No. 96780-6

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.

PETITIONER'S PETITION FOR REVIEW

David W. Lauman, WSBA #27343
Sara B. Sanders, WSBA #46832
SMALL, SNELL, WEISS & COMFORT, P.S.
4002 Tacoma Mall Blvd., Suite 200
P.O. Box 11303
Tacoma, WA 98411-0303
Telephone: (253) 472-2400
Facsimile: (253) 472-3500
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Legislative History

INTRODUCTION

The decision of the Court of Appeals should be reversed because the requirements of RCW 51.32.090(4)(b) and Department Interim Policy 5.15 were not met. The light duty transitional job Mr. Richardson was offered was not valid because: 1) the offer was not made by the employer of injury; 2) the offer was not for work with the employer of injury; 3) the job being offered did not constitute "work"; and 4) the job was not a valid job since he was not paid.

Since the offer was not a valid job offer under RCW 51.32.090(4)(b), Mr. Richardson is entitled to time loss compensation for the period in question.

IDENTITY OF PETITIONER

Aaron E. Richardson petitions for review of the decision of Division One of the Court of Appeals. Mr. Richardson is the claimant in the underlying workers' compensation claim that is the subject of this appeal. He was the plaintiff at the Superior Court level and the appellant at the Court of Appeals.

CITATION TO COURT OF APPEALS DECISION

Mr. Richardson petitions for review of the published decision of Division One of the Court of Appeals, *Aaron E. Richardson v. Department of Labor and Industries and Conco & Conco Pumping*, ____ Wn.App.

2d____, ____ P.3d ____ (No. 77289-9-1, December 24, 2018). A copy is provided in the appendix. (Appendix C).

ISSUES PRESENTED FOR REVIEW

RCW 51.32.090(4)(b) provides that an injured workers' temporary total disability (time loss) benefits can be terminated if the employer of injury presents a job offer, agreed to by the attending physician, for work with the employer of injury.

Does a job offered not by the employer of injury but instead by a retrospective rating group for work with a separate company, not owned or directly affiliated with either the employer of injury or the retrospective rating group, qualify as a job offer from the employer of injury and with the employer of injury such that temporary total disability benefits are terminated pursuant to RCW 51.32.090(4)(b)?

Does the activity of reading manuals qualify as work under RCW 51.32.090(4)(b) when the worker is not paid for the activity?

STATEMENT OF THE CASE

Mr. Richardson seeks review of a December 24, 2018 decision of Division One of the Court of Appeals which affirmed a July 21, 2017 order from King County Superior Court. In the July 21, 2017 order, the Superior Court affirmed a January 11, 2017 order issued by the Board of Industrial Insurance Appeals [hereinafter Board] and affirmed an order issued by the

Department on June 23, 2015. In the June 23, 2015 Department order, the Department ended time loss compensation benefits as of June 21, 2015, because Mr. Richardson returned to work.

Mr. Richardson is a 35-year-old man, who completed the 10th grade and recently received his GED. (CBR, 5/25/16 TR [hereinafter TR], pp. 7-8). Mr. Richardson has only ever worked in construction since leaving high school (CBR, TR, p. 8). He became a journeyman carpenter through the Pacific Northwest Regional Council of Carpenters after completing between 8,000 and 10,000 hours of work. (CBR, TR, p. 9). He has never received any certifications during his work as a journeyman carpenter, and he has never attended any training or certification courses since he started doing construction work. (CBR, TR, p. 9). Every Monday, he would attend safety meetings that lasted approximately 20-30 minutes and, during which, Mr. Richardson never received any written materials. (CBR, TR, pp. 27-28, 31). Mr. Richardson was also never afforded the opportunity by Conco to attend any trainings outside of their weekly Monday safety meetings. (CBR, TR, pp. 27-28).

On February 18, 2014, while working for Conco as a vertical foreman, he suffered an industrial injury to his low back, which was treated with two surgeries and physical therapy. (CBR, TR, pp. 8, 10-11). He missed work and received time loss compensation benefits. (CBR, TR, pp. 63-64).

Associated General Contractors [hereinafter "AGC Retro"] is a retrospective rating group that helps employers, mainly commercial contractors, navigate the worker's compensation process in exchange for membership dues that the employers pay into the group. (CBR, TR, pp. 39, 41; CBR, Gubbe, pp. 4-5, 11). By reducing costs of claims, retro groups can get monetary refunds. WAC 296-17B-400. AGC Retro is a totally separate corporate entity from Conco.

On June 15, 2015, Mr. Richardson received a letter written on AGC Retro's letterhead and signed by Janet Bueche, a claims consultant with AGC Retro. (CBR, TR, pp. 14, 33; CBR, Ex. 1). The letter purported to offer him a light duty transitional job. (CBR, TR, p. 14; CBR, Ex. 1). The letter stated that he was being offered "temporary transitional light duty work" and that it would have "sedentary physical requirements (reading and writing)." (CBR, Ex. 1). It requested that Mr. Richardson report to the Modified Duty Site Resource Center at 3680 S. Cedar Street, Suite J, Tacoma, Washington 98409, which is owned by Thom Willson, the owner of the Safety Educators Program, which received funding from AGC Retro's membership dues, but is not owned by AGC Retro or its employer-members. (CBR, TR, pp. 36-37; CBR, Ex. 1). Mr. Richardson was supposed to attend from 6:00 a.m. to 2:30 p.m. Monday through Friday. (CBR, Ex. 1). The Modified Duty Site facility manager was Tim Johnson, one of Mr. Willson's employees. (CBR, TR, p.

