NO. 44343-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

BRIEF OF APPELLANT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This is a workers' compensation case under Title 51, RCW, the Industrial Insurance Act. Under the Industrial Insurance Act, the Department of Labor & Industries (Department) calculates an injured worker's time-loss compensation rate based on the worker's wages at the time of injury, marital status, and number of dependents.[1] RCW 51.32.090(9) imposes a cap on such benefits: in no event may they exceed 120 percent of the average monthly wage in the state of Washington. Once a worker's time-loss compensation rate is set at a given amount through a final and unappealed order, that rate remains in effect when making payments in the future, absent a statutory basis for adjusting them.

Under RCW 51.32.075, a worker's time-loss rate is typically adjusted July 1 of each year based on the change to the average monthly wage in the state of Washington occurring that year.[2] However, the legislature amended RCW 51.32.075 in 2011 to preclude a worker from receiving such an adjustment for July 1, 2011.

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[1] Time-loss compensation is a wage replacement benefit that is provided to workers who are temporarily incapable of working as a result of an injury. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009).

[2] The adjustments that are made to a worker's time-loss benefits under RCW 51.32.075 are frequently referred to as cost of living adjustments, or "COLAs." *See, e.g., Messer v. Dep't of Labor & Indus.*, 118 Wn. App. 635, 641-42, 77 P.3d 1184 (2003).

Joseph Crabb contended, and the superior court agreed, that even though his benefits could not be adjusted under RCW 51.32.075 for July 1, 2011, he was still entitled to an adjustment of his time-loss compensation rate under RCW 51.32.090(9).

The superior court accepted Crabb's argument, but it erred in doing so. Although the legislature did not suspend the provisions of RCW 51.32.090(9), it does not follow that Crabb is entitled to have his time-loss benefits increased. RCW 51.32.090(9) does not provide a mechanism to increase a worker's benefits whenever the average monthly wage in the state experiences an increase. Rather, it is only RCW 51.32.075 that authorizes an increase to a worker's benefits based on a change to the average wage monthly wage. Therefore, Crabb was not entitled to have his time-loss benefit rate increased effective July 1, 2011, and the superior court erred when it concluded otherwise.

II. ASSIGNMENT OF ERRORS

Assignment #1. The superior court erred in entering Conclusion of Law No. 3, which concluded that the Department calculated Crabb's temporary and total disability benefits "incorrectly and unlawfully" and that Crabb was entitled to time-loss benefits at a rate of $4,816.20 per month. CP 172. The superior court should have concluded that the Department calculated Crabb's benefits correctly and lawfully, because

increasing Crabb's benefits effective July 1, 2011, as a result of a change in the average monthly wage, is inconsistent with RCW 51.32.075.

Assignment #2. The superior court erred in granting summary judgment to Crabb and in reversing the decision of the Board of Industrial Insurance Appeals (Board) (which, in turn, affirmed the decisions of the Department), because Crabb was not entitled to judgment as a matter of law, and because the Board's decision was correct and it should have been affirmed. CP 172-73.

Assignment #3. The superior court erred in granting attorney fees and costs to Crabb, because such fees and costs are only available to a worker who prevails on appeal and who obtains additional benefits as a result of prevailing, and because Crabb should not have prevailed in this appeal. CP 168, 173.

Assignment #4. The superior court erred in directing the Board to calculate an award of interest to Crabb, because such an award may only be made if Crabb prevails and receives additional time-loss compensation payments, and Crabb should not have prevailed in this appeal. CP 173

III. STATEMENT OF THE ISSUES

Is Crabb entitled to an increase to his time-loss compensation rate based on the increase to the average monthly wage that occurred on July 1, 2011, when, under RCW 51.32.075, the Department may not increase

Crabb's time-loss compensation rate based on the change to the average monthly wage that occurred on July 1, 2011, and when RCW 51.32.090(9) places a cap on a worker's time-loss payments that is tied to the average monthly wage in the state but it does not provide a mechanism to increase a worker's benefits?[3]

IV. STATEMENT OF THE CASE

Joseph Crabb was injured in the course of his employment on December 23, 2007. BR 54.[4] The Department allowed his claim and provided him with benefits. *See* BR 54.

In January 2010, the Department calculated Crabb's wages at the time of injury to be $8,917.92. BR 54; BR Ex. No. 1. The Department also determined, through that order, that Crabb was not married and that he had no dependent children at the time of his injury. BR 54; BR Ex. No. 1. This order was communicated to all of the necessary parties, and no party, including Crabb, filed either a request for reconsideration or an appeal from that order. BR 54.

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[3] RCW 51.32.090 was amended in 2011, after Crabb's 2007 injury. However, none of the amendments to it is relevant to the issues raised by this appeal and therefore the Department cites to the current version. Copies of RCW 51.32.090 and .075 are provided in the appendix.

[4] The certified appeal board record is cited to as "BR", followed by a cite to the appropriate page number. Citations to the testimony of witnesses will be cited to as "BR," followed by the name of the witness and the page number of the applicable transcript.

Under RCW 51.32.090(9), a worker's monthly time-loss compensation rate cannot be more than 120 percent of the average monthly wage in the state of Washington. The parties stipulated that the following amounts have constituted the maximum rate at which time-loss benefits may be paid under that statute, from the date of Crabb's injury through July 1, 2011:

Effective 7/1/07:	$4,258.40
Effective 7/1/08:	$4,472.10
Effective 7/1/09:	$4,625.60
Effective 7/1/10:	$4,715.30
Effective 7/1/11:	$4,816.20

BR 55.

Crabb received time-loss benefits for the time period beginning August 27, 2011, and up to, and including, October 21, 2011. BR 56-57; BR Ex. 2-7. For that time period, the Department paid Crabb time-loss benefits based on a monthly rate of $4,715.30. BR 56-57; BR Ex. 2-7. The Department paid Crabb benefits at that rate, for that time period, because it concluded that it could only increase Crabb's time-loss payments as of July 1, 2011, if it could grant him a cost of living adjustment (COLA) effective that date. BR 56-57; BR Ex. 3. RCW 51.32.075, as amended, precludes the Department from granting a

COLA to a worker—like Crabb—whose right to compensation was established before July 1, 2011.

Crabb appealed the Department's decision to the Board, contending that his time-loss benefits should have been increased effective July 1, 2011, even though he could not receive a COLA for that year, because the legislature did not suspend the provisions of RCW 51.32.090(9), the statute that places a cap on a worker's time-loss compensation rate. BR 20-30.

The Board rejected Crabb's argument and affirmed the Department's decision to pay Crabb benefits based on a monthly rate of $4,715.42. BR 2; BR 13-19. The Board's industrial appeals judge issued a proposed decision that concluded that the Department could not properly increase Crabb's time-loss compensation benefits effective July 1, 2011, based on the change to the average monthly wage that occurred on that date, because doing so would constitute granting him a COLA for July 1, 2011, contrary to the plain language of RCW 51.32.075. BR 13-19.

The industrial appeals judge further explained that while RCW 51.32.090(9) was not suspended or amended, that statute does not, in and of itself, provide a mechanism to increase a worker's time-loss payments effective July 1 of each year. BR 16. Rather, it simply places a cap on such benefits. BR 16. Finally, the industrial appeal judge noted

that adopting Crabb's argument would lead to the absurd result of increasing the monthly benefits of highly compensated workers (who were receiving disability benefits at high monthly rates), while not granting any benefit increase to lower paid workers (who were receiving time-loss compensation payments at lower rates). BR 16.

Crabb filed a petition for review. BR 3-10. The Board denied review, adopting the proposed decision as its own decision. BR 2.

Crabb appealed to the Pierce County Superior Court. CP 3-5. The superior court granted Crabb's motion for summary judgment, and reversed the Board, expressly noting that the liberal construction doctrine required it to resolve all doubts in favor of the worker. CP 169-173. The Department now appeals. CP 174-179.

V. SUMMARY OF THE ARGUMENT

Under RCW 51.32.075, a worker is generally entitled to a COLA effective July 1 of each year based on the change to the average monthly wage in the state of Washington that occurs on that year. However, RCW 51.32.075 was amended in 2011 to expressly preclude making such an adjustment for July 1, 2011.[5] Despite this plain statutory language, Crabb argued, and the superior court agreed, that he was entitled to an

[5] Under the 2011 amendment to RCW 51.32.075, workers who were injured before July 1, 2011, will again receive COLAs on a yearly basis starting July 1, 2012, but at a rate that does not take into account the increase to the average monthly wage that occurred on July 1, 2011. *See* RCW 51.32.075.

adjustment to his benefits as of July 1, 2011, under RCW 51.32.090(9), because that statute, unlike RCW 51.32.075, was not amended to exclude an increase on July 1, 2011, from its provisions.

