

No. 42680-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BRODERICK HAGSETH,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondant,

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. SUPERIOR COURT AND THE BOARD OF INDUSTRIAL INSURANCE APPEALS (BOARD) ERRED IN CONCLUDING THAT BRODERICK HAGSETH WAS AN ESSENTIALLY INTERMITTENT OR PART-TIME WORKER.

1. The Court erred in entering Finding of Fact 1.3 insofar as it finds Mr. Hagseth was an employee of Express Personnel Services, Inc. on an intermittent basis.
2. The Court erred in entering Finding of Fact 1.4 insofar as it states that Mr. Hagseth's job assignment with Adams Lumber which began on December 27, 2004 was temporary.
3. The Court erred in entering Finding of Fact 1.6 insofar as it states that Mr. Hagseth's relationship to work in general, to work with Express Personnel Services, Inc., and with Adams Lumber, was intermittent and not continuous or regular employment.
4. The Court erred in entering its first Conclusion of Law 2.3 insofar as it states that Mr. Hagseth's employment as a laborer at Adams Lumber was essentially part-time or intermittent within the meaning of RCW 51.08.178(2)(b).

5. The Court erred in entering its first Conclusion of Law 2.4 insofar as it states that Mr. Hagseth's relationship to his employment generally was essentially part-time or intermittent within the meaning of RCW 51.08.178(2)(b).
6. The Court erred in entering Conclusion of Law 2.5 insofar as it states that the averaging provisions of RCW 51.08.178(2) are applicable to the calculation of Mr. Hagseth's monthly wage.
7. The Court erred in entering its second Conclusion of Law 2.3 insofar as it states that the Board's September 11, 2009 Decision and Order is correct and is affirmed.
8. The Court erred in entering its second Conclusion of Law 2.4 in so far as it states that "the July 31, 2008 Department order which affirmed the April 8, 2008 and April 9, 2008 orders, that establish Mr. Hagseth's overpayment and correct his wage rate, is correct and is affirmed." [sic].
9. The Court erred in entering Judgment 3.1 insofar as it states that the September 11, 2009 Board of Industrial Insurance Appeals Decision and Order, which affirmed

the Department of Labor and Industries July 31, 2008 order is affirmed.

10. The Court erred in entering Judgment 3.2 insofar as it states that the Department was awarded, and Mr. Hagseth ordered to pay, a statutory attorney fee of \$200.00.

11. The Court erred in entering Judgment 3.3 insofar as it states that the Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

B. SUPERIOR COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

1. The Court erred in granting the Respondent's, Defendant's below, Motion for Judgment as a Matter of Law as substantial evidence existed to support Mr. Hagseth's case.

II. ISSUES

A. Whether the Superior Court and the Board erred in concluding that Broderick Hagseth was an essentially intermittent or part-time worker?

B. Whether the Superior Court erred in granting the Respondent's, Defendant's below, Motion for Judgment as a Matter of Law

when substantial evidence existed to support Mr. Hagseth's case?

III. STATEMENT OF THE CASE

On January 31, 2005, Broderick Hagseth, Appellant, Plaintiff and Claimant below, sustained an industrial injury during the course of his employment with Express Personnel Services, Inc. Certified Appeal Board Record (hereinafter "CABR") at 74. At the time of his injury, Mr. Hagseth was working as a lumber grader at Adams Lumber in Centralia, Washington, a job site he had been assigned to on December 27, 2004 by Express Personnel. CABR at 8. Mr. Hagseth filed the claim for his industrial injury on February 8, 2005. CABR at 74. In an interlocutory order issued by the Department of Labor and Industries (Department) on February 16, 2005, the Department began paying Mr. Hagseth based on him being single with no dependents and earning \$1496.00 per month. CABR at 74.

Mr. Hagseth continued to receive time loss compensation on the basis of that February 16, 2005 interlocutory order until May 23, 2007, when the Department issued a wage order which stated,

"The worker's wage is set by taking into account the following: the wage for the job of injury is based on \$8.50 per hour, 8.00 hours per day, 5.00 days per week = \$1,496.00 per month. Additional wages are: Health Care

Benefits - \$0.00 per month; Tips - \$0.00 per month; Bonuses - \$0.00 per month; Overtime - \$0.00 per month; Housing/Board/Fuel - \$0.00 per month. Worker's total gross wage is \$1,496.00 per month. Worker's marital status eligibility on the date of this order is single with 0 dependents." CABR at 77-78.

