98137-0

NO. 78629-6-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

VALUE VILLAGE,

Appellant,

v.

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

Respondents.

PETITION FOR REVIEW TO THE SUPREME COURT OF WASHINGTON

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I. IDENTITY OF PETITIONER

The Petitioner/Appellant, Value Village, petitions the Supreme Court of the State of Washington for review of the Published Opinion of the Court of Appeals, Division I, filed on December 30, 2019.

II. ISSUES PRESENTED

1. Whether Value Village preserved its "voluntary retirement" argument for appeal when it a.) expressly invoked the voluntary retirement doctrine in oral argument before the industrial appeals judge, b.) pleaded facts in its Petition for Review sufficient to prove Vasquez-Ramirez's termination for willful misconduct; and c.) specifically cited RCW 51.32.090(10) in the "Authority" relied upon section of the Petition for Review.
2. Whether Division I's conclusion that Value Village did not make a prima facie case is contrary to the ultimate goal of the Industrial Insurance Act, established precedent, and against public interest.
3. Whether review should be granted when Division I's published opinion is inconsistent with case law interpreting RCW 51.32.090(4) and (10).

III. STATEMENT OF THE CASE

In August of 2014, Candida Vasquez-Ramirez (Respondent herein) filed a workers' compensation claim for an industrial injury she incurred while in the course of employment with Value Village. CP at 13, 30, 42,

43; 2/1/17 Trans. at 16-17; 2/3/17 Trans. at 10-11. On August 28, 2014, the Department of Labor and Industries (Department) issued an order allowing her claim. CABR[1] at 147.

On January 8, 2015, the Department issued an order closing this claim because no further necessary and proper treatment was indicated, and the Respondent was not entitled to an award for permanent partial disability. CP at 3, 5, 13-14, 31, 43, 83, 100; CABR at 111.

On January 27, 2015, the Respondent was terminated from her job at Value Village due to disrespectful misconduct and willful insubordination. CP at 2, 4, 14, 24, 43, 83, 100; 2/3/17 Trans. at 20, 25-26, 63-66, Ex. 2. On March 17, 2015, less than two months after being terminated, the Respondent filed an application to reopen her claim. CP at 3, 14, 31; CABR at 61.

On July 16, 2015, the Department issued an order reopening the claim, effective March 6, 2015. CP at 3, 14; CABR at 61. On August 20, 2015, the Department issued an order affirming the July 16, 2015 Department order allowing claim reopening. CP at 14; CABR at 132. On September 3, 2015, the Employer filed a Notice of Appeal with the Board of the August 20, 2015 Department order. CP at 3, CABR at 132. This

[1] Certified Appeal Board Record.

appeal was given Docket No. 15 19690. *Id*. On December 17, 2015, the Board issued an order dismissing the appeal under Docket Nos. 15 19283 and a concurrent appeal by the Employer. *Id*.

On December 29, 2015, the Department issued an order identifying that time-loss compensation benefits were paid from August 22, 2015 through October 13, 2015. CP at 14; CABR at 133. On February 5, 2016, the Department issued an order affirming its December 29, 2015 order. CABR at 6, 133.

On March 31, 2016, the Employer filed a Notice of Appeal with the Board, for the February 5, 2016 Department order affirming time-loss compensation benefits for the period of from August 22, 2015 through October 13, 2015. CP at 5; CABR at 6, 56, 63. The Board granted this appeal on April 7, 2016. CABR at 58. This appeal was assigned Docket No. 16 13381. *Id.*

On March 8, 2016, the Department issued an order finding that time-loss compensation was paid from February 24, 2016 through March 7, 2016. CP at 5; CABR at 113, 133. On June 9, 2016, the Department issued an order affirming its March 8, 2016 order. CP at 5; CABR at 117, 133. On August 1, 2016, Value Village filed a Notice of Appeal with the Board of the June 9, 2016 Department order affirming its award of time-loss benefits from February 24, 2016 through March 7, 2016. CP at 5; CABR at 115-16,

151. The Board issued an Order granting this appeal on August 5, 2016, and assigned this appeal Docket No. 16 17890. CP at 5; CABR at 121, 151.

On April 6, 2016, the Department issued an order affirming its February 10, 2016 Department order that awarded $56.60 as an interest payment for benefits previous paid for the period of August 22, 2015 through October 13, 2015. CP at 5; CABR at 106-07, 150. On May 31, 2016, the Employer filed a Notice of Appeal with the Board of the April 6, 2016 Department order. CP at 5; CABR at 102-03, 150. The Board granted this appeal on June 7, 2016. CABR at 108, 150. This appeal was assigned Docket No. 16 15582. *Id*.

On July 7, 2016, the Department issued an order awarding the Respondent time-loss benefits from March 8, 2016 through July 6, 2016. CP at 5; CABR at 138-39, 150. On September 6, 2016, the Employer filed a Notice of Appeal with the Board of the July 7, 2016 Department order. CP at 5; CABR at 136-37, 151. The Board granted this appeal on September 12, 2016. CABR at 145, 151. This appeal was assigned Docket No. 16 19290. *Id*.

On May 19, 2017, Industrial Appeals Judge Sara M. Dannen issued a Proposed Decision and Order (PD&O) under Claim No. AV-31258 and Docket Nos. 16 13381, 16 15582, 16 17890 and 16 19290. CP at 2; CABR at 46-54. The May 19, 2017 PD&O concluded that the Employer failed "to

present a prima facie case for the relief being sought as required by RCW 51.52.050." CABR at 53.

On July 11, 2017, the Employer filed a Petition for Review ("PFR") with the Board of the May 19, 2017 Proposed Decision and Order. *Id*. at 21-39. On July 31, 2017, the Board issued an Order Granting Petition for Review. *Id*. at 19.

On October 9, 2017, the Board issued its Decision and Order. CP at 2-8; CABR at 3-9. The Board found that the Employer failed to present a prima facie case for relief "because it failed to present evidence that after the claim was reopened, Ms. Vasquez-Ramirez could perform any work, including the modified duty job the employer had made available." CP at 4; CABR at 5. The Board's Decision and Order dismissed the Employer's appeals. CP at 5-6; CABR at 6-7.

Jack Eng, one of the three members of the Board, wrote in dissent, that "[t]he Employer has made a prima facie case that Ms. Vasquez-Ramirez was not entitled to time-loss compensation benefits because she was terminated from her modified-duty work for cause. That is all the employer is required to do to shift the burden." CP at 7; CABR at 8; *see*, RCW 51.32.090(10); *and see*, WAC 296-14-100(1). Because Ms. Vasquez-Ramirez was terminated "from the modified work for reasons wholly unrelated to the industrial injury…then the worker's right to time-loss

compensation does not resume because the modified work would have remained available to her but for her wrongful conduct." *Id*.

