NO. 98433-6

SUPREME COURT
STATE OF WASHINGTON

CHARLES K. ANDERSON,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

Fringe benefits are not wages under the Industrial Insurance Act. Charles Anderson's employer provided him with a truck, which Anderson used to commute to and from work, and for some personal errands. But provision of a truck is not wages because it is not payment for something critical to protecting a worker's basic health and survival, as required by the Supreme Court's decision in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001).

To be included in the wage rate, the value of an employer benefit must be a necessity of life that must be replaced during periods of temporary disability. Provision of a benefit that allows a worker to commute to work is not a benefit that must be replaced during times of disability because the worker is not working. And though Anderson used the truck for personal errands as well as commuting, the bottom line is that it was only a fringe benefit, not one critical to protecting a worker's basic health and survival. Bolstering that is that here Anderson had his own personal truck.

The Court of Appeals decision in this appeal does not conflict with *Cockle*, nor does Anderson show any issue of substantial public interest. This Court should deny review.

II. ISSUE

Was the provision of an employer-funded truck provided as a commuting benefit "wages" critical to protecting Anderson's basic health and survival when he would not need the truck to commute to work during periods of temporary disability?

III. STATEMENT OF CASE

A. The Department Did Not Include the Value of a Company-Provided Truck in the Wage Rate Order Because It Found It Was Not Critical to Protecting Anderson's Health and Survival

In 2012, Anderson filed an industrial insurance claim for an occupational disease. CP 31. In adjudicating his claim, the Department issued a wage order, which determines the amount that a worker will be paid for wage replacement benefits, such as time-loss compensation. CP 20; RCW 51.08.178; RCW 51.32.090.

The wage order included Anderson's monthly salary, health care benefits, and bonuses, but included no valuation for the fact that Anderson's employer provided him with a truck, and paid for gasoline and other expenses associated with the truck's use. CP 20. Anderson protested and, following reconsideration, the Department affirmed the wage order. CP 33. Anderson appealed to the Board of Industrial Insurance Appeals. At the Board hearing, Anderson argued that the payments associated with the truck should be part of the wage calculation. CP 62-63.

Anderson testified that Columbia Basin LLC provides him with a company truck, which he uses while he is at work, to commute to and from work, and for some personal errands. CP 66, 68-70. Columbia Basin pays all of the truck expenses, such as gas, maintenance, and insurance. CP 69. Columbia Basin pays all of these expenses directly, and no money for truck expenses changes hands between Columbia Basin and Anderson. CP 76-77.

Anderson also testified that he has a personal truck that he has driven to work when the company truck was being serviced. CP 72. Anderson did not testify that he relies on or depends on his company truck for personal emergencies, basic needs, or survival. He uses it to drive to and from work, to perform work-related duties (such as running parts or trips to the main office), to go to lunch, and to do a few other errands. CP 69-70. Sarah Holm, Claims Consultant, testified that the Department does not include employer-provided truck benefits in wage orders. CP 80, 82.

B. The Board, the Superior Court, and the Court of Appeals Upheld the Department's Wage Rate Order Because the Company-Provided Truck Was Not Critical To Protecting Anderson's Health and Survival

The Board dismissed Anderson's appeal and affirmed the Department's order, reasoning that an employer-provided vehicle for work and personal use is a perk, and thus an excluded fringe benefit, rather than

a means to protect a worker's basic survival needs. CP 10, 19. The superior court in turn affirmed, reasoning that the cost of an employer-provided vehicle and its fuel, insurance, and maintenance should not be included in the wage because it was not consideration of like nature to board, housing, and fuel. CP 126. The Court of Appeals affirmed, holding that the truck was not critical to Anderson's health and survival. *Anderson v. Dep't of Labor & Indus.*, No. 36297-3-III, slip op. at 10 (Wash. Ct. App. Mar. 17, 2020)

IV. ARGUMENT

The Court of Appeals followed *Cockle* when it declined to treat an employer-provided fringe benefit as a benefit critical to basic health and survival. Employers may provide a commuting benefit to their employees, but this is a fringe benefit—not a core benefit that is included in the wage under *Cockle*—because the employee would not require the commuting benefit during a period of disability when the employee does not travel to or from work. A commuting benefit is a fringe benefit, not a necessity of life.

Unlike the core, non-fringe benefits of heating fuel, food, shelter, and health care, the costs associated with providing Anderson's transportation were not critical to protecting his basic health and survival. Instead, an employer-provided truck to commute between home and work

is a fringe benefit under *Cockle* that lowers a worker's out-of-pocket commuting costs; it is not wages. This Court should deny review.

A. Finding That an Employer-Provided Truck Is a Fringe Benefit Is Consistent with *Cockle*

A fringe benefit for commuting is not included in a worker's wages for the purpose of calculating the worker's benefits. "Wages" include "the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire." RCW 51.08.178(1). In *Cockle*, the Supreme Court held that the phrase "board, housing, fuel, or other consideration of like nature" in RCW 51.08.178(1) means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury *that are critical to protecting workers' basic health and survival*." *Cockle*, 142 Wn.2d at 822 (emphasis added). In other words, an employer-provided benefit must be "a necessity of life" to be included in wages. WAC 296-14-524(1)(a). That means without the benefit, a worker "cannot survive a period of even temporary disability." *Id.*; *see also Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 491, 120 P.3d 564 (2005) (noting that a premise of the *Cockle* test is that a benefit qualifies "if a worker cannot survive without it, even during a period of temporary disability.") In contrast, "the reasonable value of *fringe* benefits that are

not critical to protecting workers' basic health and survival" are not included "wages" under RCW 51.08.178(1). *Cockle*, 142 Wn.2d at 822.

