill’s wage *must* be determined under RCW 51.08.178(4). That is all the relief that Mr. Hill is requesting.

Professor Larson, in 2 A. Larson, THE LAW OF WORK[ER]’S COMPENSATION, ss 60.11(d), says of circumstances like Mr. Hill’s, “[I]t seems difficult to believe that the wage made illegal by state law would be adopted for the purposes of a wage calculation under another state law.” A wage of \$0.85 per hour in 2002 was, of course, in violation of the Washington Minimum Wage statute, RCW. 49.46.020. A “gratuity” of that amount violated no statute. But, then, it is not a “wage.”

Of the concept of “fairness,” such as that appears in RCW 51.08.178(4), he states, “The concept of fairness reappears in the final criterion by which to arrive at an average weekly wage when other tests cannot fairly be used.” *Id.* (Emphasis added.). Throughout ss 60.11(d), Professor Larson repeatedly refers to a

worker's lost *earning capacity* as a better measure of a wage basis than an unlawful "wage."

Mr. Hill seeks a rate calculation under RCW 51.08.178(4).

That section provides:

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.

It is to be noted that the section is in the *disjunctive*.

Appellant's "wage" has not been "fixed." But the section provides that where a wage "cannot be reasonably and fairly determined" (in the *conjunctive*), a "usual wage" forms the basis of the rate determination. When there is *no* "wage" that has been paid, subsection 4 applies, *a fortiori*.

The Department is apparently of the notion that a wage of \$0.85 per hour is both reasonable *and fair*, notwithstanding its illegality. Mr. Hill contends that such a wage is neither reasonable nor fair in his circumstances. He contends that, when embracing the Legislature's mandate that Title 51 RCW "is to be liberally construed in favor of the injured worker to reduce to a minimum the suffering and economic loss arising from injuries," per RCW 51.52.010, a determination based upon a "wage" of \$0.85 per hour is, in a word, ridiculous.

The Department is expected to urge that *Rose v. Department of Labor & Indus.*, 57 Wn. App. 751 (Div. II 1990), *rev. denied*, 115 Wn.2d 1010 (1990), *see also*, *In re Jeffrey Rose*, BIIA Dec., 69,983 (1986) is essentially directly on point. But it is not.

It is true that in *Rose* both the Board and the Court of Appeals ratified a determination of an inmate's TLC rate based upon an "wage rate" of \$1 per day. *Id.*, at 752, 790 P.2d. Those are the precise words used by the Court of Appeals to characterize Mr. Rose's income from the Department of Natural Resources. And, as far as we are given to know from that decision, Mr. Rose remained incarcerated throughout the period for which he was seeking benefits. Mr. Hill has been released into the world of real money, where \$0.85 per hour simply isn't realistic.

Moreover, portions of *Rose* were repudiated in *Cockle v. Department of Labor & Indus.*, 96 Wn. App. 69 (Div. II 1999). *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001) ratified the repudiation of the *Rose* calculation scheme. Noteworthy is *Rose's* rejection of the notion of food, housing, *etc.*, provided to inmates while working under the auspices of the Department of Corrections, as items to be included in the calculation of an injured worker's wage basis. *Cockle* included those items in the basis of a civilian worker's wage. Appellant is unaware of any appellate

revisitation of the question of “like kind” wages for prison inmates. Accordingly, it is unclear that *Rose’s* rejection of in-kind benefits from Mr. *Rose’s* wage basis applies to Mr. Hill. The Court could distinguish *Rose* and decline to follow it. But, if Mr. Hill’s rate of compensation is to be calculated under RCW 51.08.178(4), no consideration of “in kind” “wages” is necessary.

Presumably, one might argue that the value of housing, medical, food, and other “benefits” provided to Mr. Hill while he was performing labor for the Department of Corrections should be included in any determination of wage rate under RCW 51.10.178(1) in light of *Cockle*. But that way lies madness. Determining the value of such items would present a burdensome task to the Department, at best. Rather than engage in that folly, it would appear that RCW 51.08.178(4) is the relevant subsection to utilize in Mr. Hill’s case for wage determination.

Where a wage “has not been fixed” or cannot be “fairly” determined, RCW 51.08.178(4) applies; RCW 51.08.178(1) does not. A “wage” less than the statutory minimum wage is *ipso facto* “unfair.” A “gratuity” of \$.085 provides no basis whatsoever to establish a daily or monthly “wage.” An agency of the state simply cannot ratify an unlawful wage or use a non-wage in order to

determine entitlement to benefits intended to “reduce to a minimum the . . . economic loss arising from injuries.”

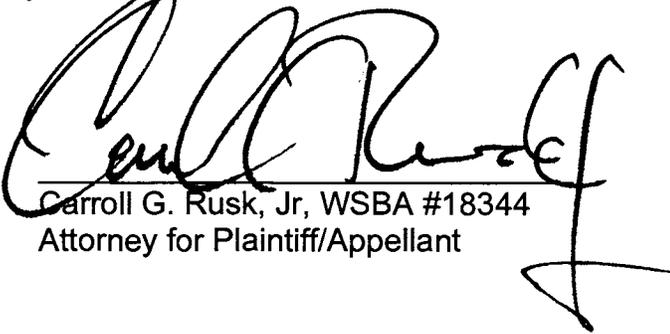
This is a case that cries out—*screams*—for disposition under RCW 51.08.178(4). Otherwise, the Legislature might just as well have instructed the Department, the Board of Industrial Insurance Appeals, and the courts, to construe Title 51 RCW to *increase* to a maximum the suffering and economic loss arising from injuries. But the Legislature, and the courts, have determined that the loss must be *reduced to a minimum*. So far, the Department’s actions have done nothing but compound Mr. Hill’s suffering and the actual physical condition arising from his injury, as well as subject him to an economic impossibility: the Department expects Mr. Hill to be compensated for total disability by less than \$200 per month when he could command a middle-class wage if he had not been injured on the job. He is expected to feed, clothe, and house himself on that amount. This Court should reverse that trend toward increased economic suffering for Mr. Hill, and reverse the decision under appeal.

