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COURT OF APPEALS NO. 55160-4-I

SUPREME COURT NO. _____

SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM GRANGER,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Petitioner.

**DEPARTMENT OF LABOR AND INDUSTRIES' PETITION FOR
REVIEW**

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FILED
DEC 30 2005
CLERK OF SUPREME COURT
STATE OF WASHINGTON

RECEIVED
DEC 22 2005

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I. IDENTITY OF PETITIONER

The Department of Labor and Industries (Department) asks under RAP 13.4(b) that this Court grant review of the Court of Appeals' decision designated in Part II.

II. COURT OF APPEALS' DECISION AND RAP 13.4

The Department seeks review of the October 31, 2005 decision of Division One of the Court of Appeals, ordered published on November 21, 2005. Copies of the October 31, 2005 slip opinion (slip op.) and order publishing are in Appendix A. Division One failed to apply the plain language of RCW 51.08.178 and erroneously relied on a passage in this Court's decision in *Gallo v. Department of Labor and Industries*, 155 Wn.2d 470, 120 P.3d 564, 574 (2005) in holding that the Department's on-point interpretive rule at WAC 296-14-526 is inconsistent with RCW 51.08.178. Slip op. at 6-7.

As Mr. Granger explained at great length in his motion for publication below, this workers' compensation case - - presenting a single statutory construction issue of first impression - - is of substantial significance to all Washington workers and employers. *See* Mr. Granger's Motion to Publish (copy of motion and appendices attached to this Petition as Appendix B). Review should be granted based on RAP 13.4(b)(4) because: 1) this case involves a fact pattern that arises often (*see* App. B);

2) the Court of Appeals' decision is published and therefore precedential;
3) the decision erroneously rejects a well-founded interpretation of law in a Department regulation; and 4) the decision does not finally resolve the hour bank issue posed here (employers will challenge the Department's adherence to Division One's decision if the decision becomes final). Accordingly, this case involves an issue of substantial public interest that this Court should determine.

III. ISSUE

Under RCW 51.08.178, the "monthly wage" upon which a worker's time loss compensation for an industrial injury is based includes only: (1) the cash wages that the worker was "*receiving at the time of the injury,*" plus (2) the value of certain core survival benefits, including health care benefits, that the worker was "*receiving at the time of the injury.*" See *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001); *Gallo*, 120 P.3d 564. At the time of his injury, Mr. Granger was not eligible for health care coverage and would not become eligible for health care coverage unless he continued to work in the near future on a relatively continuous basis. This raises the following question:

For purposes of RCW 51.08.178, must a worker be deemed to be "receiving [health care benefits] at the time of the injury" where his employer was making contributions into a health care trust fund at the time of his injury but the worker was **not** eligible for health care coverage at the time

of injury and, even if he had not been injured, he might never have become eligible for such health care coverage?

IV. STATEMENT OF THE CASE

A. Procedural history of the case

On April 20, 1995, Mr. Granger sustained an industrial injury in the course of his employment with G.G. Richardson, Inc. CP 19. He filed a claim for industrial insurance benefits, and the Department of Labor and Industries allowed his claim. CP 19, 22.

On July 9, 2002, the Department issued an order affirming an earlier order calculating Mr. Granger's "monthly wage" under RCW 51.08.178 based on total gross monthly wages of \$2,847.68, and determining that Mr. Granger was single with no dependents. CP 20. The Department's "monthly wage" computation did not include a value for the employer's "hour bank" contribution - - \$2.15 per hour to a health benefits trust fund under the collective bargaining agreement (CBA). CP 22.

Mr. Granger appealed to the Board of Industrial Insurance Appeals (Board), seeking to establish that the hourly contributions to the CBA health care fund were part of his "monthly wage," notwithstanding the fact that, at the time of injury, he had no coverage under the health plan. CP 21-22. The parties submitted the case on stipulated facts. CP 41-42, 84-86. The Board's Industrial Appeals Judge issued a Proposed Decision and

Order affirming the Department's order. CP 40-49. However, Mr. Granger petitioned for review by the three-member Board, which granted his request and reversed the proposed decision and the Department order in a decision and order signed by two members of the Board. CP 15-23. The final Board decision directed the Department to re-compute Mr. Granger's "monthly wage" under RCW 51.08.178 to include the employer-paid contribution to the CBA health care trust fund. CP 23.

The Department appealed the Board decision to superior court. CP 1-12. The case was tried to the bench, and the superior court affirmed the Board's decision. CP 114-115; CP 116-131.

The Department appealed to the Court of Appeals. CP 132-149. The Court of Appeals affirmed the superior court. Slip op. at 2.

B. Factual background

Mr. Granger did not have health care coverage under the CBA health plan on April 20, 1995, the date of his injury. CP 47; 84-86. He had coverage for a prior period ending March 31, 1995, "when his coverage lapsed because he did not have enough hours worked." *Id.*

Under the CBA health plan, a worker's eligibility for health care coverage is determined on the basis of an "hour bank" system. *Id.* A worker must accrue a minimum of 200 hours for initial eligibility. *Id.*

Once this minimum is met, 120 hours will be deducted from the “hour bank” for each month of coverage. *Id.*

This will provide coverage beginning the first day of the second month following each month in which 120 hours was deducted. *Id.* An employee will continue to be covered in each ensuing month so long as there are 120 hours or more in the “hour bank” at the end of the previous month. *Id.* However, only a maximum of nine consecutive months of prepaid continuous coverage (1,080 hours) can be accumulated. *Id.*

Mr. Granger’s industrial injury occurred on April 20, 1995, when he had only 64 hours in the “hour bank” and therefore did *not* have eligibility for health care coverage. *Id.* As noted above, the Department’s wage order here on appeal denied inclusion of any value for health care coverage on grounds that Mr. Granger was not *receiving* those benefits at the time of the industrial injury. CP 21. Not having lost any health care benefits due to injury, there was no “wage” loss to replace. *Id.*

V. RELEVANT RCW AND WAC TEXT

RCW 51.08.178 controls the computation of the “*monthly wages* the worker was receiving from all employment *at the time of injury.*” This determination of “monthly wages” being received at time of injury generally controls the industrial insurance compensation rate for temporary total disability (time loss) and other wage-based compensation. *See*

RCW 51.32.050, .060, .090.¹ Since 1971, for regularly employed workers on a fixed hourly wage such as Mr. Granger, “monthly wage” has been computed under the formula of RCW 51.08.178(1). *See* Laws of 1971, ch. 289, § 14. Days-per-week multipliers specified in the first unnumbered paragraph of subsection (1) are applied against the “daily wage” computed under the second unnumbered paragraph of subsection (1).

Two types of consideration make up “monthly wage” under RCW 51.08.178. First, the statute implicitly includes all “cash wages,” which the Department defines as “payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law.” WAC 296-14-522(1).

Second, in addition to cash wages, certain classes of benefits and other consideration are included, as follows:

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

RCW 51.08.178(1); *see also* WAC 296-14-522, -524.

As to both cash wages and non-cash consideration only that

¹ Copies of all statutes and WAC rules cited herein are included in Appendix C.

consideration that the worker “*was receiving at the time of the injury*” is included in “monthly wage.” RCW 51.08.178(1). At issue here is whether the contingent future expectancy of future health care coverage qualifies as consideration Mr. Granger was “receiving at the time of the injury.”

WAC 296-14-526 is part of the Department’s “Cockle Rules” (WAC 296-14-520 through -530) adopted to interpret RCW 51.08.178 and implement this Court’s *Cockle* decision. App. C. WAC 296-14-526 explains in relation to the instant factual context, inter alia, that the “receiving at the time of the injury” requirement of RCW 51.08.178 is not met unless “[t]he worker was actually eligible to receive the benefits” at the time of the injury. Thus, the value of other consideration of like nature is included in the worker’s monthly wage under subsection (1) only where:

- (a) The employer, through its full or partial payment, *provided the benefit to the worker at the time of the injury* or on the date of disease manifestation.
- (b) *The worker received the benefit at the time of the injury* or on the date of disease manifestation.

This section is satisfied if, at the time of the injury or on the date of disease manifestation:

- (i) The employer made payments to a union trust fund or other entity for the identified benefit; *and*
- (ii) *The worker was actually eligible to receive the*

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benefit.

WAC 296-14-526 (Emphasis added).²

VI. STANDARD OF REVIEW AND CONSTRUCTION RULES

The standard of review in a workers' compensation appeal from a superior court decision is the same as in other civil cases. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This case poses a question of statutory interpretation, a question of law reviewed de novo. *Cockle*, 142 Wn.2d at 807.

