No. 98137-0

SUPREME COURT
OF THE STATE OF WASHINGTON

VALUE VILLAGE, Appellant, v. CANDIDA VASQUEZ-RAMIREZ and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	RESPONDENT VASQUEZ-RAMIREZ'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

TO: THE CLERK OF THE COURT
AND TO: VALUE VILLAGE, Appellant, by and through HILLARY H. LEE and RYAN MILLER, its attorney of record;
AND TO: DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent, by and through its attorney of record, STEVE VINYARD, Assistant Attorney General

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A. STATEMENT OF THE ISSUES

1. **Should Appellant's petition for review should be denied?**

2. **If Appellant's petition for review is granted, should the Court of Appeals, Division One, published opinion be affirmed?**

B. STANDARD OF REVIEW

When a party appeals a decision by the Washington State Board of Industrial Insurance Appeals (Board), the appellate court's inquiry is based solely on the evidence and testimony presented to the Board. *Walston v. Boeing Co.*, 181 Wn.2d 391, 396, 334 P.3d 519, 521, (2014); *Bennerstrom v. Dep't of Labor & Indus.,* 120 Wn. App. 853, 858, 86 P.3d 826, 828, (2004). The court may substitute its own judgment for that of the Board regarding issues of law, but the court gives great weight to the Board's interpretation of the law it administers. *Bennerstrom,* 12 Wn. App. At 858.

Abuse of discretion means a disregard of "attendant facts and circumstances." *Samantha A. v. Dep't of Social and Health Serv.*, 171 Wn.2d 623, 645 (2011). This Court has also summarized this standard as:

> An exercise of judicial discretion is a composite of, among other things, conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. A decision involving discretion will not be disturbed on review except on a clear showing of its abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State Ex Rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971).

C. ARGUMENT

In response to the issues presented in Appellant's brief dated January 29, 2020, starting with issue number one (1), Value Village's continued assertion that they preserved their Voluntary Retirement argument is improper. As Judge J. Robert Leach correctly noted in his published opinion for this matter, "RCW 51.52.104 requires a party petitioning the Board to 'set forth in detail the grounds' for review." *Value Vill. v. Vasquez-Ramirez*, 11 Wn. App. 2d 590, 606 (2019). Indeed, this voluntary retirement argument is improperly brought before this court just as it was improperly brought before the Court of Appeals and Superior Court since at no point during the Board proceedings for this matter were the details given for this argument or facts referenced in support thereof. For instance, during the Board proceedings for this matter, it was never argued that Ms. Vasquez-Ramirez voluntarily retired from the workforce and no specific evidence was introduced to support that she had voluntarily retired or was no longer attached to the workforce.

As it regards the Appellant's second issue statement (2) regarding their failure to make a prima facie case, again Judge J. Robert Leach's published opinion for this matter makes clear that "Value Village presented no medical evidence that Vasquez-Ramirez could work" and "because it did not present this evidence, Value Village failed to present a prima facie case." *Value Vill. v. Vasquez-Ramirez*, 11 Wn. App. 2d at 604. Furthermore, Judge Leach also made clear that the Appellant, inter

alia, presented no medical evidence from the treating doctor as required by RCW 51.32.090(4)(b) regarding Ms. Vasquez-Ramirez's ability to do modified or light duty work in the alternative. See *Id.* Thus, Judge Leach correctly held that "we conclude that an appellant employer challenging the award of time-loss payments to an employee fired for cause bears the burden of presenting evidence that shows that the employee was capable of performing work providing compensation at a level similar to that before her injury." *Id.* Thus, the Appellant did not meet their burden of proof regarding their request to deny Ms. Vasquez-Ramirez's temporary total disability payments (or time-loss payments) under her industrial injury claim.

Regarding the Appellant's third issue (3) regarding Judge Leach's published decision being inconsistent with RCW 51.32.090(4) or (10), the Appellant's brief does not explain how they are inconsistent. Indeed, the only argument they make to support this unfounded assertion is citing the *Energy NW v. Hartje*, Court of Appeals, Division III case. However, in that case the Department of Labor and Industries formally found Ms. Hartje employable as of October 2, 1996, and there was evidence introduced at the Board by her employer which indicated that she had voluntarily retired from the workforce and her employer also made that specific argument at the Board regarding Ms. Hartje.

See, Energy Nw. v. Hartje, 148 Wn. App. 454, 460, 199 P.3d 1043, 1046 (2009). These facts do NOT exist in this matter, indeed the Department made no formal finding at any time that Ms. Vasquez-Ramirez was employable and the Appellant did not specifically argue or present evidence at the Board that Ms. Vasquez-Ramirez had voluntarily retired or removed herself from the workforce like Ms. Hartje.