## **VI. CONCLUSION**

Wherefore appellant prays that this Court will issue a decision that: reverses the trial court’s determination; grants the appellant’s Motion for Summary Judgment; denies the

Department's cross-motion; directs that appellant's rate of time-loss compensation benefits be determined under RAC 51.08.178(4); and remands the claim for further proceedings not inconsistent with the decision.

DATED this 13 day of May, 2010



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CERTIFICATE OF SERVICE

I certify that on May 13, 2010 I sent a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, and electronic mail to:

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Dated: May 13, 2010

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Zona Millard

THE LAW  
of  
WORKMEN'S  
COMPENSATION

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MATTHEW  BENDER

Conversely, even if the other employee is of the same "class," his earnings may be so different that an automatic application of the second part of the formula would produce an unrealistic result. This point may also be illustrated by a Texas case, *Travelers Insurance Company v. Liptrap*.<sup>85</sup> Claimant, a cab driver, did not work at least 210 days of the year prior to his injury, although other employees had. However, the men were all paid on a commission basis, and their earnings varied considerably. It was held error to compute the claimant's average weekly wage by using the average weekly wage of a similar employee.

A case that demonstrates effectively the need for retaining flexibility to deal with unusual combinations of facts is *Johnson v. Industrial Commission*.<sup>86</sup> A prisoner was injured while working for the Yuma County Fair. He was compensated by being given food, lodging, sundries, and cigarettes. The Commission based his average monthly wage on the amounts previously earned by the prisoner when he was "outside" working as a carpenter. The court held that his wages should have been based upon wages normally paid a person doing the work done at the fair, with allowance made for the prisoner's lost time from work due to his asthmatic condition and his drinking habits as they affected his monthly earning capacity.

§ 60.11(d) Wage that fairly represents claimant's earning capacity

When we come to the third or catchall section of the wage-basis formula, we find that the concept of fairness or reasonableness may be encountered at two points. First, for the test to come into play at all, it must be found that the first two tests cannot fairly and reasonably be applied. Then, in the application of the test, the operative rule calls for finding a wage that fairly and reasonably represents claimant's earning capacity.<sup>86.1</sup>

(Text continued on page 10-632)

<sup>85</sup> 413 S.W.2d 144 (Tex. Ct. App. 1966) (writ refused).

<sup>86</sup> 92 Ariz. 263, 375 P.2d 866 (1962).

<sup>86.1</sup> *Miller v. Workmen's Comp. App. Bd.*, 72 Pa. Commw. 253, 456 A.2d 1114 (1983). A Pennsylvania statute provided that the weekly wages of an employee employed fewer than thirteen weeks prior to a covered injury would be based upon the amount the employee "would have earned" in the preceding thirteen-week period, measured by the earnings of similarly situated employees, unless "exceptional causes" existed making this an unfair method of computation. An

(Text continued on page 10-632)

employee injured after being employed less than thirteen weeks challenged the referee's computation of his weekly wage, which had been based upon the employee's wages the week preceding his injury and the week following his return to work. The court affirmed the referee's decision. The wages of similarly situated employees had a more than \$100 weekly differential, with work hours ranging from 26 to 66 hours per week, an "exceptional cause" making computation of wages on this basis unfair.

See also the following cases:

*Illinois: But cf. Deichmiller v. Industrial Comm'n*, 497 N.E.2d 452 (Ill. Ct. App. 1986). Claimant, a 25-year-old plumber, had worked for Zonca about five years as a fourth-class apprentice plumber. He contended his wage calculation should have been based on what he would have earned as a journeyman plumber. The court disagreed, stating that it would be pure speculation to assume he would ever attain that status. Cases involving young workers were distinguished. *General Elec. Co. v. Industrial Comm'n*, 144 Ill. App. 3d 1003, 99 Ill. Dec. 3, 495 N.E.2d 68 (1986), was also distinguished, since in that case the award was indeed computed on the claimant's job classification at the time of the accident.

*Montana: Hurley v. Dupuis*, 759 P.2d 996 (Mont. 1988). The Compensation Court clearly erred when it determined that claimant's pre-injury earning capacity was \$12.44 per hour. Claimant was a nomadic general laborer who typically earned between \$4.50 and \$6.00 per hour and the only evidence to support the \$12.44 figure was his uncorroborated testimony that he had been paid that rate sometime in 1981 by an employer whose name he could not remember.

*Nebraska: Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). A calculation of the average weekly wage was held to not be in error because it excluded seven weeks when the claimant worked less because he was moving from Texas to Nebraska. The calculation was in error and reversed on a different ground, that of not applying the statute in effect at the time of injury. See § 60.50, n.8 *infra*. Treatise cited.

*Nevada: State Indus. Ins. Sys. v. Harrison*, 746 P.2d 1095 (Nev. 1987). An infection eight years after a fracture, resulting in amputation, was a new injury. Therefore benefit rates at the later date should apply. But, since the claimant's earnings were greatly reduced by his injury, his average wage should be based on what he earned before his first injury.

*New Mexico: Griego v. Bag 'N Save Food Emporium*, 109 N.M. 287, 784 P.2d 1030 (1989), *cert. denied*, 109 N.M. 262, 784 P.2d 1005 (1990). The claimant was promoted to the position of salad bar manager two weeks before her injury, and she worked an unusual amount of overtime during these weeks in preparation for the store's grand opening. There was some dispute over how to compute her average weekly wage at the time of her injury. The court affirmed the hearing officer's determination that the claimant's average weekly wage as a salad bar manager should include a certain amount of overtime. To determine the numbers of hours of overtime, the hearing officer compared the claimant's hours to those

As to the first, one finds again the familiar contest between flexibility and technicality. The mere fact that the application of the first test, based on claimant's own earnings record, may produce an annual wage slightly less than the actual wage is not reason enough for abandoning it as unreasonable. The New York case of *Smith v. Casey*<sup>87</sup> supports this view. Section 14 of the Workmen's Compensation Law requires determining a six-day worker's weekly wage by multiplying the average daily wage by 300 and dividing by 52. The court held that it was error to use claimant's actual year's earnings even though she had worked 309 days.

