NO. 91539-3

SUPREME COURT OF THE STATE OF WASHINGTON

CYNTHIA DILLON,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT W. FERGUSON
Attorney General

Scott T. Middleton
Assistant Attorney General
WSBA No. 37920
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7740

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

An area used for over 50 years to park vehicles is a parking area. Well-established appellate decisions look to the actual use of an area to determine if it is a parking area subject to the workers' compensation parking area exclusion. The Court of Appeals applied this well-established test to the undisputed fact that an area had been used for parking since the 1950s. Cynthia Dillon believes that the area should not have been used for parking, but this does not change the fact that it was used for parking. She cites no authority for the proposition that a hypothetical set of facts controls to determine the parking area exclusion, and none exists.

Dillon demonstrates no conflict with any appellate case. To the contrary, the case law is unanimous that the actual use answers the question as to whether the parking area exclusion applies. Likewise, no substantial matter of public interest exists in re-examining the common sense holding that if an area was used for over 50 years for parking, it is a parking area. This Court should decline review.

II. STATEMENT OF THE ISSUE

Does RCW 51.08.013's "parking area" exclusion apply where Dillon fell in an area that her employer has used since the 1950s for parking, and where up to 10 cars park on any given day?

III. STATEMENT OF THE CASE

A. Bardahl Employees Have Parked Their Cars in a Parking Area on Bardahl's Premises Since the 1950s and Up to Ten Cars Park in That Location on Any Given Day

Bardahl Manufacturing, Inc., operates a manufacturing plant in Seattle. BR Dillon 19; BR Nicolaysen 100.[1] Since the 1950s, Bardahl employees have parked their cars in a paved area on its premises and up to ten cars park there every day. CP 103 (FF 1.3 and 1.4); BR Nicolaysen 120-21; Ex. 1.

The paved area is bounded on one side by a public road. Ex. 1. On the other side of the paved area, opposite the roadway, is an "employees only" door, which is bounded by an exterior wall on one side and a roll top bay door on the other. Ex. 1. The bay door is rarely used. *See* BR Nicolaysen 118-19; BR Fisk 146.

While the paved area directly in front of the doors contained no signage, painting lines or other markings denoting parking spaces and no employees were assigned to park there, employees had customarily parked in this area for years. Ex. 1; BR Fisk 135; BR Dillon 38; BR Nicolaysen 108. At any one time during Bardahl's hours of operation, multiple vehicles could be found parked in a line running parallel to the adjacent

[1] "BR" refers to the certified appeal board record. Testimony is referenced by name.

exterior wall and continuing around the corner of the building. *See* Exs. 1-8, 12; BR Dillon 38; BR Nicolaysen 108, 116-17.

B. The Department, Board, Superior Court, and Court of Appeals All Decided That the Parking Area Exclusion Compels Rejection of Dillon's Claim

On November 24, 2010, after Dillon had completed work for the day, and left the Bardahl building, she fell on a patch of black ice in the area used for parking. BR Dillon 26.[2] Dillon testified that she believed one car was parked in the area where she fell. BR Dillon 34. She then applied for workers' compensation benefits.

The Department denied Dillon's workers' compensation claim because she fell in a "parking area" and was therefore not covered under RCW 51.08.013. BR 29. At the Board, she presented testimony of a land use witness who acknowledged that the area was used for parking, but opined that it should not have been. *See* BR Thorp 70. The hearings judge found this testimony unpersuasive because Dillon cited "no authority for the proposition that an area used as a parking area falls outside of the parking lot exception set forth in RCW 51.08.013 because the parking area

---

[2] Dillon concedes the area where she fell had been used for parking for decades. In her petition, she states, "Without direction from the employer, certain employees took it upon themselves, for their own convenience, to park in tandem on or near the place where Ms. Dillon fell. This customary practice was in place for decades." Pet. at 20. Also, Dillon did not assign error to the trial court's Finding of Fact 1.3 that states: "Bardahl Manufacturing has used the rea where Ms. Dillon fell for parking cars since the 1950s. On any given day, up to 10 cars park there." *See* Appellant's Br. at 2.

should have been used for another purpose." BR 43. The Board affirmed the Department. BR 1, 29-45.

Dillon appealed to superior court. CP 1-2. The superior court affirmed the Board and entered the following findings:

> 1.3 Bardahl Manufacturing has used the area where Ms. Dillon fell for parking cars since the 1950s. On any given day, up to 10 cars park there.
>
> 1.4 Bardahl Manufacturing does not use the area where Ms. Dillon fell for conducting business.

CP 103.

The superior court concluded that Dillon was injured in a "parking area" and thus not acting within the course of employment under RCW 51.08.013. CP 104 (adopting Board's conclusions of law); BR 45.

Dillon appealed to the Court of Appeals. She did not assign error to any specific findings by the superior court and she admits the area was used for parking. *See* Appellant's Br. at 2; Pet. at 20-21.