In determining the meaning of a statute, this Court looks first to the relevant statutory language and gives words their plain and ordinary meaning unless a contrary intent is evidenced in the statute or related statutes. *Dep't of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). While the provisions of RCW 51 are "liberally construed" (RCW 51.12.010), this does not authorize a court to construe unambiguous language or to render an unrealistic interpretation that produces strained or

² WAC 296-14-526(1) also includes the following example:

At the time of the worker's industrial injury, the employer paid two dollars and fifty cents for each hour worked by the employee to a union trust fund for medical insurance on behalf of the employee and her family. *If the employee was able to use the medical insurance at the time of her injury, the employer's monthly payment for this benefit is included in the worker's monthly wage, in accordance with (d) of this subsection.* This is true even where the worker's eligibility for this medical insurance is based primarily or solely on payments to the trust fund from past employers. (Emphasis added)

absurd results and defeats the plain meaning and intent of the Legislature. *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Moreover, Department interpretations of the statutes it administers are entitled to great deference, and the courts “must accord substantial weight to the [Department’s] interpretation of the law” that the Department administers. *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

VII. ARGUMENT

A. The plain language of RCW 51.08.178 requires that a worker be receiving benefits at the time of an industrial injury in order for those benefits to be included as part of monthly wages- - Mr. Granger was not receiving health benefits at the time of his industrial injury.

1. Division One failed to recognize that “receiving at the time of the injury” is unambiguous.

The plain meaning of statutory language controls where a word or phrase is unambiguous. *Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 471-74, 843 P.2d 1056 (1993). Division One failed to recognize that the applicable statute in this case, RCW 51.08.178, plainly states:

For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of the injury shall be the basis upon which compensation is computed In cases where the worker’s wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was *receiving at the time of the injury*.

RCW 51.08.178(1) (Emphasis added)

The statute is specific and unambiguous on the issue posed here. One must determine a worker's entitlement to cash wages and covered benefits based upon what he was "receiving at the time of the injury." As noted *supra* Part IV.B, Mr. Granger concedes that "his coverage had lapsed as of the date of his injury, April 20, 1995." CP 47. In essence, Division One held here that, on the date of injury, Mr. Granger was "receiving" health benefits that he was not eligible to receive. This does not make logical sense or comport with the statutory language.

A worker's wages, for purpose of RCW 51, are based exclusively on the measure of the worker's lost earning capacity under the terms of RCW 51.08.178, with its "receiving at the time of the injury" requirement and its other limitations. *E.g.*, *Cockle*, 142 Wn.2d at 810; *Gallo*, 120 P.3d at 569-75. By definition then, monthly wages cannot include wages that the worker never had and, consequently, never lost. *Cockle*, 142 Wn.2d at 814-815 (addressing health benefits that an employer continues to provide during a period of disability); *Gallo*, 120 P.3d at 576 (same); *see also Sch. Dist. 401 v. Minturn*, 83 Wn. App. 1, 5-8, 920 P.2d 801 (1996) ("wage" computation must *rationaly* reflect lost wages).

Consideration that only *might be* received at some unknown time in the future, depending on certain contingencies, is not within the scope

of RCW 51.08.178. The indisputable legislative policy choice is to take a snapshot of what is actually being received at the time of injury. Accordingly, a benefit for which a worker was not eligible, and for which, as of the date of injury, the worker might not ever achieve eligibility in the future, must be excluded from wage computation under RCW 51.08.178.

2. Board decisions in other cases have properly given effect to the unambiguous “receiving at the time of the injury” requirement of RCW 51.08.178.

Although it is the interpretation of the Department, and not that of the Board, that is due deference here (*see* Dept’s Br. of App. at 23-28), this Court may consider Board decisions for any persuasive value.³ To that end, the Board’s decision in *In Re Douglas A. Jackson*, BIIA Dec., 99 21831 (2001) (2001 WL 1328473) is helpful. In *Jackson*, the claimant was working part-time, four hours per day, five days per week at the time of the injury. He testified that he had planned to return to full-time employment, and requested that his time loss compensation rate be calculated as if he were working full-time. In rejecting his argument based on the plain “receiving” language of the statute, the Board stated:

³ Board decisions are not precedential but may be considered for any persuasive value. *Walmer v. Dep’t of Labor & Indus.*, 78 Wn. App. 162, 167, 896 P.2d 95 (1994). All of the decisions discussed herein (with the exception of the Board’s decision in the instant case) have been designated by the Board as “Significant Decision(s).” RCW 51.52.160 requires the Board to designate some of its decisions as “significant decisions,” and to publish those decisions. Those Significant Decisions are accessible on the Internet at the Board’s web page address at <http://www.wa.gov/biia/>. In addition, Board decisions, both those that have been designated as “significant” and those that have not been so designated, can be accessed on WESTLAW at WAWC-ADMIN.

Mr. Jackson has supplied no legal authority to support his argument that his time-loss compensation should be calculated as if this anticipated future change in his hours actually had occurred. RCW 51.08.178(1) specifically states that the wages that are used to calculate time loss compensation are those that the worker was *receiving 'at the time of the injury.'*... We note that if anticipated changes of circumstances could be used to support a recalculation of wages to increase time-loss compensation, changes in circumstances such as layoffs, plant closures, etc., could be used to decrease those benefits.

Jackson, at 2 (Emphasis added).

The Board addressed a similar issue in *In re Chester Brown*, BIIA Dec., 88 1326 (1989) (1989 WL 164604). In *Brown*, the claimant alleged that if he could “prove he had the ability to earn more money than he was actually earning at the time of his injury, then that earning capacity, rather than his actual wage at the time of the injury, should be considered the basis for the calculation of loss of earning power benefits.” *Brown*, at 2. The Board held that a worker who anticipates a future increase in cash wages cannot, if the wage increase has not occurred at the time of injury, demand inclusion of that anticipated wage or salary increase in the computation. *Brown*, at 2. The legislative scheme simply does not permit such evasion of the statutory computation formula of RCW 51.08.178. The money that would come with such an expected future wage increase is

not money that the worker was “receiving at the time of the injury” within the meaning of RCW 51.08.178. *Id.*

Unfortunately, the Board did not follow the logic of its prior Significant Decisions in *Jackson* and *Brown* when deciding Mr. Granger's case. Under the reasoning of *Jackson* and *Brown*, a merely anticipated increase in future wages cannot be included in wage computation.

3. Gallo does not, as Division One concluded, require that a mere anticipated receipt of health care benefits in the future, as here, be included in wage computation.

Just as an anticipated increase in monetary pay would not be included in a time loss compensation calculation, an anticipated receipt of health care benefits cannot be included in a time loss compensation calculation if eligibility for that benefit has not yet been achieved at the time of the injury. As noted, this conclusion derives from the plain language of the statute. *Harris*, 120 Wn.2d at 471-74 (“receiving” under RCW 51.32.225(1) must be given its plain meaning, i.e., to “take possession or delivery of;” liberal construction rule does not apply when interpreting the unambiguous term, “receiving”); *see also Frazier v. Dep’t of Labor & Indus.*, 101 Wn. App. 411, 418-20, 3 P.3d 221 (2000) (explaining the *Harris* Court’s interpretation of “receiving”).

As noted *supra* at page 1 of this Petition, in the instant case, Division One relied on brief discussion of “receiving” in this Court’s

Gallo decision to reject the foregoing argument of the Department. Slip op. at 6-7.⁴ Division One asserted that the *Gallo* Court rejected a similar Department argument there, and that *Gallo* held “a worker receives wages when the employer provides consideration.” Slip op. at 6-7.

The *Gallo* Court declared that a worker should be deemed to be receiving CBA *retirement trust fund* contributions at the point when the employer pays money into the trust. *Gallo*, 120 P.3d at 574.⁵ It was in this context that *Gallo* indicated that, in making payments into the retirement trust at the time of injury, “the employer was providing consideration . . . at the time of the injury.” *Id.*

But this *Gallo* discussion was addressing *retirement* plan contributions. The *Gallo* Court did not suggest there that an employer’s making of contributions can change eligibility requirements. Workers who are not eligible for health care coverage when a contribution is made are not receiving consideration; they are receiving only a mere contingency that may never be of any value to them unless they continue to be employed in the near term such that their “hour bank” will build up

⁴ Division One also apparently based its decision on its speculation that Mr. Granger would have continued to work continuously for a period of time sufficient to become eligible for health care benefits. Slip op. at 7. This speculation has no support in the record and should not be considered in support of the Court’s opinion.

