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NO. 96780-6

SUPREME COURT
OF THE STATE OF WASHINGTON

AARON RICHARDSON,

Petitioner,

v.

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

and

CONCO & CONCO PUMPING, INC.,

Respondents.

MEMORANDUM OF AMICUS CURIAE
WASHINGTON STATE LABOR COUNCIL
IN SUPPORT OF PETITIONER RICHARDSON'S
PETITION FOR REVIEW

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On Behalf of the Washington State Labor Council

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Labor Council, AFL-CIO, has an interest in the rights of injured workers to be treated fairly, including the rights of injured workers under the Industrial Insurance Act, Title 51 RCW (hereinafter “the IIA”). This includes an interest in making sure that workers’ rights are not compromised by the interests of retrospective rating groups and other employer interest groups, who are not the employer for purposes of the IIA nor an agent of the employer. The Washington State Labor Council respectfully suggests this Court should accept Mr. Richardson’s Petition for Review and overturn the Court of Appeals’ decision in *Aaron E. Richardson v. Dep’t of Labor & Indus. & Conco & Conco Pumping Inc.*, ___ Wn.App. ___, ___ P.3d ___ (Slip Opinion No. 77289-9-I)(December 24, 2018).

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves the relationship between employers and retrospective rating groups, and whether an employer can delegate its statutory duties to its workers under the IIA to a retrospective rating group of which the employer is a member.

Established more than thirty years ago, the Retrospective Rating Program allows a group of employers in similar industries to voluntarily participate in a rating program wherein the employers pool their

workers' compensation premiums for a twelve-month coverage period. RCW 51.18.010. At the end of the coverage period, if group workers' compensation losses are less than premiums, the group can earn a refund from the Department of Labor and Industries ("the Department"); conversely, if losses are greater than premiums, a penalty is assessed. See Chapter 296-17B WAC. The theory behind retrospective rating groups was that they would improve safety and workers' compensation outcomes because employers who participated would be engaging in "sound risk management strategies and enhanced cooperation with department claims management activities." RCW 51.18.005.

Retrospective rating groups are authorized by statute but created by private contract. An organization approved by the Department, usually an employer interest group will sponsor formation of a rating group and encourage employers to contract with the group. The Department does not regulate the contract between the rating group sponsor and the employer: "With limited exceptions explained in these rules, the Department is not involved in the private contractual relationship between group sponsor and group member." WAC 296-17B-200. Premium refunds are the property of the group sponsor, while premium assessments are its responsibility; the extent to which or how the individual employer benefits is governed by the private contract. *Id.*

Given the potential profitability of retrospective rating groups, these groups have become increasingly active in Washington State. Rating groups and their sponsors hire their own attorneys and regularly monitor and litigate workers' compensation claims to protect the groups' profits, separate and apart from employer members¹. In fact, retrospective rating groups are so well-known as litigants before the Board of Industrial Insurance Appeals ("the Board") that the Board issued a Significant Decision recognizing rating groups as separate entities from its members, with separate interests and rights to appeal and litigate in workers' compensation cases, separate and apart from the employer. *In re Tapia-Fuentes*, BIIA Dec., 06 15128 (2007).

Retrospective rating groups and their sponsors are also well represented in the higher courts, conducting business like suing employer members for failure to pay assessments and being sued by employer members for alleged misuse of refunds in violation of the contract between the sponsor and the employer members of the retrospective rating plan. *Tri-City Const. Council, Inc., v. Westfall*, 127 Wn.App. 669, 112 P.3d 559 (2005); *In re Wash. Builders Benefit Trust*, 173 Wn.App. 34, 45, 23 P.3d 1206, *review denied*, 177 Wn.2d 1018 (2013). The political

¹ Associated General Contractors of Washington proudly boasts in its Annual Report, publicly published on its website, www.agcwa.com, that in 2018 its retrospective rating program generated "\$425,743 on a closed year from favorable claim appeals," and more than sixty-three million dollars in three years in "whopping total combined refund."

activities of a retrospective rating group sponsor and the member services corporation it formed to administer its rating plan were before this Court as recently as 2015.² *Utter v. Building Industry Association of Washington*, 182 Wn.2d 398, 341 P.3d 953 (2015). Retired Justices Robert Utter and Faith Ireland reported the BIAW and its for-profit member services corporation to the Attorney General for suspected violations of the Fair Campaign Practices Act related to contribution of more than a half million dollars in workers' compensation premium refunds to the gubernatorial election campaign of Dino Rossi. *Id.* at 404.

