

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 IN RE: WESLEY A. HARP) DOCKET NO. 10 10736
2 CLAIM NO. AF-75328) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius
4

5 APPEARANCES:

6 Claimant, Wesley A. Harp, by
7 Williams, Wyckoff & Ostrander, PLLC, per
8 Wayne L. Williams

9 Employer, Insulation Northwest, LLC, by
10 Law Office of Gress & Clark, LLC, per
11 James L. Gress

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Steve Vinyard, Assistant

15 The claimant, Wesley A. Harp, filed an appeal with the Board of Industrial Insurance Appeals
16 on January 20, 2010, from an order of the Department of Labor and Industries dated January 5,
17 2010. In this order, the Department affirmed a prior order of September 23, 2009, in which it set
18 wages at \$3,440.80 per month. The Department order is **REVERSED AND REMANDED**.

19 **PRELIMINARY MATTERS**

20 On April 7, 2010, the parties agreed to include the Jurisdictional History in the Board's
21 record. That history establishes the Board's jurisdiction in this appeal.

22 The parties stipulated and agreed to the facts that are referenced. The parties were
23 provided a deadline of December 16, 2010, to file an objection to any of the stipulated facts. No
24 objection was received. No offer of the Stipulated Facts Statement into evidence was made. The
25 statement remains in the record, but is not an exhibit. 11/8/10 Tr. at 10 through 12.

26 **ISSUE**

27 Were the employer's monthly per diem payments correctly excluded as
28 wages by the Department, as contemplated by RCW 51.08.178?

29 **EVIDENCE**

30 In support of his appeal, Wesley A. Harp, testified, stipulated to facts, and presented a
31 post-hearing brief. The employer, Insulation Northwest, LLC, cross-examined the claimant,
32

1 stipulated to facts and presented a post hearing brief. The Department cross-examined the
2 claimant and stipulated to facts. 11/8/10 Tr. at 10 through 12.

3 The record established that Mr. Harp was employed by Installed Building Products (NKA
4 Insulation Northwest, LLC) as a siding project manager on a full-time basis. Mr. Harp lived in
5 Olympia and the job was in Puyallup. The employer provided Mr. Harp a company truck and a gas
6 card to commute daily. 11/8/10 Tr. at 7 through 9.

7 Mr. Harp testified he had a written contract because he owned his own company at the time
8 and "we were transferring it over." Mr. Harp's contract stipulated that he was to receive "900 a
9 week no matter what." 11/8/10 Tr. at 8.

10 Between October 22, 2007, and December 16, 2007, the employer paid Mr. Harp \$1,800
11 every two weeks and no amount of his compensation was designated per diem payments.
12 Between December 17, 2007, and February 24, 2008, Mr. Harp received \$1,800 every two weeks
13 but \$156 was designated per diem payments. Mr. Harp sustained an industrial injury on May 2,
14 2008.

15 Between March 10, 2008, and June 29, 2008, Mr. Harp received \$1,800 every two weeks,
16 but \$236 was designated per diem payments.

17 The employer did not include the per diem payments in the claimant's W-2 wages. The
18 claimant received the per diem payments automatically and did not submit expense reports, travel
19 vouchers, receipts, or documents of any kind for the per diem payments. Stipulation of Fact Nos. 1
20 through 3, and 6.

21 On July 1, 2008, the original employer, Installed Building Products, was purchased by
22 Insulation Northwest. Upon purchase of the original company, "per diem" payments ceased.
23 Stipulation of Fact No. 10.

24 DECISION

25 RCW 51.08.178 states, in pertinent part:

26 The term "wages" shall include the reasonable value of board, housing,
27 fuel, or other consideration of like nature received from the employer as
28 part of the contract of hire, but shall not include overtime pay except in
29 cases under subsection (2) of this section. As consideration of like
30 nature to board, housing, and fuel, wages shall also include the
31 employer's payment or contributions, or appropriate portions thereof, for
32 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

1 wages only to the extent such tips are reported to the employer for
2 federal income tax purposes.

3 The claimant and the employer cite to *In re James A. Young*, BIIA Dec. 89 3233 (1991). In
4 *Young*, the Board held that per diem paid for the cost of meals must be included as wages for the
5 purpose of RCW 51.08.178 because the per diem payment was intended as an additional
6 economic benefit, not as mere reimbursement for a work-related expense. Cited in *In re Kimberly*
7 *Bemis*, BIIA Dec., 90 5522 (1992).

8 The employer argued the per diem payments should not be included as wages because
9 RCW 51.08.178 clearly indicates that whether or not taxes are paid on the monetary sum is
10 determinative of whether or not it should be considered as "wages" for purposes of a wage loss
11 order. The per diem payments were not reported as taxable income and, therefore, under the
12 statute, should not be considered "wages" in computing the wage order. Employer's Brief at 3.