⁵ The *Gallo* Court went on, however, to hold that such *retirement* plan contributions are not included in wage computation under RCW 51.08.178 because these benefits are not consideration of like nature to board, housing and fuel. *Gallo*, 120 P.3d at 574.

to a point of eligibility. Division One's ruling must be rejected because it erroneously treats CBA "hour bank"-based health plans as if all workers have health coverage all of the time. *See, e.g., Minturn*, 83 Wn. App. at 5-8 ("wage" computation must *rationaly* reflect lost wages).

Furthermore, this Court held in *Gallo* that, where a worker retains eligibility for health coverage following injury, the draw-down of hours from the CBA hour bank constitutes the providing of health benefits by the employer. *Gallo*, 120 P.3d at 575-76. Thus, because the hour bank provides a mechanism for continuing coverage during disability periods, the worker cannot be deemed to have lost health benefits during his injury-caused disability periods. *Id.* Logically, if the hourly contributions are the providing of health coverage when the hours *come out* of the "hour bank," the contributions cannot - - as Division One held here - - also be the providing of health coverage when the contributions *go into* the "hour bank." That would be illogical double counting of the contributions.

It is also anomalous under Division One's ruling here that only those workers who have larger accruals in their hour banks at the time of injury - - and hence will have health benefits coverage during injury-caused disability periods - - will have their wage computation offset, per the just-noted *Gallo* ruling (*Gallo*, 120 P.3d at 575-76), during those disability periods. Another defect in Division One focusing exclusively

on the contribution (and ignoring coverage) is that this approach fails to take into account that the CBA health plan caps the number of hours that can be banked - - a worker can accumulate only 1080 hours in the health benefits hour bank. CP 21, 89. Where a worker is at the cap, the employer does not make any contributions. Thus, if a worker is injured at a point when the worker is at the cap, there will be no contribution, and hence the value of the health benefits coverage will not be included in “monthly wage” computation under Division One’s approach.

4. Unlike Division One’s decision, WAC 296-14-526 gives effect to the plain terms of RCW 51.08.178 and does not yield strained results.

Thus, Division One’s approach here yields several anomalies and strained results. Such outcomes are to be avoided in statutory interpretation. *See generally State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). These anomalies and strained results are avoided under WAC 296-14-526’s statutory-text based interpretation of RCW 51.08.178 (“receiving at the time of the injury”).

WAC 296-14-526 recognizes that a CBA hour bank is merely a means for fairly apportioning: 1) the employer costs of funding coverage and 2) health benefits coverage among workers. It is helpful to compare Mr. Granger’s circumstance with that of other employees, such as probationary, seasonal, intermittent and part-time public employees in Washington. During any periods for which the latter classes of employees

do not meet eligibility requirements for health plan coverage, they do not receive such coverage. *See, e.g.*, WAC 182-12-115. And, because such employees cannot point to an “hour bank” funding scheme like that used to fund and apportion health benefits for some non-public employees such as Mr. Granger, the employees cannot make the contributions-equal-consideration argument that the Court of Appeals accepted here.

It does not make sense, however, to distinguish in “wage” computation between Mr. Granger and other employees whose employers do not use an hour bank, or anything like it, to fund and apportion benefits. More importantly, nothing suggests that the Legislature intended such a distinction. At bottom, coverage, not contributions, is what counts for purposes of determining what is “consideration” and when it is “received” for work under RCW 51.08.178. Here, money was paid *to* a health care trust, but Mr. Granger was not then receiving coverage. Accordingly, the contributions cannot be included in his “wage” computation under RCW 51.08.178.

B. WAC 296-14-526 applies RCW 51.08.178’s “receiving at the time of the injury” requirement to help achieve the “sure and certain” relief goal of RCW 51.04.010.

With the adoption of the Industrial Insurance Act in 1911, the Legislature declared that it was necessary to have a uniform, fair, prompt, sure, and certain application of the law. *See generally* RCW 51.04.010

(goal of the IIA to provide “sure and certain” relief to workers). This requires a clear and principled standard.

The statute here is unambiguous. One calculates time-loss and other wage-loss benefits based upon the “monthly wages” the employee was “receiving at the time of the injury.” RCW 51.08.178(1). WAC 296-14-526 is on point, specifically stating that a worker is entitled to the value of what an employer pays into a trust fund only if the worker is actually presently eligible for the value of that benefit.

The “receiving at the time of the injury” standard of RCW 51.08.178 was created by the Legislature for the same reason that the Legislature creates effective dates of legislation and statutes of limitation. It is necessary to set a point at which the rights and responsibilities of individuals become fixed in order to bring certainty into what would otherwise be chaos and conflicting claims. “Receiving” means having a current right to the employer-funded health benefits at the time of injury.

C. Where There Is No Loss Of Wages Or Benefits Due To Injury, There Can Be No Wage Loss *Replacement* Under RCW 51.

Under RCW Title 51, an injured worker is eligible to receive time loss compensation as a temporary substitute for his *actual lost wages*. See, e.g., *Cockle*, 142 Wn.2d at 815 n.6. Time loss compensation benefits should proportionally reflect a worker’s actual wages as received at the

time of the injury, as per RCW 51.08.178(1). *South Bend Sch. Dist. 118 v. White*, 106 Wn. App. 309, 23 P.3d 546 (2001).

In discussing the nature and purpose of time loss compensation benefits, the Court in *South Bend School District 118* stated:

[T]he basic purpose of temporary disability compensation is to replace the money a worker loses by reason of temporary inability to work due to an industrial injury. However, where a worker receives his normal salary from his employer in spite of his inability to work, he has not lost anything financially and there is nothing to replace, and the basic purpose of temporary disability compensation is not met.

106 Wn. App. at 316 (addressing employer sick leave payments).

The logic behind the Court's analysis in *South Bend School District 118* is applicable here. Considering the purpose of time loss compensation payments, i.e., as a partial replacement for lost wages, one must have *actually sustained a financial loss of wages or benefits* in order to receive compensation for loss of health care benefits in one's time loss compensation calculation.

Here, it is undisputed that Mr. Granger did not receive health care benefits as employer-provided consideration at the time of his industrial injury. CP 18. The payments made by his employer into the CBA trust fund at the time of his injury had no actual or practical value to him. If he went to see a doctor in April of 1995, he had to pay for the visit himself.

Therefore, when Mr. Granger became temporarily disabled and unable to work, he *suffered no financial loss concerning health care benefits*, as, at the time of injury, he was not receiving any actual value from the payments his employer made into the CBA trust fund. There was nothing to replace, and no loss for which to compensate him.

Moreover, if the Department is required to include health care benefits in Mr. Granger's time loss compensation rate, he is being overcompensated for his temporary disability. Ultimately, this financial burden falls squarely upon employers required to pay premiums to the Department and on self-insured employers, who will pass part of that burden on to the public eventually.

VIII. CONCLUSION

Accordingly, this case presents an issue of substantial public interest that should be considered by this Court. The Department respectfully requests that the Court grant discretionary review under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 16th day of December, 2005.

ROB MCKENNA
ATTORNEY GENERAL

John R. Wasberg
Senior Counsel
WSBA 6409

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND)
INDUSTRIES OF THE STATE OF)
WASHINGTON,)

Appellant,)

vs.)

WILLIAM A. GRANGER,)

Respondent.)
_____)

DIVISION ONE

No. 55160-4-I

UNPUBLISHED OPINION

FILED: October 31, 2005

BAKER, J. — For each hour that William Granger worked, his employer paid \$2.15 into a union trust fund that provided health care benefits for qualifying employees. But under the collective bargaining agreement which governed his employment, Granger did not have enough hours to qualify for health care benefits at the time of his injury. The Department of Labor and Industries allowed Granger's claim for time-loss compensation, but did not include the \$2.15 per hour in the calculation of his "monthly wage." The Board of Industrial Insurance Appeals reversed the Department, ordering that the \$2.15 per hour be included in the calculation. The superior court affirmed the Board, and the Department appeals. Because the \$2.15 per hour for health care coverage was a

benefit that Granger was receiving at the time of his injury, which is critical to his health and survival, we affirm.

I.

Granger filed an application for benefits with the Department of Labor and Industries after he sustained an industrial injury on April 20, 1995 while working for G.G. Richardson, Inc. The Department issued an order allowing the claim and awarding time-loss benefit compensation. In July 2004, the Department issued an order affirming an earlier order that set Granger's monthly wages at \$2,847.68 for purposes of calculating his time-loss compensation. The Department did not calculate health care benefits into Granger's monthly wages.