On October 31, 2017, the Employer timely filed a Notice of Appeal with King County Superior Court of the October 9, 2017 Board Decision and Order. CP at 1. This appeal was assigned Case No. 17-2-28546-3 SEA.

On June 8, 2018, the superior court filed its Findings of Fact, Conclusions of Law and Judgment (hereinafter "Judgment") under Case No. 17-2-28546-3 SEA. CP at 63-72. The Judgment's Findings of Fact adopted the Board Decision and Order Findings of Fact Nos. 1-4. *Id*. at 70. The Judgment's Conclusions of Law adopted the Board's Decision and Order Conclusions of Law Nos. 1-3, affirmed the Board Decision and Order, and dismissed the Employer's appeals. *Id*. at 71. The June 8, 2018 Judgment reasoned,

> Even assuming that the Employer proved that it would have continued to make a modified-duty job available to the Employee had she not been terminated for cause, the fact remains that the Employer presented no medical testimony that the Employee was physically able to perform the modified-duty job during the later periods in 2015 and 2016 for which the Department paid time-loss compensation to the Employee. The Employer therefore failed to present a *prima facie* case, and the Employer's appeal must be dismissed.

Id. at 70.

On July 3, 2018, Value Village filed its Notice of Appeal to the Court of Appeals, Division I with King County Superior Court regarding

the June 8, 2018 Findings of Fact, Conclusions of Law, and Judgment issued under Case No. 17-2-28546-3 SEA. CP at 74-88. This appeal was assigned Case No. 78629-6-I.

On July 11, 2018, following the Respondent's motion for attorney fees and costs, King County Superior Court issued its Amended Findings of Fact, Conclusions of Law and Amended Judgment (hereinafter "Amended Judgment"). CP at 89-107. The Amended Judgment's Findings of Fact also adopted the Board Decision and Order Findings of Fact Nos. 1-4 (*id*. at 100), adopted the Board's Conclusions of Law Nos. 1-3, affirmed the Board Decision and Order, and dismissed the Employer's appeals (*id*. at 103). The July 11, 2018 Amended Judgment offered the same substantive reasoning as the June 8, 2018 Judgment for the dismissal of Value Village's appeals. *Id*. at 97. The Amended Judgment also awarded the Respondent $11,338.00 in attorney fees and costs for having prevailed on appeal in superior court. *See id*. at 104.

On July 27, 2018, Value Village filed its Notice of Appeal to the Court of Appeals, Division I with King County Superior Court regarding the July 11, 2018 Amended Judgment issued under Case No. 17-2-28546-3 SEA. *Id.* at 108. This appeal was assigned Case No. 78785-3-I. On August 16, 2018, Value Village filed a Motion to Consolidate Case Nos. 78629-6-I and 78785-3-I. On August 28, 2018, the Court of Appeals Division I entered a

ruling granting Value Village's motion, consolidating both cases under Case No. 78629-6-I.

On December 30, 2019, Division I of our Court of Appeals affirmed the superior court's decision under Case No. 78629-6-1. *Value Village v. Vasquez-Ramirez*, No. 78629-6-1 (Wash. App. filed December 30, 2019). In its analysis, the Court of Appeals reasoned that Value Village failed to meet its burden of producing sufficient evidence to show Ms. Vasquez-Ramirez was not entitled to time-loss benefits. *Id.* at 10.

Division I found that the evidence of firing for cause had not established a prima facie case because Value Village failed to establish the following: 1) that modified-duty work remained available for Ms. Vasquez-Ramirez, 2) that Value Village had a job available that met Ms. Vasquez-Ramirez's ostensible medical restrictions for the times for which she received time-loss, and 3) that there was medical evidence showing Ms. Vasquez-Ramirez had the physical capacity to perform any available job. *Id*. at 16-17.

Finally, Division I concluded that Value Village failed to preserve the "voluntary retirement" issue for appeal. *Id*. at 19. The Court found that Value Village quoting the pertinent text of the RCW in its PFR did not sufficiently raise the legal issue on appeal and the attorney for Value Village

only briefly, as an example, mentioned "voluntary retirement" in its argument before the IAJ. *Id.*

IV. ARGUMENT

Division I's published Opinion below conflicts with Washington Supreme Court precedent, Washington Court of Appeals precedent, statutory and regulatory authority, and runs counter to substantial public interest and the "ultimate goal" of the Industrial Insurance Act itself. Value Village petitions the Court for review as warranted by RAP 13.4(b)(1), (2) and (4).

The Petitioner argues that Division I erred in finding that the Petitioner "waived" its "voluntary retirement" argument by not presenting sufficient argument regarding this theory in its Petition for Review to the Board. The Petitioner also argues that Division I's Opinion is contrary to substantial public interest by not reaching the question of whether the Petitioner made a prima facie case for the Claimant's voluntary retirement prior to the alleged temporary total disability periods at issue. The Petitioner argues, lastly, that the published Opinion of the Court of Appeals erred in not upholding the Claimant's burden of strict proof of her entitlement to the benefits challenged before the Board.

A. Petitioner Did Not "Waive" Its "Voluntary Retirement" Argument, and Division I's Published Opinion is Contrary to Established Precedent.

RCW 51.52.104 requires a party petitioning the Board for review of the Industrial Appeals Judge's proposed decision to "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." Emphasis added. The Industrial Insurance Act also addresses what is necessary to preserve Board issues for appeal to superior court: "Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board." RCW 51.52.115.

Division I concluded that "quoting the text of RCW 51.32.090(10)" in the Authority section of its Petition for Review (PFR), argument of facts establishing Vasquez-Ramirez's termination for willful misconduct, and "briefly mention[ing] 'voluntary retirement' in its argument before the IAJ" do not constitute raising the issue before the Board. *Value Village v. Vasquez-Ramirez*, No. 78629-6-1, slip op. 18-19 (Wash. App. filed December 30, 2019).

What Division I fails to account for, however, is that the Board of Industrial Insurance Appeals (Board) is a state agency whose *purpose* is to handle substantive appeals of workers' compensation matters arising under

Title 51 RCW. *See* RCW 51.52.010. The Board consists of Industrial Appeals Judges and Board Members that are practiced triers of fact in workers' compensation matters, and are routinely and well versed in matters regarding Title 51. The Petitioner's raising of the "voluntary retirement" issue during oral argument (preserved in transcripts in the Certified Appeal Board Record), presentation of evidence and argument regarding Ms. Vasquez-Ramirez's willful misconduct and resulting termination, and explicit citation to RCW 51.32.090(10)[2] in its PFR were reasonably calculated to put the Board of Industrial Insurance Appeals on notice of the Petitioner's raising of this issue. *See* CABR at 21-36, 2/3/17 Trans. at 79-82, RCW 51.52.090, WAC 296-14-100. Value Village did not waive its "voluntary retirement" argument.

