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No. 52508-9-II

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

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

v.

ALEX WHITEHEAD,

Appellant,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Comes now the Appellant, Alex Whitehead, Plaintiff below, by and through his attorney of record, Nichole Lovrich of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby offers this brief in support of his appeal.

This case originates under RCW Title 51, the Industrial Insurance Act (“the Act”) from an Administrative Law Review (ALR) appeal from a April 13, 2017 Decision and Order of the Board of Industrial Insurance Appeals (“the Board”). The Board concluded that Mr. Whitehead’s wages were correctly calculated at \$2500 per month and the Department of Labor and Industries (“the Department”) order dated September 17, 2015, which affirmed the February 5, 2015 order was affirmed.

Mr. Whitehead appealed that decision to Superior Court asserting that the Board had erred in calculating Mr. Whitehead’s wage order and that the Employer had engaged in claim suppression. The Superior Court affirmed the Board’s decision after considering briefing and oral argument. Judgment was entered on May 11, 2018.

As will be described further below, the law and policy of the Act leads to the conclusion that the Department should find that Mr. Whitehead’s wage should have been calculated at \$3200 per month. The

Superior Court's decision, affirming the Board, undercuts the purpose and policy of the Act by allowing the Employer to engage in conduct that is not only illegal, but undermines the purpose of the Act and resulted in harm to Mr. Whitehead both financially and mentally.

II. ASSIGNMENTS OF ERROR

- A. The Superior Court, and the Board, erred in entering Finding of Fact 1.2 determining that a preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 5 of the Proposed Decision and Order adopted by the Board of Industrial Insurance Appeals as its Final Order.
- B. The Superior Court, and the Board, erred in entering Conclusion of Law 2.4 that the September 17, 2015 Department order which affirmed the February 5, 2015 order, that set Mr. Whitehead's monthly wages at \$2500 per month.

III. ISSUE

Whether the Board of Industrial Insurance Appeals erred in concluding that Mr. Whitehead's monthly wages were correctly set at \$2500?

IV. STATEMENT OF THE CASE

Alexander M. Whitehead was injured in the course of employment at Emerald Self-Storage and U-Haul ("ESS") on or about June 1, 2014. CP at 55. An order of the Department of Labor and Industries ("Department")

dated February 5, 2015 established gross monthly wages at the time of injury as \$2,500.00. *Id.* After protest and request for reconsideration, Mr. Whitehead's monthly wage of \$2,500.00 was affirmed by the Department on September 17, 2015. Mr. Whitehead appealed to the Board of Industrial Insurance Appeals ("Board") and, after hearings, Industrial Appeals Judge ("IAJ") Carol Molchior issued a Proposed Decision and Order affirming the Department's wage order. *Id.* Mr. Whitehead filed a Petition for Review with the Board which was denied by Board order on June 8, 2017. *Id.*

Thereafter, Mr. Whitehead appealed the Board's decision to Thurston County Superior Court where his appeal was assigned Cause No. 17-2-04062-0. A bench trial was held on March 23, 2018. Considering its reading of the entire record, briefing, and oral argument, the Court affirmed the conclusions of the Board. *Id.*

Mr. Whitehead worked for ESS, a storage unit business and U-Haul rental dealer in Bothell, WA, from September 15, 2011 through June 1, 2014. *Id.* He testified he never signed a contract for employment, only a W2. *Id.* All of his responsibilities were delegated by Kevin Anderson, who also trained him and was part owner of ESS. *Id.* Mr. Whitehead testified that he was hired to be the manager of ESS during the day and on-site security in the evenings. *Id.* As manager, Mr. Whitehead testified he would show units, run the customers through the contract, give them gate codes

for access, and explain rent payment procedures, working from 8am-430pm Monday through Saturday and 8am – noon on Sundays. *Id.* at 56. He also testified his duties as security included living on-site and making it known that there's always a body on-site watching and patrolling. *Id.* His security duties ran 430pm to 8am Monday through Saturday. *Id.* Mr. Whitehead understood, based upon his conversations with Kevin Anderson, that he was given the position so ESS could have an on-site manager perform security duties. *Id.* Mr. Whitehead also testified that he was on call 24/7 to perform his non-security duties for ESS should a need arise. *Id.* (“I would do whatever it took to please the customers, even if it was after hours.”).

