NO. 44343-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

REPLY BRIEF

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I. INTRODUCTION

Crabb seeks an adjustment to his time-loss compensation rate effective July 1, 2011, based on the average monthly wage in the state of Washington on July 1, 2011, even though the statute that governs annual adjustments to workers' time-loss compensation rates based on changes to the average monthly wage expressly precludes workers from receiving such adjustments.

Crabb relies on RCW 51.32.090(9) to argue that he should receive an adjustment. But Crabb is not entitled to an adjustment to his benefits effective July 1, 2011 under RCW 51.32.090(9). That statute does not provide a mechanism to increase a worker's benefits whenever the average monthly wage in the state increases. Rather, it is only RCW 51.32.075 that authorizes such increases. Since the legislature suspended the provisions of RCW 51.32.075 effective July 1, 2011, Crabb is not entitled to have his time-loss benefit rate increased effective that date.

II. ARGUMENT

A. Crabb Is Not Entitled To An Increase To His Time-Loss Compensation Rate Effective July 1, 2011, Because No Statute—Including RCW 51.32.090(9)—Authorizes Such An Increase

Crabb argues that he is entitled to have his time-loss compensation benefits increased effective July 1, 2011, under RCW 51.32.090(9) and

RCW 51.32.060. Resp. Br. at 5. Crabb notes, correctly, that an unmarried worker with no dependents typically receives time-loss compensation equal to 60 percent of a worker's wages at the time of injury. Resp. Br. at 6; RCW 51.32.090(1); RCW 51.32.060(1)(g). He also notes, correctly, that RCW 51.32.090(9) imposes a cap on time loss: under that subsection of the statute, "in no event" may a worker receive time-loss compensation more than 120 percent of the average monthly wage. Resp. Br. at 6; RCW 51.32.090(9). Crabb then asserts that "Mr. Crabb's base time loss rate, before applying the maximum cap, is in excess of the July 1, 2011 maximum time loss rate. Therefore, his time loss rate for the period at issue in this appeal should have been $4,816.20, the maximum time loss rate as of July 1, 2011." Resp. Br. at 5; *see also* Resp. Br. at 6-7.

Crabb's conclusion does not follow from his premise. RCW 51.32.090(9) imposes a limit on what a worker's time-loss compensation benefits can be, but it does not grant workers the right to have their time-loss compensation benefits adjusted on an annual basis based on changes to the average monthly wage. Indeed, the plain language of RCW 51.32.090(9) does not provide a basis for increasing the benefits of any injured worker on any given year. RCW 51.32.090(9)(a) provides that:

(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%

Thus, RCW 51.32.090(9)(a) does not allow the Department to pay any amount of time loss that is in excess of the applicable time-loss cap. But it does not either state or imply that a worker's time-loss benefits shall be increased in the event that the cap becomes higher in a later year than it was previously. RCW 51.32.090(9).

Rather, it is RCW 51.32.075 that provides for annual adjustments to workers' time-loss compensation benefits based on annual changes to the average monthly wage. Since the legislature amended RCW 51.32.075 in a way that expressly precludes workers from receiving COLAs for July 1, 2011, Crabb is not entitled to the relief he seeks.[1]

[1] Crabb notes that the Department has increased the time-loss compensation benefits of some workers to amounts up to the maximum that went into effect on July 1, 2011. Resp. Br. at 3. However, the Department did so only if there was a basis to increase the workers' time-loss compensation rate that was independent of the change to the average monthly wage that occurred at that time, such as a change in the number of dependents, a cessation of employer provided healthcare benefits, or the removal of a social security offset. *See* Resp. Br. at 3; BR 55. However, in each of those situations, a statute authorizes increasing the worker's benefits based on that factual occurrence. *See* RCW 51.28.040 (authorizing adjustment to worker's benefit amount if circumstances so

B. The Amendment To RCW 51.32.075 Did Not Alter The Basic Methodology Governing Time-Loss Compensation Calculations, But It Does Preclude Crabb From Receiving The Relief He Seeks

Crabb characterizes the Department as arguing that the amendment to RCW 51.32.075 "should be read to somehow alter the time loss rate calculation methods set forth for individuals such as Mr. Crabb in RCW 51.32.060, RCW 51.32.090(1), and RCW 51.32.090(9)." Resp. Br. at 8. This is not correct.

