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

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Appellant,

v.

ELLEN WRIGHT,

Respondent.

**BRIEF OF APPELLANT,
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Employers cannot expect to receive benefits under a statute when they fail to comply with the statute. In 2011, the Legislature amended the Industrial Insurance Act to allow employers to receive subsidies from the Department of Labor and Industries when they offer light-duty work to their own injured workers. But the statute establishes a protocol that employers must follow when offering that work for the employers to receive wage subsidies. The statute requires employers to provide the worker's medical provider with a description of the light-duty work that the employer is offering to the worker—and to obtain the provider's approval of that work—before the work begins. By requiring employers to obtain the provider's approval before the work begins, the Legislature balanced the need to quickly return workers to work after an injury with the need to ensure that the work performed after an injury is safe.

Ellen Wright's employer, Holly Ridge Center, offered her light-duty work but failed to obtain approval from Wright's doctor until after the light-duty work began. Contrary to the statute, the superior court ruled the Holly Ridge could receive the subsidy. This Court should reverse and affirm the Department decision to deny the subsidy.

II. ASSIGNMENTS OF ERROR

1. The Department assigns error to finding of fact number 2, which states, “Ms. Wright returned to work in a light duty capacity on October 20, 2014, with approval of her attending provider.”
2. The Department assigns error to conclusion of law number 2, which states that, under RCW 51.32.090(4), a physician’s approval of light-duty work can be retroactive.
3. The Department assigns error to conclusion of law number 3, which concluded that Holly Ridge was entitled to wage subsidies for the work Wright did in October 2014.
4. The Department assigns error to conclusion of law number 4, which concluded that the Board was correct when it reversed the Department.
5. The Department assigns error to the court’s judgment, which affirms the Board’s decision.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. RCW 51.32.090(4) allows an employer to receive wage subsidies when it offers light-duty work to a worker if it follows the statute’s procedures. RCW 51.32.090(4)(b) requires an employer to “furnish” the worker’s attending provider with a written description of “the work offered,” and obtain a “release” to that work, before that work begins. Can an employer rely on after-the-fact approval of a job under RCW 51.32.090(4)?
2. Does substantial evidence support finding that Wright returned to the work in October 2014 “with approval of her attending provider” when the stipulation said the approval was in November 2014?

IV. STATEMENT OF THE CASE

A. Overview of Applicable Industrial Insurance Act Provisions

In 2011, the Legislature created new industrial insurance benefits designed to encourage employers to offer their workers light-duty work.

The Legislature integrated the new program into existing provisions of RCW 51.32.090. Laws of 2011, 1st Sp. Sess., ch. 37, §101. This case involves the interpretation of the light duty requirements under RCW 51.32.090 and how they relate to the new employer-incentive program under RCW 51.32.090 called “Stay at Work.”

1. There are six steps involved in returning a worker to light duty

RCW 51.32.090 provides for wage replacement benefits called time-loss compensation when a worker is “temporarily totally disabled.” RCW 51.32.090(4) addresses what to do when a worker cannot perform his or her regular job due to injury but can do some work: light duty. The statute provides a way for employers to offer workers light-duty work that would end the payment of time-loss compensation benefits. These provisions preexisted the new stay-at-work program, which the Legislature created in 2011.

Under RCW 51.32.090, there are six steps that must be followed when offering light-duty work to an injured worker:

1. The worker’s attending provider determines that the worker cannot perform the job of injury because of an industrial injury. RCW 51.32.090(4)(b).
2. The employer “furnish[es] to the physician . . . a statement describing the work available with the employer in terms that will enable the physician . . . to relate the physical activities of the job to the worker’s disability.” *Id.*

3. The employer gives a copy of the job description to the worker. *Id.*
4. The worker's attending provider "then determine[s] whether the worker is physically able to perform the work described." RCW 51.32.090(4)(b).
5. If the attending provider determines the worker can physically perform the work, the worker's attending provider "releases" the worker to the job. *Id.*
6. The employer then offers the job to the worker. *Id.*¹

A worker who accepts the light-duty job stops receiving time-loss compensation. *Id.* And if the employer follows the steps outlined above yet the worker does not accept a light-duty job offer, the worker's time-loss compensation stops. *See O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766-67, 109 P.3d 484 (2009) (holding that worker who accepts a valid light-duty job and is terminated from it for reasons unrelated to his injury is not entitled to further temporary disability benefits); *O. C. Thompson*, No. 60, 203, 1983 WL 470531 at *3 (Wash. Bd. Indus. Ins. App. Feb. 9, 1983) (ruling that worker's time-loss compensation is only properly terminated if a worker rejects a light-duty job offer that the worker's treating physician had approved).

