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No. 84864-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Courtney Perez,

Appellant,

v.

Department of Labor & Industries and Digital Control, Inc.,

Respondents,

PETITION FOR REVIEW

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I. INTRODUCTION

This case presents a case of first impression regarding the application of the extraterritoriality provisions of the Industrial Insurance Act, Title 51 RCW. The specific statute, RCW 51.12.120, provides for coverage under Washington law to workers injured or killed outside the state in four enumerated circumstances; the provision applicable in this case states that a Washington claim will be allowed where a worker was "working under a contract of hire made in this state for employment not principally localized in any state." RCW 51.12.120(1)(b). No appellate decision, published or otherwise, has ever addressed the application of this statute in the 52 years since it was enacted. LAWS OF 1971, ex.s. ch. 289 § 82.

Courtney Perez filed a claim under the IIA on account of her husband Julian Perez Ortega's fatal on-the-job injury. The Perez family lived in Indiana, but Mr. Perez was employed by Digital Control, Inc., a Washington State-based employer, and his employment contract was made in Washington. In the

Summer of 2018, while working in the field for DCI in Michigan, Mr. Perez was struck by a driver and killed. Ms. Perez contends that Mr. Perez's employment for DCI was not principally localized in any state, thus making coverage under Washington law proper.

II. IDENTITY OF PETITIONER

Petitioner is Courtney Perez, the surviving spouse of Julian Perez Ortega. Ms. Perez seeks review of the unpublished[1] decision of the Court of Appeals, Division I, in *Perez v. Dep't of Labor & Indus.*, No. 84866-0-I (attached as Appendix). No motion for reconsideration was filed.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the term "working time" as used in RCW 51.12.150(5)(a)(ii) encompasses only time spent actually working, or whether it also includes, as the Court of

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[1] Respondent Department of Labor & Industries filed a motion to publish on December 15, 2023.

Appeals concluded, "on call" time in which the employee might be expected to work?

2. Whether conclusory use of statutory terms of art in a finding of fact morph such a finding into a conclusion of law such that *de novo* review is appropriate?

IV. STATEMENT OF THE CASE

Julian Perez Ortega began working for Digital Control, Inc., ("DCI") in 1998 as a production assembler. CP 1456. As a condition of his employment, DCI required Mr. Perez to sign an "Employee Agreement." *Id.* That Employee Agreement was executed on February 13, 1998, and provides in relevant part that it "shall be governed by the laws of the State of Washington regardless of the residency of any party to this Agreement." CP 999-1000. When he began working for DCI, Mr. Perez was already in a relationship with Courtney Perez (née McPhillips). Mr. Perez's career with DCI soon took off, and he and Ms. Perez relocated several times in furtherance of his employment with DCI, along the way getting married and

raising three children. CP 715-18. Eventually the Perezes settled in Indianapolis, Indiana, in 2007 when Mr. Perez received a promotion to become DCI's Midwest Territory Manager, with additional responsibilities in South America due to his Spanish language skills and "his expertise with DCI's equipment and customers." CP 718, 1458. Mr. Perez received a final promotion to become DCI's North American Field manager in April of 2018, just a few months before his death. CP at 1459.

Although DCI did not require Mr. Perez to live in Indiana, the company did suggest that he live somewhere within its Midwest territory. CP at 720, 797. This is because Mr. Perez's job required *extensive* travel in support of DCI's equipment and customers.[2] As Ms. Perez observed in her testimony, when Mr. Perez held these positions there "was kind of a running joke in the friends group . . . 'Where is Julian?'

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[2] DCI manufactures and supports guidance systems for drilling equipment.

[a]nd I would say 'I don't know.'" CP 727. DCI's Chief of Staff Matt Mercer stated that the territory managers "are required to travel up to 75 percent of the time." CP 786. Ms. Perez estimated that, from 2007 to 2018, Mr. Perez was away from home on work trips "at least 50 percent" of the time. *Id.* Evidence was also introduced below detailing Mr. Perez's various work trips and general comings-and-goings. CP at 996-1600.

While there was no dispute in this case that Mr. Perez's job required a lot of travel, there was a dispute regarding what he did while at home in Indiana between business trips. DCI's job description for the Midwest Territory Manager (generated in response to litigation) states that the territory managers are "home office based," but DCI Chief of Staff Matt Mercer emphasized in his testimony that the territory manager's duties are primarily in the field. Mr. Mercer explained that territory managers were primarily responsible for helping DCI's customers on the use of DCI's products. CP 785. Mr. Mercer

also testified that DCI's expectation was that, on non-travel days, Mr. Perez "should be working from home supporting customers at any time with troubleshooting issues, absorbing product content, working on presentations, test reports, field testing, bench testing and trip reports." CP 786. Ms. Perez testified that Mr. Perez would answer occasional work-related calls and emails while at home, but he did not maintain a separate home office and Ms. Perez could not recall him ever working a full day at home. CP at 722-23, 725. In fact, while Mr. Perez was certainly perennially "on call," "there was also really no, like, sitting down in an office [at home] doing work." *Id.* at 725. Mr. Perez did also occasionally work with DCI customers within Indiana.

While working in the field for DCI in Michigan on July 31, 2018, Mr. Perez was struck by a driver in a construction zone and died a few days later. CP 86-87, 998. Ms. Perez filed a timely claim for benefits in Washington State on June 26, 2019. CP 639. The Department of Labor & Industries rejected her

claim, and on October 29, 2021—after unnecessarily contentious and protracted litigation—the Board issued a final order affirming the rejection of Ms. Perez's claim. CP 21. The Board's decision adopted a "finding of fact" that Mr. Perez's "employment was principally localized in Indiana." CP 130.

