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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JENNINGS R. GUSTAFSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,  
STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Jennings R. Gustafson's employer reimbursed him for some of his expenses related to his work-related travel, but expense reimbursement is not wages because it is neither payment for employment nor payment for something objectively critical to protecting a worker's basic health and survival. Under the Industrial Insurance Act, the term "wages" includes a worker's hourly wages and the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer. But benefits are only "of like nature" to board, housing, fuel if they are objectively critical to protecting a worker's basic health and survival for even a temporary period of disability. The Department, the Board of Industrial Insurance Appeals, and the superior court properly concluded that the Department should not include mileage reimbursements in the wage calculation and Gustafson fails to show otherwise.

Gustafson also argues that the Department should not have used the average hours he worked for the employer to determine the number of hours that he "normally worked," and should have instead used Gustafson's scheduled hours regardless of whether he actually worked those hours. But the undisputed evidence establishes that the amount Gustafson worked for his employer varied from day to day, so taking the average amount he worked for his employer was a reasonable way to

determine how many hours Gustafson was “normally” employed. The superior court found that the Department properly calculated Gustafson’s work pattern at the time of injury and substantial evidence supports that finding.

The Department properly calculated Gustafson’s wages. This Court should affirm.

## II. ISSUE

1. Under RCW 51.08.178, the term “wages” includes consideration of like nature to board, housing, and heating fuel but does not include fringe benefits not critical to protecting the worker’s basic health and survival during periods of temporary disability. Gustafson’s employer paid him \$.405 for each mile he drove while working for it. Did the Department correctly exclude mileage reimbursement when calculating Gustafson’s monthly wages?
2. Under RCW 51.08.178(1), a worker’s wage is based on the number of hours the worker was “normally employed,” using a “fair and reasonable” method to calculate these hours, which “may include averaging.” The Department averaged the hours Gustafson worked over a 52-week period to determine how many hours he was “normally” employed. Does substantial evidence support the Department’s wage calculation?

## III. STATEMENT OF THE CASE

### A. **Before Gustafson’s Work Injury, His Employer Reimbursed Him for Travel Expenses He Incurred**

In November 2015, Gustafson sustained an injury while working for ABC Legal as a legal courier. AR 158, 224. ABC Legal paid

Gustafson \$13.00 per hour. AR 142, 352. Gustafson's job with ABC Legal was full time, but Gustafson did not always work 8 hours per day. AR 359-69. Gustafson clocked in and clocked out on a computer at ABC Legal's Tacoma office before and after driving the assigned routes each day. AR 168. The office was open Monday through Friday, 8:00 am to 5:00 pm. AR 164.

ABC Legal compensated Gustafson based on the actual hours worked. AR 359-69. Gustafson's supervisor submitted the hours from clocking in on the computer to payroll. AR 168. Gustafson explained that the deliveries available for couriers to perform in the afternoons "really just depended." AR 134. Gustafson and his co-workers rolled dice to see which special route they would run each afternoon. AR 135-36. Whether a special route took the entire afternoon varied based on the destination. AR 137.

ABC Legal has a policy of reimbursing workers for "actual, work-related expenses" incurred by workers, as long as the expenses are reasonable. AR 406. This includes reimbursing workers who use their own vehicles for company business at a specific mileage reimbursement rate. AR 407. ABC Legal did not use mileage reimbursement as a recruiting tool and did not consider it part of wages. AR 206. The Employee Handbook explains that ABC Legal pays only for a straight 8-hour shift

when paying workers for vacation, sick leave, or holidays, with nothing additional for mileage reimbursement. AR 206, 392-94.

