

71209-8

71209-8

NO. 71209-8

---

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

---

CASCADIAN BUILDING MAINTENANCE, LTD,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON and NORMA TELLEZ,

Respondents.

---

**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

---

ROBERT W. FERGUSON  
*Attorney General*

STEVE VINYARD,  
*Assistant Attorney General*  
WSBA # 29737  
Office Id. No. 91022  
Labor and Industries Division  
7141 Cleanwater Drive SW  
PO Box 40121  
Olympia, WA 98504-0121  
(360) 586-7715

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUN 16 AM 11:23

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUES.....	1
III.	STATEMENT OF THE CASE.....	2
IV.	SUMMARY OF THE ARGUMENT.....	3
V.	STANDARD OF REVIEW.....	6
VI.	ARGUMENT.....	7
	A. Cascadian Is Not Entitled To A Wage Subsidy For The Work That Ms. Tellez Performed On The First Three Days Following Her Injury Because She Was Not A Worker Who Was Entitled To Temporary Disability For Those Three Days.....	7
	1. RCW 51.32.090 provides temporary wage replacement benefits to injured workers.....	7
	2. Under the plain language of RCW 51.32.090(4)(b), Cascadian is not entitled to wage subsidies for the first three days that Ms. Tellez worked for it following her injury.....	10
	3. The case law supports the Department’s interpretation of RCW 51.32.090(4)(b), not Cascadian’s.....	20
	4. Although RCW 51.32.090(4)(a) references a legislative judgment that it is beneficial for workers to “remain” at work, the statute unambiguously only makes wage subsidies available when a worker is entitled to temporary total disability benefits.....	24
	5. In another section of the Industrial Insurance Act, the Legislature used the phrase “temporary total	

disability” to refer to the benefits paid to such  
workers .....28

6. It was not necessary for the Legislature to create an  
“exception” when it has defined the circumstances  
under which the statute applies.....31

B. Cascadian Is Not Entitled To An Award Of Reasonable  
Attorney Fees Because Cascadian’s Attorney Does Not  
Represent An Injured Worker .....32

VII. CONCLUSION .....38

## TABLE OF AUTHORITIES

### Cases

<i>Bennerstrom v. Dep't of Labor &amp; Indus.</i> , 120 Wn. App. 853, 86 P.3d 826 (2004).....	6
<i>Bonko v. Dep't of Labor &amp; Indus.</i> , 2 Wn. App. 22, 466 P.2d 526 (1970).....	8
<i>Energy Nw. v. Hartje</i> , 148 Wn. App. 454, 199 P.3d 1043 (2009).....	8, 14
<i>Flanigan v. Dep't of Labor &amp; Indus.</i> , 123 Wn.2d 418, 869 P.2d 14 (1994).....	36
<i>Harbor Plywood Corp. v. Dep't of Labor &amp; Indus.</i> , 48 Wn.2d 553, 295 P.2d 310 (1956).....	32, 34
<i>Jacobsen v. Dep't of Labor &amp; Indus.</i> , 127 Wn. App. 384, 110 P.3d 253 (2005).....	15
<i>Judd v. Amer. Tel. &amp; Tel. Co.</i> , 152 Wn.2d 195, 95 P.3d 337 (2004).....	25
<i>Littlejohn Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	7
<i>Lundborg v. Keystone Shipping Co.</i> , 138 Wn.2d 658, 981 P.2d 854 (1999).....	15
<i>Malang v. Dep't of Labor &amp; Indus.</i> , 139 Wn. App. 677, 162 P.3d 450 (2007).....	6
<i>O'Keefe v. Department of Labor &amp; Industries</i> , 126 Wn. App. 760, 109 P.3d 484 (2005).....	22, 23, 24
<i>Oien v. Dep't of Labor &amp; Indus.</i> , 74 Wn. App. 566, 874 P.2d 876 (1994).....	15

<i>Pearson v. Dep't of Labor &amp; Indus.</i> , 164 Wn. App. 426, 262 P.3d 837 (2011).....	36
<i>Rogers v. Dep't of Labor &amp; Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	6
<i>Seattle School Dist. No. 1 v. Dep't of Labor &amp; Indus.</i> , 116 Wn.2d 352, 804 P.2d 621 (1991).....	32, 34, 35
<i>Slaugh v. Dep't of Labor &amp; Indus.</i> , 177 Wn. App. 439, 312 P.3d 676 (2013).....	11, 14
<i>State v. Ashby</i> , 141 Wn. App. 549, 170 P.3d 596 (2007).....	6
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.2d 1020 (2007).....	11
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	11, 29

**Statutes**

Laws of 1975, ch. 235, § 1.....	18
RCW 4.84.010 .....	38
RCW 51.32 .....	17
RCW 51.32.060 .....	8
RCW 51.32.060(1).....	8
RCW 51.32.060(2).....	8
RCW 51.32.080(4).....	15
RCW 51.32.090 .....	4, passim
RCW 51.32.090(1).....	8

RCW 51.32.090(4).....	1, passim
RCW 51.32.090(4)(a) .....	6, passim
RCW 51.32.090(4)(b).....	2, passim
RCW 51.32.090(4)(c) .....	4, passim
RCW 51.32.090(4)(d)-(f).....	9, 25
RCW 51.32.090(4)(g).....	25
RCW 51.32.090(4)(h).....	9, 25
RCW 51.32.090(7).....	4, passim
RCW 51.32.099 .....	30
RCW 51.52.130 .....	5, 32, 36
RCW 51.52.135 .....	29
RCW 51.52.135(2).....	28
RCW 51.52.140 .....	6

**Rules**

CR 56(c).....	6
---------------	---

## **I. INTRODUCTION**

This is a workers' compensation case under RCW Title 51, the Industrial Insurance Act. Under RCW 51.32.090(4), the Department of Labor & Industries (Department) pays subsidies to employers who offer transitional employment to injured workers entitled to receive temporary total disability benefits. Here, it is undisputed that Cascadian Building Maintenance, LTD, provided a modified job to one of its injured workers, Norma Tellez, the day after she was injured. It is also undisputed that Ms. Tellez would not have been entitled to temporary total disability benefits for the first three days that she performed that job, regardless of whether she was working or not.

Cascadian argues that it is nonetheless entitled to wage subsidies for those three days of employment. However, the superior court properly rejected Cascadian's argument and concluded that wage subsidies are due only when a worker is entitled to temporary total disability benefits, and this Court should affirm.

## **II. STATEMENT OF THE ISSUES**

Did the superior court properly conclude that Cascadian is not entitled to wage subsidies for the first three days that Ms. Tellez performed light-duty work for it, when, under RCW 51.32.090(4), wage subsidies are only available when light-duty work is offered to a worker

“entitled to temporary total disability under this chapter”, and when it is undisputed that Ms. Tellez was not entitled to temporary total disability benefits during those three days?

### **III. STATEMENT OF THE CASE**

Ms. Tellez was injured in the course of her employment with Cascadian on January 9, 2012. Certified Appeal Board Record (BR) 70.

On January 10, 2012, Ms. Tellez’s attending physician placed restrictions on her that ruled out her job of injury. BR 70. On that same day, Cascadian offered work to Ms. Tellez that was consistent with the attending physician’s restrictions, and she accepted the work and began performing it on that very day. BR 70-71.

Ms. Tellez performed the light duty job on January 10, 11, 12, 15, 16, and 17 of 2012. BR 71. On January 22, Ms. Tellez’s attending physician approved of her returning to her job of injury, and she resumed performing her usual duties on that day. BR 71.

Cascadian submitted a request to the Department for wage subsidies under RCW 51.32.090(4)(b). BR 71. The Department paid wage subsidies to Cascadian for the work that Ms. Tellez performed on January 15, 16 and 17, but not for the work that she performed on January 10, 11, and 12. BR 71.

Cascadian appealed the Department's decision to the Board of Industrial Insurance Appeals (Board). BR 71-72. The case was tried based on stipulated facts. BR 70-73.

The Department and Cascadian each filed motions for summary judgment.<sup>1</sup> BR 74-79, 83-84, 85-90. The Board reversed the Department's order and directed it to pay Cascadian wage subsidies for January 10, 11, and 12 of 2012 (in addition to the subsidies that the Department had already paid). BR 2-8.

The Department appealed the Board's decision to the King County Superior Court. CP 1-9. The superior court entered an order that denied Cascadian's motion for summary judgment and that concluded that the Department was entitled to judgment as a matter of law. CP 124-26. Judgment was then entered in favor of the Department. CP 133-38. Cascadian now appeals. CP 127-32, 139-50.

#### **IV. SUMMARY OF THE ARGUMENT**

In 2011, the Legislature amended RCW 51.32.090(4), the statute governing temporary total disability, to provide an incentive to employers to offer modified work to their workers. An employer who makes a return to work offer "pursuant to" RCW 51.32.090(4) is eligible for wage

---

<sup>1</sup> Although she was a nominal party to the appeal, Ms. Tellez did not file a motion and did not present argument.

subsidies from the Department equal to 50 percent of the basic wages that the employer paid to a worker.

RCW 51.32.090(4)(b) governs return to work offers made to workers who are “entitled to temporary total disability under this chapter.” Therefore, a return to work offer was only made “pursuant to” RCW 51.32.090(4) if it was made to a worker “entitled to temporary total disability under this chapter.”

Under RCW 51.32.090(7), workers may not receive temporary total disability payments for the day of their injuries, nor for the first three days following their injuries, unless they are temporarily and totally disabled for a total of 14 days or more following their injuries.

When RCW 51.32.090(4)(b), RCW 51.32.090(4)(c), and RCW 51.32.090(7) are read together, it becomes plain that an employer may not receive wage subsidies for the day of a worker’s injury, nor for the first three days following an injury, unless the worker is disabled for 14 days or more. This is because a return to work offer can only be said to have been made “pursuant to” RCW 51.32.090(4)(b) if the worker was entitled to temporary total disability under RCW 51.32.090, and workers are not eligible for temporary total disability for the first three days following their injuries unless the disability continues for at least 14 days.

