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Division II
State of Washington
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No. 52508-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX WHITEHEAD,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1. A Preponderance of the Credible Evidence Shows Mr. Whitehead's Wage Rate Should be Calculated Based Upon His Monthly Salary of \$3,200

Mr. Whitehead testified that he was paid \$2,500 per month, net of \$700 withheld for taxes and other payments. AR Whitehead 8-9. Mr. Bannon testified to willfully not withholding any taxes or other payments from Mr. Whitehead's wages despite knowing that it was illegal. AR Bannon 5. The evidence also shows that ESS unlawfully failed to keep any personnel records and tried to avoid their legal obligations under the Industrial Insurance Act by forcing Mr. Whitehead to sign an unlawful release of liability in order to collect his wages owed. *Id.* at 4, 10-11. Because ESS unlawfully failed to keep personnel records, this Court must weigh Mr. Whitehead's testimony against that of the ESS owners. Mr. Whitehead is simply the more credible party based upon what is shown in the record.

The Department's discussion about Mr. Whitehead's admitted neglect in filing his income tax returns during the first few years he worked at ESS is thinly veiled victim-blaming. The Department states that he did not bother "to pay his income taxes." Dept. Response at 9. This is false. He testified to believing that ESS was paying his federal income taxes on his behalf, which Bannon admits to knowing that ESS was legally required

to do. Further, the fact that ESS did not contest the results of the audit that resulted in ESS having to pay a penalty for failure to pay L&I premiums on Mr. Whitehead does not show that ESS is ignorant or naïve. It simply falls into their admitted pattern of avoiding legal obligation.

2. 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

The reasonable value of the RV rental space, utilities and cellphone provided to Mr. Whitehead should be included in his wage order. RCW 51.08.178(1) provides 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 the contract of hire.” Our Supreme Court has construed that definition to mean “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 v. Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001). In this case, the benefits Mr. Whitehead is seeking to have added to his wage order meet the standard set forth in *Cockle*, and the ESS owners’ testimony admits their knowledge of such.

The RV parking space provided by ESS to Mr. Whitehead is included in the plain language definition of wages under RCW 51.08.178: “the reasonable value of **board, housing**, fuel, or other consideration of

like nature...” (emphasis added). The provision of free parking for Mr. Whitehead’s RV is the same as providing an apartment to an employee or paying rent reimbursement. *Cockle* dealt with the issue of whether health care benefits could be included in the statutory definition of wages. Here, the free RV parking is included in the definition on its face and in its plain meaning. It even meets the standard from *Cockle*. Our Supreme Court expressed in *Clauson v. Dep’t of Labor & Indus.*, that it is a “mandate that any doubt as to the meaning of the workers’ compensation law be resolved in favor of the worker.” 130 Wn.2d 580, 586, 925 P.2d 624 (1996). The Department states this rule of liberal construction does not apply to questions of fact. Dept. Response at 2. This Court need not apply the mandate to resolve doubts in favor of the worker to factual questions here. The construction of RCW 51.08.178 is a legal question. To the extent there is any doubt as in the application to the facts in this case of RCW 51.08.178, or any of the case law interpreting that statute, *Clauson* mandates that those doubts be resolved in favor of Mr. Whitehead.

Housing is obviously critical to protecting one’s health and survival. *Cockle*, 142 Wn.2d at 822. Further, the ESS owners were aware that the particular housing they provided was critical to Mr. Whitehead. Kevin Anderson testified that he met Mr. Whitehead at the Gig Harbor ESS location where Mr. Whitehead was storing his RV. AR Anderson 9.

Mr. Whitehead later asked if he could begin living in his RV at that location and Anderson gave him permission. *Id.* Anderson also testified there were no water or electrical hookups at the Gig Harbor location for Mr. Whitehead. Common sense dictates that a person would not choose to live without power and water unless he or she had to. Anderson knew or should have known Mr. Whitehead needed to live in his RV. Brad Bannon testified that the purpose of Mr. Whitehead living at ESS was because Mr. Whitehead did not have a car or other available transportation to get to work. AR Bannon 7. Gary Mitchell testified that Mr. Whitehead was unable to find other housing; that despite trying to find another place to live, he could not get on a lease due to issues with his credit. AR Mitchell 49. The ESS owners each testified that living on-site was not a requirement of Mr. Whitehead's contract for hire. However, every one of them knew that he did not have another place to live and could not have done his job for ESS unless he lived on-site. ESS was also aware that Mr. Whitehead required a cell phone to function as shown in the testimony of Gary Mitchell that, upon hiring, Mr. Whitehead had to use one of ESS's phone numbers in order to open a checking account. *Id.*

Common sense also dictates that water and power are critical to the protection of one's health and survival, "without which the injured worker cannot survive a period of even temporary disability" as described

in *Cockle*. 142 Wn.2d at 821. In *Yuchasz v. Dep't of Labor & Indus.*, Division I explained that the term “fuel” as used in RCW 51.08.178 183 means fuel for heat. Wn. App. 879, 890-891 (Div. I, 2014). This shows that utilities such as water and electricity are within the umbrella of compensation “of like nature” to the board, housing, and fuel explicitly mentioned in RCW 51.08.178. The Board itself interpreted “fuel” in this way in *In re Brammer*, where it explained that “fuel” in RCW 51.08.178 referred to home utility expenses as opposed to transportation costs. BIIA 06 10641 (2007).

