No. 46656-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Kimberly G. Luvaas,

Appellant,

v.

Department of Labor & Industries,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Assignment of Error

The superior court erred in entering its August 13, 2014 order which denied Ms. Luvaas's motion for summary judgment and granted Respondent's cross-motion for summary judgment.

B. Issue Pertaining to Assignment of Error

Whether the superior court erred in denying Ms. Luvaas's motion for summary judgment while granting Respondent's cross-motion for summary judgment when: in doing so failed to properly apply Washington State contract law principles to the valid and legally binding employment contract between Ms. Luvaas and the Department of Social and Health Services (DSHS); in doing so did not recognize that Ms. Luvaas was still an employee of DSHS on the date of her industrial injury of July 29, 2011 considering that the valid and legally binding employment contract between Ms. Luvaas and DSHS was still in effect; in doing so failed to both liberally construe Title 51, to include RCW 51.08.178, and/or resolve any doubts or questions regarding Title 51 in favor of the injured worker, Ms. Luvaas, as mandated by the legislature and required by statute and case law; in doing so incorrectly applied RCW 51.08.178 to the facts of this case; and, in doing so incorrectly found that Ms. Luvaas's monthly

wages from DSHS should not be included in the calculation of her timeloss compensation rate.

II. STATEMENT OF THE CASE

Ms. Luvaas takes issue with Respondent's account of the Factual and Procedural Background and therefore re asserts her facts from her opening brief *in toto*. *See* Appellant's Brief at 2-5. Respondent includes irrelevant information as well as speculation in their version of the facts. *See* Respondent's Brief at 2-7. Respondent, at times, partakes in editorializing and mischaracterizations of the circumstances surrounding Ms. Luvaas's employment relationship with DSHS and the employment contract that they entered into. *See* id. The facts put forth by Ms. Luvaas in her opening brief are concise and succinct and do not contain editorial. *See* Appellant's Brief at 2-5.

III. SUMMARY OF REPLY ARGUMENT

According to RCW 51.08.178(1), an injured worker's timeloss compensation rate is calculated based on "the monthly wages the worker was receiving from all employment at the time of the injury...." In Department of Labor & Industries v. Granger, the Washington State Supreme Court reasserted their definition of "receiving", as it pertains to

RCW 51.08.178(1), as meaning "to take possession or delivery of something." Further, the Washington State Supreme Court stated that for the phrase "receiving from all employment at the time of injury...," the proper focus is on the payment made for the benefit and not on the eligibility. Ms. Luvaas suffered an industrial injury on July 29, 2011. Ms. Luvaas took possession of her wages from DSHS on August 3, 2011. Her wages from DSHS need to be considered when calculating her timeloss compensation rate for the industrial injury that occurred on July 29, 2011.

The competing interpretations of RCW 51.08.178(1) indicate that this specific statute has no clearly defined singular meaning and is ambiguous. Therefore RCW 51.08.178(1) must be liberally construed with the benefit of the doubt belonging to the injured worker, Ms. Luvaas. According to this Court's decision in Crabb v. Department of Labor & Industries, if an injured worker makes at least a reasonable case for their entitlement to the higher benefit rate then this Court must resolve the appeal in the injured worker's favor. Ms. Luvaas has done just that and therefore this Court should decide that her wages from DSHS should be considered when calculating her timeloss compensation rate for the industrial injury that occurred on July 29, 2011.

Respondent, as a nonparty, engages in speculation as to the intentions of Ms. Luvaas and DSHS when the two former parties mutually

agreed to enter into an employment contract. Respondent suggests that extrinsic evidence should be used to determine the intentions of Ms. Luvaas and DSHS as it relates to the employment contract. According to the Washington State Supreme Court case of Hearst Communications, Inc. v. Seattle Times Co., Respondent's suggestion regarding the use of extrinsic evidence is incorrect. The Hearst Court confirmed that Washington continues to follow the objective manifestation theory of contracts. The intent of Ms. Luvaas and DSHS is clearly ascertainable based on the objective manifestations that are contained in the employment contract that they mutually agreed to. Ms. Luvaas was still considered an employee of DSHS on July 29, 2011, the date of her industrial injury.

