



## TABLE OF CONTENTS

|                                                                                    |    |
|------------------------------------------------------------------------------------|----|
| TABLE OF AUTHORITIES .....                                                         | iv |
| I. INTRODUCTION .....                                                              | 1  |
| II. ASSIGNMENTS OF ERROR                                                           |    |
| Assignment of Error No. 1<br>Regarding Denial of Summary Judgment Motion .....     | 2  |
| Assignment of Error No. 2<br>Regarding Jury Instruction Nos. 12 & 14 .....         | 2  |
| Assignment of Error No. 3<br>Regarding Alternative Theories .....                  | 3  |
| Assignment of Error No. 4<br>Regarding Jury Instruction No. 7 .....                | 4  |
| Assignment of Error No. 5<br>Regarding UPS' Proposed Jury Instruction No. 12 ..... | 4  |
| Assignment of Error No. 6<br>Regarding Jury Instruction No. 13 .....               | 5  |
| Assignment of Error No. 7<br>Regarding UPS' Proposed Jury Instruction No. 14 ..... | 5  |
| III. STATEMENT OF THE CASE .....                                                   | 6  |
| IV. ARGUMENT                                                                       |    |
| Legal Criteria .....                                                               | 11 |
| Argument on Assignment of Error No. 1 .....                                        | 19 |
| Argument on Assignment of Error No. 2 .....                                        | 32 |

|                                                                  |     |
|------------------------------------------------------------------|-----|
| Argument on Assignment of Error No. 3                            | 39  |
| Argument on Assignment of Error No. 4                            | 43  |
| Argument on Assignment of Error No. 5                            | 44  |
| Argument on Assignment of Error No. 6                            | 46  |
| Argument on Assignment of Error No. 7                            | 47  |
| V. CONCLUSION                                                    | 49  |
| VI. APPENDIX                                                     |     |
| RCW 51.08.178                                                    | A1  |
| <i>In re John Pino</i>                                           | A2  |
| Kitsap County Superior Court<br>Jury Instruction No. 7           | A12 |
| Kitsap County Superior Court<br>Jury Instruction No. 11          | A12 |
| Kitsap County Superior Court<br>Jury Instruction No. 12          | A12 |
| Kitsap County Superior Court<br>Jury Instruction No. 13          | A13 |
| Kitsap County Superior Court<br>Jury Instruction No. 14          | A13 |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 8  | A14 |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 12 | A14 |

|                                                                        |           |
|------------------------------------------------------------------------|-----------|
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 13 ..... | A15       |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 14 ..... | A16       |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 15 ..... | A16       |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 16 ..... | A17       |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 17 ..... | A17       |
| Defendant's Proposed Jury Instruction<br>Jury Instruction No. 18 ..... | A17       |
| Defendant's Proposed Jury Instruction<br>Special Verdict Form .....    | A18       |
| Exhibit No. 1 .....                                                    | A19 – A26 |
| Exhibit No. 2 .....                                                    | A27       |

## TABLE OF AUTHORITIES

### Washington Cases:

|                                                                                                                                                                         |                            |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| <i>Alhadeff v. Meridian on Bainbridge Island, LLC</i> ,<br>167 Wn. 2d 601 (2009) .....                                                                                  | 19                         |
| <i>City of Pasco v. Public Employment Relations Comm'n</i> ,<br>119 Wn. 2d 504, 507-08 (1992) .....                                                                     | 17                         |
| <i>Dep't of Labor &amp; Indus. v. Avundes</i> ,<br>140 Wn. 2d 282 (2000) 2, 13, 14, 15, 16, 17, 18, 20, 21, 22<br>.. 23, 24, 25, 26, 27, 29, 33, 34, 35<br>..... 44, 48 | 44, 48                     |
| <i>Double D Hop Ranch v. Sanchez</i> ,<br>133 Wn. 2d 793 (1997) .....                                                                                                   | 14, 22, 25, 28, 32, 38, 48 |
| <i>Fell v. Spokane Transit Auth.</i> ,<br>128 Wn.2d 618 (1996) .....                                                                                                    | 9                          |
| <i>Hollis v. Garwall, Inc.</i> , 137 Wn. 2d 683 (1999) .....                                                                                                            | , 19                       |
| <i>Jenkins v. Weyerhaeuser Co.</i> ,<br>143 Wn. App. 246 (2008) .....                                                                                                   | 41                         |
| <i>Marley v. Dep't of Labor &amp; Indus.</i> ,<br>125 Wn. 2d 533 (1994) .....                                                                                           | 40                         |
| <i>McClellan v. ITT Rayonier, Inc.</i> ,<br>65 Wn. App. 386 (1992) .....                                                                                                | 41                         |
| <i>Potter v Dep't of Labor &amp; Indus.</i> ,<br>101 Wn. App. 399 (2000) .....                                                                                          | 3, 4, 5, 6, 7              |
| <i>Owens v. Seattle</i> , 49 Wn. 2d 187, 193 (1956) .....                                                                                                               | 42                         |
| <i>Sawyer v. Dep't of Labor &amp; Indus.</i> ,<br>48 Wn. 2d 761 (1956) .....                                                                                            | 43                         |

|                                                                                                                                                         |                                             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|
| <i>School Dist. No. 401 v. Minturn</i> ,<br>83 Wn. App. 1 (1996) . . . . .                                                                              | 3, 14, 15, 22, 28, 27, 31, 33, 38<br>42, 48 |
| <i>Scott Paper Co. v. Dep't of Labor &amp; Indus.</i> ,<br>73 Wn. 2d 840 (1968) . . . . .                                                               | 43                                          |
| <i>State v. Bashaw</i> , ___ Wn.2d ___; 2010 Wash. LEXIS 540,<br>18-19 (July 1, 2010) . . . . .                                                         | 36                                          |
| <i>State v. Dana</i> , 73 Wn. 2d 533 (1968) . . . . .                                                                                                   | 39                                          |
| <i>State v. Smith</i> , 131 Wn.2d 258, 264 (1997) . . . . .                                                                                             | 35                                          |
| <i>Thompson v. King Feed &amp; Nutrition Serv.</i> ,<br>153 Wn. 2d 447 (2005) . . . . .                                                                 | 35, 44, 45, 47                              |
| <i>Watson v. Dep't of Labor &amp; Indus.</i> ,<br>133 Wn. App. 903 (2006) . . . . .                                                                     | 16, 22, 24, 25, 28                          |
| <i>Wright v. Engum</i> , 124 Wn. 2d 343, 352 (1994) . . . . .                                                                                           | 41                                          |
| <b>Washington Statutes:</b>                                                                                                                             |                                             |
| RCW 51.08.178 1, 2, 3, 5, 6, 11, 12, 13, 15, 16, 17, 19, 20, 21, 28<br>. . . . . 29, 30, 33, 34, 35, 36, 38, 42, 43, 44, 45, 46<br>. . . . . 47, 49, 50 |                                             |
| RCW 51.32.060 . . . . .                                                                                                                                 | 12                                          |
| RCW 51.32.090 . . . . .                                                                                                                                 | 12                                          |
| RCW 51.52.050 . . . . .                                                                                                                                 | 40                                          |
| RCW 51.52.115 . . . . .                                                                                                                                 | 40                                          |
| <b>Court Rules:</b>                                                                                                                                     |                                             |
| CR 56 . . . . .                                                                                                                                         | 19                                          |

**Other Authorities:**

*In re: John Pino*, Dckt. No. 915072 (Feb. 2, 1999);  
1994 WA Wrk. Comp. LEXIS 678  
(WA Wrk. Comp. 1994) . . . . . 16, 17, 29, 47, 48, 49

## I. INTRODUCTION

Workers' compensation claimants are entitled to time loss compensation where they are unable to work due to their injuries. Time loss compensation rates are a percentage of the claimant's gross monthly wages at the time of injury. Gross monthly wages are statutorily calculated pursuant to RCW 51.08.178. This statute primarily uses two methods for calculating wages.

Defendant maintains that RCW 51.08.178(1) should be used because the evidence shows Plaintiff was a normally employed worker at the time of injury. Plaintiff maintains that RCW 51.08.178(2) should be used because he was either (a) an exclusively seasonal worker, or (b) essentially part-time or intermittent worker at the time of injury. At the heart of this appeal is whether the facts of this case show Plaintiff meets the statutory requirements of subsection 1 or 2 of RCW 51.08.178. The trial court committed several errors prejudicial to Defendant by misstating law in its jury instructions.

Defendant also raised an alterative argument that if RCW 51.08.178(2) is correct, then the Department used the wrong twelve month period, where Plaintiff was working full time to calculate his gross monthly wage. The statute requires using 12 consecutive

calendar months, preceding the date of injury, which fairly represents Plaintiff's pattern of employment. The trial court did not permit Defendant to present its alternative theory of recovery to the jury.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error No. 1: The court erred when it denied United Parcel Service's Motion for Summary Judgment.**

1. Did the trial court error when it found there was a material issue of fact that Mr. Hudson's wages should be calculated pursuant to RCW 51.08.178(1) or (2)?

When reviewing an order on summary judgment, the Court of Appeals engages in the same inquiry as the trial court. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690 (1999).

**Assignment of Error No. 2: The court erred by providing the jury with misleading statements of the law in jury instruction numbers 12 and 14.**

1. Did the trial court error in undertaking to instruct the jury on an aspect of the law; in failing to instruct the jury fully and accurately on that law?

2. Did the trial court error by instructing the jury to only apply the two-part test found in *Dep't of Labor & Indus. v. Avundes*,

140 Wn. 2d 282 (2000), to whether Mr. Hudson was an essentially intermittent worker within the meaning of RCW 51.08.178(2)?

3. Did the trial court error by not instructing the jury to apply the two-part test found in *Avundes* to whether Mr. Hudson was an exclusively seasonal or essentially intermittent worker within the meaning of RCW 51.08.178(2)?

4. Did the trial court error by not instructing the jury that exclusively seasonal and essentially intermittent workers, within the meaning of RCW 51.08.178(2), must not have any off-season jobs? *School Dist. No. 401 v. Minturn*, 83 Wn. App. 1, 6 (1996).

An assigned error in interpreting the law is reviewed *de novo*. *Potter v. Dep't of Labor & Indus.*, 101 Wn. App. 399 (2000).

**Assignment of Error No. 3: The court erred in denying to instruct the jury with Defendant's Proposed Jury Instruction No. 18 and asking it to reach a verdict on which 12 consecutive months preceding the injury fairly represents Mr. Hudson's employment pattern pursuant to RCW 51.08.178(2).**

1. When a self-insured employer argues alternative theories of recovery before the Board of Industrial Insurance Appeals, can the Superior Court deny a jury instruction and special verdict form on one of the self-insured employer's theories of the

case?

An assigned error in interpreting the law is reviewed *de novo*. *Potter*, 101 Wn. App. 399.

**Assignment of Error No. 4: The court erred by failing to instruct the jury that if it finds the evidence equally balanced, then the decision of the Board of Industrial Insurance Appeals must stand.**

1. Did the trial court error in undertaking to instruct the jury on an aspect of the law; in failing to instruct the jury fully and accurately on that law?

2. Must the trial court inform the jury that if it finds the evidence equally balanced, then it must affirm the decision of the Board of Industrial Insurance Appeals?

An assigned error in interpreting the law is reviewed *de novo*. *Potter*, 101 Wn. App. 399.

**Assignment of Error No. 5: The court erred by failing to instruct the jury that RCW 51.08.178(1) is the default method for determining an injured worker's wages.**

1. Did the trial court error in undertaking to instruct the jury on an aspect of the law; in failing to instruct the jury fully and accurately on that law?

2. Did the trial court error by denying to instruct the jury, with Defendant's Proposed Jury Instruction No. 12, that RCW 51.08.178(1) is the default method for determining Mr. Hudson's wages?

An assigned error in interpreting the law is reviewed *de novo*. *Potter*, 101 Wn. App. 399.

**Assignment of Error No. 6: The court erred when it used an incorrect legal definition of essentially part time work as found in RCW 51.08.178(2).**

1. Did the trial court error in undertaking to instruct the jury on an aspect of the law; in failing to instruct the jury fully and accurately on that law?

2. Did Jury Instruction No. 13 contain an incorrect statement of the law of what is "essentially part-time" work as found in RCW 51.08.178(2)?

An assigned error in interpreting the law is reviewed *de novo*. *Potter*, 101 Wn. App. 399.

**Assignment of Error No. 7: The court erred by not instructing the jury what normal work is as found in RCW 51.08.178(1).**

1. Did the trial court error in undertaking to instruct the

jury on an aspect of the law; in failing to instruct the jury fully and accurately on that law?

2. Did the trial court error by failing to instruct the jury as to the legal definition of “normal” work as found in RCW 51.08.178(1)?

An assigned error in interpreting the law is reviewed *de novo*. *Potter*, 101 Wn. App. 399.

### III. STATEMENT OF THE CASE

#### **Factual Statement: Prior Work History**

Plaintiff, Keith Hudson, is a 53-year-old man who injured his back while working for Defendant, UPS, on December 21, 2006. [CP – CABR 8/28/08 Tr. p. 11]. Prior to working for UPS, Mr. Hudson was an active duty service member of the U.S. Air Force. [CP – CABR 8/28/08 Tr. p. 7, ln 5-12]. Between various active duty and reserve service, Plaintiff is a 33-year-veteran of the U.S. Armed Forces. *Id.* Prior to being activated in 2002, Plaintiff worked as an Information Technology Engineer. [CP – CABR 8/2808 Tr. p. 19-20]. Plaintiff testified, "I've always worked full-time. Matter of fact, there's times that I had two jobs; active duty or the reserves and my regular job." [CP – CABR Tr. 8/28/08 p. 32, ln 8-12].

Following his discharge from the U.S. Air Force, Plaintiff intended to continue his full-time employment. [CP – CABR Tr. 8/28/08 p. 8, In 1-16 and p. 27, In 16-17]. He applied for several full-time positions while he received unemployment compensation. [CP – CABR Tr. 8/28/08 p. 14, In 4-12 and p. 29, In 19-22]. Plaintiff testified his goals included furthering his education. He was confident he could work full-time and attend school full-time as he had done so in the past. [CP – CABR Tr. 8/28/08 p. 8, In 11-16]. He stated he was in an “up-tempo” mode and had always worked full-time.

