

No. 40516-4-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

UNITED PARCEL SERVICE
Appellant

vs.

KEITH HUDSON
Respondent

BRIEF OF RESPONDENT, KEITH HUDSON

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COURT APPEALS

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INTRODUCTION

This case is brought pursuant to the Industrial Insurance Act (Act). This state has held in a long line of cases that the intended beneficiary of the Act is the worker and that the provisions of the Act should be “liberally construed in favor of the worker.” *Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467 (1987); *Kirk v. Dep’t of Labor and Indus.*, 192 Wash. 671, 674 (1937); *Wilbur v. Dep’t of Labor and Indus.*, 61 Wn.2d 439, 446 (1963).

When hired by United Parcel Service, Mr. Hudson was told the position was a temporary, part time driver position for the peak Christmas holiday season. United Parcel Service provided Mr. Hudson with a driving permit marked “Seasonal Employment Only”. Mr. Hudson had no regularly specified hours and no regularly specified work days. He was informed that as he was employed for a short period, there would be no benefits. Mr. Hudson called in every morning to see whether work was available. If no work was available, he would not work. If little work was available, he would work a short day.

The issue decided by the jury was whether Mr. Hudson’s wages should be based on RCW 51.08.178(1) or RCW 51.08.178(2) as an exclusively seasonal, or essentially part-time or intermittent worker at

the time of injury.

The employer argues that despite the fact that Mr. Hudson was hired as a part-time, temporary driver for the peak holiday season, he should none-the-less be treated as a full time, regularly employed worker under RCW 51.08.178(1), with wages based on his hourly rate of \$14.64 per hour with no benefits.

Mr. Hudson retired from the Airforce in July 2006. He remained unemployed until taking the part-time, temporary position with United Parcel Service in late October 2006. He worked as a computer technician before serving three years active duty in Iraq and Afghanistan. He took the job at United Parcel Service, knowing that it was a temporary, part-time position that would last only until the Christmas holiday season ended. This was not to be a career changing position for Mr. Hudson. It was a temporary, part-time job.

The job at United Parcel Service was intended to be a part-time, temporary, seasonal job. As such, time loss benefits should be calculated under RCW 51.08.178(2), using the 12 month period that best reflects his lost earning capacity.

ASSIGNMENTS OF ERROR

The appellant lists seven assignments of error. It may be

simpler to view the assignments of error in two parts: 1) the decision denying the employer's motion for summary judgment; and 2) the court's instructions to the jury.

The court's instructions at issue are as follows:

- 1) 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;
- 2) 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.

- 3) 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;
- 4) Instruction No. 7 Burden of Proof – The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Mr. Hudson to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a “preponderance” of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true; and

- 5) 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.

The appellant's requested instructions not given by the court are as follows:

- 1) Proposed Instruction No. 18 Twelve Consecutive 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 preceding the injury fairly represent the claimant's employment pattern;
- 2) Proposed 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.

STATEMENT OF THE CASE

Keith Hudson is a 53 year old married male with one dependent child. Board Record p. 16, ln. 4-21 (hereinafter HUDSON). Mr. Hudson graduated from high school in 1973 and immediately went into the Air Force. HUDSON p. 16, ln. 22-24. Mr. Hudson was on active duty until 1979 at which time he joined the reserves. HUDSON p.17, ln. 17 - 26.

Throughout the period 1985 through 2002, Mr. Hudson served in the Air Force reserves in addition to working as a computer tech/computer specialist. HUDSON p. 19, ln. 3-7; p.19, ln. 26 - p. 20; ln. 7, p. 23; ln. 2 - 5. Mr. Hudson earned \$43,000 to \$44,000 per year in addition to \$10,000 to \$16,000 per year for serving in the reserves. HUDSON p. 20, ln. 24 - p.21, ln. 10. In the year 2001, Mr. Hudson earned \$61,763 from all employment. HUDSON p. 21, ln. 14 - 23.

In 2002, Mr. Hudson returned to active duty, volunteering when the war broke out. HUDSON p.18, ln. 8 - 24. Mr. Hudson moved troops in and out of hostile areas including Iraq, Afghanistan, Turkey, Qatar, Bulgaria, Uzbekistan, and Kurdistan. HUDSON p.23, ln. 8-22.

Mr. Hudson earned \$101,164.60 in 2004, and \$89, 064.96 in 2005. HUDSON p.24, ln. 13 - 18. For the period January 1, 2006, through July 31, 2006, Mr. Hudson earned \$51,085.23. HUDSON p.

