FILED
JUNE 4, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALEX M. WHITEHEAD, Appellant, v. DEPARTMENT OF LABOR and INDUSTRIES, Respondent.	)	No. 37357-6-III UNPUBLISHED OPINION

SIDDOWAY, J. — Alex Whitehead appeals a decision of the Thurston County Superior Court affirming a decision by the Board of Industrial Insurance Appeals (Board) that his gross wage amount was correctly determined by the Department of Labor and Industries (Department). He offers several reasons why we should reweigh evidence, which, given our well-settled role, we will not do. Substantial evidence supports the superior court's challenged findings. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Alex Whitehead was employed by Emerald Self Storage (Emerald) from September 2011 until he sustained a workplace injury on or about June 1, 2014. Emerald, located in Bothell, engaged in the business of renting storage space as well as U-Haul trucks and trailers.

In August 2014, Mr. Whitehead filed a claim for benefits with the Department. It allowed the claim, determining that his time loss benefit would be based on the $2,500 gross monthly wage he was paid for managing the self-storage facility and U-Haul rental operations. Mr. Whitehead appealed to the Board. In order to hear from all of the knowledgeable witnesses, an industrial appeals judge (IAJ) conducted three hearing sessions.

Mr. Whitehead's position in the appeal was that his verbal agreement with Emerald's principals was that his gross wages would be $3,200 a month, from which Emerald would deduct $700 a month for Mr. Whitehead's "taxes, the social security, the FICA, unemployment, whatever would be under the W-2 forms." Administrative Record (AR)/Report of Proceedings (RP) (Session 1) at 9.[1] He testified that the deductions were to include Mr. Whitehead's own liability for federal income tax. He claims that only after the industrial accident did he find out that Emerald had not reported or paid federal employment taxes, his federal income taxes, or industrial insurance premiums to the

[1] The administrative record consists of nonconsecutively paginated transcripts of three hearing sessions and a separate record of materials filed with the Board. We also have a transcript of the superior court's hearing of the appeal.

We refer to the transcript of the first administrative hearing session taking place on October 31, 2016 as "AR/RP (Session 1)," the transcript of the second session taking place on November 4, 2016 as "AR/RP (Session 2)" and the transcript of the third session taking place on January 20, 2017 as "AR/RP (Session 3)." The record of other materials filed with the Board is referred to as "AR."

We refer to the transcript of the hearing before the superior court as "RP."

Department, with the result that he could not claim an income tax refund or Social Security disability benefits. His position was that the $700 a month in unpaid taxes and insurance premiums should be added to the Department's wage loss figure.[2]

Emerald's principals admitted failing to pay federal employment taxes and failing to report or pay industrial insurance premiums to the Department. They admitted that as a result of their failure to pay industrial insurance premiums, they were subjected to, and did not protest, a Department audit.

Mr. Whitehead contended that the $3,200 gross wage should be further increased to take into consideration the value of an RV site rental for his 37-foot Class A Airstream motor home that he parked on Emerald's premises and lived in during his employment, as well as utilities and a cell phone. He contended this was in-kind compensation that he lost when his industrial injury made him unable to perform the job. Mr. Whitehead testified that based on calls to a few RV parks, he understood that rent for an RV space was $800 to $1,200, including utilities. He testified to "vaguely [having] a little bit of

[2] In *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 770, 134 P.3d 234 (2006), the court held that an "employer's mandatory payments for Social Security, Medicare, and Industrial Insurance are not 'consideration' for its employees' services and therefore not 'wages' under RCW 51.08.178." This would apply to all but Mr. Whitehead's contention that Emerald had agreed to pay *his* liability for federal income tax withholding.

Mr. Whitehead's position that his gross wage should nonetheless be increased by $700 appears to be as punishment for Empire's failure to make contributions toward refunds or benefits he might claim in the future.

understanding that [utilities] could have been anywhere from 100 to 300 a month." AR/RP (Session 1) at 25. There was no evidence that Emerald provided Mr. Whitehead with RV-park type shower and laundry facilities. An Emerald principal testified that there was no dump station on its premises and Mr. Whitehead had to arrange for a septic company to empty the motor home's septic tank when it got full.

Emerald's principals disputed Mr. Whitehead's characterization of his duties. They testified he was never required to provide security at times when he was not performing as a manager. They testified he had been allowed to move his motor home into a parking lot, "sandwiched" between U-Haul trucks and trailers, as an accommodation. AR/RP (Session 2) at 36. They admitted they allowed him to hook up to their electrical service. They testified that the only water Mr. Whitehead used was to flush out his self-contained system or to shower, using water for Emerald's heating system that they doubted was potable.