ABC Legal paid Gustafson a set rate for mileage reimbursement. AR 204. ABC Legal intended the mileage reimbursement to cover all vehicle-related expenses such as gas, insurance premiums, and vehicle maintenance. AR 206, 407. ABC Legal required Gustafson to insure his car. AR 120. At the start of 2015, the mileage reimbursement rate was 0.415 cents per mile. AR 212. Later in 2015, the mileage reimbursement rate increased to 0.50 cents per mile. AR 212, 352. A worker does not receive any mileage reimbursement if the worker does not drive. AR 170. The mileage reimbursement rate ABC Legal used was lower than the rate recommended by the Internal Revenue Service. AR 217-18. Since ABC Legal's rate was lower than the IRS recommended rate, the IRS would allow ABC Legal couriers to deduct the difference between the rates as a business cost on their federal tax returns. AR 218.

In 2010, ABC Legal switched from paying mileage reimbursement through accounts receivable to paying it through payroll. AR 176-77. The mileage reimbursement did not become taxable income when ABC Legal changed how they paid it. AR 204. On the last day of the pay period, Gustafson would turn in mileage sheets reporting the number of miles he drove. AR 126, 250-350. ABC Legal reimbursed Gustafson for his actual

mileage. AR 150-51. ABC Legal did not report the mileage reimbursement on Gustafson's W-2 for payroll taxes. AR 205; *see* AR 355. ABC Legal did not withhold any payroll taxes from the mileage reimbursement. *See* AR 352. ABC Legal's human resource director testified that the IRS allows employers to reimburse employees for mileage and does not consider the reimbursement taxable income. AR 203, 213-14.

**B. The Department Calculated Gustafson's Monthly Wages to be \$3,803.14**

At the time of injury, Gustafson worked for Pacific Northwest Legal Support, Inc. as a process server in addition to working for ABC Legal. AR 139-40; *see* AR 222. The Department calculated Gustafson's monthly wages based on the wages received from both employments.<sup>1</sup> AR 222. The Department received payroll records from ABC Legal showing how many hours they had paid Gustafson at his hourly rate of \$13 per hour for the year before his work injury. AR 222, 359-368. The Department divided the number of hours recorded by 12 to come to 154.42 hours per month and multiplied the hours by the hourly rate of \$13 to arrive at the daily wage for his employment with ABC Legal. AR 222. The Department included Gustafson's paid time off in the calculation of

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<sup>1</sup> Gustafson has not disputed the Department's wage calculation with regard to his employment by Pacific Legal Support, Inc. AR 28-37, 500.

his monthly wages; rather than including the paid time off in the calculation of his average hours worked, the Department separately averaged Gustafson's earnings based on paid time off. AR 222-23. The Department also included Gustafson's pay for overtime hours worked and the health care benefits paid by ABC Legal in Gustafson's monthly wages, but it did not include the mileage reimbursement. AR 222-23, 484-85. Gustafson testified that he did not continue to pay the same insurance premiums for his car after he stopped working as a courier. AR 156.

**C. The Board and Superior Court Concluded the Department Correctly Excluded Mileage Reimbursement from Gustafson's Wage Calculation**

Gustafson appealed the Department's March 2016 wage order to the Board of Industrial Insurance Appeals. AR 57. The industrial appeals judge affirmed the Department order because travel reimbursement could not be wages and averaging the number of hours worked per day was expressly authorized by statute. AR 49-50.

Gustafson petitioned the three-member Board for review of the judge's decision. AR 28-37. The Board agreed with the judge's decision to affirm the Department order. AR 22. The Board elaborated on why the Department should not include mileage reimbursement in Gustafson's wages. AR 19. The Board highlighted that the payments were tied to Gustafson's actual mileage and were intended by the employer to replace

transportation costs such as gas, repairs, and increased insurance costs. AR 19. The Board also explained that actual records of Gustafson's hours worked based on the employer's time clock were more reliable than his testimony that he worked eight hours per day. AR 20.

Gustafson appealed to superior court. The parties filed hearing briefs and the superior court affirmed the Board's order. AR 543-44.

Gustafson appeals.