At the time of injury, Granger was a member of Union Local 292 of Washington and Northern Idaho District Counsel of Laborers. According to the Northwest Laborers-Employer's Health and Security Trust Fund, eligibility for medical benefits was determined on the basis of an hour bank system. For every hour that Granger worked, G.G. Richardson paid \$2.15 per hour into the union trust fund for health care coverage. After working a minimum of 200 hours, Granger became eligible for medical benefits. The employer deducted 120 hours from his bank each month for medical coverage, and Granger could claim medical benefits so long as his hour bank did not drop below 120 hours.

Although Granger had previously become eligible for medical benefits, he did not have enough hours in his "hour bank" on the date of his injury for him to qualify for health care coverage. Granger's eligibility would have been reinstated once his hour bank was rebuilt to 120 hours, so long as that occurred within 10

months. Otherwise, Granger would have forfeited his hours in the hour bank, and his medical coverage would have been reinstated only after he worked the minimum 200 hours for new employees.

Granger appealed the Department's order to the Board of Industrial Insurance Appeals, arguing that the value of the employer-paid contribution for health and welfare benefits of \$2.15 per hour should be included in the formula used to calculate his wages at the time of injury, and the resulting time-loss benefits. The parties submitted the case for decision based on stipulated facts. While the Industrial Appeals Judge affirmed the Department's order, on appeal, the Board reversed the appeal judge's decision. The Board remanded the claim, ordering the Department to recalculate Granger's monthly wages and include the employer-paid contribution to Granger's union health care benefit.

The Department appealed the Board's decision and order. The superior court affirmed the Board's decision after a bench trial. The Department appeals the superior court's judgment. We heard oral argument on July 11, 2005, but stayed our decision pending Gallo v. Department of Labor and Industries.¹

II.

An appeal to this court from a superior court review of a Board decision "is governed by RCW 51.52.140, which provides that 'the practice in civil cases shall apply to appeals prescribed in this chapter.'"² We must interpret RCW

¹ No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

² Kingery v. Dep't of Labor & Indus., 80 Wn. App. 704, 708, 910 P.2d 1325 (1996) (quoting RCW 51.52.140), aff'd, 132 Wn.2d 162, 937 P.2d 565 (1997).

51.08.178. Statutory construction is a question of law, which we review de novo.³

This appeal turns on the meaning of “receiving . . . at the time of injury” for purposes of RCW 51.08.178. The Department argues that the trial court erred because Granger was not eligible to claim health care benefits at the time of his injury, and therefore was not “receiving” the benefit of the employer’s contributions. In response, Granger argues that the term “receiving” refers to whether his employer was paying consideration at the time of injury, not whether he was eligible to claim the benefit.

Compensation rates for time-loss and loss of earning power are determined “by reference to a worker’s ‘wages,’ as that term is defined in RCW 51.08.178, at the time of the injury.”⁴ Monthly wages include both cash wages and other consideration paid by the employer that is critical to protecting the worker’s basic health and survival.⁵

In pertinent part, RCW 51.08.178 provides:

(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.

....

The term “wages” shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the

³ Cockle v. Dep’t of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

⁴ Cockle, 142 Wn.2d at 806.

⁵ Cockle, 142 Wn.2d at 822.

employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section.^[6]

In Cockle v. Department of Labor and Industries,⁷ our Supreme Court considered whether the value of employer-provided health care coverage is “other consideration of like nature.”⁸ Concluding that this phrase is ambiguous, the court engaged in statutory construction.⁹ Because the statute is remedial in nature, the court liberally construed the statute, and resolved doubts in favor of the worker.¹⁰ It explained that “Title 51 RCW’s overarching objective is ‘reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’”¹¹ The court noted that wage calculation under the statute was changed by the 1971 Legislature to reflect a worker’s actual “lost earning capacity,”¹² and that “the workers’ compensation system should continue ‘serv[ing] the [Legislature’s] goal of swift and certain relief for injured workers.’”¹³ The court then construed the phrase “board, housing, fuel, or other consideration of like nature”¹⁴ to mean “readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of

⁶ RCW 51.08.178(1).

⁷ 142 Wn.2d 801, 16 P.3d 583 (2001).

⁸ Cockle, 142 Wn.2d at 805.

⁹ Cockle, 142 Wn.2d at 821-22 (citing Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991)).

¹⁰ Cockle, 142 Wn.2d at 819-20.

¹¹ Cockle, 142 Wn.2d at 822 (quoting RCW 51.12.010).

¹² Cockle, 142 Wn.2d at 822 (quoting Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727 (1997)).

¹³ Cockle, 142 Wn.2d at 822 (quoting Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

¹⁴ RCW 51.08.178(1).

injury that are critical to protecting workers' basic health and survival."¹⁵ The court further explained that "[c]ore, nonfringe benefits such as food, shelter, fuel, and health care all share that 'like nature.'"¹⁶

The circumstances we are presented with differ from those in Cockle because, unlike Granger, at the time of her injury, Cockle was eligible to claim health care benefits.¹⁷ But this distinction is immaterial to our determination that Granger was receiving health care benefits at the time of injury.

In Gallo v. Department of Labor and Industries,¹⁸ our Supreme Court clarified that the "receiving . . . at the time of injury" limitation under RCW 51.08.178 asks "whether the employer was providing consideration of like nature at the time of the injury."¹⁹ In Gallo, the court decided whether consideration paid by employers for certain benefits, such as retirement plans, apprentice-programs, and life insurance, constituted "other consideration of like nature" under RCW 51.08.178(1). It analyzed each contribution under the test set forth in Cockle, explaining that not all contributions are critical to the basic health and survival of the worker, and concluded that the contributions in question did not constitute wages.²⁰

The Department argued in Gallo, as it does here, that "receiving . . . at the time of injury" means that the worker must be able to claim the benefit at the time

¹⁵ Cockle, 142 Wn.2d at 822.

¹⁶ Cockle, 142 Wn.2d at 822-23.

¹⁷ Cockle, 142 Wn.2d at 805-06.

¹⁸ No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

¹⁹ Gallo, 2005 Wash. LEXIS 797 at *34.

²⁰ Gallo, 2005 Wash. LEXIS 797 at *2.

of the injury. Our Supreme Court rejected this assertion, and clarified that a worker receives wages when the employer provides consideration.²¹

Because Granger's employer was paying \$2.15 per hour for his health care coverage, Granger was receiving that benefit at the time of injury. And Cockle makes clear that health insurance payments are "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival," and therefore properly calculated into a worker's monthly wages under RCW 51.08.178.²²

While rejecting the argument that retirement benefits are "other consideration of like nature" for purposes of wage calculation, the Gallo court explained that employer payments into retirement plans are not benefits critical to the basic health and survival of a worker at the time of injury because "they are not intended to be, nor are they generally immediately available to the worker at the time of injury."²³ Similarly, Granger's health benefits were not immediately available to him at the time of injury. But employer payments for health care coverage are distinguishable from retirement payments. Unlike retirement benefits, health care benefits are intended for the basic health and survival of the worker while employed. And, although Granger's health care coverage had temporarily lapsed, the employer was replenishing his bank with each hour he worked and Granger would have soon realized the benefit.

²¹ Gallo, 2005 Wash. LEXIS 797 at *34.

²² Cockle, 142 Wn.2d at 822.

²³ Gallo, 2005 Wash. LEXIS 797 at *34.

The Department argues that WAC 296-14-526 directly addresses the question presented by Granger's case. Under WAC 296-14-526, the value of other consideration of like nature is included in the worker's monthly wages only where the worker was actually eligible to receive the benefit.²⁴ Although an appellate court defers to an "agency's interpretation when that will help the court achieve a proper understanding of the statute," such interpretations are not binding.²⁵ If the agency's interpretation conflicts with a statutory mandate, deference is inappropriate.²⁶ "[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is" and to "determine the purpose and meaning of statutes."²⁷

Because Cockle and Gallo dictate that health care payments made by an employer at the time of a worker's injury must be included in the calculation of the worker's monthly wages for purposes of RCW 51.08.178, WAC 296-14-526 is not controlling.

Granger requests attorney fees under RCW 51.52.130, which provides:

If, on appeal to the superior or appellate court from the decision and order of the board . . . where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . If . . . in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, . . . the attorney's fee fixed

²⁴ WAC 296-14-526(1)(b)(ii).