On July 3, 2007, Mr. Hagseth's employer protested the Department order of May 23, 2007. CABR at 78. On July 19, 2007, the Department issued an order stating that it was reconsidering the May 23, 2007 order and would issue a new order after further review. CABR at 78. In the meantime, the Department continued to pay Mr. Hagseth time loss compensation. CABR at 78-79.

On April 8, 2008, over eight months later, the Department issued an order assessing Mr. Hagseth with an overpayment of \$13,248.81 which "resulted because of a change in reported gross wages." CABR at 79.

This was followed up on April 9, 2008 which stated,

"This order corrects and supersedes DO 5/23/07. The worker's wage is set by taking into account the following: the wage for the job of injury is based on reported income for the twelve-month period from 1/1/04 to 12/31/04 of \$2869.00 equaling \$239.08 per month. Additional wages are: Health Care Benefits - \$0.00 per month; Tips - \$0.00 per month; Bonuses - \$0.00 per month; Overtime - \$0.00 per month; Housing/Board/Fuel - \$0.00 per month. Worker's total gross wage is \$239.08 per month. Worker's marital status eligibility on the date of this order is single with 0 dependents." CABR at 79.

Mr. Hagseth, through his attorney, protested the Department orders of April 8, 2008 and April 9, 2008 on May 14, 2008. On June 3, 2008 the Department affirmed both orders and on June 26, 2008 Mr. Hagseth protested the June 3, 2008 order. On July 31, 2008 the Department affirmed the April 8, 2008 and April 9, 2008 orders and on September 17, 2008 Mr. Hagseth appealed the orders to the Board. CABR at 80. Hearings at the Board were held before Industrial Appeals Judge (IAJ) Judit Gebhardt, and on June 23, 2009 the IAJ issued a Proposed Decision and Order affirming the Department's July 31, 2008 order. CABR at 23-28. Mr. Hagseth filed a Petition for Review of the Proposed Decision and Order on August 10, 2009. CABR at 8-17. On September 11, 2009 the Board issued a Decision and Order affirming the July 31, 2008 order.

Mr. Hagseth appealed the decision of the Board to Superior Court on October 8, 2009. Clerks Papers, hereinafter CP at 1. Prior to trial, the Department filed a Motion for Judgment as a Matter of Law. CP at 13. Oral argument was heard on August 26, 2011, and on September 9, 2011 a judgment was entered in favor of the Department, affirming the Department's July 31, 2008 order. On October 10, 2011, Mr. Hagseth filed a Notice of Appeal to this Court.

IV. STANDARD OF REVIEW

A. STANDARD OF REVIEW

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn.App. 846, 849, 117 P.3d 365 (2005). The hearing in the superior court is de novo. RCW 51.52.115. When a party appeals from a decision of the Board and the superior court affirms the Board's decision, this Court's inquiry is the same as that of the superior court. *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74 Wn.App. 420, 423, 873 P.2d 583 (1994). Appellate review is limited to the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). This Court's de novo review does not change when reviewing a judgment as a matter of law. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash.2d 907, 915, 32 P.3d 250, 254 (2001). *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wash.App. 443, 454, 158 P.3d 1183, 1189 (2007).

B. STATUTORY INTERPRETATION UNDER TITLE 51

Courts must liberally construe the Industrial Insurance Act in favor of the injured worker. Title 51 RCW has its own rule of statutory construction, in RCW 51.52.010, which provides, in relevant part:

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

In this state, injured workers' rights to benefits are statutory. Washington's workers' compensation law was enacted in 1911, the result of a compromise between employers and workers such that “sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy.” RCW 51.04.010. Workers receive less than full tort damages but are spared the expense and uncertainty of litigation. *See Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 469-70, 745 P.2d 1295 (1987).

The Industrial Insurance Act mandates that its provisions be “liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. Courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). Note that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the *entire statutory scheme* that receives the benefit of that construction.

Each statutory provision should be read by reference to the whole act. “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff’d*, 144 Wn.2d 907, 32 P.3d 250 (2001). The Supreme Court noted:

Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. “The purpose of reading statutory provisions in *pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision ‘as constituting a unified whole, to the that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes.’”

