NO. 46656-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KIMBERLY G. LUVAAS,

APPELLANT,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

RESPONDENT.

BRIEF OF RESPONDENT

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I. INTRODUCTION

To calculate her time-loss calculation rate, Kimberly G. Luvaas seeks to have wages included in the rate from a job she did not have at the time of injury (in fact a job that she quit in writing). On July 29, 2011, Luvaas was injured while working as a landscaper—after she quit working as a contract care giver for the Department of Social & Health Services (DSHS). RCW 51.08.178(1) sets an injured worker's time-loss compensation rate taking into consideration the worker's wages being received from all employment at the time of injury. The plain language of RCW 51.08.178(1) does not allow the Department to look back at all the wages Luvaas earned in the month of July 2011 or "count a month back from July 29, 2011" as Luvaas requests. The Department properly calculated Luvaas's monthly wages based on the only job she had at the time of the injury, her landscaping job.

Her contract with DSHS provided a 30-day notice provision for DSHS's convenience. It is undisputed that Luvaas gave written notice that she would be unavailable after July 28, 2011, and that DSHS accepted her request by terminating her contract and replacing her. Nevertheless, so that she may include her past DSHS income in her wage calculation, Luvaas seeks to find herself in breach of this provision and apply specific performance to herself to find that she was still employed with DSHS on

July 29, 2011. Luvaas cannot rewrite history through contract interpretation to benefit from her own breach. Because Luvaas was only receiving wages from her landscaping job when she was injured, the Department correctly calculated her time-loss compensation rate based solely on her only job at the time of injury.

II. COUNTERSTATEMENT OF THE ISSUE

> RCW 51.08.178(1) provides that the monthly time-loss compensation rate is established based on the wages the worker was receiving from all employment *at the time of injury*. Did the trial court properly determine as a matter of law that Luvaas was not working for DSHS on July 29, 2011, when she stopped working on July 28th, when DSHS accepted her resignation and replaced her, and when she was paid only for work she performed through July 28th?

III. COUNTERSTATEMENT OF THE FACTS

A. Luvaas Was Injured the Day After She Quit Working as a Contract Care Giver for DSHS

On Friday July 29, 2011, Luvaas was injured while working at her landscaping job at Out on a Limb Landscape Services Inc. BR Luvaas 8-11.[1] She filed a workers' compensation claim, which the Department accepted. In order to determine her wage rate for workers' compensation purposes, the Department needed to determine what employment she had at "the time of injury". RCW 51.08.178(1). It included her wages from

[1] The certified appeal board record will be cited as "BR". Testimony within the certified appeal board record will be cited "BR" followed by the witness's last name and page number.

the landscaping job, but Luvaas sought to have wages from a prior job included even though she was not working there at the time of injury. *See* BR Luvaas 8-9.

The day before her injury was Luvaas's last day at her other position working as a care provider under contract with DSHS. BR Ex. 3; BR Luvaas 42. Luvaas had entered into an agreement to provide care services from July 1, 2009 through June 30, 2012 as an independent contractor. BR Ex. 2 at 1; BR Gilliand 70.

In June 2011, Luvaas originally gave notice to terminate the contract, but DSHS did not initially find a replacement, so DSHS and Luvaas "verbally agreed that [she] would stay on another month, [to] give [DSHS] time to find somebody." BR Luvaas 42.

Then on July 5, 2011, Luvaas wrote a letter to DSHS stating:

> July 28th will be my last day as caregiver for [the client]. Until then I shall be available to help new care giver in any way I can.

BR Ex. 3.

Luvaas did not give the full 30 days written notice under the contract. BR Ex. 3. The contract provided that "the contractor may terminate this contract for convenience by giving DSHS at least 30 calendar days written notice her terminate the contract with 30 days notice." BR Ex. 2 (Section 25). The contract, however, required the contractor, here Luvaas,

to cease all services under the contract "as of the effective date of termination or expiration." BR Ex. 2 (Section 27.a). DSHS is not required to pay for any work performed by the contractor after the effective date of the termination. BR Ex. 2 (Section 27.d). However, there were no consequences for ending a contract early. BR Gilliand 72. Indeed, DSHS accepted Luvaas's termination. BR Gilliand 72-76.

