

FILED
Court of Appeals
Division III
State of Washington
3/25/2019 9:02 AM

NO. 36297-3-III

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

CHARLES ANDERSON,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Fringe benefits are not wages under the Industrial Insurance Act. Anderson's employer provided him with a truck, which he used to commute to and from work, and for some personal errands, and his employer paid for all of the truck expenses including gas, maintenance, and insurance. But provision of a truck is not wages because it is not payment for something objectively critical to protecting a worker's basic health and survival, as required by the Supreme Court's decision in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001).

The Department of Labor & Industries, the Board of Industrial Insurance Appeals, and the superior court properly concluded that the Department should not include truck-related expenses in the wage calculation, and Anderson fails to show otherwise. This Court should affirm.

II. ISSUE

Under RCW 51.08.178(1), wages include only payments for things that are objectively critical to protecting a worker's basic health and survival. Anderson's employer paid him for gasoline and insurance on a truck he used for commuting and some personal errands. Was the provision of the truck, gasoline, and insurance "wages" objectively critical to protecting Anderson's basic health and survival?

III. STATEMENT OF CASE

A. **The Department Did Not Include the Value of a Company-Provided Truck in the Wage Rate Order Because It Did Not Believe It Was Critical to Protecting the Worker's Health and Survival**

In 2012, Anderson filed an industrial insurance claim for an occupational disease. CP 31. In the course of adjudicating his claim, the Department issued a wage order on March 10, 2015, which determines the amount that a worker will be paid for wage replacement benefits, such as time-loss compensation. CP 20; RCW 51.08.178; RCW 51.32.090.

The wage order included Anderson's monthly salary, health care benefits, and bonuses, but did not include any valuation for the fact that Anderson's employer provided him with a truck and paid for gasoline and other expenses associated with the truck's use. CP 20. Anderson protested that order and on August 10, 2015, the Department affirmed the wage order. CP 33. At the hearing, Anderson argued that the payments associated with the truck should be included in the wage calculation, but he did not challenge any of the other figures in the wage order. CP 62-63.

Anderson testified that Columbia Basin LLC provides him with a company truck, which he uses while he is at work, to commute to and from work, and for some personal errands. CP 66, 68-70. Anderson testified that Columbia Basin pays all of the truck expenses, such as gas,

maintenance, and insurance. CP 69. All of these expenses are paid for directly by Columbia Basin, and no money for truck expenses changes hands between Columbia Basin and Anderson. CP 76-77.

Anderson did not offer any evidence supporting a monetary value that should be assigned to the fact that the employer allowed him to use the truck and its costs; rather, he asked for the case to be remanded to determine a fair market value for the truck's use. CP 63.

Anderson also testified that he has a personal truck that he has driven to work when the company truck was being serviced. CP 72. Anderson did not testify that he relies on or depends on his company truck for personal emergencies, basic needs, or survival. He uses it to drive to and from work, to perform work-related duties (such as running parts or trips to the main office), to go to lunch, and to do a few other errands. CP 69-70. Sarah Holm, Claims Consultant, testified that the Department does not include employer-provided truck benefits in wage orders. CP 80, 82.

B. The Board and Superior Court Affirmed the Department's Wage Rate Order Because the Company-Provided Truck Was Not Objectively Critical To Protecting the Worker's Health and Survival

The Board dismissed Anderson's appeal and affirmed the Department's order, reasoning that an employer-provided vehicle for work and personal use is a perk, and thus an excluded fringe benefit, rather than

a means to protect a worker's basic survival needs. CP 10, 19. The superior court in turn affirmed, reasoning that there was insufficient evidence to show that the value of an employer-provided vehicle, fuel, insurance, and maintenance were included in the wage as other consideration of like nature. CP 126.

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; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the trial court's decision 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. The Administrative Procedure Act does not apply. *Rogers*, 151 Wn. App. at 179-81. 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). Applying the deferential substantial evidence standard, the court views the evidence in the light most favorable to the prevailing party. *Rogers*, 151 Wn. App. at 180-81.

