Hall, Roy

TIME-LOSS COMPENSATION (RCW 51.32.090)

Compensation

RCW 51.08.178(1) through (4) does not authorize the Department to average profit and loss of a sole proprietor's business over a 12-month period in order to calculate a monthly wage. **….*In re Roy Hall*, BIIA Dec., 07 12838 (2008)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 08-2-24266-9KNT.]

Wages – Intermittent/seasonal, full-time, or other usual wages paid others (RCW 51.08.178(1), (2), or (4))

When wages are not fixed or cannot be reasonably and fairly determined under RCW 51.08.178(1), the method for determining wages is specified under RCW 51.08.178(4), which requires the Department to calculate the wage paid other employees in like or similar occupations where the wages are fixed. If the similar wage is an hourly wage, the Department may then use subsection (1) to calculate the appropriate monthly wage. **....*In re Roy Hall*, BIIA Dec., 07 12838 (2008)** [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 08-2-24266-9KNT.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROY HALL	)	**DOCKET NO. 07 12838**
	)	
CLAIM NO. AB-92982	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Roy Hall, by
Rumbaugh, Rideout, Barnett & Adkins, per
John E. Wallace

Employer, H & H Construction,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Mary V. Wilson, Assistant

The claimant, Roy Hall, filed an appeal with the Board of Industrial Insurance Appeals on March 21, 2007, from an order of the Department of Labor and Industries dated March 12, 2007. In this order, the Department affirmed two prior orders dated February 26, 2007, and February 27, 2007. In the February 26, 2007 order, the Department determined that Mr. Hall's gross monthly wage at the time of injury was $928.08. In the February 27, 2007 order, the Department assessed an overpayment of time-loss compensation in the amount of $5,305.04 for the period of October 20, 2006, through January 31, 2007, because of a change in reported gross wages. The Department order is **REVERSED AND REMANDED**.

ISSUE

Roy Hall is a self-employed carpenter doing business as H & H Construction. He elected industrial insurance coverage pursuant to RCW 51.12.110 and RCW 51.32.030, prior to October 16, 2006. On that date, he sustained an industrial injury. The sole issue is whether the Department's method for calculating Mr. Hall's monthly wage at the time of injury satisfied the requirements of RCW 51.08.178.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department, to a Proposed Decision and Order issued on February 5, 2008. The industrial appeals judge reversed the March 12, 2007 order and remanded the claim to the Department to calculate Mr. Hall's benefits based on a monthly wage of $2,819.28 and to recalculate time-loss compensation for the period of

October 20, 2006, through January 31, 2007, based upon the monthly wage of "$2,019.28." Proposed Decision and Order (Conclusion of Law No. 4), at 5.

Timeliness of the Department's Petition for Review: The claimant received the Proposed Decision and Order on February 6, 2008. On February 7, 2008, he filed a request, by telephone facsimile and by mail, asking that "$2,019.28" be corrected to $2,819.28 in Conclusion of Law No. 4. We treated that request as a timely Petition for Review, which we granted on February 20, 2008. On February 11, 2008, the Department requested a 20-day extension of the time for filing a Petition for Review. On February 13, 2008, we extended the deadline to March 17, 2008, and, on that date, we received the Department's Petition for Review by telephone facsimile. On April 2, 2008, we granted the Department's Petition.

On April 9, 2008, the claimant moved to dismiss the Department's Petition for Review as untimely. RCW 51.52.104 provides:

> Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or personally delivering the petition to the board's offices in Olympia.

WAC 263-12-01501(b) provides: "*Methods of filing.* Unless otherwise provided by statute or these rules any written communication may be filed with the board personally, by mail, or by telephone facsimile."

The claimant argues that, under RCW 51.52.104, the Department was required to file its Petition for Review either by personal delivery or by mail. According to the claimant, those are the only two methods permitted by the statute. By his analysis, WAC 263-12-01501(b) does not apply to petitions for review, because the rule only allows filing by telephone facsimile "[u]nless otherwise provided by statute." We disagree with the claimant's argument.