38; CBR, Ex. 1). Mr. Johnson was responsible for reporting attendance to Conco, releasing the attendees for breaks, accommodating any difficulties Mr. Richardson may have experienced, and provide the materials to Mr. Richardson. (CBR, Ex. 1; CBR, TR, pp. 21-22). The letter was on AGC letterhead and instructed Mr. Richardson to call AGC if he had any questions. (CBR, Ex. 1).

The job summary on the job analysis stated that Mr. Richardson was going to be reviewing DOSH construction safety standards. (CBR, Ex. 2). Then, his activities may have included CPR/First Aid certification, Flagger certification, CDL testing preparation, and/or an opportunity for GED completion. *Id.* This type of "job" is only offered for injured workers. (CBR, TR, p. 39).

Mr. Richardson accepted the offer and attended one day. (CBR, TR, pp. 16-17). He did not see any Conco signs inside or outside of the facility that day. (CBR, TR, p. 18). No one from Conco was ever at the facility. (CBR, TR, p. 38). Mr. Richardson did not have to fill out any forms prior to starting. (CBR, TR, p. 23). Mr. Johnson took attendance and gave Mr. Richardson a binder to read, which contained Washington State Labor and Industries policies. (CBR, TR, pp. 20-22). There were approximately 12 other people in the room and Mr. Johnson was the only supervisor. (CBR, TR, p. 21). Mr. Johnson would release the room for breaks throughout the

day, which included two 10-minute breaks and a 30-minute lunch break. (CBR, TR, pp. 19, 21). Mr. Johnson did not walk around the room at all to check on the participants' progress, but participants were expected to finish a binder per day. (CBR, TR, pp. 21-22). Mr. Richardson's binder did not contain information that he would have reviewed for his job as a vertical foreman, and only some of it was relevant. (CBR, TR, pp. 22, 26).

After Mr. Richardson attended that one day, he did not receive a paycheck, nor did he return. (CBR, TR, pp. 17, 23).

During the course of Mr. Richardson's claim, on January 29, 2015, Lori Allen, a vocational counselor at Strategic Consulting, was assigned by the Department to conduct an ability-to-work assessment of Mr. Richardson. (CBR, TR, pp. 68, 81-82). Ms. Allen reviewed the job analysis for the offer that AGC Retro sent to Mr. Richardson. (CBR, TR, p. 83; CBR, Ex. 2). Ms. Allen expressed concern about the job offer because she was unable to tell what the job title was or what his job duties would be. (CBR, TR, p. 85). She opined that the job analysis sounded like a student, which is not a job in the Dictionary of Occupational Titles. (CBR, TR, p. 85). She also was unsure of the goal of this training or whether this was even a work environment at the resource center. (CBR, TR, pp. 86, 89). Thus, she did not, and could not, conduct a labor market survey. (CBR, TR, p. 88). Ultimately, Ms. Allen did not recommend that vocational services be closed and thought that Mr.

Richardson was not employable in the general labor market as of June 21, 2015. (CBR, TR, pp. 91-92).

The employer introduced the testimony of Robert Walsh. Mr. Walsh was a journeyman carpenter and now works as a safety manager. (CBR, Walsh, pp. 5-6). Mr. Walsh was also offered transitional light duty work at one of the Safety Educators resource centers in the 1990s. (CBR, Walsh, pp. 6-7). Mr. Walsh also reviewed written materials while attending the resource center that contained information about the construction safety codes in Washington that he already knew about. (CBR, Walsh, pp. 8-10). Prior to his industrial injury, Mr. Walsh only ever attended weekly on-site safety meetings that lasted approximately 10-15 minutes, and he never had to review any written materials during his work as a journeyman carpenter. (CBR, Walsh, pp. 13, 15).

The Department has promulgated a policy, titled Interim Policy 5.15. (CBR, Ex. 3). It applies when there is a disagreement between the employer and the worker regarding a transitional job offer. *Id.* It states that "The department will only consider transitional job offers from the employer(s) of record." *Id.* The policy also states that transitional work can be offered "that has some relationship to the employment at the time of injury." *Id.* Ms. Allen was on the committee that promulgated that policy and testified that "employer of record" is the employer that is listed on the report of accident

and does not include a retro group. (CBR, TR, pp. 72, 76). The policy also requires that the wage for the job meet the minimum wage laws. (CBR, Ex. 3).

