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NO. 98137-0

**SUPREME COURT
OF THE STATE OF WASHINGTON**

VALUE VILLAGE,

Appellant,

v.

CANDIDA VASQUEZ-RAMIREZ and WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

**ANSWER TO PETITION FOR REVIEW,
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA #29737
Office Id. No. 91022
Labor and Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7715

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I. INTRODUCTION

Exhaustion of administrative remedies is a core principle in reviewing agency decisions, and a Court of Appeals decision that follows this principle does not warrant review. To receive consideration of an issue before the Board of Industrial Insurance Appeals, the superior court, and appellate courts; a party in a workers' compensation matter must "set forth in detail" any "objections" it has to a proposed decision of the Board's hearing judge. RCW 51.52.104. This exhaustion of administrative remedies allows the expert-reviewing body (the Board) to apply its expertise to resolve disputed workers' compensation questions.

The Court of Appeals concluded that Value Village failed to preserve voluntary retirement as an issue on appeal because it presented no argument about it in its petition for review at the Board. In its petition at the Board, Value Village quoted several subparts of RCW 51.32.090, including a quote of subpart (10), which addresses voluntary retirement. It included no further mention of this provision in its petition. Consistent with decades of case law, by failing to detail any objections, Value Village waived any consideration of the voluntary retirement issue.

Value Village failed to exhaust administrative remedies and its petition shows no reason for review.

II. ISSUE

1. RCW 51.52.104 requires a party to “specifically set forth in detail” its “objections” to a proposed decision and order. Value Village quoted a statute regarding voluntary retirement in its petition but offered no analysis as to how the facts of the case established voluntary retirement. Did Value Village waive the issue of voluntary retirement?
2. RCW 51.32.090(10) precludes time-loss compensation to a worker who is medically capable of employment but who neither works nor seeks employment. Value Village presented no evidence that there was a period when Candida Vasquez-Ramirez was able to work but did not seek employment. Did Value Village make a prima facie case that Vasquez-Ramirez voluntarily retired?

III. STATEMENT OF THE CASE

A. Vasquez-Ramirez Was Injured While Working for Value Village

Candida Vasquez-Ramirez suffered an injury while working for Value Village in August 2014. AR 3. She stepped on a hanger while trying to push a heavy rack and fell, injuring her right hip, right leg, right shoulder, neck, back, and her hands. AR 2/1/17 at 16. She received treatment for her injuries. AR 2/1/17 at 23.

Vasquez-Ramirez returned to work at Value Village the day after her injury, but her doctor imposed medical restrictions on her ability to lift and barred her from performing overhead work with her right arm or shoulder. AR 2/3/17 at 12-13, 49. Value Village formally offered a

light-duty job to Vasquez-Ramirez, which she accepted. AR 2/3/17 at 13, 25; AR Ex 1.

The Department closed Vasquez-Ramirez's claim on January 8, 2015. AR 131. On January 25, 2015, Value Village terminated Vasquez-Ramirez from the light-duty job, because she allegedly left work without permission, communicated with supervisors in a disrespectful fashion, and refused to follow instructions from her supervisors. AR Ex 2. Vasquez-Ramirez denies that she did any of those things. AR 2/1/17 at 25; AR 2/3/17 at 41-52.

Vasquez-Ramirez applied to reopen her claim in March 2015, asserting that her injury had worsened. AR 131. To reopen a claim, the Department needed to find that the worker's condition had objectively worsened, as shown by medical evidence. *See Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 654, 219 P.3d 711 (2009). Finding objective worsening, the Department issued an order in June 2015 that reopened her claim effective March 2015. AR 131. Value Village appealed the Department's decision to reopen her claim, but then withdrew its appeal. AR 131-32.

After reopening the claim, the Department issued orders paying Vasquez-Ramirez time-loss compensation from August 2015 through

October 2015 and from February 2016 through July 2016. AR 3. Value Village appealed those decisions to the Board. AR 3.

B. The Board, Superior Court, and Court of Appeals Concluded That Value Village Failed To Make a Prima Facie Case

At the Board, Value Village presented evidence that it offered Vasquez-Ramirez a light-duty job and that it terminated her from that job because it believed that she had committed misconduct. AR 2/3/17 at 13, 25; AR Ex 1; AR Ex 2. Value Village presented no medical witnesses who testified that she had the physical capacity to work at any capacity during the time-loss period. After the employer rested its case, Vasquez-Ramirez moved to dismiss under CR 41(b)(3), arguing that the employer failed to make a prima facie case. AR 2/3/17 at 56-64. The Department joined the motion. AR 2/3/17 at 64-66.