Finally, the Department repeatedly states that Mr. Whitehead’s living on the ESS premises was merely a convenience to him. However, this is clearly not so. Brad Bannon testified that he expected Mr. Whitehead to take calls from customers after hours and go open the gate for them if necessary. AR Bannon 9, 15. It is undisputed that these activities were included in Alex’s duties during normal business hours. Mr. Whitehead living on site provided mutual benefits to both ESS and himself, a fact recognized by the Industrial Appeals Judge who heard Mr. Whitehead’s appeal at the Board. AR at 25. ESS claims that Mr. Whitehead was not expected to perform any security duties, yet admits to only purchasing security surveillance services after Mr. Whitehead was terminated. Jeremy Nation testified he would visit Mr. Whitehead for an

overnight stay once every few weeks and observed Mr. Whitehead as being on duty all day long in his role for ESS. AR Nation 44-45. He would visit Mr. Whitehead in the evening and witnessed Mr. Whitehead taking calls from his employers, dealing with customers, and patrolling the lot.

3. ESS Engaged in Clear and Intentional Claim Suppression under RCW 51.28.010

The Department again attempts to paint the ESS owners as simply naïve while ignoring that Brad Bannon admitted during his testimony the September 11, 2014, agreement he made Mr. Whitehead sign before paying him his final wages owed was intended to release ESS from all liability from L&I claims.¹ *Id.*; AR Bannon 9-12. The Department claims that the agreement’s “apparent function” was to keep Mr. Whitehead away from the ESS owners and premises, even though it states directly on its face “I Alex Whitehead do hereby released (sic) [ESS] of any and all claims for unemployment and Labor & Industries claims.” Exhibit 2; Dept. Response at 12. Notably, this language is placed at the very top of the agreement, after the date and before any language about maintaining a distance from ESS. *Id.* Further, the Department tries to frame the September 11, 2014 agreement as a “note” that was “in artfully drafted.” Dept. Response at 12. However, the agreement states on its face that Mr.

¹ Such agreements are without legal effect under the Industrial Insurance Act, Title 51 RCW.

Whitehead was expected to release any future claims and maintain a distance from ESS “*in consideration of* \$850 cash.” Exhibit 2 (emphasis added). This reference to “consideration” clearly indicates the intent of the drafters to act as an agreement. Mr. Bannon’s testimony that he does not know who drafted the agreement is immaterial because he admits that he added his own name to it and it is uncontroverted that he brought it to his September 11, 2014 meeting with Mr. Whitehead to have him sign it. AR Bannon 20, 9-12.

Despite Mr. Bannon’s admitted ignorance to the fact that the attempted agreement is not valid under Washington law, a careful review of the record shows that the ESS owners were not so innocently naïve as posited by the Department. *Id.* at 12. Mr. Bannon knew taxes were not being paid on behalf of Mr. Whitehead and admitted to knowing this was illegal. *Id.* at 5. Kevin Anderson also admitted to this as well as that ESS was not paying L&I premiums for Mr. Whitehead, an offense for which they were audited and assessed a penalty. AR Anderson 15. Bannon and Anderson both admitted to not keeping any personnel records. *Id.* at 22-23; AR Bannon 4. Further, ESS failed to respond to discovery in this proceeding and Bannon failed to appear at the Board to testify as scheduled, which required this office to compel the testimony of Brad Bannon before the record in this matter could be closed.

RCW 51.28.010 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 actions of ESS were clearly taken to suppress the administration and resolution Mr. Whitehead’s legitimate industrial insurance claim. Because this case involves the weighing of testimony, this Court should keep ESS’s suppressive conduct in mind while assessing the credibility of its owners’ testimony.

4. The Doctrine of Invited Error Does Not Require That The Appellate Court Refuse to Review Errors Raised For the First Time on Appeal.

Under RAP 2.5(a), the appellate court may, but is not required to refuse review of errors not raised before the trial court. Thus, the court may consider errors raised for the first time on appeal.

The doctrine of invited error is a judicially created one, whose goal is to prevent a party from “setting up an error at trial” and then relying on such an error on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629

(1995)). In *Pam*, the State, wishing to create a test case, intentionally created the error upon which it later relied. 101 Wn.2d at 511. The Court determined that invited error applied here where the appealing party attempted to circumvent the avenue of appeals available at the trial court level. *Id.*

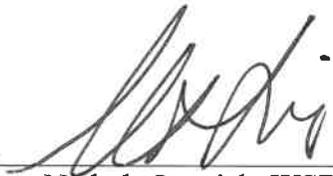
As noted in the dissent of *City of Seattle*, the invited error doctrine is a judicially created doctrine based on the principles of estoppel. 147 Wn.2d at 721-722. As such, it is not a complete bar to review. *Id.* at 722. Given that neither RAP 2.5(a) nor the doctrine of invited error are complete bars to the appellate court reviewing errors below, this Court may consider whether claim suppression is an issue in this appeal.

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 10th day of July 2019.

VAIL, CROSS & ASSOCIATES

By:  42305
Nichole Lovrich, WSBA #42305

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 10th day of July, 2019, the document to which this certificate is attached, Reply Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

James Mills
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PO Box 2317
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DATED this 10th day of July, 2019.


LYNN M. VENEGAS, Secretary

VAIL CROSS AND ASSOCIATES

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