The employer also introduced the testimony of Lauren Gubbe, the director of the workers' compensation retro program at AGC Retro. (CBR, Gubbe, p. 4). She explained that if an employer does not have specific materials that it wants a worker to review, then Safety Educators will provide a core study of the safety codes for the worker to review. (CBR, Gubbe, p. 14). Safety Educators employees are also in charge of maintaining a safe environment at the resource center and they can direct the workers to stay on task if they are being disruptive or not doing what they are supposed to be doing. (CBR, Gubbe, pp. 31, 34-35). AGC and Safety Educators do not ask workers to become employees of either AGC or Safety Educators. (CBR, Gubbe, p. 33).

ARGUMENT

This Court should accept review under RAP 13.4(b)(4). The issues in this case are of substantial public interest. The Court of Appeals' decision would leave countless injured workers exposed to having their temporary total disability benefits terminated when someone other than the worker's employer offers them work to be performed with someone other than the worker's employer. This is contrary to the plain meaning of RCW

51.32.090(4)(b) and the long-settled rules of statutory interpretation set out by this Court.

I. MR. RICHARDSON DID NOT RECEIVE 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.

A. RCW 51.32.090(4)(b) is unambiguous in requiring that a light duty job offer come from the employer of injury and be for work with the employer of injury.

The primary rule of statutory interpretation is that unambiguous statutes need no interpretation and "the court should assume that the legislature means exactly what it says. Plain words do not require construction." *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (quoting *City of Snohomish v. Joslin*, 9 Wn.App. 495, 498, 513 P.2d 293 (1973)).

RCW 51.32.090(4)(b) provides that when an "**employer of injury** requests that a worker" be certified by an attending physician "as able to perform available work other than his or her usual work, the employer shall" provide the attending physician with "a statement describing the work available with the employer of injury." (emphasis added). The statute goes on to say that time loss compensation benefits will continue until the worker is released to the work by the attending physician "and begins the work **with the employer of injury**." RCW 51.32.090(4)(b)

(emphasis added).

There is nothing ambiguous about the wording of RCW 51.32.090(4)(b). "Employer of injury" unambiguously refers to the employer that the worker was working for at the time of their injury.

B. Even if the language of RCW 51.32.090(4)(b) was ambiguous, rules of statutory interpretation would prohibit an expansive reading of RCW 51.32.090(4)(b) to allow someone other than the employer of injury to offer a job for work with someone other than the employer of injury.

The Court of Appeals stated "[t]he 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* at 12.

With such a finding of ambiguity in the statute the Court of Appeals should have relied on well-established rules of statutory interpretation to determine whether an expansive interpretation of the statute was permitted under these circumstances. In failing to make such an analysis, the Court of Appeals erroneously decided that an expansive interpretation was permitted.

i. Courts are required to read statutory exceptions narrowly. It would be improper to read into the statute an exception to time loss entitlement for job offers from anyone other than the actual employer of injury.

RCW 51.32.090 deals with when a worker is entitled to temporary total disability benefits. RCW 51.32.090(4)(b) provides an exception to a

claimant's statutory right to these benefits. Such statutory exceptions must be read narrowly, and a court must not create exceptions in addition to those specified by the Legislature. *Wash. State Republican Party v. Wash. State Pub. Disclosure Com'n*, 141 Wn.2d 245, 280-81, 4 P.3d 808 (2000); *see also e.g. Welch v. Southland Corp.*, 134 Wn.2d 629, 636, 952 P.2d 162 (1998).

It would, therefore, be improper to read into RCW 51.32.090(4)(b) the right of anyone other than the actual employer of injury to offer light duty work, or for the work to be with anyone other than the actual employer of injury. The Court of Appeals erred in concluding otherwise.

ii. The 1993 amendment to RCW 51.32.090(4) further emphasizes that the legislature intended that the offer has to come from and the work has to be with the employer of injury.

When the legislature takes action, courts presume that the legislature intends to change existing law, and in enacting an amending statute, a presumption exists that a change was intended. *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 154, 839 P.2d 324 (1992).

In 1993 the legislature amended the relevant language of RCW 51.32.090(4). The language 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 the statutory language to read:

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

H.B. 1246, 53rd Leg., 1993 Reg. Sess. (Wash. 1993). (emphasis added to highlight the changes in the statute)(see Appendix A). This same language remains in the statute.

In making this change the legislature showed an intent to emphasize that the job offer had to be from the employer of injury rather than another employer, and that the work had to be with the employer of injury rather than another employer.

The legislature is well aware of the existence of the retrospective rating program which it created. See e.g. RCW 51.16.035; RCW 51.18.005; RCW 51.18.010. This program has been in existence for decades. In setting up the program, the legislature authorized the creation of groups such as AGC Retro. RCW 51.18.010. If the legislature had intended for such groups to be allowed to make the job offer or provide the work, the legislature would have so specified.

iii. The legislative documents from the 1993 amendment to RCW 51.32.240(4) make it clear that the legislature intended to require that the job offer be from the employer of injury and for work with the employer of injury.

Even though the relevant language in RCW 51.32.240(4) is not ambiguous, if it was, the legislative source material makes the legislature's intent clear. Such legislative materials are considered authoritative sources to show legislative intent where statutes are ambiguous. *See Young v. Estate of Snell*, 134 Wn.2d 267, 280, 948 P.2d 1291 (1997), *see also Noble Manor v. Pierce Cnty.*, 133 Wn.2d 269, 277-78, 943 P.2d 1378 (1997).

