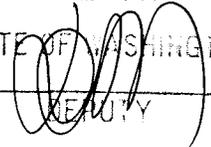


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No. 41649-2-II

STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MARGARITO BRAMBILA LOPEZ,

Respondent,

vs.

WASTE CONNECTIONS, INC.,

Appellant.

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**BRIEF OF RESPONDENT**

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Appeal from the Superior Court for Pierce County  
The Honorable Rosanne Buckner

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P.M. 8-1-2011

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## **I. INTRODUCTION**

The Self-Insured Employer (“SIE”) appeals a jury verdict and judgment in favor the injured worker. Sufficient evidence was presented to the jury to warrant a finding that Mr. Margarito Brambila Lopez sustained an industrial injury to his low back on May 17, 2007, in the course of employment with Waste Connections, Inc. (“Waste Connections”).

Waste Connections improperly encourages this Court to weigh the evidence presented as a means to reverse the trial court’s Judgment and Order; however, to weigh the evidence is to make credibility determinations properly reserved for the jury in this case.

## **II. ASSIGNMENTS OF ERROR**

- A. Mr. Brambila Lopez assigns no error to the trial court’s decisions.
- B. Issues Pertaining to Appellant’s Assignments of Error
  - 1. Whether there was substantial evidence to support the jury’s verdict that Mr. Brambila Lopez sustained an industrial injury on May 17, 2007.
  - 2. Whether the trial court properly awarded attorney fees and cost pursuant to RCW 51.52.130.

### III. PROCEDURAL HISTORY

Waste Connections correctly sets forth the Statement of Procedure in the Brief of Appellant at 2-4.

Waste Connections also notes in the Brief of Appellant at 13 that at the conclusion of the hearing, Waste Connections motioned pursuant to CR 41 (b) (3) to dismiss the appeal. See CABR<sup>1</sup> 133. In denying the SIE's motion to dismiss pursuant to CR 41 (b) (3), IAJ Douglas P. Franklin properly found that the testimony presented established "a traumatic happening did occur on May 17, 2007, when Mr. Brambila Lopez felt a sharp pain in his back while pulling a pallet off the conveyor line." CABR 178. Moreover, IAJ Franklin found Mr. Brambila Lopez's burden of establishing a prima facie case was sufficient with "Dr. Alinea's testimony that Mr. Brambila Lopez told him he injured his back when lifting a pallet, and Dr. Alinea's testimony that Mr. Brambila's pain complaint[s] were consistent with that type of injury." *Id.*

Prompted by Waste Connections' Motion to Dismiss, Mr. Brambila Lopez filed a Motion to Present Additional Evidence pursuant to RCW 51.52.102 premised on BIIA's granting the motion

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<sup>1</sup> Certified Appeal Board Record

to dismiss. CABR 190-193. Since the SIE's motion to dismiss was denied, Mr. Brambila Lopez's motion was also denied. CABR 200.

#### **IV. STATEMENT OF FACTS**

##### **A. Mr. Brambila Lopez's Notable Work History**

Mr. Brambila Lopez, currently age 63, worked for Waste Connections, Inc. for "well over 10 years." VRP<sup>2</sup> 9, 48. The manager described him as "a very good worker." VRP 48. During his 10+ years with Waste Connections, he never had a work related injury; in fact he never had called in sick. VRP 50.

##### **B. Mr. Brambila Lopez Was Injured While Working**

On May 17, 2007, as he pulled a 45 pound pallet from a conveyor belt, Mr. Brambila Lopez injured his low back. Ex<sup>3</sup>. 1, 2, 3. VRP 18-20, 55, Ex. 1, 2, 3. He told his supervisor, Gilberto Solorio (also known as "Pancho") that his back was hurting badly. VRP 21. The supervisor told him to go home before the end of his shift. VRP 21.

He was injured on a Thursday and was scheduled to work Friday. VRP 22. On Friday however, he called the manager of

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<sup>2</sup> Verbatim Report of Proceedings held on January 6, 2009.

<sup>3</sup> Exhibits admitted at Pierce County Superior Court.

Waste Connections, Siles Ceballos, and told him that he was going to see the doctor and couldn't go to work. VRP 22, 50.

