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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306127

Superior Court No. 11-2-00955-3

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

OSCAR VILLA, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

STATE OF WASHINGTON,

Respondent

REPLY BRIEF OF APPELLANT

Christopher L. Childers
WSBA No. 34077
Smart, Connell, Childers & Verhulp P.S.
309 North Delaware Street, PO Box 7284
Kennewick, WA 99336
509-735-5555
Attorneys for Appellant

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

This is Mr. Villa's Reply to the Department's brief. The facts are set forth in the Appellant's brief. The issue is whether the Department properly interpreted RCW 51.08.178(1) when calculating Mr. Villa's wages for the purpose of determining his worker's compensation pension.

IV. ARGUMENT

In the Department's brief it states that RCW 51.08.178(1) directs the Department to calculate a worker's wages based on the number of hours "normally employed . . ." Resp. Br. at 1. This is true as far as it goes. What the Department neglected to set forth is the first sentence of the statute which 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.

RCW 51.08.178(1)(Emphasis added.)

RCW 51.08.178(1) goes on to state: "The number of hours the worker is normally employed shall be determined by the department *in a fair and reasonable manner . . .*" Without apparent

consideration of these statutory directives the Department concluded that since Mr. Villa had initially been employed at 40 hours per week that should have been the basis for the wage calculation. As will be seen below this is not correct.

Next, the Department points to its cross-examination of Mr. Villa to conclude that Mr. Villa testified that a regular, "normal" workweek was 8 hours per day, 5 days per week. Resp. Br. at 4. This statement mischaracterizes the testimony. Consider the following (in regard to the 50 hour work week):

Q: So this was sort of abnormal *as far as the first four weeks you were working?*

A: Right.

Q: This was not normal. This was overtime?

A: Yeah. This is overtime.

CP 105 (Emphasis added.)

Mr. Villa's answer to the first question was to say the 50 hour workweek was "sort of abnormal" *in relation to the first four weeks he had worked*. He was not stating or implying that the new 50 hour workweek was abnormal. The second question is equally confusing. It contained both a statement and a question. Mr. Villa answered only the question asked – no response was given to the

statement. He admitted only that he was working overtime and *not* that it was abnormal. The Department's conclusion that Mr. Villa acknowledged that a 50 hour workweek was abnormal is thus deceiving.

The Department next asserts it is not necessary to review the trial court's findings for substantial evidence because Mr. Villa did not argue such in his brief making them verities on appeal. Resp. Br. at 7-8. This is not true. On page 6 of the Appellant's brief under the heading "Disputed Findings and Conclusions" is the citation to the record and the text of Board Finding #5. This is in conformity with RAP 10.3(g).¹ There is no uncertainty as to which finding is challenged.

The Department claims that Mr. Villa failed to present any argument as to why Finding #5 is not supported by the evidence. Resp. Br. at 8. This argument is misleading and ignores the crux of Mr. Villa's appeal, which is that the Board and then the trial court misinterpreted RCW 51.08.178(1). See Appellant's Brief 6-16. Mr. Villa has consistently maintained that his wages, for disability

¹ RAP 10.3(g) states in relevant part: " A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. "

pension purposes, should have been reasonably and fairly calculated based on the wage he was earning at the time of the injury as required by the statute.

It is true that Mr. Villa did not use the term “substantial evidence” in his argument. This is not fatal to his appeal. RAP 1.2(a) makes it clear that technical violation of the rules will not ordinarily bar appellate review as long as justice will be served by such review. Where the nature of the challenge is absolutely clear and the challenged finding is set forth in the appellate brief it is proper to consider the merits of the challenge. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979). Both of these elements are present in Mr. Villa’s brief. The disputed finding is not a verity on appeal.

The Department also repeats several times that the facts are *undisputed* that Mr. Villa was normally employed 8 hours per day, 5 days per week for a total of 40 hours per week. Resp. Br. at 1, 2, 8. This is incorrect. The *only* undisputed fact on this issue is that Mr. Villa was originally hired to work at 8 hours per day but that changed to 10 hours per day, 5 days per week or 50 hours per

week when it was determined the job on which he was working was behind schedule. CP 100-103

On page 12 of its brief the Department makes the following statement: "Mr. Villa argues that it is improper to consider a worker's typical work pattern when calculating a worker's wages because RCW 51.08.178(1) does not use the word "pattern." It cites to page 14 of the Appellant's brief. A review of the Appellant's brief at that citation reveals no such argument exists. Nevertheless, it is true that the statute does not define the term "normally employed" as the "typical work pattern." It requires only that the hours an injured worker is "normally employed" to be determined in a "fair and reasonable" manner.

