NO. 96834-9

SUPREME COURT OF THE STATE OF WASHINGTON

SUKHJIT AHLUWALIA,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Sukhjit Ahluwalia's attempt to shift his litigation costs from his workers' compensation appeal at the Board of Industrial Insurance Appeals to the Department of Labor & Industries raises no issue of substantial public interest. The Industrial Insurance Act does not allow Ahluwalia to shift costs or obtain attorney fees, and Ahluwalia had no basis to do so under RCW 4.84.185, the frivolous defense statute, because the Department acted with reasonable cause and the defense was not frivolous.

Ahluwalia sought retraining after his claim closed and the Department notified him of his eligibility for vocational services, and in this notification advised him of his right to appeal. He did not appeal. Later, however, Ahluwalia refused to participate in vocational services and instead sought a pension, and at this point the Department suspended his workers' compensation benefits. The parties had many months of communications back and forth and the Department provided multiple extensions so that Ahluwalia could return to vocational services, but the dispute ultimately needed to be resolved by the Board. At the Board, this procedurally complex case boiled down to the meaning of these communications. The parties disputed whether one of these many communications, an October 23, 2013 letter, was a continuation of approved vocational services—which would require no new notification about appealing—or was a new referral—which

would require a new appeal notification Ahluwalia could then appeal to seek a pension.

The Board ultimately found that Ahluwalia had good cause to refuse to cooperate with the vocational services because the Department should have notified him of a right to appeal. Although the Board concluded the Department was wrong and should have issued a new notification, the Board concluded that the Department did not act in bad faith when it asked the Board to weigh in and rejected Ahluwalia's claim for attorney's fees under RCW 4.84.185. The superior court also held that Ahluwalia did not qualify for fees under that statute, and the Court of Appeals affirmed.

The Board, superior court, and the Court of Appeals all appropriately ruled that the Department did not act unreasonably, so its defense was not frivolous for purposes of RCW 4.84.185. Ahluwalia's attempt to re-litigate this fact-bound dispute does not present an issue that warrants review.

II. COUNTERSTATEMENT OF THE ISSUES

Review is not warranted in this case. If review were accepted, the issue presented would be:

> RCW 4.84.185 allows fees for frivolous defenses advanced without reasonable cause. The Department issued a 15-day notice allowing a dispute over a vocational plan, and declined to reissue a new notice when it continued work on

the original plan. Neither WAC 296-19A-030, WAC 296-19A-040, WAC 296-19A-440, nor WAC 296-19A-450 state a second notice requirement, but the Board held that the Department had erred and should have issued a new notice. Nevertheless, the Board rejected the worker's attorney fees request premised on RCW 4.84.185. Did the trial court abuse its discretion when it denied attorney fees based on the conclusion that the Department's defense was not frivolous?

III. STATEMENT OF FACTS

The Director of the Department has the discretion to provide vocational services when vocational services are both necessary and likely to enable the injured worker to become employable at gainful employment. RCW 51.32.095(1). If vocational assessment shows the worker cannot return to work or obtain new employment, the Department may provide retraining as part of the vocational plan. RCW 51.32.095(2), (5)(b). Workers and employers may dispute the Director's decisions to provide vocational rehabilitation services. WAC 296-19A-410, -420.

The Department also "has the authority to reduce, suspend or deny benefits when a worker (or worker's representative) is noncooperative with the management of the claim." WAC 296-14-410(1); *see also* RCW 51.32.110.[1] A worker may dispute that suspension of benefits by establishing that the worker has good cause for failing to cooperate.

[1] Non-cooperation means behavior by the worker or worker's representative that obstructs or delays the Department from reaching a timely resolution of the claim, including refusing to participate in vocational services. WAC 296-14-410(2), (2)(i).

RCW 51.32.110(2). The case at the Board where Ahluwalia sought attorney fees arose out of these two Department decisions.

A. Ahluwalia Did Not Dispute His Enrollment in Vocational Services and Participated in Plan Development

Ahluwalia injured his low back working at PEPSICO Distributors in 2007. CP 137. The Department allowed his claim and provided treatment and wage replacement benefits. After Ahluwalia was able to work, the Department requested Ahluwalia to participate in a vocational assessment and his vocational counselor recommended retraining. *See* CP 137. Ahluwalia had also asked for retraining in a hand-written letter. CP 156-58.

On August 28, 2012, the Department approved the vocational counselor's request to develop a retraining plan for Ahluwalia and sent the plan development notification to all parties. CP 168-69, 170. Ahluwalia had the right to file a dispute within 15 days, but he did not. CP 168; WAC 296-19A-410, -420, -450.

