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COURT OF APPEALS
DIVISION II

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No. 40516-4-II

STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON ^{BY} Cm
DIVISION II DEPUTY

UNITED PARCEL SERVICE, *Appellant*,

v.

KEITH HUDSON, *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY
HONORABLE RUSSELL HARTMAN

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

Reply Argument On Assignment of Error No. 1

Appellant has argued that the trial court should have granted appellant's motion for summary judgment because no genuine issue of material fact exists and, as a matter of law, respondent fails to qualify under RCW 51.08.178(2). In response, respondent counterargues that he disagrees. [Respondent's Brief at pages 19-29]. In reply, appellant argues that *given a correct statement of the legal criteria*, the parties agree on the same *material* facts on all genuine issues.

A. Respondent had [Exclusively] Seasonal Employment

First, respondent argues that genuine issues of material fact exist that indicated he had "exclusively seasonal employment." [Respondent's Brief at pages 21-24]. Appellant disagrees. Appellant, to fix the nature of respondent's counterargument, must place respondent's argument in a traditional syllogistic format as follows. That argument is enthymematic:

Major Premise [Law]

"Seasonal employment is employment that is dependent on a period of the year that is characterized by a particular activity." *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799, 947 P.2d 727, 730 (1997).

Stated Minor Premise [Facts]

Respondent testified that appellant hired him as a driver during the appellant's peak season from October through December. He testified that appellant told him his employment was part time,

temporary, seasonal work. [CP—CABR--Hudson at page 34, line 7-13].

[Unstated Minor Premise]

Respondent had *exclusively* seasonal employment. Respondent had only one job in 2006--his job with appellant; that is, he had no off season employment in 2006.

Conclusion

Respondent had "[exclusively] seasonal" employment.

Major Premise [Law]

Respondent has misconstrued the applicable legal standard. 1. First, "seasonal employment is employment ... *dependent* on a period of the year ... *characterized by a particular activity.*" *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799, 947 P.2d 727, 730 (1997). In other words, a period of the year is characterized by a *particular* activity, and the worker's employment in that particular activity is therefore *dependent* on that period of the year. That is, seasonal work is work that cannot be performed by *anyone* outside the season characterized by a *particular* activity. So if a worker is hired to perform particular activities for a limited period during the year but those activities can be performed all year, not limited by a particular season, then the employment is not seasonal in nature; it is not *dependent* on a period of the year.

2. Second, a worker does not have *exclusively* seasonal employment if the worker has *off season* employment. Under

respondent's misanalysis, if a worker has a seasonal job when injured, the worker is *ipso facto* a seasonal worker [never mind that the job can be performed by someone year round]. Respondent fails to appreciate that a worker may be a seasonal worker in that narrow sense, but not an *exclusively* seasonal worker because in the context of the worker's overall employment pattern, he/she has off season work. That is, under respondent's analysis, if a worker had serial employment in different seasonal jobs throughout the year, but is injured in one of those seasonal jobs, he/she has [exclusively] "seasonal employment" because the only seasonal job considered in the analysis is the job of injury. But, in fact, under a proper legal analysis, that worker's employment pattern is not *exclusively* seasonal employment as contemplated under RCW 51.08.178(2)(a) because he/she has off season employment or seasonal employment in other activities beyond the activities of the seasonal job of injury, making the worker a normally employed worker under RCW 51.08.178(1).

Minor Premise

There are no genuine issues of material fact. The parties agree on the same *material* facts on all genuine issues. As a matter of *material* fact, respondent was not an *exclusively* seasonal worker for two reasons: 1. First, the *nature* of the employment respondent was performing with

appellant was not *entirely* dependent on the period of the year characterized by the activity respondent performed—delivering packages by truck. *Double D Hop Ranch*, 133 Wn.2d at 799. Appellant had hired respondent as a package deliverer from October through December. There is no dispute about that fact. There is also no dispute that appellant had workers who delivered packages by truck year round. So, as a matter of law, the essential nature of respondent's employment itself—delivering packages—was not seasonal. It could be performed year round (transseasonal), unconstrained by any season such as the holiday season from October through December. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 912-913, 138 P.3d 177, 182 (2006). In *Watson*, the worker was hired as a seasonal greenskeeper, though the employer had full time greenskeepers. The worker was therefore not a seasonal worker.

