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STATE OF WASHINGTON

Cause No. 70923-2-I

91539-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 23 PM 12: 27

CYNTHIA DILLON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON et al,

Respondents.

MOTION FOR DISCRETIONARY REVIEW

-PRV-

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I. IDENTITY OF PETITIONER

Cynthia Dillon, Appellant, petitions for review of the Court of Appeals' decision terminating review designated in Part II of this petition.

II. DECISION BELOW

Review is sought of *Dillon v. Dept of Labor & Industries et al.* Division I, No. 70923-2-I., filed on December 8, 2014 ("Decision"). See Appendix A. A copy of the State's motion to publish this decision and Division One's February 24, 2015 order granting publication are attached as Appendix B. RAP 12.3(e).

III. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether inconsistent analysis of the "parking area" exception created by the 1961 Legislative amendment to the Industrial Insurance Act has resulted in conflicting Appellate decisions?

Issue No. 2: Whether there is a substantial public interest for the Court to give deference to the legislative intent and limit over-broad application of the "parking area" exception under the Industrial Insurance Act?

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Ms. Dillon began working for the Bardahl Corporation in September of 2009 as a lab-tech assistant. (CABR – Dillon at 19) Ms. Dillon customarily used the Employee Only door located near the bay door to

enter the Bardahl work facility because she was initially told to use this door. (CABR – Dillon at 23-24 and Fisk at 136-137) Management never required her to use another entrance and, as the testimony of other witnesses confirmed, many of the employees also used the same Employee Only door Ms. Dillon customarily used to enter and exit the building. (CABR – Dillon at 24-25) The door was located next to a bay door that was occasionally used for ventilation purposes, but not for loading or unloading freight. As the admitted exhibits show, the bay door was located next to a fire hose connection for the fire department. (CABR - Exhibit Nos. 4, 5) In front of this area, the employees set out an ashtray and the area became known as the "smoking area". (CABR - Nicolaysen at 111)

The location where Ms. Dillon fell was near the door where she went to and from work. In that location, there are no lines or other markings denoting particular parking spaces. Similarly, the location has no signs identifying it as a parking area, and no employees were assigned to park there. (CABR - Fisk at 135) Perpendicular to the location where Ms. Dillon was injured is a separate and distinct, designated parking area containing approximately eight parking spaces clearly identified with parking lines and signs on the building directly in front of the parking

spaces reading "Reserved Parking". (CABR - Nicolaysen at 115 and Exhibit Nos. 4, 12, 13, 14, and 15)

The parties to this matter stipulated that the employer owned, controlled, and maintained the location where Ms. Dillon fell. Ms. Dillon testified that, at times, Bardahl employees would remove buckets of water from the facility through a nearby bay door and dump the buckets of water in the drain near the location where she was injured. During their testimony, other Bardahl employees confirmed this practice. (CABR – Dillon at 40-41 and Fisk at 139) Ms. Dillon further testified that water sometimes pooled in the vicinity of where she fell.

November 24, 2010, the day before Thanksgiving, was a cold day in Seattle, and snow and ice covered the ground. In fact, the weather was so inclement that Bardhal employees were given permission to leave work early due to the icy conditions and the upcoming holiday. That day, Ms. Dillon left work around 3:15 or 3:30 p.m. (CABR – Dillon at 20-22) As she left the building, she walked out the Employee Only door she regularly used to enter and exit the facility. She took approximately ten to fifteen steps before slipping on some black ice, landing on her buttocks and hands. There was no car parked where she fell. She felt immediate pain in her low back, and she sat on the ground for a minute to regain her senses. (CABR – Dillon at 26) She called her supervisor, Dennis Fisk,

who told her to walk into the office and inform Eric Nicolaysen of her injury. (CABR – Fisk at 134) After a couple of minutes, Ms. Dillon got up and walked to Mr. Nicolaysen's office. (CABR – Dillon at 27-28) He could not recall much of his conversation with Ms. Dillon that day, but did remember her telling him that she had fallen on ice just outside the building and she seemed quite upset. (CABR - Nicolaysen at 103-104 and 124-125)

Ms. Dillon went home and the following day, Thanksgiving Day, she rested at home. By Friday, her back was so symptomatic that she went to the emergency room at Valley Medical Center. On Monday, she returned to work and completed an application for benefits for her industrial injury. Her back symptoms continued, so she went to the St. Francis Hospital emergency room on November 30, 2010. (CABR – Dillon at 28) She then sought follow-up medical treatment with Alan Chen, M.D., on December 8, 2010. She told Dr. Chen about her fall at work and her excruciating pain. He restricted her from work and requested a lumbar MRI that showed a new small disc herniation at L5-S1 and marrow edema in the sacrum at S3 and S4. (CABR - Chen, M.D., at 24) Dr. Chen concluded that Ms. Dillon had suffered new and distinct injuries to her lower back proximately caused by the November 24, 2010 fall at work. (CABR - Chen, M.D. at 30-31)

Robert Thorpe is a land use expert who has worked on hundreds of similar cases for cities, counties, and private businesses to assist entities in interpreting federal, county, and city codes to request appropriate and necessary building and land permits based on the applicable codes. (CABR – Thorpe at 59-62) Mr. Thorpe is the only land use expert to testify in this matter and his opinions are unrebutted. Mr. Thorpe visited the Bardahl facility where Ms. Dillon was injured and took pictures of the area where the injury occurred. He also reviewed and analyzed the federal, county, and city codes applicable to the Bardhal facility to identify relevant parking and safety regulations. (CABR – Thorpe at 62) Based upon his investigation and research, Mr. Thorpe determined that, while the area where Ms. Dillon fell was customarily used by employees for parking, this use violated city and federal codes because the area should have been cleared from cars to allow: (1) for employees to safely enter and leave the building; (2) for fire trucks to park in the area and access the fire hose connection next to the bay door; (3) for access to and from the building for handicapped individuals pursuant to the Americans with Disabilities Act; and (4) for employees to quickly leave the building and the premises in case of emergency. (CABR – Thorpe at 62, 66-69 71, 87-90 and Exhibit Nos. 2, 3, 9) Mr. Thorpe further concluded that the area where Ms. Dillon fell should have been cleared of all cars for the safety of

the employees and that safety should take precedence over convenience. (CABR – Thorpe at 79-83) Bardhal did not have parking permits for parking to take place in the location where Ms. Dillon was injured.

