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DIVISION II

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No. 47875-7-II
Pierce County Superior Court Cause No. 14-2-08279-2

STATE OF WASHINGTON
BY 

~~DEPUTY~~

IN THE COURT OF APPEALS, DIVISION TWO FOR
THE STATE OF WASHINGTON

HARDER MECHANICAL, INC.,

Appellant,

v.

PATRICK A. TIERNEY, and DEPARTMENT OF LABOR
AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondents.

APPELLANT'S REPLY BRIEF

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I. Introduction

Appellant Harder Mechanical, Inc. (“Harder”) files this Reply to the Brief of Respondent Patrick A. Tierney, Dated January 5, 2016. This Reply is filed in accordance with and pursuant to Rules of Appellate Procedure 10.1(b)(3), 10.2(d), and 10.3(c).

In Harder’s Brief of Appellant, its argument on appeal focuses primarily on the appropriate legal standard for determining whether an injured worker’s “current employment or his or her relation to his or her employment is essentially part-time or intermittent” within the meaning of RCW 51.08.178(2). Specifically, Harder contended that the Superior Court did not follow the *Avundes*¹ test when determining whether Mr. Tierney’s relationship to his employment was essentially part-time or intermittent, failed to find facts necessary to the application of the *Avundes* test despite ample evidence in the record offered on those factors, and erred in finding certain facts as they were not supported by substantial evidence. (Brief of Appellant 4–6). Respondent Patrick A. Tierney has filed a brief in response that does not actually address the legal and factual contentions Harder raised in its brief and is replete with irrelevant arguments as it instead rehashes several factual and legal arguments related to issues Harder did not raise and on which it is not relying in this appeal. Harder now files this Reply to illustrate a few key points of disagreement, point out the error in Mr. Tierney’s articulation of the *Avundes* test, and briefly address the issues of “earning capacity” and a

¹ *Dep’t of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 996 P.2d 593 (2000).

brief discussion of the liberal construction of the statute under *Cockle v. Dep't of Labor & Industries*, 142 Wn.2d 801, 811, 16 P.2d 583 (2001).

II. Argument

As noted above, most of the issues alleged in Mr. Tierney's Respondent's Brief have already been thoroughly discussed, briefed, and debated either in Harder's Appellant's Brief or in one of the other multitude of briefs that have been filed in this case either before the Board of Industrial Insurance Appeals ("the Board") or the Superior Court. A thorough discussion of the issues Mr. Tierney raised with regard to the evidence and what facts he contends this proves can be found throughout the record currently before the Court of Appeals. (CP at 24–32 (Harder's contentions about what facts the evidence proves and disputing claimant's characterization of these facts), CP at 136–37 (showing claimant did not seek work), CP at 138 (explaining how claimant's work did not correspond to the economic downturn), CP at 139–43 (demonstrating claimant's missed work opportunities), CP at 143–44 (explaining why claimant's receipt of unemployment benefits does not indicate he was seeking to work full time), and CP at 633–40 (further discussion of evidence in Brief to Superior Court)).

Harder contends the evidence does not support the rosy interpretation of Mr. Tierney's work history as one in which he worked as much as possible, had good excuses for all the jobs he missed or did not take, and was merely a good worker who coincidentally was sick or had

car trouble five or six times over the course of five years. Similarly, in making this appeal, Harder does not rely on arguments that Mr. Tierney's future work prospects might have been limited by his conviction history or that he failed to take work out of state as suggested by Mr. Tierney. While Harder raised these issues at earlier periods of the litigation, it did not raise these issues on appeal and does not rely on them now.

Further, as a quick review of the extensive briefing in this case will show, Mr. Tierney's assertion that his sporadic work history over the five years prior to the April 2012 injury was the result of the economic downturn of 2008 and its severe impact on the plumbing and pipefitting industry does not actually comport with the evidence in this case. Mr. Tierney's work pattern did not change before or after 2008 nor did his periods of the most limited work align with union official Phillip Dines' uncontroverted testimony regarding *when* the economic downturn had an impact on Local 26 nor which members were most effected.

Mr. Tierney's brief also devotes several pages and substantial discussion to proving he was not required to work outside his home "Local" or pull his "travel card" and that his past incarceration would not affect his future employment opportunities. (Respondent's Brief 3-5, 9-10, 25-26, 27-31). But Harder does not rely on either of these arguments in this appeal.

These ongoing disputes serve only to highlight one of Harder's main points on appeal—the Superior Court made only very limited

findings of fact, leaving many questions and issues unresolved, thus hampering the application of the relevant legal standards to this case.

Harder will now take this opportunity to address four key points from Mr. Tierney's Brief.

A. *In re John Pino, In re Keith E. Craine, and Watson v. Department of Labor and Industries are Distinguishable and Applying the Legal Principles as Discussed in Those Cases Supports the Appellant's Position*

Mr. Tierney relies primarily on three cases, two nonsignificant BIIA decisions and one Washington Court of Appeals decision, to support his proposition that his relationship to work was not intermittent. These cases are *In re John Pino*, Dckt. Nos. 91 5072 & 92 5878, 1994 WL 144956 (BIIA Feb. 2, 1994); *In re Keith E. Craine*, Dckt. No. 02 10033, 2002 WL 31959149 (BIIA Dec. 26, 2002);² and *Watson v. Department of Labor and Industries*, 133 Wn. App. 903, 138 P.3d 177 (2006).