2. Second, there is no genuine issue of *material* fact that respondent had off season employment in 2006, the year of his injury. In 2006, respondent had full time employment with the U.S. Air Force until July 2006; thereafter, he had intended to find full time employment; he had applied for and was close to being offered full time employment, and, shortly before he was injured, intended to accept such full time employment as an IT Technician with Clearwater Casino. [CP—CABR—Hudson 10/11-14; 47/10-18].

B. & C. Respondent had Essentially Part Time/Intermittent Employment

Second and third, respondent argues that there are genuine issues of material fact that indicated he had “essentially part time/intermittent employment.” [Respondent’s Brief at pages 19-21 (Part Time) & 24-29 (Intermittent)]. Appellant disagrees. Because of the overlap in analysis of [B] essentially part time employment and [C] essentially intermittent employment, respondent’s two arguments will be analyzed together. Respondent argues as follow:

Essentially Part Time Employment

Major Premise [Law]

“Part time employment” is employment “in which an employee is not normally employed a specified number of days per week.”¹ [Respondent’s Brief at page 15]. No citation to any case law was provided.

Minor Premise [Facts]

There is an issue of fact whether respondent’s employment with appellant was “part time” or “full time”. Respondent testified that the appellant told him that the employment was part time. [CP—CABR--Hudson at page 34, lines 7-13]. The appellant testified that respondent was a full time, albeit temporary, employee. [CP—CABR--Crafton at page 6, lines 7-25]. Respondent had “no regular, specified hours.” [Respondent’s Brief at page 19; CP—CABR—Hudson at page 35, line 9 through page 36, line 8].

[Unstated Minor Premise]

Respondent had *essentially* part time employment in that he had only one job in 2006--his job with appellant; that is, he had no off season employment in 2006.

¹ This alleged statement of law is critiqued under Assignment of Error No. 6, *infra*.

Conclusion

Respondent had "[essentially] part time" employment.

Essentially Intermittent Employment

Major Premise [Law]

"Essentially intermittent work" may be full-time, extra-time, or part-time with definite starting and stopping points with recurring time gaps, but it is not regular or continuous in the future. *School District No. 401 v. Minturn*, 83 Wn. App. 1, 6, 920 P.2d 601, 604 (1996).

Minor Premise [Facts]

"Peak season drivers for UPS are *by definition* intermittent, with employment starting in October and lasting till the end of the Christmas season, with recurring gaps during the off peak months." [Respondent's Brief at page 24].

[Unstated Minor Premise]

Respondent had *essentially* intermittent employment in that he had only one job in 2006--his job with appellant; that is, he had no off season employment in 2006.

(1) Type of Work

Respondent was a peak season driver.

(2) Relationship of Employee to Employment

(2.1) Nature of Work

Respondent was "a peak season driver". [Respondent's Brief at page 25].

(2.2) Employee's Intent

Respondent intended to obtain full time employment as a computer technician. [Respondent's Brief at pages 26-27].

(2.3) Employee's Relationship to Current Employer

Respondent was a temporary employee hired to cover the peak season from October through December. [Respondent's Brief at page 27].

(2.4) Employee's Work History

Respondent had worked as a civilian as a computer technician and had then worked for the Air Force as a load master. [Respondent's Brief at pages 27-28].

Conclusion

Respondent had "[essentially] intermittent" employment.

In reply, appellant argues, similarly in Parts B and C, that because no genuine issue of *material* fact exists, and as a matter of law respondent fails to qualify under RCW 51.08.178(2)(b), this issue should not have gone to a jury. More specifically, appellant argues that respondent's counterargument is infirm: He has provided an incorrect major premise and respondent's stated minor premise is insufficient to enable him to derive the conclusion without the addition of the unstated minor premise, which is itself factually untrue.