²⁵ Cockle, 142 Wn.2d at 812 (quoting Clark County Citizens United, Inc. v. Clark County Natural Res. Council, 94 Wn. App. 670, 677, 972 P.2d 941 (1999)).

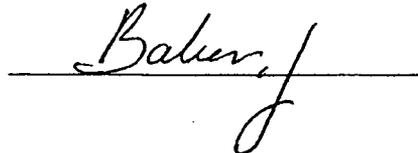
²⁶ Cockle, 142 Wn.2d at 812 (citing Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)).

²⁷ Cockle, 142 Wn.2d 812 (quoting Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981)).

by the court, for services before the court only, . . . shall be payable out of the administrative fund of the department.^[28]

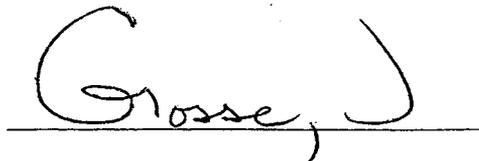
Because the Department appealed and Granger's right to relief is sustained, we award reasonable attorney fees for services before this court only.²⁹

AFFIRMED.

Handwritten signature of Baker, J. in cursive script, written over a horizontal line.

WE CONCUR:

Handwritten signature of Appelwick, J. in cursive script, written over a horizontal line.

Handwritten signature of Grosse, J. in cursive script, written over a horizontal line.

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SEATTLE

²⁸ RCW 51.52.130.

²⁹ Piper v. Dep't of Labor & Indus., 120 Wn. App. 886, 890, 86 P.3d 1231, rev.denied, 152 Wn.2d 1032 (2004).

F

No. 55160-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

WILLIAM A. GRANGER,

Respondent.

MOTION TO PUBLISH

Terry J. Barnett, WSB 8080
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820 A Street, Suite 220
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SEATTLE

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1. **Identity of moving party:**

Respondent William A. Granger.

2. **Relief sought:**

Publish the court's opinion, filed October 31, 2005.

3. **Facts relevant to motion:**

See below.

4. **Grounds for relief, and argument:**

RCW 2.06.040," Panels – Decisions, publication as opinions, when [etc.]," provides in part:

...All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published. ...

For reasons discussed below, the court's opinion in this case will have substantial precedential value.

RAP 12.3(e) provides that when a motion to publish is made by a party, the motion must address these criteria: (1) "the applicant's reasons for believing that publication is necessary"; (2) "whether the decision determines an unsettled or new question of law or constitutional principle"; (3) "whether the decision modifies, clarifies or reverses an established principle of law";

(4) “whether the decision is of general public interest or importance”; and (5) whether the decision is in conflict with a prior opinion of the Court of Appeals.”

(1) Granger’s reasons for believing publication is necessary

In enacting the Industrial Insurance Act, the Legislature declared that the Act means to serve an important public purpose¹ – to minimize injured workers’ suffering and economic loss.² Guided by this principle, the Supreme Court, in *Cockle v. Dep’t of Labor & Indus.*,³ held that employer payments for health-care protection are “wages” for the purpose of RCW 51.08.178 – *i.e.*, to determine the amount of disability benefits injured workers receive. Post *Cockle*, the Department adopted WAC 296-14-526, which provides:

WAC 296-14-526. Is the value of “consideration of like nature” always included in determining the worker’s compensation?

(1) No. The value of other consideration of like nature is only included in the worker’s monthly wage if:

¹ See *Judd v. AT&T*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004) (legislative declarations do not create enforceable rights, but are relevant to interpreting statutes to which they relate).

² RCW 51.12.010. See also RCW 51.04.010 (“The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker.”).

³ 142 Wn.2d 801, 16 P.3d 583 (2001).

(a) The employer, through its full or partial payment, provided the benefit to the worker at the time of injury or on the date of disease manifestation;

(b) The worker received the benefit at the time of injury or on the date of disease manifestation.

This section is satisfied if, at the time of injury or on the date of disease manifestation:

(i) The employer made payments to a union trust fund or other entity for the identified benefit; and

(ii) The worker was actually eligible to receive the benefit.

Example: At the time of the worker's industrial injury, the employer paid two dollars and fifty cents for each hour worked by the employee to a union trust fund for medical insurance on behalf of the employee and her family. If the employee was able to use the medical insurance at the time of her injury, the employer's monthly payment for this benefit is included in the worker's monthly wage, in accordance with (d) of this subsection. This is true even where the worker's eligibility for this medical insurance is based primarily or solely on payments to the trust fund from past employers.

(Emphasis added) This is the very opposite of what this court, in *Granger*, determined the law to be.

Cockle affects about 30,000 new claims each year.⁴ Not all of them are affected by WAC 296-14-526, but many are. As long as *Granger* remains unpublished, the Department and self-insured employers will continue to

⁴ See Exhibit 1, "2004 Year in Review," Department of Labor & Industries, at "New Time-loss (Wage Replacement) Claims."

remains unpublished, the Department and self-insured employers will continue to apply WAC 296-14-526. Most injured workers are not represented by counsel, and lack the knowledge to recognize that the regulation is in error, if they even know of it.⁵ Consequently, they will be paid less in disability benefits than the Act mandates.

If they know of the issue and pursue it, their cases will consume public resources from other unnecessarily, that otherwise could be used for other cases.

Finally, as long as *Granger* remains unpublished, the Board of Industrial Insurance Appeals and the superior courts will remain rudderless in *Granger* cases. *Granger* is the *third* Court of Appeals decision to have addressed the issue in just the last few months.⁶ Both of the previous

⁵ See *Tolleycraft Yachts v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993) (noting “the multilayered and complex statutory scheme established by the Legislature to govern industrial insurance claims”); *Hernandez v. Dep’t of Labor & Indus.*, 107 Wn. App. 190, 199, 26 P.3d 977 (2001) (“[T]he average citizen is not expected to grasp statutory nuances. That is why the Industrial insurance Act provides for attorney fees.”); *Grimes v. Lakeside*, 78 Wn. App. 554, 565, 897 P.2d 431 (1995) (“The department [of labor & industries] necessarily deals with a class of people who are unlearned in law,” citation omitted).

⁶ Besides *Granger*, the cases are *Department of Labor & Indus. v. Fahlgren*, 2005 Wash. App. LEXIS 2436 (September 20, 2005) (Div. III), and *Department of Labor & Indus. v. Bogle*, 2005 Wash. App. LEXIS 1888 (July 28, 2005) (Div. III).

In both *Fahlgren* and *Bogle*, eligibility for health-care coverage depended on hour-bank rules. In *Fahlgren*, like *Granger*, the injured worker had accumulated enough hours for initial eligibility, but at the time of injury her hours had fallen below the

decisions are unpublished. Moreover, *Granger* is the only one of the three decisions issued post *Gallo v. Dep't of Labor & Indus.*⁷ *Granger* needs to be published to guide the board and the superior courts.

(2) **The court's opinion determines an unsettled or new question of law**

The question of whether RCW 51.08.178 "wages" includes money an employer, at the time of injury, is paying to secure health-care coverage for an injured worker, where the worker is ineligible for coverage at that time, is a question of law that is both unsettled and new. *Gallo* does not decide the question. *Granger* does.

(3) **The court's opinion clarifies an established principle of law**

Cockle v. Dep't of Labor & Indus. established that employer-provided health-care coverage is "wages" for purposes of RCW 51.08.178. *Granger* clarifies application of the principle, so clarifies the principle, itself.

(4) **The court's opinion is of general public interest or importance constitutional principle**

Granger is of substantial public importance, because it rejects a

threshold for current eligibility. In *Bogle*, the worker was newly employed, and at the time of injury had yet to bank enough hours for initial eligibility.

⁷ __ Wn.2d __, 120 P.3d 564 (2005).

regulation that purports to authorize the Department and self-insured employers to (1) violate the fundamental purpose of the Industrial Insurance Act – to minimize injured workers’ suffering and economic loss; (2) violate the Legislature’s specific intent, as determined by *Cockle*, to include health-care wages in “wages”; and (3) violate the Legislature’s specific intent, stated in RCW 51.08.178, that each injured worker’s disability compensation be derived from his or her lost “wages.”

(5) The court’s opinion does not conflict with a prior opinion of the Court of Appeals

The court’s opinion does not conflict with other opinions of the Court of Appeals.

DATED this 1 day of November 2005.

