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NO. 367142

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

MIGUEL I. SANDOVAL ARAMBULA,

Appellant

v.

WASHINGTON STATE

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent

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BRIEF OF APPELLANT

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### **III. INTRODUCTION**

This is a worker's compensation matter governed by the Industrial Insurance Act (IIA), Title 51 RCW. Mr. Miguel Sandoval Arambula<sup>1</sup> appeals a decision of the Franklin County Superior Court, which affirmed a Board of Industrial Insurance Appeals (Board) decision that affirmed a Department of Labor and Industries (Department) order denying his request for time loss compensation, pursuant to RCW 51.32.090, after he was injured performing his job as an orchard worker. He contends that, under the statute, the employer's unilateral decision to make a light duty job offer at a location of employment from Pasco, WA, where Mr. Sandoval was employed at the time of his injury, to Hermiston, OR, cannot be considered "reasonable" when: (a) he neither owns a vehicle; nor (b) owns a license to operate a motor vehicle. Additionally, Mr. Sandoval is functionally illiterate and monolingual Spanish. He has never used a computer and neither he nor anyone he knew had any idea how to find transportation to and from Hermiston from Pasco. Even the person making the job offer on behalf of the employer had no idea how Mr. Sandoval could get to and from work in Hermiston, OR. For these reasons, Mr. Sandoval believed he had no option but to turn down the light-duty job offer. The employer then reported the job declination to the Department, which then determined he was not eligible for time loss benefits.

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<sup>1</sup> The claimant's formal name is Miguel Israel Sandoval Arambula. CP 104. In contrast to American tradition, in the Hispanic culture, children are named at birth using both their mother's maiden name (Sandoval) and their father's surname (Arambula). However, children are most commonly referred to, formally, by their mother's surname. In this brief, the claimant will be referred to as Miguel Sandoval or Mr. Sandoval.

#### **IV. ASSIGNMENTS OF ERROR**

Mr. Sandoval assigns error to the trial court's finding of Fact #1.2, specifically the first sentence, which states: "A preponderance of evidence supports the Board's Findings of Fact." (CP 267)

Mr. Sandoval assigns error to the trial court's Conclusion of Law #2.2.2, which states: "On October 9, 2013 the employer made a valid light-duty work offer to Mr. Sandoval within the meaning of RCW 51.32.090(4)." (CP 268)

Mr. Sandoval assigns error to the trial court's Conclusion of Law #2.2.3, which states: "Mr. Sandoval was not a temporarily totally disabled worker beginning October 9, 2013, through June 16, 2014, pursuant to RCW 51.32.090." (CP 268)

Mr. Sandoval assigns error to the trial court's Conclusion of Law #2.3, which states: "The Board's August 7, 2015 order that adopted the June 4, 2014 [PD&O] is correct and is affirmed." (CP 268).

Mr. Sandoval assigns error to the trial court's Conclusion of Law #2.4, which states: "The June 17, 2014 Department order is correct and affirmed." (CP 268)

#### **V. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

Did the trial court apply the proper standard of review when making its oral decision to affirm the Board decision?

Was the trial court's determination that the employer's light-duty job offer constituted a valid job offer supported by substantial evidence?

Was the trial court's decision that Mr. Sandoval was not a temporarily and totally disabled worker entitled to loss-of-earning-power benefits from October 9, 2013, through June 16, 2014, due to conditions proximately caused by the industrial injury supported by substantial evidence?

#### **VI. STATEMENT OF THE CASE**

Mr. Sandoval was born in Mexico in 1981 and attended Mexican schools through the fifth grade. He can speak Spanish but struggles to read and write in his native tongue. He currently remains monolingual Spanish. Mr. Sandoval performed agricultural work while living in Mexico. Since being in the United States, he has performed mainly agricultural work although a South Korean restaurateur taught him to cut meat, which

he occasionally did on the weekends prior to his industrial injury. Mr. Sandoval has never worked in an office setting nor does he know how to utilize a computer, a printer or any other office-type machines. He is not married but lives with the mother of his child in Pasco. CP 104-106.

