

FILED

AUG 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306127

Superior Court No. 11-2-00955-3

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

OSCAR VILLA, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

STATE OF WASHINGTON,

Respondent

BRIEF OF APPELLANT

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WSBA No. 34077
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Attorneys for Appellant

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS	i
II. TABLE OF AUTHORITIES	iii
III. INTRODUCTION.....	1
IV. ASSIGNMENT OF ERROR	1
V. STATEMENT OF THE CASE	2
VI. ARGUMENT	5
A. Standard of review.....	5
B. Disputed Findings and Conclusions	6
C. Statutory Construction.....	8
D. Time Loss Compensation and Wage Calculation.....	10
E. Fair and Reasonable	14
F. Attorney's Fees.....	16
VII. CONCLUSION.....	17

II. TABLE OF AUTHORITIES

Cases

<i>Brand v. Dep't of Labor and Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).	17
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).	10, 11,13,18
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999). 9	
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).	6
<i>Dep't of Ecology v. City of Spokane Valley</i> , 167 Wn. App. 952, 275 P.3d 367 (2012).	8
<i>Malang v. Dep't of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).	6
<i>Mestrovac v. Dep't of Labor & Indus.</i> , 142 Wn. App., 693, 176 P.3d 536 (2008),	10
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570	5
<i>State ex rel. Citizens Against Tolls v. Murphy</i> , 151 Wn.2d 226, 88 P.3d 375 (2004).	8
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).	9
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 368 (2003).	8, 9
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996).	5

Statutes

RCW 51.08..... 11

RCW 51.08.178(1) passim

RCW 51.12.010..... 9, 13, 18

RCW 51.52.130..... 16

RCW 51.52.140..... 5

Rules

RAP 18.1..... 16

III. INTRODUCTION

Oscar Villa sustained an on-the-job back injury and, because he was unable to return to work, received Time Loss Compensation benefits pursuant to the Industrial Industry Act, Title 51 RCW. The Department of Labor and Industries (Department) ultimately closed his claim with a Permanent Total Disability pension based on a 40-hour work week. Mr. Villa appealed that decision to the Board of Industrial Insurance Appeals (Board) contending the statutory wage computation should have been based on the 50-hour work week he was actually working at the time of the industrial injury. The Board upheld the Department order. After a de novo hearing, a Benton County Superior Court judge affirmed the Board decision. In this appeal Mr. Villa maintains his wages were improperly calculated.

IV. ASSIGNMENT OF ERROR

The trial court erred when it upheld the Board's decision to affirm the December 9, 2009 Department order that based Mr. Villa's wages on a 40-hour work week instead of the 50-hour work week he was actually working at the time of his industrial injury.

**ISSUE PERTAINING TO THE ASSIGNMENT OF
ERROR –**

1. Did the Department properly interpret Former RCW 51.08.178(1) (1988)¹ when calculating Mr. Villa's wages as of the date of his industrial injury?

V. STATEMENT OF THE CASE

Mr. Villa began working for Nuprecon Inc. on or about October 14, 2005. (CP 30, 99-100, 113) He was part of an asbestos abatement team. (CP 30, 101) He was a full-time employee, initially hired to work 8 hours per day for 5 days each week. (CP 30, 99-101, 113)

The work crew at Nuprecon held daily morning meetings since the asbestos abatement project carried so much risk. (CP 100, 107-09) Mr. Villa attended these daily meetings. (CP 100)

¹ Mr. Villa's industrial injury occurred in 2005. As a result, the relevant statute in effect at that time was Former RCW 51.08.178 (1988). The statute was amended in 2007, which is after the date of injury. However, the 2007 amendment (which is the current version in effect) merely adds one sentence to section 1. That sentence is not relevant to the issue on appeal. As such, for ease of reference all citations will be to the current statute. (2007 chapter 297, section 1, effective July 22, 2007).

The week of November 12, 2005, the crew was informed the project was so far behind that they would have to work overtime until the project was completed. (CP 8, 30-31, 100-101) Mr. Villa agreed to work the extra hours each week. (CP 100, 113) "Overtime" meant the crew worked an extra 2 hours each day, which equated to five 10-hour days each week. (CP 101-03, 105) Mr. Villa's paycheck reflects he worked the five 10-hour days that week. (CP 113). Had he not been injured it was likely he would have worked 50-hour week until the project was completed. (CP 107).