As the *Cockle* Court explained, the Act's overarching objective was to reduce to a minimum "the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle*, 142 Wn.2d at 822 (quoting RCW 51.12.010). Because the injury-caused deprivation-of-fringe benefits (i.e., those benefits that are not critical to basic health and survival) was not the kind of "suffering" that the Act was designed to remedy, they cannot be included in the worker's wages. *Cockle*, 142 Wn.2d at 822. Under *Cockle*, the value of fringe benefits like commuting costs is not included in the wage rate.[1]

That the employer provided a commuting benefit does not mean that its value is included in the worker's wages. "[T]he legislature did not intend that all consideration given in exchange for work is to be included in 'wages.'" *Gallo*, 155 Wn.2d at 484. In *Gallo*, the Supreme Court—holding that employer contributions to various trust funds benefitting employees would not count toward "wages"—reaffirmed that while an injured worker should be compensated based on actual lost earning

[1] Anderson points out that the *Cockle* dissent thought the reference to "fuel" meant transportation. Pet. 5 (quoting *Cockle*, 142 Wn.2d at 826 (Talmadge, J., dissenting)). Later courts have rejected the argument that "fuel" in RCW 51.08.178 refers to gasoline. *Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 891-92, 335 P.3d 998 (2014).

capacity, that does not mean that all forms of consideration are to be included in calculating "wages." *Gallo*, 155 Wn.2d at 488. It reiterated that "a benefit is 'other consideration' if a worker cannot survive without it, even during a period of temporary disability." *Id*. at 491, 493 (concluding that employer contributions to retirement, life insurance, disability, and apprenticeship training trust funds are "not consideration of like nature to board, housing, fuel and health benefits" because they "are not critical to the basic health and survival of the injured worker at the time of injury"). The benefit is not required to be replaced. *Id.* at 491; *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 772-75, 134 P.3d 234 (2006) (holding that Social Security, Medicare, and Industrial Insurance benefits are not "in-kind consideration" because the benefits are not "so critical to workers' health or survival that workers would be required to replace them during even temporary periods of disability").

Here, the purpose of the fringe benefit was to help Anderson commute to work. But commuting costs are not critical to protecting workers' basic health and survival. *See Yuchasz v. Dep't of Labor & Indus.*, 183 Wn. App. 879, 891-92, 335 P.3d 998 (2014) (employer-funded gasoline not critical to a worker's basic health and survival). Anderson did not testify that he relies on or depends on his company truck for personal emergencies, basic needs, or survival. There is no need to replace a

commuting benefit when a worker cannot go to work. Anderson's employer provided him with a truck so that he could get to work and travel for work. There is no need to replace the truck's costs when he is off work for temporary disability reasons because he will not be working.

Noting that his employer allowed him to use the truck for non-work travel, Anderson argues that transportation is needed to access things like food, shelter, and health care. Pet. 6-7. This argument fails for two reasons. First, though the employer allowed Anderson to use the truck for non-work related purposes, the core purpose of providing him with the truck was commuting and business errands. And Anderson had a personal vehicle. CP 72. Second, as the Court of Appeals correctly observed, "[e]ven if the truck provided by Columbia were the only family car, Mr. Anderson demonstrates only that his employer-provided truck was a *means* for securing necessities such as food and medical care, not that the truck itself was critical to his health and survival." *Anderson*, slip op. at 10. The *Cockle* test includes "core" benefits, not benefits one step removed from the core. *Cockle*, 142 Wn.2d at 822.

The mere fact a worker could use an employer-provided vehicle to help purchase board, housing, fuel, and medical care does not transform that vehicle into something that is critical to protecting basic health and survival, because a worker may use the vehicle to purchase anything, not

simply those necessities. It would render the *Cockle* test meaningless to hold that a vehicle that *can* be used to purchase a necessity of life thereby *becomes* something critical to protecting basic health and survival. This would effectively make any consideration that has economic value a necessity of life, since anything of economic value could help pay for, or cover the cost of, those necessities. Indeed, many of the benefits that the *Gallo* Court concluded are not to be included in a worker's wage calculation—retirement benefits, life insurance, and disability insurance—*could* be used to pay for a necessity of life (or anything else) but this does not convert those fringe benefits into core benefits.

The purpose of the *Cockle* test is to limit the scope of the in-kind benefits included in "wages" to those critical to protecting basic health and survival, while excluding non-essential benefits, even when those fringe benefits have economic value to workers. *Cockle* rejected the contention that the Department should include any and all forms of consideration that are valuable to a worker in a worker's wage calculation. *See Cockle*, 142 Wn.2d at 821.

B. There Is No Issue of Substantial Public Interest in Following Supreme Court Precedent

There is no issue of substantial public interest in applying the *Cockle* holding that fringe benefits are not included in the wage rate. 142

Wn.2d at 822. Repeating the argument from his *Cockle* discussion, Anderson asserts there is an issue of substantial public interest because "[w]hether in the form of a bus pass or metro card, a Lyft or Uber credit, a Prius or a Ford F350, transportation is the vehicle whereby workers gain access to food, shelter, fuel and health care [and] . . . transportation provided a worker by their employer must be replaced." Pet. 7. Anderson mischaracterizes the nature of the benefit when an employer pays for commuting. The purpose of the benefit is to help the worker get to work, not help the worker run errands. There is no need to replace the means to get to work because the worker is not working when on temporary disability. And indeed Anderson had his own personal truck he could use to run errands.

V. CONCLUSION

Following this Court's decision in *Cockle*, the Court of Appeals correctly held that an employer-provided commuting benefit is a fringe benefit not included in the wage rate. This Court should deny review.

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RESPECTFULLY SUBMITTED this 15th day of June, 2020.

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SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES K. ANDERSON, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	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 Department of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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DATED this 15th day of June, 2020.

SHANA PACARRO-MULLER
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