The House Bill Report for HB 1246 as well as the Senate Bill Report and the Final Bill Report all summarize what the bill did. The Reports explain: "The procedures for requesting light or modified duty are clarified. **The request must be from the employer of injury and the work must be available with the employer of injury.**" H.B. Rep. 53-1246, 1993 Reg. Sess., at 1 (Wash. 1993); S.B. Rep. 53-1246, 1993 Reg. Sess. (Wash. 1993); Final B. Rep. 53-1246, 1993 Reg. Sess. (Wash. 1993); *see also* Floor Synopsis 53-1246 (1993) (see Appendix B) (emphasis added).

These documents show the legislature intended to require that the job offer be from the actual employer of injury for work with the actual

employer of injury rather than any other employer.

iv. Any ambiguity in Title 51 must be liberally construed in favor of injured workers.

RCW 51.12.010 provides that the Industrial Insurance Act [hereinafter Act] "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." This means that "all doubts be resolved in favor of coverage." *Dep't of Labor & Indus. v. Lyons Enters., Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097 (2016) (citing *Doty v. Town of So. Prairie*, 155 Wn.2d 527, 532, 120 P.3d 941 (2005)). "[T]he guiding principle when interpreting provisions of the IIA is that it is a remedial statute that is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Lyons*, 185 Wn.2d at 734 (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (internal quotation marks omitted)) (citing *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Wilbur v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 311, 82 P.2d 865 (1938)). Therefore, "where reasonable minds can differ over

what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker..." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

In this case, the Court of Appeals expressed its opinion that RCW 51.32.090(4)(b) was ambiguous. However, rather than resolving that ambiguity in favor of Mr. Richardson, it interpreted that ambiguity against Mr. Richardson. This violates the rule that such statutes must be liberally construed in favor of injured workers with the benefit of the doubt belonging to the injured worker.

v. The Court of Appeal's reliance on the Department's interpretation of the statute, is misplaced.

In reaching its decision, the Court of Appeals relied on the Department's interpretation of the statute noting "we defer to the Department's expertise..." *Richardson,* at 13.

This reliance is misplaced since there was no testimony as to how the Department interprets the statute. The Court of Appeals had no knowledge of what information was actually before the Department's claims manager when they issued the Department order. It is possible that the claims manager was under the mistaken assumption that the job was offered by the employer of injury for work with the employer of injury.

Nor was there any testimony or evidence as to whether the claims manager followed the Department's interpretation of the statute. In fact, Mr. Richardson sought the testimony of Debra Hatzialexiou, the Legal Services Program Manager at the Department of Labor and Industries, to elicit testimony as to the Department's interpretation of the statute. Unfortunately, the Department moved to quash the testimony of Ms. Hatzialexiou and the Board granted that motion, arguing that the statute was not ambiguous and that the Department's interpretation of the statute was, therefore, irrelevant. (CBR, pp. 84-89, 102-03). The Industrial Appeals Judge granted the Department's motion to quash noting "[t]he Department's interpretation of an ambiguous statute may be entitled to deference, but there is no showing that RCW 51.32.090 is ambiguous." (CBR, pp. 1-2).

Mr. Richardson, through counsel, made an offer of proof that, if called to testify, Ms. Hatzialexiou would testify that a job offer is only valid if made by an employer of injury, and that an offer like that made by AGC Retro is not valid. (CBR, TR, p. 97). In responding to the motion to quash, Mr. Richardson emphasized prophetically "[t]his case may go to the Superior Court or beyond. At those levels, the courts may want to know what the Department's policy is and give the Department its due deference under the law…" (CBR, p. 94).

The only evidence of the Department's interpretation of the statute that is part of the record is Department Interim Policy 5.15, which provides that the job must be offered by the employer of injury for a return to work with the employer of injury. Nowhere in the policy does it allow for anyone else to step in the shoes of the employer of injury. (CBR, Ex. 3).

It is, therefore, improper to assume that the Department's order properly implemented the Department's interpretation of the statute.

C. The job offer made to Mr. Richardson was not a valid offer under RCW 51.32.090(4)(b) since it was not from his employer of injury and was not for work with his employer of injury.

Mr. Richardson worked for Conco. He did not work for AGC Retro nor did he work for Safety Educators. (CBR, TR, pp. 23-24). Mr. Richardson was not offered a light duty job with the employer **of injury** in this case. The employer of injury is Conco, but the job offer letter came from Janet Bueche at AGC Retro, and was for tasks to be performed for and at the direction of Safety Educators. (CBR, Ex. 1).

The plain language of RCW 51.32.090(4)(b) is clear that the job offer has to be from the employer of injury, not another employer. This interpretation is supported by the legislative history and the legislative source materials. In this case, the "job" being offered to Mr. Richardson

was not offered by the employer of injury and was not with the employer of injury. It was, therefore, not a valid job offer and cannot be a basis for the termination of temporary total disability benefits.

