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No. 71209-8
King County Superior Court Cause No. 13-2-17568-1 KNT

IN THE COURT OF APPEALS, DIVISION ONE FOR
THE STATE OF WASHINGTON

CASCADIAN BUILDING MAINTENANCE, LTD,

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

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I. Introduction

The Appellant, Cascadian Building Maintenance, Ltd. (“Cascadian”) by and through its attorney of record, Ann Silvernale, of Holmes Weddle & Barcott, P.C. and replies to the Respondent Department of Labor & Industries’ (“the Department”) Brief dated April 14, 2014, and Notice of Errata dated April 18, 2014 (together “Respondent’s Brief”). This reply is filed in accord with RAP 10.2(d) and the Court of Appeals’ Notice of April 22, 2014, requiring that any Reply Brief be filed by May 16, 2014.

II. Argument

The central issue in this case is one of statutory interpretation. When the Legislature amended RCW 51.32.090(4) in 2011¹ to create the Stay-At-Work program, did the provisions of RCW 51.32.090(4) that existed both before and after the amendments remain unchanged, enabling them to be interpreted in a vacuum as the Department argues? Or, did the expansive provisions added to the statute transform the existing statutory language, requiring all parts of the statute to be read together to affect the Legislature’s stated goal, as Cascadian argues. Contrary to the Department’s considered arguments, the statute and the principles of statutory interpretation hold in Cascadian’s favor.

¹ For the Court’s convenience, Cascadian has Included the text of H.B. 2123 showing the changes made to RCW 51.32.090 through the enactment of the Stay-At-Work program. 21 Wash. Legis. Serv. 1st Sp. Sess. Ch. 37 (H.B. 2123) (West).

A. Deference Due to the Department

The court is not, as the Department states required to give the Department's interpretations of the Industrial Insurance Act "*great deference*." Respondent's Brief at 6 (emphasis added). Nor is the deference the Department is due without limitations.

When interpreting an ambiguous statute, the court must give the opinion of an agency tasked with interpreting the statute "substantial weight" (*Littlejohn Const. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423 (1994)) or "great weight." *Dep't of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452 (2013); *Flanigan v. Dep't of Labor & Indus.*, 65 Wn. App. 119, 121 (1992). However, the court must first conclude the statute in question is ambiguous before the court need give the agency any deference. *Slauch*, 177 Wn. App. at 452.

Cascadian contends that when reading RCW 51.32.090(4) as a whole, the plain language is unambiguous and provides for Cascadian to receive reimbursement for all days during which Ms. Tellez performed light duty work. But even if the Court of Appeals concludes that the language of RCW 51.32.090(4) is ambiguous, and deference is due to the Department's opinion, this does not result in an automatic ruling in the Department's favor.

An agency's interpretation is "not binding" on the courts. *Dep't of Labor and Indus. v. Granger*, 159 Wn.2d 752, 765 (2007) (en banc). "[D]eference to an agency's interpretation is never appropriate when the agency's interpretation conflicts with a statutory mandate" *Bostain v.*

Food Exp., Inc., 159 Wn.2d 700, 716 (2007) (en banc); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 812 (2001).

For example, in *Cockle*, the Washington Supreme Court rejected the Department's interpretation of RCW 51.08.178 (the statute that establishes the definition and calculation of a worker's monthly wages for purposes of compensation under the Industrial Insurance Act) because it excluded employer-provided benefits in violation of the legislative mandate under RCW 51.12.010 "that all Title 51 RCW provisions ' shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment.'" *Cockle*, 142 Wn.2d at 812 (quoting RCW 51.12.010).

The Department's interpretation of RCW 51.32.090(4) likewise violates the Legislature's mandate. It ignores the Legislature's stated purpose in RCW 51.32.090(4)(a), for the Stay-At-Work program—to reduce long-term disability and the cost of injuries by enabling "injured workers [to] remain at work following their injury" (RCW 51.32.090(4)(a))—and it ignores the Legislature's broader mandate to liberally construe the Act to the benefit of injured workers as stated in RCW 51.12.010. In its Brief, the Department makes it clear that it doesn't consider RCW 51.32.090(4)(a) as having any real legal meaning or any bearing on its own interpretation of the other provisions of RCW 51.32.090(4). Respondent's Brief at 25–26. As discussed *infra* the

Department's position is in direct contradiction to the holding of *Judd v. American Telegraph and Telegraph Co.*, 152 Wn.2d 195, 203–04 (2004).

The Department further argues that its interpretation of RCW 51.32.090(4) in the instant case has no bearing on the Legislature's intended purpose because it takes the position that Ms. Tellez's disability was not long-term because she was released to full-duty work in less than fourteen calendar days. Respondent's Brief at 27–28. At first blush, this argument appears sound, but it includes a necessary assumption that itself is contrary to the Legislature's findings as stated in RCW 51.32.090(4)(a) and the broader principles of liberal construction found in RCW 51.12.010: that Ms. Tellez's overall period of disability was not influenced or affected by Cascadian's offer of light duty work.

No one knows how long Ms. Tellez or any other injured employee will remain off work or how long it will be before a physician releases the employee to full-duty at the employee's job of injury. The Legislature's "findings" state that long-term disability *itself* (not just costs associated with workers' compensation claims) is reduced when workers "remain at work following their injury." RCW 51.32.090(4)(a). In other words, light duty work reduces the likelihood that an injury like Ms. Tellez's will turn into a long-term disability. The Department disregards the legislature's stated policy goals in RCW 51.32.090(4)(a) and by extension its mandate in favor of a *post hoc* analysis of employer reimbursement to reduce the Department's short-term costs. By removing the certainty of reimbursement promised in RCW 51.32.090(4), the Department actively

discourages employers from offering light duty immediately after an injury, and, thus, enabling injured workers to *remain* at work, to their benefit and the reduction of claim costs, due to the uncertainty of reimbursement.

This interpretation is in violation RCW 51.32.090(4)(a) and the broader legislative mandate found in RCW 51.12.010. Thus, in the event the court finds the statute is ambiguous, the Department's opinion is not entitled to any special weight.

B. RCW 51.32.090(4)(a) Must be Read Together with RCW 51.32.090(4)(b), (c), and the Other Paragraphs of RCW 51.32.090(4).

As the Department pointed out in its Brief, “[w]hen the legislature employs the words ‘the legislature finds,’ . . . it sets forth policy statements that do not give rise to enforceable rights and duties.” *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203 (2004) (citing *Aripa v. Dep’t of Soc. & Health Servs.*, 91 Wn.2d 135, 139 (1978)); *see also* Respondent’s Brief at 25. Cascadian does not dispute this, nor is Cascadian arguing that RCW 51.32.090(4)(a) created a separate right of action or new enforceable rights.

Instead, Cascadian argues, consistent with the holding of *Judd* that RCW 51.32.090(4)(a) creates a statement of legislative intent that must be read together with the new RCW 51.32.090(4)(b) to give effect to the legislature’s meaning. The court in *Judd* explained, “legislative policy statements . . . are ‘to be considered in construing, interpreting, and

administering [the statute]. Such declarations and recitals, while not operative rules of action, may play a very important part in determining what action shall be taken.” *Judd*, 152 Wn.2d at 203–04 (quoting *Whatcom County v. Langlie*, 40 Wn.2d 855, 863 (1955) (citations omitted)) (substitution by *Judd* court). Cascadian contends that paragraph (a) must be read with paragraph (b) to give effect to the legislature’s intent.

