70923-2 70923-2

CASE NO. 70923-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CYNTHIA DILLON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON and BARDAHL MANUFACTURING, a WASHINGTON CORPORATION,

Respondents.

REPLY BRIEF OF THE APPELLANT

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I. INTRODUCTION

Appellant Cynthia Dillon suffered an industrial injury during the course of her employment when she slipped and fell on her employer's premises immediately after her work shift. The Department argues that the location where she fell is a parking area and that, as a result, her injury is not covered by the Industrial Insurance Act (Act). Ms. Dillon respectfully disagrees. The parking lot exception to coverage under the Act must be narrowly construed for the purpose of protecting injured workers and providing benefits; it should not be liberally construed to deny coverage.

The area where Ms. Dillon fell is not a parking area because (1) there were no signs or pavement markings identifying the location as a parking area, (2) there were no permitted parking spots in that area despite the fact that the employer did have permitted and marked parking spots adjacent to the location where Ms. Dillon fell, (3) there were no vehicles parked in the location in question when Ms. Dillon fell, and (4) parking in the location in question violates local and federal codes and is unsafe. As a result, Ms. Dillon's injury should be covered under the Act because it occurred while she was acting in the course of employment.

II. ASSIGNMENTS OF ERROR

A. SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT CYNTHIA DILLON'S INJURY OCCURRED IN A "PARKING AREA."

B. SUPERIOR COURT AND THE BOARD ERRED IN FINDING AND CONCLUDING THAT THE "PARKING LOT EXCEPTION" TO THE INDUSTRIAL INSURANCE ACT APPLIES AND EXCLUDES CYNTHIA DILLON FROM COVERAGE UNDER THE ACT.

III. ARGUMENT

It is critical that provisions of the Act be applied as designed: to reduce to a minimum the suffering and economic loss arising from injuries occurring in the course of employment. Accordingly, the Act's provisions must be liberally construed with ***all*** doubts resolved in favor of injured workers and/or their beneficiaries. RCW 51.12.010; *McIndoe v. Dept. of Labor and Indus.*, 144 Wn.2d.252, 256-57, 26 P.3d 903 (2001); *Wilber v. Dept. of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963). Under the Act, in order for a given event to be considered "injurious," it must meet certain requirements. Here, whether one of those requirements has been met is in dispute, namely whether Ms. Dillon's injury occurred while she was acting in the course of employment. "Acting in the course of employment" means the worker is acting at his or her employer's direction or in the furtherance of his or her employer's business,

including time spent going to and from work on the jobsite as defined in RCW 51.32.015 and RCW 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 the designated parking area. At the time an injury is sustained, it is not necessary that the worker be doing the kind of work that the worker's pay is typically based upon. RCW 51.08.013.

The Department appears to entirely ignore this last element and seemingly argues that part of the reason Ms. Dillon should be denied coverage under the Act is because she "never had to perform job duties in the area she fell." Contrary to the implied intent of this statement, it is quite clear that, under the Act, performing the kind of work the employee's pay is typically based upon is not a requirement for "acting in the course of employment." Because Ms. Dillon was injured when she slipped and fell as she exited the employer's plant immediately after her work shift ended, she was "acting" in the course of employment.

When rendering their decisions in this case, the Board and trial court interpreted the Act – specifically the "parking lot exception" – broadly in order to exclude coverage rather than narrowly to protect and provide benefits to Ms. Dillon. This broad

interpretation of the "parking lot exception" is contrary to the well-established mandate that any doubt regarding the meaning of workers' compensation law be resolved in favor of the injured worker and/or his or her beneficiaries. *Clauson v. Dept. of Labor and Indus.,* 130 Wn. 2d 580, 925 P.2d 624 (1996). The Board and trial court failed to apply liberal construction and instead resolved doubts regarding the definition of "parking area" in order to exclude Ms. Dillon from coverage under the Act. (CABR at p. 42) This overbroad reading and application of the "parking area" exception must not be allowed to stand.

A. CYNTHIA DILLON'S INJURY DID NOT OCCUR IN A PARKING AREA.

RCW 51.08.013 defines the phrase "acting in the course of employment" and contains the phrase "except parking area." However, RCW 51.08.013 fails to define the term "parking area," leaving it open to legal interpretation. The Board and trial court decisions followed case law that uses the dictionary definition to clarify the meaning of the phrase "parking area": "The term 'parking' is defined as 'the leaving of a vehicle in an accessible location' or 'an area in which vehicles may be left.' Webster's Third New International Dictionary *1642 (3rd ed. 1993)*; *Madera v. J.R. Simplot*

Co., 104 Wn. App. 93, 15 P.3d 649 (2001)." (Board Proposed Decision and Order at p. 14). This dictionary definition is also inherently ambiguous and that ambiguity must also be resolved in favor of the injured worker.