However, RCW 51.32.090(9) does not contain a mechanism to increase a worker's benefits effective July 1 of each year based on a change to the average monthly wage in the state. Rather, it simply imposes a cap on what a worker's benefits can possibly be based on the average monthly wage. But for a worker to receive an increase to his or her current time-loss benefit rate, there must be a statute that supports making such an adjustment.

RCW 51.32.075 was expressly amended to preclude such an adjustment being made for the fiscal year of 2011. Furthermore, while other statutes authorize making various adjustments to a worker's benefits, none of them supports increasing a worker's time-loss compensation rate based on a change to the average monthly wage.

Accepting Crabb's arguments would lead to RCW 51.32.075 having an unlikely, absurd, and strained result that could not be plausibly ascribed to the legislature. Under Crabb's view, workers who were already at the time-loss compensation maximum as of June 30, 2011, were entitled to have their benefits increased effective July 1, 2011, by an amount that is identical to what they would have received had they

received a COLA, while workers who were receiving much lower amounts of benefits as of June 30, 2011, would not be entitled to any increase in their benefits whatsoever as of July 1, 2011. Crabb fails to articulate any reason why the legislature would have intended to achieve that anomalous result, and no such reason is apparent to the Department.

As Crabb sought relief that is contrary to the plain language of RCW 51.32.075, and as the statute Crabb relies upon does not support his argument, the superior court erred when it reversed the decision of the Department, and this Court should reverse the superior court's decision and reinstate that of the Department.

VI. STANDARD OF REVIEW

In a workers' compensation matter involving an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). On review of a summary judgment order, the appellate court's inquiry is the same as the superior courts. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." CR 56(c). In this case, the material facts were stipulated to, and the only issue raised by this appeal is whether the Department or Crabb is entitled to prevail as a matter of law. *See* BR 54-55. This, like any other question of law, is reviewed de novo. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

The issues in this case turn in significant part on the proper construction of RCW 51.32.075 and RCW 51.32.090. Statutory construction is a question of law, reviewed de novo. *State v. Ashby*, 141 Wn. App. 549, 170 P.3d 596 (2007). However, Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

The provisions of Washington's Industrial Insurance Act are "liberally construed" to favor injured workers. RCW 51.12.010; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). This rule of construction, however, does not authorize an unrealistic interpretation that produces strained or absurd results that defeat the plain meaning and intent of the legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Cmpn. Comm. v. Pub. Disclosure Comm'n of State of Wash.*, 133 Wn.2d 229,

243, 943 P.2d 1358 (1997). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Cmpn. Comm.*, 133 Wn.2d at 243.

VII. ARGUMENT

A. The Superior Court Erred When It Concluded That The Department Should Have Increased Crabb's Benefits Effective July 1, 2011, Because No Statute Authorizes Such An Increase

The plain language of RCW 51.32.075, as amended, shows that Crabb is not entitled to an increase to his time-loss compensation benefits effective July 1, 2011. The statute that Crabb relies upon in claiming that he is entitled to this relief (and that the superior court relied upon in ruling in Crabb's favor), RCW 51.32.090(9), does not allow for annual adjustments to a worker's time-loss compensation benefits, but, rather, merely places a cap on those benefits. Furthermore, Crabb's proposed interpretation of RCW 51.32.090(9) and RCW 51.32.075 leads to absurd results that the Legislature could not have intended.

1. A Worker's Initial Time-Loss Benefit Rate Is Set At A Figure Based On A Percentage Of The Worker's Monthly Wages At The Time Of Injury, Subject To A "Cap" Based On The Average Monthly Wage In The State

Before turning to the specific question raised by this appeal, it is helpful to consider the statutes that govern the initial calculation of time-loss compensation benefits and the statutes that govern making

adjustments to those benefits. Time-loss compensation is a benefit that is provided to workers who are temporarily unable to work as a result of their industrial injuries. *E.g.*, *Hartje*, 148 Wn. App. at 463.

Several statutes, including RCW 51.32.090, RCW 51.32.060, RCW 51.08.178, and RCW 51.32.075, govern the determination of a worker's time-loss compensation benefit amount. As a starting point, a worker's initial time-loss compensation rate must be established. RCW 51.32.090 cross-references another statute for this calculation, stating that the "schedule of payments" within RCW 51.32.060 also applies to the basic calculation of the worker's time-loss compensation benefits.[6] Under RCW 51.32.060, a worker's benefits are calculated based on a percentage of the worker's monthly wages at the time of his or her injury, with the percentage depending on the worker's marital status and number of dependents.[7] A worker, like Crabb, who was single with no dependents at the time of the injury, would ordinarily receive wage replacement benefits at an initial amount equal to 60 percent of his or her wages at the time of injury. RCW 51.32.060; RCW 51.32.090.

However, RCW 51.32.090(9) imposes a cap on the time-loss benefit amount, and provides that, for injuries occurring after 1996, "in no

[6] RCW 51.32.060 governs total and permanent disability benefits, which are also referred to as "pension" benefits. *E.g.*, *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

[7] The amount of wages is determined by RCW 51.08.178.

event" shall a worker's time-loss benefits exceed 120 percent of the average monthly wage in the state, RCW 51.08.018. RCW 51.08.018, in turn, provides that the "average monthly wage" is one-twelfth of the average annual wage as defined by RCW 50.04.355. The parties stipulated that, as of July 1, 2010, the maximum time-loss compensation rate was $4,715.30, and that, as of July 1, 2011, the maximum time-loss compensation rate was $4,816.20. BR 55.

Therefore, when calculating a worker's' initial time-loss compensation rate (which would be effective as of the date of the worker's injury), one must first determine the worker's wages, marital status, and number of dependents. Next, the worker's monthly wage figure is multiplied by the appropriate percentage. If that figure is above the time-loss compensation cap, then the worker's benefits are paid at the cap.

Here, the parties stipulated both that the Department had determined that Crabb's monthly wages at the time of his injury were $8,917.92 and that his monthly wages at the time of injury were, in fact, $8,917.92. BR 54-55. Sixty percent of $8,917.92 is $5,350.75, which is a figure that exceeds the time-loss cap that was in place from the date that Crabb was injured through July 1, 2011. BR 55. This means that, at all times relevant to this appeal, Crabb could not receive 60 percent of his wages at the time of injury in time-loss compensation, since this would

exceed the statutory cap on those benefits. CP 54-55; RCW 51.32.090(9). Thus, in Crabb's case, his time-loss benefit rate, as of the date of his injury, December 2007, would properly be set at 120 percent of the average monthly wage as of July 1, 2007, or $4,258.40. BR 55.

2. Once A Worker's Initial Time-Loss Compensation Rate Is Established, The Worker Will, Generally, Receive A COLA Effective July 1 Of Each Year, Based On The Change To The Average Monthly Wage In The State

In general, once a worker's time-loss compensation rate is established through a final order that provides the factual information needed to establish that rate, the worker continues receiving benefits at amounts consistent with that rate unless a statute provides a basis for making an adjustment to the rate. *See Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 394-97, 132 P.3d 148 (2006) (concluding that a worker could not receive increase to her time-loss rate because the time-loss rate was determined through a final and unappealed order that established the factual basis for the time-loss calculation, and because no statute supported making an increase to the time-loss rate); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 834-37, 125 P.3d 202 (2005) (concluding same).

There are several statutes that could, potentially, support making an adjustment to a worker's initial time-loss compensation rate, but the

only one that is relevant here is RCW 51.32.075. RCW 51.32.075 provides for yearly adjustments to worker's time-loss compensation benefits based on changes to the average monthly wage in the state. Under that statute, workers whose right to compensation was established on or after 1971 normally receive adjustments to their time-loss compensation rates effective July 1 of each year following the year of their injury, with the exception of July 1, 2011. RCW 51.32.075. Where an adjustment is made, it is made by multiplying the worker's current entitlement amount by a fraction, the denominator of which is the average monthly wage in the state for the fiscal year for which the worker's right to compensation was established, while the numerator is the average monthly wage in the state for the fiscal year for which the adjustment is being made. RCW 51.32.075. As noted, these adjustments are generally referred to as COLAs. *See Messer*, 118 Wn. App. at 641-42

Workers who are subject to the time-loss benefit cap, like all other workers, are generally eligible for yearly COLAs. *See* RCW 51.32.075 (providing for adjustments to time-loss benefits and not providing any exception for workers who are at the maximum time-loss compensation rate). If a worker who is subject to the time-loss compensation cap receives a COLA, this effectively increases the worker's time-loss rate to

an amount equal to the cap that applies as of that fiscal year. *See* RCW 51.32.075; RCW 51.32.090(9).