Ms. Perez then appealed to King County Superior Court. After granting partial summary judgment to Ms. Perez concluding that Mr. Perez was working under a Washington contract of hire, the superior court entered judgment on December 19, 2022, otherwise affirming the Board. CP at 1835-38. The superior court also issued "findings" that Mr. Perez "spent a substantial part of his working time in the service of DCI in the State of Indiana" and that his "work with DCI was principally localized" in Indiana. CP at 1837.

Ms. Perez then appealed to the Court of Appeals, Division One. Ms. Perez argued that both the Board and the superior court failed to issue proper findings of fact and that quantification of "working time" was critical to the analysis

under RCW 51.12.120. Moreover, she argued that "working time" only encompassed time actually spent working—not merely "on call." The Court of Appeals rejected these arguments in its December 4, 2023 opinion affirming the superior court.

V. ARGUMENT—REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(4)

Review should be granted because this case "involves an issue of substantial public interest." RAP 13.4(b)(4). There is little guidance regarding the meaning of "substantial public interest" under RAP 13.4. However, this Court has provided direction in the context of exercising discretion to decide an appeal where the issue in the case has become moot. There the Court has created a three (occasionally four) part test to determine if the question on appeal "is of continuing and substantial public interest." *Randy Reynolds & Assocs. v. Harmon*, 193 Wn. 2d 143, 152, 437 P.3d 677 (2019).

> To determine whether a case presents an issue of continuing and substantial public interest, we

> consider a nonexclusive list of criteria: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.

Id. (internal quotations and brackets omitted).[3] Generally speaking, "[m]atters of statutory interpretation tend to be more public, more likely to arise again, and helpful to public officials." *Id.* at 153.

The first factor is met in this case because the question presented is public in nature. This case concerns interpretation of a statute applicable to any worker who falls within the jurisdiction of Washington State's Industrial Insurance Act ("IIA"). The IIA is a remedial statute which covers *all* "employments which are within the legislative jurisdiction of the state." RCW 51.12.010. Our Act is what is referred to as a

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[3] Occasionally a fourth factor is referenced which allows the court to "consider the level of adversity between the parties and the quality of the advocacy of the issues." *Harmon*, 193 Wn. 2d. at 152-53. There is no adversity between the parties, and Ms. Perez will let the Court judge the quality of advocacy to the extent that the Court considers it relevant.

"mandatory" coverage act, meaning that all "workers" (defined broadly[4]) are covered unless expressly excluded from the provisions of Title 51. *See, e.g., Jepson v. Dep't of Labor & Indus.*, 89 Wn. 2d 394, 398-99, 573 P.2d 10 (1977). This is true even where the employer fails to cover the worker under Washington law. *See Id.* at 399. Moreover, workers are covered irrespective of the labels used to describe them—be it "independent contractor" or some other term used to obfuscate a traditional employer-employee relationship—and the IIA creates a presumption in favor of coverage. *See Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185 Wn. 2d 721, 733-39, 374 P.3d 1097 (2016).

The IIA covers millions of Washingtonians and (as this case illustrates) even many individuals outside the borders of Washington State. In 2022, there were an estimated 3,428,560 workers employed by nearly 200,000 employers covered under

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[4] *See* RCW 51.08.180.

the IIA.[5] While statistics do not disclose how many of these workers work and/or reside out-of-state, as discussed below the IIA explicitly covers some of these workers. The first prong of the "substantial public interest" test is satisfied here because this case concerns a quintessentially public issue—a statute applicable to any of the millions of covered workers in this state (and beyond).

The second factor of the "significant public interest" test—the desirability of an authoritative determination for the future guidance of public officers—is also met in this case, and probably weighs most heavily in favor of granting review. There is no guidance from this Court on the meaning of the various terms and phrases used in the IIA's extraterritoriality statute, RCW 51.12.120. In fact, there is no guidance from any

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[5] *See* WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, *Annual Comprehensive Financial Report for the Fiscal Year Ended June 30, 2022*, at 126 Sch. 4 (*available at* https://lni.wa.gov/insurance/_docs/2022ACFR.pdf) (last accessed Dec. 26, 2023). This data includes both state fund-insured and self-insured employers.

Washington appellate court—published or unpublished—on the application of RCW 51.12.120. And while the Board of Industrial Insurance Appeals has issued two "significant decisions" concerning the extraterritoriality statute, neither involved the provisions at issue in this case.[6] A pronouncement from this Court would be beneficial because it would provide guidance to lower courts and administrative officials applying the extraterritoriality provisions of the IIA. This is all the more necessary in light of the post-COVID-19 transition of a significant percentage of workers to permanent work from

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[6] Under RCW 51.52.160 the Board is required to "publish and index its significant decisions and make them available to the public." The Board has done so, and they are available at http://biia.wa.gov/SDSubjectIndex.html. The Board has designated two decisions concerning RCW 51.12.120 as significant—*In re Irene Uzzell*, BIIA Dec., 09 18171 (2010), and *In re Kenneth Hermanson, dec'd*, BIIA Dec., 42,395 (1975). Neither case addressed whether employment was not principally localized in any state.

home arrangements, many of whom are moving out of state for a variety of reasons.[7]

Under RCW 51.12.120, the extraterritoriality statute, a worker "working outside the territorial limits of this state . . . shall be entitled to compensation under [the IIA] if at the time of the injury" he or she meets one of the four tests for extraterritorial coverage enumerated in the statute. *See* RCW 51.12.120(1)(a)-(d). Under RCW 51.12.120(1)(b), the provision applicable to this case, a worker injured *and* living outside of Washington State is covered if "[h]e or she [was] working under a contract of hire made in this state for employment not principally localized in any state."

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[7] As the Washington State Office of Financial Management stated in public guidance, the "previously rare" concept of remote work has become more common, and "agencies are getting more employee requests for out-of-state remote work for many different reasons." *See* Office of Financial Management, Out-of-state remote work guidance and resources, *available at* https://ofm.wa.gov/state-human-resources/statewide-telework-and-hybrid-work-resources/out-state-remote-work-guidance-and-resources (last accessed Jan. 2, 2024).

