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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 326756

Superior Court No. 132002179

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

Jose Ramos, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent

BRIEF OF APPELLANT

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III. INTRODUCTION

This appeal concerns a worker's compensation issue (Title 51 RCW), specifically whether wages earned by the same person at different times using his legal name and names other than his legal name (for which he had documentation) influence the determination of gross wages earned for purposes of calculating Department of Labor and Industries (Department) time loss compensation benefits.

IV. Statement of the Case

Jose Ramos was educated through the ninth grade in Mexico but came to the United States in 1988. (CP 83-84) He does not speak English.¹ When he got to the United States he worked as a laborer in fruit orchards. (CP 84) He testified that prior to his industrial injury he worked for a number of employers throughout Washington over a period of several years. (CP 85) He did not work for any one employer longer than 12 weeks before moving on to the next orchard. (CP 33) There was never any expectation that work with any one

¹ He spoke through an interpreter at the June 11, 2013 hearing. (CP 79-81)

employer was permanent or full-time. As a result Mr. Ramos traveled to where there was currently employment. Because the work was constant, he was only out of work approximately two weeks each year. (CP 85) In a signed declaration Mr. Ramos informed the Department that he worked full time or attempted to work full time. (CP 99)

Mr. Ramos candidly testified that in both 2008 and 2009 he would sometimes work under two names other than his own: (1) Miguel Amezola Farias and (2) Mario Marmolejo. He worked for various employers and was paid for work he actually performed using the name for which he currently had documentation. (CP 85, 89-90, 92)² He used the other names because he lost his wallet, leaving him without documentation, which was a requirement in order to work. (CP 87)

On September 3, 2009 Mr. Ramos was injured while working for Double S Orchards in Mattawa as an apple picker.

² This information was compiled into tables by the Industrial Appeals Judge (IAJ) in her Proposed Decision and Order. Table 1 shows the work history and wages earned up to the third quarter of 2009 while Table 2 presents the same information for calendar year 2008, which is the only relevant time period. (CP 33)

(CP 80, 84) His worker's compensation claim was accepted making him eligible for benefits, which included time loss compensation (TLC) wages.³ TLC wages are calculated according to a formula set forth in RCW 51.08.178. Mr. Ramos concedes his wages are governed by RCW 51.08.178(2). The portion of the statute that applies to Mr. Ramos states in relevant part: ". . . the monthly wage shall be determined by dividing by twelve the total wages earned . . . from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." (Emphasis added.)

That benefit originally was calculated at \$215-220 per month. (CP 45, 84-85) However, on July 6, 2012 Mr. Ramos' benefits were suddenly decreased when the Department determined he earned no wages in 2008 and his gross wages in 2009 were \$48.64 per month. This number was based on

³ Time loss compensation, also known as temporary total disability is a benefit that assists a worker while they are unable to work at their prior earning capacity as a direct result of an industrial injury. RCW 51.32.090. The fundamental objective of time loss compensation is to provide temporary financial support until the injured worker is able to return to any type of work at full capacity. *Energy NW v. Hartje*, 148 Wn. App. 454, 199 P.3d 1043, 1048-1049 (2009).

Employment Security records for the name Jose Ramos. (CP 69, 100-101) The Department concluded the drastically reduced TLC amount should have commenced in December 2009, a few months after the injury. (CP 49) Consequently, it determined Mr. Ramos had been overpaid in the amount of \$189.34 on one claim and \$229.50 on another. (CP 49, 62-63) As a result, the Department began to deduct a portion of the alleged overpayment out of each of Mr. Ramos' bi-weekly TLC checks. (CP 49-50) Disagreeing with the assessment, Mr. Ramos requested the Department reconsider its decision. It affirmed its prior ruling. (CP 71) Mr. Ramos then appealed the Department orders to the Board of Industrial Insurance Appeals (Board) challenging his gross monthly wages and the alleged overpayments. (CP 50) The Board granted his petition for review. (CP 50-51, 66, 74) The cases were consolidated for purposes of the appeal. (CP 78-80)

