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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32675-6

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

JOSÉ RAMOS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

A trial court properly rejects a witness's story that has "gaps and inconsistencies." The trial court did not believe José Ramos when he testified that he earned wages under two other names, in addition to his own, in the two years before his work injury. Ramos ignores the rule that appellate courts do not re-assess credibility and asks this Court to find his testimony credible. This Court should decline to do so. Because substantial evidence supports the challenged findings, this Court should affirm.

After Ramos was injured at work, the Department of Labor and Industries repeatedly asked him for work history and wage information to calculate his benefits. He stated in a declaration that he worked full time, but he did not provide any wage documentation. Nor did he tell the Department he had worked under other names. The Department set his monthly wage rate using the wages reported to the Employment Security Department under his name.

For the first time at hearing, Ramos asserted that he had earned wages under other names before his work injury. But neither the Board of Industrial Insurance Appeals nor the trial court believed this testimony. This Court should affirm.

II. ISSUES

1. Does substantial evidence support the finding that Ramos provided no evidence from any independent source that he was employed under the names of Miguel Amezola Farias or Mario Marmolejo where Ramos concedes in his brief that this is “a true fact” (App. Br. 7) and where both he and a Department witness testified that he provided no documentation to the Department that he ever worked under these names?
2. Does substantial evidence support the findings that Ramos did not work under the names Miguel Amezola Farias or Mario Marmolejo in 2008 and 2009 and that Ramos did “not prove any source of income earned under these names” where the trial court did not believe his testimony that he worked under these names?
3. Does substantial evidence support the finding that Ramos earned \$48.64 monthly, based on \$583.73, earned for all of 2008 through 2009 where employment security records showed these to be his earnings during this time period?

III. STATEMENT OF FACTS

A. The Department Allowed Ramos’s Workers’ Compensation Claim and Asked Him to Provide Information About His Wages, Work History, and Dependents in Order to Determine His Monthly Wage Rate for Benefit Purposes

In September 2009, José Ramos injured his knee and ankle while working as a seasonal apple picker at Double S Orchards, LLC. CP 80, 84, 90. He had been working at the orchard for about two weeks. CP 92.

Ramos filed a workers’ compensation claim under the name “José Ramos.” CP 90. His report of accident stated that he had three children, but he did not provide their birth dates. CP 100.

The Department allowed his claim. *See* CP 98. To determine his workers' compensation benefits, the Department asked Ramos about his wages, work history, and children. *See* CP 99-100.¹

Double S Orchards told the Department that Ramos was hired as a seasonal harvest picker and was not promised full-time employment. CP 98-99. The orchard planned to lay him off in mid-October. CP 99.

B. Ramos Never Provided Documentation To Support His Claim That He Worked Full Time Before His Work Injury or That He Had Dependent Children, and He Never Informed the Department That He Worked Under Other Names

When the Department asked Ramos about his work history, he provided a declaration that he worked full time, or attempted to work full time. CP 99. He stated that "there was no documentation to support that he had worked full time year-round work [sic]." CP 99. He did not provide information from any other employer to support his claim of full time work. CP 100. He did not tell the Department that he had worked under other names besides his own. CP 99.

The Department requested information about his children, including copies of their birth certificates, on five occasions, but Ramos never provided any information about the children. CP 91-92, 99-100. The

¹ An injured worker who cannot work because of the injury is entitled to time loss compensation benefits. *See* RCW 51.32.090. The benefit amount depends on the worker's monthly wage at the time of injury. *See* RCW 51.08.178. If a worker is married or has children, that worker receives a higher percentage of his or her monthly wages in time loss benefits. *See* RCW 51.32.060, .090.

Department's requests about his children also included requests for additional wage information. CP 99.

C. Because the Department Received No Documentation From Ramos About His Children or Any Other Wages He Earned Before the Injury, the Department Used Employment Security Records To Calculate His Monthly Wage Rate

The Department obtained employment security records for Ramos. CP 98, 100-01. The records showed that Ramos earned \$583.73 in the 12 months before the September 2009 injury. CP 100-01, 103-04. According to the records, these were the only wages he had earned since 2007. CP 103-104. Because Ramos did not provide any specific wage documentation, this was the only information that the Department received about Ramos's wages for the 12 months before the injury. *See* CP 99-100.

