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NO. 58200-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ENVER MEŠTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES and THE BOARD OF
INDUSTRIAL APPEALS,

Appellants/Cross-Respondents.

MEŠTROVAC AMENDED BRIEF RESPONDING TO
DEPARTMENT'S SUPPLEMENTAL BRIEF

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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RCW 51.08.178

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I. INTRODUCTION

The Department of Labor & Industries [hereafter, Department] makes two major assertions in its supplemental brief.¹ First, the Department asserts that Mr. Meštrovac waived the argument that overtime pay is equivalent to a “bonus” under RCW 51.08.178 and that, even if not waived, the argument has no merit.

Second, the Department asserts Mr. Meštrovac’s first brief should have cited this Court’s 2005 decision (instead of the Supreme Court’s 2007 decision) in *Department of Labor & Industries v. Granger* in arguing that this Court’s opinion in *Eraković v. Department of Labor & Industries*, 132 Wn.App. 762, 134 P.3d 234 (2006) was no longer viable. Further, the Department argues reliance on *Granger* is misplaced.

II. ARGUMENT

A. MR. MEŠTROVAC WAIVED NO ARGUMENT ON OVERTIME PAY.

It is important to point out that any new arguments in this case on overtime pay come from the Department -- not from Mr. Meštrovac. From the start, the Department agreed that a portion of overtime pay should be included when calculating wages.² That is, the Department,

¹ The Department moved for and received leave to file its supplemental brief. Mr. Meštrovac was granted permission to file this brief.

² The Department did not appeal the Board’s or the Superior Court’s inclusion of part of Mr. Meštrovac’s overtime pay in his “wages” under RCW 51.08.178.

Board, and Superior Court included overtime hours, at the regular pay rate rather than including all the overtime pay actually received.³ The Department adopted WAC 296-14-530 which so indicates, stating:

- (1) When the worker's monthly wage is computed under RCW 51.08.178(1), only the overtime hours the worker normally works are taken into consideration.
- (2) When the worker's monthly wage is computed under RCW 51.08.178(2), the overtime pay is included in determining the worker's wages.

Under this Department view of RCW 51.08.178(2), overtime pay is included in determining “wages” only for seasonal, part time and intermittent workers – those workers least likely to receive overtime pay.⁴

It is the Department which has shifted its position on this issue -- not Mr. Meštrovac. In its supplemental brief, the Department argued for the first time that RCW 51.08.178⁵ excludes all Mr. Meštrovac’s overtime pay from his wage calculations.⁶ The Department did not attempt to

³ Nothing in RCW 51.08.178 authorizes the Department to take a “half way” approach; *i.e.* to include overtime hours when calculating wages, but to disregard the actual rate paid or the total pay received for those hours.

⁴ RCW 49.46.130 mandates employers pay time and a half for overtime work, except to seasonal, salaried, agricultural, and some other employees. It is obvious that part time employees [working less than 30 hours per week] do not receive overtime pay.

⁵ See RCW 51.08.178, attached as **Appendix A**.

⁶ The Department’s new position creates differential treatment on temporary disability benefits under RCW 51.08.178 similar to the differential treatment on disability benefits under RCW 51.32.040 which the Supreme Court rejected as unconstitutional in *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 57 P.3d 611 (2002).

reconcile its new position with its previous position that some, not all, of Mr. Meštrovac's overtime pay is appropriately included in wages.

By contrast, Mr. Meštrovac has always argued that all his overtime pay, not merely a portion of it, should be included in calculating his wages under RCW 51.08.178. He argued in the Board proceedings, in the Superior Court, and in his opening brief to this Court that all his pay, regardless of the rate at which paid, constitutes "wages." He has consistently argued it was improper to exclude part of his overtime pay, as the Board did. Only in response to the Department's new position did Mr. Meštrovac propose that his added pay for working overtime is also reasonably included in "wages" as a "bonus."

RCW 51.08.178 provides that an injured worker's compensation is based on "the monthly wages the worker was receiving from all employment at the time of injury." Despite this broad language, the statute also provides that overtime pay is to be included only in cases of seasonal, intermittent or part-time workers. A bonus, however, is always included when calculating "wages."⁷

⁷ Treating hourly wage worker's overtime pay differently than "bonus" pay which is fully included in "wages" under RCW 51.08.178(3) creates yet another favored class of workers – those receiving "bonus" pay rather than "overtime" pay – which classifications bear no rational relationship to the Act's purposes to protect injured workers against economic loss due to industrial injury and to replace their lost earning capacity.