Here, it is undisputed that Ms. Tellez was not entitled to temporary total disability benefits for the first three days following her injury because she was not disabled for a total of 14 days following her injury. However, Cascadian argues that it remains entitled to wage subsidies for the first three days following her injury. Cascadian reasons that while RCW 51.32.090(4)(b) references workers who are “entitled to temporary total disability under this chapter,” the statute does not use either the word “payments” or “compensation.” Therefore, Cascadian claims that it is irrelevant that Ms. Tellez could not receive temporary total disability benefits under the title during the relevant time period.

Cascadian’s argument fails because, while RCW 51.32.090(4)(b) does not use the word “payments” or “compensation,” it references workers who are “entitled” to temporary total disability “under this chapter.” Read in context, the only reasonable interpretation of the relevant language in RCW 51.32.090(4)(b) is that it governs return to work offers to workers who—in the absence of an appropriate return to work offer by their employer—would otherwise be entitled to temporary total disability payments.

Cascadian also requests attorney fees, but, as recognized by the Supreme Court, the plain language of RCW 51.52.130 does not provide for such fees for an employer in a workers’ compensation appeal.

## V. STANDARD OF REVIEW

In a workers' compensation case, it is the decision of the trial court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). In an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact. CR 56(c).

Here, the case was decided by summary judgment under stipulated facts, and, therefore, the trial court's decision is reviewed de novo. *See Bennerstrom*, 120 Wn. App. at 858.

The issues in this case turn in significant part on the proper interpretation of RCW 51.32.090(4)(a), (4)(b), and (7). The proper interpretation of a statute is a question of law, which is reviewed de novo. *State v. Ashby*, 141 Wn. App. 549, 170 P.3d 596 (2007). However, Department's interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the

agenc[ies'] interpretation of the law.” *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

## VI. ARGUMENT

### A. **Cascadian Is Not Entitled To A Wage Subsidy For The Work That Ms. Tellez Performed On The First Three Days Following Her Injury Because She Was Not A Worker Who Was Entitled To Temporary Disability For Those Three Days**

Under the plain language of RCW 51.32.090(4), Cascadian is not entitled to wage subsidies for the first three days that Ms. Tellez performed light-duty work for it. This is because wage subsidies are only provided to employers who make return to work offers “pursuant to” RCW 51.32.090(4)(a), and a return to work offer has only been made “pursuant to” RCW 51.32.090(4)(a) if it was made to a worker who would have been entitled to temporary total disability had the worker not received a light-duty job offer.

#### 1. **RCW 51.32.090 provides temporary wage replacement benefits to injured workers<sup>2</sup>**

Before turning to the specific question raised by this appeal, it is helpful to consider the overall language and structure of RCW 51.32.090, the statute that governs temporary total disability.

---

<sup>2</sup> For the Court’s convenience, the Department has attached the Westlaw printout of RCW 51.32.090, which includes a history of its various amendments, as Appendix One.

RCW 51.32.090(1) provides that when a worker's "total disability is only temporary," the worker shall receive payments consistent with the schedule provided in RCW 51.32.060(1) and (2). RCW 51.32.060 governs workers who are totally and permanently disabled rather than totally and temporarily disabled, and it provides for a wage replacement benefit that is paid on a monthly basis, equal to a percentage of the wages a worker earned at the time of his or her injury, with the percentage varying depending on the worker's marital status and number of dependents.

Neither RCW 51.32.090 nor any other statute defines the phrase "temporary total disability." The case law establishes that temporary total disability refers to a condition that temporarily precludes a worker from obtaining or performing gainful employment. *See, e.g., Energy Nw. v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009)<sup>3</sup>.

RCW 51.32.090(4)(b) sets forth an employer's ability to offer light-duty work to claimants who would otherwise be entitled to "temporary total disability under this chapter." If a worker returns to work pursuant to an appropriate light-duty job offer, the worker's temporary total disability benefits are terminated. The benefits may resume if the

---

<sup>3</sup> The case law establishes that the test for determining whether a worker has temporary total disability is the same as the test for total permanent disability, aside from the duration of the disability. *See, e.g., Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25-26, 466 P.2d 526 (1970).

light-duty work comes to an end before the worker is capable of obtaining and performing work that is generally available.

RCW 51.32.090(4)(c), which was added to the statute in 2011, provides that an employer may receive wage subsidies equal to 50 percent of the basic wages it pays to a worker when the worker returns to work “pursuant to” RCW 51.32.090(4). RCW 51.32.090(4)(d) through (f) allow an employer to seek reimbursement for certain other costs associated with providing light-duty or transitional work to a worker. RCW 51.32.090(4)(h) provides that an employer must request a wage subsidy (or other reimbursement) using forms approved by the Department, and clarifies that such subsidies may only be provided if the worker’s attending health care provider restricted him or her from performing his or her usual duties.

RCW 51.32.090(7) provides that no worker shall receive compensation for the day of the worker’s injury, nor for the first three days following the injury, unless the worker is disabled for a total of three or more days following the injury. Unsuccessful attempts to return to work during the 14 days following the injury do not necessarily prevent a worker from becoming eligible for temporary total disability for the first three days following the injury. RCW 51.32.090(7).

**2. Under the plain language of RCW 51.32.090(4)(b), Cascadian is not entitled to wage subsidies for the first three days that Ms. Tellez worked for it following her injury**

Cascadian is not entitled to wage subsidies under the plain language of three, related, statutory provisions. First, under the plain language of RCW 51.32.090(4)(c), an employer may only receive a wage subsidy for a work offer that was made “pursuant to” that subsection of the statute. Second, under the plain language of RCW 51.32.090(4)(b), a work offer was only made “pursuant to” subsection (4) if it was made to a worker “entitled to temporary total disability under this chapter.” Finally, under the plain language of RCW 51.32.090(7), a worker is not entitled to temporary total disability benefits for the first three days following the worker’s injury, unless the worker’s disability continued for 14 days or more. Read together, and applied to the facts of this case, these statutory provisions establish that Cascadian is not entitled to wage subsidies for the first three days of light-duty work that Ms. Tellez performed for it, because she was not entitled to temporary total disability for those days and thus her work on those days was not pursuant to RCW 51.32.090(4).

The plain meaning of a statute is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a

whole.” *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007). The language of a statute is unambiguous if it is only susceptible to one reasonable interpretation. *Slaugh v. Dep’t of Labor & Indus.*, 177 Wn. App. 439, 451-52, 312 P.3d 676 (2013). If the statute’s meaning is plain, then the court must give effect to that meaning as an expression of the Legislature’s intent. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007).

Here, RCW 51.32.090 allows wage subsidies benefits to be paid to workers under subsection 4:

To further encourage employers to maintain the employment of their injured workers, an employer insured with the department and *that offers work to a worker pursuant to this subsection (4)* shall be eligible for reimbursement of the injured worker's wages for light duty or transitional work equal to fifty percent of the basic, gross wages paid for that work, for a maximum of sixty-six work days within a consecutive twenty-four month period. In no event may the wage subsidies paid to an employer on a claim exceed ten thousand dollars.

RCW 51.32.090(4)(c) (emphasis added). “[A] worker [who is offered work] pursuant to this subsection 4” is defined by RCW 51.32.090(4)(b) as “a worker who is entitled to total temporary disability under this chapter”:

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 . . . .

(emphasis added). The subsection then goes on to described the process the employer must follow to make a qualifying job offer.

Under subsection 7, a worker is not entitled to total temporary disability for the first three days of work in certain circumstances:

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

RCW 51.32.090(7).

Cascadian acknowledges that an employer is only eligible for wage subsidies under RCW 51.32.090(4)(c) if the employer offered work to an injured worker who is “entitled to temporary total disability under this chapter.” App. Br. at 23. Furthermore, Cascadian does not argue that Ms. Tellez was entitled to temporary total disability benefits for the first three days following her injury. Rather, making an argument that mirrors the Board’s analysis in its decision, Cascadian argues that Ms. Tellez was “entitled to temporary total disability under this chapter” during the relevant time period, even though she was not entitled to temporary total

disability benefits for those days, because RCW 51.32.090(4)(b) refers to “temporary total disability” without using the words “benefits” or “compensation”. App. Br. at 17-19, 22-23; BR 5-6.<sup>4</sup> Cascadian claims that the Department’s argument impermissibly reads the words “compensation” or “benefits” into the statute. App. Br. at 17-19. On a related note, Cascadian claims that RCW 51.32.090(7) only determines whether a worker may receive payments for temporary total disability, but does not determine whether an offer of work was made “pursuant to” RCW 51.32.090(4). App. Br. at 18. Cascadian concludes that the relevant connection is not between “claimant’s current receipt of temporary total disability benefits . . . and the employer’s entitlement to reimbursement” but between “the employer’s act of providing light duty work and the entitlement to reimbursement.” App. Br. at 22-23.

