NO. 92543-7

SUPREME COURT OF THE STATE OF WASHINGTON

KIMBERLY G. LUVAAS,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
Tacoma, WA 98402
(253) 597-3896

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I. INTRODUCTION

Kimberly Luvaas seeks to have wages included in her rate for workers' compensation benefits from a job she did not have at the time of injury. Luvaas was injured while working as a landscaper—a day after she quit working as a contract caregiver for the Department of Social & Health Services (DSHS). RCW 51.08.178(1) sets the rate of an injured worker's time-loss compensation taking into consideration the worker's wages being received from all employment "at the time of injury." The plain language of RCW 51.08.178(1) does not allow the Department to look back at wages Luvaas earned at a job she was working before the job of injury as Luvaas requests. Luvaas is wrong that this Court's decision in *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007), altered RCW 51.08.178(1)'s requirement to consider only wages at the *time of injury*. In fact, that decision supports looking to wages at the time of injury.

Review is not necessary to consider the Court of Appeals' application of well-settled principles of law to the facts of Luvaas's case. She shows no reason under RAP 13.4 for this Court to take review.

II. COUNTERSTATEMENT OF THE ISSUE

Review is not warranted in this case, but if review were accepted, the issues presented would be:

RCW 51.08.178(1) requires that workers' compensation benefits be determined by considering the wages earned at the time of injury. Was it appropriate to include only the wages earned at the time of Luvaas's injury, and exclude wages earned at a job Luvaas quit before her industrial injury?

III. COUNTERSTATEMENT OF THE CASE

A. Luvaas Was Injured at Her Landscaping Job the Day After She Quit Working as a Contract Caregiver for DSHS

On Friday, July 29, 2011, Luvaas was injured while working at her landscaping job at Out on a Limb Landscape Services, Inc. BR Luvaas 8-11.[1] She filed a workers' compensation claim, which the Department of Labor & Industries (Department) accepted. In order to determine her wage rate for workers' compensation purposes, the Department needed to determine what employment she had at "the time of injury." RCW 51.08.178(1). It included her wages from the landscaping job, but Luvaas sought to have wages from a prior contract job with DSHS included. *See* BR Luvaas 8-9.

The day before her injury was Luvaas's last day at her other position working as a care provider. BR, Ex. 3; BR Luvaas 42. Luvaas had entered into an agreement with DSHS to provide care services from July 1, 2009, through June 30, 2012. BR, Ex. 2 at 1; BR Gilliand 70.

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[1] The certified appeal board record will be cited as "BR." Testimony within the certified appeal board record will be cited "BR" followed by the witness's last name and page number.

In June 2011, Luvaas gave notice to terminate the contract, but DSHS did not initially find a replacement, so DSHS and Luvaas "verbally agreed that [she] would stay on another month, [to] give [DSHS] time to find somebody." BR Luvaas 42.

Then on July 5, 2011, Luvaas wrote a termination letter to DSHS stating:

> July 28 will be my last day as caregiver for [the client]. Until then I shall be available to help new care giver in any way I can.

BR Ex. 3.

DSHS accepted Luvaas's termination and ended the authorization for Luvaas to work for DSHS effective July 28, 2011. DSHS also specified that Luvaas had completed the contract. BR Gilliand 74-76. Because her contract had been terminated, Luvaas could not bill for any days beyond July 28. BR Gilliand 75. She was also limited to work 178 hours per month under the contract and had already reached 178 hours by July 28, 2011. BR Luvaas 35. She continued to provide services for the patient until Thursday, July 28, 2011. BR Luvaas 40-42.

On July 29, 2011, DSHS had placed a new care provider with her former client, and it is undisputed that Luvaas did not provide any further services on the July 29, 2011 date of injury. *See* BR Gillard 73, 85; BR Luvaas 36, 42-43.

After her contract had terminated, Luvaas could not submit her hours until July 31. *See* BR Luvaas 36. On August 3, 2015, DSHS direct-deposited Luvaas her final paycheck for work performed through July 28. BR, Ex. 4.

After accepting her claim for the injury at the landscaping job, the Department issued a wage rate order based on her reported employment as of the date of injury. BR Travis 52. This rate only included her employment at the time of injury at her landscaping job. *See* BR 22; BR Travis 52. Luvaas appealed the order to the Board of Industrial Insurance Appeals. BR 30.

