NO. 90455-3

SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
P.O. Box 40121
7141 Cleanwater Dr. SW
Olympia, WA, 98504-0121
(360) 586-7715

FILED IN COA ON JULY 1, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

The Department of Labor and Industries (Department) seeks review of *Crabb v. Department of Labor & Industries*, a published opinion issued by Division Two of the Court of Appeals. In 2011, faced with a crisis in the state budget, the Legislature placed a moratorium on adjustments to workers' benefits based on increases in average monthly wages (commonly referred to as cost-of-living adjustments). Ignoring the Legislature's intent to conserve resources, the Court of Appeals holding gives an increase in time-loss compensation benefits to just one class of workers: those who were already receiving the maximum time-loss compensation available under the Industrial Insurance Act. It ruled that these workers were entitled to a further increase to their benefits effective July 2011 based on the change to the average monthly wage that occurred on that date, even though the Legislature provided that no workers were to receive adjustments to their benefits at that time based on that change. This decision presents a question of substantial public interest as to whether workers who are already receiving the maximum amount of benefits that are available under the Industrial Insurance Act are entitled to preferential treatment as compared to workers who are receiving benefits at more modest rates.

Moreover, by ignoring the plain language of the relevant statutes, the Court of Appeals decision needlessly widens the divide between workers who are receiving the maximum benefit that is available under the Industrial Insurance Act and workers who are receiving lesser benefits, a result that could not plausibly have been intended by the Legislature. This case presents an issue of substantial public interest that the Court should review because the Court of Appeals decision is not only contrary to the language of the Industrial Insurance Act but it leads to a manifestly unreasonable result that affects a significant portion of workers and employers in this state.

II. IDENTITY OF PETITIONER AND DECISION

The Department petitions for review of the published decision of Division Two of the Court of Appeals, *Crabb v. Department of Labor & Industries*, __ Wn. App. ___, __ P.3d __ (No. 44343-1-II, June 5, 2014) (slip op.). A copy is provided in the appendix.

III. ISSUE PRESENTED FOR REVIEW

RCW 51.32.075 mandates that the Department may not increase a worker's time-loss compensation rate based on changes to the average monthly wage after July 1, 2011. A separate statute, RCW 51.32.090(9), places a cap on higher-earning workers' compensation rates based on a

percentage of the average monthly wage rate, but that statute does not provide a mechanism to increase a worker's benefits year to year.

Is a worker whose benefits are subject to the cap imposed by RCW 51.32.090(9) entitled to an annual increase based on increases to the average monthly wage for July 2011, despite the Legislature's mandate that no workers shall receive increases based on increases in the average monthly wage for that year?

IV. STATEMENT OF THE CASE

A. The Department Set Crabb's Time-Loss Rate By A Final Order

Joseph Crabb was injured in the course of his employment in 2007. BR 54. The Department allowed his claim for worker's compensation benefits. *See* BR 54.

In January 2010, the Department calculated Crabb's monthly wages at the time of injury to be $8,917.92. BR 54; BR Ex. No. 1. The Department also determined, through that order, that Crabb was not married and that he had no dependent children at the time of his injury. BR 54; BR Ex. No. 1. This order was communicated to all of the necessary parties, and no party, including Crabb, filed either a request for reconsideration or an appeal from that order. BR 54.

Although a worker is normally entitled to receive time-loss compensation of a certain percentage of his wages, under RCW 51.32.090(9), a worker's monthly time-loss compensation rate cannot be more than 120 percent of the average monthly wage in the state of Washington. The parties stipulated that the following amounts have constituted the maximum rate at which time-loss benefits may be paid under that statute, from the date of Crabb's injury through July 1, 2011:

Effective 7/1/07:	$4,258.40
Effective 7/1/08:	$4,472.10
Effective 7/1/09:	$4,625.60
Effective 7/1/10:	$4,715.30
Effective 7/1/11:	$4,816.20

BR 55.

Crabb received time-loss benefits for the time period beginning August 27, 2011, and up to October 21, 2011. BR 56-57; BR Ex. 2-7. For that time period, the Department paid Crabb time-loss benefits based on a monthly rate of $4,715.30. BR 56-57; BR Ex. 2-7. The Department did not increase Crabb's benefits on July 2011, as it had done in previous years, because the Legislature suspended cost of living adjustments (COLAs) for July 2011, and Crabb's benefits could not be increased without a COLA. BR 56-57; BR Ex. 3.

B. The Board Determined That The Department Could Not Increase Crabb's Time-Loss Rate In 2011 Because The Legislature Froze The COLA For That Year

Crabb appealed the Department's decision to the Board, contending that his time-loss benefits should have been increased effective July 1, 2011, even though he could not receive a COLA for that year. His theory was that the Legislature did not suspend the provisions of RCW 51.32.090(9), the statute that places a cap on a worker's time-loss compensation rate, and he believed that this statute provided for self-executing increases in his time-loss rate. BR 20-30.