Based on these records and the employer's statements that Ramos was a seasonal worker, the Department determined that Ramos was a seasonal and intermittent worker whose wage rate was governed by RCW 51.08.178(2). *See* CP 98-99, 104. Ramos now agrees that he was a seasonal worker and that his wage rate should be determined by RCW 51.08.178(2).² *See* App. Br. 3.

² Ramos argued at the Board that he was a "year round employee" whose wage rate should be calculated under RCW 51.08.178(1). *See* CP 13-16. But he now concedes that his wages "are governed by RCW 51.08.178(2)," which relates to seasonal and intermittent employees. App. Br. 3.

Under RCW 51.08.178(2), a seasonal worker's monthly wage is calculated by dividing "the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern." RCW 51.08.178(2). The Department divided the total documented wages that Ramos had earned in the 12 months before the injury (\$583.73) by 12 to arrive at a monthly wage rate of \$48.64. CP 100-01, 103-04.

The Department issued a wage order in September 2012 affirming that Ramos had total gross wages of \$48.64 per month and that he was single with no children. CP 27-28, 80. Because the Department had paid provisional time loss benefits at a higher wage rate, the Department also issued two orders assessing overpayments—one assessing an overpayment of \$189.34 for the period from December 1, 2009, through December 7, 2011, and another order assessing an overpayment of \$229.50 for the time period of July 20, 2011, through May 23, 2012. CP 79-80.

D. At the Board Hearing, Ramos Was Unable To State His Children's Birth Dates

Ramos appealed the wage order and the two overpayment orders to the Board. *See* CP 27. At the evidentiary hearing, when Ramos was asked about the ages of his three children, he gave two different birth dates for

his son (who he did not identify by name), and he could only identify the birth year for one of his daughters:

Q: Do you have any children?

A: Yes.

Q: How many children?

A: Three children.

Q: And how old are they?

A: He is from January 19, 1996 of January 8, '96.

Q: And your other two children, how old are they?

A: Her name is Sandra, and also Maria Guadalupe. She was born in 2001.

Q: Mr. Ramos, do you currently provide support for those children.

A: Yes.

CP 83.

Ramos admitted that he did not provide any documentation, including birth certificates, to the Department to show that these children were his dependents. CP 91. He explained that he had not done so because he “moved out of a different residence, and I couldn’t find them, and it was difficult for me to find them right away.” CP 91-92. Ramos now concedes that he was “unable to provide documentation that he supported his three children,” and he does not argue in this appeal that these three children should be considered in his wage calculation. *See* App. Br. 10.

E. At the Board Hearing, Ramos Testified That He Worked Under Two Other Names in 2008 and 2009

Ramos testified that, on average, he was making \$1,500 to \$1,600 per month before his injury. CP 85. He testified that he worked regularly

the whole year, stopping only for two weeks when the apple season ended. CP 85.

In addition to working at Double S Orchards under his own name, he testified that he worked at six or seven employers under the name Miguel Amezola Farias in 2008 and 2009 and that he worked at one employer under the name Mario Marmolejo in 2008. CP 85-90. He explained that he worked under these names because these were names under which he “was able to get documents to find work.” CP 92.³

For the work under his own name, Ramos could not recall how much he worked or what he earned at Double S Orchards. *See* CP 85. When asked whether he earned \$583.73 for approximately 44 hours of work at Double S Orchards, he stated that he could not remember how much he earned but that he received “a couple checks” and was “making more than a hundred dollars a day before the accident happened.” CP 85.

For the work under the name Miguel Amezola Farias in 2009, he testified that, at the beginning of the year, he worked at Lawrence Orchards for “not a long time” and earned approximately \$413.16. CP 85-87. He stated that he “probably” worked one day at Crown Royal

³ The record does not support Ramos’s representation that he had to work under these two names because “he lost his wallet and could not work without proper documentation.” App. Br. 7-8 (citing CP 33, 85, 87, 89). Although he mentioned losing his wallet at an unspecified time (CP 87), he testified that the reason he worked under the two names was because they were “name[s] that I was able to get documents to find work because that’s what they ask you.” CP 92.

Orchards, LLC but did not say what he earned. CP 87. He testified that he worked at Desert Labor, but when asked whether he earned approximately \$4,847.14, he replied that he did not remember because “there was a time when I lost my wallet.” CP 87.