The amendment to RCW 51.32.075 did not alter the basic methodology that governs the calculation of a worker's time-loss compensation benefits. Rather, it merely precludes workers from receiving COLAs for July 1, 2011. *See* RCW 51.32.075. Aside from precluding workers from receiving COLAs for that year, the amendment did not change the basic methodology that governs the calculation of workers' time-loss compensation benefits. *See id.*

The basic methodology, both before and after the 2011 amendments, is as follows: first, RCW 51.32.090(1) provides that the "schedule" of benefits contained in RCW 51.32.060 also applies to

require); RCW 51.32.240(2) (authorizing that additional benefits be paid to a worker if it is determined that worker was underpaid benefits); RCW 51.32.220(8) (authorizing increase to a worker's time-loss payments if worker's industrial insurance benefits were offset to account for the worker's receipt of social security benefits, but the worker's social security benefits are subsequently decreased or terminated). Crabb does not contend that RCW 51.28.040, RCW 51.32.240(2), or RCW 51.32.220(8) apply to him. RCW 51.32.090(9), which Crabb does rely on, does not authorize increasing a worker's time-loss compensation benefits.

time-loss compensation benefits. Thus, one begins by multiplying a worker's monthly wage by a percentage that is determined by the worker's marital status and number of dependents. RCW 51.32.060. Next, RCW 51.32.090(9) imposes a maximum on a worker's time-loss compensation benefits. The worker's initial benefits may not exceed the maximum imposed by that statute. RCW 51.32.090(9). Finally, RCW 51.32.075 provides for annual adjustments to a worker's time-loss compensation benefits based on changes to the average monthly wage, whether the worker's initial time-loss compensation rate was subject to the cap imposed by RCW 51.32.090(9) or not.

The amendment to RCW 51.32.075 did not fundamentally alter the interplay between those statutes, nor did it change the basic methods by which a given worker's time-loss compensation benefits are calculated. Rather, as noted, the amendment precludes workers from receiving a COLA for July 1, 2011. This, in turn, means that workers may not receive the adjustments to their time-loss compensation rates that they otherwise would have received—whether they were receiving benefits at the maximum imposed by RCW 51.32.090(9) or not—on July 1, 2011.

Crabb asserts that his "initial time loss rate *before applying the maximum cap* was $5,350.57 per month." Resp. Br. at 6 (emphasis added). It is true that Crabb's time-loss compensation rate would have

been $5,350.57 had it not been subject to a statutory cap. However, Crabb has never actually received time-loss compensation at a rate of $5,350.57, initially or otherwise, and, therefore, his "initial" time-loss compensation rate was not $5,350.57.

Rather, Crabb's initial time-loss compensation rate is the rate that was in effect as of the date of his injury in 2007: $4,258.40. BR 55. Under RCW 51.32.075, Crabb was entitled to an increase to his time-loss compensation benefit rate increased effective July 1 of every year after 2007, with the exception of July 1, 2011. Since Crabb may not receive a COLA for July 1, 2011, he is not entitled to have his time-loss compensation benefits increased effective July 1, 2011 based on the increase to the average monthly wage that occurred at that time.

C. Because It Is Only RCW 51.32.075, Not RCW 51.32.090(9), That Provides For Annual Increases To Workers' Time-Loss Compensation Rates, And Because EHB 2123 Amended RCW 51.32.075 By Precluding COLAs For July 1, 2011, The Fact That EHB 2123 Did Not Also Amend RCW 51.32.090(9) Is Immaterial

Crabb argues that the "plain language" of EHB 2123 supports his conclusion that he is entitled to an adjustment to a time-loss compensation rate under RCW 51.32.090(9) because EHB 2123 did not amend RCW 51.32.090(9) and there is no evidence that the legislature intended to disrupt the provisions of RCW 51.32.090(9). *See* Resp. Br. at 9. While

Crabb is correct that EHB 2123 did not amend RCW 51.32.090(9), Crabb's argument presupposes that RCW 51.32.090(9) creates an entitlement to annual increases to his time-loss compensation rate. For the reasons explained above, it does not. Therefore, the fact that EHB 2123 did not amend RCW 51.32.090(9) is immaterial, because RCW 51.32.090(9) does not provide for the relief that Crabb seeks here.