The Board rejected Crabb's argument and affirmed the Department's decision to pay Crabb benefits based on a monthly rate of $4,715.42. BR 2; BR 13-19. The Board's industrial appeals judge issued a proposed decision that concluded that the Department properly denied Crabb's request to increase his time-loss compensation benefits effective July 1, 2011, because doing so would constitute granting him a COLA for July 1, 2011, which would be contrary to the plain language of RCW 51.32.075. BR 13-19.

The industrial appeals judge further explained that while RCW 51.32.090(9) was not suspended or amended, that statute does not, in and of itself, provide a mechanism to increase a worker's time-loss payments effective July 1 of each year. BR 16. Rather, it simply places a

cap on such benefits. BR 16. Finally, the industrial appeal judge noted that adopting Crabb's argument would lead to the absurd result of increasing the monthly benefits of highly compensated workers (who were receiving disability benefits at high monthly rates), while not granting any benefit increase to lower paid workers (who were receiving time-loss compensation payments at lower rates). BR 16.

Crabb filed a petition for review. BR 3-10. The Board denied review, adopting the proposed decision as its own decision. BR 2.

C. The Superior Court And Court Of Appeals Did Not Apply The Legislature's Freeze Of The COLAS

Crabb appealed to the Pierce County Superior Court. CP 3-5. The superior court granted Crabb's motion for summary judgment, and reversed the Board order, concluding that the liberal construction doctrine required it to resolve all doubts in favor of the worker. CP 169-73. The Department appealed to the Court of Appeals. CP 174-79.

The Court of Appeals issued a published decision that affirmed the superior court, concluding, like the superior court, that both the Department and Crabb's interpretations of RCW 51.32.090(9) and RCW 51.32.075 were reasonable, but concluding that the liberal construction standard required it to rule in Crabb's favor. *Crabb,* slip op. at 6.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review under RAP 13.4(b)(4). Payment of benefits in excess of what the Legislature intended presents a substantial public interest because it fails to give effect to the Legislature's intent to conserve money in 2011 and forward, at a time when the State and taxpayers face financial challenges. Moreover, the Court of Appeals has created a system of "haves" and "have nots" by favoring workers who receive the maximum industrial insurance benefit amount, a result the Legislature did not intend.

The Industrial Insurance Act does not provide for an increase in the time-loss rate for workers at the highest end of the time-loss rate: such an increase must be authorized by another statute. Under the plain language of RCW 51.32.075 and RCW 51.32.090(9), Crabb was not entitled to an adjustment to his time-loss compensation benefits based on the change to the average monthly wage that occurred on July 1, 2011. RCW 51.32.075 provides for annual increases to a worker's time-loss compensation based on changes to the average monthly wage, but the Legislature amended it to expressly preclude such an adjustment for July 2011.

RCW 51.32.090(9) places a limit on what a worker's time-loss compensation payments can ever be, but it does not provide for annual

adjustments to those benefits. Rather, it is RCW 51.32.075 that provides for such adjustments. The Opinion violated the plain language of RCW 51.32.075 and RCW 51.32.090 when it ruled that Crabb was entitled to an increase to his benefits in July 2011, creating an absurd result that could not have been intended by the Legislature. *Crabb*, slip op. at 6. The public has a substantial interest in the correction of a decision that violates the plain language of statutes in order to reach the strained and anomalous result of widening the gap between workers receiving the maximum benefits available under the Industrial Insurance Act and all other injured workers. This Court should grant review and reverse that decision.

A. This Case Presents A Question Of Substantial Public Interest Because The Court Of Appeals Has Acted To Expand The Benefits Provided To Injured Workers Without Authorization From the Legislature, Undermining The Legislature's Intent To Conserve Resources By Freezing COLAs for 2011

1. The Legislature Caps A Worker's Time-Loss Benefit Rate But Provides For Annual COLA Adjustments Under RCW 51.32.075, Which Were Frozen In 2011

The Industrial Insurance Act caps time-loss benefits that exceed a statutory maximum, evincing the Legislature's intent to provide a limited wage replacement benefit. Several statutes, including RCW 51.32.090; RCW 51.32.060; RCW 51.08.178; and RCW 51.32.075, govern the determination of a worker's time-loss compensation benefit amount. As a

starting point, a worker's initial time-loss compensation rate must be established. RCW 51.32.090(1) provides that the "schedule of payments" within RCW 51.32.060 also applies to the basic calculation of the worker's time-loss compensation benefits. Under RCW 51.32.060, a worker's benefits are calculated based on a percentage of the worker's monthly wages at the time of his or her injury, with the percentage depending on the worker's marital status and number of dependents. A worker, like Crabb, who was single with no dependents at the time of the injury, would ordinarily receive wage replacement benefits at an initial amount equal to 60 percent of his or her wages at the time of injury. RCW 51.32.060; RCW 51.32.090.