As such, the Appellant's petition for review should be denied by this Court because they have presented issues which show no abuse of discretion by the Court of Appeals, Superior Court or the Board; or misapplication of the law to the facts by any of the lower courts; or a lack of substantial evidence to support their findings and conclusions of law; and appropriate deference was given to the Board's underlying decision as the law requires. Lastly, no public interests were violated by the decisions of the lower courts which give rise to this matter, and their decisions are not contrary to any established law, rule or case.

D. ANALYSIS

1. Value Village's assertion of Voluntary Retirement is improperly brought before this court.

As this Court is aware, appellate review is based solely on the evidence and testimony presented to the Board. *Walston v. Boeing Co.*, 181 Wn.2d 391, 396, 334 P.3d 519, 521, (2014); *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826, 828, (2004) (emphasis added). The Appellant's argument that they presented evidence

and argued to the Board that Ms. Vasquez-Ramirez had voluntarily retired from the workforce because of their cutting and pasting several sections and sub-sections of RCW 51.32.090 into their July 11, 2017 petition for review to the Board (to include section 10) does not mean they specifically argued or discussed the issue of voluntary retirement to the Board. Indeed, in the Appellant's petition for review to the Board, their main discussion points were A) termination for cause and B) burden shifting. The Appellant never argued specifically that Ms. Vasquez-Ramirez had voluntarily retired or removed herself from the workforce, and no evidence was presented or cited to the Board to support that finding pursuant to WAC 296-14-100 regarding Ms. Vasquez-Ramirez.

Next, the Appellant makes an argument in their brief to this Court that they raised or preserved the issue of voluntary retirement during "oral argument" at the Board. However, when reading the February 3, 2017 hearing transcript on page 80, voluntary retirement was only raised as a hypothetical by the Appellant in describing general circumstances wherein medical evidence does not need to be presented in lines 5-17, but that theory or argument was NEVER applied to this matter or Ms. Vasquez-Ramirez specifically or personally. Indeed, the hearing transcript for this date reveals that on page 80, beginning on line 18, through page 82 the Appellant made their specific arguments for this matter during oral

argument to the Board, regarding Ms. Vasquez-Ramirez specifically, and nowhere in the hearing transcript did they raise or cite any evidence of voluntary retirement as it regards Ms. Vasquez-Ramirez personally or specifically or expressly during their oral argument.

2. The law requires liberal construction in Ms. Vasquez-Ramirez's favor as the injured worker.

This matter regards an industrial injury claim under the Washington State Industrial Insurance Act ("Act"), Title 51 of the Revised Code of Washington (RCW). The Act was promulgated in 1911 because injured workers' remedies had "been uncertain, slow and inadequate" and therefore, the Act was created to provide "sure and certain relief for workers, injured in their work, and their families and dependents...regardless of questions of fault." RCW 51.04.010.

RCW 51.48.025 prohibits retaliation by employers and states "No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title."

RCW 51.12.010 makes clear that "there is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state. **This title 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." (emphasis added)

It is important to note in construing the Industrial Insurance Act, that it is "remedial in nature and 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.**" *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); RCW 51.12.010. *See also Bolin v. Kitsap Cy*, 114 Wn.2d 70, 72, 785 P.2d 805 (1990); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Scott v. Dep't of Labor & Indus.*, 77 Wn.2d 888, 890, 468 P.2d 440 (1970) (emphasis added).

RCW 51.04.010 and RCW 51.12.010 allow only for the liberal construction of the Act in decisions concerning the rights of workers. *Seattle School District v. Dep't of Labor and Indus*, 116 Wn.2d 352, 360, 804 P.2d 621 (1991). Thus, the doctrine of liberal construction is not applicable to an employer. Additionally, while there is a balance between the rights of the employee and the employer, the Washington Supreme Court has held that "**given our commitment to liberally construing the Act in favor of the injured worker...that tension should be resolved in favor of the injured worker.**" *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 139, 814 P.2d 629 (1991) (emphasis added).

3. Value Village failed to establish a prima facie case showing that Ms. Vasquez-Ramirez was not entitled to temporary total disability payments or time-loss payments, so they did not meet their burden of proof.

When a worker is unable to return to any type of reasonably continuous gainful employment as a direct result of an accepted industrial injury or exposure, he/she is considered temporarily totally disabled, and a percentage of the wages previously earned are paid in the form of time-loss compensation. WAC 296-20-01002; RCW 51.32.090. Often injured workers who are totally temporarily disabled continue to seek treatment from a medical provider. *See Franks v. Dep't of 11 Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950).