Division I holding that the Petitioner waived its voluntary retirement argument is also contrary to prior Court of Appeals precedent, and sound public policy.

In *Allan v. Dep't of Labor & Indus.*, Division II found that Allan, notwithstanding the merits of her position, waived an objection as it was not set out in her petition for review. *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (Div. II 1992). Similarly, the same court found

[2] RCW 51.32.090 comprises over three pages of text, single spaced. (10) comprises only two lines of text.

in another case that an aggrieved party failed to include objections to the record in a petition for review and therefore waived these objections. *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (Div. II 1983).

In *Ferencak v. Dep't of Labor & Indus.*, the Court of Appeals, Division I found that for ***the first time on appeal***, Ferencak raised several new arguments to support his claim for additional interpreter services and did not raise the issue below. *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 175 P.3d 1109 (Div. I 2008). In *Garrett Freightlines v. Dep't of Labor & Indus.*, the Plaintiff's PFR to the Board failed to challenge either the findings of fact or conclusions of law of the IAJ relating to his occupational disease theory and the Court found that the plaintiff failed to raise the occupational disease issue in his notice of appeal and PFR deeming the argument waived. *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 725 P.2d 463 (Div I 1986).

Here, the Court of Appeals' December 30, 2019 Opinion forecloses Value Village from arguing that the Claimant had voluntarily retired despite citing to the authority in its PFR, and having argued voluntary retirement in oral argument before the IAJ. CABR at 38, 2/3/17 Trans. at 79-82. It was not an accident that the Employer mentioned "Voluntary Retirement" in its *oral argument* before the Board and cited authority therefore in the PFR - it

was because it was part of the Employer's theory of the case that logically and plainly flowed from the facts in evidence.

If the Employer did not specifically cite to RCW 51.32.090(10) in its PFR, nor argued "Voluntary Retirement" before the Board, then the Court of Appeals' decision *would* be in line with the *Garrett Freightlines* or *Ferencak* cases where the issues found to be waived were not mentioned anywhere in the PFR and were in fact raised for the first time on appeal. *Ferencak v. Dep't of Labor & Indus., 142 Wn. App. 713, 175 P.3d 1109 (Div. I 2008)*; *Garrett Freightlines v. Dep't of Labor & Indus., 45 Wn. App. 335, 725 P.2d 463 (Div I 1986).* But Value Village *did* cite the voluntary retirement provision of RCW 51.32.090 in its PFR, and it *did* call out the voluntary retirement doctrine during oral argument. Division I's conclusions are contrary to existing authority finding PFR waiver of issues.

Further inconsistency and uncertainty surrounding interpretation of RCW 51.52.104 is exemplified in the rhetoric provided in an unpublished ruling on Petition for Discretionary Review by Division I. *See* Attachment 1. Counsel representing Value Village has, in the past, argued that a *worker's* petition for review was insufficient under RCW 51.52.104 and *Garrett Freightlines* because "[the worker's] petition for review to the Board did not identify any theory for claim allowance with citation to authority or argument warranting reversal." *Id.* at 3. The Court of Appeals,

Division One, ruled against the Employer, agreeing with the Superior Court that the Employer's argument was "highly technical" and not persuasive. *Id.* at 4.

Division I's apparently inconsistent ruling in *Hanlon* underscores the errant public policy put forth in its December 30, 2019 published Opinion in this case. Requiring parties to use a special "code pleading" in their PFRs to the Board is inconsistent with the principles underlying notice pleading in civil cases, and creates more confusion and ambiguity with respect to what *would be* sufficiently detailed argument to preserve issues in a PFR to the Board.

The Division I Court of Appeals' decision finding the Petitioner to have waived its "voluntary retirement" argument is inconsistent with statute, Department Regulations, Court of Appeals precedent interpreting RCW 51.52.104, and sound public policy. Review should be granted, and Division I's ruling should be reversed.

B. Division I's Conclusion that Value Village Did Not Make a Prima Facie Case is Contrary to the Ultimate Goal of the Industrial Insurance Act, Established Precedent, and Against Public Interest.

Division I's published Opinion finding that the Petitioner did not make a prima facie case for reversal of wage-replacement benefits by presenting evidence of Vasquez-Ramirez's termination for willful

misconduct is contrary to the "ultimate goal" of the Industrial Insurance Act itself, and case law interpreting the Act. Review should be granted, and the December 30, 2019 published Opinion reversed.

RCW 51.32.090(10) provides that when a "worker is voluntarily retired and is no longer attached to the workforce; benefits shall not be paid under this section." Division III explained that under RCW 51.32.090, a worker who voluntarily removed themselves from the workforce is not entitled to wage replacement benefits because "it is implicit an individual suffer a potential adverse economic impact before he may qualify for time loss benefits." *Kaiser Aluminum & Chem. Corp. v. Overdorff,* 57 Wn. App. 291, 296, 788 P.2d 8 (Div. III 1990).

> **The ultimate goal** of the Industrial Insurance Act, Title 51 RCW, is 'to provide temporary financial support until the injured worker is able to return to work. This goal cannot come to fruition when a worker voluntarily removes himself [or herself] from the active labor force and opts, despite the presence of sufficient physical capacities, to decline further employment.'

Energy Nw. v. Hartje, 148 Wn. App. 454, 469, 199 P.3d 1043 (Div. III 2009) (citing *Overdorff*, 57 Wn. App. at 296). Emphasis added.

This is consistent with *the Claimant's* burden of strict proof and requirement to present evidence of a bona fide attempt to return to work after it has been shown that he or she is no longer receiving wages from any gainful employment. *See* WAC 296-14-100(1). Here, Value Village

presented evidence sufficient to prove, on a more-probable-than-not basis, that but-for Respondent's termination for willful misconduct, employment would have remained available at Value Village to accommodate Respondent's work restrictions.

Division I's December 30, 2019 Opinion even states that Value Village presented evidence that it fired Vasquez-Ramirez for-cause and also presented evidence that it offered, and Vasquez-Ramirez accepted, modified-duty work between the time of claim closure and her subsequent termination. *See Value Village v. Vasquez-Ramirez*, 2019 No. 78629-6-1 at 13. Review is warranted and should be granted under RAP 13.4(b)(1), (2) and (4).

C. The Decision of the Court of Appeals Directly Conflicts with *Energy Nw v. Hartje*, 148 Wn. App. 454 P.3d 1043 (Div. III 1990).

In *Energy Nw. v. Hartje*, the Court of Appeals, Division III found that Hartje voluntarily withdrew from the work force prior to reopening of her claim based upon aggravation. *Id.* at 468. Hartje was terminated and she did not look for work since leaving Energy. *Id.* Hartje unsuccessfully argued that she was not voluntarily retired because she was not able to return to the work force due to her industrial injury. *Id.* In its reasoning, the Court found that "Ms. Hartje's intent to return to the work force after her voluntary departure from the work force did not constitute a bonafide attempt" and

that *she* failed to "show her voluntary retirement would not have resulted if her industrial injury had not occurred." *Id*. at 468-469. The Court of Appeals found that because Hartje was voluntarily retired, the Board erred as a matter of law in awarding her additional time loss compensation.

