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NO. 96780-6

SUPREME COURT OF THE STATE OF WASHINGTON

AARON RICHARDSON,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES AND CONCO & CONCO PUMPING, INC.,

Respondents.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO RICHARDSON'S PETITION FOR REVIEW

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I. INTRODUCTION

No issue of substantial public interest is presented by a Court of Appeals decision that tracks with the plain language of the controlling statute and that accepts trial court findings that are supported by substantial evidence. Richardson's employer offered him a light-duty job after his injury, as RCW 51.32.090(4) authorized it to do.

As the Court of Appeals correctly recognizes, RCW 51.32.090(4) only authorizes the employer of injury to offer light-duty work to a worker. Richardson argues that the Court of Appeals decision improperly allows the employer of injury to use an agent to communicate a job offer to its worker, contending that the job is not "from" the employer of injury if an agent plays any role in the process. Pet. at 11. But so long as the employer of injury maintains control over the work performed by the worker during a light-duty assignment, the employer of injury remains the employer during that assignment, even if it uses an agent to communicate the offer to the worker. And here, the Court of Appeals concluded that substantial evidence supported the superior court's finding that Richardson's employer of injury was the one who offered him a light-duty job and that he performed work.

Richardson fails to show an issue of substantial public interest in this substantial evidence case. This Court should deny his request for further review.

II. ISSUE PRESENTED

Discretionary review is not merited, but if review were granted, these issues would be presented:

1. Conco used an agent to communicate a transitional light-duty job offer to Richardson. During the job, Richardson was subject to Conco's policies and pay rates and Conco's direction through the vendor. Richardson agreed to perform the job. Does substantial evidence show that Conco controlled Richardson's work and Richardson consented to that control, so Conco remained the employer during the light-duty assignment?

2. For his light-duty work, Richardson was asked to review workplace safety standards and then possibly obtain certifications or work on other projects like reviewing blueprints for Conco. Does substantial evidence show that the training work constituted work?

III. STATEMENT OF THE CASE

A. After Richardson Sustained an Industrial Injury, He Accepted Conco's Offer To Do Light-Duty Work at AGC's Resource Center To Study Workplace Safety Standards

Richardson worked as a foreperson on a large-scale construction project for Conco, a construction company. AR Richardson 8.[1] In February 2014, he was injured while working for Conco.

[1] "AR" refers to the administrative record contained in the certified appeal board record. Witness testimony is referenced by AR followed by the witness name.

AR Richardson 8-10. The Department allowed his claim and provided treatment, which included two back surgeries. AR Richardson 11.

Conco contracted with Associated General Contractors (AGC) to manage Conco's workers' compensation program. AR 33-35. Conco directed AGC to help find a light-duty job for Richardson.
AR Bueche 33-35. AGC is a third party administrator. AR Bueche 33-35. AGC is an organization made up of employers (i.e., general contractors, subcontractors, and specialty contractors), who pay AGC membership dues. AR Gubbe 6, 11. AGC runs a retrospective rating program, negotiates union agreements, provides safety audits, and collaborates with OSHA, universities, and fire departments to design safety and injury prevention plans.
AR Gubbe5-6, 15.

Janet Bueche is a claims manager for AGC and assists employers with their workers' claims. AR Bueche 34. On Conco's behalf, she helped Conco find Richardson light-duty work. AR Bueche 35-38. As most AGC's employers, including Conco, do not have their own training centers, AGC will ask if the employers want to use its Resource Center to provide work when there is no light-duty work available at a particular job site. AR Bueche 42, 52. If an employer needs the Resource Center, AGC's

claim manager requests the employer's permission to speak with the injured worker's physician for approval of the work. AR Bueche 44.

Here, Conco used the Resource Center for Richardson's light-duty work and directed the AGC claims manager to seek approval from Richardson's attending physician. AR Bueche 43-44. After Richardson's attending provider approved of light-duty work, Conco's office manager, Catherine Santucchi, directed the claim manager to send a light-duty job offer to Richardson. AR 6; AR Bueche 35, 43-44; AR Gubbe 16.

