

NO. 40516-4-II

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

KEITH HUDSON and DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents,

v.

UNITED PARCEL SERVICE,

Appellant.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT M. MCKENNA
Attorney General

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

BY *S*
DATE

STATE OF WASHINGTON

1999 JUN 11 11:17

FILED
DEPARTMENT OF LABOR AND INDUSTRIES
JUN 11 1999

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....3

III. STATEMENT OF THE CASE4

 A. Prior Work History4

 B. UPS5

 C. Post-UPS Employment7

 D. Procedural Background.....7

IV. STANDARD OF REVIEW.....8

 A. The Standard Governing Superior Court Review of the Board’s Decision.....8

 B. Standard for this Court to Review the Jury’s Verdict.....9

 C. Standard to Review Jury Instructions10

V. ARGUMENT11

 A. RCW 51.08.178(1) is the Default Provision to Determine Time Loss.....11

 B. Substantial Evidence Does Not Support the Jury’s Verdict that Mr. Hudson’s Employment Was Exclusively Seasonal13

 C. Substantial Evidence Does Not Support the Jury’s Verdict That Mr. Hudson’s Employment Was Essentially Intermittent or Essentially Part-Time.....15

 1. *Avundes* Test.....15

 2. Mr. Hudson’s work was not intermittent.....17

| | | |
|-----|--|----|
| 3. | Mr. Hudson’s work was not essentially part-time..... | 21 |
| D. | The Failure to Instruct on the <i>Avundes</i> Test for Part-Time Employment Was Prejudicial Error | 24 |
| E. | The Trial Court Erred Regarding Instructions No. 11, 12, 13 and Defendant’s Instructions 12, 14, 17, 18 and Special Verdict Form | 28 |
| 1. | The trial court erred by failing to instruct the jury that exclusively seasonal employment assumes no off season employment (Instruction No. 12)..... | 28 |
| 2. | The trial court erred by not instructing the jury to determine which 12 months fairly represented Mr. Hudson’s employment pattern (Defendant’s Instruction No. 18 and Special Verdict Form) | 29 |
| 3. | The trial court properly instructed the jury regarding the burden of proof (Defendant’s Instruction No. 8)..... | 31 |
| 4. | The trial court erred by not instructing the jury that method 1 was the default method to use (Court’s Instruction No. 11/ Defendant’s Instruction No. 12)..... | 31 |
| 5. | The trial court erred by not instructing the jury accurately regarding the definition of part-time (Instruction No. 13/Defendant’s Instruction 17) | 33 |
| 6. | The trial court erred by not defining normal employment (Defendant’s Instruction No. 14)..... | 34 |
| VI. | CONCLUSION | 36 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----------------|
| <i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986)..... | 10 |
| <i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994)..... | 10 |
| <i>Dep't of Labor & Indus. v. Avundes</i> , 140 Wn.2d 282, 996 P.2d 593 (2000)..... | passim |
| <i>Dep't of Labor & Indus. v. Avundes</i> , 95 Wn. App. 265, 976 P.2d 637 (1999), <i>aff'd</i> 140 Wn.2d 282 (2000) | 26 |
| <i>Double D Hop Ranch v. Sanchez</i> , 133 Wn.2d 793, 947 P.2d 727 (1997)..... | 13, 14, 15, 35 |
| <i>In re Pino</i> , Dckt. Nos. 91 5072 & 92 5878, 1994 WL 144956..... | passim |
| <i>Johnson v. Rothstein</i> , 52 Wn. App. 303, 759 P.2d 471 (1988)..... | 9 |
| <i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)..... | 10, 27, 32 |
| <i>McClelland v. ITT Rayonier, Inc.</i> , 65 Wn. App. 386, 828 P.2d 1138 (1992)..... | 9 |
| <i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 555, <i>review denied</i> 167 Wn.2d 1015 (2009)..... | 9 |
| <i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999)..... | 9 |
| <i>School District No. 410 v. Minturn</i> , 83 Wn. App. 1, 920 P.2d 601 (1996)..... | 17, 29, 35, 36 |

| | |
|---|--------|
| <i>State v. Breitung</i> , 155 Wn. App. 606, 230 P.3d 614 (2010)..... | 10 |
| <i>Thompson v. King Feed & Nutrition Service, Inc.</i> 153 Wn.2d 447, 105 P.3d 378 (2005)..... | 10, 27 |
| <i>Watson v. Dep't of Labor & Indus.</i> , 133 Wn. App. 903, 138 P.3d 177 (2006)..... | passim |
| <i>Weatherspoon v. Dep't of Labor & Indus.</i> , 55 Wn. App. 439, 777 P.2d 1084 (1989)..... | 9 |
| <i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991)..... | 22 |

Statutes

| | |
|---------------------------|-----------|
| RCW 51 | 1 |
| RCW 51.08.178 | passim |
| RCW 51.08.178(1)..... | passim |
| RCW 51.08.178(2)..... | passim |
| RCW 51.08.178(2)(a) | 28 |
| RCW 51.08.178(2)(b)..... | passim |
| RCW 51.32.060 | 11 |
| RCW 51.32.090 | 11 |
| RCW 51.52.115 | 8, 30, 31 |
| RCW 51.52.140 | 9 |

Rules

RAP 1.2(c) 10
RAP 10.3(g) 9
RAP 12.1(a) 32

Appendices

- Appendix A: RCW 51.08.178
- Appendix B: Court’s Instructions
- Appendix C: Defendant’s Proposed Instructions

I. INTRODUCTION

This case concerns the question of how to classify Keith Hudson's employment so as to determine his time loss calculation rate. At issue is the "monthly wage" calculation under RCW 51.08.178. Wage calculation is pivotal to determining the rate of wage loss benefits under RCW 51. Subsection 1 of RCW 51.08.178 implicitly presumes the worker is employed year-round at a regular schedule, and, for hourly wage workers such as Mr. Hudson, multiplies the hourly dollar wage rate by a number yielded by a formula based on the worker's normal weekly work schedule to reach an imputed monthly wage. Subsection 2 requires use of a different wage calculation method—averaging of total actual wages received in the most representative previous 12-month period—for workers whose employment at the time of injury was "exclusively seasonal," or whose employment or relationship to employment at the time of injury was "essentially intermittent" or "essentially part-time." Here the question is whether Mr. Hudson's employment was subject to the default provision of subsection 1 of RCW 51.08.178 or whether his employment was exclusively seasonal, essentially part-time, or intermittent employment under subsection 2 of RCW 51.08.178.

A worker's overall work pattern is key in determining whether subsection 1 or subsection 2 of RCW 51.08.178 applies. Mr. Hudson has had a long career of full time employment. He started working in the military in 1973. He worked for 33 years in both active and reserve capacities. In July 2006, he left full time employment with the military and immediately started looking for work. In October 2006, after a short period of unemployment, he was hired by UPS as a delivery driver during the holiday season. He worked an average of 34.42 hours a week, including overtime. Of the nine consecutive weeks he worked, four weeks were forty hours or more. In December 2006, he stopped working for UPS after being injured. He had had a job lined up for post-UPS employment as an information technology technician in a tribal casino; at the time of injury, he was negotiating a salary for the casino IT tech job.