Cascadian’s argument fails. When the phrase “entitled to temporary total disability under this chapter” is interpreted using the ordinary meaning of those words, and when the phrase is interpreted in the

---

<sup>4</sup> Noting that the parties stipulated, and the superior court found, that Cascadian made an offer of work to Ms. Tellez that complied with the requirements of RCW 51.32.090(4), Cascadian suggests that the superior court found that Ms. Tellez was “entitled to temporary total disability under this chapter.” App. Br. at 21-22. However, the superior court’s finding was that the job offer was made consistent with the procedures set forth in RCW 51.32.090(4)(b), but it was not a legal conclusion that Ms. Tellez was “entitled to temporary total disability benefits” under this chapter. Indeed, the superior court expressly made a conclusion of law that Ms. Tellez was *not* entitled to temporary total disability under this chapter during the relevant time period. CP 124-26, 133-38.

context of the statute as a whole, it can only reasonably be interpreted as referring to one who would be entitled to temporary total disability benefits had the employer not furnished light-duty work to the worker. Furthermore, Cascadian’s argument that RCW 51.32.090(7) only relates to payments and not to whether a worker is entitled to temporary total disability under this chapter fails, as it rests on a false distinction. Since a worker is “entitled to temporary total disability under this chapter” only if he or she is entitled to temporary total disability benefits, a worker who is ineligible for temporary total disability under RCW 51.32.090(7) is not “entitled to temporary total disability under this chapter.” Therefore, the superior court properly rejected Cascadian’s arguments and the Board’s analysis, and this Court should affirm.<sup>5</sup>

It is true that the courts often use the phrase “temporary total disability” to refer to a condition that temporarily prevents an injured worker from working, and use a term like “benefits” or “compensation” to refer to the payments that are made to a worker who suffers from such a disability. *See, e.g., Hartje*, 148 Wn. App. at 463. However, the courts

---

<sup>5</sup> As *Slaugh* explains, when there is a dispute between the Board and the Department as to the proper interpretation of a statute, a court first determines whether the statute—on its face—is ambiguous. *Slaugh v. Dep’t of Labor & Indus.*, 177 Wn. App. 439, 451-52, 312 P.3d 676 (2013). If it is not, the statute is applied according to its plain meaning. *Id.* If a statute is ambiguous, then it is the Department’s interpretation, not the Board’s, that is entitled to deference, as the Department is the executive agency charged with implementing the Industrial Insurance Act. *Id.*

have also used the phrase “temporary total disability” as a short-hand reference to the benefits that are paid to temporarily and totally disabled workers rather than to the condition of being temporarily unable to work. *See Jacobsen v. Dep’t of Labor & Indus.*, 127 Wn. App. 384, 389-90, 110 P.3d 253 (2005) (referencing the Department’s argument that RCW 51.32.080(4) (using the terms “temporary total disability,” “TTD” and “time loss” interchangeably); *Oien v. Dep’t of Labor & Indus.*, 74 Wn. App. 566, 874 P.2d 876 (1994) (stating that the employer appealed a superior court decision “ordering it to pay temporary total disability to Ronald Oien” for a specific time period); *Lundborg v. Keystone Shipping Co.*, 138 Wn.2d 658, 981 P.2d 854 (1999) (noting that Washington’s Industrial insurance Act “pays temporary total disability (time loss)” at a rate based on a worker’s wages).

Moreover, here, the statute refers to one who is “*entitled to temporary total disability under this chapter.*” RCW 51.32.090(4)(b) (emphasis added). If the phrases “entitled to” and “under this chapter” are given their ordinary and usual meaning, the words refer to a worker who has the legal right to receive something (here, temporary total disability) under the provisions of RCW 51.32 (specifically, RCW 51.32.090).

A worker can meaningfully be said to be “entitled to” temporary total disability benefits “under” RCW 51.32.090, because that statute

establishes that workers have the legal right to receive such benefits in certain circumstances. However, it would not make any sense to say that a worker is “entitled to” have a condition that temporarily prevents him or her from working: the inability to work may be a fact of the injured worker’s life, but the disability itself is not something to which the worker has a legal entitlement. Under Cascadian’s proposed reading of the statute it would read, “entitled to [a condition that temporarily prevents him or her from working] under this chapter.” This makes no sense. Thus, “entitled to temporary total disability under this chapter” can only reasonably be interpreted as referring to a worker who is entitled to receive temporary total disability benefits under RCW 51.32.090. Therefore, even though RCW 51.32.090(4)(b) does not use the words “benefits”, the phrase “entitled to temporary total disability under this chapter”, when read as a whole, plainly refers to a worker who is entitled to temporary total disability benefits.

It might be countered that a worker could be meaningfully said to be entitled to be *classified* as a temporarily and totally disabled worker, even if the worker is not entitled to actually receive such benefits. However, that interpretation would also not make sense, because there is no legal consequence to being classified as being temporarily and totally

disabled aside from the fact that that classification would make one eligible to receive temporary total disability benefits.

Furthermore, the only thing that the relevant chapter (RCW 51.32) provides for, with regard to a temporarily and totally disabled worker, is the payment of temporary total disability benefits. RCW 51.32 does not provide a temporarily and totally disabled worker with any legal rights aside from the right to receive those payments. This, again, shows that “entitled to temporary total disability under this chapter” can only logically refer to the right to receive temporary total disability benefits, as the relevant “chapter” does not provide for any other right for those suffering from that disability.

Cascadian’s argument that the statute does not “make a direct connection” between a worker’s entitlement to temporary total disability benefits and an employer’s right to reimbursement fails. App. Br. at 22. As Cascadian itself acknowledges, employers may only receive wage subsidies for light duty work provided to workers “entitled to temporary total disability under this chapter.” App. Br. at 23. If a worker is not entitled to benefits under RCW 51.32.090(7), then the worker is not entitled to temporary total disability under the relevant chapter and the employer is not eligible for wage subsidies.

The Department's interpretation is further reinforced when one considers the history of the various amendments to RCW 51.32.090(4). RCW 51.32.090(4) has been present in the statute in some form since 1975, and has long governed an employer's right to make return to work offers to its own injured workers.<sup>6</sup> Laws of 1975, ch. 235, § 1. Before 2011, RCW 51.32.090(4) provided only one practical advantage to employers: it provided them with a mechanism to return their own injured workers to gainful employment so that they would no longer receive temporary total disability.

Under the 2011 amendments, employers who offer such work to their workers may also receive wage subsidies from the Department in addition to having their workers' temporary total disability benefits terminated. The Legislature placed what was RCW 51.32.090(4) into RCW 51.32.090(4)(b), but did not otherwise change that statutory language, and it did not amend the phrase that is critical here: the statute continues to govern return to work offers made to workers "entitled to temporary total disability under this chapter". Thus, while the 2011 amendments allow employers to receive benefits that were not previously available to them when they offer light duty work to their injured workers, those amendments did not change the terms and conditions under which

---

<sup>6</sup> The Legislature amended the wording of subsection 4 in 1993 and again in 2004, but did so in ways not material to the issues raised by this appeal.

employers can offer light-duty employment to their workers under that statute. Therefore, it can be inferred that the Legislature understood the phrase “entitled to temporary total disability under this chapter” itself to continue to have the same meaning after the 2011 that it had before those amendments were made.

This is important because, under the pre-2011 version of the statute, the only function of RCW 51.32.090(4) was that it provided employers with a method to have their worker’s temporary total disability benefits terminated. Therefore, the only logical interpretation of the phrase “entitled to temporary total disability under this chapter” is that it referred to workers who were entitled to temporary total disability *benefits*.

This is because, in effect, RCW 51.32.090(4) provided that if a worker is receiving temporary total disability, then an employer can make a return to work offer to the worker—subject to certain limitations and conditions—in order to have those benefits terminated. Since, prior to 2011, RCW 51.32.090(4) had no impact on anything other than a worker’s right to continue receiving temporary total disability benefits, it could only reasonably be interpreted to refer to one who was entitled to temporary total disability benefits. No other meaning of the phrase “entitled to temporary total disability under this chapter” would make any sense, in context: it is only when a worker is otherwise entitled to temporary total

disability benefits that it is necessary to determine if a work offer under RCW 51.32.090(4) has terminated the worker's right to those benefits.

When the Legislature amended RCW 51.32.090(4) to provide for wage subsidies to employers who offer light-duty work to their workers, it could have also expanded the class of light-duty work offers to which it applied, by stating that wage subsidies are available regardless of whether the worker would otherwise be entitled to temporary total disability. However, it did not do so, and continued to provide that that the subsection applies only to job offers made to workers "entitled to temporary total disability under this chapter." Since Ms. Tellez was not "entitled to temporary total disability under this chapter" during the first three days following her injury, Cascadian is not entitled to wage subsidies for those three days.

**3. The case law supports the Department's interpretation of RCW 51.32.090(4)(b), not Cascadian's**

The case law that was available to the Legislature as of 2011 (the date that it amended the statute to provide for wage subsidies) further reinforces that RCW 51.32.090(4) only governs return to work offers made to workers who would otherwise be entitled to temporary total disability. Cascadian argues that nothing in the case law before 2011 supports the conclusion that RCW 51.32.090(4) would "prohibit" an

employer from offering work to one of its injured workers during the first three days following the worker's injury, and that, therefore, the Legislature could not have intended to preclude employers from receiving wage subsidies for light-duty work performed during that time period. App. Br. at 23. This argument fails.

First, the relevant issue is not whether RCW 51.32.090(4) would "prohibit" an employer from making a return to work offer to a worker within three days of a worker's injury, but whether such a work offer was made "pursuant to" the provisions of RCW 51.32.090(4). An employer is free to make a return to work offer to one of its injured workers at any time, but not all such work offers are governed by the provisions of RCW 51.32.090(4). Light-duty work is performed "pursuant to" RCW 51.32.090(4) only if the worker was "entitled to temporary total disability under this chapter." Ms. Tellez was not entitled to temporary total disability for the first three days of her light-duty work under RCW 51.32.090(7), rendering Cascadian ineligible for wage subsidies for those three days.

Second, Cascadian's argument rests on the fallacy that if there is no case law saying that RCW 51.32.090(4) does *not* apply to return to work offers made to workers who are ineligible for temporary total disability under RCW 51.32.090(7), then the Legislature must have

thought that RCW 51.32.090(4) governs such return to work offers. App. Br. at 19-23. That conclusion does not follow from its premise. As noted, RCW 51.32.090(4) provides that it governs return to work offers to workers who are entitled to temporary total disability, while RCW 51.32.090(7) provides that that entitlement does not exist for the first three days following a worker's injury. The Legislature did not need to have case law holding that RCW 51.32.090(4) does not govern light-duty work performed by injured workers who are ineligible for temporary total disability under RCW 51.32.090(7) in order to understand the statute to have that effect, because that conclusion follows from the language of the statute itself.

Third, there was case law preceding the 2011 amendments that, while not dispositive, supports the Department's interpretation of RCW 51.32.090(4)(b). In *O'Keefe v. Department of Labor & Industries*, 126 Wn. App. 760, 762-63, 109 P.3d 484 (2005), a worker accepted his employer's offer to return to light-duty work under RCW 51.32.090(4). The worker was subsequently terminated for disciplinary reasons that were ostensibly unrelated to his industrial injury. *Id.*

The worker argued that regardless of whether it was true that he was fired for cause for reasons unrelated to his injury, he was entitled to temporary total disability once he was terminated from the light-duty job,

because RCW 51.32.090(4) states that temporary total disability must resume if the light-duty work “comes to an end.” *See O’Keefe*, 126 Wn. App. at 765-66. The *O’Keefe* court rejected that argument, reasoning that although the worker’s employment came to an end, the light-duty work itself did not, because the employer still had light-duty work available and would have provided it to the worker but for the worker’s own misconduct. *Id.* at 766-67.

