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No. 52200-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNINGS R. GUSTAFSON, Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A.) The decision of the Industrial Appeals Judge is not relevant or permissible in this appeal.

A hearing examiner is merely an employee of the Board. Pursuant to RCW 51.52.104, his proposed decisions and orders are not the decisions and orders of the Board. They do not acquire that dignity until the Board formally adopts them. If, as in this case, a statement of exceptions is filed, the Board is required to review the record and render its own written decision and order which '* * * shall contain findings and conclusions as to each contested issue of fact and law * * *.' RCW 51.52.106. That document is the decision and order of the Board. The hearing examiner's rejected proposal has no standing.

Stratton v. Dep't of Labor & Indus., 1 Wn. App. 77, 459 P.2d 651, (1969).

“The decision of a hearing examiner is not “a material issue Before the court' for which exact findings are required.” *Nash v. Dep't. of Labor & Indus.*, 1 Wn.App. 705, 462 P.2d 988, (1969).

The decision of the Board is the decision under review in this appeal. As stated by Division One of the Court of Appeals above, it is improper to cite to the underlying Industrial Appeals Judge's Proposed Decision and Order as the Department did in its brief (Respondent's Brief P.6) because that decision has no standing. It is only the Board's Decision and Order that is under appeal.

B.) Mr. Gustafson's "mileage reimbursement" was not a "fringe benefit" or a true reimbursement, it was an alternative means of paying wages.

The Department argues that because Mr. Gustafson was not putting mileage on his vehicle while he could not drive due to his industrial injury, he should not get "reimbursed" for mileage. This argument fails for several reasons.

First, Mr. Gustafson was not merely being "reimbursed for mileage." He was being paid for making deliveries. Part of his pay was his hourly wage, and part of his pay was based on the number of miles he drove. He explained in his testimony that he never would have taken the job for so much less than his previous job if he had not been able to make it up in the money he made for making deliveries.

Some workers who sell products get a salary, but they also get commissions for selling. This gives the worker incentive to sell as much as possible to maximize their income. Some workers who assemble products get paid piecemeal. Sometimes they are paid a low hourly rate and then they are paid extra for each piece completed, and sometimes they are only paid piecemeal. They are paid for the number of products they complete, and it gives them incentive to work as quickly as possible because the more pieces they complete, the more money they make. Realtors get a base salary, but they get a sales commission on any house sales they make. In all of these

instances, the additional income is a way to give the worker the incentive to get his/her job done as quickly and efficiently as possible because it benefits the worker to do so.

In Mr. Gustafson's case, he was paid a commission for making deliveries. His deliveries were not incidental to his work, they **were** his work. And as the testimony showed, the couriers rolled the dice to be able to get the choice of routes because the longer the route, the more money the couriers would make. They also had the additional incentive to do their routes efficiently because if they got a short route and they got back quickly they might be able to get another route to get more pay. All the other workers have their pay for commissions and piecemeal work included in their pay, just because Mr. Gustafson's commission is termed a "mileage reimbursement" should not foreclose him from the same benefit.

Second, Mr. Gustafson was not putting mileage on his car because he could not work due to his injury. A piecemeal worker is not making the product for which the worker normally gets paid, but the piecemeal pay is still included in the injured worker's wage rate. A salesman is not selling products when the salesman is injured and unable to work, but the commission earned prior to the injury is still included in the salesman's wage rate. Essentially ANY injured worker that is unable to work is not doing the job they were doing when they were injured while they are on

time loss, but their income at the time of their injuries is included in their wage rates. Therefore, Mr. Gustafson's commission, based upon the miles he normally drove to make deliveries, should also be included in the wage rate.

Third, at forty-one percent of his annual income for the year of his injury the mileage commission cannot be considered a "fringe benefit." Rather, it is much closer to that which "without which the injured worker cannot survive a period of even temporary disability," as the Supreme Court defined the term "consideration of like nature" in RCW 51.08.178(1) in *Cockle v. Dep't of Labor & Indus. Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001).

This is especially because injured workers only get 60% of their monthly wage rate. 60% of 59% of his income from the job at ABC legal leaves him with only 35% of the income he is used to receiving and depends upon. That is 35% of the income that he previously used to pay his rent, buy his food, pay for his car, pay for any medical issues, or any of the other daily costs of living. It is likely that there are not many Americans that could survive even a temporary period of disability if they lost sixty five percent of their income. Perhaps the only reason he was able to survive is because he, like most working-class Americans, was working more than one job at the time of his injury.

