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No. 52200-4

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JENNINGS R. GUSTAFSON, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondent.

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERRORS**

Jennings R. Gustafson assigns error to the following rulings made by the Pierce County Superior Court:

1. At the time of injury, Mr. Gustafson's monthly wages from all employment were \$3804.14. Mr. Gustafson was single with no dependent children.

2. Mr. Gustafson's monthly wages from all employment at the time of injury for benefit calculation purposes were \$3,804.14 within the meaning of RCW 51.08.178. Mr. Gustafson was unmarried with no dependent children within the meaning of RCW 51.32.060(1)(g).

3. The June 14, 2017 Decision and Order of the Board is correct and is affirmed.

4. The March 14, 2016 Department Order which affirmed the March 1, 2016 order, that established Mr. Gustafson's gross monthly wages at the time of injury, is correct and is affirmed.

## **II. STATEMENT OF ISSUES**

1. Whether the Department was correct when it set Mr. Gustafson's wages without including his mileage reimbursement as part of his wages?  
(Assignment of Error 1, 2 3 & 4)

2. Whether the Department properly calculated Mr. Gustafson's wage rate in accordance with RCW 51.08.178? (Assignment of Error 1, 2, 3, & 4).

### **III. PROCEDURAL HISTORY**

Jennings R. Gustafson (hereinafter Mr. Gustafson) filed an application for benefits on November 24, 2015 for an industrial injury sustained on that date, while in the course of his employment. On December 18, 2015, the Department issued an order allowing Mr. Gustafson's claim, under claim number BA-15129, and benefits were provided. On, March 01, 2016 the Department issued a wage order setting Mr. Gustafson's gross wages at \$3,803.14 per month. The Department calculated this wage by averaging his hours over a month period to determine how many hours he worked per day and dividing by 22 rather than by multiplying the hours he was contracted to work per day by his hourly rate and multiplying that by 22 as directed by RCW 51.08.178(1). The wage rate consisted of \$2158.00 monthly salary from ABC Legal, \$1259.43 for his second job, \$383.37 for health care benefits, and \$2.34 a month for overtime. This wage did not include Mr. Gustafson's mileage reimbursement which was included in his contract of hire, and for which Mr. Gustafson was compensated on a bi-weekly basis as a part of his monthly wages at ABC Legal.

#### IV. INTRODUCTION AND SUMMARY

The Industrial Insurance Act of the State of Washington (Hereinafter “Act”) was enacted in 1911. The Act essentially did away with the common-law system governing the remedy of workers against employers for injuries received in the course of their employment, “finding that due to modern industrial conditions the remedies were economically unwise and unfair.” RCW 51.04.010. The Act is a compromise between employers and their workers. *Dennis v. Dept. of Labor & Indus.*, 109 Wn.2d 467, 469, 745 P.2d 1295 (1987). In exchange for limited liability, the employer pays on some claims that have no common law liability. *Id.* at 469. And in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it. *Id.*

This case arises out of a workplace injury and thus the Act applies by and through RCW Title 51. The Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment. *Dennis*, 109 Wn.2d at 470; see also RCW 51.12.010; see also *Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 634, 519 P.2d 22 (1974). The Act differs substantially from other administrative laws. It is the product of a compromise between employers and workers through which employers

accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573, 141 P.3d 1 (2006). It is important to note that, “the Act was written to provide sure and certain relief to injured workers.” *Dennis*, 109 Wn.2d at 470. “All doubts are to be resolved in favor of the injured worker.” *Id.*

It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should be read in reference to the whole act. For instance, “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff’d*, 144 Wn.2d 907, 32 P.3d 250 (2001).

In *Cockle v. Department of Labor & Industries* the Court observed the “overarching objective” of Title 51 is to reduce to a minimum “the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Cockle v. Dept. of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001) (quoting RCW 51.12.010) (Emphasis added). “Also, on a practical level, this Court has recognized that the workers’ compensation system should continue “serv[ing] the goal of swift and

certain relief for injured workers.” *Cockle*, 142 Wn.2d at 822, 16 P.3d 583 (quoting) *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Additionally, “where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker.” *Id.* at 811. *See Clauson v. Dept. of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996); *see also McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

## V. STATEMENT OF FACTS

Mr. Jennings R. Gustafson is a 65-year-old male who has worked mainly physical jobs in his adult life. *Testimony of Mr. Gustafson*, (CP 114 L. 12-22 & CP 115 L. 11-15) He had been a process server/legal courier for the 5-7 years prior to his injury. *Testimony of Mr. Gustafson*, (CP. 115 L. 16-17). He started out as a sub-contractor for ABC Legal serving papers and delivering legal documents. *Testimony of Mr. Gustafson*, (CP. 116 L. 7-25 & CP. 117 L. 1-4). Around 2013 Mr. Gustafson began to work for ABC Legal as an employee. *Testimony of Mr. Gustafson*, (CP. 118 L. 2-6).