C. Mr. Brambila Lopez Sought Medical Treatment But Did Not Immediately Report His Injury

Mr. Brambila Lopez was seen at Multicare Lakewood Clinic on May 19, 2007. 01/22/2009 Tr. 6, 8<sup>4</sup>. At that appointment, his chief complaint was back pain that had started two days earlier. 01/22/2009 Tr. 8. He did not report that his injury occurred at work. Mr. Brambila Lopez thought his back pain would get better with rest and Tylenol. VRP 31, 33, Ex. 9.

Mr. Brambila Lopez remained off work. Over the next several weeks, Mr. Brambila Lopez stayed in contact with Mr. Ceballos. VRP 30, 31, 47, 48, 75. He would tell Mr. Ceballos that he could not work because his back hurt. VRP 23. Thereafter, Mr. Brambila Lopez or his daughter would give Mr. Ceballos his doctor's notes that kept him off work. VRP 23, 24, 44, 45, 46, 50, 51, 75. Week by week he got permission from Mr. Ceballos to use his accrued vacation. VRP 51.

D. Mr. Brambila Lopez Reported His Injury To Waste Connections

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<sup>4</sup> Deposition transcripts are referenced by date of the deposition.

Several weeks after his injury, Mr. Brambila Lopez attempted to return to work. He worked from July 9, 2007 until July 16, 2007. VRP 52, 53. Realizing that the pain was not going away, Mr. Brambila Lopez reported his injury to Mr. Ceballos on July 17, 2007. VRP 54.

With the help of Mr. Ceballos, Mr. Brambila Lopez completed two incident/accident reports. VRP 57-62, 63-64, Ex. 10 & 11. Shortly thereafter, Waste Connections issued Mr. Brambila Lopez a written warning for "failure to report an injury to management" even though he clearly explained that he did not report it because he "thought some Tylenol would take care of the pain." VRP 56-57, Ex. 9.

#### E. Delayed Reporting Of Injuries Was Justified

Mr. Ceballos explained that he found "Hispanic workers" had a hard time reporting injuries; that they liked their jobs and wanted to keep working. He expounded that he had been working with the workers to get them to report their injuries. VRP 57-59.

Similarly, Dr. Jocelyn DeVita testified that she had encountered situations where patients did not like to report their injuries at work out of fear of losing their job. 01/22/2009 Tr. 18.

F. Waste Connections Gathered Information In An Effort To Deny His Injury Claim

Once Waste Connections learned of Mr. Brambila Lopez's job-related injury, this SIE began its own in-depth investigation.

ESIS is the insurance company hired by Waste Connections to oversee their workers' compensation claims. VRP 84. Sherry Christenson is a Senior Claim Representative for ESIS and was assigned to Mr. Brambila Lopez's claim. VRP 85.

Upon learning of the claim on July 26, 2007, ESIS sent a "Notice of Late Report of Worker's Compensation Injury." The notice warned that "there may be a violation of state guidelines in delayed reporting." VRP 86-88.

Then on August 22, 2007, Ms. Christenson took Mr. Brambila Lopez's recorded statement. The plant manager Mr. Ceballos was the interpreter for the interview. In his statement, Mr. Brambila Lopez again explained and she recorded in her file notes that he:

Thought Tylenol would take care of the problem on 5/17. He did tell his evening shift supervisor that he couldn't get in and out of the loader very well. They were going to work overtime so supervisor said, why don't you just go home at your regular time. Supervisor was the one that noticed he was not walking well or sitting well, and he knew he wasn't feeling well. So instead of staying until 1:00 to go

home at 12:00. Gilberto was the one that [] sent him home. However, he did not report an injury at that time. He went to the doctor on Saturday 5/19, to Lakewood Urgent Care. Siles had a note from them. He was also seen at SeaMar Community Health Service.

VRP 97-98.

On September 23, 2007, Ms. Christenson asked Inland Medical Evaluations to perform an IME on Mr. Brambila Lopez. Dr. Michael Barnard performed the exam and prepared a report dated October 2, 2007. Ms. Christenson testified that she had previously sent other injured workers to Dr. Barnard for their independent medical exam. VRP 89-90.