2. An employer may apply for stay-at-work benefits when the employer offers work under RCW 51.32.090(4)

¹ A copy of RCW 51.32.090 is attached for the Court's reference as Appendix A.

RCW 51.32.090(4)(c) provides for subsidies to employers who offer workers work “pursuant to this subsection (4).” Employers who offer such work to workers may receive subsidies equal to half of the wages paid for a period of up to 66 working days, which may be spread out over a 24-month timeframe. RCW 51.32.090(4)(c). Employers may receive up to \$10,000 in wage subsidies over that timeframe. *Id.*

Employers seeking stay-at-work subsidies must request them using forms approved by the Department and must provide the information required under those forms. RCW 51.32.090(4)(h).

B. Wright Returned To Light-Duty Work Following Her Injury Before Her Attending Physician Had Reviewed a Written Description of That Work

Wright suffered an injury on October 15, 2014, while working for Holly Ridge. CP 91. The next day, Wright’s attending provider opined that she could work but restricted the types of physical activities she could perform. *See* CP 91. Wright returned to work in a light-duty capacity for Holly Ridge on October 20, 2014. CP 91. The light-duty work that Wright returned to followed the attending provider’s general restrictions. CP 91. But the parties stipulated that, as of October 31, 2014, the attending provider had not reviewed a written description of the light-duty work to which Wright had returned. CP 91.

On November 3, 2014, Wright's attending provider reviewed a written job description and approved of her doing the work described. CP 91-92. This was the first day that the doctor had approved of her performing that specific job.² CP 91-92. The provider did not comment at that time on whether it was appropriate for Wright to do the work as of October 20, 2014.

On May 14, 2015, Holly Ridge applied for stay-at-work benefits for the light-duty work Wright had performed for it. CP 92. Several months later, in August 2015, the attending provider retroactively approved of the light-duty work that Wright had performed, effective October 20, 2014. CP 92. The Department paid reimbursement for the days Wright worked beginning on November 3, 2014, but denied the request for the work Wright performed in October 2014. CP 92.

C. The Board and Superior Court Directed the Department To Pay Stay-At-Work Benefits To Holly Ridge Even Though Wright's Doctor Did Not Approve of the Light Duty Work Until After the Work Had Begun

² While this case involved a relatively short delay between the date the light-duty job began and the date the attending provider released the worker to do the job, the Board has issued several other decisions regarding the same issue that ordered the Department to pay the employer wage subsidies, some of which involved longer delays. *See, e.g., Joseph N. Barnhart*, No. 15 16156, 2016 WL 7493876 (Wash. Bd. Indus. Ins. App. Nov. 4, 2016); *Robert Sturgeon*, No. 15 16157, 2016 WL 7493877 (Wash. Bd. Indus. Ins. App. Nov. 4, 2016); *Josue G. Gonzalez Hernandez*, No. 15 18755, 2016 WL 7493881 (Wash. Bd. Indus. Ins. App. Nov. 4, 2016).

Holly Ridge appealed the Department's decision to pay wage subsidies effective November 3, 2014, to the Board, arguing that the Department also should have paid wage subsidies for the month of October 2014. CP 23-29. Holly Ridge argued that it did not matter that the attending physician had not approved of the work until after it had begun. CP 23-29. The Board recognized that the attending physician did not approve of the work until November 3, 2014, but still ordered the Department to pay wage subsidies for October 2014. CP 10-12.

The Department appealed to the superior court, arguing that the Board's decision conflicted with the statute's plain language, which requires a worker's physician to approve of light-duty work before the light-duty work begins. CP 1-4, 108-83. The superior court affirmed the Board. CP 198-200.

