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NO. 74565-4-I  
COURT OF APPEALS,  
DIVISION I  
IN THE STATE OF WASHINGTON

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JUSTIN D. BUCHANAN,  
*APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,  
*RESPONDENT/DEFENDANT.*

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS  
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**Table of Contents**

Table of Authorities ..... ii

I. Introduction ..... 1

II. Argument ..... 1

    A. Mr. Buchanan’s claim for workers’ compensation benefits  
        ought to be allowed..... 1

    B. No weight should be afforded to cases cited from Virginia ..... 6

    C. The Department’s argument against attorney’s fees is  
        incorrect and inconsistent with the procedural history and  
        evidence in this case. .... 7

III. Conclusion. .... 10

**TABLE OF AUTHORITIES**

**TABLE OF CASES**

*Birrueta v. Dept. of Labor & Indus.*,  
188 Wn. App 831, 844, 355 P.2d 531, 140 P.2d 320 (2015) ..... 1

*City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*,  
136 Wn.2d 38, 46, 959 P.2d 1091 (1998) ..... 2

*Hobson v. Dept. Labor & Indus.*, 176 Wash. 23, 27 P.2d 1091 (1934) ..... 2, 3

*Leary v. Dept. of Labor & Indus.*, 18 Wash. 2d 531, 140 P.2d 292 (1943) ..... 1, 2, 3, 4

*MacKay v. Dept. of Labor & Indus.*,  
181 Wash 702, 704, 44 P.2d 793, 794-795 (1935) ..... 2, 5, 6

**STATUTES**

RCW 51.08.013 ..... 1, 10

RCW 51.52.130 ..... 10

Va. Code Sec. 65.2-101 ..... 7

## I. INTRODUCTION

Comes now the Appellant, Mr. Justin Buchanan, by and through his attorney of record, Katherine L. Mason, of the Law Offices of K.L. Mason, PLLC, and hereby submits his Reply in response to the Brief of Respondent filed by the Department of Labor and Industries.

## II. ARGUMENT

- A. This court should, as it has in many cases before, reverse the Department's rejection of Mr. Buchanan's claim for workers' compensation benefits.

This Court should be reminded that if the Department did not incorrectly apply the statute to facts, we would not have the long history of cases wherein the Department's initial rejection of a claim was reversed by the courts. The statute, RCW 51.08.013(1), which defines "acting in the course of employment," has been the subject of many dozens of court cases. As the Supreme Court noted in Leary v. Department of Labor & Indus., 18 Wn.2d 532, 541, 140 P.2d 292 (1943), the question is whether the law is properly applied to the facts. The Department is not entitled to deference in its application of the law to facts and, of course, courts are not bound by an agency's interpretation of a statute. Birrueta v. Department of Labor & Indus. 188 Wn. App 831, 844, 355 P.3d 320,

quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

In its brief, the Department attempts to distinguish cases, namely Hobson, Leary, and MacKay from Mr. Buchanan's situation, applauding the sound reasons why those claims were allowed, and why Mr. Buchanan's should remain rejected. In doing so, the Department has apparently forgotten that it rejected, resisted, and appealed allowance of all of these claims – issuing allowance orders only after been ordered to do so by the Supreme Court.

In Hobson, the Department rejected Mr. Hobson's widow's claims insisting that, despite being on duty 24 hours a day at the time of the fatal accident, he was “not engaged in the course of employment for the Greenwood Logging Company; that he was not engaged in an act in furtherance of his employer's business, but his purpose in leaving the Greenwood Logging Company on November 5, 1931, was for amusement and recreation purpose.” Hobson v. Department of Labor & Indus., 176 Wash. 23, 25, 27 P.2d 1091 (1934). The Board sustained the Department's decision. However, on appeal in the courts, Mrs. Hobson's survivor's claim was finally allowed. Id.

