96780-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

AARON RICHARDSON,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON
And
CONCO & CONCO PUMPING, INC.

Respondents.

ANSWER OF RESPONDENT CONCO & CONCO PUMPING, INC. TO PETITIONER'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Conco & Conco Pumping, Inc. (Conco), Petitioner Aaron Richardson's (Mr. Richardson) employer under RCW Title 51, the Industrial Insurance Act (IIA).

II. CITATION TO COURT OF APPEALS' DECISION

On December 24, 2018, the Court of Appeals, Division I, issued a published decision in *Richardson v. Dep't of Labor & Indus.*, 2018 WL 6787065 __ Wn. App. __, 432 P.3d 841 (2018).[1] This Court should deny review because substantial evidence supports the Board of Industrial Insurance Appeals' (Board) findings of fact.

III. ISSUES PRESENTED

Does substantial evidence supports the superior court's finding of fact that the light duty job offered to Mr. Richardson was valid?

Does substantial evidence supports the superior court's finding of fact that Mr. Richardson's temporary total disability benefits were properly terminated pursuant to RCW 51.32.090(4)(b) as he turned down a valid light duty job offer?

IV. STANDARD OF REVIEW

The Board of Industrial Insurance Appeal's (Board) decision and order issued is presumed to be correct. RCW 51.52.115. The burden of proof at the superior court level lies with the challenging party. *Id.* In a Supreme Court appeal, "review is limited to examination of the record to

[1] A copy of the Opinion is contained in Appendix A.

see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Young v. Department of Labor & Indus.* 81 Wn. App. 123, 128, 913 P.2d 402 (1996). In this case, substantial and uncontroverted evidence supports the findings made. As such, the Court should deny review.

Mr. Richardson emphasized in his brief the doctrine of liberal construction associated with the IIA, noting that *Dep't of Labor & Indus. of State v. Lyons Enterprises Inc.* held that "all doubts be resolved in favor of coverage." 185 Wn. 2d 721, 374 P.3d 1097 (2016), *as amended* (July 13, 2016), *reconsideration denied* (July 14, 2016). However, the case at issue is not about whether or not Mr. Richardson's injury should be covered, but whether Conco's job offer met the requisite criteria to qualify as a valid job offer and job. CABR at 78. Moreover, the doctrine of liberal construction of the IIA is a rule of statutory construction and does not apply to the interpretation of facts. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949).

V. STATEMENT OF THE CASE

Mr. Richardson was a journeyman carpenter that worked for Conco as a vertical foreman at the time of his injury in 2014. TR Richardson, p. 8, 10-11[2]. Since Mr. Richardson had left high school, he

[2] Citation to the CABR are to the stamped numbers in the lower right-hand corner of the page. The transcript portion of the CABR was not assigned page numbers by the King County Superior Court clerk. Citations to testimony from the CABR Hearing Transcript

had worked in construction performing manual labor. TR Richardson, p. 8. As the result of the 2014 injury, Mr. Richardson received time loss compensation. TR Bueche, p. 63-64.

Associated General Contractors (AGC) AGC is a retrospective rating group that is an association of commercial contractors in Washington that is funded by dues that are paid by its members. TR Gubbe, p. 6, 11. AGC provides members various services. TR Gubbe, p. 5-6. Out of the 600 Washington member- employers, about 354 participate in the retrospective rating group AGC. TR Gubbe, p. 6-8.

Ms. Beuche works for AGC and assists AGC's member-employers navigate the workers' compensation process. TR Bueche, p. 34. Ms. Beuche works with member-employers to determine if they have light-duty positions available at their job sites. TR Bueche, p. 52. If a member-employer does not have light duty work available on one of its job sites, Ms. Beuche inquires whether the member-employer would like to utilize the Modified Duty Site Resource Center (Resource Center) to offer light duty work. TR Bueche, p. 42.

The Resource Center was created approximately 23 years ago by AGC members. TR Bueche, p. 37, ll. 2-5. The Resource Center is owned and operated by Safety Educators, a vendor Conco contracts with to assist it with training both its non- injured workers and injured workers and as a temporary return to work option. TR Bueche, p. 59. The Resource Center

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are made with reference to the transcripts (TR) with name of witness and page number taken from the transcript of the testimony or deposition.

was created to provide light duty work for injured workers. Conco and most of AGC's other member-employers do not have training centers. TR Bueche, p. 52. If the member-employer wishes to use the Resource Center, Ms. Bueche, with the permission of the member-employer, will contact the injured worker's attending physician to construct an approved light duty job. TR Bueche, p. 44.

In this case, Conco did not have light duty available for Mr. Richardson on its job sites and wanted to use the Resource Center. TR Bueche, p. 43-44. As such, Conco directed Ms. Bueche to send Mr. Richardson's attending physician a job analysis for approval. *Id.* Mr. Richardson's attending physician approved a temporary transitional light duty job. TR, Ex. 2. Mr. Richardson was released by his attending physician to participate in temporary transitional light duty work receiving training and other opportunities through Safety Educators. *Id.* The job was offered to Mr. Richardson on June 15, 2015. TR Ex. 1. The letter was sent by AGC's Ms. Beuche at the direction of Catherine Santucchi, the office manager for Conco. TR Bueche, p., 35, 43-44; TR Gubbe, p. 16. Mr. Richardson conceded that Ms. Santucchi authorized the light duty job offer. CABR, p. 125. In addition, Mr. Richardson admits that he received the job offer. TR Richardson, p. 14; CABR, p. 125. The job analysis signed by Mr. Richardson's attending physician was attached to the job offer. TR Richardson, p. 29.

