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

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DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent,

v.

ALEX WHITEHEAD,

Appellant.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUE.....2

III. STATEMENT OF FACTS.....2

A. The Department Allowed Whitehead’s Workers’ Compensation Claim and Asked Him to Provide Information About His Earnings to Determine His Monthly Wage Rate .....2

B. Emerald Self-Storage Paid Whitehead \$2,500 a Month to Manage a Small Storage Facility in Bothell .....3

C. Whitehead Lived On-site Free-of-Charge and Hooked Up to Rudimentary Utilities.....5

D. Whitehead Testified to Receiving Wages Higher Than What His Employer Testified to .....7

E. After Weighing the Testimony of the Witnesses, the Board Determined the Department Correctly Calculated White’s Wages Under RCW 51.08.178(1) .....9

F. The Superior Court Did Not Find Whitehead’s Testimony Credible, and It Affirmed the Board .....9

IV. STANDARD OF REVIEW.....11

V. ARGUMENT .....13

A. Substantial Evidence Supports the Superior Court’s Finding that Whitehead Had Total Monthly Wages of \$2,500 at the Time of Injury .....14

1. Substantial evidence shows that Whitehead’s basic monthly salary was \$2,500 .....15

2.	Substantial evidence supports that Emerald Self-Storage provided Whitehead a place to reside and utilities for his his convenience, not as part of his contract for hire .....	22
3.	Whitehead’s use of a cell phone for work-related purposes is not a benefit that should be included in his wage calculation .....	25
B.	Claim Suppression Is Not an Issue in this Appeal, So this Court Should Reject Whitehead’s Invitation to Consider It .....	27
C.	Whitehead’s Failure to Present Evidence to the Board That He Now Wishes He Had Offered Is Not a Basis for a Remand to Either the Board or Department.....	28
D.	Whitehead is Not Entitled to Attorney Fees .....	30
VI.	CONCLUSION .....	31

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Mt. Clemens Pottery Co.</i> , 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).....	20
<i>Brady v. Autozone</i> , 188 Wn.2d 576, 397 P.3d 120 (2017).....	20
<i>Cantu v. Dep't of Labor &amp; Indus.</i> , 168 Wn. App. 14, 277 P.3d 685 (2012).....	12, 27
<i>Clauson v. Dep't of Labor &amp; Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996).....	20
<i>Cockle v. Dep't of Labor &amp; Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	passim
<i>Cyr v. Dep't of Labor &amp; Indus.</i> , 47 Wn.2d 92, 286 P.2d 1038 (1955) .....	29
<i>Ehman v. Dep't of Labor &amp; Indus.</i> , 33 Wn.2d 584, 206 P.2d 787 (1949).....	21
<i>Erakovic v. Dep't of Labor &amp; Indus.</i> , 132 Wn. App. 762, 134 P.3d 234 (2006).....	17, 19
<i>Ferencak v. Dep't of Labor &amp; Indus.</i> , 142 Wn. App. 713, 175 P.3d 1109 (2008).....	17
<i>Fox v. Dep't of Ret. Sys.</i> , 154 Wn. App. 517, 225 P.3d 1018 (2009).....	12
<i>Guiles v. Dep't of Labor &amp; Indus.</i> , 13 Wn.2d 605, 126 P.2d 195 (1942).....	29
<i>Harris v. Dep't of Labor &amp; Indus.</i> , 120 Wn.2d 461, 843 P.2d 1056 (1993).....	21

<i>Harrison Mem'l Hosp. v. Gagnon</i> , 110 Wn. App. 475, 40 P.3d 1221 (2002).....	12, 16
<i>Hastings v. Dep't of Labor &amp; Indus.</i> , 24 Wn.2d 1, 163 P.2d 142 (1945).....	29
<i>Kirk v. Dep't of Labor &amp; Indus.</i> , 192 Wash. 671, 74 P.2d 227 (1937) .....	29
<i>Lenk v. Dep't of Labor &amp; Indus.</i> , 3 Wn. App. 977, 478 P.2d 761 (1970).....	30
<i>Lightle v. Dep't of Labor &amp; Indus.</i> , 68 Wn.2d 507, 413 P.2d 814 (1966) .....	28
<i>Matthews v. Dep't of Labor &amp; Indus.</i> , 171 Wn. App. 477, 288 P.3d 630 (2012).....	30
<i>Mercer v. Dep't of Labor &amp; Indus.</i> , 74 Wn.2d 96, 442 P.2d 1000 (1968) .....	28
<i>Pearson v. Dep't of Labor &amp; Indus.</i> , 164 Wn. App. 426, 262 P.3d 837 (2011).....	30
<i>Piers 67, Inc. v. King County</i> , 89 Wn.2d 379, 573 P.2d 2 (1977).....	20
<i>Raum v. City of Bellevue</i> , 171 Wn. App. 124, 286 P.3d 695 (2012).....	11, 21
<i>Rogers v. Dep't of Labor &amp; Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	11
<i>Ron Zion</i> , Nos. 16 18640 & 16 18839, 2017 WL 9854340 (Wash. Bd. Indus. Ins. Appeals August 16, 2017).....	26
<i>Rose v. Dep't of Labor &amp; Indus.</i> , 57 Wn. App. 751, 790 P.2d 201 (1990).....	23