Finally, all the case law cited by the Department in support of the proposition that Mr. Gustafson's commission for making deliveries was a simple "mileage reimbursement," is easily distinguishable. The Department cites *Gallo v. Dep't of Labor & Indus.* in which the Supreme Court held that contributions to a retirement program were not "considerations of like nature" because they were not critical to protecting a worker's survival during periods of disability because they were not immediately available to the worker. *See Gallo v. Dep't of Labor & Indus.*, , 155 Wn.2d 470 , 120 P.3d 564 (2005). Retirement savings are for future survival, not immediate survival. But immediate survival *is* at issue in Mr. Gustafson's case, one in which he needed to continue to pay the bills while he was out of work due to his injury. And the mileage commission funds were "immediately available" to Mr. Gustafson because he received them along with his hourly wages in every paycheck.

The Department cites *Yuchasz v. Dep't of Labor & Indus.* in which an electrician was reimbursed for the gasoline he put in the company van. Mr. Yuchasz kept the vehicle at home but was not allowed to use it for personal use, he would drive it to the first appointment of the day and then for the rest of the day to each of his appointments. When Mr. Yuchasz was on light duty he used his own vehicle and the employer reimbursed him for his miles, but the employer no longer paid for his gasoline and he no longer

had the use of the company vehicle. Unlike, Mr. Yuchasz, however, Mr. Gustafson's driving was his job, not incidental to his job. Mr. Gustafson was driving his own vehicle, not a company van. And Mr. Gustafson was paid for his traveling to make deliveries in each paycheck, rather than having the employer just pay for the gas put into his car. Additionally, Mr. Gustafson is arguing that the money he received for "mileage reimbursement" was a commission for the number of trips he took to do the business of his employer which was making legal deliveries, whereas Mr. Yuchasz was arguing that the gas the employer paid for should be included in the term "fuel" in the statutory language "board, housing and fuel" under RCW 51.08.178(1).

In the Board significant decision, the Board stated,

CPSI paid directly for the fuel used by the company vehicle it provided to Mr. Yuchasz rather than having him bear those costs and then reimbursing him. **Thus, the parties' dispute does not center on monetary wages or the question of whether cash reimbursement for transportation costs should be included in the wage calculation.** Rather, the issue is whether the value of transportation fuel is includable in wages as in-kind employer-provided consideration similar to room, board, and health insurance under a Cockle analysis. *In re Anthony Yuchasz*, BIIA Dec., 12 10803 (2013) (Emphasis added).

Division One of the Court of Appeals continued in that vein with a narrow holding that was very specific. "We hold that under Cockle, the **reasonable value of the employer-provided gasoline for 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) (Emphasis added).

The Department also cites *Doty v. South Prairie* in which a volunteer firefighter was injured, and the Supreme Court considered whether a stipend paid to the volunteer firefighters of \$6 per call and \$10 per drill could be considered wages for the purposes of bringing the volunteer firefighters under the auspices of Title 51. The Supreme Court found it did not, and they were volunteers rather than employees.

None of the issues discussed in the *Doty* case have any bearing on the issues in the Gustafson case. There is no dispute that Mr. Gustafson was an employee rather than a volunteer. There is no dispute that Mr. Gustafson’s payment for miles driven in making deliveries was 41% of his income from ABC Legal and was paid in each paycheck, rather than a \$6 or \$10 stipend which was only paid if the volunteer chose to fight a fire or attend a training drill. In fact, the Court gave the firefighters ability to choose to go to fires as one of the reasons it found that Doty was not an employee. “The Town did not provide Doty with remuneration for her volunteer fire fighting services, and she volunteered her services of her own free choice.” *Doty v. Town of South Prairie*, 155 Wn.2d 527, 120 P.3d 941, (2005) Additionally, it was the town that was claiming that the volunteer

stipend was a wage just to get immunity from a civil suit by that firefighter. The holding of the Supreme Court was that Title 51 did not cover non-employee volunteers, and, therefore, the Industrial Insurance Act did not provide the town with immunity for a civil suit. That is not the issue before this Court in the instant case.

C.) The Department erred when it set Mr. Gustafson's wage rate because the Department's calculation of Mr. Gustafson's wage rate did not reflect his lost earning capacity.