1. *In Re John Pino is Factually Distinguishable*

The Board of Industrial Insurance Appeals evaluated whether a worker dispatched out of a Union Hall should be considered an intermittent or part-time worker in *In re John Pino*, Dckt. Nos. 91 5072 & 92 5878 (February 2, 1994). The standard applied in that case formed the basis for the standard the Supreme Court adopted in *Avundes*,³ but the

² Both *In re John Pino* and *In re Keith E. Craine* can be found in the Clerk's Papers as they were already submitted as part of the record. (CP at 106-14 (*In re John Pino*), 116-21 (*In re Keith E. Craine*)).

³ 140 Wn.2d at 287 (discussing *In re John Pino*).

facts are distinguishable. Mr. Pino was, like Mr. Tierney, a pipefitter dispatched out of the Union Hall. In holding that Mr. Pino was entitled to have his wages calculated pursuant to RCW 51.08.178(1), the Board held that whether a worker has an intermittent or part-time relationship to employment includes not just the relationship to his current employment, but other factors, such as his subjective intent, his historical pattern, as well as other actions that may discredit the worker's stated intent. *In re John Pino*, Dckt. Nos. 91 5072 & 92 5878, at *4.

In its analysis the Board stated:

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.

Id. at *5 (emphasis added). The Board in *Pino* ultimately concluded that claimant was not an intermittent worker based on the facts of that case. The employer argues that while the facts of the instant case are distinguishable from *Pino* the Board's analysis is illustrative here, and applying the same analysis the Board should conclude Mr. Tierney's *relationship* to his employment was intermittent.

Unlike the worker in *In re John Pino*, Mr. Tierney's employment history is filled with long gaps. (CP at 490 (showing Mr. Tierney's dispatch history from Local 26 from August 1, 2007, to the present); CP at 500–17 (showing Mr. Tierney's employment hours from February 2002 through April 2012). Specifically, in the year before the injury, Mr. Tierney worked 60 hours in April 2011, 149 hours in May 2011, 0 hours in June 2011 through February 2011, 108.5 hours in March 2012, and 24 hours in April 2012. (CP at 516–17). The dispatch records from UA Local 26 show Mr. Tierney's longest dispatch in the five years prior to the April 11, 2012, injury took place between August 1, 2007 and August 15, 2008. (CP at 490). However, as the parties stipulations reflect, of this, claimant actually only worked a short period of this time as he was injured and kept on salary for the entire portion of the dispatch to that job in 2008. (CP at 518)⁴ During the five years before the April 11, 2012, injury, claimant was off work more than he was working, and during that time claimant missed dispatch calls, did not report to at least 2 jobs, turned back in, another two jobs, and was rejected from another jobsite. (CP at 490). Claimant was incarcerated and unable to work between September 2011 and January 2012. He lacked the necessary car insurance to access another job site. (CP at 414–15). Mr. Tierney's overall employment pattern showed he spent more time not working than he did working. (CP at 490, 516–178). In other words, Mr. Tierney's employment history was

⁴ Parties did not stipulate to and Mr. Tierney's testimony does not reflect the date in 2007 at which point claimant was injured.

not that of a typical worker being dispatched out of a union hall moving from job to job in a pattern of serial employment with necessary breaks and down time between jobs. For Mr. Tierney, *not* working was the norm, with only sporadic periods of employment over the years.

As discussed in Harder's Brief of Appellant, in addition to this work history, other factors, namely Mr. Tierney's intent to work *as demonstrated by his actions* and the substantial evidence in the record and his relationship with the employer, to show Mr. Tierney, unlike Mr. Pino, had an intermittent relationship to work. *In re John Pino* does not discuss these other factors at length and there is no indication or suggestion in what is detailed in the case that Mr. Pino's work history or actions around his intent to work bore more than superficial similarities to Mr. Tierney's.

Thus, Harder, maintains its position that *In re John Pino* is distinguishable and applying the rationale discussed therein, actually weighs in favor of concluding Mr. Tierney had an intermittent relationship to work.

2. *In re Keith E. Craine* is Also Distinguishable

Mr. Tierney also relies on *In re Keith E. Craine*, Dckt. No. 02 10033, 2012 WL 31959149 (BIIA Dec. 26, 2002), a nonsignificant Board of Industrial Insurance Appeals decision as an analogous case that claimant contends justifies his argument that his wages should be calculated under RCW 51.08.178(1). However, like *In re John Pino*, this case is easily distinguishable.

In *Craine*, the worker, a journeyman carpenter, was working on a job expected to last one to two months. *In re Keith E. Craine*, Dckt. No. 02 10033, at *1. There was some evidence to suggest Mr. Craine only took high-paying jobs and did not work when only lower-paying carpentry jobs were available. *Id.* at *4. Although Employment Security Department (“ESD”) records showed some gaps and low earnings years, there was also evidence the claimant had worked in Washington State or in nearby states during those years, suggesting the ESD records did not accurately reflect claimant’s earnings and employment history. *Id.* at 2. Mr. Craine testified that after he became a journeyman carpenter, it became more difficult to find consistent work due to the higher wages paid to journeyman carpenters and this explained the gaps in his employment, during which he was actively seeking work. *Id.* The Board ultimately concluded on the facts of that case claimant was not an intermittent employee. *Id.* at *6. However, before reaching this conclusion the Board noted the following:

The Employment Security records, and claimant’s statements, create a strong inference of a pattern of choosing to work only when the wage is high enough to make it worth his while, and drawing lower-paying unemployment insurance in-between. He testified that carpenters (as distinguished from journeyman carpenters) work “full-time and consistent,” but his testimony shows he was not looking for regular carpentry work.

Id. at *4. The Board went on to conclude that without testimony to explain the ambiguous ESD records it could not draw the conclusion that Mr. Tierney’s relationship to employment was intermittent or that he did

not intend to work full time as this did “not overcome the uncontroverted fact that the claimant was actively looking for work at the journeyman level and that he would consistently work if such employment was consistently available.” *Id.* at *5.