In *Judd* the Washington Supreme Court evaluated three statutory sections relating to the disclosure of telephone rates charted by “alternate operator services” companies. *Judd*, 152 Wn.2d at 199. The plaintiffs argued that one of the statutes, RCW 80.36.510, imposed substantive duties on alternative operator services companies; the defendants and the lower courts had all agreed the statute and its statutory scheme only created a cause of action for violation of disclosure regulations. *Id.* at 202–03. The Washington Supreme Court went on to explain that the interpretation the plaintiffs requested would require the court to read one of the sections “ ‘without the words, [t]he legislature finds that,’ ” and explained that the various sections of the statute must be read together in order for them to make sense and to effect the legislature’s intended meaning. *Id.* at 203 (quoting *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 766 (2003)) (internal quotation marks omitted).

Cascadian, is not, as the Department suggests, arguing that RCW 51.32.090(4)(a) gives rise to “enforceable rights and duties.” Respondent’s Brief at 25. To the contrary, Cascadian asks that the Court

of Appeals read the statute as a whole, including RCW 51.32.090(4)(a) to interpret the Legislature’s intent and the complete meaning of RCW 51.32.090 and the Stay-At-Work Program. The Department seems to take the position that the legislature added reimbursement provisions to paragraph (b) without any further explanation. Respondent’s Brief at 25–26. Cascadian contends that when the Legislature adopted the 2011 amendments it did more than just offer reimbursements to some employers some of the time for their light duty job offers. Instead, the Legislature created a new program complete with stated goals and rationale that transformed the statute as a whole. RCW 51.32.090(4)(a) provides context within which the rest of the provisions of RCW 51.32.090 and the statute as a whole must be interpreted. The Department’s interpretation of RCW 51.32.090 fails to give any effect or consideration to RCW 51.32.090(4)(a) and its role in the overall statutory scheme.

C. The Language of RCW 51.32.090(4)(b) Does Not Unambiguously Refer to “Temporary Total Disability Benefits” as the Department Argues

The Department further relies on *O’Keefe v. Department of Labor & Industries*, 126 Wn. App. 760, 765–67 (2005) for the proposition that “‘entitled to temporary total disability’ means entitled to temporary total disability benefits . . .” Respondent’s Brief at 23. But this reliance on *O’Keefe* is misplaced. *O’Keefe* addresses what it means to have a “worker’s modified work to come to an end within the meaning of [the former] RCW 51.32.090(4)(a).” *O’Keefe*, 126 Wn. App. at 767.

Specifically, the case addresses what happens to a worker's temporary total disability benefits when a worker is fired from a light duty position offered under RCW 51.32.090(4) for reasons unrelated to the worker's industrial injury. *Id.* at 767–69. The court in *O'Keefe* had no reason to discuss temporary total disability benefits or light duty offers in the first three days following an injury, because they were not relevant to the case, and because the *O'Keefe* case addressed the pre-2011 version of the RCW 51.32.090. Thus, the Court of Appeals did not discuss what effect the legislature's stated intent to keep injured workers in their jobs and to create a "Stay-At-Work" program had on the overall meaning and interpretation of other parts of RCW 51.32.090, the chapter, or the Act as a whole.

Also, *O'Keefe* went on to define the term "temporary total disability" in its decision just one page after the section cited by the Department. The court wrote "[t]emporary total disability is 'a condition that temporarily incapacitates a worker from performing any work at any gainful employment;' it differs from permanent total disability in duration, not character." *Id.* at 768. The court noted that since the worker in that case was capable of performing a light duty job, he was not "entitled to TTD benefits." *Id.* At best, this case supports a finding that RCW 51.32.090(4)(b) in its current form is ambiguous. It does not support a finding that "temporary total disability" unambiguously means "temporary total disability benefits" as the Department argues or RCW 51.32.090(4)(b) and (c) can be read without reference to

RCW 51.32.090(4)(a). Clearly, as defined by the *O'Keefe* court, “temporary total disability” refers to a state of being, and is not synonymous with “temporary total disability *benefits*” as the department argues.

D. Interpreting RCW 51.32.090(4) as a Whole, Cascadian Is Entitled to Reimbursement for Ms. Tellez’s Entire Period of Light Duty

Cascadian maintains that employer reimbursement under the Stay-At-Work Program is dependent on whether an employer makes a light-duty offer to an employee who is temporarily totally disabled from performing her job due to a workplace injury, not whether that employee ultimately would have received temporary total disability benefits for each day that she performed light duty work.

The Department argues:

[t]he 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.

Respondent’s Brief at 22. But this argument misses the point and ignores the intent the Legislature expressed in the new RCW 51.32.090(4)(a).

In the first three days following an industrial injury an injured employee’s benefits status is always unknown and always in flux because of the limitations posed by RCW 51.32.090(7). As discussed throughout

the Appellant and Respondent's briefs, RCW 51.32.090(7) provides as follows:

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).

Prior to the 2011 amendments, the former RCW 51.32.090(4)(a) provided means for an employer to bring its injured workers back to work on light duty. An injured employee's entitlement to temporary total disability *benefits* for the day of injury and the first three days thereafter was always an unknown until the worker either returned to work on full duty without restrictions related to the industrial injury within the 14-day period specified in RCW 51.32.090(7), or fourteen calendar days passed without the employee being released to the job of injury.

An employer could choose to offer light duty work pursuant to the former RCW 51.32.090(4)(a) within that three-day waiting period, and if it turned out the injured worker was ultimately not entitled to benefits during that period then the employer bore no real risk. The employer received the benefit of the worker's performance of the light duty work

while still avoiding temporary total disability benefits being charged against its account, and the injured employee received an additional opportunity to work and receive full pay. That the employee's benefits status was unknown and unknowable immediately following an injury had no real bearing on the employer's *offer* of light duty work. If the employee returned to work before the 14-day post-injury period, the first three days were not included in the time loss benefits the employee would receive if not on light duty; if the employee stayed off work longer, then three days were included in the time loss benefits the employee could receive if not on light duty. The contents of the employer's light duty offer were the same regardless and the claimant's ultimate amount of hypothetical entitlement to time loss benefits was irrelevant to the employer's offer. If the employer made a light duty offer that complied with the provisions of the pre-2011 RCW 51.32.090(4), the employer foreclosed the possibility of the claimant's entitlement to time loss from that point forward, as long as the light duty work remained available.

Because the claimant was temporarily totally disabled (and was potentially entitled to temporary total disability benefits) an employer who had light duty work available immediately after an injury had to comply with the same requirements as an employer making a light duty offer days or weeks later when employee's ultimate entitlement to temporary total disability *benefits* was known and not conditioned on the ultimate duration of the disability. The worker's ultimate entitlement to and amount of benefits had no practical effect on the employer and its light duty offer.

Moreover, there was no motivation for an employer to make a light duty offer shortly after or immediately after an industrial injury because 1) there was no statutory policy in favor of enabling injured workers to “remain” at work and 2) there was no financial incentive to the employer to do so. Thus, the courts had no reason to consider or evaluate the meaning of “entitled to temporary total disability” within the statute in terms of an employer who offered light duty work to an injured employee within three days of an industrial injury.

