

SUPREME COURT NO. 78139-7

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Petitioner,

v.

WILLIAM GRANGER,

Respondent.

OS CRT-9 11/13/18
E
by

**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF LABOR
AND INDUSTRIES**

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Appendix

Key Statutes and WAC Rules

I. NATURE OF THE CASE

This workers' compensation case follows a line of recent cases and examines whether health benefit contributions by employers should be included in a "monthly wage" computation. It specifically examines whether a worker was "receiving at the time of injury" a benefit within the meaning of RCW 51.08.178. The Department of Labor and Industries promulgated an interpretive rule at WAC 296-14-526 addressing hour-bank health benefits contributions by employers. This rule was adopted in response to the *Cockle* decision. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001). The rule is squarely on point with the facts of this case. Division One held the Department's rule is inconsistent with RCW 51.08.178, but: 1) failed to apply the plain language of RCW 51.08.178; 2) overlooked numerous anomalies and strained results produced by its over-inclusive interpretation; and 3) 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 (2005). *Dep't of Labor & Indus. v. Granger*, 130 Wn. App. 489, 495-97, 123 P.3d 858 (2005).

II. 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.*” WAC 296-14-522-526. 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.

Issue: For purposes of computing wages under RCW 51.08.178, are employer contributions into a health care trust fund deemed to be consideration that an employee is “receiving at the time of the injury” even where the employee is not actually receiving health care coverage, and is not eligible to receive health care coverage?

III. STATEMENT OF THE CASE

A. Procedural history of the case

On April 20, 1995, Mr. Granger sustained an industrial injury. CP 19. The Department allowed his claim for benefits. CP 19, 22. The Department then 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. CP 20. The Department’s monthly wage computation did not include a value for the employer’s hour-bank contribution at the time of injury - - \$2.15 per hour to a health benefits trust fund under a collective bargaining agreement (CBA). CP 22.

Mr. Granger appealed to the Board of Industrial Insurance Appeals, seeking to establish that the hourly contributions to the CBA health care fund were part of his monthly wage, notwithstanding that, at the time of injury, he had no coverage. CP 21-22. The parties stipulated to the facts. CP 41-42, 84-86. The Board's final decision reversed and directed the Department to re-compute Mr. Granger's monthly wage under RCW 51.08.178 to include the CBA hour-bank contributions. CP 15-23.

The Department appealed to superior court, which affirmed the Board. CP 1-12; CP 114-115; CP 116-131. The Department appealed to the Court of Appeals (CP 132-149), which affirmed.

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, but "his coverage lapsed because he did not have enough hours worked." *Id.*

Under the CBA plan, a worker's eligibility for health coverage is determined under 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 is deducted from the bank for each month of coverage. *Id.* Coverage begins the first day of the second month following each month in which 120 hours was deducted. *Id.* An employee continues to be

covered each ensuing month, but only so long as there are 120 hours or more in the hour-bank at the end of the previous month. *Id.*

But only a maximum of nine consecutive months of prepaid continuous coverage (1,080 hours) can be accumulated. *Id.* This cap on hours means, as a matter of basic logic, that after the cap is reached, the employer's contributions to the hour-bank count for nothing for that individual worker until the worker draws down to a level below the 1080-hour cap. *See* discussion *infra* Part VI.A.4.

Mr. Granger's industrial injury occurred on April 20, 1995, when he had only 64 hours in the hour-bank and therefore was *not* eligible for any health care coverage. *Id.* The Department's wage order denied inclusion of any value for health coverage on grounds that Mr. Granger was not *receiving* and was not eligible for those benefits at the time of the industrial injury. CP 21. Not having lost any health benefits (because he was ineligible), he had no benefits-based wage loss to replace. *Id.*

IV. RELEVANT RCW AND WAC TEXT

RCW 51.08.178 controls 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 the 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 consideration that the worker “*was receiving at the time of the injury*” is included in “monthly wages.” RCW 51.08.178(1). WAC 296-14-526 is part of the Department’s “Cockle Rules” (WAC 296-14-520 through -530)