Respondent, as a nonparty to the employment contract between Ms. Luvaas and DSHS, is in no position to discuss and promote various potential remedies for any alleged breach of the employment contract between Ms. Luvaas and DSHS. Any inference or suggestion that either Ms. Luvaas or DSHS has remedial measures at their disposal for an alleged breach of contract is speculation and fabrication on the part of Respondent and only lends itself to confuse as well as divert from the relevant reason the employment contract is being discussed in the first

place: to evidence that Ms. Luvaas was still considered an employee of DSHS on July 29, 2011, the date of her industrial injury.

An award of attorney fees and costs to Ms. Luvaas is appropriate should this matter be reversed and/or remanded to the superior court.

IV. REPLY ARGUMENT

A. The Washington State Supreme Court's definition of "receiving" as it pertains to RCW 51.08.178(1) requires the inclusion of Ms. Luvaas's wages from DSHS in her timeloss compensation rate.

Throughout their brief, Respondent puts forth the argument that Ms. Luvaas was not "receiving" wages from DSHS on the date of her industrial injury pursuant to RCW 51.08.178(1)[1]. *See generally* Respondent's Brief. Respondent's position is misplaced considering the Washington State Supreme Court reasserted their definition of the term "receiving" as it pertains to RCW 51.08.178(1) in Department of Labor & Industries v. Granger. *See generally* Dep't of Labor & Indus. v. Granger, 159 Wash.2d 752, 153 P.3d 839 (2007).

In Granger, the Court determined "that the proper focus under RCW 51.08.178's 'receiving at the time of injury' language is on the payment made for the benefit and not on the eligibility...." *See* id. at 766-

[1] At times in their brief, Respondent incorrectly uses the phrase "engaged in" and the word "earning" in discussing RCW 51.08.178(1). The correct operative word in RCW 51.08.178(1) is "receiving."

67. In coming to this conclusion, the Court acknowledged their decision in Harris v. Department of Labor & Industries in which it was determined that "receiving" means "to 'take possession or delivery of' something". *See* id. at 760; *see also* Harris v. Dep't of Labor & Indus., 120 Wash.2d 461, 472, 843 P.2d 1056 (1993) (*citing* Webster's Third New International Dictionary 1894 (1976)).

It is irrefutable that Ms. Luvaas received the payment made to her by DSHS on August 3, 2011. *See* Board Exhibit 4. Ms. Luvaas did not take possession or delivery of the aforementioned payment from DSHS, which was for the entire month of July 2011, prior to August 3, 2011. *See* id. Clearly, Ms. Luvaas received payment of her wages from DSHS after her industrial injury of July 29, 2011. Therefore, pursuant to RCW 51.08.178(1) and the definition of "receiving" as set forth by the Washington State Supreme Court, Ms. Luvaas's wages from DSHS that she took possession or delivery of on August 3, 2011 need to be included in her timeloss compensation rate for her industrial injury of July 29, 2011.

B. Various terms and phrases in RCW 51.08.178(1) are not defined and do not have clear meaning which in turn creates an ambiguous statute with various interpretations and therefore, pursuant to Crabb, Ms. Luvaas should prevail in her appeal.

In an effort to avoid the liberal construction requirement of ambiguous Title 51 statutes as set forth by the courts of Washington, Respondent argues that the plain language of RCW 51.08.178(1) is clear, only allows for one interpretation, and therefore does not render the statute to be ambiguous. *See generally* Respondent's Brief. To refute this stance all one has to do is reference the previous section in which it is clear that Ms. Luvaas and Respondent have different interpretations of what "receiving" means, albeit Ms. Luvaas has a Washington State Supreme Court decision in her favor.