In re Estate of Kerr, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), *citing State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In addition to liberal construction, Washington courts have mandated that doubts as to the meaning of the workers’ compensation law be resolved in favor of the worker. *See, Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996)(where a worker who had been awarded a permanent total disability pension under one worker’s compensation claim received a permanent partial disability award for a prior injury under a separate, pre-existing claim. Where the court held that the timing of the closure of claims should not work to the disadvantage of an injured worker.); *see also, McClelland v. ITT Rayonier Inc.*, 65 Wn.

App. 386, 828 P.2d 1138 (1992)(a case involving an employee's claim for worker's compensation benefits for an aggravation of his psychological condition of major depression coupled with simple phobia).

C. THE ACT'S PURPOSE AND POLICIES WHEN LOOKING AT THIS CASE

In order for a proper understanding of the importance of this case and the issues presented, it is important to first look at what brought about Washington's Industrial Insurance Act and the policies and presumptions that came with it.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. As noted for many years by the courts, the enactment of the Industrial Insurance Act in 1911 by the Washington State Legislature was due to a, "finding that the remedy of the injured workman had been uncertain, slow and inadequate. . . ." 1911 Wash. Law, ch. 74; *see, e.g. Lee v. Dep't of Labor & Indus.*, 81 Wn. 2d 937, 506 P.2d 308, 309 (1973)(a case involving a Mandamus proceeding by injured workman to compel director of Labor and Industries to obey and carry out order of board of industrial insurance appeals directing department of labor and industries to provide workman additional treatment). The declared purpose of the Act was to provide sure and certain relief for injured workmen. *Id.*

The Washington Supreme Court has long held that the Industrial Insurance Act is to be liberally applied in favor of the injured worker. The court stated in *Johnson v. Dep't of Labor & Indus.*, 134 Wn. 2d 795, 953 P.2d 800 (1998), “We have previously recognized the change in the common law brought about by the Legislature’s enactment of the Industrial Insurance Act and that the Act is remedial in nature and ‘is to be liberally applied to achieve its purpose of providing compensation to all covered persons injured in their employment.’” 134 Wn. 2d at 799, 953 P.2d at 802. (Emphasis added)(Quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979)).

As the cases above establish, the Industrial Insurance Act was enacted to compensate as fully as possible workers injured on the job. The long standing policy of liberal construction of the Act in favor of the worker and the remedial nature of the Act, in conjunction with the mandate that any doubt be resolved in favor of the worker, supports a finding by this Court reversing the superior court’s ruling granting Judgment as a Matter of Law to the Department and affirming the July 31, 2008 order.

V. ARGUMENT

On January 31, 2005, while he was working as a lumber grader at Adams Lumber in Centralia, Washington, Broderick Hagseth sustained an industrial injury to his right shoulder while he was stacking wood boards. At that time, Mr. Hagseth was working full time at Adams Lumber, which was a job site he had been assigned to one month earlier, on December 27, 2004, by his employer, Express Personnel.

At the time of his injury, Mr. Hagseth had worked for his employer, Express Personnel, for two years. CABR at 5. He had also previously been working with Express Personnel for several years earlier. CABR at 5. Exhibit 4 shows that Mr. Hagseth worked for Express Personnel from 1991 through 1997, 1999 through 2000, 2003 through 2005. Initially, Mr. Hagseth's wage was set under RCW 51.08.178(1), the "default provision," based on the amount he was earning at the time he was injured. The Department calculated his TLC rate at \$897.60 per month based on a pay rate of \$1,496.00. RCW 51.08.178(1) states:

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.

On April 8, 2008, the Department recalculated Mr. Hagseth's wage rate using the twelve-month averaging provision in RCW 51.08.178(2). Because Mr. Hagseth's income from Express was recalculated at an average of \$239.08 per month in the twelve months leading up to his injury, the Department assessed an overpayment in the amount of \$13,248.81. RCW 51.08.178(2) states:

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.

At hearings before the Board, Mr. Hagseth established a prima facie case that he was not an essentially intermittent worker and formed questions which must be determined by a trier of fact. As such, it was

inappropriate for Judgment as a Matter of Law to be granted in favor of the Department.