When he became an employee Mr. Gustafson’s hours were 8AM-5PM Monday through Friday. *Testimony of Mr. Gustafson*, (CP. 118 L. 25, CP 119 L. 1, CP. 132 L. 12-14 & *Testimony of Lana Sheldon*, (CP. 164 L.

19-23). When he started at ABC Legal as an employee he was paid \$12.50/hour and somewhere around \$.40/mile for mileage reimbursement. *Testimony of Mr. Gustafson*, (CP. 119 L. 12-22). Mr. Gustafson was required to use his own car, provide insurance coverage of \$100,000/\$350,000 for his vehicle, and follow certain driving rules. *Testimony of Mr. Gustafson*, (CP. 120 L. 4-16 & CP. 121 L. 1-18).

Mr. Gustafson would come into work at 8AM, take the work out of his bin and sort it, which took about 10-15 minutes, before leaving to start his delivery route at 8:30AM. *Testimony of Mr. Gustafson*, (CP. 132 L. 18-25 & CP. 133 L. 1-20). He would return to the office usually between 1030AM-1100AM, and then do whatever needed to be done such as if something had to be filed with the court before noon, he would sometimes make those deliveries. *Testimony of Mr. Gustafson*, (CP. 133 L. 24-25 & CP. 134 L. 1-7). He would take an hour lunch and then there were different types of deliveries that needed to be made in the afternoon. *Testimony of Mr. Gustafson*, (CP. 134 L. 8-20). Included were “specials” which were deliveries that had to be done by the end of the day. *Testimony of Mr. Gustafson*, (CP. 135 L. 13-18). The specials were organized into areas, such as deliveries going to Puyallup, Fife and Bonney Lake would be grouped together because they were going in the same direction. *Testimony of Mr. Gustafson*, (CP. 135 L. 18-22).

When everyone returned from lunch the drivers would roll dice to get the pick of the route they wanted. *Testimony of Mr. Gustafson*, (CP. 135 L. 23-25 & CP. 136 L. 1). Mr. Gustafson would always choose the routes with the highest number of miles because they would pay the most. *Testimony of Mr. Gustafson*, (CP. 137 L. 6-12). He also felt incentive to complete his “special” as quickly as possible in order to possibly get another delivery if he returned to work early enough. *Testimony of Mr. Gustafson*, (CP. 137 L. 21-25 & CP. 138 1-5). In the 52 weeks prior to Mr. Gustafson’s injury Mr. Gustafson was paid \$43,524.54, of which \$18,129.58 was for mileage reimbursement, which equals 41% of his overall pay. (Exhibit 10 CP 359-368) Mr. Gustafson estimated that driving was 90% of his job at ABC Legal. *Testimony of Mr. Gustafson*, (CP. 157 L. 8-11).

Prior to going to work for ABC Legal Mr. Gustafson averaged about \$30/hour wage. *Testimony of Mr. Gustafson*, (CP. 148 L. 7-13). In the legal courier job Mr. Gustafson had prior to being hired on as an employee he was making more than \$50,000 a year. *Testimony of Mr. Gustafson*, (CP. 148 L. 18-23). Mr. Gustafson never would have taken the job as a courier for only a salary of \$13/hour. *Testimony of Mr. Gustafson*, (CP. 149 L. 1-4). Mr. Gustafson has not worked since November 24, 2015 and his time loss wage is based upon his hourly wage, but not his mileage reimbursement. *Testimony of Mr. Gustafson*, (CP. 158 L. 1-11).

## VI. STANDARD OF REVIEW

When reviewing a decision of the Board, the superior court presumes the correctness of the Board's decision. RCW 51.52.115; *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 200, 378 P.3d 139 (2016). If the superior court decides that the Board "has acted within its power and has correctly construed the law and found the facts," the superior court confirms the Board's decision in its entirety: In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. RCW 51.52.115. When the Board's decision is confirmed, it is unnecessary for the superior court to make its own findings. The superior court can make its own findings or reach a different result only if the judge finds by a preponderance of the evidence that the Board's findings and decision are erroneous. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015).