DSHS terminated the authorization for Luvaas to work for DSHS effective July 28, 2011, and DSHS specified that Luvaas had completed the contract. BR Gilliand 74-75. Accordingly, she could not bill for any days beyond July 28th. BR Gilliand 75. She was approved to work 178 hours per month and had reached 178 hours by July 28, 2011. BR Luvaas 35. She continued to provide services for the patient until Thursday, July 28, 2011. BR Luvaas 40-42.

Luvaas could not submit her time until July 31st because DSHS does not accept hours for payment under these contracts until the end of the month. BR Luvaas 36. Following July 28th, she did not care for anyone else as a DSHS caregiver. BR Luvaas 36. On July 29, 2011, DSHS had placed a new care provider with her former client and it is undisputed that Luvaas did not provide any further services on the date of injury. *See* BR Gillard 73, 85; BR Luvaas 42-43.

After accepting her claim for the injury at the landscaping job, the Department issued a wage rate order based on her reported employment as of the date of injury. BR Travis 52. The May 4, 2012 order calculated Ms. Luvaas's gross wages on the date of injury as $447.17 per month, at the single, with zero children. BR 11, 22. This rate only included her employment at the time of injury at her landscaping job. *See* BR 22; BR Travis 52. Luvaas protested the Department order and the Department affirmed the order. BR Travis 52-53. Luvaas appealed the order to the Board of Industrial Insurance Appeals. BR 30..

B. The Board Affirmed the Department's Wage Rate Order Because the Plain Language of the Statute Did Not Allow the Department "to Calculate Monthly Wages Based on Employment One Day Before the Actual Date of Injury"

Following hearings at the Board, the industrial appeals judge issued a proposed decision affirming the Department order. BR 11-20. The industrial appeals judge concluded that "she was no longer employed with DSHS as an independently contracted caregiver, having voluntarily quit." BR 15. The industrial appeals judge reasoned that the plain language of RCW 51.08.178(1) does not allow "the Department to calculate monthly wages based on employment one day *before* the actual date of injury." BR 15 (emphasis in original).

The judge also reasoned that time-loss compensation benefits are meant as a monetary buffer to lessen the economic impact of lost wages or income because of injuries. BR 16. But "Ms. Luvaas, by her own admission, voluntarily removed herself from DSHS' employment after July 28, 2011. Thus, she lacked the requisite adverse economic impact, i.e. lost wages or income, to warrant the award of time-loss benefits for this particular job." BR 16; Findings of Fact 3, 4; Conclusion of Law 20. Luvaas filed a petition for review to the full Board. BR 2-6. The Board denied review and adopted the proposed decision and order. BR 1.

C. The Superior Court Affirmed the Board, Reasoning That Luvaas Did Not Show Wages to Replace From DSHS Because She Terminated Her Position There

Luvaas appealed to Clallam County Superior Court, where the parties filed cross-motions for summary judgment. CP 20-45. Luvaas argued that she was an employee of both her landscaping job and DSHS on July 29th because she was legally bound to the contract through the end of July by the 30-day termination clause. CP 40. The Department argued that the undisputed facts showed that she had terminated her employment with DSHS because Luvaas had provided written notice that July 28th would be her last day, she had worked all the hours that could be allotted to her for July, and DSHS had replaced her with another caregiver. CP 29-32. The superior court granted summary judgment to the Department affirm-

ing the Board order. CP 12-17. In its memorandum opinion, the superior court reasoned that Luvaas had "no lost wages or income from DSHS to replace" there is no purpose in basing the wage rate on income from DSHS:

> Since the plaintiff terminated her employment with DSHS on July 28, 2011, and had reached the maximum number of allotted hours for that month at that time, she had no wages or income from DSHS to replace after July 28, 2011. Since there were no lost wages or income from DSHS to replace after July 28, 2011, there would be no purpose to awarding time-loss compensation based upon wages or income from DSHS during this time frame.