This case involves whether costs for a truck provided by the employer, including fuel, maintenance, and insurance are critical to protecting basic health and survival for purposes of calculating “wages” under RCW 51.08.178(1). Statutory construction is a question of law reviewed de novo. *Cockle*, 142 Wn.2d at 807. The primary goal of statutory construction is to carry out the Legislature’s intent. *Cockle*, 142 Wn.2d at 807. “[W]here a statute has been construed by the highest court of the state, the court’s construction is deemed to be what the statute has meant since its enactment.” *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996). Although not binding, the appellate courts defer to the Board’s and Department’s interpretations of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

V. ARGUMENT

“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). A worker’s monthly “wages” at the time of injury are the basis for calculating loss of earning power benefits. RCW 51.08.178(1); *see also Cockle*, 142 Wn.2d at 806.

In *Cockle*, the Supreme Court held that the phrase “board, housing, fuel, or other consideration of like nature” in RCW 51.08.178(1)

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 (emphasis added). In contrast, “the reasonable value of *fringe* benefits that are *not* critical to protecting workers’ basic health and survival” are not included “wages” under RCW 51.08.178(1). *Cockle*, 142 Wn.2d at 822.¹

Applying the *Cockle* analysis, the Court of Appeals in *Yuchasz* decided that the cost of gasoline that the employer provided was not included in the wage rate under RCW 51.08.178(1). *Yuchasz v. Dep’t of Labor & Indus.*, 183 Wn. App. 879, 891-92, 335 P.2d 988 (2014). Here, similarly, neither the employer’s provision of a truck to Anderson, nor its payments for gas, maintenance, and insurance, are critical to protecting Anderson’s basic health and survival, and accordingly they cannot be included in the worker’s “wages” under *Cockle*. Rather, the employer’s provision of the truck and payments for the truck’s gas, maintenance, and insurance are fringe benefits under *Cockle* that lowered Anderson’s out-

¹ Anderson argues that RCW 51.08.178(1) is ambiguous, but the *Cockle* Court resolved any ambiguity. Brief of Appellant (AB) 6. He argues that the statute is ambiguous and he seeks a liberal interpretation of the statute. AB 17-18. But because the ambiguity has been resolved, the meaning of the statute is now plain and he is not entitled to a liberal construction. *City of Bellevue v. Raum*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012) (liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act).

of-pocket commuting costs but are nonetheless not wages. Other employees survive without an employer-provided vehicle. None of these fringe benefits are like the core benefits that were recognized in *Cockle* as being critical to the worker's health and survival, such as health, shelter, heating fuel, and health care. A worker needs food, shelter and warmth to survive, and access to health care to remain healthy. The reduction of commuting costs is desirable but bears no resemblance to the things that are included in a worker's wage calculation under *Cockle*.

A. Under the Supreme Court's Decision in *Cockle*, Costs for an Employer-Provided Truck, Including Fuel, Maintenance, and Insurance, Are Not Wages Because They Are Not Critical to Protecting a Worker's Basic Health and Survival

1. The only components of a worker's lost earning capacity that can be included in a worker's wage must be critical to protecting a worker's basic health and survival

Anderson asserts that the Department should have included in its wage calculation the cost of the employer-provided truck used to transport him to and from work and for some personal errands. AB 10.

The Legislature enacted RCW 51.08.178(1)'s definition of "wages" in 1971. *See* Laws of 1971, 1st Ex. Sess., ch. 289, § 14. RCW 51.08.178(1) reads in relevant part: "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"

RCW 51.08.178(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); *see also Cockle*, 142 Wn.2d at 806.

The Court of Appeals first interpreted the meaning of the term "fuel" in RCW 51.08.178(1). *See Cockle v. Dep't of Labor & Indus.*, 96 Wn. App. 69, 977 P.2d 668 (1999), *aff'd*, 142 Wn.2d 801 (2001). There, the issue was whether employer-paid health insurance premiums constituted "consideration of like nature" to "board, housing, and fuel" such that the amount of the employer's premiums should be included as "wages" under RCW 51.08.178(1). *See Cockle*, 96 Wn. App. at 71, 86.