The letter indicated that Tim Johnson would be his site manager. The letter explained that Mr. Richardson's attendance would be reported

by Mr. Johnson to Ms. Santucchi. TR, Ex. 1. In addition, the letter explained that Mr. Richardson's compensation for performing this position would be paid by Conco. TR Bueche, p. 38, 49-50; TR Gubbe p. 15-16. Specifically, Mr. Richardson would receive his regular wage plus benefits, which is more than Mr. Richardson would receive in time loss compensation. TR, Ex. 1. Mr. Richardson's start date was June 22, 2015 and he would be working Monday through Friday, 6:00 a.m. to 2:30 p.m. TR, Ex.1 The job offer stated, "The knowledge you will gain through your participation is readily applicable when you return to work, i.e. you will become more familiar with the construction safety regulations, proper lifting techniques, etc." TR, Ex. 1. The job analysis and job offer letter informed Mr. Richardson that once he completed his "comprehensive review of DOSH [Division of Safety and Health] safety regulations pertaining to construction," he would possibly have "an opportunity… to receive Flagger certification, CDL certification, CPR/First Aid certification and if applicable, the opportunity to complete [his] GED." TR, Ex. 2. Further, the attached job analysis provided that "[s]kill enhancement is accomplished through lectures, videos, written materials, worksheets, and discussions." TR, Ex. 1. The employer on the job offer was listed as "Conco Cement." TR, Ex. 2. Further, the person of contact for the light duty job was a Conco employee, Elizabeth Wrenn. TR, Ex. 2. Ms. Wrenn's contact information was provided. TR, Ex. 2.

Mr. Richardson went to the Resource Center on June 22, 2015 as directed by the job offer letter. TR, Ex. 1. There were about twelve other

people present at the Resource Center. TR Richardson, p. 20-21. Mr. Johnson instructed Mr. Richardson that he was to read a binder each day that contained safety information. That first day Mr. Richardson was instructed to read from a binder that contained materials about "the structure of the L&I [Labor & Industries] program." TR Richardson, p. 21. The other persons present at the Resource Center were also reading safety materials. TR Richardson, p. 22. After initially accepting Conco's offer of temporary transitional light duty work, Mr. Richardson left the job after only one day although he remained medically certified and able to participate in the program. TR Richardson, p. 17.

VI. ARGUMENT

The light duty job offered to Mr. Richardson met all of the criteria of a valid job offer under RCW 51.32.090. Further, the offer was provided by Conco and constituted "work" that benefitted Conco. Conco maintains that its use of a contracted facility to establish an appropriate environment for Mr. Richardson's transitional light duty does not constitute a job offer from or for a third party.

Mr. Richardson asserts that the job offer made by Conco was defective in two ways. First, Mr. Richardson alleges that the job offer made by Conco was not actually made by Conco. Mr. Richardson's Petition for Review, p. 9. Second, Mr. Richardson alleges that the job offer made by Conco was not for "work" and was therefore invalid. *Id.* at p. 18. Because substantial evidence supports the lower courts' findings that the job offer made by Conco constituted an offer of employment with

Conco and the additional safety training constitutes employment or "work," Mr. Richardson's challenges to Conco's job offer, an offer Mr. Richardson initially accepted, should be rejected and Mr. Richardson's Petition for Review should be denied.

1. THE LIGHT DUTY JOB OFFER PROVIDED TO MR. RICHARDSON WAS FROM HIS EMPLOYER.

In the case at bar, a dispute has arisen regarding the validity of the light duty transitional work that was approved by Mr. Richardson's attending physician, offered to Mr. Richardson, and accepted by Mr. Richardson. Mr. Richardson argues that the offer was not extended to him by his employer of injury because it was extended to him by Conco's representative on the claim. Under RCW 51.32.090(4) and the Department's Interim Policy 5.15, the offer extended to Mr. Richardson must be from the employer of injury and must offer a position working for the employer of injury. As recognized by the Court of Appeals, there is no need to engage in statutory interpretation. It is clear that substantial evidence supports the superior court's findings and the Court of Appeal's affirmation of the decisions preceding their review.

Here, Mr. Richardson takes issue with superficial elements of Conco's job offer, essentially arguing form over substance. For instance, Mr. Richardson states that because the offer appeared on the letterhead of Conco's retrospective rating group and was signed by Ms. Bueche, who manages L&I claims for Conco at AGC, the offer was not made by Conco, but was, instead an offer to work for AGC. Mr. Richardson's Petition for

Review, p. 17. Further, the job offer was for "tasks to be performed for and at the direction of Safety Educators." *Id.* However, Mr. Richardson's arguments ignore the uncontroverted facts of this case. Specifically, Conco's retrospective rating group acts only on behalf of Conco and cannot make job offers or any other claims decisions without the knowledge, approval and explicit direction of Conco. Bueche TR, p. 43. In addition, it ignores the fact that Safety Educators did not have any decision-making authority to alter the curriculum choices made by the employer of injury. Gubbe TR, p. 31.

Under the IIA, an employer is defined as "any person, body of persons, corporate or otherwise, and the legal representative of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers." RCW 51.08.070. An employment relationship is created between an employer and employee where "'the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship.'" CABR, p. 18. (citing *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 303-04, 39 P.3d 1006 (2002)).

In determining if this standard has been met, the Court of Appeals has stated that the following factors should be examined: "(1) who controls the work to be done; (2) who determines the qualifications; (3) who sets pay and hours of work and issuing paychecks; (4) who has day-

to-day supervision responsibilities; (5) who provides work equipment; (6) who directs what work is to be done; and (7) who conducts safety training." *Gary Merlino Const. Co., Inc. v. City of Seattle*, 167 Wn. App. 609, 616, 273 P.3d 1049 (2012) (citing *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 863, 86 P.3d 826 (2004)); see, also, *In re Sylvia Booth*, BIIA Dec., 92 6148 (1995) (finding the following factors important to consider: who determined qualifications, who controlled payments and number of hours worked, who prepared tax forms, and who hours were ultimately reported to). Here, substantial evidence supports that Conco was Mr. Richardson's employer with respect to the light duty work offered. In addition, the evidence in the Board record demonstrates that neither AGC nor Safety Educators were Mr. Richardson's employers.