Harder contends that the evidence in this case goes that extra step that was missing in *Craine*. Applying the law to the facts according to the *Avundes* rule, and looking at both Mr. Tierney’s testimony and his actions, the picture is clear that Mr. Tierney did not intend to work full time and when weighing all four factors, had an intermittent relationship to employment. Comparing to *In re Keith E. Craine*, the differences between the cases are many. In *Craine* there was no evidence the claimant had missed work opportunities and turned down jobs due to a combination of failure to accept dispatches, turning dispatches back in, failing to report for work, being rejected from a jobsite, or failing to meet site requirements. And as noted above, all parties have stipulated to the amount of claimant’s earnings over the five years preceding his injury, and there is no ambiguity as to what the ESD or other earnings and employment records show. For all these reasons, *In re Keith E. Craine* is factually distinguishable. Applying the same law to the instant case should lead the Board to conclude the claimant in this case, Mr. Tierney, had an intermittent relationship to work.

3. The Rationale on which the Court Relied in *Watson v. Department of Labor & Industries* is Undermined by the Facts of This Case

Mr. Tierney relies on *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 138 P.3d 177 (2006) to support his assertion that his relationship to employment was not intermittent. *Watson* involved the wage rate of a golf course groundskeeper; the employer claimed it had intended that worker to be a seasonal worker, while the worker insisted he had intended to work. *Id.* at 912–13. Mr. Tierney relies on this case, in part for his assertion that his receipt of unemployment benefits shows he intended to work full-time, and under *Watson*, is a reason to find his relationship to work is not intermittent.

Harder would like to take this opportunity to distinguish *Watson* and other cases that have adopted this rationale. Washington state courts and the BIIA have both interpreted that the receipt of unemployment benefits shows the intent of a worker to engage in full-time employment. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 911 (Div. II 2006); *see also In re Alfredo J. Gallardo*, Dckt. No. 05 14494, 2007 WL 2174604 (BIIA Apr. 9, 2007); *In re Felipe Zamudio*, Dckt. Nos. 05 18873 & 05 19816, 2006 WL 3520133 (BIIA Aug. 28, 2006). In the *Gallardo* case, the Board elaborated on the Court of Appeals' rationale in *Watson*: "Because receipt of unemployment compensation benefits depends upon the worker being available for, and actively seeking, full-time work, the Court of Appeals concluded Mr. Watson had established his intent to work

full time, despite his inability to secure full-time, year-round work.” *In re Alfredo J. Gallardo*, Dckt. No. 05 14494, at *5.

Mr. Tierney testified, and the parties stipulated, that he received unemployment benefits when he was not working. (CP at 418, 519). Indeed, Mr. Tierney testified he usually kept an “open” unemployment claim so he could easily collect benefits between dispatches. (CP at 418). However, the inference that courts and the Board have drawn in the past about unemployment benefits does not apply here. For most workers receiving unemployment benefits in Washington State, the worker must be able, available, and actively seeking work. RCW 50.20.080; RCW 50.20.240. However, as Mr. Tierney testified, workers who are members of full-referral unions (as is herein the case) need not engage in active job searches. (CP at 313; *see also* RCW 50.20.240(b) (benefit recipients with union referral need not present evidence of work search); WAC 192-180-010(c) (“If you are a member of a referral union you must be registered with your union, eligible for and actively seeking dispatch, and comply with your union's dispatch or referral requirements.”); WAC 192-180-020 (detailing requirements for individuals participating in referral union programs)). Mr. Tierney did not need to actively search for work while receiving unemployment benefits or do anything beyond having his name on the dispatch list in order to receive unemployment benefits. (*See, e.g.*, CP at 313).

More importantly, as discussed in Harder’s original Post-Hearing Brief before the BIIA (CP at 153–69), members of Mr. Tierney’s union

can turn down work up to three times without losing their place on the dispatch list, and even if a worker turns down work more than that, the penalty is only to drop to the bottom of the list. This will not impair the worker's ability to receive Unemployment Compensation. If a worker's name is on a dispatch list, regardless of why, he or she is eligible for Unemployment Compensation. (CP at 215, 247). Mr. Tierney admitted there were jobs he turned down or quit because of the distance he was required to travel (despite having made himself available for dispatch in all seven zones of Local 26) (*see* CP at 498), transportation difficulties, and other personal problems. Harder contends Mr. Tierney's application for and receipt of unemployment benefits in these circumstances does not indicate he was actively seeking full-time employment, and if anything, Mr. Tierney's actions and inactions demonstrate his intent was to work only when necessary.

Regardless of what the Employment Security Department deems as a result of Mr. Tierney's applications for and receipt of unemployment benefits, in the years leading up to the April 11, 2012, injury, claimant's behavior demonstrates that he was not actively seeking work. Neither the Washington Industrial Insurance Act nor its implementing regulations adopt or require the adoption of the Employment Security Department's ("ESD") rules. The ESD's policy regarding receipt of unemployment benefits has instead been relied upon as evidence that a claimant is actively seeking employment. The facts of this claim do not support such an inference and Mr. Tierney should not be entitled to the presumption

that he was actively seeking full time work within the meaning of *Watson*.

In contrast to the instant case the court in *Watson* specifically explained:

The Department points out that the unemployment benefits statute requires the State to terminate benefits if an individual does not apply for suitable work when directed by the employment office. RCW 50.20.080. Moreover, the State has authority to waive the work search requirement under RCW 50.20.010(1)(a). But there is no evidence that the State waived Watson's search requirement. We can infer from the unemployment statutory scheme that there is a general requirement that individuals look for work in order to receive benefits. And because Watson testified that he received unemployment, a reasonable trier of fact could infer that he complied with the general requirement by looking for work. Therefore, substantial evidence supports the trial court's finding of fact that Watson was looking for work when not at the golf course.