In explaining its decision, *O’Keefe* discussed RCW 51.32.090(4) in some detail. *Id.* at 765-67. *O’Keefe* noted that “RCW 51.32.090(4) applies when a worker receiving TTD [temporary total disability] *benefits* returns to work at a modified job he is physically able to perform.” *O’Keefe*, 126 Wn. App. at 765 (emphasis added). Thus, *O’Keefe* ties RCW 51.32.090(4)’s applicability to a worker’s entitlement to temporary total disability *benefits*. *See id.*

*O’Keefe*’s interpretation that “entitled to temporary total disability” means entitled to temporary total disability benefits is logical, because, prior to 2011, the only significance of an employer having made a return to work offer under RCW 51.32.090(4) was that it was a basis to terminate the worker’s temporary total disability benefits. *Id.* at 765-67. As *O’Keefe* explains, RCW 51.32.090(4) provides employers with a mechanism to have their workers’ temporary total disability discontinued:

Under RCW 51.32.090(4)(a), a worker who cannot return to the job of injury is no longer entitled to TTD benefits if a physician certifies that the worker is able to perform an alternate job the employer has made available. The worker's TTD benefits cease when the physician releases the worker to perform the work and the worker begins the alternate work. But TTD benefits resume if the work ends before the worker is, in his physician's judgment, able to resume his usual work or perform other available work the employer of injury offers.

*O'Keefe*, 126 Wn. App. at 766.

Thus, while the issue in *O'Keefe* is different from the issue presented here, *O'Keefe's* overall analysis and discussion of RCW 51.32.090(4) supports the Department's interpretation that a worker is "entitled to temporary total disability under this chapter" only if the worker is entitled to temporary total disability benefits. *See id.*

**4. Although RCW 51.32.090(4)(a) references a legislative judgment that it is beneficial for workers to "remain" at work, the statute unambiguously only makes wage subsidies available when a worker is entitled to temporary total disability benefits**

Because Cascadian is not entitled to wage subsidies under the plain language of RCW 51.32.090(4)(b) and (c), its reliance on RCW 51.32.090(4)(a) is misplaced, as that subsection of the statute merely contains a general statement explaining why the Legislature amended the statute to provide for wage subsidies.<sup>7</sup> App. Br. at 20-21.

---

<sup>7</sup> The Board, similarly, pointed to RCW 51.32.090(4)(a) to support its decision. BR 5-6.

Therefore, the language in RCW 51.32.090(4)(a) that Cascadian relies on does not overcome the mandate set forth in RCW 51.32.090(4)(b) and (c), and, therefore, its argument fails.

RCW 51.32.090(4)(a) provides:

The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage employers at the time of injury to provide light duty or transitional work for their workers, wage subsidies and other incentives are made available to employers insured with the department.

Cascadian argues that if wage subsidies are not provided for the first three days following a worker's injury, then the Legislature's objective of encouraging employers to have their workers "remain" at work would be thwarted. App. Br. at 20-21. However, RCW 51.32.090(4)(a) contains a legislative finding explaining why the Legislature decided to make wage subsidies available to employers at all. It does not purport to define the scope of an employer's legal entitlement to wage subsidies. As the Supreme Court observed, when the Legislature employs the words "the legislature finds" in a statute, it sets forth policy statements that do not give rise to enforceable rights and duties. *Judd v. Amer. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004).

Rather, the scope of an employer's right to wage subsidies is set forth in RCW 51.32.090(4)(c) through (4)(h). Furthermore,

RCW 51.32.090(4)(c) provides that the work offer must have been made “pursuant to” subsection (4), and whether a work offer was made “pursuant to” that subsection is resolved through RCW 51.32.090(4)(b). As the Department explained above, those statutory provisions provide that Cascadian is not entitled to wage subsidies for the first three days that Ms. Tellez performed light-duty work for Cascadian.

There is no conflict between RCW 51.32.090(4)(a) and a rule limiting wage subsidies to light-duty work offers made to workers who would otherwise have been entitled to temporary total disability benefits. As noted, RCW 51.32.090(4)(a) contains a finding that the cost of long-term disability and work place injuries is reduced if workers remain at work. Therefore, the Legislature decided to encourage employers to make light-duty and transitional work offers to their injured workers. However, it does not follow that the Legislature must make wage subsidies available to *all* employers whose workers remain at work following an injury in order to reduce the cost of work place injuries. Rather, the Legislature made wage subsidies available, but it placed several limits and conditions on that right, including, among other things, a provision that the work must have been offered to a worker who would otherwise be entitled to temporary total disability benefits.

Under the Department's interpretation of "entitled to temporary total disability," the Legislature's overall objective of encouraging employers to make light-duty and transitional work available to their workers would still be furthered, since many employers would receive substantial financial incentives to offer work to their workers, even with a proviso that such subsidies are not available to the employers for the first three days following the workers' injuries.

Furthermore, Cascadian's argument ignores that RCW 51.32.090(4)(a) references reducing the cost of long-term disability. A worker who returns to light-duty work under RCW 51.32.090(4)(b) is no longer entitled to temporary total disability benefits. Temporary total disability is calculated at 60 percent or more of the worker's wages at the time of injury, while wage subsidies are paid based on 50 percent of the worker's wages. Thus, in a case of long-term disability, it is more cost effective to pay an employer 50 percent of the worker's wages than to pay a worker 60 percent or more of his or her wages. However, this economic assumption is only valid if the wage subsidies are reserved for situations in which the injured worker would have been entitled to temporary total disability benefits had a return to work offer under RCW 51.32.090(4) not been made.

Finally, a case where the worker is disabled for less than 14 days can hardly be said to be a case of “long-term disability.” Thus, RCW 51.32.090(4)(a)’s general statement of the purpose of making wage subsidies available to some employers does not support the conclusion that they should be paid during the time period at issue here.

**5. In another section of the Industrial Insurance Act, the Legislature used the phrase “temporary total disability” to refer to the benefits paid to such workers**

Contrary to Cascadian’s suggestion, the Legislature has used the phrase “temporary total disability”, without including the words “benefits” or “compensation,” as a short hand reference to the payments that are made to temporarily and totally disabled workers rather than to the status of being temporarily unable to work. Therefore, Cascadian’s argument that “entitled to temporary total disability under this chapter” cannot be considered a reference to the benefits that are paid to temporarily and totally disabled workers fails. *See* App. Br. at 18-19.

Specifically, RCW 51.52.135(2) provides that “when a worker prevails in an appeal by the worker or beneficiary regarding a claim for temporary total disability, the worker shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award . . . .”

The phrase “a worker [who] prevails [on] a claim for temporary total disability” refers to a worker who prevailed in showing that he or she was

entitled to additional temporary total disability *compensation*, and not to a worker who demonstrated on appeal that he or she was unable to work during some period of time but who failed to show that he or she was actually entitled to any benefits. A worker could only be granted interest on a “claim for temporary total disability” if the worker was granted temporary total disability benefits.

Thus, the Legislature, like the courts, sometimes uses the phrase “temporary total disability” to refer to the benefits that are paid to workers who suffer from that status, without including the words “compensation” or “benefits”, when it is plain in context that that is what was intended. Here, similarly, it is plain that “entitled to temporary total disability under this chapter” references a worker who is entitled to temporary total disability benefits, as that is the only interpretation of the phrase that is reasonable and that gives meaning to all of the words in that phrase. As *Udall* explains, plain meaning “is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Udall*, 159 Wn.2d at 909. Thus, where the context makes the meaning of statutory language plain, the statute is unambiguous. *Udall*, 159 Wn.2d at 909. In both RCW 51.32.090(4)(b) and RCW 51.52.135, the context makes it plain that the phrase “temporary total disability” refers to the

benefits paid to disabled workers rather than the state of being temporarily disabled.

Cascadian points out that in RCW 51.32.099 the Legislature provided that if a worker is participating in vocational retraining that is provided by the Department, the Department shall pay the worker “temporary total disability compensation.” Cascadian argues that this shows that the Legislature understood “temporary total disability compensation” to mean something different from “temporary total disability”, and that the former refers to the status of being temporarily unable to work while the latter refers to the benefits that are paid to such workers. App. Br. at 18-19.

However, while it is true that in some sections of RCW Title 51 the Legislature used the phrase “temporary total disability compensation” to refer to the benefits paid to such workers, the Legislature has also used the phrase “temporary total disability,” by itself, to refer to those benefits. Furthermore, Cascadian has failed to point to any provision in RCW Title 51 where the Legislature plainly used the phrase “temporary total disability” to mean something other than the benefits that are paid to such workers. In any event, RCW 51.32.090(4) refers not just to “temporary total disability,” but to a worker who is “*entitled to temporary total disability under this chapter.*” (Emphasis added). When that phrase is

read as a whole, it unambiguously refers to a worker who is entitled to temporary total disability benefits, as no other interpretation of it makes any sense, particularly when it is read in the larger context of the Industrial Insurance Act as a whole. The fact that the Legislature has used other language in other sections of the Industrial Insurance Act does not change the fact that the relevant language here can only reasonably be interpreted to refer to a worker who is entitled to temporary total disability benefits.

**6. It was not necessary for the Legislature to create an “exception” when it has defined the circumstances under which the statute applies**

Under RCW 51.32.090(4)(b) and (c), an employer may only receive a wage subsidy for light-duty work that is performed by a worker who would otherwise be entitled to temporary total disability. Cascadian argues that since RCW 51.32.090(4) does not contain an exception that precludes an employer from receiving wage subsidies for the first three days that a claimant returned to work, it follows that subsidies for such work must be provided. App. Br. at 17-18. However, the fact that RCW 51.32.090(4) does not contain an “exception” providing that an employer shall not receive wage subsidies for the first three days following the worker’s injury does not support Cascadian’s argument, because the statute only provides for subsidies for work offers made to workers who are “entitled to temporary total disability under this chapter”,

and workers are not entitled to temporary total disability for the first three days following their injuries. Therefore, it was not necessary for the Legislature to carve out an “exception” for such light-duty work, because the statute already conditions eligibility for wage subsidies on a worker’s entitlement to temporary total disability.