The uncontroverted facts establish that Conco was Mr. Richardson's employer with respect to the light duty job. Lauren Gubbe, the director of AGC's workers' compensation retro program, stated that the retrospective rating group "essentially function[s] as, you know, a third party representative for them on their behalf... as a retro association, you act on behalf of your members." TR Gubbe, p. 8. Ms. Gubbe stated that "[w]e can't take action on the claims, actually, in the form of protest or whatever without talking to the employer." TR Gubbe, p. 10. With respect to Mr. Richardson's claim, Ms. Gubbe stated that AGC Retro had Conco's permission to send the offer of temporary transitional light duty work and that AGC would have no power to independently offer such employment to an injured worker. TR Gubbe, p. 16.

Ms. Gubbe also testified that it was up to the employer of injury to decide what curriculum or subject matter will be covered with an injured worker. TR Gubbe, p. 14. Ms. Gubbe denied that employees of Safety Educators would have any decision-making authority to alter the curriculum choices made by the employer of injury. TR Gubbe, p. 31. Ms. Gubbe stated that the employer of injury, in this case Conco, would pay Mr. Richardson's salary and benefits. TR Gubbe, p. 15-26. Ms. Bueche confirmed that, stating that "[e]ach employer pays their individual workers." TR Bueche p. 38. Ms. Gubbe also stated that Conco retains control over Mr. Richardson's schedule and would have to approve any time off requested by the Claimant. TR Gubbe, p. 18-19. Ms. Bueche agreed that Conco, and not Safety Educators, "had complete say in how many hours [Mr. Richardson] would be required to attend, what absences would be deemed excusable, versus not excusable, and what have you." TR Gubbe, p. 48.

In cases of discipline, Ms. Gubbe testified that Safety Educators was required to "contact the employer, unless, of course, there's a safety issue, in which case they would do what they needed to do for safety." TR Gubbe, p. 31. Ultimately, though, discipline is "up to the employer." TR Gubbe, p. 35. Ms. Bueche stated that "[i]t would be the employer" rather than Safety Educators, who was ultimately in charge of discipline, if necessary. TR Bueche, p. 48. Safety Educators' role was, essentially, an advisory one to Conco. TR Bueche, p. 49.

In short, Conco controlled the work to be done, whether Mr. Richardson was eligible for the position, set Mr. Richardson's hours of work, pay rate, and provided both paychecks and benefits, had control over discipline, directed what work was to be done, and was providing additional safety training to its employee in the process. Conco was in no way exempting itself from its burdens as an employer per RCW 51.04.060 as asserted in the Amicus Brief. The facts clearly show that Conco was responsible for all of its burdens under the IIA. Further, these factors establish that an employment relationship existed between Mr. Richardson and Conco during his transitional light duty job. Mr. Richardson's argument to the contrary should be rejected

A. The 1993 Amendment Does Not Support Mr. Richardson's Argument that the Job Offer Was Not Offered by Conco.

Mr. Richardson specifically cites to the 1993 amendment to RCW 51.32.090(4) in support of his contention that the light duty transitional work offer was invalid. However, nothing contained in the 1993 amendment invalidates the light duty transitional work offered by Conco. RCW 51.32.090(4) previously read:

> Whenever an employer requests that the worker who is entitled to temporary total disability under this chapter be certified by a physician as able to perform available work other than his usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the available work in terms that will enable...

The 1993 amendment changed "employer" to "the employer of injury" and "the available work" to "work available with the employer of injury."

Mr. Richardson asserts those minor changes by the legislature evidenced an intent "to emphasize that the job offer had to be from the employer of injury rather than another employer." Mr. Richardson's Petition for Review, p. 12. Contrary to Mr. Richardson's allegations, that change clearly only shows the legislature's intent to hold the employer of injury responsible for both the offer of the transitional job and the work program. The amendment does not convey a prohibition against an employer of injury utilizing an agent to provide an offer of transitional work. More importantly, Mr. Richardson does not provide any additional authority that an agent cannot be used.

The record supports the fact that AGC acted as an agent for Conco. AGC and Safety Educators are not third-party employers that Conco sent Mr. Richardson to go work for as Mr. Richardson appears to assert. A principal-agent relationship can be established when "[t]he agent manifests a willingness to act subject to the principal's control, and the principal expresses consent for the agent to so act." *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wash. App. 637, 645, 898 P.2d 347, 352 (1995). The determinative question is whether the principal has "the right to control the... actor's physical conduct in the performance of the service [?]." *Baxter v. Morningside, Inc.*, 10 Wn. App. 893, 895-96, 521 P. 2d 946 (1974).

Conco possessed sole authority regarding whether Mr. Richardson was to be offered light duty and retained the right to use the Resource Center if, when, and how it saw fit. Conco's decision to offer Mr.

Richardson light duty was facilitated by AGC at Conco's direction. AGC could not have contacted Mr. Richardson without being authorized to act on Conco's behalf, as AGC can only interact with injured workers at and according to Conco's instructions. Accordingly, AGC clearly noted in its letter to Mr. Richardson that Conco was the party offering a light duty job. Conco, not AGC, controlled the scope of the light duty job offered to Mr. Richardson. In determining the scope of the light duty offered to Mr. Richardson, Conco made all decisions as to what and how the light duty was to be done. Conco was responsible for the decision to have Mr. Richardson review safety rules and regulations to further its company-wide compliance and safety goals. This type of self-led training and review served no purpose for and provided no benefit to AGC. AGC is not in the construction business and does not employ contractors and laborers to complete projects. AGC's role amounted to a worker's compensation consultant assisting Conco with communicating and implementing Conco's light duty job offer to Mr. Richardson.