That granting a worker who was already at the time-loss compensation maximum a COLA (under RCW 51.32.075) will result in the worker's benefit being increased from the prior time-loss compensation maximum to the new time-loss compensation maximum can be seen from the following mathematical equations. For any injured worker, whether the worker is at or above the time-loss cap or not, a COLA increases a worker's benefits effective July 1 of each year as follows:

$$\text{current benefit amount} \times \frac{\text{current average monthly wage}}{\text{initial average monthly wage}}$$

A worker who is at the time-loss benefit cap can only receive a time-loss benefit equal to 120 percent of the current, applicable, fiscal year. In other words, the worker's benefits are equal to:

1.2 x current average monthly wage

Therefore, a worker who is at the time-loss benefit cap, and who receives a COLA, would, effective July 1 of the next year, receive a COLA equal to:

$$1.2 \times \text{initial average monthly wage} \times \frac{\text{current average monthly wage}}{\text{initial average monthly wage}}$$

The above equation has the same value as the following:

1.2 x the current average monthly wage

Thus, as noted, if a worker is currently at the time-loss compensation cap, and the worker's time-loss rate is adjusted in accordance with the formula contained in RCW 51.32.075, the worker's new time-loss rate will end up being a sum that is equivalent to the cap that applies to that fiscal year.

For example, the maximum time-loss compensation rate effective July 1, 2009 was $4,625.60. BR 55. The maximum time-loss compensation rate effective July 1, 2010, was $4,715.30. BR 55. Thus, on July 1, 2010, Crabb, like all other injured workers whose right to compensation was established after 1971, was eligible for a COLA under RCW 51.32.075. Since the proper time-loss compensation rate for Crabb, as of July 1, 2009, was $4,625.60 (the maximum in effect as of July 1, 2009) Crabb's new time-loss rate effective July 1, 2010, after receiving a COLA under RCW 51.32.075, was $4,715.30 (the maximum in effect as of July 1, 2010). BR 55.

3. The Legislature Froze The COLA Statute Effective July 1, 2011, Which Precludes Crabb From Receiving A COLA For That Year

In 2011, the legislature passed EHB 2123, which amended RCW 51.32.075 to provide that a worker whose right to compensation was

established after 1971, but before July 1, 2011, shall not receive a COLA for July 1, 2011.[8] Laws of 2011, 1st Spec. Sess., ch. 37 § 202. Crabb's right to compensation was established after 1971 and before July 1, 2011. *See* BR 54. Therefore, Crabb could not receive a COLA effective July 1, 2011, and cannot receive another COLA until July 1, 2012.[9]

Since Crabb could not receive a COLA effective July 1, 2011, the proper rate for his benefits for the period from July 1, 2011, through June 30, 2012, remained the same as what it had been from July 1, 2010, through June 30, 2011: a monthly rate of $4,715.30. RCW 51.32.075.

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[8] Those injured on or after July 1, 2011, do not receive a COLA for the first July 1 that occurs after their industrial injuries, and receive their first COLA on the second July 1 that occurs after their injuries.

[9] In general, an amendment to a workers' compensation statute is presumed to apply prospectively only, unless the legislature has indicated that it intends for the statute to apply retroactively. *See Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 921, 91 P.3d 903 (2004) (stating that, absent clear evidence of a contrary legislative intent, an amendment to a statute is presumed to apply prospectively). Here, however, the legislature has plainly indicated that the amendment to RCW 51.32.075 was intended to apply retroactively, and, therefore, it is properly given retroactive effect. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 473, 843 P.2d 1056 (1993) (concluding that presumption that statute does not have retroactive effect should not be followed when it is clear that the legislature did intend for a statute to be given such effect). On its face, RCW 51.32.075, as amended, states that workers whose right to compensation was established after July 1, 1971, but before July 1, 2011, shall receive a COLA effective each July 1 except for July 1, 2011. By definition, this means that the denial of a COLA for July 1, 2011, applies to workers whose right to compensation was established before the amendment itself was passed (in 2011). RCW 51.32.075. In any event, Crabb has never contended that the amendment to RCW 51.32.075 should not be applied retroactively, and the superior court did not grant him relief on that basis. *See* CP 7-18.

4. Although The Legislature Did Not Amend RCW 51.32.090(9), Crabb Could Not Receive An Adjustment To His Time-Loss Compensation Rate Under RCW 51.32.090(9), Because That Statute Does Not Provide Authority To Increase A Worker's Benefits

The plain language of RCW 51.32.090(9) does not provide a basis for increasing the benefits of any injured worker on any given year. RCW 51.32.090(9)(a) provides that:

> (9) In no event shall the monthly payments provided in this section:
>
> > (a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:
> >
> > | AFTER | PERCENTAGE |
> > |---|---|
> > | June 30, 1993 | 105% |
> > | June 30, 1994 | 110% |
> > | June 30, 1995 | 115% |
> > | June 30, 1996 | 120% |

Thus, RCW 51.32.090(9)(a), by its terms, prevents the Department from paying any amount of time loss that is in excess of the applicable time-loss cap. It does not, however, either state or imply that a worker's time-loss benefits shall be increased in the event that the cap becomes higher in a later year than it was previously. RCW 51.32.090(9).

The Department's legal authority to increase an injured worker's wages based on changes to the average monthly wage can be found only in RCW 51.32.075. Since that statute, as amended, plainly does not allow

for COLAs for July 1, 2011, Crabb's time-loss rate could not be increased effective July 1, 2011, based on the change to the average monthly wage that occurred on that date. *See* RCW 51.32.075.

5. No Statute Other Than RCW 51.32.075 Supports Increasing A Worker's Time-Loss Compensation Based On A Change To The Average Monthly Wage

Although there are statutes other than RCW 51.32.075 that allow for various adjustments to be made to a worker's time-loss compensation rate, none of them supports increasing Crabb's time-loss compensation rate based on a change to the average monthly wage in the state. *See* RCW 51.28.040 (stating that, upon application, a worker's benefits may be adjusted if this is warranted "by change of circumstances"); RCW 51.32.025 (stating that payments of benefits, including time-loss compensation, that are made "to or on behalf of" the children of an injured worker "shall terminate" when child becomes 18, unless exception applies); RCW 51.32.072 (providing for adjustments to benefits provided to workers who were placed on the pension rolls prior to July 1, 1971); RCW 51.32.220 (providing for reduction in time-loss compensation and total permanent disability payments if worker receives payments under "federal old age, survivors, and disability insurance act").

In particular, while a worker's time-loss benefit rate can be adjusted under RCW 51.28.040 if the worker experienced a change to his

or her personal circumstances that occurred after the wage order had become final, that statute does not apply here, because Crabb experienced no change in his circumstances that was personal to him. *See Hyatt*, 132 Wn. App. at 396-97; *Lynn*, 130 Wn. App. at 834-36. As *Lynn* and *Hyatt* show, a change only qualifies as a change of circumstances under RCW 51.28.040, if it is a factual change that is personal to the injured worker. *See Hyatt*, 132 Wn. App. at 396-97; *Lynn*, 130 Wn. App. at 834-36. Crabb has never contended that any change in his factual circumstances that is personal to him occurred. *See* CP 7-18 (contending that he is entitled to have his time-loss compensation increased effective July 1, 2011, but not mentioning RCW 51.28.040). In any event, such a claim would be insupportable, as a change in the average monthly wage in the state of Washington is plainly not a factual change that is personal to Crabb.

The plain language of RCW 51.32.090(9) does not authorize the Department to increase a worker's time-loss benefits. Furthermore, when RCW 51.32.090(9) is read in the conjunction with the related statutes, it becomes even more apparent that it does not authorize the Department to increase a worker's time-loss compensation rate. When deciding what effect should be given to a statute under a "plain language" analysis, a Court should not analyze the language of a statute in isolation, but

construe it in conjunction with other, related provisions. *State v. Coombs*, 149 Wn. App. 556, 204 P.3d 264 (2009) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Furthermore, related statutes should be construed in ways that avoids conflict between those provisions and that give some legal effect to each of them. *Gorman v. Garlock*, 155 Wn.2d 198, 210-11, 118 P.3d 311 (2005).