However, if the statutory period designated by the first test happened to be an abnormal one, it is plainly not fair and

of the deli manager. However, the evidence was insufficient to determine if the claimant's overtime hours during the week prior to her injury were a result of her promotion or of the grand opening preparations. The case was remanded to determine the average weekly wage according to alternative statutory provisions, including the subsection which indicates that if all the other tests fail, the average weekly wage should be "fairly determined" based on all of the facts. 784 P.2d at 1034. Treatise cited.

*Accord* *Kincaid v. Wek Drilling Co., Inc.*, 109 N.M. 480, 786 P.2d 1214 (1990).

*North Carolina*: *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 269 S.E.2d 165 (1980). The decedent was a minor high school student, engaged in a cooperative education program, who worked part-time during the school year and full-time during the summer. The court held that employees in cooperative education programs may not be fairly and justly classified as full-time for purposes of the Compensation Act. Accordingly, the Commission was required to average the decedent's 41 weeks of part-time employment with 11 weeks of full-time employment, to derive the decedent's average weekly wage.

*Ohio*: *Smith v. Industrial Comm'n*, 25 Ohio St. 3d 25, 494 N.E.2d 1140 (1986). The commission should not have considered a period during which claimant operated a gas station at a loss in calculating average wage. The wage should have been reckoned under the "special circumstances" provision.

*South Carolina*: *Booth v. Midland Trane Heating & Air Conditioning*, 298 S.C. 251, 379 S.E.2d 730 (1989). The court held that the Commission did not err in computing claimant's weekly wage on the basis of his wages in the five months prior to his injury rather than on the whole year, even though he had worked for the same employer the entire year. Claimant had received three raises, talling a 63% increase during the year, and had worked at the highest rate for the five-month period preceding the injury. These were "exceptional circumstances" which made application of the presumptive "whole year" test unfair.

<sup>87</sup> 23 A.D.2d 923, 259 N.Y.S.2d 273 (1965).

reasonable to follow it slavishly, whether the wages for the period were abnormally high<sup>88</sup> or abnormally low.<sup>89</sup>

The State of Florida, for some reason, has contributed a series of the most inexcusably rigidified interpretations of the wage

<sup>88</sup> Johnson v. D. B. Rosenblatt Inc., 265 Minn. 427, 122 N.W.2d 31 (1963). Commission determined claimant's piece-work weekly wage on the basis of earnings during highly productive hours in one day. *Held*, the rate should be based upon normal conditions. Award reversed. Treatise quoted.

<sup>89</sup> Peck v. Alaska Aeronautical, Inc., 756 P.2d 282 (Alaska 1988). Peck, an airline pilot, injured his back in 1964 in an airplane crash while working for his employer's predecessor. At that time his average weekly wage was \$255. He continued to work as a pilot with various airlines until he was forced to retire for medical reasons in 1982. At the time he retired he was earning \$1,294 per week. The defendant conceded the former employee was permanently and totally disabled and that the disability was directly caused by the 1964 injury. The defendant controverted the employee's contention as to average weekly wage, however. The compensation board and the superior court determined that the law in effect at the time of the original injury would control. That statute provided for a maximum average weekly wage of \$81, or a maximum compensation rate of only \$52.65. The employee contended the statute in effect at the time of the disability should control. This would result in a substantially higher compensation rate. The court held that, inasmuch as the disability reaches into the future, his loss as a result of the injury must be thought of in terms of the impact of probable future earnings. The statutes cannot be applied in a vacuum. The average weekly wage must be recomputed. The supreme court, therefore, remanded the case for further proceedings. Treatise quoted.

Hawthorne v. Director, Office of Workers' Comp. Programs, 844 F.2d 318 (6th Cir. 1988). The court of appeals reversed a Benefits Review Board decision which had failed to consider what an employee would have earned had his labor union not gone on strike for a substantial period of the calendar year preceding the date of the injury. The worker was allowed a recomputation of his average weekly wage.

Hanson v. Benson, 179 F. Supp. 130 (D. Alaska 1959). The injured employee received compensation for temporary total disability. Two days later she went back to work at the same pay until discharged for lack of efficiency. She then moved to California and subsequently to Minnesota. She then applied for compensation. The court ruled that the earning capacity should have been calculated on her wages in Alaska, California, and Minnesota rather than on the previous low wages earned in Florida.

Riley v. Industrial Comm'n, 9 Ohio App. 3d 71, 458 N.E.2d 428 (1983). Claimant was injured after only three weeks on the job. He had not worked at all during the preceding year because other income made it unnecessary. The court reversed the commission's finding of an average weekly wage during the previous year of \$10.92, computed by dividing his three weeks of wages by 52.

formula to be found anywhere.<sup>90</sup> Its literalistic approach may be seen in pure form in *Adams v. Florida Industrial Commission*.<sup>91</sup> Claimant, an orange picker, remained continuously in the employ of defendant year round. But the amount of her earnings fluctuated widely according to the season. The Florida statute provides:

(1) If the injured employee shall have worked . . . during substantially the whole of thirteen weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the said thirteen weeks. . . .