Mr. Whitehead testified that he was not able to leave the premises for any significant length of time while he was on duty without the permission of Mr. Anderson. *Id.* Mr. Whitehead testified he was provided two business cellphones by ESS, that were for business purposes only from 830am to 430pm, but that he was allowed to use for personal reasons after hours. He also testified he lived on-site at ESS during the entire length of his employment, with ESS providing him a place to park his Airstream Recreational Vehicle (“RV”) and modifying the property to provide him electricity and water to the RV. *Id.* He was not required to pay rent, which was worth between \$800 and \$1200 per month based on his research. *Id.* He was also not required to pay for his power or water, which his research

revealed was worth between \$100 and \$300 per month, depending on usage. *Id.* Others who testified on Mr. Whitehead's behalf witnessed him working after hours and understood his duties required staying on-site around the clock on days he worked. *Id.*

After his employment ended, Mr. Whitehead contacted ESS about getting his final wages. *Id.* At 56-57. Thereafter, on September 11, 2014, he met ESS part-owner Brad Bannon, who forced Mr. Whitehead to sign a letter releasing ESS from all liability, including from L&I claims, before paying him his final wages owed. *Id.* At 57.

Mr. Whitehead testified he was paid \$2,500 per month in the form of two \$1,250 check, but he understood that his gross wages were \$3,200 per month and that ESS took out \$700 per month for taxes and other required withholdings. *Id.* All witnesses who testified for ESS admitted that ESS did not pay any taxes or other fees on Mr. Whitehead's behalf. Brad Bannon testified that he knew this practice to be illegal. *Id.* They also admitted not keeping any personal records, financial information, and not paying any L&I premiums for Mr. Whitehead. *Id.* In her decision, IAJ Molchior held that ESS benefited from Mr. Whitehead's presence after hours; that he was not merely living there as a courtesy, but was on call day or night. *Id.*

V. STANDARD OF REVIEW

A party aggrieved by an order of the Board may appeal to superior court. RCW 51.52.060. The superior court's review of the decision and order of the Board is de novo but based on the same evidence and testimony received by the Board. RCW 51.52.110. The appealing party has the burden to "establish a prima facie case for the relief sought." RCW 51.52.050. The superior court is empowered to reverse or modify the Board's decision if the court determines the Board incorrectly construed the law or found the facts. "The court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *McClelland v. I.T.T. Rayonier*, 65 Wn.App 386, 390, 828 P.2d 1138 (1992); *See also Ravsten v. Dep't of Labor & Industries*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (holding that the appellant must "establish that the Board's findings are incorrect by a preponderance of the evidence.").

On appeal from the superior court, the appellate court must ascertain whether there was substantial evidence to support the findings of the trial court. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964). "If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department [now board of industrial insurance appeals] as to that issue must stand; but, if the evidence produced by the party attacking the

finding preponderates in any degree, then the finding should be set aside.”
McLaren v. Department of Labor & Indus., 6 Wn.2d 164, 168, 107 P.2d
230 (1940).

In reviewing the decision from the Superior Court, the role of the Court of Appeals is to determine whether the trial court’s findings, to which error is assigned, are supported by substantial evidence and whether conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). Questions of law are reviewed de novo. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (Superior court’s legal conclusions are reviewed de novo); *Romo v. Dep’t of Labor and Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

The Department is charged with administering the Industrial Insurance Act, so the Court of Appeals affords substantial weight to its interpretation of the Act, but the Court of Appeals may nonetheless substitute its judgment for that of the Department’s because its review of the Act is de novo. *Dana’s Housekeeping, Inc. v. Dep’t of Labor and Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995).

Here, there is a legal question to be reviewed de novo. Namely, whether the Act, in light of its underlying purpose and policy, require a finding that Mr. Whitehead’s wages were incorrectly calculated at \$2500.

VI. ARGUMENT

A. The Purpose of the Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers Such as Mr. Whitehead.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 12 (1945); *Nelson v. Department of Labor and Industries*, 9 Wn.2d 621, 628 (1941); and *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 174 (1931).

