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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.

REPLY BRIEF

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I. INTRODUCTION

To ensure the safety of injured workers, workers' physicians must be able to know about and approve the physical requirements and details of proposed light-duty jobs before the workers begin those jobs. Holly Ridge Center did not let Ellen Wright's doctor know about the physical requirements and details about a proposed light-duty job *before* Wright did this job. Not only does a doctor's retroactive approval not comply with RCW 51.32.090's plain language requirement of pre-approval, allowing employers to ignore the statute's requirements could put workers in danger.

This Court should reject Holly Ridge's arguments and affirm the Department's decision.

II. ARGUMENT

The Legislature designed a system motivating employers to offer light-duty job work and encouraging workers to perform such work as a method of keeping workers connected to the work force. But the Legislature did not design this system without safeguarding workers: it required the attending provider's pre-approval of the job duties before the worker begins the job. The need for this is unmistakable: without the attending provider's pre-approval, the statute would motivate an employer to return a worker to work without ensuring that the work was safe, and,

an employer—in its efforts to achieve cost savings—might push the worker into performing physical tasks that either set back the worker’s improvement or affirmatively cause the worker harm. The physician’s role as the worker’s guardian is especially important because the Department of Labor and Industries is not generally involved in evaluating whether the work is safe before the worker performs it.

Rather than focus on the actual language of the light-duty job statute, Holly Ridge argues that because the Legislature has found benefit in encouraging workers to remain at work, any standards that might delay a worker’s return to work should be rejected. Brief of Respondent (RB) 5-6. But RCW 51.32.090(4) provides standards that employers must follow—it provides for wage subsidies when an employer “offers work to a worker pursuant to this subsection (4)” RCW 51.32.090(4)(c). Key is that the worker’s physician must release the worker to “perform the work offered.” RCW 51.32.090(4)(h). To receive the subsidy, there is only one process an employer can use when “offering” light-duty work to a worker: the process in RCW 51.32.090(4)(b). This process requires the employer to obtain approval of a specific job from the worker’s attending provider before the light-duty work begins. And this in turn furthers worker safety.

A. RCW 51.32.090(4) Unambiguously Requires an Employer To Obtain Pre-Approval of a Specific Light-Duty Job for an Employer To Receive Wage Subsidies

1. The statute requires applying RCW 51.32.090(4)(b)'s pre-approval provisions

RCW 51.32.090(4)(c) allows for wage subsidies when an employer

“offers work to a worker pursuant to this subsection (4)”

RCW 51.32.090(4)(b) governs how an employer must offer the job to the worker. Subsection (4)(b) begins by directing the employer to “furnish” the worker’s attending 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.” Subsection (4)(b) next says that the physician “shall then determine” whether the worker can physically perform “the work described.”

Subsection (4)(b) then states the provider must release the worker to perform that job (as described in the written statement provided to the provider) 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. *See also* RCW 51.32.090(4)(h).

In what appears to be a tacit acknowledgment that it did not follow RCW 51.32.090(4)(b) when it offered work to Wright, Holly Ridge argues that it did not have to comply with subsection (4)(b) to receive wage subsidies. *See* RB 6-7. Holly Ridge argues that the subsection only applies to questions of time-loss compensation and has no application to whether employers may receive wage subsidies. *See* RB 7-8. But this argument conflicts with the plain language of the statute.

RCW 51.32.090(4)(c) provides for wage subsidies when employers offer work “pursuant to this subsection (4)” Holly Ridge suggests that since RCW 51.32.090(4)(c) references subsection (4) rather than subsection (4)(b), subsection (4)(b) does not apply. *See* RB 8. But that argument does not make sense. By requiring employers to offer work “pursuant to this subsection (4),” the Legislature required employers to comply with the statutory provisions within subsection (4), including subsection (4)(b). This is all the more apparent because subsection (4) contains no content other than the various subsections that are contained within it. And subsection (4)(b) is the only portion of the statute setting out a process for offering work to a worker.

And if Holly Ridge is right that only subsection (4)(c) applies when deciding if wage subsidies are due, that would mean subsection (4)(h) does not apply here as well. But subsection (4)(h) expressly says

that an employer may not receive wage subsidies “unless the worker’s physician . . . has restricted him or her from performing his or her usual work and the worker’s physician . . . has released him or her to perform the work offered.” So one cannot look at subsection (4)(c) alone when deciding if wage subsidies are due. And subsection (4)(h) specifically directs that the attending provider has released the worker to perform “the work offered.” This means the doctor must know the details of the work offered, so that the doctor can “release” the worker to perform it.

