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The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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FILED
12/30/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VALUE VILLAGE, Appellant, v. CANDIDA VASQUEZ-RAMIREZ and THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	NO. 78629-6-I (Consolidated with No. 78785-3-I) DIVISION ONE PUBLISHED OPINION FILED: December 30, 2019

LEACH, J. — A party appealing a Department of Labor & Industries (Department) decision to the Board of Industrial Insurance Appeals (Board) has the burden of producing sufficient evidence to establish a prima facie case for the relief it requests.[1] And a party waives any argument not raised in its petition for review to the Board. Value Village appealed four Department orders awarding Candida Vasquez-Ramirez time-loss payments and interest. To prevail, Value Village had to present medical evidence that Vasquez-Ramirez could work during the times for which she received time-loss benefits. It did not present any

[1] RCW 51.52.050(2)(a).

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medical evidence, and it did not claim in its petition that Vasquez-Ramirez had voluntarily retired. So we affirm the Board's dismissal of Value Village's appeal.

FACTS

Candida Vasquez-Ramirez was injured August 15, 2014, while working for Value Village. Vasquez-Ramirez timely filed a worker's compensation claim that the Department allowed.

Dr. Vincent Koike treated Vasquez-Ramirez for her injuries from August until November 2014. Koike initially restricted Vasquez-Ramirez from work that required use of her right arm and shoulders to reach overhead. Value Village offered her modified-duty work on August 29, 2014, which she accepted.[2] The parties agree that this job modification was consistent with Koike's restrictions, which included "[n]o lifting greater than ten pounds and no reaching above shoulder level." Because Vasquez-Ramirez continued to work full time at Value Village in this modified position, she did not receive time-loss compensation during her employment.

Koike later restricted Vasquez-Ramirez's use of her right arm to no more than three hours during the day. Charita Dumas, Value Village's senior claim analyst, testified that although Koike added these restrictions on November 3,

[2] The offer letter referenced an attached "detailed description of the job which has been approved by a medical provider," but the description was not attached to the exhibit.

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2014, she never offered Vasquez-Ramirez a modified-duty job including these restrictions because Vasquez-Ramirez was "still able to perform the essential functions of her job."

The Department closed Vasquez-Ramirez's claim on January 8, 2015. On January 27, 2015, Value Village fired Vasquez-Ramirez for alleged unacceptable behavior that included absenteeism, disrespectful communication with supervisors and coworkers, and disregarding supervisor's instructions. Vasquez-Ramirez denied these allegations.

Vasquez-Ramirez asked to reopen her claim on March 17, 2015, the same month she resumed medical treatment with Koike. The Department reopened her claim effective March 6, 2015. Value Village appealed this decision but later dismissed its appeal.

After reopening Vasquez-Ramirez's claim, the Department awarded her time-loss compensation for August 22 to October 13, 2015, February 24 to March 7, 2016, and March 8 to July 6, 2016. The Department also ordered payment of interest on time-loss payments under the same claim. Value Village appealed these orders to the Board.

At a hearing before an industrial appeals judge (IAJ), Value Village presented evidence that it offered and Vasquez-Ramirez accepted modified-duty work approved by her medical provider after she injured herself. It admitted that

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while her doctor ordered additional modifications, it did not incorporate them into a new job description. Value Village modified her work but did not create a new job offer, and Koike never approved these modifications. Value Village also offered evidence supporting its position that it fired her for cause. Vasquez-Ramirez presented evidence of her injury, the change in her injury over time, and testimony rebutting Value Village's evidence supporting termination for cause.

In her proposed decision and order, the IAJ dismissed all of Value Village's claims because it had failed to establish a prima facie case that the Department's orders were incorrect. Specifically, Value Village had not presented any medical evidence that Vasquez-Ramirez could perform the modified-duty job during the times for which the Department awarded her time-loss benefits. Value Village petitioned the Board for review. Its petition asked the Board to decide "that the Employer presented a prima facie case that the Claimant was not entitled to time-loss compensation benefits." It made no claim that Vasquez-Ramirez had voluntarily retired. The Board dismissed Value Village's appeals for the reason proposed by the IAJ.

Value Village appealed to King County Superior Court. It affirmed the Board and awarded Vasquez-Ramirez attorney fees and costs. Value Village has appealed this decision.