The jury concluded that the Board was incorrect in determining that Mr. Hudson's employment was not exclusively seasonal, essentially part-time or intermittent. This verdict was not supported by sufficient evidence and should be reversed.

Based on his employment pattern as a whole, namely that of working consecutive jobs full time throughout 33 years, a rational juror could not conclude that his employment was exclusively seasonal, essentially part-time or intermittent.

In the alternative, the case should be remanded for a new trial with a proper instruction regarding part-time employment, which should instruct the jury about the multi-part test in *Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290, 996 P.2d 593 (2000). Failure to instruct the jury was prejudicial in that the jury could incorrectly believe that it was not to look at Mr. Hudson's employment pattern as a whole, but rather that it must focus on the UPS job.

This case should also be remanded to provide correct instructions regarding seasonal employment, which 12 months fairly represented his employment, the default method for determining the wage rate, the definition of part-time, and the definition of normal employment.

II. ISSUES

1. Does substantial evidence support the jury's verdict that Mr. Hudson did not have exclusively seasonal, essentially part-time, or intermittent employment under subsection 2 of RCW 51.08.178?
2. Did the trial court err by failing to instruct the jury of the *Avundes* test as applied to part-time employment when the jury could have believed it was to look only to Mr. Hudson's current job when determining if he had part-time employment?
3. Did the Superior Court err in its instructions regarding seasonal employment, regarding which 12 months fairly represented his employment, regarding the default method for determining the wage rate, regarding the definition of part-time, and regarding the definition of normal employment?

III. STATEMENT OF THE CASE

A. Prior Work History

Mr. Hudson injured his back while working for UPS on December 21, 2006. BR Hudson 11.¹ He was 53 years old with a long work history. BR Hudson 16. Before working for UPS, Mr. Hudson was an active duty service member of the U.S. Air Force. BR Hudson 7. He started in 1973. BR Hudson 17. Between various active duty and reserve service, Mr. Hudson is a 33 year military veteran. BR Hudson 6, 18. Before starting active service in 2002, Mr. Hudson worked as an information technology engineer. BR Hudson 19-20.

He has always worked full-time, testifying “I’ve always worked full-time. Matter of fact, there’s times that I had two jobs; active duty or the reserves and my regular job.” BR Hudson 32.

Mr. Hudson was discharged from the U.S. Air Force in July 2006 because he had reached the maximum number of years of service. BR Hudson 7. After he left the military, he intended to continue full-time employment. BR Hudson 7, 27. He applied for several full-time positions while he received unemployment compensation. BR Hudson 7, 14. He testified that he was in an “up-tempo mode” and wanted to work:

¹ The Certified Appeal Board Record will be cited as “BR.” Testimony will be cited as BR followed by the witness name.

Like I said, the up-tempo mode I was in, this was something I guess I was compelled to do. I just have to go out and do something. I've always worked full-time.

BR Hudson 32.

While trying to find work, he was on unemployment for the period of July 31, 2006 to October 23, 2006. BR Hudson 7, 29, 31; BR Crafton 6. On the latter date, he took a position at UPS as a package car driver (delivery driver). BR Craft 6.

B. UPS

UPS is a worldwide package delivery, transportation and logistics service provider, which operates a year-round package delivery business. BR Crafton 9. UPS employs package package car drivers year round. BR Crafton 9. UPS hires temporary, full-time-employees to cover a peak volume period, which is generally between October 1st and December 31st. BR Crafton 7. Drivers hired for the holiday season are sometimes retained as year-round employees based on job performance and volume level. BR Crafton 8.

Mr. Hudson was not a permanent year-round employee for UPS; rather he was a temporary, full-time, on call employee hired to cover the peak volume period. BR Crafton 7; BR Hudson 35. There was a possibility that UPS could potentially retain people following the holiday

period, but that had not been offered to Mr. Hudson. BR Hudson 10; BR Crafton 8.

Mr. Hudson worked steadily for UPS, with some fluctuation in hours, between October 23, 2006, and December 20, 2006. His average hours were approximately 7.2 a day. BR Ex. 1. This is based on 309.74 regular and overtime hours over 43 days worked. BR Ex. 1. Over the nine weeks he worked, he worked an average of 34.42 hours a week, working, on average, four days per week. BR Ex. 1. He earned \$14.64 an hour. BR Ex. 1. Of the nine consecutive weeks he worked, four weeks were forty hours or more. BR Ex. 1.

On some days, his hours were reduced and he did not work his shift due to lack of available work. BR Crafton 38, BR Hudson 9. This is no different than a year-round driver, as they would also be sent home if they were lacking work. BR Crafton 34. This situation occurred three times in two months. BR Crafton 31; BR Ex. 1. He also missed days for illness. BR Ex. 1. He did not work the Thanksgiving holiday. BR Ex. 1. He also worked overtime for UPS. BR Ex. 1.

On December 21, 2006, Mr. Hudson injured his back and stopped working for UPS. BR Hudson 44, 12.

C. Post-UPS Employment

Mr. Hudson's position with UPS was scheduled to end on either December 23 or 24, 2006. BR Hudson 10. Mr. Hudson testified that if he had been offered a job by UPS, he would not have accepted it. BR Hudson 10. After his work for UPS, he wanted to obtain a full-time information technology technician position. BR Hudson 12-13.

While working for UPS, he applied for work as an IT tech with Clearwater Casino. BR Hudson 10, 46. This was a full-time position. The negotiations with Clearwater Casino had not been finalized, but they were "leaning more towards" offering him a position. BR Hudson 11, 47. The casino wanted to bring him on earlier, but he told the casino that he was already working at UPS and he wanted to complete what he had started. BR Hudson 11.

D. Procedural Background

On May 31, 2007, the Department issued an order determining that Mr. Hudson's wages should be calculated under RCW 51.08.178(2), using the time period of January 1, 2004 to December 31, 2004. BR 25. This would be in the "twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." RCW 51.08.178(2). UPS protested this order and the Department affirmed. BR 25.

UPS appealed to the Board of Industrial Insurance Appeals. On November 14, 2008, the industrial appeals judge issued a proposed order that reversed the Department's order. BR 21. The Board judge decided that the wages should be determined using RCW 51.08.178(1). BR 26. Therefore, the Board judge did not address whether the Department had used the correct 12-month period under RCW 51.08.178(2).

Mr. Hudson petitioned the Board for review. On January 13, 2009, the Board denied review, thereby affirming the proposed decision. BR 2. Mr. Hudson appealed to superior court. The jury overturned the Board's decision, answer "no" to the following question: "Was the Board of Industrial Insurance Appeals correct in its determination that Mr. Hudson's employment was not exclusively seasonal, essentially part-time, or intermittent." CP 59.² On March 8, 2010, the superior court entered judgment in favor of Mr. Hudson. CP 58.