(3) If either of the foregoing methods cannot reasonably and fairly be applied, the full time weekly wages of the injured employee shall be used. . . .<sup>92</sup>

The thirteen weeks preceding claimant's injury were the slackest in the year. They ran at an annual rate of \$1,072 while her actual annual earnings in the three preceding years had run over \$1,700. The court held that it was absolutely bound to use the thirteen-week test, and that to do anything else would be to flout the statute. The dissent<sup>93</sup> contended that the majority itself flouted the statute by "reading out of the statute" the words "reasonably and fairly."

<sup>90</sup> See also n.81 *supra* this subsection.

*Coles v. Gainesville Bonded Warehouse*, 409 So. 2d 1205 (Fla. Dist. Ct. App. 1982). The claimant was an independent contractor truck driver who, for some unspecified reason, was covered by worker's compensation. During the 13 weeks preceding his injury his gross income from trucking less his truck payments, repairs and fuel for the truck, and payments to his co-driver had produced net receipts of \$6,520.48. He had also indicated that he spent approximately \$20 per day for personal expenses on the road, but there was no indication of how many days he had spent on the road. The deputy had accepted the claimant's testimony that, during the year in which he was injured, he had netted about \$1,000 per month, and had set \$250 per week as the claimant's average weekly wage. The court remanded, holding that since the claimant had been employed for substantially all of the 13 weeks prior to the accident, the deputy must make further findings as to the exact amount of claimant's personal expenses for the period, and thus establish his actual weekly wage.

*Apholz v. North Am. Van Lines*, 427 So. 2d 1094 (Fla. Dist. Ct. App. 1983). Follows *Coles*.

<sup>91</sup> 110 So. 2d 255 (Fla. Dist. Ct. App. 1959).

<sup>92</sup> Fla. Stat. Ann. § 440.14 (1966).

<sup>93</sup> Treatise quoted.

Since the dissenting judge, Judge Carroll, agrees with the author, it should not be surprising that the author agrees with Judge Carroll. If the words "reasonably and fairly" were not inserted for the purposes of preventing such obvious injustices as this, why were they inserted? The majority read the statute as if it said, "If either of the foregoing methods cannot literally and automatically be applied. . . ." The choice is between being literal and being fair. The statute itself makes the choice and decrees fairness.

It was argued that to impose the burden of deciding when fairness required resort to the third test would be too great an administrative hardship on the Commission. But the statute has in fact imposed that task. It is always harder work to apply tests of reasonableness than to apply self-executing mathematical tests. But the former cannot be avoided in a mature and civilized legal system.

By what test shall the "fairness and reasonableness" of the use of the first test be judged? The answer is plain: Does it produce an honest approximation of claimant's probable future earning capacity?<sup>93.1</sup> Applied to the instant situation, the test answers itself. Extrapolating earnings in the slackest period in the year cannot possibly give such an approximation.

Six years later the Florida court, unmoved by the scolding in the preceding paragraphs, produced a case<sup>94</sup> in which the

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<sup>93.1</sup> *Wilson v. Service Broadcasters, Inc.*, 483 So. 2d 1339 (Miss. 1986). Decedent, who had worked as a full-time reporter for a television station, was working part-time at the time of her accidental death. The reason was complications from pregnancy. The court concluded that her wage basis should be part-time, since it would be speculative to assume that she would return to full-time work. Treatise quoted.

<sup>94</sup> *Waymire v. Industrial Comm'n*, 174 So. 2d 404 (Fla. 1965).

*Witzky v. West Coast Dup. & Claims Ctr.*, 503 So. 2d 1327 (Fla. Dist. Ct. App. 1987). The issue was whether commissions earned during the 13-week period preceding the accident but not actually paid should be included in the claimant's wage. Reversing the deputy commissioner, the court held that they should. The opinion goes on to agree with the Treatise criticism of the "inexcusably rigidified" Florida statute, arguing that, in this type of case, equity demands that the claimant's wage be calculated on an annual basis, and imploring the legislature to modify the strict 13-week period basis. Treatise quoted.

*See also California Comp. & Fire Co. v. Industrial Acc. Comm'n*, 57 Cal. 2d 600, 21 Cal. Rptr. 551, 371 P.2d 287 (1962). The claimant had earned only \$760

departure from the statutory call for fairness and reasonableness was even greater. Claimant, a salesman, was paid on a commission basis, and as a result had a fluctuating income. It appeared that the thirteen-week period preceding the injury was a time of lower than normal income for the claimant, and resulted in a finding of an average weekly wage approximately one-half of his average wage for the past three years. It was nevertheless held that, since claimant had worked for the thirteen weeks prior to his accident, the thirteen-week average wage test had to be applied.

It remained, however, for the Supreme Courts of North Carolina and Georgia to produce a doctrine that, for the exaltation of medieval word-worship over fairness, dwarfs even these efforts from Florida. The exact question at stake was quite different: Is the court bound to apply an actual wage even if it is clearly illegal? But the same preference for the literal over the reasonable is evident. In the North Carolina case of *Lovette v. Reliable Manufacturing Company*,<sup>95</sup> decedent had been paid \$10.67 for work done for defendant; but under the Federal Fair Labor Standards Act, he should have received more. It was held that the minimum wage set by statute did not affect the amount of compensation payable.

The court followed a similar holding by the Supreme Court of Georgia in *Bituminous Casualty Corporation v. Sapp*,<sup>96</sup> and a

during the preceding calendar year. In the first two weeks of the current year he earned \$153 while employed as a temporary employee. *Held*, maximum benefits, based upon an average weekly wage of \$65 or more, were properly awarded.

<sup>95</sup> 262 N.C. 288, 136 S.E.2d 685 (1964).

