

NO. 48477-3-II

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

JAMES L. MILLER,

Respondent,

v.

SHOPE CONCRETE PRODUCTS. CO.,

Defendant,

and

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant.

**REPLY BRIEF
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

RCW 51.08.178 provides that “the monthly wages the worker was receiving from all employment *at the time of injury* shall be the basis upon which compensation is computed” This unambiguously provides that the Department of Labor and Industries (Department) use the wages the worker received at the time of injury to calculate the wages, and it does not allow the Department to use anticipated wages. Because Miller’s employer did not pay health care benefits at the time of his injury and he did not receive health care benefits at that time, there is no amount of health care benefits to include in his wage calculation. To contest RCW 51.08.178, Miller does not point to any ambiguous language or offer a reasonable alternative reading of any specific language. The case law confirms that the Department does not use a worker’s anticipated, future wages to calculate the amount of the wages.

This Court should reverse the superior court’s decision directing the Department to calculate Miller’s wages at the time of injury based on hypothetical benefits and uphold the Department’s calculation of Miller’s wages.

II. ARGUMENT

A. **RCW 51.08.178 Unambiguously Directs the Department to Use the Wages Earned at the Time of Injury, Not the Worker's Anticipated Wages**

RCW 51.08.178 ties a worker's wage calculation to the wages the worker received "at the time of injury" and to the amount the employer paid for health care benefits at the time of that injury. RCW 51.08.178 does not allow for the use of anticipated, future wages in any situation. The statute's unambiguous language is fatal to Miller's argument that his wage calculation should include payments that his employer did not make at the time of injury. Resp't Br. at 1.

RCW 51.08.178 focuses exclusively on the wages actually received at the time of injury:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment *at the time of injury* shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned.

(Emphasis added). As Miller's benefits must be calculated based on the wages he "was receiving . . . at the time of injury," and as he was not receiving payments for health care benefits at the time of that injury, his wages are properly calculated at an amount that does not include any payments for health care benefits. This is because the employer did not pay for such benefits at the time of injury.

RCW 51.08.178 also focuses on the payments that were actually made at the time of the injury when it addresses the specific issue of health care benefits, stating:

The term “wages” shall include the reasonable value of board, housing, fuel, or other consideration of like nature *received* from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, *wages shall also include the employer’s payment or contributions, or appropriate portions thereof, for health care benefits* unless the employer continues ongoing and current payment or contributions for these benefits at the same level provided *at the time of injury*.

(Emphasis added). As this language indicates, the Legislature treats certain types of in-kind benefits, including health care benefits, as wages if the worker “received” the benefit from the employer at the time of injury. RCW 51.08.178(1). With regard to health care benefits in particular, the worker’s wage calculation includes the amount the employer paid for those benefits. *Id.* It follows that if the employer did not pay for health care benefits at the time of injury, then the Department cannot include any amount for those benefits in the wage calculation.

No one can reasonably read RCW 51.08.178 to allow for the Department to calculate wages using wages or benefits that the employer did not provide at the time of injury. A statute is ambiguous only if more than one reasonable interpretation of its language exists. *Dep’t of Labor &*

Indus. v. Slauch, 177 Wn. App. 439, 451-52, 312 P.3d 676 (2013). Miller alleges ambiguity in RCW 51.08.178 regarding whether the Department may consider anticipated health care benefits, yet he points to no language in RCW 51.08.178 supporting his interpretation. Resp't Br. at 7-10. Miller unreasonably interprets RCW 51.08.178 because he ignores the language that hinges the wage rate on wages received at the time of injury.

Indeed, Miller implicitly acknowledges that RCW 51.08.178's language does not support his contentions, asserting "a plain reading of the statute produces harsh results that are contrary to the policy of the Act." Resp't Br. at 8. Thus, Miller effectively concedes that he seeks a result not supported by the statute's plain language, arguing instead that the policy considerations surrounding this issue should overcome the statute's plain language. However, a court gives effect to a statute's plain meaning as an expression of the Legislature's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). Courts do not override the plain meaning of a statute based on policy considerations, as that is a legislative, not judicial, function. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012).

Miller's claim that a plain reading here would be at odds with the policies underlying the Industrial Insurance Act as a whole also fails.