This issue necessarily required the Court of Appeals to interpret the phrase "board, housing, and fuel" in order to determine what constituted "consideration of like nature" to these three items. *See Cockle*, 96 Wn. App. at 74-76. In its statutory analysis, the court observed that, by enacting RCW 51.08.178(1), the Legislature had recognized three categories of in-kind consideration that an employer provides to a worker: (1) board, housing, and fuel; (2) "other consideration of like nature" to board, housing, and fuel; and (3) other consideration *not* of like nature to board, housing, and fuel. *Cockle*, 96 Wn. App. at 74. The court observed that the first two categories of in-kind consideration counted as "wages"

under RCW 51.08.178(1) while the third category did not. *Cockle*, 96 Wn. App. at 74.

With regard to the first category: “board, housing, and fuel,” the court stated that the Legislature included these items in the definition of “wages” under RCW 51.08.178(1) because each was a necessity of life:

It is not hard to discern why the legislature provided that items in the first category shall count as “wages.” Board means food. Housing means shelter. *Fuel means heat or warmth*. Each is a necessity of life, without which the injured worker cannot survive a period of even temporary disability. Before the worker’s injury, each was an item that the employer was supplying in kind. After the worker’s injury, each is an item that the worker must replace *during the period of his or her disability*. Thus, each is an item that the worker must replace out of time-loss compensation, and each is an item that should be included in the basis from which time-loss compensation is computed.

Cockle, 96 Wn. App. at 74 (first emphasis added). Thus, the Court of Appeals explicitly interpreted the term “fuel” as “heat or warmth” as part of its statutory analysis. *Cockle*, 96 Wn. App. at 74. Applying *ejusdem generis*, a well-established rule of statutory construction, the court held that the reasonable value of health insurance had to be included as “wages” under RCW 51.08.178(1). *See Cockle*, 96 Wn. App. at 86.

The Supreme Court affirmed the Court of Appeals’ decision. *Cockle*, 142 Wn.2d at 822. Significantly, the Supreme Court quoted and adopted the Court of Appeals’ interpretation of “fuel” as “heat”:

The Court of Appeals correctly rejected the “any and all forms of consideration” standard in *Rose v. Dep’t of Labor & Indus.*, 57 Wn. App. 751, 758, 790 P.2d 201, *review denied*, 115 Wn.2d 1010, 797 P.2d 512 (1990).^[2] Rather, it applied the ejusdem generis rule to arrive at a narrower construction: “It is not hard to discern why the legislature provided that [food, shelter, and heat] shall count as ‘wages.’ . . . Each is a necessity of life, without which the injured worker cannot survive a period of even temporary disability.

Cockle, 142 Wn.2d at 821 (alterations in original) (citation and footnote omitted) (quoting *Cockle*, 96 Wn. App. at 74). The Supreme Court stated that it “would modify that analysis only slightly.” *Cockle*, 142 Wn.2d at 821. Specifically, rather than adopting the Court of Appeals’ “necessity of life” test, the Court construed the phrase “board, housing, fuel, or other consideration of like nature” 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*, 142 Wn.2d at 822 (emphasis added).

Accordingly, the *Cockle* Court’s holding makes clear that the only components of a worker’s lost earning capacity, whether in the form of board, housing, fuel, or whether in the form of consideration of like nature

² The Court of Appeals in *Cockle* had rejected the worker’s argument, based on *Rose*, that “wages” under RCW 51.08.178(1) included “any and all forms of consideration received by the employee from the employer in exchange for work performed.” See *Cockle*, 96 Wn. App. at 76 (quoting *Rose*, 57 Wn. App. at 758). The court explained that the quoted language in *Rose* was non-precedential dictum. *Cockle*, 96 Wn. App. at 77.

to these items, that can be included in the worker's wage calculation are those components that "are critical to protecting workers' basic health and survival." *Cockle*, 142 Wn.2d at 822. Under this construction of the term "wages" in RCW 51.08.178(1), only fuel that is critical to protecting a worker's basic health and survival, i.e., fuel that provides "heat and warmth," constitutes "fuel" under RCW 51.08.178(1). *See Cockle*, 142 Wn.2d at 822; *Cockle*, 96 Wn. App. at 74 ("Fuel means heat or warmth.").