In an almost identical set of facts, here the Claimant was voluntarily retired and subsequently filed an application to reopen her claim. Contrastingly, Division I in this case kept the burden on the Employer rather than Ms. Velasquez. The Court of Appeals in its December 30, 2019 Opinion incorrectly indicates that Value Village did not present a prima facie case for "voluntary retirement" within the meaning of RCW 51.32.090.

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V. CONCLUSION

The Published December 30, 2019 Opinion of the Division I Court of Appeals is in conflict with existing Washington State Supreme Court and Court of Appeals precedent, is inconsistent with RCW 51.52.115 and RCW 51.52.104, policies underlying the Industrial Insurance Act, fails to clarify existing ambiguity in pertinent case law, and should be reversed.

RESPECTFULLY SUBMITTED this 29th day of January, 2020.

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CASE #: 79046-3-I
City of Bellingham, Petitioner v. Sheila Hanlon, Respondent

CASE #: 79240-7-I
Sheila Hanlon, Petitioner v. City of Bellingham, Respondent

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on February 15, 2019, regarding petitioner's motion for discretionary review:

This workers' compensation case involves a firefighter who developed esophagus cancer and filed a claim for an occupational disease. The Department of Labor and Industries denied his claim, and an industrial appeals judge affirmed the denial by concluding that the worker's adenocarcinoma was more likely than not caused by his risk factors (being male, Caucasian, older, and a history of obesity) not related to his work while also finding that the worker was routinely exposed to smoke, combustion products, and diesel exhaust fumes as distinctive conditions of his 33-year employment with the City of Bellingham as a firefighter. On the worker's petition for review, the Board of Industrial Insurance Appeals denied his

petition, thus adopting the industrial appeals judge's proposed decision and order. The worker's appeal is currently pending in Whatcom County Superior Court. The worker passed away while his appeal was pending.

In No. 79046-3-I, self-insured employer City of Bellingham seeks interlocutory review of a superior court order that denied the City's motion for summary judgment. In No. 79240-7-I, firefighter Neil Carlberg's widow Sheila Hanlon, as real party in interest, seeks review of a superior court order that disallowed use of videotaped depositions in lieu of the transcripts of the depositions and any mention of the worker's death before the jury. In seeking review of the summary judgment denial, the City argues that the worker waived his claim allowance because his petition for review to the Board did not identify any legal theory to support his claim with citation to authority and argument warranting reversal and the superior court thus lacks statutory authority or jurisdiction to enter findings or conclusions. The widow argues that a videotaped witness is better than "presentation by reading off a paper transcript" and that CR 30(b)(8) allows video depositions. As explained below, both parties' motions for discretionary review are denied.

"Interlocutory review is disfavored." Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)). "Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business." Minehart, 156 Wn. App. at 462 (quoting Maybury, 53 Wn.2d at 721). "It is not the function of an appellate court to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case." Maybury, 53 Wn.2d at 720. This Court accepts pretrial review only on the four narrow grounds set forth in RAP 2.3(b). The City seeks review under (b)(1), and the widow seeks review under (b)(2) and (3). The rules set forth the following criteria:

> [D]iscretionary review may be accepted only in the following circumstances:
>
> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; [or]
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court[.]

RAP 2.3(b)(1)-(3) (emphasis added). Neither party satisfies any of the criteria for discretionary review.

A. City's Motion for Discretionary Review

At the outset, I grant the widow's motion to extend the time to file an answer to the City's motion for discretionary review.

In seeking review of the superior court's denial of its summary judgment motion under RAP 2.3(b)(1) (obvious error rendering further proceedings useless), the City argues that the worker waived argument for claim allowance because his petition for review to the Board did not identify any theory for claim allowance with citation to authority or argument warranting reversal. Review is not warranted because the City fails to show an obvious error.

In asserting a waiver, the City cites RCW 51.52.104, which provides in relevant part: "Such 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." The City did not cite RCW 51.52.104 in its response to the worker's petition for review but cited WAC 263-12-145(4), which provides in relevant part:

> A petition for review shall set forth in detail the grounds for review. A party filing a petition for review waives all objections or irregularities not specifically set forth therein. A general objection to findings of fact on the ground that the weight of evidence is to the contrary shall not be considered sufficient compliance, unless the objection shall refer to the evidence relied in support thereof. A general objection to all evidentiary rulings adverse to the party shall be considered adequate compliance with this rule. If legal issues are involved, the petition for review shall set forth the legal theory relied upon and citation to authority and/or argument in support thereof.

The worker's petition for review pointed out his experts' testimony showing a causal connection between his work and his esophagus cancer. He argued that the industrial appeals judge failed to accord special consideration to his attending physician's opinions. Appendix to City's Motion for Discretionary Review (City Motion App.) 85-86. The worker argued that the judge improperly denied admission of the best evidence of his inhalation exposures and "erred by ignoring the significant evidence that [he] was neither drinker nor smoker yet he contracted esophageal cancer, an illness most often found among drinkers and smokers." City Motion App. 94. He argued that despite admitting defense experts' testimony that all cancers had multiple causes, the judge "simply ignored the proof that highly carcinogenic polycyclic aromatic hydrocarbons were virtually always present in [his] work place, and at the locations where he fought fires for the City." City Motion App. 94-95. He argued that because he had a cancer not often seen in non-smokers and non-drinkers, it was "only credible and reasonable that his smoke exposures during his work caused or acted as a cause of his esophageal cancer." City Motion App. 95. He argued that the judge "paid little heed to the compelling testimony" of his OSHA expert. City Motion App. 95. He asked the Board to overturn the industrial appeals judge's decision.

In response, the City argued that the worker's petition for review was "facially inadequate" because it "failed to state any findings of fact or conclusions of law contained in the [industrial appeals judge's decision] to which he was objecting" and "merely allege[d] that Judge Gil 'ignored' evidence, and that [his] evidence was 'strong.'" City Motion App. 99. The City

argued that the worker did "not bother to state the relevant standards of review, nor to conduct any legal analysis for that matter" and instead provided "his highly editorialized view of what his supporting evidence stated." City Motion App. 99.

In denying the City's summary judgment motion predicated on the asserted waiver, the superior court noted that the City's argument was "highly technical." City Motion App. 305. I agree with the superior court. This is not a case where an industrial appeals judge made many findings of fact and conclusions of law, and a worker's petition for review did not show which findings he was challenging. Among the four findings of fact, only one appears adverse to the worker, and the worker's petition for review clearly challenged that finding that his esophagus cancer did not arise naturally and proximately out of the distinctive conditions of his employment with the City. He challenged this adverse causation finding by arguing that the industrial appeals judge failed to accord special consideration to his attending physician's opinions and failed to properly consider the evidence supporting a causal link.

