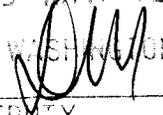


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 41649-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MARGARITO BRAMBILLA LOPEZ, Respondent,

v.

WASTE CONNECTIONS, INC., Appellant.

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

<b>TABLE OF AUTHORITIES</b> .....	ii
<b>I. ARGUMENT</b> .....	1
<b>A. Respondent’s “Red Herrings” Must be Summarily Disregarded.</b> .....	1
<b>B. Respondent Confuses “Omission” and “Commission” When Discussing the First Date of Treatment</b> .....	3
<b>C. Mr. Lopez Had Already Reported the Alleged Incident Months Before Seeing Dr. Barnard on October 2, 2007.</b> .....	4
<b>D. The Standard of Review Allows This Court to Look for Substantial Evidence.</b> .....	5
<b>II. CONCLUSION</b> .....	8

**TABLE OF AUTHORITIES**

Table of Cases

*Ruse v. Department of Labor and Industries,*  
138 Wn.2d 1, 5-6 (1999) ..... 6

Statutes

RCW 51.04.010 ..... 1  
RCW 51.28.050 ..... 2

## I. ARGUMENT

### A. Respondent's "Red Herrings" Must be Summarily Disregarded.

Respondent raised several "red herrings" to divert attention from the real issue in this case, the fact that a quantum of evidence is not sufficient to persuade a rational, fair-minded person that the premise is true. In this case, the premise is that Mr. Lopez sustained an industrial injury, on or about May 17, 2007. The evidence is not sufficient and is not substantial to support this premise.

The first "red herring" has to do with Mr. Lopez' work history for Waste Connections, and his lack of a prior reported injury while at Waste Connections. The very first section of Title 51, establishes that relief is provided, "...regardless of questions of fault... ." RCW 51.04.010. In essence, Washington is known as a "no fault" jurisdiction when addressing industrial injuries. In fact, the lower court's Jury Instruction No. 2, stated, "The Industrial Insurance Act Allows compensation regardless of any consideration of fault. In this case there is no issue of negligence of the employer or of the worker." CP 89.

To raise issues of length of employment and absence of prior injuries is just as improper as if the employer attempted to raise issues of the shortness of employment or evidence of prior injuries.

If a prior injury cannot be brought in as evidence of a claimant's fault in understanding a present injury, then the absence of injuries should also be excluded from consideration. The same goes with work history. An worker injured in Washington can be covered if they are acting in the course of employment on the first minute of the first day of the job. The length of time an employee works is not relevant to the test for whether a person is acting in the course of employment and as such, this line of argument must be disregarded.

A second "red herring" involves the argument that Mr. Lopez filed his claim in a timely manner pursuant to RCW 51.28.050. Again, this case did not turn on whether or not he filed his claim within the one-year period after the day upon which the alleged injury occurred. Had there been an issue of timeliness, a preliminary hearing would have been held at the Board of Industrial Insurance Appeals before addressing the merits of the claim. This was not the case, and to raise such argument when there is no dispute that Mr. Lopez reported his claim on or around July 17, 2007, following the alleged May 17, 2007, injury, only serves to divert the Court's attention from the merits of this appeal.

**B. Respondent Confuses “Omission” and “Commission”  
When Discussing the First Date of Treatment.**

Respondent argues several times that Mr. Lopez did not tell his initial provider that he was injured at work. (Respondent’s Brief at 4, and 13). In fact, respondent argues that Dr. DeVita did not relate the diagnosed condition to a workplace injury because Mr. Lopez never stated this occurred at work. On the face of the argument, it would sound like Mr. Lopez simply forgot to mention something about his injury, or omitted this fact. It was not a case that his memory cleared up only later, once the severity of his injury became apparent. Instead, Mr. Lopez affirmatively told his providers at Multicare Lakewood Clinic, including Dr. Stromberg and Dr. DeVita that there was no known injury at work. 01/22/09 Tr. at 9 and 12.

Specifically, Dr. DeVita stated, “It’s our standard procedure, at these urgent cares, to identify where the patients - - how and where they got injured. Primarily, we always ask if it was work or not at work.” *Id.* at 7. Dr. DeVita then said it is, “My understanding, from when I saw him, there was no known injury of any kind.” *Id.* at 9. Dr. DeVita added on the intake notes, dated May 25, 2007, “What he reported to Gabrielle Smith was that he was complaining of right leg pain with no known injury.” *Id.* at 12.

This is not “omitting” something, but rather affirmatively “committing” to a fact. That Mr. Lopez decided to change his story later was his free choice, but the medical providers that examined him placed great emphasis on this initial report.

**C. Mr. Lopez Had Already Reported the Alleged Incident Months Before Seeing Dr. Barnard on October 2, 2007.**

Respondent attempts to make much out of the fact that ESIS sent Dr. Barnard a letter upon receiving his report, and shortly thereafter on October 8, 2007, requested a background check on Mr. Lopez. (Respondent’s Brief at 7). Respondent added that, “In light of all this conduct, it is really not surprising that Mr. Brambila Lopez did not want to report his injury.” *Id.* at 15.