Resp't Br. at 7-8 (arguing that the Department's plain language reading would "produce an unjust result that is contrary to the spirit of the Industrial Insurance Act."). While the Legislature intended for the Industrial Insurance Act to reduce the economic loss associated with workplace injuries (RCW 51.12.010), it does not follow that the Department should calculate a worker's benefits using anticipated wages. Furthermore, the Act is the product of a compromise: in return for swift and certain relief, a worker receives only the statutorily-defined benefits rather than the damages that would have been available under a tort action. *Meyer v. Burger King*, 144 Wn.2d 160, 164, 26 P.3d 925 (2001); RCW 51.04.010. Using the wages at injury does not conflict with the Act as a whole: on the contrary, the other provisions of the Act echo RCW 51.08.178 in tying a worker's benefits to the wages the worker received at the time of injury rather than the worker's anticipated future wages. See RCW 51.32.050 (tying the calculation of death benefits to the worker's wages at the time of injury); RCW 51.32.060 (tying the calculation of permanent total disability benefits to the worker's wages at the time of injury); RCW 51.32.090 (tying the calculation of temporary total disability benefits to the calculation of permanent total disability benefits, which are tied to the worker's wages at the time of injury).

RCW 51.08.178 unambiguously provides that the Department calculates a worker's wages using the wages received at the time of injury. As Miller received no payments for health care benefits at the time of injury, the Department cannot calculate his wages as if he received benefits that he did not actually receive.

B. *Cockle* and *Granger* Support the Department, Not Miller

Under RCW 51.08.178, a worker's wages include health care benefits only if the employer paid for those benefits at the time of injury. Rather than addressing this unambiguous language, Miller cites *Cockle* and *Granger* to argue that they show that the Department may include anticipated health care benefits in the wage calculation. Resp't Br. at 13-16 (citing *Granger v. Dep't of Labor & Indus.*, 159 Wn.2d 752, 153 P.3d 839 (2007); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001)). But these cases confirm that the Department may only look to wages and benefits received at the time of injury to calculate the wage rate.

1. *Cockle* directs the Department to use actual wages, not hypothetical wages

Cockle recognizes that the Department must calculate a worker's benefits using the wages at the time of injury. *Cockle*, 142 Wn.2d at 806. In *Cockle*, an injured worker received health care benefits from her

employer at the time of injury in addition to traditional wages. *Cockle*, 142 Wn.2d at 805-06. *Cockle* observed that “[t]ime-loss and loss of earning power compensation rates are determined by reference to a worker’s ‘wages,’ as that term is defined in RCW 51.08.178, at the time of injury.” *Id.* at 806. *Cockle* concluded that a worker’s wage calculation must include employer-provided in-kind benefits “at the time of injury that are critical to protecting workers’ basic health and survival.” *Id.* at 822. Thus, in holding that the Department should include health care benefits in a wage calculation, *Cockle* focused on the wages (including health care benefits) received at the time of injury. *Id.* Consistent with this, *Cockle* held that when including health care benefits in a wage calculation, the Department should include the amount “*actually* paid by an employer” to secure the benefit, not the hypothetical market value of the health care benefit. *Id.* at 820-21. *Cockle*’s focus supports the Department, not Miller.

2. Under *Granger*, health care benefits are received at the time of injury only if the employer made payments for them at that time

Granger similarly supports the Department, not Miller, as it holds that the inclusion of health care benefits depends on whether the employer pays for them at the time of injury. *See Granger*, 159 Wn.2d at 761.

Granger concluded that when deciding whether a worker was “receiving” health care benefits at the time of injury, the focus must be “upon payment

for the benefit and not entitlement to the coverage.” *Id.* at 762. Thus, because the employer in *Granger* paid for health care benefits at the time of injury, the worker was receiving those benefits then. *See id.* at 762-63. By the same logic, where, as here, an employer does not pay for health care benefits at the time of an injury, the worker receives no such benefits at that time, and the Department may not use those benefits to calculate the wages.

Indeed, *Granger* explicitly recognized that a worker’s rights with regard to whether health care benefits will be included in a wage calculation or not are fixed at the time of injury. One of the Department’s arguments in *Granger* was that it is necessary “to set a point at which the rights and responsibilities of individuals become fixed in order to bring certainty to wage computation.” *Id.* at 765 (quotations omitted). The *Granger* Court explained that its test of looking to whether the employer had paid for health care benefits sets the “fixed” point “at which the rights and responsibilities” of the worker are established. *Id.* Under *Granger*, the time of the injury therefore “fixes” Miller’s rights regarding health care benefits; namely, his rights depend on whether “the employer was making the health care payments” *Id.*

Granger repeatedly emphasizes that the proper analysis focuses on whether the employer paid for the health care benefits at the time of the

injury. *Id.* at 759-61. Miller criticizes the Department for “putting improper emphasis on whether Shope was actually making payments for health care at the time Mr. Miller was injured,” yet *Granger* demands this focus. *Compare* Resp’t Br. at 13 *with Granger*, 159 Wn.2d at 759-61.