2. THE LIGHT DUTY JOB OFFER PROVIDED TO PETITION CONSTITUTED "WORK."

In his Petition for Review, Mr. Richardson alleged that the offer made by Conco was not for employment at all. Mr. Richardson's Petition for Review, p. 18. Mr. Richardson in his brief noted that the activity he was to perform for his light duty job was to read manuals. *Id.* He asserted that reading manuals was "an activity that he never did as a part of his work at his job of injury, and he did not need to read a manual to perform

his job." *Id.* Mr. Richardson noted that reading the manuals was more "akin to retraining than to work." *Id.*

Mr. Richardson's argument, however, ignores the extensive testimony in the record detailing the purpose and benefits of the training and its connection to the construction industry. Mr. Richardson's outright dismissal of training as work or employment also is in direct conflict with multiple Board decisions[3], although not binding on this Court, which found that training, whether on or off site, constitutes work and employment under the IIA and the Department's Interim Policy 5.15, which explicitly allows on and off-site training of Employees as transitional employment.

RCW 51.32.090 does not define what exactly constitutes "transitional work." It merely states that the work must be offered by the employer of injury and approved by a medical provider. Interim Policy 5.15 provides additional information. Courts are able to look to an agency policy to interpret undefined terms contained in statutes despite the fact that agency policies do not have the force of law. *Stevens v. Brink's Home Sec., Inc.*, 162 Wn. 2d 42, 54, 169 P. 3d 473 (2007) (Madsen, J., concurring). That policy requires that the transitional work offered by an employer correlate to the work the worker was performing at the time of injury. It does not require that the work be the same exact work. The

[3] *In re Kimberly Bemis*, BIIA Dec., 90 5522 (1992); *In re Chris J. Thrush*, Dckt. No. 09 21463 (November 5, 2010), *In re Darlene R. Cate*, Dckt. No. 00 20324 (February 5, 2002), *In re Richard A. Parsons*, Dckt. Nos. 95 5039, 95 7344, & 95 7344-A (February 18, 1997), *In re Vernon Randall, Dec'd*, BIIA Dec., 47,325 (1977).

duties are not required to be identical. Interim Policy 5.15 further provides that the job offered "should provide a meaningful and respectful work environment."

The work offered to Mr. Richardson clearly benefited both Mr. Richardson and Conco. The work offered included a comprehensive review of all safety regulations relevant to the construction industry, safety policies and procedures of the employer, and numerous additional opportunities including but not limited to training and certification in CPR, obtaining a Commercial Drivers License (CDL), obtaining a flagger certification, and reviewing Conco blueprints relevant to an employee's job assignment. TR Bueche, p. 36; TR, Ex. 2. Specific to the safety training offered, Mr. Richardson was given the opportunity to participate in classroom learning that went well beyond that offered in brief on-the-jobsite safety meetings and which would have provided him with much greater knowledge of Washington's workplace safety statutes and rules, or at the very least, a refresher of those rules. TR Walsh, p. 10-11. This enhanced knowledge is important both for Employees, especially supervisory employees like Mr. Richardson, a foreman, and provides tangible benefits to the Employer. TR Gubbe, p. 20; TR Walsh, p. 11.

Conco has a vested interest in developing employee knowledge of safety rules and regulations. While Mr. Richardson may have received safety information on a weekly basis, Conco sought to develop Mr. Richardson's safety knowledge beyond the bare minimum. Conco regularly engages its employees, when possible, in enhancing their

knowledge in order to prevent injuries and deaths before they happen. Safety training has been deemed so essential in the construction industry that the Occupational Safety and Health Administration implements outreach efforts, and private enterprises organize multi-day conferences and expositions. Mr. Richardson fails to note that there is no deficiency requirement that must be met in order to engage in prophylactic training. The Monday safety meetings referred to by Mr. Richardson are an example of this preventive training.

The program also accomplishes the statutorily-defined goals of the legislature in establishing the temporary transitional light duty program. The legislature has stated that "long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury" and employers are encouraged to "provide light duty or transitional work for their workers..." when a worker is injured. RCW 51.32.090(4)(a). The statute further contemplates that the transitional light duty work would be "work other than his or her usual work...." RCW 51.32.090(4)(b). Here, Conco provided temporary transitional light duty work to Mr. Richardson, which unfortunately Mr. Richardson quit, that would have benefited Conco and Mr. Richardson, and also was in furtherance of the legislature's stated goals under 51.32.090.

The direct, uncontroverted/uncontested evidence in this record that best speaks to the issue regarding whether the temporary transitional light duty work offered to Mr. Richardson was of direct benefit to Mr. Richardson was through the testimony of Robert Walsh. TR Walsh, p. 6.

In approximately 1994, having worked for 20 years in the construction industry, Mr. Walsh sustained an industrial injury while working as a carpenter. TR Walsh, p. 6. Because initially he could not return to his job of injury, he was offered temporary transitional light duty work identical to that offered to Mr. Richardson in our case.