24, ln. 13 - 18; and Exhibit 3.

Mr. Hudson retired from the Air Force on July 31, 2006, after 33 years of service. HUDSON p.20, ln. 2-5; p.26, ln. 21-25. He had no job to return to with Siemens. HUDSON p.27, ln. 18 - p.28, ln. 23. He wanted to go to school, go to work, and start living a normal life again. HUDSON p.27, ln.15, p.28, ln. 24 - p.29, ln. 16.

Mr. Hudson collected unemployment benefits for approximately two months before obtaining a job at UPS. HUDSON p.29, ln. 21 - p.31, ln. 13. Although the position at UPS paid less than his unemployment benefits, Mr. Hudson thought it might be interesting and applied. HUDSON p.32, ln. 3 - p.33, ln. 23.

Mr. Hudson applied for a seasonal, part-time driver position at UPS. HUDSON p.9, ln. 2-15; p.33, ln. 24 - p.34, ln. 9. Mr. Hudson was told that the position was part-time, temporary seasonal work when he interviewed with Kelly Keeling. HUDSON p.34, ln. 7-13. The position was for the "peak season," defined as Christmastime, when UPS has an abundance of packages that need to be delivered. HUDSON p.34, ln. 21-26. The position was to last until December 24th. HUDSON p.34, ln.21-23. After the peak season is over, the job is over. HUDSON p.35, ln.1-5.

Following one week of training, Mr. Hudson obtained a temporary driving permit from UPS, marked "Seasonal Employment Only" in red letters. HUDSON p.37, ln. 1 - p.40, ln. 15; Exhibit 5.

Mr. Hudson had no regular, specified hours. HUDSON p.35, ln. 6-7. He was to call in daily. HUDSON p.35, ln.8-9. Kelly Keeling would determine whether Mr. Hudson would work on any given day based on the work load. HUDSON p.35, ln. 9 - p.36, ln 8. Mr. Hudson was not guaranteed any particular number of hours or days per week to work. HUDSON p.36, ln. 3-6. Some days, work was not available. HUDSON p.37, ln.2-3. Some days he would be sent home and called back. HUDSON p.37, ln. 4-15. Mr. Hudson was informed that as he was to be employed for a short duration, less than 90 days, there would be no medical or dental benefits, nor sick time. HUDSON p.41, ln. 11-17.

Milt Crafton is the Washington District Risk Manager for UPS in Tukwila, Washington. BR p.4, ln.11-16 (hereinafter Crafton). He oversees all workers' compensation claims in the state. CRAFTON p.5, ln.6-10. Mr. Crafton testified that Mr. Hudson's position was full-time. CRAFTON p.6, ln.16-25. Mr. Crafton testified that Mr. Hudson was not a permanent year-round employee for UPS.

CRAFTON p.7, ln.2-4. He would have been a temporary full-time employee, to cover a peak volume period falling between October 1st and December 31st. CRAFTON p.7, ln.7-16. Mr. Hudson's employment was to end after the Christmas peak season. CRAFTON p.34, ln. 7-11. UPS considers this a temporary job. CRAFTON p.34, ln.12-13.

Mr. Hudson was hired at the Bremerton terminal. CRAFTON p.7, ln. 25-26. Mr. Crafton did not hire Mr. Hudson. CRAFTON p.32, ln. 13-20. He has never met Mr. Hudson. CRAFTON p.32, ln. 21-22. Mr. Crafton does not know who Mr. Hudson's supervisor was. CRAFTON p.32, ln. 23-24. He had no input in the hiring process. CRAFTON p.32, ln. 25 – p.33, ln. 1. Mr. Crafton is not involved in hiring any of the drivers. CRAFTON p.37, ln. 10-11.

Mr. Crafton ordered an earnings report, admitted as Exhibit 1. Mr. Hudson was paid \$14.64 hourly, and time and one half for overtime. HUDSON p.40, ln. 24 - p. 41, ln.10.

On December 21, 2006, Mr. Hudson injured his low back while sorting packages after making a delivery. HUDSON p.44, ln. 17-25. He underwent surgery in July 2007. HUDSON p.45, ln.15-19.

Mr. Hudson earned \$4,869.34 while working for UPS. Exhibit 6.