The IIA provides some guidance to determine where a worker's employment *is* principally localized. Under RCW 51.12.120(5)(a), the worker's employment "is principally localized in this or another state" if one of two tests is met. First, if the worker's employer "has a place of business in this or the other state" and the worker "regularly works at or from the place of business," the worker's employment is principally localized in that state. Second, and only if the first test is not dispositive, the worker's employment may be principally localized in the state in which the worker lives if "he or she spends a substantial part of his or her working time in the service of his or her employer" in that state. It follows that if neither of these two definitional tests are met, the worker's employment is not principally localized in any state.

The Court of Appeals analyzed the language of RCW 51.12.120 in a manner inconsistent with the principles governing provisions of the IIA, in particular the construction of ambiguous terminology. This Court should take the

opportunity to reaffirm those principles and provide guidance to lower courts and to the Department of Labor & Industries, which is entrusted to apply the terms of RCW 51.12.120 to all workers covered by Washington law. This guidance is necessary because the Court of Appeals neglected to apply one of the most fundamental principles of construction of the IIA—liberal construction of ambiguous terms.

As the Legislature has commanded, and as this Court has repeatedly affirmed, the IIA is "remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis v. Dep't of Labor & Indus.*, 109 Wn. 2d 467, 470, 745 P.2d 1245 (1987) *see also* RCW 51.12.010. The thrust of the IIA's liberal construction mandate is that "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." *Cockle v. Dep't of*

Labor & Indus., 142 Wn. 2d 801, 811, 16 P.3d 583 (2001). To the extent there is any ambiguity or uncertainty in the language of the IIA, it must be interpreted in a manner most favorable to the injured worker: "The liberal construction of the IIA necessitates that all doubts be resolved in favor of coverage." *Lyons Enters., Inc.*, 185 Wn. 2d at 734.

While the Court of Appeals proclaimed that the plain language of RCW 51.12.120 was dispositive in this case, it also acknowledged that the parties "differ[ed] . . . on the definition of working time" as used in that statute. Slip Op. at 7. Ms. Perez contended that "working time" meant time actually spent working, while the Department argued—and the Court of Appeals held—that "working time" includes potential working time in the case of a salaried worker. This distinction matters because Mr. Perez was expected to travel for his work "up to 75% of the time"[8] (including many weekends), and he had thus

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[8] *See* CP at 766.

very little time at home with his family as a worker with a more "normal" schedule would have. Although Mr. Perez's precious little down-time often fell during "business hours" on weekdays, the Court of Appeals found that this down-time was technically "working time" because it was time for which Mr. Perez was ostensibly paid salary. *See* Slip Op. at 9-10.[9]

Thus, in spite of Ms. Perez's reasonable interpretation of the term "working time," the Court of Appeals failed to address whether the parties' differing definitions were reasonable, and failed to even mention—let alone apply—the principle of liberal construction. Without guidance from this Court, future appellate and trial courts, the Board of Industrial Insurance Appeals, and the Department of Labor & Industries will be left with guidance to the interpretation of RCW 51.12.120 bereft of

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[9] Mr. Perez was "expected to work Monday through Friday or take leave," and "as a salaried employee, being 'on call' meant he was working."

any analysis of the fundamental precepts of construction of the IIA.

Importantly, even under a *plain language* analysis—without resort to liberal construction—Ms. Perez's interpretation of "working time" is the correct one. The Court of Appeals decided that Mr. Perez's "on call" time was "working time" in part based on his status as a salaried worker. Essentially, because Mr. Perez was a salaried worker, his employer reasonably expected him to work regular daytime hours Monday through Friday, and thus "being 'on call' meant he was working." Slip Op. at 10. The Court's analysis is incorrect; RCW 51.12.120 uses "working time" as the relevant metric, and the plain meaning of "working time" under RCW 51.12.120 requires *quantification* of the amount of time that the worker spent in different locations in order to determine whether their employment was "principally localized" in any state.

Yet even if the Department's proposed definition of working time as encompassing "on call" time is credited, at best the Department merely offered a competing reasonable interpretation.[10] The Court of Appeals improperly failed to consider Ms. Perez's competing definition or acknowledge any ambiguity within RCW 51.12.120, and consequently failed to engage in the proper statutory construction analysis. This analysis would require the Court to, first and foremost, liberally construe "working time" in a manner most favorable to the Ms. Perez. But the Court of Appeals did not do that—no reference to either liberal construction or ambiguity is found *anywhere* in the court's opinion. Liberal construction would not include "on call" time because that is not time spent actually working.

The Court of Appeals' treatment of Mr. Perez's "on call" time as "working time" because he was a salaried worker is also

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[10] While Ms. Perez does not believe the Department's definition is *reasonable*, for purposes of argument here she presumes it is.

inconsistent with Mr. Perez's actual work pattern. Respectfully, the Court of Appeals' analysis is incorrect, and it places unfair and unreasonable expectations on Mr. Perez and other salaried workers. Though the Court of Appeals observed that Mr. Perez "was paid for every work day that he was outside of Indiana and for every work day that he was in Indiana, no matter how many hours he worked," that observation is incorrect. Slip Op. at 10.

