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COURT OF APPEALS

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NO. 40394-3

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

JAMES B. HILL,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. NATURE OF THE CASE

This is a workers' compensation case arising under the Industrial Insurance Act, Title 51 RCW. At issue is the determination of Mr. Hill's time-of-injury "monthly wage" under RCW 51.08.178. The amount of an injured worker's monthly wage is a crucial factor in determining the rate of time-loss compensation under RCW 51.32.090.

The default method of calculation of time-of-injury monthly wage is set forth in subsection 1 of RCW 51.08.178. For a worker with a fixed hourly pay rate and a regular work schedule, the rate is determined by multiplying the worker's actual rate of pay per hour by a factor based on the worker's actual schedule of hours per day and days per week of work. Mr. Hill was injured while incarcerated and working for the Department of Corrections (DOC) in Correctional Industries for 6 days a week, 7.5 hours a day, being paid \$0.85 per hour and receiving no other consideration for his work.

Mr. Hill posits several theories in his effort to avoid the effect of using his actual hourly wage rate as a prison laborer to compute his monthly wage under RCW 51.08.178. His theories directly conflict with this Court's decision in *Rose v. Department of Labor & Industries*, 57 Wn. App. 751, 790 P.2d 201 (1990). The Department of Labor and Industries (L&I), the Board of Industrial Insurance Appeals (Board), and

the Thurston County Superior Court each considered and rejected Mr. Hill's theories. So should this Court.

II. ISSUES

1. Where Mr. Hill had a fixed hourly rate of pay and a regular work schedule, was his monthly wage properly calculated based on the formula of subsection 1 of RCW 51.08.178?

2. Does the fact that the DOC has characterized Mr. Hill's hourly rate of pay in consideration for his work as a "gratuity," or that prison-work statutes do so, preclude treating his work pay as a "wage" for purposes of application of subsection 1 of RCW 51.08.178?

3. The value of board (food), housing and health care benefits provided at the time of industrial injury by an employer as consideration for work is included in wage calculation under subsection 1 of RCW 51.08.178. Is the value of board, housing and health care benefits that DOC provided to Mr. Hill as an incident of incarceration – not as consideration for his work – part of his monthly wage under RCW 51.08.178?

4. Assuming for the sake of argument that it is relevant whether the \$0.85 per hour that DOC paid Mr. Hill for his work was a lawful rate of pay under the Minimum Wage Act (MWA), does Mr. Hill's theory

under the MWA fail because RCW 49.46.010(5)(k) expressly excludes prisoners from coverage of the MWA?

III. COUNTERSTATEMENT OF THE CASE

Mr. Hill was incarcerated on the date of his industrial injury, December 10, 2002. Certified Appeal Board Record (CABR) at 40.¹ At the time of injury, Mr. Hill was being paid \$0.85 per hour for work he was performing for Correctional Industries. CABR at 72. The work he performed was for a “Class II” program, as defined by RCW 72.09.100. *See* CABR at 378. While painting, Mr. Hill, stepped down from a ladder, tripped, and twisted both of his knees. CABR at 40.

The DOC provided Mr. Hill with food and shelter during his incarceration, as it is obligated to do for all inmates under Washington State Law. CABR at 72. The record is unclear as to when, if ever, Mr. Hill was released from prison. According to an affidavit that Mr. Hill submitted to the Board, he was released on some unspecified date that occurred after his industrial injury, and he was arrested later that day for an unrelated issue, and then spent another eight months in jail, at which point the new charges were allegedly dismissed. CABR at 41.

¹ CABR” references the Certified Appeal Board Record. The Clerk’s Papers did not re-number the CABR. References to CABR are to the page number stamped by the Board in the lower right corner of the page.

An order was issued by L&I on January 3, 2007, that calculated Mr. Hill's wages based on L&I's determination that he worked 7.5 hours per day, six days per week, and earned \$0.85² per hour. CABR at 418. The order also determined that he was single but had three dependents. *Id.* L&I issued four other orders that paid him specific amounts of time-loss compensation on specific dates.³

Mr. Hill filed a timely appeal from each of those orders to the Board of Industrial Insurance Appeals (Board). CABR at 418. Mr. Hill argued that it was improper to calculate his time-of-injury wages based on the actual wages he was earning at that time, because he was injured while he was incarcerated. He sought a recalculation of his time-of-injury wages, and a correlative increase in amounts paid by each of the four orders that paid him time-loss compensation. Thus, the outcome of all five appeals ultimately depended on one issue: whether the Department's wage order correctly calculated his time-of-injury wages based on the actual wages earned.

² The Department notes that Mr. Hill incorrectly indicates, "\$.085" on page 15 of his Brief of Appellant. Mr. Hill correctly uses "\$0.85" throughout the Statement of the Case and in other parts of his brief.