The Legislature established a uniform standard for light-duty job offers through its enactment of RCW 51.32.090(4)(b), for both time-loss compensation and wage subsidy purposes. If the Legislature had intended to set out two different processes for an employer to use when offering work to a worker, one about time-loss compensation and a different one about wage subsidies, the Legislature would have set out two such processes. But the Legislature did not do so. It provided for only one process—the process in subsection (4)(b).

Additionally, when subsections (4)(b), (4)(c), and (4)(h) are read together, it is even more apparent that the process for offering work to a worker contained in (4)(b) governs both time-loss compensation and wage subsidies. *See State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013) (explaining that the courts harmonize related statutory provisions when

interpreting statutes). Subsection (4)(b) provides for termination of a worker's time-loss compensation when an employer offers work consistent with the terms of that subsection of the statute. Subsection (4)(c) then says that "[t]o 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 wage subsidies. Subsection (4)(h) then directs there cannot be any subsidies "unless the worker's physician . . . has restricted him or her from performing his or her usual work and the worker's physician . . . has released him or her to perform the work offered."

By referring to wage subsidies as something the statute offers to "further encourage" employers to offer work under subsection (4), the Legislature signaled that wage subsidies are a *further* incentive to employers who offer work pursuant to subsection (4), *in addition* to the incentive that the statute already offered to employers who followed that process. The benefit that the statute originally provided to employers who offered work under subsection (4) was the termination of the worker's time-loss compensation. The additional incentive that the statute now provides for is wage subsidies. This shows that the Legislature understood that an employer who offers work pursuant to subsection (4)—including subsection (4)(b)—receives two benefits: termination of the worker's

time-loss and payment of wage subsidies. And neither benefit is available to the employer unless it follows that process.

Holly Ridge argues that allowing the doctor to issue a general opinion on a worker's physical capacities through a form that lists the worker's physical limitations is enough to fulfill a doctor's duties under the statute. RB 7-9, 15-16. Holly Ridge suggests that subsection (4)(h) somehow suggests that a general opinion about ability to work is sufficient, at least when this is coupled with a retroactive approval of the job. *See* RB 7. But subsection (4)(h) states that, "[i]n no event shall an employer receive wage subsidy payments or reimbursements of any expenses pursuant to this subsection (4) unless" the attending provider "has restricted him or her from performing his or her usual work" and "has released him or her to perform the work offered." The statute's use of the phrase "the work offered" shows that the attending provider must release the worker to perform the particular job that the employer offered to the worker, and does not show that a general opinion about ability to work is sufficient. And the job must be approved in advance.

2. *Cascadian* does not suggest that an employer can ignore RCW 51.32.090(4)(b) and still receive wage subsidies

Holly Ridge's reliance on *Cascadian* is misplaced. *Cascadian* did not discuss whether an employer can fail to follow

RCW 51.32.090(4)(b)'s process when offering light-duty work to a worker and still receive wage subsidies. *See Dep't of Labor & Indus. v. Cascadian Bldg. Maint., Ltd.*, 185 Wn. App. 643, 645-53, 342 P.3d 1185 (2015). There was no issue in that case as to whether the employer failed to comply with RCW 51.32.090(4) when it offered work to the worker. *See id.* Rather, the Department argued that the employer was not entitled to wage subsidies for the first three days of the worker's light-duty work because the work would not have been eligible for time-loss compensation for those three days under RCW 51.32.090(7). *See id.* at 648. The *Cascadian* Court rejected the Department's argument, concluding that wage subsidies should be paid because the job offer complied with the statute and no statute expressly tied an employer's ability to receive wage subsidies to the three-day rule. *Cascadian*, 185 Wn. App. at 648-53. But *Cascadian* does not suggest that an employer need not comply with statutory provisions governing return to work offers if it wishes to receive subsidies.