For the work under the name Miguel Amezola Farias in 2008, he testified that he worked for Bill Shlagel in the last half of that year and earned about \$4,082.14. CP 89; *see also* CP 91. He testified that he worked for Crown Royal Orchards, LLC and earned about \$913.20. CP 88. He testified that he worked for Washington Fruit and earned about \$1,627. CP 89. He thought that he worked at King Fuji Ranch and earned about \$1,004.87. CP 88. He testified that he worked approximately one day at G and P Orchard Leasing and earned \$75. CP 88. He did not state when during 2008 he worked at Crown Royal, Washington Fruit, G and P Orchard, or King Fuji Ranch. *See* CP 88-90. Nor did he state how many weeks he worked at Crown Royal, Washington Fruit, or King Fuji Ranch. *See* CP 88-90.

Under the name Mario Marmolejo, Ramos testified that if he worked under that name for Bill Shlagel in 2008, he would have earned approximately \$614.43. CP 90. When asked if he worked in the last half of that year for Shlagel, Ramos stated that he did not recall that year very

well “but if I did, I didn’t work for a long time under that name.” CP 90;
see also CP 91.

Ramos testified that he did not provide any information about his work under any other names to the Department. CP 91. He agreed that the only information that he provided to the Department was that he worked under the name José Ramos. CP 91. The Department’s claims consultant Kristine Davis testified that Ramos did not inform the Department that he had worked under other names. CP 99.

F. The Board Determined that the Department Correctly Calculated Ramos’s Wages Under RCW 51.08.178(2)

In a proposed decision, the hearings judge found that Ramos’s employment was seasonal and intermittent, and she concluded that the Department correctly calculated his wage rate under RCW 51.08.178(2). CP 34-35. In her proposed decision, she created a table summarizing all of the work that Ramos had testified that he had performed in 2008 and 2009 under his name and the other two names. CP 33. She stated that, even being generous in calculations, Ramos’s testimony did not support his repeated representations that he worked full time before the injury:

Claimant testified he made \$1500-\$1600 a month, which is roughly \$400 a week. Based on that assumption, claimant’s testimony, and being generous in calculations, claimant worked approximately 14 weeks in the third quarter of 2009. Claimant’s injury occurred in September 2009. Excluding September 2009 from the number of weeks

available in the first through third quarters of 2009, claimant worked 14½ of 35 weeks. . . . This does not constitute full-time year-round work.

CP 32 (footnote omitted). Using the same methodology, she noted that Ramos worked approximately 20 weeks in 2008. CP 33.

The judge found that Ramos was single, had no dependents, and earned \$48.64 per month based on earnings of \$583.73. CP 34. She found that he did not work under the names of Miguel Amezola Farias and Mario Marmolejo in 2008 or 2009. CP 34. She affirmed the Department's wage order and overpayment orders. CP 35.

Ramos petitioned for review of the hearing judge's decision to the three-member Board. CP 11-17. The Board denied his petition and adopted the judge's decision as its final order. CP 6-7.

G. The Superior Court Did Not Find Ramos's Testimony Credible, and It Affirmed the Board

Ramos appealed to superior court. CP 1. In a memorandum ruling, the judge rejected his arguments, noting that Ramos's testimony was not credible:

Upon reviewing the certified transcript of Mr. Ramos[']s testimony below, this Court finds that Mr. Ramos did not prove in this forum that he is entitled to be considered a full time worker with three dependents. Mr. Ramos testified as to two different birth dates for his alleged male child. He gave scant testimony as to the dates of birth of his two female children. He did not provide any official documentation as to his parentage. He provided no evidence from any independent source that he actually was

employed under the names of Miguel Amezola Farias or Mario Marmolejo. The gaps and inconsistencies in his testimony belied his position that he is a full time worker with three dependent children.

CP 125.

The trial court entered a finding that Ramos did not provide evidence from any independent source about his work under the other two names:

- 1.3 Mr. Ramos provided no evidence from any independent source that he actually was employed under the names of Miguel Amezola Farias or Mario Marmolejo. He did not prove any source of income earned under these names.