*Harder Mechanical, Inc. v. Tierney*, 196 Wn.App. 384, 384 P.3d 241, (2016).

In a case of this type, the appellate court examines the record "to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996)), quoted in *Gorre*, 184 Wn.2d at 36. When the superior court concludes the Board's findings and decision are erroneous, the findings we review for substantial evidence are those made by the court. *Watson v. Dep't of Labor & Indus.*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006). But when the superior court confirms the Board's findings and decision, the Board's findings survive and provide the basis for substantial evidence review by the appellate court. Here, because the superior court

confirmed the decision of the Board, our review--like the superior court's--examines the legal and factual sufficiency of the Board's decision.

*Id* at 384.

“The meaning of a statute is a question of law reviewed de novo.” *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002). “The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.* at 9-10. “(A) term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal. *Id* at 11.

“(T)he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context.” *Id.* at 11. “Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.” *Id* at 12.

## VII. LEGAL AUTHORITY AND ARGUMENT

Under Title 51, RCW 51.08.178 is the applicable statute for the computation of monthly wages for time loss payments:

"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:

1. (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.

*RCW 51.08.178.*

**A.) The Department was not correct when it set Mr. Gustafson's wages without including his mileage reimbursement as part of his wages because they were readily identifiable and critical to protecting his basic health and survival.**

In *Cockle* the Supreme Court of Washington set the standard of how to construe the arguably ambiguous statutory language of RCW 51.08.178(1) "other consideration of like nature received from the employer as part of the contract of hire...." RCW 51.08.178(1). In keeping with its previous holding that the calculation of wages was changed to "reflect a worker's actual lost earning capacity," *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1998), the Supreme Court in *Cockle*

held as follows: “We therefore construe the statutory phrase “board, housing, fuel, or other consideration of like nature in RCW 51.08.178 to mean *readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of injury that are critical to protecting workers’ basic health and survival.*” *Cockle* at 822 (emphasis added).

Mr. Gustafson’s reimbursement for mileage was not a fringe benefit. It was a readily identifiable and reasonably calculable in-kind component of his lost earning capacity. He was not merely being reimbursed for fuel, the monthly in-kind payment made up 41% of his annual income. His driving was not incidental to his job, it WAS his job. Therefore, previous rulings that have found that the “fuel” listed in RCW 51.08.178 refers to home heating fuel as opposed to fuel for a vehicle are not relevant to the issue in this case.

The Department witness, Anh Trinh, cited the *Brammer* decision in his testimony as a reason for the Department’s refusal to include Mr. Gustafson’s mileage reimbursement rate in his wages, stating “the *Brammer* decision states that fuel under the RCW refers to home utilities and not transportation fuel.” *Testimony of Anh Trinh*, P. 120 L. 19-22. *In Re: Douglas M. Brammer*, BIIA Feb., 06 10641. Mr. Gustafson’s mileage

reimbursement was not for transportation fuel either. The facts of the *Brammer* case are easily distinguishable from the facts before this Court in Mr. Gustafson's case, and, in fact, support Mr. Gustafson's claims more than the Department's.

Mr. Gustafson was not being reimbursed for his fuel. He was being paid wages for his job as a driver based upon the number of miles that he traveled in order to do that job. The Department caught on the word "fuel" and interpreted everything based on that one word without looking at the underlying facts. Mr. Gustafson's mileage reimbursement was not merely a fringe benefit or "perk" to reimburse him for the gasoline he put in his car. It was an alternative method of wages that many different employers use in order to shape their wages to fit the job.

Property managers often get free rent as partial payment for their duties in managing the property. That is a very real benefit that they would be owed were they to be injured at work and lose that benefit because it is a cost they would have to bear that would affect their monthly income that is directly attributable to the industrial injury. Some people work on commission, and their commissions make up a great amount of their monthly income. When they lose the ability to make those commissions, they are losing that income that they use to pay for their housing and food.

These are all wages; they are merely paid by alternative means that employers use to create incentive for employees to work harder. That does not take them out of the category of wages, or the category of a necessity for basic survival on the part of the worker.