The Department also contends Mr. Villa does not explain "precisely" what he means when he asserts he was working 50 hours per work at the time of his injury. Resp. Br. at 13. This argument is disingenuous when the crux of this appeal is that Mr. Villa's work schedule had changed, due to the scope of the asbestos abatement job, from 40 hours per week to 50 hours in the week prior to the injury, the week of the injury and 8 months to a

year into the foreseeable future since the job was sizeable. CP 100-102.

On page 16 of the Department's brief it makes a statement that Mr. Villa did not support his argument as to why the Department's interpretation of RCW 51.08.178 in regard to the term "at the time of injury" was superfluous. It misinterpreted Mr. Villa's contention. What was being argued is the Board's Finding # 1.2, which states that he failed to "establish a pattern of wages," is incorrect and superfluous to the wording of the statute. Mr. Villa supports this argument with the statement, "By both adding language on one hand and ignoring vital language on the other the trial court did not apply the statute in the requisite "fair and reasonable manner." App. Br. at 10.

On page 17 the Department renews its argument that Mr. Villa did not challenge the court's Finding # 1.2, which is patently false. This argument was set forth above and will not be repeated here.

Next, the Department states that Board decisions may be considered as persuasive authority citing *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997).

Resp. Br. at 17. Nowhere in this case is there any reference to Board decisions being persuasive authority. Thus, the Department's argument is not well taken.

Nevertheless, if this court reviews the *Stedman* Board decision, cited by the Department, it will find it dealt with income averaging, which is not the issue here. *In re Maggie Stedman*, BIIA Dec., 09 22981 (2010). The Department has coined the phrase "normal working pattern" and uses it consistently throughout its explanation of the *Stedman* decision. Resp. Br. at 17-19. This is not the term used in *Stedman*, which stayed true to the language set forth in RCW 51.08.178(1), which states: "The daily wage shall be the hourly wage multiplied by the number of hours the worker is *normally employed*." (Emphasis added.) "Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the *words of the statute itself, regardless of contrary interpretation by an administrative agency*." *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392 396, 103 P.3d 1226 (2005).

Interpreting *Stedman*, while using its so-called "normal working pattern" analysis, the Department concludes that Mr. Villa

failed to establish that his new 50 hour per week work schedule represented a “more or less permanent shift” in his work hours. It also concludes that his shift to a 50 hour workweek is only a “minor variation” in his schedule that should not be considered in determining his wages. Resp. Br. at 17-19. To the contrary, the 50 hour workweek was not a “more or less permanent shift,” it was a *permanent* shift. Additionally, the 50 hour workweek was not a “minor variation,” it constituted a 20% increase in hours worked per week! These facts are subject to the statute’s fair and reasonable analysis and should have been considered by the Board and then the trial court rather than the “normal working pattern” analysis.

The Department is attempting to construe the statute in a way whereby the fair and reasonable standard of determining wages is to be interpreted solely as the number of hours per week the “worker most often worked.” Resp. Br. at 18. This is not the proper legal standard. Worse yet, it has the potential to lead to absurd results that would defeat the plain meaning and intent of the statute. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 464, 219 P.3d 686 (2009).

The Department's last argument regarding liberal construction is puzzling. It initially states that "no provision of the Act, and no legal authority, [sic] supports Mr. Villa's argument" Resp. Br. at 20. To the contrary the plain language of the statute supports his stated arguments. It is not possible to cite to legal authority as this is a novel legal issue.

The guiding principle of the Industrial Insurance Act is that it is remedial in nature and therefore must be liberally construed to achieve the purpose of providing compensation to all covered employees injured in their employment. Thus, all doubts must be resolved in favor of the worker. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 425, 873 P.2d 583 (1994).

Mr. Villa is not asking this court to create a new rule of law through the liberal construction doctrine. He is merely asking for application of the current law to the facts presented. Requesting the statute be applied in a fair and reasonable manner in order for Mr. Villa to be justly compensated does not lead to a strained or absurd result nor defeat the plain meaning of the statute. RCW 51.08.178 must be applied on a case by case basis with all doubts resolved in favor of the injured worker. RCW 51.12.010.

V. CONCLUSION

Taking into consideration the arguments set forth in the Appellant's brief and this Reply brief, Mr. Villa respectfully requests this court reverse the trial court decision and award him attorney fees.

Respectfully submitted this 31st day of October, 2012.