From a logical standpoint, an “exception” to a general rule only needs to be created if a given item would otherwise meet the relevant legal test. Where an individual is not entitled to a benefit under the general rule, it is not necessary to create an exception stating that the individual is not entitled to that benefit. Since Ms. Tellez was not entitled to temporary total disability during the relevant time period, Cascadian was not entitled to a wage subsidy under RCW 51.32.090(4)(c).

**B. Cascadian Is Not Entitled To An Award Of Reasonable Attorney Fees Because Cascadian’s Attorney Does Not Represent An Injured Worker**

RCW 51.52.130 only provides for attorney fees for an injured worker’s attorney or an injured worker’s beneficiary. *Seattle School Dist. No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d 352, 361-64, 804 P.2d 621 (1991); *Harbor Plywood Corp. v. Dep’t of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (observing that under RCW 51.52.130, there is no provision for an attorney fee award to an employer). Therefore,

Cascadian's argument that it should be granted an award of its reasonable attorney fees under RCW 51.52.130 lacks merit. *See* App. Br. at 24-27.

First, Cascadian should not prevail on the merits of this appeal. However, even assuming Cascadian prevails on the merits, its argument that it is entitled to an award of its reasonable attorney fees under RCW 51.52.130 is rebutted by the plain language of that statute because it is an employer, not a worker or a worker's beneficiary.

RCW 51.32.130 provides for fees for prevailing *workers* in certain circumstances, stating in relevant part:

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases 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 a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

Thus, RCW 51.52.130 provides for an award of reasonable attorney fees to the attorney of an *injured worker* or the attorney of an *injured worker's beneficiary*. It does not provide for an award of reasonable attorney fees to an *employer* under any circumstances, including a situation in which the employer's interests might in some broad sense be said to be compatible with the injured worker's. RCW 51.52.130. While Cascadian's counsel broadly alleges that her arguments are supportive of Ms. Tellez's rights, she does not assert—nor could she on this record—that she is the attorney of Ms. Tellez herself. For this reason alone, Cascadian's argument that it is entitled to an award of attorney fees if it prevails on appeal must fail. *See* RCW 51.52.130.

Furthermore, in *Seattle School District*, the Supreme Court expressly observed that RCW 51.52.130 only provides for a reasonable attorney's fee award for a worker, not for an employer. *Seattle School Dist.*, 116 Wn.2d at 361-64; *Harbor Plywood*, 48 Wn.2d at 559. The *Seattle School District* Court explained that it was appropriate for the Legislature to distinguish between workers and employers, because workers are often dependent on industrial insurance benefits to live, and having to pay even a portion of a disability award to an attorney would deprive the worker of needed fashion. *Seattle Sch. Dist.*, 116 Wn.2d at 363-64. Also, the Court observed that an employer can treat litigation

costs associated with industrial insurance appeals as a cost of doing business, and pass the cost on to its customers, which is something an injured worker cannot do. *Id.*

Cascadian will likely argue that *Seattle School District* is distinguishable because the employer's interests in that case were not aligned with the claimant's. However, in *Seattle School District* the Court read the statute as precluding an employer from ever receiving an attorney fee award on appeal, without suggesting that there were any exceptions or caveats to that rule. *Seattle School Dist.*, 116 Wn.2d at 361-64. If no employer is entitled to attorney fees in an industrial insurance appeal under RCW 51.52.130, then Cascadian is not entitled to such an award, either. Furthermore, the rationale for distinguishing between employers and workers that was given in *Seattle School District* would apply equally here: as with the employer in that case, Cascadian can treat its litigation costs as a cost of doing business. *See id.*

Furthermore, Cascadian does not support its broad claim that it is somehow advancing the interests of the injured worker, Ms. Tellez. The issue in this case is limited to whether Cascadian is entitled to wage subsidies for three days of light-duty work that it provided to Ms. Tellez. There is no issue in this case as to Ms. Tellez's right to receive disability benefits for her industrial injury: the only issue on appeal is whether

Cascadian is entitled to wage subsidies for some of the work that it offered to Ms. Tellez. A ruling in Cascadian's favor would have no consequence, positive or negative, on Ms. Tellez's eligibility for industrial insurance benefits.<sup>8</sup>

It should also be noted that, even with regard to an injured worker, RCW 51.52.130 provides for attorney fee awards only in two circumstances, neither of which apply here. First, fees are due if the worker appeals a decision of the Board, secures a reversal of that decision, and "the accident fund or medical aid fund managed by the Department is affected by the litigation." RCW 51.52.130; *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 427-28, 869 P.2d 14 (1994); *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). RCW 51.52.130. Second, fees are due to a worker if a party other than the injured worker appeals a decision of the Board, and the worker's right to relief is "sustained." RCW 51.52.130.

Thus, RCW 51.52.130 does not allow an injured worker to receive an attorney fee award in any case where the worker secures a court ruling

---

<sup>8</sup> Cascadian also suggests that it is relevant that Ms. Tellez was listed as a co-defendant in the superior court appeal. *See* App. Br. at 26. However, this is an artifact of the naming convention governing industrial insurance appeals, and does not establish that Cascadian is somehow attempting to advance Ms. Tellez's interests on appeal. The typical practice in an industrial insurance case is to list the party who is appealing the Board's decision as the plaintiff and the parties who have not filed appeals from that decision as defendants. Since the Department appealed the Board's decision and Cascadian and Ms. Tellez did not, the Department was designated the "plaintiff" and Cascadian and Ms. Tellez were designated the "defendants."

that in some broad sense can be said to be favorable to the worker. Rather, the worker must obtain a concrete benefit regarding his or her right to benefits under the Industrial Insurance Act: the worker must either obtain additional benefits on appeal, or successfully defend his or her right to receive benefits that have already been awarded against an appeal by the Department or an employer.

Neither of those criteria applies to Ms. Tellez. Ms. Tellez is not seeking additional workers' compensation benefits on appeal, nor is she attempting to defend her right to receive benefits that have already been awarded to her over the objection of the Department or the employer. Rather, her employer has filed an appeal regarding an issue that impacts the employer's financial interests alone, and that has no impact on Ms. Tellez's right to receive industrial insurance benefits.

As RCW 51.52.130 would not even grant an *injured worker* an award of attorney fees if he or she obtained a ruling that was favorable in a general sense but that does not directly impact his or her right to receive industrial insurance benefits, it would be strained, if not absurd, to read the statute as giving an *employer* the right to such an award when it secures a ruling that, at most, could be considered to be broadly favorable to workers, but which does not directly advance the worker's right to receive benefits under the Industrial Insurance Act.

In the alternative, Cascadian argues that it should receive an award of some of its costs under RCW 4.84.010 in the event that it prevails on appeal, including an award of nominal attorney fees. Cascadian should not prevail on appeal, so it should not receive such an award. However, the Department agrees that if Cascadian prevails on the merits of this case, then it would be proper for it to receive costs—including nominal attorney fees—under RCW 4.84.010.

## **VII. CONCLUSION**

Cascadian is not entitled to wage subsidies for the first three days of light-duty work that Ms. Tellez performed for it. As Cascadian acknowledges, it may receive wage subsidies for those three days of work only if Ms. Tellez was “entitled to temporary total disability under this chapter” on those days. However, Ms. Tellez was not entitled to temporary total disability on those days, because it is undisputed that she was not entitled to receive temporary total disability benefits on those days. When the words in the key phrase are given their ordinary and usual meaning, they can only reasonably be interpreted as referring to a worker who is entitled to temporary total disability benefits.

The superior court properly reversed the Board's order and affirmed the Department's determination regarding Cascadian's eligibility for wage subsidies, and this Court should affirm.

RESPECTFULLY SUBMITTED this 14 day of April, 2014.

ROBERT W. FERGUSON  
*Attorney General*



STEVE VINYARD,  
*Assistant Attorney General*

WSBA # 29737  
Office Id. No. 91022  
Labor and Industries Division  
7141 Cleanwater Drive SW  
PO Box 40121  
Olympia, WA 98504-0121  
(360) 586-7715





Effective: June 15, 2011

West's Revised Code of Washington Annotated Currentness

Title 51. Industrial Insurance (Refs & Annos)

Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

→→ **51.32.090. Temporary total disability--Partial restoration of earning power--Return to available work--When employer continues wages--Limitations--Finding--Rules**

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage employers at the time of injury to provide light duty or transitional

work for their workers, wage subsidies and other incentives are made available to employers insured with the department.

(b) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(c) To further encourage employers to maintain the employment of their injured workers, an employer insured with the department and that offers work to a worker pursuant to this subsection (4) shall be eligible for reimbursement of the injured worker's wages for light duty or transitional work equal to fifty percent of the basic, gross wages paid for that work, for a maximum of sixty-six work days within a consecutive twenty-four month period. In no event may the wage subsidies paid to an employer on a claim exceed ten thousand dollars. Wage subsidies shall be calculated using the worker's basic hourly wages or basic salary, and no subsidy shall be paid for any other form of compensation or payment to the worker such as tips, commissions, bonuses, board, housing, fuel, health care, dental care, vision care, per diem, reimbursements for work-related expenses, or any other payments. An employer may not, under any circumstances, receive a wage subsidy for a day in which the worker did not actually perform any work, regardless of whether or not the employer paid the worker wages for that day.

(d) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with training or instruction to be qualified to perform the offered work, the employer shall be eligible for a reimbursement from the department for any tuition, books, fees, and materials required for that training or instruction, up to a maximum of one thousand dollars. Reimbursing an employer for the costs of such training or instruction does not constitute a determination by the department that the worker is eligible for vocational services authorized by RCW 51.32.095 and 51.32.099.