The City relies on Garrett Freightlines, Inc. v. Department of Labor and Industries, 45 Wn. App. 335, 725 P.2d 463 (1986). But the City did not cite this case in its response to the worker's petition for review. In any event, its reliance on Garrett Freightlines is misplaced. That case involved a worker's claim for an industrial injury, and this Court affirmed the trial court's decision that the worker did not suffer an industrial injury. This Court then addressed the worker's argument that if this Court rejected all other bases for allowing coverage, this Court should find his condition as an occupational disease. See Garrett Freightlines, 45 Wn. App. at 345-46. This Court rejected this argument by concluding that because the worker did not "raise the occupational disease issue in his Notice of Appeal and Petition for Review he must be deemed to have waived this argument." Garrett Freightlines, 45 Wn. App. at 346. Unlike the situation in Garrett Freightlines, an occupational disease was the only issue raised by the worker and addressed by the industrial appeals judge in this case. The City's argument in reliance on Garrett Freightlines presents no obvious error in the superior court's decision.

B. Widow's Motion for Discretionary Review

The widow seeks review of the superior court decision that disallowed use of videotaped testimony in lieu of transcripts and disallowed mention of the worker's death before the jury. The widow argues that review is warranted under RAP 2.3(b)(2) and (3). I disagree.

First, the superior court decision does not substantially alter the status quo or substantially limit the widow's freedom to act within the meaning of RAP 2.3(b)(2). The "probable" error criterion is generally limited to an injunction or like orders having "an immediate effect outside the courtroom," such as an order compelling a party to dispose of his or her private property. State v. Howland, 180 Wn. App. 196, 207, 321 P.3d 303 (2014). When "a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)." Howland, 180 Wn. App. at 207. The superior court's decision does not meet the effect prong of (b)(2).

Second, the widow fails to explain how the superior court's decision so far departed from the accepted and usual course of judicial proceedings as to call for this Court's interlocutory intervention under RAP 2.3(b)(3). She argues that review is warranted under (b)(3) "because the very rules which control the use of video authorize and permit it though the superior court expressly ruled against the force of this controlling authority." Motion for Discretionary Review at 7. But the superior court disagreed with her legal argument, and her argument challenging the superior court's decision raises at most a legal error, not a far departure from the accepted and usual course of judicial proceedings. Review is not warranted under RAP 2.3(b)(3).

Further, the widow fails to show any legal error with sufficient certainty to warrant review. As the City points out, the industrial insurance act, Title 51 RCW, and the Board's rules adopted under the act, do not appear to contemplate use of videotaped testimony. Although the widow relies on CR 30(b)(8), the practice in civil cases applies in workers' compensation proceedings "[e]xcept as otherwise provided" in the act. RCW 51.52.140. The Board's rules and regulations concerning its functions and procedure "shall have the force and effect of law until altered, repealed, or set aside by the board." RCW 51.52.020.

In superior court proceedings under Title 51 RCW, the Board must file with the court "a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case." RCW 51.52.110. Absent procedural irregularity before the Board, "the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110." RCW 51.52.115.

WAC 263-12-117(4), as amended effective January 2, 2017, provides: "Video depositions will not be considered as part of the record on appeal," and the "electronic deposition must be submitted in searchable pdf format." The superior court made its decision at issue in October 2018. The widow does not explain why this rule did not apply to the superior court's decision regarding the use of videotaped depositions in the pending superior court proceedings.

Even if the amended rule did not apply because the amendment was not in effect at the time of the industrial appeals judge's decision disallowing use of videotaped depositions in lieu of transcripts, the rule effective at the time of the industrial appeals judge's decision did not appear to contemplate videotaped depositions. The rule provided: "The party filing a deposition must submit the deposition in a written format as well as an electronic format in accordance with procedures established by the board. . . . If the deposition is not transcribed in a reproducible format it may be excluded from the record." Former WAC 263-12-117(4). The rule also provided that "the deposition may be appended to the record as part of the transcript, and not as an exhibit, without the necessity of being retyped into the record." Former WAC 263-12-117(5)(e). It appears that the amendment was intended to "clarify current practice and procedure for . . . perpetuation deposition." WSR 16-24-054.

The superior court proceedings in workers' compensation cases are "unique" in that "counsel for the litigants adopt unique 'role playing' capacities and 'read' their respective parts to the jury, in the same manner as they would when reading a witness' deposition," and the "jury is

then informed that the [Board's] decision is presumed correct and the burden is on the appealing party to establish by a preponderance of the evidence that it is incorrect." Lewis v. Simpson Timber Co., 145 Wn. App. 302, 316, 189 P.3d 178 (2008) (citation omitted). Judicial review of the Board's decision is de novo and "based solely on the evidence and testimony presented to the [Board]." Lewis, 145 Wn. App. 315. Either party may request a jury to resolve factual disputes, and the jury "may disregard the [Board's] findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive." Id. The unique proceedings are "the product of a compromise between employers and workers" where workers forfeited common law remedies in exchange for sure and certain relief regardless of fault. Id. at 315.

The widow argues that "requiring petitioner to use only words from a transcript when it is a known that far more information of persuasive value is transmitted by non verbal means is to ignore the last 50 years of development in understanding communication." Motion for Discretionary Review at 11. Her argument is understandable but appears to be one for the Legislature or Board.

The widow presents no argument explaining why the superior court's decision disallowing mention of the worker's death before the jury is in error. She does not cite any statute, rule, or case supporting her argument.

The widow fails to show a basis for discretionary review.

Therefore, it is

ORDERED that discretionary review is denied in both No. 79046-3-I and No. 79240-7-I.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

c: Judge Charles Snyder

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VALUE VILLAGE, Appellant, v. CANDIDA VASQUEZ-RAMIREZ and THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	NO. 78629-6-I (Consolidated with No. 78785-3-I) DIVISION ONE PUBLISHED OPINION FILED: December 30, 2019

LEACH, J. — A party appealing a Department of Labor & Industries (Department) decision to the Board of Industrial Insurance Appeals (Board) has the burden of producing sufficient evidence to establish a prima facie case for the relief it requests.[1] And a party waives any argument not raised in its petition for review to the Board. Value Village appealed four Department orders awarding Candida Vasquez-Ramirez time-loss payments and interest. To prevail, Value Village had to present medical evidence that Vasquez-Ramirez could work during the times for which she received time-loss benefits. It did not present any

[1] RCW 51.52.050(2)(a).

medical evidence, and it did not claim in its petition that Vasquez-Ramirez had voluntarily retired. So we affirm the Board's dismissal of Value Village's appeal.