B. The Board and the Superior Court Affirmed the Department's Wage Rate Order, Reasoning That the Plain Language of the Statute Did Not Allow the Department To Calculate Monthly Wages Based on Employment Worked Only Before the Date of Injury

Following hearings at the Board, the industrial appeals judge issued a proposed decision affirming the Department order. BR 11-20. The industrial appeals judge concluded that "she was no longer employed with DSHS as an independently contracted caregiver, having voluntarily quit." BR 15. The industrial appeals judge reasoned that the plain language of RCW 51.08.178(1) does not allow "the Department to calculate monthly wages based on employment one day *before* the actual date of injury." BR 15 (emphasis in original).

Luvaas appealed to superior court. CP 20-45. The superior court affirmed, reasoning that Luvaas had no lost earnings to replace since she did not have the DSHS job the day of the injury:

> Since the plaintiff terminated her employment with DSHS on July 28, 2011, and had reached the maximum number of allotted hours for that month at that time, she had no wages or income from DSHS to replace after July 28, 2011. Since there were no lost wages or income from DSHS to replace after July 28, 2011, there would be no purpose to awarding time-loss compensation based upon wages or income from DSHS during this time frame.

CP 10.

C. The Court of Appeals Concluded That There Was No Question That Luvaas Had Ended Her Employment at DSHS Before Her Industrial Injury and Affirmed the Superior Court

At the Court of Appeals, Luvaas argued that she was still an employee of DSHS on the date of her industrial injury on a contractual theory and that the Department should have included her wages from DSHS. In an unpublished opinion, the Court of Appeals held that under the plain language of RCW 51.08.178(1), Luvaas's wages from her caregiver position could only be considered if she was employed by DSHS at the time of injury and there is no question of fact that Luvaas was not employed by DSHS at the time of injury. *Luvaas v. Dep't of Labor & Indus.*, No. 46656-2-II (September 29, 2015) (slip op.). Luvaas moved for reconsideration and that was denied.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Review is not warranted here because the Court of Appeals correctly applied the plain language of RCW 51.08.178(1) and well-established principles of law to the uncontested facts of Luvaas' case. Such a case presents no issue of substantial public interest. Further, no conflict exists with *Granger* or *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 843 P.2d 1056 (1993), because neither case stands for the proposition that the "receiving from all employment at the time of injury" language in RCW 51.08.178(1) means that the Department should include wages from previous employment. Because Luvaas demonstrates none of the bases for review under RAP 13.4, this Court should deny review.

A. No Conflict Exists With *Granger* and *Harris* as Both Cases Affirm the Principle That It Is Wages at the Time of Injury That Is Relevant

Luvaas is not entitled to a wage rate that includes her prior contract work with DSHS because she quit working for DSHS the day before she was injured at her landscaping job. Consistent with the plain language of RCW 51.08.178, the Supreme Court has never held that wages earned for employment that is not occurring on the day of injury should be included in the wage rate. Luvaas's suggestion that *Granger* and *Harris* support the opposite conclusion is without merit.

Here, Ms. Luvaas's wages were calculated under RCW 51.08.178(1) that looks to the wages "at the time of injury":

> 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 injury*: [detailing formula].

(Emphasis added.)

The Court of Appeals correctly concluded that the plain language of RCW 51.08.178(1) provides that the Department must consider the wages that the worker was "receiving from *all employment at the time of injury*." *Luvaas*, slip op. at 1 (emphasis added). Luvaas had no "employment" with DSHS at the "time of injury" and thus was not "receiving" any wages from DSHS at the time of injury, so no DSHS wages could be considered.

Focusing on the word "receiving" in the statute, Luvaas argues that *Granger* supports her case because in that case, the Court defined "receiving" as to "take possession or delivery of" something. *Granger*, 159 Wn.2d at 760-67 (internal quotations omitted); Pet. 6. Luvaas claims that the day she took possession of her final wages is dispositive to her claim. Pet. 6-8. But the statute does not focus on the pay day; rather, it

looks to the timing of the work performed on the day of injury. *Granger* does not say to ignore the language in the statute that looks to the wages received from "employment at the time of injury"— a phrase Luvaas reads out of the statute. While courts look to the broader statutory context for guidance, they do not add or delete language the Legislature has chosen to include, and they construe statutes such that all of the language is given effect. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Here, the statute plainly provides that the Department must consider "wages the worker was receiving from all *employment at the time of injury*." RCW 51.08.178(1) (emphasis added). Thus, under the statute's plain language, the Department cannot consider employment *before* or *after* the injury as Luvaas requests—it only considers "employment" at the "time of injury." *Id. Granger* only confirms this analysis.

