

## **Yuchasz, Anthony**

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### **TIME-LOSS COMPENSATION (RCW 51.32.090)**

#### **Wages (RCW 51.08.178) - Compensation**

The value of fuel provided by the employer for the worker's transportation is not part of the "wages" paid to the worker for purposes of computing time-loss compensation benefits. ...*In re Anthony Yuchasz, BIA Dec., 12 10803 (2013)* [Editor's Note: The Board's decision was appealed to King County Superior Court, No. 13-2-05305-0 SEA.]

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

1 **IN RE: ANTHONY J. YUCHASZ ) DOCKET NO. 12 10803**  
2 **CLAIM NO. AP-56089 ) DECISION AND ORDER**  
3 \_\_\_\_\_)

4 **APPEARANCES:**

5 Claimant, Anthony J. Yuchasz, by  
6 Law Office of William D. Hochberg, per  
7 William D. Hochberg

8 Employer, Computer Power & Service, Inc.,  
9 None

10 Department of Labor and Industries, by  
11 The Office of the Attorney General, per  
12 Erica Koscher, Assistant

13 The claimant, Anthony J. Yuchasz, filed a protest on December 13, 2011, forwarded to the  
14 Board of Industrial Insurance Appeals as a direct appeal on February 6, 2012, from an order of the  
15 Department of Labor and Industries dated December 8, 2011. In this order, the Department  
16 affirmed a July 26, 2011 order in which it set Mr. Yuchasz's total gross monthly wage from all  
17 employment at the time of injury at \$6,531.76 without including an amount for fuel. The Department  
18 order is **AFFIRMED**.

**DECISION**

19 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
20 review and decision. The Department filed a timely Petition for Review of an October 3, 2012  
21 Proposed Decision and Order in which the industrial appeals judge granted the claimant's motion  
22 for summary judgment; reversed the December 8, 2011 Department order; and "remanded to the  
23 Department to calculate the claimant's loss of earnings benefits based on his wages, including the  
24 reasonable value of the cost of fuel for him to travel to and from his home to the worksite." PD&O  
25 at 3.

26 Mr. Yuchasz contends that the value of the transportation fuel his employer provided at the  
27 time of injury for his commute to and from work should be included in his wages under  
28 RCW 51.08.178(1), which provides: "The term 'wages' shall include the reasonable value of board,  
29 housing, fuel, or other consideration of like nature received from the employer as part of the  
30 contract of hire . . . ." We have granted review because the Board has previously interpreted the  
31 statutory reference to "fuel" to refer to home utility expenses, not transportation costs. *In re*  
32

1 *Douglas M. Brammer*, Dckt. No. 06 10641 (February 7, 2007). Based on *Brammer, Cockle v.*  
2 *Department of Labor & Indus.*, 142 Wn.2d 801 (2001), and WAC 296-14-524, we conclude that the  
3 value of the fuel the employer provided Mr. Yuchasz for traveling between his home and his work  
4 cannot be included as wages under RCW 51.08.178(1).

5 The Department responded to the claimant's motion for summary judgment but did not file a  
6 cross-motion of its own. Nonetheless, because there is no genuine dispute about any material fact,  
7 the Department is entitled to a decision as a matter of law as contemplated by CR 56. *Leland v.*  
8 *Frogge*, 71 Wn.2d 197, 201 (1967); *Washington Ass'n of Child Care Agencies v. Thompson*,  
9 34 Wn. App. 225, 234, rev. denied, 99 Wn.2d 1020 (1983); *Impecoven v. Department of Revenue*,  
10 120 Wn.2d 357, 364 (1992); *In re Jay A. Williams*, Dckt. No. 05 10724 (January 18, 2006), 3-4; and  
11 *In re Anthony Sakellis*, Dckt. No. 10 C1058 (July 20, 2011), 5-6.

12 In resolving this appeal we have considered the Claimant's Motion for Summary Judgment  
13 along with the Declaration of Claimant; the Department's Response to Claimant's Motion for  
14 Summary Judgment, along with the Declarations of Kelly Dwyer and Erica Koscher, and  
15 Attachments A and B, which consist of the July 26, 2011, and December 8, 2011 Department  
16 orders; the Claimant's Reply; and the clarifications made during the hearing on the motion, as  
17 explained below. Because we are finding in the Department's favor, we have construed the  
18 evidence in the light most favorable to the claimant.