RCW 51.52.104 permits a party to file a Petition for Review by mail or by personal delivery. It does not exclude all other methods of delivery, nor does it require us to consider a Petition for Review untimely, even though it was received at the Board within the time allowed by law. Under WAC 263-12-01501(b), we permit Petitions for Review to be filed by telephone facsimile. The Department chose that method here. The claimant's motion to dismiss is denied.

Furthermore, before we received the Department's Petition for Review, we had already granted the claimant's Petition for Review on February 20, 2008. At that point, all issues were before us, not just the limited matter raised by the claimant, and regardless of whether the

Department subsequently filed a timely Petition for Review. See, *In re Richard Sims*, BIIA Dec. 85 1748 (1986).

Claimant's Motion for Summary Judgment: The claimant moved for summary judgment on October 18, 2007. The motion included declarations by Mr. Hall and his attorney, both dated October 16, 2007; Exhibit No. 1 (2005 Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship)); a second Exhibit No. 1 (Department Order dated February 26, 2007); Exhibit No. 2 (Department Order dated February 27, 2007); Exhibit No. 3 (Department Order dated March 12, 2007); Exhibit No. 4 (an Activity Log created by the Department, showing how the monthly wages were calculated); Exhibit No. 5 (pages C-3 through C-4 of the Department's Workers' Compensation Manual); and Exhibit No. 6 (Department Policy 4.41). The Department responded with a legal memorandum on November 5, 2007, attaching no declarations, affidavits, or exhibits. The claimant replied on November 13, 2007, attaching a November 9, 2007 declaration by the claimant; a November 12, 2007 declaration by the claimant's attorney; Exhibit No. 1 (the September 24, 2007 Agreed Judgment After Return of Mandate in *Crystal C. Engelhart Malang v. Department of Labor and Industries of the State of Washington*, No. 05-2-11627-2); and Exhibit No. 2 (the Department's appellate brief in *Malang v. Department of Labor & Indus.,* 139 Wn. App. 677 (2007)). Additionally, on November 29, 2007, the claimant filed a November 27, 2007 declaration by his wife and bookkeeper, Joy Hall, providing further information regarding the deductions taken in Schedule C.

The parties agreed that there was no genuine issue with respect to any material fact, and the industrial appeals judge determined that summary disposition was appropriate under CR 56. We agree.

DECISION

Roy Hall is a self-employed carpenter doing business as H & H Construction. He elected and paid for industrial insurance coverage from the State Fund, pursuant to RCW 51.12.110 and RCW 51.32.030, and was covered by such insurance on October 16, 2006. On that date, Mr. Hall sustained an industrial injury during the course of his employment for H & H Construction. The Department allowed the claim and paid time-loss compensation.

Under RCW 51.32.030: "Any sole proprietor . . . who has requested coverage under this title and who shall thereafter be injured or sustain an occupational disease, shall be entitled to the benefit of this title, as and under the same circumstances and subject to the same obligations as a worker . . .." Thus, like any injured worker, Mr. Hall is entitled to time-loss compensation benefits

pursuant to RCW 51.32.090, based on the gross monthly wages he was receiving at the time of injury, as calculated under RCW 51.08.178. RCW 51.08.178(1) provides:

> 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.

At the time of his injury, Mr. Hall was not receiving a fixed hourly, daily, or monthly wage from H & H Construction. The Department therefore relied on RCW 51.08.178(4), rather than RCW 51.08.178(1), to calculate Mr. Hall's monthly wage. RCW 51.08.178(4) provides: "In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed." According to the Department, RCW 51.08.178(4) allows it to use any reasonable and fair method.

The Department based its calculation of the monthly wages Mr. Hall was receiving at the time of the October 16, 2006 injury on the Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship), he filed with the Internal Revenue Service for the year 2005. Mr. Hall claimed gross receipts of $55,282 and a net profit of $8,195, after all business expense deductions were taken. Because the depreciation deduction did not represent an out-of-pocket expense for Mr. Hall, the Department added that deduction of $2,942 to the net profit of $8,195, for a total amount of $11,137. The Department then divided $11,137 by 12 months, calculating a monthly wage of $928.08.