#### IV. STANDARD OF REVIEW

In workers' compensation appeals to superior court, the ordinary civil standards of review apply. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). The Administrative Procedure Act standards do not apply. RCW 34.05.030(2)(a), (c); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). This Court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 179-81; RCW 51.52.140. This Court limits its review to examining whether substantial evidence supports the superior court's findings and whether the conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Evidence is substantial if it is of sufficient quantity to persuade a fair-minded person of the truth or correctness of the decision. *Hahn v.*

*Dep't of Ret. Sys.*, 137 Wn. App. 933, 939, 155 P.3d 177 (2007). The appellate court views the evidence and accepts all reasonable inferences in the light most favorable to the prevailing party, here, the Department. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). The appellate court does not reweigh the evidence or rebalance competing testimony. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Gagnon*, 110 Wn. App. at 485.

The court reviews legal conclusions, including when interpreting a statute, de novo. *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 542-43, 379 P.3d 120 (2016). Because courts defer to an agency's interpretation of a law when that agency has specialized expertise in dealing with such issues, courts defer to the Department's interpretation of the Industrial Insurance Act. See *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014); *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

## V. ARGUMENT

The Department properly excluded Gustafson's mileage payments from his wage calculation because those payments merely reimbursed him for work-related expenses and were not objectively critical to protecting his basic health and survival. Gustafson argues that since driving is critical to his job, the Department should include payments for mileage in his

wages. Brief of Appellant (AB) 12. But the fact that driving was a key part of his job does not change the fact that the payments for mileage just reimbursed him for some of his work-related expenses. And since Gustafson does not incur these work-related expenses when he is not working, his time-loss compensation payments should not take those payments into account because he does not incur those expenses in the first place during times that he is disabled.

Gustafson also shows no error in the Department's use of averaging to determine the number of hours that he was normally employed. RCW 51.08.178 authorizes the Department to use a "fair and reasonable" method to calculate a worker's wages, which "may include averaging." The undisputed evidence shows that the number of hours Gustafson worked each day varied from day to day and frequently did not amount to 40 in a workweek. *See* AR 359-68. The Department calculated the number of hours that Gustafson normally worked by averaging his hours worked over a 52-week period. Substantial evidence supports the trial court's finding that the Department properly calculated Gustafson's wages based on the average number of hours he worked during the relevant time.

The superior court properly affirmed the Department's wage order, and Gustafson does not establish otherwise. This Court should affirm.

**A. The Department Properly Excluded Gustafson’s Mileage Reimbursements from the Wage Calculation**

**1. Mileage reimbursement is a fringe benefit that is excluded from a wage calculation under *Cockle***

The Industrial Insurance Act only includes certain payments from an employer to a worker as wages, and mileage reimbursements are not one of the included items. RCW 51.08.178 defines “wages” to include hourly wages, monthly salaries, and certain other, narrowly defined, payments. The statute includes payments for board, housing, heating fuel, health care benefits, and other payments “of like nature” to those items. RCW 51.08.178(1). Gustafson’s mileage reimbursement was excluded from his wages because the reimbursement was not “consideration of like nature” as contemplated by RCW 51.08.178(1). To be of a like nature to board, housing, and heating fuel, the claimed amount must be “critical to protecting the workers’ basic health and survival.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001). Two aspects of this test control here.

First, to be covered, the claimed amount must be necessary during the time when the worker is not working. The *Cockle* Court cited with approval the Court of Appeals’ analysis that “[i]t is not hard to discern why the legislature provided that [food, shelter, and heat] shall count as ‘wages.’ . . . Each is a necessity of life, *without which the injured worker*

*cannot survive a period of even temporary disability.” Cockle, 142 Wn.2d at 822 (citing Cockle v. Dep’t of Labor & Indus., 96 Wn. App. 69, 74, 977 P.2d 668 (1999)) (emphasis added). The Supreme Court concluded that access to health care, like access to food, shelter and heat, was a basic life necessity a worker would need during periods of temporary disability, and that it should therefore be included in a worker’s wage calculation so it is reflected in a worker’s time-loss compensation payments. *Id.* at 822.*