Upon receiving Dr. Barnard's report (that was favorable to Mr. Brambila Lopez), Ms. Christenson wrote him a letter. VRP 91-93. Contained in her file, there were two versions of Dr. Barnard's report. 02/18/2009 Tr. 23.

Shortly thereafter on October 8, 2007, Ms. Christenson requested a background check on Mr. Brambila Lopez, to include any criminal history, business licenses, and contractor licenses. VRP 94. The background check did not reveal any criminal history, business or contractor licenses, or other earnings outside of Waste Connections. VRP 95.

Her investigation continued when on October 17, 2007, manager Mr. Ceballos faxed Ms. Christensen a "To Whom It May Concern" letter. In that letter, he claimed to have hired Mr. Brambila Lopez to perform yard work. He also claimed that he issued Mr. Brambila Lopez a check for \$1,000.00 for work he had previously done. On the facsimile cover sheet, he wrote "Here is the letter I promised to send you. Hope it helps." VRP 69-70. Ex. 13 & 14.

The testimony of evidence revealed that Mr. Brambila Lopez, along with other Waste Connections workers, had gone to the manager's home to help him clean up leaves the previous fall – six or seven months before. Mr. Brambila Lopez was never paid, nor did he issue an invoice. In fact, none of the workers, including Mr. Brambila Lopez, expected any compensation. VRP 40, 41, 70, 71, 74.

G. There Is Sufficient And Substantial Medical Testimony Relating His Condition To His Workplace Injury

Dr. Jocelyn DeVita testified that pulling a 45 pound pallet from a conveyor, could more likely than not lead to a sciatic [nerve] injury, low back pain, and herniated disk. 01/22/2009 Tr. 22-23. Dr. DeVita confirmed that she did not relate the diagnosed

condition to a workplace injury because Mr. Brambila Lopez never stated that this occurred at work. (Emphasis added) 01/22/2009 Tr. 15.

Dr. Dean Ricketts diagnosed Mr. Brambila Lopez with a herniated disk at the L-4/5 level on the right, with nerve-root radiculopathy unrelated to his work activities. 01/23/2009 Tr. 18. He also testified that, "That opinion was based exclusively upon review of the medical records, which were provided, beginning with his earliest date of treatment on May 19th. And that was the problem [], in trying to determine which history was correct, the history provided in those records, which he had provided to the doctors he saw in the early weeks following his reported injury, or whether the history that he gave later on, to other physicians and to us, indicating that he had indeed injured himself at work with a specific incident..." 01/23/2009 Tr. 20.

Dr. Ricketts also testified that if Mr. Brambila Lopez had reported this injury to his employer within 24 hours, reported the symptoms that he was having such as sciatica and pain, and reported that he had hurt his back pulling a 45 pound pallet, then "I would say, on a more-probable-than-not basis, it was work related." 01/23/2009 Tr. 42.

Even Dr. Michael Barnard's first report unequivocally found Mr. Brambila Lopez's low back injury was related to his injury on May 17, 2007. In his report, he opined:

Herniated nucleus propulsis on the right at L4/5 with nerve root compression of L5 and positive EMG and nerve conduction studies of L5 radiculopathy related on a more probable than not basis to the industrial injury of May 17, 2007.

The medical evidence does support a traumatic incident of lifting and moving pallets on May 17, 2007.

He is unable to work at this time.

The recommended course of treatment as defined by Dr. Brown is decompression at L4/5. The surgical procedure is not only warranted, but in our opinion is long overdue.

VRP 91-93.

## **V. ARGUMENT**

### **A. Substantial Evidence Supports The Jury's Verdict That Mr. Brambila Lopez Sustained An Industrial Injury On May 17, 2007**

When reviewing a jury verdict in a workers' compensation case, the Court of Appeals need only determine whether substantial evidence supports that verdict. Here, there was substantial evidence to support the jury's finding that Mr. Brambila Lopez sustained an industrial injury on May 17, 2007.

In industrial insurance cases, the Superior Court conducts a de novo review of the BIIA's decision and relies exclusively on the certified board record. RCW 51.52.115; *Gallo v. Dep't of Lab. & Indus.*, 119 Wn. App. 49, 53, 81 P.3d 869 (2003), *aff'd*, 155 Wn.2d 470 (2005). The BIIA's findings and decision are prima facie correct and the party challenging the BIIA's decision has the burden of proof. *Gallo*, 119 Wn. App. at 53-54.