Mr. Sandoval worked for Atkinson Staffing, Inc. (Atkinson) out of their Pasco, WA facility. Atkinson supplies agricultural workers to employers that request such. In that capacity, Atkinson sent Mr. Sandoval to perform agricultural work in various orchards in and around Franklin County, WA. Because his driver's license had been suspended in approximately 2000-2001, Mr. Sandoval was unable to drive to the different orchards. Instead, "Oscar," his foreman, drove Mr. Sandoval to the work sites each morning and brought him home after work most evenings. This seemed to work out well for both men although sometimes Mr. Sandoval got home later than usual if he waited for Oscar to finish his workday. (CP 50, 111-114, 118)

On October 3, 2013, Mr. Sandoval was injured when he fell from a ladder while harvesting red apples while working for Atkinson. He injured his lower back and right shoulder in the fall. He received treatment for his injuries and was released by Dr. Spann, his treating provider, for light-duty employment on October 7, 2013. Atkinson asked Dr. Spann to approve a light-duty position for Mr. Sandoval as a printer operator/office clerk in its Pasco office. Dr. Spann approved the offer on October 8, 2013, and Mr. Sandoval was told to report to the Pasco office the next morning for training. When he arrived in the Pasco office, Mr. Sandoval was presented with a light-duty job offer as a printer operator/office clerk, but instead of the job being located in Pasco, WA, it was now to be performed in Hermiston, OR. Mr. Sandoval explained to the employer's representative

in the Pasco office, Amanda Gomez, that he did not drive nor did he have a car so he didn't know how he would get back and forth to Hermiston each day. Ms. Gomez didn't know how to advise him either. After a short discussion with Ms. Gomez, Mr. Sandoval said he would have to turn down the light-duty offer in Hermiston. Ms. Gomez helped Mr. Sandoval with the formal refusal by writing at the bottom of the English-language job offer, that Mr. Sandoval had to refuse the job offer due to lack of transportation to and from Hermiston, OR. Mr. Sandoval printed his own name under Ms. Gomez's notation. Ms. Gomez testified that Mr. Sandoval "was provided with a Spanish copy." It does not say when the Spanish copy was provided. She did say she and the rest of the staff at the Pasco facility were bilingual. (CP 107-114, 116-117, 211-213, 215-217)

Mr. Sandoval applied for temporary total disability benefits from the Department of Labor & Industries (Department) under a worker's compensation statute, RCW 51.51.090, covering the time period from October 9, 2013, through June 16, 2014, but the Department denied the benefits "because the worker was able to work." (CP 41, 51) Mr. Sandoval appealed that decision to the Board. An Industrial Appeals Judge at the Board filed a Proposed Decision and Order (PD&O) on June 4, 2014, which affirmed the Department's denial of Mr. Sandoval's request for time loss benefits. (CP 25-38) Mr. Sandoval appealed this decision to the three-member Board by filing a Petition for Review (PFR) dated July 22, 2015. (CP 14-19) The full Board denied the PFR and on August 7, 2015, determined "[t]he Proposed Decision and Order becomes the Decision and Order (D&O) of the Board." (CP 9) Mr. Sandoval timely appealed this decision to the Franklin County Superior Court for a de novo review. A bench trial was held on October 17, 2018, (RP 1-35) after which the trial court affirmed the Board's D&O, which had the effect of

affirming the Department's initial June 17, 2014, order, which denied Mr. Sandoval's application for time loss benefits from October 9, 2013, through June 16, 2016. (CP 41; RP 31-33)

## VII. ARGUMENT

### a. Standard of Review – Court of Appeals

Review by the Court of Appeals is governed by RCW 51.52.140. Unlike the superior court, this court does not conduct a de novo review of the Board record. Instead, its review is limited to an examination of the trial court record to determine whether substantial evidence supports the trial court's factual findings. It then reviews, de novo, whether the trial court's conclusions of law flow from the findings. *Dep't of Labor & Indus., v. Shirley*, 171 Wn. App. 870, 878, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013). "Substantial evidence" is that which is adequate enough to persuade a rational, fair-minded person that the premise is true. *Richardson v. Dep't of Labor & Indus.*, 6 Wn. App.2d. 896, 904, 432 P.3d 841 (2018), *review denied*, 193 Wn.2d 1009 (2019).

### b. Standard of Review – Franklin County Superior Court

On the other hand, a party appealing a Board decision to the superior court must do so under the guidance of RCW 51.52.115, which states that a Board decision is prima facie correct and a party claiming otherwise must support their challenge by a preponderance of the evidence. *Ravsten v. Department of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). In making its decision at the conclusion of its review of the Board record below, the superior court may substitute its own findings and decision

for those set forth by the Board, but *only* if the trial court determines from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570, 572 (1999).

In making its oral decision the trial court stated, "[T]he Court finds that [the Board's] findings of fact are supported by substantial evidence that there's not *other substantial evidence more persuasive*, and so I am going to deny Mr. Sandoval's request for relief and uphold [the Board's] ruling." (RP 33) As such, the trial court committed reversible error when, in its oral decision, it applied the court of appeals' [RCW 51.52.140] *substantial evidence* standard to what Mr. Sandoval had to prove to defeat the Board's decision rather than the *preponderance of credible evidence* standard, which is properly used in appeals under the Industrial Insurance Act. *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 200, 378 P.3d 139 (2016).