Miller suggests that *Granger* does not turn on wage receipt and that it stands for a broader rule that any time a worker is in the process of obtaining health care benefits that the Department should include health care benefits in the wages. *See* Resp’t Br. at 12-13. Miller incorrectly argues that his case is like that of the worker in *Granger* because he alleges that like *Granger*, he lost the ability to earn health care coverage as a result of his injury. Resp’t Br. at 12-13. But *Granger* held that the employer’s payment of health care benefits triggers inclusion in the wage rate, not eligibility to use the benefits. *Granger*, 159 Wn.2d at 759-61, 765. Furthermore, *Granger*’s statement that its holding sets a “fixed” point to include health care benefits would not be true if the actual payment of benefits was not dispositive. *Id.* at 765.

Granger recognized that its analysis could create a seeming disparity, in that the worker of an employer who makes payments into a trust fund that eventually result in health care coverage may have the payments into the trust fund included in the worker’s wage calculation, while a worker whose employer does not make payments for health care

benefits until the worker has completed an orientation period may not have those benefits included in the wage calculation until the employer starts paying for those benefits. *Granger*, 159 Wn.2d at 763-64. However, the *Granger* Court affirmed that the statute drives this result and the Legislature could change that result by amending the statute. *See id.* The Legislature did amend RCW 51.08.178 after *Granger*, but not to include health care benefits in a wage calculation when the employer has not paid for them. Laws of 2007, ch. 297, § 1. Instead the Legislature confirmed that “wages shall also include the employer’s payment or contributions, or appropriate portions thereof, for health care benefits”

RCW 51.08.178(1).

C. The Courts’ Use of the Term “Lost Earning Capacity” Refers to the Idea That the Department Calculates a Worker’s Wages in a Realistic Way, Not That It Should Use Anticipated Wages

Granger and *Cockle* discuss the concept of “lost earning capacity” in the decisions, but, contrary to Miller’s claims, do not provide that this concept demands the use of hypothetical wages. *See Granger*, 159 Wn.2d at 766; *Cockle*, 142 Wn.2d at 811; Resp’t Br. at 13. On the contrary, the concept of “lost earning capacity” refers to the principle that a worker’s wage calculation should accurately capture the wages that the worker received at the time of an injury and which the worker lost as a result of that injury, not to a notion that anticipated future wages should be used

instead of the wages actually received at the time of injury. *See Cockle*, 142 Wn.2d at 810-11. The courts have never used the concept of “lost earning capacity” to justify the Department using anticipated wages or benefits in the calculation. Instead, the case law establishes that the Department accounts for the worker’s lost earning capacity by using the wages and benefits the employer provided at the time of the injury. *Granger*, 159 Wn.2d at 759-61; *Cockle*, 142 Wn.2d at 810-11.

As *Cockle* explains, the phrase “lost earning capacity” refers to the Legislature’s intention in amending the Industrial Insurance Act in 1971 to tie the calculation of a worker’s wage replacement benefits to the wages the worker actually received at the time of an injury rather than an arbitrarily set figure. *Cockle*, 142 Wn.2d at 811. When the Legislature first enacted the Act in 1911, the Legislature paid wage replacement benefits like time-loss compensation at uniform rates for all workers. *Id.* at 810. In 1971, the Legislature amended the Act to calculate wage replacement benefits “proportional to a worker’s actual ‘wages’ at the time of injury.” *Id.* at 810. After discussing this historical amendment to the statute, *Cockle* observed that, “Since the 1971 revision of Title 51, this court has emphasized that an injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her actual ‘lost earning capacity.’” *Id.* at 811.