IV. STANDARD OF REVIEW

A. The Standard Governing Superior Court Review of the Board's Decision

The Board's decision is prima facie correct under RCW 51.52.115, and a party attacking the decision must support its challenge by a preponderance of the evidence. *Ruse v. Dep't of Labor & Indus.*, 138

² Therefore, the jury determined that Mr. Hudson's employment was either: (a) exclusively seasonal, (b) essentially intermittent, or (c) essentially part-time.

Wn.2d 1, 5, 977 P.2d 570 (1999). On review, the superior court may substitute its own findings and decision for the Board's only if it finds "from a fair preponderance of credible evidence", that the Board's findings and decision are incorrect." *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) (quoting *Weatherspoon v. Dep't of Labor & Indus.*, 55 Wn. App. 439, 440, 777 P.2d 1084 (1989)).

B. Standard for this Court to Review the Jury's Verdict

The appellate court reviews superior court decisions in industrial insurance cases using the standards used in other civil cases. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 181, 210 P.3d 555, *review denied* 167 Wn.2d 1015 (2009). The Court should review the jury's verdict for sufficiency of the evidence. UPS argues that the trial court erred in denying summary judgment in its favor. UPS Br. at 19. This is correct for the reasons stated in UPS's brief; however, this issue is not before the Court as the summary judgment ruling was interlocutory and a challenge to this was rendered moot after a jury trial. *See Johnson v. Rothstein*, 52 Wn. App. 303, 307-08, 759 P.2d 471 (1988).

The Court should, however, take UPS's challenge to the summary judgment motion as properly an argument that the jury's verdict was not sufficiently supported by substantial evidence. Although the Court does not typically review issues where error has not be assigned (RAP 10.3(g)),

the Court may consider issues where the nature of the challenge is clear in the briefing, as is the case here. *State v. Breitung*, 155 Wn. App. 606, 619, 230 P.3d 614 (2010). Moreover, the Court may waive application of the rules to serve the interests of justice. RAP 1.2(c).

A jury's verdict may be overturned only if it was not supported by substantial evidence. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question. *See Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

C. Standard to Review Jury Instructions

Jury instructions are reviewed de novo, and any instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Thompson v. King Feed & Nutrition Service, Inc.* 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and when taken as a whole, properly inform the jury of the law to be applied. *Id.* A clear misstatement of the law, however, is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

V. ARGUMENT

A. RCW 51.08.178(1) is the Default Provision to Determine Time Loss

This case concerns the time loss calculation rate for Mr. Hudson. RCW 51.08.178 defines “wage” for the purpose of computing monthly wages to set the time loss rate under RCW 51.32.060 and .090. Wage is defined as:

(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.

....

(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.

Here the Board was correct that Mr. Hudson's rate should be set using RCW 51.08.178(1) instead of .178(2). Subsection 1 is used for workers who are "normally employed" at the time of injury. Subsection 2 is used for workers are either (a) exclusively seasonal or (b) essentially part-time or intermittent workers at the time of injury.

The default provision to use in setting wages is subsection 1. *Avundes*, 140 Wn.2d at 290. In *Avundes*, the Supreme Court emphasized that "the Department must be mindful that the default provision is subsection (1); it must be used unless the Department establishes it does not apply." *Avundes*, 140 Wn.2d at 290. In holding this, the Court relied upon RCW 51.08.178(1), "[subsection (1) applies] unless otherwise provided specifically in the statute concerned." *Id.* at 290. The exceptions in subsection 2 are narrow exceptions as shown the fact that seasonal employment must be "exclusively" seasonal, and part-time and intermittent employment must be "essentially" part-time or intermittent. RCW 51.08.178(2). Mr. Hudson's employment does not meet these narrow exceptions.

B. Substantial Evidence Does Not Support the Jury's Verdict that Mr. Hudson's Employment Was Exclusively Seasonal

The first employment type to consider is whether Mr. Hudson's employment was "exclusively seasonal" under RCW 51.08.178(2). Seasonal work, according to the Washington Supreme Court, "is employment that is dependent on a period of year that is characterized by a particular activity." *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799, 947 P.2d 727 (1997). The work must be *exclusively* seasonal. *Id.* at 800.

In *Double D Hop Ranch*, the Court determined the time loss rate for a worker employed by a hops ranch. The worker worked part of the year for the hops ranch, typically not working November through February. *Id.* at 796. He performed hops-related work during the spring, summer, and fall growing seasons, including planting hops, cultivating hops, and picking hops. *Id.* at 796. However, he also performed general labor type work, such as maintenance and repair work. *Id.* at 800. The employer conceded that it employed general labors to perform similar tasks year round. *Id.* at 800. Because part of the job tasks performed by Mr. Sanchez, were performed year round by others, the Court held that Mr. Sanchez's work was not exclusively seasonal:

In order for Sanchez's employment to have been "exclusively seasonal in nature," the nature of his

employment would have to have been entirely dependent on a period of the year that is characterized by a particular activity. Some of Sanchez's work, like planting and picking hops, was dependent on the hop growing season. However, Sanchez also performed general farm labor, like maintenance and repair work, and Double D concedes that it employs general laborers to perform similar tasks year round. Sanchez's employment, therefore, cannot be said to have been exclusively seasonal in nature.

Id. at 799-800.

Mr. Hudson argues that because his job of injury was performed during the holiday season, the work itself was seasonal. Hudson Br. at 22-23. However, this ignores the fact that Mr. Hudson performed work that could and was performed year round. Mr. Hudson's position was a package car driver. BR Crafton 6. A package car driver performs the "pickup and delivery of packages." BR Crafton 9. UPS hires these drivers year round. BR Crafton 9. The business of delivering packages is a year round business. BR Crafton 9.

For work to be seasonal work, it must be *exclusively* seasonal work. *Double D Hop Ranch*, 133 Wn.2d at 799. It does not matter that Mr. Hudson did not deliver packages year round, rather what is key is that the employment in general was year round. *Id.* at 799-800. Mr. Sanchez in *Double D Hop Ranch* did not perform general labor work year round, but the Court did not consider him a seasonal employee because general labor work in general is performed year round.

Additionally, and perhaps more importantly, Mr. Hudson did not only perform the UPS job, rather he worked for years for the military and then had the casino IT tech job lined up. Even if the package car delivery job was considered seasonal because Mr. Hudson's particular job was for the holiday season, Mr. Hudson was not a seasonal worker. This is because he worked throughout the year. *Double D Hop Ranch*, 133 Wn.2d at 799-800. Employment in one job does not transform a worker's overall employment from one category to another.

Insufficient evidence supports the jury's verdict that Mr. Hudson could have been engaged in "exclusively" employment.