After the 2011 amendments, RCW 51.32.090(4) in general and RCW 51.32.090(4)(b) in particular serves many additional purposes: 1) it defines how an employer can bring an injured employee back to work on light duty; 2) it provides an incentive to an employer who brings an injured employee back to work on light duty by providing for reimbursement when an employer offers light duty work in compliance with the statute; 3) it places limitations on the amount and duration of reimbursements (in paragraphs (g) and (h)); 4) provides other economic incentives to employers to help injured employees remain at work; and 5) in paragraph (a) it states the Legislature’s goals, aspirations, and reasons for creating the Program, namely keeping injured employees at work. RCW 51.32.090(4)(a)–(l). As a result there is now a potential tension in the statute between the Legislature’s policy statement found in paragraph (a), the conditioning of wage subsidy reimbursement on an employer’s offer of “work to a worker pursuant to this subsection (4)” found in paragraph (c), and the language of paragraph (b) that provides the terms of

light-duty offers to workers who are “entitled to temporary total disability under this chapter”

With the enactment of the 2011 Amendments, there are now good reasons for an employer to make a light duty offer as soon as possible after an industrial injury: the Legislature’s stated policy preference that injured workers *remain* at work and the financial incentive of reimbursement in the form of wage subsidies. RCW 51.32.090(4)(a), (c). If an employer makes a light-duty offer compliant with RCW 51.32.090(4) to an employee immediately after an injury as Cascadian did, it is still unknown and unknowable at the time the employer makes the offer whether the employee would ultimately be entitled to receive temporary total disability benefits for that day (and the three days after) if no light duty offer was made. Yet the Department’s interpretation of RCW 51.32.090(4) requires a wait-and-see approach for all offers made within the first three days following an injury. Under the Department’s interpretation of the statute an employer cannot know if it offered “work to a worker pursuant to” subsection (4) until fourteen calendar days have passed. The Department thus shifts the question of reimbursement from the employer’s act of making a qualifying light-duty offer (as specified by paragraph (c)) to the employee’s ultimate length of disability, essentially penalizing an employer when a light duty offer has its intended effect and reduces the overall length of an employee’s disability.

This tension, uncertainty, confusion, and need for a *post hoc* evaluation of both the light duty offer and the employer’s entitlement to

reimbursement is avoided if “temporary total disability” is interpreted to refer to an injured employee’s state of being disabled rather than the employee’s entitlement to benefits. For these reasons, Cascadian maintains that, as amended, the plain language of RCW 51.32.090(4) refers to an employee’s temporary total disability and not her receipt of temporary total disability benefits.

Here, the Superior Court found that Cascadian made a light duty offer to Ms. Tellez that “complied with the requirements of RCW 51.32.090(4).” Clerk’s Papers at 135, ¶ 1.2.5. Pursuant to RCW 51.32.090(4)(c) “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” RCW 51.32.090(4)(c), and the King County Superior Court found that Cascadian made such an offer. That Ms. Tellez ultimately would not have been eligible for temporary total disability benefits for the first three days following her injury had she 1) not been performing light duty work pursuant to Cascadian’s offer and 2) had the duration of her disability been the same had she not remained at work on light duty, does not, as the Department argues (Respondent’s Brief at 13, n.4) defeat Cascadian’s entitlement to reimbursement for the full period of light duty under the Stay-At-Work program.

Cascadian also contends the Department’s reliance on *Udall v. T.D. Escrow, Services, Inc.*, 159 Wn.2d 903 (2007) (Respondent’s Brief at 29) is similarly misplaced. As the Department notes, *Udall* explained that

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,’” *Udall*, 159 Wn.2d at 909 (quoting *State v. Jacobs*, 154 Wn.2d 596, 600 (2005)); Respondent’s Brief at 29. As the Department’s own discussion of the existing case law shows, the term “temporary total disability” has been interpreted by courts to refer to both the state of being temporarily totally disabled, *and* to temporary total disability benefits. Respondent’s Brief at 14–15. The Department goes on to argue that in a different chapter of the Industrial Insurance Act, the Legislature used “temporary total disability” in a way that arguably refers to “temporary total disability compensation.” Respondent’s Brief at 28–29 (citing RCW 51.52.135). The Department then applies *Udall* to argue RCW 51.32.090(4) is therefore unambiguous and means Cascadian is not entitled to reimbursement for Ms. Tellez’s first three days on light duty. Respondent’s Brief at 28–29. But this ignores the plain language of RCW 51.32.090(4)(a), which creates a lens through which the rest of RCW 51.32.090(4) must be interpreted, as well as the language in RCW 51.32.090(4)(b), which refers to workers “entitled to temporary total disability *under this chapter*,” not under other chapters of the Act. RCW 51.32.090(4)(b) (emphasis added).

Further, contrary to the Department’s assertion that interpreting the phrase “entitled to temporary total disability under this chapter” as found in RCW 51.32.090(4)(b) must refer exclusively to an injured employee’s entitlement to benefits. Respondent’s Brief at 15–16. Chapter 32 does

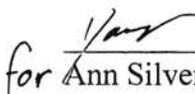
more than explain entitlement to disability. It also makes a qualitative and substantive distinction between temporary total disability and permanent total disability. *See generally* RCW 51.32 (distinguishing between temporary and permanent total disability as well as between total and partial disabilities, different kinds of benefits and compensation, and defining who is entitled to such benefits). The Court of Appeals must also take into consideration this broader scope of *the chapter* when interpreting RCW 51.32.090.

III. Conclusion

For the reasons articulated above, the Department's argued interpretation of RCW 51.32.090(4) is in error. Cascadian is entitled to reimbursement under the Stay-At-Work program for the entirety of Ms. Tellez's period of light duty. The judgment of the King County Superior Court should be reversed.

Dated this 15th day of May, 2014.

HOLMES, WEDDLE & BARCOTT, P.C.

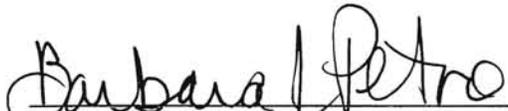
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CERTIFICATE OF SERVICE

I hereby certify that on this ~~5th~~ day of May, 2014, a true and correct copy of the foregoing sent to the following people via U.S. Mail overnight, postage pre-paid:

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IV. Appendix One

2011 Wash. Legis. Serv. 1st Sp. Sess. Ch. 37 (H.B. 2123) (WEST)

WASHINGTON 2011 LEGISLATIVE SERVICE

62nd Legislature, 2011 1st Special Session

Additions are indicated by Text; deletions by

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Vetoed are indicated by ~~Text~~ ;

stricken material by ~~Text~~ .