The Court of Appeals applied several cases governing the "parking area" exemption to conclude that Dillon was not entitled to workers' compensation benefits because the area where she slipped and fell was actually used as a parking area. *Dillon v. Dep't of Labor & Indus.*, __ Wn. App. __, 344 P.3d 1216, 1220 (2014).

IV. REASONS WHY REVIEW SHOULD BE DENIED

No reason exists to take review. Dillon has demonstrated neither a conflict nor an issue of substantial public interest. The Industrial Insurance Act plainly calls for rejection of claims where the worker was injured in a parking area:

> "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, *except parking area* . . . .

RCW 51.08.013(1) (emphasis added).

The courts have uniformly interpreted "parking area" to mean an area that is actually used for parking. *See Univ. of Wash. v. Marengo*, 122 Wn. App. 798, 803-04, 95 P.2d 787 (2004) (stairwell in parking garage not used for parking and therefore not parking area); *Madera v. J.R. Simplot Co.*, 104 Wn. App. 93, 97-98, 15 P.3d 649 (2001) (drive-through lane not parking area because not used for parking); *Boeing Co. v. Rooney*, 102 Wn. App. 414, 418-19, 10 P.3d 423 (2000) (grassy slope not used for parking is not parking area); *Bolden v. Dep't of Transp.*, 95 Wn. App. 218, 223, 974 P.2d 909 (1999) (parking area where worker not working excluded); *Bergsma v. Dep't of Labor & Indus.*, 33 Wn. App. 609, 616,

656 P.2d 1109 (1983) (parking area where worker not working excluded); *see also Ottesen v. Food Serv. of Am., Inc.*, 131 Wn. App. 310, 316, 126 P.3d 832 (2006) (staging/truck yard used for parking and as jobsite).

A. The Court of Appeals Decision in This Case Does Not Conflict with 30 Years of Case Law Holding That If an Area Is Actually Used for Parking It Is a Parking Area

Contrary to Dillon's arguments, no conflict exists with other Court of Appeals decisions. *See* Pet. at 8-17. Instead, the Court of Appeals applied a large body of case law to the undisputed facts of this case and properly decided that actual use of a parking area controls.

Since the Industrial Insurance Act does not define the term "parking area," the Court of Appeals here, as in previous appellate decisions, looked to the ordinary definition of the term. *Dillon*, 344 P.3d at 1219; *Marengo*, 122 Wn. App. at 803-04; *Madera*, 104 Wn. App. at 97-98. The term "parking" is defined as "the leaving of a vehicle in an accessible location" or "an area in which vehicles may be left." *Madera*, 104 Wn. App. at 97. Dillon agrees that this is the definition to use. Pet. at 13; Appellant's Br. at 15. Under this definition, the area was a parking area because it was an area where vehicles are left.

Dillon has described a number of parking area cases: *Bergsma*, *Rooney*, *Bolden*, *Ottesen*, *Madera*, and *Marengo*. Pet. at 8-16. And, although she says the Court of Appeals decision conflicts with these

decisions because it did not use the "type of analysis" of these cases (Pet. at 16), with the exception of one sentence in *Madera*, she points to no specific analysis that conflicts with *Dillon*. Pet. at 14-16.

Regarding *Madera*, she asserts there is a conflict because, in her view, the Court of Appeals decision does not address "whether an ordinary person would view the location where Ms. Dillon was injured as intended for parking, and the Court doesn't address the fact that the un-rebutted land use expert testified that the location of the accident was adjacent to a designated 'parking area' maintained by the employer for the sole purpose of parking cars." Pet. at 16. Assuming that the *Madera* Court intended to establish an "ordinary person" standard to determine if it was a parking area, such a standard is met by evidence that the area was used for parking since the 1950s and an ordinary person would view it as a parking area. Certainly in *Madera*, the court looked to the actual use to see if there was parking in the drive-through lane to see if the exclusion applied. *Madera*, 104 Wn. App. at 96-98.

Dillon's whole argument hinges on her assertion that the Court of Appeals should have looked at how the parking area should have been used, not how it was actually used. Courts applying the "parking area" exclusion have routinely analyzed how the area is actually used, not how it could or should be used. When the area is actually used as a "parking

area," the exclusion applies. *See Bolden*, 95 Wn. App. at 223 ("Because he was not performing his work related duties . . . *and because the site of the accident was a parking area*, [the worker] is not covered.") (emphasis added); *Bergsma*, 33 Wn. App. at 616 (parking area exclusion applied because worker injured his eye in parking area while returning to work after lunch). When the worker is injured is an area where cars do not park, the exclusion does not apply. *Marengo*, 122 Wn. App. at 800, 803-04 (parking garage stairwell); *Madera*, 104 Wn. App. at 98 (drive-through lane); *Rooney*, 102 Wn. App. at 416, 419 (grassy slope between parking lot and road).[3]

Here, the Court of Appeals properly declined to look at how the parking area could or should have been used and instead appropriately looked to the actual use of the area where Dillon fell, as other courts consistently have done. *Dillon*, 344 P.3d at 1219. No conflict exists.