On November 21, 2005, Mr. Villa was injured on the job-site when he tripped over some propane bottles. (CP 31, 99) He was sent home from work. Unfortunately, his injuries were so severe that he was unable to return to his job with Nuprecon. (CP 102, 105) Mr. Villa continued to receive his regular wages from Nuprecon until May 19, 2006. (CP 98, 102, 107, 113)

The Department began to provide time loss compensation when it determined Mr. Villa was unable to return to work due to his injuries. (CP 103) It eventually determined that he was a permanently and totally disabled worker. (CP 67-68) In an order

dated August 15, 2008, the Department set his pension amount by calculating the number of hours worked *at the time of his industrial injury* (which was 50) multiplied by his rate of pay, which was \$25.56 per hour. (CP 45-46, 69, 113) These monthly payments continued for 16 months until December 9, 2009 at which time the Department decreased its calculation of wages by determining Mr. Villa worked only 40 hours per week at the time of his industrial injury. (CP 50-51, 71)

Mr. Villa timely asked the Department to reconsider its December 9, 2009 order. (CP 48, 61) On February 26, 2010 the Department affirmed the order. (CP 47, 52, 72). Mr. Villa then timely appealed the Department decision to the Board, which was granted. (CP 53-55) Nearly 1 year later, on January 20, 2011, the Board issued a Proposed Decision and Order that affirmed the Department's order which used the 40 hour work week in its pension calculation. (CP 40-44) Mr. Villa's a petition for review, filed on March 4, 2011, was accepted. (CP 129) On March 31, 2011, the Board ultimately issued its Decision and Order, which affirmed the Department's December 9, 2009 order. (CP 7-11)

Mr. Villa filed a timely appeal asking the Benton County Superior Court to review the Board's final decision. (CP 1-2) On January 23, 2012 a hearing was held in the Benton County Superior Court in front of Judge Spanner. (CP 143; RP 1-29) The Board's order was affirmed. (CP 143-46)

VI. ARGUMENT

A. Standard of review

Review at the Court of Appeals is governed by RCW 51.52.140 which provides: "Appeal shall lie from the judgment of the superior court as in other civil cases." Normally, this court's review is limited to examining the record to ascertain whether substantial evidence supports the findings of fact after the superior court's de novo review. It then determines whether the court's conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996).

Here however, the sole issue being appealed involves interpretation and application of a statute, RCW 51.08.178(1). Accordingly, the meaning of the term "normal wages" as applied to Mr. Villa's time loss compensation is a question of law that is

reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Although the Department's interpretation of the Industrial Insurance Act (IIA) is not binding, it is given deference by the appellate court. *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 684, 162 P.3d 450 (2007). (Citations omitted.) However, deference is not appropriate if, like here, the Department's interpretation conflicts with its statutory directive. *Id.*

B. Disputed Findings and Conclusions

The trial court misinterpreted RCW 51.08.178 and as a result, its Finding of Fact #1.2 is improper. It states: "The Board's Findings of Fact One through Five are correct and should be affirmed. The Court adopts the Board's Findings of Fact One through five [sic] as the Court's finding." (CP 144)

Mr. Villa takes no issue with the Board's Findings 1 through 4. (CP 8, 42) However, Finding #5 is an incorrect interpretation of the statute. It states: "As of November 21, 2005, Mr. Villa had not *established a pattern* of normally working additional overtime hours." (CP 9, 42) (Emphasis added.)

Whether or not a pattern was established is immaterial to this analysis. There is no language in the statute that requires that the "hours normally worked" depend on any "pattern" of hours worked in order to make a wage determination. The statute merely requires a fair and reasonable calculation of wages *at the time of injury*. Not only did the Board insert language into the statute that does not belong, it left out a vital clause that requires any wage calculation be accomplished by referring to the wage *at the time of injury*. This will be discussed in more detail below.

Because the trial court's reliance on Board "Finding" # 5 is erroneous, its Conclusions of Law 2.2 and 2.3 do not necessarily flow from it. Conclusion of Law # 2.2 states: "The Board's March 31, 2011 order that adopted the January 20, 2011 Proposed Decision and Order is correct and should be affirmed." Conclusion of Law # 2.3 states: "The February 26, 2010 Department order, which affirmed the December 9, 2009 order, that established Mr. Villa's wage rate, is correct and should be affirmed."