Watson, 133 Wn. App. at 911. To the contrary, we know Mr. Tierney did not have to engage in a work search and did not even have to take jobs that were offered to him (in fact, we know he missed some calls, failed to report, etc.). So the rationale used in *Watson* combined with Mr. Tierney's receipt of unemployment benefits does not constitute substantial evidence that Mr. Tierney intended to work full time or actively sought full-time, regular, nonintermittent work.

B. Mr. Tierney's Monthly Wage as Currently Calculated Does Not Reflect his Lost Earning Capacity

Respondent Mr. Tierney asserts the determination of his wage under subsection (1) does not result in a windfall to him, but instead correctly

compensates him for his actual “lost earning capacity” and to calculate his wage otherwise would result in a windfall to Harder Mechanical. (Respondent’s Brief 26–27).

Title 51 of the Revised Code of Washington does not define “earning capacity.” Black’s Law Dictionary, defines “earning capacity” as: “[a] person’s ability or power to earn money given the person’s talent skills, training, and experience.” Black’s Law Dictionary 547–48 (8th Ed. 2004). “Lost earning capacity” is defined as “[a] person’s diminished earning power resulting from an injury.” Black’s Law Dictionary 965 (8th Ed. 2004).

Respondent’s brief asserts Mr. Tierney could have earned \$95,000 annually had he worked 8 hours per day, 5 days per week, at the hourly wage of \$36.56, thus, this figure represents Mr. Tierney’s earning capacity and we should ignore that he never came close to working 8 hours per day 5 days per week on any more than an intermittent basis in any year Local 26’s Benefits Trust recorded his earnings. Thus, Respondent claims, the calculation of Mr. Tierney’s wage rate is correct because it is compensating him for his wage earning capacity. The speciousness of this argument becomes clear upon an examination of the statute. There would be no need for RCW 51.08.178 to include a provision regarding the calculation of wage rates for part-time or intermittent workers (RCW 51.08.178(2)), if the only inquiry was an individual’s theoretical maximum earnings. This is why even the default statutory provision, RCW 51.08.178(1) contains a variety of multipliers depending on the

number of days per week an individual worker's days "normally" worked and recognizes that a worker's daily wage will vary depending on the number of hours per day "normally" worked. RCW 51.08.178(1)(a)–(g).

Following this logic, Harder contends Mr. Tierney is overestimating his earning capacity. There is no evidence Mr. Tierney has ever demonstrated the ability to earn at the capacity he attributes to himself. (See CP at 500–17 (showing Mr. Tierney's hours and months worked every year from 2002 through 2012)). To the contrary, the earnings records and employment records admitted into evidence show Mr. Tierney's greatest earnings year and most regular employment occurred in calendar year 2008, when he earned a sum of \$55,232.20, of which \$47,499.10 was salary paid in lieu of time loss when Mr. Tierney was "kept on salary" following an industrial injury. (CP at 518; *see also* CP at 500–17)).

Clearly, under either subsection (1) or subsection (2) of RCW 51.08.178, a worker's earning capacity requires a deeper inquiry than what could the worker theoretically earn if he worked 8 hours per day, 5 days per week, in the best job he could obtain; there is instead a grounding in reality, an inquiry into the normal pattern of a worker's work schedule and earnings. Mr. Tierney's assertion that his monthly wage as calculated and his interpretation asks the court to overlook this and interpret RCW 51.08.178(2) and the *Avundes* in a way that is inconsistent with the rest of the statute.

Moreover, there is no windfall to Harder should Mr. Tierney's wage be recalculated under RCW 51.08.178(2), as Mr. Tierney suggests. (Respondent's Brief 27). Mr. Tierney's argument on this point is hypothetical and strained at best. How, precisely, an accurate calculation of Mr. Tierney's wage rate under the test prescribed by the Washington Supreme Court in *Avundes* could result in a windfall to the employer is neither clear nor explained in Mr. Tierney's brief. As Harder demonstrated in its brief, there was no expectation of a long-term or indefinite employer–employee relationship between Harder and Mr. Tierney. (Brief of Appellant 16–17). Thus, Mr. Tierney's argument falls flat. His assertion that a liberal construction of the statute requires this conclusion will be discussed next.

C. Liberal Interpretation of the Act in Favor of the Injured Worker Does Not Permit the Department, Board, or Superior Court to Ignore Established Law

Claimant relies on *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001) for the proposition that when interpreting the Washington Industrial Insurance Act, benefits of the doubt must be construed in favor of the claimant. (Respondent's Brief 11). Claimant then goes on to note “[s]ubstantial deference” is also afforded to an agency's interpretation of the law in those areas involving the agency's special knowledge and expertise, therefore, the Department's conclusion that his wage rate was properly calculated under RCW 51.08.178(1) should be afforded great weight. (Respondent's Brief 11–12).

Mr. Tierney is correct that both *Cockle*, the Act itself, and many other cases have observed that under the Washington Industrial Insurance Act, the *law* must be liberally construed, but this applies to the law, not the facts. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 810–11, 16 P.3d 583 (2001); RCW 51.12.010. The Act's Declaration of Policy states in pertinent part "[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and *economic loss* arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. The act does not require that the facts be construed in such a way that the injured worker receives an *economic gain*, which is the result of Mr. Tierney's interpretation of the Act and is also inconsistent with the result that would be found if the Department, the Board, or the Superior Court had correctly applied the *Avundes* test as prescribed by the Washington Supreme Court.