During the hearing, Mr. Whitehead offered as evidence a letter that Brad Bannon, one of Emerald's principals, presented and required him to sign as a condition of receiving his final pay. The letter, dated September 11, 2014, stated in part that Mr. Whitehead released Emerald from "any and all claims for unemployment and Labor & Industry claims." AR Ex. 2; AR/RP (Session 3) at 20. The IAJ questioned the relevance of the letter, but ultimately admitted it into evidence.

Following the conclusion of the hearing and receipt of posthearing briefing from Mr. Whitehead, the IAJ denied Mr. Whitehead's appeal. Its proposed decision and order found that the evidence did not support Mr. Whitehead's claim that he was employed as an overnight security guard; rather, it demonstrated that he managed the Emerald facility from 8:00 a.m. to 4:30 p.m. It did find, however, that he would respond after hours on an occasional, as-needed basis, serving customers. It found that all of this work was performed "for an agreed flat monthly salary of $2,500." AR at 26.

As for the in-kind housing, utility, and cell phone compensation claimed by Mr. Whitehead, the IAJ rejected Emerald's contention that it allowed Mr. Whitehead to live in its parking lot purely as a courtesy. It found that Emerald derived a benefit from having Mr. Whitehead living there, because his presence enabled him to respond to occasional after-hours customer needs. It found that Mr. Whitehead's use of parking space, water, power, and cell phone was not compensation includible in his gross wage, however, because none was critical to protecting his immediate health and survival.

Mr. Whitehead petitioned the Board for review. His petition argued that Emerald engaged in claim suppression in violation of RCW 51.28.010(5) by having him sign the September 11 letter stating he was waiving his right to make an industrial insurance claim.[3] AR at 7. He argued that "[b]ecause the employer has engaged in claim

[3] Claim suppression is defined as "intentionally . . . (a) Inducing employees to fail to report injuries; (b) Inducing employees to treat injuries in the course of employment as

suppression, the facts should be weighed heavily in favor of the Claimant," something that "was clearly not done by the Industrial Appeals Judge." AR at 8.

The Board denied the petition and adopted the IAJ's proposed decision and order as the decision and order of the Board.

Mr. Whitehead appealed to the Thurston County Superior Court. The superior court reviewed the entire administrative record and then conducted a hearing at which it heard argument from counsel.

After hearing from counsel, the court orally affirmed the Board's proposed decision, finding none of the witnesses "were really neutral or detached, and so each of the witnesses ha[d] some credibility issues." RP at 35. In orally ruling, it found the $2,500 wage calculation was correct and that Mr. Whitehead staying on site was something that Emerald allowed but did not require. It found no claim suppression, since the waiver Mr. Whitehead was asked to sign never induced him to forgo an industrial insurance claim.

Notwithstanding its oral rulings, in later entering written findings and conclusions, the trial court adopted the Board's findings of fact and conclusions of law.[4]

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off-the-job injuries; or (c) Acting otherwise to suppress legitimate industrial insurance claims." RCW 51.28.010(4). Employers found to have suppressed claims are subject to penalties of up to $2,500 per offense, which are paid to the supplemental pension fund. RCW 51.28.025(2).

[4] "'It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to

Mr. Whitehead appeals. Division Two of the Court of Appeals administratively transferred Mr. Whitehead's appeal to this division.

ANALYSIS

Calculation of wages under Title 51

RCW 51.08.178(1) provides that a worker's wage is computed based on "the daily wage the worker was receiving at the time of the injury." When it comes to in-kind compensation, RCW 51.08.178(1) provides that "[t]he term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire." In a controlling construction of this provision, the Washington Supreme Court held that the statutory phrase "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity . . . *that are critical to protecting workers' basic health and survival*." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) (emphasis added).

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further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.'" *SVN Cornerstone, LLC v. N. 807 Inc.*, 10 Wn. App. 2d 72, 79 n.3, 447 P.3d 220 (2019) (alteration in original) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963)), *review denied*, 194 Wn.2d 1018, 455 P.3d 128 (2020).

Nature of superior court and appellate review

In industrial insurance cases, the superior court conducts a de novo review of the Board's decision, relying exclusively on the Board record. RCW 51.52.115; *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 53, 81 P.3d 869 (2003), *aff'd*, 155 Wn.2d 470, 120 P.3d 564 (2005). The Board's findings and decision are prima facie correct and the party challenging the Board's decision has the burden of proof. *Id*. at 53.