In *Granger*, the dispute was whether health care benefit payments being paid into a trust fund—for medical benefits the worker was not yet eligible for—should be included in the time-loss compensation wage rate. *Granger*, 159 Wn.2d at 755. The Court concluded that it should read the statute to include future benefits being received "at the time of injury" in the wage calculation. *Id.* at 761 (internal quotations omitted). The Court reasoned that under the statute the focus was not on the entitlement to

coverage. *Id.* Rather, because the worker "was *earning* the $2.15 per hour for health care at the time of his injury . . . this constitutes part of his earning capacity." *Id.* at 763 (emphasis added). Here, the Court of Appeals similarly counted only what Luvaas was *earning* at the time of injury.

Likewise, *Harris* focuses on the day of the event that triggers the right under the statute and does not call for looking for a different date, when construing a statute with the word "receive" in it. 120 Wn.2d at 472.

Far from demonstrating a conflict with Supreme Court decisions, the Court of Appeals decision here is consistent with Supreme Court cases that provide that the worker's wages are based on the monthly rate of pay *as of the date of injury* rather than a worker's past pattern of employment—or when a worker receives payment for past work. *See Dep't of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 284, 996 P.2d 593 (2000); *see also Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005) (under the Industrial Insurance Act, "time-loss and loss of earning power compensation rates are determined by reference to a worker's wage *at the time of injury*") (citations omitted) (emphasis added).

B. No Issue of Substantial Public Interest Is Presented by a Decision That Appropriately Applies the Plain Language of the Statute

Review is not warranted of a case that appropriately applies the plain language of the statute. Contrary to her arguments, just because the

case involves an injured worker does not mean that the case involves an issue of substantial public interest. Pet. 9. Further, the Court of Appeals' unpublished decision does not "impact every single worker in the [S]tate of Washington," but applies only to Luvaas. Pet. 9. The Court of Appeals' analysis is correct. But even if its analysis was incorrect (and duplicated), its impact would be limited to a small number of workers. Luvaas's circumstances—quitting one of two jobs and being injured in the other position one day after her self-termination—are unlikely to be frequently repeated. Accordingly, the opinion does not raise an issue of substantial public interest. RAP 13.4(b)(4).

In any event, she points to no public policy reasons to support review. As the Board, superior court, and Court of Appeals recognized here, the purpose of wage *replacement* benefits like time-loss compensation is to lessen the economic impact of lost wages because of industrial injuries. BR 16; CP 10. Luvaas asks for a new rule where the timing of the payment of wages—as opposed to wages "at the time of injury"—controls under RCW 51.08.178(1). It is unwise to base a workers' entitlement to wage-replacement benefits on when a worker receives wages they have already earned because it may not reflect their "lost earning capacity." And it is unfair to employers, whose experience ratings are driven in part by time-loss compensation wages paid to injured

workers, when those wages do not reflect the wages the worker was earning at the time of injury. *See* WAC 296-17-31010, -850, -855. Luvaas's requested relief will aid her, but would do so at the detriment of those workers whose benefits are diminished by relying on the timing of employers' payment periods, and to the detriment of those employers who pay additional premiums unrelated to a worker's wage rate at the time of injury.

Luvaas's interpretation disregards this Court's fundamental rule that workers' compensation benefits should reflect the worker's "lost earning capacity." *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997); *Avundes*, 140 Wn.2d at 287. There is no lost earning capacity for employment not worked on the day of injury. Her approach was correctly rejected by the Court of Appeals.

V. CONCLUSION

This case presents the routine workers' compensation issue of establishing a time-loss compensation rate. The Court of Appeals decided that Luvaas's wages from her previous caregiver position could not be considered because she was not employed by DSHS at the time of injury. No reason exists to revisit this determination, especially given that this unpublished decision addresses an uncommon fact pattern. Because Luvaas was not working for DSHS at the time of her injury, her wages

from her prior work there cannot be considered. This Court should deny review.

RESPECTFULLY SUBMITTED this 21st day of January, 2016.

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
PO Box 2317
(253) 593-5243

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P.O. Box 2028
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Subject: Kimberly Luvaas, Docket No. 92543-7

Attached for filing please find the Respondent's Answer to Petition for Review regarding the above matter.

Tracy Lane-Patton
Legal Assistant for
Office of the Attorney General
Tacoma -- LNI division
1250 Pacific Avenue, Suite 105
Tacoma, WA 98401
(253) 593-2949
Email: TracyL@atg.wa.gov