This is also the circumstance in regards to the meaning of the specific phrase "monthly wages", what is all encompassed by this phrase, how the two words work together, and how the phrase is to be interpreted. Clearly the meaning of this particular phrase is not so easily ascertainable considering Ms. Luvaas and Respondent have put forth differing interpretations for how "monthly wages" should be realized within RCW 51.08.178(1). In her opening brief, Ms. Luvaas argues that if the legislature's intent was to limit timeloss compensation to only the very date and time of an industrial injury, then they could have done so and

drafted the statute with such specificity that only one meaning and one interpretation could result, but the legislature did not do so. More so, "monthly wages" is not defined in Title 51. *See* Wash. Rev. Code Ann. § 51.08 (West 2015). With no definition in Title 51 or instruction via Title 51 or case law on how the phrase should be interpreted, it is not clear how "monthly wages" should be implemented in conjunction with the rest of RCW 51.08.178(1). This allows for various interpretations which creates uncertainty and no clear meaning. Various interpretations, uncertainty, and no clear singular meaning is the definition of ambiguity. Ambiguity results in liberal construction of Title 51 in Ms. Luvaas's favor.

In Crabb v. Department of Labor & Industries, this Court recognized that "the provisions of Title 51 RCW 'shall be liberally construed...'" as directed by the legislature. Crabb v. Dep't of Labor & Indus., 181 Wash. App. 648, 658, 326 P.3d 815 (Div. II 2014) (*quoting* § 51.12.010; *citing* Cockle v. Dep't of Labor & Indus., 142 Wash.2d 801, 811, 16 P.3d 583 (2001)). "The Supreme Court has commanded that this legislative directive **requires** that [this Court] resolve all reasonable doubt in favor of the injured worker." Id. (emphasis added) (*citing* Clauson v. Dep't of Labor & Indus., 130 Wash.2d 580, 586, 925 P.2d 624 (1996)). Doing so precludes alternative methods of interpreting a provision of Title 51. Id. "[T]he benefit of the doubt belongs to the injured worker...."

Cockle, 142 Wash.2d at 811; *see also* Double D Hop Ranch, et. al. v. Sanchez, 133 Wash.2d 793, 798, 947 P.2d 727 (1997) (*citing* Rozner v. City of Bellevue, 116 Wash.2d 342, 804 P.2d 24 (1991)). If an injured worker "makes at least a reasonable case for [their] entitlement to the higher benefit rate, [this Court] **must** resolve the ... appeal in [their] favor ...." Crabb, 181 Wash. App. at 658 (emphasis added) (*citing* Cockle, 142 Wash.2d at 811-13).

Both Ms. Luvaas and Respondent, in their previous briefs submitted to this Court, have argued that RCW 51.08.178(1) is unambiguous. Both Ms. Luvaas and Respondent interpret this "unambiguous" statute to be supportive of their respective positions. Now, after the Brief of Appellant and the Brief of Respondent have been submitted and considering the competing interpretations contained therein, clearly an ambiguity exists as to RCW 51.08.178(1). Such an ambiguity, which now receives liberal construction with the benefit of the doubt belonging to the injured worker, must be resolved in favor of Ms. Luvaas. Ms. Luvaas, having made more than a reasonable case to have her wages from DSHS included in her timeloss compensation rate, should have this appeal decided in her favor consistent with this Court's decision in Crabb.

C. Respondent, as a nonparty to the contract between Ms. Luvaas and DSHS, inappropriately partakes in speculation as to the subjective intentions of the signors of the contract.

Respondent was not a party to the employment contract that was agreed upon by Ms. Luvaas and DSHS, yet they endeavor to tell this Court how Ms. Luvaas and DSHS interpreted the employment contract that was exclusively between them[2]. In doing so, Respondent engages in gross speculation in an attempt skew the employment contract between Ms. Luvaas and DSHS in Respondent's favor in this matter. Respondent was not privy, nor were they present, to the dealings and bargaining between Ms. Luvaas and DSHS in reaching mutual acceptance which resulted in the executed employment contract.