The claimant agreed with the Department that his wages as a self-employed carpenter should be calculated based on his 2005 Schedule C. However, the claimant relied on RCW 51.08.178(1), not RCW 51.08.178(4). He argued that RCW 51.08.178(1) required the Department to use the gross annual receipts of $55,282, and divide by 12 months, resulting in a monthly wage of $4,606.83.

Nonetheless, the claimant has accepted the industrial appeals judge's alternative calculation. She began with the $55,282 gross receipts figure. She then subtracted $4,359, which Mr. Hall paid for contract labor; $13,494, which he paid in wages to an employee; and $3,597.70, the approximate amount paid for employee-related taxes, including "social security, workers' compensation, employment security, and Medicare," according to Joy Hall's November 27, 2007 Declaration. The remaining amount was $33,831.30. The industrial appeals judge divided this "annual income" by 12, yielding a "monthly income or 'wage'" of $2,819.28. Proposed Decision and Order, at 4.

Although the figures range considerably, from $55,282 to $33,831.30 to $11,137, the basic premise of all three methods is that an annual income is calculated based on Schedule C. That amount is then divided by 12, to arrive at a monthly wage. Yet, neither the parties nor the industrial appeals judge have explained how RCW 51.08.178(1) or (4) would permit the averaging that all three calculations have in common. We acknowledge that some of their confusion may have been engendered by our own decision in *In re Crystal C. Engelhart Malang*, Dckt. No. 04 16364 (August 25, 2005), as noted below.

In addition to the question of whether the statute permits the type of averaging proposed here, there are other problems with using Schedule C as the basis for computing a self-employed worker's monthly wage. As the Department points out, the gross receipts of the business are just that. They represent amounts paid to H & H Construction by its customers, not wages paid to Mr. Hall by the business. Indeed, that point is driven home by the fact that at least $21,450.70 of the $55,282 in gross receipts was paid to others for services performed or the related taxes.

The claimant also makes several valid points. For example, RCW 51.08.178 requires the calculation of a gross monthly wage, prior to any deductions, whereas the Department has used a net profit figure, after numerous deductions have been taken. Furthermore, RCW 51.08.178(4) does not permit the Department to devise any method it chooses to calculate a worker's wage. Instead, that subsection prescribes one method if "a wage has not been fixed or cannot be reasonably and fairly determined." Under those circumstances, the statute requires the Department

to compute the monthly wage "on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed."

Unfortunately, there is no published court opinion resolving the question of how a self-employed worker's monthly wage at the time of injury should be calculated. The question was raised but not resolved in *Malang v. Department of Labor & Indus.,* 139 Wn. App. 677 (2007). Instead, the Court of Appeals remanded for a determination of whether Crystal Malang or Crescent Realty, Inc., was "the 'employer' that gave consideration for her services." *Malang,* 139 Wn. App. at 692. In the current appeal, there is no issue regarding who the employer is. In a final October 30, 2006 order, the Department determined that Mr. Hall was working for himself, under the business name of H & H Construction, when he was injured on October 16, 2006.

Although there are no published court opinions to guide us on the question of how to calculate Mr. Hall's wage at the time of injury, this Board has issued a number of decisions regarding the use of income tax returns to determine the monthly wage for a self-employed worker. In *In re Jerry Uhri*, BIIA Dec., 93 6908 (1995), we rejected the use of tax returns and directed the Department to compute the monthly wage based on "the usual wage paid other employees engaged in like or similar occupations where the wages are fixed," pursuant to RCW 51.08.178(4). However, in *Malang*, we approved the use of the gross receipts figure on Schedule C, less certain deductions, averaged over an eleven-month period.

We take this opportunity to reaffirm the method used in *Uhri* for calculating the monthly wage under RCW 51.08.178(4), although our reasoning is somewhat different. In *Uhri*, we evaluated whether the worker's wage could be reasonably and fairly determined based on his tax return, and concluded that it could not. That analysis may have created the impression that RCW 51.08.178(4) empowers the Department to devise alternative methods for calculating an injured worker's monthly wage, so long as the Department's approach is fair and reasonable. However, subsection (4) limits the Department to one method. "In cases where a wage has not been fixed or cannot be reasonably and fairly determined," it requires the Department to compute the monthly wage "on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed."