(e) If an employer insured with the department offers a worker work pursuant to this subsection (4), and the employer provides the worker with clothing that is necessary to allow the worker to perform the offered work, the employer shall be eligible for reimbursement for such clothing from the department, up to a maximum of four hundred dollars. However, an employer shall not receive reimbursement for any clothing it provided to the worker that it normally provides to its workers. The clothing purchased for the worker shall become the worker's property once the work comes to an end.

(f) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with tools or equipment to perform the offered work, the employer shall be eligible for a reimbursement from the department for such tools and equipment and related costs as determined by department rule, up to a maximum of two thousand five hundred dollars. An employer shall not be reimbursed for any tools or equipment purchased prior to offering the work to the worker pursuant to this subsection (4). An employer shall not be reimbursed for any tools or equipment that it normally provides to its workers. The tools and equipment shall be the property of the employer.

(g) An employer may offer work to a worker pursuant to this subsection (4) more than once, but in no event may the employer receive wage subsidies for more than sixty-six days of work in a consecutive twenty-four month period under one claim. An employer may continue to offer work pursuant to this subsection (4) after the worker has performed sixty-six days of work, but the employer shall not be eligible to receive wage subsidies for such work.

(h) An employer shall not receive any wage subsidies or reimbursement of any expenses pursuant to this subsection (4) unless the employer has completed and submitted the reimbursement request on forms developed by the department, along with all related information required by department rules. No wage subsidy or reimbursement shall be paid to an employer who fails to submit a form for such payment within one year of the date the work was performed. In no event shall an employer receive wage subsidy payments or reimbursements of any expenses pursuant to this subsection (4) unless the worker's physician or licensed advanced registered nurse practitioner has restricted him or her from performing his or her usual work and the worker's physician or licensed advanced registered nurse practitioner has released him or her to perform the work offered.

(i) Payments made under (b) through (g) of this subsection are subject to penalties under RCW 51.32.240(5) in cases where the funds were obtained through willful misrepresentation.

(j) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner. An employer who directs a claimant to perform work other than that approved by the attending physician and without the approval of the worker's physician or licensed advanced registered nurse practitioner shall not receive any wage subsidy or other reimbursements for such work.

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

(l) In the event of any dispute as to the validity of the work offered or as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination pursuant to an order that contains the notice required by RCW 51.52.060 and that is subject to appeal subject to RCW 51.52.050.

(5) An employer's experience rating shall not be affected by the employer's request for or receipt of wage subsidies.

(6) The department shall create a Washington stay-at-work account which shall be funded by assessments of employers insured through the state fund for the costs of the payments authorized by subsection (4) of this section and for the cost of creating a reserve for anticipated liabilities. Employers may collect up to one-half the fund assessment from workers.

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

(8) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(9) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

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

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (9)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

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

(11) The department shall adopt rules as necessary to implement this section.

CREDIT(S)

[2011 1st sp.s. c 37 § 101, eff. June 15, 2011. Prior: 2007 c 284 § 3, eff. July 1, 2008; 2007 c 190 § 1, eff. July 22, 2007; 2004 c 65 § 9; prior: 1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4; prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

#### HISTORICAL AND STATUTORY NOTES

**Finding--2011 1st sp.s. c 37:** “The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. The state must ensure that the workers' compensation system remains financially healthy in order to provide needed resources for injured workers. Further, the legislature recognizes that reducing the number and cost of long-term disability and pension claims, while strengthening safety programs; addressing workers' compensation system fraud by employers, workers, and providers; finding ways to improve claims management processes; studying occupational disease claims in the workers' compensation system; and establishing a fund for purposes of maintaining low, stable, and predictable premium rate increases are all key to ensuring productive worker outcomes and a financially sound system for Washington workers and employers.” [2011 1st sp.s. c 37 § 1.]

**Effective date--2011 1st sp.s. c 37:** “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [June 15, 2011].” [2011 1st sp.s. c 37 § 1101.]

**Effective date--2007 c 284:** See note following RCW 51.32.050.

**Report to legislature-Effective date-Severability-2004 c 65:** See notes following RCW 51.04.030.

**Effective date--1993 c 521:** See note following RCW 51.32.050.

**Effective date--1993 c 299:** “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993.” [1993 c 299 § 2.]

**Effective date--1993 c 271:** “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993].” [1993 c 271 § 2.]

**Benefit increases--Application to certain retrospective rating agreements--Effective dates--1988 c 161:** See notes following RCW 51.32.050.

**Expiration date--1986 c 59 § 2; Effective dates--1986 c 59 §§ 3, 5:** "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

**Program and fiscal review--1985 c 462:** See note following RCW 41.04.500.

Laws 1965, Ex.Sess., ch. 122, § 3, increased the amounts of compensation.

Laws 1971, Ex.Sess., ch. 289, § 11, in subsec. (5), substituted "fourteen" for "thirty"; added subsec. (7) pertaining to limits on monthly payments; and rewrote the first paragraph of subsec. (2), which prior thereto read:

"But if the injured workman has a wife or husband and has no child or, being a widow or widower, with one or more children, the compensation for the case during such period of time as the total temporary disability continues, shall be per month as follows, to wit: (a) Injured workman with wife or invalid husband and no child, two hundred fifteen dollars; injured workman with able-bodied husband, but no child, one hundred seventy-five dollars; injured workman with wife or invalid husband and one child, or being a widow or widower and having one child, two hundred fifty-two dollars; (b) injured workman with able-bodied husband and one child, two hundred twelve dollars; (c) injured workman with wife or invalid husband and two children, or being a widow or widower and having two children, two hundred eighty-three dollars; (d) injured workman with able-bodied husband and two children, two hundred forty-three dollars; and twenty-three dollars for each additional child, but the total monthly payments shall not exceed three hundred fifty-two dollars to an injured workman with a wife or invalid husband, or being a widow or widower, and having children, and shall not exceed three hundred twelve dollars to an injured workman with children and having an able-bodied husband and any deficit shall be deducted proportionately among the beneficiaries."

Laws 1972, Ex.Sess., ch. 43, § 22, deleted references to the accident fund.

Laws 1975, 1st Ex.Sess., ch. 235, § 1, inserted subsec. (4) and renumbered the subsequent subsections.

Laws 1977, Ex.Sess., ch. 350, § 47, throughout the section, made gender related changes.

Laws 1980, ch. 129, § 1, in subsec. (5), inserted the proviso.

Laws 1985, ch. 462, § 6, in subsec. (3), added a former last sentence to read: "However, during the period a worker returns to light-duty work, receives disability leave supplement payments pursuant to RCW 41.04.500 through 41.04.530, and is otherwise eligible for compensation under this section, the worker shall continue to receive such compensation at the rate provided under RCW 51.32.060 (1) through (13)."; and, in subsec. (6), added a former last sentence to read: "This limitation does not apply to disability leave supplement payments made pursuant to RCW 41.04.500 through 41.04.530."

Laws 1986, ch. 59, §§ 2 and 3, added subsec. (8).

Laws 1988, ch. 161, § 3, effective until June 30, 1989, updated statutory references; and, in subsec. (7), substituted 100% for 75%.

Laws 1988, ch. 161, § 4, effective June 30, 1989, updated statutory references; in subsecs. (3) and (6), deleted the last sentences added by Laws 1985, ch. 462, § 6; and, in subsec. (7), substituted 100% for 75%.

Laws 1993, ch. 271, § 1, in subsec. (3), designated subd. (a); then, in subd. (a), designated par. (i); then, in par. (i), at the beginning, added "For claims for injuries that occurred before May 7, 1993,;" inserted par. (ii); and designated subd. (b).

Laws 1993, ch. 299, § 1, divided subsec. (4) into subdivisions; then, in subd. (a), in the first sentence, substituted "Whenever the employer of injury requests" for "Whenever an employer requests"; substituted "a statement describing the work available with the employer of injury" for "a statement describing the available work"; divided and rewrote the former third sentence into the current third and fourth sentences; the former third sentence read: "If the worker is released by his or her physician for said work, and the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work, the worker's temporary total disability payments shall be resumed.;" in subd. (b), following "of this subsection" inserted "(4)"; and inserted subd. (c).

Laws 1993, ch. 521, § 3, rewrote subsec. (7).

Laws 2004, ch. 65, § 9, in subsec. (4), inserted references to licensed advanced registered nurse practitioner.

Laws 2004, ch. 65, § 19, which provided for the repeal of "this act" on June 30, 2007, was itself repealed by Laws 2007, ch. 275, § 1, eff. May 2, 2007.

Laws 2007, ch. 190, § 1 inserted subsec. (3)(c); and, in subsec. (6), added the proviso.

Laws 2007, ch. 284, § 3 designated subsec. (7)(a) and inserted subsec. (7)(b).

#### 2011 Legislation

Laws 2011, 1st sp.s. ch. 37, § 101, rewrote the section, which formerly read:

"(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

"(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

“(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

“(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

“(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

“(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

“(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

“(4)(a) 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: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

“(7) In no event shall the monthly payments provided in this section:

“(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

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

“(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

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

Source:

Laws 1911, ch. 74, § 5.

Laws 1913, ch. 148, § 1.

Laws 1917, ch. 28, § 1.

Laws 1919, ch. 131, § 4.

Laws 1923, ch. 136, § 2.

Laws 1927, ch. 310, § 4.

Laws 1929, ch. 132, § 2.

Laws 1941, ch. 209, § 1.

Laws 1947, ch. 246, § 1.

Laws 1949, ch. 219, § 1.

RRS § 7679.

Laws 1951, ch. 115, § 3.

Laws 1955, ch. 74, § 8.

Laws 1957, ch. 70, § 33.

#### CROSS REFERENCES

Disability leave supplement for law enforcement officers and firefighters, see § 41.04.500 et seq.

Inmates employed in correctional industries and honor camps, industrial insurance eligibility, see §§ 72.60.102, 72.64.065.

Jail inmates working in free venture industries, eligibility for benefits, see § 36.110.120.

Juvenile forest camp inmates, eligibility for industrial insurance benefits, see § 72.05.154.

Public assistance for child support, reimbursement of department of social and health services from payments made under this section, see § 74.20A.260.

Public assistance recipients, subrogation of department of social and health services to industrial insurance

compensation, see § 43.20B.720 et seq.