A hearing regarding the appeals was held on June 11, 2013 before an Industrial Appeals Judge (IAJ) during which live testimony was taken. (CP 80-93, 96-104) Mr. Ramos appeared telephonically from through an interpreter in the room with the attorneys and the IAJ. (CP 78-93) In her

Proposed Decision and Order (PDO) the IAJ affirmed the Department orders. (CP 27-35) Although Mr. Ramos filed a petition for review of the order, it was denied. (CP 6, 11-16) As a result, the PDO became the Board's final Decision and Order. (CP 6)

Mr. Ramos requested a trial de novo in the Adams County Superior Court pursuant to RCW 51.52.115. (CP 1) After a bench trial the court affirmed the Board's Decision and Order. (CP 121, 124-25) Findings and Conclusions were entered. (CP 127-128) This appeal resulted.

V. ASSIGNMENTS OF ERROR

1. The trial court's Findings of Fact # 1.3 and 1.4⁴ are not supported by substantial evidence and/or are contrary to law.
2. The superior court's conclusions of law # 2.3 through 2.6⁵ (CP 127-128) do not flow from its findings of fact.

VI. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The sole issue presented on appeal is whether the trial court's determination that the wages earned by Mr. Ramos in the third

⁴ (CP 127) in addition to the court's findings, the Board findings # 3, 5, 7-8 (CP 34) are also applicable to this appeal. (CP 34) The full text of the disputed findings and conclusions will be set forth below.

⁵ The full text of these conclusions of law will be set forth below.

quarter of 2008 to the third quarter of 2009 under the names Miguel Amezola Farias and Mario Marmolejo could not be considered for purposes of determining Mr. Ramos' gross monthly wage is supported by substantial evidence.

VII. ANALYSIS

A. Standard of Review

Review by the Court of Appeals is limited to examination of the record to see whether substantial evidence supports the superior court's findings of fact and whether its conclusions of law flow from its findings. *Ruse v. Dep't of Labor and Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999)(citation omitted). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *Ruse*, 138 Wn.2d at 5 (citing *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987)).

B. Discussion

1. Findings of fact

As an initial matter, Mr. Ramos contends the trial court's finding of fact #1.3 is contrary to law. Finding of fact

#1.3 states: “Mr. Ramos provided no evidence from any independent source that he actually was employed under the names Miguel Amezola Farias and Mario Marmolejo. He did not prove any source of income earned under these names.” (CP 127) Mr. Ramos will address these two sentences separately.

Mr. Ramos agrees the first sentence, taken alone is a true fact. But Mr. Ramos knows of no law that requires him to provide evidence from an *independent source* nor did the trial court cite to case law to verify its determination. When, as here, the standard of review is substantial evidence, Mr. Ramos is required to present sufficient evidence to “persuade a fair-minded, rational person of the truth of the matter asserted.” *Id.* He asserts not only is he *not* required to provide evidence from an independent source, the unrefuted, sworn testimony he did provide revealed that in 2008 and 2009, the year prior to his injury, he was employed at different employers under the names Miguel Amezola Farias and Mario Marmolejo, in addition to his legal name. Mr. Ramos testified that he had to work under the other names because he lost his wallet and could not work without proper

documentation. (CP 33, 85, 87, 89) The Department's sole witness, a claims consultant, did not say or even imply that Mr. Ramos was not employed under the names of Miguel Amezola Farias or Mario Marmolejo during that time period. She merely said she did not have that information. (CP 100-101) Because an independent source of evidence is not required and the only evidence provided under these facts was the testimony of Mr. Ramos, which stated definitively that he worked at different times for different employers under his legal name as well as the names Miguel Amezola Farias and Mario Marmolejo, substantial evidence does not support the first sentence of trial court finding #1.3.