C. PROCEDURAL FACTS

On December 10, 2010, the Department received an application for benefits from Cynthia M. Dillon for a November 24, 2010 injury she sustained in the course of her employment with Bardahl Manufacturing Corporation. (CABR at 69) The Department assigned claim number AP-51612 and issued an order on December 16, 2010, paying provisional time loss compensation from December 7, 2010 through December 15, 2010. (CABR at 69) The Department issued another order on December 30, 2010, paying provisional time loss benefits from December 16, 2010 through December 29, 2010. (CABR at 69) On January 6, 2011, the Department issued an order assessing a time loss compensation overpayment of $1,463.95 and rejecting Ms. Dillon's application for benefits on the basis that she was not in the course of employment since her injury reportedly occurred in a parking lot, thus excluding her from coverage under the Act. (CABR at 69) On January 18, 2011, Ms. Dillon requested reconsideration of the Department's January 6, 2011 order. After reconsideration, on March 2, 2011, the Department affirmed its January 6, 2011 order. (CABR at 70) With the assistance of counsel, on

March 16, 2011, Ms. Dillon requested reconsideration of all adverse orders issued within the preceding sixty days. (CABR at 70) Thereafter, on April 20, 2011, Ms. Dillon supplemented her request for reconsideration of the March 2, 2011 order. (CABR at 70) This was forwarded to the Board as a direct appeal on May 4, 2011. (CABR at 70) On May 10, 2011, the Board issued an order granting Ms. Dillon's appeal and assigned it docket number 11 14830. (CABR at 69) As noted above, the Board affirmed the Department's March 2, 2011 order rejecting Ms. Dillon's claim based upon application of the "parking lot exception". (CABR at 1-16)

Ms. Dillon filed a timely appeal in King County Superior Court. (CP at 1-2) The Department subsequently moved for summary judgment, which motion was denied on March 1, 2013. (CP at 7-19 and 48-49) The matter was converted to a bench trial; both parties provided trial briefs and presented oral argument. (CP at 97-98, 50-96) On August 26, 2013, the Court entered a judgment and order affirming the Board's decision to affirm the rejection of Ms. Dillon's claim based upon application of the "parking lot exception." (CP at 102-104) As a result, Cynthia Dillon appealed to the Washington State Court of Appeals, Division One. (CP at 105-109).

On December 8, 2014, The Court of Appeals issued its unpublished

opinion affirming the trial court's order. Appendix A. The Department of Labor and Industries of the State of Washington filed a Motion for Publication, which was granted on February 24, 2015. Appendix B.

IV. REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following considerations for review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Ms. Dillon seeks review under subsections (2) and (4).

A. THE DECISION BELOW CONFLICTS WITH DECISIONAL LAW

1. The Court's "Parking Area" Analysis is Inconsistent with Prior Decisions.

The Supreme Court and Appellate Courts have addressed application of the "parking area" exception on numerous occasions. *See Bergsma v. Dep't of Labor & Indus*, 33 Wn. App. 609, 656 P.2d 1109 (1983); *Boeing Co. v. Rooney,* 102 Wn. App. 414, 10 P.3d 423 (2000); *Bolden v. Department of Transportation,* 95 Wn. App. 218, 974 P.2d 909 (1999); *In re Hamilton*, 77 Wn.2d 355; 462 P.2d 917 (1969); *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965); *Ottsen v. Food Servs. of Am, Inc.,* 131 Wn. App. 310, 126 P.3d 832 (2006); *Madera v. J.R. Simplot Co.*,

104 Wn. App. 93, 15 P.3d 649 (2001); and *UW, Harborview Med. Ctr. v. Marengo*, 122 Wn. App. 798, 95 P.3d 787 (2004).

In *Bergsma v. Dep't of labor & Indus*, 33 Wn. App. 609, 656 P.2d 1109 (1983), the Court of Appeals, Division One held that RCW 5.08. 013 expressly precluded an employee from workers' compensation benefits for injuries sustained in the parking lot, whether going to or coming from work. In that case:

> An unchallenged finding of fact stated that: "The employee parking area where John Bergsma was injured was not occupied, used or contracted for by Seattle-Tacoma Box Co. for the business or work process in which it was engaged." Unchallenged findings of fact become the established facts of the case on review and our sole function is to determine whether the findings support the conclusion of law.

The Court reasoned that because this unchallenged finding of fact designated the accident site as an "employee parking area" the trial court's conclusion of law precluding the employee from coverage under the Industrial Insurance Act was correct. However, the Court made no independent evaluation as to whether the trial court's finding that the site was an employee parking area was correct. The Department relied heavily on *Bergsma* when arguing that the site where Dillon fell was a parking area. Because *Bergsma* did not define the term "parking area", it should not be applied in a case where the meaning of the term is disputed.

In other cases the Courts have addressed the meaning of "parking area". In *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965) the Supreme Court analyzed whether the accident site constituted a "parking area" under RCW 51.08.013 in light of the 1961 legislative amendment that created the so-called "parking area" exception. In so doing the Court cited a pre-1961 amendment case *Purinton v. Dep't of Labor & Indus.*, 25 Wn.2d 364, 170 P.2d 656 (1946), which held that:

> [W]here a workman is injured going to or returning from work, in an area maintained by the employer for the parking of his employees' automobiles, the workman is not to be deemed in the course of his employment at the time of injury.

The Court viewed the 1961 amendment as an effort by the legislature to "allay any remaining doubts as to parking areas". *Olson v. Stern*, 65 Wn.2d 871, 875, 400 P.2d 305 (1965). The Court also established a mixed-use test. Because Mr. Olson was driving a scooter loaded with tools in furtherance of the employer's business activity when injured, the "parking area" exception did not apply because the site of the accident was immaterial.