II. THE OFFER MADE TO MR. RICHARDSON WAS NOT FOR "WORK" SINCE NO WORK WAS PERFORMED AND SINCE MR. RICHARDSON WAS NOT PAID.

The activities to be performed by Mr. Richardson at Safety Educators was to read manuals. This is an activity that he never did as part of his work at his job of injury, and he did not need to have read a manual to perform his job. This activity is more akin to retraining than to work.

This case is almost identical to one in Oregon. In *In the Matter of the Compensation of Douglas B. Organ*, WCB Case No. 95-08498, 95-08107 (Feb. 26, 1997),[i] the Oregon Workers' Compensation Board had an opportunity to review a similar program as the one offered to Mr. Richardson in this case. In *Organ*, the claimant was offered modified employment at the AGC Job Skills center during which he was paid his regular wages while attending a program that offered a "self-directed, self-paced learning environment." *Id.* at 2. Participants could receive certification, such as flagger, first aid, construction safety, and CPR training. *Id.* The center's supervisor had testified that participants could do

[i] Though not binding on this Court, the Oregon Workers' Compensation Board's decision provides a persuasive analysis to aid in this Court's decision in the present case. (CBR, pp. 136-42).

whatever they wanted as long as they were present between 7 a.m. and 3:30 p.m. *Id.* The Board held that this was not employment because the claimant provided little, if any, benefit to the employer and the skills center's training was not sufficiently related to the claimant's employment as a carpenter. *Id.* at 4-5.

Furthermore, and perhaps more importantly, Mr. Richardson was not paid for the day he performed these activities. It certainly does not make sense to call this work for which time loss can be terminated under RCW 51.32.090(4)(b) where there is no pay for the activities.

III. MR. RICHARDSON'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES.

Rule 18.1 of the Rules of Appellate Procedure provides that, "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1.

RCW 51.52.130 provides that in workers' compensation cases, if a worker appeals a decision of the Board of Industrial Insurance Appeals and additional relief is granted to the worker, the worker is entitled to attorneys' fees for the work done before that court. RCW 51.52.130.

If the decision of the Court of Appeals is reversed and Mr.

Richardson is awarded additional relief, attorney fees should be awarded for work done at Superior Court, the Court of Appeals, and the Supreme Court.

CONCLUSION

The Court should grant review and reverse the decision of the Court of Appeals because Mr. Richardson was not offered a light duty job by his employer of injury with his employer of injury, and the activities he was engaged in at Safety Educators did not constitute "work."

For the foregoing reasons, Mr. Richardson respectfully requests that the Court grant review and reverse the decision of the Court of Appeals and remand to the Department with instructions to reverse its June 23, 2015 order and award time loss compensation benefits effective June 22, 2015.

Mr. Richardson and his attorneys also request that appropriate fees be awarded in accordance with RAP 18.1 and RCW 51.52.130.

DATED this 18th day of January, 2019.

SMALL, SNELL, WEISS & COMFORT, P.S.
Attorneys for Appellant, Aaron E. Richardson

By: _____
David W. Lauman, WSBA #27343
Sara B. Sanders, WSBA #46832

APPENDIX A

CERTIFICATION OF ENROLLMENT

HOUSE BILL 1246

Chapter 299, Laws of 1993

53rd Legislature
1993 Regular Session

WORKERS' COMPENSATION--COMPENSATION AND BENEFITS FOR EMPLOYEE RETURNING TO WORK

EFFECTIVE DATE: 7/1/93

Passed by the House April 20, 1993
Yeas 69 Nays 28

BRIAN EBERSOLE
Speaker of the House of Representatives

Passed by the Senate April 15, 1993
Yeas 36 Nays 9

JOEL PRITCHARD
President of the Senate

Approved May 12, 1993

MIKE LOWRY
Governor of the State of Washington

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 1246** as passed by the House of Representatives and the Senate on the dates hereon set forth.

ALAN THOMPSON
Chief Clerk

FILED

May 12, 1993 - 10:24 a.m.

Secretary of State
State of Washington

HOUSE BILL 1246

AS AMENDED BY THE SENATE

Passed Legislature - 1993 Regular Session

State of Washington 53rd Legislature 1993 Regular Session

By Representatives G. Cole, Heavey, King, Franklin, Jones, Veloria and Johanson

Read first time 01/20/93. Referred to Committee on Commerce & Labor.

AN ACT Relating to employee compensation and benefits during return to work; amending RCW 51.32.090; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 51.32.090 and 1988 c 161 s 4 are each amended to read as follows:

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall continue in the proportion which the new earning

power shall bear to the old. No compensation shall be payable unless the loss of earning power shall exceed five percent.

(4)(a) Whenever ((~~an~~)) the employer of injury requests that a 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 or her usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the ((~~available~~)) work available with the employer of injury in terms that will enable the physician to relate the physical activities of the job to the worker's disability. The physician shall then determine whether the worker is physically able to perform the work described. ((~~If~~)) The worker's temporary total disability payments shall continue until the worker is released by his or her physician for ((~~said~~)) the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed one hundred percent of the average monthly wage in the state as computed under the provisions of RCW 51.08.018.