While the Court of Appeals did not elaborate on what it considered to be a "work day," Ms. Perez assumes this means Monday through Friday based on the Court's focus on the "expectation" that Mr. Perez would "work Monday through Friday or take leave." Slip Op. at 9. The Court of Appeals' analysis does not take into consideration the numerous weekend days Mr. Perez spent on the road in the course of his employment, and it similarly does not account for the fact that, while on the road, Mr. Perez's entire 24 hour day was dictated by his employment. While an "ordinary" salaried worker might

reasonably be expected to work regular eight hour days Monday through Friday, according to the Court's analysis Mr. Perez would *also* be saddled with the obligation to be effectively on the job 24 hours per day many weekdays and weekends alike. That travel was a requirement in which Mr. Perez was given no choice—it was an "incredibly important," and non-negotiable, part of his job. *See* CP at 785-86. The Court of Appeals thus effectively held that Mr. Perez was required to perform two full time jobs—one on the road and one at home—simply because he was a salaried worker.

In reaching the conclusion that a salaried worker's "on call" time constitutes "working time," the Court of Appeals also focused its analysis on case law interpreting a U.S. Department of Labor regulation defining "payment on a salary basis." Slip Op. at 9. The Court's analysis is flawed, though, because it misconstrues the context of that regulatory framework. The Court of Appeals cited this Court's decision in *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn. 2d 291, 996 P.2d 582

(2000), in part for the proposition that "it is reasonable for an employer to expect that a full-time salaried employee's work-related responsibilities will occupy a normal workweek." Slip Op. at 9 *quoting Drinkwitz*, 140 Wn. 2d at 302. Moreover, according to the Court of Appeals, the *Drinkwitz* case supports its conclusion in Ms. Perez's case because *Drinkwitz* acknowledges that a salaried worker "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked." *Id.*

While the Court of Appeals' analysis is correct insofar as a salaried worker must receive his or her full salary without regard to the number of "days or hours worked," it ignores the context of the passages quoted in *Drinkwitz*. This Court's use of the term "workweek" in *Drinkwitz* does not stand for the proposition that every salaried employee is expected to work a forty hour, Monday through Friday workweek. Rather, in *Drinkwitz* this Court addressed an employer's use of *quotas*, whereby the employer imposed a "requirement that employees

work a weekly quota of between 40 and 45 hours per week" in order to receive their full salary. *See* 140 Wn. 2d at 296.

Thus, the language quoted by the Court of Appeals from *Drinkwitz* that "it is reasonable for an employer to expect that a full-time salaried employee's work-related responsibilities will occupy a normal workweek" is *immediately* followed by the qualifier that "employers should not be permitted to impose a rigid workweek hour requirement with pay deductions as a consequence for failure to meet such a quota." *Id.* Comparing *Drinkwitz* to the instant case is an apples-to-oranges comparison—*Drinkwitz* addressed whether an employer can dock a salaried employee's pay for not working a full forty hour week while this case asks whether a salaried employee's "on call" time is "working time" in a different context under a different statutory framework.

In summary, guidance from this Court on the proper interpretation of RCW 51.12.120 is necessary in order to ensure that future courts and administrative officials properly apply its

terms. This requires the quantification of the worker's time spent actually working in various locations where the worker alleges that their employment was not principally localized in any state—as difficult as that may be in cases such as this where the worker is killed on the job. Plain language dictates this interpretation of "working time," and liberal construction commands it.

Additionally, this Court can take the opportunity to provide further guidance regarding the distinction between a finding of fact and conclusion of law. Because the Board and the superior court both neglected to issue proper findings of fact regarding the crucial issues in this case, Ms. Perez was forced to concede (regretfully) to the Court of Appeals that the only proper outcome would be for the court to reverse and remand her case to the Board to issue proper findings of fact.[11] As Ms.

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[11] *See* Sept. 14, 2023, oral argument at 0:50, *available at* https://www.tvw.org/watch/?clientID=9375922947&eventID=2023091183&startStreamAt=50.

Perez argued to the Court of Appeals, the Board's and superior court's findings of fact were actually conclusions of law, and because appellate courts cannot make factual findings, the only remedy was to remand the case to the Board to issue findings of fact.

The line between a finding of fact and a conclusion of law has been described as "fuzzy." *See NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961) (Friendly, J.). The rule in Washington is that "[i]f a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law." *Para-Medical Leasing v. Hangen*, 48 Wn. App. 389, 397, 739 P.2d 717 (1987). "A finding, on the other hand, is a determination from the evidence of the case propounded by one party and denied by another." Id. "The determination of whether particular statutory language applies to a factual situation is a conclusion of law and is fully reviewable by the appellate court." *In re Meistrell*, 47 Wn. App. 100, 107, 733 P.2d 1004 (1987). "If a conclusion of law is

incorrectly denominated a finding of fact, it is subject to review." *State v. Williams*, 96 Wn. 2d 215, 220-21, 634 P.2d 868 (1981).

The critical findings of fact made by the superior court in this case—findings 1.12 and 1.13—are properly characterized as conclusions of law. Finding 1.12 concludes that Mr. Perez "spent a substantial part of his working time in the service of DCI in the State of Indiana," while Finding 1.13 states that "Mr. Perez Ortega's work with DCI was principally localized in Indiana." CP at 1837. Both "findings" merely employ conclusory terms of art lifted directly from RCW 51.12.120 rather than elucidate what specific *facts* justify the conclusions that Mr. Perez spent a "substantial part of his working time" in Indiana and that his employment "was principally localized in Indiana." The Court of Appeals' analysis of this issue is internally inconsistent and flawed.

The Court of Appeals acknowledged initially that "[t]he meaning of 'substantial part' and 'working time' in RCW

51.12.120(5)(a)(ii) is a question of law," but later in its opinion stated that "whether Perez Ortega spent a substantial part of his working time in the service of DCI in Indiana is a fact question reserved for the fact finder." *See* Slip Op. at 6, 12. Only one of these statements can be true, and in this case it is the former—the determination of whether a statutory term is met is a conclusion of law. The Court of Appeals reasons, though, that the superior court "listed the evidence it relied on to make [the] finding" that Mr. Perez "spent a substantial part or his working time in the service of DCI in Indiana." Slip Op. at 12. That evidence, according to the Court of Appeals, include the facts that Mr. Perez "worked from home in Indiana, that he was a salaried worker required to be available 24 hours per day, that he worked with customers in Indiana, and traveled in and around Indiana for work-related travel." *Id.* Most of these

things may be true,[12] but they do not justify the *conclusion* that Mr. Perez spent a "substantial part of his working time" in Indiana doing those things without *quantification*. This Court may also take this opportunity to clarify the boundary between a finding of fact and a conclusion of law.