<i>Ruse v. Dep't of Labor &amp; Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	12
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	12, 27
<i>Zavala v. Twin City Foods</i> , 185 Wn. App. 838, 343 P.3d 761 (2015).....	12, 16
<i>Zoff v. Dep't of Labor &amp; Indus.</i> , 174 Wash. 585, 25 P.2d 972 (1933) .....	29

**Statutes**

RCW 49.46.010(3).....	21
RCW 51.08.178 .....	22
RCW 51.08.178(1).....	passim
RCW 51.28.010 .....	27
RCW 51.28.025 .....	27
RCW 51.48.030 .....	18
RCW 51.52.050.....	28
RCW 51.52.050(2)(a) .....	2, 28
RCW 51.52.115 .....	16
RCW 51.52.130(1).....	30
RCW 51.52.140 .....	11, 28

**Regulations**

WAC 207-14-524.....	22
WAC 263-12-115(2)(a) .....	28

WAC 296-128.....	21
WAC 296-14-522(1).....	14
WAC 296-14-522(3).....	22

## I. INTRODUCTION

The Court of Appeals does not conduct trials de novo in workers' compensation appeals: it reviews the superior court's findings only for substantial evidence. Emerald Self-Storage paid Alexander Whitehead a monthly salary of \$2,500 to manage a storage facility in Bothell. His employer agreed he could move his RV onto the storage facility and live in it on-site because he could not find a place to live nearby and did not have a car. Whitehead later hooked up to the facility's electricity and non-potable water supply, but that was not part of his compensation agreement. He also received a cell phone to perform his job duties, but it was not for personal use.

Whitehead ignores the rule that appellate courts do not re-assess credibility and asks this Court to reweigh the evidence to find that his monthly wage was \$3,200, rather than the \$2,500, everyone testified Whitehead received each month. Whitehead also wants to include the gratuities he received from his employer as part of his monthly wage rate for his worker's compensation claim. This Court should decline to do so. Because substantial evidence supports the superior court's findings, this Court should affirm.

## II. ISSUE

1. A worker's monthly "wages" at the time of injury are the basis for calculating the worker's loss of earning power benefits. RCW 51.08.178(1). "Wages" include "the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer *as part of the contract of hire . . .*" RCW 51.08.178(1) (emphasis added). The employer witnesses testified that Whitehead was paid \$2,500 per month and that the RV rental space, utilities, and the use of the cell phone were not part of his pay. Does substantial evidence support the trial court's finding that Whitehead's wages were \$2,500 a month?
2. At the Board, the appealing party has "the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal." RCW 51.52.050(2)(a). Whitehead failed to present evidence of the actual value of the RV rental space, utilities, and the use of the cell phone he received from Emerald Self Storage while he was employed. Should this Court remand to the Board to take further evidence?

## III. STATEMENT OF FACTS

### A. **The Department Allowed Whitehead's Workers' Compensation Claim and Asked Him to Provide Information About His Earnings to Determine His Monthly Wage Rate**

Alexander Whitehead was injured in June 2014 while working for Emerald Self-Storage. AR 41.<sup>1</sup> The Department allowed the claim and provided benefits. AR 41. The Department issued an order that determined that his total monthly wages at the time of his injury—which are used to

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<sup>1</sup> The administrative record (the certified appeal board record) is referred to as "AR" followed by the witness name and page number. Exhibits are referred to as "AR Ex."

calculate certain benefits under the Industrial Insurance Act—were \$2,500. AR 36-38. Whitehead appealed the order to the Board. AR 29-30.

**B. Emerald Self-Storage Paid Whitehead \$2,500 a Month to Manage a Small Storage Facility in Bothell**

Emerald Self-Storage, a small storage facility in Bothell that also rented out U-Haul products, hired Whitehead to manage its day-to-day operations. AR Whitehead 7-8; AR Anderson 5-6; AR Mitchell 49. The Bothell facility is a two-story building on about an acre and a half of fenced paving. AR Anderson 5, 34. Most of the space is taken up with the U-Haul trucks and trailers that Emerald Self-Storage rents. AR Anderson 6. Before Emerald Self-Storage offered Whitehead a job, one of its owners allowed Whitehead to store his travel trailer at the owner's Gig Harbor site and live there, free of charge. AR Anderson 8-10.<sup>2</sup> Anderson, one of the owners of Emerald Self-Storage, offered Whitehead a job. AR Anderson 8-10. Anderson believed the job would be a good fit for Whitehead, who he understood to have been dealing with some personal issues. AR Anderson 11-12. Anderson also thought the change of scenery would be good for him. AR Anderson 11-12. Emerald Self-Storage had four owners—Phil Michelson, Kevin Anderson, Brad Bannon, and Gary

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<sup>2</sup> Whitehead began to live in his stored travel trailer in Gig Harbor, but he was not employed there. *See* AR Anderson 9-10. Whitehead asked Anderson if he could live there in his travel trailer, and Anderson acquiesced, but Whitehead did not have access to any utilities there. He was there for about a year. AR Anderson 8-10.

Mitchell—during the time that Whitehead worked there. AR Anderson 4-5; AR Mitchell 44-45.