This is the backdrop against which the activities of the retrospective rating group at issue in this case should be understood. The underlying facts in this case are drawn from the Certified Appeal Board Record (CABR), the superior court records and the briefs of the parties. For purposes of this amicus curiae brief the following facts are relevant: The Associated General Contractors of Washington is a professional association of building contractors which sponsors a retrospective rating group, also called Associated General Contractors. Conco & Conco Pumping, the Employer of injured worker Aaron Richardson, agreed to

² There are striking similarities between the behavior of the Associated General Contractors of Washington and its retrospective rating group, and the incestuous relationship between BIAW and BIAW-MSA in the *Utter* case. For example, the light duty job offer that was made to Mr. Richardson appears to have come from the association that was sponsoring the rating group, acting as its administrator and receiving program monies. *See* Appendix A, attached for ease of reference and contained in the Certified Appeal Board Record as Exhibit 1 to the Hearing Transcript in this case.

membership in the Associated General Contractors of Washington's rating group. *Richardson*, Slip Op. at 2.

RCW 51.32.090 provides that if an **Employer** can accommodate an injured worker's disability and offers an injured worker light duty work at full wages, the Department will reimburse the worker's wages up to fifty percent, not to exceed ten thousand dollars. RCW 51.32.090(4)(c). This represents a savings for a retrospective rating group because minimum temporary total disability benefits are sixty percent of a worker's wages. *See* RCW 51.32.090(1) & RCW 51.32.060. RCW 51.32.090 also provides that if the injured worker refuses a light duty job offered by the Employer, the injured worker's benefits can be terminated, which also results in a savings for the retrospective rating group.

Associated General Contractors offered Mr. Richardson, a career-manual laborer who did not graduate from high school, what was termed a "light duty job" reading safety manuals eight hours a day on the premises of yet another third party, a Resource Center funded by Associated General Contractors. *Id.* Unsurprisingly, Mr. Richardson lasted only one day, resulting in the termination of his benefits. Mr. Richardson appealed, ultimately to the Court of Appeals, which incorrectly found that the text of RCW 51.32.090(4) does not expressly answer the question of whether an entity other than the employer can make a light duty job offer on the

employer's behalf under RCW 51.32.090(4), amongst other findings. Mr. Richardson filed a Petition for Review to this Court on January 18, 2019.

III. STATEMENT OF THE ISSUES

1. Can an employer delegate its burdens under the IIA to another entity like a retrospective rating group or its sponsor?
2. For workers' compensation purposes, can an employer require a worker to enter into an employment relationship with another entity without that worker's consent?

IV. STANDARD OF REVIEW

Where, as here, an assignment of error addresses statutory interpretation, a matter of law, the standard of review of this Court is *de novo*. *Stuckey v. Dep't of Labor and Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

V. ARGUMENT

A. EMPLOYERS ARE STATUTORILY BARRED FROM DELEGATING THEIR DUTIES UNDER THE IIA

Before the IIA was enacted in 1911, injured workers were forced to sue their employers at common law to recover lost wages and medical bills; this system was "economically unwise and unfair." RCW 51.04.010. The "remedy of the worker" was "uncertain, slow and inadequate," but Washington State conceived a better remedy, the IIA:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

Id. Aware of the power imbalance between employers and workers, the Legislature took the additional step of providing that neither employers nor workers can delegate or contract around the burdens or the benefits of the IIA. RCW 51.04.060, the statute which bars such delegation, is much the same as it was when the IIA was enacted in 1911. It provides:

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

RCW 51.04.060. This is black letter law. It is also black letter law that an employer under the IIA is defined as “any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers.” RCW 51.08.070 (Emphasis added). Retrospective rating groups are defined elsewhere in the IIA and have no

duties to injured workers. *See* Chapter 51.18 RCW. The words used in the IIA are defined by the IIA: “Unless the context indicates otherwise, words used in this title shall have the meaning given in this chapter.” RCW 51.08.010.