Respectfully submitted,
RUMBAUGH, RIDEOUT, BARNETT & ADKINS



Terry J. Barnett, WSB 8080, Attorneys for
Respondent William A. Granger

Under penalty of perjury under the laws of the State of Washington,

I certify that on this date I mailed a copy of this pleading as follows:

Timothy Hamill, AAG
120 S. Third Street, #100
Yakima, WA 98901

John Wasberg, AAG
Office of the Attorney General
900 4th Ave., Suite 2000
Seattle, WA 98164-1012

DATED this 1 day of November 2005.


Michelle E. Rhodes, Legal Assistant

Insurance for Workers and Employers

Your Guarantee

Washington State established its workers' compensation program in 1911, the result of a historic compromise that provided mutual protection for workers and employers. Workers gave up their right to sue their employer for a work-related injury or illness. In exchange, employers were protected from the cost of extended claims and tort liability that would result from workplace injuries. Changes through the years involved negotiations with employers and workers.

Our Commitment

The Department of Labor and Industries (L&I) administers the workers' compensation program to serve the interests of injured workers and their employers. Our commitment:

- Work with employers and workers to prevent workplace injuries and illnesses.
- Provide prompt and certain relief to workers who suffer work-related injury or illness.
- Administer the program and its finances in a way that maximizes benefits and minimizes costs.
- Maintain program integrity by eliminating fraud and abuse, and by making sure injured workers return to work as soon as medically possible.
- Listen to and respond to the needs of our customers.

Responsive Change

To fulfill this commitment, L&I must identify problems aggressively and find remedies and be open to new ideas and change. Our administration of workers' compensation evolves as new proven technologies become available. For example, we must closely monitor medical technology and its application to those that improve an injured worker's condition and assist those that provide a better quality of life. L&I must manage claims effectively, encourage return to work options and minimize the financial impact of a claim. No one benefits when a claim lasts longer than it should.

Finally, we must continue to partner with employers and workers to improve a vital and vigorous workers' compensation program.

2004

Washington's Workers' Compensation Program

- Insurance for Workers and Employers
- A Year of Change in Worker's Compensation
- Benefits/Administrative Costs
- Emeriturns Compared to Inflation
- Statistics at a Glance
- Financial Summary

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APPENDIX B

F

No. 55160-4-1

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If they know of the issue and pursue it, their cases will consume public resources from other unnecessarily, that otherwise could be used for other cases.

Finally, as long as *Granger* remains unpublished, the Board of Industrial Insurance Appeals and the superior courts will remain rudderless in *Granger* cases. *Granger* is the *third* Court of Appeals decision to have addressed the issue in just the last few months.⁶ Both of the previous

⁵ See *Tolleycraft Yachts v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993) (noting “the multilayered and complex statutory scheme established by the Legislature to govern industrial insurance claims”); *Hernandez v. Dep’t of Labor & Indus.*, 107 Wn. App. 190, 199, 26 P.3d 977 (2001) (“[T]he average citizen is not expected to grasp statutory nuances. That is why the Industrial insurance Act provides for attorney fees.”); *Grimes v. Lakeside*, 78 Wn. App. 554, 565, 897 P.2d 431 (1995) (“The department [of labor & industries] necessarily deals with a class of people who are unlearned in law,” citation omitted).

⁶ Besides *Granger*, the cases are *Department of Labor & Indus. v. Fahlgren*, 2005 Wash. App. LEXIS 2436 (September 20, 2005) (Div. III), and *Department of Labor & Indus. v. Bogle*, 2005 Wash. App. LEXIS 1888 (July 28, 2005) (Div. III).

In both *Fahlgren* and *Bogle*, eligibility for health-care coverage depended on hour-bank rules. In *Fahlgren*, like *Granger*, the injured worker had accumulated enough hours for initial eligibility, but at the time of injury her hours had fallen below the

decisions are unpublished. Moreover, *Granger* is the only one of the three decisions issued post *Gallo v. Dep't of Labor & Indus.*⁷ *Granger* needs to be published to guide the board and the superior courts.

(2) **The court's opinion determines an unsettled or new question of law**

The question of whether RCW 51.08.178 "wages" includes money an employer, at the time of injury, is paying to secure health-care coverage for an injured worker, where the worker is ineligible for coverage at that time, is a question of law that is both unsettled and new. *Gallo* does not decide the question. *Granger* does.

(3) **The court's opinion clarifies an established principle of law**

Cockle v. Dep't of Labor & Indus. established that employer-provided health-care coverage is "wages" for purposes of RCW 51.08.178. *Granger* clarifies application of the principle, so clarifies the principle, itself.

(4) **The court's opinion is of general public interest or importance constitutional principle**

Granger is of substantial public importance, because it rejects a

threshold for current eligibility. In *Bogle*, the worker was newly employed, and at the time of injury had yet to bank enough hours for initial eligibility.

⁷ __ Wn.2d __, 120 P.3d 564 (2005).

regulation that purports to authorize the Department and self-insured employers to (1) violate the fundamental purpose of the Industrial Insurance Act – to minimize injured workers’ suffering and economic loss; (2) violate the Legislature’s specific intent, as determined by *Cockle*, to include health-care wages in “wages”; and (3) violate the Legislature’s specific intent, stated in RCW 51.08.178, that each injured worker’s disability compensation be derived from his or her lost “wages.”

(5) The court’s opinion does not conflict with a prior opinion of the Court of Appeals

The court’s opinion does not conflict with other opinions of the Court of Appeals.

DATED this 1 day of November 2005.

Respectfully submitted,
RUMBAUGH, RIDEOUT, BARNETT & ADKINS



Terry J. Barnett, WSB 8080, Attorneys for
Respondent William A. Granger

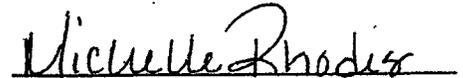
Under penalty of perjury under the laws of the State of Washington,

I certify that on this date I mailed a copy of this pleading as follows:

Timothy Hamill, AAG
120 S. Third Street, #100
Yakima, WA 98901

John Wasberg, AAG
Office of the Attorney General
900 4th Ave., Suite 2000
Seattle, WA 98164-1012

DATED this 1 day of November 2005.


Michelle E. Rhodes, Legal Assistant

Insurance for Workers and Employers

Your Guarantee

Washington State established its workers' compensation program in 1911, the result of a historic compromise that provided mutual protection for workers and employers. Workers gave up their right to sue their employer for a work-related injury or illness. In exchange, employers were protected from the cost of extended claims and tort liability that would result from workplace injuries. Changes through the years involved negotiations with employers and workers.

Our Commitment

The Department of Labor and Industries (L&I) administers the workers' compensation program to serve the interests of injured workers and their employers. Our commitment:

- Work with employers and workers to prevent workplace injuries and illnesses.
- Provide prompt and certain relief to workers who suffer work-related injury or illness.
- Administer the program and its finances in a way that maximizes benefits and minimizes costs.
- Maintain program integrity by eliminating fraud and abuse, and by making sure injured workers return to work as soon as medically possible.
- Listen to and respond to the needs of our customers.

Responsive Change

To fulfill this commitment, L&I must identify problems, aggressively find remedies, and be open to new ideas and change. Our administration of workers' compensation evolves as new proven technologies become available. For example, we must closely monitor medical liability and emerging technology those that improve injured workers' conditions and assist those that provide better care. We must encourage claims effectively, encourage return to work options and minimize the financial impact of a claim. We give benefits when a claim lasts longer than it should.

Finally, we must continue to partner with employers and workers to improve a vital and vigorous workers' compensation program.

2004

Washington's Workers' Compensation Program

- Insurance for Workers and Employers
- A Year of Change in Worker's Comp
- Benefits/Administrative Costs
- Premiums Compared to Inflation
- Statistics at a Glance
- Financial Summary

For more information, contact the Labor and Industries Information Center at 1-800-422-0000. A PDF version is also available at www.lni.wa.gov.



APPENDIX C

APPENDIX C

STATE STATUTES

RCW 51.04.010 - - INTRODUCTORY PROVISION TO INDUSTRIAL INSURANCE STATUTE

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been **uncertain, slow** and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and **sure and certain relief** for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

(Bolding added)

RCW 51.08.178 - - WAGE COMPUTATION STATUTE

(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. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was **receiving at the time of the injury**:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;

(g) By thirty, if the worker was normally employed seven days a week.

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. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

(Bolding added)

RCW 51.32.050 - - DEATH BENEFITS STATUTE

(1) Where death results from the injury the expenses of burial not to exceed two hundred percent of the average monthly wage in the state as defined in RCW 51.08.018 shall be paid.