Holly Ridge relies on language in *Cascadian* referring to the legislative intent of allowing uninterrupted work by the worker. RB 9-11. But as discussed above, *Cascadian* does not address the statutory requirements here, so it is of limited value in addressing this entirely different legal question. And importantly, unlike in *Cascadian*, the rule the

Department seeks here does not have the effect of precluding subsidies for any work performed immediately after an injury. While Holly Ridge did not do so here, it could have tried to obtain written approval of its light-duty job before Wright began the light-duty work for it, and, had it obtained such approval before the work began, it would have received wage subsidies for all of the light-duty work Wright performed for it. This quick turn around is possible as shown here when the attending provider approved of the light-duty job the same day that Holly Ridge gave it to the provider. But since Holly Ridge did not do this in a timely fashion, it is not eligible for wage benefits under that statute.

B. Because RCW 51.32.090(4) Is Unambiguous, It Is Unnecessary To Consider Its Legislative History, But in Any Event, Statutory Construction Principles Support the Department, Not Holly Ridge

Holly Ridge argues that RCW 51.32.090(4) is ambiguous, but fails to show any ambiguity. *See* RB 6-7. It notes that RCW 51.32.090 contains many subsections and that different subsections apply in different contexts. BR 6-7. But the test for whether a statute is ambiguous is whether more than one interpretation of its language is reasonable, not whether it contains many subsections. *See State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Holly Ridge fails to show how RCW 51.32.090(4)(c) could reasonably be interpreted to mean that an

employer need not comply with subsection (4)(b) to receive wage subsidies when it requires an employer to offer work “pursuant to” subsection (4). And aside from arguing that subsection (4)(b) does not apply here, Holly Ridge does not dispute that subsection (4)(b) requires an employer to receive pre-approval of a specific light-duty job from the worker’s attending provider before the job begins, nor does it claim that it obtained such a release here.

RCW 51.32.090(4) unambiguously requires an employer to obtain approval of a specific light-duty job before that job begins for an employer to obtain wage subsidies. Since RCW 51.32.090(4) is unambiguous, it is unnecessary to resort to statutory construction principles, including review of legislative history. *See Velasquez*, 176 Wn.2d at 336. But if the Court were nonetheless to consider statutory construction principles, the statute’s legislative history, the deference accorded the Department, the required liberal construction of the statute to benefit workers, and sound public policy support using the worker-protection features of RCW 51.32.090(4)(b).

1. The legislative history shows the Legislature intentionally placed the Stay at Work provisions in the light job duty section to provide protections for workers

The Legislature amended RCW 51.32.090(4) in 2011 to provide for wage subsidies to employers who offer work “pursuant to” this

subsection (4). Before the 2011 amendments, RCW 51.32.090(4) contained language identical to what is now included in RCW 51.32.090(4)(b), which governed light-duty jobs. Under the pre-2011 version of the statute, RCW 51.32.090(4) set out a process that an employer could use to offer work to a worker who is receiving time-loss compensation. That process required the worker's attending provider to approve a specific light-duty job—not a general opinion about ability to work—and to approve the job before it began—not retroactively.

The Legislature amended the statute in 2011 to provide for wage subsidies for employers who offer work “pursuant to this subsection (4).” Rather than place the wage subsidy provisions in a new statute, the Legislature grafted those provisions onto the light-duty job section in RCW 51.32.090(4), which already contained a process an employer could use to offer a light-duty job to a worker, the process in what is now RCW 51.32.090(4)(b). And rather than create a new procedure that an employer could use to offer work to a worker and receive wage subsidies, the Legislature kept the old process for offering work to workers within subsection (4), and directed employers to offer work “pursuant to” this subsection (4) to receive wage subsidies. This history shows that the Legislature intended to link the process for offering work to workers that was contained in the old statute to the new benefit it provided for

employers.