Mr. Hudson planned to go to work as an IT tech, his longtime profession, at Clearwater Casino when his job with UPS ended after Christmas. HUDSON p.46, ln. 16 - p.47, ln 9. Because of the injury, Mr. Hudson was unable to show up the first day of work, and Clearwater Casino retracted their offer. HUDSON p.47, ln. 10 - p.48, ln.5. Mr. Hudson was to earn \$23 - \$24 per hour, in addition to medical benefits. HUDSON p.48, ln.6-25.

Mr. Hudson filed an application for benefits on January 18, 2007. The claim was allowed. The Department of Labor and Industries issued an order on May 31, 2007 calculating wages based on RCW 51.08.178(2) based on Mr. Hudson's seasonal, part-time or intermittent work for UPS. The self-insured employer protested the order on June 20, 2007. The Department affirmed the order on September 12, 2007. The self-insured employer appealed. The Board of Industrial Insurance Appeals reversed the Department's order on January 13, 2009. Mr. Hudson appealed the Board's order to the superior court.

The jury was asked to determine whether the Board of Industrial Insurance Appeals was correct in its determination that Mr. Hudson's employment was not exclusively seasonal, essentially part-time, or intermittent. The jury found in Mr. Hudson's favor, determining that

the Board of Industrial Insurance Appeals was incorrect.

The employer appealed the jury verdict to this Court.

ARGUMENT

A. The Purpose of Time Loss Compensation

The purpose of time-loss compensation is to reflect the workers' compensation claimant's lost earning capacity. *Malang v. Department of Labor & Indus.*, 139 Wn. App. 677, 691 (Div. II, 2007); *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 811 (2001); *Double D Hop Ranch, Et al., v. Eduardo T. Sanchez*, 133 Wn.2d 793, 798 (1997); and *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222, 230 (1994). The Supreme Court in *Double D. Hop Ranch* stated that RCW 51.08.178 should be construed in "a way that will most likely reflect a worker's lost earning capacity." *Double D. Hop Ranch*, at 798. The Supreme Court in *Cockle* explained that "Since the 1971 revision of Title 51 RCW, this court has emphasized that an injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her actual "lost earning capacity"." *Cockle v. Department of Labor and Indus.*, 142 Wn.2d 801, 811 (2001).

B. Estimating The Worker's Lost Earning Capacity

Keeping in mind that the purpose of time-loss compensation is to

reflect the worker's lost earning capacity, RCW 51.08.178 sets forth three alternatives for determining the injured worker's wages. Under RCW 51.08.178(1), the monthly wage at the time of injury is used. In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his relation to his employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern. RCW 51.08.178(2). 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 in similar occupations. RCW 51.08.178(4).

C. Seasonal Work

Seasonal employment, for purposes of RCW 51.08.178, 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 (1997).

In determining whether Mr. Sanchez's employment was exclusively seasonal in nature, the Court began its analysis stating that

“The purpose of time-loss compensation is to reflect a worker’s lost earning capacity. Therefore, we should construe RCW 51.08.178 in a way that will most likely reflect a worker’s lost earning capacity. Yet, we should remain mindful that the Industrial Insurance Act is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker.” *Id.* at 798.

The Court adopted a broad sense of the word season, reasoning that it is commonly understood that there is a **holiday season** (emphasis added), a baseball season, and growing seasons for crops. *Id.* at 799. This broader concept of “season” is consistent with the dictionary definition which is “a period of the year set off by a particular and usually high level of activity in some field. *Id.* More importantly, the broader concept furthers the legislative intent to base time-loss benefits on a worker’s lost earning capacity. *Id.* The Court held that “seasonal” employment for purposes of RCW 51.08.178 is employment that is dependent on a period of the year that is characterized by a particular activity. *Id.*

The Court distinguished exclusively seasonal employment from employment that is essentially part-time or intermittent, stating that “Although Sanchez’s employment is not exclusively seasonal in nature,

it is yet unresolved whether his “employment or his ... relation to his ... employment is essentially part-time or intermittent” and therefore subject to wage averaging under RCW 51.08.178(2)(b).” *Id.* At 800.

D. Part Time Employment

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

RCW 51.08.178 specifies that:

(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.

The Court recognized in *Department of Labor and Indus. V. Avundes*, 140 Wn.2d 282 (2000), if an employee works less than full time, both RCW 51.08.178(1) and RCW 51.08.178(2)(b) may apply. *Id.* At 286-287. However, the court points out that the provisions of the statute employ different terms: subsection (1) refers to workers who are “normally employed” for a specified number of days per week, while subsection (2) refers to workers who are “essentially part-time or intermittent.” *Id.*

Thus the question becomes whether the employee was normally employed a specified number of days per week.