The *Cockle* Court also distinguished "fringe benefits" from "nonfringe benefits." *Cockle*, 142 Wn.2d at 822. "Core, nonfringe benefits" like food, shelter, fuel and health care all share the "like nature" of being critical to protecting a worker's basic health and survival. *Cockle*, 142 Wn.2d at 822; *see also* WAC 296-14-524 (defining "consideration of like nature"). As such, these core, non-fringe benefits must be included in the worker's "wages" under RCW 51.08.178(1). *See Cockle*, 142 Wn.2d at 822.

In contrast, "fringe benefits" are those benefits that are not critical to protecting a worker's basic health and survival. *See Cockle*, 142 Wn.2d at 822. As the Court explained, the Act's overarching objective was to reduce to a minimum "the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle*, 142 Wn.2d at 822 (quoting RCW 51.12.010). Because the injury-caused

deprivation of fringe benefits (i.e. those benefits that are not critical to basic health and survival) was not the kind of “suffering” that the Act was designed to remedy, they cannot be included in the worker’s wages.

Cockle, 142 Wn.2d at 822.

2. The value of an employer-provided vehicle is not critical to a worker’s basic health and survival

The truck costs at issue here allowed Anderson to get to work and to run some personal errands. Unlike the core, non-fringe benefits of heating fuel, food, shelter, and health care, those costs were not critical to protecting his basic health and survival. Instead, an employer-provided truck to commute between home and work is a fringe benefit under *Cockle* that lowers a worker’s out-of-pocket commuting costs but is not wages. It is similar to other fringe benefits that an employer might elect to pay for or to subsidize in order to reduce the costs or the difficulty of its employees’ commutes, such as gas reimbursement, on-site parking, bus passes, ferry tickets, vanpools, shuttle service, electric truck charging stations, and bike lockers. Although such commuting benefits may be valuable to employees because they lower commuting costs, *Cockle* excludes them from the worker’s “wages” under RCW 51.08.178(1) because they are not critical to protecting employees’ basic health and survival. *See Cockle*, 142 Wn.2d at 822. “[T]he legislature did not intend that all consideration given in

exchange for work is to be included in ‘wages.’” *Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 484, 120 P.3d 564 (2005) (quoting RCW 51.08.178(1)).

Anderson suggests that his employer-provided truck is critical to his basic health and survival because he does not live in a major metropolitan area with mass transit and would not otherwise be able to go to the grocery store, health appointments, and work to earn a wage. AB 11-13.³ In addition, he argues that since he uses the truck for some personal errands that are potentially critical to his health and survival, that the means in which he accomplishes these should also be critical to his health and survival. AB 12. He distinguishes this from *Yuchasz* because the vehicle in that case was only used to commute to and from work and to job sites, but not for personal errands. AB 14. These arguments disregard the substance of *Cockle*’s holding, which is that “[c]ore, nonfringe benefits” must be included as “wages” because, by their nature, they are critical to protecting a worker’s basic health and survival. *Cockle*, 142 Wn.2d at 822. Heating fuel that enables a worker to survive cold weather

³ He also argues that the Department cannot have a statewide policy excluding employer-provided vehicles from wage calculations. AB 16-17. But the Department correctly follows *Cockle* which excludes the reasonable value of *fringe* benefits that are *not* critical to protecting workers’ basic health and survival.” *Cockle*, 142 Wn.2d at 822.

meets this test; truck expenses that allow a worker to drive to work does not.

The mere fact a worker could use an employer-provided vehicle to help purchase board, housing, fuel, and medical care does not transform that vehicle into a necessity of life, because a worker may use the vehicle to purchase anything, not simply those necessities. It would render the *Cockle* test meaningless to hold that a vehicle that can be used to purchase a necessity of life thereby becomes a necessity of life; this would effectively make any consideration that has economic value a necessity of life, since anything of economic value could conceivably be used to help pay for, or cover the cost of, those necessities.

The purpose of the *Cockle* test is to limit the scope of the in-kind benefits included in “wages” to those earmarked for fundamental necessities of life, while excluding non-essential benefits even when those fringe benefits have economic value to workers. *Cockle* rejected the contention that the Department should include any and all forms of consideration that are valuable to a worker in a worker’s wage calculation. *See Cockle*, 142 Wn.2d at 821. A ruling that any costs attributed to purchasing a necessity of life is itself a necessity of life would mean that all forms of consideration are included in a wage calculation, which *Cockle* rejected.