C. Substantial Evidence Does Not Support the Jury's Verdict That Mr. Hudson's Employment Was Essentially Intermittent or Essentially Part-Time

1. *Avundes* Test

The Supreme Court in *Avundes* interpreted the phrase "essentially part-time or intermittent." The worker in *Avundes* was a general farm laborer who was injured while cutting asparagus. *Avundes*, 140 Wn.2d at 284. He had been cutting asparagus for only 50 days. But in the previous 14 months, he had worked 19 different jobs, working on each project until it was complete. *Id.* at 284-85. The parties stipulated that the worker intended to secure full-time work throughout the year. *Id.* at 285. On these facts, the Court held that he was not an intermittent worker.

The Court adopted a two-part test that looks first to the type of work being performed, and secondly, the relationship of the work being performed. *Avundes*, 140 Wn.2d at 287. Even if the type of work is not essentially intermittent or part-time, RCW 51.08.178(2)(b) applies if the worker's relationship to his employment is essentially intermittent or part-time. To determine a worker's relationship to his or her employment, the court considers four factors: (1) the nature of the work, (2) the worker's intent, (3) the worker's relation with the current employer, and (4) the worker's work history. *Id.* at 287.³

The Court's test looks at the worker's employment as a whole and does not just focus on the employment where the worker was injured:

[W]e find nothing in either the statute or the BIIA two-part test that requires the work used to calculate the base monthly wage also be the work used in determining the worker's relation to employment. Further, nothing in the statute or the two-part test requires the worker characterize his or her work by the last job performed. Finally, the four factors used in the second part of the test say nothing about focusing exclusively on the current work. All factors must be reviewed. Accordingly, we reject the Department's invitation to limit the analysis to the most recent job.

³ The Court in *Avundes* interpreted the language in RCW 51.08.178(2)(b), "the worker's current employment or his relation to his or her employment is essentially part-time or intermittent" as a whole, referring several times in the analysis to both intermittent and part-time work. *Avundes*, 140 Wn.2d at 287-88. When deciding the application of the law to the facts, the Court focused on the intermittent prong of the statute. *Id.* at 290. Here the superior court took this to mean the *Avundes* test did not apply to part-time work. RP 130-31. However, it is clear by looking at the Court's decision in its entirety and the language of the statute that the test would apply to both intermittent and part-time work. As discussed below in Part V.D, the trial court erred by failing to so instruct the jury.

Avundes, 140 Wn.2d at 289. In *Avundes*, looking at the worker's work as a whole, he was not subject to RCW 51.08.178(2) because the type of his work was full-time, his intent was to work full-time, and his work history showed a consistent pattern of working or looking for work. *Id.* at 288, 290. Thus, he fell under the default section in RCW 51.08.178(1).

2. Mr. Hudson's work was not intermittent

In addition to the *Avundes* test, intermittent has also been defined by case law. The Court in *School District No. 410 v. Minturn*, 83 Wn. App. 1, 6, 920 P.2d 601 (1996), defined an intermittent employment as "not regular or continuous in the future. It may be full-time, extra-time or part-time and has definite starting and stopping points with recurring time gaps."⁴ The example in *Minturn* was a school bus driver who only worked 9 months of the year.⁵ The Court in *Watson v. Department of Labor & Indus.*, 133 Wn. App. 903, 138 P.3d 177 (2006), looked at this definition and the *Avundes* test. It found that a groundskeeper at a golf course who did not work each winter did not have intermittent employment because he was continuing to try to find work during the winter. This showed that

⁴ The jury was instructed with this definition. CP 55. The jury was also instructed with the *Avundes* test in the context of intermittent work. CP 55.

⁵ The Court in *Minturn* did not decide whether the school bus driver had intermittent employment, but remanded the case. The Court did note that the job duties were intermittent, as the work started in September, ended in June, and involved a recurring time gap. *Minturn*, 83 Wn. App. at 7.

his relationship to work was not intermittent or part-time. *Watson*, 133 Wn. App. at 915.

Here there is insufficient evidence to persuade a rational juror that Mr. Hudson worked on an intermittent basis. The evidence was that Mr. Hudson worked throughout the year or that he was attempting to work throughout the year, there were no gaps in this pattern. He is like the groundskeeper in *Watson* in that he was attempting to find work throughout the year.

Looking at the *Avundes* test shows that the work was not intermittent. First, the type of work is not essentially intermittent. Mr. Hudson performed different types of work, he worked for the military, he delivered packages, and he had a job as an information technician lined up. None of this employment was essentially intermittent. This is all work that is available throughout the year. Mr. Hudson focuses on the particulars of Mr. Hudson's relationship with UPS, namely that of a peak driver. Hudson Br. at 25-26. However, the proper focus is on the total picture of his employment, not one job. *Avundes*, 140 Wn.2d at 289.

Second, Mr. Hudson's "relationship to his employment" was not essentially intermittent, considering the four factors. (1) *The nature of the work*. Package delivery occurs throughout the year, work in the military occurs throughout the year, and information technician work occurs

throughout the year. The fact that there is a higher volume in the holiday months for package delivery does not mean the work has, by its nature, recurring gaps. Looking at the objective nature of the work, it occurs throughout the year. As long as jobs are available for package car drivers year round, then the nature of the work is not essentially intermittent. *Avundes*, 140 Wn.2d at 288-89; *Watson*, 133 Wn. App. at 912-15.

(2) *The worker's intent.* Mr. Hudson looks only to his intent with respect to his employment at UPS to determine intent. Hudson Br. at 27. But the inquiry is to his intent as a whole. RCW 51.08.178(2)(b) looks to determine whether the worker's "relation to his or her employment is essentially . . . intermittent." Employment in this context is not narrowly limited to the job of injury, but broadly to consider all employment. *Avundes*, 140 Wn.2d at 289 (rejecting "invitation to limit analysis to the most recent job.").

Mr. Hudson testified repeatedly that it was his intent to work full-time and that he was doing whatever he could to accomplish that. BR Hudson 8, 27, 32. There was no evidence that it was his intent to only work the holiday season as a package car driver, with no other employment. Nor is there any evidence that he wanted to have employment with starting and stopping points, with recurring time gaps.

(3) *The worker's relation with the current employer.* Mr. Hudson was hired to work during October to December 2006, and was not hired to work beyond. Mr. Hudson had no intention of working for UPS beyond the holiday season. He was asked whether he would keep on working for UPS beyond December if he was offered the work, and he replied that he had already applied for the job at the casino and that, though they had not finished negotiations, it was leaning toward him working there. BR Hudson at 9-10.

Mr. Hudson did not have any intent to continue working for UPS either as a peak season driver or a year round driver. The fact that Mr. Hudson did not intend to work more for UPS does not, however, turn his relationship to employment into an intermittent one. In *Avundes*, the Court emphasized that the current job is not the exclusive focus of the test. *Avundes*, 140 Wn.2d at 289.