**Factual Statement: Employment at UPS**

United Parcel Service is a worldwide package delivery transportation and logistics service provider, which operates a year-round package delivery business. [CP – CABR Tr. 8/11/08 p. 9, In 5-6, 15-18]. Thus, package car drivers are employed by United Parcel Service year-round. *Id.*

United Parcel Service hires temporary, full-time employees to cover a peak volume period, which is generally between the 1<sup>st</sup> of October and the 31<sup>st</sup> of December. [CP – CABR Tr. 8/11/08 p. 7, In 9-13]. Drivers hired for the busy holiday season are sometimes retained as year-round employees based on job

performance and volume level for delivery and pickup of packages. [CP – CABR Tr. 8/11/08 p. 8, In 16-26].

Plaintiff applied for a job at United Parcel Service while he was receiving unemployment compensation. [CP – CABR Tr. 8/28/08 p. 8, In 18-20]. He understood United Parcel Service needed employees to deliver packages during the holidays and he was hired as a “peak season” driver. [CP – CABR Tr. 8/11/08 p. 10, In 1-3 and p. 9, In 3-4]. Plaintiff began working for United Parcel Service on October 23, 2006. [CP – CABR Ex No. 1] His last day of work was December 21, 2006, when he sustained an injury to his low back. [CP – CABR Tr. 8/28/08 p. 10].

Plaintiff was not a permanent year-round employee for United Parcel Service; rather, he was a temporary, full-time employee hired to cover the peak volume period. [CP – CABR Tr. 8/11/08 p. 7, In 2-10]. Plaintiff was aware United Parcel Service could potentially retain people following the holiday period; but there were no guarantees. [CP – CABR Tr. 8/28/08 p. 10, In 7-9].

**Factual Statement: Plaintiff’s Post-UPS Employment**

Plaintiff understood his position with United Parcel Service was scheduled to end on either December 23 or 24, 2006. [CP – CABR Tr. 8/28/08 p. 10, In 11-12]. In fact, if offered a job by

Defendant, Plaintiff would not have accepted it. [CP – CABR Tr. 8/28/08 p. 10, In 13-16]. After working for United Parcel Service, he was hoping to secure an information technology technician position on a full-time basis. [CP – CABR Tr. 8/28/08 p. 12, In 23-26; p. 13, In 1-2].

While working for United Parcel Service, he applied for another job as an IT Technician with Clearwater Casino. This was a full-time position. [CP – CABR Tr. 8/28/08 p. 10, In 13-26; p. 46, In 18-23]. The negotiations with Clearwater Casino had yet to be finalized, but they were “leaning more towards” offering him a position. [CP – CABR Tr. 8/28/08 p. 11, In 11-14; p. 47, In 10-18]. In fact, Plaintiff testified the casino wanted to bring him on earlier, but he told the casino he was already working at United Parcel Service and he was the type of person who wanted to complete something he started. [CP – CABR Tr. 8/28/08 p. 11, In 3-10; p. 47, In 25–26].

**Factual Statement: Plaintiff’s Actual Hours With UPS**

Plaintiff’s average hours per day, between October 23, 2006 and December 20, 2006, were 7.20326. [CP – CABR Ex No. 1]. This is based on 309.74 regular and overtime hours over 43 days worked. [CP – CABR Ex No. 1]. Plaintiff earned \$14.64 per hour.

[CP – CABR Ex No. 1]. Between October 23, 2006 and December 20, 2006 Plaintiff worked, on average, four days per week. [CP – CABR Ex No. 1].

Ex No. 1 is an hours history report containing information downloaded from Plaintiff's time-keeping device, which is known as a DIAD. [CP – CABR Tr. 8/11/08 p. 9, In 19-26]. In 2006, all time keeping functions were recorded electronically.

[CP – CABR Tr. 8/11/08 p. 10, In 21-23]. Plaintiff testified Ex No. 1 reflects the hours annotated in the DIAD, and he believed the hours reported were accurate. [CP – CABR Tr. 8/28/08 p. 52, In 12-17]. Furthermore, he was never concerned his paycheck from United Parcel Service documented incorrect hours. [CP – Tr. CABR 8/28/08 p. 52, In 24-26; p. 53, In 1]. Based on Plaintiff's own testimony, the wages and hours documented in Ex No. 1 accurately reflect his earnings while working for United Parcel Service.

On some days, Plaintiff's hours were reduced and he did not work his regularly scheduled shift due to a lack of available work. [CP – CABR Tr. 8/11/08 p. 38, In 15-20; CP – CABR Tr. 8/28/08 p. 9, In 19-22]. This is no different than a year-round driver, as they would also be sent home if they were lacking work. [CP – CABR Tr. 8/11/08 p. 34, In 17-20]. This situation occurred three times in two months. [CP – CABR Tr. 8/11/08 p. 31, In 14-20 with CABR Ex 1].

Plaintiff was also unable to work due to personal illness for three days. [CP – CABR Tr. 8/11/08 p. 31]. Plaintiff also did not work the Thanksgiving holiday, November 23 and 24, 2006. [CP – CABR Ex No. 1]. At other times, Plaintiff worked overtime for United Parcel Service. [CP – CABR Tr. 8/28/08 p. 9, ln 23-24; Ex No. 1].

### **Procedural Statement**

The Department of Labor and Industries issued a May 31, 2007 order determining Plaintiff's wages should be calculated pursuant to RCW 51.083178(2), and that Plaintiff's wages from January 1, 2004 to December 31, 2004 fairly represented Plaintiff's employment pattern. [CP – CABR pp. 30-32]. Defendant timely protested this order and the Department affirmed it on September 12, 2007.

Defendant appealed the September 12, 2007 order to the Board of Industrial Insurance Appeals. On appeal, Defendant argued that RCW 51.08.178(1) should have been used and, in the alternative, the Department used the wrong 12 consecutive calendar months to calculate wages under subsection 2. [CP – CABR pp. 238-239 Self-Insured Employer's Trial Brief]. Hearings were held and Industrial Appeals Judge Steven Straume's November 14, 2008 Proposed Decision and Order reversed the

Department's September 12, 2007 order. IAJ Straume found Plaintiff's wages should be calculated pursuant to RCW 51.08.178(1).

Plaintiff filed a Petition for Review of IAJ Straume's decision. The Board declined review on January 13, 2009, which affirmed IAJ Straume's decision. Plaintiff appealed the Board's decision to Kitsap County Superior Court. Defendant filed a Motion for Summary Judgment. After hearing oral argument on September 18, 2009, the trial court denied Defendant's motion.

A jury was empaneled on January 6, 2010. After the Board's record was read to the jury and the jury was given its instructions, it overturned the Board's decision on January 7, 2010. The final judgment was entered in Kitsap County Superior Court on March 8, 2010. Defendant then requested review by this Court.

### **III. ARGUMENT**

#### **Legal Criteria**

Workers who are temporarily totally disabled are entitled to time loss benefits. RCW 51.32.090. These benefits are computed as a percentage of gross monthly wages at the time of injury. RCW 51.32.060. Gross monthly wage rates must be calculated pursuant to RCW 51.08.178.

RCW 51.08.178 provides two primary methods for calculating wages at the time of injury. Subsection 1 is used for workers who are “normally employed” at the time of injury. Subsection 2 is used for workers who are either (a) exclusively seasonal or (b) essentially part-time or intermittent workers at the time of injury. When deciding which subsection to use the Washington Supreme Court found:

[T]he Department must be mindful that the default provision is subsection (1); it must be used unless the Department establishes it does not apply. RCW 51.08.178(1) (“[subsection (1) applies] unless otherwise provided specifically in the statute concerned.”).

*Dep’t of Labor & Indus. v. Avundes*, 140 Wn. 2d 292, 290 (2000).

In *Avundes*, the court held that the worker’s wages must be calculated using RCW 51.08.178(1) when the worker is engaged in full time work. *Avundes*, 140 Wn. 2d. at 290. It is Plaintiff’s burden to prove his work was part-time, seasonal, or intermittent subject to RCW 51.08.178(2).

A complete reading of RCW 51.08.178, its legislative history, and the various interpreting decisions shows subsection 2 is a narrow exception to subsection 1. It begins with the fact that until 1988, subsection 1 was the only method available to calculate wages. *Avundes*, 140 Wn. 2d at 286. Since subsection 2 was

added, the Supreme Court concluded subsection 1 is the default method. *Id.* at 290. It is the appealing party's burden to prove subsection (1) does not apply. *Id.* Use of subsection 2 is further narrowed by the requirement that seasonal employment must be exclusively seasonal and part-time or intermittent employment must be essentially part-time or intermittent.

### **1. Definition of "Exclusively Seasonal"**

Seasonal work, according to the Washington Supreme Court, "is employment that is dependent on a period of the year that is characterized by a particular activity." *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799 (1997). The Supreme Court found employment is not "exclusively seasonal in nature" when the worker does a type of work that can be done year round, even if the worker was not hired year round for the job. *Id.* at 799-800 (emphasis added). This Court has also held that if the worker has an "off-season" job, then they cannot be classified as an exclusively seasonal worker. *School Dist. No. 401 v. Minturn*, 83 Wn. App. 1, 6 (1996).

### **2. Definition of "Essentially Part-Time or Intermittent"**

The *Avundes* Court did not express a singular statement

defining what is meant by “essentially intermittent” in RCW 51.08.178(2). Instead the Court analyzes each of the four factors contained in the second prong of its test and whether they support a finding of essentially intermittent employment. The Court adopted the Court of Appeals’ analysis that a worker who has worked a series of jobs prior to being injured, but whose current employment relationship is intermittent. *Avundes*, 140 Wn. 2d at 288. Just because a worker is temporarily having a difficult time finding a permanent position, does not turn them into an essentially intermittent worker under RCW 51.08.178(2). *Id.*

This Court provided a succinct definition of essentially intermittent employment in *School Dist. No. 401*, 83 Wn. App. 1:

The Department defines it [intermittent employment] as follows: Intermittent employment is not regular or continuous in the future. It may be full-time, extra-time, or part-time and has definite starting and stopping points with recurring time gaps. We accept this definition for purposes of this case.

*Id.* at 6 (quotations omitted). The example given by this Court is that of a seasonal farm worker who only works specific months of the year for which he or she is only paid for those specific months. But this Court cautioned that subsection (2) does not apply to workers who hold off-season jobs. *Id.* This Court has more recently ruled “that where a worker intends to work full time, year-

round, performs general labor that is not seasonal, looks for work year-round, but is currently employed in a seasonal job, his relationship to work is not essentially part-time or intermittent.”

*Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 915 (2006).

No reported appellate decision has defined “essentially part-time” employment. Nor has any reported decision distinguished essentially part-time from essentially intermittent employment as found in RCW 51.08.178(2)(b). The Supreme Court acknowledged RCW 51.08.178 is potentially irreconcilable on this issue as part-time employment could qualify under subsection 1 or 2. *Avundes*, 140 Wn. 2d at 286-87.

The Board of Industrial Insurance Appeals has attempted a definition in *In re: John Pino*, Dckt. No. 915072 (Feb. 2, 1999);

1994 WA Wrk. Comp. LEXIS 678 (WA Wrk. Comp. 1994) .

However, its definition is a catch-all for workers whose employment does not easily fall within subsection 1:

A worker who is not employed in a typical 40-hour per week position may or may not be an intermittent or part-time worker within the meaning of RCW 51.08.178(2)(b) simply because he or she works fewer days than might be considered typical and may, in fact, be appropriately included in section (1).

*Id.* at 3. The Board focuses on whether the part-time work makes the injured worker “normally employed” as required by subsection

1:

[it depends on] whether the worker has a “normal” number of work days each week that can be readily determined. We note there is no requirement that a person work the same days each week to fall within the scope of RCW 51.08.178(1). The requirement is simply that a worker be employed a consistent number of work days each week, a “normal” number to use the language of the statute. If a normal number of work days can be established, and the worker’s daily wage is known, the worker readily comes within the scope of section (1) and his monthly wage is easily computed.

*Id.* Administrative agency decisions, where they are charged to interpret ambiguous statutes, must be given great weight. *City of Pasco v. Public Employment Relations Comm’n*, 119 Wn. 2d 504, 507-08 (1992).

### **3. The Avundes Test**

In *Avundes*, the injured worker was a general farm laborer who had been injured while cutting asparagus. *Avundes*, 140 Wn. 2d at 284. The injured worker sought to have his wages calculated pursuant to RCW 51.08.178(1). The Department disagreed, arguing he should be classified as an essentially part-time or intermittent worker pursuant to RCW 51.08.178(2). The Supreme Court identified the issue in *Avundes* as whether RCW 51.08.178(1) or (2) applies. This issue is identical to the present appeal.

To resolve this question, the Supreme Court noted Division III of the Court of Appeals had adopted a two-part test “to resolve the question of which subsection applies” to the facts of the case. *Id.* at 288. Step one looks “to the type of work being performed.” *Id.* (citations omitted). Step Two looks to “the relationship of the worker to the employment.” *Id.* (citations omitted). When considering the second step, the trier of fact must consider “the nature of the work, the worker’s intent, the relation with the current employer, and the worker’s work history.” *Id.* The Supreme Court found this approach “accords with the statute” and adopted it. *Id.*

The *Avundes* Court cautioned that this analysis should not myopically focus on the job at injury, it is merely one of several factors that must be considered. The Court noted neither the statute nor the two-part test does not require “the work used to calculate the base monthly wage [job at injury] also be the work used in determining the worker’s relation to employment.” *Id.* at 289. The Court further emphasized this point, “Nothing in the statute or the two-part test requires the worker characterize his or her work by the last job performed. Finally, the four factors used in the second part of the test say nothing about focusing exclusively on the current work.” *Id.* Therefore when applying the facts of this

appeal to the statute, the Court must assess Claimant's history, intent, current employment in its entirety.

### **Summary of Argument on Assignment of Error No. 1**

Kitsap County Superior Court erred in denying Defendant's Motion for Summary Judgment. When viewing the record and applying the facts to the two-part *Avundes* test, no reasonable juror could conclude claimant's employment was "exclusively seasonal" or "essentially part-time or intermittent pursuant to RCW 51.08.178(2). If no reasonable juror could find for Plaintiff, then the Board of Industrial Insurance Appeals' decision must be affirmed.

### **Argument on Assignment of Error No. 1**

A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690 (1999). A material fact is one on which the outcome of litigation depends. CR 56(c); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618 (1996). On appeal, the trial court's decision is reviewed *de novo*. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn. 2d 601 (2009).

Summary Judgment should be granted because no

reasonable juror can conclude Plaintiff's time loss rate should be calculated under RCW 51.08.178(2). The legal criteria for calculating time loss rates under the Industrial Insurance Act sets RCW 51.08.178(1) as the default method. *Avundes*, 140 Wn. 2d at 290. At the time of injury, Plaintiff was not an "exclusively seasonal" or "essentially part-time or intermittent" worker pursuant to RCW 51.08.178(2) as defined by Washington courts. The legal criteria for granting Defendant's Motion for Summary Judgment is outlined above.