CP 10. The superior court concluded that the 30-day termination provision is in place to allow DSHS a reasonable period of time in which to find someone else to perform the tasks formerly performed by the plaintiff. CP 9. Accordingly, the superior court rejected her contention that the "termination for convenience clause" required "a binding 30 days of employment following notice regardless of any agreement or circumstances to the contrary." CP 10.

IV. STANDARD OF REVIEW

Review is governed by RCW 51.52.140, which provides that an appeal shall lie from the judgment of the superior court as in other civil cases, and that ordinary practice in civil cases shall apply. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). In an

industrial insurance case, it is the decision of the trial court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Speculation and conclusory allegations are insufficient to avoid a summary judgment. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009); CR 56(e).

Here, both parties agree that there are no material facts in dispute and the dispositive issues are ones of law, which this Court reviews de novo. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 298, 253 P.3d 430 (2011); App. Br. 5. Although this Court may substitute its judgment for that of the Department, great weight is accorded to the agency's view of the law it administers. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

V. ARGUMENT

A. The Wages From Luvaas's Prior Employment With DSHS Are Not Included in the Calculation of Her Time-loss Compensation Rate Because the Plain Language of RCW 51.08.178(1) Includes Wages From Only the Employment She Was Engaged in at the Time of the Injury

Luvaas is not entitled to a wage rate that includes her prior contract work with DSHS because she quit working for DSHS effective the day before she was injured at her landscaping job. Here, Ms. Luvaas's wages were calculated under RCW 51.08.178(1), which provides in pertinent part:

> For the purposes of this title, *the monthly wages the worker was receiving from all employment at the time of the injury shall be the basis upon which compensation is computed* unless otherwise provide specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving *at the time of the injury*:
>
> (a) By five, if the worker was normally employed one day a week;
> (b) By nine, if the worker was normally employed two days a week;
> (c) By thirteen, if the worker was normally employed three days a week;
> (d) By eighteen, if the worker was normally employed four days a week;
> (e) By twenty-two, if the worker was normally employed five days a week;
> (f) By twenty-six, if the worker was normally employed six days a week;
> (g) By thirty, if the worker was normally employed seven days a week.

(Emphasis added.)

The primary purpose in interpreting a statute is to give effect to the Legislature's intent. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007). If the statute's meaning is plain on its face, the court treats this plain meaning as an expression of the Legislature's intent. *Udall*, 159 Wn.2d at 909. An unambiguous statute is not subject to statutory construction. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Only if the statutory language is susceptible to more than one reasonable interpretation is statute considered ambiguous, and the court may then employ statutory construction tools for assistance in discerning legislative intent. *Udall*, 159 Wn.2d at 909.

Contrary to Luvaas's arguments, liberal construction does not apply in this matter because this case does not involve the construction of an ambiguous statute. *See* App. Br. 18; *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 474, 843 P.2d 1056 (1993) ("Only if the statute is ambiguous would we be able to employ a liberal construction to it for

the benefit of the injured worker."); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012), *review denied,* 176 Wn.2d 1024 (2013).

Here, the plain language of RCW 51.08.178(1) provides that the Department must consider the wages that the worker was "receiving" from any "*employment*" "*at the time of her injury.*" She had no "employment" with DSHS at the "time of injury" and was not "receiving" any wages from DSHS at the time of injury, so no DSHS wages could be considered. Applying RCW 51.08.178(1), the Department calculated Luvaas's wages based on her monthly earnings from the only job she was employed at when the injury occurred on July 29, 2011—her landscaping job. BR Travis 53; BR Ex. 1; BR Luvaas 35-36.

The context of the statute in which that provision is found supports this plain reading. *See Tingey*, 159 Wn.2d at 657. RCW 51.08.178(1) directs that "[i]n cases where the worker's wages are not fixed by month, they shall be determined by *multiplying the daily wage the worker was receiving at the time of the injury*" by the days the worker was "normally employed." The statute looks to the employment pattern only to determine the number of days worked by a worker. This shows that RCW 51.08.178(1) calculates the worker's wages based on the rate of

pay as of the date of injury, rather than looking to the worker's past employment pattern as Luvaas suggests.