**c. Unreasonable, thus Invalid Light-duty Job Offer (RCW 51.32.090(4))**

Commonly, employers of injury create light-duty jobs that are appropriate for the stage of recovery in which its temporarily totally disabled worker finds themselves. Offering a light-duty position to an injured worker is not required; however, if an employer of injury would like to do so in order to terminate the time loss benefits being paid, it may do so. However, there are strict guidelines with which the employer must comply set forth in RCW 51.32.090(4)(b). Mr. Sandoval contends Atkinson failed to comply with the statute such that the light duty job offer located in Hermiston, OR, cannot be considered a reasonable one.

RCW 51.32.090(4)(a) provides that an employer of injury can receive wage subsidies from the Department for providing light duty or transitional work to a worker

entitled to temporary total disability benefits. In order to collect these subsidies, the worker's medical provider must restrict the worker from his usual work. RCW 51.32.090(4)(b). A physician or nurse practitioner must certify the light duty work is appropriate for the worker. RCW 51.32.090(4)(b). However, before any of this can occur, the employer of injury must provide a statement of the light duty work to both the provider and the worker. RCW 51.32.090(4)(b). The description of the work certified by the provider is meant to limit an injured employee's activities so they may continue to recover. RCW 51.32.090(4)(j). Once the employer offers the certified work, the worker's temporary total disability payments end, replaced by wages earned in the temporary transitional position. RCW 51.32.090(4)(b). If the provider determines that the transitional work should stop because it is impeding the worker's recovery, "the worker's temporary total disability payments shall be resumed when the worker ceases such work." RCW 51.32.090(4)(b).

Under the facts of this case, Atkinson apparently created a light duty position for Mr. Sandoval entitled "printer operator/office assistant." (C 64-65) It was sent to Dr. Spann for approval on October 8, 2013. Dr. Spann approved the job, which was located in Pasco, for Mr. Sandoval. When Mr. Sandoval arrived for work at Atkinson's Pasco facility the next day he was told the job location had changed to Hermiston, OR. Dr. Spann did not approve any sort of job in Hermiston. Thus, on October 9, 2013, Mr. Sandoval was *not* presented with the same job offer his treating physician had approved the day before. We are left to speculate whether Dr. Spann would have approved the job had he known it was in Hermiston. However, as was seen above, Mr. Sandoval knew immediately he could not accept the job offer because he did not own a vehicle, nor did

he have a driver's license. He did not know anyone that could get him to work each day and he was unaware of any transportation options that would get him to Hermiston and back each workday. The employer didn't have any ideas for him and surprisingly, claimant's witness Dr. Maui Garza, a vocational counselor for over 20 years in this area, was unaware any kind of transportation option was available for Mr. Sandoval. (CP 83, 93) In his professional opinion, Dr. Garza did not believe this was a reasonable job offer even though physically Mr. Sandoval and Atkinson could have worked around his physical limitations. From a vocational standpoint, Dr. Garza opined Mr. Sandoval was not capable of obtaining and maintaining reasonably continuous gainful employment, in general, between October 9, 2013, and June 16, 2014. (CP 64-77, 86-89, 91)

Finally, although the office manager testified it wouldn't have mattered, Mr. Sandoval is monolingual Spanish and is nearly functionally illiterate in his native language. He had never before worked with office machines or in an office setting. He did not know how to use a computer. Mr. Sandoval's work history was mainly as an agricultural worker and he was restricted from raising his right arm above his head. Nevertheless, he was willing to attempt the light duty office worker position for which he was cleared by his treating physician, Dr. Spann, which was located in Pasco. (CP 179-180, 185)

Mr. Sandoval showed up to work on the morning of October 9, 2013, in the Pasco Atkinson facility ready to start his first day of work. However, he was immediately told that the job offer wasn't for the Pasco office. He learns, for the first time, that the job offer was located in Hermiston. But a job in Hermiston was not the job for which Dr. Spann had medically cleared him. (CP 182-185). Mr. Sandoval was never offered a job for

which he had been medically cleared by his treating provider. Finally, the Department asks this court to determine that a minor detail like a 70-mile road trip five days per week is one Mr. Sandoval should gratefully overlook. But the record reveals what the 70-mile roundtrip on the public transportation could provide, equated to a 14-hour workday for just eight hours of paid work at a minimum wage rate. The other six hours were spent riding the trolley, waiting for work to start, and waiting for the trolley home. Even the Department's vocational witness, Mr. Trevor Duncan could not say with certainty that this was vocationally reasonable. (CP 194) Mr. Sandoval would catch the trolley at around 5:00 a.m. in Pasco and arrive in Hermiston around 6:30 a.m. He would have to wait 90-minutes for the Atkinson office to open. At the end of the workday, Mr. Sandoval would wait another hour for the trolley to pick him up to take him back to Pasco. He would finally arrive back at the bus stop closest to his home at 7:20 p.m. Neither vocational expert found this schedule reasonable.