Whitehead's job duties involved collecting the rent, answering customer calls, helping to rent units to customers who called or walked up, renting out U-Haul products, and keeping the premises clean. AR Anderson 18; AR Mitchell 49. Michelson, Anderson, Bannon and Mitchell testified that Anderson's job duties did not include overnight security and that it was not part of the job offer for him to live on-site. AR Anderson 13; AR Mitchell 49; AR Bannon 7. At some point in the summer of 2013, Whitehead also had a night job dishwashing for another employer. AR Anderson 15-18.

Emerald Self-Storage paid Whitehead \$2,500 per month through checks, which were issued twice per month. AR Anderson 15; AR Bannon 5-6; AR Whitehead 9. Emerald Self-Storage did not deduct any amount for taxes or mandatory contributions. AR Anderson 15, 24; AR Bannon 5-6. Whitehead's regular schedule at the self-storage unit was 40 hours per week, split over five and a half days per week. AR Anderson 18. His full day off varied depending on the schedule of Mitchell, who relieved Whitehead when he had a day off. AR Anderson 18; AR Mitchell 47-48.

**C. Whitehead Lived On-site Free-of-Charge and Hooked Up to Rudimentary Utilities**

The job offer itself in Bothell did not include the option of living on-site. AR Anderson 13; AR Mitchell 49. Anderson had never had an employee living on-site before Whitehead moved onto the Bothell property, and Emerald Self-Storage did not require him to provide overnight security. AR Anderson 13. Anderson relied on the variety of on-site cameras to watch over the area. AR Anderson 6-7, 25.<sup>3</sup> Bannon confirmed that Whitehead was living on-site because he did not have a vehicle to travel to and from work, so the owners allowed him to park his RV at the facility. AR Bannon . Whitehead had no duties after 5:00, although if he was on the premises and someone called to say they were locked out, Bannon assumed that Whitehead would help them out. AR Bannon 9. The employers testified that they did not require Whitehead to be on-site after business hours. AR Anderson 13; AR Bannon 14-15.

Although Whitehead lived there, the storage facility is not set up to maintain an RV; there was limited room because of the U-Haul trailers and there were no utilities set up. AR Anderson 13, 19-20, 27. The RV was self-contained, and at first Whitehead had no access to any utilities

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<sup>3</sup> Mitchell also testified that Whitehead was not fit to work as a night security person anyway because he was a regular user of marijuana and he drank. AR Mitchell 50-53.

from the site. AR Anderson 19-20. Mitchell later helped Whitehead hook up the electricity and the water. AR Mitchell 50-51; *see also* AR Anderson 19, 27, 38-39, Ex. No. 3. The only water available was for the heating system in the building, and should not have been used for drinking. AR Anderson 19. There was no facility available for flushing the toilet system out. AR Anderson 19-20. Emerald Self-Storage had a cell phone on-site for business calls. AR 14-15. The phone was supposed to remain in the office after 4:30 each day. AR Anderson 14.<sup>4</sup>

Around May 13th or 14th, Whitehead suddenly quit. AR Anderson 20. Anderson went to the facility and discovered that Whitehead had left the keys and was gone. AR Anderson 20. Whitehead did not say anything about quitting before he left. AR Anderson 20.<sup>5</sup>

After Whitehead left employment, he sought a final payment for working at Emerald Self-storage. AR Whitehead 26-27; AR Bannon 9-10. Whitehead described it as his “last check.” AR Whitehead 27. Brad Bannon met with Whitehead on September 11, 2014, to give him the

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<sup>4</sup> The testimony on whether Whitehead had his own cell phone is unclear. Several witnesses testified that they believed he had one, but Whitehead testified that he did not. AR Whitehead 20; AR Mitchell 55. Anderson testified the phone was for business purposes only. AR Anderson 14-15. Whitehead said he was allowed to use the phone for personal use after 4:30. AR Whitehead 21.

<sup>5</sup> Based on the testimony of Anderson, Whitehead was no longer working for Emerald Self-Storage on the date that he alleged he was injured. But allowance is not an issue in this case because the Department allowed the claim and no one challenged its allowance. AR 41.

money. AR Bannon 9-10. Bannon also asked that he sign a letter that said “I, Alex Whitehead, do hereby release BAMM NW dba Emerald Self Storage and BAM NW dba Affordable All Purpose Storage of any and all claims for unemployment and Labor & Industries claims. Now and in the future, I will also stay over 500 feet from each premises and not maintain any contact with all parties below.” AR Ex. 2 (listing the four owners of Emerald Self-Storage). Bannon testified that the purpose of the letter was to give Whitehead his final wages and to have him stay away from their premises and have no contact with any of the owners. AR Bannon 10-11. Bannon testified that he thought the settlement was provided because “it would be easier just to give him the money and say goodbye.” AR Bannon 11-12. The amount paid was the amount that Whitehead said he wanted. AR Bannon 11-12. “Whitehead said that \$850.00 cash, no check, would do the trick.” AR Bannon 12; AR Ex. 2.

**D. Whitehead Testified to Receiving Wages Higher Than What His Employer Testified to**

Whitehead testified that he believed that Emerald Self-Storage hired him to work as an on-site manager and also to provide security after hours. AR Whitehead 16-18. Contrary to the testimony of the owners, he stated that he was supposed to be on-site at all times and that if he wanted to leave he needed to clear it with Kevin Anderson. AR Whitehead 19.

Whitehead testified that he believed he was required to live on-site and that he moved on-site as soon he took the job there. AR Whitehead 22.