¹ Copies of key statutes and WAC rules cited herein are included in Appendix A.

adopted to interpret RCW 51.08.178 and implement this Court's 2001 *Cockle* decision.² 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 benefit.*

WAC 296-14-526 (Emphasis added).³

² Mr. Granger has questioned whether the Department's interpretive *Cockle* rules can be applied in this case where the facts arose before the rules were adopted. *See, e.g., Granger Ans. at 7.* As the Department has explained with supporting authority, however, the Department does not assert that the *Cockle* rules have the force of law, but rather asserts only that the rules are *interpretive* rules that are entitled to deference by this Court. *See, e.g., Department Reply to Ans. at 1-4.* Notably, Division One apparently found the rules applicable because Division One addressed the rules on their merits. *Granger*, 130 Wn. App. at 497.

³ WAC 296-14-526(1) also includes the following example:

V. STANDARD OF REVIEW AND CONSTRUCTION RULES

The standard of review in a workers' compensation appeal from a 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 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

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)

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).

VI. ARGUMENT

A. Division One Failed to Recognize That RCW 51.08.178’s “Receiving at the Time of the Injury” Requirement Is Unambiguous in the Health Benefits Hour-bank Context.

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 III.B, Mr. Granger stipulated 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.⁴ This neither makes logical sense nor comports 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 explicit 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*, 155 Wn.2d at 494-95. By definition then, monthly wages cannot include wages that the worker did not lose due to injury. *Cockle*, 142 Wn.2d at 814-815 (addressing health benefits that an employer continues to provide during a period of disability); *Gallo*, 155 Wn.2d. at 494-95 (same); *see also Sch. Dist. 401 v. Minturn*, 83 Wn. App. 1, 5-8, 920 P.2d 801 (1996) (“wage” computation must *rationaly* reflect reality and actual loss to the worker due to injury); *South Bend Sch. Dist. 118 v. White*, 106 Wn. App. 309, 23 P.3d (2001) (if employer provides wage continuation during disability periods through sick leave payments, there is no wage loss and hence no eligibility for time loss compensation); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 762-67, 855 P.2d 711 (1993) (voluntary retirement precludes wage loss compensation because wages have not

⁴ Despite Granger’s ineligibility to receive benefits, Division One concludes that “Granger would have soon realized the benefit.” *Granger*, 130 Wn. App. at 497. This conclusion is wholly unsupported in the record.

been lost due to injury); *Kaiser Alum. & Chem. Corp. v. Overdorff*, 57 Wn. App. 291, 294-97, 788 P.2d 9 (1990) (same as *Farr*).

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.

B. 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.

It is the interpretation of the Department as an administrative agency with statutory authority to promulgate rules to interpret its statutes that is due deference. *See* Dep’t App. Br. at 23-29. This Court may consider Board decisions for any persuasive value since the Board is a quasi-judicial agency.⁵ To that end, the Board’s decision in *In Re Douglas*

⁵ Board decisions are not precedential, and, as just noted, should not be given the same degree of deference as Department interpretations of RCW 51. *See* Dep’t App. Br. at 23-29 (discussing *Port of Seattle v. Pollution Control Hr’gs Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004) and other state and federal court decisions). But Board decisions 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 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

A. Jackson, BIIA Dec., 99 21831, 2001 WL 1328473 (2001) is helpful. In *Jackson*, the worker was employed 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:

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 WL 164604 (1989). In *Brown*, the worker 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

those that have been designated as “significant” and those that have not been so designated, can be accessed on WESTLAW at WAWC-ADMIN.

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.*

When deciding Mr. Granger’s case, the Board erred by failing to follow the logic of its prior Significant Decisions. Under the reasoning of *Jackson* and *Brown*, a merely anticipated increase in future wages - - here, the addition of health benefits upon qualifying - - cannot be included in wage computation. Similarly, Division One erred by including health benefits in wage computation upon the assumption that “Granger would have soon realized the benefit.” *Granger*, 130 Wn. App. at 497.