C. Statutory Construction

When interpreting a statute, this court's fundamental objective is to ascertain and carry out the Legislature's intent. That intent comes primarily from an examination of the language of the statute being interpreted. *Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 962, 275 P.3d 367, 372 (2012).

In interpreting any statute one must first consider its plain and ordinary meaning. If the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 368 (2003). Under the plain meaning rule, one must examine the relevant statute as well as related statutes or other legislative purposes in order to determine whether a plain meaning is ascertainable. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004). If the statute still remains susceptible to more than one reasonable meaning, it is ambiguous. Therefore, it is appropriate to look to aids of statutory construction, legislative history and case law. *Id.* It is important to note however, that a statute is not ambiguous merely because two or more interpretations are conceivable. *Spokane Valley, supra.* at 962.

Of all the existing rules of statutory construction, there is none more vital to the outcome of this case than this: “Statutes must be interpreted and construed so that *all* the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, supra (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). A decision maker “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Likewise, one “may not delete language from an unambiguous statute . . .” *J.P.*, supra.

Applying the current facts to these rules of statutory construction leads to the conclusion that the trial court misinterpreted the statute. First of all, the parties will agree that the intent of the statute is to provide fair wages to an injured worker, which is consistent with RCW 51.12.010. Here, the Legislative intent is not hidden, it is found in the plain language of the statute. The parties will also agree that an injured worker’s wages, for the purpose of calculating a PTD pension, is to be done in a fair and reasonable manner considering the worker’s wages at the time of the injury. RCW 51.08.178(1).

Second, the statute is not ambiguous. Additionally, there is no dispute that, pursuant to the statute and *Mestrovac v. Dep't of Labor & Indus.*, 142 Wn. App., 693, 711-12, 176 P.3d 536 (2008), in the calculation of wages, for time loss compensation purposes, overtime *hours* will not be paid as overtime pay. Instead, overtime hours are calculated at the regular hourly wage rate.

Finally, as will be seen below, the trial court added language (“establish a pattern of wages”) to the statute *and* neglected to utilize *all* the language contained in RCW 51.08.178(1). As applied, the term that was not considered (“at the time of injury”) became superfluous, which violates the rules of statutory construction. By both adding language on one hand and ignoring vital language on the other the trial court did not apply the statute in the requisite “fair and reasonable manner.”

D. Time Loss Compensation and Wage Calculation

Time loss compensation rates are determined by reference to the injured worker's wage “at the time of injury.” RCW 51.08.178(1); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 806-07, 16 P.3d 583 (2001). “. . . This court has emphasized that

an injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her actual 'lost earning capacity.'" *Cockle*, at 811. (Citations omitted.) At the time of his industrial injury, it is undisputed Mr. Villa was earning \$25.56 an hour as he worked 50 hours per week.

The term "wage" is not specifically defined in RCW 51.08. However, its meaning becomes clear when reading RCW 51.08.178(1), which states in relevant part:

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...*" RCW 51.08.178(1). (Emphasis added.)

Simply put, both parties agree that Mr. Villa's daily "wage" was the hourly wage he earned multiplied by the number of hours he was "normally" working at the time of his industrial injury. The number of hours normally worked is determined by the Department in a fair and reasonable manner. It is this formula the Department is statutorily required to use in determining time loss compensation for an injured worker.

In its August 15, 2008 order the Department properly used this method in calculating Mr. Villa's time loss compensation. The Department order stated: "The wage for the job of injury is based on \$25.56 per hour, 10 hours per day, 5.00 days per week = \$5,623.20 per month." (Emphasis added.) (CP 45-46)

Because there is no dispute regarding the rate of pay Mr. Villa received at the time of the injury the crux of the controversy here is the number of "normal" hours Mr. Villa was working at the time of injury. As set forth above, Mr. Villa claims it is 50 hours per week. The Department argues 40 hours per week is "fair and reasonable." The Board agreed with the Department declaring that Mr. Villa failed to establish "a *pattern* of normally working additional overtime hours." (Finding of Fact #5. CP 9, 42) (Emphasis added.) In affirming the Board the trial court specifically agreed with that finding. But, that interpretation is erroneous.

A careful reading of the statute reveals that it does not say or even imply that the Department must find and utilize a "pattern" of normal work hours in calculating a wage. Instead, the statute is clear, wages must be calculated *at the time of the industrial injury*. The trial court improperly interpreted the statute.