#### LAW REVIEW AND JOURNAL COMMENTARIES

Amendments of 1961. 36 Wash.L.Rev. 333 (1961).

#### LIBRARY REFERENCES

Workers' Compensation  840.1 to 840.5, 880.1 to 880.19, 934.6.  
Westlaw Topic No. 413.

#### RESEARCH REFERENCES

##### ALR Library

63 ALR 1241, Workmen's Compensation: Right to Compensation as Affected by Refusal to Accept, or Failure to Seek, Other Employment, or by Entering Into Business for Oneself After Injury.

98 ALR 729, What Amounts to Total Incapacity Within Workmen's Compensation Acts.

122 ALR 550, Res Judicata as Regards Decisions or Awards Under Workmen's Compensation Acts.

95 ALR 254, Survival of Right to Compensation Under Workmen's Compensation Act Upon the Death of the Person Entitled to the Award.

88 ALR 385, Workmen's Compensation: Right to Compensation for Temporary Total Disability in Addition to Compensation for Permanent Partial Disability.

82 ALR 889, Deduction for Lost Time in Computing Wages as Basis for Workmen's Compensation.

##### Treatises and Practice Aids

Modern Workers' Compensation § 202:3, Nondisabling Injuries.

Modern Workers' Compensation § 200:26, End of Disability.

Modern Workers' Compensation § 200:39, No-Fault Discharge or Layoff.

Modern Workers' Compensation § 200:41, Retirement.

Modern Workers' Compensation § 200:45, Waiting Period.

Modern Workers' Compensation § 321:10, Temporary Total Disability and Benefits.

Modern Workers' Compensation § 321:11, Temporary Partial Disability and Benefits.

Modern Workers' Compensation § 321:17, Rehabilitation Benefits.

## NOTES OF DECISIONS

Able to perform available work 4  
Amount of compensation 8  
Change of disability status 7  
Construction and application 1  
Construction with other laws 2  
Decrease or elimination of payments 10  
Loss of earning power benefits 9  
Temporary total disability, generally 3  
Three-day period 11  
Time loss compensation 5  
Voluntary retirement 6

### 1. Construction and application

Statute allowing an employer may stop paying time-loss benefits only after the employee “begins the work with the employer of injury” did not allow employer to cease paying time-loss benefits to injured workers' compensation claimant, whom employer had terminated for cause due to accident which resulted in claimant's injuries and whom employer had no intention of re-hiring; statute required claimant to begin the modified work before time-loss benefits could cease but employer never rehired claimant, and employer had other remedies available to it to ensure that its payments reflected claimant's ability to work, including attempting to force claimant to find modified work elsewhere by requesting vocational rehabilitation services from the Department of Labor and Industries. *Glacier Northwest, Inc. v. Walker* (2009) 151 Wash.App. 389, 212 P.3d 587. Workers' Compensation  2003

Board of Industrial Insurance Appeals (BIIA) did not go beyond parties' stipulation, on employee's appeal from order determining his time loss compensation rate, when it ruled that employer had no obligation to pay employee his full wages based on employer's initially marking “yes” on self-insurer accident report form (SIF-2) to question whether it would pay full wages, though parties had stipulated that issue was jurisdictional, i.e., whether BIIA had jurisdiction to determine merits of employee's claim for full wages, where parties also agreed that order on appeal was correct as to adjudication of benefits, and parties stipulated that they rested their cases. *Rushing v. ALCOA, Inc.* (2005) 125 Wash.App. 837, 105 P.3d 996. Workers' Compensation  1814

Monthly compensation rate for injured worker's benefits was tied to statute in effect at date of the injury, rather than to amended statute removing statutory percentage-based caps for benefits; nothing in amended statute expressed legislative intent that amended statute apply retrospectively, and worker's right to compensation vested at time of injury. *Cena v. Department of Labor and Industries* (2004) 121 Wash.App. 915, 91 P.3d 903, review denied 153 Wash.2d 1015, 111 P.3d

## 1190. Workers' Compensation ☞ 60

## 2. Construction with other laws

Under § 74.04.530 (recodified as § 43.20B.720), governing right of department of social and health services to be subrogated to right of injured worker to recover time loss payments from department of labor and industries, where public assistance has been furnished to one or more children to whom workman owes a duty of support, subrogation rights of department of social and health services with respect to time loss payments allocated to children is calculated with respect to children to whom public assistance has been furnished and to whom workman owes a duty of support, and is not limited only to children in workman's custody. *Medrano v. Department of Social and Health Services* (1980) 93 Wash.2d 75, 605 P.2d 783. Public Assistance ☞ 131

Neither § 41.26.130(4) nor anything contained in the state Industrial Insurance Act preclude a plan I LEOFF member who is on disability leave because of injuries sustained in the performance of some other employment from simultaneously receiving a disability leave allowance under § 41.26.120 and workers' compensation benefits in accordance with Title 51. Op.Atty.Gen.1980, L.O. No. 32.

## 3. Temporary total disability, generally

"Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful employment. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ☞ 840.3; Workers' Compensation ☞ 880.15

Injured employee who began receiving temporary total disability (TTD), returned to a modified job with his employer, and then was fired for disciplinary reasons, was not entitled to have his TTD payments resumed; TTD payments would have resumed pursuant to statute if the modified work had "come to an end" before injured employee had sufficiently recovered to resume his previous work, but in this case, the modified work remained available but for his disciplinary problems. *O'Keefe v. State, Dept. of Labor & Industries* (2005) 126 Wash.App. 760, 109 P.3d 484, review denied 156 Wash.2d 1003, 128 P.3d 1239. Workers' Compensation ☞ 2003

"Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful employment and differs from permanent total disability only in duration of disability, and not in its character. *Hubbard v. Department of Labor & Industries of State of Washington* (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ☞ 840.3; Workers' Compensation ☞ 880.15

A claimant's right to temporary total disability benefits (TTD) terminates when the claimant's earning power, at any kind of work, is restored to that existing at the time of the occurrence of the injury, when the claimant's claim is closed, or when the claimant is able to earn a wage at any kind of reasonably continuous and generally available employment. *Hubbard v. Department of Labor & Industries of State of Washington* (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ☞ 880.5

Temporary total disability compensates for lost income until extent of disability is fixed; once condition is fixed,

permanent partial disability compensates workers' compensation claimant for future lost earning capacity measured by a percentage loss of bodily function. *Davis v. Bendix Corp.* (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ⚡ 870.2

Only difference between permanent total disability and temporary total disability is duration. *Herr v. Department of Labor and Industries* (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation ⚡ 840.1

"Temporary total disability" is defined as condition temporarily incapacitating workers' compensation claimant from performing any work at any gainful occupation. *Oien v. Department of Labor and Industries* (1994) 74 Wash.App. 566, 874 P.2d 876, reconsideration denied, review denied 125 Wash.2d 1021, 890 P.2d 463. Workers' Compensation ⚡ 880.15

Phrase "temporary total disability" means claimant is temporarily incapable of performing generally available work of any kind on a reasonably continuous basis. *Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust* (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation ⚡ 880.10

"Temporary total disability" terminates as soon as claimant's condition has become fixed and stable or as soon as claimant is able to perform any kind of work. *Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust* (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation ⚡ 870.4

Temporary total disability differs from permanent total disability only in duration of disability, and not in its character. *Bonko v. Department of Labor and Industries* (1970) 2 Wash.App. 22, 466 P.2d 526.

Claim for time loss for temporary total disability is inconsistent with claim for permanent partial disability award, for temporary total disability contemplates that eventually there will be either complete recovery or impaired bodily condition which is static, whereas permanent partial disability contemplates situation where condition has reached fixed state from which full recovery is not expected. *Franks v. Department of Labor & Industries* (1950) 35 Wash.2d 763, 215 P.2d 416. Workers' Compensation ⚡ 840.3; Workers' Compensation ⚡ 850.8

Evidence supported denial of employer's motion for judgment as matter of law regarding finding that workers' compensation claimant was totally and temporarily disabled after work injury, and thus, entitled to time loss compensation, in spite of evidence that claimant's inability to find light duty work was the result of a poor labor market; employer presented no evidence that it was the job market that prevented claimant from obtaining gainful employment, and expert testimony regarding whether claimant could engage in light duty work following her injury was conflicting. *Simpson Inv. Co. v. Reams* (2006) 132 Wash.App. 1040, 2006 WL 1075478, Unreported. Workers' Compensation ⚡ 1688

#### 4. Able to perform available work

Temporary disability classification contemplates that workers' compensation claimant will reach an eventual complete recovery or a static impaired condition; thus, temporary disability terminates as soon as claimant's condition stabilizes or as soon as claimant can perform any sort of work. *Davis v. Bendix Corp.* (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ⚡ 870.4

Statute permitting employer to request that worker entitled to temporary total disability be certified by physician as able to perform available work other than his or her usual work, could be invoked by employer only if worker was first entitled to temporary total disability; employee did not thereby become disabled if section was invoked. *Herr v. Department of Labor and Industries* (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation ⚡ 880.19

Ability to perform light or sedentary work of general nature precludes finding of total disability. *Herr v. Department of Labor and Industries* (1994) 74 Wash.App. 632, 875 P.2d 11. Workers' Compensation ⚡ 880.16

Evidence, including evaluation of treating physician, that claimant was capable of light clerical work was sufficient to establish that claimant's earning power had been restored and she was not "temporarily totally disabled" within meaning of statute; moreover, finding that she was in need of further medical treatment did not preclude finding that her earning power had been restored. *Hunter v. Bethel School Dist. and Educational Service Dist. No. 121 Worker's Compensation Trust* (1993) 71 Wash.App. 501, 859 P.2d 652, review denied 123 Wash.2d 1031, 877 P.2d 695. Workers' Compensation ⚡ 1627.17(7)

#### 5. Time loss compensation

Under industrial insurance statute, workers' compensation claimant with a temporary total disability was entitled to time loss compensation until her present earning power was restored to that existing at the time of the occurrence of the injury, not until the industrial injury had been restored to pre-injury status. *Chunyk & Conley/Quad-C v. Bray* (2010) 156 Wash.App. 246, 232 P.3d 564, as amended, review denied 169 Wash.2d 1031, 241 P.3d 786. Workers' Compensation ⚡ 880.6