E. Intermittent Work

Intermittent employment is defined 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.” *School*

District No. 401 v. Minturn, 83 Wn. App. 1, 6 (Div. II, 1996).

Both *School District No. 401 v. Minturn*, and *The Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 287-290 (2000) required the court to decide whether an injured worker's employment was essentially intermittent under RCW 51.08.178(2).

In determining whether an employee performs intermittent work, the Supreme Court rejected a purely objective analysis in favor of a two-part test focusing on lost earning capacity. *The Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 287-290 (2000).

This subjective approach first looks at the type of work performed. *Avundes*, at 287. If the nature of the work performed is not intermittent, the Court looks at the relationship of the worker to the employment and determines whether that is intermittent. *Avundes*, at 287. Relevant factors under the second part of the test include the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history. *Id.* This two-part test is intended to follow from the Court's holding in *Double D Hop Ranch* that workers' compensation benefits should reflect the worker's "lost earning capacity." *Id.* (citing *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798 (1997)).

F. Assignments of Error

1) Denial of Summary Judgment

The Kitsap County Superior Court correctly denied the Employer's Motion for Summary Judgment. A motion for summary judgment is granted only if, after considering the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 690 (1999). In order to prevail on summary judgment, the employer must show that there is no genuine issue of material fact as to whether Mr. Hudson was employed as a part time worker, no genuine issue of material fact as to whether Mr. Hudson was employed as a seasonal worker, and no genuine issue of material fact as to whether Mr. Hudson was employed as an intermittent worker. The employer fails on all accounts.

As to whether Mr. Hudson was employed as a part time worker, there is much dispute. Mr. Hudson applied for a seasonal part-time driver position. HUDSON BR p.9, ln. 2-15; p.33, ln. 24 - p.34, ln. 9. When he interviewed with UPS, Mr. Hudson was told the position was part-time. HUDSON p.34, ln. 7-13. Mr. Hudson had no regular, specified hours. HUDSON p.35, ln. 9 - p.36, ln. 8. Mr. Hudson was

not guaranteed any particular number of hours or days per week. HUDSON p.36, ln. 3-6. Mr. Hudson had to call in daily to see whether UPS had work for him. HUDSON p.35, ln. 9-26. Mr. Hudson only worked when UPS needed him. HUDSON p.36, ln.7-8. Work was not available some days. HUDSON p.37, ln. 2-3. Some days Mr. Hudson would be sent home and called back. HUDSON p.37, ln. 4-15.

The evidence with regard to the intentions of the parties, the hours worked and the procedure followed in determining if and when work Mr. Hudson was to work all suggest the job with UPS was a part-time job.

In contrast, Milt Crafton testified for the employer that it was his understanding that Mr. Hudson was a full time employee. CRAFTON p.6, ln. 16-25. Mr. Crafton knew nothing of circumstances surrounding Mr. Hudson's hiring by UPS, did not know the identity of Mr. Hudson's supervisor, and never met Mr. Hudson. Still, it was his understanding that Mr. Hudson was a full time, albeit temporary, employee. CRAFTON p.6, ln. 16-25, p.7, ln.7-16.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences in the light most favorable to the non-moving party. CR 56(e). If there is a

genuine issue of material fact and reasonable persons might reach different conclusions, the motion should be denied. *Novenson v. Spokane Culvert & Fabricating Company*, 91 Wn.2d 550, 552 (1979). As to whether Mr. Hudson worked as a part time employee for UPS, there was a genuine issue of material fact upon which reasonable persons might reach different conclusions. As such, the court correctly denied the Employer's Motion for Summary Judgment.

With regard to seasonal employment, the Court in *Double D. Hop Ranch v. Sanchez*, the Court begins its analysis stating that "The purpose of time-loss compensation is to reflect a worker's lost earning capacity. Therefore, we should construe RCW 51.08.178 in a way that will most likely reflect a worker's lost earning capacity. Yet, we should remain mindful that the Industrial Insurance Act is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker." *Double D. Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798 (1997)

The Court adopted a broad sense of the word season, reasoning that it is commonly understood that there is a **holiday season** (emphasis added), a baseball season, and growing seasons for crops. *Id.* at 799. This broader concept of "season" is consistent with the dictionary

definition which is “a period of the year set off by a particular and usually high level of activity in some field. *Id.* More importantly, the broader concept furthers the legislative intent to base time-loss benefits on a worker’s lost earning capacity. *Id.* The Court held that “seasonal” employment for purposes of RCW 51.08.178 is employment that is dependent on a period of the year that is characterized by a particular activity. *Id.*