V. STANDARD OF REVIEW

In an appeal from a superior court's decision to this Court in a workers' compensation case, 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). The appellate court does not review the Board decision, nor does the Administrative Procedure Act apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The facts here are not in dispute, and the questions raised by the appeal are mainly questions of statutory interpretation reviewed de novo. *Dep't of Labor & Indus. v. Granger*, 159 Wn.2d 752, 757, 153 P.3d 839 (2007). And where a case is tried at the Board based on stipulated facts, the appellate court reviews the stipulated facts. *See Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 647 n.1, 677 P.2d 1134 (1984). If the Department and the Board disagree about the construction of a statute, the court defers to the Department's interpretation rather than the Board's interpretation, as the Department is the front-line agency charged with implementing the Industrial Insurance Act. *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013).

VI. ARGUMENT

The Legislature created incentives for employers who offer light-duty work to their injured workers, but employers may receive the subsidies only if they follow the process set out in the statute for offering that work to the worker. Throughout this process, the statute puts the attending provider in the driver's seat. *See* RCW 51.32.090(4)(b), (h). The attending provider must approve the particular physical activities and must release the worker to perform them before the worker starts the job. RCW 51.32.090(4)(b), (h). This protects the worker from potentially

harmful physical activities so that the worker does not work beyond the physical limitations caused by the industrial injury.

By not providing the worker's physician with a description of the light-duty work that Wright would perform until well after the work had begun, Wright's employer, Holly Ridge, did not follow RCW 51.32.090(4)'s worker-safety procedures. CP 91-92. Because of this, Holly Ridge may not receive wage subsidies for the time period before Wright's attending physician approved the work. Any other legal rule would encourage employers to disregard worker-protection mandates and undermine the statute's dual goals of motivating employers to offer work to injured workers while also ensuring that workers return only to work that is safe for them to perform.

A. Holly Ridge Is Not Entitled To Stay-at-Work Subsidies for Wright's Light-Duty Work Because It Did Not Follow RCW 51.32.090(4)'s Requirements for Light-Duty Work

RCW 51.32.090(4)'s plain language requires that the worker's physician determine that the worker can perform specific physical activities listed in the job description and that the physician approve of the job in advance before the worker begins performing that work.

Holly Ridge has advanced two erroneous theories of why it should receive wages: (1) that the worker's attending physician can provide after-the-fact approval and (2) that a general statement about physical

restrictions is sufficient, instead of a specific release about specific job duties. *See* CP 192. Both arguments fail.

1. A worker’s attending physician must release the worker to a specific job in advance

As explained below, a worker’s attending provider must release the worker to a job before the worker starts it. RCW 51.32.090(4)(b), (h). An employer who relies on after-the-fact approval may not receive wage subsidies under the statute. This is because RCW 51.32.090(4)(c) says that an employer must offer work to a worker “pursuant to” RCW 51.32.090(4) to obtain wage subsidies and RCW 51.32.090(4) requires employers to follow a specific process when they offer light-duty work to their workers, which involves pre-approval of the job by the worker’s attending provider.

A court interprets a statute to discern and implement the intent of the Legislature. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010). When the meaning of a statutory provision is plain from reading the statute as a whole and related statutory provisions, the court’s “inquiry is at an end” and the court follows the statute’s plain meaning. *Id.* And the court gives meaning to all of a statute’s related terms for a harmonious reading. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

Read as a whole, RCW 51.32.090(4) requires an employer to obtain the attending provider's approval of a specific job before the work begins and not rely on after-the-fact approval. Three subsections of RCW 51.32.090(4) compel this conclusion.

First, subsection (4)(c) provides that an employer "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" RCW 51.32.090(4)(c). "Pursuant to" here means that the job offer must follow subsection (4)'s requirements, including (4)(b) and (h).

See id.

Second, subsection (4)(b) mandates a detailed process that an employer must use when offering light-duty work to an employee:

Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician . . . as able to perform available work other than his or her usual work, *the employer shall furnish to the physician . . . , with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician . . . to relate the physical activities of the job to the worker's disability.* The physician . . . *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 . . . for the work*, and begins the work with the employer of injury.

(Emphasis added.)

Subsection (4)(b) reflects the Legislature's understanding that the attending provider would approve the light-duty work before the light-duty work begins. Subsection (4)(b) begins by stating that if an injured worker is entitled to temporary total disability payments (time-loss compensation), the worker's employer may contact the attending provider and "furnish" the provider with a written description of the job that is detailed enough to "enable the physician . . . to relate the physical activities of the job to the worker's disability."