CHAPTER 37

H.B. No. 2123

WORKERS COMPENSATION--RATES AND CHARGES--STABILIZATION

AN ACT Relating to stabilizing workers' compensation premium rates and claim costs through the limited means of creating the stay-at-work program, suspending cost-of-living adjustments for fiscal year 2012 with no catch-up and delaying the initial adjustment, allowing claim resolution structured settlements for injured workers age fifty-five and older effective 2012, fifty-three and older effective 2015, and fifty and older effective 2016, adjusting pension benefits for prior permanent partial disability awards, eliminating the interest on permanent partial disability award schedules, providing safety and health investment grants, creating the industrial insurance rainy day fund, directing the department of labor and industries to increase its employer, worker, and provider fraud prevention efforts, requiring a performance audit by the joint legislative audit and review committee of workers' compensation claims management in the workers' compensation system to include self-insured claims, and studying occupational disease claims in the workers' compensation system; amending RCW 51.32.072, 51.32.075, 51.52.120, 51.32.080, 51.04.110, 51.44.100, and 43.79A.040; reenacting and amending RCW 51.32.090; adding new sections to chapter 51.04 RCW; adding a new section to chapter 49.17 RCW; adding a new section to chapter 51.44 RCW; creating new sections; providing an expiration date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1. 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.

PART 1. CREATING THE WASHINGTON STAY-AT-WORK PROGRAM

Sec. 101. RCW 51.32.090 and 2007 c 284 s 3 and 2007 c 190 s 1 are each reenacted and amended to read as follows:

<< WA ST 51.32.090 >>

Reenacted and Amended

(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.

(b) (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.

(4) (1) 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.

(6) (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.

(7) (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 (7) (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.

(8) (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.

**PART 2. ONE-YEAR COST-OF-LIVING ADJUSTMENT FREEZE WITH NO
CATCH-UP, AND DELAY IN FIRST COST-OF-LIVING ADJUSTMENTS**

Sec. 201. RCW 51.32.072 and 1987 c 185 s 34 are each amended to read as follows:

<< WA ST 51.32.072 >>

(1) Notwithstanding any other provision of law, every surviving spouse and every permanently totally disabled worker or temporarily totally disabled worker, if such worker was unmarried at the time of the worker's injury or was then married but the marriage was later terminated by judicial action, receiving a pension or compensation for temporary total disability under this title pursuant to compensation schedules in effect prior to July 1, 1971, shall after July 1, 1975, through June 30, 2011, be paid fifty percent of the average monthly wage in the state as computed under RCW 51.08.018 per month and an amount equal to five percent of such average monthly wage per month to such totally disabled worker if married at the time of the worker's injury and the marriage was not later terminated by judicial action, and an additional two percent of such average monthly wage for each child of such totally disabled worker at the time of injury in the legal custody of such totally disabled worker or such surviving spouse up to a maximum of five such children. The monthly payments such surviving spouse or totally disabled worker are receiving pursuant to compensation schedules in effect prior to July 1, 1971 shall be deducted from the monthly payments above specified.

Where such a surviving spouse has remarried, or where any such child of such worker, whether living or deceased, is not in the legal custody of such worker or such surviving spouse there shall be paid for the benefit of and on account of each such child a sum equal to two percent of such average monthly wage up to a maximum of five such children in addition to any payments theretofore paid under compensation schedules in effect prior to July 1, 1971 for the benefit of and on account of each such child. In the case of any child or children of a deceased worker not leaving a surviving spouse or where the surviving spouse has later died, there shall be paid for the benefit of and on account of each such child a sum equal to two percent of such average monthly wage up to a maximum of five such children in addition to any payments theretofore paid under such schedules for the benefit of and on account of each such child.

If the character of the injury or occupational disease is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of this title except for care granted at the discretion of the supervisor pursuant to RCW 51.36.010: PROVIDED, That such payments shall not be considered compensation nor shall they be subject to any limitation upon total compensation payments.

No part of such additional payments shall be payable from the accident fund.

The director shall pay monthly from the supplemental pension fund such an amount as will, when added to the compensation theretofore paid under compensation schedules in effect prior to July 1, 1971, equal the amounts hereinabove specified.

In cases where money has been or shall be advanced to any such person from the pension reserve, the additional amount to be paid under this section shall be reduced by the amount of monthly pension which was or is predicated upon such advanced portion of the pension reserve.

(2) In addition to the adjustment under subsection (1) of this section, further adjustments shall be made beginning July 1, 2012, and on each July 1st thereafter. The adjustment shall be the percentage change in the average monthly wage in the state under RCW 51.08.018 for the preceding calendar year, rounded to the nearest whole cent.

(3) Compensation due for July 1, 2011, through June 30, 2012, must be paid based on the average monthly wage in the state as computed under RCW 51.08.018 on July 1, 2010.

Sec. 202. RCW 51.32.075 and 1988 c 161 s 7 are each amended to read as follows:

<< WA ST 51.32.075 >>

The compensation or death benefits payable pursuant to the provisions of this chapter for temporary total disability, permanent total disability, or death arising out of injuries or occupational diseases shall be adjusted as follows:

(1) On July 1, 1982, there shall be an adjustment for those whose right to compensation was established on or after July 1, 1971, and before July 1, 1982. The adjustment shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1, 1982.

(2) In addition to the adjustment established by subsection (1) of this section, there shall be another adjustment on July 1, 1983, for those whose right to compensation was established on or after July 1, 1971, and before July 1983, which shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1, 1983.

(3) In addition to the adjustments under subsections (1) and (2) of this section, further adjustments shall be made beginning on July 1, 1984, and on each July 1st thereafter through July 1, 2010, for those whose right to compensation was established on or after July 1, 1971. The adjustment shall be determined by multiplying the amount of compensation to which they are entitled by a fraction, the denominator of which shall be the average monthly wage in the state under RCW 51.08.018 for the fiscal year in which such person's right to compensation was established, and the numerator of which shall be the average monthly wage in the state under RCW 51.08.018 on July 1st of the year in which the adjustment is being made. The department or self-insurer shall adjust the resulting compensation rate to the nearest whole cent, not to exceed the average monthly wage in the state as computed under RCW 51.08.018.

(4) In addition to the adjustments under subsections (1), (2), and (3) of this section, further adjustments shall be made beginning July 1, 2012, and on each July 1st thereafter for those whose right to compensation was established on or after July 1, 1971. The adjustment shall be the percentage change in the average monthly wage in the state under RCW 51.08.018 for the preceding calendar year, rounded to the nearest whole cent. For claims whose right to compensation was established on or after July 1, 2011, no adjustment shall be made under this subsection until the second July 1st following the date of injury or occupational disease manifestation.

PART 3. CLAIM RESOLUTION STRUCTURED SETTLEMENT AGREEMENTS

NEW SECTION. Sec. 301. A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. Further, the legislature recognizes that controlling pension costs is key to a financially sound workers' compensation system for employers and workers. To these ends, the legislature recognizes that certain workers would

benefit from an option that allows them to initiate claim resolution structured settlements in order to pursue work or retirement goals independent of the system, provided that sufficient protections for injured workers are included.

NEW SECTION. Sec. 302. A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

(1) Notwithstanding RCW 51.04.060 or any other provision of this title, beginning on January 1, 2012, an injured worker who is at least fifty-five years of age on or after January 1, 2012, fifty-three years of age on or after January 1, 2015, or fifty years of age on or after January 1, 2016, may choose from the following: (a) To continue to receive all benefits for which they are eligible under this title, (b) to participate in vocational training if eligible, or (c) to initiate and agree to a resolution of their claim with a structured settlement.