Richardson received the light-duty job offer letter and an attached job analysis. AR Richardson 14, 29; AR 125. The job analysis directed Richardson to contact a Conco employee, Elizabeth Wrenn, about the light-duty work. AR Ex 2. The job analysis listed "Conco Cement" as the employer. AR Ex 2. The letter stated that Conco was responsible for paying wages and remained his employer. AR Bueche 38; Ex 1, 2.

The offer letter stated that Richardson would become "familiar with the DOSH [Division of Occupational Safety Health of the Department of Labor and Industries] safety regulations pertaining to construction" and that he may have an opportunity to receive flagger certification, a commercial driving license, CPR/first aid certification, and even GED completion. AR Ex 1. The job analysis stated that Richardson's duties were to conduct "a comprehensive review of the DOSH

construction safety standards." AR Ex 2. After that, he could receive other training assignments AR Ex 2.

The offer letter stated that Richardson would receive his regular wages and benefits, exceeding his time-loss compensation rate, and his hours would be from 6:00 a.m. to 2:30 p.m., Monday through Friday. AR Ex 1. Richardson would report to a site supervisor who would report to Conco's office manager. Ex 1.

Conco's personnel policies and procedures applied to Richardson while he performed the light-duty job. *See* AR Bueche 47-48. Conco set the hours, and would excuse absences and approve requests for time off. *See* AR Bueche 48; AR Gubbe 18-19. The Resource Center could not take disciplinary action against Richardson, but it could contact Conco, who could then take disciplinary action if Conco deemed it necessary. *See* AR Bueche 48-49; AR Gubbe 31, 35.

Richardson acknowledged that working in the construction industry, particularly as a foreperson, required him to be familiar with safety rules and regulations pertaining to the job sites where he worked. AR Richardson 25-26. He admitted that some of the safety manuals available at the Resource Center would help to inform him (or refresh his memory). AR Richardson 25-26.

B. Department Policy Encourages Employers To Provide Light-Duty Work, Including Jobs Consisting of Training

The Department has a policy discussing light-duty jobs. AR Bueche 56-57. The policy discusses what is a valid job offer, which turns in part on whether the job provides meaningful work for the worker to perform and whether there is a respectful work environment. AR Ex 3 at 3. The policy explains that workers may perform work at a training facility if it has a relationship to the worker's employment. AR Ex 3 at 3. The Department approves of jobs that involve training centers. *See* AR Ex 3.

C. Richardson Quit the Light-Duty Job After One Day for Reasons Unrelated To His Industrial Injury

Richardson initially accepted the light-duty job and performed the job for one day. AR Richardson 17. He did not fill out any employment forms when he began performing that job. *See* AR Richardson 23; Ex 2. The instructor told Richardson to read one binder of construction safety materials per day. AR Richardson 21-22. A Resource Center supervisor called attendance and released participants for breaks. AR Richardson 21. Richardson quit after one day. *See* AR Richardson 17, 23. He does not claim that his injury prevented him from performing the light-duty work.

D. The Department Denied Richardson Time-Loss Compensation Because He Quit His Light-Duty Job for Reasons Unrelated To

His Injury, and the Board, Superior Court, and Court of Appeals Affirmed

After Richardson quit, the Department did not provide time-loss compensation. AR 63. Time-loss compensation payments cease after a worker's physician releases him or her for light-duty work and the worker begins work with the employer of injury; the payments do not resume if the worker quits the job for reasons unrelated to the industrial injury. *See* RCW 51.32.090(4)(b).

Richardson appealed to the Board of Industrial Insurance Appeals. AR 62. The Board affirmed the Department's order. AR 6-7. Richardson appealed to superior court, which affirmed the Board. CP 259-60.

Richardson appealed to the Court of Appeals, arguing that the light-duty job was not valid because it was not offered by the employer of injury, as RCW 51.32.090(4) requires. The Court of Appeals recognized that RCW 51.32.090(4) applies only to a job offer by the employer of injury, but concluded that the trial court had properly found that Conco was the employer for the light-duty job offered to and accepted by Richardson. *Richardson v. Dep't of Labor & Indus.*, __ Wn. App. __, 432 P.3d 841, 848 (2018). The Court of Appeals also rejected Richardson's argument that the job offer was not for "work." *Id.* at 849-50.