However, RCW 51.32.090(9) imposes a cap on the time-loss benefit amount, and provides that, for injuries occurring after 1996, "in no event" shall a worker's time-loss benefits "exceed" 120 percent of the average monthly wage in the state, RCW 51.08.018. RCW 51.08.018, in turn, provides that the "average monthly wage" is one-twelfth of the average annual wage as defined by RCW 50.04.355.

Therefore, when calculating a worker's initial time-loss compensation rate (which would be effective as of the date of the worker's injury), one must first determine the worker's wages, marital status, and number of dependents. Next, the worker's monthly wage figure is

multiplied by the appropriate percentage. If that figure is above the time-loss compensation cap, then the worker's time-loss rate is at the cap.

Here, the parties stipulated that Crabb's monthly wages at the time of his injury were $8,917.92. BR 54-55. Sixty percent of $8,917.92 is $5,350.75, which is a figure that exceeds the time-loss cap that was in place when Crabb was injured in 2007. BR 55. Thus, in Crabb's case, his time-loss benefit rate, as of the date of his injury, December 2007, was properly set at 120 percent of the average monthly wage as of July 1, 2007, or $4,258.40. BR 55.

Once a worker's time-loss compensation rate is established through a final order that provides the factual information needed to establish that rate, the worker continues receiving benefits at amounts consistent with that rate unless a statute provides a basis for making an adjustment to the rate. *See Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 394-97, 132 P.3d 148 (2006) (concluding that a worker could not receive increase to her time-loss rate because the time-loss rate was determined through a final and unappealed order that established the factual basis for the time-loss calculation, and because no statute supported making an increase to the time-loss rate); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 834-37, 125 P.3d 202 (2005) (concluding same).

RCW 51.32.075 provides for yearly adjustments to a worker's time-loss compensation benefits based on changes to the average monthly wage in the state, even after the initial time-loss compensation rate has been established. However, the Legislature froze such an increase for July 2011. The legislative freeze of this COLA, on its face, makes no exceptions for any workers, let alone for workers receiving the maximum time-loss benefits. Nor is there an indication in the statutory language, its history, or its purpose, that the Legislature intended this freeze to apply to all workers except workers receiving the maximum time-loss benefits. Instead, contrary to the Court of Appeals approach, the statute applies equally to workers receiving the maximum time-loss benefits. RCW 51.32.075. As noted, these adjustments are generally referred to as COLAs. *See Messer v. Dep't of Labor & Indus.*, 118 Wn. App. 635, 641-42, 77 P.3d 1184 (2003).

Workers who are subject to the time-loss benefit cap, like all other workers, are generally eligible for yearly COLAs. *See* RCW 51.32.075 (providing for adjustments to time-loss benefits and not providing any exception for workers who are at the maximum time-loss compensation rate). If a worker who is subject to the time-loss compensation cap receives a COLA, this effectively increases the worker's time-loss rate to

an amount equal to the cap that applies as of that fiscal year. *See* RCW 51.32.075; RCW 51.32.090(9).

However, in 2011, the Legislature passed EHB 2123, which amended RCW 51.32.075, to preclude workers who were injured before July 1, 2011, from receiving a COLA for July 1, 2011.[1] Laws of 2011, 1st Spec. Sess., ch. 37 § 202. Because Crabb was injured before July 2011, he could not receive a COLA effective July 1, 2011, and cannot receive another COLA until July 1, 2012. Therefore, the Department properly continued paying Crabb benefits at the same rate it paid him benefits effective July 1, 2010: a monthly rate of $4,715.30. RCW 51.32.075.

2. Although The Legislature Did Not Amend RCW 51.32.090(9), Crabb Could Not Receive An Adjustment To His Time-Loss Compensation Rate Under RCW 51.32.090(9), Because That Statute Does Not Provide Authority To Increase A Worker's Benefits

The Court of Appeals erroneously held that RCW 51.32.090(9) provides for a self-executing increase in time-loss benefits. *See Crabb*, slip op. at 10. But the plain language of the cap statute, 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

[1] Those injured on or after July 1, 2011, do not receive a COLA for the first July 1 that occurs after their industrial injuries, and receive their first COLA on the second July 1 that occurs after their injuries.

"in no event" shall the time-loss payments "exceed" the statewide monthly average wage as specified:

> (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%

(Emphasis added).

Thus, RCW 51.32.090(9)(a), by its terms, prevents the Department from paying any amount of time loss that is in excess of the applicable time-loss cap, but it neither states nor implies 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).

The Department's legal authority to increase an injured worker's wages based on changes to the average monthly wage can be found only in RCW 51.32.075, not RCW 51.32.090(9). Since RCW 51.32.075 does not allow for COLAs for July 1, 2011, Crabb's time-loss rate could not be increased effective July 1, 2011, based on the change to the average

monthly wage that occurred on that date. *See* RCW 51.32.075.[2] The Court of Appeals ignored the plain language of the statute when it concluded otherwise, and this Court should take review to overturn this decision. *Crabb*, slip op. at 10.