The Supreme Court’s broader concept of season perfectly describes Mr. Hudson’s employment with UPS. Mr. Hudson applied for a seasonal, part time driver position at UPS. HUDSON p.9, ln. 2-15; p.33, ln. 24 – p. 34, ln. 23. Mr. Hudson was told by UPS that the position was part time, temporary, seasonal work. HUDSON p.34, ln. 7-13. The job was for the “peak season” defined as Christmas time, when UPS has an abundance of packages that need to be delivered. HUDSON p.34, ln. 21-26. The position was to last only until December 24th. HUDSON p.34, ln.21-23. After the holiday season was over, the job was over. HUDSON p.35, ln. 1-5. Mr. Hudson was given a temporary driving permit marked in red letters “Seasonal Employment Only. HUDSON p.37, ln. 1- p.40, ln. 15, Exhibit 5. The employer went out of its way to define the job as a seasonal job.

Mr. Hudson was hired for the holiday season. Mr. Hudson's employment with UPS was the "seasonal" employment described by the Supreme Court in its broader concept of "season", a period of the year set off by a particular and usually high level of activity.

Finding Mr. Hudson to be a seasonal employee most accurately reflects his earning capacity. Mr. Hudson is a computer technician by profession, making far more money than the short term, seasonal work for UPS. Mr. Hudson took the UPS seasonal job to stay busy. He made less money at UPS than he received through unemployment. His intention was not to become a delivery driver for UPS long term. In fact, he was never offered a long term position. His intention was to return to his usual occupation, that of a computer technician, and had a job lined up in his usual occupation as soon as the seasonal work for UPS ended. The Supreme Court informs us that RCW 51.08.178 should be construed in a way that will most likely reflect a worker's lost earning capacity. In the present case, finding Mr. Hudson's employment to be seasonal most likely reflects his lost earning capacity.

It was the employer's motion, not Mr. Hudson's. If summary judgment was to be granted on the issue of seasonal employment, it should have been for Mr. Hudson, not the employer. Still, Mr. Crafton

testified that the position was a full time position, and Mr. Hudson did not bring a motion. As such, the court properly denied the Employer's Motion for Summary Judgment.

With regard to intermittent employment, there is an inherent question of fact with regard to the intention of the parties. As such, the court was correct in denying the Employer's Motion for Summary Judgment.

Intermittent employment is defined by the Court of Appeals 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." *School District No. 401 v. Minturn*, 83 Wn. App. 1, 6 (Div. II, 1996). Applied to the present case, Mr. Hudson's employment with UPS was not regular or continuous in the future. There was a definite stopping point, that being the end of the Christmas season, December 24th. BR. p.34, ln. 21-26. The 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.

In determining whether an employee performs intermittent work, the Supreme Court rejected a purely objective analysis in favor of

a two-part test focusing on lost earning capacity. *The Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 287-290 (2000).

This subjective approach first looks at the type of work performed. *Avundes*, at 287. If the nature of the work performed is not intermittent, the Court looks at the relationship of the worker to the employment and determines whether that is intermittent. *Avundes*, at 287. Relevant factors under the second part of the test include the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history. *Id.* This two-part test is intended to follow from the Court's holding in *Double D Hop Ranch* that workers' compensation benefits should reflect the worker's "lost earning capacity." *Id.* (citing *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798 (1997)).

(1) Type of Work Performed

Mr. Hudson was hired as a peak season driver. HUDSON. p.34, ln. 21-26. The employment was to end after the Christmas peak season CRAFTON p.34, ln. 7-11. Mr. Hudson received a "Seasonal Employment Only" driving permit. HUDSON. p.37, ln. 1 - p.40, ln. 15; Exhibit 5. His duties were different than regular UPS drivers. Mr. Hudson had no regular specified hours. He was required to call work

daily to find out whether he was needed. He received no medical or dental benefits, nor sick time.

As to the first prong of the test, a peak season driver is intermittent lasting from October to December each year. The first prong of the test is satisfied and wages must be determined based on RCW 51.08.178(2).