Whitehead testified that he believed that he was being paid \$3,200 per month, with \$700 per month being withheld, but he did not explain why he believed this to be the case. AR Whitehead 8-9. He testified that he first learned that Emerald Self-Storage was not withholding taxes after he had stopped working for them, years after he was first hired. AR Whitehead 10. Whitehead provided estimates of what he thought should be added to his wage rate for the first time on the first day of his Board appeal hearings. AR Colloquy 3-5. He testified that he believed the value of space was “anywhere from 800 to 1200, just by a couple of places [he] called. And that was including utilities.” AR Whitehead 23. He testified that he “vaguely had a little bit of understanding that [electric and water use] could have been anywhere from 100 to 300 a month based on usage.” AR Whitehead 25.

Whitehead also put on the testimony of his mother, Patricia Whitehead, and his friends, Jeremy Nation and Kevin Silverman. AR Patricia Whitehead 36-41; AR Nation 42-49; AR Silverman 50-55.

**E. After Weighing the Testimony of the Witnesses, the Board Determined the Department Correctly Calculated White's Wages Under RCW 51.08.178(1)**

In a proposed decision, the hearing judge concluded that Whitehead's wages were flat monthly rate of \$2,500, and she concluded that the Department correctly calculated his wage rate under RCW 51.08.178(1). AR 25-26. She also rejected the claim that he was worked 24-7 as a security guard and received fringe benefits as part of his employment contract. AR 25.

Whitehead petitioned for review of the hearing judge's decision to the three-member Board. AR 6-15. In his petition for review, Whitehead asked that wages be set at \$3,200, but also asked for a remand "or, in the alternative for the compensation rate of \$3,200 per month include additional compensation for the 24 hours a day, 7 days a week that claimant was required to work, as well as additional compensation for the fringe benefits he received." AR 7, 15.

The Board denied his petition and adopted the judge's decision as its final order. AR 3.

**F. The Superior Court Did Not Find Whitehead's Testimony Credible, and It Affirmed the Board**

After weighing the evidence, the superior court concluded that the Board properly calculated the wage at \$2,500. CP 52-54. The court

adopted the Board's findings of fact and conclusions of law. CP 52 (FF 1.2, CL 2.2). In particular, the court reasoned that Whitehead's claims that his wage was \$3,200 was not supported by the fact that he claimed an "even amount" of "\$700 was taken out for taxes and various other deductions that were all testified to" and "no tax documents are recorded for the years 2011, 2012, and 2013." RP I 36-37.<sup>6</sup>

The court recognized that "each of the witnesses" had "some issues related to credibility associated with what happened in this particular case[.]" RP I 36. For example, it recognized "[t]he owner employers inexplicably did not handle the employment of Mr. Whitehead correctly in terms of the law or just appropriate employer-employee relationship. That is exhibited by the lack of employment contract or any documentation to indicate Mr. Whitehead's employment relationship, hours, schedule, et cetera." RP I 36. But the superior court also recognized Whitehead "had no explanation as to why he didn't question some of these things earlier." RP I at 36. The superior court found it significant that the worker failed to report taxes over "three potential tax periods and over two years." RP I at 36.

The Court rejected Whitehead's claim that he was entitled "the reasonable value of RV space, utilities, and the cell phone" because "there is

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<sup>6</sup> The March 23, 2018 Verbatim Report of Proceedings for the bench trial are designated "RP I," and the August 24, 2018 Verbatim Report of Proceedings on Whitehead's Motion for reconsideration are designated "RP II."

no evidence other than Mr. Whitehead's statement and his apparent explanation to others that he knew that this was part of his job. Otherwise, there's no indication of that, and that is contrary to the testimony of the employer witnesses." RP I 37-38. The superior court reasoned that the "preponderance of the evidence is in favor of finding that there was no requirement that Mr. Whitehead stay on-site and that he was allowed to have his RV there and to stay in it not as a requirement of the job but as an allowance." RP I 38. Finally, the Court concluded that the employer did not suppress the claim. RP I 38-39.

Whitehead moved for reconsideration, but the Court declined because it concluded it had "properly considered the facts, weighed the credibility of the witnesses, and [had] applied the law correctly." CP 55-66, 77; *see* RP II 5-6.

Whitehead then appealed to this Court. CP 75-76.

#### **IV. STANDARD OF REVIEW**

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-

81, 210 P.3d 355 (2009); RCW 51.52.140.<sup>7</sup> This Court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 859, 343 P.3d 761 (2015); *Gagnon*, 110 Wn. App. at 485.

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012). Where substantial evidence supports the trial court's findings, "we do not reweigh the evidence and substitute our judgment even though

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<sup>7</sup> The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases. *See Rogers*, 151 Wn. App. at 180.

we might have resolved the factual dispute differently.” *Zavala*, 185 Wn. App. at 867.

## V. ARGUMENT

This Court should decline Whitehead’s invitation to reweigh the evidence and reverse the decisions of the Department, the Board, and the trial court. The trial court found that Whitehead’s wages at the time of injury were \$2,500 a month, and substantial evidence squarely supports this finding. The owners of Emerald Self-Storage testified that Whitehead received a flat \$2,500 wage per month in two \$1,250 installments, that the RV storage and use of the facilities’ utilities Whitehead later took advantage of were for his convenience rather than as part of the contract for hire, and that while Whitehead had a cell phone that was available on-site, it was only for business purposes. A reasonable person could believe this testimony and find that Whitehead’s monthly wages were \$2,500, as the Department determined. Whitehead urges this Court to give his testimony more weight than it gives to the other witnesses. But this Court does not reweigh the evidence and does not revisit credibility determinations: it reviews the superior court’s findings only to see if substantial evidence supports them. The superior court’s findings are supported by substantial evidence, and Whitehead fails to show otherwise. This Court should affirm.