A. MR. HAGSETH WAS NOT AN ESSENTIALLY INTERMITTENT OR PART-TIME WORKER

1. Standard for determining whether work is essentially intermittent

The Industrial Insurance Act defines monthly wages used to calculate benefits in RCW § 51.07.178. *Watson v. Dep't. of Labor & Indus.*, 133 Wn. App. 903, 912, 138 P.3d 177 (2006). Under this statute, there are two methods for calculating monthly wages: the first, contained in subsection (1), requires the Department to compute a worker's monthly salary by multiplying the worker's daily wage at the time of injury and number of hours worked. RCW 51.08.178(1); *Watson*, 133 Wn. App. at 912 (emphasis provided). The statute specifies that this provision "shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned." RCW § 51.08.178(1); *Watson*, 133 Wn. App. at 912. It is, therefore, the default provision.

To determine whether a worker's employment is "essentially part-time or intermittent," the Washington State Supreme Court has adopted a two part test. *Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 285, 996 P.2d 593 (2000) (citations omitted). First, the Court must determine

whether the type of work being performed itself is essentially intermittent. *Avundes*, 140 Wash.2d 282 at 290. If the type of employment itself is not intermittent, the Court must determine whether the worker's relation to the work is intermittent. *Id.*

Intermittent employment is employment that is not regular or continuous into the future. *School Dist. No. 401 v. Minturn*, 83 Wn. App. 1, 920 P.2d 601, (1996). Washington courts have further refined "intermittent employment" to mean a job that "may be full-time, extra-time or part-time and has definite starting and stopping points with recurring time gaps." *Watson*, 133 Wn. App. at 914. As long as the type of work being performed by the injured worker "is generally available on a continuous basis and constitutes full-time employment," the work cannot be considered essentially part-time or intermittent. *In re Deborah Guaragna (Williams)*, BIIA Dec., 90, 4246 (1992).

If the Court finds that the type of employment performed is not essentially part-time or intermittent, the Court must determine the worker's relation to the work by considering all relevant factors, including: (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. *Avundes*, 140 Wn.2d at 287 (citations omitted).

2. Mr. Hagseth was not an essentially intermittent or part-time worker

It has been established that “work which requires a worker to establish serial employment should be viewed as essentially full-time.” *Avundes*, 140 Wash.2d 282 at 288. Additionally, the Board, in its significant decision *In re Deborah Guaragna (Williams)*, held that employment with a labor exchange is considered continuing in nature, even though the employer may not have been able to offer continuous employment after a current project is completed. *In re Guaragna (Williams)* at 9.

The type of work being performed by Broderick Hagseth was not essentially intermittent or part-time. Mr. Hagseth was a permanent employee of Express Personnel and had been for several years. CABR at 5, Exhibit 3. Additionally, when Mr. Hagseth was injured, he was working at Adams Lumber as a lumber grader where he worked multiple 40 hour weeks, including receiving overtime. Exhibit 4. Adams Lumber eventually hired a full time employee. CABR at 26-27.

In determining whether Mr. Hagseth’s relationship to employment was essentially intermittent, the court has enumerated four factors to be taken into consideration: (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. *Avundes*, 140 Wn.2d at 287.

First, as established above, the nature of the work that Mr. Hagseth was performing cannot be considered essentially intermittent or part-time, thus the first factor in determining whether Mr. Hagseth's relationship to his employment was essentially intermittent must be held to be in Mr. Hagseth's favor.

Second, Mr. Hagseth clearly intended his employment at Express Personnel to be full time if possible, and desired to get hired on full time by Adams Lumber. Mr. Hagseth stated that he was available to work full time for express. CABR at 5. Further, he wanted to get hired on directly by Adams Lumber. CABR at 12. Additionally, Jackie Rayan testified that she believed Mr. Hagseth was seeking full time employment. CABR at 44.

Third, Mr. Hagseth had a consistent, full time relationship with his current employer, Express Personnel. He also had a continuing relationship with Adams Lumber. Mr. Hagseth stated he was able to lift the required number of boards at one time. CABR at 12. While Francisco Vargas stated that he did not believe Adams Lumber would hire Mr. Hagseth, Adams Lumber also did not sever their association with Mr. Hagseth, as other employers to whom Mr. Hagseth had been sent had done

in the past. Exhibit 3. Rather, Mr. Hagseth's work at Adams Lumber ended because of his industrial injury. Exhibit 3. Mr. Hagseth's employment with Express Personnel, however, continued until May 12, 2005.