This statute contains no definition for “wages,” “overtime pay,” or “bonus.” Hence, to determine whether Mr. Meštrovac’s additional compensation for working more than 40 hours per week should be excluded as “overtime pay” or included as a “bonus” requires this court to construe the Act. When doing so, the court is required to interpret any ambiguity in favor of the injured worker. *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001). As noted in *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997), the Act “is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker.”

Because our Act is unique, resorting to authority from other jurisdictions is not helpful. *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 604, 158 Pac. 256 (1916); *Thompson v. Lewis County*, 92 Wn.2d 204, 208-209, 595 P.2d 541 (1979). Thus, the Court must look to the Act⁸ and Washington cases for guidance.

In *Kilpatrick v. Department of Labor & Industries*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994), our Supreme Court recognized the goal

⁸ RCW 51.04.010 states unambiguously that “The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker.” While RCW 51.12.010 states “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.”

of the Act is "to insure fair compensation of disabled workers." The *Kilpatrick* Court also said on 230:

The purpose of workers' compensation benefits is to reflect future earning capacity rather than wages earned in past employment.

There can be little doubt Mr. Meštrovac's overtime pay reflected part of his future earning capacity at the time of his injury.

In *Rose v. Department of Labor & Industries*, 57 Wn. App. 751, 757, 758, 790 P.2d 201 (1990), the court noted that "wages" include "any and all forms of consideration received by the employee from the employer in exchange for work performed."

The Supreme Court observed in *Cockle, supra*, 816 fn. 8:

In his treatise, Larson argued, as he did before the United States Supreme Court, that "wages" should include "not only wages and salary but any thing of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee.... 'wages' that the worker lives on and not miscellaneous 'values' that may or may not someday have a value to him or her depending on a number of uncontrollable contingencies . . ." 5 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 93.01[2][a], [b] (2000) (footnotes omitted) (emphasis added).

In *Malang v. Department of Labor & Industries*, Div. II No. 34504-8 (May 22, 2007), the Court stated:

The plain meaning of "wages" is remuneration from the employer in exchange for work performed. *Webster's Third New*

Intern'l Dictionary 2568 (2002); *Black's Law Dictionary* 1610 (8th ed. 1999); *see also Doty*, 155 Wn.2d at 542 ("[W]ages, 'simply stated, refer to the monetary remuneration for services performed."); *Rose*, 57 Wn. App. at 758 ("We construe the term 'wage,' therefore, to include any and all forms of consideration received by the employee from the employer in exchange for work performed.").

Based on the foregoing, it seems plain that the money Mr. Meštrovac received from his employer for working over 40 hours a week falls well within the above definitions of "wages."

Furthermore, Mr. Meštrovac's added compensation for working over 40 hours a week falls within the meaning of "bonus" as that term was defined in the Department's supplemental brief. As noted by the Department, a "bonus" may be defined as:

- i. a form of remuneration for work in addition to stipulated wages to reward for employee performance,
- ii. an incentive to additional effort on behalf of the company; and/or
- iii. a sum paid as an addition to wages because of extra effort.

At the very least, the added pay Mr. Meštrovac received for working more than 40 hours in a week falls squarely within the third "bonus" definition above. Common sense tells us that working more than the usual 40 hours in a week involves "extra effort." Mr. Meštrovac was rewarded for this extra effort by additional pay over and above his usual

pay. This additional pay was calculated at time and a half his normal pay rate, thus increasing his usual wage earned for a 40 hour workweek.

In short, the additional compensation paid to Mr. Meštrovac for working over 40 hours in a week can reasonably be deemed a “bonus” for his extra effort and thus be included in determining his wages. When the remedial purpose of the Act is considered, there is little doubt this additional compensation should be characterized most favorably to Mr. Meštrovac, that is, as a “bonus” and, thus, included in his “wages.”

B. MR. MEŠTROVAC PROPERLY RELIED ON THE SUPREME COURT’S DECISION IN *GRANGER*.

The Department concedes that the Supreme Court’s decision in *Granger*⁹ was not published until after Mr. Meštrovac submitted his opening brief.¹⁰ Even so, the Department argues that opening brief could and should have cited this Court’s own *Granger* decision,¹¹ claiming its opinion was “mirrored” by the Supreme Court.

The Department overlooks the fact that this Court’s decision in *Granger* was originally issued as an unpublished opinion and, thus, was not to be cited. Moreover, inasmuch as the Department had requested and

⁹ *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.2d 839 (2007).