Anderson also argues that the truck is critical to his survival because he lives in an area that is not a major metropolitan area where mass transportation is available. AB 13. But *Cockle* does not support that what is critical to a worker's health and survival changes based upon geographic location; rather, it is what is critical to *all* workers' basic health and survival. The test in *Cockle* is an objective one. 142 Wn. 2d at 822, n.13. As such, Anderson's personal circumstances are not relevant. But if they were, he has a personal truck that he can use. CP 72.

To accept Anderson's theories, this Court would have to refuse to follow *Cockle*. But this Court must follow *Cockle*. See *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (“[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.”).

3. Anderson presents no evidence about the value of the truck

Anderson argues that the value of the truck, gasoline, and insurance is readily identifiable as required by *Cockle*. AB 10. But Anderson has not provided evidence of a monetary value of the truck and its costs. Instead, he asked for remand to the Department to determine the fair market value. CP 63. He has failed in his burden of proof. RCW 51.52.050(2)(a) (appellant has burden to make a prima facie case); RCW

51.52.115 (appellant has burden of proof to show Board decision wrong). He had to provide all evidence to support his theory at the Board, and the court reviews only evidence presented at the Board. RCW 51.52.115. The superior court cannot remand to the Board to take more evidence. *Salesky v. Dep't of Labor & Indus.*, 42 Wn.2d 483, 484-85, 255 P.2d 896 (1953) (trial court could not remand case to Department to incorporate Department file into Board record and issue new decision); *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 163-64, 102 P.2d 683 (1940) (trial court could not remand for new medical evidence); *Gilbertson v. Dep't of Labor & Indus.*, 22 Wn. App. 813, 817, 592 P.2d 665 (1979) (“[R]emand to the Board of Industrial Insurance Appeals is not justified if the evidence in the record is conflicting or unclear.”).

Anderson had his opportunity to present evidence on the value of any alleged wages and he failed to do so. This provides an alternative ground to affirm the trial court.

B. The Internal Revenue Service Rules and Regulations Do Not Apply to Washington Workers' Compensation Law

Anderson references a copy of the Internal Revenue Service Taxpayer Information Publication, which indicates that an employer-provided vehicle to commute to and from work is a fringe benefit and must be included in the recipient's pay. AB 10. Based on this tax rule,

Anderson argues that the value of the employer provided truck should be included in his wage. AB 10. But he does not cite any authority to support that a publication from the Internal Revenue Service applies to Washington State workers' compensation law. Moreover, the *Cockle* Court specifically held that only core, *non-fringe* benefits should be included in a worker's wage because they are critical to a worker's health and survival. Here, the Internal Revenue Service's publication specifies that an employer-provided vehicle used to commute to and from work is a *fringe* benefit. App. B at 3. So even if the Court could look to the Internal Revenue Service's publication to decide if the provision of the truck should be considered wages under *Cockle* or not, the publication would actually support the conclusion that the truck benefits are fringe benefits and therefore not included in wages under *Cockle*.

VI. CONCLUSION

The employer-provided truck that Anderson used to commute to and from work and for some personal errands is not consideration of like nature critical to his basic health and survival. The Department correctly excluded the value of the truck from the wage calculation. This Court should affirm the Board's and superior court's decisions affirming the Department.

//

RESPECTFULLY SUBMITTED this 25th day of March 2018.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "A. Sandstrom". The signature is written in a cursive, flowing style.

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CHARLES K. ANDERSON,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

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SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below described manner:

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//

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DATED this 25th day of March, 2019.

A handwritten signature in black ink, appearing to read "Shana Pacarro-Muller". The signature is written in a cursive style with a large initial 'S'.

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March 25, 2019 - 9:02 AM

Transmittal Information

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Appellate Court Case Number: 36297-3
Appellate Court Case Title: Charles K. Anderson v. Dept. of Labor & Industries
Superior Court Case Number: 16-2-02097-3

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