However, this really is a temporally false argument. First, Respondent agrees that the testimony revealed the Mr. Lopes reported his claim on July 17, 2007, two months after the alleged incident and one week after returning to work. Thus, actions after that date have no bearing on Mr. Lopez’s decision to report the alleged incident on July 17, 2007.

Further, Respondent argues that, “In this case, a rational, fair-minded jury could also be persuaded that Dr. Michael Barnard’s original opinions were correct... .” *Id.* at 14.

However, Dr. Barnard clearly explained that his draft report supporting causation was in error and should not have gone out for publication. 02/18/09 Tr. at 12. It was only after Dr. Barnard reviewed additional records Mr. Lopez and his daughter brought in for the examination that he recognized that the initial affirmative statement from Mr. Lopez was that he had “**no known work injury.**” *Id.* at 11-12, and 19-20. (Emphasis added).

Thus, whether Mr. Lopez wanted to file a claim or not is not relevant. Mr. Lopez did file a claim months before seeing Dr. Barnard, and it was only his act of filing a claim that led to him being written up for violating reporting policies and that led ESIS to investigate this claim.

**D. The Standard of Review Allows This Court to Look for Substantial Evidence.**

Respondent argues “Here, there was substantial evidence to support the jury’s findings that Mr. Brambila Lopez sustained an industrial injury on May 17, 2007.” (Respondent’ Brief at 10). In fact, Respondent goes even further, “...Dr. DeVita, Dr. Ricketts, Dr. Barnard, and Dr. Alinea all offered testimony that support a finding that pulling a 45 pound pallet, on a more probable than not basis caused the injury to his low back and was work related.” If that were so, then there is no way the Board could have affirmed the Department’s rejection of this claim.

It is undisputed law that this Court's review is limited to an "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6 (1999). "Substantial Evidence" is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.

The conclusion of law reached by the jury and signed off by the judge was that Mr. Lopez sustained an industrial injury on or around May 17, 2007. The evidence does not support this conclusion.

Dr. DeVita was unequivocal that based on Mr. Lopez stating there was "**no known injury**" that she could not provide a medical opinion causally relating his low back condition to a May 17, 2007, incident. Dr. Ricketts relied on this May 25, 2007, report from Dr. DeVita and was unequivocal about the same conclusion. Dr. Barnard, on reviewing only some of the records gave Mr. Lopez the benefit of the doubt and provided an opinion causally relating the low back condition to a reported May 17, 2007, incident. However, on review of Dr. DeVita's May 25, 2007, report, reached an unequivocal conclusion that the low back problem was not related, on a more probable than not basis. As stated previously, the opinion of Dr. DeVita must be afforded special consideration.

Thus, for the conclusion to flow from the evidence, there is only Dr. Alinea. He barely, if at all, provided a medical opinion on a more probable than not basis. In fact, the best he could do was state that the low back condition would be consistent with moving a garbage can full of leaves, or pulling a pallet. In other words, when asked, Dr. Alinea indicated a bodily movement could cause Mr. Lopez' back problem, any bodily movement involving forceful lifting. He did not state, unequivocally, that this alleged incident involving a pallet on May 17, 2007, caused the injury, on a more probable than not basis. Without this opinion, there is no quantum of evidence.

The fact that Mr. Lopez' own witness testified against him and stated that he did not complain of an injury or accident or had any trouble walking only further limits the claim that there is substantial evidence in this case.

It is the position of Waste Connections that this record, as emphasized above, does not have a quantum of evidence to persuade a rational fair-minded person the premise is true. There is not substantial evidence. At best, there is a scintilla of evidence, and this affords much liberal interpretation to the sole testimony of Dr. Alinea to reach this scintilla.

## II. CONCLUSION

Based on a lack of substantial evidence to find that there was an industrial injury on or around May 17, 2007, Waste Connection respectfully seeks a reversal of the December 10, 2010, Judgment for Plaintiff, a reversal of the fee and cost award, and a determination that affirms the final order, dated July 23, 2009, of the Board of Industrial Insurance Appeals that Mr. Lopez did not sustain an industrial injury to his back on May 17, 2007, in the course of employment with Waste Connections, Inc., within the meaning of RCW 51.08.100.

DATED this 29<sup>th</sup> day of August 2011.

Respectfully submitted,



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Robert M. Arim  
Attorney for Appellant  
WSBA #27868

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COURT OF APPEALS  
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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

MARGARITO BRAMBILA LOPEZ, ) No. 41649-2-II  
)  
Respondent, )  
v. ) CERTIFICATE OF SERVICE  
)  
WASTE CONNECTIONS, INC. )  
)  
Appellant. )

I certify that I caused a true and accurate copy of the foregoing REPLY BRIEF  
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ESIS, Inc.

**VIA E-MAIL**  
Waste Connections, Inc.

DATED this 29<sup>th</sup> day of August, 2011.

THE LAW OFFICE OF ROBERT M. ARIM, PLLC



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