Next, subsection (4)(b) says that the physician "shall then determine" whether the worker can physically perform "the work described." The statute's inclusion of the word "then" in the phrase "shall then determine" shows that the physician offers this opinion *after* receiving and reviewing a specific description of a job from an employer.

Subsection (4)(b) then requires a physician to release the worker to perform a specific job described in a written statement provided to the physician before the work begins. Release means the physician has "determine[d] whether the worker is physically able to perform the work described." *Id.* RCW 51.32.090(4)(b)'s language shows that the Legislature contemplated a physician reviewing and commenting on physical activities "described" in a specific job before the worker is "released" for the work.

Third, subsection (4)(h) states that the Department may grant subsidies to an employer only if the worker's physician "has released him or her to perform the work offered." The phrase "[h]as released" shows that the physician must have not merely released the worker to perform some sort of work, but released the worker to perform the specific job that the employer offered to the worker. The provision relates back to subsection (4)(b), which sets out a detailed process for a "release" to work, and which cannot be satisfied unless an attending physician approves of the light-duty work before the work begins. The superior court ignored the statute's plain language in concluding that after-the-fact approval suffices.

Interpreting the statute to allow for after-the-fact approval to suffice would only be possible if much of RCW 51.32.090(4)'s language was excised from the statute. But courts do not delete words from a statute when analyzing its meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *see Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (the court gives effect to every word, clause, and sentence).

2. The attending provider must preapprove specific job duties for an employer and an employer cannot use a general statement of physical restrictions

Wright's doctor gave a general set of restrictions to Holly Ridge, and Holly Ridge used those restrictions to find a job that Wright could perform, but this does not satisfy the statute. Just as the plain language of

RCW 51.32.090(4) precludes the argument that after-the-fact approval of a job is sufficient, the statute's plain language also precludes the argument that an employer can fail to provide the worker's attending provider with a written description of the job and instead rely on the provider's general opinions about the worker's ability to work. RCW 51.32.090(4)(b), (c), and (h) compel this conclusion.

A job offer is only made "pursuant to" RCW 51.32.090(4) when it follows the process set forth in RCW 51.32.090(4)(b). Subsection (4)(b) requires that the employer begin by providing the worker's attending provider with a written description of a specific job, which the provider must "release" the worker to perform. An employer cannot circumvent that process and instead invent a job that falls within the provider's general opinions about the worker's ability to work: the statute is only satisfied when the employer sends the provider a description of the job and the provider signs off on that job. *See id.*

Furthermore, subsection (4)(h) explicitly links an employer's ability to receive wage subsidies to pre-approval of a light-duty job by an attending provider, providing that "[i]n no event shall an employer receive wage subsidy payments . . . unless the worker's physician . . . has released him or her to perform the work offered." This further demonstrates that

the provider must have actually released the worker to perform a specific job.

RCW 51.32.090(4)(b), (c), and (h) have interrelated terms that carry the same meaning throughout section (4), as shown by the statute's context. *See Alliance One Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904 (2014) (explaining that words in a regulation must be read in their entirety and construed together and considered with the regulatory and statutory framework and should not be analyzed piecemeal). "Release," "work," and "offer" all have the same respective meanings throughout section (4). When (h) requires a release for "work offered," this is the same "release" for "work" as what was detailed in (b) and "offers work" in subsection (4)(c). So, under the statute, the attending provider must approve of a written description of "the work offered" by the employer to the worker. RCW 51.32.090(4)(h). Anything short of that does not comply with the statute.

Holly Ridge did not satisfy the statute by developing a job that fit with the attending provider's general opinions regarding Wright's ability to work. *See* RCW 51.32.090(4)(b), (c), (h). It needed to provide Wright's doctor with a description of the specific job it was offering to her and obtain the doctor's approval of it before the work began. *See id.* Since it did not do that until November 2014, Holly Ridge is not entitled to wage

subsidies for the work Wright performed in October 2014.

RCW 51.32.090(4)(c), (h); CP 91-92.