(2)(a) As provided in this section, the parties to an allowed claim may initiate and agree to resolve a claim with a structured settlement for all benefits other than medical. Parties as defined in (b) of this subsection may only initiate claim resolution structured settlements if at least one hundred eighty days have passed since the claim was received by the department or self-insurer and the order allowing the claim is final and binding. All requirements of this title regarding entitlement to and payment of benefits will apply during this period. All claim resolution structured settlement agreements must be approved by the board of industrial insurance appeals.

(b) For purposes of this section, "parties" means:

(i) For a state fund claim, the worker, the employer, and the department. The employer will not be a party if the costs of the claim or claims are no longer included in the calculation of the employer's experience factor used to determine premiums, if they cannot be located, are no longer in business, or they fail to respond or decline to participate after timely notice of the claim resolution settlement process provided by the board and the department.

(ii) For a self-insured claim, the worker and the employer.

(c) The claim resolution structured settlement agreements shall:

(i) Bind the parties with regard to all aspects of a claim except medical benefits unless revoked by one of the parties as provided in subsection (6) of this section;

(ii) Provide a periodic payment schedule to the worker equal to at least twenty-five percent but not more than one hundred fifty percent of the average monthly wage in the state pursuant to RCW 51.08.018, except for the initial payment which may be up to six times the average monthly wage in the state pursuant to RCW 51.08.018;

(iii) Not set aside or reverse an allowance order;

(iv) Not subject any employer who is not a signatory to the agreement to any responsibility or burden under any claim; and

(v) Not subject any funds covered under this title to any responsibility or burden without prior approval from the director or designee.

(d) For state fund claims, the department shall negotiate the claim resolution structured settlement agreement with the worker or their representative and with the employer or employers and their representative or representatives.

(e) For self-insured claims, the self-insured employer shall negotiate the agreement with the worker or their representative. Workers of self-insured employers who are unrepresented may request that the office of the ombudsman for self-insured injured workers provide assistance or be present during negotiations.

(f) Terms of the agreement may include the parties' agreement that the claim shall remain open for future necessary medical or surgical treatment related to the injury where there is a reasonable expectation such treatment is necessary. The parties may also agree that specific future treatment shall be provided without the application required in RCW 51.32.160.

(g) Any claim resolution structured settlement agreement entered into under this section must be in writing and signed by the parties or their representatives and must clearly state that the parties understand and agree to the terms of the agreement.

(h) If a worker is not represented by an attorney at the time of signing a claim resolution structured settlement agreement, the parties must forward a copy of the signed agreement to the board with a request for a conference with an industrial appeals judge. The industrial appeals judge must schedule a conference with all parties within fourteen days for the purpose of (i) reviewing the terms of the proposed settlement agreement by the parties; and (ii) ensuring the worker has an understanding of the benefits generally available under this title and that a claim resolution structured settlement agreement may alter the benefits payable on the claim or claims. The judge may schedule the initial conference for a later date with the consent of the parties.

(i) Before approving the agreement, the industrial appeals judge shall ensure the worker has an adequate understanding of the agreement and its consequences to the worker.

(j) The industrial appeals judge may approve a claim resolution structured settlement agreement only if the judge finds that the agreement is in the best interest of the worker. When determining whether the agreement is in the best interest of the worker, the industrial appeals judge shall consider the following factors, taken as a whole, with no individual factor being determinative:

(i) The nature and extent of the injuries and disabilities of the worker;

(ii) The age and life expectancy of the injured worker;

(iii) Other benefits the injured worker is receiving or is entitled to receive and the effect a claim resolution structured settlement agreement might have on those benefits; and

(iv) The marital or domestic partnership status of the injured worker.

(k) Within seven days after the conference, the industrial appeals judge shall issue an order allowing or rejecting the claim resolution structured settlement agreement. There is no appeal from the industrial appeals judge's decision.

(l) If the industrial appeals judge issues an order allowing the claim resolution structured settlement agreement, the order must be submitted to the board.

(3) Upon receiving the agreement, the board shall approve it within thirty working days of receipt unless it finds that:

(a) The parties have not entered into the agreement knowingly and willingly;

(b) The agreement does not meet the requirements of a claim resolution structured settlement agreement;

(c) The agreement is the result of a material misrepresentation of law or fact;

(d) The agreement is the result of harassment or coercion; or

(e) The agreement is unreasonable as a matter of law.

(4) If a worker is represented by an attorney at the time of signing a claim resolution structured settlement agreement, the parties shall submit the agreement directly to the board without the conference described in this section.

(5) If the board approves the agreement, it shall provide notice to all parties. The department shall place the agreement in the applicable claim file or files.

(6) A party may revoke consent to the claim resolution structured settlement agreement by providing written notice to the other parties and the board within thirty days after the date the agreement is approved by the board.

(7) To the extent the worker is entitled to any benefits while a claim resolution structured settlement agreement is being negotiated or during the revocation period of an agreement, the benefits must be paid pursuant to the requirements of this title until the agreement becomes final.

(8) A claim resolution structured settlement agreement that meets the conditions in this section and that has become final and binding as provided in this section is binding on all parties to the agreement as to its terms and the injuries and occupational diseases to which the agreement applies. A claim resolution structured settlement agreement that has become final and binding is not subject to appeal.

(9) All payments made to a worker pursuant to a final claim resolution structured settlement agreement must be reported to the department as claims costs pursuant to this title. If a self-insured employer contracts with a third-party administrator for claim services and the payment of benefits under this title, the third-party administrator shall also disburse the structured settlement payments pursuant to the agreement.

(10) Claims closed pursuant to a claim resolution structured settlement agreement can be reopened pursuant to RCW 51.32.160 for medical treatment only. Further temporary total, temporary partial, permanent partial, or permanent total benefits are not payable under the same claim or claims for which a claim resolution structured settlement agreement has been approved by the board and has become final.

(11) Parties aggrieved by the failure of any other party to comply with the terms of a claim resolution structured settlement agreement have one year from the date of failure to comply to petition to the board. If the board determines that a party has failed to comply with an agreement, they will order compliance and will impose a penalty payable to the aggrieved party of up to twenty-five percent of the monetary amount unpaid at the time the petition for noncompliance was filed. The board will also decide on any disputes as to attorneys' fees for services related to claim resolution structured settlement agreements.

(12) Parties and their representatives may not use settlement offers or the claim resolution structured settlement agreement process to harass or coerce any party. If the department determines that an employer has engaged in a pattern of harassment or coercion, the employer may be subject to penalty or corrective action, and may be removed from the retrospective rating program or be decertified from self-insurance under RCW 51.14.030.

NEW SECTION. Sec. 303. A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

The department must maintain copies of all claim resolution structured settlement agreements entered into between the parties and furnish copies of such agreements to any party actively negotiating a subsequent claim resolution structured settlement

agreement with the worker on any allowed claim when requested. An employer may not consider a prior agreement when making a decision about hiring or the terms or conditions of employment.

Sec. 304. RCW 51.52.120 and 2007 c 490 s 3 are each amended to read as follows:

<< WA ST 51.52.120 >>

(1) Except for claim resolution structured settlement agreements, it shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director or the director's designee for services performed by an attorney for such worker or beneficiary, if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the department is communicated to the party making the application.

(2) If, on appeal to the board, the order, decision, or award of the department 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 by the board, the board shall fix a reasonable fee for the services of his or her attorney in proceedings before the board if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the board is communicated to the party making the application. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by the director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney, worker, or beneficiary. The department or self-insured employer, as the case may be, shall be served a copy of the application and shall be entitled to appear and take part in the proceedings. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board.

