

NO. 35796-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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DOLORES MARQUEZ, Appellant

vs.

CASCADE RESIDENTIAL DESIGN, INC., Respondent

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**APPELLANT'S OPENING BRIEF**

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ORIGINAL

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## **I. ASSIGNMENTS OF ERROR**

- 1. Arbitrator Edward Lindstrom Erred When He Refused to Determine the *Amount* of Attorneys Fees He Previously Awarded After Being Ordered to Do So by the Superior Court**
- 2. The Superior Court Erred When It Refused to Overturn Arbitrator Lindstrom's Refusal to Determine the Amount of Attorneys Fees as the Court Ordered Him to Do**
- 3. The Superior Court Erred by Entering a Judgment on the Arbitrator's Award that Did Not Include the Mandatory Attorneys Fees Previously Awarded**

## **II. STATEMENT OF ISSUES**

- 1. Did Arbitrator Edward Lindstrom Err When He Refused to Determine the Amount of Attorneys Fees Previously Awarded After Being Ordered to Do So by the Superior Court**
- 2. Did the Superior Court Err by Declining to Overturn Arbitrator' Lindstrom's Refusal to Determine the Amount of Attorneys Fees Previously Awarded**
- 3. Did the Superior Court Err by Entering a Judgment on the Arbitrator's Award that Did Not Include the Mandatory Attorneys Fees Previously Awarded by the Arbitrator**

## **III. STATEMENT OF THE CASE**

The appellant Delores Marquez filed a lawsuit against her employer Cascade Residential Design (Cascade) for breach of

employment contract and statutory wage violations. CP 1-5. In the complaint, Ms. Marquez asserted that she was entitled to recover her attorneys fees pursuant to RCW 49.48.030 and RCW 49.52.070. CP 4. On August 24, 2006, Ms. Marquez's claim were submitted to mandatory arbitration before arbitrator Edward Lindstrom. CP 12. In her Pre-Hearing Statement of Proof, Ms. Marquez argued that she was entitled to attorneys fees and costs, and requested that the arbitrator enter judgment including such reasonable attorney's fees and costs. CP 56. Ms. Marquez's Pre-Hearing Statement of Proof was served upon Cascade and submitted to the arbitrator. CP 56-57.

Mr. Lindstrom awarded Ms. Marquez total damages for breach of contract and statutory wage violations in the amount of \$10,365.75. Mr. Lindstrom also found that Ms. Marquez was entitled to reasonable attorney's fee pursuant to RCW 49.48.030 and RCW 49.52.070. CP 12. On September 1, 2006, Mr. Lindstrom filed his award with the court. CP 12.

On October 5, 2006. Ms. Marquez's trial counsel filed his attorney fee affidavit with the court in conjunction with a "Motion for Attorneys Fees and for Judgment on Arbitration Award." CP 14-25. Despite the title on the motion, in fact, it was a request for the court to determine the *amount* of fees that should be awarded based upon the arbitrator's

conclusion that Ms. Marquez was entitled to attorneys fees. More specifically, the motion requested “an award of attorneys fees as awarded by the Arbitrator and for a judgment on the arbitration award filed with the Superior Court on September 1, 2006.” CP 24. Cascade opposed Ms. Marquez’s motion claiming that it was not timely filed with the arbitrator. CP 28, 44-53.

On October 20, 2006, the trial court ordered that “the issue regarding the *amount* of attorneys fees previously awarded by the arbitrator is hereby remanded to the arbitrator for determination.” CP 63 (emphasis added). Counsel for Ms. Marquez provided a copy of the court’s order to Mr. Lindstrom. CP 69. Mr. Lindstrom responded to counsel’s letter asserting that, as he interpreted PCLMAR 6.3(c)(1), he lacked “jurisdiction” to determine the amount of attorneys fees previously awarded to Ms. Marquez. CP 83. Mr. Lindstrom’s reasoning was that Ms. Marquez was required to file her motion to determine the *amount* of attorneys fees within seven days of receipt of the award. CP 83, 118. Ultimately, on October 30, 2006, Mr. Lindstrom filed an order with the court denying Ms. Marquez’s motion for attorneys fees. CP 87.

Cascade then filed a motion to enter judgment on the arbitrator’s award without an award of attorneys fees. CP 64-65. Ms. Marquez opposed Cascade’s motion and requested that the superior court overturn

Mr. Lindstrom's order denying Ms. Marquez's request to determine the amount of the attorneys fees previously awarded. CP 88-99. Despite the superior court's previous order, and despite the fact that attorneys fees are mandatory when there are proven statutory wage violations, the superior court denied Ms. Marquez's request and entered a judgment on the arbitration award without including any attorneys fees. CP 120-122. Ms. Marquez timely appealed. CP 123-124.