The use of the word "monthly" does not require that the Department consider the actual wage of any given "month" rather it demands the Department look at what the worker's *monthly rate* was as of the time of injury. Luvaas argues that RCW 51.08.178(1) looks to the worker's "monthly" wages by either looking back to all the wages "from all employment for the month of July 2011" or "one could count a month back from July 29, 2011, which would include the last couple of days in June 2011, and determine what was earned from all employment for that period of time." App. Br. 19. But RCW 51.08.178(1) demands that if a "worker's wages are not fixed by month, they shall be determined by multiplying the daily wage the worker was receiving at the time of injury" by a fixed number associated with the number of days a week the worker is "normally employed". *See e.g.* 51.08.178(1)(a), (b), (c), (d), (e), (f), (g). This statutory language shows that it is not the worker's recent work pattern that is determinative under RCW 51.08.178(1), but rather the monthly wage rate based on the employment *at the time of the injury.*

The case law also supports the interpretation that the worker's wages are based on the monthly rate of pay as of the date of injury rather than his pattern of employment—monthly or otherwise. *See Dep't of*

Labor & Indus. v. Avundes, 140 Wn.2d 282, 284, 996 P.2d 593 (2000). In *Avundes*, the worker was injured while cutting asparagus. *Id.* In the 14 months prior to his injury, the worker had 19 different jobs, working at each job until complete; the jobs varied in length from one day to six weeks. *Id.* at 285. The Department averaged the worker's wages from the previous 12 months under RCW 51.08.178(2). *Id.* The *Avundes* Court rejected this approach, requiring the Department to set wages based only on the worker's employment at the time of injury rather than applying RCW 51.08.178(2) and looking back at his past employment as Luvaas suggests that the Department must to do. *See id.* at 287-88.

The Board has also recognized that RCW 51.08.178(1) requires that the wages used to calculate time-loss compensation are those wages that the worker was receiving "at the time of injury." *In re Douglas Jackson*, No. 99 21831, 2001 WL 1328473, *2 (Bd. Ind. Ins. Appeals August 13, 2001); *see also In re Gilberto Ramirez*, Nos. 13 10168 & 13 10562, 2014 WL 3055472, *2 (Bd. Ind. Ins. Appeals June 27, 2014) (the date of

manifestation is the relevant date for calculating the wage "at time of injury" under RCW 51.08.178(1) for occupational diseases).[2]

Luvaas claims that she should also be entitled to have DSHS wages included because she was paid for the entire month of July. App. Br. 19 (citing BR Exs. 4, 5). Contrary to her assertions here, Luvaas was not paid for the entire month of July, but rather the unrebutted evidence shows she was paid for the 178 hours she was authorized to complete—and did complete by July 28, 2012. BR Gilliand 74-75; BR Luvaas 35. Luvaas submitted her time sheet on July 31st because DSHS only accepted hours for payment for the services completed after the month ended. BR Luvaas 36; *see also* BR Ex. 2 (Section 17) ("DSHS shall not make any payments in advance or anticipation of the delivery of services to be provided pursuant to this Contract."). RCW 51.08.178(1) directs the Department to take into account the monthly income as of the day of the injury, not the monthly income from the month leading up to the injury.

As the Board and superior court recognized here, the purpose of wage *replacement* benefits is to provide a monetary buffer to lessen the

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[2] The Board designates a decision significant when it considers it to have "an analysis or decision of substantial importance to the board in carrying out its duties." WAC 263-12-195. Significant Board decisions are persuasive authority. *See Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491 n. 13, 288 P.3d 630 (2012). The courts, however, have also considered non-significant decisions. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013).

economic impact of lost wages or income because of industrial injuries. BR 16; CP 10. This analysis also correctly follows from the Supreme Court's holding in *Double D Hop Ranch* that workers' compensation benefits should reflect the worker's "lost earning capacity". *Double D Hop Ranch v. Sanchez,* 133 Wn.2d 793, 798, 947 P.2d 727 (1997); *see also Avundes*, 140 Wn.2d at 287.