¹⁰ Supreme Court oral argument occurred in *Granger* on November 9, 2006. Mr. Meštrovac’s amended opening brief was filed February 26, 2007. The Supreme Court’s opinion in *Granger* was issued on March 1, 2007.

been granted review by the Supreme Court¹² of this Court's decision in *Granger*, it was entirely reasonable for Mr. Meštrovac to wait for the Supreme Court to issue the final and most authoritative opinion.¹³

As for the substance of the matter, Mr. Meštrovac need not repeat what he has already argued in explaining why the Supreme Court's *Granger* opinion supports his claim. Even so, two points need to be made in response to the assertions in the Department's supplemental brief.

First, the Department asserts that the employer contributions in question in this case do not meet the "benefits of like nature" test established in *Cockle*.¹⁴ There is little doubt, under *Granger*, that contributions to these governmentally mandated health care and subsistence programs are "benefits of a like nature" which should be included when calculating wages, even if the benefits are not being received at the time of the injury. That being the case, it is hard to see how the employer contributions at issue here can properly be excluded.

¹¹ *Department of Labor & Industries v. Granger*, 130 Wn. App. 489, 123 P.3d 858 (2005).

¹² The Supreme Court accepted review in *Granger* on September 7, 2006.

¹³ Curiously, the Department faults Mr. Meštrovac for not citing *Granger* while omitting *Granger* in discussing *Eraković* on pages 45-48 of its reply brief [written by the counsel who appeared for the Department in *Granger*].

¹⁴ "We therefore construe the statutory phrase 'board, housing, fuel, or other consideration of like nature' in RCW 51.08.178(1) 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, supra*, at 822.

These employer contributions fund either subsistence benefits to ensure survival [Social Security Disability, Unemployment Compensation, Industrial Insurance] or health care [Medicare, Medicaid, and Industrial Insurance]. The fact that these programs are critical to protecting worker health and survival is underscored by the fact that the government requires all employers to fund them for the benefit of their workers.

Whether these employer payments are labeled “contributions,” “taxes,” “assessments,” “premiums,” or something else should be of no consequence. The Department’s argument focuses on the label applied to these payments rather than their true nature. This argument, improperly elevating form over substance, should be rejected.

Second, the Department’s suggestion that these government-mandated contributions are not “consideration” for work should be rejected. These employer contributions are made on behalf of workers and are made only because they perform work for the employer.¹⁵ How can it reasonably be said that these contributions are not consideration for work? The fact that these contributions are made involuntarily neither alters their function nor diminishes their importance to the worker.

III. CONCLUSION

The arguments offered by the Department in its supplemental brief are without merit. This Court is respectfully urged to grant the relief Mr. Meštrovac requested in his opening brief.

Respectfully submitted this 16th day of July, 2007.



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¹⁵ The amounts the employer must pay for these worker benefit programs are calculated either as a percentage of the employee's pay or as a multiplier of the number of hours the employee worked.

APPENDIX A

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. 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.

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COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

ENVER MEŠTROVAC,)	
)	58200-3-I
Respondent/Cross Appellant,)	
)	CERTIFICATE OF SERVICE:
v.)	AMENDED BRIEF OF
)	MEŠTROVAC IN RESPONSE
DEPARTMENT OF LABOR)	TO DEPARTMENT'S
AND INDUSTRIES,)	SUPPLEMENTAL BRIEF
)	
Appellant/Cross-Respondent,)	
)	
BOARD OF INDUSTRIAL)	
INSURANCE APPEALS,)	
)	
Respondent/Cross Appellant)	
(Denied Intervenor))	
_____)	

ANN PEARL OWEN declares under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. Today I mailed a copy of the Meštrovac Amended Brief Responding to Department's Supplemental Brief and a copy of this Certificate of Service with proper postage and address affixed to the following counsel:

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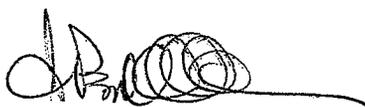
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2. Today I also mailed the original and one copy of the Meštrovac Amended Brief Responding to Department's Supplemental Brief and a copy of this Certificate of Service with proper postage and address affixed to:

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Signed at Seattle, Washington this 16th day of July 2007.

A handwritten signature in black ink, appearing to read 'Ann Pearl Owen', written over a horizontal line.

Ann Pearl Owen, WSBA 9033