IV. ARGUMENT

Richardson's petition for review should be denied as it fails to establish any basis for this Court's review. Richardson fails to establish that his claims involve an issue of substantial public interest. Contrary to Richardson's argument (Pet. at 11), the Court of Appeals decision does not allow employers other than the employer of injury to offer light-duty work to their workers. *See* Pet. at 11; *Richardson*, 432 P.3d at 848. Rather, the Court of Appeals properly recognized that so long as the employer of injury maintains control over the worker during the light-duty assignment, the job offer is "from" the employer even if an agent was used to communicate the offer. *Richardson*, 432 P.2d at 848. The Court of Appeals affirmed the superior court because it concluded that substantial evidence showed that Conco maintained control over the work during the light-duty assignment and therefore the light-duty job was from Conco. *Id.* at 848-49.

The Court of Appeals also correctly concluded that the light-duty job offer was for "work." *Richardson*, 432 P.3d at 849-50. Conco agreed to pay Richardson wages in return for performing tasks that had value to Conco, and nothing in the statute precluded the employer from offering Richardson the kind of job that Conco offered him. Richardson shows no error.

Richardson fails to show that this case presents an issue of substantial public interest, and his petition for review should be denied.

A. Richardson Cannot Show an Issue of Substantial Public Interest Because the Court of Appeals Decision Follows the Plain Language of the Statute

RCW 51.32.090(4) authorizes the "employer of injury" to offer light-duty work to a worker, so long as the employer follows the procedures set out in the statute. The Department and Conco asserted, and the Court of Appeals agreed, that RCW 51.32.090(4) only applies to a job offer made by the employer of injury to one of its injured workers. *Richardson*, 432 P.3d at 848. And though Richardson appears to suggest otherwise, the Court of Appeals expressly recognized that RCW 51.32.090(4) only permits the employer of injury to offer work to the worker. *See* Pet. at 11; *Richardson*, 432 P.3d at 848 ("The parties agree that the transitional work must be offered by, and for the benefit of, the employer of injury—here, Conco").

The fact that Conco used AGC as an agent to help communicate the light-duty job offer to Richardson does not change the fact that Conco, not AGC, was the employer for the light-duty job. Richardson argues that the Court of Appeals erred by concluding that the employer of injury can use an agent to communicate a job offer to a worker, arguing that if the

employer uses the agent to do this, the job offer is no longer from the employer of injury. Pet. at 8-9, 11. But this is wrong for two reasons.

First, the test under the Industrial Insurance Act to determine if an entity is an employer turns on who had control over the worker's work and whether there was consent to an employment relationship. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). Because Conco maintained control over Richardson's work during the light-duty job and there was consent to an employment relationship, the fact that an agent communicated the job offer to Richardson does not mean that Conco was not, in fact, the employer.

Second, as the Court of Appeals correctly noted, nothing in RCW 51.32.090(4) or any other provision of the Industrial Insurance Act precludes an employer from using an agent to communicate a job offer to a worker. *Richardson*, 432 P.3d at 848-49. The Court of Appeals correctly determined that the Legislature "clearly intended to make the employer of injury responsible for the transitional job offer and work program." *Id.* at 848. And under the common law regarding principals and agents, a principal is generally responsible for its agent's actions. *See generally Bank of Am. NT & SA v. David Hubert, P.C.*, 153 Wn.2d 106, 123-24, 101 P.3d 409 (2004). Conco's use of an agent to communicate a job offer to Richardson did not prevent Conco from maintaining control over the work

performed during that light-duty job. The Court of Appeals thus properly recognized that Conco could use an agent to communicate the job to Richardson. *Richardson*, 432 P.3d at 848.