In its brief in this case, the Department claims that Mr. Hobson's claim was allowed because he was killed on his employer's premises in an employer-owned vehicle. However, the substance of the court's analysis and ultimate opinion focuses, instead, on the characterization and motivation of Mr. Hobson's trip. Id. at 26, 27 P.2d 1091. While the fatal crash eventually occurred on the employer's premises, he was offsite for a period of hours prior to the crash. This off-site time was the basis for the Department's claim in 1934 that Mr. Hobson was travelling at the time of his death for "amusement and recreation." Id. at 26, 27 P.2d 1091. The court rejected the Department's claims, stating: "[we] find no evidence from which it may be reasonably inferred that the trip was made for any purpose other than to obtain supplies." In reversing the Department's decision and ordering that the claim be allowed, the court reiterated its basis for allowing Mrs. Hobson's survivor's claim: (1) Mr. Hobson was required to furnish his own supplies; (2) the only purpose of his trip was to obtain his required supplies; (3) he could not do his work without these supplies; and, (4) travelling off his employer's premises to retrieve supplies was not an interruption in the course of his employment. Id.

Furthermore, in Leary, the Department has again apparently forgotten that it rejected this worker's claim, too. In its order, the

Department's rationale for rejecting the claim was: Mr. Leary's cause of death was a heart attack induced by excitement; Mr. Leary died off the employer's premises while engaged in activities that were not in the actual performance of his duties for his employer; and, he died of progressive coronary disease for which his employment was "in no way responsible for the fatal culmination of the disease." Leary, 18 Wn.2d 532, 533, 140 P.2d 292. The Board agreed with the Department that Mr. Leary's heart attack was not brought on from any exertion in the course of employment, and therefore the claim was properly rejected. Id. at 539, 140 P.2d 292. The courts – both the Superior Court and the Supreme Court – reversed the Board and the Department and insisted that Mr. Leary was in the course of employment when he used his own car and acted on his own initiative to perform an act to benefit his employer. Id. at 543, 140 P.2d 292. After the Superior Court ordered that the claim be allowed, it was the Department that further fought claim allowance by appealing to the Supreme Court, where it again lost.

Mr. Leary did not need to be told to clear the gate area; he did not need to be told to retrieve his car for such a purpose – instead, Mr. Leary identified on his own what was needed and what his employer's expectations of him were. He undertook steps to benefit his employer and

while in the course of working towards that benefit, he perished. While Mr. Buchanan has not suffered the same fate, the facts of his case are properly analyzed in the same fashion – was he seeking to perform an act to benefit his employer when he retrieved his tools during a second, extraordinary return trip to a jobsite? There can be no plausible suggestion otherwise: of course he travelled back to the jobsite to get his tools. If he had been instructed to do so, there is no question he would have been within the course of his employment since he was engaging in a special errand at the direction of his employer. But, he did not need to be told to go pick up his tools, nor did he need to ask whether he should do so. He knew what he would have been told to do, so he endeavored to satisfy his employer's, and the industry's, expectations on his own initiative.

The Department rejected Mr. MacKay's claim, too, though the Department cites this case, too, as though it made the correct call from the beginning. Recall that in this case, Mr. MacKay was hired by Le May to run a caterpillar machine; Mr. MacKay owned his own caterpillar and he was paid by Le May for both his time running the machine and an extra \$2.00 per hour for the use of the caterpillar. MacKay v. Department of Labor & Indus., 181 Wash. 702, 703, 44 P.2d 793 (1935). A part on the

machine broke and required repair in order for work to continue. Id. The Department rejected Mr. MacKay's claim on the basis that while seeking to repair the part, Mr. MacKay was not in the course of his employment because he was not acting in furtherance of his employer's interests. While on the repair trip, Mr. MacKay's pay was suspended and the caterpillar was out of use. Id. The Department further insisted that once Mr. MacKay began a trip to a nearby town to repair a broken part, his tasks were of no import to his employer whatsoever. The Board disagreed with the Department and from that decision the Department appealed to both the Superior Court and the Washington State Supreme Court. Id. The Department lost in both of its appeals and was forced to allow the claim by court order on the basis that the trip where the injury occurred was "so intimately related to his employment, as to call for the holding that he was injured in the course of his employment though not then actually at work or within his actual working hours." Id. (internal citations omitted). Likewise, Mr. Buchanan's trip was so closely connected to his employment, that claim allowance is the only fair and reasonable result in his case.

B. Extraterritorial cases must be reviewed with caution: here, no weight should be afforded to cases cited from Virginia.