Finally, as the to third part of the substantial public interest test, "the likelihood of future recurrence of the question" presented in this case is high as alluded to above in regards to the recent increase in work-from-home arrangements.

VI. CONCLUSION

In summary, Ms. Perez respectfully asks this Court to grant review in this case because it presents an issue of substantial public interest that should be determined by this Court. This Court may take this opportunity to provide guidance on the interpretation of RCW 51.12.120, something

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[12] Ms. Perez takes issue with the finding that Mr. Perez was "required to be available 24 hours a day," though as explained further, *availability* is not "working time."

that has not been done by any Washington court in the half century of that statute's existence. Additionally, this Court can provide guidance to lower courts on the distinction between a finding of fact and a conclusion of law.

Respectfully submitted this 3rd day of January, 2024.

I certify, pursuant to RAP 18.17(b), that this brief contains 4,748 words, exclusive of words in sections excluded per the rule.

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APPENDIX

No. 84864-0-I

FILED
12/4/2023
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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COURTNEY PEREZ, Appellant, v. THE DEPARTMENT OF LABOR & INDUSTRIES; and DIGITAL CONTROL, INC., Respondents.	No. 84864-0-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — After Julian Perez Ortega was killed in a work-related accident, his wife, Courtney Perez, applied for survivor workers' compensation under the Industrial Insurance Act (IIA), Title 51 RCW. The Department of Labor and Industries (Department) denied her claim. The denial was affirmed by the Board of Industrial Insurance Appeals (Board) and the superior court. Perez appeals and argues that the superior court erred in finding Perez Ortega's employment was principally localized in Indiana. We affirm.

I

Perez Ortega began his employment with Digital Control, Inc. (DCI) in 1998. DCI is a Washington corporation, headquartered in Kent, Washington, that engineers and

manufactures electronic guidance systems for horizontal directional drilling. When Perez Ortega started at DCI he signed an employment agreement. The employment agreement is governed by the laws of the State of Washington.[1]

Perez Ortega started as a production assembler, transitioned to customer service, and then held multiple territory manager roles, first in Florida, then in California. In 2007, Perez Ortega became the Midwest Territory Manager. Territory managers are required to live somewhere within their assigned territory but are also "home office" based. The Midwest territory mainly includes Indiana, Illinois, Michigan, Missouri, and Kansas, with occasional travel to other states in the Midwest. Perez Ortega and his family relocated to Indiana and have lived there ever since.

Perez Ortega's position required him to travel within the territory up to 50 percent of the time. His job responsibilities included, among others, managing relationships with dealers and customers; providing training, technical support, and customer service; giving presentations, demos, and trainings; performing field testing and troubleshooting company products; and handling customer service phone calls, questions, and general trouble-shooting issues. Because of his fluency in Spanish, Perez Ortega also served DCI's small South American market.

In April 2018, Perez Ortega accepted an offer to become DCI's North American Field Manager. In this role, all of DCI's territory managers reported to Perez Ortega. Perez Ortega remained responsible for the Midwest and South America territories. This position also required the ability to travel up to 50 percent of the time and otherwise

[1] The agreement does not say where Perez Ortega's employment would be principally localized, nor does it identify which state's workers' compensation law would apply to work-related injuries.

work from home. When not travelling, Perez Ortega was expected to communicate with customers, and, as part of his supervisory responsibilities, check in with other territory managers.

In late July 2018, Perez Ortega was struck by a motor vehicle while working for DCI at a construction site in Michigan. Perez Ortega died from his injuries.

After Perez Ortega's death, Perez submitted a claim for survivor workers' compensation with the Department. The Department denied her claim, finding that Perez Ortega was not a Washington worker at the time of the injury and was not covered under the IIA. Perez appealed to the Board.

After cross motions for summary judgment, the industrial appeals judge (IAJ) issued a proposed decision and order affirming the Department. The IAJ found that Perez Ortega's work was principally localized in Indiana. Perez petitioned for review of the IAJ's decision by the Board. The Board adopted the IAJ's proposed decision as its final decision.

Perez appealed the Board's decision to King County Superior Court. The superior court affirmed the Board's decision, concluding that the Board had not erred in finding that Perez Ortega's work was principally localized in Indiana.[2]

Perez appeals.

[2] The superior court agreed with Perez that Perez Ortega was working under a contract of hire made in Washington. The parties do not challenge this conclusion.

II

A

The IIA governs judicial review of workers' compensation determinations. Rogers v. Dep't of Lab. & Indus., 151 Wn. App. 174, 179, 210 P.3d 355 (2009). A worker aggrieved by the decision and order of the Board may appeal to the superior court. RCW 51.52.110. The superior court reviews de novo the Board's decision, based only on the administrative record and evidence presented to the Board. RCW 51.52.115; Butson v. Dep't of Lab. & Indus., 189 Wn. App. 288, 295, 354 P.3d 924 (2015). The Board's decision is considered prima facie correct and the opposing party must support its challenge by a preponderance of the evidence. RCW 51.52.115; Eastwood v. Dep't of Lab. & Indus., 152 Wn. App. 652, 657, 219 P.3d 711 (2009).