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STANDARD OF REVIEW

In a worker's compensation case, an appellate court generally limits its review of a superior court decision to whether substantial evidence supports the superior court's findings made after its de novo review of the Board record and whether the court's findings support its conclusions of law.[3] Substantial evidence is evidence sufficient to "persuade a rational fair-minded person the premise is true."[4] This court accepts as true findings supported by substantial evidence.[5] If substantial evidence supports the trial court findings, it reviews de novo whether those findings support the superior court's conclusions of law.[6] It views the record in the light most favorable to the party prevailing in superior court, and it does not reweigh evidence.[7]

Our Supreme Court instructs us that the Industrial Insurance Act[8] (Act) is liberally construed to achieve the legislature's intent to provide compensation to

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[3] Rogers v. Dep't of Labor & Indus., 151 Wn. App. 174, 180-81, 210 P.3d 355 (2009).

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

[5] State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993).

[6] Street v. Weyerhaeuser Co., 189 Wn.2d 187, 205, 399 P.3d 1156 (2017); Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting Young v. Dep't of Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

[7] Fox v. Dep't of Ret. Sys., 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

[8] Title 51 RCW.

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all covered employees injured in their employment,[9] with all doubts resolved in the worker's favor.[10] This court applies the liberal rule of construction to its interpretation of the Act but does not apply it to questions of fact.[11] Although the Board's interpretation of the Act does not bind an appellate court, in most circumstances "it is entitled to great deference."[12]

ANALYSIS

Value Village claims that the Department should not have awarded Vasquez-Ramirez time-loss benefits. It makes four supporting arguments. First, it claims that the Board and trial court incorrectly required it to present evidence that Vasquez-Ramirez could work. Value Village contends that the Board and trial court should have required Vasquez-Ramirez to produce medical evidence of her inability to work.

Second, Value Village claims that it produced sufficient evidence to show that the Department did not have enough evidence to award time-loss benefits to Vasquez-Ramirez. Third, Value Village asserts that Vasquez-Ramirez's employment with it did not "come to an end" as required by statute because it fired her for cause unrelated to her injuries before the time for which the

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[9] RCW 51.04.010.

[10] Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

[11] Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

[12] Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

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Department awarded time-loss benefits. Finally, Value Village claims that it presented evidence that Vasquez-Ramirez removed herself from the workforce by retiring.

Time- Loss Benefits and Appeal Process

The Act entitles a worker to compensation if she is injured in the course of her employment.[13] If she cannot work as a result of her industrial injury and is totally but only temporally disabled, she has a right to time-loss compensation "so long as the total disability continues."[14] The payments stop when she recovers to a point that her "present earning power . . . is restored to that existing at the time of the occurrence of the injury."[15] If her earning power is partially restored, she may receive a diminished payment described by a statutory formula.[16]

The legislature recognizes the value of having injured workers remain at work after their injuries.[17] So the Act provides a way for "employers at the time of injury to provide light duty or transitional work for their workers" who are injured on the job.[18] An employer may ask that an injured worker "be certified by a physician or licensed advanced registered nurse practitioner as able to perform

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[13] RCW 51.32.010.

[14] RCW 51.32.090(1). Also called "temporary total disability." Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

[15] RCW 51.32.090(3)(a).

[16] RCW 51.32.090(3)(a)(ii).

[17] RCW 51.32.090(4)(a).

[18] RCW 51.32.090(4)(a).

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available work other than . . . her usual work."[19] The employer must provide the medical professional with a description of available modified-duty work so that the medical professional can evaluate how the physical activities of the work relate to the worker's disability.[20] Once the medical professional releases the employee for the work, the time-loss benefits stop.[21]

Time-loss benefits resume in two circumstances.[22] First, the benefits resume if the modified work ends and the worker's medical provider concludes she has not recovered sufficiently to return to her usual job or perform the other work the employer offers her.[23] Second, the benefits resume if the worker engages in the modified work but it "impede[s] . . . her recovery to the extent" that her medical provider concludes she should not continue that work.[24] Once she

> returns to work under the terms of this subsection (4), . . . 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 or licensed advanced registered nurse practitioner.[25]

The Act controls appeals of Department decisions.[26] A person aggrieved by a Department decision may appeal to the Board.[27] The appealing party

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[19] RCW 51.32.090(4)(b).
[20] RCW 51.32.090 (4)(b).
[21] RCW 51.32.090 (4)(b).
[22] RCW 51.32.090 (4)(b).
[23] RCW 51.32.090 (4)(b).
[24] RCW 51.32.090 (4)(b).
[25] RCW 51.32.090 (4)(j).
[26] Ch. 51.52 RCW.