Ahluwalia then worked for several months with his vocational counselor and health care team to develop a vocational goal and retraining plan that met his physical limitations and vocational aptitudes. *See* CP 172-75, 177-93. They developed a retraining goal of medical secretary and located a training program at Renton Vocational Technical College. CP

195-96. After developing the plan, the vocational counselor attempted to meet with Ahluwalia to review and sign the plan. *See* CP 195-98.

B. Ahluwalia Decided to Quit His Vocational Program to Seek a Permanent Total Disability Award Rather Than Cooperate with Training

On March 1, 2013, Ahluwalia sent the Department a statement that said:

> I Sukhjit Ahluwalia am declining Vocational Services and understand that those services will close and that Time Loss may stop as a result. I have met and discussed this matter with my attorney . . . and have decided under his advisement to choose this option.

CP 201. On March 5, 2013, the Department sent a letter to Ahluwalia asking him to explain why he refused to participate in the retraining he requested. CP 203.

Ahluwalia's legal representative responded that Ahluwalia no longer viewed his requested plan as a "reasonable plan" because he would be 67 and he could not obtain and maintain reasonably gainful employment in an entry-level position. CP 206-07; *see also* CP 229-36. The representative asked the Department to find Ahluwalia totally and permanently disabled instead and to place him on a pension. CP 207.

On March 6, 2013, the Department sent an order ending time-loss compensation. CP 204.[2] The March 6, 2013 order was formally superseded on April 22, 2013, when the Department issued an order suspending (but not closing) vocational services and time loss compensation because Ahluwalia failed to cooperate with vocational services he had sought before. AR 704.[3] This letter said "time-loss benefits ended 03/01/13 because: participation in vocational services has ended," yet on March 20, 2013, the Department granted him the first of several extensions to sign his retraining plan. CP 204. The Department may grant extensions for good cause and determines good cause on a case-by-case basis. WAC 296-19A-096(1).

On October 22 and 23, 2013, the Department sent Ahluwalia letters that approved continued vocational services for retraining plan development should he choose to begin to cooperate with the retraining program. CP 132-35. The October 23, 2013 letter provided until January 21, 2014, to finalize the training plan. CP 135.

Ahluwalia's legal representative sent letters to the Department on November 1, 2013 and November 12, 2013. CP 237-38. Ahluwalia asked the Department to "issue a (new) 15 day vocational determination which

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[2] The Department may change its orders within 60 days of issuing one. RCW 51.52.060.

[3] "AR" refers to administrative record in the certified appeal board record.

formally notifies and approves Mr. Ahluwalia for plan development" because "the suspension matters on this claim were set aside, and based on the actions of Kristina Ostler, Vocational Services Specialist, who indicated the department has approved the injured worker for plan development[.]" CP 237.

On November 15, 2013, in response to Ahluwalia's letters, the Department issued a letter informing him he could not have a new vocational development plan determination because he had not complied with the previous vocational services. CP 241. The Department affirmed the November 15, 2013 letter in an order dated October 8, 2014. CP 243. Ahluwalia filed in appeal to the order on December 16, 2014. AR 276. The Department reassumed jurisdiction on December 30, 2013 to reconsider the order. AR 276.

Between January 24, 2014 and November 12, 2014, the Department extended the plan development deadline several times to allow Ahluwalia to finalize the retraining plan. AR 277. On October 30, 2014, the vocational counselor submitted a plan development closing report, which found that Ahluwalia was "not able to benefit due to non-cooperation with vocational services." AR 277. On November 18, 2014, the Department terminated vocational services "because of circumstances unrelated to his workplace injury." AR 277.

On December 3, 2014, Ahluwalia's legal representative sent a letter to the Vocational Dispute Resolution Office (VDRO) protesting the November 18, 2014 letter. AR 554-56. Ahluwalia renewed his claim that he should receive a new vocational determination. AR 554-56.

On February 15, 2015, the Director of the Department sent Ahluwalia a letter stating that the Director would not refer Ahluwalia for additional vocational services because he failed to cooperate with the services already provided. *See* AR 659. Ahluwalia appealed this letter to the Board of Industrial Insurance Appeals. AR 238-48.

The Department also affirmed the November 15, 2013 letter in an appealable order on March 9, 2015 that said the Department would not let Ahluwalia dispute the vocational plan because he already had the opportunity to do so. CP 248. Ahluwalia appealed the March 9, 2015 order to the Board. AR 241. The Board consolidated the appeals.