(4) *The worker's work history.* Mr. Hudson appears to argue that because he did not intend to work in his job of injury permanently that this means that his work history shows that he is a intermittent worker. UPS Br. at 28. Again, Mr. Hudson incorrectly focuses on the job of injury. The factor of work history is one that must consider a worker's employment pattern as a whole. *Avundes*, 140 Wn.2d at 288.

Mr. Hudson's work history was that of a full-time worker, in fact in many instances he had two jobs, one in civilian employment and one in the reserves. BR Hudson at 32. Mr. Hudson did have a period when he was on unemployment. However, under *Watson* this is not determinative if there was proof that the worker intended to work and was trying to find work. *Watson*, 133 Wn. App. at 915. Mr. Hudson testified that he was trying to find work after he left the military. BR Hudson at 8.⁶

Looking at all the factors together points to a worker that worked steadily throughout the years, with no meaningful gaps in employment. The essential nature of his employment was full-time employment. The fact that he needed to find new employment after leaving the military does not make his employment essentially intermittent. Substantial evidence does not support the jury's verdict that Mr. Hudson could have engaged in essentially intermittent employment.

3. Mr. Hudson's work was not essentially part-time

Part-time employment is not defined in the statute or by case law. It is not the number of hours worked by an employee that only determines whether a worker is subject to RCW 51.08.178(1) or (2). A worker may work less than 40 hours a week and be subject to subsection 1 if he or she

⁶ The mere fact that Mr. Hudson was claiming unemployment compensation benefits does not show he was seeking work, rather it is his testimony that he was seeking work, in combination with the fact of benefits, that shows this.

is “normally employed” certain days of the week. A worker is subject to subsection 2 only if his or her employment is “essentially” part-time.

The Board in *In re Pino*, Dckt. Nos. 91 5072 & 92 5878, 1994 WL 144956, discussed the inquiry for normal employment under RCW 51.08.178(1), which contrasts with part-time employment under RCW 51.08.178(2).⁷ To determine whether a worker had “normal” employment, the Board looked to see whether there was a consistent work pattern:

A worker who is not employed in a typical 40-hour per week position may or may not be an intermittent or part-time worker within the meaning of RCW 51.08.178(2)(b) simply because he or she works fewer days than might be considered typical and may, in fact, be appropriately included in section (1). The analysis requires more than a simple evaluation of the hours worked.

....

The requirement is simply that a worker be employed a consistent number of work days each week, a “normal” number to use the language of the statute. If a normal number of work days can be established, and the worker’s daily wage is known, the worker readily comes within the scope of section (1) and his monthly wage is easily computed.

⁷ The Board’s interpretation of a provision of the Industrial Insurance Act, while not binding, “is entitled to great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). The Supreme Court has recognized the expertise of the Board in this area, basing its multi-part test discussed above on the Board’s test in *Pino. Avundes*, 140 Wn.2d 287.

Pino, 1994 WL 144956 at *3-*4. The Board in *Pino* looked to see whether there was consistent employment and a known daily wage to determine whether someone had normal employment or essentially part-time employment.

The *Avundes* test is used to determine if someone has essentially part-time employment. As discussed below in Part V.D., the trial court erred by failing to instruct the jury as to this test regarding part-time employment.

Setting aside the jury instruction issue, Mr. Hudson failed to prove that he had essentially part-time employment. The focus is not on the job of injury, but on the employment history as a whole. *Avundes*, 140 Wn.2d at 289 (“nothing . . . requires the worker characterize his or her work by the last job performed.”). Mr. Hudson worked full-time for years. His relationship to employment as a whole was full-time, not part-time. The fact that he took a job that averaged 34.42 hours a week does not transform his overall relationship to work into part-time. Moreover, working an average of 34.42 hours a week shows a regular work pattern consistent with normal employment under RCW 51.08.178(1). Working an average of 34.42 hours a week is not essentially part-time employment.

Looking at the *Avundes* test reinforces that Mr. Hudson’s work was not essentially part-time. The first step is to assess whether the type

of work is essentially part-time. *Avundes*, 140 Wn.2d at 287. The type of work is not essentially part-time, people deliver packages full time, people are in the military full-time, and people are IT technicians on a full-time basis.

The second step is to determine a worker's relationship to his or her employment considering four factors. *Id.* at 287. (1) *The nature of the work.* As noted above, the nature of all his work is full-time work. (2) *The worker's intent.* Mr. Hudson's intent was to have full-time employment. (3) *The worker's relation with the current employer.* UPS intended to hire Mr. Hudson for the holiday season. As noted, he worked an average of 34.42 hours a week. (4) *The worker's work history.* Mr. Hudson had worked for years on a full time basis and he had a job lined up for after the UPS job to work full time in as an IT technician.

If Mr. Hudson's work pattern is looked to as a whole, it is clear that his employment was not essentially part-time. Therefore, substantial evidence does not support a finding that Mr. Hudson's employment was essentially part-time.

D. The Failure to Instruct on the *Avundes* Test for Part-Time Employment Was Prejudicial Error

The trial court instructed the jury as to the *Avundes* test in Instruction No. 14 with respect to essentially intermittent employment.

CP 55. UPS excepted on the ground that the test should apply to all of the categories in RCW 51.08.178(2), including seasonal, part-time, and intermittent employment. RP 129-30; *see* CP 26 (Defendant’s Instruction No. 13). On appeal, UPS argues that it was error to not instruct the jury on the *Avundes* test for seasonal, intermittent, and part-time work. UPS Br. at 33, 35, 39. The Department disagrees with UPS that the *Avundes* test applies to seasonal work.⁸ However, the Department agrees that the jury should have been instructed regarding the *Avundes* test’s application to part-time work.

As noted above, the Court in *Avundes* interpreted the language in RCW 51.08.178(2)(b), “the worker’s current employment or his relation to his or her employment is essentially part-time or intermittent” as a whole, referring several times in the analysis to both intermittent and part-time

⁸ *Avundes* specifically considered subsection (2)(b) of RCW 51.08.178 (part-time and intermittent employment), not subsection (2)(a) (seasonal). *Avundes*, 140 Wn.2d at 286. The test formulated by the Supreme Court primarily addresses interpreting the statutory language in (2)(b), namely whether the “relation to his or her employment is essentially part-time or intermittent.” The “relation” language is absent in RCW 51.08.178(2)(a), the inquiry is simply whether the type of employment was “exclusively seasonal.” It is irrelevant whether a worker has a seasonal relationship with the employment, the employment itself must be seasonal.

work. *Avundes*, 140 Wn.2d at 286-88.⁹ In its conclusion, the *Avundes* Court focused on the intermittent prong of the statute. *Id.* at 290. As discussed above, the superior court took this to mean the *Avundes* test did not apply to part-time work. RP 130-31. However, under a complete reading of the *Avundes*, the test would apply to both essentially intermittent and essentially part-time work.