The Court of Appeals reviews the trial court's decision for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. *Harrison Memorial Hospital v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221, *review denied*, 147 Wn.2d 1011 (2002). The Court of Appeals is not to re-weigh or re-balance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury. *Id.* at 485, citing *Benedict v. Dep't of Lab. & Indus.*, 63 Wn.2d 12, 16, 385 P.2d 380 (1963) (appellate court has no right to substitute its judgment for that of trial court); *see also Du Pont v. Dep't of Lab. & Indus.*, 46 Wn. App. 471, 479, 730 P.2d 1345 (1986) (appellate court cannot substitute its judgment for that of the trial court); *Ritzschke v. Dep't of Lab. & Indus.*, 76 Wn.2d 29, 31, 454 P.2d 850 (1969) (where

findings are supported by record, appellate court will not substitute its judgment for that of trial court); *Scott Paper Co. v. Dep't of Lab. & Indus.*, 73 Wn.2d 840, 844, 440 P.2d 818 (1968) (appellate court tests "for sufficiency of probative evidence to support findings of fact").

Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility determinations are solely for the trier of fact and cannot be reviewed. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Mr. Brambila Lopez met his burden of proof at the trial. The jury rendered a unanimous verdict after being read all transcripts and testimony and being properly instructed on the law. The jury deliberated, weighed the evidence, and rendered a verdict finding that the Board of Industrial Insurance Appeals was wrong to deny Mr. Brambila Lopez's injury claim.

Waste Connections argues that the entire verdict should be reversed because there was insufficient evidence to support a verdict that Mr. Brambila Lopez's sustained an industrial injury. Although Waste Connections, Inc. couches its arguments in terms

of failing to make a prima facie case, Waste Connections, Inc. never moved for a directed verdict or for a judgment notwithstanding the verdict to the trial court.

Waste Connections now argues that there is no evidence establishing that Mr. Brambila Lopez sustained an industrial injury in terms of medical probability, not possibility. Contrary to Waste Connections' assertion, Dr. DeVita, Dr. Ricketts, Dr. Barnard, and Dr. Alinea all offered testimony that support a finding that pulling a 45 pound pallet, on a more-probable-than-not basis caused the injury to his low back and was work related.

Waste Connections asks this Court to give special consideration to Dr. DeVita testimony because she examined him shortly after he was injured. Brief of Appellant at 15-16. Nonetheless, Dr. DeVita confirmed that she did not relate the diagnosed condition to a workplace injury **because** Mr. Brambila Lopez never stated that this occurred at work.

Even so, Mr. Brambila Lopez has the benefit of all the medical testimony even when offered by Waste Connections. The jury was properly instructed, in Court's Instruction Number 1, that each party is entitled to the benefit of all of the evidence, whether or not that party introduced it. VRP 86. In this case, a rational, fair-

minded jury could also be persuaded that Dr. Michael Barnard's original opinions were correct when he wrote in his report:

Herniated nucleus propulsis on the right at L4/5 with nerve root compression of L5 and positive EMG and nerve conduction studies of L5 radiculopathy related on a more probable than not basis to the industrial injury of May 17, 2007.

The medical evidence does support a traumatic incident of lifting and moving pallets on May 17, 2007.

That said, any discussion about competing testimonies and inferences goes to the weight the jury might have given to various doctors' testimony. And we are reminded that it is improper to re-weigh or re-balance, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.

**B. Mr. Brambila Lopez Timely Filed An Industrial Injury Claim**

Waste Connections may very well have a company policy requiring its workers to report their injuries within 24 hours. However in Washington, a worker has one year from the day of the injury to file an industrial insurance claim. RCW 51.28.050; *Baugh Enterprises, Inc. v. Bungler*, 127 Wn. App. 1049 (2005); *Magee v. Rite Aid*, 182 P.3d 429, 144 Wn. App. 1 (2008); *Harman v. Dep't of Lab. & Indus.*, 111 Wn. App. 920, 47 P.3d 169 (2002).