B. By Accepting Crabb's Argument, The Court Of Appeals Decision Provides For An Absurd Result That Favors High Earning Workers And Undercuts The Legislature's Intent To Conserve Resources

This Court should also take review of the decision because the Court of Appeals' interpretation of the interplay between RCW 51.32.075 and RCW 51.32.090 leads to strained, unlikely, and unrealistic results that the Legislature could not have intended when it amended RCW 51.32.075. *See* BR 16. The courts do not adopt interpretations of statutes that result in strained, unlikely, or unrealistic results. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 380 (1993).

The plain language of RCW 51.32.075 and RCW 51.32.090(9) do not support Crabb, as RCW 51.32.090 places a cap on benefits but does not provide for annual increases to those benefits, while RCW 51.32.075 provides for annual increases to benefits but expressly denies such an

[2] The impact of the Court of Appeals decision is not confined to July 2011: although workers who were injured before 2011 will receive COLAs on July 2012. The July 2012 COLAs do not take into account the change to the average monthly wage that occurred on July 2011. *See* RCW 51.32.075. Therefore, the Court's decision will have a lasting affect on the benefits paid to workers who are receiving the maximum time-loss compensation rate that is available under RCW 51.32.090(9).

adjustment for July 2011. The liberal construction doctrine cannot be used to overcome the plain language of a statute. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Since the plain language of the relevant statutes does not support Crabb, the Court of Appeals erred when it relied on the liberal construction canon in order to rule in Crabb's favor. Furthermore, the liberal construction standard does not trump other rules of statutory construction, nor does it support a court adopting a strained or unrealistic interpretation of a statute. *See Senate Republican Cmpn. Comm. v. Pub. Disclosure Comm'n,* 133 Wn.2d 229, 241-43, 943 P.2d 1358 (1997) (explaining that, while Campaign Financing Act was subject to liberal construction, this would not support a strained interpretation of the relevant statute, and noting that liberal interpretation of that Act would be contrary to other principles of statutory interpretation).

Under the Court of Appeals' interpretation of RCW 51.32.075 and RCW 51.32.090, an injured worker receiving a comparatively modest time-loss benefit rate as of June 30, 2011, would not be entitled to any adjustment to his or her time-loss rate as of July 1, 2011, but a worker like Crabb, who was receiving the highest benefit rate that is possible under

the statute as of June 30, 2011, would be entitled to an increase to that time-loss benefit rate as of July 1, 2011.[3] *See Crabb*, slip op. at 6.

Accepting an argument raised by Crabb in oral argument but which he did not raise in his brief, the Court of Appeals concluded that it would not be absurd to grant what is effectively a COLA to workers who are receiving the maximum benefits available under the Industrial Insurance Act while denying COLAs to injured workers who are receiving much less in benefits. *Crabb*, slip op. at 9. The Court suggested that the Legislature may have decided that workers who are receiving less than 60 percent of their wages in benefits should not suffer the further injury of not receiving a COLA on July 2011, while workers who are receiving far less in benefits but who are at least receiving 60 percent of their lost wages do not have need for a COLA increase. *See id.*

The Court of Appeals offers a creative interpretation of what the Legislature intended when it amended RCW 51.32.075, but nothing supports the notion that the Legislature believed that workers receiving, say, $800 a month in time-loss compensation, do not have any need for a COLA while workers receiving the maximum benefits available as of

[3] For example, suppose an injured worker was receiving $800 a month in time loss as of June 30, 2011. (Crabb was receiving $4,715.30 a month as of that time.) Under Crabb's interpretation of the two statutes, this hypothetical injured worker would continue receiving $800 a month in time loss effective July 1, 2011, while Crabb's time-loss benefits would be increased from $4,715.30 a month to $4,816.20.

June 2010 ($4715.30) have suffered enough and should receive an additional increase effective July 2011. *Id.* Furthermore, this argument ignores that RCW 51.32.090(9) places a cap on benefits but does not provide for annual adjustments to benefits, while RCW 51.32.075—and RCW 51.32.075 alone—provides for such annual adjustments.

The Court of Appeals also mistakenly concluded that the Department argued that the Legislature implicitly amended RCW 51.32.090(9) when it amended RCW 51.32.075. *Crabb*, slip op. at 7. The Department's argument does not depend on that notion. RCW 51.32.090(9) places a cap on a worker's benefits but does not provide for annual adjustments. RCW 51.32.075 provides for annual adjustments, whether a worker is receiving the maximum benefits available under the statute or not. When the Legislature amended RCW 51.32.075 to eliminate any benefit adjustments based on changes to the average monthly wage, this did not amend RCW 51.32.090(9). RCW 51.32.090(9) continued—as it had before—to cap workers' benefits, and it continued—as it had before—to lack any mechanism to provide for annual adjustments to a worker's benefits. The Legislature had no need to amend RCW 51.32.090 to further its intent to conserve resources by providing the freeze in RCW 51.32.075. By concluding otherwise, the Court of Appeals subverts the Legislature's intent. Because this

subversion has significant ramifications for the payment of time-loss benefits (and collection of taxes to fund such benefits), this presents an issue of substantial public interest.