19 According to Mr. Yuchasz's Declaration, he was employed as an electrician at the time of his  
20 February 22, 2011 industrial injury. At that time, he "was provided with the use of a company car.  
21 My employer supplied the fuel for the car." Declaration at paragraph 5. He returned to work on  
22 August 16, 2011, in a light-duty position and received loss of earning power benefits from August  
23 16, 2011, to April 3, 2012. "These benefits did not include the cost of fuel that had been previously  
24 supplied by my employer at the time of my injury." Declaration at paragraph 9.

25 The claimant's assertions regarding the provision of the company car at the time of his injury  
26 are in accord with what Kelly Dwyer, the Vice President of Computer Power & Service, Inc., (CPSI)  
27 stated in her Declaration:

- 28 4. Up through the date of the industrial injury, Anthony Yuchasz used a company  
29 vehicle to perform his regular duties.
- 30 5. This company vehicle contained the tools that Mr. Yuchasz needed to perform  
31 his job duties for CPSI.
- 32 6. At night, Mr. Yuchasz kept the vehicle at his home.

- 1  
2 7 Mr. Yuchasz traveled from his home to the first job site of the day, and from  
3 the last job site of the day to his home, as well as to job sites in between, in  
4 this company vehicle.  
5 8. The fuel for the vehicle was paid for by CPSI.  
6 . . .  
7 11. The company vehicle is not to be used for personal use.  
8 12. When Mr. Yuchasz returned to light duty work, this vehicle was no longer  
9 available to Mr. Yuchasz to use as it had been re-assigned to another full-time,  
10 regular duty employee.

11 Based on the foregoing it is undisputed that CPSI was providing a vehicle and the  
12 associated fuel at the time of the injury and after the injury Mr. Yuchasz no longer had the use of  
13 the company vehicle. There is a discrepancy between Mr. Yuchasz's and Ms. Dwyer's Declarations  
14 on the question of whether he received reimbursement for the use of his personal vehicle when he  
15 returned to work at light duty. Ms. Dwyer stated: "13. Upon returning to light duty, Mr. Yuchasz  
16 was reimbursed for use of his personal vehicle when used to travel between job sites." In contrast,  
17 Mr. Yuchasz stated: "10. I have not received any reimbursement for my out-of-pocket expenses  
18 related to operating my own car during the course of employment; 11. I have not received any  
19 reimbursement for the cost of fuel since I returned to work."

20 Despite these assertions in Mr. Yuchasz's Declaration, his attorney agreed at the motion  
21 hearing that after Mr. Yuchasz returned to work at light duty, the employer "reimburse[d] him for fuel  
22 from job site to job site," but not for travel between his home and his work. 8/16/12 Tr. at 7.  
23 According to Mr. Yuchasz's attorney, "coming and going [is] not included as part of the calculation  
24 that he's getting now." 8/16/12 Tr. at 7. These assertions are consistent with Ms. Dwyer's  
25 Declaration and we accept them as true.

26 With these undisputed facts in mind, we turn to the legal question of whether any portion of  
27 the value of the fuel the employer provided for the company vehicle prior to Mr. Yuchasz's injury  
28 should be included in the calculation of his wage. Under RCW 51.08.178(1), the wage at time of  
29 injury includes monetary wages as well as certain in-kind consideration received from the employer  
30 as part of the contract of hire. CPSI paid directly for the fuel used by the company vehicle it  
31 provided to Mr. Yuchasz rather than having him bear those costs and then reimbursing him. Thus,  
32 the parties' dispute does not center on monetary wages or the question of whether cash  
reimbursement for transportation costs should be included in the wage calculation. Rather, the

1 issue is whether the value of transportation fuel is includable in wages as in-kind employer-provided  
2 consideration similar to room, board, and health insurance under a *Cockle* analysis.

3 In *Brammer*, the Board addressed facts similar to those in the current appeal. Mr. Brammer  
4 was a ranch manager. His employer provided a truck and paid for all related expenses, including  
5 fuel. After Mr. Brammer was injured, he no longer received that benefit and sought to have the  
6 value of the fuel the employer had previously provided included in his wage at the time of injury.  
7 The Board held that the word "fuel" in RCW 51.08.178(1) refers to home utilities, not transportation  
8 fuel.

9 The Board reasoned that under the *eiusdem generis* rule of statutory construction when a  
10 general word follows an enumeration of specific words, it should be interpreted as referring to  
11 things that are similar to the specific words. Here, the word "fuel" appears in the following list: "The  
12 term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of  
13 like nature received from the employer as part of the contract of hire . . . ." RCW 51.08.178(1). The  
14 Board held that because "fuel" follows "board" and "housing," it refers to the costs of home utilities  
15 rather than to transportation expenses.