CP 127. The superior court also entered a finding (FF 1.4) that adopted and incorporated several of the Board's findings that Ramos now challenges on appeal, including:

3. On September 3, 2009, Jose Ramos was single, had no dependents, and earned \$48.64 monthly, based on \$583.73, earned for all of 2008 through 2009.
5. José Ramos did not work under the names of Miguel Amezola Farias and Mario Marmolejo in 2008 or 2009.
7. The Department correctly assessed an overpayment of \$189.34, for the time period of December 1, 2009, through December 7, 2011.
8. The Department correctly assessed an overpayment of \$229.50, for the time period of July 20, 2011, through May 23, 2012.

CP 34, 127; App Br. 5 n. 4. Ramos now appeals.

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 51.52.140.⁴ 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, 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*, ___ Wn. App. ___, 343 P.3d 761, 772 (2015); *Gagnon*, 110 Wn. App. at 485.

⁴ The Washington Administrative Procedure Act, RCW 34.05, does not apply to workers' compensation cases under RCW 51., RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180.

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 we might have resolved the factual dispute differently." *Zavala*, 343 P.3d at 772.

V. ARGUMENT

A. **Substantial Evidence Supports the Finding That Ramos Did Not Provide Information About Working Under Other Names to the Department Because Ramos Concedes That This Fact Is True**

Substantial evidence supports the finding that Ramos provided no evidence from any independent source that he was employed under the names Miguel Amezola Farias and Mario Marmolejo. CP 127; FF 1.3 (first sentence). Ramos concedes that this finding is "a true fact." App. Br. 7. Both Ramos and the Department's claims consultant testified that Ramos did not provide any information to the Department that he worked under other names. CP 91, 99. The finding is thus undisputed and supported by substantial evidence.

More to the point, this is an appropriate factual finding in a case that turns on credibility. Ramos asserts that this finding is "contrary to

law” because he “knows of no law that requires him to provide evidence” of wages “from an independent source.” App. Br. 6-7. Ramos misses the point.

Ramos fails to discern that independent evidence that corroborates otherwise self-serving testimony makes such testimony more credible. Because Ramos’s testimony that he worked under two different names was self-serving, it was reasonable and appropriate for the trial court, when assessing Ramos’s credibility, to consider whether he had presented any independent evidence to corroborate his self-serving statements. This was especially true given that Ramos admitted that he never told the Department that he had worked under other names, even though he had submitted a declaration to the Department about his work history. *See* CP 91, 99.

It was not until a Board hearing almost four years after his injury that Ramos first stated that he had worked as Farias and Marmolejo. *See* CP 91, 99. Had Ramos presented evidence at hearing from an independent source that he worked under the other two names—either through the testimony of co-workers, friends, or family members, or through documentary evidence like paystubs, cancelled checks, or bank statements—this evidence could have corroborated his testimony and influenced the trial court’s assessment of his credibility. He did not, and it

was reasonable for the trial court to consider the lack of independent evidence as part of its credibility determination and to enter a finding on this issue.

Contrary to Ramos's argument, the trial court here did not require him to provide evidence of his wages from an independent source. *See* App. Br. 7. Instead, it simply found that he did not provide such evidence, a fact that Ramos concedes as true. App. Br. 7. The trial court was entitled to believe or not to believe Ramos's testimony that he had worked under other names, either with or without corroboration. Ultimately, the court did not believe him, noting the "gaps and inconsistencies" in his testimony. CP 125. This is a credibility determination that this Court does not review on appeal. *Camarillo*, 115 Wn. 2d at 71; *Cantu*, 168 Wn. App. at 22.

B. Substantial Evidence Supports the Findings That Ramos Did Not Work Under Other Names and Did Not "Prove Any Source of Income Under These Names" Because The Trial Court Did Not Believe His Testimony

Substantial evidence also supports the findings that Ramos did not work under the names of Farias and Marmolejo in 2008 and 2009 (CP 34) and that he did not "prove any source of income under these names." CP 127; FF 1.3 (second sentence). These findings turn on the trial court's assessment of Ramos's credibility. Although Ramos testified that he

earned income under these names, the trial court did not believe him. Thus, substantial evidence supports these findings.

As a preliminary matter, Ramos misstates the trial court's finding of fact 1.3 when he argues that substantial evidence does not support it. See App. Br. 10. He says that "[s]ubstantial 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." App. Br. 10. But that is not what the finding says. See CP 127. The trial court's finding does not refer to whether any information was provided; rather, it states that Ramos "did not prove any source of income earned under these names." CP 127. Although Ramos testified that he earned income under these names, the trial court did not believe him.