VI. CONCLUSION

The Court of Appeals wrongly concluded that workers receiving the maximum benefits available under the statute were entitled to better treatment than any other workers in the state, by allowing such workers to receive further increases to their benefits when all other workers were denied any increase to their benefits. The Court of Appeals decision is contrary to the plain language of the statutes and it leads to the absurd result of widening the gap between workers receiving the maximum benefits available under the law and all other injured workers. This Court should take review and reverse.

RESPECTFULLY SUBMITTED this 1 day of July, 2014.

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
7141 Cleanwater Drive SW
PO Box 40121
Olympia, Washington 98504
(360) 586-7715

ATTACHMENT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOSEPH CRABB, Respondent, v. DEPARTMENT OF LABOR & INDUSTRIES, Appellant.	No. 44343-1-II PUBLISHED OPINION

BJORGEN, J — The Department of Labor and Industries (Department) appeals an order of summary judgment directing it to pay Joseph Crabb's workers' compensation benefits for 2011 at the maximum monthly amount for that year. Crabb began receiving these benefits in 2007. The statutory formula for calculating his benefits called for payments in excess of the maximum monthly amount, so the Department paid Crabb at the maximum between 2007 and 2010. In 2011, amendments to the workers' compensation statutes froze the annual cost of living adjustment (COLA) to benefit payments. Based on these amendments, the Department continued to pay Crabb at the 2010 maximum monthly rate when he sought benefits in 2011.

Crabb protested, eventually appealing to the superior court, which reversed an order by the Board of Industrial Insurance Appeals (Board) and directed the Department to pay his benefits at the maximum 2011 monthly amount. Concluding that the 2011 COLA suspension did not prevent payment of Crabb's benefits at the 2011 maximum, we affirm the superior court.

FACTS

Crabb experienced a work-related injury to his left foot in 2007. He filed a claim for benefits, which the Department allowed. By statute, the Department calculates temporary total disability payments, the type of benefits Crabb received, using three factors measured at the time

of the accident: the worker's monthly wages, his or her marital status, and the number of the worker's dependent children. RCW 51.32.090(1), .060. At the time of his injury, Crabb made $8,917.92 per month, was unmarried, and had no children. Based on these factors, the statutory formula for calculating disability payments codified in RCW 51.32.090 and RCW 51.32.060 set Crabb's benefits at 60 percent of his monthly wages, or $5,350.57 per month. However, because RCW 51.32.090(9) capped the payment of temporary total disability payments at 120 percent of the average monthly state wage, Crabb was only entitled to payments of $4,258.40 per month for 2007, the year of his injury.

The effects of Crabb's injury persisted, and his claim remained open. In 2011 he filed claims for temporary total disability for the period of August 27, 2011 through October 21, 2011.

The COLA is given effect by RCW 51.32.075, which requires the Department to adjust temporary total disability payments each July to account for inflation. However, during a special session in 2011, the legislature eliminated the automatic COLA to workers' compensation benefits for that year. LAWS OF 2011, 1st Spec. Sess., ch. 37, §§ 202, 1101. The legislature did not, however, alter the statutory scheme for calculating benefits found in RCW 51.32.090(1) or for calculating the maximum monthly payment allowed by RCW 51.32.090(9). *See* LAWS OF 2011, 1st Spec. Sess., ch. 37, § 101.

Because of the suspension of the 2011 COLA before its effective date, July 1, the Department paid Crabb's 2011 claims at a monthly benefit rate of $ 4,714.30, the maximum monthly payment for 2010. Crabb wrote the Department and claimed that, under the benefit schedule for temporary total disability benefits established by RCW 51.32.090(1), adjusted for inflation by RCW 51.32.075, and capped by the maximum monthly payment provision found in

RCW 51.32.090(9), he should receive the maximum payment allowed in 2011, $4,816.20 per month. The Department rejected Crabb's claim, contending that the legislature's suspension of 2011's COLA prevented it from adjusting his payments upward.

Crabb appealed, and the parties contested the issue on stipulated facts before an industrial appeals judge (IAJ) of the Board. The IAJ accepted the Department's argument that, absent an automatic COLA, it had no mechanism to adjust Crabb's benefits and denied his appeal with a proposed decision and order. The Board denied Crabb's petition for review, adopting the IAJ's proposed decision and order as its own.