Mr. Brammer was a ranch manager at Happy Hill where he managed the ranch and helped train horses for Happy Hill, but he also kept his own herd as a side business. Mr. Brammer accepted a much lower salary than he had received in a previous job because they provided him with a benefit package that was substantially higher. Happy Hill provided him with a residence on the ranch, for which the employer paid all of the costs of maintaining the residence, including all utilities except for telephone. He was provided with a vehicle he could use for both business and pleasure, for which Happy Hill covered the cost of fuel, insurance, and servicing the vehicle. Another benefit that he had was the ability to breed and sell his own horses there at Happy Hill with minimal out of pocket expenses on the part of Mr. Brammer. *See In Re: Douglas M. Brammer*, BIIA Feb., 06 10641.

In *Brammer* the Board determined that the Department should have included Mr. Brammer's in-kind payments for home maintenance expenses and heating and electricity that the employer had paid to maintain Mr. Brammer's home. It also determined that Mr. Brammer should have the

wages he made through his home business of breeding horses included in his wages. The Board, however, determined that the transportation expenses should not have been included. Although, at first glance it would appear that this decision strengthens the Department's argument, the mileage reimbursement for Mr. Gustafson, however, is much more like the home maintenance expenses than the transportation expenses in *Brammer*.

The reasons that Mr. Brammer's transportation expenses were not the same as Mr. Gustafson's were, first, Mr. Brammer was hired to manage the ranch and the provision of the vehicle to him was, in the words of the Board, "a perk rather than as a means of protecting a worker's basic survival needs" *Brammer* at P6 L. 16. Conversely, Mr. Gustafson's job was driving, it was the sole reason he was hired by ABC Legal and cannot be likened to a "perk."

Second, Mr. Brammer's employer provided the vehicle, the gasoline, the insurance, and the maintenance for a vehicle that he could use on the ranch or for personal use. Conversely, Mr. Gustafson was required to provide his own vehicle, keep it maintained and pay for that maintenance, pay additional insurance as a result of his job, pay for his own gasoline, and drive in such a way at all times so as not to be cited or involved in accidents

at the risk of losing his job. The two agreements are obviously not close to the same thing.

Mr. Gustafson's mileage reimbursement was much more like the Brammer home maintenance expenses in the following ways. First, the Board pointed to the fact that Brammer took a reduced monthly salary of \$2122 per month because the value of his benefit package was substantially higher (in the month of December of 2004 Mr. Brammer's in-kind benefits were valued at \$3000). Mr. Gustafson accepted an hourly rate of less than half of what he had been making previously because his mileage reimbursement would enable him to make up the difference, which is borne out by the fact that the mileage reimbursement was 41% of his income in 2015.

Second, the vehicle Mr. Gustafson used at ABC Legal was also the vehicle that Mr. Gustafson used for his other job as a courier, so the wear and tear on the vehicle had the potential to affect his secondary income as well, increasing its importance to his overall survival. Finally, the *Brammer* decision points to the *Cockle* decision for the test to determine in-kind benefits. "In kind contributions to a worker's monthly income can, however, be included in his wages if they are critical to protecting his or her basic health and survival." *In Re Brammer citing Cockle*. Mr. Gustafson

only gets 60% of the wage rate that is determined by the Department. If 41% of his income is removed prior to applying the 60% reduction, Mr. Gustafson ends up with only 35% of his previous income due to his industrial injury. It seems that the loss of 65% of his pre-injury income qualifies as critical to protecting his basic health and survival.

The Department also cited *Yuchasz* as authority that vehicle fuel is not reimbursable as a wage. *Yuchasz* is also easily distinguishable. Mr. Yuchasz was an electrician that used a company car and was reimbursed for the fuel he used to travel to his various appointments. *See In Re Anthony Yuchasz*, BIIA Dec., 12 10803 (2013). Additionally, *Yuchasz* did not determine whether or not cash reimbursement for transportation costs should be included in the wage calculation as that was not the issue raised before the Board. *Yuchasz* at P. 3 L. 29-31. Division I of the Court of Appeals reached a very narrow decision on the case when it was appealed. The Court held that “the reasonable value of the employer-provided gasoline for the use in the company van is a fringe benefit that is not critical to the basic health and survival of the worker at the time of injury. *Yuchasz v. Dep’t of Labor & Indus.*, 183 Wn.App. 879, 335 P.3d 998 (2014).