Here, RCW 51.32.090(9) and RCW 51.32.075 deal with a common, related subject: the effect that the average monthly wage in the state of Washington has on the calculation of any given injured worker's time-loss compensation benefits. Under the Department's interpretation of the two statutes, RCW 51.32.090(9) places a cap on an injured worker's time-loss benefits based on a percentage of the average monthly wage in the state, while RCW 51.32.075 allows a worker—whether he or she is at the "cap" or not—to receive an adjustment to the time-loss benefit rate based on a subsequent change to the average monthly wage in the state (with the exception of July 1, 2011). The Department's interpretation is consistent with the plain language of both statutes, and it gives full legal effect to each of them.

6. Accepting Crabb's Argument Would Lead To Unlikely, Absurd, And Strained Results

Finally, this Court should not accept Crabb's interpretation of the interplay between RCW 51.32.075 and RCW 51.32.090 because accepting it would, as the Board suggested, lead to strained, unlikely, or unrealistic results that the legislature could not have intended when it amended RCW 51.32.075. *See* BR 16. The courts do not adopt interpretations of statutes that result in strained, unlikely, or unrealistic results. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993).

Under Crabb's interpretation of RCW 51.32.075 and RCW 51.32.090, an injured worker receiving a comparatively modest time-loss benefit rate as of June 30, 2011, would not be entitled to any adjustment to his or her time-loss rate as of July 1, 2011, but a worker like Crabb, who was receiving the highest benefit rate that is possible under the statute as of June 30, 2011, would be entitled to an increase to that time-loss benefit rate as of July 1, 2011.[10] Crabb offers no explanation as to why the legislature would have intended to increase the benefit rates of workers who were receiving the maximum benefit amount that is available under the statute, while declining to grant a comparable adjustment to

[10] For example, suppose an injured worker was receiving $800 a month in time loss as of June 30, 2011. (Crabb was receiving $4,715.30 a month as of that time.) Under Crabb's interpretation of the two statutes, this hypothetical injured worker would continue receiving $800 a month in time loss effective July 1, 2011, while Crabb's time-loss benefits would be increased from $4,715.30 a month to $4,816.20.

workers receiving comparatively modest benefit amounts. Furthermore, no reasonable explanation for such a discrepancy is apparent to the Department. Since accepting Crabb's interpretation of the statute would lead to strained, unlikely, and unrealistic results, the superior court erred when it accepted Crabb's argument, and this Court should not follow its lead. *See Bour*, 122 Wn.2d at 835.

B. Crabb's Contention, And The Superior Court's Decision, Is Not Supported By Either The Plain Language Of The Relevant Statutes Nor By The Doctrine Of Liberal Construction

At superior court, Crabb offered two primary arguments in support of his interpretation of the statute. CP 7-18. First, Crabb argued that the "plain language" of EHB 2123 shows it did not amend RCW 51.32.090(9) nor suspend its provisions, and that, since he is seeking an adjustment to his time-loss benefits rate under RCW 51.32.090(9), it follows that the amendment is irrelevant to whether his time-loss benefits can be increased effective July 1, 2011. CP 7-13. Second, Crabb argued that his interpretation should be accepted under the "liberal construction" doctrine. CP 13-14. The superior court concluded that Crabb was entitled to the relief he seeks, and it expressly based its decision on the liberal construction standard. CP 170-71. It erred in doing so, as neither of Crabb's arguments has merit.

First, Crabb's argument (at CP 13) that the "plain language" of the relevant statutes supports him ignores that RCW 51.32.090(9) merely places a cap on time-loss benefits but does not provide the Department with a legal basis to increase a given worker's time-loss rates effective July 1 of a given year based on a change to the average monthly wage in the state. Rather, it is RCW 51.32.075 that provides the Department with the legal authority to do so. Since EHB 2123 did unambiguously amend RCW 51.32.075 by precluding the Department from granting a COLA for July 1, 2011, the amendment precludes Crabb from receiving the relief he seeks.

Second, the liberal construction standard also fails to support Crabb, because the liberal construction doctrine cannot be used to overcome the plain language of the statute. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Here, as noted, the plain language of RCW 51.32.075 and RCW 51.32.090 do not support Crabb.

Moreover, Crabb's proposed interpretation of the two statutes is strained, unreasonable, and would lead to absurd results that the legislature could not have intended when it enacted EHB 2123. The liberal construction standard does not trump the other rules of statutory

construction, nor does it support a court adopted a strained or unrealistic interpretation of a statute. *See Senate Republican Cmpn. Comm.*, 133 Wn.2d at 241-43. As Crabb's proposed interpretation is strained and unrealistic, the liberal construction doctrine does not aid him. *Id.*

C. Because Crabb Should Not Have Prevailed At Superior Court, He Should Not Have Received An Award Of Attorney's Fees And Costs

Upon receiving judgment in his favor, Crabb sought, and was granted, an award of his reasonable attorney's fees and expenses under RCW 51.52.130. CP 173. It is true that RCW 51.52.130 authorizes an award of reasonable attorney's fees and expenses to an injured worker who appeals a decision of the Board to a superior court, if the decision of the Board is reversed and the accident funds managed by the Department are thereby affected. However, the superior court erred in granting summary judgment to Crabb, and its decision to do so should be reversed, for the reasons explained above. Therefore, this Court should reverse the superior court's award of attorney's fees and litigation expenses as well. *See* RCW 51.52.130.

D. Because Crabb Should Not Have Prevailed At Superior Court Or Obtained Additional Time-Loss Compensation On Appeal, The Board Should Not Be Directed To Calculate Interest On An Award Of Additional Time-Loss Compensation

Finally, the superior court, upon granting judgment to Crabb, directed the Board to calculate the interest to which Crabb was due for the award of additional time-loss compensation it granted him. CP 173. RCW 51.52.135(2) provides that a worker who prevails on an appeal to the Board or to superior court "in a claim involving time loss compensation," the worker shall receive an award of interest on the "unpaid amount of the award."[11]

However, for the reasons explained above, the superior court erred when it granted Crabb's motion for summary judgment and when it concluded that Crabb was entitled to receive an additional award of time-loss compensation since he should have received time-loss compensation at a higher rate effective July 1, 2011. Therefore, the superior court's award of interest should be reversed as well. *See* RCW 51.52.135.

[11] RCW 51.52.135(3) provides that the award of interest may be calculated by either the Board or a court.

VIII. CONCLUSION

For the reasons discussed above, the Department asks that this Court reverse the decision of the superior court, and affirm the decision of the Department.

RESPECTFULLY SUBMITTED this 26 day of February, 2013.

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APPENDIX A

C

Effective: June 15, 2011

West's Revised Code of Washington Annotated Currentness
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)
→→ 51.32.075. Adjustments in compensation or death benefits

The compensation or death benefits payable pursuant to the provisions of this chapter for temporary total disability, permanent total disability, or death arising out of injuries or occupational diseases shall be adjusted as follows:

(1) On July 1, 1982, there shall be an adjustment for those whose right to compensation was established on or after July 1, 1971, and before July 1, 1982. The adjustment shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1, 1982.

(2) In addition to the adjustment established by subsection (1) of this section, there shall be another adjustment on July 1, 1983, for those whose right to compensation was established on or after July 1, 1971, and before July 1983, which shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1, 1983.

(3) In addition to the adjustments under subsections (1) and (2) of this section, further adjustments shall be made beginning on July 1, 1984, and on each July 1st thereafter through July 1, 2010, for those whose right to compensation was established on or after July 1, 1971. The adjustment shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1st of the year in which the adjustment is being made. The department or self-insurer shall adjust the resulting compensation rate to the nearest whole cent, not to exceed the average monthly wage in the state as computed under RCW 51.08.018.

(4) In addition to the adjustments under subsections (1), (2), and (3) of this section, further adjustments shall be made beginning July 1, 2012, and on each July 1st thereafter for those whose right to compensation was estab-

lished on or after July 1, 1971. The adjustment shall be the percentage change in the average monthly wage in the state under RCW 51.08.018 for the preceding calendar year, rounded to the nearest whole cent. For claims whose right to compensation was established on or after July 1, 2011, no adjustment shall be made under this subsection until the second July 1st following the date of injury or occupational disease manifestation.