This makes sense because the *Avundes* test in main part determines the question of whether the “*relation* to his or her employment is essentially part-time or intermittent” as provided in RCW 51.08.178(2)(b). To determine the “*relation*” question, the *Avundes* test looks to (1) the nature of the work, (2) the worker’s intent, (3) the worker’s relation with

⁹ The *Avundes* Court expressly adopted the test from the Board regarding both intermittent and part-time employment:

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. [*Dep’t of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 271, 976 P.2d 637 (1999), *aff’d* 140 Wn.2d 282 (2000)]; *Pino*, 1994 WL 144956.] This approach requires looking “first to the type of work being performed, and secondly, the relationship of the worker to the employment.” *Avundes*, 95 Wn. App. at 273 (quoting *In re Pino* at *5). In *Pino*, the BIIA determined “the nature of the work performed by Mr. Pino [pipe fitting] was not part-time or essentially intermittent.” *In re Pino* at *5. After making this first determination, the BIIA looked to the second inquiry to determine whether the worker’s relation to employment was essentially part-time or intermittent. *In re Pino* at *5. Several relevant factors, including the nature of the work, the worker’s intent, the relation with the current employer, and the worker’s work history, are considered in making this determination. *Avundes*, 95 Wn. App. at 273; *In re Pino* at *5.

We find this approach accords with the statute We adopt the BIIA two-part analysis and apply it here. *Avundes*, 140 Wn.2d at 287.

the current employer, and (4) the worker's work history. *Avundes*, 140 Wn.2d at 287. Such an inquiry would be the same in determining whether there was part-time or intermittent employment.

It was prejudicial error to not instruct the jury on essentially part-time employment regarding the *Avundes* test. The failure to instruct the jury of the *Avundes* test meant the jury was not informed of the law, and UPS was not allowed to argue its theory of the case. *See Thompson*, 153 Wn.2d at 453. A clear misstatement of the law, as is the case here, is presumed to be prejudicial. *Keller*, 146 Wn.2d at 249-50.

The *Avundes* test plainly applies to both part-time and intermittent employment. This error was not harmless because the jury may have believed that it could not look to Mr. Hudson's employment history as a whole to determine whether he had essentially part-time employment. The *Avundes* test makes it clear that both the "current employment" and "work history" is considered. Without this instruction, the jury could have believed that it could only look to his current job. Moreover, the jury could have believed it should not look at Mr. Hudson's intent when determining whether he had part-time employment, a critical component given Mr. Hudson's stated intent to work full-time. The jury also may not have considered the nature of the work, which can be done year round on a full time basis.

The Department's position is that substantial evidence does not support a finding of essentially part-time employment under any standard. Should the Court disagree with this, it should remand the case back to the jury to consider the matter using the proper jury instruction.

E. The Trial Court Erred Regarding Instructions No. 11, 12, 13 and Defendant's Instructions 12, 14, 17, 18 and Special Verdict Form

1. The trial court erred by failing to instruct the jury that exclusively seasonal employment assumes no off season employment (Instruction No. 12)

The trial court erred by not adequately instructing the jury that seasonal employment must be exclusive. Instruction No. 12 instructs the jury that:

A worker's employment is exclusively seasonal in nature if it is characterized by a particular activity that is entirely dependent on a period of the year.

CP 53. UPS argues that the trial court erred by not also instructing that this assumes that that the worker has no off season job. UPS Br. at 33, 37. This was excepted to at trial. RP 126-27. The proposed language offered at trial was "[e]xclusively seasonal work assumes that claimant has no off season job." CP 28. This is a correct statement of the law. RCW 51.08.178(2)(a) applies to work that is "*exclusively* seasonal." Necessarily this means that if a worker has an off season job, the worker is not a

seasonal employee. In the context of discussing intermittent work, the Court in *Minturn* recognized this:

For example, a seasonal farm worker often will have duties only during certain months. Correlatively, however, he or she will also receive pay only during those same months. Thus, job duties and job pay coincide, and the employment is clearly intermittent, assuming no off season job.

Minturn, 83 Wn. App. at 6.

The jury should have been instructed regarding off season employment, and the failure to do so was prejudicial because the jury may not have understood the importance of other employment.

2. The trial court erred by not instructing the jury to determine which 12 months fairly represented Mr. Hudson's employment pattern (Defendant's Instruction No. 18 and Special Verdict Form)

UPS argues that the trial court erred by not instructing the jury to consider which months to use to set the time loss rate. UPS Br. at 39-43. UPS raised this issue below to the trial court. RP 44-60. RCW 51.08.178(2) provides that where employment is exclusively seasonal or 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.

The Department used the dates January 1, 2004, to December 31, 2004. BR 25. UPS contested this at the Board. BR 238. The Board did

not make a finding on this issue as it had found that Mr. Hudson was subject to RCW 51.08.178(1).

The question as to what 12 months applied is a factual issue. The trial court did not want to instruct the jury about the matter because the Board had not directly ruled upon it. RP 58. However, Mr. Hudson was entitled to have this issue presented to a fact-finder. The subject was raised at the Board. At superior court, it was a necessary component of determining that Mr. Hudson was subject to RCW 51.08.178(2).

RCW 51.52.115 does not provide for remand to the Board. Therefore, the trial court should have decided the issue. The trial court should have instructed the jury on the issue using Defendant's Instruction No. 18 and Defendant's Special Verdict Form. CP 31, 34. It was prejudicial error because UPS was not allowed to argue an essential component of its case.

Mr. Hudson argues that there was no prejudice because UPS argued the issue in closing arguments without an instruction. Hudson Br. at 33. However, any such argument was irrelevant in the absence of a jury verdict form on the subject. Mr. Hudson also argues that there was no prejudice because the Department decided the issue on remand from the

superior court. Hudson Br. at 33.¹⁰ This, however, does not negate the fact that the fact-finder responsible for determining the issue—the jury—was precluded from doing so.

3. The trial court properly instructed the jury regarding the burden of proof (Defendant's Instruction No. 8)

UPS argues that the Court's Instruction No. 7 should include the language "[i]f you find the evidence equally balanced, then the findings of the Board must stand." UPS Br. at 43.

The Court's Instruction No. 7 was based off the pattern instruction, WPI 155.03 and is an accurate statement of the law. The instruction stated that the Board's decision was presumed correct and that the burden of proof was on Mr. Hudson to prove his case with a preponderance of the evidence. This is a correct statement of the law. RCW 51.52.115; WPI 155.03 (5th ed. 2009). This was sufficient to allow UPS to argue that if the evidence was even the Board's decision must stand.