Major Premise—Part Time

Respondent has misconstrued the applicable law in two respects. 1. First, he fails to address whether his employment with appellant was *essentially* part time in light of the *Avundes*' two-part test. This court has indicated that, when analyzing whether a worker has *essentially* part time employment under RCW 51.08.178(2)(b), it would apply the *Avundes*' two-part test. *Watson*, 133 Wn. App. at 915.

Respondent's major premise fails to state both parts of the *Avundes*' two-part test. He purports to state the definitional criteria for the

first part of the *Avundes*' two-part test as it applies to "essentially part time employment" under RCW 51.08.178(2)(b). He fails altogether to state the second part of the *Avundes*' two-part test.

Moreover, as to respondent's purported statement of the definitional criteria for the first part of the *Avundes*' two-part test, that statement is incorrect. He fails to impart that part time employment may qualify under RCW 51.08.178(1). His statement is deceptively misleading in implying that part time employment can only qualify under RCW 51.08.178(2).

Respondent's major premise is *essentially* as follows: "Part time employment is that in which an employee is not normally employed." In respondent's statement of his major premise, the phrase modifying the phrase "normally employed"—"a specified number of days per week"—is superfluous because it is entailed by the phrase "normally employed." That is, working a "specified" or consistent number of days per week is what defines what it is to be "normally employed."

But the statement, "Part time employment is that in which an employee is not normally employed" is by itself untrue. It is untrue by itself because a worker with normal employment under RCW 51.08.178(1) may be a part time employee. So the jury instruction fails to

distinguish part time employment under RCW 51.08.178(2) from part time employment under RCW 51.08.178(1).

That distinction needs to be announced. Under RCW 51.08.178(1), part time work is working part time regularly or consistently. Under RCW 51.08.178(2), part time work is working part time irregularly or inconsistently. *School District No. 401 v. Minturn*, 83 Wn. App. 1, 6, 920 P.2d 601, 604 (1996).

For instance, a worker working part time under RCW 51.08.178(1) may be employed consistently or regularly three days a week. The days worked need not be the same days each week (for instance always Monday, Wednesday and Friday), as long as the number of days worked (three) is consistent from week to week. Moreover, the worker may not work the same number of hours each of those three days he/she works during the week. That is, 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 over the month. Respondent's major premise fails to convey that distinction.

2. Second, in his major premise, respondent fails to state that a worker does not have *essentially* part time employment if he/she has off season employment. *Minturn*, 83 Wn. App. at 6. In *Minturn*, this court

suggested that a worker who had off season employment did not have “essentially intermittent” employment. For instance, a worker plays professional football in the Fall and Winter; professional basketball in the Winter and Spring and professional baseball in the Spring and Summer does not have essentially part time or exclusively seasonal employment under RCW 51.08.178(2). Essentially part time employment under RCW 51.08.178(2)(b) is essentially intermittent employment under RCW 51.08.178(2)(b). Both would have definite starting and stopping points with recurring time gaps, and would not be anticipated to be regular or continuous in the future.

Major Premise--Intermittent Employment

1. First, respondent fails to address whether his employment with appellant was *essentially* intermittent in light of the *Avundes*’ two part test. *Dep’t of Labor & Indus. v. Avundes*, 140 Wn. 2d 282, 287, 996 P.2d 593, 596 (2000). This court has indicated that when analyzing whether a worker has *essentially* intermittent employment under RCW 51.08.178(2)(b), it would apply the *Avundes*’ two-part test. *Watson*, 133 Wn. App. at 912. Respondent’s major premise fails to state both parts of the *Avundes*’ two-part test. He purports to state the definitional criteria for the first part of the *Avundes*’ two-part test as it applies to “essentially

intermittent employment” under RCW 51.08.178(2)(b). He fails altogether to state the second part of the *Avundes*’ two-part test.