On appeal to this court, we review the superior court's decision under the ordinary standard of review for civil cases, examining whether substantial evidence supports the trial court's factual findings and then, de novo, whether the trial court's conclusions of law flow from the findings. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus*., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

Most of Mr. Whitehead's challenges to the superior court's decision can be rejected out of hand as contrary to longstanding standards of review. He argues that the requirement that the remedial provisions of the Industrial Insurance Act, Title 51 RCW, be liberally construed in favor of injured workers should cause us to conclude that the superior court abused its discretion in its weighing of witness credibility. Appellant's Opening Br. at 10. The doctrine of liberal construction "does not apply to questions of

fact but to matters concerning the construction of the statute," however. *Ehman v. Dep't of Labor & Indus*., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

He argues that the fact that Emerald did not put Mr. Whitehead's employment terms in writing or comply with recordkeeping requirements "must be counted against [Empire's] credibility in these proceedings" and the absence of such evidence "must be read against [it] and the Department." Appellant's Opening Br. at 14, 18. Empire's failure to comply with federal tax and state industrial insurance laws could certainly be counted against Empire's credibility by the Board. It could also be counted against Empire's credibility by the trial court if Mr. Whitehead met his burden of overcoming the prima facie correctness of the Board's findings. The evidence of Empire's violations was before both. *This court* does not count evidence for or against credibility. "[I]n an industrial insurance case, credibility determinations are solely for the trier of fact and cannot be overturned on appeal." *Zavala v. Twin City Foods*, 185 Wn. App. 838, 869, 343 P.3d 761 (2015).

For the same reason, we will not consider Mr. Whitehead's argument that "[t]he weight of the evidence should have been found to be in favor of Mr. Whitehead because he put on disinterested lay witnesses," whereas Empire's evidence was the testimony of its principals. Appellant's Opening Br. at 15. Setting aside whether Mr. Whitehead's

mother and two friends were disinterested witnesses, the bias or interest of testifying witnesses was for the Board to consider, subject to challenge before the superior court. It is not a matter for consideration at this level.

His argument that Empire's "claim suppression must weigh heavily against [its credibility] in the weighing of the testimony," Appellant's Opening Br. at 17, is also irrelevant to this appeal. Aside from the Department director's ability to waive the time limits for an employee to file a claim, an allegation that an employer engaged in claim suppression is a matter to be resolved between the employer and the Department. RCW 51.28.025(3), (5); RCW 51.28.010(5). Mr. Whitehead's release of any industrial insurance claim was invalid, and requiring that he provide it reflects poorly on Emerald. The letter was in evidence before the Board and the superior court and it was for them to decide its relative significance. It is not an issue for this court.

Sufficiency of the evidence

Having rejected all of Mr. Whitehead's arguments that we should reweigh evidence and reassess credibility, we turn to his challenges to the superior court's decision, which adopted the Board's findings and conclusions.

Base wage. The superior court affirmed the Board's finding that Mr. Whitehead's agreed flat monthly salary was $2,500, not the $3,200 contended by Mr. Whitehead. Emerald's principals provided direct evidence supporting the finding. Mr. Whitehead's

failure to question his nonreceipt of W-4 forms and his failure to file a federal tax return for tax years 2011, 2012 or 2013 is circumstantial evidence that his agreed monthly salary was $2,500. This is substantial evidence supporting the finding.

Housing, utilities, and cell phone. The superior court affirmed the following findings on Mr. Whitehead's claim of in-kind compensation:

> 4. . . . The employer allowed him to park it on the grounds of Emerald Self Storage. The RV was mobile and self-contained, but the employer allowed him to connect it to the employer's water and power supply. And the employer provided him with a cell phone for business use.
>
> 5. Mr. Whitehead's use of the employer's parking space, water, power and cell phone was not critical to protecting his immediate health and survival while employed with Emerald Self Storage.

AR at 26.

Mr. Whitehead did not include any argument in his opening brief that the alleged in-kind compensation was critical to protecting his immediate health and survival. He first argues the issue in his reply brief. His opening brief focused on Emerald's argument before the Board that these benefits were an accommodation, not part of the contract of hire. *See, e.g.*, Appellant's Opening Br. at 12-13. Because Mr. Whitehead failed to properly brief this argument in a manner permitting the Department to respond, we need not consider it. *Greensun Grp., LLC v. City of Bellevue*, 7 Wn. App. 2d 754, 780 n.11, 436 P.3d 397 (2019) ("A party abandons the assignments of error that it does not discuss

in its brief."), *review denied*, 193 Wn.2d 1023, 448 P.3d 64 (2019); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Moreover, as the Board's order observed, Emerald was not providing housing, it was permitting Mr. Whitehead to park his mobile home in a lot filled with rental trucks and trailers. The Board's order observed that Emerald's evidence was that water was made available not for drinking, but for flushing out the Airstream's self-contained system. It observed that no evidence was presented that the mobile home was uninhabitable without an external electrical supply. No evidence supported the contention that a cell phone is critical for survival and health. This is substantial evidence supporting the superior court's findings.

The superior court's findings support its challenged conclusion affirming the Board's order setting Mr. Whitehead's monthly wages at $2,500.

Mr. Whitehead requests an award of attorney fees under RCW 51.52.130 and RAP 18.1. RCW 51.52.130 authorizes an award of fees if a Board decision appealed by a worker is reversed or modified and additional relief is granted to a worker or beneficiary. Given our disposition of the appeal, the statute does not apply.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, C.J.