#### IV. ARGUMENT

A. ARBITRATOR LINDSTROM PROPERLY DETERMINED THAT MS. MARQUEZ WAS ENTITLED TO ATTORNEYS FEES PURSUANT TO RCW 49.48.030 AND RCW 49.52.070.

Pursuant to RCW 49.48.030, an award of attorneys fees "shall be assessed" against an employer in any "action" in which a person is successful in recovering a "judgment" for wages or salary. An arbitration proceeding is an "action" and an arbitration award is a "judgment" for purposes of RCW 49.48.030. *Hitter v. Bellevue School District No. 405*, 66 Wn. App. 391, 396-397, 832 P.2d 130 (1992). According to the plain language of RCW 49.48.030, the *amount* of the attorneys fees is to be determined "by the court." RCW 49.48.030. Pursuant to RCW 49.52.070, an employer "shall be liable" for attorneys fees in any action where the

employer is found to have violated any of the provisions of subdivisions (1) and (2).

The word “shall” in a statute is generally presumed to be mandatory. *Hansen v. Esell*, 100 Wn. App. 281, 290, 997 P.2d 426 (citing *Dussault v. Seattle Pub. Schs.*, 69 Wn. App. 728, 733, 850 P.2d 581 (1993) *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). In addition, RCW 49.48.030 is a remedial statute that must be liberally construed in favor of the employee. *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006). Thus, Arbitrator Lindstrom had a mandatory obligation to award attorneys fees once he determined that Cascade had violated RCW 49.48.010 and RCW 49.52.050.

**B. THE SUPERIOR COURT PROPERLY REMANDED TO THE ARBITRATOR TO DETERMINE THE “AMOUNT OF ATTORNEYS FEES PREVIOUSLY AWARDED”.**

The Mandatory Arbitration Rules are silent regarding whether an arbitrator has the authority to award attorneys fees when fees are authorized by statute, contract, or recognized ground of equity. *Bongirno v. Moss*, 93 Wn. App. 654, 659, 969 P.2d 1118 (1999). In fact, MAR 1.3 states:

A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. Except for the

authority expressly given to the arbitrator by these rules, all issues *shall be determined by the court*.

PCLMAR 3.2(b), however, expressly gives an arbitrator authority to award attorney's fees, "as authorized by these rules, by a contract or by law." PCLMAR 6.1(c) provides the procedure for presenting a motion for attorneys fees to the arbitrator when a request is made *after* receipt of the arbitration award. *See Bongirno*, 93 Wn. App. at 659-660; *Smukalla v. Barth*, 73 Wn. App. 240, 868 P.2d 888 (1994).

These local rules, however are silent on the *court's* authority to determine the *amount* of an attorney fee award when confirming an arbitration award that includes the arbitrator's conclusion that one party is entitled to attorneys fees. *See Bongirno*, 93 Wn. App. at 659. The Court of Appeals has concluded that by adopting these local rules, the superior court has delegated the authority to award attorney fees in mandatory arbitration hearings to the arbitrator. *See Bongirno*, 93 Wn. App. at 660; *Smukalla*, 73 Wn. App. at 244; *see also Trusley v. Statler*, 69 Wn. App. 462, 849 P.2d 1234 (1993). Thus, it appears that the superior court here properly remanded to the arbitrator to determine the *amount* of attorney fees to which Ms. Marquez was entitled by statute.

It is noteworthy, however, that the *Bongirno*, *Smukalla*, and *Trusley* cases are all factually distinguishable. The issue in those cases

was *not* whether the superior court had the authority to determine the *amount* of an attorney fee award after the arbitrator determined that a party was entitled to attorney fees pursuant to a statute, *but rather*, whether the court had the authority to award attorneys fees when the arbitrator either expressly declined to award fees (*Bongirno* and *Trusley*), or the prevailing party failed to request that the arbitrator award attorneys fees (*Smukalla*).

In *Bongirno*, for example, the arbitration award was silent on the subject of attorney fees. In a post-arbitration letter to the arbitrator, the defendant requested attorneys fees, which the arbitrator declined to award. Three months later, the defendant moved in superior court to enter the arbitration judgment and for an award of costs and attorneys fees pursuant to the contract between the parties and RCW 4.84.330. *Bongirno*, 93 Wn. App. at 657. The superior court confirmed the arbitration award and granted the defendant attorneys fees. *Bongirno*, 93 Wn. App. at 657. The court of appeals reversed finding that the superior court improperly attempted to amend the arbitration award by awarding attorney fees. *Bongirno*, 93 Wn. App. at 657.

Here, in contrast, the trial court would not have effected an amendment of the arbitration award simply by determining the *amount* of attorneys fees because the arbitrator award already expressly found that Ms. Marquez was entitled to her attorneys fees. In fact, the trial court's

entry of judgment without attorneys fees effected an improper modification of the arbitration award filed September 1, 2006.<sup>1</sup> See CP 12.