Further, with regard to the interpretation of RCW 51.08.178, the *Cockle* court recognized the limitations to the weight afforded to the Department's interpretation of the Act.

While we may "defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute," Indeed, we have deemed such deference "inappropriate" when the agency's interpretation conflicts with a statutory mandate. "[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is[]" and to "determine the purpose and meaning of statutes" Moreover, legislative acquiescence can

never be interpreted as permission to ignore or violate statutory mandates.

Cockle, 142 Wn.2d at 812 (internal citations omitted).

The parties agree there is ambiguity and overlap in the application and interpretation of RCW 51.08.178(1) and (2). However, on the specific issue central to this case, the Washington Supreme Court has spoken as to how RCW 51.08.178(2) should be interpreted and applied. The Court set forth that test in *Avundes*, but neither the Department nor any fact finder who has reviewed this case has followed the Supreme Court's rule. It is the application of the *Avundes* test to the facts that Harder seeks.

D. The *Avundes* Test Requires a Worker's Work History to be Considered Among Other Factors and has Not Been Applied Correctly

The *Avundes* test itself brings Harder to its third major point in this Reply. In his brief Mr. Tierney has once again perpetuated the misinterpretation and misunderstanding that because the court in *Avundes* rejected a rule that determined an individual's relationship to his work based on the worker's objective work history, that somehow the worker's work history cannot be considered. (Respondent's Brief 23–24).

But this is not the case. As Harder noted in its Appellant's Brief, the court in *Avundes* rejected the Department's proposed rule that would have used an worker's objective work history as the sole determining factor in determining a worker's relationship to work. *Avundes*, 140 Wn.2d at 289–90. The *Avundes* court then went on to establish *four* factors

that must be considered in the second prong of the test, one of which is the “worker’s work history.” *Id.* at 290.

Mr. Tierney also asserts the only issue Harder raises is that under the second prong of *Avundes* Mr. Tierney’s work history argues in favor of finding Mr. Tierney an intermittent worker under RCW 51.08.178(2). But this is patently false. As Harder’s earlier brief established, Harder contends three of the four factors listed in *Avundes*: “the worker’s intent, the relation with the current employer, and the worker’s work history” all weigh in favor of finding Mr. Tierney had an intermittent relationship with work. As noted in the Brief of Appellant, Harder contends the Superior Court’s finding on Mr. Tierney’s intent was not supported by substantial evidence (nor based on any stated credibility determinations) and the Superior Court failed to address the issue of relationship between Harder and Mr. Tierney, despite ample evidence adduced on that issue.

It is concerning that Mr. Tierney perpetuates this misreading of *Avundes*—that somehow the court cannot consider Mr. Tierney’s work history despite it being a factor explicitly called out by the test—is exactly the same misunderstanding on which the Superior Court based its conclusion. (See Brief of Appellant 24–26 and sources cited therein).

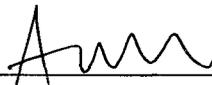
III. Conclusion

For the reasons discussed above, Mr. Tierney’s arguments do not defeat the Appellant Harder Mechanical’s contentions that the Superior Court erred in finding facts that were not supported by substantial evidence and failed to make findings with regard to several facts (such as

the relationship of Mr. Tierney to Harder and the nature of Mr. Tierney's work history) that were crucial to the application of the *Avundes* test, the test endorsed by the Washington Supreme Court. The Court of Appeals should reverse the decision of the Superior Court, and to the extent necessary, remanded for further findings of fact and for an application of the *Avundes* test in accordance with law.

Dated this 4 day of February 2016

HOLMES, WEDDLE &
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IV. Appendix

WESTLAW

2007 WL 2174604 (Wash.Bd.Ind.Ins.App.)

Board of Industrial Insurance Appeals

IN RE: ALFREDO J. GALLARDO

Board of Industrial Insurance Appeals April 9, 2007 (Approx. 10 pages)

IN RE: ALFREDO J. GALLARDO

Docket No. 05 14494

Claim No. Y-651705

April 9, 2007

*1 Appearances:

Claimant, Alfredo J. Gallardo,

by Smart, Connell & Childers, per Michael V. Connell

Employer, Ron Beriner Ranch,

None

Department of Labor and Industries,

by The Office of the Attorney General, per Cathy W. Marshall, Assistant

DECISION AND ORDER

The claimant, Alfredo J. Gallardo, filed an appeal with the Board of Industrial Insurance Appeals on May 2, 2005, from an order of the Department of Labor and Industries dated March 3, 2005. In that order, the Department affirmed three prior orders dated October 13, 2003, September 13, 2004, and September 15, 2004. In the October 13, 2003 order, the Department set the claimant's wage rate by taking into account reported income for the twelve-month period from July 1, 2002 to June 30, 2003 of \$6,377.60, equaling \$531.46 per month; no health care benefits, tips, bonuses, overtime, or housing/board/fuel; and a marital status of married, with no children. In the September 13, 2004 order, the Department affirmed an April 12, 2004 order, in which it had ended time-loss benefits as paid through March 15, 2004. In the September 15, 2004 order, the Department closed the claim with a permanent partial disability award equal to 7 percent of the left leg above the knee joint with short thigh stump (3" or below the tuberosity of ischium). The March 3, 2005 Department order is REVERSED AND REMANDED.

DECISION

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 January 25, 2007. The industrial appeals judge affirmed the March 3, 2005 Department order. The only issue in dispute is the wage calculation used as the basis for Mr. Gallardo's time-loss compensation rate. The parties filed cross-motions for summary judgment and the industrial appeals judge granted the Department's motion, affirming the Department's wage calculation under RCW 51.08.178(2).