*See also* *McCrudden v. Venditto Bros., Inc.*, 103 R.I. 201, 235 A.2d 878 (1967). Claimant worked with a traveling carnival, assembling and dismantling rides. He was paid a set fee for each ride, rather than an hourly wage. No evidence as to the actual hours worked was presented. Claimant contended that his average weekly wage should be computed by taking the 40-hour week set as full-time work by statute, and multiplying it by the minimum hourly wage in effect. The court stated that it had no authority to apply the minimum hourly wage, and since claimant had merely offered evidence of his weekly wage, which was \$14, and not the amount of hours worked, his average weekly wage could only be computed on the basis of actual wages received, and not hourly wage times 40.

*Contra* *Trujillo v. Tanuz*, 85 N.M. 35, 508 P.2d 1332 (Ct. App. 1973). At the time of injury, claimant was receiving wages at less than the legal minimum wage for New Mexico. *Held*, claimant was entitled to benefits based upon the wages he would have earned had he received the legal wage. Treatise quoted.

<sup>96</sup> 196 Ga. 431, 26 S.E.2d 724 (1943).

holding by the Arizona Supreme Court<sup>97</sup> in a somewhat analogous situation involving an agreement for a guaranteed base wage made pursuant to federal statutes.

If one may assume, for purposes of the legal issue involved, that the fact of payment of less than the required minimum wage is not in dispute, the decisions in the *Lovette* and *Sapp* cases are clearly wrong. The calculation of "average weekly wage" under the Workmen's Compensation Act is not an automatic process. The North Carolina Workmen's Compensation Act<sup>97.1</sup> defines "average weekly wage" in terms of "earnings."<sup>98</sup> From this it could be argued that the proper basis for the calculation is not what the claimant was in fact paid but what he "earned."<sup>98.1</sup> This in turn would properly seem to mean what he could have compelled his employer to pay him if he had exercised his legal rights.

<sup>97</sup> *Miami-Copper Co. v. Schoonover*, 65 Ariz. 239, 178 P.2d 554 (1947).

<sup>97.1</sup> N.C. Gen. Stat. § 97-2(5) (Supp. 1967).

<sup>98</sup> *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 269 S.E.2d 165 (1980), n.86.1 *supra* this subsection.

<sup>98.1</sup> *Harvey Auto Supply, Inc. v. Industrial Comm'n*, 25 Ariz. App. 274, 542 P.2d 1154 (1975). The claimant, an employee of a closely held family corporation, had the option of taking his \$1,000 a month salary in cash or stocks. In the year in which he was injured, he had taken only part in cash, deferring the rest, to be taken in stock, to the following year for tax purposes. The court of appeals ruled that the entire \$1,000 was his proper wage basis. Quoting the Treatise, the court based its conclusion on the simple proposition that anything constituting real economic gain to the claimant should be included in wage. The fact that the stock was not paid in the month was immaterial, as were also the standards of the Internal Revenue Code. Treatise quoted.

*Faith Evangelical Lutheran Church v. Industrial Comm'n*, 119 Ariz. 506, 581 P.2d 1156 (1978) (rehearing denied) (review denied). The plaintiff and his wife were custodians at a church and received a combined salary for their work. The checks they received reflected that two-thirds of the pay was allocated to the husband, and one third to the wife. When the husband was injured, the Commission based his award on the wage of two-thirds of the total. The husband requested a hearing. At the hearing, the Pastor testified that two-thirds was an arbitrary allocation, and that the plaintiff actually performed 80 to 90% of the work. The hearing office awarded compensation based on 85% of the total wage. The court of appeals affirmed on the basis that the purpose of the workmen's compensation is to compensate for lost earning capacity, and therefore the proper determination requires a "realistic pre-injury wage base" which can serve as a standard for comparison with post-injury earning capacity. The emphasis was on what he actually earned, and the Commission could look beyond the amount paid if it did not represent the worker's earning capacity.

Suppose, for example, that the employer, having agreed to pay a certain wage, then simply refused to pay the claimant anything at all. Suppose at the time of hearing the claimant had in fact not been paid a single dollar for his work, although under his agreement with the employer he was entitled to receive \$200 a week. Obviously no court would hold that the employee's "average weekly wage" for that period was zero.<sup>98.2</sup> Yet the situation is somewhat similar. In both instances it becomes necessary to use as a basis for wage calculation, not what the employee was in fact paid, but what he was entitled in law to be paid, in the one instance by private agreement, and the other instance by federal law.

The fact that the calculation of "average weekly wage" is not intended to be automatic and rigidly arbitrary is evident from the various typical provisions for adjustment of actual wages received in order to achieve a figure which is fairly representative. For example, the North Carolina statute, in common with many statutes, contains a residual catchall calculation formula to be applied when the preceding methods would be "unfair." For whatever it may be worth, one may make the observation that the federal statute is entitled the "Federal Fair Labor Standards Act" and when the law of the land, whether federal or state, has provided that a particular wage is unfair, it is questionable to deny that it is unfair for workmen's compensation purposes.

There seems to be no reason why the outcome should be affected by the fact that it is a federal statute that happens to be involved

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<sup>98.2</sup> *Farmers Gin Co. v. Rose*, 374 So. 2d 351 (Ala. Ct. App. 1979). The claimant contracted to work for the defendant for \$200 a week. After working over one year, he was disabled in a work-related accident. The court held that his wage basis was \$200 even though he was not actually paid that amount. On some occasions he took merchandise in lieu of payment, and the defendant owed him some back wages. The court reasoned that the crucial factor was the obligation incurred by the defendant, as evidenced by the contract to pay \$200 a week. The mode or timing of payment was immaterial.