2. Second, in his major premise, respondent fails to state that a worker does not have *essentially* intermittent employment if he/she has off season employment. *Minturn*, 83 Wn. App. at 6. In *Minturn*, this court suggested that a worker who had off season employment did not have “essentially intermittent” employment.

Minor Premise—Intermittent/Part Time

(1) Type of Work

On this issue, there is no genuine issue of *material* fact. There are two points: First, respondent is misinformed in believing that genuine issues of material fact exist because he misunderstand the applicable law that discriminates from the manifold of facts which are material and which are not. Respondent says he was a peak season driver. But the type of the work he performed was not seasonal; it is transseasonal. Respondent’s job was from October through December, but “the type of work” in that job was not limited by any season. Just as the worker in *Watson* was hired to be a greenskeeper in the Spring, the type of work he performed as a greenskeeper was not seasonal because greenskeeping was year round work. *Watson*, 133 Wn. App. at 912-913.

Second, respondent appears to attempt to smuggle in a rule of law into his minor premise when he states, “Peak season drivers for UPS are *by definition* intermittent, with employment starting in October and lasting till the end of the Christmas season, with recurring gaps during the off peak months.” [Respondent’s Brief at page 24]. In short, he is saying that, as a matter of law, a peak season driver--because he is working only from October through December--has intermittent employment. This is akin to saying that a Spring season greenskeeper has, as a matter of law, intermittent employment. But this court has indicated that respondent is in error. *Watson*, 133 Wn. App. at 912-913.

(2) Relationship of Employee to Employment

Given that respondent’s work was not inherently essentially part time/intermittent, respondent must prove that under part two of the Avundes’ two-part test, he qualifies as having *essentially* part time/intermittent employment. *Avundes*, 140 Wn. 2d at 287.

(2.1) Nature of Work

On this issue, there is no genuine issue of *material* fact. Respondent says he was a peak season driver. But, as discussed above, the *nature of the work* he performed was not seasonal. It was year round work. *Watson*, 133 Wn. App. at 912-913.

(2.2) Employee's Intent

On this issue, there is no genuine issue of *material* fact. Respondent testified that he intended to obtain, and actively sought, full time employment as a computer technician. In *Watson*, the pivotal reason why he was not characterized as an intermittent worker was that he intended to work throughout the year. In this case, the evidence of respondent's intent is stronger because he had worked full time in the U.S. Air Force until July 2006 and had thereafter that same year sought full time work as an IT Technician with Clearwater Casino. [CP—CABR—Hudson 10/11-14; 47/10-18].

(2.3) Employee's Relationship to Current Employer

On this issue, there is no genuine issue of *material* fact. Respondent says he was a temporary employee hired to cover the peak season from October through December. In *Watson*, the employer itself had characterized Watson as an intermittent worker. But that characterization did not result in Watson having part time/intermittent employment. Being a "temporary" worker is by itself insufficient to result in the worker having *essentially* part time/intermittent employment.

(2.4) Employee's Work History

On this issue, there is no genuine issue of *material* fact. The parties agree that respondent had worked as a civilian as a computer

technician and had then worked for the U.S. Air Force as a load master. These agreed facts strengthen the basis for the conclusion that respondent was not an essentially part time/intermittent worker. Unlike in *Watson*, where Watson had an employment history of only seasonal work, respondent has a work history of essentially full time employment. Moreover, that Watson was looking for full time employment was sufficient to cause the court to conclude that he was not a part time/intermittent worker. The court should apply the same analysis to respondent.

Reply Argument On Assignment of Error No. 2

Appellant had argued that the trial court erred in giving Jury Instructions No. 12 on Exclusively Seasonal Employment and No. 14 on Intermittent Employment and in failing to give in their stead appellant's Proposed Jury Instructions Nos. 12-17.