The Virginia state case cited and discussed by the Department should not be considered even instructive for this court because Virginia's workers' compensation laws require that, unlike in Washington, an injury must "arise out of and in the course of employment" in order to be covered by its Industrial Insurance system. Va. Code Sec. 65.2-101 (Definitions: "Injury"). As noted in prior briefing, Washington has rejected this narrow standard and requires only that a worker be in the "course of employment" in order for an injury to be covered under our Industrial Insurance Act.

C. The Department's argument against attorney's fees is incorrect and inconsistent with the procedural history and evidence in this case.

For the first time, the Department has argued that Mr. Buchanan is not entitled to attorney's fees on appeal because the medical aid fund would not be affected should he prevail. The Department insists that the only issue at hand is whether Mr. Buchanan was in the course of his employment while retrieving his tools. The Department's further claims that there is only a "claimed injury" at issue, and that it would be further decided later is not a correct statement of the case.

First, the Department's order which rejected Mr. Buchanan's claim states in pertinent part:

“This claim for benefits filed on 9/18/13 while working for Madden Industrial Craftsmen I is hereby rejected as an industrial injury or occupational disease for the following reason(s): That at the time of injury, the claimant was not in the course of employment.

Any and all bills for services or treatment concerning this claim are rejected, except those authorized by the Department.”

(CABR p. 39). This is a statement by the Department that establishes its assessment that there has indeed been an “injury,” but that it did not occur within the course of Mr. Buchanan’s employment. Furthermore, the specific rejection of bills for services or treatment concerning the claim, unless otherwise authorized, further confirm the Department’s agreement that Mr. Buchanan did suffer an injury on September 3, 2013, even though it did not allow the claim.

Later, when the matter was pending before the Board of Industrial Insurance Appeals, the Industrial Appeals Judge prepared a standard Interlocutory Order Establishing Litigation Schedule. (CABR p. 46). That Order was served on all parties by mail. (CABR p. 50). In that Order, the Judge identified the “Issue Presented” in this matter as follows:

“Whether the claimant was in the course of his employment at the time of injury and the claim should be allowed as proximately caused by an industrial injury.”

(CABR p. 46). No party appealed this order, nor submitted any disagreement with this statement of the issue presented to the Board. Clearly, the IAJ sets forth that there was an “injury” that occurred, but there was a question as to whether Mr. Buchanan was in the course of his employment. Id. Furthermore, during the hearing on the parties’ motions for summary judgment, Mr. Greg Nelson, counsel for Mr. Buchanan, began his argument with the statement:

“The employee and the parties all agree that Mr. Buchanan was injured while carrying his tools in a heavy bag on the late evening of September 3, 2013. The sole dispute is whether or not said injury occurred in the course of employment as defined by Title 51.”

October 31, 2014, Telephone Hearing, Board of Industrial Insurance

Appeals, p. 5, ll 5-10. At no time during this hearing did either the Department’s representative or the employer’s representative disagree with this assessment or otherwise challenge it in any way.

When the IAJ issued his Proposed Decision and Order, which was later adopted by the full Board and became the final decision of the Board, the following Findings of Fact and Conclusions of Law were entered:

Finding of Fact No. 4: On his return commute to his residence by his normal work route, he began to suffer from lower back pain.

Finding of Fact No. 5: At the time Mr. Buchanan experienced lower back pain, he was not acting at the employer's direction or in furtherance of his employer's business

[ . . . . . ]

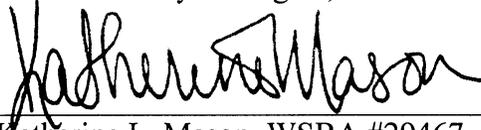
Conclusion of Law No. 3: The claimant was not acting in the course of his employment at the time of injury in accordance with RCW 51.08.013.

(CABR p. 32). Again, neither the Department nor the Employer filed an appeal (called a "Petition for Review") of the Board's Findings of Fact or Conclusions of Law. Furthermore, neither party appealed for review of these findings or even argued them in Superior Court. Accordingly, that Mr. Buchanan sustained an injury on September 3, 2013, has already been established as the law of the case.

### **III. CONCLUSION**

For all reasons stated above, in prior briefing, and throughout this case, Mr. Buchanan renews his request that this court find that he was acting in the course of his employment when he retrieved his tools on September 3, 2013, because the trip had a dual purpose for both him and his employer. Furthermore, should this court find he was in the course of his employment at the time of his injury, reasonable attorney's fees are appropriate pursuant to RCW 51.52.130, are hereby requested as well.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2016.