R.C.W. § 51.04.010 declares "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault". Similarly, R.C.W. § 51.12.010 provides: This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

The Washington Supreme Court has repeatedly stated that, "The Industrial Insurance Act mandates that its provisions be 'liberally construed for the purpose of reducing to a minimum the suffering and economic loss

arising from injuries and/or death occurring during the course of employment' and courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001), citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("All doubts as to the meaning of the Act are to be resolved in favor of the injured worker."); *Dep't of Labor and Indus v. Johnson*, 84 Wn. App 275, 277-78, 928 P.2d 1138 (1996).

The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987)

Under accepted canons of statutory interpretation, each statutory provision should be read by reference to the whole Act. "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000). Historically, the Court has followed the rule that each provision of a statute should be read together with other provisions

in order to determine legislative intent. “The purpose of reading statutory provision in part material with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision ‘as constituting a unified whole, to the extent that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes.” *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In the case at hand, Mr. Whitehead is the injured worker, and therefore the Court must resolve any doubts as to the meaning of the Industrial Insurance Act in his favor. Thus, the Court must liberally construe the provisions of the Act for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring during the course of his employment. Here, the superior court’s findings and conclusions of law are not supported by substantial evidence because Mr. Whitehead proved that his wages should have been \$3200 month under RCW 51.08.178(1) as well as under the facts of this case in terms of the actions of the employer. The superior court’s decision is not supported by substantial evidence because the Judge abused her discretion in weighing the witnesses’ credibility. For the reasons elaborated below, liberal construction in this case dictates that Mr. Whitehead established through

both the law and witness testimony that his monthly wages should have been set at \$3200, not \$2500 as affirmed by the court. Therefore, contrary to the findings and conclusions of law of the superior court, Mr. Whitehead's wage order was incorrect and the decision should be reversed and remanded.

B. The Department's September 17, 2015 wage order should include the reasonable value of RV rental space, RV utilities, and a cellphone provided to Mr. Whitehead by his employer at the time of his industrial injury

RCW 51.08.178 provides that the "monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned." RCW 51.08.178 further states that "the term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of his contract of hire." The Court of Appeals, Division 2, construed the term "wage" to "include any and all forms of consideration received by the employee from the employer in exchange for work performed." *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 758, 790 P.2d 201, 205 (1990).

It is undisputed that Mr. Whitehead lived in his RV on-site at ESS the entire time he was employed by ESS. Even ESS part-owner Gary Mitchell, who claimed to work at ESS one day per week so that Alex could have a day off, admits that Alex was present at ESS whenever he went on-

site. In her decision, IAJ Molchior held that ESS benefited from Mr. Whitehead's presence after hours; that he was not merely living there as a courtesy, but was on call day or night.

Though it was previously argued that Mr. Whitehead was nonexempt employee under 29 USC 213, it is likely that Mr. Whitehead actually was exempt as RCW 49.46.010 controls in Washington. *See Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982). Among its definitions of exempt employees, RCW 49.46.010 includes "(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties." Accordingly, whether Mr. Whitehead was required to live on site, or simply on call 24/7, he was likely exempt and not entitled to overtime. However, all of this supports the argument that Mr. Whitehead needed to keep his trailer on-site in order to perform his duties for ESS. If he was on-call 24/7 as the IAJ held in her decision, then it makes logical sense that he needed to be immediately present at all times to perform his duties of being ever-available for ESS's customer base.

Additionally, the testimony of the ESS owners that the provision of a cell phone, parking space, water, and electric power was not part of the contract for hire between Mr. Whitehead and ESS should be discounted for

their lack of credibility as explained *supra*. This Court should find that the preponderance of the evidence shows that the Board was not correct in affirming the Department's wage order and should reverse and remand with instruction to include the reasonable value of RV rental space, RV utilities, and a cellphone provided to Mr. Whitehead by his employer at the time of his injury.