Contrary to Holly Ridge's argument, the Department's reading of RCW 51.32.090(4) is consistent with the Legislature's goal of encouraging employers to maintain their worker's employment. Holly Ridge argues that the Legislature wanted workers to *remain* at work without interruption, and argues that requiring pre-approval of a specific light-duty job would prevent that objective. BR 8-9. But it is not true that pre-approval of a specific light-duty job makes it impossible for employers to maintain the employment of their workers following an injury. If the employer promptly provides the attending provider with a description of a light-duty job, the employer could obtain pre-approval of the job before it begins, without interrupting the worker's employment. Indeed, here, the attending provider approved of the light-duty job the same day that the provider received it; had the employer sent it to the provider earlier, the employer might well have received the necessary pre-approval. And while the Legislature expressed its intent to encourage employers to maintain the employment of their workers after injuries, it also expressly provided that employers must offer work to their workers pursuant to subsection (4), and subsection (4) unambiguously requires pre-approval of a specific light-duty job. Thus, while the Legislature—in the words of RCW 51.32.090(4)—“encourage[s]” employers to maintain their workers’

employment, it mandates (*e.g.* employer “shall furnish” a job description to the provider) employers to obtain pre-approval of a specific light-duty job if they wish to receive wage subsidies. RCW 51.32.090(4)(b); (4)(c).

The Legislature showed that it was concerned with worker safety by expressly requiring employers to obtain pre-approval of a specific light-duty job. This promotes worker safety by ensuring that the provider has reviewed every task the job requires the worker to do, and released the worker to do them, before the job begins. Holly Ridge argues that the Legislature said nothing to suggest that it was concerned with the safety of workers when it enacted RCW 51.32.090(4). BR 15-17. But the purest expression of legislative intent is the language of the statute itself. *See In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838, 215 P.3d 166 (2009) (explaining, “Where a statute is plain on its face, we give effect to that plain meaning as an expression of legislative intent.”). RCW 51.32.090(4)(c) requires employers to offer work pursuant to subsection (4) and subsection (4) requires employers to obtain approval from the worker’s attending provider before the worker begins performing a light-duty job. By expressly requiring employers to obtain pre-approval of light-duty jobs before those jobs begin, the Legislature communicated its commitment to protecting worker safety.

2. The Department's interpretation of the statute is entitled to deference because the Department has the experience administering light-duty jobs

The Department's interpretation of the Industrial Insurance Act is entitled to deference, as Holly Ridge at least partially recognizes. *See* RB 3-4. The court gives substantial judicial deference to agency views when the matter is "close to the heart of the agency's expertise." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997). As the Department is the front-line agency charged with enforcing the Act, its interpretation, not the Board's, is entitled to deference. *See Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013) (noting that where Department and Board disagree about interpretation of Act, Department's interpretation is entitled to deference); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004) (rejecting argument for deferring to Pollution Control Hearings Board's interpretation of Clean Water Act, recognizing that Department of Ecology is the agency designated with administering that act).

The Legislature charged the Department with adjudicating disputes about the validity of a light-duty job offer, showing that it intended for the Department to take the lead in applying the language of the statute to the facts of a given case. RCW 51.32.090(4)(l). Holly Ridge argues that the Department is arbitrarily making it difficult for employers to obtain wage

subsidies. RB 17. But the Department is not doing so, it is simply fulfilling its duty to administer the statute by applying the statute as it is written. And the statute plainly requires worker safety to temper the wage-subsidy incentive for employers. Holly Ridge's argument that the statute's approach to wage subsidies is too restrictive would be better addressed to the Legislature.

3. A liberal interpretation of the statute to benefit workers requires safe jobs for workers and requires employers give workers notice of the job's requirements, whether the issue is time-loss or wage subsidies

Liberal construction of the statute requires a construction that will aid workers and encourage employers to make workplaces safer. *See Harry v. Buse Timber*, 166 Wn.2d 1, 12, 19, 201 P.3d 1011 (2009); RCW 51.12.010. The Legislature's stated goal of reducing the disability associated with workplace injuries by encouraging employers to offer light-duty jobs to their workers will not come to fruition unless the jobs that the workers return to are safe. *See* RCW 51.32.090(4)(a). Stripping the statute of the protection it gives to injured workers—requiring pre-approval of a specific job by the worker's attending provider—thwarts the stated intention of the statute and also contradicts the guiding principle of the Industrial Insurance Act, which is to liberally construe it to reduce the suffering and economic loss associated with workplace injuries.

Harry, 166 Wn.2d at 8, 12; RCW 51.12.010. And though Holly Ridge argues that economic loss is reduced by maintaining workers at work (RB 12), returning workers to medically inappropriate jobs would increase, not reduce, the disability caused by injuries.