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<sup>1</sup> The law is well established that a superior court's authority to vacate or modify an arbitration award is very limited. The superior court may confirm, vacate, modify or correct an arbitration award based only upon one of the statutory bases set forth in RCW 7.04A.230 (formerly RCW 7.04.160). *Barnett v. Hicks*, 119 Wn.2d 151, 153-154, 829 P.2d 1087 (1992); *Luvaas Family Farms v. Ferrell Family Farms*, 106 Wn. App. 399, 404, 23 P.3d 1111 (2001); *Godfrey v. Hartford Cas. Ins. Co.*, 99 Wn. App. 216, 220, 993 P.2d 281 (2000); *Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258, review denied, 134 Wn.2d 1011, 954 P.2d 276 (1997).

Pursuant to RCW 7.04A.230, a trial court may vacate or modify an arbitration award if:

- (a) The award was procured by corruption, fraud, or other undue means;
- (b) There was:
  - (i) evident partiality by an arbitrator appointed as a neutral;
  - (ii) corruption by an arbitrator;
  - (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
- (d) An arbitrator exceeded the arbitrator's powers;
- (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
- (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Arguably, *Bongirno* and *Smukalla* are not controlling on the issue of whether the court also has authority to determine the *amount* of attorneys fees when an arbitrator concludes that a party is entitled to them. In any event, the trial court certainly had the authority to remand this issue to the arbitrator for determination.

C. **ARBITRATOR LINDSTROM ERRED WHEN HE REFUSED TO DETERMINE THE AMOUNT OF ATTORNEYS FEES PREVIOUSLY AWARDED AS ORDERED BY THE SUPERIOR COURT**

Arbitrator Lindstrom refused to follow the trial court's order on remand. He refused on the grounds that he lacked "jurisdiction" to determine the *amount* of attorneys fees to which Ms. Marquez was entitled because her trial counsel did not submit his fee affidavit within seven days of receiving the award. What Arbitrator Lindstrom failed to recognize, however, was that Ms. Marquez made her request for attorneys fees at the arbitration itself, and therefore PCLMAR 6.1(c) could not possibly have deprived him of "jurisdiction" to later determine the *amount* of her fees. The arbitrator's authority or "jurisdiction" to award attorneys fees is derived from PCLMAR 3.2(b) and not PCLMAR 6.1(c). PCLMAR 6.1(c)(1) does not deprive the arbitrator of jurisdiction to determine the

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RCW 7.04A.230. **Here, none of these statutory bases for modifying the arbitration award is applicable. Thus, neither the arbitrator nor the court had authority to remove the award of attorney fees to Ms. Marquez.**

*amount* of attorneys fees to be awarded, when the request for fees is timely made at the arbitration itself and the initial award includes the conclusion that the prevailing party is entitled to attorneys fees.

PCLMAR 6.1 merely provides the procedure for requesting attorneys fees *after* the arbitration. Implicitly, PCLMAR 6.1(c) does not apply when a request has already been made at the arbitration ***and granted*** by the arbitrator. Nothing in the Mandatory Arbitration Rules or the Pierce County local rules precludes a party from making their request for attorneys fees at the arbitration itself. Here, because the arbitrator found that Ms. Marquez was entitled to fees, he was required to file an amended award including the *amount* of such fees pursuant to PCLMAR 6.1(c)(4).

Arbitrator Lindstrom clearly had the discretion to request an attorney fee affidavit from Ms. Marquez’s counsel and impose a deadline for providing such fee affidavit. *See* PCLMAR 1.1. PCLMAR 1.1 provides in pertinent part as follows:

The Mandatory Arbitration Rules, as supplemented by these local rules, are not, designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator. The arbitrator should not hesitate to exercise that discretion.

Given Arbitrator’s Lindstrom’s obligation to enter an “amended award” pursuant to PCLMAR 6.1(4), he clearly should have called for an attorney

fee affidavit from Ms. Marquez's counsel before filing his award. Having failed to do so, Arbitrator Lindstrom could not properly assert in response to the remand order from the court that he lacked "jurisdiction" to determine the *amount* of attorneys fees that should be awarded to Ms. Marquez. Notably, Ms. Marquez's trial counsel did not unreasonably delay in filing his attorney fee affidavit. It was filed just one month after the arbitrator wrongfully filed his award without determining the amount of attorneys fees.