In 1971, our Legislature codified a principle that had been long recognized by our courts: “This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. It follows that where reasonable minds 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[.]” *Cockle*, 142 Wn.2d at 811. The statute states:

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that 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, with doubts resolved in favor of the worker. RCW 51.12.010.

Because the Act must be liberally construed in favor of Mr. Villa, the number of hours he was working at the time of his industrial injury is the proper basis of the wage calculation for the purpose of determining his pension.

E. Fair and Reasonable

The Department's argument for the 40-hour work week relies solely on the last two sentences found in RCW 51.08.178(1), which state in relevant part:

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. (Emphasis added.)

But, these two sentences cannot be read in isolation – the statute must be read as a whole. A statute must be interpreted utilizing every word “with no portion rendered meaningless or superfluous.” *Id.*

Mr. Villa contends the August 15, 2008 order was proper. RCW 51.08.178(1) requires that the monthly wages the worker was receiving “at the time of injury” form the basis upon which compensation is computed. It is undisputed that at the time of injury Mr. Villa was working 50 hours per week. Not only was he working those hours he *had* to work that many hours if that is what the employer required if he wanted to stay employed. Mr. Villa, as an hourly employee did not have the luxury to choose to work only

40 hours. 50 hours was what was expected of him and what he was doing at the time of his industrial injury.

Nevertheless, the trial court found the December 9, 2009 order, which reduced Mr. Villa's wage calculation from a 50-hour work week to a 40-hour work week was proper. As noted above, heavy reliance is placed on the definition of "normally employed" yet the trial court apparently refused to consider the first sentence of the statute which mandates wage calculations be based on wages from all sources of employment "at the time of injury" This is in direct conflict with the intent of the statute, which is to provide fair wages to injured workers.

Instead of following the plain meaning of the phrase "at the time of injury" the trial court embraced the strained construction that "at the time of injury" means the salary he was earning for the 4 weeks prior to the required 50 hour work necessitated by the needs of the job. This is not a fair or reasonable interpretation of the statute, especially if it is supposed to be interpreted in favor of the injured worker.

The trial court apparently found it is not fair or reasonable to utilize (in its calculation) the hours Mr. Villa *actually* worked at the time of the injury, which was a direct result of a job-related

contingency forced by the slow progress of the asbestos abatement. The trial court was willing to look back in time to create a “pattern” of wages but refused to look at the earned wages “at the time of injury”. This is neither fair nor reasonable especially as Mr. Villa had no choice but to work the hours requested by the employer if he wanted to stay employed.

The fair and reasonable approach is precisely what Mr. Villa is asking this court to consider in its de novo review. Under the plain language of the statute, the Department may not solely look back in time nor may it look past the date of injury in order to determine Mr. Villa's normal rate of pay at the time of injury. There is nothing ambiguous about the phrase “at the time of injury” it just needs to follow the statutory formula in a fair and reasonable manner.

F. Attorney's Fees

If successful in his appeal, Mr. Villa requests that he be awarded attorney fees pursuant to RAP 18.1, RCW 51.52.130² and

² The relevant portion of RCW 51.52.130(1) provides: “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 ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.”

Brand v. Dep't of Labor and Indus., 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain all compensation due on their claim. *Id.* at 667-70.

Mr. Villa has set forth good faith arguments that prove the Board and trial court erred in calculating his wages at the time of his industrial injury. There is no dispute that he is totally and permanently disabled. As a result, he was forced to file this appeal in order to receive a fair and reasonable rate of compensation under his industrial insurance claim. Mr. Villa asks this court to award him the attorney fees he incurred as a result of this appeal.

VII. CONCLUSION

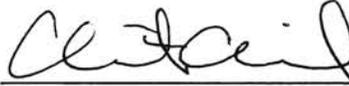
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With these principles in mind and based upon the foregoing argument and legal citation, Mr. Villa respectfully requests this court reverse the trial court order that affirmed the Board's March 31, 2011 Decision and Order regarding wage computation pursuant to RCW 51.08.178(1) and remand the case for recalculation.

Respectfully submitted this 23rd day of August, 2012



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CERTIFICATE OF SERVICE

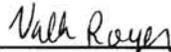
I HEREBY CERTIFY that on the 23rd day of August, 2012, I sent for delivery a true and correct copy of Appellant's Brief by the method indicated below, and addressed to the following:

U.S. Mail (Original and one (1) copy)

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