B. Holding That an Area Used for Parking for 50 Years Is a Parking Area Presents No Issue of Substantial Public Interest

No substantial public interest exists in the determination that an area used since the 1950s for parking is a parking area. Dillon contends that maintaining a narrow application of the "parking area" exclusion is of

[3] Dillon did not fall in a grassy area adjacent to a parking area, nor did she fall in a drive-through lane, nor did she fall in a stairwell in a parking garage. *See Rooney*, 102 Wn. App. at 418-19; *Madera*, 104 Wn. App. at 97-98; *Marengo* 122 Wn. App. at 803-04. In contrast to these cases, she fell where cars were actually parked. Her factual argument that her case is like these cases fails. *Contra* Pet. at 17.

substantial public interest. *See* Pet. at 17-22. It is true that the courts liberally construe the Industrial Insurance Act. RCW 51.12.010. But, the doctrine of liberal construction is not applicable here because the term "parking area" is not ambiguous. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). There was nothing for the Court of Appeals to construe with regard to the parking area exclusion. It is undisputed that the area where Dillon fell had been used as a parking area since the 1950s. Under the well-settled case law, that ends the analysis.

Echoing her earlier arguments, Dillon asserts that how the parking area should have been used is determinative. Pet. at 20-21. But, she cites no authority for the proposition that a hypothetical set of facts controls how the parking area applies, and this Court should reject her unsupported arguments.[4] Instead, she argues that "under the current decision, any employer, at any time, can invoke the 'parking area' exclusion simply by parking a car in any location, even if doing so is otherwise unpermitted, illegal and unsafe." Pet. at 22. Her hypothetical concern is unfounded. Courts looking at whether the parking area exclusion applies look to primary use of the area where the accident occurred. *See Ottesen*, 131 Wn.

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

App. at 315 (stating the initial question as, "What is the primary use of the area where the accident occurred?"). Here, the court specifically noted that the area where Dillon fell had been used as a parking area for over 50 years. *See Dillon*, 344 P.3d at 1219.[5]

V. CONCLUSION

The Court of Appeals correctly applied the long-standing principle that when a worker is injured in an area that is actually used as a "parking area" a worker is not entitled to workers' compensation benefits under RCW 51.08.013.

///

///

///

///

///

///

[5] Abandoning her argument below, Dillon does not now argue that the hazardous route exception applies to parking areas under *Hamilton v. Department of Labor & Industries*, 77 Wn.2d 355, 462 P.2d 917 (1969). However, in her petition she mischaracterizes *Hamilton* as involving a hazardous route exception to the parking area exclusion. Pet. at 10-11. *Hamilton* involved an area outside of a parking area and rejected the proposition that its hazardous route rule would apply to parking areas. *Hamilton*, 77 Wn.2d at 362-63. Because some Board decisions suggest the hazardous route exception could apply to parking areas, the Department moved to have the *Dillon* decision to the contrary published.

Applying this principle does not conflict with any appellate decisions or present an issue of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 22nd day of May, 2015.

ROBERT W. FERGUSON
Attorney General

SCOTT T. MIDDLETON
Assistant Attorney General
WSBA No. 37920
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7740

No. 70923-2-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CYNTHIA DILLON, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the Department's Answer to Petition for Review and this Declaration of Service in the below-described manner.

E-filed:

The Hon. Ronald R. Carpenter
Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Supreme@courts.wa.gov

Via First Class United States Mail, Postage Pre-paid to:

Tara Reck
Foster Law PC
8204 Green Lake Drive N
Seattle, WA 98103

Signed this 22ND day of May, 2015, in Seattle, Washington by:

KJRSTEN SWAN
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite.2000
Seattle, WA 98104-3188
(206) 389-2196

OFFICE RECEPTIONIST, CLERK

To: Swan, Kjrsten (ATG)
Cc: Middleton, Scott (ATG)
Subject: RE: Cynthia Dillon v. Washington State Dept. of Labor and Industries/Docket # 91539-3/Department's Answer to Petition for Review

Received 5-22-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Swan, Kjrsten (ATG) [mailto:KjrstenS@ATG.WA.GOV]
Sent: Friday, May 22, 2015 10:52 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Middleton, Scott (ATG)
Subject: Cynthia Dillon v. Washington State Dept. of Labor and Industries/Docket #91539-3/Department's Answer to Petition for Review

Good Morning,

On behalf of Scott T. Middleton, Assistant Attorney General, Washington State Bar Number 37920; please find attached the following pleadings for the Dillon v. Dept. of Labor and Industries; Docket Number 91539-3:

Department of Labor and Industries Answer to Petition for Review and Certificate of Service

If you have any questions, please feel free to contact Kjrsten Swan at (206) 389-2196 or kjrstens@atg.wa.gov.

Thank-you for your assistance;
Kjrsten

Kjrsten Swan
Legal Assistant
Attorney General's Office- Labor & Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-389-2196 -Direct
kjrstens@atg.wa.gov