**D. THE SUPERIOR COURT ERRED BY DECLINING TO OVERTURN ARBITRATOR LINDSTROM'S REFUSAL TO DETERMINE THE AMOUNT OF ATTORNEYS FEES HE PREVIOUSLY AWARDED, AND BY ENTERING A JUDGMENT WITHOUT AN AWARD OF ATTORNEYS FEES**

Here, the superior court erroneously reversed itself after Arbitrator Lindstrom refused to follow the court's previous order, and then erroneously entered a judgment on the arbitration award without including attorneys fees.

This action improperly effected a modification of the arbitration award dated September 1, 2006. *See* footnote 1 *supra*. For the reasons discussed in Section B above, the trial court properly remanded the issue of the amount of attorneys fees to Arbitrator Lindstrom. For the reasons discussed in Section C above, Arbitrator Lindstrom erroneously refused to

determine the *amount* of attorneys fees. Therefore, the superior court erred by failing to overturn Arbitrator Lindstrom's order dated October 30, 2006.

Cascade argued to the superior court that Ms. Marquez' motion to determine the *amount* of attorneys fees violated the letter and purpose of the arbitration rules and attempted to cut off Cascade's sole avenue for appeal of an attorney fee award through a trial de novo. *See* CP 45. These arguments lack merit.

First, Ms. Marquez' motion did not violate the letter of PCLMAR 6.1(c)(1) or the letter of the remedial statutes that entitled her to attorneys fees. It did not violate the letter of PCLMAR 6.1(c)(1) because her motion to the court was not a request that the court determine whether or not she was actually entitled to attorneys fees, but rather a request that the court determine the *amount* of fees to which she was already entitled based upon her prior request at the arbitration itself *and* the arbitrator's award dated filed September 1, 2006. One of the attorney fee statutes at issue, RCW 49.48.030, specifically indicates that reasonable attorneys fees shall be assessed against the employer "in an amount to be determined by the court."

Even if the court was not the proper forum to determine the *amount* of attorneys fees, Ms. Marquez's motion did not violate the

purpose of mandatory arbitration, which is to reduce congestion in the courts and discourage meritless appeals. *See Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997). Ms. Marquez's case was decided by an arbitrator and not by the court, and, thus the purpose of reducing court congestion was served. If either party chooses to appeal arbitrator Lindstrom's amended decision (which has yet to be entered), and such party does not improve her or its position at trial, the court will be required to assess attorneys fees against the appealing party. Thus, the purpose of discouraging meritless appeals will also be served.

Finally, Ms. Marquez's motion could not cut off Cascade's avenue for appealing an award of attorneys fees. Pursuant to PCLMAR 6.1(c)(6), the time for appeal of the arbitrator's decision in any case where attorney fees have been timely requested does not start to run until the service and filing of the amended award or denial thereof. Here, attorneys fees were timely requested at the arbitration itself *and granted*. Thus, the time for an appeal did not begin to run until the *amount* of fees was determined by the arbitrator and included in an amended award. Here, because Arbitrator Lindstrom wrongfully refused to file an amended award that included attorneys fees, the time for appealing his decision has not yet run.

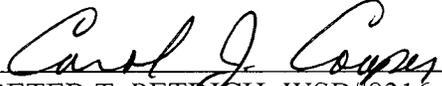
## V. ATTORNEYS FEES ON APPEAL

Pursuant to RAP 18.1(a), Ms. Marquez requests attorney fees on appeal if she is the prevailing party. Such request is made pursuant to RCW 49.48.030 and RCW 49.52.070. See *Miller v. Farmers Bros. Co.*, \_\_\_ Wn. App. \_\_\_, 150 P.3d 598 (2007) (awarding attorneys fees on appeal to prevailing party pursuant to RAP 18.1(a) and RCW 49.48.030).

## VI. CONCLUSION

Based upon the foregoing, Ms. Marquez respectfully requests that this court reverse the judgment of the trial court and its decision refusing to overturn Arbitrator Lindstrom's refusal to follow the court's order and determine the amount of attorneys fees. This case should be remanded to the arbitrator to determine the *amount* of fees to which Ms. Marquez is entitled. Once Arbitrator Lindstrom files an amended award, each party should then have 20 days to request a trial do novo. Ms. Marquez should be awarded her attorneys fees for having to bring this appeal.

DATED this 15<sup>th</sup> day of March, 2007.

  
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Attorneys for Appellant

**CERTIFICATE OF SERVICE**

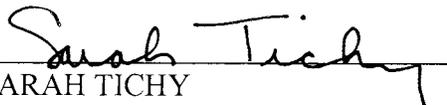
I hereby certify that on the 16 day of March, 2007, I caused a copy of the original of **Appellant's Opening Brief** to be delivered to the below listed at their respective addresses:

**VIA LEGAL MESSENGER**

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Signed at Tacoma, Washington on March 16, 2007.

  
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STATE OF WASHINGTON  
BY  DEPUTY  
JULIE M. COOPER  
CLERK OF SUPERIOR COURT