FACTS

Candida Vasquez-Ramirez was injured August 15, 2014, while working for Value Village. Vasquez-Ramirez timely filed a worker's compensation claim that the Department allowed.

Dr. Vincent Koike treated Vasquez-Ramirez for her injuries from August until November 2014. Koike initially restricted Vasquez-Ramirez from work that required use of her right arm and shoulders to reach overhead. Value Village offered her modified-duty work on August 29, 2014, which she accepted.[2] The parties agree that this job modification was consistent with Koike's restrictions, which included "[n]o lifting greater than ten pounds and no reaching above shoulder level." Because Vasquez-Ramirez continued to work full time at Value Village in this modified position, she did not receive time-loss compensation during her employment.

Koike later restricted Vasquez-Ramirez's use of her right arm to no more than three hours during the day. Charita Dumas, Value Village's senior claim analyst, testified that although Koike added these restrictions on November 3,

[2] The offer letter referenced an attached "detailed description of the job which has been approved by a medical provider," but the description was not attached to the exhibit.

2014, she never offered Vasquez-Ramirez a modified-duty job including these restrictions because Vasquez-Ramirez was "still able to perform the essential functions of her job."

The Department closed Vasquez-Ramirez's claim on January 8, 2015. On January 27, 2015, Value Village fired Vasquez-Ramirez for alleged unacceptable behavior that included absenteeism, disrespectful communication with supervisors and coworkers, and disregarding supervisor's instructions. Vasquez-Ramirez denied these allegations.

Vasquez-Ramirez asked to reopen her claim on March 17, 2015, the same month she resumed medical treatment with Koike. The Department reopened her claim effective March 6, 2015. Value Village appealed this decision but later dismissed its appeal.

After reopening Vasquez-Ramirez's claim, the Department awarded her time-loss compensation for August 22 to October 13, 2015, February 24 to March 7, 2016, and March 8 to July 6, 2016. The Department also ordered payment of interest on time-loss payments under the same claim. Value Village appealed these orders to the Board.

At a hearing before an industrial appeals judge (IAJ), Value Village presented evidence that it offered and Vasquez-Ramirez accepted modified-duty work approved by her medical provider after she injured herself. It admitted that

while her doctor ordered additional modifications, it did not incorporate them into a new job description. Value Village modified her work but did not create a new job offer, and Koike never approved these modifications. Value Village also offered evidence supporting its position that it fired her for cause. Vasquez-Ramirez presented evidence of her injury, the change in her injury over time, and testimony rebutting Value Village's evidence supporting termination for cause.

In her proposed decision and order, the IAJ dismissed all of Value Village's claims because it had failed to establish a prima facie case that the Department's orders were incorrect. Specifically, Value Village had not presented any medical evidence that Vasquez-Ramirez could perform the modified-duty job during the times for which the Department awarded her time-loss benefits. Value Village petitioned the Board for review. Its petition asked the Board to decide "that the Employer presented a prima facie case that the Claimant was not entitled to time-loss compensation benefits." It made no claim that Vasquez-Ramirez had voluntarily retired. The Board dismissed Value Village's appeals for the reason proposed by the IAJ.

Value Village appealed to King County Superior Court. It affirmed the Board and awarded Vasquez-Ramirez attorney fees and costs. Value Village has appealed this decision.

STANDARD OF REVIEW

In a worker's compensation case, an appellate court generally limits its review of a superior court decision to whether substantial evidence supports the superior court's findings made after its de novo review of the Board record and whether the court's findings support its conclusions of law.[3] Substantial evidence is evidence sufficient to "persuade a rational fair-minded person the premise is true."[4] This court accepts as true findings supported by substantial evidence.[5] If substantial evidence supports the trial court findings, it reviews de novo whether those findings support the superior court's conclusions of law.[6] It views the record in the light most favorable to the party prevailing in superior court, and it does not reweigh evidence.[7]

Our Supreme Court instructs us that the Industrial Insurance Act[8] (Act) is liberally construed to achieve the legislature's intent to provide compensation to

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[3] Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

[4] Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

[5] State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993).

[6] Street v. Weyerhaeuser Co., 189 Wn.2d 187, 205, 399 P.3d 1156 (2017); Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

[7] Fox v. Dep't of Ret. Sys., 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

[8] Title 51 RCW.

all covered employees injured in their employment,[9] with all doubts resolved in the worker's favor.[10] This court applies the liberal rule of construction to its interpretation of the Act but does not apply it to questions of fact.[11] Although the Board's interpretation of the Act does not bind an appellate court, in most circumstances "it is entitled to great deference."[12]

ANALYSIS

Value Village claims that the Department should not have awarded Vasquez-Ramirez time-loss benefits. It makes four supporting arguments. First, it claims that the Board and trial court incorrectly required it to present evidence that Vasquez-Ramirez could work. Value Village contends that the Board and trial court should have required Vasquez-Ramirez to produce medical evidence of her inability to work.

Second, Value Village claims that it produced sufficient evidence to show that the Department did not have enough evidence to award time-loss benefits to Vasquez-Ramirez. Third, Value Village asserts that Vasquez-Ramirez's employment with it did not "come to an end" as required by statute because it fired her for cause unrelated to her injuries before the time for which the

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[9] RCW 51.04.010.

[10] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

[11] Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

[12] Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Department awarded time-loss benefits. Finally, Value Village claims that it presented evidence that Vasquez-Ramirez removed herself from the workforce by retiring.

Time- Loss Benefits and Appeal Process

The Act entitles a worker to compensation if she is injured in the course of her employment.[13] If she cannot work as a result of her industrial injury and is totally but only temporally disabled, she has a right to time-loss compensation "so long as the total disability continues."[14] The payments stop when she recovers to a point that her "present earning power . . . is restored to that existing at the time of the occurrence of the injury."[15] If her earning power is partially restored, she may receive a diminished payment described by a statutory formula.[16]

The legislature recognizes the value of having injured workers remain at work after their injuries.[17] So the Act provides a way for "employers at the time of injury to provide light duty or transitional work for their workers" who are injured on the job.[18] An employer may ask that an injured worker "be certified by a physician or licensed advanced registered nurse practitioner as able to perform

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[13] RCW 51.32.010.

[14] RCW 51.32.090(1). Also called "temporary total disability." Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

[15] RCW 51.32.090(3)(a).

[16] RCW 51.32.090(3)(a)(ii).

[17] RCW 51.32.090(4)(a).