The Board's hearing judge granted Vasquez-Ramirez's motion by issuing a proposed decision that dismissed Value Village's appeal, concluding that Value Village failed to establish a prima facie case because it failed to present evidence that Vasquez-Ramirez could perform either the light-duty job it had offered to her or any other job during the time for which the Department had paid Vasquez-Ramirez time-loss compensation. AR 46-54. Value Village petitioned the Board for review. AR 22-38. In its petition, it quoted several subparts of RCW 51.32.090,

including a quote of subpart (10), which addresses voluntary retirement. AR 28-30. It included no further mention of this provision in its petition. AR 22-38. The Board granted review and dismissed Value Village's appeal based on its failure to present a prima facie case. AR 3-10, 19.

Value Village appealed to superior court. CP 1. The superior court affirmed the Board, agreeing that Value Village failed to establish a prima facie case. CP 63-73. Value Village appealed to the Court of Appeals. CP 74.

At the Court of Appeals, Value Village raised two arguments. First, it argued that it made a prima facie case despite the absence of medical evidence. The Court of Appeals rejected that argument. *Value Village v. Vasquez-Ramirez*, 455 P.3d 216, 222-24 (Wash. Ct. App. 2019).

Second, although Value Village had not presented any analysis on the issue in its petition for review at the Board, it argued that Vasquez-Ramirez voluntarily retired. The Court of Appeals concluded that Value Village waived the issue of whether Vasquez-Ramirez voluntarily retired by not raising that as an issue in its petition for review with the Board. *Value Village*, 455 P.3d at 225. The Court explained that merely mentioning the voluntary retirement statute in the brief, without analysis or argument, was not enough to preserve the issue. *See id.*

Value Village then petitioned for review with this Court.

IV. ARGUMENT

Value Village cites RAP 13.4(b)(1), (2), and (4) as its basis for seeking review. Pet. 9, 16. But it has not only not cited a Supreme Court case that supports a claim of conflict, but the Court of Appeals decision here follows the Court of Appeals decisions Value Village cites.

Consistency is no reason to grant review. And it does not discuss why this case presents an issue of substantial public interest. There is none when the appealing party did not exhaust administrative remedies and seeks to dispose of fundamental workers' compensation principles that require a party to present proof of its claim.

A. **Value Village Shows No Conflict with Court of Appeals Decisions When It Waived the Issue of Voluntary Retirement**

Value Village failed to exhaust administrative remedies when it did not argue in its petition at the Board that the proposed decision and order was incorrect on the issue of voluntary retirement. AR 22-38. RCW 51.52.104 provides that a "petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." In adopting this statute, the Legislature intended to further principles of exhaustion of remedies. Exhaustion of administrative remedies ensures the development of a record, as well as facilitating the

exercise of administrative expertise, allowing correction of errors, and preventing circumvention of procedures. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997).

In a long line of cases, the Supreme Court and Court of Appeals recognize that under RCW 51.52.104, a party must raise an issue in its petition for review that it files with the Board or it waives the issue in later court proceedings. *Dep't of Labor & Indus. v. Lyons Enters. Inc.*, 185 Wn. 2d 721, 743 n.5, 374 P.3d 1097 (2016) (court need not consider argument that was not raised in a petition for review); *Leuluai v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (same); *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279-80, 580 P.2d 636 (1978) (holding claimant waived argument of Board chair's potential disqualification by failing to present argument to Board); *Gary Merlino Const. Co. v. City of Seattle*, 167 Wn. App. 609, 616 n.3, 273 P.3d 1049 (2012) (holding party waived argument that a police officer was an independent contractor by failing to present argument to the Board or trial court); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (holding claimant waived objection on the grounds of insufficient notice because she did not argue that in her petition for review to the Board).

Value Village's petition for review quoted the voluntary retirement provision, RCW 51.32.090(10), without explanation of the quote's significance. Indeed, the petition did not assert that Vasquez-Ramirez voluntarily retired and it lacked any analysis for how the facts of the case supported a finding of voluntary retirement. *See* AR 22-38. This failure means that Value Village waived the issue of voluntary retirement.

None of the cases Value Village cites suggest otherwise. Value Village cites cases, including *Allan*, holding that RCW 51.52.104 requires a party to raise an issue in a petition for review to preserve the issue on appeal. Pet. at 11-14. But none of those cases suggest that simply citing a statute, with no analysis or explanation as to how that statute supports the party's case, can preserve an issue for appeal. Nor would such a proposition make sense: the whole point of requiring a party to "specifically set forth in detail" its objections in a petition for review is to give the three-member Board the opportunity to address a legal argument before the Board's decision is appealed to the courts. If a party mentions a statute in a petition but provides no analysis about how that statute relates to the issues on appeal, this does not give the Board a meaningful opportunity to address the issue. Concluding that merely mentioning a statute in a petition is sufficient to preserve the issue for appeal would undermine the purpose of the statute.