(2) Relationship of the Worker to the Employment

Assuming the first prong of the test is not satisfied, the inquiry shifts to whether the worker's relation to the work is intermittent. *The Department of Labor and Indus. v. Avundes*, 140 Wn.2d 282, 290 (2000). Relevant factors include the nature of the work, the worker's intent, the relation with the current employer, and the worker's work history. *Id.* However, the proper analytical focus is on the worker's lost earning capacity, not his work history. *Watson v. The Department of Labor & Indus.*, 113 Wn. App. 903, 915 (2006), (citing *Avundes*, at 289-290).

Mr. Hudson's intent was not to become a full time driver for UPS. He took the job to keep busy, knowing that he would earn less at UPS than he received through unemployment benefits. Mr. Hudson's profession was that of a computer technician, a job he held for many

years before returning to active duty in the Airforce. Mr. Hudson's intention was return to work as a computer technician. He had a job lined up in his chosen field to begin shortly after fulfilling his obligation with UPS. Mr. Hudson understood the position at UPS was to last only through the Christmas season. There is no evidence that Mr. Hudson intended to work for UPS as a full time driver on a permanent basis.

Similarly, the employer did not intend to hire Mr. Hudson as a permanent employee. Mr. Hudson was told the position was part-time, temporary, seasonal work. The position was to end December 24th. UPS gave Mr. Hudson a temporary driving permit for "Seasonal Employment Only". Milt Crafton testified that Mr. Hudson was not hired as a permanent employee. He was hired as a temporary employee to cover the peak volume period between October 1 and December 31. UPS considers this a temporary job. With regard to Mr. Hudson's relation with the current employer, he was not a permanent employee.

Work history is the final factor the Court considers in determining whether the relationship of the worker to the employment is intermittent. Mr. Hudson had an excellent work history until retiring from the Air Force in July 2006. However, prior to UPS, Mr. Hudson had never been employed as a delivery driver. A delivery driver was

not Mr. Hudson's profession. In this sense, Mr. Hudson's work history differs significantly from those of Avundes, Minturn, and Watson.

In *The Department of Labor & Indus. v. Avundes*, 95 Wn. App. 265 (Div. III, 1999), the claimant performed general farm work which was available during all seasons, was available to work for each employer for as long as each job was available, and always intended to secure full-time work throughout the year. *Id.*, at 268. In *Watson v. The Department of Labor & Indus.*, 133 Wn. App. 903 (Div. II, 2006), the claimant worked as a greenskeeper at the Port Ludlow Golf Course from 1999 through 2002. *Id.* at 906. In *School District No. 401 v. Minturn*, 83 Wn. App. 1(Div. II, 1996), the claimant worked as a school bus driver for Pierce County School District from the mid 1980's to 1990. *Id.* at 2. In each of those cases, the claimant intended to work full time in his chosen profession. That is not the case here. Mr. Hudson never intended to become a delivery driver permanently. He understood this was temporary employment in a seasonal, intermittent employment situation. Mr. Hudson intended to return to his regular profession, that of a computer technician, a job that pays significantly more than the temporary UPS peak season driver position.

When considering the type of work performed, (that of a peak

season driver), the worker's intent (to work for UPS for a definite period of time during the peak season), the relation to the current employer (a temporary job during the peak season), and the worker's work history (working as a computer technician and for the Air Force), Mr. Hudson's wages should be based on intermittent work pursuant to RCW 51.08.178(2). Such a finding is consistent with the Court's mandate that RCW 51.08.178 is to be construed liberally in a way that is most likely to reflect a worker's lost earning capacity, with doubts resolved in favor of the worker.

Much of the analysis regarding Mr. Hudson's relationship to the work is a question of fact. The nature of the work is a question of fact. The worker's intent is a question of fact. The worker's relationship with the current employer is a question of fact. As such, the court was correct in denying the Employer's Motion for Summary Judgment.

2) Court's Instructions Number 12 and 14 (Exclusively Seasonal and Essentially Intermittent)

The employer argues that the court's instructions number 12 and 14 are
in error in that the *Avundes* analysis must be used to determine whether RCW 51.08.178(2)(a) and (b) apply to the facts in the present case. The

Court has never applied the *Avundes* analysis to RCW 51.08.178(2)(a).

The Court distinguished exclusively seasonal work from essentially part time or intermittent work in *Double D. Hop Ranch v. Sanchez*, stating that “Although Sanchez’s employment is not exclusively seasonal in nature, it is yet unresolved whether his “employment or his ... relation to his ... employment is essentially part-time or intermittent” and therefore subject to wage averaging under RCW 51.08.178(2)(b).” *Id.* At 800. If the analysis were the same, the outcome would be the same.