“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)

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

the daily wage the worker was receiving at the time of the injury:

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

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

The Supreme Court has been clear that the purpose of time-loss compensation is to reflect the worker's lost earning capacity. The statute is written in such a way that it sets out exactly how that should be determined. First, if a person is salaried and the monthly amount is set, that becomes the basis for the wage rate, plus the reasonable value of other consideration. If the monthly amount is not set, then the Department is to multiply the daily wage by set numbers that are dependent upon the number of days the workers normally worked each week. Each multiplication maximizes the potential amount earned by either reaching an exact number of days a person would have worked in a year or when there is a fraction of a day the result is rounded up.

The statute goes on to say that the daily wage *shall* be the number of hours the worker is *normally employed*. Then it goes on to say that the number of hours a worker is normally employed should be determined in a *fair and reasonable manner*. Then the very last sentence of the statute says that *may* include averaging the number of hours worked a day.

Both Mr. Gustafson and the Employer agreed that Mr. Gustafson's contract of hire was 5 days a week, eight hours a day. Eight hours a day was the number of hours Mr. Gustafson was *normally employed*. By the statutory language, the Department should have multiplied 8 by his hourly

wage to get his daily wage and then multiplied that by 22 because he worked five days a week. Instead, the Department admits that it looked at all of the hours he actually worked and divided by twelve to get an average number of hours worked a month. This does not reflect Mr. Gustafson's earning capacity. His earning capacity is 8 hours a day five days a week.

This method also penalizes hourly wage workers in a way that salaried workers don't get penalized. If a salaried worker takes a day off or a vacation, their wage rate is still based upon the wage they get per month and they are not penalized for taking time off.

The Statute uses the term *normally employed* rather than *normally worked* for a reason. The number of hours a person is normally employed shows their earning capacity. A person is employed for a certain number of hours per day for a certain number of days per week. That does not necessarily mean that the person will work all of those days. By the Department's logic, if a person is scheduled to work every Monday, but they are sick one Monday, then they are no longer "normally employed" one day a week for the week they missed, so does the Department then determine they no longer fall under subsection one and are now intermittent?

Subsection one of RCW 51.08.178 is written in a cascading structure that instructs the Department how to determine a wage rate starting with a set monthly wage that is unquestioned and then explaining in detail how to go about figuring out a fair wage based upon many different employment patterns when the wage is not a monthly salary. Throughout the Department is instructed in what they “shall” do. They shall multiply the daily wage by a specific number, they shall include reasonable value, shall include health care benefits, shall compute the daily wage by multiplying the hourly wage by the number of hours the worker is normally employed, and shall determine the number of hours the worker is normally employed in a fair and reasonable manner. There is only one time where the statute says “may” in subsection one and that is where the Department is told that a fair and reasonable manner “may include averaging the number of hours worked per day.” The Department skipped past all of the mandates that the legislature gave it with the intent of creating a structure that would fairly compensate workers during the time when they were at their most vulnerable, and went right for the part where it could artificially lower an injured workers wage.

Mr. Gustafson submits that the permission to “average the number of hours per day” was not intended to punish injured workers who are paid hourly for staying home sick or taking vacations or even just leaving early when all of the work was complete. It was intended to give the Department

a method of computing a daily wage when a worker didn't have a set number of hours a day, such as a restaurant worker or fast food worker who gets a new schedule every week and never knows for how many hours he/she is going to be scheduled so it is impossible to know the "hours normally employed."

The Department's request of the employer should have been, "Does Mr. Gustafson have a monthly salary?" Then, "how many days per week and how many hours per day is he scheduled?" It should have multiplied his hourly wage of \$13 by 8 and then multiplied that by 22 because that is what the statute says to do. Anything else is contrary to the intent of the legislature and the case law that states that the purpose of time loss is to reflect an injured worker's lost earning capacity.

II. 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 wage rate by averaging the hours worked during the year to determine his daily wage rather than basing his wage on the hours he was

scheduled to work per his contract of hire. Mr. Gustafson respectfully requests the Court 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 5th day of April, 2019.

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SARA M. WOOD, being first duly sworn on oath, deposes and says:
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Email, Fax, Legal Messenger, Certified Mail, or First Class Mail, as
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SUBSCRIBED AND SWORN to before me this 5th day of April, 2019.





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