

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: LORENZO RODRIGUEZ) DOCKET NO. 14 22597
2)
3 CLAIM NO. AR-97761) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius
6

7 APPEARANCES:
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9 Claimant, Lorenzo Rodriguez, by
10 Williams Wyckoff & Ostrander, PLLC, per
11 Dane D. Ostrander
12

13 Employer, Tradesmen International, Inc.,
14 Retrospective Rating Group, Smart Association A Team Retro Group #10005, by
15 Approach Management Services, per
16 Jennifer Gulbin
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18 Department of Labor and Industries, by
19 The Office of the Attorney General, per
20 Susan Pierini
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22 The retrospective rating group, Smart Association A Team Retro Group #10005, filed an
23 appeal with the Board of Industrial Insurance Appeals on October 24, 2014, from an order of the
24 Department of Labor and Industries dated September 10, 2014. In this order, the Department
25 calculated wages based on 8 hours per day and 5 days per week. The Department order is
26
27 **AFFIRMED.**
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30 **PROCEDURAL AND EVIDENTIARY MATTERS**

31 On January 22, 2015, the parties agreed to include the Jurisdictional History, as amended, in
32 the Board's record. That history establishes the Board's jurisdiction in this appeal.
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34 **ISSUE**
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36 Did Mr. Rodriguez work 8 hours per day, 5 days per week at his job of
37 injury?
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39 The parties agreed that Mr. Rodriguez's employment was not
40 intermittent, but was regular or continuous full-time work.¹ Because the
41 law provided that the daily wage was the hourly wage multiplied by the
42 number of hours the worker was normally employed,² the number of
43 hours worked and the number of days per week worked were the only
44 issues in this appeal.
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46 ¹ 5/4/15 Tr. at 22.

47 ² RCW 51.08.178

1 EVIDENCE

2 Lorenzo Rodriguez was born on November 23, 1956. Mr. Rodriguez, an electrician, served
3 in the US Navy from 1975 -1980 and worked 40 hours per week consistently until 2011. In 2011,
4 Mr. Rodriguez unsuccessfully attempted to secure full-time employment on a weekly basis.
5 Mr. Rodriguez moved to Washington state in the summer of 2012 and contacted a labor lessor,
6 Tradesmen International, Inc.(Tradesmen) in January 2013.
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10 Jared Henslin, Tradesmen's district manager, presented the corporate orientation to
11 Mr. Rodriguez. Tradesmen had ten office employees and about 130 leased employees in 2013.
12 Over 90 percent of Tradesmen's construction employees were leased out to full-time work, defined
13 as 40 hours per week. The number of daily hours varied, depending on the days per week, but
14 most employees worked 8 hours per day and 5 days per week.
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17 Mr. Rodriguez was hired by Tradesmen on January 21, 2013. Tradesmen did not dispatch
18 Mr. Rodriguez to a construction contractor until February 27, 2013. During that month,
19 Mr. Rodriguez called Tradesmen every day by 4 p.m. Mr. Rodriguez testified that he would call the
20 office number and ask for "Jeff." Mr. Rodriguez testified that whoever answered the phone would
21 take down the information and note that he had called, and advise Mr. Rodriguez that they will
22 contact him.
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26 Mr. Rodriguez was dispatched to MTE Electric, a contractor, who then assigned him to a
27 construction site. Mr. Rodriguez worked at the MTE Electric construction site in the end of February
28 and on March 1, 2013, for 7.75, 8 and 8 hours, respectively.
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31 Mr. Henslin testified that Tradesmen intended to lease Mr. Rodriguez for 40 hours per week.
32 Mr. Rodriguez testified that it was his intent to work 8 hours per day and 40 hours per week. He
33 was motivated to work the hours required to upgrade his certification to that of a journeyman.
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35 From March 2 to March 11, Tradesmen did not dispatch Mr. Rodriguez. Mr. Rodriguez
36 testified that he called Tradesmen, according to their policy, every day by 4 p.m.³
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38 Mr. Henslin testified that it is possible for an electrician to work consistently, on a full-time
39 basis throughout the year at Tradesmen as there was no lack of available work. Mr. Henslin
40 acknowledged that Mr. Rodriguez was not given a set schedule of 8 hours per day 5 days per week
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47 ³ 5/4/15 Tr. at 12.