B. The Legislature Wants Workers To Return Safely To Work and Shows No Intent To Allow Employers to Circumvent Safety Protections

The requirement that a worker's doctor review and approve of a written description of a specific light-duty job before that job begins is not a mere paperwork requirement. Instead, it ensures that a worker does not begin performing the job until there has been a determination by the worker's attending provider that that job is safe. RCW 51.32.090(4)(b). An employer who offers a job without pre-approval, based on the hope that the worker's medical provider will retroactively approve of it, is gambling with the worker's safety. And by concluding that after-the-fact approval is sufficient, the superior court and the Board encourage employers to make the same gamble. CP 13-14, 198-200.³

1. Advance approval of a job advances an important goal of the statute: ensuring that the light-duty work is safe

³ While this case involves a relatively small delay from the date that the worker returned to work to the date that the worker's provider approved of a written description of the job, the logic of the Board's decision would apply equally if an employer waited several months or longer to obtain retroactive approval of the job. *See* CP 10-13. Furthermore, the Board has issued several decisions regarding this legal issue and it concluded in each of them that a retroactive approval of the job could suffice, which shows that this case is part of a larger pattern and is not a fluke. *See, e.g., Barnhart*, 2016 WL 7493876; *Sturgeon*, 2016 WL 7493877; *Gonzalez Hernandez*, 2016 WL 7493881. The Department has separately appealed the *Barnhart*, *Sturgeon*, and *Gonzalez Hernandez* cases to superior court. Moreover, any tolerance of retroactive approval of a job undermines worker safety, regardless of the magnitude of the employer's delay in obtaining that approval.

RCW 51.32.090(4) provides an important safety feature to prevent reinjury when a worker returns to work: advance physician review and approval of the specific physical requirements of the job. Offering general opinions about a worker's physical limitations is a different process from reviewing a detailed description of a job and determining whether those job activities safely match the worker's physical limitations.

When offering general opinions about a worker's ability to work, an attending provider will likely focus on the provider's biggest concerns about the worker's injury, and the provider is unlikely to identify every activity that an employer might expect the worker to perform. A provider may not restrict a worker from performing an activity simply because it never occurred to the provider that the employer would expect the worker to engage in that activity. When presented with a detailed job description (with the opportunity to discuss the job with the worker), the attending provider must necessarily review each work activity individually.

While requiring the attending provider to review a specific job description before the worker performs that job might seem like an unnecessary precaution sometimes, in other cases it could help to identify a hazard and avoid reinjury. For example, the provider may realize after viewing a job description that the worker must work on uneven terrain, on a ladder, or in a dusty environment, and these work conditions may be

contraindicated, even though the attending provider's general release to work did not mention them. The Legislature determined that the attending provider's review and approval of the specific light-duty job being offered was the better approach. RCW 51.32.090(4)(b).

The attending provider's role in reviewing the job description in advance goes hand in hand with the worker's rights. As *Shafer v. Department of Labor & Industries*, 166 Wn.2d 710, 719, 213 P.3d 591 (2009), explains, a worker's attending provider "plays an important role" in safeguarding the worker's rights under the Act. And in the context of a light-duty job offer, the employer must give a copy of the job description to both the worker and the attending provider. RCW 51.32.090(4)(b). This allows the worker to work with the worker's provider to make sure the job is appropriate when the employer reveals the actual work activities. And allowing the employer to bypass the attending provider by crafting a job that the employer thinks the provider will approve, but without providing a description of the job to the provider and worker, would undermine the attending provider's role in protecting the worker's rights. If the worker does not think the worker can perform the job, the worker may talk to the attending provider or dispute it with the Department. RCW 51.32.090(1), .055(6).

The Legislature protected against risk of harm by requiring review of the actual job description of the light-duty work. There are interconnected public policies here: the value of a worker's early return to work combined with the need to have that work be safe. The Legislature settled on an approach that balances the two interests in a way that emphasizes worker safety: employers may benefit only if the medical provider is in the driver's seat in determining that specific physical activities are safe before the worker is released for that work.

2. The Board wrongly substituted its judgment for that of the Legislature in concluding that employers should not have to obtain an attending provider's pre-approval

The superior court wrongly upheld the Board's decision because the Board's decision misconstrues RCW 51.32.090(4). When the Board concluded that Holly Ridge was entitled to wage subsidies, the Board did not show how RCW 51.32.090(4) can reasonably be read to allow either a general release without viewing a job description or an after-the-fact approval of light-duty work to suffice under the statute. *See* CP 11-13. Instead, the Board explained that it was reaching its ruling because RCW 51.32.090(4)'s purpose is to encourage employers to offer light-duty work to injured workers and that purpose is best advanced by allowing after-the-fact medical opinions to substitute for a prospective medical release to light-duty work. CP 11-13. But RCW 51.32.090(4) requires

employers to obtain the attending provider's approval of a specific light duty job (not a general release to work) and approval of that job in advance. This plain language requirement cannot be overridden based on the idea that public policy might be better served through an approach that is less protective of worker safety. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) ("This court should resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a judicial, function.'") (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (internal citation omitted)).