The phrase "[i]n cases where a wage has not been fixed" refers to similar language in subsection (1) establishing the formulas for calculating the monthly wage "[i]n cases where the worker's wages are not fixed by the month." Likewise, the "reasonably and fairly" language in subsection (4) echoes the last two sentences of subsection (1), which read as follows: "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."

Thus, if the wage is not fixed or cannot be reasonably and fairly calculated under subsection (1), the Legislature has directed the Department to determine the particular worker's wage based on what other workers receive, under RCW 51.08.178(4). However, that subsection does not grant the Department the independent authority to devise its own methods, separate and apart from the statute. Because the Department has no such authority, the question before us is whether the way in which the Department calculated Mr. Hall's monthly wage under RCW 51.08.178(4) is permitted by the statute, not whether the method was reasonable and fair under RCW 51.08.178(4).

We turn, then, to the question of what process the Department was required to follow under RCW 51.08.178. The statute spells out what should be included in the monthly wage calculation, but it does not define "wages." For that, we look to WAC 296-14-522(1), which provides, in relevant part: "The term 'wages' is defined as: (1) The gross cash wages paid by the employer for services performed. 'Cash wages' means payment . . . made directly to the worker before any mandatory deductions required by state or federal law."[1]

RCW 51.08.178(1) establishes the default process for determining the monthly wage at injury. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290 (2000). For a full-time worker who receives a fixed monthly wage, the process is easy. The gross monthly wage is used. However, if there is no fixed monthly wage, the Department must determine the number of hours normally worked per day and the hourly wage received. Under RCW 51.08.178(1), the daily wage is arrived at by multiplying those two numbers. To calculate the monthly wage, the daily wage is then multiplied: "(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." RCW 51.08.178(1).

[1] Other elements of the wage computation, such as the "reasonable value of board, housing, fuel, or other consideration of like nature," are not relevant to the narrow issue raised by this appeal, and are not discussed here, for the sake of clarity. RCW 51.08.178(1).

RCW 51.08.178(1) permits averaging to determine the number of hours normally worked per day, as follows: "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." This was the only averaging allowed, prior to the amendment of the statute in 1988. *See*, for example, *In re Teresa Johnson*, BIIA Dec. 85 3229 (1987). At that time, the Legislature added RCW 51.08.178(2) and (3), which spell out two additional limited circumstances where averaging is permitted.

RCW 51.08.178(2) provides:

> 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.

RCW 51.08.178(3) provides: "If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages."

Thus, our starting point in the current appeal is to determine the pattern of Mr. Hall's employment. If his employment was "exclusively seasonal in nature" or if his employment or his relation to his employment was "essentially part-time or intermittent," then the type of averaging proposed here would be permitted under RCW 51.08.178(2). However, according to Mr. Hall's November 9, 2007 declaration: "On average, in 2005 until my industrial injury I worked approximately 50 hours per week for 50 weeks out of the year." Therefore, he was neither a seasonal worker, nor was his relation to his employment essentially part-time or intermittent. Likewise, there is no suggestion that Mr. Hall received a bonus in the 12 months preceding his injury. We therefore conclude that neither RCW 51.08.178(2) or (3) applies.

As a result, there was no statutory authority for the Department to develop an annual income amount and divide by twelve, to derive a gross monthly wage. Instead, because Mr. Hall had no fixed monthly wage, the Department was required to begin its calculation by determining the number of hours per day and days per week he was normally employed. It is apparent from the Department's Activity Log (Exhibit No. 4) that the Department did not follow that process.