The context of RCW 51.32.090(4) does not indicate otherwise. It is the “employer” as defined by RCW 51.08.070 who **must** offer light duty or transitional work, “the essence of which is the personal labor of such worker” for the employer. RCW 51.08.010. It is the “employer” as defined by RCW 51.08.070 that the Legislature sought to encourage to bring disabled workers back to work after an injury:

The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage **employers** at the time of injury to provide light duty or transitional work for their workers, wage subsidies and other incentives are made available to employers insured with the department.

RCW 51.32.090(4)(a)(Emphasis added). It is the “employer” as defined by RCW 51.08.070 who must provide light duty work for the worker within that worker’s medical restrictions and furnish “a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker’s disability.” RCW 51.32.090(4)(b). The “employer” as defined by RCW 51.08.070 is barred from exempting itself from this burden and

delegating it elsewhere “by any contract, agreement, rule or regulation.” See RCW 51.04.060. Therefore, an employer cannot delegate its duty to its injured workers to another entity, whether a rating group or business sponsor, as a “principal” delegating to an “agent,” or otherwise. The Court of Appeals erred in finding employers can assign the responsibility to provide light duty work under the IIA to an agent or other entity. “Any ambiguity in the language of the IIA must be resolved in favor of the injured worker.” *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 21, 201 P.3d 1011 (2009), citing RCW 51.12.010.

B. AN EMPLOYMENT RELATIONSHIP EXISTS ONLY WHEN AN EMPLOYEE CONSENTS

For purposes of workers’ compensation, an employment relationship exists only when: (1) the employer has the right to control the servant’s physical conduct in the performance of his duties and (2) there is consent by the employee to this relationship. *Jamies v. NDTIS Constr., Inc.*, 195 Wn.App. 1, 381 P.3d 67 (2016), citing *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). The right of control is not by itself determinative; to find an employer-employee relationship, a mutual agreement must exist between the employer and employee. *Id.* To thrust upon a worker an employee status to which he has not consented might deprive him of the valuable right to sue the so-called employer (here the retrospective

rating group or sponsoring business association which provided the so-called “light duty work”) for damages at common law. *Id.*, citing *Novenson*, 91 Wn.2d at 554-555. Here, Mr. Richardson did not consent to Associated General Contractors as his employer, either as a retrospective rating group or a business association of which his actual employer was a member. The idea that an employer can assign its duties under the IIA to another entity deemed its “agent” is dangerous, and likely to encourage further impingement on the protections of the IIA by rapacious retrospective rating groups and the business interests which sponsor them.

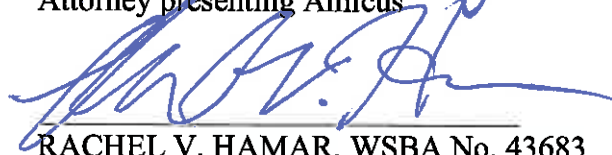
VI. CONCLUSION

Accordingly, the Amicus Washington State Labor Council respectfully suggests this Court should accept Mr. Richardson’s Petition for Review and remand the case to the Board to enter a finding that an employer cannot delegate its duties under the IIA to another entity pursuant to RCW 51.04.060, or for the taking of additional testimony regarding the relationship between Mr. Richardson’s employer and the retrospective rating group. RCW 51.52.115 (...Provided, that in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court.”).

Respectfully submitted this 15 day of March, 2019

A handwritten signature in blue ink, appearing to read "William D. Hochberg", written over a horizontal line.

WILLIAM D. HOCHBERG, WSBA No. 13510
Attorney presenting Amicus

A handwritten signature in blue ink, appearing to read "Rachel V. Hamar", written over a horizontal line.