A handwritten signature in black ink, appearing to read "Katherine L. Mason". The signature is written in a cursive style with a horizontal line underneath it.

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## § 65.2-101. Definitions

As used in this title:

"Average weekly wage" means:

1. a. The earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, divided by 52; but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of the 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results fair and just to both parties will be thereby obtained. When, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

b. When for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

2. Whenever allowances of any character made to an employee in lieu of wages are a specified part of the wage contract, they shall be deemed a part of his earnings. For the purpose of this title, the average weekly wage of the members of the Virginia National Guard and the Virginia Defense Force, registered members on duty or in training of the United States Civil Defense Corps of the Commonwealth, volunteer firefighters engaged in firefighting activities under the supervision and control of the Department of Forestry, and forest wardens shall be deemed to be such amount as will entitle them to the maximum compensation payable under this title; however, any award entered under the provisions of this title on behalf of members of the National Guard or their dependents, or registered members on duty or in training of the United States Civil Defense Corps of the Commonwealth or their dependents, shall be subject to credit for benefits paid them under existing or future federal law on account of injury or occupational disease covered by the provisions of this title.

3. Whenever volunteer firefighters, volunteer emergency medical services personnel, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, members of volunteer search and rescue organizations, volunteer members of community emergency response teams, and volunteer members of medical reserve corps are deemed employees under this title, their average weekly wage shall be deemed sufficient to produce the minimum compensation provided by this title for injured workers or their dependents. For the purposes of workers' compensation insurance premium calculations, the monthly payroll for

(5) The owner-operator determines the method and means of performing the service.

"Employer" includes (i) any person, the Commonwealth or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay and (ii) any volunteer fire company or volunteer emergency medical services agency electing to be included and maintaining coverage as an employer under this title. If the employer is insured, it includes his insurer so far as applicable.

"Executive officer" means (i) the president, vice-president, secretary, treasurer or other officer elected or appointed in accordance with the charter and bylaws of a corporation and (ii) the managers elected or appointed in accordance with the articles of organization or operating agreement of a limited liability company. However, "executive officer" does not include (a) noncompensated officers of corporations exempt from taxation pursuant to § 501(c)(3) of Title 26 of the United States Code (Internal Revenue Code of 1954) or (b) noncompensated officers of a property owners' association as such term is defined in § 55-509.

"Filed" means hand delivered to the Commission's office in Richmond or any regional office maintained by the Commission; sent by means of electronic transmission approved by the Commission; sent by facsimile transmission; or posted at any post office of the United States Postal Service by certified or registered mail. Filing by first-class mail, electronic transmission, or facsimile transmission shall be deemed completed only when the document or other material transmitted reaches the Commission or its designated agent.

"Injury" means only injury by accident arising out of and in the course of the employment or occupational disease as defined in Chapter 4 (§ 65.2-400 et seq.) and does not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes. Such term shall not include any injury, disease or condition resulting from an employee's voluntary:

1. Participation in employer-sponsored off-duty recreational activities which are not part of the employee's duties; or
2. Use of a motor vehicle that was provided to the employee by a motor vehicle dealer as defined by § 46.2-1500 and bears a dealer's license plate as defined by § 46.2-1550 for (i) commuting to or from work or (ii) any other nonwork activity.

Such term shall include any injury, disease or condition:

1. Arising out of and in the course of the employment of (a) an employee of a hospital as defined in § 32.1-123; (b) an employee of a health care provider as defined in § 8.01-581.1; (c) an employee of the Department of Health or a local department of health; (d) a member of a search and rescue organization; or (e) any person described in clauses (i) through (iv), (vi), and (ix) of subsection A of § 65.2-402.1 otherwise subject to the provisions of this title; and
2. Resulting from (a) the administration of vaccinia (smallpox) vaccine, Cidofivir and derivatives thereof, or Vaccinia Immune Globulin as part of federally initiated smallpox countermeasures, or (b) transmission of vaccinia in the course of employment from an employee participating in such countermeasures to a coemployee of the same employer.

"Professional employer organization" means any person that enters into a written agreement