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993.

Passed the House April 20, 1993.
Passed the Senate April 15, 1993.
Approved by the Governor May 12, 1993.
Filed in Office of Secretary of State May 12, 1993.

APPENDIX B

FINAL BILL REPORT

HB 1246

C 299 L 93
Synopsis as Enacted

Brief Description: Revising provisions for maintaining employee benefits for temporarily disabled workers.

By Representatives G. Cole, Heavey, King, Franklin, Jones, Veloria and Johanson.

House Committee on Commerce & Labor
Senate Committee on Labor & Commerce

Background: The Industrial Insurance Act allows an employer to provide a light or modified job to an injured worker while the worker is recovering from his or her injury. The light duty job must be approved by the worker's physician. If the worker returns to a light duty job paying less than 95 percent of the worker's wages at injury, the worker is entitled to partial benefits that are paid in proportion to the worker's loss of earning power. The statute does not address the worker's right to fringe benefits while in the light duty position.

Summary: If an injured worker is returned to work at light or modified duty during the period in which the worker is unable to return to his or her regular job, the employer must continue or resume the health and welfare benefits to which the worker was entitled at the time of injury. However, the benefits will not be continued or resumed if that would be inconsistent with the terms of the benefit program or an applicable collection bargaining agreement.

The procedures for requesting light or modified duty are clarified. The request must be from the employer of injury and the work must be available with the employer of injury. The worker's temporary disability compensation must continue until the worker is released for work by the attending physician and begins work.

Votes on Final Passage:

House	70	28	
Senate	36	9	(Senate amended)
House	69	28	(House concurred)

Effective: July 1, 1993

The procedures for requesting light or modified duty are clarified. The request must be from the employer of injury and the work must be available with the employer of injury. The worker's temporary disability compensation must continue until the worker is released by the attending physician to the job and begins work.

EFFECT OF SENATE AMENDMENT(S): The Senate amendment provides that health and welfare benefits will not be continued or resumed if it would be inconsistent with the terms of the benefit program or with the terms of an applicable collective bargaining agreement.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect on July 1, 1993.

Testimony For: When a worker returns to light duty, he or she will receive partial compensation for loss of earning power, but this compensation does not cover health and welfare benefits that the worker received on the job before the injury. It is important to create incentives for workers to return to employment after an injury. Continuing the worker's eligibility for health benefits is one way to encourage the workers return to work.

Testimony Against: Whether a worker receives fringe benefits is usually covered in a collective bargaining agreement. It is not appropriate for the Legislature to determine a matter that can be negotiated between the parties. In addition, many health insurance contracts require a worker to be employed a certain number of hours before they can be covered under the contract. This bill's requirements may be in conflict with many health insurance policies.

Witnesses: (Pro): Jeff Johnson, Washington State Labor Council; and Bob Dilger, Washington Building and Construction Trades Council. (Con): Gary Smith, Independent Business Association; and Clif Finch, Association of Washington Business.

VOTE ON FINAL PASSAGE:

Yeas 70; Nays 28

Nays: Representatives Ballard, Ballasiotes, Brumsickle, Casada, Chandler, Cooke, Dyer, Edmondson, Foreman, Forner, Fuhrman, Horn, Lisk, Long, Mielke, Miller, Morton, Padden, Reams, Schmidt, Schoesler, Sehlin, Sheahan, Stevens, Talcott, Tate, Thomas, Vance

Effective Date: The bill contains an emergency clause and takes effect on July 1, 1993.

TESTIMONY FOR:

When a worker who is recovering from a work-related injury returns to work for a light duty or part-time assignment, they need to have health or fringe benefits, if those benefits are offered to other employees by the employer. This would provide a valuable incentive for workers to accept early return to work opportunities, which is generally in both the worker's and employer's best interest.

TESTIMONY AGAINST:

This should be handled through collective bargaining agreements rather than statute. It may deter employers from offering those opportunities. Some health care benefit contracts preclude coverage to workers in this situation.

TESTIFIED: Jeff Johnson (pro); Clif Finch (con)

HOUSE BILL ANALYSIS
HB 1246

Brief Description: Revising provisions for maintaining employee benefits for temporarily90Xdisablaabrkers.

Sponsors: Representatives G. Cole, Heavey, King, Franklin, Jones, Veloria and Johanson.

Public Hearing: February 16, 1993

BACKGROUND

The industrial insurance act allows an employer to provide a light or modified job to an injured worker while the worker is recovering from his or her injury. The light duty job must be approved by the worker's physician. If the worker returns to a job paying less than 95 percent of the worker's wages at injury, the worker is entitled to partial benefits that are paid in proportion to the worker's loss of earning power. The statute does not address the worker's right to fringe benefits while in the light duty position.

SUMMARY OF BILL

If an injured worker is returned to work at light or modified duty during the period in which the worker is unable to return to his or her regular job, the employer must continue or resume the health and welfare benefits to which the worker was entitled at the time of injury.

The procedures for requesting light or modified duty are clarified. The request must be from the employer of injury and the work must be available with the employer of injury. The worker's temporary disability compensation must continue until the worker is released by the attending physician to the job and begins work.