C. The Superior Court Judge Abused her Discretion in Weighing the Witnesses' Credibility.

1. Mr. Whitehead Provided All Evidence Available to him while the Employers admit to failure to keep records which they were required to

In making its ruling after trial, the Court stated "this is really a question of credibility." CP at 58. Such statement makes sense because, as noted by the Court, the owners of ESS admit to a "lack of employment contract or any documentation to indicate Mr. Whitehead's employment relationship, hours, schedule, et cetera." *Id.* As for Mr. Whitehead, she discounts his credibility because he did not provide sufficient explanation for why he did not question the lack of such things. When compared with the issues affecting the ESS employers' credibility, these supposed marks against Mr. Whitehead boil down to victim blaming.

The ESS employers were legally required to maintain personnel records such as those detailing Mr. Whitehead's contract for hire,

employment relationship, hours, and schedule. RCW 51.48.030; WAC 296-17-35201. Mr. Whitehead was not required to keep those records, nor was he required to investigate whether they existed while he worked for ESS. In the absence of written or recorded evidence of these things, all that remains is testimony. Mr. Whitehead provided all that he possibly could by putting on his own testimony and that of his lay witnesses. On the other hand, the ESS employers tried to avoid providing any evidence at all. The ESS employers failed to respond to multiple subpoenas for a records deposition in advance of hearings before the Board. ESS claims no personnel file exists, but such an assertion does nothing to explain why ESS owner Bannon refused to respond to the subpoenas. He could have simply appeared at the deposition and stated that no such records exist, but instead caused the waste of time and resources in attempts to secure his appearance. Such behavior must be counted against ESS' credibility in these proceedings.

This case demonstrates perfectly the reason why RCW 51.48.030 exists. Employers are required to keep employment and personnel records because of the power dynamic necessarily present in every employment relationship. ESS stood in a position of power over Mr. Whitehead. By either failing to keep or failing to produce the required records, they have deprived Mr. Whitehead of a fair trial. Mr. Whitehead was unable to

produce or keep those records. Employers must be required to keep personnel records to prevent against the type of exploitation perpetrated by ESS against Mr. Whitehead. By this same policy, it was wrong to find the ESS employers more credible than Mr. Whitehead. Holding so creates a dangerous precedent wherein an employer can simply avoid their obligations by failing to keep adequate, or any, personnel records.

2. Mr. Whitehead's Lay Witnesses' Testimony was Not Tainted by Interest

The weight of the evidence should have been found to be in favor of Mr. Whitehead because he put on disinterested lay witnesses whereas the Department put on only owners of ESS, interested parties to this matter. The Court held "each person who has testified either has a direct interest or has a relationship with a person who has a direct interest...there were no witnesses who were really neutral or detached, and so each of the witnesses has some credibility issues sort of built in." The Court ended its weighing of the credibility of the witnesses there, but that assessment is incomplete. The Court failed to account for the fact that the Department put on only witnesses with a direct interest while Mr. Whitehead put on disinterested lay witnesses. None of the lay witnesses that testified had a stake in the outcome of the case. While they might have been happy if Mr. Whitehead had won his case, none of them would receive a benefit from

it. Therefore, their testimony should be considered at least more credible than that of the ESS owners. The Court did not take this into account and, as such, committed harmful error when making its ruling.

3. The Employers' Conduct Amounted to Claim Suppression and the Court erred its Interpretation of 51.28.010

The Court held that there was no claim suppression in this matter because the conduct of the ESS owners did not stop Mr. Whitehead from filing or pursuing his claim for benefits. Such a holding displays a skewed understanding of what constitutes claim suppression. RCW 51.28.010(3) states Employers shall not engage in claim suppression and defines claim suppression as “intentionally: (a) Inducing employees to fail to report injuries; (b) Inducing employees to treat injuries in the course of employment as off-the-job injuries; or (c) Acting otherwise to suppress legitimate industrial insurance claims.” (emphasis added).

The conduct of the ESS employers amounts to claim suppression under RCW 51.28.010(3)(c). Nowhere in the statute or in any interpreting caselaw does it state that in order to prove claim suppression a party must have actually been prevented from filing or pursuing a claim. The items in the statute are separated by an “or,” meaning conduct meeting any of the listed items by itself is claim suppression under a plain reading of the law. RCW 51.28.010(3)(c) is about intent, not about effect. Caselaw

interpreting that indicates as much. In *Anderson v. Wal-Mart Stores, Inc.*, 2017 WL 1960673, the United States District Court for the Eastern District of Washington interpreted RCW 51.28.010 to conclude an employer had engaged in claim suppression when the employers conduct discouraged, but did not actually prevent, an employee for filing a claim. 2017 WL 1960673 at 23-25.