Ramos seems to believe that the fact-finder had to believe his testimony because he was the only witness that testified about his wages. See App. Br. 8-9, 11. But a fact-finder may reject self-serving testimony. See *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 910, 138 P.3d 177 (2006) ("Whether self-serving testimony should be discounted is a credibility issue for the trier of fact, and we will not review it."); accord *State v. Curtiss*, 161 Wn. App. 673, 696, 250 P.3d 496 (2011). Further, Ramos provides no authority for his unsupported proposition and the court

should reject it. A court may generally assume that where no authority is cited, counsel has found none after a diligent search. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The trial court had a sound basis for rejecting Ramos's self-serving testimony about working under other names. When he provided the Department with a declaration about his work history, he did not mention that he had worked under other names. *See* CP 99. He asserted this for the first time at the Board hearing. *See* CP 91, CP 99. The trial court was entitled not to believe this self-serving testimony.

Additionally, Ramos's vague and confusing testimony about his specific employers in 2008 and 2009 was inconsistent with his repeated assertions that he worked full time all year with only two weeks off. In 2009, for example, he reported his entire work history to be "about two weeks" at Double S Orchard, "probably one day" at Crown Royal, "not a long time" at Lawrence Orchards, and an unspecified time at Desert Labor where he could not confirm if he had earned \$4,847.14 before he lost his wallet. CP 86-88.

Indeed, his testimony about his specific worksites in general was extremely vague and, as the industrial appeals judge pointed out, even the most generous calculations based on his testimony would suggest that Ramos worked only 20 weeks in 2008 and 14.5 weeks in 2009. CP 32-33.

This conflicts with the declaration he provided to the Department stating that he worked full time, or attempted to work full time, and with his testimony at hearing that he worked regularly the whole year, except for two weeks. *See* CP 85, 99. Ramos's inconsistency on this point is another reason the trial court could disbelieve him. Indeed, Ramos now concedes that he was not a full-time worker. *See* App. Br. 3 (agreeing that his wage rate should be calculated under RCW 51.08.178(2) as a seasonal and intermittent worker).

Ramos's incomplete testimony about his children further undermined his credibility. He told the Department that he had three dependent children, but he gave two different birthdates for his son, could not identify his daughters' birthdates, provided no documentation as to his parentage, and did not name all the children. CP 83, 125.

Ramos implies that more weight should be given to his testimony because it was "very specific" and "clear." App. Br. 11. He contends that he "was able to provide employer names, number of weeks worked and wages earned from each employer." App. Br. 8-9, 11-12. He asserts that he provided "Employment Security records for the names Miguel Amezola Farias and Mario Marmolejo" (App. Br. 9) and that "his earnings under each name are verifiable by Employment Security records." App. Br. 14.

Each of these arguments ignores the proper standard of review. This Court does not reweigh evidence or reassess credibility on appeal. *Camarillo*, 115 Wn. at 71; *Cantu*, 168 Wn. App. at 22; *Fox*, 154 Wn. App. at 527; *Gagnon*, 110 Wn. App. at 485. The trial court disagreed that Ramos's testimony should be found credible because it was "very clear" and "specific"; to the contrary, the Court determined that his testimony had "gaps and inconsistencies." CP 125. That is a credibility determination this Court does not disturb on appeal. *Camarillo*, 115 Wn. at 71; *Cantu*, 168 Wn. App. at 22; *Watson*, 133 Wn. App. at 910.

Further, Ramos's assertion fails on its own terms. Although he provided employer names, he could not reliably state how long he worked or how much he earned at several of these employers. He could not remember whether he earned \$583.73 for 44 hours of work at Double S Orchards, stating only that he received "a couple checks" and was "making more than a hundred dollars a day before the accident happened." CP 85. He could not recall whether he earned \$4,847.14 at Desert Labor. CP 87. He did not state what he earned at Crown Royal in 2009. CP 87. He did not state how long he worked as Farias at Crown Royal, Washington Fruit, King Fuji Ranch in 2008, although he stated how much he earned at each of those locations. CP 88-90. He did not testify how long he worked at Bill Shlagel under either name. CP 88, 90-91. This testimony

is far from “clear” and “very specific” about the “number of weeks” and “wages earned” from these employers. *Contra* App. Br. 8-9, 11-12.