FISCAL NOTE: Not requested.

EFFECTIVE DATE: The bill contains an emergency clause and takes effect on July 1, 1993.

Prepared for the House Commerce & Labor Committee
By Chris Cordes, Staff Counsel (786-7117)
Office of Program Research

submitted by WSLC

the four years between 1986 and 1989 there were no general premium rate increases even though premium increases were skyrocketing in other parts of the country. (See attached chart.) 1/24/91

Though there was a modest general benefit increase in 1988, the first general benefit increase since 1971, Washington State's benefit structure remains far from being adequate. The bills you are considering today would considerably improve the adequacy of benefits for Washington State's injured workers.

INDUSTRIAL INSURANCE LEGISLATION

The Washington State Labor Council, AFL-CIO urges you to pass the following four bills out of committee and to work on their passage through the House of Representatives.

H - 0333.1 PAYMENTS TO INJURED WORKERS/MEDICAL EXAMS

This bill would require the state fund or the self-insured employer to replace a claimant's wage-loss for the day(s) the worker must take off from work to attend a medical exam realating to his or her claim. Current statute only reimburses the worker at their temporary total disability (time-loss) rate for the time missed from work.

Time-loss benefits, at best, represent 60 to 75 percent of an injured worker's wage. For higher paid workers, those whose benefits are arbitrarily limited by the maximum cap on benefits, time-loss benefits may represent as little as 30 percent of their lost wages.

As a matter of equity, an injured worker who is back at full time productive labor should be recompensed at their full lost wages for the day when they have to take off from work to attend a medical exam relating to their industrial insurance claim.

This issue was brought to our attention by the Aluminum, Brick and Glass Workers Local Union in Wenatchee. The problem was highlighted when several of their members were sent to Seattle for medical examinations which caused them to lose two days of wages.

HB 1283 (H - 0502.1) LIGHT DUTY BENEFITS/INJURED WORKERS

This bill would require employers to maintain or renew an injured worker's health insurance coverage when he or she returns to work on light duty status. The bill further specifies that

light duty work can only be offered by the employer of injury.

Light duty work enables an injured worker to gradually return to full productive work while recovering from their workplace injury. The employer benefits by maintaining a skilled employee, lowering time-loss payments and reducing premiums through experience rate and retrospective rate adjustments. It seems only fitting that the injured worker should benefit by having their pre-injury health insurance benefits restored.

Light duty or restricted employment should be confined to the employer of injury since there is hardly any labor market for injured workers who cannot perform a full days work.

H - 0331.1 INCREASING PERMANENT PARTIAL DISABILITY AWARDS

This bill would double permanent partial disability awards.

A permanent partial disbility caused by a workplace accident is defined as a loss of a body part by amputation or a loss of function of a body part. A permanent partial disability (PPD) award is granted after an injured worker's condition has become medically stable and their claim is closed. PPD awards are granted in lieu of damages for pain and suffering.

The maximum PPD award for loss of an arm or a leg is $54,000. The maximum award for partial loss of a toe is $378. The Washington state industrial insurance statute stipulates a schedule of dollar values that relate to 47 specified body parts.

Awards for permanently injured backs and other musculoskeletal impairments are based on percentages of the total value of the body. The whole body is worth $90,000 according to current statute.

While no PPD award amount is going to compensate an injured worker for losing a part of their body or for a loss of function, there are three good reasons to double our PPD awards.

1. PPD awards in the personal injury field are 10 to 12 times greater than PPD awards under our workers' compensation system. This is reflected in the table below:

	ARM at SHOULDER	LEG at HIP
Workers' Compensation 1985 statutory award	$36,000	$36,000
Average Jury Verdict (General damages) 1975-1982	$472,269	$480,145

1246 AAS 4/15/93

HB 1246 - S Amd 000842
By Senator Prentice

ADOPTED 4/15/93

On page 2, line 32, after "injury." insert "Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force."

--- END ---

FLOOR SYNOPSIS

HB 1246
TEMPORARILY DISABLED WORKERS

A. WHAT THE BILL DOES

IF AN INJURED WORKER RETURNS TO WORK BEFORE FULL RECOVERY FOR A LIGHT OR MODIFIED DUTY ASSIGNMENT, THE EMPLOYER MUST RESUME HEALTH AND WELFARE BENEFITS THAT THE WORKER WAS ENTITLED TO AT THE TIME OF INJURY.

PROCEDURES FOR REQUESTING LIGHT OR MODIFIED DUTY ARE CLARIFIED. THE REQUEST MUST BE FROM THE EMPLOYER AT THE TIME OF INJURY, AND THE WORK MUST BE AVAILABLE WITH THAT EMPLOYER.