Thus, in using the phrase “lost earning capacity,” the *Cockle* Court did not suggest that the Department calculate the wages on hypothetical future wages, but instead emphasized use of the worker’s actual wages—not an arbitrary figure. *See Cockle*, 142 Wn.2d at 811. The statute does not contain the phrase “lost earning capacity”; rather, the courts use this phrase to discuss the purpose behind RCW 51.08.178. *See id.* at 810-11. General statements of legislative purpose cannot overcome an explicit statutory directive. *Cf. Pierce Cty. v. State*, 150 Wn.2d 422, 434, 78 P.3d 640 (2003) (explaining that a portion of a statute setting out a statement of intent does not have the force of law). Here, RCW 51.08.178 directs the Department to use wages the worker earned at the time of an injury and does not allow the use of anticipated wages.

Like *Cockle*, *Granger* discusses “lost earning capacity” in the context of explaining why the Department should include in the wage calculation the payments that the worker’s employer made at the time of injury towards health care coverage. *Granger*, 159 Wn.2d at 759-61, 765-66. The court equates “lost earning capacity” to the actual loss of wages—not a hypothetical amount.

Miller objects to describing the payments that his employer might have begun making in the future as “hypothetical” future wages, arguing that they were not merely hypothetical but something he had the right to

receive under his contract. Resp't Br. at 10. However, the wages that Miller might have received in the future are hypothetical wages because we cannot know whether Miller would have completed his orientation if the injury had not occurred. Had the injury not occurred, Miller might have voluntarily quit or his employer might have terminated his employment. Miller argues that the fact that his employer "kept him on salary" while he received time-loss compensation proves that his employer had a long-term investment in him. Resp't Br. at 10. However, the fact the employer kept him on salary does not prove that he would have completed his orientation had the injury not occurred. By paying a worker his or her usual wages following an injury, an employer ensures that the Department will not pay the worker time-loss compensation. RCW 51.32.090(8). Payments of time-loss can have a significant impact on the taxes that an employer must pay the Department for industrial insurance. *See* WAC 296-17-31010; WAC 296-17-855. Thus, an employer may decide to keep paying a worker's salary following an injury for reasons related to the employer's tax liability to the Department that have nothing to do with whether the employer has a long-term investment in that employee.

D. The Industrial Insurance Act Does Not Provide for Calculating Benefits Based on a Worker's Anticipated, Future Wages, But It Addresses the Need for Ongoing Benefit Increases in a Different Way

The Industrial Insurance Act ties a worker's benefit calculation to the wages a worker actually received at the time of injury, not to the worker's anticipated, future wages. RCW 51.08.178. However, the Legislature recognized that workers would need to receive regular increases to their benefit levels in order for their compensation to keep pace with ongoing increases to the cost of living. The Legislature addressed this problem by automatically adjusting a worker's wage replacement benefits each July 1 based on changes to the average wage in the state of Washington. RCW 51.32.075.

The Legislature could have addressed the problem of the need for ongoing adjustments to a worker's benefits in a different way. Specifically, the Legislature could have increased a worker's benefits each year based on a worker's anticipated wage increase. Had the Legislature designed the Act to operate in that fashion, Miller's theories may have had some merit. However, the Legislature did not do so. It chose to tie the wage rate to health care benefits the employer paid for at the time of injury instead.

E. The Court Should Not Award Attorney Fees to Miller Because He Should Not Prevail and Because He Waived the Claim

Miller should not receive a fee award for two reasons.

First, this Court should reverse the superior court's decision, not affirm it.

Second, even if this Court affirms, this Court need not address Miller's demand for an attorney fee award because he neglected to devote a separate section to his brief explaining why he should receive such an award if he prevails as RAP 18.1(b) mandates. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013). As *Gardner* explains, a party must include a request for a fee award in a separate section of a brief, and a court will not address such a request if the party seeking the award fails to follow the rule. *Id.* Here, Miller included a single sentence in the "Conclusion" section of his brief asserting that he should receive a fee award if he prevails rather than addressing this in a separate section as RAP 18.1(b) requires. Therefore, he has waived any claim for fees.

III. CONCLUSION

Miller is not entitled to have his wage calculation include benefits that his employer never provided. RCW 51.08.178 unambiguously provides for the use of a worker's actual wages at time of injury, not anticipated wages. The cases Miller cites support the Department, not Miller. The Department asks that this Court reverse the superior court's decision and affirm the Department's decision.

RESPECTFULLY SUBMITTED this 3rd day of August, 2016.

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A handwritten signature in cursive script that reads "Steve Vinyard".

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Reply Brief Department of Labor and Industries and this Declaration of Service to all parties on the record as follows:

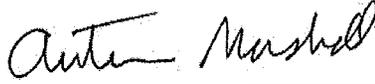
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