*Adart South Polybag Mfg., Inc. v. Goldberg*, 495 So. 2d 826 (Fla. Dist. Ct. App. 1986). The court applied Fla. Stat. 440.14(1) (d) to find that the claimant's full-time wages must be determined prospectively, using the claimant's contract of employment. There was evidence which showed that the business owned by claimant and his brother was legally obligated to pay him \$350 per week, though he never, in fact, received this amount. Citing *Farmer's Gin Co., Inc. v. Rose*, *supra*, this note, the court held that the fact that claimant did not receive the stipulated salary did not preclude the use of that amount in determining his average weekly wage. Treatise cited.

in these two cases. The same point could easily arise under a state minimum wage statute. If the first case presenting this point had arisen under a state statute, it seems difficult to believe that the wage made illegal by state law would be adopted for purposes of a wage calculation under another state law. This being so, the question is narrowed to the issue whether there is any good reason for distinguishing between a state and federal minimum wage law for this purpose. In both cases, the substandard wage is illegal under the law of the land, and in both cases the claimant has a legal right to the higher wage which he can enforce by appropriate proceedings.<sup>98.3</sup>

The present holding is quite capable of producing shockingly inequitable results. The wrongdoing employer profits twice: in the first instance, by paying the substandard wage, and in the second instance, by having his workmen's compensation liability ever after reduced to a substandard level as his reward for his first violation of law. Once the claimant's source of income is converted from wages into workmen's compensation benefits on the substandard basis, it might be very difficult for him in some jurisdictions to get his benefits adjusted upward, even if he retroactively pursued his right to compel the payment of a higher wage under the Fair Labor Standards Act. As indicated later,<sup>99</sup> there is considerable difference among the various statutes on the question whether reopening would be possible in these circumstances. In any event, if it were possible, it would be a burdensome procedure, and it hardly seems within the spirit of the Workmen's Compensation Act to put the claimant through this succession of legal proceedings in order to have his benefits based upon the "fair" wage to which he was legally entitled.

The concept of fairness reappears in the final criterion by which to arrive at an average weekly wage when other tests cannot fairly be used. The usual formulation speaks of a wage that fairly

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<sup>98.3</sup> *Trujillo v. Tanuz*, 85 N.M. 35, 508 P.2d 1332 (1973). Claimant had received a 50% permanent partial disability rating below. The amount of his benefit payments had been computed on the basis of his former weekly wage as it was stipulated by the claimant and his employer. This weekly wage was out of compliance with the state's minimum wage law, however, and the court reversed, ordering that the benefits be computed at the rate of the legal minimum wage. Treatise quoted.

<sup>99</sup> § 81.50 to § 81.53 *infra*.

represents claimant's earning capacity. As the examples adduced throughout this discussion testify, there are almost an infinite number of variables that might figure in these cases,<sup>99.1</sup> and,

<sup>99.1</sup> *Federal*: See generally *Hawthorne v. Director, Office of Workers' Comp. Programs*, 844 F.2d 318 (6th Cir. 1988). The court of appeals reversed a Benefits Review Board decision which had failed to consider what an employee would have earned had his labor union not gone on strike for a substantial period of the calendar year preceding the date of the injury. The worker was allowed a recomputation of his average weekly wage.

*Alaska*: *Peck v. Alaska Aeronautical, Inc.*, 744 P.2d 663 (Alaska 1987), *petition for reh'g granted*, 756 P.2d 282 (1988). Peck, an airline pilot, was injured in 1964 in an airplane crash. His weekly wage then was \$255. He was temporarily disabled, but resumed work shortly after, until he was forced to retire from flying for medical reasons in May 1982. His weekly wage then was \$1,294. The court applied the escape clause for "undue hardship" and held that the later wage should be used, since it was the one that realistically reflected the claimant's loss for the rest of his life. The same was true as to the statutory maximum applicable. Treatise quoted.

*Colorado*: *HLJ. Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. Ct. App. 1990), *cert. denied* (Feb. 4, 1991). The employer was bound by the admission of liability representing the claimant's average weekly wage as \$191.07 prior to review of the agreement by the Board. The Board could review the average weekly wage since the claimant challenged it, and find that the average weekly wage should be lower, at \$175.25, from the time of the entry of its order. With the \$175.25 wage, the claimant's temporary disability compensation came to \$116.83 per week from the time of the order.

*Florida*: *Cf. Sizemore v. Canaveral Port Auth.*, 332 So. 2d 23 (Fla. 1976). The claimant, a minor, was crushed against a trailer by a tractor. At the trial, the parties stipulated that the claimant's income had been \$60 per week. The court held that the judge of industrial claims could not increase the claimant's award above the amount stipulated by both parties, under a statute which would have allowed it in the case of a minor, when no evidence of anticipated wage increase was presented. Treatise cited.

*New Jersey*: Treatise quoted in holding that wage for deaths of founders and officers of corporation, which did not pay them for their part-time endeavors, was properly based on wages received in their full-time employment for a 40-hour week and not at an hourly rate times the number of hours they worked for the corporation. *Mahoney v. Nitroform Co.*, 20 N.J. 499, 120 A.2d 454 (1956).

*New York*: *Chromey v. Argentieri*, 10 A.D.2d 749, 197 N.Y.S.2d 642 (1960). The claimant held three jobs: an inspector for the Erie Railroad, a "wrecker" subject to call on occasions, and a general handyman for the defendant employer. Since the claimant's wages from just the defendant could not "reasonably and fairly be applied," the Board calculated his average annual earnings at not less than 200 days times eight hours per day times his actual \$1 per hour wages.

unspecific as this test is, it is much better than a technical test that methodically produces demonstrably inequitable results. A good illustration of what a court can do in the name of fairness is seen in the case of *Infelt v. Horen*.<sup>99.2</sup> After a compensable injury, claimant attempted to carry on his work. In order to do so, he paid his brother \$35 per week to help him. Fellow employees offered gratuitous aid. The compensation award was based on an average weekly wage of \$41.17, computed on the basis of the claimant's average wage for the quarter next preceding the injury. Claimant asserted that he was capable of earning \$100 per week, and that his earnings were reduced by reason of bad weather. The court was also of the opinion that the claimant was not to be penalized for the wages lost because he paid his brother to assist him.