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presents the evidence supporting its appeal at a hearing conducted by an IAJ.[28] After the hearing, the IAJ files a proposed decision.[29] Any party may have the Board review that decision by filing a petition asking for this relief.[30] The petition must state in detail the grounds for review, and all objections or irregularities not specifically set forth in the petition are deemed waived.[31] The Board's decision must include findings and conclusions for each contested issue of fact and law.[32]

In an appeal from the Board to the superior court, that court considers the Board's findings and decisions prima facie correct and the party attacking them has the burden of proof.[33] This means that the party attacking a Board decision must establish a prima facie case of its right to relief by a preponderance of evidence.[34] At the superior court, a party may raise only those issues that it included in its petition to the Board or that are contained in the "complete record of the proceedings before the board."[35] If the court concludes "that the

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[27] RCW 51.52.060(1)(a).
[28] RCW 51.52.104.
[29] RCW 51.52.104.
[30] RCW 51.52.104.
[31] RCW 51.52.104.
[32] RCW 51.52.106.
[33] RCW 51.52.115.
[34] RCW 51.52.050(2)(a); RCW 51.52.115; Hendrickson v. Dep't of Labor & Indus., 2 Wn. App. 2d 343, 350-51, 409 P.3d 1162, review denied, 190 Wn.2d 1030 (2018).
[35] RCW 51.52.115.

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board . . . acted within its power and . . . correctly construed the law and found the facts," it will affirm.[36] If not, it will reverse or modify the Board's decision.[37]

Value Village Had the Burden of Producing Sufficient Evidence To Show That Vasquez-Ramirez Was Not Entitled To Time-Loss Benefits

The legislature has allocated the initial burden of evidence production in an appeal of a Department decision. RCW 51.52.050(2) states, "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." For appeals to superior court, RCW 51.52.115 states, "In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." Value Village does not cite, let alone discuss, these unambiguous statutes in its briefing. Instead, it claims that case law allows it to meet its burden by asserting that the Department and Vasquez-Ramirez did not present sufficient evidence to support the time-loss awards. We disagree.

In Department of Labor & Industry v. Rowley,[38] our Supreme Court, as a matter of first impression, interpreted RCW 51.52.050(2)(a), "the statute requiring the appellant in 'an appeal before the [B]oard . . . [to] proceed[ ] with the evidence to establish a prima facie case for the relief sought in such appeal.'"

[36] RCW 51.52.115.
[37] RCW 51.52.115.
[38] 185 Wn.2d 186, 206, 378 P.3d 139 (2016) (alterations in original).

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Rowley appealed the Department's denial of his claim based on its determination that he was injured during the commission of a felony.[39] The court agreed with the Department's position that to establish a "prima facie" case, "a party must show that a department decision is incorrect."[40] But, in the context of the case before it, the court explained that Rowley could do this "by showing (1) an injury in the course of employment and (2) that the Department's order is unsupported by sufficient evidence."[41]

The court noted that a contrary holding would shift from the Department to the worker the burden of proof on the felony payment bar and require the worker to prove the noncommission of a felony before any formal hearing had occurred.[42] The court considered this to "be inconsistent with basic principles of fairness."[43] The court also noted that requiring an appellant to produce new affirmative evidence about the incorrectness of the Department's order would be inconsistent with its cases interpreting RCW 51.52.115.[44] Finally, the court stated that RCW 51.52.115 places a greater burden on an appellant than RCW

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[39] Rowley, 185 Wn.2d at 189-90.
[40] Rowley, 185 Wn.2d at 206.
[41] Rowley, 185 Wn.2d at 206.
[42] Rowley, 185 Wn.2d at 206.
[43] Rowley, 185 Wn.2d at 206.
[44] Rowley, 185 Wn.2d at 207.

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51.52.050(2)(a) does because RCW 51.52.115 requires that the superior court presume that the Board's decision is correct.[45]

So Rowley requires the appellant, here, Value Village, to show that the Department's order is incorrect and does not permit it to shift to Vasquez-Ramirez the burden of proof. But Value Village could rely on evidence from the Department's record to prove its case and does not have to produce new affirmative evidence before the Board. As explained below, that evidence does not show that the Department's order was incorrect.