Waste Connections made much ado about Mr. Brambila Lopez not reporting his injury right away. Yet a reasonable inference reveals that Mr. Brambila Lopez never really wanted to file a worker's compensation claim. He had hoped that with rest and Tylenol, the pain would go away. Keep in mind this is a worker who had never called in sick before this injury. On top of that you have the plant manager confirming that Hispanic workers did not like reporting their injuries because they wanted to keep working.

Additionally, once Mr. Brambila Lopez reported his injury, Waste Connections disciplined him with a written warning, requested a criminal background check, prepared memos alleging that he had outside employment, and wrote a letter to the "independent" examiner who in turn rewrote his report. In light of all this conduct, it really is not surprising that Mr. Brambila Lopez did not want to report his injury. Unfortunately after two months of rest, the pain did not go away.

Fortunately Washington law allows injured workers time to decide whether he or she really needs to file an industrial injury claim. If after a day or two - or even several weeks of rest - Mr. Brambila Lopez's back pain had gone away, he would not have filed a claim. Mr. Brambila Lopez should not be penalized for not

immediately filing a claim. In the interest of public policy and keeping administrative costs down, it is best to have a rule that allows workers to try to get better without having to file a claim for every ache that may arise during the course of his or her employment.

There is no dispute, within one year of May 17, 2007; Mr. Brambila Lopez filed an application for benefits alleging he injured his back in the course of his employment with Waste Connections. Accordingly under Washington law, he timely filed his claim for benefits.

C. The Trial Court Properly Awarded Attorney Fees

Waste Connections agrees that a worker is entitled to attorney fees where a court sustains his right to relief in an appeal. Brief of Appellant at 19, citing *Young v. Dep't of Lab. & Indus.*, 81 Wn. App. 123, 132 (1996); RCW 51.52.130. Waste Connections does not argue that the award of \$19,250.00 for attorney fees and \$1,748.60 for cost was incorrect. Mr. Brambila Lopez prevailed on his appeal and the court properly awarded his attorney fees and costs pursuant to RCW 51.52.130.

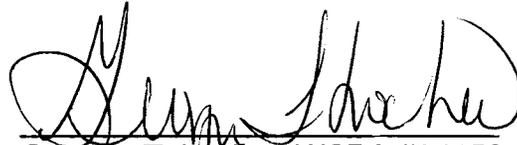
D. Mr. Brambila Lopez Requests Attorney Fees Pursuant To  
RAP 18.1 & RCW 51.32.130

This Court should affirm the judgment and verdict in favor of Mr. Brambila Lopez. Should he prevail to any degree, Mr. Brambila Lopez is entitled to attorney's fees on this appeal. RAP 18.1 and RCW 51.32.130 provides for attorney's fees before the Court of Appeals, following an appeal by an employer, if Mr. Brambila Lopez succeeds in defending his entitlement to benefits. *McIndoe v. Dep't of Lab. & Indus.*, 100 Wn. App. 64, 995 P.2d 616 (2000).

**VI. CONCLUSION**

The trial court properly entered a judgment in favor of Mr. Brambila Lopez following a jury verdict in his favor. Sufficient evidence was presented to the jury to warrant their finding that Mr. Margarito Brambila Lopez sustained an industrial injury to his low back on May 17, 2007, in the course of employment with Waste Connections, Inc. The trial court's judgment should be affirmed. If Mr. Brambila Lopez prevails and succeeds in defending his entitlement to benefits, this Court should award additional attorney fees.

Respectfully submitted this 1<sup>st</sup> day of August, 2011.

A handwritten signature in black ink, appearing to read "Georgia T. Locher". The signature is fluid and cursive, with a large initial "G" and "L".

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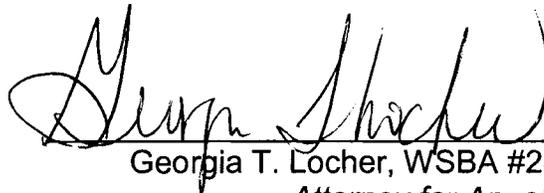
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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **Brief of Respondent** postage prepaid, via U.S. mail on the 1<sup>st</sup> day of August, 2011, to the following counsel of record at the following addresses:

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