Gustafson’s employer only reimbursed him for the miles he drove while making deliveries for work, and Gustafson will not be making work deliveries when he is disabled from working. When Gustafson was working, he drove personally owned vehicles several thousand miles a year, which led to significant expenses including gasoline, additional maintenance on the vehicles, and depreciation. The employer helped offset those losses by paying him mileage. But when Gustafson is not working for ABC Legal, he does not incur these work-related expenses in the first place, so no economic loss needs to be restored by including the mileage reimbursements in the wage calculation. By contrast, a worker needs food, shelter, warmth, and access to health care whether a worker is working or not. That is why the Department includes an employer’s payments for board, housing, heating fuel, and health care in a wage calculation when

calculating a worker's time-loss payments. *See Cockle*, 142 Wn.2d at 822-23.

Second, the claimed amount must be critical to protecting a worker's basic health and survival. Mileage reimbursements are not objectively critical to protecting a worker's basic health and survival. Being reimbursed for one's use of a vehicle is not a fundamental life necessity in the way that food, housing, warmth, and access to health care are life necessities. For this reason alone, mileage reimbursements are not "like" payments for board, housing, fuel, or health care, so the Department does not include them in a wage calculation. *See Cockle*, 142 Wn.2d at 822-23.

*Gallo v. Department of Labor & Industries*, 155 Wn.2d 470, 492-93, 120 P.3d 564 (2005), emphasizes that only employer payments for things objectively critical to protecting a worker's basic health and survival during periods of disability are included in a worker's wage calculation. *Gallo* concluded that the Department should not include an employer's contributions towards retirement benefits in a worker's wage calculation because those payments are not objectively critical to protecting the worker's basic health and survival. *Id.* at 492-93. The Court explained that, unlike payments for board, housing, fuel, or access to health care, a worker would not need contributions towards retirement

benefits in order to survive a period of temporary disability. *Id.* at 492-93. Therefore, while contributions towards retirement benefits can be a fringe benefit of significant value to a worker, such contributions are not included in the worker's wage calculations. Mileage reimbursements, similarly, had value to Gustafson, but are not critical to protecting his basic health and survival during periods of disability.

Travel expense reimbursement is not part of wages in the same way gasoline reimbursement is not part of wages: neither is critical to a worker's basic health and survival when disabled from working. *Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 882, 335 P.3d 998 (2014). The worker in *Yuchasz* was an electrician who used a company van to carry his equipment and to travel between jobsites. *Id.* His employer reimbursed him for the gasoline he purchased to drive the van. *Id.* The court concluded that these payments for gasoline were not objectively critical to protecting the worker's basic health and survival and rejected the worker's argument that the economic value of the gasoline purchases measured the worker's work-related income. *Id.* at 889-92. The *Yuchasz* Court emphasized that the Department should include only those payments from an employer that are critical to protecting a worker's basic health and survival during periods of disability in a worker's wage calculation. *See id.* at 889-90.

Gustafson, like the worker in *Yuchasz*, was reimbursed for work-related expenses associated with driving, but the reimbursements are not critical to protecting his basic health and survival. Like the worker in *Yuchasz*, Gustafson does not incur these work-related expenses when he is not working, so the payments are not critical to protecting his health and survival during periods of disability. Gustafson argues that his case is different because driving was not merely part of his job, “it WAS his job.” AB 12 (emphasis in original). But the issue under *Yuchasz*, *Gallo*, and *Cockle* is whether the type of payment at issue is critical to protecting the worker’s *basic health and survival*, not whether the payment relates to an essential duty of the worker’s job. Gustafson also argues that his case is different because he had to drive his personally owned vehicle to make deliveries and he therefore incurred expenses beyond the cost of gasoline. AB 15-16. This does not help Gustafson’s argument. While it is true that mileage reimbursements cover costs other than gasoline such as auto insurance, the principle is the same. Both gasoline reimbursement and auto insurance reimbursement reimburse the Gustafson for work-related expenses that he does not incur when not working. Gustafson did not continue paying the same auto insurance premiums once he was disabled from working. AR 156.