Ramos’s argument that “his earnings under each name are verifiable by Employment Security records” is misleading. App. Br. 14. These records were not admitted into evidence and are not part of the record on appeal. Although it appears that counsel used these records to examine his client at hearing, Ramos could not recall many of the specific facts that these records purportedly demonstrated. *See* CP 85-90.⁵

Ramos also inverts the standard of review when he argues that, on substantial evidence review, all that is required of him is to present “sufficient evidence to persuade a fair-minded, rational person of the truth of the matter asserted.” App. Br. 7. But the question in this appeal is not whether he presented sufficient evidence to support his theory. Rather, it is whether substantial evidence supports the trial court’s findings. Because the trial court did not believe Ramos’s testimony, substantial evidence supports the findings that Ramos did not work under the two other names or prove any source of income under these names.

Finally, under the substantial evidence standard of review, it is not necessary, as Ramos implies, for the Department to “refute” or “dispute” his testimony that he was not employed under these two names. *See* App.

⁵ Additionally, there was no evidence that the real Farias and Marmolejo did not work for the time periods allegedly shown in these records.

Br. 9, 11. The trial court does not need to believe Ramos's testimony, whether the Department puts on contrary evidence or not. When assessing credibility, a trial court can discount self-serving testimony. *Watson*, 133 Wn. App. at 910.

In summary, the trial court had several reasons for disregarding Ramos's self-serving testimony that he worked under the names of Farias and Marmolejo before his work injury. He did not give the Department this information even though he provided a declaration about his work history. His vague testimony about specific workplaces did not support his claim that he worked full time. He did not identify his children's birthdates or all of their names. The trial court did not believe his testimony, and this Court will not reassess his credibility on appeal.

C. Substantial Evidence Supports the Finding About The Amount of Ramos's Monthly Wage

Substantial evidence supports the finding that Ramos "earned \$48.64 monthly, based on \$583.73, earned for all of 2008 through 2009." CP 34. The employment security records stated that these were Ramos's total earnings under his own name for that time period. CP 100-01, 103-04. Specifically, the records showed that he earned no wages from 2007 through the second quarter of 2009 and that he earned \$583.73 in the third quarter of 2009. CP 103-04. Thus, under RCW 51.08.178(2), the

Department divided the total wages he earned in the twelve successive months before the work injury (\$583.73) to arrive at a monthly rate of \$48.64. CP 103-04.⁶

D. The Department's Overpayment Orders Are Correct

The Department agrees that the Board's findings 7 and 8 stating that the overpayments were correct are properly characterized as conclusions of law, not findings of fact. *See* App Br. 12. Findings of fact that are conclusions of law will be interpreted as conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014). In any case, because these conclusions flow from the trial court's findings about Ramos's wage rate, they are correct.

Finally, the doctrine of liberal construction provides no basis to reverse the trial court's decision. *See* App. Br. 15-16. 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*

⁶ Ramos does not argue that the portion of this finding stating that he "had no dependents" is not supported by substantial evidence. *See* App. Br. 5, 10-11; CP 34. Indeed, he concedes that he was "unable to provide documentation that he supported his three children." App. Br. 10. Therefore, the fact that he had no dependents is a verity on appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

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.

E. Ramos is Not Entitled to Attorney Fees

This Court should reject Ramos's request for attorney fees. See App. Br. 15. 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; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). To support his claim of attorney fees, Ramos quotes the first sentence of RCW 51.52.130(1). App. Br. 15 n. 6. However, that sentence addresses only the fixing of attorney fees. It is the fourth sentence of RCW 51.52.130(1) that addresses when attorney fees are payable. The fourth sentence makes clear that 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

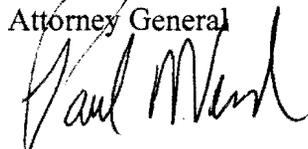
51.52.130(1); *Pearson*, 164 Wn. App. at 445. Because Ramos should not prevail in this appeal, he is not entitled to attorney fees.

VI. CONCLUSION

Applying the correct standard of review, substantial evidence supports the trial court's findings that Ramos earned \$48.64 per month, did not work under any other names, and did not provide independent evidence of his income under those names. Although Ramos gave contrary testimony about earning wages under other names, the trial court did not believe his testimony because of its "gaps and inconsistencies." This Court does not re-assess credibility on appeal and should affirm.

RESPECTFULLY SUBMITTED this 6th day of May, 2015.

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