***A. Application of Facts to Legal Criteria***

Summary Judgment is merited in this case. There are no facts in dispute. The only reasonable application of the law to the facts supports the Board's order that Plaintiff's average monthly wage rate should be calculated under RCW 51.08.178(1). There is no evidence supporting Plaintiff's assertion that RCW 51.08.178(2) should be used to calculate his average monthly wage rate. When the facts are applied to the law, only one reasonable conclusion can be reached: Plaintiff was normally employed at the time of injury pursuant to RCW 51.08.178(1).

**1. The Facts Are Not Disputed in This Case**

The testimony presented did not raise any material issues of

fact. Plaintiff testified to the same facts at issue in this case both for the Defendant and the Plaintiff on August 28, 2009. All portions of his testimony are cited to in the facts section to show there is no dispute as to the facts. The testimony of other witnesses did not create any genuine issues for the trier of fact to decide. These facts are unambiguous and the only question is their application to RCW 51.08.178. When applied to the law, these facts generate only one conclusion: that Plaintiff's time loss rate must be calculated under the default section RCW 51.08.178(1). *Avundes*, 140 Wn.2d. at 282.

The trial court erroneously found an issue of fact whether Plaintiff "was a seasonal or part-time worker." [RP – 09/18/09 p. 26 In 8-10]. The trial court focused on that Plaintiff's badge said seasonal, would call in every day for work, and was told he was a seasonal worker created an issue of fact. [RP – 09/18/09 p. 26 In 14-18]. Defendant does not dispute any of these facts. Defendant does dispute whether these facts, which are true, meet the statutory definition for exclusively seasonal or essentially part-time employment pursuant RCW 51.08.178(2). As will be shown below, they do not.

**2. Plaintiff is not an "Exclusively Seasonal" or**

### **“Essentially Part-Time Or Intermittent” Employee**

Applying the *Avundes* test to this appeal, delivering packages for UPS is not exclusively seasonal or essentially intermittent work on its face. Plaintiff would have the Court focus on the fact that his specific employment was a temporary holiday season position. The trial court mistakenly focused on this fact when it denied Defendant’s Motion for Summary Judgment. [R.P. 9/18/09 p. 26). This is a misapplication of *Avundes*.

#### **a. *Avundes* Test, Step One**

An examination of the specific employment relationship is appropriate under the second part of the test. *Avundes* 140 Wn. 2d at 287. However, the first part requires an examination of the “type of work being performed.” This is a broader inquiry as highlighted by this Court in *Watson*. It is not an examination of the specific position at injury, but an examination of whether the work performed is generally available versus seasonally available. *Watson*, 133 Wn. App. at 912-13, 915. The injured worker in *Watson* was a seasonal Groundskeeper working with full-time, year-round Groundskeepers at a golf course. *Id.* This is factually identical to the present case where Defendant employs peak-season drivers and full-time, year-round drivers.

There is no genuine issue of material fact the type of work being performed by Plaintiff was delivering packages. There is no genuine issue of material fact that delivering packages is a year-round position that is not dependent on a specific season. *Double D Hop Ranch*, 133 Wn. 2d at 799. There is no genuine issue of material fact that the delivery of packages does not have “definite starting and stopping points with recurring time gaps.” *School Dist. No. 401*, 83 Wn. App. at 6. Therefore, this Court must conclude, as a matter of law, claimant is not an “exclusively seasonal” or “essentially part-time or intermittent” worker pursuant to the first step of the *Avundes* test.

**b. Avundes Test, Step Two**

Having failed the first step, there must be a genuine issue of material fact showing Plaintiff’s work was exclusively seasonal or essentially intermittent based on his relationship to employment in general. In assessing the four factors of the second step of the *Avundes* test, this Court must be mindful of the Supreme Court’s admonition that it must not characterize Plaintiff’s relationship to employment in general “by the last job performed” and to not exclusively focus “on the current work.” *Avundes*, 140 Wn. 2d at 289.

**i. Nature of the Work**

The first factor is the nature of the work. *Id.* at 287. There is some overlap between the first factor and the first step of the *Avundes* test. In light of the Supreme Court's caution that we do not exclusively focus on the current work, then this Court must again perform a general assessment of the nature of the work performed by Plaintiff. There is no genuine issue of material fact that delivering packages is not exclusively seasonal or essentially intermittent work. The volume of packages being shipped increase from October to December, but the nature of the work performed by Plaintiff is not defined by a particular time of the year. Neither does the delivery of packages have regular starting and stopping points with recurring time gaps. As long as jobs are *available* for package car drivers year round, then the nature of the work is not exclusively seasonal or essentially intermittent. *Watson*, 133 Wn. App. 903. Therefore, this Court must find as a matter of law, the first factor does not support a determination that Plaintiff's employment relationship is exclusively seasonal or essentially intermittent.

**ii. Plaintiff's Intent**

The second factor this Court must consider is Plaintiff's

intent. *Avundes*, 140 Wn. 2d at 287. Once again, there is no genuine issue of material fact as to Plaintiff's intent. Plaintiff unambiguously testified that he wanted to find a permanent, full-time position. But he would take anything that was offered. [CP – CABR Tr. 8/28/08 p. 8, ln 1-16; p. 14, ln 4-12; p. 27, ln 16-17; p. 29, ln. 19-22]. This is identical to the injured worker in *Watson*. 133 Wn. App. at 915.

No reasonable juror could conclude, based on this record, that it was Plaintiff's intent to only work holiday seasons for UPS. No reasonable juror could conclude it was Plaintiff's intent to have his employment defined by delivering packages (particular activity) from October to December (specific period of the year). *Double D Hop Ranch*, 133 Wn. 2d at 799. No reasonable juror could conclude it was Plaintiff's intent to find work with definite starting and stopping points, plus recurring time gaps. *School Dist. No. 401*, 83 Wn. App. at 6. This Court must find, as a matter of law, the second factor does not support a determination Plaintiff's employment relationship is exclusively seasonal or essentially intermittent.

**iii. Plaintiff's Relationship with  
Defendant**

The third factor is Plaintiff's relation with the current employer. *Avundes*, 140 Wn. 2d at 287. There is no issue of material fact Plaintiff was generally hired by United Parcel Service as a temporary full-time employee to cover a peak volume period between the 1<sup>st</sup> of October and the 31<sup>st</sup> of December. [CP – CABR Tr. 8/11/08 p. 10, ln 1-3 and p. 9, ln 3-4]. Again, there is no genuine issue it was the intention of United Parcel Service to specifically employ Plaintiff only through December 23, 2006. [CP – CABR Tr. 8/11/08 p. 7, ln 9-13]. Plaintiff acknowledged UPS could hire him as a permanent, year-round employee if a position became available. [CP – CABR Tr. 8/28/08 p. 10, ln 7-9]. However, even if offered a permanent, year-round position, it was not Plaintiff's intent to accept the job. [CP – CABR Tr. 8/28/08 p. 10, ln 13-16]. He had already applied for a full-time permanent position with Clearwater Casino that he intended to take after leaving UPS. [CP – CABR Tr. 8/28/08 p. 10, ln 13-26; p. 12, ln 23-26; p. 13, ln 1-2; p. 46, ln 18-23].

Viewed as a whole, there is no genuine issue of material fact that Plaintiff's relationship with the Defendant was neither exclusively seasonal nor essentially intermittent. Plaintiff had no intention of ever returning to work again with UPS as a peak-season driver. This Court must find, as a matter of law, the third

factor does not support a determination Plaintiff's employment relationship is exclusively seasonal or essentially intermittent.

**iv. Plaintiff's Work History**

The final factor requires an examination of Plaintiff's work history. *Avundes*, 140 Wn. 2d at 282. Once again, there is no genuine issue of material fact that at no point in his work history was Plaintiff ever an "exclusively seasonal" or "essentially part-time or intermittent worker". Once again, Plaintiff's testimony was unambiguous. He's always worked full-time, sometimes two jobs, and sometimes a full-time job while attending school full-time. [CP – CABR Tr. 8/28/08 p. 32, ln 8-12]. He has worked full-time as an IT Technician or Engineer since the 1980's. No reasonable juror would conclude Plaintiff's work history supports a finding he is an exclusively seasonal or essentially intermittent worker. This Court must find, as a matter of law, the fourth factor does not support a determination Plaintiff's employment relationship is exclusively seasonal or essentially intermittent.

**c. Off-Season Employment**

In addition to the *Avundes* test, there is the legal requirement that exclusively seasonal and essentially intermittent workers not hold off-season jobs. *School Dist. No. 401*, 83 Wn.

App. at 6. This requirement further highlights that subsection 2 is a narrow exception to subsection 1. While this Court's decision addressed intermittent employment, the example given by the Court equally applies to seasonal employment. This is further supported by the use of the term "off-season" job by the Court. In addition, the Supreme Court found in *Double D Hop Ranch*, workers who string together employment "like planting and picking hops, [and performing] general farm labor, like maintenance and repair work . . . cannot be said to have been *exclusively* seasonal in nature." 133 Wn. 2d at 799-800 (emphasis in original). This principle was further affirmed by this Court in *Watson* where a golf course groundskeeper was merely looking for year-round work. 133 Wn. App. 903 (2006).

No reasonable juror would conclude that Plaintiff did not hold off-season employment. Instead reasonable jurors would only conclude that Plaintiff had held off-season jobs and was seeking additional employment after his position with UPS ended. Therefore, this Court must find as a matter of law the Board's decision to calculate Plaintiff's wages under RCW 51.08.178(1) is correct and find for the Defendant.

**d. Essentially Part-Time Employment**

As noted above, no Court decision has formally defined “essentially part-time” work under RCW 51.08.178(2). Furthermore, separately defining essentially part-time from essentially intermittent employment creates a potentially irreconcilable reading of the statute. *Avundes*, 140 Wn. 2d at 288. Therefore, the best way to harmonize the statute is not to distinguish essentially part-time from essentially intermittent employment. If there is no distinction, then application of the *Avundes* test above still proves that RCW 51.08.178(1) is the legally correct method for calculating claimant’s wages.

Even if the Court distinguishes’ essentially part-time from essentially intermittent employment, there is still no genuine issue of material fact that RCW 51.08.178(1) is the legally correct method. But by distinguishing the two statutory terms, this Court should adopt the Board’s definition of “normal” part-time from “essential” part-time employment from *In re John Pino*. *Pino* at p. 3. To summarize the Board’s definition, if Plaintiff has a consistent number of days worked each week and his daily wage is known, then Plaintiff “readily comes within the scope of section (1) and his monthly wage is easily computed.” *Id.*

Plaintiff’s hours and wages are part of this record and are

not in dispute. These show Plaintiff worked 309.74 hours, regular and overtime, over 43 days worked. This means his undisputed average hours per day worked was 7.20326. He earned \$14.64 per hour. This means his daily wage was \$105.46.

Between October 23, 2006 through December 16, 2006, the number of days worked each week by Plaintiff was: 5, 3, 2, 4, 3, 5, 5, and 5. The week of his injury he worked four days (if the date of injury is included). On average, Plaintiff consistently worked four days per week. The statutory formula of RCW 51.08.178(2) is easily computed: \$105.46 per day multiplied by 18 equals \$1,898.28. The facts giving rise to this calculation are undisputed and therefore this Court must grant Summary Judgment that Plaintiff was not essentially a part-time worker.

**e. 12 Consecutive Calendar Months**

Summary judgment should be granted because RCW 51.08.178(2) also requires that monthly wages be calculated, based on "any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." RCW 51.08.178(2). If Plaintiff's employment as of December 21, 2006 is either "exclusively seasonal" or "essentially part-time or intermittent," then what 12 consecutive months fairly represent this

“exclusively seasonal,” or “essentially part-time or intermittent” employment? The Department picked January 1, 2004 through December 31, 2004 when Plaintiff was normally employed with the U.S. Air Force. [CP – CABR 8/28/08 Tr. p. 24, ln 13-18]. Plaintiff was normally employed with the U.S. Air Force through July 31, 2006. [CP – CABR 8/28/08 Tr. p. 7, ln 5-12]. “[The Department] may not elect to treat the same employment as both non-intermittent and intermittent; being internally inconsistent, that approach is contrary to the statute, arbitrary, and hence unlawful.” *School Dist. No. 401*, 83 Wn. App. at 7.

Out of the 12 consecutive months prior to the industrial injury, Plaintiff was normally employed for at least seven months (December 2005 through July 2006). Arguably, Plaintiff was normally employed for 9 of the 12 months, if his employment at UPS is included. Beside the time period of August 1, 2006 through December 21, 2006, it is impossible for this Court to identify any twelve consecutive calendar month period where Plaintiff’s employment pattern can be fairly described as “exclusively seasonal,” or “essentially part-time or intermittent.” It is impossible to issue an internally consistent order that finds Plaintiff “exclusively seasonal,” or “essentially part-time or intermittent,” and a twelve consecutive month period that does not substantially include

“normal” full-time employment.

Finally, using subsection 1 appropriately reflects Plaintiff's lost earning capacity proximately caused by the industrial injury. *Double D Hop Ranch*, 133 Wn. 2d at 298. Using time periods that include Plaintiff's Air Force wages do not reflect his lost earning capacity. It is undisputed that Plaintiff can no longer earn over \$100,000.00, but he lost that earning capacity five months prior to this industrial injury. Plaintiff will never regain his Air Force earning capacity because he can no longer serve due to his age.

In addition, it is entirely speculative to base Plaintiff's lost earning capacity on his earnings as an IT Engineer. Plaintiff last worked as an IT Engineer in 2001. What he earned in 2001, and before has no relevance of his earning capacity in 2006, after his discharge from the Air Force. The only substantial evidence of Plaintiff's earning capacity as of December 21, 2006 are his wages while employed with Defendant. Therefore, summary judgment affirming the Board's decision is appropriate.

### **Summary of Argument on Assignment of Error No. 2**

The Court's Jury Instructions No. 12 and 14 did not correctly or accurately instruct the jury how to decide whether Plaintiff was an exclusively seasonal, essentially intermittent or essentially part-

time. [CP – 27F]. The *Avundes* test must be used to determine whether RCW 51.08.178(2)(a) and (b) applies to this appeal. *Avundes*, 140 Wn.2d at 288. While the trial court correctly applied this two-part test in the Court's Jury Instruction No. 14, the trial court committed harmful error by not instructing the jury to apply this two-part test in the Court's Jury Instruction No. 12.