C. *Gallo’s Discussion of “Receiving” Rejects the Argument That “All Consideration” Should Be Included in Wage Computation. Division One’s Simplistic Approach That Workers are “Receiving” Whenever Employers Make Hour-bank “Payments” Contradicts Both *Gallo* and *Harris*.*

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* Part I, in the instant case, Division One relied on brief discussion of “receiving” in this Court’s *Gallo* decision (addressing contributions to a *retirement* trust fund) to reject the interpretation in WAC 296-14-526. *Granger*, 130 Wn. App. at 496-97.⁶ 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.” *Id.* Here, *health* benefits, not *retirement* benefits, are involved, and *Granger* was not “receiving” a health benefit per the *Harris* Court’s interpretation of the term “receiving” as meaning to “take

⁶ 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. *Id.* at 497. This speculation has no support in the record and, in any event, should not be considered in support of the Court’s opinion. *See generally* the Board decisions in *Jackson* and *Brown* discussed *supra* Part VI.A.2.

possession or delivery of”. Division One’s simplistic, out-of-context application of a phrase from *Gallo* contradicts the definition of “receiving” in *Harris* and also contradicts *Gallo*’s holding that not all consideration should be included in wage computation.

The *Gallo* Court did declare 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*, 155 Wn.2d at 491.⁷ 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.*

D. *Gallo*’s Ruling That Continuation of Benefits During Disability Periods Is “Wage” Continuation Means That the Mere Payment of Money Into the Hour-bank Is Not Necessarily “Wage” Payment; Division One’s Ruling Creates a Double-counting Anomaly.

This Court held in *Gallo* that, where a worker retains eligibility under a CBA plan for health coverage following injury, the continuation of coverage constitutes the providing of health benefits by the employer. *Gallo*, 155 Wn.2d at 494-95. Here, the hour-bank provides a mechanism for continuing coverage during disability periods, as the worker draws down from hours built up in the hour-bank prior to injury. *Id.* Logically,

⁷ 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*, 155 Wn.2d at 491-93.

if the hourly contributions are wage payments when the hours *come out of* the hour-bank, the contributions cannot - - as Division One held here - - also be wage payments when the contributions *go into* the hour-bank. Counting hourly contributions as wages both when the hours go in to the hour-bank and when the hours come out would be illogical double-counting of the contributions.⁸

Mr. Granger's Answer to Petition in this Court attempts to rebut regarding this anomaly, but his main point is mere disagreement with the wage-continuation holding in *Gallo*. Ans. at 14-15.

E. Numerous Other Anomalies and Strained Results Are Created by Division One's Ruling That Mr. Granger Was "Receiving [Benefits] at the Time of the Injury."

Division One's ruling must be rejected because it does not reflect reality. The ruling 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). Mr. Granger's Answer to Petition attempts to rebut regarding this anomaly, but he argues only that this point is not relevant. Ans. at 15. He overlooks that interpretations of statutes producing strained results must be avoided. *Senate Republican Comm.*, 133 Wn.2d at 243.

⁸ This double-counting argument addresses abstract accounting logic. This argument is distinguishable from the double-recovery concern of the *Gallo* Court (155 Wn.2d at 494-95), where the workers would have received both health benefits and credit for lost health benefits.

It is also anomalous that the effect of Division One's ruling is to treat workers differently depending on how many hours they have accrued in their bank. Division One views workers with few hours accrued (who are not actually eligible for benefits) to be deemed to have received benefits, and accordingly their wage computation is increased. Workers who have many hours and are actually eligible for benefits will have their wage computations reduced while they retain those benefits. In this respect, Division One confuses the just-noted *Gallo* ruling (*Gallo*, 155 Wn.2d at 494-95), producing strained results. Mr. Granger again attacks as irrelevant the Department's raising of this anomaly (Ans. at 16), but he again ignores that such strained results must be avoided.