4. The trial court erred by not instructing the jury that method 1 was the default method to use (Court's Instruction No. 11/ Defendant's Instruction No. 12)

Instruction No. 11 instructs the jury regarding the two methods to use, namely that of subsection 1 of RCW 51.08.178 and that of subsection 2 of the statute. CP 52. Instruction No. 11 did not include the language

¹⁰ This is not in the record.

that “[w]hen determining which method should be used Method 1 is the default method” as proposed by Defendant’s Instruction No. 12.¹¹ CP 12. This language should have been included in Instruction No. 11. As discussed above in Part V.A the Court in *Avundes* held that RCW 51.08.178(1) was the default provision to use in setting wages. *Avundes*, 140 Wn.2d at 290. The jury should have been instructed on this.

Mr. Hudson argues it was not necessary because the jury was instructed that Mr. Hudson carried the burden of proof. Hudson Br. at 35. However, this was insufficient to convey to the jury that it was not an even question as to what method applied, rather method 1 should be the starting-point. Using the instruction as given to the jury, the jury would not know that method 1 was the default method.

It was prejudicial to not instruct the jury regarding the default provision because as instructed the jury could give equal weight to the two methods, which is plainly counter to law. *Keller*, 146 Wn.2d at 249-50 (a misstatement of the law is presumed prejudicial).

¹¹ UPS did not take exception to this instruction below. (It also did not take exception to Instructions No. 7, 11, 13 and Defendants No. 14, 17.) Mr. Hudson, however, has not objected to consideration on this ground and has waived it as an argument. RAP 12.1(a) (appellate court will decide a case only on the basis of issues set forth by the parties in their briefs). Accordingly, the Court should therefore consider the merits of UPS’s arguments. In any event, because this case may be remanded, the Court should take the opportunity to determine whether the instructions were correct in order to assist the trial court on retrial.

5. The trial court erred by not instructing the jury accurately regarding the definition of part-time (Instruction No. 13/Defendant's Instruction 17)

UPS argues that the Court's instruction on part-time employment was incorrect. The Court instructed the jury that "[p]art time employment is that in which an employee is not normally employed a *specified* number of days per week." CP 54. Use of the word "specified" implies that there needs to be a precise schedule as to what days a worker works to be considered "normal employment." There is no such requirement as the Board decided in *Pino*:

We note there is no requirement that a person work the same days each week to fall within the scope of RCW 51.08.178(1). The requirement is simply that a worker be employed a consistent number of work days each week, a "normal" number to use the language of the statute. If a normal number of work days can be established, and the worker's daily wage is known, the worker readily comes within the scope of section (1) and his monthly wage is easily computed.

Pino, 1994 WL 144956, at *4

To reach this conclusion, the Board considered the structure of RCW 51.08.178(1), which covers individuals working different combinations of employment per week. By its very nature, RCW 51.08.178(1) does not require a specified amount.

The Defendant's Instruction 17 (or an instruction of similar import) should have been used because it accurately instructs the jury that

if a worker does not work a normal numbers of days each week, the worker's wages should be determined by method 2 or part-time.

Additionally, Instruction No. 13 is incorrect because, as discussed above in Part V.D, the jury should have been instructed to use the *Avundes* test to determine whether the employment was essentially part-time.

6. The trial court erred by not defining normal employment (Defendant's Instruction No. 14)

UPS argues that the trial court erred by not instructing the jury with Defendant's Instruction No. 14 regarding "normal employment." UPS Br. at 47. Mr. Hudson argues, inter alia, that there is no need to define the term "normal employment" because the statute does not use that term. Hudson Br. at 36. As Mr. Hudson acknowledges, however, RCW 51.08.178(1) uses the term "normally employed" in determining what wage rate calculation to use. Instruction No. 11 uses the term "normally employed." As noted by UPS, this is a term of art and should be defined for the jury.

The proposed instruction was:

Normal employment is where a worker is engaged in reasonably continuous employment at the time of injury. If a normal number of work days can be established and the worker's daily wage is known, the worker is normally employed.

In other words, if the type of position exists year round in the general labor market, then the worker is normally

employed. Alternatively, when a worker strings together or intends to string together consecutive jobs year round, then the worker is normally employed.

CP 27. The first sentence of this instruction is correct. A worker who had continuous employment would be subject to subsection 1 of RCW 51.08.178.

The second sentence of this instruction is correct and is based off the Board's decision in *Pino*. The Board in *Pino* discussed the language "normally employed" in RCW 51.08.178(1):

The requirement is simply that a worker be employed a consistent number of work days each week, a "normal" number to use the language of the statute. If a normal number of work days can be established, and the worker's daily wage is known, the worker readily comes within the scope of section (1) and his monthly wage is easily computed.

Pino, 1994 WL 144956 at *3-*4.

The third and fourth sentences instruct the jury that if the position exists year round in the general labor market, the worker is normally employed and that if a worker strings together or intends to string together consecutive jobs year round, the worker is normally employed. These statements of the law are based on *Double D Hop Ranch*, *Avundes*, *Watson*, and *Minturn*. *Double D Hop Ranch* held that a worker who performed both seasonal work and general labor work was not a seasonal worker. 133 Wn.2d at 800. *Avundes* held that a worker who had worked

19 different jobs in the relatively short period before his injury was not an intermittent worker. 140 Wn.2d at 285, 290. *Watson* held a jury was supported in its findings, on the totality of the circumstances, that a worker who was trying to find employment was not an intermittent worker. 133 Wn. App. at 915. Finally, *Minturn* recognized that a worker with an off season job may not be an intermittent worker. 83 Wn. App. at 6.

It was prejudicial to not instruct the jury as to the meaning of “normal employment” because the jury would not understand that there can be different patterns of employment that are still normal employment.

VI. CONCLUSION

This Court should reverse the trial court’s March 8, 2010 decision because the jury’s verdict is not supported by substantial evidence. In the alternative, the Court should reverse and remand for a new trial using corrected jury instructions.

RESPECTFULLY SUBMITTED this 29th day of October, 2010.

ROBERT M. MCKENNA
Attorney General



Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-6993

Appendix A
RCW 51.08.178

- 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.

[2007 c 297 § 1; 1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

Notes:

Application -- 2007 c 297 § 1: "Section 1 of this act applies to all wage determinations issued on or after July 22, 2007." [2007 c 297 § 2.]

Severability -- Effective date -- 1977 ex.s. c 323: See notes following RCW 51.04.040.

Effective dates -- Severability -- 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

Appendix B

Court's Instructions

INSTRUCTION NO. 11
MONTHLY WAGES

The monthly time-loss compensation rate is determined using one of two methods:

Method 1

The monthly wages the worker was receiving from all employment at the time of injury. In cases where the worker's wages are not fixed by month, the monthly wages are established by multiplying the daily wage at the time of injury by the number of days the worker was normally employed, the daily wage being 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 of Labor and Industries in a fair and reasonable manner which may include averaging the numbers of hours worked per day.

Method 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 is 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.

**INSTRUCTION NO. 12
EXCLUSIVELY SEASONAL**

A worker's employment is exclusively seasonal in nature if it is characterized by a particular activity that is entirely dependent on a period of the year.