The trial court committed further harmful error with the Court's Jury Instruction No. 12 when it failed to fully advise the jury what must be proved to determine Plaintiff was an exclusively seasonal worker pursuant to RCW 51.08.178(2). Jury Instruction No. 12 failed to advise the jury that exclusively seasonal employment must not only be entirely dependent on a period of the year, but it also assumes the injured worker has no off season employment. *School Dist. No. 401*, 83 Wn. App. at 6. The Court should have instead used Defendant's Proposed Jury Instruction No. 15 as it a complete and accurate statement of the law.

### **Argument on Assignment of Error No. 2**

The two-part *Avundes* test applies to all portions of RCW 51.08.178(2), not just essentially intermittent employment. *Avundes*, 140 Wn. 2d at 286-87. The trial court committed legal error when it failed to instruct the jury to apply the *Avundes* test to

exclusively seasonal employment. Instead, it should have used Defendant's Proposed Instruction Nos. 12-17.

As noted above, the issues in *Avundes* are identical to the present appeal: whether the injured worker's wages should have been calculated pursuant to RCW 51.08.178(1) or (2). However, the trial court committed prejudicial error by not asking the jury to apply the *Avundes* test to exclusively seasonal employment. Rather than focusing on the Supreme Court's holding on page 287, the trial court instead focused on the Supreme Court's application of its test to the question of intermittent employment. [RP 1/07/10 pp. 130-31]. Specifically, the trial court focused on the last paragraph of *Avundes* where the trial court summarized its decision. *Avundes*, 140 Wn. 2d at 290.

The trial court's interpretation of *Avundes* is wrong. While the Supreme Court focused on application of the two-part test to essentially part-time or intermittent employment, the Department only argued that Mr. Avundes' employment was essentially part-time or intermittent. *Id.* at 285. Therefore, the Supreme Court appropriately constrained its application of the two-part test to RCW 51.08.178(2)(b).

But the trial court ignored the Supreme Court's earlier

unambiguous statement:

To resolve the question of which subsection applies, the Court of Appeals adopted a two-part analysis which had previously been developed by the BIIA to determine whether subsection (1) or subsection (2) applies. . . . We adopt the BIIA two-part analysis and apply it here.

*Id.* at 287. The trial court erroneously focused on the *Avundes* Court's application of this two-part test when it denied Defendant's Proposed Jury Instructions. It should have instead instructed the jury to apply this test to whether Plaintiff's wages should be calculated under subsection (1) or subsection (2) of RCW 51.08.178. Subsection (2) applies only if Plaintiff's employment pattern is "exclusively seasonal" or "essentially part-time or intermittent."

The Court's Jury Instruction No. 12 is prejudicial because it misstates the law by not instructing the jury to apply this two-part analysis to the facts of this appeal. This error was not harmless. *Thompson v. King Feed & Nutrition Serv.*, 153 Wn. 2d 447 (2005). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case." *State v. Smith*, 131 Wn.2d 258, 264 (1997). This State's Supreme Court very recently ruled, "In order to hold that a jury instruction

error was harmless we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *State v. Bashaw*, \_\_\_ Wn.2d \_\_\_; 2010 Wash. LEXIS 540, 18-19 (Wash. July 1, 2010).

Failing to instruct the jury as to the law regarding how to apply subsection (1) or subsection (2) of RCW 51.08.178 is neither trivial, formal, or academic. Instead, the outcome of this case hinges on this very distinction. The trial court’s decisions prejudiced the Defendant’s substantial rights by affecting the outcome of this case.

It affected the outcome of this case because the jury only had to decide whether Plaintiff’s employment as a holiday season driver was entirely dependent on a period of the year. In other words, the Court’s Jury Instruction No. 12 only focused on whether Plaintiff’s employment was seasonal, but did not instruct the jury how to decide whether it was “exclusively” seasonal as required by RCW 51.08.178(2). The *Avundes* test is used to not only determine whether the employment was seasonal, but whether it is also exclusively seasonal. As written, the Court’s Jury Instruction No. 12 did not give effect to the entire statute.

The jury was not asked to first determine whether the type of work generally being performed by Plaintiff was seasonal. There is

substantial evidence for a reasonable juror to conclude delivering packages and parcels is not seasonal work. [CP – CABR Tr. 8/11/08 p. 9, ln 5-6, 15-18]. The jury was not asked to next determine whether Plaintiff's relationship to employment in general was exclusively seasonal.

The jury was not asked to determine Plaintiff's intent, work history, the nature of the work, and relationship with Defendant. There is substantial evidence for a reasonable juror to conclude it was Plaintiff's intent to seek full-time work, not seasonal employment. [CP – CABR Tr. 8/28/08 p. 8, ln 1-16; p. 14, ln 4-12; p. 27, ln 16-17; p. 29, ln. 19-22]. There is substantial evidence for a reasonable juror to conclude Plaintiff's work history did not include exclusively seasonal positions. [CP – CABR Tr. 8/28/08 p. 32, ln 8-12]. There is substantial evidence for a reasonable juror to conclude the nature of delivering packages is not exclusively seasonal. [CP – CABR Tr. 8/11/08 p. 9, ln 5-6, 15-18]. There is no evidence to the contrary in this record.

The trial court committed a second harmful error with its Jury Instructions No. 12 and 14, by failing to advise the jury that if Plaintiff maintains an off-season employment, then he is not an exclusively seasonal worker. This Court, in *School District No. 401*, required that exclusively seasonal and essentially intermittent

employees show they have no off-season employment:

For example, a seasonal farm worker often will have duties only during certain months. Correlatively, however, he or she will also receive pay only during those same months. Thus, job duties and job pay coincide, and the employment is clearly intermittent, *assuming no off-season job*.

83 Wn. App. at 6 (*emphasis added*). The Supreme Court has also ruled that where an injured worker has serial employment where they work a full year, then they are not exclusively seasonal workers. *Double D Hop Ranch*, 133 Wn. 2d at 799. Substantial evidence shows Plaintiff was attempting to string together serial employments or find a permanent full-time position, such that a reasonable juror could decide Plaintiff was neither an *exclusively* seasonal or *essentially* intermittent worker under RCW 51.08.178(2). [CP – CABR Tr. 8/28/08 p. 10, ln 13-26; p. 11, ln. 3-14; p. 12, ln 23-26; p. 13, ln 1-2; p. 36, ln. 18-23; p.47, ln. 10-18, 25-26].

This Court must conclude the trial court's error to properly apply the *Avundes* test in its Jury Instruction No. 12, and to instruct the jury that an off-season job defeats a finding of exclusively seasonal or *essentially* intermittent employment. The trial court's statement of law errors were substantial and prejudicial. They did not fully advise the jury of the legal definition of exclusively

seasonal and essentially part-time or intermittent employment. The substantial evidence could have lead the jury to conclude Plaintiff's employment is neither exclusively seasonal or essentially part-time or intermittent. Therefore, this Court cannot conclude, beyond a reasonable doubt, the outcome would have been the same absent these errors.

### **Summary of Argument on Assignment of Error No. 3**

The trial court committed harmful legal error when it denied UPS' Proposed Jury Instruction No. 18 and Proposed Special Verdict Form. The Proposed Instruction and Special Verdict Form addressed UPS' alternative theory of the case. It was harmful legal error for the trial court to not present these proposed instructions and special verdict form to the jury because it prevented UPS' from arguing its alternative theory to the jury. When read as a whole, the jury instructions did not allow UPS to argue to the jury that the Department of Labor and Industries did not choose the correct 12 consecutive months preceding the injury which fairly represent Mr. Hudson's employment pattern. RCW 51.08.178(2); *State v. Dana*, 73 Wn.2d 533 (1968).

### **Argument on Assignment of Error No. 3**

Kitsap County Superior Court committed harmful error when

it denied Defendant's Proposed Jury Instruction No. 18 and Proposed Special Verdict Form. Denying these two documents precluded UPS' right to argue its alternate theory of defense to the jury: the Department chose the wrong 12 consecutive month time period in its September 12, 2007 order.

Under the Industrial Insurance Act, the Department is vested with the original jurisdiction to issues orders addressing the benefits of injured workers. RCW 51.52.050. *Marley v. Dep't of Labor & Indus.*, 125 Wn. 2d 533 (1994). The Department's order under appeal concluded Plaintiff's wages should be calculated under subsection 2, and 2004 fairly represents his "exclusively seasonal," or "essentially part-time or intermittent" employment pattern. Defendant appealed both issues to the Board.

The Board found for Defendant on its first issue and therefore did not need to reach Defendant's alternative issue. Consequently, the Board did not enter any Findings of Fact or Conclusions of Law on Defendant's alternative defense. Plaintiff appealed the Board's final decision to Kitsap County Superior Court. The Court denied Defendant's Proposed Jury Instruction No. 18, and Proposed Special Verdict form on the basis that RCW 51.52.115 states in part:

Where the court submits a case to the jury, the court

shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

(RP 1/06/10 Tr. p. 58). The Court reasoned Defendant was precluded from presenting its alternative theory because the Board failed to enter any Findings of Fact on this alternative theory. *Id.*

The Court's reasoning is flawed because it ignores the opening statement of RCW 51.52.115:

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board.

Courts must "read the statute as a whole, considering all provisions in relation to each other and giving effect to each provision."

*Wright v. Engum*, 124 Wn. 2d 343, 352 (1994). Washington Courts have specifically found that *de novo* review means they have the authority to substitute its own findings of fact for the Boards'.

*Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246 (2008); *McClellan v. ITT Rayonier, Inc.*, 65 Wn. App. 386 (1992) . The trial court failed to give effect to the statute when it failed to present to the jury all of the issues of law and fact presented in the Board's complete record by denying Defendant's Proposed Jury Instruction No. 18 and Proposed Special Verdict Form. By doing so, the trial court committed legal error.

The trial court's legal error was harmful to Defendant. It was harmful because Defendant is "entitled to have its theory of the case presented to the jury by proper instructions, if there is any evidence to support the theory. *Owens v. Seattle*, 49 Wn. 2d 187, 193 (1956). Failure to give a jury instruction on Defendant's alternative theory "was therefore prejudicial error." *Id.* Substantial evidence exists in the evidence presented to the jury to support Defendant's theory the Department used the wrong twelve consecutive month period pursuant to RCW 51.08.178(2).

Substantial evidence exists because the Department's decision was illogical and absurd on its face. The Department determined that 2004, when Plaintiff was "normally" employed, was the correct 12 consecutive month period that fairly represented Plaintiff's alleged "exclusively seasonal," or "essentially part-time or intermittent" employment pattern. The absurdity of this decision is argued above in Defendant's Assignment of Error No. 1. In summary, Plaintiff cannot be seasonal, intermittent or part time, and also a full time worker. *School Dist. No. 401*, 83 Wn. App. at 7.

Finally, there are strong policy reasons for presenting Defendant's alternative theory. Defendant preserved its alternative

theory before the Board and the trial court. Without specific instruction from the trial court, the Department may decide again that 2004 is the correct 12 month period to use under RCW 51.08.178(2). But such decision would necessitate another appeal by Defendant to the Board of this erroneous decision. This violates all doctrines of judicial efficiency.

Defendant was entitled to present its alternative theory of defense to the jury. Defendant was denied that right when the trial court rejected its Proposed Jury Instruction No. 18 and Proposed Special Verdict Form. This denial was harmful judicial error as there was substantial evidence to support Defendant's alternative theory.

#### **Summary of Argument on Assignment of Error No. 4**

In appeals to Superior Court, the Board of Industrial Insurance Appeals' decisions are *prima facie* correct. *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn. 2d 840, 844 (1968); *Sawyer v. Dep't of Labor & Indus.*, 48 Wn. 2d 761 (1956). The trial court rejected Defendant's Proposed Instruction No. 8, which included the legally correct statement from *Scott Paper Co.*, "If you find the evidence equally balanced, then the findings of the Board must stand." It was prejudicial error for the trial court not to include this

statement of the law as it appropriately advises the jury, in layman's terms, what is meant by the Board's decisions which are *prima facie* correct. *Thompson*, 153 Wn. 2d 447. Defendant will not further brief the Court on this assignment of error.

#### **Summary of Argument on Assignment of Error No. 5**

RCW 51.08.178(1) is the default section for determining injured workers' wages under the Industrial Insurance Act. *Avundes*, 140 Wn. 2d at 290. The Court's Jury Instruction No. 11, which essentially adopted Defendant's Proposed Jury Instruction No. 12, did not include the statement, "When determining which method should be used Method 1 is the default method." Failing to completely instruct the jury about the of RCW 51.08.178 was harmful error.

#### **Argument on Assignment of Error No. 5**

The trial court harmfully erred when it refused to instruct the jury that RCW 51.08.178(1) is the default method for calculating wages. 140 Wn. 2d at 290. The trial court justified this decision by focusing on whether Plaintiff proved his status as an exclusively seasonal or essentially intermittent worker under subsection 2. [RP 1/06/10 pp. 118-119]. However, the court acknowledged this statement of the law was "a correct statement of the mechanics of

the statute.” [RP 1/06/10 p. 119, In 2]. “A clear misstatement of the law, however, is presumed to be prejudicial.” *Thompson*, 153 Wn. 2d at 453 (citations omitted).

It is important to instruct the jury that it must start its analysis that the wages of all workers in the State are calculated using subsection 1, unless it is proved they are exclusively seasonal or essentially intermittent. Without so advising the jury as to this legal requirement, the average juror may be confused on how to apply RCW 51.08.178(1) and (2) to the facts of this appeal. Rather than beginning with subsection 1, this instruction leaves it up to each individual juror to decide where to begin its analysis of the law and facts.

This is an important distinction, because it advises the jury where it must begin its analysis. Without knowing subsection 1 is the default section, the jury is essentially deciding whether Plaintiff proved he was an exclusively seasonal or essentially intermittent worker. But this is not the legally correct question. Under *Avundes*, the legally correct question is whether Plaintiff proved he was not a normally employed worker.

This is not a mere difference of semantics. It is the essence of a party meeting its burden of proof. It is why the Court advised the jury in the Court’s Jury Instruction No. 7, “The findings and

decisions of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence.” It properly advises the jury where to start its analysis.

Finally, there is nothing within the Court’s Jury Instruction No. 10 that is obvious to the average juror that subsection 1 is the default section. It simply advises there are two methods. When the instructions are read as a whole, the jury is simply asked to ultimately pick which section best describes Plaintiff’s employment based on a preponderance of the evidence. Again, the average juror would not know *a priori* that subsection 1 is the default, the starting point, unless specifically advised by the trial court. Therefore, the trial court’s failure to advise the jury that subsection 1 is the default method for determining wages was harmful error.