The applicability of the "parking lot exception" depends greatly upon the particular facts and circumstances of each individual case and the "parking lot exception" must not be broadly construed to exclude coverage because: (1) the exception does not clearly define "parking area"; (2) the location where Ms. Dillon fell was not clearly marked as a "parking area"; (3) the location where Ms. Dillon fell does not fit within the ordinary meaning of a parking area based upon local and federal codes and in the interest of public safety; and (4) the increasingly liberal interpretation and application of the "parking lot exception" undermines legislative intent and contradicts the purpose of the Act.

According to the Respondent's Brief, since the 1950s, workers at the employer's plant have parked their cars in the general area where Ms. Dillon fell, and any area customarily used for parking is thereby transformed into a "parking area." These arguments assume the purpose of a place can be determined

solely by its customary use, even when that customary usage is not open and obvious to the general public, even when that usage is practiced and known by only a small group of people, even when that use is contrary to local and federal codes, and even when that use is unsafe. To analogize the Department's argument, any public beach where a few individuals decide to frequent and remove their tops thereby becomes a topless or nude beach regardless of whether the beach has other uses or is designated as such.

Another problematic aspect of the Department's argument that purpose is defined by use is the Department's own acknowledgement that no cars were parked in the location where Ms. Dillon fell when she fell. In its brief, the Department states:

> Dillon marked the area she fell with an "X" on Exhibit 2. (BR Dillon 33; Ex. 2; *see also* Ex. 19.) There was no car parked where she fell. (BR Dillon 34.)

If the thing that transforms an unmarked and unpermitted location into a parking area is cars being parked in the location, then the lack of cars parked in the location divests that location of being termed a "parking area." Use of an unmarked area by some employees at some times falls short of defining the location where Ms. Dillon fell as a parking area at all times.

Regarding the customary use of the location where Ms. Dillon fell for parking purposes, un-rebutted land use expert Robert Thorpe determined that although the area where Ms. Dillon fell may have been used by some employees for parking, this use violated city and federal codes because the area should have been cleared from cars to allow: (1) for employees to safely enter and leave the employer's plant; (2) for fire trucks to park in the area and access the fire hose connection next to the bay door; (3) for access to and from the building for handicapped individuals pursuant to the Americans with Disabilities Act; and (4) for employees to quickly leave the plant and the employer's premises in case of emergency. (CABR, testimony of Robert Thorpe at pp. 62, 66-69 71, 87-90; exhibit nos. 2, 3, 9) Customary use, even if that use has been occurring for a long time, is not a valid basis for violating city and federal rules and certainly should not be used as a basis for denying coverage under the Act to an injured worker. In response to Mr. Thorpe's expert testimony, the Department cites only the lay testimony of the employer:

> Nicolaysen testified that the fire marshal inspected the Bardahl premises from time to time and the fire department had recently reissued a permit regarding the company's updated sprinkler system. He had never been contacted by the state or federal

> government regarding parking on the property. Bardahl had never received fines or citations from the city or fire department about the premises. (BR Nicolaysen 125, 126.)

It must be noted that no evidence was presented that the unmarked asphalt area was being used for parking at the time any such inspections took place. It would be quite difficult for either the fire department or any other governmental agency to recognize and cite a violation that was not obvious at the time inspection was made. Regarding allowable parking at the employer's plant, the only proven fact is that the employer has only four permitted parking spaces that are adjacent to but not the same location where Ms. Dillon fell, and there were no permits in place for parking to occur in the location where she fell. Therefore, any vehicle parked in a location outside the four permitted parking spaces is not parked in a space that is accessible or in a location where vehicles may be left; in short, any vehicle parked in a location outside the four permitted parking spaces is not parked in a "parking area." Properly applying liberal construction to any doubt regarding the definition of "parking area", it follows that the location where Ms. Dillon fell was not a "parking area."

B. THE "PARKING LOT EXCEPTION" IS NOT APPLICABLE AND THE HAZARDOUS ROUTE RULE PROTECTS CYNTHIA DILLON AND PROVIDES HER WITH COVERAGE UNDER THE ACT

Both the Board and courts have held that the "parking lot exception" does not apply when the injury location is classified as part of the jobsite in an area controlled by the employer and/or the injury location occurred along a customary employee ingress/egress route containing a specific hazard not shared by the general public.