1 but someone could work 40 hours per week for Tradesmen if they attended work punctually,
2 obeyed instructions, and did not call in sick.⁴
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4 Mr. Henslin testified that Mr. Rodriguez worked on the same job on February 27, 28, March 1
5 and March 12, 2013. The client contractor was MTE Electric. Mr. Henslin testified that
6 Mr. Rodriguez was not terminated or warned for not calling or attending work. Mr. Henslin testified
7 there was no documentation that a Tradesmen's field representative visited the MTE Electric job
8 site and was advised an electrician was absent.
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11 On March 12, 2013, Mr. Rodriguez was dispatched by Tradesmen again to the MTE Electric
12 job site, as he had worked on February 27, 28, and March 1, 2013.⁵ Mr. Rodriguez testified that the
13 contractor was close to being done as the project was in the finishing stage of the electrical phase.
14 Mr. Rodriguez injured his low back while working for Tradesmen on March 12, 2013. Mr. Rodriguez
15 ultimately underwent a lumbar fusion. Mr. Rodriguez testified that he did not return to work after the
16 industrial injury for Tradesmen because Tradesmen would not hire him as long as his physical
17 capacities were restricted.
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22 Mr. Henslin testified that each employee was to call the office daily at 4 p.m., if released from
23 a job or if available for work. Mr. Henslin testified that employees were to speak to Mr. Henslin or
24 his project coordinator "letting us know they are available for their next assignment."⁶ Mr. Henslin
25 testified that Tradesmen did not require employees to speak to Mr. Henslin to find out if there was
26 work. They could ask whoever answered the phone. The Tradesmen policy required that when
27 calling, employees were to provide a name, number and trade. Mr. Henslin testified that Tradesmen
28 has a process but it was questionable if the process was used every single time a call was
29 received. The accuracy and completeness of the phone logs depended on consistent use by the
30 receiving party at Tradesmen. Mr. Henslin testified that Tradesmen had the ability to log in every
31 time somebody calls if the answering employee actually puts the note in; whether it was used every
32 single time somebody calls in is in question.⁷ Mr. Henslin did not know if Mr. Rodriguez called in
33 and if so, if the calls were logged in. Mr. Henslin testified that Mr. Rodriguez did not call in when
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44 ⁴ 4/28/15 Tr. at 16.

45 ⁵ 5/4/15 Tr. at 14.

46 ⁴ 4/28/15 Tr. at 12.

47 ⁷ 4/28/15 Tr. at 23.

1 there was work available and if he had called in, Tradesmen would have given him work, but there
2 was no documentation to support that.⁸

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4 Mr. Rodriguez testified that he called in to Tradesmen daily around 4 p.m., between March 1
5 and 12, 2013, because that was the "only way I would have gotten back to work. If I hadn't called
6 in, they would have never asked me to go to work."⁹ Mr. Rodriguez had no idea why Tradesmen did
7 not dispatch him to work during that one-week period. Mr. Rodriguez recalled reading the
8 Tradesmen policies during orientation and agreed that Tradesmen made their call in policy clear.¹⁰

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10 Tradesmen's policy provided that an employee is disciplined, up to and including termination,
11 if the employee failed to conform to the call-in policy. Neither Mr. Rodriguez nor Mr. Henslin testified
12 that Mr. Rodriguez was disciplined for not calling in.

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15 **DECISION**

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17 51.08.178. "Wages" -- Monthly wages as basis of compensation -- Computation thereof.

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19 (1) For the purposes of this title, the monthly wages the worker was
20 receiving from all employment at the time of injury shall be the basis
21 upon which compensation is computed unless otherwise provided
22 specifically in the statute concerned. In cases where the worker's wages
23 are not fixed by the month, they shall be determined by multiplying the
24 daily wage the worker was receiving at the time of the injury.