Workers new to a position, such as temporary workers, are frequently injured shortly after beginning new positions. Caroline K. Smith, *Temporary Workers in Washington*, American Journal of Industrial Medicine, February 2010, at 135, 143 (showing in a 2009 study that temporary workers in Washington State have higher industrial insurance claim rates than regular employees). Looking retrospectively at wages for workers employed only shortly before the workers' injuries would not provide a sufficient replacement for their lost earning capacity. Accordingly, Luvaas's interpretation requiring the Department to make a wage determination based a worker's employment in the past month would benefit her, but would adversely impact those workers who recently started new employment and were injured early in their new positions.

B. Luvaas Was No Longer Earning Wages From DSHS on July 29, 2011, When She Was Injured While Working Her Landscaping Job Because She Terminated Her Contract Effective July 28th and Provided No Services Thereafter

Luvaas cannot establish that she was "receiving" wages from DSHS at "the time of injury" based on her purported failure to provide the full 30 days written notice requested by DSHS for its own convenience. *See* RCW 51.08.178(1). The question here is not the meaning of termination clause in the contract, but what monthly wages Luvaas was earning when she was injured on July 29th. The evidence is unequivocal that Luvaas terminated her employment with DSHS before her injury and therefore she was no longer *receiving* wages from DSHS when she was injured at her landscaping job.

The fact that the contract between DSHS and Luvaas had a 30-day termination provision does not mean that Luvaas did not terminate her contract early. The contract provides that she had to cease all work after termination. BR Ex. 2 (Section 27.a). She terminated her contract effective July 28, 2011, and could not do work after that date. *Id.* Luvaas argues that because she failed to give 30 days written notice before she ceased providing services to DSHS she was still "technically" employed under the contract with DSHS. App. Br. 16 ("Ms. Luvaas had a valid and legally binding employment contract with DSHS in place on the date of her industrial injury which subsequently and technically means she was still an employee of DSHS on July 29, 2011."). But she did not have a contract in place because she terminated the contract. She asks this Court

to ignore the undisputed facts that she gave oral notice in June that she would no longer be working for DSHS, agreed to remain only through July 28, 2011, unambiguously told DSHS in writing that she would no longer be available after July 28, 2011, and that DSHS terminated her employment and replaced her before she was injured July 29, 2011. BR Luvaas 42; BR Ex. 3; BR Luvaas 36; BR Gilliand 74-75; *see* BR Gilliand 73, 85. Simply put, Luvaas was not receiving wages from DSHS at the time of injury.

If the contract demanded a full 30 days written notice before she stopped providing services, Luvaas breached the agreement because it is undisputed that she was no longer available to care for the patient after July 28th. BR Ex. 3; BR Luvaas 44; *contra* App. Br. 13 ("When Ms. Luvaas decided to terminate her employment contract with DSHS prior to the end date of June 30, 2012, she abided by applicable terms and conditions.").[3] Accordingly, Luvaas argues that although she breached the agreement, she should receive the benefit of a provision intended to protect DSHS's interests. Indeed, after finding that she has breached, Luvaas then asks this Court to apply specific performance to her *own* breach to find that she was somehow bound by the contract. But DSHS did not seek

[3] To claim that she abided by the agreement because the mechanical operation of the agreement prevented her from terminating the employment relationship before the 30 days elapsed when she unequivocally terminated the employment relationship is nonsensical.

specific performance. Rather DSHS recognized her termination and Luvaas cannot benefit from her own breach. *See Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 595, 305 P.3d 230 (2013); *Schweiter v. Halsey,* 57 Wn.2d 707, 712, 359 P.2d 821 (1961).[4]