We review the decision of the superior court rather than the decision of the Board. Birgen v. Dep't of Lab. & Indus., 186 Wn. App. 851, 856, 347 P.3d 503 (2015). The superior court's decision is subject to the ordinary standard of review for civil appeals. RCW 51.52.140; Malang v. Dep't of Lab. & Indus., 139 Wn. App. 677, 683, 162 P.3d 450 (2007). We review "'whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.'" Rogers, 151 Wn. App. at 180 (quoting Watson v. Dep't of Lab. & Indus., 133 Wn. App. 903, 909, 138 P.3d 177 (2006)). Substantial evidence is evidence "'sufficient to persuade a fair-minded, rational person of the truth of the matter.'" Potter v. Dep't of Lab. & Indus., 172 Wn. App. 301, 310, 289 P.3d 727 (2012) (quoting R & G Probst v. Dep't of Lab. & Indus., 121 Wn. App. 288, 293, 88 P.3d 413, (2004)). We review the record in the light most favorable to the party who prevailed in

superior court—the Department. Robinson v. Dep't of Lab. & Indus., 181 Wn. App. 415, 425, 326 P.3d 744 (2014). We do not reweigh the evidence. Value Village v. Vasquez-Ramirez, 11 Wn. App. 2d 590, 596, 455 P.3d 216 (2019). "Statutory interpretations are questions of law reviewed de novo." Kustura v. Dep't of Lab. & Indus., 169 Wn.2d 81, 87, 233 P.3d 853 (2010).

B

Perez argues that Perez Ortega's employment with DCI was not principally localized in any state and so it was error for the superior court to affirm the Board. We disagree.

The IIA broadly provides "sure and certain relief" for workers and their families, injured in their work. RCW 51.04.010. While this generally includes workers who are injured while working out of state, for those workers, coverage is more limited. Washington's extraterritorial statute provides in part:

> (1) If a worker, while working outside the territorial limits of this state, suffers an injury on account of which he or she, or his or her beneficiaries, would have been entitled to compensation under this title had the injury occurred within this state, the worker, or his or her beneficiaries, shall be entitled to compensation under this title if at the time of the injury:
>
> (a) His or her employment is principally localized in this state; or
>
> (b) He or she is working under a contract of hire made in this state for employment not principally localized in any state;

RCW 51.12.120(1).[3] Perez argued below that Washington had jurisdiction under subsection (b) because Perez Ortega was working under a contract of hire made in Washington and his employment was not "principally localized in any state."

Where employment is principally localized is defined by statute. Under RCW 51.12.120(5)(a), there are two ways to determine where a person's employment is principally localized:

> A person's employment is principally localized in this state or another state when: (i) His or her employer has a place of business in this or the other state and he or she regularly works at or from the place of business; or (ii) if (a)(i) of this subsection is not applicable, he or she is domiciled in and spends a substantial part of his or her working time in the service of his or her employer in this or the other state.

While DCI has a place of business in Kent, Washington, Perez Ortega rarely worked there. As a result, RCW 51.12.120(5)(a)(i) is not applicable. Turning to RCW 51.12.120(5)(a)(ii), Perez Ortega was domiciled in Indiana. The issue therefore is whether Perez Ortega spent "a substantial part" of his "working time" in the service of DCI in Indiana. If not, then Perez Ortega's employment was not principally localized in any state and Washington would have jurisdiction.

The meaning of "substantial part" and "working time" in RCW 51.12.120(5)(a)(ii) is a question of law susceptible to judicial review. Gorre v. City of Tacoma, 184 Wn.2d 30, 36 n.2, 357 P.3d 625 (2015). And whether Perez Ortega spent a substantial part of his working time in the service of DCI in Indiana is a fact question reserved for the fact finder.

[3] The legislature recently amended RCW 51.12.120. LAWS OF 2023, ch. 88 § 11. Because the amendments do not affect our analysis, we use the current version of the statute.

The goal of statutory interpretation is to determine and give effect to the legislature's intent. Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To determine legislative intent, we first look to the plain language of the statute. Jametsky, 179 Wn.2d at 762. We consider the meaning of the provision in question, the context of the statute in which the provision is found, and related statutes. Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). "If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says." Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co., 186 Wn.2d 336, 346, 376 P.3d 372 (2016).

Perez concedes that the terms are plain on their face. And both Perez and the Department rely on similar definitions of "substantial."[4] Merriam-Webster defines "substantial" as "considerable in quantity." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/substantial (last visited Aug. 22, 2023).

The parties differ, however, on the definition of "working time." Perez argues that the plain language of the term "working time" only encompasses time spent actually working. Perez asserts that Perez Ortega was just "on call" when in Indiana and because that time is only time spent potentially working, it should be disregarded. We disagree.

Perez cites two cases from Pennsylvania which have a similar extraterritorial coverage statute and definition of "principally localized." See 77 PA. STAT. AND CONS. STAT. ANN. § 411.2. In both cases the claimant was a truck driver. First, in Watt v.

[4] Perez uses the following definition of substantial, "of ample or considerable amount, quantity, size, etc." While the Department uses "considerable in amount, value, or worth."

Workers' Compensation Appeal Board, 123 A.3d 1155, 1161 (Pa. Commw. Ct. 2015), the court compared the time and miles the claimant spent in Pennsylvania with the total time and miles he spent driving. While the claimant spent more time, 19 percent, and drove more miles, 17 percent, in Pennsylvania than any other state, it was only slightly higher than other high totaling states, like Ohio 10 percent and 13 percent respectively, and Virginia 12 percent and 14 percent. Watt, 123 A.3d at 1161-62. The court found that the claimant did not spend a substantial part of his working time in Pennsylvania because it was only a fraction of his total time. Watt, 123 A.3d at 1161-62.