The only information contained in our record regarding Mr. Hall's work pattern is his declaration that he normally worked about 50 hours per week, 50 weeks per year. However, because H & H Construction is an established business, the Department presumably has several other sources of information. Mr. Hall likely has contemporaneous documentation regarding the work he performed. In addition, as a sole proprietor electing coverage under the Industrial Insurance Act, H & H Construction was required "on or before the last day of January, April, July and October" to "furnish the department with a true and accurate payroll for the period in which workers were employed by it during the preceding calendar quarter, the total amount paid to such workers during such preceding calendar quarter, and a segregation of employment in the different classes established pursuant to this title . . .." RCW 51.16.060. Under WAC 296-17-31007, Mr. Hall was required to report his own hours of work, that is, "four hundred eighty hours or actual hours worked each quarter for each covered owner/officer and in the applicable workers' compensation classification code."

Four hundred and eighty hours per quarter translates to 160 hours per month, which loosely approximates full time work, at eight hours per day, five days per week. Apparently, even if the sole proprietor works longer hours than that, the Department does not require that the additional hours be reported for premium assessment purposes. However, the sole proprietor would still be entitled to time-loss compensation benefits calculated on a monthly wage based on normal hours of employment. If Mr. Hall's normal employment exceeded 160 hours per month, it would be incumbent on him to present supporting documentation.

We recognize that there will be cases where the information regarding hours worked per day and days worked per week is sparse. *In re Lorraine Marquardt*, Dckt. No. 06 17674 (August 8, 2007) was such a case. Ms. Marquardt was self-employed in her own home preschool business. She was injured as she was setting up her operation, prior to providing any services. We determined that she had intended to work ten hours a day, five days a week, based on the fact that her home preschool would have offered two five-hour sessions a day. We directed the Department to calculate her hourly wage rate "on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed," pursuant to RCW 51.08.178(4).

Likewise, once the hours Mr. Hall normally worked per day and the days he normally worked per week have been ascertained, the hourly wage must be determined. Because Mr. Hall had no fixed hourly, daily, or monthly wage, RCW 51.08.178(4) applies, and Mr. Hall's hourly wage must be "computed on the basis of the usual wage paid other employees engaged in like or similar

occupations where the wages are fixed." The Department already has an imputed wage process in place for an entirely different purpose, proof that benefits have been obtained by willful misrepresentation under RCW 51.32.240(5). WAC 296-14-4129(1) provides:

> When the worker has performed work or work-type activities within the state of Washington, the department imputes wages based on information collected and reported by the department of employment security. This information may include wages for the same or similar jobs within the geographic area proximate to the worker and for the same or most proximate time period as the work or work-type activities performed.

We see no reason why the Department cannot use a similar process under RCW 51.08.178(4).

In summary, the Department should have used RCW 51.08.178(1) to calculate the number of hours Mr. Hall was normally employed per day, and the number of days he was normally employed per week. The Department should have used RCW 51.08.178(4) to calculate the usual hourly wage paid other employees engaged in "like or similar occupations where the wages are fixed." That hourly wage should then have been used in the appropriate formula under RCW 51.08.178(1), to compute Mr. Hall's gross monthly wage. Because the Department failed to follow the process required by RCW 51.08.178, the Claimant's Motion for Summary Judgment is granted.

FINDINGS OF FACT

1. The claimant, Roy Hall, filed an Application for Benefits with the Department of Labor and Industries on October 17, 2006, in which he alleged that he sustained an industrial injury on October 16, 2006, during the course of his employment with H & H Construction. The claim was allowed and benefits paid.

   On February 26, 2007, the Department determined that Mr. Hall's total gross wage per month was $928.08. On February 27, 2007, the Department assessed an overpayment of time-loss compensation in the amount of $5,305.04 for the period of October 20, 2006, through January 31, 2007, because of a change in reported gross wages. On March 7, 2007, the claimant protested the February 26, 2007 and February 27, 2007 orders. The Department affirmed both orders on March 12, 2007. On March 21, 2007, the claimant appealed the March 12, 2007 order to the Board of Industrial Insurance Appeals. The Board granted the appeal on April 27, 2007, assigning it Docket No. 07 12838, and ordering that further proceedings be held.

2. On October 16, 2006, Roy Hall was a self-employed carpenter doing business as H & H Construction.

3. Mr. Hall elected and paid for industrial insurance coverage from the State Fund, and was covered by such insurance on October 16, 2006.