Luvaas cites no authority for the proposition that a termination of a contract really is not termination of the contract when there is a notice provision. Contract law recognizes that a party may terminate a contract; the question is what remedies the party that suffered the breach may seek in the event from the termination, for example when the notice was not sufficient. *See* H. B. Chermside, Jr., Annotation, *Employer's Damages for Breach of Employment Contract by Employee's Terminating Employment,* 61 A.L.R.2d 1008 (1958). Moreover, courts do not apply specific performance to contracts for personal service, such as employment contracts. *See State ex rel. Schoblom v. Anacortes Veneer, Inc.*, 42 Wn.2d 338, 342, 255 P.2d 379 (1953); *see also Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994); Restatement (Second) of Contracts § 367 (l) (1981) ("A promise to render personal service will not be

[4] Luvaas's logic also fails because even if DSHS had elected to pursue a breach of the contract claim against Luvaas, a court could not revise history to give DSHS back Luvaas's performance of duties from July 29th through the purported termination date of August 5, 2011. DSHS could get monetary damages to compensate it for her breach. *See* BR Ex. 2 (Section 27.f) ("The rights and remedies provided to DSHS in this Section are in addition to any other rights and remedies provided by law, in equity, and/or under this Contract, including consequential and incidental damages.").

specifically enforced."). Key here to the analysis is it is the party who suffered the damage (here DSHS) that can elect to choose the remedy it decides to seek. DSHS accepted the premature termination and hired someone else.

Even assuming in arguendo that the mechanical operation of the 30-day notice clause could establish that Luvaas had an ongoing employment relationship with DSHS after July 28th, irrespective of the parties' actual actions, the 30-day notice clause does not provide her the relief she seeks. Applying the proper contract principles to its interpretation shows that it is a provision for DSHS's benefit and DSHS accepted her early termination without complaint.

The termination clause provides:

> DSHS may terminate this Contract in whole or in part when it is in the best interest of DSHS by giving the Contractor at least thirty (30) calendar days' written notice. The Contractor may terminate this Contract for convenience by giving DSHS at least thirty (30) calendar days' written notice.

Nothing in the language of this provision bars DSHS from accepting a contractor's request for termination before 30 calendar days elapse, if it

chooses to do so, as it did here.[5] This approach is also consistent with other provisions of the contract addressing the effective date of termination. BR Ex. 2 (Section 27.a) ("The Contractor shall cease to perform any services required by this Contract as of the effective date of termination or expiration."); BR Ex. 2 (Section 27.d) ("DSHS shall be liable only for payment required under the terms of this Contract for service rendered up to the effective date of termination or expiration."). These provisions are unimpaired by DSHS's acceptance of Luvaas's request for termination and show that DSHS could accept Luvaas's request for termination of the contract without the full 30 days written notice.

The admissible extrinsic evidence confirms the parties' interpretation that this notice clause was for the *convenience* rather than a strict prerequisite for her request to terminate the contract effective July 28, 2011. While Luvaas is correct that Washington courts "attempt to determine the parties' intent by focusing on the objective manifestations of the agreement", she incorrectly treats the objective manifestation standard as a plain meaning rule. App. Br. 10 (quoting *Hearst Commc'ns v. Seattle*

[5] When analyzing an earlier version of another contract between a home health care worker and DSHS with nearly identical language, this Court recognized that DSHS reserved for itself broad authority to terminate the contract as long as it abided by the home care rules. *Myers v. State*, 152 Wn. App. 823, 829-830, 218 P.3d 241 (2009); *see also* WAC 388-71-0556 ("The department, AAA, or managed care entity may otherwise terminate the individual provider's contract for default or convenience in accordance with the terms of the contract and to the extent that those terms are not inconsistent with these rules.").

Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (quotations omitted)), 10-12. The Washington Supreme Court has rejected the plain meaning rule, instead adopting the context rule. *Berg v. Hudesman*, 115 Wn.2d 657, 667-71, 801 P.2d 222 (1990).