CREDIT(S)

[2011 1st sp.s. c 37 § 202, eff. June 15, 2011; 1988 c 161 § 7; 1983 c 203 § 1; 1982 1st ex.s. c 20 § 1; 1979 c 108 § 1; 1977 ex.s. c 202 § 2; 1975 1st ex.s. c 286 § 2.]

HISTORICAL AND STATUTORY NOTES

Finding--Effective date--2011 1st sp.s. c 37: See notes following RCW 51.32.090.

Effective date--1982 1st ex.s. c 20: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1982." [1982 1st ex.s. c 20 § 4.]

Laws 1977, Ex.Sess., ch. 202, § 2, in subsec. (1), deleted reference to subsequent adjustments; and added subsec. (2) pertaining to those whose compensation rights were established on or after July 1, 1975, and before July 1, 1977.

Laws 1979, ch. 108, § 1, changed the effective dates for adjustments to compensation.

Laws 1982, 1st Ex.Sess., ch. 20, § 1, changed the effective dates and methods of computation.

Laws 1983, ch. 203, § 1, added subsec. (3).

Laws 1988, ch. 161, § 7, in subsec. (3), added the third sentence.

2011 Legislation

Laws 2011, 1st sp.s. ch. 37, § 202, in subsec. (3), inserted "through July 1, 2010,"; and added subsec. (4).

LIBRARY REFERENCES

Workers' Compensation 835.5, 911.
Westlaw Topic No. 413.
C.J.S. Workmen's Compensation §§ 521, 526, 528 to 529.

NOTES OF DECISIONS

1. Crime victims' compensation

Pursuant to § 7.68.070, the cost of living increases authorized in this section for recipients of workers' compensation are also applicable to eligible crime victims under the state Crime Victims' Compensation Act, § 7.68.010 et seq. Op.Atty.Gen. 1983, No. 22.

2. Cost-of-living increases

Annual cost of living adjustment (COLA) on workers' compensation claimant's permanent total disability pension was required to be calculated after the reduction in the amount of the pension by a lump sum claimant previously received for a permanent partial disability. Rhoades v. Department of Labor and Industries (2008) 143 Wash.App. 832, 181 P.3d 843. Workers' Compensation ⚿ 835.5; Workers' Compensation ⚿ 934.4

Under this section governing cost-of-living adjustments to monthly disability pensions for permanently and totally disabled workers, claimants were entitled to periodic cost-of-living adjustments computed on amount owed to claimants after reduction for prior receipt of any lump-sum permanent partial disability awards. Department of Labor and Industries of State of Wash. v. Auman (1988) 110 Wash.2d 917, 756 P.2d 1311. Workers' Compensation ⚿ 835.5; Workers' Compensation ⚿ 934.4

West's RCWA 51.32.075, WA ST 51.32.075

Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

END OF DOCUMENT

APPENDIX B

Effective: June 15, 2011

West's Revised Code of Washington Annotated Currentness
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

→→ 51.32.090. Temporary total disability--Partial restoration of earning power--Return to available work--When employer continues wages--Limitations--Finding--Rules

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five per- cent.

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage employers at the time of injury to provide light duty or transitional

work for their workers, wage subsidies and other incentives are made available to employers insured with the depart- ment.

(b) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. 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. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(c) To further encourage employers to maintain the employment of their injured workers, an employer insured with the department and that offers work to a worker pursuant to this subsection (4) shall be eligible for reimbursement of the injured worker's wages for light duty or transitional work equal to fifty percent of the basic, gross wages paid for that work, for a maximum of sixty-six work days within a consecutive twenty-four month period. In no event may the wage subsidies paid to an employer on a claim exceed ten thousand dollars. Wage subsidies shall be calculated using the worker's basic hourly wages or basic salary, and no subsidy shall be paid for any other form of compensation or payment to the worker such as tips, commissions, bonuses, board, housing, fuel, health care, dental care, vision care, per diem, reimbursements for work-related expenses, or any other payments. An employer may not, under any circumstances, receive a wage subsidy for a day in which the worker did not actually perform any work, regardless of whether or not the employer paid the worker wages for that day.

(d) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with training or instruction to be qualified to perform the offered work, the employer shall be eligible for a reimbursement from the department for any tuition, books, fees, and materials required for that training or instruction, up to a maximum of one thousand dollars. Reimbursing an employer for the costs of such training or instruction does not constitute a determination by the department that the worker is eligible for vocational services authorized by RCW 51.32.095 and 51.32.099.

(e) If an employer insured with the department offers a worker work pursuant to this subsection (4), and the employer provides the worker with clothing that is necessary to allow the worker to perform the offered work, the employer shall be eligible for reimbursement for such clothing from the department, up to a maximum of four hundred dollars. However, an employer shall not receive reimbursement for any clothing it provided to the worker that it normally provides to its workers. The clothing purchased for the worker shall become the worker's property once the work comes to an end.

(f) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with tools or equipment to perform the offered work, the employer shall be eligible for a reimbursement from the department for such tools and equipment and related costs as determined by department rule, up to a maximum of two thousand five hundred dollars. An employer shall not be reimbursed for any tools or equipment purchased prior to offering the work to the worker pursuant to this subsection (4). An employer shall not be reimbursed for any tools or equipment that it normally provides to its workers. The tools and equipment shall be the property of the employer.

(g) An employer may offer work to a worker pursuant to this subsection (4) more than once, but in no event may the employer receive wage subsidies for more than sixty-six days of work in a consecutive twenty-four month period under one claim. An employer may continue to offer work pursuant to this subsection (4) after the worker has performed sixty-six days of work, but the employer shall not be eligible to receive wage subsidies for such work.

(h) An employer shall not receive any wage subsidies or reimbursement of any expenses pursuant to this subsection (4) unless the employer has completed and submitted the reimbursement request on forms developed by the department, along with all related information required by department rules. No wage subsidy or reimbursement shall be paid to an employer who fails to submit a form for such payment within one year of the date the work was performed. In no event shall an employer receive wage subsidy payments or reimbursements of any expenses pursuant to this subsection (4) unless the worker's physician or licensed advanced registered nurse practitioner has restricted him or her from performing his or her usual work and the worker's physician or licensed advanced registered nurse practitioner has released him or her to perform the work offered.

(i) Payments made under (b) through (g) of this subsection are subject to penalties under RCW 51.32.240(5) in cases where the funds were obtained through willful misrepresentation.

(j) Once the worker returns to work under the terms of this subsection (4), he or 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. An employer who directs a claimant to perform work other than that approved by the attending physician and without the approval of the worker's physician or licensed advanced registered nurse practitioner shall not receive any wage subsidy or other reimbursements for such work.

(k) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(l) In the event of any dispute as to the validity of the work offered or as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination pursuant to an order that contains the notice required by RCW 51.52.060 and that is subject to appeal subject to RCW 51.52.050.

(5) An employer's experience rating shall not be affected by the employer's request for or receipt of wage subsidies.

(6) The department shall create a Washington stay-at-work account which shall be funded by assessments of employers insured through the state fund for the costs of the payments authorized by subsection (4) of this section and for the cost of creating a reserve for anticipated liabilities. Employers may collect up to one-half the fund assessment from workers.

(7) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(8) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(9) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (9)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08. 178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(10) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(11) The department shall adopt rules as necessary to implement this section.

CREDIT(S)

[2011 1st sp.s. c 37 § 101, eff. June 15, 2011. Prior: 2007 c 284 § 3, eff. July 1, 2008; 2007 c 190 § 1, eff. July 22, 2007; 2004 c 65 § 9; prior: 1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4; prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

HISTORICAL AND STATUTORY NOTES

Finding--2011 1st sp.s. c 37: "The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. The state must ensure that the workers' compensation system remains financially healthy in order to provide needed resources for injured workers. Further, the legislature recognizes that reducing the number and cost of long-term disability and pension claims, while strengthening safety programs; addressing workers' compensation system fraud by employers, workers, and providers; finding ways to improve claims management processes; studying occupational disease claims in the workers' compensation system; and establishing a fund for purposes of maintaining low, stable, and predictable premium rate increases are all key to ensuring productive worker outcomes and a financially sound system for Washington workers and employers." [2011 1st sp.s. c 37 § 1.]