**A. Substantial Evidence Supports the Superior Court's Finding that Whitehead Had Total Monthly Wages of \$2,500 at the Time of Injury**

Whitehead fails to establish that the Department miscalculated his monthly salary, and substantial evidence supports the superior court's affirmation of the Department's decision. A worker's monthly "wages" at the time of injury are the basis for calculating some benefits under the Industrial Insurance Act, including time-loss compensation and loss of earning power benefits. RCW 51.08.178(1); *see also Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001). Under RCW 51.08.178(1), a worker with a "fixed" monthly salary has his or her wages calculated based on that salary.

The parties agree that Whitehead had a fixed monthly salary and that his wages should be calculated based on that salary, but disagree about what the amount of the salary was. "Wages" means "the gross cash wages paid by the employer for services performed[.]" WAC 296-14-522(1). "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law." WAC 296-14-522(1). Because the Department presented evidence that Whitehead's fixed monthly salary was \$2,500 and because a reasonable person could believe that testimony, substantial evidence supports the Department's

wage calculation and this Court should affirm the superior court's decision.

**1. Substantial evidence shows that Whitehead's basic monthly salary was \$2,500**

The superior court properly upheld the Department and the Board's determination that Whitehead earned a monthly salary of \$2,500 at the time of his injury, and substantial evidence supports this finding. A worker's monthly "wages" at the time of injury are the basis for calculating some benefits under the Industrial Insurance Act, including time-loss compensation and the worker's loss of earning power benefits. RCW 51.08.178(1); *see also Cockle*, 142 Wn.2d at 822. Under RCW 51.08.178(1), a worker with a "fixed" salary has his or her wages calculated based on that fixed monthly salary.

The parties agree that Whitehead had a fixed monthly salary at the time of his injury and that his wages should be calculated based on that salary, but disagree about the amount of the salary. The owners of Emerald Self-Storage testified that Whitehead's salary was \$2,500 per month, which it paid out through two paychecks each month. AR Anderson 15; AR Bannon 5-6. Whitehead agreed that that is what he received in each paycheck. AR Whitehead 9. Whitehead argued, however, that his monthly salary amount was \$3,200, and that \$700 was withheld to

pay various things. The owners testified, however, that they did not deduct any taxes or other amounts from the \$2,500 and that \$2,500 was the salary that Whitehead was paid, and did not agree that they agreed to pay him a \$3,200 salary and then deduct \$700 from that salary. AR Anderson 15, 24; AR Bannon 5-6.

When viewing the above evidence in the light most favorable to the Department, as must be done under the substantial evidence standard, the trial court finding that Whitehead had a fixed monthly salary of \$2,500 is supported. *Zavala*, 185 Wn. App. at 859; *Gagnon*, 110 Wn. App. at 485; CP 53 (FF 1.2, CL 2.2).

Whitehead turns the substantial evidence standard on its head, arguing that because he presented evidence that his monthly salary was \$3,200, the superior court's contrary finding is not supported by substantial evidence. AB 10.<sup>8</sup> It is not a question of whether Whitehead provided some evidence that he earned \$3,200—though here the evidence of that is limited to Whitehead's self-serving testimony—but whether

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<sup>8</sup> Whitehead's claim that superior court abused its discretion by weighing the witness's credibility is without merit and inconsistent with Whitehead's own position below. AB 13. At the trial court, Whitehead's counsel told the Court "this Court is reviewing this case de novo having had the opportunity to review the entire record. You are making a completely new determination based on your view of the evidence and these arguments." RP I 6. Any claim that the trial court erred by performing a de novo weighing of the evidence is contrary to the plain language of RCW 51.52.115, which provides that "[t]he hearing in the superior court shall be de novo" review of the record created that Board.

there is any evidence that could persuade a reasonable person that Whitehead's monthly salary was \$2,500. A reasonable person could reach that conclusion based on the testimony of Whitehead's employers.

Whitehead invites the Court to reweigh the evidence and make different credibility determinations than the superior court made. But the appellate courts do not do so under the substantial evidence standard, and this Court should decline Whitehead's invitation to reweigh the evidence. Furthermore, while this Court need not decide whether it independently agrees with the superior court's findings here, the superior court's findings are consistent with a common sense weighing of the evidence. It is implausible that the employer agreed to pay Whitehead \$3,200 with the idea that it would deduct exactly \$700 from that amount every month, as the amount that should be deducted from a given worker's wages vary considerably from worker to worker. It is more plausible that the \$2,500 that the employer actually paid Whitehead each month is the amount that it agreed to pay him.