To aid in their speculation, Respondent cites to a 1990 Washington State Supreme Court Case, Berg v. Hudesman, in an effort to have extrinsic evidence considered in this matter. *See* Respondent's Brief at 20-22; *see also* Berg v. Hudesman, 115 Wash.2d 657, 801 P.2d 222 (1990). In 2005, in their Hearst Communications, Inc. v. Seattle Times Co. decision, the Washington State Supreme Court addressed the misunderstandings that were caused by Berg, stating that "there has been

[2] At one point, Respondent mentions that Ms. Luvaas could not submit her hours to DSHS until the end of the month. *See* Respondent's Brief at 14. It should be noted that, according to Granger, "[t]he [Industrial Insurance] Act itself states that its provisions may not be modified by an employment contract." Granger, 159 Wash.2d at 762 (*citing* § 51.04.060). The employment contract does not usurp Ms. Luvaas's rights as an injured worker under Title 51.

much confusion over the implications of Berg." *See* Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 502-04, 115 P.3d 262 (2005). The Court stated that "[s]ince [the] Berg [decision], we have explained that surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" Id. at 503 (emphasis theirs) (*quoting* Hollis v. Garwall, Inc., 137 Wash.2d 683, 695-96, 974 P.2d 836 (1999)); *see also* Go2Net, Inc. v. C I Host, Inc., 115 Wash. App. 73, 60 P.3d 1245 (Div. I 2003) ("Admissible extrinsic evidence does not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract." *Citing* Bort v. Parker, 110 Wash. App. 561, 42 P.3d 980 (Div. III 2002)). The Court confirmed that "Washington continues to follow the objective manifestation theory of contracts." Id. at 503. This was addressed in Ms. Luvaas's opening brief. *See* Appellant's Brief at 9-10. More so, the Court explicitly rejected the misunderstandings that stemmed from Berg, which Respondent now relies on to try and have speculative extrinsic evidence help determine a contract that they were not a party to. Id. at 503 ("Our holding in Berg may have

been misunderstood as it implicates the admission of parol and extrinsic evidence."). Clearly the objective manifestations theory of contracts is more in line with the plain meaning rule than the misunderstandings of Berg as put forth by Respondent, and clearly, as addressed by Ms. Luvaas in her opening brief, the intent of Ms. Luvaas and DSHS are easily ascertainable from the terms and conditions contained in the employment contract between Ms. Luvaas and DSHS. *See* Appellant's Brief at 9-16. Suggestions by Respondent, a nonparty to the employment contract that was exclusively between Ms. Luvaas and DSHS, that extrinsic evidence shows otherwise is purely speculative and runs counter to the objective manifestation theory of contracts that is adhered to by the state of Washington. Ms. Luvaas was still considered an employee of DSHS on July 29, 2011.

Assuming, *arguendo*, that extrinsic evidence is to be used, as Respondent suggests, to determine the parties' "interpretation" of the contract entered into between Ms. Luvaas and DSHS, then Ms. Luvaas's testimony must also be considered. Ms. Luvaas testified that she would never break her contract with DSHS. *See* Board Transcript at 43. Furthermore, there is no evidence that Ms. Luvaas provided a written note to DSHS about ending her employment prior to July 5, 2011. *See* Board Transcript at 17, 60, 77, 82; *see* Board Exhibit 3. She also testified as to

the significance of July 28, 2011, the date listed on the written note. *See* Board Transcript at 47. Ms. Luvaas listed the July 28, 2011 date because she took weekends off and July 28, 2011 would have been the last date she would have been with her client in the month of July before she typically would have started work again the next week, which in this situation would have been in the month of August. *See* id. Respondent cannot refute the testimony of Ms. Luvaas and the evidence that Ms. Luvaas did not provide a written note to DSHS prior to July 5, 2011 about ending her employment. To adequately rebut this, Respondent would have needed to call Jennifer Strozyk, the individual who signed the employment contract on behalf of DSHS, or some other individual from DSHS authorized to make decisions/changes regarding the contract in question, as a witness to testify, but Respondent failed to do so. *See* Board Exhibit 2. Respondent did not present the testimony of any witness from DSHS who refuted the testimony from Ms. Luvaas. Failure to deny facts on summary judgment make them a verity and they are deemed admitted. *See, e.g.*, Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wash.2d 346, 354, 779 P.2d 697 (1989) ("When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established."); *see also* LaMon v. Butler, 112 Wash.2d 193, 199, 770 P.2d 1027 (1989); *see also* Wash. Osteopathic Med. Ass'n v.