Effective date--2011 1st sp.s. c 37: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [June 15, 2011]." [2011 1st sp.s. c 37 § 1101.]

Effective date--2007 c 284: See note following RCW 51.32.050.

Report to legislature-Effective date-Severability-2004 c 65: See notes following RCW 51.04.030.

Effective date--1993 c 521: See note following RCW 51.32.050.

Effective date--1993 c 299: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 299 § 2.]

Effective date--1993 c 271: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993]." [1993 c 271 § 2.]

Benefit increases--Application to certain retrospective rating agreements--Effective dates--1988 c 161: See notes following RCW 51.32.050.

Expiration date--1986 c 59 § 2; Effective dates--1986 c 59 §§ 3, 5: "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

Program and fiscal review--1985 c 462: See note following RCW 41.04.500.

Laws 1965, Ex.Sess., ch. 122, § 3, increased the amounts of compensation.

Laws 1971, Ex.Sess., ch. 289, § 11, in subsec. (5), substituted "fourteen" for "thirty"; added subsec. (7) pertaining to limits on monthly payments; and rewrote the first paragraph of subsec. (2), which prior thereto read:

"But if the injured workman has a wife or husband and has no child or, being a widow or widower, with one or more children, the compensation for the case during such period of time as the total temporary disability continues, shall be per month as follows, to wit: (a) Injured workman with wife or invalid husband and no child, two hundred fifteen dollars; injured workman with able-bodied husband, but no child, one hundred seventy-five dollars; injured workman with wife or invalid husband and one child, or being a widow or widower and having one child, two hundred fifty-two dollars; (b) injured workman with able-bodied husband and one child, two hundred twelve dollars; (c) injured workman with wife or invalid husband and two children, or being a widow or widower and having two children, two hundred eighty-three dollars; (d) injured workman with able-bodied husband and two children, two hundred forty-three dollars; and twenty-three dollars for each additional child, but the total monthly payments shall not exceed three hundred fifty-two dollars to an injured workman with a wife or invalid husband, or being a widow or widower, and having children, and shall not exceed three hundred twelve dollars to an injured workman with children and having an able-bodied husband and any deficit shall be deducted proportionately among the beneficiaries."

Laws 1972, Ex.Sess., ch. 43, § 22, deleted references to the accident fund.

Laws 1975, 1st Ex.Sess., ch. 235, § 1, inserted subsec. (4) and renumbered the subsequent subsections.

Laws 1977, Ex.Sess., ch. 350, § 47, throughout the section, made gender related changes.

Laws 1980, ch. 129, § 1, in subsec. (5), inserted the proviso.

Laws 1985, ch. 462, § 6, in subsec. (3), added a former last sentence to read: "However, during the period a worker returns to light-duty work, receives disability leave supplement payments pursuant to RCW 41.04.500 through 41.04.530, and is otherwise eligible for compensation under this section, the worker shall continue to receive such compensation at the rate provided under RCW 51.32.060 (1) through (13)."; and, in subsec. (6), added a former last sentence to read: "This limitation does not apply to disability leave supplement payments made pursuant to RCW 41.04.500 through 41.04.530."

Laws 1986, ch. 59, §§ 2 and 3, added subsec. (8).

Laws 1988, ch. 161, § 3, effective until June 30, 1989, updated statutory references; and, in subsec. (7), substituted 100% for 75%.

Laws 1988, ch. 161, § 4, effective June 30, 1989, updated statutory references; in subsecs. (3) and (6), deleted the last sentences added by Laws 1985, ch. 462, § 6; and, in subsec. (7), substituted 100% for 75%.

Laws 1993, ch. 271, § 1, in subsec. (3), designated subd. (a); then, in subd. (a), designated par. (i); then, in par. (i), at the beginning, added "For claims for injuries that occurred before May 7, 1993,"; inserted par. (ii); and designated subd. (b).

Laws 1993, ch. 299, § 1, divided subsec. (4) into subdivisions; then, in subd. (a), in the first sentence, substituted "Whenever the employer of injury requests" for "Whenever an employer requests"; substituted "a statement describing the work available with the employer of injury" for "a statement describing the available work"; divided and rewrote the former third sentence into the current third and fourth sentences; the former third sentence read: "If the worker is released by his or her physician for said work, and the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work, the worker's temporary total disability payments shall be resumed."; in subd. (b), following "of this subsection" inserted "(4)"; and inserted subd. (c).

Laws 1993, ch. 521, § 3, rewrote subsec. (7).

Laws 2004, ch. 65, § 9, in subsec. (4), inserted references to licensed advanced registered nurse practitioner.

Laws 2004, ch. 65, § 19, which provided for the repeal of "this act" on June 30, 2007, was itself repealed by Laws 2007, ch. 275, § 1, eff. May 2, 2007.

Laws 2007, ch. 190, § 1 inserted subsec. (3)(c); and, in subsec. (6), added the proviso.

Laws 2007, ch. 284, § 3 designated subsec. (7)(a) and inserted subsec. (7)(b).

2011 Legislation

Laws 2011, 1st sp.s. ch. 37, § 101, rewrote the section, which formerly read:

"(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

"(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

"(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

"(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

"(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

"(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five per- cent.

"(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

"(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. 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. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

"(b) Once the worker returns to work under the terms of this subsection (4), he or 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.

"(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker

was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

"(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

"(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

"(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

"(7) In no event shall the monthly payments provided in this section:

"(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

"	AFTER	PERCENTAGE
"	June 30, 1993	105%
"	June 30, 1994	110%
"	June 30, 1995	115%
"	June 30, 1996	120%

"(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

"(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section."

Source:

Laws 1911, ch. 74, § 5.

Laws 1913, ch. 148, § 1.

Laws 1917, ch. 28, § 1.

Laws 1919, ch. 131, § 4.

Laws 1923, ch. 136, § 2.

Laws 1927, ch. 310, § 4.

Laws 1929, ch. 132, § 2.

Laws 1941, ch. 209, § 1.

Laws 1947, ch. 246, § 1.

Laws 1949, ch. 219, § 1.

RRS § 7679.

Laws 1951, ch. 115, § 3.

Laws 1955, ch. 74, § 8.

Laws 1957, ch. 70, § 33.

CROSS REFERENCES

Disability leave supplement for law enforcement officers and firefighters, see § 41.04.500 et seq.
Inmates employed in correctional industries and honor camps, industrial insurance eligibility, see §§ 72.60.102, 72.64.065.
Jail inmates working in free venture industries, eligibility for benefits, see § 36.110.120.
Juvenile forest camp inmates, eligibility for industrial insurance benefits, see § 72.05.154.
Public assistance for child support, reimbursement of department of social and health services from payments made under this section, see § 74.20A.260.
Public assistance recipients, subrogation of department of social and health services to industrial insurance com-

pensation, see § 43.20B.720 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Amendments of 1961. 36 Wash.L.Rev. 333 (1961).

LIBRARY REFERENCES

Workers' Compensation 840.1 to 840.5, 880.1 to 880.19, 934.6.
Westlaw Topic No. 413.

RESEARCH REFERENCES

ALR Library

63 ALR 1241, Workmen's Compensation: Right to Compensation as Affected by Refusal to Accept, or Failure to Seek, Other Employment, or by Entering Into Business for Oneself After Injury.

98 ALR 729, What Amounts to Total Incapacity Within Workmen's Compensation Acts.

122 ALR 550, Res Judicata as Regards Decisions or Awards Under Workmen's Compensation Acts.

95 ALR 254, Survival of Right to Compensation Under Workmen's Compensation Act Upon the Death of the Person Entitled to the Award.

88 ALR 385, Workmen's Compensation: Right to Compensation for Temporary Total Disability in Addition to Compensation for Permanent Partial Disability.

82 ALR 889, Deduction for Lost Time in Computing Wages as Basis for Workmen's Compensation.

Treatises and Practice Aids

Modern Workers' Compensation § 202:3, Nondisabling Injuries.

Modern Workers' Compensation § 200:26, End of Disability.

Modern Workers' Compensation § 200:39, No-Fault Discharge or Layoff.

Modern Workers' Compensation § 200:41, Retirement.

Modern Workers' Compensation § 200:45, Waiting Period.

Modern Workers' Compensation § 321:10, Temporary Total Disability and Benefits.

Modern Workers' Compensation § 321:11, Temporary Partial Disability and Benefits.