In *In re Hamilton*, 77 Wn.2d 355; 462 P.2d 917 (1969) the Supreme Court tackled the "hazardous route" exception to the "parking area" exception. In so doing the Court held that:

> The legislature did not intend to exclude from industrial insurance coverage an employee injured, immediate to the time of work,

> while in the process of going to or from an employer-designated parking area, lying a relatively short distance outside of what otherwise might be deemed worker areas actually controlled by the employer, over and along the only practical, proximate and customarily used route, which route, under given circumstances, contained particular hazards likely to produce injuries and which hazards were not of a kind commonly shared by the general public. Under such circumstances, the route which an employee is required to traverse, with the knowledge if not the express direction of the employer, to reach his or her actual work site falls within the contemplation of the legislative definition of 'jobsite' as the premises 'used' by the employer's business work work process, and that in pursuing such a route the employee is 'acting in the course of employment' within the meaning of RCW 51.08.013.

In *Hamilton*, the particular hazard the employee faced was an uneven spur track in the roadway. It is the application of this "hazardous route" exception to the "parking area" exception that the Department contended has been inconsistently applied in its motion to publish. APPENDIX B.

In 1999 the Court heard the case of *Bolden v. Department of Transportation,* 95 Wn. App. 218, 974 P.2d 909 (1999). In *Bolden,* the Court of Appeals, Division One, addressed application of the "parking area" exception when the site of the accident is used for a "mixed purpose". The Court concluded that the accident site was a "mixed-use area" because it was a "parking lot" parked with employees' personal vehicles and DOT vehicles. The parties in *Bolden* agreed that the accident site was "generally both a jobsite and a parking area", and the Court reasoned that, under *Olson,* if Bolden had been "acting in the course of

employment" when the accident occurred he would be covered. However, because Bolden "was not performing his work-related duties" and because the site was a "parking area" he was not covered. *Id.* at 223.

A year later the Court of Appeals, Division One, also heard the case of *Boeing Co. v. Rooney,* 102 Wn. App. 414, 10 P.3d 423 (2000). In this case, the Court analyzed the "going and coming" rule, which generally provides coverage under the Industrial Insurance Act when an employee is injured while going to or coming from work on the employer's premises. However, the Court was also faced with interpreting the meaning of "parking area" in the context of the 1961 "parking area" exception legislative amendment. In so doing the Court stated that:

> It is clear that the legislature, in enacting the pertinent legislation, intended to extend coverage to employees injured while going to and from work on the employer's premises, and to exclude from coverage injuries occurring to an employee in a parking area maintained either on or off the employer's premises.

The Court found no fault with the Board's interpretation of a "parking area" according to the term's ordinary meaning or the Board's decision to give the exception narrow interpretation consistent with the Legislature's mandate to liberally construe the Act's provisions in favor of the employee's right to coverage. Therefore, because Mr. Rooney was injured on a grassy area adjacent to the parking area, the Court determined that he was not excluded from coverage under the "parking area" exception.

In 2001 another "parking area" case came before the Court of Appeals, Division Three, in *Madera v. J.R. Simplot Co.*, 104 Wn. App. 93, 15 P.3d 649 (2001). Again the Court was required to interpret the meaning of "parking area" in the context of the 1961 exception. In so doing, the Court looked to *Rooney* for guidance, but found the facts surrounding Ms. Madera's injury more ambiguous. The Court acknowledged that the court in *Bolden* did not define a parking area. Because the 1961 amendment does not define "parking area" the Court ruled that the meaning of the term may be ascertained through ordinary method of statutory construction, including looking to the dictionary meaning of the term. No dictionary definition exists for "parking area" but the term "parking" is defined as "the leaving of a vehicle in an accessible location" or "an area in which vehicles may be left." *Madera v. J.R. Simplot Co.*, 104 Wn. App. 93, 97-98, 15 P.3d 649 (2001). The Court clearly and appropriately stated that:

> [C]overage provisions of the Act are to be construed broadly, while limitations on coverage are to be construed narrowly.

When narrowly construing the "parking area" exception and when relying on the helpful aspects of the dictionary definition of "parking", the Court concluded that the site of Ms. Madera's accident, a drive-thru lane, did not

constitute a "parking area" because "an **ordinary person** would not view a drive-through lane as intended for parking." *Id.* at 98 (emphasis added).

In 2004 another "parking area" case was decided by the Court of Appeals, Division One, in *UW, Harborview Med. Ctr. v. Marengo*, 122 Wn. App. 798, 95 P.3d 787 (2004). In its analysis the Court looked to both *Rooney* and *Madera* for guidance in ascertaining the meaning of "parking area". Again, the Court affirmed the importance of narrowly construing the "parking area" exception consistent with the legislative mandate to broadly construe the Industrial Insurance Act in favor of coverage and to construe exceptions to coverage narrowly. The site of Mr. Marengo's accident was in a parking garage stairwell, which the Court analogized to *Rooney* and *Madera* as being an area adjacent to a "parking area" and ruled that Mr. Marengo should not be excluded from coverage under the "parking area" exception. *UW, Harborview Med. Ctr. v. Marengo*, 122 Wn. App. 798, 789, 95 P.3d 787 (2004)

In 2006, the Court of Appeals, Division Two, heard *Ottsen v. Food Servs. of Am, Inc.*, 131 Wn. App. 310, 126 P.3d 832 (2006), another "parking area" exception case. Mr. Ottsen was fatally injured when he was hit by a yard goat while he was walking in a crosswalk toward the employer's warehouse. In this case, the Court distinguished between two

types of "parking areas", "pure parking areas" and "mixed-use areas". The Court stated that:

> If the primary use of an area is only for employee parking, it is a 'pure' parking area and the IIA does not apply.