Crabb then appealed to the superior court contending that the provisions of RCW 51.32.090 entitled him to the maximum allowable monthly payment and that the COLA issue was irrelevant to that calculation. The Department again claimed that, absent some mechanism for adjusting Crabb's benefits, it could not do so, and it therefore could only pay at the 2010 cap level. Accepting Crabb's interpretation, the superior court granted summary judgment in his favor and ordered the Department to recalculate and pay Crabb benefits for the period at issue at the 2011 maximum monthly amount, interest on the deficiency, and costs and fees related to his appeal.

The Department appeals and seeks reversal of the summary judgment order in Crabb's favor and reinstatement of the Board's decision.

ANALYSIS

The Department contends that the superior court erred because (1) the legislature precluded any kind of increase in benefit payments for Crabb when it suspended the 2011 COLA and (2) even if Crabb could receive higher benefit payments, it lacked any mechanism to

implement an increase in payments. The Department's claims present questions of statutory interpretation that ultimately turn on whether the superior court correctly interpreted RCW 51.32.090 and RCW 51.32.075, the provisions establishing Crabb's benefit schedule, the maximum monthly payment allowed, and annual adjustments for inflation.

When we interpret a statute, we attempt to "ascertain and carry out the Legislature's intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We determine the legislature's intent through the plain meaning imparted by the text of the statutory provision at issue, as well as any related provisions that "disclose legislative intent about the provision in question." *Campbell & Gwinn*, 146 Wn.2d at 11-12. Unless "the statute remains susceptible to more than one reasonable meaning" after this textual inquiry, the statute is unambiguous, our inquiry is over, and we must give effect to the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 12. If, however, the statute is susceptible to more than one reasonable interpretation after the plain meaning analysis, "the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." *Campbell & Gwinn*, 146 Wn.2d at 12 (citing, among other cases, *Cockle v. Dep't of Labor and Industries*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001)).

We review de novo an order for summary judgment, "engaging in the same inquiry as the trial court." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). Summary judgment is proper where "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Afoa*, 176 Wn.2d at 466. Because the parties agree on the facts, this appeal turns on our de novo review of the Department's interpretation of the

provisions of chapter 51.32 RCW. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

I. THE STATUTORY BENEFIT SCHEME AND CRABB'S RATE OF BENEFIT PAYMENTS

Under RCW 51.32.090(1) workers experiencing temporary total disability "shall" receive benefit payments according to the same payment schedule as those receiving permanent total disability, although only "so long as the total disability continues." The payment schedule for workers with permanent total disability sets benefit payments as a variable percentage of the workers' average monthly wages, conditioned on the workers' marital status and number of dependent children at the time of the injury. RCW 51.32.060. For those, like Crabb, with no spouse or dependent children at the time of injury, RCW 51.32.060(1) and RCW 51.32.060 together require the Department to pay temporary total disability benefits at "[60] percent of [the worker's] wages." RCW 51.32.090(1)(g). The Department fixed Crabb's benefit schedule by order, correctly determining that the statutory scheme entitled him to 60 percent of his $8,917.92 average monthly wage, or $5,350.57.

RCW 51.32.075 codifies the legislature's attempt to deal with the problem of inflation in the context of worker's compensation payments. *See Dep't of Labor & Indus. v. Auman*, 110 Wn.2d 917, 920, 756 P.2d 1311 (1988). Between the years 1982 and 2010, this statute required the Department to make yearly adjustments to the injured worker's compensation by multiplying the payment schedule called for by RCW 51.32.090(1) by a fraction determined by dividing that year's average monthly salary by the average monthly salary of the year in which the claimant suffered his or her injury. Former RCW 51.32.075 (1983). In 2011, however, the legislature suspended the COLA increase for the year and adjusted the formula so that any adjustments to

benefits lag a year behind the current pace of inflation. LAWS OF 2011, 1st Spec. Sess., ch. 37, § 202 (codified as RCW 51.32.075).

The payments required by RCW 51.32.090(1) are also capped by a maximum monthly payment rate. RCW 51.32.090(9). As relevant here, the capping provision states that "[i]n no event shall the monthly payments provided in this section" exceed 120 percent of the average monthly wage in the state as computed under the provisions of RCW 51.08.018. RCW 51.32.090(9)(a). During the 2010 year, RCW 51.32.090(9) limited payments to $4,715.30 per month; for 2011 the provision restricted payments to a maximum of $4,816.20 per month.

II. RCW 51.32.075 AND THE COLA FREEZE

The Department first claims the superior court erred by misinterpreting the effects of the legislature's suspension of the 2011 COLA. The Department argues that the suspension of the COLA precluded it from adjusting Crabb's benefits because the rise in the maximum payment amount allowed by RCW 51.32.090(9) is equal to the benefit increase that the COLA would have provided. Crabb contends that the amendments have no bearing on his claim. We find the statutory amendments ambiguous and, applying the canon of liberal construction, hold that the Department erred.