Modern Workers' Compensation § 321:17, Rehabilitation Benefits.

NOTES OF DECISIONS

1. Construction and application

Statute allowing an employer may stop paying time-loss benefits only after the employee "begins the work with the employer of injury" did not allow employer to cease paying time-loss benefits to injured workers' compensation claimant, whom employer had terminated for cause due to accident which resulted in claimant's injuries and whom employer had no intention of re-hiring; statute required claimant to begin the modified work before time-loss benefits could cease but employer never rehired claimant, and employer had other remedies available to it to ensure that its payments reflected claimant's ability to work, including attempting to force claimant to find modified work elsewhere by requesting vocational rehabilitation services from the Department of Labor and Industries. Glacier Northwest, Inc. v. Walker (2009) 151 Wash.App. 389, 212 P.3d 587. Workers' Compensation ⚷ 2003

Board of Industrial Insurance Appeals (BIIA) did not go beyond parties' stipulation, on employee's appeal from order determining his time loss compensation rate, when it ruled that employer had no obligation to pay employee his full wages based on employer's initially marking "yes" on self-insurer accident report form (SIF-2) to question whether it would pay full wages, though parties had stipulated that issue was jurisdictional, i.e., whether BIIA had jurisdiction to determine merits of employee's claim for full wages, where parties also agreed that order on appeal was correct as to adjudication of benefits, and parties stipulated that they rested their cases. Rushing v. ALCOA, Inc. (2005) 125 Wash.App. 837, 105 P.3d 996. Workers' Compensation ⚷ 1814

Monthly compensation rate for injured worker's benefits was tied to statute in effect at date of the injury, rather than to amended statute removing statutory percentage-based caps for benefits; nothing in amended statute expressed legislative intent that amended statute apply retrospectively, and worker's right to compensation vested at time of injury. Cena v. Department of Labor and Industries (2004) 121 Wash.App. 915, 91 P.3d 903, review denied 153 Wash.2d 1015, 111 P.3d

1190. Workers' Compensation ⚿ 60

2. Construction with other laws

Under § 74.04.530 (recodified as § 43.20B.720), governing right of department of social and health services to be subrogated to right of injured worker to recover time loss payments from department of labor and industries, where public assistance has been furnished to one or more children to whom workman owes a duty of support, subrogation rights of department of social and health services with respect to time loss payments allocated to children is calculated with respect to children to whom public assistance has been furnished and to whom workman owes a duty of support, and is not limited only to children in workman's custody. Medrano v. Department of Social and Health Services (1980) 93 Wash.2d 75, 605 P.2d 783. Public Assistance⚿ 131

Neither § 41.26.130(4) nor anything contained in the state Industrial Insurance Act preclude a plan I LEOFF member who is on disability leave because of injuries sustained in the performance of some other employment from simultaneously receiving a disability leave allowance under § 41.26.120 and workers' compensation benefits in accordance with Title 51. Op.Atty.Gen.1980, L.O. No. 32.

3. Temporary total disability, generally

"Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful employment. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚿ 840.3; Workers' Compensation ⚿ 880.15

Injured employee who began receiving temporary total disability (TTD), returned to a modified job with his employer, and then was fired for disciplinary reasons, was not entitled to have his TTD payments resumed; TTD payments would have resumed pursuant to statute if the modified work had "come to an end" before injured employee had sufficiently recovered to resume his previous work, but in this case, the modified work remained available but for his disciplinary problems. O'Keefe v. State, Dept. of Labor & Industries (2005) 126 Wash.App. 760, 109 P.3d 484, review denied 156 Wash.2d 1003, 128 P.3d 1239. Workers' Compensation ⚿ 2003

"Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful employment and differs from permanent total disability only in duration of disability, and not in its character. Hubbard v. Department of Labor & Industries of State of Washington (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ⚿ 840.3; Workers' Compensation ⚿ 880.15

A claimant's right to temporary total disability benefits (TTD) terminates when the claimant's earning power, at any kind of work, is restored to that existing at the time of the occurrence of the injury, when the claimant's claim is closed, or when the claimant is able to earn a wage at any kind of reasonably continuous and generally available employment. Hubbard v. Department of Labor & Industries of State of Washington (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ⚿ 880.5

Temporary total disability compensates for lost income until extent of disability is fixed; once condition is fixed, per-

manent partial disability compensates workers' compensation claimant for future lost earning capacity measured by a percentage loss of bodily function. Davis v. Bendix Corp. (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation 870.2

Only difference between permanent total disability and temporary total disability is duration. Herr v. Department of Labor and Industries (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation 840.1

"Temporary total disability" is defined as condition temporarily incapacitating workers' compensation claimant from performing any work at any gainful occupation. Oien v. Department of Labor and Industries (1994) 74 Wash.App. 566, 874 P.2d 876, reconsideration denied, review denied 125 Wash.2d 1021, 890 P.2d 463. Workers' Compensation 880.15

Phrase "temporary total disability" means claimant is temporarily incapable of performing generally available work of any kind on a reasonably continuous basis. Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation 880.10

"Temporary total disability" terminates as soon as claimant's condition has become fixed and stable or as soon as claimant is able to perform any kind of work. Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation 870.4

Temporary total disability differs from permanent total disability only in duration of disability, and not in its character. Bonko v. Department of Labor and Industries (1970) 2 Wash.App. 22, 466 P.2d 526.

Claim for time loss for temporary total disability is inconsistent with claim for permanent partial disability award, for temporary total disability contemplates that eventually there will be either complete recovery or impaired bodily condition which is static, whereas permanent partial disability contemplates situation where condition has reached fixed state from which full recovery is not expected. Franks v. Department of Labor & Industries (1950) 35 Wash.2d 763, 215 P.2d 416. Workers' Compensation 840.3; Workers' Compensation 850.8

Evidence supported denial of employer's motion for judgment as matter of law regarding finding that workers' compensation claimant was totally and temporarily disabled after work injury, and thus, entitled to time loss compensation, in spite of evidence that claimant's inability to find light duty work was the result of a poor labor market; employer presented no evidence that it was the job market that prevented claimant from obtaining gainful employment, and expert testimony regarding whether claimant could engage in light duty work following her injury was conflicting. Simpson Inv. Co. v. Reams (2006) 132 Wash.App. 1040, 2006 WL 1075478, Unreported. Workers' Compensation 1688

4. Able to perform available work

Temporary disability classification contemplates that workers' compensation claimant will reach an eventual complete recovery or a static impaired condition; thus, temporary disability terminates as soon as claimant's condition stabilizes or as

soon as claimant can perform any sort of work. Davis v. Bendix Corp. (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation 870.4

Statute permitting employer to request that worker entitled to temporary total disability be certified by physician as able to perform available work other than his or her usual work, could be invoked by employer only if worker was first entitled to temporary total disability; employee did not thereby become disabled if section was invoked. Herr v. Department of Labor and Industries (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation 880.19

Ability to perform light or sedentary work of general nature precludes finding of total disability. Herr v. Department of Labor and Industries (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation 880.16

Evidence, including evaluation of treating physician, that claimant was capable of light clerical work was sufficient to establish that claimant's earning power had been restored and she was not "temporarily totally disabled" within meaning of statute; moreover, finding that she was in need of further medical treatment did not preclude finding that her earning power had been restored. Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation 1627.17(7)

5. Time loss compensation

Under industrial insurance statute, workers' compensation claimant with a temporary total disability was entitled to time loss compensation until her present earning power was restored to that existing at the time of the occurrence of the injury, not until the industrial injury had been restored to pre-injury status. Chunyk & Conley/Quad-C v. Bray (2010) 156 Wash.App. 246, 232 P.3d 564, as amended , review denied 169 Wash.2d 1031, 241 P.3d 786. Workers' Compensation 880.6

When an injured employee becomes able to work any job, temporary total disability benefits terminate and are replaced by reduced time-loss compensation. Glacier Northwest, Inc. v. Walker (2009) 151 Wash.App. 389, 212 P.3d 587. Workers' Compensation 880.10

Findings by Board of Industrial Insurance Appeals that workers' compensation claimant was permanently partially disabled, and thus capable of obtaining gainful employment, prior to the reopening of her claim, was res judicata as to her condition at that time, in subsequent proceedings to reopen her claim seeking time loss benefits for aggravation of her injury. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation 2001