The soldier who is wounded, but who still "carries on," is looked upon as a hero; the injured workman who likewise attempts to "carry on" will lose nothing by doing so when his rights become a matter of judicial determination.<sup>99.3</sup>

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*Ohio: State ex. rel. Erkard v. Industrial Comm'n*, 55 Ohio App. 3d 186, 563 N.E.2d 310 (1988). The Bureau was held to have arrived at a fair average weekly wage. The higher calculation proposed by the claimant was not awarded because the claimant was a seasonal worker. The claimant, a construction worker, worked a full 40-hour week only three times during the year preceding the injury, and was found to have been unemployed 39 weeks of the year.

*Texas: Indemnity Ins. Co. of No. Am. v. Redie*, 344 S.W.2d 936 (Tex. Ct. App. 1961). The claimant was injured when temporarily operating a tow-lift truck. His normal duties were as a wheelbarrow pusher. The court held that the lower court should have arrived at a fair wage, not the wages of a tow-lift operator.

<sup>99.2</sup> 136 Mont. 217, 346 P.2d 556 (1959).

*Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E.2d 837 (1982). The claimant, who had been employed in cotton mills for over 40 years, sought benefits for total disability due to chronic obstructive lung disease. The physicians who testified stated that the claimant's lung problems were probably due to exposure to cotton dust and that, if there were other causes, it was impossible to quantify what percentage of his disability was due to those other causes. Thus, there was substantial evidence to support the Commission's finding that all of the claimant's disability was due to his employment. The claimant's last period of employment had been for only twelve weeks, during which he had been unable to work full days due to his disability. It was proper for the commission to consider also an earlier period in which the claimant had worked full-time in order to reach a "just and fair" approximation of his average weekly wage.

<sup>99.3</sup> 346 P.2d at 559, quoting *Raffaghelle v. Russel*, 103 Kan. 849, 176 P. 640, 641 (1918).

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

In Re: JAMES B. HILL  
Claim No. Y-341774

Docket No. 06 21980, 07 10181,  
07 11087, 07 11088, 07 11178,  
07 11881

CLAIMANT'S FIRST REQUESTS  
FOR ADMISSION OF FACTS AND  
DEPARTMENT OF CORRECTIONS'  
RESPONSES THERETO

TO: DEPARTMENT OF CORRECTIONS, by and through Jean E. Meyn, its attorney; and  
DEPARTMENT OF LABOR AND INDUSTRIES, by and through Cheryl M. Handy, its  
attorney.

COMES NOW the Department of Corrections ("DOC"), by and through its attorneys,  
ROBERT M. MCKENNA, Attorney General and JEAN E. MEYN, Assistant Attorney General,  
and submits the Department of Corrections' Responses to Claimant's First Requests for  
Admission of Facts.

The Department of Corrections neither agrees nor stipulates to the Claimant's definitions  
and/or procedures.

The Department of Corrections objects to the definition of "you" to include attorneys and  
investigators. Such definition is overbroad, invades attorney-client privilege and attorney work  
product privilege.

The Department of Corrections objects to the supplementation provisions. All discovery  
requests will be supplemented in accordance with CR 26(e) (1)-(4), which sets forth all parties'  
duties for supplementation.

1 All answers are provided pursuant to CR 33.

2 **REQUEST FOR ADMISSION NO. 1:**

3 At all times subsequent to his December 2002 injury under this claim, Mr. Hill was temporarily,  
4 totally disabled at all times relevant to these appeals.

5 **ADMIT** \_\_\_\_\_ **DENY** \_\_\_\_\_

6 **OBJECTION:** DOC objects to this request because it is irrelevant to the issues on appeal  
7 and is not reasonably calculated to lead to the discovery of admissible evidence.

8

9 **REQUEST FOR ADMISSION NO. 2:**

10 Mr. Hill was performing interior painting on his date of injury.

11 **ADMIT** \_\_\_\_\_ **DENY** \_\_\_\_\_

12 **OBJECTION:** DOC has insufficient information to admit or deny because the term  
13 "interior painting" is vague. Without waiving objection, DOC admits that Mr. Hill was painting  
14 trim on inside walls of a building on December 10, 2002.

15 **REQUEST FOR ADMISSION NO. 3:**

16 Mr. Hill had previously performed general construction and journeyman carpentry activities for  
17 the Department of Corrections prior to his injury.

18 **ADMIT** \_\_\_\_\_ **DENY**  X

19

20 **REQUEST FOR ADMISSION NO. 4:**

21 For the types of work performed by Mr. Hill for the Department of Corrections that Department  
22 is required to hire union labor to perform those tasks if not performed by inmates.

23 **ADMIT** \_\_\_\_\_ **DENY** \_\_\_\_\_

24 **OBJECTION:** DOC objects to this question as the meaning is confusing and unclear and  
25 therefore DOC is unable to admit or deny.

26

1 Without waiving objection, DOC denies that DOC substitutes any union labor with work  
2 done by inmates.

3  
4 **REQUEST FOR ADMISSION NO. 5:**

5 In December, 2002, a wage of \$.85 per hour would violate the State's minimum wage statute if  
6 paid to a non-inmate.

7 **ADMIT** \_\_\_\_\_ **DENY** \_\_\_\_\_

8 **OBJECTION:** DOC objects to this request because it is not reasonably calculated to lead  
9 to admissible evidence and it calls for a legal conclusion.

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11 **REQUEST FOR ADMISSION NO. 6:**

12 The Department of Corrections acknowledged the quality of Mr. Hill's work performed on  
13 various construction projects by providing him with a Certificate of Recognition.