(3) For claim resolution structured settlement agreements, fees for attorney services are limited to fifteen percent of the total amount to be paid to the worker after the agreement becomes final. The board will also decide on any disputes as to attorneys' fees for services related to claim resolution structured settlement agreements consistent with the procedures in subsection (2) of this section.

(4) In an appeal to the board involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185.

~~(4)~~ (5) Any person who violates this section is guilty of a misdemeanor.

NEW SECTION. Sec. 305. The department of labor and industries and the board of industrial insurance appeals shall adopt rules as necessary to implement sections 302 and 303 of this act.

NEW SECTION. Sec. 306. A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

On December 1, 2011, and annually thereafter through December 1, 2014, the department shall report annually to the appropriate committees of the legislature on the implementation of claim resolution structured settlement agreements. In calendar years 2015, 2019, and 2023, the department shall contract for an independent study of claim resolution structured settlement agreements approved by the board under this section. The study must be performed by a researcher with experience in workers'

compensation issues. When selecting the independent researcher, the department shall consult with the workers' compensation advisory committee. The study must evaluate the quality and effectiveness of structured settlement agreements of state fund and self-insured claims, provide information on the impact of these agreements to the state fund and to self-insured employers, and evaluate the outcomes of workers who have resolved their claims through the claim resolution structured settlement agreement process. The study must be submitted to the appropriate committees of the legislature.

PART 4. DEDUCTING PRIOR PERMANENT PARTIAL DISABILITY AWARDS FROM PENSIONS, AND ELIMINATING INTEREST ON UNPAID PERMANENT PARTIAL DISABILITY BENEFITS

Sec. 401. RCW 51.32.080 and 2007 c 172 s 1 are each amended to read as follows:

<< WA ST 51.32.080 >>

(1)(a) Until July 1, 1993, for the permanent partial disabilities here specifically described, the injured worker shall receive compensation as follows:

LOSS BY AMPUTATION

Of leg above the knee joint with short thigh stump (3# or less below the tuberosity of ischium)	\$54,000.00
Of leg at or above knee joint with functional stump.....	48,600.00
Of leg below knee joint.....	43,200.00
Of leg at ankle (Syme).....	37,800.00
Of foot at mid-metatarsals.....	18,900.00
Of great toe with resection of metatarsal bone.....	11,340.00
Of great toe at metatarsophalangeal joint.....	6,804.00
Of great toe at interphalangeal joint.....	3,600.00
Of lesser toe (2nd to 5th) with resection of metatarsal bone.....	4,140.00
Of lesser toe at metatarsophalangeal joint.....	2,016.00
Of lesser toe at proximal interphalangeal joint.....	1,494.00
Of lesser toe at distal interphalangeal joint.....	378.00
Of arm at or above the deltoid insertion or by disarticulation at the shoulder.....	54,000.00
Of arm at any point from below the deltoid insertion to below the elbow joint at the insertion of the biceps tendon.....	51,300.00
Of arm at any point from below the elbow joint distal to the insertion of the biceps tendon to and including mid-metacarpal amputation of the hand.....	48,600.00
Of all fingers except the thumb at metacarpophalangeal joints.....	29,160.00
Of thumb at metacarpophalangeal joint or with resection of carpometacarpal bone.....	19,440.00

Of thumb at interphalangeal joint.....	9,720.00
Of index finger at metacarpophalangeal joint or with resection of metacarpalbone.....	12,150.00
Of index finger at proximal interphalangeal joint.....	9,720.00
Of index finger at distal interphalangeal joint.....	5,346.00
Of middle finger at metacarpophalangeal joint or with resection of metacarpalbone.....	9,720.00
Of middle finger at proximal interphalangeal joint.....	7,776.00
Of middle finger at distal interphalangeal joint.....	4,374.00
Of ring finger at metacarpophalangeal joint or with resection of metacarpal bone.....	4,860.00
Of ring finger at proximal interphalangeal joint.....	3,888.00
Of ring finger at distal interphalangeal joint.....	2,430.00
Of little finger at metacarpophalangeal joint or with resection of metacarpal bone.....	2,430.00
Of little finger at proximal interphalangeal joint.....	1,944.00
Of little finger at distal interphalangeal joint.....	972.00

MISCELLANEOUS

Loss of one eye by enucleation.....	21,600.00
Loss of central visual acuity in one eye.....	18,000.00
Complete loss of hearing in both ears.....	43,200.00
Complete loss of hearing in one ear.....	7,200.00

(b) Beginning on July 1, 1993, compensation under this subsection shall be computed as follows:

(i) Beginning on July 1, 1993, the compensation amounts for the specified disabilities listed in (a) of this subsection shall be increased by thirty-two percent; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the compensation amounts for the specified disabilities listed in (a) of this subsection, as adjusted under (b)(i) of this subsection, shall be readjusted to reflect the percentage change in the consumer price index, calculated as follows: The index for the calendar year preceding the year in which the July calculation is made, to be known as "calendar year A," is divided by the index for the calendar year preceding calendar year A, and the resulting ratio is multiplied by the compensation amount in effect on June 30 immediately preceding the July 1st on which the respective calculation is made. For the purposes of this subsection, "index" means the same as the definition in RCW 2.12.037(1).

(2) Compensation for amputation of a member or part thereof at a site other than those specified in subsection (1) of this section, and for loss of central visual acuity and loss of hearing other than complete, shall be in proportion to that which such other amputation or partial loss of visual acuity or hearing most closely resembles and approximates. Compensation shall be

calculated based on the adjusted schedule of compensation in effect for the respective time period as prescribed in subsection (1) of this section.

(3)(a) Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability, and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment. In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides for determining various bodily impairments.

(b) Until July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be deemed to be ninety thousand dollars. Beginning on July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be adjusted as follows:

(i) Beginning on July 1, 1993, the amount payable for total bodily impairment under this section shall be increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the amount payable for total bodily impairment prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(c) Until July 1, 1993, the total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed the sum of ninety thousand dollars. Beginning on July 1, 1993, total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed a sum calculated as follows:

(i) Beginning on July 1, 1993, the sum shall be increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the sum prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(4) If permanent partial disability compensation is followed by permanent total disability compensation, ~~any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance~~ all permanent partial disability compensation paid to the worker under the claim or claims for which total permanent disability compensation is awarded shall be, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly pension benefits ~~in an amount not to exceed twenty-five percent of the monthly amount due from the department or self-insurer or one-sixth of the total overpayment, whichever is less~~ until the total award or awards paid are recovered; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly. Any interest paid on any permanent partial disability compensation may not be deducted from the pension benefits or pension reserve. The provisions of this subsection apply to all permanent total disability determinations issued on or after July 1, 2011.