Christopher L. Childers, WSBA #34077
Smart, Connell, Childers & Verhulp P.S.
309 North Delaware Street
Kennewick, WA 99336
(509) 735-5555
Attorneys for appellant

VI. APPENDIX

In re Maggie Stedman, BIIA Dec. 09 22981 (2010)



Board of Industrial Insurance Appeals
State of Washington

WAC
 7
 100-00000

Significant Decisions

SEE TIME LOSS COMPLENSATION Wages - RCW 51.08.178(1), (2), or (4)

Averaging hours worked per day pursuant to RCW 51.08.178(1) should only be used in limited circumstances. Minor variations in hours worked should be considered self correcting rather than representative of a change in full time status. Averaging is the exception rather than the norm when establishing the number of hours worked.Maggie

Stedman, 09 22981 (2010)

[Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No.10-2-00039-6.]
 Court of Appeals 6950-8-7.]

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IN RE: MAGGIE R. STEDMAN) **DOCKET NOS. 09 22981 & 09 23486**
)
CLAIM NO. W745018) **DECISION AND ORDER**
)

APPEARANCES:

Claimant, Maggie R. Stedman, by
 Rumbaugh, Rideout, Barnett & Adkins, per
 Stanley J. Rumbaugh

Self-Insured Employer, General Construction Co., by
 Wallace, Klor & Mann, P.C., per
 Drew D. Dalton, and John L. Klor

Department of Labor and Industries, by
 The Office of the Attorney General, per
 Zebular Madison, Assistant

The claimant, Maggie R. Stedman, filed an appeal with the Board of Industrial Insurance Appeals on December 10, 2009, from an order of the Department of Labor and Industries dated November 30, 2009 (Docket No. 0922981). In that order, the Department reversed orders dated June 9, 2009, and August 28, 2009, and calculated the claimants gross wage as \$4,370.12 per month.

On December 15, 2009, the employer, General Construction Co., also appealed the November 30, 2009 Department order (Docket No. 0923486). The Department order is REVERSED AND REMANDED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on September 7, 2010, in which the industrial appeals judge reversed and remanded the November 30, 2009 Department order. The employer filed a response to the claimant's Petition for Review on October 1, 2010.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. **[2]**

We grant review to address the calculation of the claimant's daily wage pursuant to RCW 51.08.178(1). The statute provides that a workers daily wage shall be the hourly wage multiplied by the number of hours the worker is "normally employed." Our industrial appeals judge determined that the claimant, Maggie Stedman, worked an average of 7.17 hours per day, five days per week. This figure was calculated by averaging the claimant's hours over the twelve months preceding the injury.

RCW 51.08.178(1) specifically provides that the number of hours a 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. We previously determined that the only averaging permitted by subsection (1) of the statute was averaging similar to that used by our industrial appeals judge, that is to say, we determined the statute permitted averaging the number of hours per day and days per week to determine the number of hours a worker was "normally employed." See, Ubaldo Antunez, BIIA Doc., 88 1852 (1989). Among other changes to RCW 51.08.178, amendments in 1988 reflected our holding in Antunez and specifically permitted, but did not require, averaging of hours worked per day to calculate the hours "normally worked."

Although this method of averaging is permitted by RCW 51.08.178(1), the method should be utilized only in limited circumstances. Whether an averaging method is needed is dependent on the circumstances that define the hours and days a worker is employed. We previously defined "normally employed" as a "more or less permanent standard" or "established norm". In *re* Jeanetta Stepp, BIIA Dec. 87 2734 at 7 (1989). We also stated that the use of the averaging method should be reserved for employment situations with "persistent fluctuations in the number of hours per day or days per week." *Antunez* at 6. A worker can be considered "normally employed" eight hours a day five days a week despite occasional variations from the normal work schedule. A minor variation in a worker's schedule does not require that the Department resort to averaging in order to determine the hours worked per day. Minor variations should be generally considered self-corrective rather than representative of a change in full-time status. *Antunez* at 7. When the statutory provision is viewed in this light, the use of an averaging method should remain the exception rather than the norm when establishing the number of hours normally employed. [3]

Averaging is not required in this case in order to calculate the hours and days Ms. Stedman was normally employed. We find only minor variations, not persistent fluctuations, in the hours or days. Ms. Stedman was employed as a carpenter with General Construction Co. on a full-time basis. She was scheduled to work eight hours per day, five days per week. While she was occasionally sent home if a project finished early, the intention of both the claimant and her employer was that she was scheduled to work full time. The employer's choice to have the crew leave early if a project was completed represents the type of self-correcting change contemplated by *Antunez*. The minor changes in Ms. Stedman's schedule due to leave or project completion are not persistent schedule fluctuations that justify averaging under the statute. The circumstances of her employment establish a norm of full-time employment.