13 Mr. Harp testified that he had not, at the time of the hearing on November 8, 2010, reported
14 the portion of his paycheck identified as per diem to the IRS because he had not filed a W-2 report
15 with the Internal Revenue Service for 2008. 11/8/10 Tr. at 6. Although Stipulated Fact No. 7
16 indicated that Insulation Northwest did not include the per diem in the claimant's W-2 wages, the
17 claimant as part of the sale of his business to Installed Building Products may or may not have
18 created an obligation to file a report with the Internal Revenue Service. Insulation Northwest did not
19 purchase the original employer, Installed Building Products, until July 1, 2008. The industrial injury
20 occurred on May 2, 2008. The evidence does not establish that the per diem payments were not
21 reported as taxable income by another entity: either Installed Building Products or Mr. Harp.

22 RCW 51.08.178 defines wages for the purpose of calculating benefits as including
23 consideration of like nature to board, housing, and fuel, wages, including health care benefits.

24 This Board has previously held that per diem payments must be included as wages, without
25 imposing the same burden the statute imposed on the recipients of tips. There is no requirement
26 that per diem payments must be reported to the employer for federal income tax purposes.

27 The characterization of per diem payments depends on the facts and circumstances. If an
28 economic benefit, then the payments should be included. The issue is often presented along with
29 the overarching issue of which section of RCW 51.08.178 should be used to determine a worker's
30 time-loss compensation rate.

31 Here, the only issue is the inclusion of the per diem payments. Nevertheless, the same
32 principle should apply to interpreting RCW 51.08.178, in the context of the inclusion of Mr. Harp's
per diem payments. The appellate courts have construed the statute liberally in a way that is most

1 likely to reflect a worker's lost earning capacity. *Department of Labor & Indus. v. Avundes*,
2 140 Wn.2d 282 (2000). Mr. Harp's lost earning capacity included the per diem payments made by
3 the employer.

4 The Department order dated January 5, 2010, was incorrect and should be reversed. The
5 matter should be remanded to the Department to issue an order that further includes the per diem
6 payments provided by the employer in the Department's computation of wages under
7 RCW 51.08.178 and to take such other and further action as is indicated by the law and the facts of
8 this case.

9 FINDINGS OF FACT

10 1. On August 25, 2008, the claimant, Wesley A. Harp, filed an Application
11 for Benefits with the Department of Labor and Industries in which he
12 alleged the occurrence of an industrial injury while in the course of his
13 employment with Insulation Northwest, LLC. On August 25, 2009, the
14 Department issued an order and allowed the claimant's claim of an
15 industrial injury occurring on May 2, 2008. On September 23, 2009, the
16 Department issued an order and determined the claimant's wages for
17 his job of injury was \$19.55 per hour, 8 hours per day, 5 days per week,
18 for a total of \$3,440.80 per month. The Department determined the
19 claimant's marital status was single and he had two dependent children.
20 The Department did not include payments from the employer to
21 Mr. Harp designated as per diem payments in the calculation of wages
22 for time-loss compensation benefits.

23 On September 25, 2009, the claimant filed a Protest and Request for
24 Reconsideration of the Department order dated September 23, 2009.
25 On January 5, 2010, the Department issued an order and affirmed the
26 Department order dated September 23, 2009. On January 20, 2010, the
27 claimant filed a Notice of Appeal with the Board of Industrial Insurance
28 Appeals from the Department order dated January 5, 2010. On
29 March 1, 2010, the Board agreed to hear the appeal under Docket
30 No. 10 10736.

31 2. On May 2, 2008, the claimant sustained an industrial injury while in the
32 course of his employment with Installed Building Products (NKA
Insulation Northwest, LLC).

3. Between October 22, 2007, and December 16, 2007, the employer paid
Mr. Harp \$1,800 every two weeks and no amount of his compensation
was designated per diem payments. Between December 17, 2007, and
February 24, 2008, Mr. Harp received \$1,800 every two weeks, but
\$156 was designated per diem payments. Between March 10, 2008,
and June 29, 2008, Mr. Harp received \$1,800 every two weeks but \$236
was designated per diem payments.

4. The employer did not include the per diem payments in the claimant's
W-2 wages.

- 1 5. The claimant received the per diem payments automatically and did not
2 submit expense reports, travel vouchers, receipts, or documents of any
3 kind for the per diem payments.
4 6. On July 1, 2008, the original employer, Installed Building Products, was
5 purchased by Insulation Northwest, LLC. Upon purchase of the original
6 company, "per diem" payments ceased.
7 7. By the time of the hearing on November 8, 2010, Mr. Harp had not
8 reported the portion of his paycheck identified as per diem to the IRS
9 because he had not filed a W-2 report with the Internal Revenue Service
10 for 2008.
11 8. Installed Building Products provided Mr. Harp with an economic benefit
12 that included the payments designated as per diem payments.

13 **CONCLUSIONS OF LAW**

- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the
15 parties to and the subject matter of this appeal.
16 2. The per diem payments paid to Mr. Harp are includible in "wages" for
17 purposes of determining the rate of time-loss compensation pursuant to
18 RCW 51.08.178.
19 3. The Department order of January 5, 2010, is incorrect and is reversed.
20 The matter is remanded to the Department to issue an order that further
21 includes the per diem payments provided by the employer in the
22 Department's computation of wages under RCW 51.08.178 and to take
23 such other and further action as is indicated by the law and the facts of
24 this case.

25 DATED: FEB 16 2011

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27 Tom M. Kalenius
28 Industrial Appeals Judge
29 Board of Industrial Insurance Appeals
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