16 The Board then turned to the question of whether transportation fuel could be included in  
17 wages under the phrase "or other consideration of like nature received from the employer as part of  
18 the contract of hire." In *Cockle*, the supreme court held that health insurance benefits are included  
19 in that catchall phrase because, like "board, housing, and fuel," they are "core, nonfringe benefits  
20 critical to protecting the basic health and survival of workers." *Cockle*, at 823. The question in  
21 *Brammer* was whether transportation fuel is likewise necessary to meet basic survival needs and  
22 the Board concluded that, unlike home utility fuel, it was not.

23 This analysis is consistent with WAC 296-14-524, which provides:

24 How do I determine whether an employer provided benefit qualifies as  
25 "consideration of like nature" to board, housing and fuel?

26 To qualify as "consideration of like nature" the employer provided benefit must meet  
27 all of the following elements:

28 (1) The benefit must be objectively critical to protecting the worker's basic health  
29 and survival at the time of injury or date of disease manifestation.

30 (a) The benefit must be one that provides a necessity of life at the time of injury  
31 or date of disease manifestation without which employees cannot survive a  
32 period of even temporary disability.

1 (b) This is not a subjective determination. The benefit must be one that virtually  
2 all employees in all employment typically use to protect their immediate health  
3 and survival while employed.

4 (c) The benefit itself must be critical to protecting the employee's immediate  
5 health and survival. The fact that a benefit has a cash value that can be  
6 assigned, transferred, or "cashed out" by an employee and used to meet one or  
7 more of the employee's basic needs is not sufficient to satisfy this element.

8 Consistent with *Brammer*, we conclude that unlike home utility fuel, transportation fuel used  
9 to commute to and from work is not a core, non-fringe benefit critical to protecting the basic health  
10 and survival of workers. Based on *Brammer*, *Cockle*, WAC 296-14-524, and RCW 51.08.178, the  
11 Department correctly excluded the transportation fuel supplied by CPSI from the wage at time of  
12 injury. Because the facts are not in dispute, entry of summary judgment in favor of the Department,  
13 the nonmoving party, is appropriate. *Impecoven*, 120 Wn.2d at 364.

#### 14 **FINDINGS OF FACT**

- 15 1. On April 4, 2012, an industrial appeals judge certified that the parties  
16 agreed to include the Jurisdictional History in the Board record solely for  
17 jurisdictional purposes.
- 18 2. Anthony J. Yuchasz sustained an industrial injury during the course of  
19 his employment with Computer Power & Service, Inc., on February 22,  
20 2011.
- 21 3. At the time of Mr. Yuchasz's injury, the employer provided him with a  
22 company vehicle and paid for the fuel. Mr. Yuchasz kept the vehicle at  
23 his home at night, and in the morning, he drove it to the first jobsite of  
24 the day. During the day, he drove the vehicle between jobsites, and at  
25 night, he drove it home from the last jobsite of the day.
- 26 4. After the injury, Mr. Yuchasz returned to work at light duty with  
27 Computer Power & Service, Inc. The employer no longer provided him  
28 with a vehicle but reimbursed him for the use of his personal vehicle to  
29 travel between jobsites. He was not reimbursed for travel between his  
30 home and his work.
- 31 5. Mr. Yuchasz received loss of earning power benefits from August 16,  
32 2011, to April 3, 2012. The calculation of these benefits did not include  
the reasonable value of fuel that had previously been supplied by his  
employer at the time of injury for travel between his home and work.
6. The pleadings and evidence submitted by the parties demonstrate that  
there is no genuine issue as to any material fact.

#### 33 **CONCLUSIONS OF LAW**

- 34 1. Based on the record, the Board of Industrial Insurance Appeals has  
35 jurisdiction over the parties to and the subject matter of this appeal.

- 1 2. The Department is entitled to a decision as a matter of law as  
2 contemplated by CR 56.  
3 3. The reasonable value of transportation fuel provided by the employer at  
4 the time of injury for going to and from work cannot be included in  
5 wages under RCW 51.08.178(1).  
6 4. The December 8, 2011 Department order is correct and is affirmed.

7 DATED: February 28, 2013.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS

9  
10 /S/ \_\_\_\_\_  
11 DAVID E. THREEDY Chairperson

12  
13 /S/ \_\_\_\_\_  
14 JACK S. ENG Member