We incorporate by reference the designation of documents and other evidence relied on, appearing at 11/6/06 Tr. at 3-4. CR 56(h). The facts are undisputed. 11/6/06 Tr. at 17. In the affidavit attached to his motion, Mr. Gallardo described himself as a "season [*sic*] farm worker." He stated as follows: "4. I would work at various ranches throughout the year for varying lengths of time. 5. When I was not able to find work at a ranch I would apply for unemployment benefits. 6. I depended on the unemployment benefits to support myself and my wife during the parts of the year that I could not find any work."

For most injured workers, the monthly wage used to calculate the time-loss compensation rate is determined based on the wages received from all employment at the time of injury. RCW 51.08.178(1). By the terms of the statute, that method applies "unless otherwise provided specifically in the statute concerned." In *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290 (2000), the Supreme Court interpreted that proviso to mean that RCW 51.08.178(1) is the "default provision" and "must be used unless the Department establishes it does not apply."

*2 One exception to the method set forth in RCW 51.08.178(1) applies to seasonal or intermittent workers as defined by RCW 51.08.178(2). Under that subsection, the wage is calculated by averaging "any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." In the current case, the Department concluded that Mr. Gallardo was an intermittent worker and calculated his wages using the averaging method set forth in RCW 51.08.178(2). 11/6/06 Tr. at 21-22; Department's Motion for Summary Judgment, at 2; Department's Response to Claimant's Motion for Summary Judgment, at 1-2. Mr. Gallardo's attorney accepted the applicability of RCW 51.08.178(2), though he considered his client a seasonal worker. 11/6/06 Tr. at 21-22; Worker's Memorandum in Support of Motion for Summary Judgment, at 2-3. However, he argued that the 12-month average under RCW 51.08.178(2) should include the \$4,752 Mr. Gallardo received in unemployment compensation benefits, in addition to the \$6,377.60 he received in wages for the period of July 1, 2002 to June 30, 2003.

The industrial appeals judge took the parties' agreement that RCW 51.08.178(2) applied as his starting point and concluded that the unemployment compensation should not be

included in the 12-month average. However, the threshold question is whether the averaging method set forth in RCW 51.08.178(2) is applicable here. That is a legal determination and the Board is not bound by the parties' stipulations with respect to the applicable law. *Rusan's, Inc. v. State*, 78 Wn.2d 601, 606-607 (1970). We have granted review because we do not believe RCW 51.08.178(2) applies to the facts of this case, particularly in light of the recent Court of Appeals decision in *Watson v. Department of Labor & Indus.*, 133 Wn. App. 903 (2006).

ANALYSIS

RCW 51.08.178(2) provides as follows:

(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.

Was Mr. Gallardo's employment "exclusively seasonal in nature?"

Under RCW 51.08.178(2)(a), the first question is whether Mr. Gallardo's employment was "exclusively seasonal in nature." In his affidavit, Mr. Gallardo described himself as a seasonal worker. However, there is a distinction between the use of that term in everyday parlance and the statutory definition. We are concerned with the latter, not the former. Thus, regardless of how Mr. Gallardo characterized himself, we are required to independently review the facts to determine if his ranch work was "exclusively seasonal in nature" within the meaning of RCW 51.08.178(2)(a).

*3 The Supreme Court defined that term in *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799 (1997), holding that "'seasonal' employment for purposes of RCW 51.08.178 is employment that is dependent on a period of the year that is characterized by a particular activity." Thus, in order for Mr. Gallardo's ranch work to be considered "exclusively seasonal in nature" under RCW 51.08.178(2)(a), it must be entirely dependent on a period of the year that is characterized by a particular activity.

While the record here is sparse, there is no suggestion that the ranch work Mr. Gallardo performed could only be done at certain times of the year. To the contrary, Mr. Gallardo stated that he "would work at various ranches throughout the year for varying lengths of time." Affidavit at 1 (4.) Likewise, his Employment Security records for the period of July 1, 2002 through June 30, 2003, just prior to his September 23, 2003 injury, show he received unemployment compensation for periods interspersed throughout the year—July 20, 2002 through August 17, 2002; October 26, 2002 through December 28, 2002; February 1, 2003

through February 15, 2003; February 22, 2003 through June 7, 2003; and July 19, 2003 through August 9, 2003. The gaps in between these periods of unemployment would have been when he worked. Thus, like the periods of unemployment, the periods when Mr. Gallardo was able to find employment were not associated with any particular season or job that could only be performed at that time of year. Instead, his work spanned the entire year and was apparently dictated by availability, rather than the nature of the work. We, therefore, conclude that like the ranch work in *Double D Hop Ranch*, Mr. Gallardo's ranch work was not "dependent on a period of the year that is characterized by a particular activity." *Double D Hop Ranch*, 133 Wn.2d at 799. As a result, his work was not "exclusively seasonal in nature" within the meaning of RCW 51.08.178(2)(a).

Was Mr. Gallardo's employment or his relation to his employment essentially intermittent?

We turn then to the question of whether Mr. Gallardo's employment or his relation to his employment was essentially intermittent under RCW 51.08.178(2)(b). The Supreme Court addressed that issue in *Avundes*, adopting the Board's analysis, as set forth in *In re John Pino*, Dckt. No. 91 5072 (February 2, 1994). The court summarized the Pino analysis as follows:

[t]he Department must first determine whether the type of employment is "essentially intermittent" within the meaning of the statute. If the type of work is intermittent, subsection (2) applies. If the type of employment itself is not intermittent, the inquiry shifts to whether the worker's *relation* to the work is intermittent. The Department must consider all relevant factors, including the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history.

*4 *Avundes*, 140 Wn.2d at 290.

Was Mr. Gallardo's employment as a ranch worker essentially intermittent?