The dispositive issue under *Cockle* is whether an employer's payment is objectively critical to protecting the worker's basic health and survival, not whether the payment represents a certain percentage of all payments made by the employer. Gustafson argues that the mileage reimbursements are critical to protecting his basic health and survival because they represent 41 percent of what his employer paid him. AB 12. But no matter what the percentage was, the employer did not make the payment for anything Gustafson needs for his basic health and survival. Furthermore, Gustafson's argument ignores that the employer pays mileage reimbursement to cover the losses that Gustafson and other workers only incur while driving their own vehicles for work purposes. AR 465. So while Gustafson does not receive mileage reimbursements when he is not working, he also does not incur the mileage costs when he is not working. Since Gustafson does not have these costs when he is disabled from working, no loss needs to be restored by including the mileage reimbursements in the wages that are used to calculate his disability payments.<sup>2</sup>

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<sup>2</sup> Contrary to Gustafson's implication, employer-provided housing is not analogous to mileage reimbursement because housing is a necessity of life while mileage reimbursement is not. *See* AB 13-15. First, housing is listed as an employer-provided benefit under RCW 51.08.178(1), while mileage reimbursements are not. Second, a worker needs housing whether the worker is employed or not, because having a place to live is a basic human necessity. Reimbursements for the miles driven while making deliveries for an employer do not cover a basic life necessity, nor does a worker need to

**2. Mileage reimbursements are not wages because they cover the cost of work-related expenses only and are not remuneration for the work performed**

The reimbursements for Gustafson's travel related expenses are not wages. Under *Doty v. South Prairie*, 155 Wn.2d 527, 541-43, 120 P.3d 941 (2005), a payment by an employer to reimburse a worker for work-related expenses is not a "wage" because it covers the cost of work-related expenses only and is not remuneration for work performed. The issue in *Doty* was whether a city was immune from suit by a volunteer firefighter under the theory that the Industrial Insurance Act covered the firefighter. *Id.* at 530. The *Doty* Court concluded that the volunteer firefighter was not a "worker" under the Act because the volunteer did not receive a "wage" from an "employer." *See id.* at 540-545. The City argued that its payment of a stipend to the volunteer was a "wage" and that meant that the volunteer was a worker and that the Industrial Insurance Act provided the exclusive remedy for the volunteer. *See id.* at 541. The *Doty* Court rejected this argument, concluding that the stipends were reimbursement for work-related expenses rather than remuneration for work performed, and the stipends therefore were not wages. *See id.* at 541-42.

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receive mileage reimbursements when the worker is disabled because the worker did not incur those mileage costs when the worker was not actively working.

The *Doty* Court acknowledged that payments by an employer for full health care coverage would qualify as a wage under *Cockle*, but clarified that other reimbursements of expenses that do *not* pass the *Cockle* test are *not* wages. *Doty*, 155 Wn.2d at 543-45. *Doty* concluded that none of the payments the City made to the volunteer passed the *Cockle* test, which meant the payments did not qualify as “wages.” *See id.* at 543-45.

Gustafson’s receipt of mileage reimbursement is not a wage under *Doty* because it is a reimbursement of a work-related expense and does not pass the *Cockle* test because it is not objectively critical to protecting his basic health and survival during periods of disability. *See Doty*, 155 Wn.2d at 541-43; *Cockle*, 142 Wn.2d at 822-23. Gustafson suggests that because driving is a key part of his job, and because the mileage reimbursements amount to a significant percentage of the total payments made by his employer, his wage calculation should include his mileage reimbursements. AB 12. Gustafson’s suggestion fails under *Doty*: regardless of how much driving he does, and regardless of the total dollar amount of the mileage reimbursements he receives, those reimbursements just cover the cost of certain expenses he incurs from working. And while the total dollar amount of the mileage reimbursement over the course of a year is significant, the costs he incurred because of driving many

thousands of miles for his employer were also significant.<sup>3</sup> Since the reimbursements just reimburse him for his work-related expenses, they are not wages under *Doty*. 155 Wn.2d at 541-43.