The Department offers a reasonable interpretation of the 2011 amendments to RCW 51.32.075. As the Department argues, both the maximum monthly benefit payment and the COLA are functions of the average monthly wage of Washington workers. *See* RCW 51.32.075, .090(9). As a result, the yearly change to the maximum benefit payment is identical to the yearly COLA. Given this, the legislature's suspension of 2011's COLA could indicate intent to prevent increases to benefit payments like the one Crabb seeks.

However, Crabb also offers a reasonable interpretation of the statutory scheme. As Crabb notes, while the legislature amended RCW 51.32.075, it did not amend RCW 51.32.090(9). The Department's position that the 2011 amendments to RCW 51.32.075 suspended benefit increases for workers at the statutory maximum requires us to view them as impliedly amending RCW 51.32.090(9). We disfavor such implied amendments, and we presume the legislature knows this. *Wilbur v. Dep't of Labor & Indus.*, 38 Wn. App. 553, 559, 686 P.2d 509 (1984). Crabb thus reasonably argues that the legislature did not intend to preclude the benefit raise he seeks here when it amended RCW 51.32.075 but not RCW 51.32.090(9).

Since both parties offer reasonable, conflicting interpretations of the text and purpose of the statutory scheme at issue, we find the scheme ambiguous. Interpreting the provision requires us to turn to extrinsic aids to ascertain the legislature's intent. The Department invokes several canons of construction that it claims support its interpretation; Crabb invokes only one, the doctrine of liberal construction. We find the canon invoked by Crabb to be dispositive, especially in light of the differing roles of the monthly cap and the COLA.[1]

The legislature has declared that the provisions of Title 51 RCW "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010; *Cockle*, 142 Wn.2d at 811. The Supreme Court has commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker. *See, e.g., Clauson v. Dep't of*

[1] We acknowledge some uncertainty in the case law as to whether rules of liberal construction are to be consulted in determining whether a statute is ambiguous or whether they are applied after ambiguity has been found. *Compare Jametsky v. Olson*, 179 Wn.2d 756, 764-65, 317 P.3d 1003 (2014) with *Cockle*, 142 Wn.2d at 811. Because *Cockle* applied the specific rule of liberal construction for workers' compensation statutes only after ambiguity had been found, we do the same.

Labor & Indus., 130 Wn.2d 580, 586, 925 P.2d 624 (1996). Because Crabb makes at least a reasonable case for his entitlement to the higher benefit rate, we must resolve the Department's appeal in his favor, despite the canons of construction invoked by the Department. *See, e.g.*, *Cockle*, 142 Wn.2d at 811-13.

The voice of the canon of liberal construction in this setting is strengthened by the differing purpose and role of the statutory limitations under examination. The monthly cap is simply a device to hold benefits, however calculated, below a set maximum. It applies whatever the mix of factors entering into the benefit calculation and whatever the contribution of a COLA to those benefits. The COLA on the other hand, increases benefits up to the monthly cap. The annual adjustment to the monthly cap, therefore, is not a COLA, even though their amounts may be the same in an individual year. Here, the raising of the cap simply allows Crabb to enjoy more of the benefits the statute otherwise would grant him, benefits which do not include the suspended COLA for 2011. Since the cap increases are not a COLA, it would offend the canon of liberal construction even more to deny Crabb the cap increase simply because it was the same amount as the suspended COLA.

The Department attempts to overcome the legislature's directive that we construe the provisions of Title 51 RCW liberally by arguing that liberal construction cannot overcome the canon against interpretations producing absurd results. *Senate Republican Campaign Comm'n v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997); *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992). The Department claims that Crabb's interpretation allows higher paid workers to receive what amounts to a COLA for 2011 while

less well paid workers do not and labels this a "strained and unrealistic" result. Br. of Appellant at 26. There are two problems with the Department's argument.

First, the Department's interpretation produces an absurdity of its own. The Department asks us to hold on one hand that Crabb's rate of payment is determined by the maximum payment provision, but then to hold on the other hand that changes to the maximum payment provision have no effect on Crabb's rate of payment. This inconsistency is difficult to accept.

Second, we cannot say that Crabb's interpretation is absurd, as it accords with prior legislative amendments to chapter 51.32 RCW. Workers' compensation payments, like the ones made under RCW 51.32.090(1), exist to compensate injured workers "based not on an arbitrarily set figure, but rather on his or her actual 'lost earning capacity.'" *Cockle*, 142 Wn.2d at 811 (quoting *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997)). In fact, the legislature amended Title 51 to make workers' compensation payments dependent on wages, rather than set payments for particular types of injuries, precisely to more accurately reflect lost wages. *Cockle*, 142 Wn.2d at 810-11. Because Crabb's lost wages resulted in benefits that exceeded the maximum monthly payment, allowing Crabb to receive a larger benefit payment when the maximum monthly payment is increased comports with the goal of better compensating Crabb for his lost earning capacity.