In *School District No. 401 v. Minturn*, 83 Wn. App. 1, 8 (1996), the Court of Appeals accepted the Department's definition of 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."). In its more recent decision in *Watson v. Department of Labor & Indus.*, 133 Wn. App. 903, 914 (2006) the court characterized the *Minturn* holding as follows: "In *School District No. 401 v. Minturn*, we reasoned that, assuming no off-season job, a school bus driver who worked nine months of every year was "clearly" an intermittent employee." [Citation omitted.]

Mr. Gallardo's employment does not meet the *Minturn* definition of intermittent employment. Unlike the school bus driver in *Minturn*, there were no definite starting and stopping points

for his ranch work. Instead, Mr. Gallardo “worked for various ranches throughout the year for varying lengths of time,” and when he was unable to find work at a ranch he would apply for unemployment compensation. Affidavit at 1 (4) and (5). Thus, Mr. Gallardo's ranch work involved working throughout the year, with different employers, and with gaps between jobs as he looked for new employment. His situation is more akin to that of the pipefitter in *Pino*, who was engaged in serial employments, with various employers. In *Pino*, the Board held that:

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.

Pino, at 10-11.

In *Avundes*, the Board used much the same analysis with respect to the question of whether employment as a general farm laborer was, by its nature, intermittent. The Board found that “work which requires a worker to establish serial employment ‘should be viewed as essentially full-time.’ ... unless rebutted by the Department. ... Here, there was no such rebuttal.” *Avundes*, 140 Wn.2d at 288. The Department did not challenge that finding and the Supreme Court declined to revisit the issue. Likewise, in the current appeal, the facts are undisputed. Mr. Gallardo worked for various ranches throughout the year, with gaps between jobs as he sought new employment. Since ranch work is apparently available year-round and since Mr. Gallardo was always either working or looking for work, we conclude that his employment was not essentially intermittent within the meaning of RCW 51.08.178(2)(b).

Was Mr. Gallardo's relation to his employment essentially intermittent?

*5 We therefore turn to the second prong of the *Avundes* analysis— whether Mr. Gallardo's relation to his employment was essentially intermittent. Under this part of the test, we consider “the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history.” *Avundes*, 140 Wn.2d at 290. We have already determined that the nature of ranch work is not essentially intermittent. With respect to the employment relationship between Mr. Gallardo and Ron Beriner Ranch, the employer at

injury, the record contains no information one way or the other regarding the parties' expectations. What is clear from this record is Mr. Gallardo's intent to be employed as fully as possible. His affidavit indicates that he looked for work throughout the year, and when he was unable to find work, he applied for and received unemployment compensation. That consistent pattern in his work history is supported by his federal income tax returns for the years of 1994 through 2003.¹ They show that he earned wages and also received unemployment compensation during each of those years.

Mr. Gallardo's receipt of unemployment compensation is critical to our analysis in light of the recent decision in *Watson v. Department of Labor & Indus.*, 133 Wn. App. 903 (2006). Robert Watson was a seasonal golf course groundskeeper, who was laid off each winter. The Department did not contest the superior court's finding that groundskeeper work itself was not essentially intermittent, because there were full-time groundskeepers who worked year-round. The sole issue was whether Mr. Watson's relation to his employment was essentially intermittent. The court concluded that it was not, relying largely on his own testimony that he wanted to work full-time and that, when he was not working, he mostly collected unemployment compensation. According to the Court, receipt of those benefits supported an inference that Mr. Watson intended to work full-time, because the payment of unemployment compensation is dependent on the worker being available for and actively seeking employment.

In our recent Decision and Order in *In re Felipe Zamudio*, Dckt. No. 05 18873, 7-8 (August 28, 2006), we described the *Watson* holding as follows:

In *Watson*, the court held, "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.'" ... In [*Watson*], the Court of Appeals noted that during periods Mr. Watson was not employed, he consistently looked for full-time work. His testimony was bolstered by evidence that he collected unemployment compensation during the periods he was between jobs. Because receipt of unemployment compensation benefits depends upon the worker being available for, and actively seeking, full-time work, the Court of Appeals concluded Mr. Watson had established his intent to work full time, despite his inability to secure full-time, year-round work.

*6 The facts in *Zamudio* were distinguishable from the facts in *Watson* because there was no evidence that Mr. Zamudio sought work or received unemployment compensation when he was off work. We, therefore, affirmed the Department's use of the averaging provision to calculate Mr. Zamudio's wages. However, in the current appeal, Mr. Gallardo has provided un rebutted evidence that he was either working or looking for work, and that when he was not working, he was on unemployment compensation. As in *Watson*, the receipt of unemployment compensation supports Mr. Gallardo's intent to be employed full-time. Therefore, Mr. Gallardo's relation to employment was not essentially intermittent. As a

result, the averaging provisions of RCW 51.08.178(2) do not apply. Mr. Gallardo is therefore entitled to summary judgment, reversing the March 3, 2005 Department order.

We turn then to the question of what issues the Department may address on remand. In *Double D Hop Ranch*, the Supreme Court discussed the Board's scope of review and the extent of our authority to direct the Department to take further action in an appeal from an order addressing the wage calculation. In *Double D Hop Ranch*, the order under appeal specifically addressed the question of whether the claimant's work was exclusively seasonal under RCW 51.08.178(2)(a), but did not address the applicability of RCW 51.08.178(2)(b) with respect to intermittent or part-time work. The court, therefore, concluded that the Board had exceeded the scope of review by resolving both issues against the Department, and directing that the wages be calculated pursuant to RCW 51.08.178(1).