**B. Substantial Evidence Shows That the Department Properly Calculated the Hours Gustafson Normally Worked Based on the Average Hours Worked**

This Court should affirm the Department’s calculation of the hours Gustafson was normally employed because the Department’s approach follows RCW 51.08.178 and is supported by substantial evidence. When an employer compensates a worker using an hourly wage, the Industrial Insurance Act directs the Department to calculate the wage based on the number of hours that the worker was “normally” employed, which the Department is to do through “a fair and reasonable manner,” which “may include averaging”:

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 . . . . 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*

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<sup>3</sup> ABC Legal reimbursed mileage at a rate lower than the standard mileage rate set by the IRS. Unlike wage payments, which are taxed, Gustafson could claim the difference between the mileage reimbursements from his employer and the standard rate as a loss on his income tax return. This underscores that the mileage reimbursements did not leave Gustafson with a net profit and at most covered a portion of the expenses associated with his work-related driving.

*department in a fair and reasonable manner, which may include averaging the number of hours worked per day.*

RCW 51.08.178(1).<sup>4</sup>

The Department reasonably determined how many hours Gustafson was “normally” employed by using the average number of hours he worked over the course of a 52-week period. Gustafson suggests that the Department must calculate a worker’s wages based on the worker’s scheduled hours, no matter how many hours the worker worked on most occasions. AB 20-21. This suggestion contradicts the plain language of the statute, which calls for calculating a worker’s wages based on the hours the worker was “normally” employed, not the hours the worker was scheduled to work. Gustafson argues that since the statute uses the term “employed” rather than “worked,” it does not matter if he was actually working that many hours. But this is an unreasonable reading of the statute: when the statute uses the term “employed,” it uses the term in the context of a worker who is paid an hourly wage and who is “employed” for a certain number of hours. In that context, the number of hours that the worker is “employed” can only reasonably refer to the number of hours that the worker worked for the employer. And the statute

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<sup>4</sup> The complete text of RCW 51.08.178 is in Appendix A.

specifically contemplates the use of averaging to arrive at the number of hours that a worker was normally employed. RCW 51.08.178(1).

The undisputed evidence establishes that Gustafson did not work all the hours that he was scheduled to work: he worked more than his scheduled hours on rare occasions and fewer than his scheduled hours on other occasions. His employer only paid him for the hours he worked—an objective source of his hours.

Substantial evidence shows the Department calculated his hours in a fair and reasonable way. Gustafson does not argue that the 52-week period that the Department used to calculate his wages was a time period that failed to reflect the number of hours he normally worked for ABC Legal. Nor does he claim that any other period over the course of his employment with ABC Legal would have been a better reflection of his usual work pattern.

The Department took Gustafson's holiday hours and vacation hours into account when calculating his monthly wages with ABC Legal. Gustafson argues that the Department failed to properly take the holiday and vacation hours into account because it separately determined how many holiday and vacation hours he had per month, rather than including the holiday and vacation hours in the calculation of his total hours worked. AB 21-22. Had the Department used the approach Gustafson suggests, the

wage calculation would have been identical, so Gustafson establishes no error.

The Department calculated Gustafson's wages with ABC Legal by taking his total hours worked over a 52-week period (1,853.09), dividing this figure by 12 to arrive at the average hours worked per month (154.42) and multiplying that figure by Gustafson's hourly wage (\$13), which leads to a basic monthly wage from ABC Legal of \$2,007.51. The Department then took Gustafson's total holiday hours over the 52-week period (72), divided this by 12 to determine the monthly average (6), and multiplied it by \$13, for an average monthly holiday pay of \$78. The Department then took Gustafson's total vacation hours over the 52-week period (66), divided this by 12 (5.5) and multiplied that figure by \$13, to arrive at \$71.50. The Department then combined the \$2007.51 in wages with the \$78 in holiday pay and \$71.50 in vacation pay for wages of \$2157.01, which it apparently rounded up to \$2,158.<sup>5</sup>