Richardson also incorrectly states that the Court of Appeals concluded that RCW 51.32.090(4) was ambiguous as to whether an agent could use an employer to offer a worker a job. He argues that, upon concluding that the statute was ambiguous, the Court should have ruled in Richardson's favor. Pet. at 10-12, 14-15. But the Court did not say the statute was ambiguous. It simply observed that the statute did not expressly state whether an employer could use an agent. *Richardson*, 432 P.3d at 848. The mere fact that a statute does not expressly address an issue does not make the statute ambiguous; rather, a statute is ambiguous only if more than one interpretation of its language is reasonable. *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 858-59, 347 P.3d 503 (2015) (silence does not create an ambiguity).

As nothing in RCW 51.32.090(4) suggests that an employer cannot use an agent to communicate a job offer to a worker, the only reasonable interpretation is that the statute does not preclude an employer from doing so, in accordance with generally applicable common law principles. Such common law principles can be considered in industrial insurance cases to

the extent that they do not conflict with the Act's provisions. *See* RCW 4.04.010.

For the statute to be ambiguous there would have to be some way to reasonably construe it as precluding an employer from using an agent to convey a job offer to a worker. But nothing in the statute supports such a conclusion. Nor is such a construction reasonable.

When the employer of injury uses an agent to communicate a job offer to a worker, the employer of injury remains the true employer for that light-duty job, because the employer of injury maintains control over the work performed during the light-duty assignment. *See Novenson*, 91 Wn.2d at 553. The job offer is thus *from* the employer of injury.

The Court of Appeals conclusion that the statute permits an agent of the employer of injury to make a job offer and provide work is also appropriate as it furthers the objective of the statute. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

The Court of Appeals appropriately determined that the Legislature's intent behind the 1993 amendment cited by Richardson was

to encourage employers to offer work to their workers, while ensuring that the employer of injury remained responsible for the transitional job offer and work program. *Richardson*, 432 P.3d at 848. That intent is furthered by permitting an employer of injury to use an agent to communicate a job offer, as long as the employer of injury maintains responsibility for the job offer and the program. And as substantial evidence shows that Conco maintained such responsibility in this case, Conco was the employer for the light-duty job even though it used an agent to communicate the job offer to Richardson.

B. An Issue of Significant Public Interest Is Not Raised by a Case Where Substantial Evidence Supports the Trial Court's Findings

Since the Court of Appeals and the parties agree that job offers under RCW 51.32.090(4) must come from the employer of injury, and since there is no basis under the statute to conclude that an employer can never use an agent to communicate a job offer to a worker, the disposition of this case depends on whether substantial evidence supports the trial court's finding that Conco was the employer for the light-duty job. Here, the record shows that Conco had control over the work offered to Richardson, as Conoco (a) decided to offer light-duty work to Richardson, (b) authorized a representative to send a job offer letter to Richardson, (c) did choose and would have continued to choose the projects

Richardson worked on during the light-duty job, (d) was responsible for paying Richardson's wages for the light-duty work, (e) maintained the right to approve leave requests, and (f) maintained the right to discipline Richardson for misconduct. AR Bueche 35, 38, 43-44, 48-49; Ex 1; Ex 2.

Furthermore, Richardson consented to working for Conco by accepting its job offer, and nothing in the record suggests that he consented to having an employer other than Conco. Substantial evidence therefore shows that Conco was the employer for the light-duty job, as Conco had control over the work and the parties consented to the employment relationship. *Novenson*, 91 Wn.2d at 553.

C. Substantial Evidence Supports That the Light-Duty Job Was "Work" Because Conco Agreed To Pay Richardson Wages in Return for Performing Tasks That Had Value To Conco

The Court of Appeals concluded that the trial court correctly found that the light-duty job offered by Conco to Richardson was "work" because Conco agreed to pay Richardson wages in return for Richardson agreeing to perform tasks for Conco. *Richardson*, 432 P.3d at 849-50. The Court of Appeals further determined that the activities offered to Richardson "could help both Conco and Richardson by providing him a deeper knowledge of industry safety standards and the potential to gain additional training and certificates." *Id.* at 849.