Mr. Walsh testified that the training he received was considerably more comprehensive than anything he ever received on a job site. TR Walsh, p. 14-15. In reviewing the safety regulations, Mr. Walsh developed a far greater appreciation for this information than he previously held. Based on the review of safety rules and regulations while in his temporary transitional light duty job at the resource center, Mr. Walsh developed a real interest in construction safety. As a result of the training he received in his temporary transitional light duty work at Safety Educators, Mr. Walsh was able to be hired as a safety manager as a result of the skills and knowledge that he developed during his temporary transitional light duty job when it was determined he could not return to work as a carpenter. TR Walsh, p. 10-11. **Mr. Walsh's testimony is not only compelling for the benefit he personally received from his transitional light duty work, this testimony provides irrefutable evidence that the position meets the requirements of "work."**

Mr. Richardson attempts to portray the light duty job provided to him as punishment using Oregon case law, specifically, a decision from the Oregon Workers' Compensation Board, *In the Matter of the Compensation of Douglas B. Organ*, WCB Case No. 95-08498, 95-08107

(Feb. 26, 1997). However, Mr. Richardson's discussion of Oregon jurisprudence is irrelevant, as it involves an entirely different statutory scheme of worker's compensation. Foreign authority is unhelpful when interpreting Washington industrial insurance law. Indeed, when interpreting Washington's industrial insurance laws "because of the differences in the statutes of other states, the decisions of their courts can be of little assistance." *Wheaton v. Dep't of Labor & Indus.*, 40 Wn.2d 56, 57, 240 P.2d 567 (1952). Compared with other jurisdictions, there are several unique aspects of Washington industrial insurance law and the role of the Department, the Board, and the Courts. These unique characteristics make it inappropriate to rely on authority from other jurisdictions, with workers' compensation systems vastly different from the State of Washington. *Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467, 482-83, 745 P.2d 1295 (1987) ("Our Industrial Insurance Act is unique and the opinions of other state courts are of little assistance in interpreting our Act.").[4]

Ultimately, Mr. Richardson fails to recognize that the light duty he was given was not a punishment, but an opportunity. Despite Mr. Richardson's complaints that the information he reviewed during his one

[4] *In re Organ* also is self-limited in scope and, even if it were appropriate to rely on foreign authorities in interpreting the Industrial Insurance Act, the Oregon Board states explicitly at footnote 6 that "Our decision should not be construed as a determination that the AGC Job-Skills program can never qualify as 'modified' employment. To the contrary, as previously noted, our decision is based on the record as developed in this particular case." The Claimant would have the Board ignore this warning and decide this case based on the facts of *Organ*, rather than the record developed in this case, and the laws of Oregon, rather than those of Washington.

day at the Resource Center was not something he would have reviewed "in the course of his job of injury," the work provided was relevant to Mr. Richardson's field of work and offered the opportunity to become a resource for his colleagues and subordinates. Mr. Richardson's refusal to work has no bearing on the adequacy of the light duty job provided. If Mr. Richardson wanted more out of the program, he had the option to obtain additional certifications and licensing. Mr. Richardson's brief makes it clear that he lacked any understanding of the opportunities available to him and had no interest in acquiring any understanding. Regardless of Mr. Richardson's attitude towards the work he was provided, the light duty job offered to Mr. Richardson was "work."

3. MR. RICHARDSON'S ATTORNEYS ARE NOT ENTITLED TO AN AWARD OF FEES.

Substantial and uncontroverted evidence supports the decision reached by the Board of Industrial Insurance Appeals, the Superior Court, and affirmed by the Court of Appeals. Mr. Richardson presents the same arguments in his Petition that were advanced at all prior levels of adjudication. There is no basis for reversal and therefore he is not entitled to attorneys' fees under RAP 18.1 and RCW 51.52.130. Conco respectfully requests Mr. Richardson's request for attorney's fees be denied.

VII. CONCLUSION

Based on the foregoing points and authorities, Conco requests that this Court deny Mr. Richardson's petition and deny review.

RESPECTFULLY SUBMITTED this 27th day of March, 2019.

PRATT, DAY & STRATTON, PLLC

By _____
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AARON E. RICHARDSON, Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 77289-9-I DIVISION ONE PUBLISHED OPINION FILED: December 24, 2018

LEACH, J. — Aaron Richardson appeals a superior court decision terminating his time-loss benefits because he rejected a transitional work offer. He claims that his employer did not make the offer, the offer did not involve work for his employer, and the work was not "meaningful and respectful." Because substantial evidence supports the superior court's contrary findings, we affirm.

FACTS

Aaron E. Richardson is a journeyman carpenter. Since leaving high school, he has worked only in construction, doing manual labor.[1] Richardson injured his back in 2014 while employed as a vertical foreman for Conco & Conco Pumping Inc. As a result, he received time-loss compensation.

[1] Richardson did obtain his GED (general education diploma).

In June 2015, Richardson received a letter on Associated General Contractors' (AGC) letterhead offering him transitional light duty work. Janet Beuche, a claims consultant with AGC, signed the letter.[2] AGC is an association of Washington commercial contractors funded by dues paid by its members. AGC provides its members various services. AGC helps its program members manage workers compensation claims.

The June 2015 letter offered Richardson a "light duty job." It directed him to go to the Modified Duty Site Resource Center (Resource Center) where Tim Johnson would be his site manager. The letter said that Johnson would report Richardson's attendance to Catherine Santucchi, the Conco office manager. For doing this job, Conco would pay Richardson his regular wage plus benefits, more than his time-loss compensation rate.

The letter stated, "The knowledge you will gain through your participation is readily applicable when you return to work, i.e. you will become more familiar with the construction safety regulations, proper lifting techniques, etc." According to the letter and attached job analysis, once he completed his "comprehensive review of DOSH [Division of Safety and Health] safety regulations pertaining to construction," he might have "an opportunity . . . to receive Flagger certification,

[2] Janet Beuche also uses the name "Janet Hansen," the name she used to sign the letter.