C. The Board, Superior Court, and Court of Appeals Declined to Award Sanctions Because They Concluded That the Department's Defense Was Not Frivolous

The parties filed stipulated facts and agreed to address Ahluwalia's challenge of the Department's suspension of benefits with cross motions for summary judgment. AR 274-77. The industrial appeals judge issued a proposed decision and order concluding that Ahluwalia had failed to cooperate, but that "given the narrow circumstances presented in these

appeals," that Ahluwalia had good cause for his failure to cooperate. AR 245. Based on this, she reasoned that the Director "abused his discretion in failing to require his staff to issue a disputable/appealable order prior to forcing Mr. Ahluwalia to proceed with the disputed plan." AR 246. As a result, the Board remanded this matter to the Department.

After this, Ahluwalia moved for attorney fees claiming that the Department's defense was frivolous. CP 55. The Board denied the motion. CP 63-66. The Board noted that "WAC 296-19A-440(1) provides that a finding that an injured worker is eligible or ineligible for vocational rehabilitation services may be disputed" and "sections 2 and 3 of this regulation provide that an approved vocational rehabilitation plan may be disputed as well as an approved plan modification." CP 65. It recognized that "there is no evidence that any vocational rehabilitation plan was approved," so the appeals presented the question of whether the October 23, 2013 letter was a continuation of the approved vocational services or a new determination ("that would require the parties to have an opportunity to dispute the determination."). CP 65-66. It found "that the Department's defense was not frivolous or untenable given the circumstances of these appeals." CP 66. This means that it was not untenable for the Department to believe that the October 23, 2013 letter was a continuation of approved vocational services.

Ahluwalia appealed the Board's order denying attorney fees to superior court and the superior court affirmed. CP 1-5, 352-55.The superior court also found that the "Department's defense was not frivolous or untenable given the circumstances of these appeals" and granted summary judgment to the Department. CP 354. Ahluwalia moved for reconsideration again; and, the superior court denied reconsideration. CP 345.

Ahluwalia appealed. *Ahluwalia v. Dep't of Labor & Indus.*, No. 77018-7-I, slip op. (Wash. Ct. App. Nov. 13, 2018) (unpublished decision). The Court of Appeals rejected Ahluwalia's arguments and concluded that that the trial court did not abuse its discretion denying review under the facts of this case. *Id.* at 7.

IV. ARGUMENT

Ahluwalia's attorney fees claim does not raise an issue of substantial public importance because it is unique to the facts of this case and thus will provide no meaningful guidance for other parties, and because Ahluwalia provides no support for this Court to consider review under any other basis.[4] Prevailing workers have no right to attorney fees for work performed at the Board. RCW 51.52.120, .130. So, Ahluwalia argues that he should get fees under RCW 4.84.185. Even assuming this

[4] Ahluwalia suggests that the Court of Appeals' decision implicates RAP 13.4(b)(1), but offers no argument showing any conflict.

statute applies, this Court has no need to re-review the facts of this case to address whether the Department's defense at the Board was "frivolous and advanced without reasonable cause" as required for that statute. A frivolous action is one that, considering the action as a whole, a party cannot support with any rational argument. *Hanna v. Margitan*, 193 Wn. App. 596, 612, 373 P.3d 300 (2016). Ahluwalia fails to show that there is any reason for further review of whether the Department had some non-frivolous factual and legal basis for defending its decision to suspend his benefits after he failed to participate in the vocational services he requested.

A. There is no Substantial Public Interest Served by this Court Reviewing Ahluwalia's Fact-bound Claim That the Department's Position in this Unique Case was Frivolous

A fee dispute following an honest legal dispute is not an issue of substantial public importance. This case is a factual contest over whether the trial court abused its discretion in finding that an order of the Department, and later litigation in defense of that order, is not frivolous as required by RCW 4.84.185. Ahluwalia argues that the Department's position is not based on any rational argument on law or facts, but that position ignores the record before the Board and superior court.

While adjudicating Ahluwalia's participation in vocational services, the Department had sent Ahluwalia a notification of his

eligibility for vocational services. CP 168-70. Time and complications ensued and the Board ultimately believed that the Department should have sent another notification of eligibility. CP 51-52. But on this point, the Board believed it was reasonable for the Department to believe the October 23, 2013 letter was a continuation of the approved vocational services. CP 65-66. This is relevant because if it were a continuation of old services, the Department would not need to issue a new notification letter. Given the complicated procedural history, and the sequence of letters, including letters suspending the claim and not closing it, it was reasonable for the Department to think it was acting on the original plan determination, even if the Board later disagreed. Indeed, no regulations require the Department to provide a new notification letter. *See* WAC 296-19A-030 (no mention of additional notice until the Department approves the plan), WAC 296-19A-040 (discussing separate authorizations for "each referral," which doesn't apply because he was referred back to the same plan), WAC 296-19A-440 (discussing when there may be a dispute and making no mention of a dispute between the eligibility determination and plan approval), WAC 296-19A-450 (only discussing when Department must receive a dispute request from a party).