When an injured employee becomes able to work any job, temporary total disability benefits terminate and are replaced by reduced time-loss compensation. *Glacier Northwest, Inc. v. Walker* (2009) 151 Wash.App. 389, 212 P.3d 587. Workers' Compensation ⚡ 880.10

Findings by Board of Industrial Insurance Appeals that workers' compensation claimant was permanently partially disabled, and thus capable of obtaining gainful employment, prior to the reopening of her claim, was res judicata as to her condition at that time, in subsequent proceedings to reopen her claim seeking time loss benefits for aggravation of her injury. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚡ 2001

A worker not actively engaged in the work force due to retirement lacks the requisite adverse economic impact, i.e., lost wages or income, to warrant the award of time loss benefits. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚡ 880.24

The ultimate goal of time loss compensation is to provide temporary financial support until the injured worker is able to return to work. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚡ 836

“Time loss” is workers' compensation parlance for temporary total disability compensation, a wage replacement benefit. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚡ 840.3; Workers' Compensation ⚡ 850.8

Only time injured worker is entitled to time loss compensation is during a period worker is classified as temporarily totally disabled. *Davis v. Bendix Corp.* (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ⚡ 840.4; Workers' Compensation ⚡ 850.9

Once workers' compensation claimant has been classified as permanently partially disabled, he or she is not entitled to time loss compensation unless claimant needs further treatment and is thus returned to temporary totally disabled status. *Davis v. Bendix Corp.* (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ⚡ 870.4

Evidence was sufficient to support finding that workers' compensation claimant was gainfully employed or capable of gainful employment, and thus was not entitled to time loss benefits; claimant regularly engaged in services for taxi service including dispatching, driving, and repairing cabs. *Layrite Products Co. v. Degenstein* (1994) 74 Wash.App. 881, 880 P.2d 535, review denied 125 Wash.2d 1011, 889 P.2d 499. Workers' Compensation ⚡ 1627.17(3)

Time loss compensation resulting from compensable injury is that temporary compensation which workman is entitled to receive under this statute while totally incapacitated to perform work for his employer, and before his disability has been fixed or determined. *Lightle v. Department of Labor and Industries* (1966) 68 Wash.2d 507, 413 P.2d 814. Workers' Compensation ⚡ 840.3; Workers' Compensation ⚡ 850.8

Where status of injured workman was determined as of specified date to be that of permanent partial disability and he was awarded and accepted a lump sum payment pursuant to such determination, time-loss payments made to him while his status was that of temporary partial disability were properly terminated as of such date; since act contemplates two separate and distinct classifications, that is, temporary disability status, and permanent disability status, and payment of compensation in connection with temporary disability status would not be authorized and would be inconsistent with any simultaneous classification within permanent disability status and payment and acceptance of permanent disability award. *Hunter v. Department of Labor & Industries* (1953) 43 Wash.2d 696, 263 P.2d 586.

## 6. Voluntary retirement

Workers' compensation claimant voluntarily retired prior to the reopening of her claim based upon aggravation of her industrial injury, and thus claimant was not entitled to time loss compensation, since her injury did not cause her failure to return to work force; claimant had been found prior to reopening to be capable of obtaining gainful employment, and claimant made no showing that she had made a bona fide attempt to return to workforce. *Energy Northwest v. Hartje* (2009) 148 Wash.App. 454, 199 P.3d 1043. Workers' Compensation ⚡ 1994

Under workers' compensation statute, temporary disability benefits are not available to voluntarily retired worker. *Weyerhaeuser Co. v. Farr* (1993) 70 Wash.App. 759, 855 P.2d 711, reconsideration denied, review denied 123 Wash.2d 1017, 871 P.2d 600. Workers' Compensation ↪ 880.24

Fact that workers' compensation claimant's partial injury may have played indirect role in his decision to retire was irrelevant to legal question at issue, whether claimant's retirement constituted voluntary withdrawal from general work force, such that he was not entitled to permanent total disability benefits. *Weyerhaeuser Co. v. Farr* (1993) 70 Wash.App. 759, 855 P.2d 711, reconsideration denied, review denied 123 Wash.2d 1017, 871 P.2d 600. Workers' Compensation ↪ 880.24

Voluntarily retired worker, collecting retirement benefits, could not simultaneously qualify for time loss payments for industrial injury sustained prior to retirement. *Kaiser Aluminum & Chemical Corp. v. Overdorff* (1990) 57 Wash.App. 291, 788 P.2d 8. Workers' Compensation ↪ 880.24

#### 7. Change of disability status

Once award is made to claimant and no appeal within time allowed is taken from order establishing extent of his disability, such determination becomes res judicata as to his condition on that date; and if disability established on that date is less than total, some aggravation must be shown to warrant subsequent determination of total disability. *Dinnis v. Department of Labor and Industries* (1965) 67 Wash.2d 654, 409 P.2d 477.

Where claimant presented claim for compensation for permanent partial disability and was awarded and accepted payments for permanent partial disability, and on appeal to superior court jury found that claimant was temporarily totally disabled and in need of further treatment, claimant could not be denied compensation for temporary total disability on ground that such award was inconsistent with his claim and acceptance of award for permanent partial disability. *Otter v. Department of Labor and Industries* (1941) 11 Wash.2d 51, 118 P.2d 413. Workers' Compensation ↪ 1844

#### 8. Amount of compensation

Workers' compensation claimant's loss of earning power was to be measured by comparing earning capacity during aggravation period with earning capacity at date of claim closure, rather than at time of original injury, for purposes of determining entitlement to loss of earning power benefits. *Davis v. Bendix Corp.* (1996) 82 Wash.App. 267, 917 P.2d 586, review denied 130 Wash.2d 1004, 925 P.2d 989. Workers' Compensation ↪ 880.7

Section 51.32.090 is not intended to preclude the simultaneous receipt of "wages" and industrial insurance benefits in all cases; instead, it acts only to preclude the simultaneous receipt of wages and benefits to the extent that the combination of the two would exceed the employee's normal income from his or her employment. *Op.Atty.Gen.*1981, L.O. No. 17.

Provision of a school district collective bargaining agreement, which obligates the district to pay an absent employee the difference between any industrial insurance entitlement and the amount normally earned, the amount paid by the district being deducted from the employee's accumulated sick leave, is permissible if the collective bargaining agreement gives

the employee the option of claiming and receiving accumulated sick leave benefits before claiming and receiving any industrial insurance payments. Op.Atty.Gen.1981, L.O. No. 17.

Effect of deduction of compensation from wages paid during disability. Op.Atty.Gen. 1931-32, p. 103.

Increased payment for temporary total disability. Op.Atty.Gen. 1911-1912 p. 176.

#### 9. Loss of earning power benefits

Injured worker upon reopening of industrial insurance claim based upon objective worsening of prior injury is not entitled to loss of earning power (LEP) benefits if worker continued to be employed at same earning level throughout aggravation period; worker must make threshold showing that he or she suffered temporary total loss of wages and/or decrease in earning power proximately resulting from injury's aggravation. *Hubbard v. Department of Labor & Industries of State of Washington* (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ↪ 2012

Upon termination of temporary total disability benefits, temporarily disabled claimant becomes eligible for reduced time loss compensation or loss of earning power (LEP) benefits. *Hubbard v. Department of Labor & Industries of State of Washington* (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ↪ 860.1

Loss of earning power (LEP) benefits were intended to follow temporary total disability and to be continuous, but only until earning power is fully restored or, alternatively, claim is closed. *Hubbard v. Department of Labor & Industries of State of Washington* (2000) 140 Wash.2d 35, 992 P.2d 1002. Workers' Compensation ↪ 880.3

#### 10. Decrease or elimination of payments

Letter from workers' compensation claimant's physician to employer stating that claimant should attempt light duty work on trial basis constituted release of claimant to perform screw sorter's job, which was flexible position designed for recuperating workers, and thus, time-loss compensation of claimant, who did not accept offered position, was properly terminated; if claimant had taken position and was unable to continue work, however, she would have been entitled to resumption of compensation. *Bayliner Marine Corp. v. Perrigoue* (1985) 40 Wash.App. 110, 697 P.2d 277. Workers' Compensation ↪ 880.20(2)

Under subd.(3) of this statute directing reduction or elimination of time loss compensation when workman with temporary total disability has regained his earning ability, regained earning power of workman need not be at his former type of employment, but may be at any kind of work. *Bonko v. Department of Labor and Industries* (1970) 2 Wash.App. 22, 466 P.2d 526.

Under former law, providing that, in case of recovery and partial restoration of earning power by injured workman, payments should continue in proportion which new earning power should bear to old, remittitur on appeal and judgment therein, under decision quoting statute and directing insurance department to make such order for compensation as would reasonably cover difference in wage-earning power, meant no more than that award was to be in proportion which new

earning power should bear to old. *Parker v. Industrial Ins. Dept.* (1919) 108 Wash. 235, 183 P. 82.

11. Three-day period

Significance of three-day period; authority of county to pay employees for first three days following injury while engaged in county work. Op. Atty. Gen. 1954 53-55 No. 287.

West's RCWA 51.32.090, WA ST 51.32.090

Current with 2014 Legislation effective through March 31, 2014

© 2014 Thomson Reuters.

END OF DOCUMENT

NO. 71209-8-I

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

CASCADIAN BUILDING  
MAINTENANCE, LTD,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES, AND NORMA TELLEZ,

Respondents.

**DECLARATION OF  
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent with Attachment One and this Declaration of Service to all parties on record as follows:

**Via ABC Legal Messengers**

Ann Silvernale  
Holmes, Weddle & Barcott, P.C.  
999 Third Avenue, Suite 2600  
Seattle, WA 98104-4011

**First Class U.S. Mail**

Norma Tellez  
33614 39<sup>th</sup> Ave. S.  
Auburn, WA 98001

DATED this 14 day of April, 2014 at Tumwater, WA.

  
DEBORA A. GROSS  
Legal Assistant 3  
(360) 586-7751

2014 APR 16 AM 11:23  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIV 1