Had the Department used the approach Gustafson suggests it should have used—treating the vacation and holiday hours as regular work

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<sup>5</sup> The Department's wage order set Gustafson's total monthly wages at \$3,803.14, based on wages with ABC Legal of \$2,158, health care benefits of \$383.37, overtime pay of \$2.34, and wages from a second job of \$1,259.43. AR 54-55. Gustafson does not dispute the Department's calculation of the health care benefits, overtime pay, or the second job's wages.

The record does not explain why the Department rounded Gustafson's wages up from \$2,157.01 to \$2,158.00, but rounding Gustafson's wages up in this fashion operated to his benefit and is not a basis for reversing the wage order.

hours—the monthly wage calculation would have been identical. The Department would have taken the 1,853.09 in regular work hours and added 72 holiday hours and 66 vacation hours to that figure, for a total work-hours figure of 1991.09. It would have then divided 1991.09 by 12 which leads to 165.92 hours per month, multiplied that figure by \$13, and arrived at a monthly wage of \$2,157.01, and if it followed its previous rounding practice, round up to \$2,158. Gustafson’s suggestion that the Department somehow devalued the holiday or vacation time by using the methodology it used lacks factual support.

Gustafson did not work eight hours a day on average even when taking his holiday and vacation time into account. Gustafson appears to suggest that if the Department had included his holiday and vacation hours in the calculation of his total hours worked (rather than separately taking them into account and then adding them to the wage calculation), this would lead to him having the equivalence of full time, eight hour a day employment. *See* AB 21-22. But this is not true. To be identical to a full-time worker, Gustafson would have had to have worked 2080 hours over a 52-week period.<sup>6</sup> As noted above, including Gustafson’s vacation and

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<sup>6</sup> 52 weeks multiplied by 5 workdays per week is 260, and 260 workdays multiplied by 8 hours per day is 2080.

holiday hours takes his total hours worked to 1991.09 total hours, not 2080.

Contrary to Gustafson's argument, *Avundes v. Department of Labor & Industries*, 140 Wn.2d 282, 284, 996 P.3d 593 (2000) is immaterial here because *Avundes* addresses whether the Department should use subsection (1) or (2) of RCW 51.08.178, not how the Department should calculate a worker's wages under subsection (1). AB 20, 24. The Department used subsection (1) here.

Gustafson points to the doctrine of liberal construction to argue that averaging the number of hours worked each day was not a fair manner of determining his normally employed hours. AB 19. But liberal construction only applies when there is a question arising from ambiguity in the Industrial Insurance Act. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). Here, the governing statute unambiguously states that a fair and reasonable manner of determining the number of hours normally employed "may include averaging the number of hours worked per day." RCW 51.08.178(1). This means the Legislature has allowed the Department to average hours worked per day while not requiring it to do so in every case. This leaves nothing to construe.

The superior court properly affirmed the Department's wage order.  
This Court should affirm.

## VI. CONCLUSION

The Board and the superior court correctly upheld the Department's calculation of Gustafson's monthly wages. The Department properly did not include the mileage reimbursement in the wage calculation because it was not objectively critical to protecting Gustafson's basic health and survival. And substantial evidence supports the superior court's finding that the Department properly calculated Gustafson's wages based on the average hours he worked over a 52-week period. This Court should affirm.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of March, 2019.

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## **RCW 51.08.178**

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

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

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

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

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

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

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

NO. 52200-4-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

JENNINGS R. GUSTAFSON,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES, STATE OF  
WASHINGTON,

Respondent.

DECLARATION OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Brief of Respondent and this Declaration of Service in the below described manner:

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Derek M. Byrne  
Clerk/Administrator  
Court of Appeals, Division II

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Tacoma, WA 98401

DATED this 8<sup>th</sup> day of March, 2019, at Tumwater, Washington.



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