RACHEL V. HAMAR, WSBA No. 43683
Attorney presenting Amicus

APPENDIX A



ASSOCIATED GENERAL CONTRACTORS of WASHINGTON

Skill • Integrity • Responsibility

Workers' Compensation / Group Retiro Program

June 15, 2015

Aaron Richardson
1448 Island Lake Rd NW
Silverdale, WA 98383

Sent by Certified and Regular Mail
7011 2000 0000 5344 6939

Re: Claim #: AV16762

Light Duty Job Offer

Dear: Aaron Richardson

Good news! Your doctor has released you to participate in temporary transitional light duty work. In order to accommodate your restrictions and minimize your risk for aggravating your condition, we are providing you with an opportunity to expand your knowledge of the construction industry through the Modified Duty Program. We have attached a job analysis that describes your light duty job and the sedentary physical requirements (reading and writing). If you should need special accommodation, please call us immediately; so we can make every effort to assist and/or accommodate you. The knowledge you will gain through your participation is readily applicable when you return to work, i.e. you will become more familiar with the construction safety regulations, proper lifting techniques, etc. After you complete and are familiar with the DOSH safety regulations pertaining to construction, there may also be an opportunity for you to receive Flagger certification, CDL certification, CPR/First Aid certification, and, if applicable, the opportunity to complete your GED.

Your participation will help lessen your financial burden as you will receive a higher rate of pay working light duty than you would via the Department of Labor and Industries (L&I) time loss compensation rate.

You will be paid your regular wage plus benefits per hour for hours of participation and you have been cleared by your doctor to participate at (40) hours per week.

Please report to the Modified Duty Site Resource Center in Tacoma on, Monday June 22, 2015. The center is located at 3680 S. Cedar Street, Ste. J, Tacoma, WA 98409. A map is enclosed for your convenience. Your hours will be from 6:00 AM to 2:30 PM, Monday through Friday. Any appointments (doctor, personal, physical therapy, etc.) should be made after work hours.

Your Modified Duty Site manager will be Tim Johnson and he can be reached at 253-474-1323. He will be responsible for reporting your attendance to Catherine Santucchi for payroll purposes. Please present picture ID when reporting to the resource center the first day.

The course material is in a user-friendly format. It is important that you communicate any questions or difficulties you experience to your modified duty site manager; so he can attempt to accommodate you. If you are unable to attend the light duty position, please call the modified duty site manager and your employer before work hours. It is also important that you abide by the rules and policies set forth by the modified duty site manager.

If you fail to report to the Modified Duty Site on the start date, this will be considered refusal of the approved light duty position offered and you may not be entitled to time loss benefits or Loss of Earning Power (LEP) from the Department of Labor & Industries.

www.agcwa.com

Board of Industrial Insurance Appeals
 In re: Aaron Richardson
 Docket No. 1517069
 Exhibit No. 5-2516
 ADM. REJ.
 Date

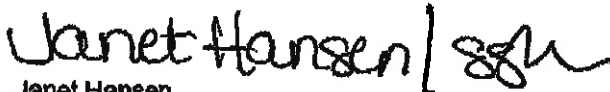
12629 • Olympia, WA 98508 • 360.352.1632 or 888.227.3876 • Fax 360.352.2940 or Fax 888.737.3876

Richardson, Aaron
AV16762
Light Duty Job Offer
Page Two

We hope you will take advantage of this opportunity to expand your knowledge in the construction field and we wish you a speedy recovery.

Please feel free to call us if you should have any questions. We look forward to hearing from you.

Best regards,



Janet Hansen
Claims Consultant

Enclosures: Job Analysis and Physician's Release for work
Directions/Map to the Modified Duty Site Resource Center

Cc: Maria Avalos, Department of Labor and Industries
Catherine Santucchi, Elizabeth Wrenn, Conco Cement Company
Tim Johnson, Tacoma Modified Duty Site Manager, Safety Educator's, Inc.
Thom Willson, Safety Educator's, Inc.
Small, Snell, Weiss, Comfort PS Atty, PO Box 11303, Tacoma, WA 98411-0303

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5, I hereby certify the Memorandum of Amicus Curiae was delivered to the below persons, as indicated, at the addresses listed below, by in-person filing or mailing a true copy of the same to said persons with postage prepaid by regular mail on March 15, 2019.

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HOCHBERG & HAMAR, PLLC

March 15, 2019 - 5:18 PM

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Comments:

Memorandum of Amicus Curiae - accompanying Motion to allow Amicus in support of Petitioner Richardson's Petition for Review

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