Another anomaly produced by Division One's focus exclusively on contribution (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. This cap on accumulation of hours means, as a matter of basic logic, that after the cap is reached, the employer's contributions to the hour-bank count for nothing for that individual employee until he draws down to a level below the 1080-hour cap. Thus, while a worker is at the cap, the employer is not actually making any contributions that go to that worker. Under Division One's approach, the

worker who is injured while at the cap - - who by definition has coverage at the time of injury - - would not have any value included for health benefits in his wage computation.

Mr. Granger's Answer to Petition appears to have misunderstood the Department's point about the cap, and he asserts only that the record does not support the point. Ans. at 16-17. As just noted, however, the record (and basic logic) does in fact support the Department's point regarding this additional anomaly under Division One's approach.

F. Unlike Division One's Decision, WAC 296-14-526 Gives Effect to the Plain Terms of the "Receiving at the Time of the Injury" Requirement of RCW 51.08.178, and the WAC Rule Does Not Yield Strained Results.

WAC 296-14-526's statutory-text based interpretation of RCW 51.08.178 avoids the anomalies and strained results of Division One's ruling. WAC 296-14-526 recognizes that a CBA hour-bank is merely a means in the multi-employer, serial-jobs context of the construction industry for fairly apportioning: 1) the employer costs of funding coverage and 2) health benefits coverage among workers. It is instructive to note that hour-banks are not the only means by which health benefits are funded by employers or allocated among workers. A comparison of hour-bank circumstances to non-hour-bank circumstances of funding of health benefits yields yet another anomaly in Division One's ruling here.

Compare Mr. Granger's circumstance with that of newly hired non-hour-bank employees, such as probationary public employees in

Washington who do not initially receive health benefits coverage. 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 union workers such as Mr. Granger, the employees cannot make the contributions-equal-receiving-benefits argument that the Court of Appeals accepted here.

It does not make sense, however, to distinguish in wage computation between Mr. Granger and non-union workers 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, health care 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.

G. Many Injured Workers Seeking Temporary Partial Disability Benefits Will Be Harmed by Division One’s Decision.

Division One’s expansive construction of wages will harm many injured workers seeking temporary partial disability benefits under RCW 51.32.090(3). Under the statute, a worker with reduced earning capacity receives partial time loss compensation. Eligibility under subsection 3 is

determined by comparing wages at time of injury to current wages upon the injured worker's return to employment in a reduced capacity.

The returning injured worker likely will not have enough hours in his hour-bank to qualify for benefits, but his employer will be making hourly contributions for any work performed. Under WAC 296-14-526's construction of wage, the current wage will reflect reality - - health benefits will not be included in the current wage, and the worker will be entitled to greater temporary partial disability benefits under subsection 3 than under Division One's fiction that benefits are being received.

H. 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). The "receiving at the time of the injury" standard of RCW 51.08.178 was created 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 to wage computation. "Receiving" means having a current right to health benefits at the time of injury. WAC 296-14-526.⁹

VII. CONCLUSION

Accordingly, this Court should reverse the decisions of the courts and the Board below and reinstate the Department wage computation order.

RESPECTFULLY SUBMITTED this 6th day of October, 2006.

ROB MCKENNA
ATTORNEY GENERAL


John R. Wasberg
Senior Counsel
WSBA 6409

⁹ Mr. Granger unsuccessfully attempts to show that WAC 296-14-526 itself creates uncertainty when he quotes from the Board's fallacious discussion, not adopted by Division One, regarding such elements of health benefits packages as "deductibles, exclusions, and a myriad of conditions placed on actual receipt of benefits." Ans. at 18 (citation omitted). But as the Department explained in its Reply Brief at 27-28, the wage computation question under WAC 296-14-526 and RCW 51.08.178 is quite simple - - Was there any coverage at the time of injury? This is an all-or-nothing question. The elements of the coverage do not matter.

APPENDIX

APPENDIX

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.

(Bolding added)

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.

(Bolding added)

**RCW 51.32.090 - - TIME LOSS AND LOSS OF EARNING POWER
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.

(Bolding added)

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.

(Bolding added)

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.

(Bolding added)

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.

(Bolding added)

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.