³ The four time-loss payment orders that were appealed are dated December 1, 2006; December 29, 2006; January 12, 2007; and January 26, 2007. These four orders were for time-loss periods from November 14, 2006 through November 27, 2006 and December 12, 2006 through January 22, 2007. CABR at 506-518.

After extensive proceedings at the Board, Mr. Hill moved for summary judgment. CABR at 275. L&I filed a Cross Motion for Summary Judgment, and DOC filed a brief that was consistent with L&I's position. CABR at 297, 364. Mr. Hill argued that it was unfair to calculate his time-of-injury wages based on the wages he actually earned at that time. CABR at 275-281. He requested that his wages be calculated pursuant to subsection 4 of RCW 51.08.178⁴ based on the wage rates of non-prisoners doing similar jobs in free society, or, in the alternative, that his wage computation under subsection 1 be adjusted to include the value of the "housing" and board provided to him by the DOC. *Id.*

L&I responded that RCW 51.08.178(4) was inapplicable because Mr. Hill's hourly wages were fixed and his monthly wages could be readily calculated under RCW 51.08.178(1). CABR at 368-375. The Industrial Appeals Judge issued a Proposed Decision and Order that granted L&I's motion for summary judgment and that affirmed all five of the orders on appeal. CABR at 7-14.

Mr. Hill filed a Petition for Review that argued in conclusory fashion, without clear legal or factual support, that the Proposed Decision and Order was in error. CABR at 4. He did *not* contend that L&I's

⁴ Subsection 4 of RCW 51.08.178 provides: "In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed."

calculation of his hourly wages was wrong, nor did he argue that L&I had miscalculated the number of hours per day or days per week that he was normally employed at the time of his injury. *Id.* He also did not argue that his work for Correctional Industries should have been classified as “Class I” labor under RCW 72.09.100, rather than “Class II” labor.

The Board denied his Petition for Review, thereby adopting the Proposed Decision and Order as its own Decision and Order. CABR at 2.

Mr. Hill appealed to Superior Court and filed a Motion for Summary Judgment. CP at 12-191. L&I filed a Cross Motion. CP at 192-205. Each side made arguments substantially similar to what they had contended to the Board (CP at 12-205) and to what they are contending in this Court. *Id.* Mr. Hill did not dispute that L&I’s calculation of his wages at the time of his injury was based on a correct calculation of his hourly wage, the hours per day he worked, or the days per week he was working at that time. *Id.* He also did not argue that he was performing “Class I” labor under RCW 72.09.100. *Id.*

The trial court denied Mr. Hill’s motion for summary judgment and granted L&I’s cross motion, thereby affirming the Board’s decision which, itself, affirmed each of L&I’s orders on appeal. CP at 211-219. Mr. Hill then appealed to this Court.

IV. STANDARD OF REVIEW

Because this case was disposed of at both the Board and Superior Court levels on motions for summary judgment, this Court reviews the trial court's decision to grant L&I's Cross Motion for Summary Judgment *de novo*. When deciding whether L&I was entitled to summary judgment, the Court must view all facts in the light most favorable to Mr. Hill. However, questions of law raised by this appeal are reviewed *de novo*.

The issues in this case turn on the proper construction of RCW 51.08.178. Statutory construction is a question of law, reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). However, L&I and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to L&I interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (recognizing that deference is due the interpretations of both L&I and Board).

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010; see also *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). This rule of construction, however, does not authorize an unrealistic interpretation that

produces strained or absurd results and defeats the plain meaning and intent of the legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Com'n.*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

A court should not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d (701) 1999); *see also Rhoad v. McLean Trucking, Dep't of Labor & Indus.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) (“[a] court may not read into a statute those things which it conceives the Legislature may have left out unintentionally”); *Rhoad v. McLean Trucking, Dep't of Labor & Indus.*, 102 Wn.2d at 427 (“[t]he drafting of a statute is a legislative, not a judicial function”). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Comm. v. Pub. Disclosure Com'n.*, 133 Wn.2d at 243.

V. SUMMARY OF ARGUMENT

L&I correctly applied RCW 51.08.178(1) in determining Mr. Hill's monthly wages at the date of his industrial injury. RCW 51.08.178(1) is the default, or preferred, method of calculating a worker's time-of-injury wages, and another method is not used unless

application of subsection 1 has been clearly demonstrated to be incorrect. *See Avundes v. Dep't of Labor & Indus.*, 140 Wn.2d 282, 290 996 P.2d 593 (2000). Mr. Hill's argument that RCW 51.08.178(4) must be used simply because application of the clear terms of subsection 1 results in a low monthly wage figure is unsupported and unsupportable. As this Court held in *Rose*, a person who is injured while performing labor as an inmate shall have his or her wages calculated under RCW 51.08.178(1) based on the actual wages earned at the time of that injury, even if this results in a wage that is considerably less than what the individual could have earned had he or she had not been incarcerated at the time of the injury and was performing comparable work. *Rose*, 57 Wn. App. at 757-759.