Second, in Williams v. Workers' Compensation Appeal Board, 4 A.3d 742, 747 (Pa. Commw. Ct. 2010), the court explained, "Determining what a substantial part is requires a comparison with the working time spent elsewhere." In Williams, the claimant spent 38 percent of his time driving in Pennsylvania, 32 percent in Ohio, and the remaining 30 percent in 19 other states. 4 A.3d at 747. The court held the statute does not require a majority of time be spent in the state but only a substantial part, and because the claimant spent 6 percent more time in Pennsylvania than the next most traveled state, and 38 percent of his time overall, he spent a substantial part of his work time driving in Pennsylvania. Williams, 4 A.3d at 747-48. Significantly, the Williams court also found, "It is indisputable that time spent driving is work time as Claimant was paid by the mile. He was not paid by the load or any other method. When not driving, Claimant was not generating earnings." Williams, 4 A.3d at 747.

"Working time" in both Watt and Williams was time spent driving as both were paid by the mile. 123 A.3d at 1157; 4 A.3d at 747. Unlike the claimants in Watt and Williams, Perez Ortega was a salaried employee. In a different context, our Supreme

Court has explained that "[s]alary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task . . . The salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it." Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 302, 996 P.2d 582 (2000) (citing Brock v. Claridge Hotel & Casino, 846 F.2d 180, 184 (3d Cir. 1988)). Significantly, "it is reasonable for an employer to expect that a full-time salaried employee's work-related responsibilities will occupy a normal workweek." Drinkwitz, 140 Wn.2d at 302.

Washington has also applied a U.S. Department of Labor regulation that defines "payment on a salary basis":

> An employee will be considered to be paid 'on a salary basis' . . . if . . . he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed . . . [T]he employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

Drinkwitz, 140 Wn.2d at 299 (quoting former 29 C.F.R. § 541.118(a) (1975)) (emphasis added).

Perez insists that to properly compare the time Perez Ortega spent in other states, DCI should have had to quantify the time Perez Ortega spent "actually working" in Indiana. She insists that anything less than a full eight-hour day should not count. We disagree.

As a salaried employee, Perez Ortega was not required to specifically track his time. But he was expected to work Monday through Friday or take leave. When not

travelling, Perez Ortega was still generating earnings. While Perez repeatedly argues that "on call" time should not count as "working time," in this context Perez Ortega was expected to be responsive to the needs of DCI's customers and vendors, and his co-workers. As a salaried employee, being "on call" meant he was working. He was paid for every work day that he was outside of Indiana and for every work day that he was in Indiana, no matter how many hours he worked. Thus, an hour by hour comparison of Perez Ortega's time on the road versus working from home was not required.

While the working time of the truck drivers in Watt and Williams was easily quantifiable because they were paid by the mile, Perez Ortega's working time as a salaried employee is also easy to quantify—because he was paid the same amount whether he was travelling or working from home in Indiana.

Based on these facts, Perez Ortega's "working time" as a salaried employee was the time that he was paid for and not on paid time off.

C

Perez specifically assigns error to the trial court's findings of fact 1.5, 1.12, and 1.13. Perez mainly argues that the findings are immaterial, irrelevant, and do not support concluding that Perez Ortega spent a substantial amount of his working time in Indiana. We address each.[5]

[5] Perez also argues that the superior court erred by entering findings of fact 1.14 and 1.15 because they pertain to the superior court's earlier ruling on summary judgment that Perez Ortega's contract of hire was made in Washington. Perez argues that "findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863, 867 (1991). We agree with Perez that these two findings of fact are superfluous, regardless the conclusion of law that the contract of hire was made in Washington has not been appealed.

Finding of fact 1.5 states, "[a]t all times relevant, DCI recorded Mr. Perez Ortega's employment in the State of Indiana for workers' compensation, unemployment, and tax purposes."[6] Perez argues that finding of fact 1.5 is true but not supported by substantial evidence. This is so, Perez contends, because substantial evidence must be admissible and the evidence of his coverage by the State of Indiana was irrelevant and inadmissible.

Perez moved in limine to exclude evidence that Perez Ortega was insured in another state and that Perez had applied for and received benefits from another state. The IAJ agreed that the evidence should be excluded, but the IAJ allowed the parties to ask questions on this subject in colloquy to preserve factual evidence for potential future motions or requests of the Board. But the fact that DCI paid for worker's compensation for Perez Ortega in Indiana was admitted as exhibit 4. Perez did not object to admission of exhibit 4. And Department witness Christina Alcatraz testified that DCI covered Washington workers in Washington state, and covers Perez Ortega in Indiana without objection from Perez.

"A party is obligated to renew an objection to evidence that is the subject of a motion in limine in order to preserve the error for review." City of Bellevue v. Kravik, 69 Wn. App. 735, 742, 850 P.2d 559 (1993) (citing Sturgeon v. Celotex Corp., 52 Wn. App. 609, 623, 762 P.2d 1156 (1998)). Because Perez failed to renew her objection when the evidence was introduced, Perez waived any possible error and the superior court

[6] Finding of fact 1.5 states in full, "[o]n and around July 31, 2018, DCI was a State of Washington corporation, headquartered in Kent, Washington. At all times relevant, DCI recorded Mr. Perez Ortega's employment in the State of Indiana for workers' compensation, unemployment, and tax purposes."

could rely on the evidence because it was part of the Board's record. Malang, 139 Wn. App. at 683.

Thus, we conclude that finding of fact 1.5 is supported by substantial evidence.

2

Finding of fact 1.12 states:

> A preponderance of evidence supports that from 2017 through July 31, 2018, Mr. Perez Ortega spent a substantial part of his working time in the service of DCI in the State of Indiana. At all times relevant, Mr. Perez Ortega resided in Indiana, he was a salaried worker that was required to be available 24 hours per day, he worked from home in the State of Indiana, he worked with customers in the field in the State of Indiana, he traveled in and around the State of Indiana for work related travel, and he maintained and rented a storage unit for work equipment in the State of Indiana.