CDL[3] certification, CPR[4]/First Aid certification, and, if applicable, the opportunity to complete [his] GED." The job analysis noted that "[s]kill enhancement is accomplished through lectures, videos, written materials, worksheets, and discussions." Richardson's physician signed the job analysis. The job offer resulted in termination of Richardson's time-loss compensation on June 21, 2015.

Richardson attended the Resource Center as directed in the letter on June 22, 2015, from 6:00 a.m. to 2:30 p.m. When Richardson arrived at the Resource Center, Johnson, the supervisor, told Richardson that he was to read a binder of safety information each day. On that first day, Richardson read from a binder materials about "the structure of the L&I [Labor & Industries] program." While Richardson attended weekly safety meetings as a journeyman carpenter and vertical foreman, he was never required to read the type of safety information contained in this binder. Richardson refused to return after the first day.

At the Resource Center, Richardson saw about "a dozen" other people present, also reading out of binders, and Johnson, who took attendance and directed participants when to take their breaks. Richardson did not see any Conco signs or employees.

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[3] Commercial driver's license.
[4] Cardiopulmonary resuscitation.

AGC members created the Resource Center 23 years ago because member companies often do not have on-site light duty work available for injured workers. According to Conco, the light duty work at the Resource Center gives workers the opportunity to learn about safe work practices. This benefits employers by having their workers review required safety information. It benefits workers by exposing them to this information. They also have the opportunity to obtain additional certifications to help with future employment.

Safety Educators owns and operates the Resource Center. It contracts with AGC to provide the challenged program. AGC members contribute annually to the Resource Center to maintain its availability. Safety Educators and its Resource Center supervisors have limited authority to direct what a worker does while at the Resource Center. The employer of injury determines the hours the worker is required to attend the Resource Center, the rate of payment, and the number of excusable absences. The employer of injury also pays the employee and is responsible for taking any disciplinary action for the worker's misbehavior at the Resource Center. If the employer does not provide specific direction and materials, the Safety Educators' supervisor will instruct the worker to begin on the safety review.

Conco presented the testimony of Robert Walsh to respond to Richardson's claims about the quality of the Resource Center activities. Walsh

went through the program at the Resource Center after he was injured in the 1990s. While at the Resource Center, Walsh followed a curriculum where he reviewed the Washington Administrative Code and answered test questions as he read. He found the work relevant for him as a member of the construction industry because it helped him learn necessary safety codes. This helped him to become a safety manager.

Procedure

The Department of Labor and Industries (Department) terminated Richardson's time-loss compensation when he received the offer to work at the Resource Center. Richardson appealed the termination. He claimed that the job offer was invalid because his employer had not made it and it did not involve work for his employer. He also contended that the offered job was not light-duty transitional work. An industrial appeals judge reversed the Department's decision and ordered reinstatement of Richardson's time-loss benefits. The Board of Industrial Insurance Appeals (Board) affirmed the Department's order.[5] Richardson appealed to superior court. It affirmed the Board's decision. Richardson now appeals the superior court's decision.

In his notice of appeal, Richardson asserted that the following findings of fact are erroneous:

[5] The superior court's conclusions of law 2.3, 2.4, and 2.5 adopt verbatim the Board's conclusions of law 1, 2, and 3.

1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts. Nos. 1 through 7 of the January 11, 2017 Decision and Order. Specifically the Court finds:

. . . .

1.2.3 Conco, through its retrospective rating group, offered Mr. Richardson a transitional or light-duty job that was to begin on June 21, 2015. His work hours were to be 6:30 a.m. to 2:30 p.m., Monday through Friday, and the work was to be performed at a facility operated by Safety Educators in Tacoma, Washington. Mr. Richardson was to be paid his full salary with benefits while he participated in the training program.[6]

. . . .

1.2.6 The transitional job offer came from Conco, and constituted work with Conco, the employer of injury. The transitional work would have maintained the employment relationship between Mr. Richardson and Conco.

1.2.7 The transitional job offer was for work that was available and different than Mr. Richardson's usual duties. The work had a relationship to Mr. Richardson's employment at the time of the injury and provided a meaningful and respectful work environment.

Richardson also challenges the following superior court conclusions of law:

2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 3 of the January 11, 2017 Decision and Order.

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[6] Finding of fact 1.2.3 has an error: the hours offered Richardson were 6:00 a.m. to 2:30 p.m.

2.3 Conco's light duty job offer to Mr. Richardson constituted a valid offer of transitional work within the meaning of RCW 51.32.090(4).

2.4 The Board's January 11, 2017 Decision and Order is correct and is affirmed.

2.5 The June 23, 2015 Department order is correct and is affirmed.

STANDARD OF REVIEW

Civil review standards guide appellate analysis of issues under the Industrial Insurance Act (Act).[7] We review the superior court's findings of fact to determine if substantial evidence supports them, looking only at the evidence presented to the Board.[8] We do not reweigh the evidence.[9]

Substantial evidence is evidence sufficient to "persuade a rational fair-minded person the premise is true."[10] If this court, after reviewing the record in the light most favorable to the party who prevailed in the superior court, finds substantial evidence supports the trial court findings, it reviews de novo whether those findings support the superior court's conclusions of law.[11] The Board's

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[7] Title 51 RCW; RCW 51.52.140; Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009); City of Bellevue v. Raum, 171 Wn. App. 124, 139-40, 286 P.3d 695 (2012).

[8] Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999); Dep't of Labor & Indus. v. Shirley, 171 Wn. App. 870, 879, 288 P.3d 390 (2012).

[9] Fox v. Dep't of Ret. Sys., 154 Wn. App. 517, 527, 225 P.3d 1018 (2009).