A. Seasonal Employment

Appellant had two arguments why Jury Instruction No. 12 was incomplete and therefore inaccurate. 1. First, appellant had argued that the trial court erred in failing to instruct the jury to apply the *Avundes*' two-part test to assess whether respondent had "exclusively seasonal employment." [Appellant's Opening Brief at page 33]. In response, respondent offered two counterarguments: First, the Washington Supreme

Court has never applied the *Avundes*' analysis to RCW 51.08.178(2)(a). [Respondent's Brief at page 29-30]. In reply to this counterargument, appellant argues that that the Court has yet to apply the *Avundes*' analysis to RCW 51.08.178(2)(a) is no reason why it will not apply that analysis to RCW 51.08.178(2)(a) in the future. In short, respondent has begged the issue.

Second, as respondent argues, the language of RCW 51.08.178(2)(a) differs from that of RCW 51.08.178(2)(b). [Respondent's Brief at pages 30-31]. In reply to this counterargument, appellant argues again respondent has begged the issue. Appellant grants that the language of RCW 51.08.178(2)(a) differs from that of RCW 51.08.178(2)(b). But appellant then asks, "Is that difference legally significant in assessing the reasons for using the two-part test?" In short, a difference in language does not entail a difference in legal significance.

Appellant contends that the difference in language does not warrant a difference in legal effect. The Washington Supreme Court appears to consider the difference in language to be legally insignificant.

In *Avundes*, the Washington Supreme Court provided:

To resolve the question of which subsection applies, the Court of Appeals adopted a two-part analysis which had previously been developed by the BIIA to determine whether subsection (1) or subsection (2) applies. . . . We adopt the BIIA two-part analysis and apply it here.

Avundes, 140 Wn.2d at 287.

In *Avundes*, if the jury had been instructed on the basis of the Jury Instruction No. 12, it would have isolated on *Avundes*' employment at the time of injury—the seasonal job of cutting asparagus--and found him an “exclusively seasonal worker,” even though in the context of *Avundes*' employment pattern, he was a full time worker, having worked 19 different jobs in the preceding 14 months before his accident.

The Supreme Court adopted the two-part test because that test would require the jury to focus on the worker's “employment pattern” in order to assess the worker's “lost earning capacity,” not just on the worker's job at the time of injury.

In the case at bar, the trial court, in giving Jury Instruction No. 12, appears to have intended that the jury isolate its focus on respondent's job of injury in assessing whether he was an exclusively seasonal worker and disregard his employment pattern. As a matter of law, that pattern would clearly show respondent to have other than *exclusively* seasonal employment.

2. Appellant had argued that the trial court erred in failing to instruct the jury that employment is not “exclusively seasonal” if the worker had off season employment based on the authority of *School Dist.*

No. 401 v. Minturn, 83 Wn. App. 1, 920 P.2d 601 (1996). In response, respondent counterargues that *Minturn* is not a seasonal employment case but an intermittent employment case. That is, by implication, the holding in *Minturn* does not dictate whether a worker has exclusively seasonal employment. [Respondent's Brief at page 32].

In reply, appellant argues that seasonal employment is essentially intermittent employment and that, if it is legally not, although *Minturn* is not a seasonal employment case, it provides the correct way to analyze whether or not a worker has *exclusively* seasonal employment. The holding in *Minturn* abjures an analysis that isolates the jury's focus on the worker's job of injury, deflecting focus from the worker's employment pattern and lost earning capacity. That is, the criteria provided by the court in Jury Instruction No. 12 state a necessary condition for an employee having seasonal employment, but they do not provide sufficient criteria for an employee having *exclusively* seasonal employment. For example, if a worker had a seasonal job, but had off season employment, he/she would not have seasonal employment but not "*exclusively* seasonal employment."

This court contemplates that a seasonal farm worker, for example, with duties only during certain months who receives pay only for those months has intermittent employment, assuming no off season job.

Minturn, 83 Wn. App. at 6. In 2006, in *Avundes*, the Supreme Court sanctioned the use of this two-part test to determine whether subsection (1) or (2) applies. *Avundes*, 140 Wn.2d at 287. Under that two-part test, the analytical focus is on the worker's lost earning capacity, not on the worker's job of injury.