B. WHY IS IT NEEDED

THE INDUSTRIAL INSURANCE LAW ALLOWS AN EMPLOYER TO CALL AN INJURED WORKER BACK TO WORK FOR A LIGHT DUTY ASSIGNMENT, APPROVED BY THE WORKER'S PHYSICIAN, WHILE THE WORKER IS RECOVERING. THE WORKER RECEIVES A REDUCED TIME LOSS BENEFIT, IF THE LIGHT DUTY WAGES ARE LESS THAN 90% OF PRE-INJURY WAGES, BUT THE LAW DOES NOT ADDRESS THE ISSUE OF FRINGE BENEFITS DURING A LIGHT DUTY ASSIGNMENT.

C. FISCAL IMPLICATIONS OF THE BILL

NONE.

D. PERSONS SPEAKING ON THE BILL

JEFF JOHNSON - PRO; CLIFF FINCH - CON

E. COMMENTS

NONE.

SENATE BILL REPORT

HB 1246

AS REPORTED BY COMMITTEE ON LABOR & COMMERCE, APRIL 2, 1993

Brief Description: Revising provisions for maintaining employee benefits for temporarily disabled workers.

SPONSORS: Representatives G. Cole, Heavey, King, Franklin, Jones, Veloria and Johanson

HOUSE COMMITTEE ON COMMERCE & LABOR

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: Do pass.
Signed by Senators Moore, Chairman; Prentice, Vice Chairman; Fraser, McAuliffe, Pelz, Sutherland, and Vognild.

Staff: Dave Cheal (786-7576)

Hearing Dates: April 1, 1993; April 2, 1993

BACKGROUND:

The Industrial Insurance Act allows an employer to provide a light or modified job to an injured worker while the worker is recovering from his or her injury. The light duty job must be approved by the worker's physician. If the worker returns to a job paying less than 95 percent of the worker's wages at injury, the worker is entitled to partial benefits that are paid in proportion to the worker's loss of earning power. The statute does not address the worker's right to fringe benefits while in the light duty position.

SUMMARY:

If an injured worker is returned to work at light or modified duty during the period in which the worker is unable to return to his or her regular job, the employer must continue or resume the health and welfare benefits to which the worker was entitled at the time of injury.

The procedures for requesting light or modified duty are clarified. The request must be from the employer of injury and the work must be available with the employer of injury. The worker's temporary disability compensation must continue until the worker is released by the attending physician to the job and begins work.

Appropriation: none

Revenue: none

Fiscal Note: none requested

Effective Date: The bill contains an emergency clause and takes effect on July 1, 1993.

TESTIMONY FOR:

When a worker who is recovering from a work-related injury returns to work for a light duty or part-time assignment, they need to have health or fringe benefits, if those benefits are offered to other employees by the employer. This would provide a valuable incentive for workers to accept early return to work opportunities, which is generally in both the worker's and employer's best interest.

TESTIMONY AGAINST:

This should be handled through collective bargaining agreements rather than statute. It may deter employers from offering those opportunities. Some health care benefit contracts preclude coverage to workers in this situation.

TESTIFIED: Jeff Johnson (pro); Clif Finch (con)

APPENDIX C

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.

---

[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.

---

[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

---

[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.

---

[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

---

[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,

---

[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

---

[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

[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

---

[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

---

[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]

---

[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

---

[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

---

[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:

Dwyer, J.

Mann, A.C.J.

No.

SUPREME COURT OF THE STATE OF WASHINGTON

AARON RICHARDSON, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES and CONCO & CONCO PUMPING, INC., Respondents.	**DECLARATION OF SERVICE**

The undersigned, under penalty of perjury under the laws of the State of Washington, certifies:

1. That on this date I electronically filed Petitioner's Petition for Review and this Declaration of Service with:

Supreme Court of the State of Washington

2. That on this date a copy of Petitioner's Petition for Review and this Declaration of Service was sent via U.S. Mail & electronic mail as follows to:

Gibby Stratton
Pratt Day & Stratton, PLLC
2102 N. Pearl St., Suite 106
Tacoma, WA 98406
gstratton@prattdaystratton.com

Steve Vinyard, AAG
Office of the Attorney General
Labor and Industries Division
PO Box 40121
Olympia, WA 98504-0121
stevev1@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing statements of fact are true and correct to the best of my knowledge and belief.

DATED this 18th day of January, 2019.

Patricia Klein

Patricia Klein

SMALL, SNELL, WEISS & COMFORT, P.S.

January 18, 2019 - 3:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77289-9
Appellate Court Case Title:	Aaron Richardson, Appellant v. Department of Labor & Industries, Respondent
Superior Court Case Number:	17-2-01722-1

The following documents have been uploaded:

- 772899_Petition_for_Review_Plus_20190118153754D1480927_7673.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Petition for Review
  The Original File Name was RICHARDSON Aaron PFR 1 18 19.pdf

A copy of the uploaded files will be sent to:

- LIOlyCEC@atg.wa.gov
- gstratton@prattdaystratton.com
- sbs@sswc-law.com
- stevev1@atg.wa.gov

Comments:

Sender Name: Patricia Klein - Email: pak@sswc-law.com
Filing on Behalf of: David W Lauman - Email: dwl@sswc-law.com (Alternate Email:)

Address:
PO Box 11303
Tacoma, WA, 98411-0303
Phone: (253) 472-2400

Note: The Filing Id is 20190118153754D1480927