#### **Summary of Argument on Assignment of Error No. 6**

An element of RCW 51.08.178(2) is whether Plaintiff was an essentially part-time worker. However, the Court’s Jury Instruction No. 13 is not a complete definition of an essentially part-time worker under RCW 51.08.178(2). The trial court’s Jury Instruction No. 13 misinstructs the jury to focus on whether there is a “specified” number of days worked each week. A misstatement of

the law is presumed prejudicial. *Thompson*, 153 Wn. 2d at 453. Instead, the Court should have used Defendant's Proposed Jury Instruction No. 17. Defendant's Proposed Jury Instruction No. 17 asked the trial court to adopt the Board's definition of essentially part-time work. *In re: John Pino*. The Board's definition places the proper focus on whether there is a "consistent" number of days worked each week. Defendant will not further brief the Court on this assignment of error.

#### **Summary of Argument on Assignment of Error No. 7**

The Court wrongfully rejected Defendant's Proposed Jury Instruction No. 14. Like part-time employment, there are no reported cases that define what is meant by normal employment under RCW 51.08.178. In order for the jury to decide whether Plaintiff's employment was normal, exclusively seasonal, essentially intermittent, or essentially part-time, the trial court should have provided the jury with a definition of each and every one of these statutory terms.

#### **Argument on Assignment of Error No. 7**

Again, there are no reported cases defining normal employment. As argued above, the Board's decision in *In re John Pino* provides some guidance on how to distinguish normal

employment from essentially part-time employment. The focus is whether there is a consistent number of days worked each week that can be readily determined. *Pino*, p. 3. If there is such consistency, then RCW 51.08.178(1) should be used to calculate wages.

In addition, a definition of what is normal employment can be determined, through implication, by the courts' decisions in *Avundes*, *Double D Hop Ranch*, and *School Dist. No. 401*. As long as the injured worker is working year round, stringing together serial employment, or intending to find full-time work, then they are normally employed inasmuch as their employment cannot be exclusively seasonal, essentially intermittent, or essentially part-time. *Avundes*, 140 Wn. 2d at 288; *Double D Hop Ranch*, 133 Wn. 2d at 799-800; *School Dist. No. 401*, 83 Wn. App. at 6.

Defendant's Proposed Jury Instruction No. 14 is a complete and accurate definition of normal employment. It incorporates the Board's definition from *In re John Pino* as well as the reasonable implications of three appellate decisions. Failure to give the jury a definition of normal employment was harmful error because the term "normally employed" is a term of art and not dependent "on the everyday meaning of full-time, part-time, seasonal, or

intermittent work.” *In re John Pino*, p. 3. This means it was harmful error for the trial court to simply expect the jurors to apply their common understanding of this peculiar term used by the Legislature.

## V. CONCLUSION

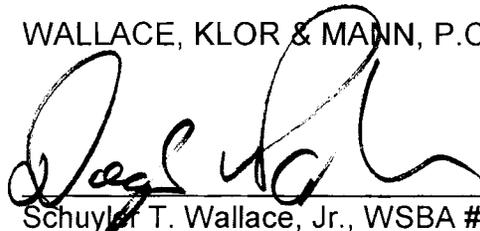
This Court must affirm the decision of the Board of Industrial Insurance Appeals as there is no genuine issue of material fact that Plaintiff was “normally employed” at the time of injury pursuant to RCW 51.08.178(1). When applying the *Avundes* test, no reasonable juror could conclude Plaintiff was an exclusively seasonal, essentially intermittent, or essentially part-time employee pursuant to RCW 51.08.178(2). This Court must reverse Kitsap County Superior Court’s order denying summary judgment and grant Defendant’s Motion for Summary Judgment.

In the alternative, this Court must remand this matter to Kitsap County Superior Court for a new trial. Several harmful errors were committed in the instructions given to the jury. First, the trial court did not properly instruct the jury on how it should apply the *Avundes* decision to RCW 51.08.178(2). The trial court improperly narrowed the *Avundes* test to only essentially intermittent employment. Second, the trial court denied

Defendant's right to argue its alternative theories of recovery on appeal. Third, the trial court did not properly instruct the jury as to the complete standard of review in appeals under the Industrial Insurance Act. Fourth, the trial court did not properly advise the jury that RCW 51.08.178(1) is the default method for calculating wages. Fifth, the trial court did not provide a complete and accurate definition of essentially part-time employment to the jury. Finally, the trial court refused to instruct the jury as to what is meant by "normally employed" in RCW 51.08.178(1). For these reasons, this case should be sent back to Kitsap County Superior Court with instructions to hold a new trial.

DATED: July 28, 2010.

WALLACE, KLOR & MANN, P.C.



Schuyler T. Wallace, Jr., WSBA #15043  
Douglas M. Palmer, WSBA #35198  
of Attorneys for United Parcel Service and  
Gallagher Bassett Services

## VI. APPENDIX

### 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.

1994 WA Wrk. Comp. LEXIS 678, \*  
JOHN PINO  
DOCKET NOS. 91 5072 & 92 5878; CLAIM NO. K-963116  
WASHINGTON STATE BOARD OF INDUSTRIAL INSURANCE  
APPEALS  
1994 WA Wrk. Comp. LEXIS 678  
February 2, 1994

DISPOSITION: REVERSED AND REMANDED

COUNSEL: Claimant, John Pino, by Stiles & Stiles, Inc., P.S., per Brian L. Stiles and Terence G. Carroll

Employer, Haskell Corporation, by Paul E. Herbold, Jr., Safety Director, and Barbara Kennedy and Gary Schafer

Department of Labor and Industries, by The Attorney General, per Gordon C. Klug, Assistant, and Whitney P. Cochran and Steve LaVergne, Paralegals

JUDGES: S. FREDERICK FELLER, Chairperson; FRANK E. FENNERTY, JR., Member

#### OPINION: DECISION AND ORDER

**[\*1]**The claimant, John Pino, has filed two appeals. Docket No. 91 5072 identifies an appeal filed on October 1, 1991 from an order of the Department of Labor and Industries dated September 17, 1991 which demanded reimbursement of \$ 43,045.14 relating to overpayment of time loss compensation for the period of February 18, 1989 to August 27, 1991. The overpayment was alleged to be based on incorrect wage information. The order of September 17, 1991 established Mr. Pino's corrected average earnings to be \$ 437.50 per month. Reversed and remanded.

Docket No. 92 5878 identifies an appeal filed by Mr. Pino on November 25, 1992 from an order of the Department dated November 6, 1992 which denied responsibility for conditions described as pre-existing unrelated degenerative arthritis of the right acromioclavicular joint, impingement syndrome of the right shoulder, and right rotator cuff tear. The order of November 6, 1992 affirmed an earlier Department order of September 19, 1991 which closed the claim with time loss compensation as paid and without further award for time loss or permanent partial disability. Reversed and remanded.

#### PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 16, 1993 which affirmed the Department order dated September 17, 1991 but reversed the Department order of November 6, 1992 and remanded the matter to the Department with directions to allow the claim for a right rotator cuff tear, pay a permanent **[\*2]** partial disability award equal to 10% of the

amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder, and thereupon close the claim.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

## DECISION

Five issues are presented by these appeals. However, Docket No. 91 5072, which we will consider first, essentially presents but a single question: Given the provisions of RCW 51.08.178, what is the basis upon which the claimant's monthly wage should be computed?

Docket No. 92 5878 presents four issues: 1) Was the claimant's right rotator cuff tear causally related to his industrial injury of January 30, 1989?; 2) Were the claimant's industrially-related conditions fixed and stable as of November 6, 1992 and, if so, what was the extent of permanent partial disability related thereto, if any?; 3) Was the claimant temporarily totally disabled from August 28, 1991 to November 6, 1992 as a result of his industrial injury of January 30, 1989?; and 4) As of November 6, 1992, was the claimant a totally and permanently disabled worker within the meaning of the Industrial Insurance Act?

We begin our discussion of the above issues by considering the basis upon which Mr. Pino's monthly wage should be computed. The record reveals that Mr. Pino, who was born December 21, 1938, worked as a union dispatched pipefitter from 1970 through the date of this injury, January 30, 1989. His employment was not typical of workers in other industries in the sense that he did not always work a five day, 40-hour week, Monday through Friday. Instead, Mr. Pino would be dispatched to a particular job by his union hall and would work an indefinite period ranging from a day or two to as many as several months depending on the needs of the employer and the length of the job. He would then return to the union hall, place his name on a list of available workers, and wait

for his next assignment, which might come immediately or after a wait of several weeks.

The record establishes that at the time of Mr. Pino's injury of January 30, 1989 he was in the 20th day of his employment with Haskell Corporation and was working ten hours per day, six days a week. His employment with Haskell Corporation followed a two and one-half year period of unemployment, during which time he was recovering from a 1986 industrial injury. Prior to the 1986 injury, Mr. Pino had worked an average of 7.5 months per year for the years of 1980 to 1986 with an employment low of six months three weeks in 1980 to a high of eight months three weeks in 1982.

Although not immediately obvious from the foregoing, there appears to be a substantial difference in the temporary total disability benefits (time loss compensation) that Mr. Pino might be entitled to receive, depending on which part of RCW 51.08.178 is used to determine his monthly wage. Using section (1)(f), Mr. Pino would appear to have a relatively high monthly wage inasmuch as his daily wage would be multiplied by 26. If section (2)(b) were used, Mr. Pino's monthly wage would appear to be determined by dividing by 12 his total wages earned from all employments in any 12 successive calendar months preceding the injury which fairly represent his employment pattern. Given that Mr. Pino was generally employed 7.5 months per year, his benefits would be lower. As an aside, the Department of Labor and Industries used a third undetermined method to establish a fairly low monthly wage of \$ 437.50, which results in the least amount of benefits being paid.

Because of frequent references to RCW 51.08.178, we will include the section in its entirety here:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of the 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;
- [\*3]**
- (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 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."

In analyzing RCW 51.08.178(1) we are struck by several features. First, there is an absence of language suggesting that a worker must be a full-time, 40-hour per week employee to fall within its purview. Clearly, there is no use of "full-time worker", "40-hour per week employee", or similar such phraseology. To the contrary, the section includes within its scope those persons who are normally employed from as many as seven days a week to as little as one day a week. The inclusion of persons who normally work only one day a week is significant inasmuch as we might ordinarily consider persons in this class to be part-time workers within the purview of RCW 51.08.178(2)(b). However, given their specific inclusion in section (1), we are led to the following conclusion: A worker who is not employed in a typical 40-hour per week position may or may not be an intermittent or part-time worker within the meaning of RCW 51.08.178(2)(b) simply because he or she works fewer days than might be considered typical and may, in fact, be appropriately included in section (1). The analysis requires more than a simple evaluation of the hours worked.

If there is a distinguishing feature of RCW 51.08.178(1)(a-g) it is the consistent use of the words "normally employed" found in each subsection. The repeated use of "normally employed" suggests that the application of a particular subsection of (1)(a-g) depends not on the everyday meaning of full-time, part-time, seasonal, or intermittent work, but on whether the worker has a "normal" number

of work days each week that can be readily determined. We note there is no requirement that a person work the same days each week to fall within the scope of RCW 51.08.178(1). The requirement is simply that a worker be employed a consistent number of work days each week, a "normal" number to use the language of the statute. If a normal number of work days can be established, and the worker's daily wage is known, the worker readily comes within the scope of section (1) and his monthly wage is easily computed.

The controversy in this matter regarding the computation of Mr. Pino's time loss compensation benefits focuses on the 1988 amendments to RCW 51.08.178. As we noted in our earlier decision of *In re Deborah J. Guaragna* (Williams), BIIA Dec., 90 4246 (1992), the 1988 amendments made several changes in the method for determining injured workers monthly wages for purposes of RCW Title 51. Among other things, the statute, as amended, provides that the monthly wage for workers whose current employment or relationship to employment is "essentially part-time or intermittent", shall be determined by averaging the wages earned over any period of 12 successive calendar months preceding the injury which "fairly represent the claimant's employment pattern."

The 1988 amendments provide a specific method for determining the monthly wage for part-time or intermittent workers. We note that RCW 51.08.178(1), which precedes the 1988 amendments, also provides a method for computing a monthly wage for workers, some of whom have a non-standard employment pattern. Specifically, as we have already explained, this section provides not only for those who work five days a week, but also one, two, three, four, five, six, or seven days per week. Thus, RCW 51.08.178(1) could arguably be used to determine the monthly wage of a part-time worker. However, we believe the Legislature intended the 1988 amendments to provide the basis for determining the nature of a worker's employment, not just the number of days actually worked in a given time period.

**[\*4]** If we were to try and apply RCW 51.08.178(2)(b) (the part added by the 1988 amendment), we must determine the nature of the employment or the worker's individual relationship to the employment. ". . . (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, . . ." RCW 51.08.178(2)(b) (emphasis added). Thus, part-time or intermittent is determined by looking at the nature of the work actually performed at the time of the injury or is determined by the worker's participation in or relationship to the employment. If either the worker's current employment or the worker's relationship to employment is essentially part-time or intermittent, then the 12 month averaging method as set forth in RCW 51.08.178(2) is used to determine the monthly wage. On the other hand, if the worker is not within the scope of RCW 51.08.178(2)(b) as an essentially part-time or intermittent worker, then RCW 51.08.178(1) provides the method for computing the worker's monthly wage. We believe that this inquiry is required to give effect to each section of the statute and to the statute as a whole.

The question presented in this case and the issue which is squarely before us is whether Mr. Pino was a part-time or intermittent worker as those terms are used in RCW 51.08.178(2)(b). We believe that the proper analysis to be used in determining whether Mr. Pino was essentially part-time or intermittent requires that we look first to the type of work being performed, and secondly, the relationship of the worker to the employment. In reviewing the facts presented in this record, we find that Mr. Pino was engaged in construction work as a pipefitter. The record establishes that Mr. Pino was working 60 hours a week. We believe the nature of the work performed by Mr. Pino was not part-time or essentially intermittent. Instead, we believe the type of work Mr. Pino performed, i.e., pipefitting on a construction type project for 60 hours a week is generally available on a continuous basis and the nature of which constitutes full-time employment. We next consider Mr. Pino's relationship to his employment.

We do not believe Mr. Pino had an essentially part-time or essentially intermittent relationship to his employment. There is nothing part-time or essentially intermittent about pipefitting work on a construction project. While the relationship with the current employer may be relevant to resolving the worker's relationship to employment, other factors, including the worker's intent as well as the nature of the current employment (e.g., whether the employment is typically a full-time employment), also bear on the determination.