However, if the primary use of an area is mixed and includes both parking activity and work activity, the Court determined that further analysis was required under *Bolden* and *Olson.* In citing *Olson,* the Court wrote:

> The parking area exception is not, however, an absolute bar to industrial insurance coverage. The appropriate inquiry is whether the injury occurred while the employee was acting in the course of his employment. If so, the situs of the accident is, as to him, immaterial.

In *Olson*, because the worker was driving a scooter reloaded with tools when injured in a "parking area", he was determined to be covered because he was engaged in work activity. On the other hand, in *Bolden* the worker was not covered in a mixed-use area because he was not engaged in work activities when the injury occurred. Applying *Bolden* and *Olson*, the Court concluded that because Mr. Ottsen was walking in a crosswalk he was not engaged in work activity, and was therefore excluded from coverage under the "parking area" exception even though he was on his way to work, was in a crosswalk, and was struck by a piece of equipment being operated in furtherance of the employer's business activity. *Ottsen v. Food Servs. of Am, Inc.*, 131 Wn. App. 310, 317-318,

126 P.3d 832 (2006). *Ottsen* is inconsistent with *Rooney, Madera*, and *Marengo.* No reasonable ordinary person would view a crosswalk as a place intended for the parking of cars.

In the present case, the parties cited and the Court referenced *Marengo*, *Madera*, *Ottesen*, *Bolden*, *Bergsma*, *Rooney*, *Olson*, and *Hamilton*. Like *Ottsen*, in concluding that Ms. Dillon should be excluded from coverage, the Court concluded that the site of her accident was a place where cars are customarily parked. However, the Court did not engage in the type of analysis used to determine the meaning of "parking area" as all of the other cases referenced. Specifically, the Court's analysis does not mention the need to narrowly construe the "parking area" exception, and the Court's analysis of the term "parking area" is not consistent with the analysis from prior decisions.

In its decision, the Court does not address the impact of the "going and coming" rule, the Court doesn't address whether an ordinary person would view the location where Ms. Dillon was injured as intended for parking, and the Court doesn't address the fact that the un-rebutted land use expert testified that the location of the accident was adjacent to the designated "parking area" maintained by the employer for the sole purpose of parking cars. Because the Court did not engage in the type of analysis engaged in by prior courts, the decision in this case is inconsistent with

Rooney, *Madera*, and *Marengo.* As was the case in *Rooney,* where the injured worker fell on a grassy area adjacent to the employer maintained parking area, Ms. Dillon fell on an asphalt area adjacent to her employer's maintained parking area. As was the case in *Madera*, where the injury occurred in a drive-thru lane, Ms. Dillon's injury occurred in a place that an ordinary person would not view as intended for parking because there were no parking lines, no parking signs, and the area was in front of a giant roll-up delivery door. As was the case in *Marengo*, where the worker was injured in a stairwell of the parking garage, Ms. Dillon fell in an area used for crossing from the employer's facility entrances to the designated parking area. However, despite these consistencies, Ms. Dillon has been excluded from coverage under the "parking area" exception whereas in *Rooney, Madera,* and *Marengo* the workers were determined to be covered under the Industrial Insurance Act. As a result, review must be granted to clarify the appropriate analysis concerning the meaning of "parking area" and to resolve inconsistent applications of the "parking area" exception.

B. MAINTINAING NARROW APPLICATION OF THE "PARKING AREA" EXCEPTION IS SUBSTANTIALLY IMPORTANT TO THE PUBLIC

1. Explanation of the "Parking Area" Exception

In a 1961 amendment, the Legislature created the "parking area"

exception to the "coming and going" rule under RCW 51.08.013. It states:

> Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

The Legislature orginally created the Industrial Insurance Act specifically to reduce to a minimum the suffering and economic loss arising from injuries occurring in the course of employment. Injured workers are the intended beneficiaries of the Act. Therefore the Courts have long held that the Act's provisions to be liberally construed with ***all*** doubts regarding the meaning of workers' compensation law must be resolved in favor of the injured worker. RCW 51.12.010; *McIndoe v. Dept. of Labor & Indus.*, 144 Wn.2d.252, 256-57, 26 P.3d 903 (2001); *Wilber v. Dept. of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963). Because the "parking area" exception is a limitation to coverage, it must be construed and applied narrowly. *Madera v. J.R. Simplot Co.*, 104 Wn. App. 93, 97-98, 15 P.3d 649 (2001).

2. The Court of Appeals Failed to Narrowly Construe the "Parking Area" Exception

Narrow construction and application of the "parking area" exception is a principle echoed throughout decisions like *Rooney, Madera,* and *Marengo.* Specifically in *Rooney*, the court stated:

> The Board's narrow interpretation of the exclusion is consistent with the Legislature's mandate to liberally construe the Act's provisions in favor of the employee's right to coverage.

Boeing Co. v. Rooney, 102 Wn. App. 414, 418, 10 P.3d 423 (2000). Similarly, in *Madera* the court stated:

> [C]overage provisions of the Act are to be construed broadly, while limitations on coverage are to be construed narrowly.

Madera v. J.R. Simplot Co., 104 Wn. App. 93, 98, 15 P.3d 649 (2001). In *Marengo* the Court stated:

> Whether the 'parking area' exception in RCW 51.08.013(1) includes an entire parking structure or only those portions where vehicles actually park is a question of statutory interpretation. In construing statutes, this court's primary objective is to ascertain the intent of the legislature.

UW, Harborview Med. Ctr. v. Marengo, 122 Wn. App. 798, 789, 95 P.3d 787 (2004). With respect to the Legislature's intent, the Court in *Marengo* also stated:

> The Board's narrow construction of the parking area exception is also consistent with the legislative mandate to broadly construe the Industrial Insurance Act in favor of coverage and to construe exceptions to coverage narrowly.

Id. at 790. Here, however, the Court's decision is silent regarding the Legislature's intent or the need to construe the "parking area" exception narrowly and resolve doubts in the favor of coverage for injured workers.