(2)(a) Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage payments according to the following schedule:

(i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars;

(ii) If there is one child of the deceased worker and in the legal custody of such spouse, sixty-two percent of the wages of the deceased worker but not less than two hundred twenty-two dollars;

(iii) If there are two children of the deceased worker and in the legal custody of such spouse, sixty-four percent of the wages of the deceased worker but not less than two hundred fifty-three dollars;

(iv) If there are three children of the deceased worker and in the legal custody of such spouse, sixty-six percent of the wages of the deceased worker but not less than two hundred seventy-six dollars;

(v) If there are four children of the deceased worker and in the legal custody of such spouse, sixty-eight percent of the wages of the deceased worker but not less than two hundred ninety-nine dollars; or

(vi) If there are five or more children of the deceased worker and in the legal custody of such spouse, seventy percent of the wages of the deceased worker but not less than three hundred twenty-two dollars.

(b) Where the surviving spouse does not have legal custody of any child or children of the deceased worker or where after the death of the worker legal custody of such child or children passes from such surviving spouse to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children. The amount of such payments shall be five percent of the monthly benefits payable as a result of the worker's death for each such child but such payments shall not exceed twenty-five percent. Such payments on account of such child or children shall be subtracted from the amount to which such surviving spouse would have been entitled had such surviving spouse had legal custody of all of the children and the surviving spouse shall receive the remainder after such payments on account of such child or children have been subtracted. Such payments on account of a child or children not in the legal custody of such surviving spouse shall be apportioned equally among such children.

(c) Payments to the surviving spouse of the deceased worker shall cease at the end of the month in which remarriage occurs: PROVIDED, That a monthly payment shall be made to the child or children of the deceased worker from the month following such remarriage in a sum equal to five percent of the wages of the deceased worker for one child and a sum equal to five percent for each additional child up to a maximum of five such children. Payments to such child or children shall be apportioned equally among such children. Such sum shall be in place of any payments theretofore made for the benefit of or on account of any such child or children. If the surviving spouse does not have legal custody of any child or children of the deceased worker, or if after the death of the worker, legal custody of such child or children passes from such surviving spouse to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children.

(d) In no event shall the monthly payments provided in subsection (2) of this section exceed the applicable percentage of the average monthly wage in the state as computed under RCW 51.08.018 as follows:

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

(e) In addition to the monthly payments provided for in subsection (2) (a) through (c) of this section, a surviving spouse or child or children of such worker if there is no surviving spouse, or dependent parent or parents, if there is no surviving spouse or child or children of any such deceased worker shall be forthwith paid a sum equal to one hundred percent of the average monthly wage in the state as defined in RCW 51.08.018, any such children, or parents to share and share alike in said sum.

(f) Upon remarriage of a surviving spouse the monthly payments for the child or children shall continue as provided in this section, but the monthly payments to such surviving spouse shall cease at the end of the month during which remarriage occurs. However, after September 8, 1975, an otherwise eligible surviving spouse of a worker who died at any time prior to or after September 8, 1975, shall have an option of:

(i) Receiving, once and for all, a lump sum of twenty-four times the monthly compensation rate in effect on the date of remarriage allocable to the spouse for himself or herself pursuant to subsection (2)(a)(i) of this section and subject to any modifications specified under subsection (2)(d) of this section and RCW 51.32.075(3) or fifty percent of the then remaining annuity value of his or her pension, whichever is the lesser: PROVIDED, That if the injury occurred prior to July 28, 1991, the remarriage benefit lump sum available shall be as provided in the remarriage benefit schedules then in effect; or

(ii) If a surviving spouse does not choose the option specified in subsection (2)(f)(i) of this section to accept the lump sum payment, the remarriage of the surviving spouse of a worker shall not bar him or her from claiming the lump sum payment authorized in subsection (2)(f)(i) of this section during the life of the remarriage, or shall not prevent subsequent monthly payments to him or to her if the remarriage has been terminated by death or has been dissolved or annulled by valid court decree provided he or she has not previously accepted the lump sum payment.

(g) If the surviving spouse during the remarriage should die without having previously received the lump sum payment provided in subsection (2)(f)(i) of this section, his or her estate shall be entitled to receive the sum specified under subsection (2)(f)(i) of this section or fifty percent of the then remaining annuity value of his or her pension whichever is the lesser.

(h) The effective date of resumption of payments under subsection (2)(f)(ii) of this section to a surviving spouse based upon termination of a remarriage by death, annulment, or dissolution shall be the date of the death or the date the judicial decree of annulment or dissolution becomes final and when application for the payments has been received.

(i) If it should be necessary to increase the reserves in the reserve fund or to create a new pension reserve fund as a result of the amendments in chapter 45, Laws of 1975-'76 2nd ex. sess., the amount of such increase in pension reserve in any such case shall be transferred to the reserve fund from the supplemental pension fund.

(3) If there is a child or children and no surviving spouse of the deceased worker or the surviving spouse is not eligible for benefits under this title, a sum equal to thirty-five percent of the wages of the deceased worker shall be paid monthly for one child and a sum equivalent to fifteen percent of such wage shall be paid monthly for each additional child, the total of such sum to be divided among such children, share and share alike: PROVIDED, That benefits under this subsection or subsection (4) of this section shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018, as follows:

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

(4) In the event a surviving spouse receiving monthly payments dies, the child or children of the deceased worker shall receive the same payment as provided in subsection (3) of this section.

(5) If the worker leaves no surviving spouse or child, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty percent of the average monthly support actually received by such dependent from the worker during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018 as follows:

| AFTER | PERCENTAGE |
|---------------|------------|
| June 30, 1993 | 105% |
| June 30, 1994 | 110% |
| June 30, 1995 | 115% |

If any dependent is under the age of eighteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent reaches the age of eighteen years except such payments shall continue until the dependent reaches age twenty-three while permanently enrolled at a full time course in an accredited school. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

(6) For claims filed prior to July 1, 1986, if the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving a surviving spouse, or child, or children, the surviving spouse or child or children shall receive benefits as if death resulted from the injury as provided in subsections (2) through (4) of this section. Upon remarriage or death of such surviving spouse, the payments to such child or children shall be made as provided in subsection (2) of this section when the surviving spouse of a deceased worker remarries.

(7) For claims filed on or after July 1, 1986, every worker who becomes eligible for permanent total disability benefits shall elect an option as provided in RCW 51.32.067.

RCW 51.32.060 - - PENSION BENEFITS STATUTE

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

(a) If married at the time of injury, sixty-five percent of his or her wages but not less than two hundred fifteen dollars per month.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages but not less than two hundred fifty-two dollars per month.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages but not less than two hundred eighty-three dollars.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages but not less than three hundred six dollars per month.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages but not less than three hundred twenty-nine dollars per month.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages but not less than three hundred fifty-two dollars per month.

(g) If unmarried at the time of the injury, sixty percent of his or her wages but not less than one hundred eighty-five dollars per month.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages but not less than two hundred twenty-two dollars per month.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages but not less than two hundred fifty-three dollars per month.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages but not less than two hundred seventy-six dollars per month.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages but not less than two hundred ninety-nine dollars per month.

(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages but not less than three hundred twenty-two dollars per month.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

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

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

RCW 51.32.090 - - TIME LOSS COMPENSATION STATUTE

(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 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.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released

by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

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

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

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

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

| AFTER | PERCENTAGE |
|---------------|------------|
| June 30, 1993 | 105% |
| June 30, 1994 | 110% |

| | |
|---------------|------|
| June 30, 1995 | 115% |
| June 30, 1996 | 120% |

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

RCW 51.32.225 - - SOCIAL SECURITY RETIREMENT OFFSET STATUTE

(1) For persons receiving compensation for temporary or permanent total disability under this title, the compensation shall be reduced by the department to allow an offset for social security retirement benefits payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C. This reduction shall not apply to any worker who is receiving permanent total disability benefits prior to July 1, 1986.

(2) Reductions for social security retirement benefits under this section shall comply with the procedures in RCW 51.32.220 (1) through (6), except those that relate to computation, and with any other procedures established by the department to administer this section.

(3) Any reduction in compensation made under chapter 58, Laws of 1986, shall be made before the reduction established in this section.

RCW 51.52.160 - - BIIA TO DESIGNATE SIGNIFICANT DECISIONS

The board shall publish and index its significant decisions and make them available to the public at reasonable cost.

WAC REGULATIONS

WAC 182-12-115 Eligible employees.