Ms. Vasquez-Ramirez was determined to be temporarily totally disabled by the Department for certain periods of time, which was communicated to her employer Value Village by way of work restrictions from her treating doctor or physician. CP 2, lines 6-11; CP 31, line 14-15. The employer did not present any medical evidence from Ms. Vasquez-Ramirez's treating doctor or physician pursuant to RCW 51.32.090(4)(b) (after her claim was re-opened for benefits (pursuant to WAC 296-14-400) on or after March 6, 2015 that indicated she could still perform any modified or light duty work. CP 3, lines 13-20; CP 4, lines 27-38. By appealing the Department's decision to award time-loss or temporary total disability benefits to Ms. Vasquez-Ramirez, Value Village is statutorily

required to present evidence to establish a prima facie case that Ms. Vasquez-Ramirez was not entitled to those benefits. CP 3, lines 21-22.

> Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department or may appeal to the board. In an appeal before the board, **the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.**

RCW 51.52.050 (emphasis added).

The legislature's choice to use the word 'shall' removes any doubt or discretion regarding an appealing party's obligation or burden to present evidence to support their appeal(s), and in this matter that required medical evidence—namely, medical evidence that Ms. Vasquez-Ramirez was not temporarily totally disabled; however, the employer Value Village presented no medical evidence and therefore did not meet their burden of proof. RCW 51.52.050; *Turner v. Dep't of Labor & Indus.*, 41 Wn.2d 739, 251 P.2d 883 (1953).

Indeed, in making a determination regarding time-loss compensation or temporary total disability, medical testimony is an essential element. CP 94, lines 13-18. For instance, an injured worker must present medical evidence to show their entitlement to receive time-loss compensation; likewise, expert medical testimony must be presented by an employer that contends that a worker is capable of performing a particular job. CP 94, lines 18-22; *Weinheimer v. Dep'tLabor & Indus.*, 8 Wn.2d. 14, 17, 111 P.2d 221, 222 (1941); *see also, Page v. Dep't of Labor*

& Indus., 528 Wn.2d 706, 708-09, 328 P.2d 663, 664 (1958). Therefore, an employer appealing a Department Order awarding a temporary total disability payment should present medical evidence showing the payment was incorrect. Here, Value Village presented no expert medical evidence that showed Ms. Vasquez-Ramirez could work during the time periods on appeal at the Board. CP 95, lines 11-17. In failing to present necessary expert medical evidence to establish Ms. Vasquez-Ramirez was not temporarily totally disabled for the time periods on appeal, the employer Value Village fatally failed to meet their burden of proof and they also failed to present any evidence regarding the interest payment on said benefits under Board Docket 16 15582 to Ms. Vasquez-Ramirez, thus all their appeals were properly dismissed. CP 4, lines 34-39; CP 5, lines 1-6.

4. Ms. Vasquez-Ramirez had no burden to show she was entitled to temporary total ability benefits because the Appellant did not meet their burden of proof.

Ms. Vasquez-Ramirez re-opened her industrial injury claim due to the objective worsening of her work-related injuries which she sustained while working for Value Village, her claim was re-opened effective March 6, 2015. CP 3, lines 12-20. When the Department of Labor and Industries (Department) re-opened Ms. Vasquez-Ramirez's industrial injury claim, Value Village failed to pursue an appeal to that re-opening decision. CP 3, lines 17-20. In failing to pursue any appeal to claim re-opening, Value

Village conceded that Ms. Vasquez-Ramirez's industrial injury conditions had objectively worsened pursuant to RCW 51.32.160.

Nevertheless, Value Village continues to argue on appeal that Ms. Vasquez-Ramirez has the burden to prove her entitlement to benefits and has cited *Olympia Brewing Co. v. Dep't of Labor & Indus.* Brief of Appellant, p. 12. While *Olympia Brewing* is an interesting reference, it would actually further reinforce the requirement of Value Village (as the appealing party) to provide strict proof that Ms. Vasquez-Ramirez was not entitled to time loss or temporary total disability benefits and would require the appealing party to meet their burden of proof first, but since Value Village did not meet their burden of proof, as noted above, the burden should not shift to Ms. Vasquez-Ramirez to present proof since the Board dismissed the employer Value Village's appeals for failure to make a prima facie case and the Superior Court below correctly affirmed the Board's dismissals.