Here, the Board and trial court erroneously held that Ms. Dillon's industrial injury occurred in a parking area and did not apply the "hazardous route" rule. In *Hamilton,* 77 Wn.2d at 363, the Supreme Court held that:

> *It is clear that the legislature, in enacting the pertinent legislation, intended to extend coverage to employees injured while going to and from work on the employer's premises, and to exclude from coverage injuries occurring to an employee in a parking area maintained either on or off the employer's premises. (Olson v. Stern, 65 Wn.2d 871, 400 P.2d 305 (1965)). In this sense, then, it would appear that, with the express parking area modification, the legislature enacted that which is now generally accepted as the "going and coming" rule. It is not, however, clear from the language of the statute that the legislature intended to exclude from coverage the exception to the rule to which we have heretofore alluded, namely, injuries occurring to an employee while traversing a hazardous route in close proximity to the employer's*

> *premises which is the only practical route and/or one customarily and normally used by employees engaged in the immediate act of going to or coming from the actual sites of their work."*

(Emphasis added.)

The requirements of the "hazardous route" rule are met by the particular facts and circumstances here: (1) Ms. Dillon's injury occurred on her employer's premises immediately after work when she had just left her employer's facility; (2) Ms. Dillon's injury occurred in an area owned and maintained by the employer; (3) Ms. Dillon's injury did not take place in a parking area; (4) and Ms. Dillon slipped and fell on the customary route used by plant employees to enter and exit the facility for work shifts and the route she customarily used to access the Employee Only door to enter the plant. (CABR, testimony of Ms. Dillon at pp. 23-24; testimony of Dennis Fisk at pp. 136-137) Although the Department states in its brief that, for the "hazardous route" rule to apply, the injured worker must use the "only practical, proximate and customarily used route," in the case of Bardahl plant workers, this condition is quite ambiguous because the plant has several designated employee entrances. What is not ambiguous is the fact that the location where Ms. Dillon fell was a customarily used route by her and other

plant employees and it did contain particular hazards likely to produce injury that were not shared by the general public. While the Department argues that Ms. Dillon cannot be covered by the "hazardous route" rule because the icy surface was caused by the generally cold weather and therefore it is hazard shared by the general public, both Mr. Fisk and Ms. Dillon confirmed that the plant uses the area where she fell for work business because employees empty buckets of water from the plant facility into the drain near the location where she fell. This icy surface presented a fall hazard not commonly shared by the general public.

IV. ATTORNEY FEES ON APPEAL

Ms. Dillon is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 51.52.130. *See also* RAP 18.1. This statute provides that "a reasonable fee for the services of the worker's or beneficiary's attorney" shall be awarded if a decision order is "reversed or modified and additional relief is granted to a worker or beneficiary." RCW 51.52.130. Here, Ms. Dillon seeks to reverse the Superior Court and Board Decisions resulting in allowance of her claim. Thus, Ms. Dillon should be entitled to an award of attorney fees and expenses for her

attorney's work on the matter before this Court and the Superior Court or the opportunity to file a supplemental motion for attorney fees and costs in the event she is successful in reversing the Department order denying her claim, thereby securing additional relief as a direct consequence of her success before this Court. *See Brand v. Dept. of Labor and Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

V. CONCLUSION

In conclusion, the trial court and the Board erroneously applied the "parking lot exception" to exclude Ms. Dillon from coverage under the Act. The term "parking area" is not defined by statute, leaving doubt as to its meaning. In resolving this doubt, the term "parking area" must be liberally construed in order to protect and provide benefits to injured workers like Ms. Dillon. The "parking lot exception" requires discriminating use application. The trial court and Board entered findings and conclusions based upon an erroneous, overbroad application of the "parking lot exception". As a result, the decision must be reversed and this matter must be remanded to the Department with direction to issue an order allowing Ms. Dillon's claim because the "parking lot exception" is

inapplicable and Ms. Dillon was injured during the course of her employment. A remand to either the Board or trial court would serve no useful purpose and would only further delay benefits under the Act.

CERTIFICATE OF MAILING

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 2nd day of June, 2014, the original and one copy of the documents to which this certificate is attached, Reply Brief of the Appellant, were mailed upon the following parties via U.S. postage pre-paid, first class mail:

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DATED this 2 day of June, 2014.

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