King Cy. Med. Serv. Corp., 78 Wash.2d 577, 579, 478 P.2d 228 (1970); *see* CP 34-35, 41; *see* Board Transcript at 17, 43, 47, 60, 77, 82; *see* Board Exhibit 3. Respondent, by failing to controvert, has admitted Ms. Luvaas's testimony and the evidence regarding the note of July 5, 2011 as fact.

Arguendo aside, the objective manifestations of the employment contract between Ms. Luvaas and DSHS make it clear that Ms. Luvaas was still considered an employee on July 29, 2011, the date of her industrial injury.

D. Respondent's discussion regarding potential remedies stemming from the contract between Ms. Luvaas and DSHS is entirely irrelevant to this matter between Ms. Luvaas and Respondent.

As stated above, Respondent is in no position to opine about a contract in which they are not a party to. In this same vein, the nonparty Respondent is in no position to discuss various potential remedies that actual parties to the employment contract could pursue for any alleged breach of said contract and any focus on this only lends itself to confuse the matter at hand. Such a pursuit by Respondent is not appropriate and their efforts are misplaced. Respondent is not the arbiter of any alleged, or more appropriately, fabricated, contract dispute between Ms. Luvaas and DSHS. Interestingly, neither of the parties to the employment contract

have raised any complaints as to the actions of the parties in regards to the employment contract. That's because there is no dispute between Ms. Luvaas and DSHS as to the employment contract. Any suggestion or discussion having to do with various contractual remedies is enitrely irrelevant to the matter at hand.

The employment contract is being used in this matter to evidence that Ms. Luvaas was still an employee of DSHS at the time of her industrial injury and therefore here wages from DSHS should be considered when calculating her timeloss compensation rate. Any other inferences, fabrications, or suggestions beyond that made by Respondent are irrelevant.

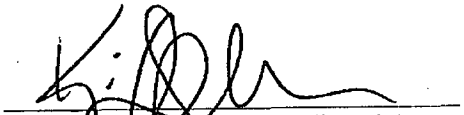
E. Awarding attorney fees and costs to Ms. Luvaas is appropriate in this matter.

Should this Court reverse and/or remand this matter to the superior court, Ms. Luvaas would respectfully request an award of attorney fees, at both the superior court and appellate court levels, pursuant to RCW § 51.52.130. *See* § 51.52.130; *see* Boyd v. Davis, 127 Wash.2d 256, 264-65, 897 P.2d 1239 (1995) (At the appellate level, attorney fees can be requested in either the opening brief or reply brief.); *see* Tobin v. Dep't of Labor & Indus., 169 Wash.2d 396, 405-06, 239 P.3d 544 (2010).

V. CONCLUSION

After carefully considering Ms. Luvaas's Brief, the Brief of Respondent, as well as Ms. Luvaas's Reply Brief, Ms. Luvaas respectfully requests that this Court reverse the Clallam County Superior Court's order granting summary judgment for Respondent while denying summary judgment for Ms. Luvaas and remand this matter to the trial court for entry of an order in favor of Ms. Luvaas with instruction to include Ms. Luvaas's wages from DSHS in the calculation of her timeloss compensation rate. The Washington State Supreme Court's definition of "receiving," as well as the ambiguity of RCW 51.08.178(1), require a determination that Ms. Luvaas's wages from DSHS must be included when calculating her timeloss compensation rate for her industrial injury of July 29, 2011. Furthermore, the employment contract between Ms. Luvaas and DSHS was still in effect on the date of her industrial injury which, again, warrants her wages from DSHS being included in her timeloss compensation rate calculation.

RESPECTFULLY SUBMITTED this 5th day of May, 2015.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2015, I served the foregoing document upon all parties of record in this proceeding to party or his attorney or authorized representative listed below via ABC Legal Messenger:

DOCUMENT: REPLY BRIEF OF APPELLANT

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