The Department also argues that we should defer to its interpretation of RCW 51.32.090 and that we should accept its interpretation because it gives effect to all the statutory language. We generally defer to the Department's interpretation of Title 51 RCW. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). This deference has limits however, and where the Department's reading "conflicts with a statutory mandate," deference is

"'inappropriate.'" *Cockle*, 142 Wn.2d at 812 (quoting *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)). For the reasons set out above, the Department's reading conflicts with applicable statutory mandates, even giving that reading its due deference. Further, the Department's reading contravenes the express language of RCW 51.32.090, which provides that the worker "shall" receive benefits according to the statutory schedule during his disability. Only by allowing Crabb to benefit from increases in the monthly cap can this requirement be met. Denying him that benefit because the COLA was suspended reads RCW 51.32.090(1) right out of the statutory scheme. For this reason also, we decline to follow the Department's construction of RCW 51.32.090.

III. Statutory Mechanisms for Benefit Increases

The Department next contends that the superior court erred by ordering it to increase Crabb's benefits because it has no means to do so. The Department claims that adjustments must be made using an applicable mechanism and contends that without the COLA it had no mechanism applicable to Crabb because the maximum monthly benefit cap does not, in and of itself, provide a mechanism to increase payments. We disagree.

As noted above, the Department used the factors prescribed by RCW 51.32.090(1) to calculate Crabb's benefit schedule. Because the Department correctly fixed Crabb's benefit schedule in excess of the maximum monthly payment allowed by RCW 51.32.090(9), increases in the maximum monthly payment operate as a mechanism to increase Crabb's benefit payments. *See* RCW 51.32.090(1), (9). When the maximum monthly payment rises, Crabb's benefit payments are necessarily reduced less. This adjustment inheres in the raising of the monthly cap, and no additional legal mechanism is necessary to effect it.

Nevertheless, the Department cites our opinion in *Hyatt v. Department of Labor and Industries*, 132 Wn. App. 387, 132 P.3d 148 (2006), and Division One's similar opinion in *Lynn v. Department of Labor and Industries*, 130 Wn. App. 829, 125 P.3d 202 (2005), claiming that they support its contention that it needed a statutory mechanism to increase Crabb's benefit payments. Those cases stand for the proposition that once the Department fixes a claimant's benefit schedule by final order, principles of res judicata require the claimant to show some kind of change in personal circumstances to warrant recalculation of that schedule. *Hyatt*, 132 Wn. App. at 396-400; *Lynn*, 130 Wn. App. at 834-40. Crabb is not seeking a recalculation of his benefit schedule. He is literally seeking to compel the Department to pay him what it initially decided it should.[2] Res judicata cannot justify the Department's refusal to pay Crabb according to the factors it fixed by order.

IV. ATTORNEY FEES

The superior court awarded Crabb attorney fees and costs. Crabb devoted a portion of his opening brief to the attorney fees issue and asks that we award appellate attorney fees based on RCW 51.52.130, which allows for such fees. Crabb has satisfied the requirements of RAP 18.1. Because we affirm the trial court's summary judgment order, we affirm its award of fees and costs to Crabb. We also award Crabb fees on appeal, in an amount to be set by a commissioner of our court.

[2] The Department points to several orders in the record and claims that these fix Crabb's benefit payments at the 2010 maximum monthly payment rate. These orders fix Crabb's payments at those levels for set periods of time consistent with the provisions of RCW 51.32.090(9). Again, the Department fixed Crabb's benefit schedule according to RCW 51.32.090(1). The Department must pay him according to that schedule as modified by the provisions of RCW 51.32.090(9), which allowed for a larger monthly rate of payment for the period of time at issue here.

CONCLUSION

The legislature's command that we construe the provisions of chapter 51 RCW liberally in favor of injured workers, along with the different purpose and role of the monthly benefit cap and the COLA, requires that we resolve the Department's appeal in Crabb's favor. We affirm the superior court's grant of summary judgment.

Bjorgen, A.C.J.
BJORGEN, J.

We concur:

Worswick J
WORSWICK, J.

Johanson, C.J.
JOHANSON, C.J.

NO. 44343-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Appellant, v. JOSEPH C. CRABB, Respondent.	**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 Petition for Review to Supreme Court and this Declaration of Service to all parties on record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid, to:

David Lauman
Small, Snell, Weiss & Comfort, P.S.
PO Box 11303
Tacoma, WA 98411-0303
DWL@sswc-law.com
(Counsel for Respondent, Joseph C. Crabb)

DATED this 1st day of July, 2014 at Tumwater, WA.

Debora A. Gross

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

WASHINGTON STATE ATTORNEY GENERAL

July 01, 2014 - 11:56 AM

Transmittal Letter

Document Uploaded: 443431-Petition for Review.pdf

Case Name: Joseph C. Crabb vs. Dept of Labor & Industries
Court of Appeals Case Number: 44343-1

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Steve Vinyard - Email: deborag1@atg.wa.gov