The subjective element of the analysis involving an inquiry into the worker's intent seems mandated by the language of the statute which refers to the worker's "relationship" to employment. A worker's "relationship" to employment is not a purely historical question, i.e., what has gone on in the past? Most workers who engage in employment intend to remain employed, especially where the employment is by its nature full-time employment. We hasten to add that intent is but one factor we will consider in our analysis. In some cases a worker's stated intent may be completely undercut by a historical pattern or other actions that discredit the stated intent. Clearly, however, the relationship of a worker to an employment must involve at least an inquiry into the expectations of the worker, and perhaps of the employer, which expectations involve the question of intent as to future employment.

General laboring work in the capacity of a pipefitter on a construction project usually requires that the worker seek a new relationship with an employer once each project is completed. In doing so, the worker may have periods of unemployment. We do not believe that working from job to job in construction type work should be considered part-time or intermittent work merely because there may be periods of non-work in between job assignments. Construction work, or any other work, that may require the worker to establish an employment relationship with several different employers, back-to-back or in succession, should be viewed as full-time work. We do not believe the Department may speculate that a worker will not have work available continuously in the future and, based on such speculation, classify the worker as part-time or intermittent. We do not believe that the statute intended this result.

In summary, we believe the facts of this case indicate that Mr. Pino's employment at the time of his industrial injury was not, by its nature, part-time or intermittent. Nor do we believe, based on the facts and evidence in this case, that his relation to employment was part-time or intermittent at the time of his injury. As such, the Department order in this matter should be reversed and the matter remanded to the Department with instructions to compute Mr. Pino's monthly wage pursuant to RCW 51.08.178(1) based upon his actual wage at the time of the injury with Haskell Corporation, but shall not include overtime pay as per the provisions of RCW 51.08.178(1).

Turning now to the issues raised in Docket No. 92 5878, we consider the question of whether Mr. Pino's right rotator cuff tear was causally related to his industrial injury of January 30, 1989. With respect to this question, we adopt the analysis outlined by our industrial appeals judge. PD&O at 9-13. Dr. Robert Zwick, who acted as Mr. Pino's treating orthopedic surgeon, was of the opinion that the rotator cuff tear was caused by the industrial injury. Nothing presented by the Department was sufficient to warrant a conclusion that the opinion of Dr. Zwick should not be accepted. Similarly, we agree with our industrial appeals judge that as of November 6, 1992, Mr. Pino's industrially-related condition [\*5] was fixed, his permanent partial disability best described as equal to 10% of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder, and that he was not totally and permanently disabled. We disagree, however, on the question of temporary total disability and believe that Mr. Pino is entitled to time loss compensation for the period of August 28, 1991 to November 6, 1992. This conclusion is again based on the testimony of Dr. Robert Zwick, who was reasonably clear that Mr. Pino could not have done any kind of work during this period. 4/16/93 Tr. at 66. At the time that he testified, Dr. Zwick had treated Mr. Pino for almost ten years for a variety of conditions and was in a capable position to comment on Mr. Pino's ability to work. We find his opinion to be persuasive compared to the opposing evidence presented by the Department.

**KITSAP COUNTY SUPERIOR COURT  
INSTRUCTION NO. 7  
BURDEN OF PROOF**

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Mr. Hudson to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

**KITSAP COUNTY SUPERIOR COURT  
INSTRUCTION NO. 11  
MONTHLY WAGES**

The monthly time-loss compensation rate is determined using one of two methods:

**Method 1**

The monthly wages the worker was receiving from all employment at the time of injury. In cases where the worker's wages are not fixed by month, the monthly wages are established by multiplying the daily wage at the time of injury by the number of days the worker was normally employed, the daily wage being 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 of Labor and Industries in a fair and reasonable manner which may include averaging the numbers of hours worked per day.

## **Method 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 is 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.

### **KITSAP COUNTY SUPERIOR COURT INSTRUCTION NO. 12 EXCLUSIVELY SEASONAL**

A worker's employment is exclusively seasonal in nature if it is characterized by a particular activity that is entirely dependent on a period of the year.

### **KITSAP COUNTY SUPERIOR COURT INSTRUCTION NO. 13 ESSENTIALLY PART TIME**

Part time employment is that in which an employee is not normally employed a specified number of days per week.

### **KITSAP COUNTY SUPERIOR COURT INSTRUCTION NO. 14 ESSENTIALLY INTERMITTENT**

Intermittent employment is not regular or continuous in the future. It may be full-time, extra-time or part-time and has definite starting and stopping points with recurring time gaps.

To determine whether a worker performs intermittent work, a two part test is employed:

1. First evaluate the type of work performed, if the nature of the work performed is intermittent, the employment is intermittent, if not;

2. Evaluate the relationship of the worker to the employment to determine whether the relationship of the worker to the employment is intermittent. Relevant factors include the nature of the work, the worker's intent, the relation with the current employer and the worker's work history.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 8  
BURDEN OF PROOF**

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Mr. Hudson to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

If you find the evidence equally balanced, then the findings of the Board must stand.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 12  
MONTHLY WAGES**

The monthly time-loss compensation rate is determined using one of two methods:

**Method 1**

The monthly wages the worker was receiving from all employment at the time of injury (in cases where the worker's wages are not fixed by month), by multiplying the daily wage at the time of injury by the number of days the worker was normally employed, the daily wage being 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 of Labor and Industries in a fair and reasonable manner which may include averaging the numbers of hours worked per day.

## **Method 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 is 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.

When determining which method should be used Method 1 is the default method.

### **DEFENDANT'S PROPOSED JURY INSTRUCTION INSTRUCTION NO. 13 NATURE OF THE EMPLOYMENT**

In order to determine which method should be used, you must first determine whether the type of work being performed was normal employment (Method 1), or instead was exclusively seasonal or essentially intermittent or essentially part-time employment (Method 2). The type of work being performed includes, but is not limited to, an analysis of the type of job as it exists in the general labor market.

You must next determine what type of relationship Mr. Hudson had to employment in general. Mr. Hudson's relationship to employment is determined by examining the following relevant factors: the nature of the position as of the date of injury, Mr. Hudson's intent related to the work force, Mr. Hudson's relationship with United Parcel Services and Mr. Hudson's work history.

When examining the relevant factors regarding Mr. Hudson's relationship to employment you are required to balance the evidence to determine if Mr. Hudson's wages should be determined using Method 1 or Method 2. A balancing requires a look at all the evidence related to the relevant factors to determine whether a preponderance of the evidence shows whether at the date of injury Mr. Hudson was normally employed or an exclusively seasonal, essentially intermittent, or essentially part-time worker.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 14  
NORMAL EMPLOYMENT**

Normal employment is where a worker is engaged in reasonably continuous employment at the time of injury. If a normal number of work days can be established, and the worker's daily wage is known, the worker is normally employed.

In other words, if the type of position exists year round in the general labor market, then the worker is normally employed. Alternatively, when a worker strings together or intends to string together consecutive jobs year round, then the worker is normally employed.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 15  
EXCLUSIVELY SEASONAL**

Exclusively seasonal work must be entirely dependent on a period of the year that is characterized by a particular activity. A season can be a holiday season, shopping season, harvest season or one of the four yearly seasons. Exclusively seasonal work assumes that claimant has no off season job. For work to be exclusively seasonal the employee cannot work in consecutive seasons doing different jobs.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 16  
ESSENTIALLY INTERMITTENT**

Essentially intermittent work is employment that is not regular or continuous in the future. The nature of the work may be full-time, extra-time, or part-time with different starting and stopping points and with recurring time gaps. Essentially intermittent work does not continue year round. This means that the worker has not historically worked nor intended to work year round.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 17  
ESSENTIALLY PART TIME**

A worker who is not employed in a typical 40-hour per week position may or may not be part-time worker within Method 2 of determining a workers' monthly wages as of the date of injury. Simply because a worker works fewer days than might be considered typical, the worker's monthly wages may, in fact, be appropriately determined using Method 1.

The analysis requires a determination of whether the worker has a normal number of work days each week that can be readily determined. It is not required that the days worked, be the same days worked each week. It is only required that the worker work a normal number of days each week. If the worker works a normal number of days each week his monthly wages should be determined using Method 1. If the worker does not work a normal number of days each week his monthly wages should be determined using Method 2.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
INSTRUCTION NO. 18  
TWELVE SUCCESSIVE CALENDAR MONTHS**

If you find Method 2 should be used to determine the worker's monthly wage, then you must determine what twelve successive calendar months preceeding the injury fairly represent the claimant's employment pattern.

**DEFENDANT'S PROPOSED JURY INSTRUCTION  
SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the Board of Industrial Insurance Appeals correct in its determination that Mr. Hudson's employment was not exclusively seasonal, essentially part-time or intermittent?

ANSWER: \_\_\_\_\_ (Write "yes" or "no")

INSTRUCTION: If your answer to QUESTION 1 was "yes", then DO NOT answer QUESTION 2 below; if your answer to QUESTION 1 was "no", then DO answer QUESTION 2 below.

QUESTION 2: What twelve successive calendar months preceding the injury fairly represent Plaintiff's employment pattern?

ANSWER: \_\_\_\_\_

INSTRUCTION: Sign this verdict and notify the bailiff.

DATED: \_\_\_\_\_, 2010

\_\_\_\_\_  
Presiding Juror

# EXHIBIT NO. 1

KEITH HUDSON

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 0576 WEST WASHINGTON PAGE 1 HOURS HISTORY REPORT  
 T N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST<br>WORK<br>RATE            | PAY<br>OTHER<br>DATE | START<br>WORK<br>AMOUNTS | FINISH<br>TOTAL<br>DOLLARS | WORK<br>EQ<br>CD | ADJ<br>WORK<br>CODE | WORK<br>ACTIVITY<br>CENTER | REC<br>SYS | ST<br>HOURS | OT<br>HOURS | DT<br>HOURS |
|-------------------------------|----------------------|--------------------------|----------------------------|------------------|---------------------|----------------------------|------------|-------------|-------------|-------------|
|                               | 06                   | 07:00                    | 16:00                      |                  |                     |                            | A          | 0.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 0.00                       |                  |                     |                            |            |             |             |             |
| 10/23/06                      |                      | 07:00                    | 16:00                      | 0081             | PKG 9831            |                            | A          | 8.00        | 0.00        | 0.00        |
| 14.640                        | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR -                   |                      | 10/23/06                 |                            |                  |                     |                            |            | 8.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| 10/24/06                      | 06                   | 07:00                    | 16:00                      |                  |                     |                            | A          | 0.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 0.00                       |                  |                     |                            |            |             |             |             |
| 10/24/06                      |                      | 07:00                    | 16:00                      | 0081             | PKG 9831            |                            | A          | 8.00        | 0.00        | 0.00        |
| 14.640                        | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR -                   |                      | 10/24/06                 |                            |                  |                     |                            |            | 8.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| 10/25/06                      | 06                   | 07:00                    | 16:00                      |                  |                     |                            | A          | 0.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 0.00                       |                  |                     |                            |            |             |             |             |
| 10/25/06                      |                      | 07:00                    | 16:00                      | 0081             | PKG 9831            |                            | A          | 8.00        | 0.00        | 0.00        |
| 14.640                        | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR -                   |                      | 10/25/06                 |                            |                  |                     |                            |            | 8.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| 10/26/06                      | 06                   | 07:00                    | 16:00                      |                  |                     |                            | A          | 0.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 0.00                       |                  |                     |                            |            |             |             |             |
| 10/26/06                      |                      | 07:00                    | 16:00                      | 0081             | PKG 9831            |                            | A          | 8.00        | 0.00        | 0.00        |
| 14.640                        | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR -                   |                      | 10/26/06                 |                            |                  |                     |                            |            | 8.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 117.12                     |                  |                     |                            |            |             |             |             |
| 10/27/06                      | 06                   | 07:00                    | 17:45                      |                  |                     |                            | A          | 0.00        | 0.00        | 0.00        |
|                               | 0.0000               |                          | 0.00                       |                  |                     |                            |            |             |             |             |
| 10/27/06                      |                      | 07:00                    | 17:45                      | 0081             | PKG 9831            |                            | A          | 8.00        | 1.75        | 0.00        |
| 14.640                        | 0.0000               |                          | 155.55                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR -                   |                      | 10/27/06                 |                            |                  |                     |                            |            | 8.00        | 1.75        | 0.00        |
|                               | 0.0000               |                          | 155.55                     |                  |                     |                            |            |             |             |             |
| TOTAL FOR PAY PERIOD ENDING - |                      | 10/28/06                 |                            |                  |                     |                            |            | 40.00       | 1.75        | 0.00        |
|                               | 0.0000               |                          | 624.030                    |                  |                     |                            |            |             |             |             |

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 0576 WEST WASHINGTON PAGE 2 HOURS HISTORY REPORT

Page 1

Board of  
 Industrial Insurance Appeals  
 In re: Hudson  
 Docket No. 07-23635  
 Exhibit No. 1  
 8/11/08 Substantive