3. Failing to Narrowly Construe and Apply the "Parking Area" Creates is Contrary to Public Interest

The simple facts of this case cannot be disputed. Ms. Dillon fell in an area that was not marked for parking. There were no painted parking stall lines, and there were no signs indicating parking was allowed in the area. The employer maintained a set of marked parking stalls, identified by lines and signage as a parking area, adjacent to the location where Ms. Dillon fell. The employer held a permit for four parking stalls in this area adjacent to where Ms. Dillon fell. Without direction from the employer certain employees took it upon themselves, for their own convenience, to park in tandem on or near the place where Ms. Dillon fell. This customary practice was in place for decades. However, these simple facts are only a small and insignificant part of the bigger public interest analysis in this case. The additional and un-rebutted circumstantial facts are more alarming and pertinent, and should not be ignored.

In this case, the testimony and opinions of a land use expert were presented and were un-rebutted. His opinion is that the location where Ms. Dillon fell is not an area where cars may be parked. His opinion is

based upon the hundreds of times he has assisted cities, counties, and private businesses, to interpret federal, county, and city codes and to request building and land permits based on those codes. He visited the site where Ms. Dillon was injured and opined that that, while the area where Ms. Dillon fell was at times used by some employees for parking cars, this was ***against*** the city and federal codes because the area should have been cleared from cars to allow: (1) employees to safely enter and leave the building; (2) fire trucks to park in the area to use the fire hose connection next to the bay door; (3) access to and from the building for handicapped people based on the Americans Disability Act; and (4) employees to quickly leave the building and the premises in case of fire. Mr. Thorpe testified that the area where Ms. Dillon fell should have been cleared of all cars for the safety of the employees and stated his opinion that safety should take precedence over convenience. (CABR – Thorpe at 62, 69-71) Furthermore, the employer had a permit for just four parking spaces located in the permissible parking area identified clearly by signs that designated the spaces for parking.

Based on the totality of direct ***and*** probative circumstantial evidence presented in this case, excluding Ms. Dillon from coverage by applying the "parking area" exception constitutes an overbroad application of the exception and is a slippery slope to future overbroad applications.

Under the current decision, any employer, at any time, can invoke the "parking area" exception simply by parking a car in any location, even if doing so is otherwise unpermitted, illegal, and unsafe. This must not stand. While it is clear that the Legislature intended to exclude injuries occurring in parking areas from coverage under the Act, it does not follow that the Legislature intended injuries occurring in unpermitted, illegal, and unsafe areas to be excluded from coverage. Does the act of parking a car on a sidewalk, a grassy area, or a drive-thru lane magically convert those areas into a "parking area"? It should not. There is a long standing public interest in maintaining the Legislative intent behind the Industrial Insurance Act to protect and provide benefits for injured workers, their dependents, and beneficiaries. This decision constitutes an overbroad application of the "parking area" exception and undermines the very purpose of the Industrial Insurance Act.

V. CONCLUSION

For the above stated reasons, this Court should accept review.

Dated this 23rd day of March 2015.

FOSTER LAW, P.C.

By: 

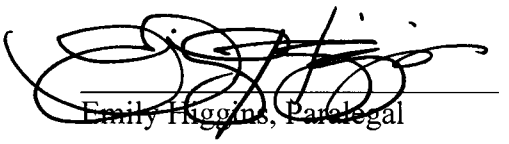
Tara Jayne Reck, WSBA #37815
Attorney for Appellant

Certificate of Service

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 23rd day of March 2015, the documents to which this certificate is attached, Motion for Discretionary Review, was delivered to upon each recipient as follows:

VIA HAND DELIVERY:	Richard D. Johnson, Court Administrator Court of Appeals, Division 1, of the State of Washington One Union Square 600 University Street Seattle, WA 98101-4170
VIA US POSTAGE PRE-PAID, FIRST CLASS MAIL:	Paul Weideman, AAG Office of the Attorney General 800 Fifth Ave, Suite 2000 Seattle, WA 98104-3188

FOSTER LAW, P.C.



Emily Higgins, Paralegal

APPENDIX A

RECEIVED
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CYNTHIA DILLON, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON AND BARDAHL MANUFACTURING, A WASHINGTON CORPORATION Respondents.	)	No. 70923-2-I DIVISION ONE UNPUBLISHED OPINION FILED: December 8, 2014

SPEARMAN, C.J. — Cynthia Dillon was injured on her way home from work as she walked through her employer's parking area. She challenges the trial court's determination that her injuries are not covered under Title 51 RCW, the Industrial Insurance Act (Act), which precludes coverage for injuries sustained in a parking area. We conclude that Dillon's injuries are not covered under the Act and affirm.

FACTS

In the fall of 2010, Cynthia Dillon worked for Bardahl Manufacturing, Inc. as a lab technician assistant. On November 24, 2010, after Dillon had completed her work for the day, she prepared to leave the building through an "employees only" door, which was one of two exits in the building. Dillon left the building and, after walking about fifteen steps, slipped and fell on a patch of black ice.

Dillon fell near a drain in a paved area just outside the Bardahl facility. The area was bounded on one side by a public roadway. On the other side of the

paved area, opposite the roadway, was the employee's only door, which was bounded by an exterior wall on one side and a roll top bay door on the other. The bay door was rarely used, as secured shelves ran along the inside of it. When the bay door was opened, it was solely for ventilation purposes. Employees had set out an ash tray in the paved area between the roadway and doors; this area had become known as the employee smoking area. Bardahl generally did not use this area to conduct business, though it was occasionally used for storage and employees frequently dumped buckets of water used in the business in a drain located in the area.

The paved area directly in front of the doors contained no signage, painted lines, or other markings denoting parking spaces and no employees were assigned to park in this area. Nevertheless, employees customarily parked in this area. At any given time during Bardahl's hours of operation, several vehicles could be found parked in a line running parallel to the adjacent exterior wall and continuing around a corner of the building. Dillon testified that she believed one car was parked in this area when she fell. In addition, on the far side of the bay door were four angle parking spaces, which were clearly identified by "Reserved Parking" signage. Clerk's Papers (CP) at 24. Cars parked in the reserved spaces would have been so close to the smoking area that their rear bumpers abutted or crossed the common boundary with the smoking area.