**INSTRUCTION NO. 13
ESSENTIALLY PART TIME**

Part time employment is that in which an employee is not normally employed a specified number of days per week.

INSTRUCTION NO. 14
ESSENTIALLY INTERMITTENT

Intermittent employment is not regular or continuous in the future. It may be full-time, extra-time or part-time and has definite starting and stopping points with recurring time gaps.

To determine whether a worker performs intermittent work, a two part test is employed:

1. First evaluate the type of work performed, if the nature of the work performed is intermittent, the employment is intermittent, if not;
2. Evaluate the relationship of the worker to the employment to determine whether the relationship of the worker to the employment is intermittent. Relevant factors include the nature of the work, the worker's intent, the relation with the current employer and the worker's work history.

Appendix C
Defendant's Proposed
Instructions

**INSTRUCTION NO. 12:
MONTHLY WAGES**

The monthly time-loss compensation rate is determined using one of two methods:

Method 1

The monthly wages the worker was receiving from all employment at the time of injury (in cases where the worker's wages are not fixed by month), by multiplying the daily wage at the time of injury by the number of days the worker was normally employed, the daily wage being 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 of Labor and Industries in a fair and reasonable manner which may include averaging the numbers of hours worked per day.

Method 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 is 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.

When determining which method should be used Method 1 is the default method.

Avundes v. Dept. of Labor and Industries, 140 Wash. 2d 282 (2000).
Mintum v. Dept. of Labor and Industries, 83 Wash. App. 1,6 (1996).
In re: John Pino, Dckt. No 915072 & 925878 (Feb. 2, 1999).
Watson v. Dep't of Labor & Indus., 133 Wash. App. 903 (2006).
Double D Hop Ranch v. Sanchez, 133 Wash. 2d 793 (1997).

**INSTRUCTION NO. 13:
NATURE OF THE EMPLOYMENT**

In order to determine which method should be used, you must first determine whether the type of work being performed was normal employment (Method 1), or instead was exclusively seasonal or essentially intermittent or essentially part-time employment (Method 2). The type of work being performed includes, but is not limited to, an analysis of the type of job as it exists in the general labor market.

You must next determine what type of relationship Mr. Hudson had to employment in general. Mr. Hudson's relationship to employment is determined by examining the following relevant factors: the nature of the position as of the date of injury, Mr. Hudson's intent related to the work force, Mr. Hudson's relationship with United Parcel Services and Mr. Hudson's work history.

When examining the relevant factors regarding Mr. Hudson's relationship to employment you are required to balance the evidence to determine if Mr. Hudson's wages should be determined using Method 1 or Method 2. A balancing requires a look at all the evidence related to the relevant factors to determine whether a preponderance of the evidence shows whether at the date of injury Mr. Hudson was normally employed or an exclusively seasonal, essentially intermittent, or essentially part-time worker.

Avundes v. Dept. of Labor and Industries, 140 Wash. 2d 282 (2000).
Mintum v. Dept. of Labor and Industries, 83 Wash. App. 1,6 (1996).
In re: John Pino, Dckt. No 915072 & 925878 (Feb. 2, 1999).
Nguyen v. Dep't of Health, 144 Wash. 2d 516 (2001).
Watson v. Dep't of Labor & Indus., 133 Wash. App. 903 (2006).
Double D Hop Ranch v. Sanchez, 133 Wash. 2d 793 (1997).
RCW 51.08.178

**INSTRUCTION NO. 14:
NORMAL EMPLOYMENT**

Normal employment is where a worker is engaged in reasonably continuous employment at the time of injury. If a normal number of work days can be established, and the worker's daily wage is known, the worker is normally employed.

In other words, if the type of position exists year round in the general labor market, then the worker is normally employed. Alternatively, when a worker strings together or intends to string together consecutive jobs year round, then the worker is normally employed.

RCW 51.08.178

Avundes v. Dept. of Labor and Industries, 140 Wash.2d 282 (2000).

Mintum v. Dept. of Labor and Industries, 83 Wash. App. 1 (1996).

In re: John Pino, Dckt. No 915072 & 925878 (Feb. 2, 1999).

**INSTRUCTION NO. 17:
ESSENTIALLY PART TIME**

A worker who is not employed in a typical 40-hour per week position may or may not be part-time worker within Method 2 of determining a workers' monthly wages as of the date of injury. Simply because a worker works fewer days than might be considered typical, the worker's monthly wages may, in fact, be appropriately determined using Method 1.

The analysis requires a determination of whether the worker has a normal number of work days each week that can be readily determined. It is not required that the days worked, be the same days worked each week. It is only required that the worker work a normal number of days each week. If the worker works a normal number of days each week his monthly wages should be determined using Method 1. If the worker does not work a normal number of days each week his monthly wages should be determined using Method 2.

RCW 51.08.178.

Avundes v. Dept. of Labor and Industries, 140 Wash. 2d 282 (2000).

In re: John Pino, Dckt. No 915072 & 925878 (Feb. 2, 1999).

**INSTRUCTION NO. 18:
TWELVE SUCCESSIVE CALENDAR MONTHS**

If you find Method 2 should be used to determine the worker's monthly wage, then you must determine what twelve successive calendar months preceeding the injury fairly represent the claimant's employment pattern.

RCW 51.08.178(2)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

| | | |
|------------------------|---|-----------------------------|
| Keith Hudson, |) | No. 09-2-00336-1 |
| |) | |
| Plaintiff, |) | |
| |) | SPECIAL VERDICT FORM |
| v. |) | |
| |) | |
| United Parcel Service, |) | |
| |) | |
| <u>Defendant.</u> |) | |

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the Board of Industrial Insurance Appeals correct in its determination that Mr. Hudson's employment was not exclusively seasonal, essentially part-time or intermittent?

ANSWER: _____ (Write "yes" or "no")

INSTRUCTION: If your answer to QUESTION 1 was "yes", then DO NOT answer QUESTION 2 below; if your answer to QUESTION 1 was "no", then DO answer QUESTION 2 below.

///
///
///

NO. 40516-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

UNITED PARCEL SERVICE,

Appellant,

v.

KEITH HUDSON & DEPARTMENT
OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondents

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on October 29, 2010, she caused to be served the Brief of Respondent Department of Labor and Industries and this Certificate of Service in the below-described manner.

Via ABC Legal Messenger to:

Mr. David Ponzoha
Court Administrator/Clerk
Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

10 OCT 29 PM 1:16
STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

Via First Class United States Mail, Postage Prepaid to:

Michael Costello
Walthew, Warner, Thompson, Eagan & Keenan, PS
123 3rd Ave South
Seattle, WA 98104

William A. Masters
Wallace, Klor & Mann, P.C.
5800 Meadows Road, Suite 220
Lake Oswego, OR 97034

Signed this 29th day of October, 2010, in Seattle, Washington by:



ROBIN HANEY
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740