Because RCW 51.32.090(4) is unambiguous, there is no reason to defer to the Board's erroneous interpretation of it. *See Slauch*, 177 Wn. App. at 452. And even assuming there is any ambiguity in the statute, this Court should defer to the Department's interpretation, not the Board's, since the Department is the front-line agency charged with implementing the Industrial Insurance Act. *See id.* But there is no ambiguity here.

It is the Legislature's prerogative to make policy decisions about whether an employer must show that an attending provider has released the worker to perform a specific light-duty job or whether it is sufficient for the provider to have generally released the worker to work within some parameters. The Legislature chose here to require that the employer

furnish the attending provider with a job description so the provider can determine whether to release the worker to performing that work before the work begins. And the Legislature's approach makes sense because requiring the attending provider to approve of a specific light-duty job before that job begins provides workers with additional protection in ensuring that the light-duty work is appropriate. In any event, the Legislature's decision should not be second-guessed, and the Board erred when it did so. *See Sedlacek*, 145 Wn.2d at 390.

3. The process for offering light-duty work applies the same to the termination of time-loss compensation or receipt of wage subsidies

RCW 51.32.090(4)(b) sets out only one process an employer can use when offering light-duty work to a worker: the process in RCW 51.32.090(4)(b), which requires the employer to obtain approval of a specific job from the worker's attending provider before the light-duty work begins. RCW 51.32.090(4)(b) applies when the issue is whether the worker's time-loss compensation will be terminated if the worker refuses the light-duty job just the same as when the employer should receive wage subsidies. In either instance, the worker's attending provider must approve of the job before the work begins or the job offer does not comply with the statute. RCW 51.32.090(4)(b) applies in both situations because

subsection (4)(b) is the only portion of the statute that sets out a process for an employer to use when offering light-duty work to a worker.

This case is about one side of the coin: whether an employer can receive wage subsidies when it fails to obtain pre-approval of a specific light-duty job. But the other side of the coin—whether the worker’s time-loss should be terminated—is governed by the same statutory provision. If an employer does not need pre-approval of a specific light-duty job to be eligible for wage subsidies for that work, there is no reason there would need to be approval of the job by an attending provider for the worker’s time-loss compensation to be terminated.

Thus, concluding that pre-approval from the attending provider is unnecessary under RCW 51.32.090(4) does not merely loosen the test for determining whether the employer receives wage subsidies, it would also expose workers to termination of their time-loss if they rejected light-duty job offers made without pre-approval of the job by their attending providers.

Such a legal rule would wrongly deprive worker’s of the safeguards in RCW 51.32.090(4)(b), which are designed to ensure that workers are not forced to accept light-duty job offers unless the workers may safely perform those jobs. *See Glacier Northwest Inc. v. Walker*, 151 Wn. App. 389, 393-94, 212 P.3d 587 (2009). But if this Court concludes

that RCW 51.32.090(4)(b) does not require an employer to obtain pre-approval when the employer is seeking wage subsidies, there would be no basis under the statute to conclude that employers need to follow those protocols before a worker's time-loss will be terminated.⁴

C. Wright's Doctor Did Not Approve of Her Returning To the Specific Light-Duty Work That Holly Ridge Offered To Her Until November 3, 2014, so Holly Ridge May Not Receive Wage Subsidies for Any Date Before That

Wright's doctor did not approve of the light-duty work Wright performed until November 3, 2014, which means that Holly Ridge cannot receive wage subsidies for the work Wright performed in October 2014. CP 91-92; RCW 51.32.090(4). The Department has already granted Holly Ridge wage subsidies for the light-duty work performed after November 3, 2014: the only issue on appeal is whether Holly Ridge should have also received wage subsidies for the work performed in