However, in the *Yuchasz* decision Division One also cited the Supreme Court’s definition of a benefit critical to basic health and survival

of an injured worker. “In *Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 491-92, 120 P.3d 564 (2005), the Supreme Court reiterated that in order to qualify as a benefit "critical to the 'basic health and survival' of the injured worker at the time of injury," the benefit must be funded by the employer at the time of the injury, immediately available to the injured worker, and necessary to maintain the worker's health or ensure his survival during even temporary periods of disability. *Yuchasz at 890.*

Mr. Gustafson’s “mileage reimbursement” wages meet all of these elements. 1. Mr. Gustafson was receiving this benefit at the time of his injury. 2. It was immediately available to him when he cashed his paycheck. 3. And because it was 41% of his income from that job it was necessary to his survival during even temporary periods of disability for very few people can afford to continue to pay rent or put food on the table when losing 41% of their income, let alone 65% of that income because the Department only pays 60% of the monthly wages. Losing 65% of his income for even a short period of time is likely to be detrimental to an injured worker’s health or survival, especially when he is at his most vulnerable, injured and unable to go out and get more work to increase his income.

**B.) The Department erred when it set Mr. Gustafson’s wage rate based on a monthly salary of \$3804.14 because the Department’s calculation of Mr. Gustafson’s wage rates is contrary to RCW 51.08.178 and caselaw.**

“The primary objective of statutory construction is to carry out the Legislature's intent. The purpose of time-loss compensation is to reflect a worker's lost earning capacity. Therefore, we should construe RCW 51.08.178 in a way that will most likely reflect a worker's lost earning capacity. Yet, we should remain mindful that the Industrial Insurance Act is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker.” *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 947 P.2d 727, (1997)

“[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.”)” *Dept. of Labor and Indus. v. Avundes*, 140 Wn.2d 282, 996 P.2d 593, (2000).

Subsection one of RCW 51.08.178 is the default provision. First the Department must determine if the monthly wages that the worker was receiving at the time of his injury were set by a monthly salary because the

statute sets out the parameters for figuring what a person's monthly wages are only if that person's wages are **not** set by the month.

By the statute, once it is determined that a worker is not a salaried employee, the monthly wage rate then needs to be determined by multiplying the worker's daily wage by a number that is dependent on the number of days the worker was normally employed per week. If a worker is normally employed five days a week then the worker's daily wage is multiplied by 22. The daily wage is to be determined in a fair and reasonable manner. The determination of what constitutes a "fair and reasonable manner" is at issue in this case.

"There is no logical reason why a claimant should be penalized solely because his prior employment was irregular or uncontinuous." *State, Dept. of Labor and Industries v. Avundes*, 140 Wn.2d 282, 996 P.2d 593, (2000). Although the issue in *Avundes* centered around the determination of when subsection 1 of RCW 51.08.178 for fulltime employees versus subsection 2 for intermittent employees should be utilized, the premise is the same. An employee should not be determined to have been less than a full-time employee because he took time off or used the leave that was afforded to him by his employer. RCW 51.08.178(1) states that "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: (e) By twenty-two, if the worker was normally employed five days a week; ...The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed.” RCW 51.08.178. Both Mr. Gustafson and his Supervisor Ms. Sheldon testified that Mr. Gustafson was employed Monday through Friday 8AM-5PM with an hour for lunch. Mr. Gustafson worked an eight-hour day. It is easily identifiable by the work hours he was hired to work. His wages should have been \$13.00 (his hourly wage at the time of his injury) multiplied by 8 hours a day for a daily wage of \$104. Then that wage would be multiplied by 22 days because Mr. Gustafson works five days a week. 22 multiplied by \$104.00 is \$2288.00.

The way the Department has figured the number of hours Mr. Gustafson was “normally employed” has artificially lowered his daily wage. The Department only gave Mr. Gustafson credit for the hours actually worked when averaging his hours for the year prior to his injury rather than including the hours where Mr. Gustafson used his leave or holiday pay to get paid for the hours he was taking off. By this method anyone who ever takes a vacation will show that they didn’t “average” an eight-hour work day. A person who is employed 40 hours a week works 2080 hours in a year. But if that person takes two weeks off, that is 80 hours less for that

year period. If those hours are removed from the total prior to “averaging” it will show that the person only “averaged” 38 hours a week rather than 40 even though that is not an accurate reflection of what that person actually worked on a weekly basis. The Department took out holiday hours and other types of leave, and averaged Mr. Gustafson’s hours over the year period just using hours actually worked. Then they “averaged” holiday hours to figure out how much he made for those over the year and added that amount back in, and did the same for the other leave. This gives a skewed version of Mr. Gustafson’s hours worked.