Value Village also claims that the Court of Appeals' decision conflicts with a commissioner's ruling in a case involving a request for discretionary review, but this argument lacks merit. Pet. 13-14. Value Village does not show that a commissioner's decision is the type of decision to support a claim of conflict under RAP 13.4(b)(2). But even assuming it could, the two cases do not conflict, because, in the case involving the commissioner's ruling, the worker preserved the issue in the petition for review by arguing that the Board's decision was wrong, and pointed to evidence as to why the worker believed this was so, but the worker did not cite a specific statute. *See* Pet. Ex 1. In this case, the employer cited a statute but did not present an argument involving that statute, and it did not explain how the statute it cited showed that the proposed decision was wrong. *See* AR 22-38. Since the worker in the other case did something that Value Village failed to do here—present an argument on the issue he wished to preserve for appeal—there is no conflict between the rulings in the two cases.

RCW 51.52.104 requires a party to identify an issue in a petition for review to preserve it for appeal. Value Village seeks refuge in the fact that it mentioned voluntary retirement during oral argument before the Board judge. Pet. 11. But this is irrelevant under the plain language of RCW 51.52.104. Value Village needed to brief the voluntary retirement

argument in its petition for review, and it did not do so. Value Village shows no conflict with any appellate decision.

B. Value Village Shows No Conflict with Voluntary Retirement Case Law

Value Village shows no conflict with the voluntary retirement case, *Energy Northwest v. Hartje*, 148 Wn. App. 454, 466-69, 199 P.3d 1043 (2009). Pet. 16. Consistent with its failure to argue the issue in its petition for review at the Board, Value Village failed to present evidence to support a voluntary retirement claim, and a failed theory does not merit review. “Voluntary retirement” is a term of art that refers to a worker who can work despite the effects of an injury, but who decides to neither work nor look for work even though the worker had the physical capacity to do so. *See Energy Nw.*, 148 Wn. App. at, 466-69 (citing *Kaiser Aluminum & Chem. Corp. v. Overdorff*, 57 Wn. App. 291, 296, 788 P.2d 8 (1990)); RCW 51.32.090(10).

Value Village carried the burden of proof at the Board. RCW 51.52.050. But it presented no evidence that there was a period when Vasquez-Ramirez could work, yet neither worked nor looked for bona fide employment. A court can only find voluntary retirement when a worker was capable of work yet declined to work or look for employment.

See Energy Nw., 148 Wn. App. at 466; *Kaiser Aluminum.*, 57 Wn. App. At 296.

Contrary to Value Village’s arguments, the ultimate purpose of the Industrial Insurance Act is to reduce the suffering and economic loss caused by workplace injuries, not to relieve employers of their duty to present evidence supporting their appeals. RCW 51.12.010; Pet. 14-15. Value Village argues that the Court of Appeals’ decision conflicts with the ultimate goal of the Industrial Insurance Act, citing *Kaiser Aluminum*, which notes that a goal of the Act is to provide workers with temporary benefits until the worker can return to work. Pet. 14-15 (citing *Kaiser Aluminum*, 57 Wn. App. at 296). *Kaiser Aluminum* observes that this goal cannot come to fruition if the worker “voluntarily removes himself [or herself] from the active labor force and opts, despite the presence of sufficient physical capacities, to decline further employment activity.” *Kaiser Aluminum*, 57 Wn. App. at 296. But again, the point of *Kaiser Aluminum* is that the worker needs to have “sufficient physical capacities” to be found to have voluntarily retired, and Value Village did not prove that Vasquez-Ramirez had the sufficient physical capacity to work.

V. CONCLUSION

The Court of Appeals’ decision followed the cases of this Court and other Court of Appeals decisions. A party must detail its argument in

its petition for review at the Board, or it waives the issue on further review. The Court of Appeals correctly followed this well-established principle. Even had the Court of Appeals reached the voluntary-retirement issue, it lacks merits and shows no reason for review.

This Court should deny the petition for review.

RESPECTFULLY SUBMITTED this 26th day of March, 2020.

ROBERT W. FERGUSON
Attorney General



STEVE VINYARD
Assistant Attorney General
WSBA #29737
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

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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 Answer to Petition for Review, Department of Labor and Industries and this Declaration of Service in the below described manner:

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Susan L. Carlson
Supreme Court Clerk
Washington State Supreme Court

E-Mail via Washington State Appellate Courts Portal:

Hillarie H. Lee
Ryan S. Miller
Hall & Miller, P.S.
hlee@thall.com
rmiller@thall.com

Thomas F. Feller
Lawrence J. Van Daley, Sr.
Law Office of Thomas F Feller, PLLC
tom@thomasfellerlaw.com
lawrence@thomasfellerlaw.com

DATED this 26th day of March 2020, at Olympia, Washington.



AUTUMN MARSHALL
Legal Assistant
(360) 586-7737

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

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