14 **ADMIT** \_\_\_\_\_ **DENY** \_\_\_\_\_

15 **OBJECTION:** DOC denies awareness of providing a "Certificate of Recognition"  
16 because a search of Mr. Hill's central file retained at headquarters in Tumwater found no such  
17 document; but DOC admits awareness of a document that Mr. Hill provided to the Department of  
18 Labor and Industries and received by them on or about May 20, 2003, entitled "In  
19 Appreciation to James Hill" that includes "for your excellent effort and work ethic on the Alpine  
20 Remodel project," a copy is attached and labeled as Employer to Claimant, p. 1; and, DOC  
21 admits that the document speaks for itself and denies that this document is acknowledgement of  
22 the quality of Mr. Hill's work on various construction projects. In addition, this document was  
23 presented to all the inmate workers involved with the Alpine Remodel project at Cedar Creek  
24 Corrections Center.  
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1 **REQUESTS FOR PRODUCTION**

2 Please produce copies of all documents, records, etc., named, identified or covered in any  
3 of the above interrogatories, particularly Interrogatory Numbers 7 and 15, pursuant to Paragraph  
4 B of the Directions.

5 **RESPONSE:** DOC attaches a document labeled as Employer to Claimant, p. 1 regarding  
6 response to No. 6 to Requests for Admission.

7 **OBJECTION:** DOC objects to providing any documents that may relate to  
8 interrogatories, such as Numbers 7 and 15 cited above, because no other form of discovery may  
9 be combined with requests for admission under CR 36.  
10

11 **VERIFICATION**

12 ELIZABETH LASLEY certifies, under penalty of perjury:

13 That I am an employee of the Department of Corrections, that my position is Human  
14 Resources Consultant Assistant 2, that I have read the Claimant's First Requests for Admissions  
15 of Facts directed to the Department of Corrections and to the Department of Labor and Industries  
16 and DOC's Responses Thereto, know the contents thereof, and believe the same to be true and  
17 correct.

18 DATED this 22 day of October, 2007.

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20   
21 ELIZABETH LASLEY  
22 Human Resources Consultant Assistant 2  
23 Department of Corrections  
24  
25  
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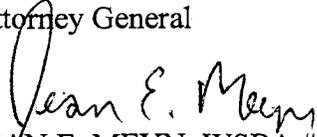
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**CERTIFICATION BY ATTORNEY**

THE UNDERSIGNED attorney has read the foregoing Claimant's First Requests for Admissions of Facts directed to the Department of Corrections and to the Department of Labor and Industries and DOC's Responses Thereto and they are in compliance with Superior Court Civil Rule 26(g).

DATED this 24<sup>th</sup> day of October 2007.

ROBERT M. MCKENNA  
Attorney General

  
JEAN E. MEYN, WSBA #15990  
Assistant Attorney General  
Attorney for Employer  
Criminal Justice Division  
P.O. Box 40116  
Olympia, WA 98504-0116  
(360) 586-5121

1 **CERTIFICATE OF SERVICE**

2 I certify that I served a copy of CLAIMANT'S FIRST REQUESTS FOR ADMISSION  
3 OF FACTS AND DEPARTMENT OF CORECTIONS' RESPONSES THERETO on all parties  
4 or their counsel of record on the date below as follows:

5  
6 TO:

7  Hand delivered by AGO staff Kathy Branam

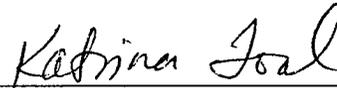
8 CARROLL G. RUSK JR  
9 LAW OFFICES OF JAMES ROLLAND PS  
10 WESTSIDE PROFESSIONAL PLAZA  
11 1405 HARRISON AVE NW SUITE 300  
12 OLYMPIA WA 98507

13  State Campus Delivery

14 CHERYL HANDY  
15 ASSISTANT ATTORNEY GENERAL  
16 LABOR & INDUSTRIES DIVISION  
17 PO BOX 40121  
18 OLYMPIA, WA 98504-0121

19 I certify under penalty of perjury under the laws of the state of Washington that the  
20 foregoing is true and correct.

21 DATED this 24<sup>th</sup> day of October, 2007, at Olympia, Washington.

22  
23  
24  
25  
26  


\_\_\_\_\_  
KATRINA TOAL  
Legal Assistant

*Does this account for anything?*

# In Appreciation To James Hill

for  
your excellent effort and work ethic  
on the Alpine Remodel project.



Dan MacKenzie, Const. Supervisor  
Cedar Creek Corrections Center  
November 27, 2002

Rec'd L & I  
MAY 20 2003

Express / Cert. Mail



Working Proudly Today for a Safer Tomorrow

RCW 51.08.178

"Wages" — Monthly wages as basis of compensation — Computation thereof.

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

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

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

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

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

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

Notes:

**Application -- 2007 c 297 § 1:** "Section 1 of this act applies to all wage determinations issued on or after July 22, 2007." [2007 c 297 § 2.]

**Severability -- Effective date -- 1977 ex.s. c 323:** See notes following RCW 51.04.040.

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

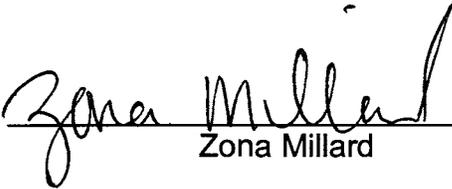
CERTIFICATE OF SERVICE

I certify that on May 13, 2010 I sent a true and correct copy  
of the Brief of Appellant by first class mail, postage prepaid, and  
electronic mail to:

Michael Rothman, Assistant Attorney General  
Labor & Industries Division  
P.O. Box 40121  
Olympia, Washington 98504-0121

Michael (ATG) Rothman: [MichaelR3@atg.wa.gov](mailto:MichaelR3@atg.wa.gov)  
Carroll G. Rusk, Jr.: [Carroll@jrollandlaw.com](mailto:Carroll@jrollandlaw.com)

Dated: May 13, 2010

  
\_\_\_\_\_  
Zona Millard

FILED  
COURT OF APPEALS  
MAY 14 AM 9:56  
STATE OF WASHINGTON  
BY