Mr. Ramos also contends the second sentence of finding #1.3 is not supported by substantial evidence. The trial court determined Mr. Ramos did not prove any source of income earned under the names Miguel Amezola Farias and Mario Marmolejo. This is not true. Through an interpreter, Mr. Ramos gave sworn telephonic testimony at the hearing held on June 11, 2013. He testified that in 2008 and 2009, not only did he work under these names but was able to provide employer names, number of weeks worked and

wages earned from each employer. As set forth in footnote one above, this information was compiled into two tables by the IAJ in her Proposed Decision and Order. (CP 33) The Department did not refute this information. Its only response was to say that it asked Mr. Ramos for employer information but did not receive it. (CP 99-100) On cross-examination the Department employee was asked if she had asked Mr. Ramos if he had worked under different names. The answer was "No." (CP 102) She was then asked if a person *had* worked under different names in the year prior to the industrial injury is that is something that would be taken into consideration? She said that if a person could provide documentation "we would take that into consideration." (CP 102) At the June 11, 2013 Board hearing Mr. Ramos provided 2008 and 2009 Employment Security records for the names Miguel Amezola Farias and Mario Marmolejo and admitted that, at different times, he worked for several employers for documented wages under the names Jose Ramos, Miguel Amezola Farias and Mario Marmolejo. (CP 33, 85-90) Because the Department did not take into consideration the wages Mr. Ramos earned under the names Miguel Amezola Farias and

Mario Marmolejo it improperly calculated Mr. Ramos' gross wages, thus his time loss compensation benefit was improperly lowered. Substantial evidence does not support the trial court's finding that Mr. Ramos did not provide *any* information regarding the source of income earned under the names Miguel Amezola Farias and Mario Marmolejo.

Additionally, substantial evidence does not support the trial court's finding of fact #1.4, which states:

A preponderance of evidence supports the Board's Findings of Fact. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts Nos. 1 through 8 of the August 26, 2013 Proposed Decision and Order adopted by the Board of Industrial Appeals as its Final Order on October 21, 2013.

(CP 127) Because they are referenced by the court Mr. Ramos objects to Board findings #3, 5, 7-8. (CP 34)

Board finding #3 states: "On September 3, 2009, Jose Ramos was single, had no dependents, and earned \$48.64 monthly, based in \$583.73, earned for all of 2008 through 2009." Mr. Ramos will concede he was single and was unable to provide documentation that he supported his three children. However, he maintains his gross earnings were improperly

calculated for the purpose of time loss compensation benefits. The same analysis used above for trial court finding #1.3 is applicable here. Mr. Ramos presented unrefuted, specific sworn testimony that at different times in 2008 and 2009, in addition to working under his legal name, he worked and earned wages under the names Miguel Amezola Farias and Mario Marmolejo. The Department could not dispute that testimony. As a result, those wages were not properly included in his annual gross wages for the purpose of determining his time loss compensation benefits. Board finding #3 is incorrect, thus the trial court's finding #1.4, is not supported by substantial evidence.

Board finding #5 states: "Jose Ramos did not work under the names of Miguel Amezola Farias and Mario Marmolejo in 2008 and 2009." This just isn't supported by the evidence. The analysis set forth above also applies to this assignment of error. Mr. Ramos presented uncontested, very specific sworn testimony that he worked under these names at different times during 2008 and 2009, the year prior to his industrial injury. He not only presented clear evidence he worked under these names, he was able to provide the names

of employers, the number of weeks he worked and the wages he earned for each employer. Board finding #5 was incorrect, thus trial court finding #1.4 is not supported by substantial evidence.

Finding #7 states: "The Department correctly assessed an overpayment of \$189.34, for the time period of December 1, 2009, through December 1, 2011." Finding #8 states: "The Department correctly assessed an overpayment of \$229.50, for the time period of July 20, 2011, through May 23, 2012."