Furthermore, not all contributions that an employer makes on a worker's behalf are included in a worker's wage calculation. Wages do not include employer payments for various government benefits. *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 770, 134 P.3d 234 (2006); *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 725-27, 175

P.3d 1109 (2008). In *Erakovic*, relying on the rule that “wages” must be “consideration” for worker services, the Court rejected the worker’s arguments that the Department must include her employer’s payments for social security and Medicare taxes, industrial insurance taxes, and premiums for accidental health, disability, and dismemberment insurance. *Erakovic*, 132 Wn. App. at 770. The *Ferencak* court applied the same analysis to unemployment compensation benefits, concluding that such payments by an employer are also not included in the calculation of a worker’s wages, even if the employer pays them on the worker’s behalf as a result of the worker’s employment. *Erakovic*, 142 Wn. App. at 725-26. So even if Emerald Self-Storage had made payments for social security, Medicare, or similar things on Whitehead’s behalf—which it did not—those payments would not be included in Whitehead’s wage calculation. AR Anderson 15, 24; AR Bannon 5,-6.

The superior court’s finding that Whitehead’s salary was \$2,500 is also supported by the fact that Emerald Self-Storage’s owners testified that they made no withholdings and no federal or state tax payments on Whitehead’s behalf. AR Anderson 15, 24; AR Bannon 5-6. Anderson acknowledged that they had failed to track anything besides cancelled paychecks and did not withhold or pay any taxes on Whitehead’s behalf. AR Anderson 15, 22, 24; *see also* AR Bannon 5-6. To be clear, the

Department does not condone the bad behavior of employers; that is why L&I audited Emerald Self-Storage and made it pay back the Department for its failure to pay industrial insurance premiums. AR Anderson 15.<sup>9</sup> But Emerald Self-Storage's failure to deduct taxes does not justify inflating Whitehead's monthly wage calculation by including amounts in it that the employer never agreed to pay him. Indeed, if anything, Whitehead's "under the table" compensation arrangement resulted in his take home pay being higher than it likely otherwise would have been because neither Whitehead nor Emerald Self-storage paid the taxes they were required to pay under state and federal law.

Furthermore, Whitehead's testimony was unclear on the nature of the payments that he claims were part of the \$700 figure. Whitehead testified that he understood that "\$700 of that *was the company paying in for my taxes, the social security, the FICA, unemployment, whatever* would be under the W-2 forms." AR Whitehead 9. As noted, Whitehead is not entitled to the employer contributions the employer would have made on his behalf. *See Erakovic*, 132 Wn. App. at 770 (employer contributions for social security and medicare taxes, industrial insurance taxes, and

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<sup>9</sup> RCW 51.48.030 requires employers to maintain industrial insurance records, allows the Department to assess penalties for the failure to do so, and bars employers from challenging an industrial insurance premium assessment the Department makes. But industrial insurance records are not at issue here.

premiums for accidental health, disability, and dismemberment insurance); *Ferencak*, 142 Wn. App. at 725-27 (unemployment contributions by employer are not wages).

It is a longstanding principle of wage and hour law that a court may consider the testimony of a worker about the worker's wages when there are no records, and an employer may not use the absence of records as a barrier to recovery, but Whitehead is wrong that the absence of such evidence may also be read against the Department. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946); *see also Brady v. Autozone*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017); *contra* AB 18. The Department is not tasked with keeping records here and cannot be held responsible for their absence. And in any case, substantial evidence supports the superior court's determination that Whitehead's monthly salary was \$2,500 a month. While the superior court could have perhaps have reached a different finding, it was not required to do so, and it committed no error in making the findings that it made.

The superior court recognized that Emerald Self-Storage "inexplicably" failed to keep records, but the court also recognized that Whitehead did not raise the issue over a period of several years, including "three potential tax periods." RP I 36-37. Neither *Piers 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), nor *Clauson v. Dep't of Labor*

*& Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996), stand for proposition that an employer's failure to keep records in a workers' compensation case may bar L&I from refuting a worker's claim.<sup>10</sup> *Contra* AB 18-19.

Finally, the doctrine of liberal construction provides no basis to reverse the trial court's decision. *See* AB 8-11. Under that doctrine, the court liberally construes the terms of the Industrial Insurance Act. RCW 51.12.010. Liberal construction "does not apply to questions of fact but to matters concerning the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Liberal construction does not apply when the court is reviewing the sufficiency of the evidence to support the fact-finder's decision. *Raum*, 171 Wn. App. at 155 n.28. It applies only to the construction of ambiguous statutes. *Id.*; *see also Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). This case does not involve an ambiguous statute that requires construction but, rather, whether substantial evidence supported the trial court's decision. The court's findings have such support here and should be affirmed.

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<sup>10</sup> Whether Whitehead was an exempt employee for the Minimum Wage Act is immaterial for the analysis here. *Contra* AB 12. Both parties agree that the question presented is whether the Department correctly calculated his wage rate under the wage provisions of RCW 51.08.178(1), not whether he is exempt under one of the provisions of RCW 49.46.010(3) or one of the provisions of the Minimum Wage Act regulations, WAC 296-128. AB 11.