The Board and the trial court correctly allocated the burden of proof. Value Village did not contest that Vasquez-Ramirez suffered a work injury and withdrew its appeal of the order reopening her claim. So it accepted that her work injury prevented her from doing her job of injury and that her medical condition was worse than when her doctor approved the modified-duty job from which Value Village fired her. To make a prima facie showing that the Department's award of time-loss benefits was incorrect required some evidence that Vasquez-Ramirez was capable of performing reasonably continuous, gainful employment for the periods for which she received time loss.

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[45] Rowley, 185 Wn.2d at 207-08.

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Value Village Failed To Provide Evidence That Vasquez-Ramirez Was Capable of Performing Gainful Employment During the Time in Question

Value Village challenges the trial court's finding adopting findings of facts the Board made. These Board findings state that Value Village "failed to provide medical or other evidence that the claimant was capable of performing reasonably continuous gainful employment for the periods from August 22, 2015, through October 13, 2015, and from February 24, 2016, through July 6, 2016," and "failed to provide evidence that the Department improperly paid interest on benefits previously paid for the period from August 22, 2015, through October 13, 2015."

At the hearing before the IAJ, Value Village presented evidence that it fired Vasquez-Ramirez for cause. It also presented evidence that it offered, and Vasquez-Ramirez accepted, modified-duty work approved by her medical provider after her injury. But Value Village did not present any evidence, medical or otherwise, to establish that Vasquez-Ramirez could continue to do the work described in the original modified-duty job after her condition worsened and her medical provider imposed more restrictions on her activities. And it presented no evidence that she could do any other available work during the time for which the Department awarded time-loss benefits. And it presented no evidence to show that the interest payments were improper. So substantial evidence supports the challenged findings, and we consider them true for our analysis.

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Evidence of Firing for Cause Did Not Establish a Prima Facie Case

Value Village asserts that evidence showing that it provided Vasquez-Ramirez a modified-duty job and later fired her from this job for cause established the required prima facie case that the Department's orders were incorrect. We disagree.

If the Department closes a worker's claim for disability but her injury is aggravated or worsens, she may apply to reopen her claim.[46] For the Department to reopen the claim, the worker must prove a number of elements "'by medical testimony,'" including that she is experiencing an "'aggravation of the injury result[ing] in increased disability,'" that there is a relationship between the original injury and the subsequent disability, that "'the increased aggravation occurred between the terminal dates of the aggravation period,'" and that her "'disability on the date of the closing order was greater than the supervisor found it to be.'"[47]

The Board addressed the impact for-cause firings have on time-loss benefits in In re Chad Thomas[48] and In re Jennifer Soesbe.[49] If an employer fires an employee working in a modified-duty position for cause, the worker no longer

[46] RCW 51.32.160(1)(a); WAC 296-14-400.

[47] Eastwood v. Dep't of Labor & Indus., 152 Wn. App. 652, 657-58, 219 P.3d 711 (2009) (quoting Phillips v. Dep't of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956)).

[48] No. 00 10091 (Wash. Bd. of Indus. Ins. Appeals July 31, 2001).

[49] No. 02 19030 (Wash. Bd. of Indus. Ins. Appeals Sept. 25, 2003).

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has a right to time-loss compensation if the firing occurred for reasons that were unrelated to the industrial injury and the employer would have terminated other similarly situated employees.[50] But a for-cause firing does not bar a worker's right to time-loss compensation if the work injury she sustained before she was fired continues to interfere with her ability to perform work.[51]

Although the Board's interpretation of the Act does not bind an appellate court, in most circumstances "it is entitled to great deference."[52] The Board decided Soesbe in 2003, and the legislature has not amended the Act to require termination of all payments whenever an employee is fired for cause, regardless of her capacity to work. 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.

As discussed above, Value Village presented no medical evidence that Vasquez-Ramirez could work and be paid adequately during the time the Department awarded her time-loss compensation and interest. Because it did not present this evidence, Value Village failed to present a prima facie case.

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[50] Thomas, No. 00 10091.
[51] Soesbe, No. 02 19030.
[52] Tri, 117 Wn.2d at 138.

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When the Department approved Vasquez-Ramirez's request to reopen her claim, Value Village could have challenged the sufficiency of her "threshold showing." But it withdrew its appeal of the decision to reopen. So the issue of whether Vasquez-Ramirez had made a "threshold showing" was not before the trial court. It did not err in affirming the Board's dismissal of the appeal.