[18] RCW 51.32.090(4)(a).

available work other than . . . her usual work."[19] The employer must provide the medical professional with a description of available modified-duty work so that the medical professional can evaluate how the physical activities of the work relate to the worker's disability.[20] Once the medical professional releases the employee for the work, the time-loss benefits stop.[21]

Time-loss benefits resume in two circumstances.[22] First, the benefits resume if the modified work ends and the worker's medical provider concludes she has not recovered sufficiently to return to her usual job or perform the other work the employer offers her.[23] Second, the benefits resume if the worker engages in the modified work but it "impede[s] . . . her recovery to the extent" that her medical provider concludes she should not continue that work.[24] Once she

> returns to work under the terms of this subsection (4), . . . she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.[25]

The Act controls appeals of Department decisions.[26] A person aggrieved by a Department decision may appeal to the Board.[27] The appealing party

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[19] RCW 51.32.090(4)(b).
[20] RCW 51.32.090 (4)(b).
[21] RCW 51.32.090 (4)(b).
[22] RCW 51.32.090 (4)(b).
[23] RCW 51.32.090 (4)(b).
[24] RCW 51.32.090 (4)(b).
[25] RCW 51.32.090 (4)(j).
[26] Ch. 51.52 RCW.

presents the evidence supporting its appeal at a hearing conducted by an IAJ.[28] After the hearing, the IAJ files a proposed decision.[29] Any party may have the Board review that decision by filing a petition asking for this relief.[30] The petition must state in detail the grounds for review, and all objections or irregularities not specifically set forth in the petition are deemed waived.[31] The Board's decision must include findings and conclusions for each contested issue of fact and law.[32]

In an appeal from the Board to the superior court, that court considers the Board's findings and decisions prima facie correct and the party attacking them has the burden of proof.[33] This means that the party attacking a Board decision must establish a prima facie case of its right to relief by a preponderance of evidence.[34] At the superior court, a party may raise only those issues that it included in its petition to the Board or that are contained in the "complete record of the proceedings before the board."[35] If the court concludes "that the

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[27] RCW 51.52.060(1)(a).
[28] RCW 51.52.104.
[29] RCW 51.52.104.
[30] RCW 51.52.104.
[31] RCW 51.52.104.
[32] RCW 51.52.106.
[33] RCW 51.52.115.
[34] RCW 51.52.050(2)(a); RCW 51.52.115; Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 350-51, 409 P.3d 1162, review denied, 190 Wn.2d 1030 (2018).
[35] RCW 51.52.115.

board . . . acted within its power and . . . correctly construed the law and found the facts," it will affirm.[36] If not, it will reverse or modify the Board's decision.[37]

Value Village Had the Burden of Producing Sufficient Evidence To Show That Vasquez-Ramirez Was Not Entitled To Time-Loss Benefits

The legislature has allocated the initial burden of evidence production in an appeal of a Department decision. RCW 51.52.050(2) states, "In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal." For appeals to superior court, RCW 51.52.115 states, "In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." Value Village does not cite, let alone discuss, these unambiguous statutes in its briefing. Instead, it claims that case law allows it to meet its burden by asserting that the Department and Vasquez-Ramirez did not present sufficient evidence to support the time-loss awards. We disagree.

In Department of Labor & Industry v. Rowley,[38] our Supreme Court, as a matter of first impression, interpreted RCW 51.52.050(2)(a), "the statute requiring the appellant in 'an appeal before the [B]oard . . . [to] proceed[ ] with the evidence to establish a prima facie case for the relief sought in such appeal.'"

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[36] RCW 51.52.115.
[37] RCW 51.52.115.
[38] 185 Wn.2d 186, 206, 378 P.3d 139 (2016) (alterations in original).

Rowley appealed the Department's denial of his claim based on its determination that he was injured during the commission of a felony.[39] The court agreed with the Department's position that to establish a "prima facie" case, "a party must show that a department decision is incorrect."[40] But, in the context of the case before it, the court explained that Rowley could do this "by showing (1) an injury in the course of employment and (2) that the Department's order is unsupported by sufficient evidence."[41]

The court noted that a contrary holding would shift from the Department to the worker the burden of proof on the felony payment bar and require the worker to prove the noncommission of a felony before any formal hearing had occurred.[42] The court considered this to "be inconsistent with basic principles of fairness."[43] The court also noted that requiring an appellant to produce new affirmative evidence about the incorrectness of the Department's order would be inconsistent with its cases interpreting RCW 51.52.115.[44] Finally, the court stated that RCW 51.52.115 places a greater burden on an appellant than RCW

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[39] Rowley, 185 Wn.2d at 189-90.
[40] Rowley, 185 Wn.2d at 206.
[41] Rowley, 185 Wn.2d at 206.
[42] Rowley, 185 Wn.2d at 206.
[43] Rowley, 185 Wn.2d at 206.
[44] Rowley, 185 Wn.2d at 207.

51.52.050(2)(a) does because RCW 51.52.115 requires that the superior court presume that the Board's decision is correct.[45]

So Rowley requires the appellant, here, Value Village, to show that the Department's order is incorrect and does not permit it to shift to Vasquez-Ramirez the burden of proof. But Value Village could rely on evidence from the Department's record to prove its case and does not have to produce new affirmative evidence before the Board. As explained below, that evidence does not show that the Department's order was incorrect.

The Board and the trial court correctly allocated the burden of proof. Value Village did not contest that Vasquez-Ramirez suffered a work injury and withdrew its appeal of the order reopening her claim. So it accepted that her work injury prevented her from doing her job of injury and that her medical condition was worse than when her doctor approved the modified-duty job from which Value Village fired her. To make a prima facie showing that the Department's award of time-loss benefits was incorrect required some evidence that Vasquez-Ramirez was capable of performing reasonably continuous, gainful employment for the periods for which she received time loss.

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[45] Rowley, 185 Wn.2d at 207-08.

Value Village Failed To Provide Evidence That Vasquez-Ramirez Was Capable of Performing Gainful Employment During the Time in Question

Value Village challenges the trial court's finding adopting findings of facts the Board made. These Board findings state that Value Village "failed to provide medical or other evidence that the claimant was capable of performing reasonably continuous gainful employment for the periods from August 22, 2015, through October 13, 2015, and from February 24, 2016, through July 6, 2016," and "failed to provide evidence that the Department improperly paid interest on benefits previously paid for the period from August 22, 2015, through October 13, 2015."

At the hearing before the IAJ, Value Village presented evidence that it fired Vasquez-Ramirez for cause. It also presented evidence that it offered, and Vasquez-Ramirez accepted, modified-duty work approved by her medical provider after her injury. But Value Village did not present any evidence, medical or otherwise, to establish that Vasquez-Ramirez could continue to do the work described in the original modified-duty job after her condition worsened and her medical provider imposed more restrictions on her activities. And it presented no evidence that she could do any other available work during the time for which the Department awarded time-loss benefits. And it presented no evidence to show that the interest payments were improper. So substantial evidence supports the challenged findings, and we consider them true for our analysis.

Evidence of Firing for Cause Did Not Establish a Prima Facie Case

Value Village asserts that evidence showing that it provided Vasquez-Ramirez a modified-duty job and later fired her from this job for cause established the required prima facie case that the Department's orders were incorrect. We disagree.