(5) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(6) When the compensation provided for in subsections (1) through (3) of this section exceeds three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, payment shall be made in monthly payments in accordance with the schedule of temporary total disability payments set forth in RCW 51.32.090 until such compensation is paid to the injured worker in full, except that the first monthly payment shall be in an amount equal to three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, ~~and interest shall be paid at the rate of eight percent on the unpaid balance of such compensation commencing with the second monthly payment.~~ However, . Upon application of the injured worker or survivor the monthly payment may be converted, in whole or in part, into a lump-sum payment, in which event the monthly payment shall cease in whole or in part. Such conversion may be made only upon written application of the injured worker or survivor to the department and shall rest in the discretion of the department depending upon the merits of each individual application. Upon the death of a worker all unpaid installments accrued shall be paid according to the payment schedule established prior to the death of the worker to the widow or widower, or if there is no widow or widower surviving, to the dependent children of such claimant, and if there are no such dependent children, then to such other dependents as defined by this title.

(7) Awards payable under this section are governed by the schedule in effect on the date of injury.

PART 5. SAFETY AND HEALTH INVESTMENT GRANTS

NEW SECTION. **Sec. 501.** A new section is added to chapter 49.17 RCW to read as follows:

<< WA ST 49.17 >>

(1) The director is authorized to provide funding from the medical aid fund established under RCW 51.44.020, by grant or contract, for safety and health investment projects for workplaces insured for workers' compensation through the department's state fund. This shall include projects to: Prevent workplace injuries, illnesses, and fatalities; create early return-to-work programs; and reduce long-term disability through the cooperation of employers and employees or their representatives.

(2) Awards may be granted to organizations such as, but not limited to, trade associations, business associations, employers, employees, labor unions, employee organizations, joint labor and management groups, and educational institutions in collaboration with state fund employer and employee representatives.

(3) Awards may not be used for lobbying or political activities; supporting, opposing, or developing legislative or regulatory initiatives; any activity not designed to reduce workplace injuries, illnesses, or fatalities; or reimbursing employers for the normal costs of complying with safety and health rules.

(4) Funds for awards shall be distributed as follows: At least twenty-five percent for projects designed to develop and implement innovative and effective return-to-work programs for injured workers; at least twenty-five percent for projects that specifically address the needs of small businesses; and at least fifty percent for projects that foster workplace injury and illness prevention by addressing priorities identified by the department in cooperation with the Washington industrial safety and health act advisory committee and the workers' compensation advisory committee.

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

Sec. 502. RCW 51.04.110 and 2010 c 8 s 14001 are each amended to read as follows:

<< WA ST 51.04.110 >>

The director shall appoint a workers' compensation advisory committee composed of ten members: Three representing subject workers, three representing subject employers, one representing self-insurers, one representing workers of self-insurers, and two ex officio members, without a vote, one of whom shall be the chair of the board of industrial appeals and the other the representative of the department. The member representing the department shall be chair. This committee shall conduct a continuing study of any aspects of workers' compensation as the committee shall determine require their consideration and shall assist in the identification of priorities for safety and health investment projects as provided in chapter 49.17 RCW. The committee shall report its findings to the department or the board of industrial insurance appeals for such action as deemed appropriate. The members of the committee shall be appointed for a term of three years commencing on July 1, 1971 and the terms of the members representing the workers and employers shall be staggered so that the director shall designate one member from each such group initially appointed whose term shall expire on June 30, 1972 and one member from each such group whose term shall expire on June 30, 1973. The members shall serve without compensation, but shall be entitled to travel expenses as provided in RCW 43.03.050 and 43.03.060 ~~as now existing or hereafter amended~~. The committee may hire such experts, if any, as it shall require to discharge its duties, and may utilize such personnel and facilities of the department and board of industrial insurance appeals as it shall need without charge. All expenses of this committee shall be paid by the department.

PART 6. INDUSTRIAL INSURANCE RAINY DAY FUND

NEW SECTION. Sec. 601. A new section is added to chapter 51.44 RCW to read as follows:

<< WA ST 51.44 >>

- (1) There shall be, in the custody of the state treasurer, a fund to be known and designated as the industrial insurance rainy day fund.
- (2) The director shall be the administrator of the fund, may transfer moneys into and out of the fund only as authorized by this section, and shall separately account for moneys in the fund from the accident and medical aid funds. The assets of this fund shall not be used for any purposes other than meeting the obligations of this title.
- (3) Before proposing premium rates as provided in RCW 51.16.035, the director shall determine whether the assets of the accident and medical aid funds combined are at least ten percent but not more than thirty percent in excess of its funded liabilities, and if so transfer any excess to the industrial insurance rainy day fund, unless doing so would:
 - (a) Threaten the department's ability to meet the obligations of this title;
 - (b) Result in total assets of the rainy day fund combined with the assets of the accident and medical aid funds to exceed thirty percent of the accident and medical aid funds' liabilities.
- (4) The workers' compensation advisory committee shall create a finance subcommittee made up of six members, three of whom shall represent business, and three of whom shall represent workers. The director or director's designee shall chair the committee. The committee shall provide recommendations for any changes to subsection (3)(b) of this section to the appropriate committees of the legislature by December 1, 2011.
- (5) When adopting premium rates, the director may transfer moneys from the industrial insurance rainy day fund into the accident fund or medical aid fund upon finding that the transfer is necessary to reduce a rate increase or aid businesses in recovering from or during economic recessions. The director may also transfer moneys from this fund at any time liabilities increase so that total liabilities exceed assets of the accident fund, medical aid fund, or both.

(6) Notwithstanding chapter 51.52 RCW, the director's decisions regarding transfers into and out of the industrial insurance rainy day fund are not reviewable by any court or tribunal, but must be announced as part of the rule-making process for setting premium rates, and must be part of the department's rule-making file required by chapter 34.05 RCW.

Sec. 602. RCW 51.44.100 and 1990 c 80 s 1 are each amended to read as follows:

<< WA ST 51.44.100 >>

Whenever, in the judgment of the state investment board, there shall be in the accident fund, medical aid fund, reserve fund, industrial insurance rainy day fund, or the supplemental pension fund, funds in excess of that amount deemed by the state investment board to be sufficient to meet the current expenditures properly payable therefrom, the state investment board may invest and reinvest such excess funds in the manner prescribed by RCW 43.84.150, and not otherwise.

The state investment board may give consideration to the investment of excess funds in federally insured student loans made to persons in vocational training or retraining or reeducation programs. The state investment board may make such investments by purchasing from savings and loan associations, commercial banks, mutual savings banks, credit unions and other institutions authorized to be lenders under the federally insured student loan act, organized under federal or state law and operating in this state loans made by such institutions to residents of the state of Washington particularly for the purpose of vocational training or reeducation: PROVIDED, That the state investment board shall purchase only that portion of any loan which is guaranteed or insured by the United States of America, or by any agency or instrumentality of the United States of America: PROVIDED FURTHER, That the state investment board is authorized to enter into contracts with such savings and loan associations, commercial banks, mutual savings banks, credit unions, and other institutions authorized to be lenders under the federally insured student loan act to service loans purchased pursuant to this section at an agreed upon contract price.

Sec. 603. RCW 43.79A.040 and 2011 c 274 s 4 are each amended to read as follows:

<< WA ST 43.79A.040 >>

(1) Money in the treasurer's trust fund may be deposited, invested, and reinvested by the state treasurer in accordance with RCW 43.84.080 in the same manner and to the same extent as if the money were in the state treasury, and may be commingled with moneys in the state treasury for cash management and cash balance purposes.

(2) All income received from investment of the treasurer's trust fund must be set aside in an account in the treasury trust fund to be known as the investment income account.