After Dillon's fall, she experienced significant pain and sought medical treatment. Shortly thereafter, she filed an application for worker's compensation with the Department of Labor & Industries (Department), claiming she was entitled to benefits under the Act. The Department determined that Dillon's

injuries were not covered under the Act because they had occurred in a parking area and had not occurred in the course of employment. The Department denied Dillon's motion for reconsideration.

Dillon appealed the Department's decision to the Board. A hearing was held before an industrial appeals judge (IAJ) at which Eric Nicolaysen, the owner of Bardahl, gave undisputed testimony that the area where Dillon fell had been used for parking for fifty years or more. Nicolaysen, Dennis Fisk, a Bardahl employee, also gave undisputed testimony that while the area where Dillon fell was occasionally used for storage and the drain was frequently used by employees to dump water used in the business, the area was not generally used to conduct business.

Robert Thorpe, a land use consultant, testified on Dillon's behalf that the use of the area where she fell as a parking area was not appropriate under city, state, and federal code. He opined that there should be a lane or "walking area" in the parking area for access under the American with Disabilities Act (ADA), for "fire access," and for "unloading chemical materials. Certified Appeal Board Record (CABR)[1] (Thorpe) at 62, 69. He testified that the law required a fire lane through the smoking area, which "could be combined with ADA and emergency access" and could be a "multiple-use lane, walkway or lane." CABR (Thorpe) at 67. He noted that the cars in the angled reserved parking spaces were "in designated areas." Id. at 70. By contrast, it was his opinion that the cars parked along the exterior wall and in front of the employee entrance were "parked where

[1] CABR (Dillon; Fisk; Nicolaysen; Thorpe).

they shouldn't be parked." Id. at 70-71. In Thorpe's estimation, the area should have been "an open lane for ADA" and "for . . . turning movements and parking requirements." Id. at 70-71.

The IAJ found Thorpe's testimony unpersuasive because Dillon cited "no authority for the proposition that an area used as a parking area falls outside of the parking lot exception set forth in RCW 51.08.013 because the parking area *should* have been used for another purpose." CABR at 43. The IAJ concluded that, at the time of her fall, Dillon was not acting in the course of employment under RCW 51.08.013. The IAJ issued a proposed decision and order affirming the Department's order. Dillon petitioned for review to the Board, which denied her petition and adopted the IAJ's proposed decision and order as its final decision.

Dillon appealed the Board's decision to King County Superior Court. After a bench trial, the trial court adopted the Board's findings of fact and conclusions of law, entered additional findings of fact and conclusions of law, and entered a judgment and order affirming the Board's decision. Dillon appeals.

DISCUSSION

Standard of Review

In an industrial insurance case, we review the decision of the trial court, not the decision of the Board. See, Rogers v. Dep't of Labor & Indus., 151 Wn. App.174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. "[O]ur review in workers' compensation cases is akin to our review of any other superior court trial judgment." Id. at 181. Thus, we limit our review to determining whether substantial evidence supports the findings made by the trial court and then

review de novo whether the trial court's conclusions of law flow from the findings. Id.; see also, Gorre v. City of Tacoma, 180 Wn. App. 729, 324 P.3d 716 (2014), amended on reconsideration in part, as amended. Unchallenged findings are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Because the Board's consideration of the statutory term "parking area" is a matter of statutory interpretation, we review its decision on this issue de novo. Univ. of Washington, Harborview Med. Ctr. v. Marengo, 122 Wn. App. 798, 802, 95 P.3d 787 (2004). Our fundamental objective in interpreting a statute is to ascertain and carry out the Legislature's intent. Id.

Coverage under the Act

The Act provides coverage for a worker who is injured while "'[a]cting in the course of employment.'" RCW 51.08.013(1) defines "acting in the course of employment" as follows:

> 'Acting in the course of employment' means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area.

Under this provision and what has come to be known as the "coming and going" rule, a worker is acting in the course of employment and covered under the Act for injuries sustained while coming and going from work on the jobsite in areas controlled by his or her employer. Marengo, 122 Wn. App. at 801. However, "specifically excepted from coverage are injuries occurring in 'parking areas' while going to or from work." Madera v. J.R. Simplot, Co., 104 Wn. App. 93, 96,

15 P.3d 649 (2001); accord, Ottesen v. Food Servs. of Am., Inc., 131 Wn. App. 310, 315, 126 P.3d 832 (2006); see also, Bolden v. Dep't of Transp., 95 Wn. App. 218, 221, 974 P.2d 909 (1999); Bergsma v. Dep't of Labor & Indus., 33 Wn. App. 609, 615, 656 P.2d 1109 (1983).

Dillon claims that she is entitled to compensation under the Act because, in her view, she was injured while going home from work in an area controlled by her employer. She recognizes the parking area exception to coverage under the Act, but argues that the area where she fell was not a "parking area" within the meaning of the Act. We disagree.

As the legislature did not define the term "parking area," we look to the ordinary meaning of the term in construing the Act. In Boeing Co. v. Rooney, 102 Wn. App. 414, 418, 10 P.3d 423 (2000), we determined that the parking area exclusion applied only to areas where vehicles actually parked, not to a grassy slope that was adjacent to a parking lot, but on which vehicles were never parked. Similarly, in Madera, we looked to dictionary definitions of "parking," which included "the leaving of a vehicle in an accessible location" and "an area in which vehicles may be left." Marengo, 122 Wn. App. at 803 (citations omitted). Based on these definitions, we concluded that a drive-through lane where an employee had been injured when she slipped and fell on a patch of ice was not a "parking area" under RCW 51.08.013(1). Madera, 104 Wn. App. at 95. In Marengo, 122 Wn. App. at 803, we held that a stairwell in a parking garage was a means of getting to and leaving from a parking area and not a place where vehicles park. Consequently, it was not a "parking area" under RCW 51.08.013(1).