[10] Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

[11] Street v. Weyerhaeuser Co., 189 Wn.2d 187, 205, 399 P.3d 1156 (2017); Ruse, 138 Wn.2d at 5 (quoting Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

interpretation of the Act does not bind an appellate court.[12] However, in most circumstances, "it is entitled to great deference."[13]

Because the legislature has said that the purpose of the Act is to provide compensation to all covered employees injured in employment,[14] a court construing its provisions should resolve doubts in the worker's favor.[15] This liberal rule of construction applies to interpretation of the Act but does not apply to questions of fact.[16]

ANALYSIS

Assignment of Error and Issues Raised

As a preliminary matter, the Department claims that this court should not consider Richardson's appeal because he did not include in his opening brief specific assignments of error to findings of fact.[17] But Richardson's notice of appeal identifies the findings of fact and conclusions of law that he challenges. And his briefing clearly supports those challenges with argument, citations to the record, and legal authority.

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[12] Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).
[13] Weyerhaeuser Co, 117 Wn.2d at 138.
[14] RCW 51.04.010.
[15] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).
[16] Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).
[17] RAP 10.3(g).

RAP 10.3(a)(4) requires an appellant to include a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." This court generally will review only an alleged error a party has included in an "assignment of error or clearly disclosed in the associated issue pertaining thereto."[18] But we have the discretion to "waive or alter the provisions of any of these rules . . . to serve the ends of justice."[19] RAP 1.2(a) states that "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands."

Justice does not demand strict compliance with the rules here. Richardson's notice of appeal and the briefing make his claims clear.[20] The briefing of both respondents demonstrates that Richardson's failure to follow the requirements of RAP 10(a)(4) did not hamper their ability to respond fully to Richardson's claims. So we consider the merits of his appeal.

Transitional Work

RCW 51.32 governs compensation for covered workers injured in the course of their employment. RCW 51.32.090(4) provides that an employer of injury can receive wage subsidies from the Department for providing "light duty or

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[18] RAP 10.3(g).
[19] RAP 1.2(c).
[20] Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979).

transitional work" to a worker entitled to temporary total disability benefits.[21] To receive these subsidies, the worker's medical provider must restrict the worker from his usual work.[22] And a physician or nurse practitioner also must certify the transitional work as appropriate for the worker.[23] Before this can happen, the employer of injury must provide a statement of the work to both the provider and the worker.[24] The description of the work certified by the provider limits the employee's activities.[25] Once the employer offers the certified work, the worker's temporary total disability payments end, replaced by wages earned in the temporary transitional position.[26] If the provider determines that the transitional work should stop because it is impeding the worker's recovery, "the worker's temporary total disability payments shall be resumed when the worker ceases such work."[27]

The subsidy provided to employers to pay injured workers for transitional work is aimed at "encourag[ing] employers to maintain the employment of their injured workers."[28] This goal is different than that for vocational rehabilitation,

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[21] RCW 51.32.090(4)(a); WAC 296-16A020(2).
[22] RCW 51.32.090(4)(b); WAC 296-16A020(2).
[23] RCW 51.32.090(4)(b); WAC 296-16A020(3).
[24] RCW 51.32.090(4)(b); WAC 296-16A020(3).
[25] RCW 51.32.090(4)(j); WAC 296-16A020(4).
[26] RCW 51.32.090(4)(b).
[27] RCW 51.32.090(4)(b).
[28] RCW 51.32.090(4)(c).

covered by a separate section of the Act, which aims to rehabilitate and retrain workers.[29]

In 2003, the Department issued Interim Policy 5.15, "Adjudicating Transitional Job Offers and Eligibility for Time-Loss Compensation and Loss of Earning Power Benefits." The Department uses this policy when deciding if a worker is entitled to time-loss benefits when an employer and employee disagree about a transitional job offer. This policy requires that the job must come from the "employer of record" and must meet RCW 51.32.090(4) requirements. These require that the employer provide sufficient information to the worker and medical provider to allow certification of the work. The description of the job should include the job duties, location and start date, number of hours, and, if appropriate, a graduated schedule of hours and/or duties. For the employer to be reimbursed, the work must be related to the worker's employment but not specifically to the employee's job duties at the time of the injury. It must be work for the employer of record and "[s]hould provide a meaningful and respectful work environment."[30]

Richardson claims that the job offer he received did not satisfy RCW 51.32.090(4). Specifically, he contends that Conco, his employer of injury, did

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[29] RCW 51.32.095(1).

[30] Dep't of Labor & Indus., Interim Policy 5.15, at 2 (effective Sept. 15, 2003).

not make the offer and that his activity at the Resource Center was not for Conco's benefit. He also claims that the job was not "work" and did not provide a "meaningful and respectful work environment."

A. Employer of Injury

Richardson claims that the job offer was not "a valid light duty job offer because it was not from his employer of injury and was not for work with the employer of injury."

The parties agree that the transitional work must be offered by, and for the benefit of, the employer of injury—here, Conco.[31] The parties disagree about who offered the job and whether Richardson was doing the work for Conco. They also disagree about the ability of an employer to use an agent to make a job offer and whether AGC and Safety Educators acted as Conco's agents.

The text of RCW 51.32.090(4) does not expressly answer the agent question. It neither permits nor prohibits an employer from using an agent. Richardson contends that a 1993 amendment to the statute that changed "an employer" to "an employer of injury" shows that an employer may not use an agent.[32] The legislature clearly intended to make the employer of injury responsible for the transitional job offer and work program. But a principal has responsibility for its agent's actions. So this amendment does not show that the

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[31] WAC 296-16A-020(1)-(2).
[32] LAWS OF 1993, ch. 299, § 1.

statute prohibits an employer of injury from using an agent to provide transitional work.[33] We note that the text of the Board's order and decision identifies AGC as Conco's agent and does not consider this a violation of any statutory requirement. Richardson provides no additional authority for the premise that a principal may not use an agent to provide the job offer and work. In the absence of any statutory prohibition, we defer to the Department's expertise and accept the conclusion implicit in its decision that an employer may act under the statute through an agent.