Under the context rule, the intent of the parties is discerned by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 84, 60 P.3d 1245 (2003) (quoting *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993)). When interpreting contracts, it is true that the subjective intent of the parties is generally irrelevant if the intent can be determined from *actual* words used. *See* App. Br. 10; *Hearst*, 154 Wn.2d at 503-504. But here the performance of Luvaas and DSHS under the contract is not evidence of *subjective* intent that would be excluded under the context rule; rather, it is admissible evidence of how the parties actually performed the contract. *See Go2Net, Inc.*, 115 Wn. App. at 84.[6] The undisputed extrinsic evidence shows that Luvaas interpreted the contract to

[6] Construction of a contract is a question of law. *See Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010) ("While interpretation of a contractual provision is often an issue of fact, construction is always a question of law, . . . , and, thus, amenable to summary judgment.").

allow her to terminate the contract on July 28, 2011, and DSHS agreed with this interpretation processing her termination effective on that date. BR Luvaas 36, 42; BR Ex. 3; *see* BR Gilliand 72-76.

Rather than staying silent about the July 28th termination, the record shows that DSHS accepted the termination and waived any breach. *Contra* App. Br. 15. Luvaas claims the benefit of the DSHS's waiver provision to support her claim that she should be able to invoke the 30-day notice provision so she may include past employment in her monthly wage calculation. App. Br. 15. The DSHS waiver provision protects DSHS from inadvertent waiver and notifies the parties that any "waiver of any breach or default on any occasion shall not be deemed to be a waiver of any subsequent breach or default." BR Ex. 2 (Section 16). The language of this provision also does not bar DSHS from accepting early termination.[7] It specifically contemplates that there may be waivers. It merely allows DSHS to continue to enforce the contract in the event of another breach.

Another provision of the contract specifically encourages the contractor to "contact the client's *case manager* if at any time they have con-

[7] Luvaas also renews her argument that because there was no modification of the contract under the terms of contract that the agreement must be strictly enforced. App. Br. 14; *see also* BR 4-5. But the parties' actions and the language of the contract do not bar DSHS from accepting Luvaas's early termination, as it did here, without modifying the contract.

cerns about their ability to perform the responsibilities of this Contract." BR Ex. 2 (Special Terms and Conditions, Section 1767SS Personal Care at e); *see also* BR Ex. 2 (Section 1.b. provides: ""Case Manager" means the DSHS or DDD social worker assigned to a client."). This is what Luvaas did when she contacted Case Manager Gilliand to quit her position.

Taking Luvaas's argument that wages from her previous job should be included in her wage rate calculation to its logical conclusion, had she started employment at a third job on July 29, 2011, she would be entitled for the Department to consider all three jobs, including her DSHS employment, even if it would not have been possible for her to work all three jobs simultaneously. This contradicts the underlying purpose of the wage *replacement* formula at issue here and RCW 51.08.178(1)'s direction to look at all the wages being received at the time of injury rather than limiting the worker to wages earned from the job of injury.

No amount of contractual re-interpretation can change the fact that Luvaas was not receiving wages from DSHS to be considered under RCW 51.08.178(1). Following July 28th, Luvaas did not care for anyone else as a DSHS caregiver. BR Luvaas 36, 42. On July 29, 2011, DSHS had placed a new care provider with her former client and she did not provide any further services on the date of injury. *See* BR Gilliand 73, 85; *see also*

BR Luvaas 36, 42-44. Accordingly, when DSHS terminated the authorization for her to work for DSHS effective July 28, 2011, it treated the contract as completed. BR Gilliand 74-75. Luvaas could not bill for any days beyond July 28th and it "was the last day [she] would have physically worked[.]" BR Gilliand 75; BR Luvaas 43. The undisputed facts here show that Luvaas was not receiving wages from DSHS after July 28th and therefore summary judgment for the Department is appropriate.

VI. CONCLUSION

There is no genuine issue of material fact that Luvaas was only receiving wages from her landscaping job when she was injured on July 29, 2011, because the undisputed facts show that she had terminated her contract with DSHS effective July 28, 2011. Accordingly, the Department correctly calculated her time-loss compensation rate based solely on her only job at the time of injury as required by RCW 51.08.178(1).

RESPECTFULLY SUBMITTED this 5th day of March, 2015.

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