4. On October 16, 2006, Mr. Hall sustained an industrial injury during the course of his self-employment for H & H Construction.

5. On October 30, 2006, the Department allowed the claim for an industrial injury that occurred on October 16, 2006, while Mr. Hall was working for H & H Construction. No protest or appeal was filed, challenging that order.

6. At the time of his October 16, 2006 injury, Mr. Hall was not receiving a fixed hourly, daily, or monthly wage from H & H Construction.

7. At the time of his October 16, 2006 injury, Mr. Hall's employment was not exclusively seasonal in nature, nor was his employment or his relation to his employment essentially part-time or intermittent.

8. Within the twelve months immediately preceding the October 16, 2006 injury, Mr. Hall did not receive a bonus from H & H Construction as part of the contract of hire.

9. The Department used Mr. Hall's 2005 Schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship), to calculate the monthly wages he was receiving at the time of the October 16, 2006 injury. Mr. Hall claimed gross receipts for 2005 in the amount of $55,282 and a net profit of $8,195, after all deductions. The Department added the depreciation deduction of $2,942 to the net profit of $8,195, for a total amount of $11,137. The Department then divided $11,137 by 12 months, calculating a monthly wage of $928.08.

10. In calculating Mr. Hall's monthly wages at the time of injury, the Department did not determine the number of hours Mr. Hall was normally employed per day or the number of days he was normally employed per week.

11. In calculating the monthly wages Mr. Hall was receiving at the time of injury, the Department did not determine the usual hourly wage paid other employees engaged in like or similar occupations where the wages are fixed.

12. The declarations and exhibits submitted by the parties demonstrate that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Pursuant to the final October 30, 2006 Department order, it is res judicata that Mr. Hall was working for H & H Construction when he was injured on October 16, 2006.

3. Because Mr. Hall's employment was not exclusively seasonal in nature, and because his employment or his relation to his employment was not essentially part-time or intermittent, his monthly wage could not be determined under RCW 51.08.178(2), "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."

4. Because Mr. Hall did not receive a bonus from H & H Construction as part of the contract of hire within the twelve months immediately preceding the October 16, 2006 injury, the average monthly value of such a bonus could not be included in determining his monthly wages under RCW 51.08.178(3).

5. Because the averaging provisions of RCW 51.08.178(2) and (3) were not applicable, there was no statutory authority for the Department to develop an annual income amount and divide by twelve, to derive a gross monthly wage.

6. Because Mr. Hall's wage was not fixed by the month, the Department was required to determine the number of hours he was normally employed per day and the number of days he was normally employed per week at the time of injury, "in a fair and reasonable manner, which may include averaging the number of hours worked per day," pursuant to RCW 51.08.178(1).

7. Because Mr. Hall had no fixed wage at the time of the October 16, 2006 injury, his monthly wage should have been "computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed," pursuant to RCW 51.08.178(4).

8. The Department should have used RCW 51.08.178(4) to calculate the usual hourly wage paid other employees engaged in "like or similar occupations where the wages are fixed." That hourly wage should then have been used in the appropriate formula under RCW 51.08.178(1), to compute Mr. Hall's gross monthly wage.

9. The method the Department used to calculate Mr. Hall's gross monthly wage did not satisfy the requirements of RCW 51.08.178.

10. The claimant is entitled to summary judgment as a matter of law, as contemplated by CR 56.

11. The March 12, 2007 Department order is reversed. The claim is remanded to the Department, with directions: (1) to calculate the number of hours Mr. Hall was normally employed per day and the number of days he was normally employed per week, in a fair and reasonable manner, which may include averaging the number of hours worked per day, pursuant to RCW 51.08.178(1); (2) to calculate the usual hourly wage paid other employees engaged in like or similar occupations where the wages are fixed, pursuant to RCW 51.08.178(4); (3) to compute the gross monthly wage, using the hourly wage determined under RCW 51.08.178(4) and the appropriate formula under RCW 51.08.178(1); and (4) to take further action as required by the law and the facts.

It is **ORDERED**.

DATED: June 26, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
CALHOUN DICKINSON Member