Substantial evidence supports the finding that AGC and Safety Educators acted as agents for Conco. An agency-principal relationship arises when a principal has actual authority over the agent's actions.[34] An agent must "reasonably believe[ ]" that the principal has authority based on the "principal's [direct or indirect] manifestations to the agent."[35] The central question: is does the principal have "the right to control the . . . actor's physical conduct in the

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[33] Cf. Chi. Title Ins. Co. v. Office of Ins. Comm'r, 178 Wn.2d 120, 137, 309 P.3d 372 (2013) (describing the scope of agent authority and the resultant liability that accrues to the principal).

[34] RESTATEMENT (THIRD) OF AGENCY §2.01 (AM. LAW INST. 2006).

[35] RESTATEMENT (THIRD) OF AGENCY §2.01 cmt. c.

performance of the service[?]"[36] Direct supervision is not necessary for there to be an agency relationship.[37]

Conco had final authority for the job offer and controlled the conduct of Richardson at the Resource Center. Conco authorized the job and directed AGC to make the job offer. AGC discussed with Conco all of the actions it took regarding Richardson's transitional work. Conco, not Safety Educators, had final oversight over Richardson's activities at the Resource Center, his hours, and his compensation. Conco was also responsible for paying and disciplining him. The Resource Center itself exists only through funding from AGC members like Conco. It benefits these members by training workers in safety regulations relevant to the construction industry. Conco workers, like Richardson, benefit from access to safety information as well as the potential for gaining additional training and certifications.

Richardson claims that Conco did not offer him the job because the offer letter came from an AGC employee on AGC letterhead. He also suggests that the lack of signage and obvious Conco equipment and the absence of Conco managers at the Resource Center show that Conco was not his ultimate employer. But other substantial evidence supports the trial court's contrary

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[36] Baxter v. Morningside, Inc., 10 Wn. App. 893, 895-96, 521 P.2d 946 (1974) (discussing what must be found for a principal to be controlling an agent during a negligent act).

[37] Baxter, 10 Wn. App. at 896.

factual findings. Because an appellate court does not reweigh evidence on review, Richardson's factual challenges about who made the work offer and who was the employer fail.

B. Work

Richardson also claims that the offered job was not work meeting the requirements of RCW 51.32.090. In addition, he contends that the Resource Center was not a "meaningful and respectful work environment."

RCW 51.32.090 and the implementing regulations do not define "transitional work" beyond the requirements that the employer of injury offer work for that employer and a medical provider approved it for the injured worker. Although agency policies do not have the force of law, this court can look to them to interpret statutes with undefined terms.[38] Interim Policy 5.15 requires that the transitional work relate to the worker's employment when injured. But the duties do not need to be identical. The job "should provide a meaningful and respectful work environment." Unfortunately, the policy does not provide guidance about what the Department considers a "meaningful and respectful work environment."[39]

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[38] Stevens v. Brink's Home Sec., Inc., 162 Wn.2d 42, 54, 169 P.3d 473 (2007) (Madsen, J., concurring).

[39] Interim Policy 5.15, at 2.

When a statute contains an undefined term, this court can look to a dictionary definition for the plain meaning of the term.[40] Webster's Third New International Dictionary defines "work" as "activity in which one exerts strength or faculties to do or perform."[41] More specifically "work" can refer to such activities as "sustained physical or mental effort valued as it overcomes obstacles and achieves an objective or result" or "a specific task, duty, function, or assignment often being a part or phase of some larger activity."[42] "Meaningful" is "having a meaning or purpose."[43] "Respectful" is "full of respect" or "showing deference."[44] Implicit in these definitions is the idea that an activity becomes work when it has a purpose beyond simply doing the activity.

The parties do not dispute that the material in the binder included information important for industry safety and that the Resource Center operates to provide safety information to people in the industry. During the administrative hearing, respondents provided evidence that the Resource Center's activities could help both Conco and Richardson by providing him a deeper knowledge of industry safety standards and the potential to gain additional training and certifications. This evidence sufficiently supports the trial court's findings that

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[40] State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001).
[41] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2634 (2002).
[42] WEBSTER'S at 2634.
[43] WEBSTER'S at 1399.
[44] WEBSTER'S at 1934.

Conco offered work having a relationship to Richardson's employment and the Resource Center provided a meaningful and respectful work environment. These findings support the conclusion that Conco offered transitional work meeting all statutory requirements.

Richardson relies on a case before Oregon's Worker's Compensation Board involving a "modified employment" program.[45] The Oregon board made it clear that its decision was specific to the record in the case before it. Also, Richardson has not demonstrated sufficient similarity between Oregon's program and Washington's program for the opinion to provide any persuasive guidance.

The superior court did not err in affirming the Board.

ATTORNEY FEES

Richardson requests fees pursuant to RAP 18.1 and RCW 51.52.130. Because his appeal fails, we deny this request.

CONCLUSION

Substantial evidence supports the trial court's findings that Conco, the employer of injury, was responsible for the job offer and for supervising the work

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[45] In re Organ, Nos. 95-08498, 95-08107 (Or. Workers Comp. Bd. Feb. 26, 1997).

at the Resource Center. Substantial evidence also supports its finding that Richardson's activity at the center was "work." We affirm.

Leach, J.

WE CONCUR:

Smith, J.

Mann, A.C.J.

PRATT, DAY AND STRATTON, PLLC

March 28, 2019 - 9:10 AM

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