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26 The law further contemplated that the number of hours the worker is normally employed shall
27 be determined by the Department in a fair and reasonable manner.

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29 Tradesmen argued that Mr. Rodriguez did not work from March 5 through March 11 and so
30 he was not normally employed 8 hours per day and 5 days per week. Mr. Rodriguez contended that
31 he called in each day as required under the Tradesmen policy. Mr. Rodriguez did not know why
32 Tradesmen did not dispatch him from March 5 through March 11. Mr. Rodriguez was dispatched on
33 March 12, 2013, to the same contractor and job site for which he worked three days in a row,
34 February 27, 28, and March 1. He worked 7.75 hours the first day and 8 hours the other two days.¹¹

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36 Mr. Henslin testified that he normally discovered that an employee did not show for work
37 through Tradesmen employees. Mr. Henslin testified that Tradesmen employees visit job sites
38 weekly or more frequently. Mr. Henslin testified that clients, such as MTE Electric, may inform
39 Tradesmen by telephone that a Tradesmen employee did not appear. MTE Electric did not

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⁸ 4/28/15 Tr. at 29.

45 ⁹ 5/4/15 Tr. at 14.

46 ¹⁰ Exhibit No. 2.

47 ¹¹ Exhibit No. 1

1 complain to Tradesmen that Mr. Rodriguez failed to appear for work on March 4, 2013. Mr. Henslin
2 acknowledged that clients, such as MTE Electric, do not always inform Tradesmen of a no show.
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4 The inference that Mr. Rodriguez elected not to work 8 hours per day and 5 days per week
5 was not supported by a preponderance of the evidence. The evidence in the record did not explain
6 how it was Mr. Rodriguez's election for Tradesmen to fail to dispatch Mr. Rodriguez in February
7 2013 and from March 2, 2013, through March 11, 2013.
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10 The presumption that Mr. Rodriguez failed to call in every day at 4 p.m. was rebutted by
11 Mr. Rodriguez's testimony that he made the call according to Tradesmen's policy. Tradesmen failed
12 to present a log of the calls and admitted that the capacity to log calls did not equal to performance
13 and so no written logs were produced. Mr. Henslin testified that Tradesmen had "no evidence
14 showing that he called in for work."¹²
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17 The inference that if Mr. Rodriguez was not normally employed 8 hours per day and 5 days
18 per week, it was because of his failure to call in was not supported by the evidence in the record.
19 The employer failed to discipline Mr. Rodriguez or notify him of the alleged failure to obey company
20 policy. The preponderance of the evidence was persuasive that Mr. Rodriguez had worked 8 hours
21 per day and 5 days per week when Tradesmen dispatched him.
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25 The preponderance of the evidence was persuasive that Mr. Rodriguez was normally
26 employed 8 hours per day and 40 hours per week at the time of the industrial injury on March 12,
27 2013. The Department order dated September 10, 2014, was correct and should be affirmed.
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30 FINDINGS OF FACT

- 31 1. On January 22, 2015, an industrial appeals judge certified that the
32 parties agreed to include the Jurisdictional History in the Board record
33 solely for jurisdictional purposes.
- 34 2. Lorenzo Rodriguez sustained an industrial injury on March 12, 2013;
35 while in the course of his employment with Tradesmen International, Inc.
36 as an electrician apprentice.
- 37 3. Mr. Rodriguez was normally employed 8 hours per day and 40 hours per
38 week at the time of the industrial injury.
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40 CONCLUSIONS OF LAW

- 41 1. The Board of Industrial Insurance Appeals has jurisdiction over the
42 parties and subject matter of this appeal.
- 43 2. Lorenzo Rodriguez's wages shall be determined by 8 hours per day and
44 5 days per work within the meaning of RCW 51.08.178.
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47 ¹² 4/28/15 Tr. at 18

1 3. The Department order dated September 10, 2014, was correct and is
2 affirmed.
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4 Dated: July 6, 2015
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8 *Tom M. Kalenius*

9 Tom M. Kalenius
10 Industrial Appeals Judge
11 Board of Industrial Insurance Appeals
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