Additionally, RCW 51.08.178 states that the daily wage shall be “the hourly wage multiplied by the number of hours the worker is normally employed.” The statute does not say, the number of hours the worker normally “works.” It goes on to state that 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.” Averaging the number of hours worked per day is given as an alternative. The Department, however, knew how much Mr. Gustafson was employed per day because the Employer stated that he was hired to work eight hours a day, five days a week. Forty hours a week is Mr. Gustafson’s normal employment. There should only be a need for averaging if an injured worker does not have a normal hourly pattern. He should not

be punished in his Time Loss check because he took time off from work.

The only averaging allowed under Subsection 1 is in the second paragraph and that is only listed as a possible solution to coming up with a fair and reasonable method of determining an injured worker's hours 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.*" RCW 51.08.178(1) (emphasis added).

Under statutory construction "shall" means that the Department "has a duty to," whereas the use of the word "may" indicates discretion. (*Washington State Legislature Office of the Code Reviser-Bill Drafting Guide -Part IV(1)(g)* (2017). By the very definition of the words, the discretion to use averaging to figure out the number of hours normally worked, is still subsumed into the Department's overall duty to determine those hours in a fair and reasonable manner. Therefore, the Department's duty is to determine the hours that Mr. Gustafson was "normally employed" in a fair and reasonable manner, and the Department has the discretion to use averaging of hours to reach that determination, but its final result must still be fair and reasonable. Subtracting the time that Mr. Gustafson took off is not fair and reasonable as the standard under *Double D Hop Ranch* is to try to reflect his lost earning **capacity**.

The *Avundes* decision required the Department to use Subsection 1 of RCW 51.08.178 unless it could show that it did not apply, and only then could it use averaging under Subsection 2 to determine a worker's wage when that worker did not have a traditional 9-5 job. "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. **While making this determination, the Department must be mindful that the default provision is subsection (1); it must be used unless the Department establishes it does not apply.**" *Dept. of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 996 P.2d 593 (2000) (emphasis added).

However, since the *Avundes* decision the, Department has slowly begun to make an end run around the Court by now using its "discretion" to average hours to determine a daily wage. By doing this it often reaches the same result it would have reached had it been allowed to treat construction workers, and others with schedules that are changeable, as intermittent, seasonal workers. Averaging of hours will almost always lead to a lesser result, and almost always affect the worker's wage calculation negatively.

A hypothetical situation will explain the inefficacy. What if Mr. Gustafson took every Friday off for six months because he was taking classes on that day. He had saved ahead of time so that he would be able to

afford to have less pay during that time period only, knowing that when the classes were over he would go back to his regular pay and regular pattern. However, two weeks after completing his classes and returning to working Fridays he gets injured. By the Department's method of calculating his wages, Mr. Gustafson would be penalized for the entire time he was on Time Loss because the Fridays he took off would lower his average hours and he would be paid at the lower rate even though he had only intended to do that for a limited time.

Mr. Gustafson was hired by ABC Legal to work forty hours a week. Eight hours a day was the number of hours he was "normally employed." Averaging Mr. Gustafson's hours is not a "fair and reasonable manner" for determining Mr. Gustafson's daily wage as it will always result in an artificially low number of hours.

#### **VIII. REQUEST FOR ATTORNEYS' FEES AND EXPENSES**

Mr. Gustafson requests attorneys' fees and expenses on this appeal pursuant to RCW 4.84.010, RCW 4.84.030, RCW 51.52.130(1) and RAP 18.1

RCW 4.84.010 states: there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the

action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees; ... (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files; ... (6) Statutory attorney and witness fees”

*RCW* 4.84.010.

*RCW* 4.84.030 states: “In any action in the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements.”

Under Title 51 if the claimant prevails in his appeal he is entitled to attorneys' fees and costs.

(1) If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing

the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

RCW 51.52.130(1)

Rule 18.1 of the Rules of Appellate Procedure provides that if “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP 18.1.

Should he prevail in this appeal, Mr. Gustafson is entitled to attorneys' fees and expenses pursuant to these authorities.

## IX. CONCLUSION

For the reasons stated above, Mr. Gustafson respectfully requests that the Court reverse the trial court's July 3, 2018 order and rule that the Department incorrectly set Mr. Gustafson's wages without including the commission that he received in the form of mileage reimbursement. Additionally, the Department was incorrect in the way it calculated Mr. Gustafson's wages by averaging the hours worked during the year to determine his hourly wage rather than basing his wage on the hours he was scheduled to work per his contract of hire, and reverse and remand for the Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions.

Respectfully submitted this 7<sup>th</sup> day of January, 2019.

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**Superior Court Case Number:** 17-2-09460-4

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