If respondent's employment with appellant was seasonal, then that employment was not *exclusively* seasonal employment because respondent had full time off season employment with the U.S. Air Force until July 2006; thereafter, he had intended to find and was actively seeking full time employment; and, shortly before he was injured, he was near to having accepted full time employment as an IT Technician with Clearwater Casino. [CP—CABR—Hudson 10/11-14; 47/10-18]. The only reason a jury could have concluded that respondent was other than a normally employed worker was because it was misled by the seriously misleading Jury Instruction No. 12.

B. Intermittent Employment

Appellant had argued that the trial court erred in giving Jury Instruction No. 14 and in failing to instruct the jury that employment is not "essentially intermittent" if the worker had off season employment. In response, respondent offers no counterargument. [Respondent's Brief at pages 29-32]. Apparently, respondent concedes appellant's point. Earlier,

respondent had correctly conceded that *Minturn* is an intermittent employment case. [Respondent's Brief at page 32]. In *Minturn*, this court held that a worker who had off season employment did not have "essentially intermittent" employment.

In the case at bar, the trial court erred when it failed to instruct the jury an employee who had off season employment could not have "essentially intermittent" employment. Respondent had off season employment in that he had off season full time employment with the U.S. Air Force until July 2006; thereafter, he had intended to and was actively seeking full time employment; and, shortly before he was injured, nearly had accepted such employment as an IT Technician with Clearwater Casino. [CP—CABR—Hudson 10/11-14; 47/10-18].

On the basis of this incomplete and therefore misleading Jury Instruction No. 14, if respondent had off season employment the jury would have still found him to have "essentially intermittent employment." That was an error. Appellant was thereby harmed.

Reply Argument On Assignment of Error No. 3

Appellant had argued that the trial court erred in failing to give appellant's Proposed Jury Instruction No. 18 and submit to the jury appellant's Proposed Verdict Form on the issue of which 12 consecutive months preceding injury fairly represents respondent's employment

pattern. In response, respondent offered three distinct counterarguments:

1. First, the question was not before the jury because the BIIA did not decide which 12 successive calendar months preceding the injury fairly represents the respondent's employment pattern. [Respondent's Brief at page 33]. In reply, appellant argues that respondent has begged the issue. Granted that the BIIA reversed the Department, finding that RCW 51.08.178(1) applied and not RCW 51.08.178(2). Granted that because of its ruling on that predicate issue, the BIIA did not have reason or need to determine then whether or not year 2004 fairly represented respondent's employment pattern.

Granted all that, then what? Because appellant had appealed to the BIIA the Department's finding that 2004 fairly represented respondent's employment pattern, once the jury found that RCW 51.08.178(2) should apply, that issue of which 12 month period was appropriate became ripe for resolution. That issue should not have been swept under the rug *merely* because the appellant had earlier prevailed at the Board that RCW 51.08.178(1), not RCW 51.08.178(2), applied. The trial court should have instructed the jury that, if it determined that RCW 51.08.178(2) applied, it was then obligated to determine what 12 consecutive month period fairly represented respondent's employment pattern. In failing to do so, it erred. That error harmed appellant.

2. Second, as respondent argues in closing argument, the appellant argued its alternative theory, and so it was unharmed. [Respondent's Brief at page 33]. In reply, appellant argues that being able to argue a point in closing argument is no substitute for a jury instruction on the law on that point. The trial court's Jury Instruction No. 1 basically eviscerates the force of any such closing argument when it is unaccompanied by a corresponding jury instruction on the law.

"As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained to you."

What this jury instruction informs the jury is that if appellant suggests a rule of law to you about which I have not instructed you, disregard that argument. For this reason, appellant maintains that argument is no adequate substitute for a jury instruction.