The ESS owners discouraged Mr. Whitehead from pursuing a worker's compensation claim and their conduct amounted to claim suppression. The Department admits that ESS did not pay any L&I premiums for Mr. Whitehead and were eventually assessed a penalty for failing to do so. Further, ESS either failed to produce or failed to keep any personnel records. ESS, through Brad Bannon also coerced Mr. Whitehead into signing an agreement releasing ESS from any liability for L&I claims by withholding Mr. Whitehead's final wages owed, then also threatened Mr. Whitehead's life in the process. Finally, ESS sought to interfere with the resolution of Mr. Whitehead's claim at the Board by failing to respond to discovery requests. To the extent that RCW 51.28.010 is at all unclear, all doubts must be read in favor of Mr. Whitehead. *Clauson*, 130 Wn.2d at 584. The Court was wrong to conclude that ESS did not engage in claim suppression and ESS's claim suppression must weigh heavily against the Credibility of ESS in the weighing of the testimony.

4. Policy and Precedent Dictate that Inferences from the lack of Necessary Evidence should be read Against the Employers because they are Responsible therefor

Because it is the fault of the ESS owners, not Mr. Whitehead that Court did not have before it any personnel records, contract for employment, or the like, the absence of such evidence must be read against ESS and the Department. In *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), the Court held:

Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

89 Wn.2d at 385-86, 573 P.2d 2. The Court has made clear that personnel records would be relevant to its determination. ESS was in control of those records, if any, and has a clear interest in their absence before the Board. Accordingly, the absence of that evidence must be read against ESS and the Department per well settled Supreme Court precedent.

Further, the Court made clear in *Clauson* its mandate of policy that all doubts as to the application of the industrial insurance act are to be resolved in favor of the injured worker. 130 Wn.2d at 584. Because Mr. Whitehead is not at all responsible for the lack of personnel records, the

underlying policy for the Act as stated by the Supreme Court establishes that their absence must not be read against Mr. Whitehead.

Mr. Whitehead's own conduct enforces his credibility. Whitehead testified to working nearly 24 hours per day, 6.5 days per week, or roughly 624 hours per month. (156 hours per week x 4 weeks per month). Mr. Whitehead's lay witnesses corroborated his working after hours by their own personal observation. At a salary of \$2,500, that would amount to \$4 per hour. That is way under minimum wage. It is not reasonable to think someone would work at that wage. This tends to indicate that his agreed gross wage was greater than that testified to by ESS.

D. The Record at the Board was Insufficient at No Fault to Mr. Whitehead and the Proper Remedy is Remand for Further Development of the Evidence.

Due to the lack of substantial evidence as to the core issues in this appeal, the appropriate remedy is to remand this matter back to the Department for further investigation and collection of necessary evidence. Such evidence would include, the actual value of the benefits provided by ESS to Mr. Whitehead in the form of parking space, utilities, phone, etc.; and a more-detailed assessment of the actual gross wages owed to Mr. Whitehead as part of the contract for hire. Due to the fact that such records were not made available at the Board, Mr. Whitehead was deprived of a

fair trial and the proper remedy is to remand this this matter to the Department for greater development of the record of evidence.

VII. CONCLUSION

Mr. Whitehead respectfully requests that the Court reverse the Superior Court's affirmance of the Board's order setting Mr. Whitehead's wage at \$2500 per month and conclude that the reasonable value of the employer-provided parking space, water, and cell phone are included in wages under RCW 51.08.178(1). Mr. Whitehead further requests attorney's fees pursuant to RCW 51.52.130 and RAP 18.1.

Dated this 11th day of March, 2019.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
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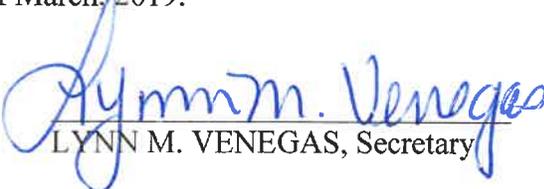
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