EXHIBIT 1  
 PAGE 1 OF 9

KEITH HUDSON  
N845RP01

PAY PERIOD ENDING DATE: 01/13/07  
CENTER: PKG 9831 BREMERTON

DETAIL FOR: 12/21/05 THRU 12/20/06

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST<br>WORK<br>RATE                     | PAY<br>OTHER<br>CODE<br>WORK<br>AMOUNTS | START<br>WORK<br>HOURS | FINISH<br>TOTAL<br>WORK<br>DOLLARS | WORK<br>EQ<br>ADJ<br>CD | WORK<br>ACTIVITY<br>CENTER<br>CODE | REC<br>STS | ST<br>HOURS | OT<br>HOURS | DT<br>HOURS |
|----------------------------------------|-----------------------------------------|------------------------|------------------------------------|-------------------------|------------------------------------|------------|-------------|-------------|-------------|
| 10/30/06                               | 05<br>0.0000                            | 08:49                  | 12:40<br>0.00                      |                         |                                    | A          | 0.00        | 0.00        | 0.00        |
| 10/30/06                               |                                         | 08:49                  |                                    | 0082                    | PKG 9831                           | A          | 3.84        | 0.00        | 0.00        |
| 14.640                                 | 0.0000                                  |                        | 56.22                              |                         |                                    |            |             |             |             |
| TOTAL FOR - 10/30/06                   |                                         |                        |                                    |                         |                                    |            | 3.84        | 0.00        | 0.00        |
|                                        | 0.0000                                  |                        | 56.22                              |                         |                                    |            |             |             |             |
| 10/31/06                               | 21<br>0.0000                            | 00:00                  | 00:00<br>0.00                      |                         |                                    | A          | 0.00        | 0.00        | 0.00        |
| TOTAL FOR - 10/31/06                   |                                         |                        |                                    |                         |                                    |            | 0.00        | 0.00        | 0.00        |
|                                        | 0.0000                                  |                        | 0.00                               |                         |                                    |            |             |             |             |
| 11/01/06                               | 21<br>0.0000                            | 00:00                  | 00:00<br>0.00                      |                         |                                    | A          | 0.00        | 0.00        | 0.00        |
| TOTAL FOR - 11/01/06                   |                                         |                        |                                    |                         |                                    |            | 0.00        | 0.00        | 0.00        |
|                                        | 0.0000                                  |                        | 0.00                               |                         |                                    |            |             |             |             |
| 11/02/06                               | 05<br>0.0000                            | 08:30                  | 18:01<br>0.00                      |                         |                                    | A          | 0.00        | 0.00        | 0.00        |
| 11/02/06                               |                                         | 08:30                  |                                    | HLPR                    | PKG 9831                           | A          | 8.00        | 1.03        | 0.00        |
| 14.640                                 | 0.0000                                  |                        | 139.74                             |                         |                                    |            |             |             |             |
| TOTAL FOR - 11/02/06                   |                                         |                        |                                    |                         |                                    |            | 8.00        | 1.03        | 0.00        |
|                                        | 0.0000                                  |                        | 139.74                             |                         |                                    |            |             |             |             |
| 11/03/06                               | 05<br>0.0000                            | 08:30                  | 17:58<br>0.00                      |                         |                                    | A          | 0.00        | 0.00        | 0.00        |
| 11/03/06                               |                                         | 08:30                  |                                    | HLPR                    | PKG 9831                           | A          | 8.00        | 0.47        | 0.00        |
| 14.640                                 | 0.0000                                  |                        | 127.44                             |                         |                                    |            |             |             |             |
| TOTAL FOR - 11/03/06                   |                                         |                        |                                    |                         |                                    |            | 8.00        | 0.47        | 0.00        |
|                                        | 0.0000                                  |                        | 127.44                             |                         |                                    |            |             |             |             |
| TOTAL FOR PAY PERIOD ENDING - 11/04/06 |                                         |                        |                                    |                         |                                    |            | 19.84       | 1.50        | 0.00        |
|                                        | 0.0000                                  |                        | 323.400                            |                         |                                    |            |             |             |             |

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
PAGE 3  
0576 WEST WASHINGTON HOURS HISTORY REPORT  
T N845RP01

PAY PERIOD ENDING DATE: 01/13/07  
CENTER: PKG 9831 BREMERTON

DETAIL FOR: 12/21/05 THRU 12/20/06

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

PAY START FINISH WORK WORK REC ST OT DT  
Page 2

EXHIBIT 1  
PAGE 2 OF 9

| KEITH HUDSON                  |        |          |         |       |         |          |          |     |       |       |       |      |
|-------------------------------|--------|----------|---------|-------|---------|----------|----------|-----|-------|-------|-------|------|
| ST                            | WORK   | DATE     | OTHER   | START | FINISH  | WORK     | WORK     | REC | ST    | OT    | DT    |      |
| WORK                          | RATE   |          | CODE    | WORK  | WORK    | ACTIVITY | CENTER   | STS | HOURS | HOURS | HOURS |      |
|                               |        |          | AMOUNTS |       | DOLLARS | CD       | CODE     |     |       |       |       |      |
| 11/06/06                      |        | 05       | 08:04   | 17:45 |         |          |          |     | A     | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| 11/06/06                      | 14.640 |          | 08:04   |       | 142.81  | HLPR     | PKG 9831 |     | A     | 8.00  | 1.17  | 0.00 |
| TOTAL FOR -                   |        | 11/06/06 |         |       | 142.81  |          |          |     |       | 8.00  | 1.17  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |
| 11/07/06                      |        | 05       | 08:30   | 17:49 |         |          |          |     | A     | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| 11/07/06                      | 14.640 |          | 08:30   |       | 135.35  | HLPR     | PKG 9831 |     | A     | 8.00  | 0.83  | 0.00 |
| TOTAL FOR -                   |        | 11/07/06 |         |       | 135.35  |          |          |     |       | 8.00  | 0.83  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |
| 11/08/06                      |        | 27       | 00:00   | 00:00 |         |          |          |     | Z     | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| TOTAL FOR -                   |        | 11/08/06 |         |       | 0.00    |          |          |     |       | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |
| 11/09/06                      |        | 27       | 00:00   | 00:00 |         |          |          |     | Z     | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| TOTAL FOR -                   |        | 11/09/06 |         |       | 0.00    |          |          |     |       | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |
| 11/10/06                      |        | 27       | 00:00   | 00:00 |         |          |          |     | Z     | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| TOTAL FOR -                   |        | 11/10/06 |         |       | 0.00    |          |          |     |       | 0.00  | 0.00  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |
| TOTAL FOR PAY PERIOD ENDING - |        | 11/11/06 |         |       | 278.160 |          |          |     |       | 16.00 | 2.00  | 0.00 |
|                               |        |          | 0.0000  |       |         |          |          |     |       |       |       |      |

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 PAGE 4  
 0576 WEST WASHINGTON HOURS HISTORY REPORT  
 T N845RP01  
 PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST       | WORK   | DATE | PAY     | START | FINISH  | WORK     | WORK     | REC | ST    | OT    | DT    |      |
|----------|--------|------|---------|-------|---------|----------|----------|-----|-------|-------|-------|------|
| WORK     | RATE   |      | OTHER   | WORK  | WORK    | ACTIVITY | CENTER   | STS | HOURS | HOURS | HOURS |      |
|          |        |      | AMOUNTS |       | DOLLARS | CD       | CODE     |     |       |       |       |      |
| 11/13/06 |        | 05   | 08:30   | 18:00 |         |          |          |     | A     | 0.00  | 0.00  | 0.00 |
|          |        |      | 0.0000  |       | 0.00    |          |          |     |       |       |       |      |
| 11/13/06 | 14.640 |      | 08:30   |       | 139.08  | HLPR     | PKG 9831 |     | A     | 8.00  | 1.00  | 0.00 |
|          |        |      | 0.0000  |       |         |          |          |     |       |       |       |      |

EXHIBIT 1  
 PAGE 3 OF 9

11/21/06 08:30 KEITH HUDSON  
 14.640 0.0000 163.68 PKGD PKG 9831 A 8.00 2.12 0.00  
 TOTAL FOR - 11/21/06 8.00 2.12 0.00  
 0.0000 163.68  
 11/22/06 06 08:30 18:04 A 0.00 0.00 0.00  
 0.0000 0.00  
 11/22/06 08:30 PKGD PKG 9831 A 8.00 1.07 0.00  
 14.640 0.0000 140.62  
 TOTAL FOR - 11/22/06 8.00 1.07 0.00  
 0.0000 140.62  
 11/23/06 22 00:00 00:00 Z 0.00 0.00 0.00  
 0.0000 0.00  
 TOTAL FOR - 11/23/06 0.00 0.00 0.00  
 0.0000 0.00  
 11/24/06 22 00:00 00:00 Z 0.00 0.00 0.00  
 0.0000 0.00  
 TOTAL FOR - 11/24/06 0.00 0.00 0.00  
 0.0000 0.00

TOTAL FOR PAY PERIOD ENDING - 11/25/06 24.00 4.65 0.00  
 0.0000 453.480

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 0576 WEST WASHINGTON PAGE 6 HOURS HISTORY REPORT  
 T N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST          | PAY      | START   | FINISH   | WORK    | WORK     | REC | ST    | OT    | DT    |
|-------------|----------|---------|----------|---------|----------|-----|-------|-------|-------|
| WORK        | DATE     | CODE    | WORK     | TOTAL   | EQ ADJ   | ST  | HOURS | HOURS | HOURS |
| RATE        |          | AMOUNTS | WORK     | DOLLARS | CD       | STS |       |       |       |
|             |          |         | ACTIVITY |         |          |     |       |       |       |
|             |          |         | CENTER   |         |          |     |       |       |       |
|             |          |         | CD       |         |          |     |       |       |       |
|             |          |         | CODE     |         |          |     |       |       |       |
| 11/27/06    | 06       | 08:00   | 19:13    |         |          | A   | 0.00  | 0.00  | 0.00  |
|             | 0.0000   |         | 0.00     |         |          |     |       |       |       |
| 11/27/06    | 08:00    |         |          | PKGD    | PKG 9831 | A   | 8.00  | 2.65  | 0.00  |
| 14.640      | 0.0000   |         | 175.31   |         |          |     |       |       |       |
| TOTAL FOR - | 11/27/06 |         |          |         |          |     | 8.00  | 2.65  | 0.00  |
|             | 0.0000   |         | 175.31   |         |          |     |       |       |       |
| 11/28/06    | 05       | 11:00   | 18:00    |         |          | A   | 0.00  | 0.00  | 0.00  |
|             | 0.0000   |         | 0.00     |         |          |     |       |       |       |
| 11/28/06    | 11:00    |         |          | PKSH    | PKG 9831 | A   | 7.00  | 0.00  | 0.00  |
| 14.640      | 0.0000   |         | 102.48   |         |          |     |       |       |       |
| TOTAL FOR - | 11/28/06 |         |          |         |          |     | 7.00  | 0.00  | 0.00  |
|             | 0.0000   |         | 102.48   |         |          |     |       |       |       |
| 11/29/06    | 06       | 10:00   | 18:07    |         |          | A   | 0.00  | 0.00  | 0.00  |
|             | 0.0000   |         | 0.00     |         |          |     |       |       |       |

EXHIBIT 1  
 PAGE 5 OF 9

KEITH HUDSON

|                                        |          |         |  |      |          |   |       |      |      |
|----------------------------------------|----------|---------|--|------|----------|---|-------|------|------|
| 11/29/06                               | 10:00    |         |  | PKSH | PKG 9831 | A | 5.42  | 0.00 | 0.00 |
| 14.640                                 | 0.0000   | 79.35   |  |      |          |   |       |      |      |
| 11/29/06                               | 15:25    |         |  | PKGD | PKG 9831 | A | 2.58  | 0.12 | 0.00 |
| 14.640                                 | 0.0000   | 40.41   |  |      |          |   |       |      |      |
| TOTAL FOR - 11/29/06                   |          |         |  |      |          |   | 8.00  | 0.12 | 0.00 |
|                                        | 0.0000   | 119.76  |  |      |          |   |       |      |      |
| 11/30/06                               | 05 10:49 | 20:04   |  |      |          | A | 0.00  | 0.00 | 0.00 |
|                                        | 0.0000   | 0.00    |  |      |          |   |       |      |      |
| 11/30/06                               | 10:49    |         |  | HLPR | PKG 9831 | A | 8.00  | 0.74 | 0.00 |
| 14.640                                 | 0.0000   | 133.37  |  |      |          |   |       |      |      |
| TOTAL FOR - 11/30/06                   |          |         |  |      |          |   | 8.00  | 0.74 | 0.00 |
|                                        | 0.0000   | 133.37  |  |      |          |   |       |      |      |
| 12/01/06                               | 05 10:30 | 20:30   |  |      |          | A | 0.00  | 0.00 | 0.00 |
|                                        | 0.0000   | 0.00    |  |      |          |   |       |      |      |
| 12/01/06                               | 10:30    |         |  | HLPR | PKG 9831 | A | 8.00  | 1.50 | 0.00 |
| 14.640                                 | 0.0000   | 150.06  |  |      |          |   |       |      |      |
| TOTAL FOR - 12/01/06                   |          |         |  |      |          |   | 8.00  | 1.50 | 0.00 |
|                                        | 0.0000   | 150.06  |  |      |          |   |       |      |      |
| TOTAL FOR PAY PERIOD ENDING - 12/02/06 |          |         |  |      |          |   | 39.00 | 5.01 | 0.00 |
|                                        | 0.0000   | 680.980 |  |      |          |   |       |      |      |

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 PAGE 7  
 HOURS HISTORY REPORT  
 N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST                   | PAY     | START   | FINISH  | WORK     | WORK     | REC | ST    | OT    | DT    |
|----------------------|---------|---------|---------|----------|----------|-----|-------|-------|-------|
| WORK                 | OTHER   | DATE    | TOTAL   | EQ       | ADJ      |     | HOURS | HOURS | HOURS |
| RATE                 | AMOUNTS | WORK    | WORK    | ACTIVITY | CENTER   | STS |       |       |       |
|                      |         | AMOUNTS | DOLLARS | CD       | CODE     |     |       |       |       |
| 12/04/06             | 05      | 10:30   | 20:00   |          |          | A   | 0.00  | 0.00  | 0.00  |
|                      | 0.0000  |         | 0.00    |          |          |     |       |       |       |
| 12/04/06             |         | 10:30   |         | HLPR     | PKG 9831 | A   | 8.00  | 0.50  | 0.00  |
| 14.640               | 0.0000  |         | 128.10  |          |          |     |       |       |       |
| TOTAL FOR - 12/04/06 |         |         |         |          |          |     | 8.00  | 0.50  | 0.00  |
|                      | 0.0000  |         | 128.10  |          |          |     |       |       |       |
| 12/05/06             | 05      | 10:34   | 18:33   |          |          | A   | 0.00  | 0.00  | 0.00  |
|                      | 0.0000  |         | 0.00    |          |          |     |       |       |       |
| 12/05/06             |         | 10:34   |         | PKGD     | PKG 9831 | A   | 7.97  | 0.00  | 0.00  |
| 14.640               | 0.0000  |         | 116.68  |          |          |     |       |       |       |
| TOTAL FOR - 12/05/06 |         |         |         |          |          |     | 7.97  | 0.00  | 0.00  |
|                      | 0.0000  |         | 116.68  |          |          |     |       |       |       |
| 12/06/06             | 05      | 09:09   | 20:34   |          |          | A   | 0.00  | 0.00  | 0.00  |
|                      | 0.0000  |         | 0.00    |          |          |     |       |       |       |
| 12/06/06             |         | 09:09   |         | HLPR     | PKG 9831 | A   | 8.00  | 2.92  | 0.00  |
| 14.640               | 0.0000  |         | 181.24  |          |          |     |       |       |       |

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 PAGE 6 OF 9

KEITH HUDSON

TOTAL FOR - 12/06/06 8.00 2.92 0.00  
0.0000 181.24

12/07/06 05 08:25 18:00 A 0.00 0.00 0.00  
0.0000 0.00  
12/07/06 08:25 14.640 0.0000 140.84 PKGD PKG 9831 A 8.00 1.08 0.00