Instead, the Court held that seasonal employment, for purposes of RCW 51.08.178, 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 (1997).

The court’s instruction number 12 is taken from the Supreme Court’s holding in *Double D. Hop Ranch*, with more particular language taken from the same case - 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. *Id.*; and Court’s Instruction Number 12. This is an accurate and complete statement of the law.

That RCW 51.08.178(2)(a) and RCW 51.08.178(2)(b) do not

share the same analysis is not surprising. The language employed in RCW 51.08.178 is quite different from that employed in RCW 51.08.178(b). RCW 51.08.178(2)(a) uses the phrase “worker’s employment is exclusively seasonal in nature”, whereas RCW 51.08.178(2)(b) uses the phrase “worker’s current employment or his or her relation to his or her employment is essentially part-time or intermittent. The difference in the language of the statute suggests a different analysis.

The employer argues that the court’s instruction number 12 did not ask whether Mr. Hudson’s relationship to employment in general is exclusively seasonal. That is not the test. The statute is plain. RCW 51.08.178(2)(a) applies only to cases “where (a) the worker’s employment is exclusively seasonal in nature.” RCW 51.08.178(2)(b) applies to cases where “(b) the worker’s current employment or his or her relation to his or her employment is essentially part-time or intermittent.” An employee’s relation to employment is only relevant under RCW 51.08.178(2)(b) per the language of the statute.

The employer also argues that the court erred by failing to advise the jury that if the plaintiff maintains an off-season employment, then he is not an exclusively seasonal worker, citing *School District No. 401 v.*

Minturn, 83 Wn. App. 1, 6 (Div II, 1996). *Minturn* was an intermittent employment case as opposed to exclusively seasonal. As such, the cite has no application in the present argument. Furthermore, the court in *Minturn* did not state that if a person maintains an off-season employment, he is not exclusively seasonal. The court stated that “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.” *Id.* This is hardly the same as stating if a person maintains an off-season employment, he is not exclusively seasonal.

The court properly advised the jury. The Court’s Instruction Number 12 is entitled “Exclusively Seasonal”, and used the same definition of exclusively seasonal as used by the Supreme Court in *Double D. Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799 (1997).

**3) Rejecting Employer’s Proposed Instruction Number 18
(Proposed Special Verdict Form)**

The Board of Industrial Insurance Appeals found that Mr. Hudson was
was
not an exclusively seasonal, essentially part-time or intermittent worker.

As such, the Board did not pass on the issue of what twelve successive calendar months preceding the injury fairly represents the claimant's employment pattern. The employer argues that this did not allow UPS to argue to the jury that the Department of Labor and Industries did not choose the correct 12 consecutive month period which fairly represents Mr. Husdon's employment pattern.

The question was not before the jury because the Board did not pass on the issue.

In its brief, the employer argues that failing to put the question to the jury as to which 12 months period should have been used prevented the employer from arguing its theory that the department's decision was illogical and absurd. The employer argued its alternative theory in closing. VRP p.143, ln. 22 – p.145, ln. 13; p. 155, ln. 17 – p.156, ln.3. The employer was not prejudiced in any way.

The employer also argues that without instruction from the court, the department may again decide that 2004 is the correct 12 month period under RCW 51.08.178(2), necessitating another appeal. On remand, the department decided to use the 12 month period immediately preceding the date of injury. Again, the employer was not prejudiced.

4) Rejecting Employer's Proposed Instruction Number 8

(Burden of Proof)

The employer argues that the court erred in failing to give the employer's instruction on Burden of Proof. The Court's instruction is identical to WPI 155.03 as prepared by the Washington Supreme Court Committee on Jury Instruction. In its note on use, the Washington Supreme Court Committee on Jury Instruction states that "This instruction should be given in every case." The court's instruction number 7 is a true and complete statement of the law with regard to the burden of proof in a superior court appeal of a decision of the board of industrial insurance appeals. There is no reason the court should have given anything other than the WPI.

5) Court's Instruction Number 11 (Monthly Wages)

The court's instruction number 11 is based on RCW 51.08.178. The Instruction is a correct statement of the law. It is the same instruction as that proposed by the employer. The employer's instruction included an additional sentence at the end - "When determining which method should be used Method 1 is the default method."