The following employees of state government, higher education, K-12 school districts, educational service districts, political subdivisions and employee organizations representing state civil service workers are eligible to apply for PEBB insurance coverage. For purposes of defining eligible employees of school districts and educational service districts, a collective bargaining agreement will supersede all definitions provided under this chapter 182-12 WAC only if approved by the HCA.

(1) "Permanent employees." Those who work at least half-time per month and are expected to be employed for more than six months. Coverage begins on the first day of the month following the date of employment. If the date of employment is the first working day of a month, coverage begins on the date of employment.

(2) "Nonpermanent employees." Those who work at least half-time and are expected to be employed for no more than six months. Coverage begins on the first day of the seventh month following the date of employment.

(3) "Seasonal employees." Those who work at least half-time per month during a designated season for a minimum of three months but less than nine months per year and who have an understanding of continued employment season after season. Coverage begins on the first day of the month following the date of employment. If the date of employment is the first working day of a month, coverage begins on the date of employment. However, seasonal employees are not eligible for the employer contribution during the break between seasons of employment but may be eligible to continue coverage by self-paying premiums.

(4) "Career seasonal/instructional year employees." Employees who work half-time or more on an instructional year (school year) or equivalent nine-month seasonal basis. Coverage begins on the first day of the month following the date of employment. If the date of employment is the first working day of the month, coverage begins on the date of employment. These employees are eligible to receive the employer contribution for insurance during the off-season following each period of seasonal employment.

(5) "Part-time faculty." Faculty who are employed on a quarter/semester to quarter/semester basis are eligible to apply for coverage beginning with the second consecutive quarter/semester of half-time or more employment at one or more state institutions of higher education. Coverage begins on the first day of the month following the beginning of the second quarter/semester of half-time or more employment. If the first day of the second consecutive quarter/semester is the first working day of the month, coverage begins at the beginning of the second consecutive quarter/semester.

Employers of part-time faculty must:

(a) Consider spring and fall as consecutive quarters/semesters when determining eligibility; and

(b) Determine "halftime or more employment" based on each institution's definition of "full-time"; and

(c) At the beginning of each quarter/semester notify, in writing, all current and newly hired part-time faculty of their potential right to benefits under this section.

(d) Part-time faculty members employed at more than one institution are responsible for notifying each employer quarterly, in writing, of the employee's multiple employment. In no case will retroactive coverage be permitted or employer contribution paid to HCA if a part-time faculty member fails to inform all of his/her employing institutions about employment at all institutions within the current quarter; and

(e) Where concurrent employment at more than one state higher education institution is used to determine total part-time faculty employment of half-time or more, the employing institutions will arrange to prorate the cost of the employer insurance contribution based on the employment at each institution. However, if the part-time faculty member would be eligible by virtue of employment at one institution, that institution will pay the entire cost of the employer contribution regardless of other higher education employment. In cases where the cost of the contribution is prorated between institutions, one institution will forward the entire contribution monthly to HCA; and

(f) Once enrolled, if a part-time faculty member does not work at least a total of half-time in one or more state institutions of higher education, eligibility for the employer contribution ceases.

(6) "Appointed and elected officials." Legislators are eligible to apply for coverage on the date their term begins. All other elected and full-time appointed officials of the legislative and executive branches of state government are eligible to apply for coverage on the date their term begins or they take the oath of office, whichever occurs first. Coverage for legislators begins on the first day of the month following the date their term begins. If the term begins on the first working day of the month, coverage begins on the first day of their term. Coverage begins for all other elected and full-time appointed officials of the legislative and executive branches of state government on the first day of the month following the date their term begins, or the first day of the month following the date they take the oath of office, whichever occurs first. If the term begins, or oath of office is taken, on the first working day of the month, coverage begins on the date the term begins, or the oath of office is taken.

(7) "Judges." Justices of the supreme court and judges of courts of appeals and the superior courts become eligible to apply for coverage on the date they take the oath of office. Coverage begins on the first day of the month following the date their term begins, or the first day of the month following the date they take oath of office, whichever occurs first. If the term begins, or oath of office is taken, on the first working day of a month, coverage begins on the date the term begins, or the oath of office is taken.

WAC 296-14-520 Why is it important to establish the worker's monthly wage?

The department or self-insurer is required to establish a monthly wage that fairly and reasonably reflects workers' lost wages from all employment at the time of injury or date of disease manifestation. This monthly wage, which is calculated using the formulas in RCW 51.08.178, represents the worker's lost earning capacity. This monthly wage is used to calculate the rate of the worker's total disability compensation or beneficiary's survivor benefits under Washington's Industrial Insurance Act.

WAC 296-14-522 What does the term "wages" mean?

The term "wages" is defined as:

(1) The gross cash wages paid by the employer for services performed. "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law. Tips are also considered wages but only to the extent they are reported to the employer for federal income tax purposes.

(2) Bonuses paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation.

(3) The reasonable value of board, housing, fuel and other consideration of like nature received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.

WAC 296-14-524 How do I determine whether an employer provided benefit qualifies as "consideration of like nature" to board, housing and fuel?

To qualify as "consideration of like nature" the employer provided benefit must meet all of the following elements:

(1) The benefit must be objectively critical to protecting the worker's basic health and survival at the time of injury or date of disease manifestation.

(a) The benefit must be one that provides a necessity of life at the time of injury or date of disease manifestation without which employees cannot survive a period of even temporary disability.

(b) This is not a subjective determination. The benefit must be one that virtually all employees in all employment typically use to protect their immediate health and survival while employed.

(c) The benefit itself must be critical to protecting the employee's immediate health and survival. The fact that a benefit has a cash value that can be assigned, transferred, or "cashed out" by an employee and used to meet one or more of the employee's basic needs is not sufficient to satisfy this element.

(2) The benefit must be readily identifiable. The general terms and extent of the benefit must be established through the employer's written policies, or the written or verbal employment contract between the employer and worker (for example, a collective bargaining agreement that requires the employer to pay a certain sum for the employee's health insurance).

(3) The monthly amount paid by the employer for the benefit must be reasonably calculable (for example, as part of the employment contract, the employer agrees to pay three dollars for each hour worked by the employee for that person's health insurance).

Examples of benefits that qualify as “consideration of like nature” are medical, dental and vision insurance provided by the employer.

Examples of benefits that do not qualify as “consideration of like nature” are retirement benefits or payments into a retirement plan or stock option, union dues and life insurance provided by the employer.

WAC 296-14-526 Is the value of “consideration of like nature” always included in determining the worker's compensation?

(1) No. The value of other consideration of like nature is only included in the worker's monthly wage if:

(a) The employer, through its full or partial payment, provided the benefit to the worker at the time of injury or on the date of disease manifestation;

(b) The worker received the benefit at the time of injury or on the date of disease manifestation.

This section is satisfied if, at the time of injury or on the date of disease manifestation:

(i) The employer made payments to a union trust fund or other entity for the identified benefit; and (ii) The worker was actually eligible to receive the benefit.

Example: At the time of the worker's industrial injury, the employer paid two dollars and fifty cents for each hour worked by the employee to a union trust fund for medical insurance on behalf of the employee and her family. If the employee was able to use the medical insurance at the time of her injury, the employer's monthly payment for this benefit is included in the worker's monthly wage, in accordance with (d) of this subsection. This is true even where the worker's eligibility for this medical insurance is based primarily or solely on payments to the trust fund from past employers.

(c) The worker or beneficiary no longer receives the benefit and the department or self-insurer has knowledge of this change. If the worker continues to receive the benefit from a union trust fund or other entity for which the employer made a financial contribution at the time of injury or on the date of disease manifestation, the employer's monthly payment for the benefit is not included in the worker's monthly wage.

Example: An employer contributes two dollars and fifty cents for each hour an employee works into a union trust fund that provides the employee and her family with medical insurance. If the employer stops contributing to this fund, but the worker continues to receive this benefit, the employer's monthly payment for the medical insurance is not included in the worker's monthly wage.

(2) This rule does not permit the department or self-insurer to alter, change or modify a final order establishing the worker's monthly wage except as provided under RCW 51.28.040.

WAC 296-14-528 How do I determine the value of a benefit that qualifies as “consideration of like nature”?

The amount paid by the employer for the benefit at the time of injury or on the date of disease manifestation represents the amount that may be included in the worker's monthly wage.

WAC 296-14-530 Is overtime considered in calculating the worker's monthly wage?

(1) When the worker's monthly wage is computed under RCW 51.08.178(1), only the overtime hours the worker normally works are taken into consideration.

(2) When the worker's monthly wage is computed under RCW 51.08.178(2), the overtime pay is included in determining the worker's wages.