TOTAL FOR - 12/07/06 8.00 1.08 0.00  
0.0000 140.84

12/08/06 05 08:34 20:00 A 0.00 0.00 0.00  
0.0000 0.00  
12/08/06 08:34 14.640 0.0000 179.49 PKGD PKG 9831 A 8.00 2.84 0.00

TOTAL FOR - 12/08/06 8.00 2.84 0.00  
0.0000 179.49

TOTAL FOR PAY PERIOD ENDING - 12/09/06 39.97 7.34 0.00  
0.0000 746.350

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
PAGE 8  
0576 WEST WASHINGTON HOURS HISTORY REPORT  
T N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST   | PAY     | START | FINISH  | WORK | WORK | REC | ST    | OT    | DT    |
|------|---------|-------|---------|------|------|-----|-------|-------|-------|
| WORK | OTHER   | DATE  | TOTAL   | EQ   | ADJ  |     | HOURS | HOURS | HOURS |
| RATE | AMOUNTS | WORK  | DOLLARS | CD   | CODE | STS |       |       |       |

|             |          |       |        |      |          |   |      |      |      |
|-------------|----------|-------|--------|------|----------|---|------|------|------|
| 12/11/06    | 05       | 08:15 | 19:18  |      |          | A | 0.00 | 0.00 | 0.00 |
|             | 0.0000   |       | 0.00   |      |          |   |      |      |      |
| 12/11/06    |          | 08:15 |        | PKGD | PKG 9831 | A | 8.00 | 2.53 | 0.00 |
| 14.640      | 0.0000   |       | 172.68 |      |          |   |      |      |      |
| TOTAL FOR - | 12/11/06 |       |        |      |          |   | 8.00 | 2.53 | 0.00 |
|             | 0.0000   |       | 172.68 |      |          |   |      |      |      |
| 12/12/06    | 05       | 08:34 | 18:10  |      |          | A | 0.00 | 0.00 | 0.00 |
|             | 0.0000   |       | 0.00   |      |          |   |      |      |      |
| 12/12/06    |          | 08:34 |        | PKGD | PKG 9831 | A | 8.00 | 1.17 | 0.00 |
| 14.640      | 0.0000   |       | 142.81 |      |          |   |      |      |      |
| TOTAL FOR - | 12/12/06 |       |        |      |          |   | 8.00 | 1.17 | 0.00 |
|             | 0.0000   |       | 142.81 |      |          |   |      |      |      |
| 12/13/06    | 05       | 09:45 | 18:12  |      |          | A | 0.00 | 0.00 | 0.00 |
|             | 0.0000   |       | 0.00   |      |          |   |      |      |      |
| 12/13/06    |          | 09:45 |        | PKGD | PKG 9831 | A | 8.00 | 0.45 | 0.00 |
| 14.640      | 0.0000   |       | 127.00 |      |          |   |      |      |      |
| TOTAL FOR - | 12/13/06 |       |        |      |          |   | 8.00 | 0.45 | 0.00 |
|             | 0.0000   |       | 127.00 |      |          |   |      |      |      |

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PAGE 7 OF 9

12/14/06 05 08:34 17:54 KEITH HUDSON A 0.00 0.00 0.00  
 0.0000 0.00  
 12/14/06 08:34 PKGD PKG 9831 A 8.00 1.32 0.00  
 14.640 0.0000 146.11  
 TOTAL FOR - 12/14/06 8.00 1.32 0.00  
 0.0000 146.11  
 12/15/06 06 10:21 18:03 A 0.00 0.00 0.00  
 0.0000 0.00  
 12/15/06 10:21 PKGD PKG 9831 A 7.20 0.00 0.00  
 14.640 0.0000 105.41  
 TOTAL FOR - 12/15/06 7.20 0.00 0.00  
 0.0000 105.41

TOTAL FOR PAY PERIOD ENDING - 12/16/06 39.20 5.47 0.00  
 0.0000 694.01

NB45RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 PAGE 9  
 0576 WEST WASHINGTON HOURS HISTORY REPORT  
 T N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH \*

| ST                                     | PAY     | START   | FINISH  | WORK | WORK     | REC | ST     | OT    | DT    |
|----------------------------------------|---------|---------|---------|------|----------|-----|--------|-------|-------|
| WORK                                   | OTHER   | WORK    | TOTAL   | EQ   | ADJ      |     |        |       |       |
| RATE                                   | AMOUNTS | AMOUNTS | DOLLARS | CD   | CD       | STS | HOURS  | HOURS | HOURS |
| 12/18/06                               | 06      | 08:19   | 19:04   |      |          | A   | 0.00   | 0.00  | 0.00  |
|                                        | 0.0000  |         | 0.00    |      |          |     |        |       |       |
| 12/18/06                               |         | 08:19   |         | PKGD | PKG 9831 | A   | 8.00   | 2.24  | 0.00  |
| 14.640                                 | 0.0000  |         | 166.31  |      |          |     |        |       |       |
| TOTAL FOR - 12/18/06                   |         |         |         |      |          |     | 8.00   | 2.24  | 0.00  |
|                                        | 0.0000  |         | 166.31  |      |          |     |        |       |       |
| 12/19/06                               | 06      | 09:00   | 19:00   |      |          | A   | 0.00   | 0.00  | 0.00  |
|                                        | 0.0000  |         | 0.00    |      |          |     |        |       |       |
| 12/19/06                               |         | 09:00   |         | PKGD | PKG 9831 | A   | 8.00   | 1.53  | 0.00  |
| 14.640                                 | 0.0000  |         | 150.72  |      |          |     |        |       |       |
| TOTAL FOR - 12/19/06                   |         |         |         |      |          |     | 8.00   | 1.53  | 0.00  |
|                                        | 0.0000  |         | 150.72  |      |          |     |        |       |       |
| 12/20/06                               | 06      | 09:00   | 18:00   |      |          | A   | 0.00   | 0.00  | 0.00  |
|                                        | 0.0000  |         | 0.00    |      |          |     |        |       |       |
| 12/20/06                               |         | 09:00   |         | PKGD | PKG 9831 | A   | 8.00   | 0.87  | 0.00  |
| 14.640                                 | 0.0000  |         | 136.23  |      |          |     |        |       |       |
| TOTAL FOR - 12/20/06                   |         |         |         |      |          |     | 8.00   | 0.87  | 0.00  |
|                                        | 0.0000  |         | 136.23  |      |          |     |        |       |       |
| TOTAL FOR PAY PERIOD ENDING - 12/23/06 |         |         |         |      |          |     | 24.00  | 4.64  | 0.00  |
|                                        | 0.0000  |         | 453.26  |      |          |     |        |       |       |
| TOTAL FOR EMPLOYEE - ██████████        |         |         |         |      |          |     | 274.01 | 35.73 | 0.00  |

CREDIT 1  
 PAGE 8 OF 9

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KEITH HUDSON

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\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*\*\*END\*\*\*  
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\* JOBID: J0010876 \*  
\* JOB NAME: I8450RPE \*  
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\* OUTPUT GROUP: 2 .0001.0001 \*  
\* TITLE: \*  
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\* DESTINATION: RMTE9600 \*  
\* NAME: R3242 JS230 \*  
\* ROOM: 3242 \*  
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\* DEPARTMENT: \*  
\* ADDRESS: \*  
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\* PRINT DATE: 13 JAN 2007 \*  
\* PRINT NAME: RMTE9600 \*  
\* SYSTEM: QSYS \*  
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EXHIBIT 1  
PAGE 9 OF 9

# EXHIBIT NO. 2

KEITH HUDSON

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 PAGE 1  
 0576 WEST WASHINGTON HOURS HISTORY REPORT  
 T N845RP01

PAY PERIOD ENDING DATE: 01/13/07 DETAIL FOR: 12/21/05 THRU 12/20/06  
 CENTER: PKG 9831 BREMERTON

EMPLOYEE ID: ██████████ NAME: HUDSON, KEITH

| ST   | PAY OTHER                              | START    | FINISH | WORK    | WORK | REC | ST     | OT       | DT    |
|------|----------------------------------------|----------|--------|---------|------|-----|--------|----------|-------|
| WORK | DATE                                   | CODE     | WORK   | TOTAL   | EQ   | ADJ | CENTER | STS      | HOURS |
| RATE | AMOUNTS                                | DOLLARS  | CD     | CODE    |      |     |        |          |       |
|      | 10/23/06                               | 06       | 07:00  | 16:00   |      |     |        |          |       |
|      |                                        | 0.0000   |        | 0.00    |      |     | 0081   | PKG 9831 | A     |
|      | 10/23/06                               |          | 07:00  |         |      |     |        |          |       |
|      | 14.640                                 | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | TOTAL FOR                              | 10/23/06 |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | 10/24/06                               | 06       | 07:00  | 16:00   |      |     |        |          |       |
|      |                                        | 0.0000   |        | 0.00    |      |     | 0081   | PKG 9831 | A     |
|      | 10/24/06                               |          | 07:00  |         |      |     |        |          |       |
|      | 14.640                                 | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | TOTAL FOR                              | 10/24/06 |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | 10/25/06                               | 06       | 07:00  | 16:00   |      |     |        |          |       |
|      |                                        | 0.0000   |        | 0.00    |      |     | 0081   | PKG 9831 | A     |
|      | 10/25/06                               |          | 07:00  |         |      |     |        |          |       |
|      | 14.640                                 | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | TOTAL FOR                              | 10/25/06 |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | 10/26/06                               | 06       | 07:00  | 16:00   |      |     |        |          |       |
|      |                                        | 0.0000   |        | 0.00    |      |     | 0081   | PKG 9831 | A     |
|      | 10/26/06                               |          | 07:00  |         |      |     |        |          |       |
|      | 14.640                                 | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | TOTAL FOR                              | 10/26/06 |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 117.12  |      |     |        |          |       |
|      | 10/27/06                               | 06       | 07:00  | 17:45   |      |     |        |          |       |
|      |                                        | 0.0000   |        | 0.00    |      |     | 0081   | PKG 9831 | A     |
|      | 10/27/06                               |          | 07:00  |         |      |     |        |          |       |
|      | 14.640                                 | 0.0000   |        | 155.55  |      |     |        |          |       |
|      | TOTAL FOR                              | 10/27/06 |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 155.55  |      |     |        |          |       |
|      | TOTAL FOR PAY PERIOD ENDING - 10/28/06 |          |        |         |      |     |        |          |       |
|      |                                        | 0.0000   |        | 624.030 |      |     |        |          |       |

N845RP25 RUN DATE: 01/13/2007 RUN TIME: 07:17:43 UNITED PARCEL SERVICE  
 PAGE 2  
 0576 WEST WASHINGTON HOURS HISTORY REPORT  
 Page 1

Board of Industrial Insurance Appeals  
 In re: Hudson  
 Docket No. 07-23635  
 Exhibit No. 2  
 Hubel

**CERTIFICATE OF SERVICE**

I hereby certify I filed the foregoing **BRIEF OF APPELLANT/DEFENDANT** by depositing the originals thereof in the United States Post Office in Lake Oswego, Oregon, on today's date, in a sealed envelope with first class postage thereon prepaid, Certified Mail, Return Receipt Requested, addressed as follows:

**ORIGINALS TO:** Clerk of the Court of Appeals of the State of Washington - Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4454

I further certify that I served the foregoing **BRIEF OF APPELLANT/DEFENDANT** on the following parties on July 28, 2010, by mailing to said parties to this action a copy thereof, with postage prepaid, addressed to said parties at their last-known addresses as follows, and deposited in the post office at Lake Oswego, Oregon on said day:

**COPY TO:** Scott Timmons, Executive Secretary  
Board of Industrial Insurance Appeals  
P.O. Box 42401  
Olympia, WA 98504-2401

Anastasia Sandstrom, Assistant Attorney General  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98164

Michael J. Costello (*Certified Mail - Return Receipt Requested*)  
Walthew, Warner, Thompson, Eagan & Keenan, PS  
123 3rd Avenue South  
Seattle, WA 98104-2690

Milt Crafton  
United Parcel Service  
13035 Gateway Dr., Ste. 149  
Seattle, WA 98168

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Elizabeth Footman  
Gallagher Bassett Services  
4550 Kruse Way, Ste. 155  
Lake Oswego, OR 97035

DATED: July 28, 2010.

WALLACE, KLOR & MANN, P.C.



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Schuyler T. Wallace, Jr., WSBA No. 15043  
Douglas M. Palmer, WSBA No. 35198  
of Attorneys for United Parcel Service and Gallagher  
Bassett Services

**CERTIFICATE OF MAILING**

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I hereby certify that I filed the foregoing **BRIEF OF APPELLANT/DEFENDANT** by depositing the original thereof in the United State Post Office in Lake Oswego, Oregon on today's date, in a sealed envelope, postage thereon prepaid, Certified Mail, Return Receipt Requested, addressed as follows:

ORIGINAL TO: Clerk of the Court of Appeals of the State of Washington - Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4454

I further certify that I served the foregoing **BRIEF OF APPELLANT/DEFENDANT** on attorneys of record and other parties on July 28, 2010, by mailing to said persons a copy thereof, addressed to said persons at their last known address postage thereon prepaid as follows, and deposited in the post office at Lake Oswego, Oregon on said date:

COPIES TO: Scott Timmons  
Executive Secretary  
Board of Industrial Insurance Appeals  
P.O. Box 42401  
Olympia, WA 98504-2401

Michael J. Costello (*Certified Mail - Return Receipt Requested*)  
Walthew, Warner, Thompson, Eagan & Keenan, PS  
123 3rd Avenue South  
Seattle, WA 98104-2690

Anastasia Sandstrom, Assistant Attorney General  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98164

Elizabeth Footman  
Gallagher Bassett Services  
4550 Kruse Way, Ste. 155  
Lake Oswego, OR 97035

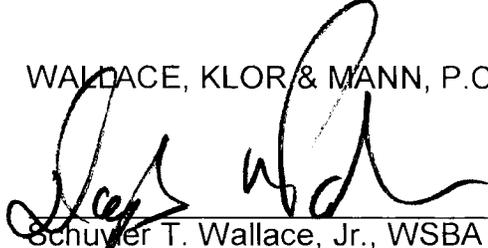
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1 Milt Crafton  
2 United Parcel Service  
3 13035 Gateway Dr., Ste. 149  
4 Seattle, WA 98168

5 DATED: July 28, 2010.

6 WALLACE, KLOR & MANN, P.C.

7 

8 Schuyler T. Wallace, Jr., WSBA No. 15043  
9 Douglas M. Palmer, WSBA No. 35198  
10 of Attorneys for United Parcel Service and  
11 Gallagher Bassett Services  
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