Ms. Stedman completed a three-week unpaid apprentice training program prior to beginning her position as a carpenter. While she was permitted to collect unemployment during this period, the parties agreed that it would be unjust to average the unemployment compensation into her wage calculation. This illustrates the difficulty with averaging the wages of a full-time worker. All of the parties recognized that averaging the unemployment wage for the training program would be inconsistent with the statutory mandate that the daily wage be determined in a fair and reasonable manner. Under these circumstances, the hours Ms. Stedman was normally scheduled to work, rather than an average of the actual hours worked, should govern the wage calculation. Once the worker establishes that they were "normally employed" full-time, hours should not be averaged under the statute.

The employer raised the issue of including the claimant's vacation and leave pay when averaging her hours. Because averaging was not the proper method for determining Ms. Stedman's hours, this issue need not be further addressed.

Because Ms. Stedman was "normally employed" full-time, we conclude that her daily wage should have been calculated based on eight hours per day, five days per week, with a wage of \$21.24 per hour, plus monthly health care benefits of \$844.28. We remand this matter to the Department to recalculate the claimant's time-loss compensation benefits rate using these figures. [4]

FINDINGS OF FACT

1. On January 25, 2007, the Department of Labor and Industries received an Application for Benefits in which the claimant, Maggie R. Stedman, alleged she incurred an industrial injury to the claimant on January 24, 2007, during the course of her employment with General Construction Co. The claim was allowed and benefits were provided. On June 9, 2009, the Department issued an order in which it determined the claimant's time-loss compensation benefits based on total gross wages of \$3,611.64 per month. On June 16, 2009, the Department received the claimant's protest to the June 9, 2009 order. On August 28, 2009, the Department issued an order in which it directed the claimant to repay the self-insured employer an overpayment of time-loss compensation benefits. On September 4, 2009, the Department received the claimant's protest to the August 28, 2009 order, and it was placed in abeyance. On November 30, 2009, the Department issued an order in which it reversed the June 9, 2009, and August 28, 2009 orders and determined the claimant's total gross wages of \$4,370.12 per month. This amount was based on \$21.24 per hour times 166 hours per month with health care benefits of \$844.28 per month as a single individual with three dependents. On December 10, 2009, the Board received the claimant's appeal from the November 30, 2009 order. On December 15, 2009, the Board received the self-insured employer's appeal from the November 30, 2009 order. On December 23, 2009, the Board granted the claimant's appeal under Docket No. 09 22981, and agreed to hear the appeal. On December 23, 2009, the Board granted the self-insured employer's appeal under Docket No. 09 23486, and agreed to hear the appeal.
2. Ms. Stedman sustained an industrial injury on January 24, 2007, during the course of her employment with General Construction Co.
3. At the time of her industrial injury, Ms. Stedman was a married individual with three dependents. She earned \$21.24 per hour, and her self-insured employer provided \$844.28 per month for her health care benefits.
4. Ms. Stedman was scheduled to work eight hours per day, five days per week.
5. Ms. Stedman was occasionally sent home early when a project was completed. She also took leave. These slight variations in her schedule were self-correcting and do not constitute persistent fluctuations in the hours worked.

CONCLUSIONS OF LAW

- 1 The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. Ms. Stedman was normally employed eight hours a day, five days a week within the meaning of RCW 51.08.178(1). [5]
3. Ms. Stedman's hours should not be averaged when her schedule reflected a permanent standard or established norm of working full-time or eight hours per day, five days per week.
4. The November 30, 2009 order of the Department of Labor and Industries is incorrect and is reversed. The claim is remanded with direction to calculate the claimant's time-loss compensation benefits rate as a married individual with three dependents, based on a full time schedule of five days per week, eight hours per day, with an hourly wage of \$21.24, and self-insured employer paid health care benefits of \$844.28 per month.

Dated: November 18, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of October, 2012,
I sent for delivery a true and correct copy of Appellant's Reply Brief
by the method indicated below, and addressed to the following:

U.S. Mail (Original and one (1) copy)

Renee S. Townsley, Clerk Administrator
The Court of Appeals of the State of Washington Division III
500 North Cedar Street
Spokane, WA 99201-1905

U.S. Mail (One (1) copy)

Jeffrey R. Johnson
Attorney General of Washington
8127 West Klamath Ct., Suite A
Kennewick, WA 99336



Vallari Royer