In each of these cases, we determined whether a given area was a "parking area" based on whether the area was actually used for parking. The Board has taken a similar approach to interpreting RCW 51.08.013(1). For example, in In re Burnett, 1978 WL 182672 at *1-2 (1978), an employer had set aside a section of its property to be used as a parking area by its employees. The area was fenced and paved and parking stalls had been painted. The area, however, was not actually used for parking vehicles. Instead, the employer used much of the area for storage. When an employee filed a claim for injuries sustained in the area, the Board determined that the parking area exception did not apply, noting that the area was no longer used for parking at the time of the injury. The Board emphasized that it was the actual use of the area that controlled, explaining:

> There is nothing magic about a fence that would forever stamp the whole area inside of it as a 'parking area' if, in fact, *much of such area was being used for something else.* The particular location where the claimant fell was a storage area on the employer's premises; *it clearly was not used for parked cars.*

Burnett, 1978 WL 182672 at *2 (emphases added).

Notwithstanding Thorpe's testimony, the undisputed evidence in this case was that the area in which Dillon fell had been used as a parking area for over fifty years. By Dillon's own testimony, at the time she fell, at least one car was parked in the area between the employee only entrance and the drain. The trial court considered the actual use of the area where Dillon fell and correctly concluded it was a "parking area" within the meaning of RCW 51.08.013. There was no error.

Dillon points out that, although an employee generally is not covered under the Act for injuries sustained in a parking area, where the area is also part of the employee's "jobsite," as defined in the Act, the parking area exception may not apply. Dillon argues that the area where she fell is a jobsite because Bardahl employees occasionally emptied buckets of water used in the business in a nearby drain. The argument is without merit.

"Jobsite" is defined as "the premises as are occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged." See RCW 51.32.015 and 51.36.040. Even assuming that Bardahl employees dumping buckets of water falls within this definition, it is of no help to Dillon. It is not enough that the parking area is a jobsite as to some employees, it must be a jobsite as to the employee claiming benefits under the Act. Olson v. Stern, 65 Wn.2d 871, 877, 400 P.2d 305 (1965) (parking area was jobsite as to on-shift employee performing his work duties but not as to off-shift employee on his way home after work). Here, there was no evidence that the area was a jobsite as to Dillon. It is undisputed that Dillon was never assigned any duties in the area where she fell and that, at the time of her fall, she was not performing work duties, but was on her way home. Thus, under Olson, Dillon's injuries were not sustained in a jobsite and are not exempt from the parking area exception.

Dillon contends that even if she was injured in a parking area that was not part of her jobsite, she is entitled to recover under the Act because she was injured on a "hazardous route" within the meaning of Hamilton v. Dep't of Labor & Indus., 77 Wn.2d 355, 363, 462 P.2d 917 (1969). But her reliance on Hamilton is misplaced. In that case the court adopted the "hazardous route rule," extending

the scope of coverage under the Act to areas not owned or controlled by the employer under specified circumstances. The rule is inapplicable here because it is undisputed that the area of Dillon's accident was owned and controlled by her employer. But even if that were not so, the rule would be of no help to her because the Hamilton court expressly noted the legislature's intent "to exclude from coverage injuries occurring to an employee in a parking area maintained either on or off the employer's premises. . . ." Hamilton, 77 Wn.2d at 362. Accordingly, we noted in Bergsma that "[i]f Hamilton had been injured on [her employer's] parking lot while on her way to work, she would have been precluded from recovery." Bergsma, 33 Wn. App. at 614. Because Dillon was injured while walking through the Bardahl parking area on her way home from work the hazardous route rule is inapplicable.

Attorney Fees

Dillon requests an award of reasonable attorney fees and costs on appeal pursuant to RAP 18.1 and RCW 51.52.130. But because she is not the prevailing party, the statute is inapplicable and we decline her request. Pearson v. State Dep't of Labor & Indus., 164 Wn. App. 426, 445, 262 P.3d 837 (2011), as modified (Nov. 28, 2011).

Affirmed.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 DEC -8 AM 11:00

Spearman, C.J.

WE CONCUR:

APPENDIX B

RECEIVED
DEC 29 2014
FOSTER LAW, P.C.

NO. 70923-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MICHAEL SMITH,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on December 24, 2014, she caused to be served the Department's Motion to Publish Unpublished Opinion and this Certificate of Service in the below-described manner:

Via ABC Legal Messenger to:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
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Seattle, WA 98101-1176

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Via First Class United States Mail, Postage Prepaid to:

Tara J. Reck
Foster Law, P.C.
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Signed this 24th day of December, 2014, in Seattle, Washington by:

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RICHARD D. JOHNSON,
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February 24, 2015

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CASE #: 70923-2-I
Cynthia Dillon, Appellant v. Dept of Labor & Industries et al, Respondents

Counsel:

Enclosed please find a copy of the Order Granting Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CYNTHIA DILLON, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON AND BARDAHL MANUFACTURING, A WASHINGTON CORPORATION Respondents.	)	No. 70923-2-I ORDER GRANTING MOTION TO PUBLISH

The respondents, Department of Labor and Industries filed a motion to publish the opinion filed in the above matter on December 8, 2014. The panel called for an answer to the motion to be filed by February 5, 2015. Appellant did not file an answer to the motion. A majority of the panel has determined the motion to publish should be granted.

Now therefore, it is hereby

ORDERED that respondent's motion to publish is granted.

DATED this 24th day of February, 2015.

FOR THE COURT:

Spearman, C.J.

Presiding Judge

PUBLISHED OPINION INFORMATION SHEET

Info Sheet No.:017ssd
Cause No: 70923-2-I
Title: Dillon v. Dept of Labor & Industries
Filed Date: December 8, 2014

Written by: Spearman, C.J.
Concurred by: Verellen, A.C.J. , Schindler, J.