(3) The investment income account may be utilized for the payment of purchased banking services on behalf of treasurer's trust funds including, but not limited to, depository, safekeeping, and disbursement functions for the state treasurer or affected state agencies. The investment income account is subject in all respects to chapter 43.88 RCW, but no appropriation is required for payments to financial institutions. Payments must occur prior to distribution of earnings set forth in subsection (4) of this section.

(4)(a) Monthly, the state treasurer must distribute the earnings credited to the investment income account to the state general fund except under (b), (c), and (d) of this subsection.

(b) The following accounts and funds must receive their proportionate share of earnings based upon each account's or fund's average daily balance for the period: The Washington promise scholarship account, the college savings program account, the Washington advanced college tuition payment program account, the accessible communities account, the community and technical college innovation account, the agricultural local fund, the American Indian scholarship endowment fund, the foster care scholarship endowment fund, the foster care endowed scholarship trust fund, the students with dependents grant account, the basic health plan self-insurance reserve account, the contract harvesting revolving account, the Washington state

combined fund drive account, the commemorative works account, the county enhanced 911 excise tax account, the Washington international exchange scholarship endowment fund, the toll collection account, the developmental disabilities endowment trust fund, the energy account, the fair fund, the family leave insurance account, the food animal veterinarian conditional scholarship account, the fruit and vegetable inspection account, the future teachers conditional scholarship account, the game farm alternative account, the GET ready for math and science scholarship account, the Washington global health technologies and product development account, the grain inspection revolving fund, the industrial insurance rainy day fund, the juvenile accountability incentive account, the law enforcement officers' and firefighters' plan 2 expense fund, the local tourism promotion account, the pilotage account, the produce railcar pool account, the regional transportation investment district account, the rural rehabilitation account, the stadium and exhibition center account, the youth athletic facility account, the self-insurance revolving fund, the sulfur dioxide abatement account, the children's trust fund, the Washington horse racing commission Washington bred owners' bonus fund and breeder awards account, the Washington horse racing commission class C purse fund account, the individual development account program account, the Washington horse racing commission operating account (earnings from the Washington horse racing commission operating account must be credited to the Washington horse racing commission class C purse fund account), the life sciences discovery fund, the Washington state heritage center account, the reduced cigarette ignition propensity account, and the reading achievement account.

(c) The following accounts and funds must receive eighty percent of their proportionate share of earnings based upon each account's or fund's average daily balance for the period: The advanced right-of-way revolving fund, the advanced environmental mitigation revolving account, the federal narcotics asset forfeitures account, the high occupancy vehicle account, the local rail service assistance account, and the miscellaneous transportation programs account.

(d) Any state agency that has independent authority over accounts or funds not statutorily required to be held in the custody of the state treasurer that deposits funds into a fund or account in the custody of the state treasurer pursuant to an agreement with the office of the state treasurer shall receive its proportionate share of earnings based upon each account's or fund's average daily balance for the period.

(5) In conformance with Article II, section 37 of the state Constitution, no trust accounts or funds shall be allocated earnings without the specific affirmative directive of this section.

PART 7. INITIATIVE TO ADDRESS WORKER, EMPLOYER, AND PROVIDER FRAUD

NEW SECTION. **Sec. 701.** A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

(1) The legislature finds that the department is successfully addressing employer fraud and the underground economy, helping ensure that employers who appropriately report and pay premiums can be competitive. Efforts focus on prevention, education, and enforcement by identifying industries for targeted audits, informing industry members and providing the opportunity for voluntary compliance, and ultimately identifying employers for audit based on proven criteria.

(2) To ensure the appropriate use of workers' compensation funds, the legislature directs the department of labor and industries to continue applying these proven best practices to employer fraud and to apply the same best practices to address instances of worker and provider fraud, including but not limited to:

(a) Participating in a national information exchange with other workers' compensation insurers to avoid duplication of claims and benefits;

(b) Increasing public awareness of employer, worker, and provider fraud issues and how to report suspected fraud;

(c) Establishing criteria for the periodic review of total permanent disability pension recipients including their level of disability and physical activity to determine whether they can be gainfully employed; and

(d) Identifying provider billing patterns to target potentially abusive practices.

(3) The provisions of RCW 51.28.070 shall not be a barrier to the department's participation in a national information exchange as required in subsection (2)(a) of this section.

(4) The department's activities must include approaches to prevent, educate, and ensure compliance by providers, employers, and workers. The department shall provide a report to the governor and the appropriate legislative committees by December 1, 2012, that describes the agency's efforts and outcomes and makes recommendations for statutory changes to address barriers for successfully addressing provider, employer, and worker fraud.

PART 8. PERFORMANCE AUDIT OF THE WORKERS' COMPENSATION CLAIMS MANAGEMENT SYSTEM

NEW SECTION. **Sec. 801.** A new section is added to chapter 51.04 RCW to read as follows:

<< WA ST 51.04 >>

(1) The joint legislative audit and review committee, in consultation with the department of labor and industries and the workers' compensation advisory committee, shall conduct a performance audit of the workers' compensation claims management system, including self-insured claims. The joint legislative audit and review committee may contract with an independent expert in workers' compensation claims management to assist with the audit.

(2) The audit shall:

(a) Evaluate the extent to which the department: (i) Makes fair and timely decisions, and resolves complaints and disputes in a timely, fair, and effective manner; and (ii) communicates with employers and workers in a timely, responsive, and accurate manner, including communication about review and appeal rights, and including the use of plain language and sufficient opportunities for face-to-face meetings;

(b) Determine if current claims management organization and service delivery models are the most efficient available; analyze organization and delivery for retrospective rating plan participants as compared to nonparticipants to identify differences and how those differences influence retrospective rating plan refunds; and determine whether current initiatives improve service delivery, meet the needs of current and future workers and employers, improve public education and outreach, and are otherwise measurable; and

(c) Make recommendations regarding administrative changes that should be made to improve efficiency while maintaining high levels of quality service to help address system costs, and any needed legislative changes to implement the recommendations.

(3) The joint legislative audit and review committee shall submit progress reports by December 1, 2012, and December 1, 2013, and the results of the audit by June 30, 2015, to the appropriate committees of the legislature.

(4) This section expires December 31, 2015.

PART 9. OCCUPATIONAL DISEASE STUDY

NEW SECTION. Sec. 901. The department of labor and industries shall contract with an independent entity with research experience in workers' compensation issues to study occupational disease claims in the Washington workers' compensation system. When selecting the independent researcher, the department shall consult with the workers' compensation advisory committee. The workers' compensation advisory committee shall recommend to the department the independent researcher to conduct the study. The study shall include, but not be limited to, an examination of the frequency and severity of occupational disease claims for state fund and self-insured employers; the impact of these claims on long-term disability and pension trends; the statutory definition of occupational disease and its interpretation and comparison to definitions in other states and jurisdictions; and comparison of the statute of limitations for filing occupational disease claims for Washington and other states and jurisdictions. The study must be submitted to the appropriate committees of the legislature by December 1, 2012.

PART 10. SEVERABILITY

NEW SECTION. Sec. 1001. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

PART 11. EFFECTIVE DATE

NEW SECTION. Sec. 1101. 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.

Approved June 15, 2011.

Effective June 15, 2011.

End of Document

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