Furthermore, as *Harry* explains, one of the core purposes of the Act is to allocate the cost of workplace injuries to employers in order to encourage employers to make their workplaces safer. *Harry*, 166 Wn.2d at 19. A reading of RCW 51.32.090(4) that encourages employers to make their workplaces safer furthers this core purpose, while a reading that removes the incentive to ensure safety undermines it. Requiring an employer to obtain the provider's pre-approval of a specific light-duty job furthers the core purpose of the Act of incentivizing employers to promote workplace safety, by ensuring that the worker's provider has reviewed a description of the job and released the worker to do it before the job begins. But allowing employers to gamble on after-the-fact approval would thwart the objective of encouraging safe workplaces.

Additionally, RCW 51.32.090(4)(b) requires that the job description be given to the attending provider as well as the worker. This allows the worker to know what it is the employer wishes to have the worker do, and the worker can talk to the provider so the provider can let the worker know if the provider thinks it is safe or not. The worker can

also file a dispute with the Department contesting that the job does not fit the worker's capacities. RCW 51.32.090(4)(l). Not uncommonly, workers raise disputes that the employer is really asking the worker to do things that do not match the worker's physical capacities and the job description is a sham. The worker has an incentive to raise these issues because the provision of a valid job offer means the termination of time-loss compensation. To protect a worker's important rights, the worker and physician both need to know about the job description ahead of time. A construction of the statute that does not provide for this would be one that does not interpret the statute to benefit workers and is inconsistent with a liberal interpretation of the statute.

4. Sound public policy supports placing the doctor in the driver's seat to protect workers

Sound public policy supports the Department's interpretation of the statute. RCW 51.32.090(4) puts the attending provider in the driver's seat by requiring the employer to obtain the provider's buyoff on a specific light-duty job before the job begins. This statutory requirement makes the attending provider the gatekeeper for job offers: if the attending provider has not released the worker to perform that job, the employer cannot receive wage subsidies for any work performed. *See* RCW 51.32.090(4)(b), (c), (h). Holly Ridge's strained reading of the

statute puts the employer, not the attending provider, in the driver's seat. Under Holly Ridge's view, the employer can offer a worker work based on the assumption that the provider will eventually approve it, and if that happens then the employer receives wage subsidies, even though the provider did not review the job until long after it began. Under that view, the attending provider is neither the driver nor the gatekeeper: the provider simply opines in hindsight on whether a job turns out to have been appropriate or not. Drivers and gatekeepers make decisions in real-time; they do not just offer opinions in hindsight.

C. Holly Ridge Did Not Comply with the Wage Subsidy Requirements

RCW 51.32.090(4) requires an employer to obtain a physician's approval of a specific light-duty job before the job begins. Only in that situation has the attending physician "released" the worker to perform "the work offered," as the statute requires. RCW 51.32.090(4)(b). Rather than beginning by sending Wright's attending provider a written description of a job, Holly Ridge created a job that broadly fell within some restrictions that the provider had identified. *See* CP 91-92.¹ Wright returned to work in

¹ Holly Ridge contends that the activity prescription form that Wright's provider completed is a form created by the Department, and suggests that it follows that an employer who uses the form has complied with RCW 51.32.090(4). RB 13-14. But nothing in the record suggests that the Department created the form with RCW 51.32.090(4)(b) in mind, so there is no reason to infer that using the form satisfies the statute.

October 2014, but Wright's provider did not receive a written description of the job until November 2014. CP 91-92. Creating a job that fits within the provider's restrictions does not satisfy the statute because the statute requires the provider's express release to perform a specific job. The Department properly paid Holly Ridge wage subsidies for the work she performed from November 2014 and onwards, because at that point Holly Ridge had done what the statute required. But the Department properly denied wage subsidies for the work performed in October 2014 because, at that point, Wright's doctor had neither seen nor approved a description of the work she was doing.

III. CONCLUSION

Sidestepping the worker safety protections in RCW 51.32.090(4) would strip workers of the protections granted by the Legislature and undermine its objective of promoting returns to work while also ensuring that work is safe. This Court should reverse the superior court's decision and affirm the Department.

RESPECTFULLY SUBMITTED this 16th day of October, 2018.

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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 Department of Labor and Industries' Reply Brief and this Declaration of Service in the below described manner:

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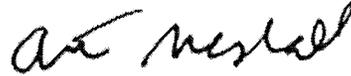
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