If the Department closes a worker's claim for disability but her injury is aggravated or worsens, she may apply to reopen her claim.[46] For the Department to reopen the claim, the worker must prove a number of elements "'by medical testimony,'" including that she is experiencing an "'aggravation of the injury result[ing] in increased disability,'" that there is a relationship between the original injury and the subsequent disability, that "'the increased aggravation occurred between the terminal dates of the aggravation period,'" and that her "'disability on the date of the closing order was greater than the supervisor found it to be.'"[47]

The Board addressed the impact for-cause firings have on time-loss benefits in In re Chad Thomas[48] and In re Jennifer Soesbe.[49] If an employer fires an employee working in a modified-duty position for cause, the worker no longer

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[46] RCW 51.32.160(1)(a); WAC 296-14-400.

[47] Eastwood v. Dep't of Labor & Indus., 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009) (quoting Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956)).

[48] No. 00 10091 (Wash. Bd. of Indus. Ins. Appeals July 31, 2001).

[49] No. 02 19030 (Wash. Bd. of Indus. Ins. Appeals Sept. 25, 2003).

has a right to time-loss compensation if the firing occurred for reasons that were unrelated to the industrial injury and the employer would have terminated other similarly situated employees.[50] But a for-cause firing does not bar a worker's right to time-loss compensation if the work injury she sustained before she was fired continues to interfere with her ability to perform work.[51]

Although the Board's interpretation of the Act does not bind an appellate court, in most circumstances "it is entitled to great deference."[52] The Board decided Soesbe in 2003, and the legislature has not amended the Act to require termination of all payments whenever an employee is fired for cause, regardless of her capacity to work. We conclude that an appellant employer challenging the award of time-loss payments to an employee fired for cause bears the burden of presenting evidence that shows that the employee was capable of performing work providing compensation at a level similar to that before her injury.

As discussed above, Value Village presented no medical evidence that Vasquez-Ramirez could work and be paid adequately during the time the Department awarded her time-loss compensation and interest. Because it did not present this evidence, Value Village failed to present a prima facie case.

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[50] Thomas, No. 00 10091.
[51] Soesbe, No. 02 19030.
[52] Tri, 117 Wn.2d at 138.

When the Department approved Vasquez-Ramirez's request to reopen her claim, Value Village could have challenged the sufficiency of her "threshold showing." But it withdrew its appeal of the decision to reopen. So the issue of whether Vasquez-Ramirez had made a "threshold showing" was not before the trial court. It did not err in affirming the Board's dismissal of the appeal.

Value Village Did Not Establish That Modified-Duty Work Remained Available

Value Village also asserts that the Board should not have dismissed its case because Vasquez-Ramirez failed to establish that her modified job had "come to an end." As we have explained, Value Village cannot shift the burden of proof to Vasquez-Ramirez. In addition, the record does not support Value Village's claim that modified-duty work remained available to Vasquez-Ramirez.

RCW 51.32.090(4)(b) provides,

> The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed.

(Emphasis added.)

Value Village did not establish it had a job available that met Vasquez-Ramirez's medical restrictions for the times for which she received time-loss

payments. It presented evidence that the modified-duty job approved by her doctor remained available. But it admitted that her doctor imposed additional restrictions and that it did not modify the job description to accommodate the new restrictions. It presented no evidence of any available position that had been approved by Vasquez-Ramirez's health care provider as required by RCW 51.32.090(4)(b). It presented no medical evidence that Vasquez-Ramirez had the physical capacity to perform any available job. So it presented no evidence that the Department's decision to award time loss was incorrect.

Value Village cites to O'Keefe v. Department of Labor & Industries[53] to support its assertion that Vasquez-Ramirez failed to meet her burden. In O'Keefe, a worker challenged a Department's termination of his benefits after his employer fired him for cause.[54] As the appellant, the worker had the burden of proof. The employer presented evidence that his job would have "remained available to him but for his attendance problems and inappropriate comments."[55] And the parties stipulated that his "physician would certify him as physically capable of performing the light duty job."[56] So, the court concluded, the light duty work had not "come to an end" under RCW 51.32.090(4)(a).[57] So the worker,

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[53] 126 Wn. App. 760, 766, 109 P.3d 484 (2005).
[54] O'Keefe, 126 Wn. App. at 762-64.
[55] O'Keefe, 126 Wn. App. at 763.
[56] O'Keefe, 126 Wn. App. at 763.
[57] O'Keefe, 126 Wn. App. at 766.

with the burden of proof, failed to establish a prima facie case. In contrast, Value Village, with the burden of proof, identifies no evidence that Vasquez-Ramirez could perform the modified-duty job. So it failed to establish the availability of relevant modified-duty work; it failed to establish a prima facie case that the Department's decision was incorrect.

Value Village Did Not Preserve the Voluntary Retirement Issue for Appeal

Finally, Value Village claims that because it presented evidence supporting the conclusion that Vasquez-Ramirez "voluntarily retired," the trial court erred in dismissing the case. RCW 51.52.104 requires a party petitioning the Board to "set forth in detail the grounds" for review and the party filing the petition "shall be deemed to have waived all objections or irregularities not specifically set forth" in the petition. Value Village did not raise the issue of "voluntary retirement" in its petition to the Board, so it waived it.

In its reply brief, Value Village claims that by quoting the text of RCW 51.52.090(10) in its petition to the Board, it raised and preserved the issue. But a party does not raise an issue by quoting a statute without providing any explanation of its relevance to its appeal. The terms "retire," "retired," and "retirement" appear nowhere else in the petition. And Value Village only briefly mentioned "voluntary retirement" in its argument before the IAJ as an example of

one of different scenarios where a worker is not entitled to time-loss," not as an issue it was raising.

Because Value Village did not raise the issue before the Board, it waived it.

Attorney Fees

Vasquez-Ramirez requests attorney fees and costs. Because we sustain her right to relief, she is entitled to fees and costs[58] provided she complies with RAP 18.1.

CONCLUSION

We affirm. Value Village presented evidence that it fired Vasquez-Ramirez for cause but did not present a prima facie case that but for this firing, Vasquez-Ramirez could perform reasonably continuous work during the time periods she was awarded time-loss compensation.

Leach, J.

WE CONCUR:

Schindler, J.

Appelwick, C.J.

[58] RCW 51.52.130.

NO. 78629-6-I

COURT OF APPEALS FOR DIVISION I
OF THE STATE OF WASHINGTON

VALUE VILLAGE, Appellant, v. CANDIDA VASQUEZ-RAMIREZ and THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Appellant's Petition for Review and this Certificate of Service in the below-described manner:

Via Washington State Appellate Courts' Portal:

Mr. Richard Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Via legal messenger, with electronic copy via Washington State Appellate Courts' Portal:

Thomas Feller
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Attorney General's Office
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Signed this 29th day of January, 2020, in Shoreline, Washington by:

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