3. Third, as respondent argues, because the Department, on remand, decided to use the 12 month period immediately preceding the date of injury, the appellant suffered no harm. [Respondent's Brief at page 33]. In reply, appellant argues that this third argument should be disregarded because, assuming what respondent says is true, what the

Department did or did not do on remand is not part of the record before this court.

Reply Argument On Assignment of Error No. 4

In reply, appellant will rest on its opening argument.

Reply Argument On Assignment of Error No. 5

In reply, appellant will rest on its opening argument.

Reply Argument On Assignment of Error No. 6

Appellant had argued that the trial court erred in giving Jury Instruction No. 13 rather than appellant's Proposed Jury Instruction No. 17 because Proposed Jury Instruction No. 17 is a more complete and accurate statement of the law. In response, respondent counterargues that Jury Instruction No. 13 is "a logical explanation of the implementation of RCW 51.08.178." [Respondent's Brief at page 36].

In reply, appellant argues that Jury Instruction No. 13 illogically explains RCW 51.08.178. It is incomplete and extremely misleading. This jury instruction basically says, "part time employment is that in which an employee is not normally employed." The phrase modifying the phrase "normally employed"--a specified number of days per week—is superfluous because it is entailed by the phrase "normally employed." That is, working a specified or consistent number of days per week is what defines what it is to be "normally employed."

But the statement, “part time employment is that in which an employee is not normally employed” is by itself untrue. It is untrue by itself because a worker with normal employment under RCW 51.08.178(1) also may have part time employment. So the jury instruction fails to distinguish part time employment under RCW 51.08.178(2) from part time employment under RCW 51.08.178(1). Unlike the trial court’s Jury Instruction No. 13, appellant’s Proposed Jury Instruction No. 17 identifies that distinction.

Reply Argument On Assignment of Error No. 7

Appellant had argued that the trial court erred in failing to give appellant’s Proposed Jury Instruction No. 14. In response, respondent has offered two distinct counterarguments why the trial court did not err in failing to give that jury instruction.

1. First, proposed Jury Instruction No. 14 would confuse the jury because “normal employment” is not coterminous with “normally employed.” [Respondent’s Brief at pages 36-37]. In reply, appellant argues that respondent’s response is trivial. It is equivalent to arguing that the statement, “he is normal” is not coterminous or does not have the same intension as the statement, “he behaves normally.” It is an argument of trivial semantics--a semantic difference without a substantive legal distinction.

2. Second, as respondent argues, Proposed Jury Instruction No. 14 is an incorrect statement of law. [Respondent's Brief at page 37]. In reply, appellant argues that Proposed Jury Instruction No. 14 is a correct statement of law. As this Court has remarked, "by necessary implication, subsection (1) [of RCW 51.08.178] applies to cases in which the worker was engaged in non-intermittent (i.e., reasonably continuous) employment at the time of injury." *Minturn*, 83 Wn. App. at 5; *Double D Hop Ranch*, 133 Wn.2d at 799-800. This language taken from *Minturn* tracks the appellant's Proposed Jury Instruction.

Moreover, it is mightily misleading for the trial court to have provided the jury with instructions--such as jury instruction numbers 11 and 13 on what are the methods of computing monthly wages and what is part time employment, respectively--using the term of art "normally employed" without also providing the jury with a definition of "normally employed."

II. CONCLUSION

For the preceding reasons, this court should reverse the rulings of the trial court, vacate the judgment entered in favor of respondent and enter judgment in favor of appellant.

Respectfully submitted this 21st day of September 2010.

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COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

DIVISION II

BY _____
DEPUTY

UNITED PARCEL SERVICE, INC.,

Appellant,

v.

KEITH HUDSON,

Respondent.

COURT OF APPEALS No. 40516-4-II

**DECLARATION OF SERVICE OF
APPELLANT'S REPLY BRIEF**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the REPLY BRIEF OF APPELLANT to be served on the following:

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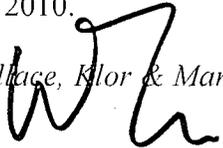
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SIGNED This 21st day of September 2010.

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