**2. Substantial evidence supports that Emerald Self-Storage provided Whitehead a place to reside and utilities for his convenience, not as part of his contract for hire**

Whitehead is not entitled to a higher wage calculation based on side benefits he received from his employer because substantial evidence supports the trial court's finding that they were not provided as compensation for employment but for the convenience of Whitehead. Under RCW 51.08.178, "wages," in addition to a worker's basic monthly salary or hourly wage, also include "the reasonable value of board, housing, fuel, or other consideration of like nature *received from the employer as part of the contract of hire . . .*" RCW 51.08.178(1) (emphasis added); WAC 296-14-522(3)¶, -524. In *Cockle*, our Supreme Court held that the phrase "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival." *Cockle*, 142 Wn.2d at 822. However, fringe benefits that are not critical to protecting a worker's basic health and survival are not included in the wage calculation. *Cockle*, 142 Wn.2d at 822. And in any event, for the *Cockle* analysis to apply, a benefit must be provided under the contract of

employment, and cannot be something provided for reasons unrelated to the worker's employment.<sup>11</sup>

Substantial evidence supports the trial court's finding that Whitehead was allowed to live on-site at Emerald Self-Storage for his convenience, not under the contract of hire. The owners of Emerald Self-Storage testified that they did not require Whitehead to live on-site for their benefit; instead, Whitehead asked if he could move his RV onto their property because he had no other place to live, and could not afford to rent an apartment, and had no transportation to the location. AR Anderson 13; AR Mitchell 49. That this arrangement was merely for Whitehead's convenience is supported by the fact that before he became an employee for Emerald Self-Storage or any of its owners, Anderson allowed Whitehead to live at Anderson's Gig Harbor self-storage property in a travel trailer for around a year. AR Anderson 9-10. And Whitehead never worked for Anderson at the Gig Harbor site. AR Anderson 9-10. A reasonable fact-finder could conclude that Whitehead was simply allowed to move onto the premises because he had already been living for free at

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<sup>11</sup> Whitehead cites *Rose v. Department of Labor & Industries* for the proposition that any and all forms of consideration from an employer are included in a worker's wage calculation. AB 11 (citing *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 758, 790 P.2d 201 (1990)). But *Rose's* comment was dicta and *Cockle* expressly disapproved of it, holding that only benefits that are of like nature to board, housing and fuel are included in a worker's wage calculation. *Cockle*, 142 Wn.2d at 821-22.

Anderson's other location anyway, rather than finding, as Whitehead argues, that the employer provided Whitehead with a place to stay because it required him to be on-site at the property 24/7.

The fact that Emerald Self-Storage was not set up for anyone to live on-site also supports the finding that the employer allowed Whitehead to stay at the property for his convenience, not as a condition of employment and not as a benefit under the contract of hire. There was no hook-up for the RV's utilities, nor any way to flush the septic tank. AR Anderson 19-20. Mitchell later helped Whitehead hook up the electricity and the water at some point after he moved on-site. AR Mitchell 50-51; *see also* AR Anderson 19, 27, 38-39; AR Ex. No. 3. Just as Anderson allowed Whitehead to live in his travel trailer at the Gig Harbor facility, he allowed Whitehead to live in his RV at the Bothell facility. AR Anderson 8-15. This was not part of his contract for hire: the employer witnesses testified that his job duties did not include overnight security and that it was not part of the job offer for him to live on-site. AR Anderson 13; AR Mitchell 49; AR Bannon 7.

Additionally, Whitehead failed to establish that there is a readily determinable amount that should be included in his wage calculation. Under *Cockle*, a worker seeking to include an employer-provided benefit in a wage calculation must, among other things, establish that there is a

readily identifiable and reasonably calculable amount that should be included in that figure. Whitehead provided estimates of what he thought should be added to his wage rate for the first time on the day of hearing. AR Colloquy 3-5. He testified that he believed the value of the rental space was “anywhere from 800 to 1200, just by a couple of places [he] called. And that was including utilities.” AR Whitehead 23. A reasonable trier of fact could conclude that Whitehead’s estimate was too vague to be considered a “readily identifiable and reasonably calculable amount.” *Cockle*, 142 Wn.2d at 822. This is especially true given that Whitehead’s estimates were presumably based on the amounts RV owners typically paid in rent to businesses who catered to RV owners, while Emerald Self-Storage was not in the business of renting space to RV owners and did not provide the facilities that such businesses would have provided to their renters. But since Emerald Self-Storage only allowed Whitehead to stay on the property for Whitehead’s convenience and not as part of his contract for hire, his ability to stay on the property should not be included in his wage calculation in any event.

**3. Whitehead’s use of a cell phone for work-related purposes is not a benefit that should be included in his wage calculation**

The superior court properly rejected Whitehead’s argument that the employer’s decision to provide him with a cell phone should be included

in his wage calculation. There are two reasons why the superior court's decision was correct.

First, under *Cockle*, employer-provided benefits are only included in a worker's wage calculation if they are of like nature to board, housing, fuel, and medical coverage. *See Cockle*, 142 Wn.2d at 822. To be of like nature to those things, a benefit must be "critical to protecting workers' basic health and survival." *Id.* A cell phone is not analogous to board, housing, fuel, or medical care, as having a cell phone is not objectively critical to protecting a worker's basic health and survival. It therefore should not be included in the calculation of a worker's wages. *See Cockle*, 142 Wn.2d at 822; *see also Ron Zion*, Nos. 16 18640 & 16 18839, 2017 WL 9854340, \*3 (Wash. Bd. Indus. Ins. Appeals August 16, 2017).

Second, substantial evidence supports the superior court's finding that the employer provided the cell phone to Whitehead to use only for work-related reasons, not for Whitehead's personal benefit. The owners made clear to him that he should be leaving the business cell in the office at the end of his workday, and they did not make helping customers after business hours on the cell phone a requirement. AR Anderson 14. If Whitehead used the cell phone for his personal calls, he did so despite being told he was not permitted to do so. And though Whitehead testified otherwise, a reasonable person could believe the employer's testimony.