The trial court, in adopting the Board's findings verbatim, neglected to formulate a finding that reflected the fact that Mr. Sandoval was not offered the same job Dr. Spann had approved. Nevertheless, the trial court was able to find, with contrary evidence presented, in Conclusion 2.2.2 that "[T]he employer made a valid light duty worker offer to Mr. Sandoval within the meaning of RCW 51.32.090(4)." A de novo review of the record reveals that no evidence, let alone substantial evidence, supports this conclusion. Admirably, Mr. Sandoval attempted, with his physician's approval, to go back to work doing field work. After only two weeks he had reinjured his shoulder and low back and Dr. Spann had to restrict Mr. Sandoval's work activities to no field work once again. Dr. Maui Garza testified that as a result of his industrial injury Mr. Sandoval was not capable

of obtaining and maintaining reasonably continuous gainful employment, in general, between October 9, 2013, and June 16, 2014. (CP 75)

Mr. Duncan, the other vocational counselor, relying *only* on the unreasonable light duty job offer and ignoring the fact that Dr. Spann placed Mr. Sandoval back on time loss benefits in mid-October 2013, testified that “Mr. Sandoval could have performed the physical components of this [light duty] job . . . and could have conveyed himself from home to work and back for free via public transportation.” Mr. Duncan thus concluded that Mr. Sandoval could have tolerated full-time, gainful employment *during that time period.*” (CP 180) This statement does not accurately reflect Mr. Duncan’s failure to consider that Dr. Spann imposed an unable to work restriction on Mr. Sandoval within a week of his October 8, 2013, approval of Atkinson’s light duty job description. A de novo review of the entire facts of this case reveals Conclusion 2.2.3 is not supported by substantial evidence. Because the trial court’s adoption of the Board’s findings and conclusions are not supported by substantial evidence the trial court’s Conclusions 2.3 and 2.4 are not supported by substantial evidence.

### **VIII. ATTORNEY FEES**

If successful in his appeal, Mr. Sandoval requests he be awarded attorney fees. Such an award in IIA appeals is controlled by RCW 51.52.130, which provides in relevant part:

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, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

RCW 51.52.130. This statute ensures legal representation for injured workers and also corresponds with the Industrial Insurance Act's purpose of ensuring compensation for employees who suffer industrial injuries. *Dep't of Labor & Indus. v. Cascadian Bldg. Maint., Ltd.*, 185 Wn. App. 643, 653, 342 P.3d 1185 (2015). The statute also encompasses fees in both the superior and appellate courts when both courts review the matter. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). By its terms, the statute allows the court to determine an award of attorney fees if the court reverses the BIIA's order and grants an award to the disabled worker. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180, 186 (2008). If the trial court decision is reversed or modified and additional relief is granted Mr. Sandoval, he asks that his reasonable attorney fees on appeal be awarded by this court.

#### **IX. CONCLUSION**

Based on the foregoing arguments and citations to authority, Mr. Sandoval respectfully requests this court reverse the trial court's March 22, 2019, decision that affirmed the Board decision to affirm the Department's June 17, 2014, decision denying Mr. Sandoval's request for time loss compensation from October 9, 2013, through June 16, 2016, in that, as a direct result of the residuals of his 2013 industrial injury, he was not able to work during that time period.

Respectfully submitted this 29 day of July, 2019.

  
\_\_\_\_\_  
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NO. 367142

**COURT OF APPEALS FOR DIVISION III  
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MIGUEL I. SANDOVAL ARAMBULA,

Appellant,

vs.

DEPARTMENT OF LABOR  
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Respondent.

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SERVICE**

STATE OF WASHINGTON )

County of Benton )

ss.

I, Mary Cochenour, do hereby certify that I am an employee of Smart Law Offices, P.S., attorneys for the Appellant. That I am a citizen of the United States and competent to be a witness herein. That on the 29<sup>th</sup> day of July, 2019, I sent, via United States Mail at Kennewick, Washington, first class postage prepaid addressed as follows:

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