D. *Lynn* And *Hyatt* Stand For The Legal Principle That A Worker's Time-Loss Compensation, Once Set At A Given Rate, May Be Increased Only If A Statute Warrants Doing So

Crabb also asserts that two cases cited by the Department in its opening brief, *Hyatt v. Department of Labor & Industries*, 132 Wn. App. 387, 394-97, 132 P.3d 148 (2006), and *Lynn v. Department of Labor & Industries*, 130 Wn. App. 829, 834-37, 125 P.3d 202 (2005), are distinguishable from his case, because he, unlike the workers in those cases, is not challenging the correctness of a final and unappealed wage order. Resp. Br. at 10-12. However, the Department did not, and does not, contend that *Lynn* and *Hyatt* directly control the outcome of this case. App's Br. at 14.

Rather, the Department cited those cases as supporting the legal principle that once a worker's time-loss compensation benefits are set at an initial rate through a final and unappealed order, the worker's benefits continue being paid at that rate unless a statute warrants making an

adjustment to it. App's Br. at 14; *Hyatt*, 132 Wn. App. at 394-97; *Lynn*, 130 Wn. App. at 834-37. That legal principle is relevant here, because Crabb is seeking an adjustment to his initial time-loss compensation rate and, as Crabb concedes (Resp. Br. at 11), his wages have been set through a final order.

Notably, Crabb does not dispute that *Lynn* and *Hyatt* support the legal principle that once a worker's benefits are set at a given rate they may be increased only if a statute warrants making such an adjustment. *See* Resp. Br. at 10-12. Nor, for that matter, does Crabb argue that he is entitled to have his time-loss compensation benefits increased whether a statute warrants making such an adjustment or not. Resp. Br at 10-12.

E. The Liberal Construction Doctrine Does Not Aid Crabb Here, Because His Proposed Interpretation Of The Relevant Statutes Is Not Reasonable

Finally, Crabb argues that his view that RCW 51.32.090(9) entitles him to have his benefits increased is supported by the doctrine of liberal construction. Resp. Br. at 9-10. However, as the Department explained in its opening brief, the doctrine of liberal construction may not overcome the plain language of a statute. App's Br. at 25-26; *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Here, RCW 51.32.090(9) cannot be reasonably interpreted to make workers entitled to annual increases to their time-loss compensation benefits based

on annual changes to the average monthly wage, since that statute does not provide for such annual adjustments and because another statute, RCW 51.32.075, plainly governs and controls workers' rights to such annual adjustments.

Furthermore, the doctrine of liberal construction cannot be used to support an unrealistic interpretation of a statute that produces strained or absurd results. *Senate Republican Cmpn. Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Here, Crabb's interpretation of the interplay between RCW 51.32.075 and RCW 51.32.090(9) would lead to the strained and unrealistic result of the amendment precluding workers who were receiving benefits at comparatively lower rates from receiving adjustment to their benefit rates based on the change to the average monthly wage in the state, while workers who were already receiving the maximum benefits that are available under the Industrial Insurance Act would receive increases to their benefit rates based on that change to the average monthly wage. As this is an unrealistic interpretation of the statute leading to strained and absurd results, the liberal construction standard does not support it.

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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 Reply Brief and this Declaration of Service to all parties on record as follows:

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III. CONCLUSION

For the reasons discussed above, the Department asks that this Court reverse the decision of the superior court and affirm the decision of the Department.

RESPECTFULLY SUBMITTED this 4 day of April, 2013.

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