**B. Claim Suppression Is Not an Issue in this Appeal, So this Court Should Reject Whitehead's Invitation to Consider It**

The Industrial Insurance Act prohibits employers from intentionally inducing employees to fail to report injuries, or to otherwise suppress claims. RCW 51.28.010; RCW 51.28.025. The Department takes claims suppression seriously and penalizes employers when they fail to follow the workers' compensation requirements or stand in the way of workers' claims. RCW 51.28.025. But the Department did not issue an penalty assessment to the employer that is at issue here, and Whitehead filed his application to open a claim without any interference from the owners. The Department allowed the claim without any appeal or challenge from the employer. While a portion of the release letter—provided in exchange for the \$850 “final check”—can be read as a request for Whitehead to waive such benefits, since it did not suppress the claim, the court limited its impact in assessing credibility. AR Ex. 2; RP I 38-39. To the extent that the letter impacts the credibility of the witnesses, the superior court recognized it was a “questionable practice” and considered it in the weighing the credibility of the witnesses. RP 38-39. Nonetheless, the trial court concluded that Emerald Self Storage paid Whitehead \$2,500 per month. CP 52-54. Because this Court does not revisit credibility determinations,

claim suppression is not an issue here. *See Camarillo*, 115 Wn.2d at 71;

*Cantu*, 168 Wn. App. at 22.

**C. Whitehead's Failure to Present Evidence to the Board That He Now Wishes He Had Offered Is Not a Basis for a Remand to Either the Board or Department**

Whitehead's failure to offer evidence at the Board is not a basis to remand his case for a second bite at the apple. At the Board, the appealing party has "the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal." RCW 51.52.050(2)(a); *see also* WAC 263-12-115(2)(a) (the appealing party shall initially introduce all evidence in his or her case-in-chief); RCW 51.52.140 (practice in civil cases applies to workers' compensation appeals). The Legislature adopted this longstanding principle from case law in its original form in 1975. Laws of 1975, 1st Ex. Sess., ch. 58, § 1.<sup>12</sup> Consistent with the Legislature's intent in RCW 51.52.050, our Supreme Court has repeatedly held that appealing claimants must prove the Department order incorrect, and it has held them to strict proof of their right to receive their requested relief.

*Mercer v. Dep't of Labor & Indus.*, 74 Wn.2d 96, 101, 442 P.2d 1000 (1968)

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<sup>12</sup> The original statute read: "[w]henver the department has taken any action or made any decision relating to any phase of the administration of this title the workman, beneficiary, employer, or other person aggrieved thereby may appeal to the board and *said appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such an appeal.*" Laws of 1975, 1st Ex. Sess., ch. 58, § 1 (emphasis added).

(claimant must make a “prima facie case”); *Lightle v. Dep’t of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 5, 163 P.2d 142 (1945); *Guiles v. Dep’t of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942); *Kirk v. Dep’t of Labor & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); *Zoff v. Dep’t of Labor & Indus.*, 174 Wash. 585, 586, 25 P.2d 972 (1933).

Whitehead therefore had the initial burden of proof to show that he was entitled to higher wage calculation, including the value of the additional benefits he wanted included. But instead of presenting evidence of the actual benefits, Whitehead chose to provide rough estimates of what he thought should be added to his wage rate for the first time on the day of hearing. AR Colloquy 3-5. He testified that he believed the value of the rental space was “anywhere from 800 to 1200, just by a couple of places [he] called. And that was including utilities.” AR Whitehead 23. As Whitehead apparently concedes, that is not enough. *See* AB 19. But the fact that he chose not to provide the necessary evidence does not mean that “such records were not available at the Board.” *Contra* AB 19. It means he failed to seek that information and provide it in support of his appeal.

Likewise, his suggestion that this should go back to the Department because he failed to provide the necessary evidence at the Board is also without merit. AB 19. The Board may only consider and decide questions raised by the Department order, as limited by the issues raised by the notice of appeal. *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). But here the Department considered what Whitehead's monthly wages were and entered an order addressing them. AR 36-38. Whitehead cites no authority for remanding to the Department because he failed to present the evidence. No such authority exists.

**D. Whitehead is Not Entitled to Attorney Fees**

This Court should reject Whitehead's request for attorney fees. AB 20. Fees are awarded against the Department only if the worker requesting fees prevails in the action and if the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130(1); *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). To support his claim of attorney fees, Whitehead cites RCW 51.52.130(1). AB 20. An award of fees requires both that the worker prevail in the action and that the accident fund or medical aid fund be affected. RCW 51.52.130(1);

*Pearson*, 164 Wn. App. at 445. Because Whitehead should not prevail in this appeal, he is not entitled to attorney fees.

## VI. CONCLUSION

Substantial evidence supports the trial court's findings that Whitehead earned \$2,500 per month and that he received additional advantages for his own convenience and not under his contract of hire with his employer.

The superior court's conclusion that Whitehead's monthly wages should be calculated at \$2,500 flows from its findings. This Court should affirm.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of June, 2019.

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Melanie Pennington, Legal Assistant

**ATTORNEY GENERAL OF WASHINGTON - TACOMA LNI**

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