The court decided that the employer's additional line is superfluous to the jury's work in this case. VRP p.118, ln. 18 – 25. The court was correct. The burden was already on Mr. Hudson to prove

that he was an exclusively seasonal, essentially part time or intermittent worker. As the employer points out, the court advised the jury in the Court's Jury Instruction Number 7 that "The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. The presumption is rebuttable and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on Mr. Hudson to establish by a preponderance" of the evidence that the decision is incorrect.

The court did not misstate the law as the employer argues. The jury was fully informed by the court's instructions as a whole.

6) Court's Instruction Number 13 (Essentially Part Time)

The employer argues that the Court's Instruction Number 13 is not a complete definition of an essentially part-time worker under RCW 51.08.178(2) because the proper focus should be on whether there is a "consistent" number of days worked each week as opposed to whether there is a "specified" number of days worked each week.

The statute states that 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 injury:

- (a) By five, if the worker was normally employed on 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, etc.

The court's instruction is a logical explanation of the implementation of

RCW 51.08.178. If it can be determined that a worker is employed a specified number of days per week, RCW 51.08.178(1) is used. If the worker is not normally employed a specified number of days per week, RCW 51.08.178(2) is used.

**7) Rejecting Employer's Proposed Instruction Number 14
(Normal Employment)**

Lastly, the employer argues that the court's failure to define Normal Employment pursuant to employer's proposed instruction number 14 was harmful error because the term "normally employed" is a term of art. The employer did not propose an instruction explaining what is meant by the term "normally employed". The employer proposed an instruction defining "normal employment." The difference is significant in that it may make sense to define what is meant by "normally employed" as used in RCW 51.08.178(1), but the statute does

not distinguish between “normal employment” and non-normal employment. The employer’s proposed instruction would confuse the jury.

The employer’s proposed instruction is wrong. If “normal employment” is where a worker is engaged in reasonably continuous employment at the time of injury, all employment would be “normal employment”. That definition would not assist the jury decide this case.

The second sentence does not make sense. What is a normal number of work days? Why would this make a worker normally employed? If the worker is normally employed, how will this help the jury decide the case? The instruction is very confusing.

The second paragraph is more confusing still, and inaccurate. It is not a correct statement of the law. If the type of position exists year round in the general labor market, the worker is not necessarily normally employed. If a worker strings together or intends to string together consecutive jobs year round, the worker is not necessarily normally employed.

I believe the employer is trying to equate its definition of “normal employment” with RCW 51.08.178(1), whereby RCW

51.08.178(1) is “normal employment” and RCW 51.08.178(2) is not “normal employment”. The statute simply does not use the term “normal employment”. Defining the term “normal employment” would only serve to confuse the jury.

G. Attorney Fees – Keith Hudson is entitled to reasonable attorney fees under RCW 51.52.130.

RCW 51.52.130 provides that when a Decision and Order from the Board is reversed or modified on appeal and additional relief is granted to a worker or a beneficiary, then a reasonable fee for the services of the worker’s attorney shall be fixed by the court. Here, Mr. Keith Hudson is defending the jury verdict of the Superior Court which reversed the Board of Industrial Insurance Appeals. Because Mr. Hudson has proven that the Order of the Board of Industrial Insurance Appeals was incorrect, and was thereafter required to defend the jury verdict before the Court of Appeals, he is entitled to an award of reasonable attorney fees and expenses for the work on the matter before this Court.

CONCLUSION

The Kitsap County Superior Court correctly denied the

Employer's Motion for Summary Judgment. A motion for summary judgment is granted only if, after considering the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. In order to prevail on summary judgment, the employer must show that there is no genuine issue of material fact as to whether Mr. Hudson was employed as a part time worker, no genuine issue of material fact as to whether Mr. Hudson was employed as a seasonal worker, and no genuine issue of material fact as to whether Mr. Hudson was employed as an intermittent worker. The employer fails on all accounts.

As to the employer's assignments of error based on the court's jury instructions, the instructions are all accurate and complete statements of the law. All instructions are well within the discretion of the judge that heard the case. The court made no prejudicial errors.

As the Employer's Motion for Summary Judgment was correctly denied, and there were no prejudicial errors made with respect to the court's instructions, Mr. Hudson asks that the Court uphold the jury's decision that Mr. Hudson's wages should be based on RCW 51.08.178(2). This is consistent with the courts holding that RCW 51.08.178 should be liberally construed in a way most likely to reflect a

worker's lost earning capacity, with doubts resolved in favor of the
worker.

Dated this 30th day of August, 2010.



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