⁴ Holly Ridge has argued that *Cascadian Building Maintenance v. Department of Labor & Industries*, 185 Wn. App. 643, 342 P.3d 1185 (2015), shows that an employer need not follow the process for offering work under RCW 51.32.090(4)(b) in order to receive wage subsidies. *See* CP 191-92. But *Cascadian* provides no support for that argument. There was no issue in *Cascadian* as to whether the employer followed RCW 51.32.090(4)(b) when it offered light-duty work to its worker. *See Cascadian*, 185 Wn. App. at 648-653. Instead, *Cascadian* held that an employer who offers work under RCW 51.32.090(4) can receive wage subsidies for the light-duty work performed, including for the three days following the injury, even though RCW 51.32.090(7) precludes workers from receiving time-loss for those three days. *See Cascadian*, 185 Wn. App. at 648-53. But *Cascadian's* conclusion that the employer should receive wage subsidies was predicated on the court's understanding that the employer complied with RCW 51.32.090(4) when it offered light-duty work to the worker, and nowhere did the court suggest that employers need not follow RCW 51.32.090(4)(b) when they offer their workers light-duty work. *Id.* at 650.

October 2014. CP 91-92. It cannot, because it did not comply with the statute until November 3, 2014.

The superior court erroneously entered a finding that “Ms. Wright returned to work in a light-duty capacity on October 20, 2014, *with approval of her attending provider.*” CP 199 (emphasis added). The wording of the finding suggests that, on October 20, 2014, the attending provider, in some fashion, approved of Wright returning to the job on that date. CP 199. But that is incorrect: Wright’s doctor was not provided with a written description of the job until November 3, 2014, and the doctor did not approve of Wright performing that job until then. CP 91-92.

The parties stipulated that the work Wright returned to on October 20, 2014, was consistent with a set of general restrictions that Wright’s doctor had placed on her following her injury. CP 91-92. But there is a difference between a job falling within the attending provider’s general opinions regarding the worker’s ability to work and the provider approving of that job. And Wright’s doctor did not approve of the job until November 3, 2014. The superior court’s finding that the attending provider approved of the return to work on October 20, 2014, lacks support and should be rejected. CP 199.⁵

⁵ It is possible that the trial court’s finding that Wright returned to work on October 20, 2014, with her physician’s “approval” was not intended to be a finding that the physician had approved of her returning to that job on that date, and was merely an

RCW 51.32.090(4) required Holly Ridge to obtain pre-approval from Wright's doctor before Wright began performing light duty work. Holly Ridge did not obtain such pre-approval and thus did not comply with RCW 51.32.090(4)'s requirements. It is not eligible for the wage subsidies it claims.

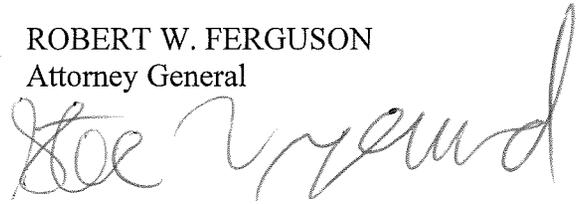
VII. CONCLUSION

An employer wishing to receive wage subsidies under RCW 51.32.090(4) must follow the requirements of that statute to receive the benefits of that statute. Contrary to RCW 51.32.090(4)'s plain language, Holly Ridge returned Wright to work without having her medical provider release her to that job, and it obtained only after-the-fact approval of that job from the medical provider. Because Holly Ridge gambled on worker safety and ignored the requirements of subsection (4) in offering light-duty work to its worker, it may not have the benefits it seek here. This Court should reverse the superior court's decision and affirm the Department.

opaque reference to the fact that Holly Ridge offered Wright a job that fell within the general restrictions Wright's doctor had opined to. *See* CP 199. But as written, the finding implies that Wright's doctor expressly approved of her returning to work in October 2014, which is not true. CP 91-92. And regardless, RCW 51.32.090(4) requires that the attending provider approve of a specific light-duty job in advance, which did not happen here.

RESPECTFULLY SUBMITTED this 20th day of July, 2018.

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A handwritten signature in cursive script, appearing to read "Steve Vinyard".

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APPENDIX A

RCW 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 percent.

(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 department.

(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 workdays 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

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.

[2011 1st sp.s. c 37 § 101. Prior: 2007 c 284 § 3; 2007 c 190 § 1; 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.]

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.

NO. 52177-6-II

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

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Appellant,

v.

ELLEN WRIGHT,

Respondent.

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 served the Brief of Appellant, Department of Labor and Industries and this Declaration of Service in the below described manner:

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