Mr. Ramos asserts the Board's alleged findings #7-8 are actually conclusions of law and cannot be analyzed as findings of fact. If a determination involves whether evidence reveals something occurred or existed it is accurately labeled a finding of fact. However, if a determination occurs through the process of legal reasoning from facts in evidence it is a conclusion of law. *State v. Niedergang*, 43 Wn. App. 656, 658-659, 719 P.2d 576 (1986). In the trial court's "findings" #7 and 8 the Board concluded that the Department's decision regarding the overpayments was correct. This determination involves legal reasoning from facts in the record. This is the

definition of a conclusion of law. The trial court's decision to adopt and incorporate by reference these two conclusions of law as findings of fact is improper.

2. Conclusions of Law

Mr. Ramos assigns error to the trial court's conclusions of law #2.3 through 2.6. Conclusion #2.3 states: "The Board's October 21, 2013 order that adopted the August 26, 2013 Proposed Decision and Order is correct and is affirmed." Conclusion #2.4 states: "The July 17, 2012 Department order that assessed an overpayment of \$189.34, is correct and is affirmed." Conclusion #2.5 states: "The July 18, 2012 Department order that assessed an overpayment of \$229.50 is correct and is affirmed." Finally, conclusion #2.6 states: "The September 10, 2012 Department order which affirmed the July 6, 2012 order, that set Mr. Ramos' wage rate is correct and is affirmed."

As set forth the in the standard of review above, the trial court's conclusions of law must flow from its findings. Trial court conclusion #2.3 relies on both its findings and the Board's findings since, as noted, they were adopted and

incorporated by reference in trial court conclusion #2.2. (CP 127) Mr. Ramos discussed above the fallacy contained in trial court findings #1.3 and 1.4 as well as Board findings #3, 5, 7-8. Because none of these findings are supported by substantial evidence in the record the conclusions cannot flow from the findings. Trial court conclusion #2.3 does not flow from its findings #1.3 and 1.4 because the unrefuted evidence reveals the Department improperly calculated Mr. Ramos' 2008 and 2009 employment earnings. Mr. Ramos, at different times, worked under his legal name, Miguel Amezola Farias and Mario Marmolejo. His earnings under each name are verifiable by Employment Security records.

The next three conclusions (#2.4 through 2.6) address the three different Department orders from which Mr. Ramos commenced this appeal process. (CP 38-39, 49-50, 62-63, 69-71) The Department orders affirmed by the trial court all depend on the determination the Board properly interpreted the evidence presented, which is shown to be false. Mr. Ramos' analysis has shown this court the Board's decision, as well as the trial court's affirmance of that decision is not supported by substantial evidence. Because the findings to

which error are assigned are erroneous, the disputed conclusions cannot flow from those findings.

C. Attorney Fees

If successful in his appeal, Mr. Ramos requests attorney fees pursuant to RAP 18.1, RCW 51.52.130⁶ and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Act in favor of the injured worker. The purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70.

⁶ The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

VIII. CONCLUSION

The court must liberally construe the Industrial Insurance Act “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment.” RCW 51.12.010 Doubts are resolved in favor of the injured worker. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 598, 257 P.3d 532 (2011).

The evidence is uncontroverted that Mr. Ramos worked throughout the state of Washington as an apple orchard employee under his legal name as well as the names Miguel Farias and Mario Marmolejo. As such there is no disagreement he is entitled to worker’s compensation benefits, which include time loss compensation. The Board’s final order agreed. Nevertheless, it declined to apply the wages earned under the two additional names to Mr. Ramos’ gross yearly wages, which left him receiving less financial compensation than the Department had originally calculated. The trial court compounded the error when it affirmed the Board decision.

For the reasons outlined above, Mr. Ramos asks this court to reverse the trial court decision and remand the case to the Department with the instruction that it include in his gross yearly wages for purposes of his time loss compensation calculation not only the 2008 and 2009 income earned and paid under his legal name but also the documented 2008 and 2009 income earned and paid under the names Miguel Amezola Farias and Mario Marmolejo.

Respectfully submitted this 3 day of March 2015.



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