Value Village Did Not Establish That Modified-Duty Work Remained Available

Value Village also asserts that the Board should not have dismissed its case because Vasquez-Ramirez failed to establish that her modified job had "come to an end." As we have explained, Value Village cannot shift the burden of proof to Vasquez-Ramirez. In addition, the record does not support Value Village's claim that modified-duty work remained available to Vasquez-Ramirez.

RCW 51.32.090(4)(b) provides,

> The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for 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 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.

(Emphasis added.)

Value Village did not establish it had a job available that met Vasquez-Ramirez's medical restrictions for the times for which she received time-loss

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payments. It presented evidence that the modified-duty job approved by her doctor remained available. But it admitted that her doctor imposed additional restrictions and that it did not modify the job description to accommodate the new restrictions. It presented no evidence of any available position that had been approved by Vasquez-Ramirez's health care provider as required by RCW 51.32.090(4)(b). It presented no medical evidence that Vasquez-Ramirez had the physical capacity to perform any available job. So it presented no evidence that the Department's decision to award time loss was incorrect.

Value Village cites to O'Keefe v. Department of Labor & Industries[53] to support its assertion that Vasquez-Ramirez failed to meet her burden. In O'Keefe, a worker challenged a Department's termination of his benefits after his employer fired him for cause.[54] As the appellant, the worker had the burden of proof. The employer presented evidence that his job would have "remained available to him but for his attendance problems and inappropriate comments."[55] And the parties stipulated that his "physician would certify him as physically capable of performing the light duty job."[56] So, the court concluded, the light duty work had not "come to an end" under RCW 51.32.090(4)(a).[57] So the worker,

[53] 126 Wn. App. 760, 766, 109 P.3d 484 (2005).
[54] O'Keefe, 126 Wn. App. at 762-64.
[55] O'Keefe, 126 Wn. App. at 763.
[56] O'Keefe, 126 Wn. App. at 763.
[57] O'Keefe, 126 Wn. App. at 766.

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with the burden of proof, failed to establish a prima facie case. In contrast, Value Village, with the burden of proof, identifies no evidence that Vasquez-Ramirez could perform the modified-duty job. So it failed to establish the availability of relevant modified-duty work; it failed to establish a prima facie case that the Department's decision was incorrect.

Value Village Did Not Preserve the Voluntary Retirement Issue for Appeal

Finally, Value Village claims that because it presented evidence supporting the conclusion that Vasquez-Ramirez "voluntarily retired," the trial court erred in dismissing the case. RCW 51.52.104 requires a party petitioning the Board to "set forth in detail the grounds" for review and the party filing the petition "shall be deemed to have waived all objections or irregularities not specifically set forth" in the petition. Value Village did not raise the issue of "voluntary retirement" in its petition to the Board, so it waived it.

In its reply brief, Value Village claims that by quoting the text of RCW 51.52.090(10) in its petition to the Board, it raised and preserved the issue. But a party does not raise an issue by quoting a statute without providing any explanation of its relevance to its appeal. The terms "retire," "retired," and "retirement" appear nowhere else in the petition. And Value Village only briefly mentioned "voluntary retirement" in its argument before the IAJ as an example of

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one of different scenarios where a worker is not entitled to time-loss," not as an issue it was raising.

Because Value Village did not raise the issue before the Board, it waived it.

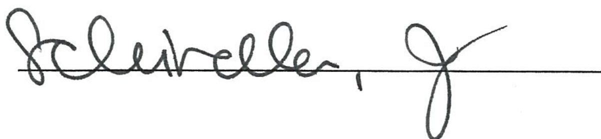
Attorney Fees

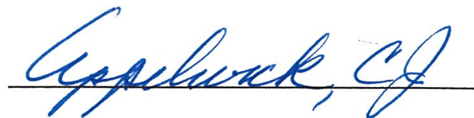
Vasquez-Ramirez requests attorney fees and costs. Because we sustain her right to relief, she is entitled to fees and costs[58] provided she complies with RAP 18.1.

CONCLUSION

We affirm. Value Village presented evidence that it fired Vasquez-Ramirez for cause but did not present a prima facie case that but for this firing, Vasquez-Ramirez could perform reasonably continuous work during the time periods she was awarded time-loss compensation.

WE CONCUR:





[58] RCW 51.52.130.