The Department considered its rules and applied them to the facts of this case.[5] The Department's reading of its own rules was reasonable and not a basis for fees and costs under RCW 4.84.185. As the Court of Appeals recognized, "[g]iven the convoluted procedural posture in this case, it was not unreasonable for the Department to assert [its] defense while seeking clarity from the industrial appeals judge." Slip op. at 3.

In short, there is no public interest served by this Court reviewing the fact-bound question of whether the Department's positions met the high standard of RCW 4.84.185 and amounted to "spite, nuisance or harassment." *See Biggs v. Vail*, 119 Wn.2d 129, 135, 830 P.2d 350 (1992) (RCW 4.84.185 only applies to "actions which, as a whole, were spite, nuisance or harassment suits."). The Department was simply defending the state fund against an argument it believed was wrong.[6] The Legislature made the Department the trustee of the state fund and so charged the Department to act to defend it. *See Clark v. Pacificorp*, 118 Wn.2d 167, 177, 822 P.2d 162 (1991), *superseded by statute on other grounds as*

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[5] "An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (quotations omitted).

[6] The parties filed stipulated facts and agreed to address Ahluwalia's challenge of the Department's suspension of benefits on summary judgment. The Department's agreement to streamline the appeals shows the Department's good faith. The only thing that has caused a "huge expense[] in term of attorney's time" are Ahluwalia's ongoing appeals to seek fees after he prevailed at the Board. Pet. 12.

stated in Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 128 Wn.2d 745, 912 P.2d 472 (1996). Although the Board was unpersuaded by the Department's arguments, the Department has compelling arguments that support its reading of the vocational rehabilitation rules as applied to Ahluwalia.

B. Ahluwalia's Argument That a Finding of an Abuse of Discretion Automatically Means a Finding of Frivolousness Lacks Merit

Ahluwalia argues that the Court should review this case to hear his argument that because the Board found that the Director abused his discretion by declining to issue a new 15-day notice, it equates to the type of frivolous or spiteful actions that allows fees under RCW 4.84.185. Pet. 17-18. This is not an argument that warrants review because no authority supports Ahluwalia's argument.

The abuse of discretion standard of review applies to vocational rehabilitation decisions. *See, e.g.*, *ITT Rayonier v. Dalman*, 122 Wn.2d 801, 810, 863 P.2d 64 (1993). This standard applies when the Director has made a discretionary decision, including a decision to grant or deny vocational services to an injured worker. *See id.* at 810. Ahluwalia is arguing that a finding of an abuse of discretion equals a frivolous defense. Pet. 17-18. None of the Board cases he cites stand for this proposition. More to the point, the Court of Appeals rejected this argument because

authority establishes that losing a case does not equal acting without reasonable cause. Slip op. at 4; *see also Mass. Mutual Life Ins. Co. Inc. v. Dep't of Labor & Indus.*, 51 Wn. App. 159, 166, 752 P.2d 381 (1988); *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 721, 42 P.3d 456 (2002); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-90, 86 P.3d 1231 (2004). Given that the Department has rational arguments to support its defense, the Board's finding that the Director abused his discretion by failing to issue a new notice does not transform that defense into one advanced without reasonable cause.

Ahluwalia's argument could trigger attorney fees claims every time a party lost a case on abuse of discretion grounds. That argument has no basis in the text or case law interpreting RCW 4.84.185. More importantly, the Legislature has shown no intent for this to occur in the vocational dispute setting. The Legislature gives the Department discretion about vocational decisions, but it has not provided for attorney fees at the Board to contest this discretion. RCW 51.32.095; *see Piper*, 120 Wn. App. at 889-90 (reaffirming RCW 51.52.120 does not provide attorney fees for work before the Board). The Court should not accept review in order to address that untenable application of RCW 4.84.185.

V. CONCLUSION

Review is not warranted because the Court of Appeals' decision does not implicate any of the reasons for review provided by RAP 13.4(b). The issue does not involve any colorable conflict among the lower courts. The issue of whether the Department's actions here violated RCW 4.84.185 is a matter relevant only to the parties to this litigation. Ahluwalia's broader arguments that equate an abuse of discretion with a violation of RCW 4.84.185 has no basis in the text of the statute, case law, and would inflict attorney fees liability on the Department in a way that undermines the clear policy of the workers' compensation statutes to deny such attorney fee shifting.

RESPECTFULLY SUBMITTED this 15th day of April, 2019.

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