Fourth, Mr. Hagseth's work history is also in his favor. Ms. Rayan testified that Mr. Hagseth was working regularly in 2003 and 2004. CABR at 42-43. In fact, Ms. Rayan classified Mr. Hagseth as a typical Express Personnel employee. CABR at 41. Thus, Mr. Hagseth's relationship to his employment satisfies all four criteria for full-time, regular employment and was not essentially part-time or intermittent within the meaning of RCW 51.08.178(2)(b).

B. JUDGMENT AS A MATTER OF LAW WAS NOT APPROPRIATE IN THIS CASE

The Court may grant judgment as a matter of law (CR 50(a)) on an appeal from a Board decision if the Board record contains no substantial evidence to establish an essential element of the non-moving party's case. *See Strmich v. Dep't of Labor & Indus.*, 31 Wn.2d 598, 198 P.2d 181 (1948); *Krlevich v. Dep't of Labor & Indus.*, 23 Wn.2d 640, 161 P.2d 661 (1945); *Zipp v. Seattle School District No. 1*, 36 Wn.App. 598, 676 P.2d 538 (1984). Substantial evidence exists if it is sufficient to persuade a fair-minded person of the truth of the declared premise. *Davis v.*

Microsoft Corp., 149 Wash. App. 521, 531, 70 P.3d 126 (2003).

Specifically, CR 50(a) provides:

(a) Judgment as a Matter of Law.

- (1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

The standard for granting a motion for judgment as a matter of law is the same as the standard for granting summary judgment under Rule 56. *Hanna v. Goodyear Tire and Rubber*, 17 F.Supp.2d 647 (E.D.Tex.1998); *Nunez v. Monterey Peninsula Engineering*, 867 F.Supp. 895 (N.D.Cal.1994); *Smith v. Fourre*, 71 Wn.App. 304, 307, fn. 7, 858 P.2d 276, 277 (1993). Summary Judgment is appropriate, when the facts are not in dispute and, therefore, the issue is one of law. CR 56(c); *Ventures Northwest v. State*, 81 Wn.App. 353, 914 P.2d 1180 (1996). As noted in *Ventures Northwest*, 81 Wn.App. at, 358, the reviewing court must

determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wn.App. 225, 230, 660 P.2d 1124 review denied, 99 Wn.2d 1020 (1983).

When ruling on a motion for judgment as a matter of law, the Court must view the evidence and all reasonable inferences therefrom in a light most favorable to the nonmoving party. *Bishop v. Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn. App. 443. *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn.App. 454, 962 P.2d 854 (1998); *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697 (11th Cir.1998); *Marsh v. Coleman Co., Inc.*, 806 F.Supp. 1505 (D.Kan.1992); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 93, 549 P.2d 483, 489 (1976).

Simply put, it was appropriate for the Superior Court to grant the motion for a judgment as a matter of law only if there was no evidence, nor reasonable inferences from the evidence, to support the conclusion that Broderick Hagseth was not an essentially intermittent worker. See e.g. *Peterson v. Littlejohn*, 56 Wash. App. 1, 11-12, 781 P.2d 1329 (1989). Clearly, Mr. Hagseth presented evidence to support the conclusion that he was not an intermittent worker. Reading the record in the light most favorable to the non-moving party, Mr. Hagseth presented a

prima facie case which satisfied all factors of the *Avundes* test. *Avundes*, 140 Wn.2d 282. As evidence existed to support the Mr. Hagseth's case, granting Judgment as a Matter of Law in favor of the Department was inappropriate, and reversible error.

VI. CONCLUSION

The Superior Court erred in granting the Department's Motion for Judgment as a Matter of Law as Mr. Hagseth presented evidence to support the conclusion that he was not an intermittent worker. The awarding of Judgment as a Matter of Law in this case went against the very nature of the Industrial Insurance Act. As a result, the Superior Court's judgment must be reversed and the case remanded to Superior Court so that Mr. Hagseth may present his case to a trier of fact.

Dated this 3rd day of February, 2012.

Respectfully submitted,

VAIL-CROSS & ASSOCIATES

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 3rd day of February, 2012, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Kay A. Germiot
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P.O. Box 2317
Tacoma, WA 98401

DATED this 3rd day of February, 2012.


LYNN M. VENEGAS, Secretary