REVIEW OF SUPERIOR COURT DECISION

Superior Court County:	King
Superior Court Cause No:	12-2-19032-1 SEA
Date filed in Superior Court:	August 27, 2013
Superior Court Judge Signing:	Dean Lum

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NO. 70923-2-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

CYNTHIA DILLON, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON AND BARDAHL MANUFACTURING, A WASHINGTON CORPORATION, Respondents.	MOTION TO PUBLISH UNPUBLISHED OPINION

TO: CLERK OF THE COURT, COURT OF APPEALS DIVISION ONE;
AND TO: CYNTHIA DILLON, Appellant, by and through her attorney, TARA J. RECK.

I. IDENTITY OF MOVING PARTY

The Department of Labor and Industries (Department) moves for relief designated in Part II.

II. RELIEF SOUGHT

Under RAP 12.3(e), the Department seeks an order publishing the Court's Opinion filed December 8, 2014. A copy of the slip opinion is attached.

III. FACTS RELATIVE TO MOTION

On December 8, 2014, this Court issued its Opinion in this case. The Court ruled it would not publish its decision in the Washington Appellate Reports, but would file it as a public record under RCW 2.06.040.

IV. GROUNDS FOR RELIEF

RAP 12.3(e) allows a party to move to publish an unpublished opinion. RAP 12.3(d) provides the criteria the appellate court uses to determine whether to publish an opinion. The Court considers:

> (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d). The Court developed these criteria in *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

The Department believes that this Court's opinion meets the second criterion for publication.

V. ARGUMENT

A. This Court's Opinion Clarifies The Established Principle of Workers' Compensation Law that the Hazardous Route Rule Does Not Apply to Injuries in Parking Areas

This Court's decision clarifies the established principle of workers' compensation law that the hazardous route rule does not apply to injuries in

parking areas. Although this principle was articulated in *Hamilton v. Department of Labor and Industries*, 77 Wn.2d 355, 363, 462 P.2d 917 (1969) and reiterated in *Bergsma v. Department of Labor and Industries*, 33 Wn. App. 609, 615, 656 P.2d 1109 (1983), the Board of Industrial Insurance Appeals has misapplied the hazardous route rule following *Hamilton* and *Bergsma*. Accordingly, publication is warranted under RAP 12.3(d) to clarify this established principle of law.

This Court's clear articulation and application of the hazardous route rule in this case will provide guidance to the Board in future cases. This Court's opinion applied *Hamilton* and *Bergsma* and concluded that the hazardous route rule did not apply to the worker in this case because she fell in a parking area owned and controlled by her employer. This Court's decision followed the rule established in *Hamilton* that the hazardous route rule applies only when an employee is "in the process of going *to or from* an employer-designated parking area" and not while the worker is in the parking area. *Hamilton*, 77 Wn.2d at 363 (emphasis added). And it reiterated this Court's observation in *Bergsma* that if the worker had "been injured on [her employer's] parking lot while on her way to work, she would have been precluded from recovery." *Bergsma*, 33 Wn. App. at 614.

Despite *Hamilton* and *Bergsma*, at least two significant decisions by the Board have concluded that a worker was entitled to workers' compensation coverage even though the worker's injury occurred in a parking area.[1] These decisions conflict with this Court's decision in this case. In one case, the Board applied the hazardous route rule from *Hamilton* even after it found that the worker slipped on ice in an "employee parking area." *In re Cathy Dickey*, No. 64,560, 1984 WL 547150 at *3 (Wash. Bd. Ind. Ins. App. May 30, 1984). In a subsequent case that did not cite or discuss *Hamilton*, the Board extended workers' compensation coverage to an injury in a parking area. *In re Deborah Carey*, Nos. 03 13166 & 03 15519, 2004 WL 2359740 (Wash. Bd. Ind. Ins. App. July 12, 2004).

These Board significant decisions contradict the established principle of law that the hazardous route rule does not apply in parking areas on the employer's premises. The Board has stated that it is bound by a "duty of consistency" to follow prior decisions, whether designated significant or not, unless articulable reasons existed for not doing so. *In re Dianne DeRidder*, No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins.

[1] The Board designates decisions as "significant" that it "considers to have an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195(1); *see also* RCW 51.52.160. These decisions are available online at http://www.biia.wa.gov/SignificantDecisions/indexbiia.htm.

Appeals May 30, 2000). The Board may continue to follow erroneous decisions like *Dickey* and *Carey* unless this Court's opinion is published.

B. No Negative Consequences Exist Precluding Publication

In *Fitzpatrick*, 5 Wn. App. at 669, the court listed criteria under which an opinion should not be published. The Department believes the opinion in this case does not fall within these negative criteria.

Fitzpatrick's first criterion for not publishing is where an affirmance is based upon the conclusion that the evidence is sufficient to sustain a finding of fact. *Fitzpatrick*, 5 Wn. App. at 669. Here, the issue did not involve the sufficiency of the evidence. Rather, it involved the application of the hazardous route rule to the facts.

Fitzpatrick's second criterion for not publishing is whether an affirmance or reversal is readily determined by following legal principles well established by previous decisions. *Fitzpatrick*, 5 Wn. App. at 669. Here, although previous decisions have observed that the hazardous route rule does not apply in parking areas, the Board has not followed this rule. As an agency that adjudicates workers' compensation cases, it has not been able to readily determine the limits on the hazardous route rule from cases like *Hamilton* and *Bergsma*. Additionally, the observation of the *Bergsma* Court that the worker in *Hamilton* would have been precluded from recovery if she

had been injured in the employer's parking lot could be considered dicta. Thus, this criterion is not met.

Fitzpatrick's third criterion for not publishing is when the Court's decision is based upon a question of practice or procedure. *Fitzpatrick*, 5 Wn. App. at 669. This case does not involve a question of practice or procedure.

VI. CONCLUSION

The Department believes that the Opinion meets the criteria in RAP 12.3(d)(2). Accordingly, the Department asks that the Court publish its Opinion in this case.

RESPECTFULLY SUBMITTED this 24th day of December, 2014.

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