Richardson argues that the light-duty job was not "work" because it consisted only of him reading safety manuals, which he contends is more akin to retraining. Pet. at 18-19. Richardson fails to show error, and the case does not warrant further review. Nothing in RCW 51.32.090(4) precludes a light-duty job from involving tasks such as reading safety manuals or performing other tasks that give a worker a deeper understanding of workplace safety. RCW 51.32.090(4) requires only that the work be approved by the worker's attending medical provider and that it be work for the employer of injury. If the Legislature had intended to preclude an employer from offering a job involving tasks such as reading safety manuals or otherwise developing a greater understanding of workplace safety, it could have included language imposing such a requirement. But it did not do so. And indeed, the statute expressly references a worker performing light-duty assignments "other than" the worker's "usual work," showing that the Legislature anticipated that a light-duty job might involve tasks that are different from the worker's usual work.

The case of *Douglas B. Organ*, 49 Van Natta 198, 1997 WL 104444 (Or. Work. Comp. Bd. Feb. 26, 1997), cited by Richardson, does not support his argument as it involves markedly dissimilar facts. Pet. at 18-19. As a starting point, the case law from other jurisdictions is of

limited aid in interpreting the provisions of Washington's Industrial Insurance Act, as Washington's Act is unique. *See Thompson v. Lewis Cty.*, 92 Wn.2d 204, 208-09, 595 P.2d 541 (1979). Furthermore, and contrary to Richardson's assertion that the facts in his case are "almost identical" to those in *Organ*, the facts of the two cases are quite different. Pet. at 18; *Organ*, 1997 WL 104444. In *Organ*, the worker was offered a light-duty job that required him to report to a training facility but that did not require him to perform any tasks whatsoever while he was there: so long as he was present during the scheduled hours, he could do whatever he wished, and the worker "could play video games all day" without violating the terms of the job offer. *Organ*, 1997 WL 104444, at **1. While the Oregon Board determined that such extreme circumstances did not qualify as "work," it restricted its decision to the facts of that case, and suggested that a job offer which involved receiving retraining at a skills center could be valid light work. *See Id.* at **2.

Here, substantial evidence supports the conclusion that the light-duty activities offered to Richardson constituted "work," even under *Organ*'s approach. Richardson was not free to simply hang out at the training center and do whatever he wished. He was not free to play video games all day. He was required to read materials that he conceded included "information important for industry safety" and that was useful to

his job. *Richardson*, 432 P.3d at 850. And Conco saw value in the work, which provided its workers with a greater understanding of workplace safety in the construction industry.[2]

V. CONCLUSION

Richardson's petition raises no issues of substantial public interest warranting this Court's review. The Court of Appeals correctly recognized that a light-duty job offer must come from the employer of injury and correctly concluded that substantial evidence showed that Richardson's employer of injury was also his employer for the light-duty job, even though it used an agent to convey the job offer to Richardson. And Richardson fails to establish that the job was not for "work" because the job required Richardson to perform tasks for Conco in return for wages, and the undisputed evidence establishes that the tasks had value to Conco. His petition should be denied.

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[2] Conco's apparent failure to pay Richardson for the one day of work he performed does not stop the light-duty job from being work. Key to employment is that there is an agreement by an employer to pay a worker wages in return for performing tasks for the employer. Workers unquestionably have the right to be paid for any work they perform, and an employer's failure to pay a worker wages subjects the employer to various legal remedies. *See* RCW 49.48.083. But an employer's failure to pay a worker wages does not retroactively void the employment relationship. If this were so, an employer could deliberately fail to a pay a worker wages in order to avoid being found to be the worker's employer, and thus exempt itself from various employment laws. Conco must pay Richardson his wages, but the fact that it failed to do so does not stop it from being his employer.

RESPECTFULLY SUBMITTED this 27th day of March, 2019.

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SUPREME COURT
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AARON E. RICHARDSON, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES and CONCO & CONCO PUMPING, INC., Respondents.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Department of Labor and Industries' Answer to Richardson's Petition for Review and this Declaration of Service in the below described manner:

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