In the current appeal, the Department used the averaging method under RCW 51.08.178(2) in its October 13, 2003 order, without specifying whether this was based on subsection (a) or (b). We, therefore, conclude that the applicability of both subsections was properly before us for resolution in this appeal. We have determined that neither subsection applies to the wage calculation. Thus, on remand the Department is precluded from applying any aspect of RCW 51.08.178(2) to this case.

We note, as well, that in the October 13, 2003 order, the Department determined that no health care benefits, tips, bonuses, overtime, or housing/board/fuel should be included in wages; and that Mr. Gallardo's marital status was married, with no children. In his affidavit, Mr. Gallardo agreed with all of those factual determinations. The Department will, therefore, not be required to revisit those questions on remand, nor is RCW 51.08.178(3), with respect to bonuses applicable here.

The only remaining question, then, is whether RCW 51.08.178(1) or (4) applies. While it appears likely that the default method set forth in RCW 51.08.178(1) is applicable here, the Department has not explicitly ruled out RCW 51.08.178(4). On remand, we will therefore leave it to the Department to resolve which of those two subsections applies to the facts of this case.

FINDINGS OF FACT

*7 1. On October 3, 2003, the claimant, Alfredo J. Gallardo, filed an Application for Benefits with the Department of Labor and Industries, alleging that he sustained an injury while in the course of his employment. On October 10, 2003, the Department allowed the claim for an industrial injury that occurred on September 23, 2003, while Mr. Gallardo was working for Ron Beriner Ranch.

On October 13, 2003, the Department set the claimant's wage rate by taking into account

reported income for the twelve-month period from July 1, 2002 to June 30, 2003, in the amount of \$6,377.60, equaling \$531.46 per month; no health care benefits, tips, bonuses, overtime, or housing/board/fuel; and a marital status of married, with no children. The claimant protested that order on November 21, 2003.

On April 12, 2004, the Department ended time-loss benefits as paid through March 15, 2004. On April 19, 2004, the claimant protested that order. On September 13, 2004, the Department affirmed the April 12, 2004 order. Within 60 days of the communication of that order, the claimant filed a protest.

On September 15, 2004, the Department closed the claim with a permanent partial disability award equal to 7 percent of the left leg above the knee joint with short thigh stump (3" or below the tuberosity of ischium). Within 60 days of the communication of that order, the claimant filed a protest.

On March 3, 2005, the Department affirmed the orders dated October 13, 2003, September 13, 2004, and September 15, 2004. On May 2, 2005, the claimant filed an appeal of the March 3, 2005 order with the Board of Industrial Insurance Appeals. On June 1, 2005, the Board granted the appeal and assigned it Docket No. 05 14494.

2. On September 23, 2003, Mr. Gallardo sustained an industrial injury to his left knee, while employed as a ranch worker for Ron Beriner Ranch.

3. Mr. Gallardo's employment as a ranch worker was not dependent on a period of the year that is characterized by a particular activity.

4. Ranch work is available year-round. There were no definite starting and stopping points for Mr. Gallardo's employment as a ranch worker. He worked for various ranches throughout the year, for varying lengths of time, with gaps between jobs as he looked for new employment.

5. Ranch work is not, by its nature, essentially intermittent or part-time. Mr. Gallardo intended to be employed as fully as possible as a ranch worker. He looked for such work throughout the year and, when he was unable to find work, he applied for and received unemployment compensation. His work history from 1994 through 2003 demonstrates this consistent pattern. The payment of unemployment compensation is dependent on the worker being available for and actively seeking employment.

6. Mr. Gallardo was not receiving health care benefits, tips, bonuses, overtime, or housing/board/fuel at the time of his September 23, 2003 injury. His marital status was married, with no children.

*8 7. The affidavits and exhibits submitted by the parties demonstrate that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. Mr. Gallardo is entitled to a decision as a matter of law as contemplated by CR 56.
3. Mr. Gallardo's employment as a ranch worker was not exclusively seasonal in nature within the meaning of RCW 51.08.178(2)(a).
4. Mr. Gallardo's employment as a ranch worker was not essentially part-time or intermittent within the meaning of RCW 51.08.178(2)(b).
5. Mr. Gallardo's relation to employment was not essentially part-time or intermittent within the meaning of RCW 51.08.178(2)(b).
6. The averaging provisions of RCW 51.08.178(2) are inapplicable to the calculation of Mr. Gallardo's monthly wage.
7. Mr. Gallardo is not entitled to the inclusion of health care benefits, tips, bonuses, overtime, or housing/board/fuel in his monthly wage pursuant to RCW 51.08.178(1) and RCW 51.08.178(3).
8. The March 3, 2005 Department order is incorrect and is reversed. The claim is remanded to the Department with directions to issue an order in which it determines that RCW 51.08.178(2) and RCW 51.08.178(3) are inapplicable to the calculation of Mr. Gallardo's wage; that Mr. Gallardo's monthly wages, pursuant to RCW 51.08.178, do not include any health care benefits, tips, bonuses, overtime, or housing/board/fuel; and that his marital status is married, with no children. The Department shall then calculate Mr. Gallardo's monthly wage under RCW 51.08.178(1) or (4), as appropriate; recalculate and pay any additional time-loss compensation owed through March 15, 2004; close the claim with time-loss compensation as paid through that date, and with a permanent partial disability award equal to 7 percent of the left leg above the knee joint with short thigh stump (3" or below the tuberosity of ischium), less prior awards.

It is so **ORDERED**.

Dated this 9th day of April, 2007.

Thomas E. Egan

Chairperson

Frank E. Fennerty, Jr.

Member

Footnotes

1 Mr. Gallardo was unable to find the return for 1999.

2007 WL 2174604 (Wash.Bd.Ind.Ins.App.)

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