Perez asserts that the first sentence is a conclusion of law and the finding is "bereft of any explication as to what that evidence is."

As discussed above, whether Perez Ortega spent a substantial part of his working time in the service of DCI in Indiana is a fact question reserved for the fact finder. And, within the finding, the superior court listed the evidence it relied on to make that finding. This is not a conclusion of law.

Perez does not seriously contend that substantial evidence does not support the subsequent findings, conceding that substantial evidence supports finding Perez Ortega worked from home in Indiana, that he was a salaried worker required to be available 24 hours per day, that he worked with customers in Indiana, and traveled in and around Indiana for work-related travel.

And while Perez does not concede the fact that Perez Ortega "maintained and rented a storage unit for work equipment in the State of Indiana" is supported by

substantial evidence, she does acknowledge it as a fact, just not one that is relevant to conclude that Perez's employment was principally localized in Indiana. But this finding is supported by substantial evidence. Perez testified that Perez Ortega had a storage unit in Indiana, it only contained DCI property, and DCI reimbursed Perez Ortega for the cost of the storage unit. DCI Chief of Staff Matt Mercer testified similarly.

Thus, we conclude that finding of fact 1.12 is supported by substantial evidence.

3

Perez argues the superior court erred by concluding that Perez Ortega's work was principally localized in Indiana because it "does not flow" from the findings that were made. Perez challenges finding of fact 1.13 which states, "[a] preponderance of evidence supports the Board's finding that on July 31, 2018, Mr. Perez Ortega's work with DCI was principally localized in the State of Indiana." While we agree that this finding 1.13 is a conclusion of law that we review de novo, the trial court's conclusion that Perez Ortega's employment was principally localized in Indiana is supported by the findings.

Perez Ortega's employment was principally localized in Indiana if he was domiciled in Indiana and spent a substantial part of his working time in the service of DCI in Indiana. RCW 51.12.120(5)(a)(ii). Perez Ortega was domiciled in Indiana.

As discussed above, Perez concedes that substantial evidence supports finding that Perez Ortega was a salaried employee, that he worked from home in Indiana, that he was required to be available 24 hours a day, that he worked with customers in Indiana, traveled in and around Indiana for work-related travel, and maintained a storage unit for work equipment in Indiana.

In addition, DCI presented evidence that in 2017 Perez Ortega worked 247 days for DCI, not including holidays and paid time off. Of those days, Perez Ortega worked from home in Indiana 128 days, or 52 percent of the time. In 2018, Perez Ortega worked 146 days for DCI. And 56 of those days were worked in Indiana, 38 percent of the time. While Perez Ortega travelled extensively, during that time he spent no more than 9 percent of the time in any other state.

DCI provided Perez Ortega with a vehicle, a phone, and a laptop. DCI also paid a portion of the home internet in 2017 and 2018. And Perez testified that Perez Ortega,

> always had his phone on him. So even if he was out in the yard mowing and his phone rang, he would take the call. If someone would e-mail or text, he would respond to it. So regardless of if he was at a baseball game or whatever we were doing, even on vacations, he would take the call.

The substantial evidence standard is highly deferential to the fact finder; and we do not weigh the evidence or substitute our judgment for the fact finder's judgment. See Chandler v. Office of Ins. Comm'r, 141 Wn. App. 639, 648, 173 P.3d 275 (2007). Viewing the evidence in the light most favorable to the Department, we conclude that substantial evidence supports the superior court's finding that Perez Ortega spent a substantial part of his working time in Indiana and that finding supports the conclusion that Perez Ortega's employment was principally localized in Indiana.

D

Perez next argues that the superior court erred in considering the testimony of Department witness Christina Alcatraz. We disagree.

Perez first asserts that the Board erred in refusing to exclude Alcatraz's testimony as a discovery sanction. Perez attempts to incorporate by reference her prior

arguments to the Board. "We do not permit litigants to use incorporation by reference as a means to argue on appeal or to escape the page limits for briefs set forth in RAP 10.4(b)." Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 891, 251 P.3d 293 (2011) (citing Kaplan v. Nw. Mut. Life Ins. Co., 115 Wn. App. 791, 801 n.5, 65 P.3d 16 (2003)).

Perez next asserts it was error to consider Alcatraz's testimony because it was an impermissible legal conclusion. Perez specifically points to two pieces of testimony. First, Alcatraz testified that the Department's decision to reject Perez's claim was correct because the Department did "not have jurisdiction over this worker at the time of his injury." Second, Alcatraz testified, "it was our finding that Mr. Perez Ortega was principally localized in the state of Indiana at the time of his injury." While the first statement may be an opinion on a legal conclusion, the second is a factual statement about the Department's determination in this case.

When Perez objected to the first statement, the ALJ overruled the objection and explained:

> I view this more as the Department's position on explaining its actions, which it can do if it wishes to do so. And I do not view this opinion as a precedent-setting legal opinion that I have to follow. I'll make the determination of the meaning and quality of weight with regard to statutory matters.

It is clear from the record that the ALJ recognized its role and disregarded potentially inadmissible legal conclusions made by this witness. And the superior court could rely on the testimony because it was part of the Board's record. Malang, 139 Wn. App. at 683. Thus, the superior court did not err by considering this testimony.

We affirm.[7]

Mann, J.

WE CONCUR:

Coleman, J.

Bowman, J.

[7] Perez requests attorney fees under RCW 51.52.130, which provides a fixed fee for workers or their beneficiaries, who receive additional relief on appeal. Because Perez does not receive additional relief on appeal, she is not entitled to fees on appeal.

CAUSEY WRIGHT

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I certify that I have this day served Appellant's Petition for Review on the parties to this proceeding, as listed below, by email and United States mail, postage prepaid, or by other method where indicated.

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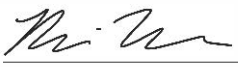

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