A worker not actively engaged in the work force due to retirement lacks the requisite adverse economic impact, i.e., lost wages or income, to warrant the award of time loss benefits. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation 880.24

The ultimate goal of time loss compensation is to provide temporary financial support until the injured worker is able to return to work. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation

836

"Time loss" is workers' compensation parlance for temporary total disability compensation, a wage replacement benefit. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation 840.3; Workers' Compensation 850.8

Only time injured worker is entitled to time loss compensation is during a period worker is classified as temporarily totally disabled. Davis v. Bendix Corp. (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation 840.4; Workers' Compensation 850.9

Once workers' compensation claimant has been classified as permanently partially disabled, he or she is not entitled to time loss compensation unless claimant needs further treatment and is thus returned to temporary totally disabled status. Davis v. Bendix Corp. (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation 870.4

Evidence was sufficient to support finding that workers' compensation claimant was gainfully employed or capable of gainful employment, and thus was not entitled to time loss benefits; claimant regularly engaged in services for taxi service including dispatching, driving, and repairing cabs. Layrite Products Co. v. Degenstein (1994) 74 Wash.App. 881, 880 P.2d 535, review denied 125 Wash.2d 1011, 889 P.2d 499. Workers' Compensation 1627.17(3)

Time loss compensation resulting from compensable injury is that temporary compensation which workman is entitled to receive under this statute while totally incapacitated to perform work for his employer, and before his disability has been fixed or determined. Lightle v. Department of Labor and Industries (1966) 68 Wash.2d 507, 413 P.2d 814. Workers' Compensation 840.3; Workers' Compensation 850.8

Where status of injured workman was determined as of specified date to be that of permanent partial disability and he was awarded and accepted a lump sum payment pursuant to such determination, time-loss payments made to him while his status was that of temporary partial disability were properly terminated as of such date; since act contemplates two separate and distinct classifications, that is, temporary disability status, and permanent disability status, and payment of compensation in connection with temporary disability status would not be authorized and would be inconsistent with any simultaneous classification within permanent disability status and payment and acceptance of permanent disability award. Hunter v. Department of Labor & Industries (1953) 43 Wash.2d 696, 263 P.2d 586.

6. Voluntary retirement

Workers' compensation claimant voluntarily retired prior to the reopening of her claim based upon aggravation of her industrial injury, and thus claimant was not entitled to time loss compensation, since her injury did not cause her failure to return to work force; claimant had been found prior to reopening to be capable of obtaining gainful employment, and claimant made no showing that she had made a bona fide attempt to return to workforce. Energy Northwest v. Hartje (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation 1994

Under workers' compensation statute, temporary disability benefits are not available to voluntarily retired worker. Weyerhaeuser Co. v. Farr (1993) 70 Wash.App. 759, 855 P.2d 711, reconsideration denied, review denied 123 Wash.2d 1017, 871 P.2d 600. Workers' Compensation ⚿ 880.24

Fact that workers' compensation claimant's partial injury may have played indirect role in his decision to retire was irrelevant to legal question at issue, whether claimant's retirement constituted voluntary withdrawal from general work force, such that he was not entitled to permanent total disability benefits. Weyerhaeuser Co. v. Farr (1993) 70 Wash.App. 759, 855 P.2d 711, reconsideration denied, review denied 123 Wash.2d 1017, 871 P.2d 600. Workers' Compensation ⚿ 880.24

Voluntarily retired worker, collecting retirement benefits, could not simultaneously qualify for time loss payments for industrial injury sustained prior to retirement. Kaiser Aluminum & Chemical Corp. v. Overdorff (1990) 57 Wash.App. 291, 788 P.2d 8. Workers' Compensation ⚿ 880.24

7. Change of disability status

Once award is made to claimant and no appeal within time allowed is taken from order establishing extent of his disability, such determination becomes res judicata as to his condition on that date; and if disability established on that date is less than total, some aggravation must be shown to warrant subsequent determination of total disability. Dinnis v. Department of Labor and Industries (1965) 67 Wash.2d 654, 409 P.2d 477.

Where claimant presented claim for compensation for permanent partial disability and was awarded and accepted payments for permanent partial disability, and on appeal to superior court jury found that claimant was temporarily totally disabled and in need of further treatment, claimant could not be denied compensation for temporary total disability on ground that such award was inconsistent with his claim and acceptance of award for permanent partial disability. Otter v. Department of Labor and Industries (1941) 11 Wash.2d 51, 118 P.2d 413. Workers' Compensation ⚿ 1844

8. Amount of compensation

Workers' compensation claimant's loss of earning power was to be measured by comparing earning capacity during aggravation period with earning capacity at date of claim closure, rather than at time of original injury, for purposes of determining entitlement to loss of earning power benefits. Davis v. Bendix Corp. (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ⚿ 880.7

Section 51.32.090 is not intended to preclude the simultaneous receipt of "wages" and industrial insurance benefits in all cases; instead, it acts only to preclude the simultaneous receipt of wages and benefits to the extent that the combination of the two would exceed the employee's normal income from his or her employment. Op.Atty.Gen.1981, L.O. No. 17.

Provision of a school district collective bargaining agreement, which obligates the district to pay an absent employee the difference between any industrial insurance entitlement and the amount normally earned, the amount paid by the district being deducted from the employee's accumulated sick leave, is permissible if the collective bargaining agreement gives the employee the option of claiming and receiving accumulated sick leave benefits before claiming and receiving any in-

dustrial insurance payments. Op.Atty.Gen.1981, L.O. No. 17.

Effect of deduction of compensation from wages paid during disability. Op.Atty.Gen. 1931-32, p. 103.

Increased payment for temporary total disability. Op.Atty.Gen. 1911-1912 p. 176.

9. Loss of earning power benefits

Injured worker upon reopening of industrial insurance claim based upon objective worsening of prior injury is not entitled to loss of earning power (LEP) benefits if worker continued to be employed at same earning level throughout aggravation period; worker must make threshold showing that he or she suffered temporary total loss of wages and/or decrease in earning power proximately resulting from injury's aggravation. Hubbard v. Department of Labor & Industries of State of Washington (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ⚿ 2012

Upon termination of temporary total disability benefits, temporarily disabled claimant becomes eligible for reduced time loss compensation or loss of earning power (LEP) benefits. Hubbard v. Department of Labor & Industries of State of Washington (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ⚿ 860.1

Loss of earning power (LEP) benefits were intended to follow temporary total disability and to be continuous, but only until earning power is fully restored or, alternatively, claim is closed. Hubbard v. Department of Labor & Industries of State of Washington (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ⚿ 880.3

10. Decrease or elimination of payments

Letter from workers' compensation claimant's physician to employer stating that claimant should attempt light duty work on trial basis constituted release of claimant to perform screw sorter's job, which was flexible position designed for recuperating workers, and thus, time-loss compensation of claimant, who did not accept offered position, was properly terminated; if claimant had taken position and was unable to continue work, however, she would have been entitled to resumption of compensation. Bayliner Marine Corp. v. Perrigoue (1985) 40 Wash.App. 110, 697 P.2d 277. Workers' Compensation ⚿ 880.20(2)

Under subd.(3) of this statute directing reduction or elimination of time loss compensation when workman with temporary total disability has regained his earning ability, regained earning power of workman need not be at his former type of employment, but may be at any kind of work. Bonko v. Department of Labor and Industries (1970) 2 Wash.App. 22, 466 P.2d 526.

Under former law, providing that, in case of recovery and partial restoration of earning power by injured workman, payments should continue in proportion which new earning power should bear to old, remittitur on appeal and judgment therein, under decision quoting statute and directing insurance department to make such order for compensation as would reasonably cover difference in wage-earning power, meant no more than that award was to be in proportion which new earning power should bear to old. Parker v. Industrial Ins. Dept. (1919) 108 Wash. 235, 183 P. 82.

11. Three-day period

Significance of three-day period; authority of county to pay employees for first three days following injury while engaged in county work. Op.Atty.Gen. 1954 53-55 No. 287.

West's RCWA 51.32.090, WA ST 51.32.090

Current with all 2012 Legislation and Chapters 1, 2, and 3 from the 2013 Regular Session

END OF DOCUMENT

NO. 44343-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Appellant and this Declaration of Service to all parties on record as follows:

Via First Class U.S. Mail, Postage Prepaid, to:

David Lauman
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(Counsel for Respondent, Joseph C. Crabb)

DATED this 26 day of February, 2013 at Tumwater, WA.

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