Neither *Olympia Brewing* nor any other case, statute, or regulation places a burden on Ms. Vasquez-Ramirez to show she is entitled to a specific benefit (in this case time-loss compensation or temporary total disability payments) when she is allowed said benefits under the Act and she is not the party appealing the decision to award said benefits. Instead, the burden of proof falls on Value Village, as the party appealing the

Department's decision to pay said benefits, but they failed to meet their burden of proof, so the burden does not shift. See *Olympia Brewing Co. v. Dep't of Labor & Indus.,* 34 Wn.2d 498, 504, 208 P.2d 1181, 1184 (1949); RCW 51.52.11; See also *McClelland v. ITT Rayonier*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

5. Termination from Value Village did not preclude Ms. Vasquez-Ramirez from future benefits.

Ms. Vasquez-Ramirez' claim (prior to claim re-opening) was closed previously on January 8, 2015, and her employment was terminated from Value Village approximately nineteen (19) days after claim closure on January 27, 2015. CP 3, lines 1-3; CP 2, lines 38-39. The closing order dated January 8, 2015 was not protested or appealed by any party and thereby became legally final and binding. CP 3, lines 6-12. Thus, the January 8, 2015 closing order is res judicata, but it was not res judicata regarding aggravation or re-opening rights that Ms. Vasquez-Ramirez has and exercised after claim closure (as noted above, her claim subsequently re-opened effective March 6, 2015), pursuant to RCW 51.32.160 and WAC 296-14-400. See *White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414-15, 293 P.2d 764, 765 (1956); *Karniss v. Department of Labor and Industries*, 39 Wn.2d 898, 239 P.2d 555 (1952); *Kleven v. Department of Labor and Industries*, 40 Wn.2d 415, 243 P.2d 488 (1952). As RCW

51.32.160 and WAC 296-14-400 provide expressly, industrial insurance claims can be re-opened if related injury conditions objectively worsen and if so, then pursuant to RCW 51.32.210 and 51.32.090 temporary total disability payments and other benefits can be provided.

Nevertheless, Value Village also argues that the for-cause termination of Ms. Vasquez-Ramirez precludes her from ever receiving temporary total disability or time loss benefits on her claim. Brief of Appellant p. 16. This blanket assertion or argument is not lawful. Value Village cites *O'Keefe v. Labor Indus*, 126 Wn. App. 760, 109 P.3d 484 (2005) to support this blanket, over-broad assertion, but this case was distinguished by *Glacier NW, Inc. v. Walker*., 151 Wn. App. 587, 212 P.3d 587 (2009), wherein the Court of Appeals stated and clearly held that "we will not read an overarching exception into RCW 51.32.090(4) for any firing for cause." See *Id.*, (emphasis added). Thus, there is no law, case, statute, regulation, etc. that would stand for the proposition that a for-cause termination would forever extinguish or preclude an injured worker's right to subsequent temporary total disability payments or other benefits under their industrial injury claim. Important to note, Judge Leach's published opinion for this matter is consistent with this holding from *Glacier* and this statutory provision as well.

To wit, the relevant portion of RCW 51.32.090(4)(b) provides:

> If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner 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 or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.
>
> RCW 51.32.090(4)(b) (emphasis added)

The Board has also interpreted this statute in the context of for-cause terminations—indeed, in one of their significant decisions *In re Jennifer Soesbe*, BIIA Dec., 02 19030 (2003), the Board held:

> This Board has never held that an injured worker who was terminated for cause is barred from receiving time loss compensation that they would otherwise be entitled to. We have merely held that a modified job does not come to an end within the meaning of RCW 51.32.090(4) when an injured worker is terminated for cause. If a terminated worker becomes unable to perform any gainful employment or if she can work but has decreased earning power, she is entitled to receive the benefits indicated by the law. See *Id.*

Indeed, any termination for cause does not affect an injured worker's entitlement to benefits when the residuals of their industrial injury persist, this was explicitly also noted in the Board's Decision and Order for this matter as follows: "But if, after termination for cause, the worker is unable to perform any gainful employment her entitlement to time-loss compensation benefits resumes." CP 3, lines 24-27. Indeed, the Board

further held and stated for this matter that "evidence was introduced that Ms. Vasquez-Ramirez's work restrictions increased" but the employer Value Village "failed to present evidence that after the claim was re-opened Ms. Vasquez-Ramirez could perform any work." CP 3, lines 27-29 and lines 36-38. (emphasis added).

E. CONCLUSION

Ms. Vasquez-Ramirez respectfully requests this Court deny the Appellant's petition for review; or in the alternative to affirm the Court of Appeals, Division I, published opinion filed December 30, 2019, and should Ms. Vasquez-Ramirez prevail, she requests an additional award of attorney fees and costs for time, work and costs incurred and spent addressing this matter before this Court.

DATED this 25th day of March, 2020.

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No. 98137-0

SUPREME COURT
OF THE STATE OF WASHINGTON

VALUE VILLAGE, Appellant, v. CANDIDA VASQUEZ-RAMIREZ and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this date I served Respondent's Answer to Appellant's Petition for Review as follows:

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