Also, the fact that DOC has characterized the \$0.85 per hour as a "gratuity," or that prison-work statutes do so, does not change its character as a cash wage to something else. Cash paid in consideration for work is a "wage" within the meaning of RCW 51.08.178 and WAC 296-14-522(1).

Furthermore, *Rose* also conclusively demonstrates that L&I properly excluded the value of the "board" and "housing" and health benefits that Mr. Hill received as a result of being incarcerated in a correctional facility. *See* discussion *infra* Part VI.C. Such in-kind benefits only qualify as a portion of a worker's "wage" when they are "part of the contract of hire" and when they are "consideration for work performed."

See Rose, 57 Wn. App. at 759-760. Mr. Hill did not receive food, shelter, and health benefits as part of a contract of hire, nor were they “consideration for work performed.” *Rose*, 57 Wn. App. at 759-760. Rather, the food, shelter, and health benefits were incidental to his status as an inmate. *See id.* Therefore, those in-kind benefits are not wages within the meaning of RCW 51.08.178, and were properly excluded from the calculation of his wages at the time of his industrial injury. *See id.*

Finally, the discontinuance of Mr. Hill’s board, housing and health care that occurred when he was released from prison was not a “change of circumstances” that would justify an adjustment to the amount of his time-loss benefits pursuant to RCW 51.28.040. The latter statute applies only to give qualified relief from the preclusive effect of previously unappealed Department orders, and there is no unappealed prior Department order at issue here. And, in any event, since the board, housing and health care that Mr. Hill lost upon release from prison were not wages in the first place; his loss of those “benefits” is irrelevant to the proper calculation of his monthly wage and the related rate of his time-loss benefits.

VI. ARGUMENT

A. **L&I Properly Calculated Mr. Hill's Time-Of-Injury Wages Under RCW 51.08.178(1) Based On The Actual Hourly Dollar Wage Rate He Was Receiving At That Time**

RCW 51.08.178 defines an injured worker's "wages" for the purposes of the Industrial Insurance Act. RCW 51.08.178. That statute sets forth three general approaches to calculating the wages of an injured worker. *Id.* Under RCW 51.08.178(1), the injured worker's wage is based either on the fixed monthly salary or, for an hourly employee, the worker's monthly wage is calculated based on a mathematical formula that is driven by the worker's actual hourly wage rate and actual average number of days per week normally worked and actual average number of hours per day normally worked. *Id.* RCW 51.08.178(2) sets forth a 12-month averaging method of calculating the wages of a worker whose employment is exclusively seasonal or essentially intermittent or part-time, but that section of the statute is inapplicable here because Mr. Hill was not working on an exclusively seasonal, intermittent, or part-time basis at the time of his injury. Finally, RCW 51.08.178(4) provides that a worker whose wages are not fixed or that cannot be reasonably and fairly determined shall be calculated based on the "usual wage" earned by workers performing a "like or similar" occupation to that done by the worker at the time of the injury. *Id.*

As the Supreme Court held in *Avundes*, RCW 51.08.178(1) is the “default,” or preferred, method of calculating a claimant’s wages at the time of the injury, and it is to be used unless another method is clearly more applicable. *Avundes*, 140 Wn.2d at 290. Here, L&I properly used RCW 51.08.178(1) to calculate Mr. Hill’s wages based on his hourly wage and the number of hours per day and days per week he typically worked at that time.

Mr. Hill does not contend that L&I is mistaken about the amount (\$0.85) of the hourly wage that he was paid at the time of his injury, the number of days per week he typically worked, or the number of hours per day that he was normally employed. Instead, Mr. Hill argues that his wages should have been calculated under subsection 4 of RCW 51.08.178 because it would not be “fair” to calculate his time-of-injury wages based on the actual wages he was earning at that time. Appellant’s Brief (AB) 5, 11-16.⁵ Mr. Hill’s notion that RCW 51.08.178(4) allows a court to ignore the actual wages earned by a worker at the time of his injury whenever the worker’s actual wages seem to the worker to result in an unfair time-loss compensation payment amount is unpersuasive.

⁵ In the alternative, he appears to continue to argue, as he did in the Board and Superior Court proceedings, that if his wages are calculated under subsection 1, they should be adjusted to include the board, housing, and health care benefits provided by Department of Corrections (DOC) as a result of his incarceration. AB 15. *See* discussion *infra* Part VI.C.

Subsection 4 reads as follows: “In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.” RCW 51.08.178(4). Contrary to Mr. Hill’s suggestion, this provision applies when a worker’s actual wages at the time of an industrial injury were not fixed or when there is no reasonable and fair way to determine what the claimant’s actual wages were. It is not an open invitation to the courts to construct a fictional wage whenever a worker’s actual wages, which are fixed and easily ascertainable, seem low. Here, Mr. Hill’s hourly wages were “fixed” at the time of his injury, and his monthly wages can be calculated pursuant to the formula contained in RCW 51.08.178(1) with certainty.

The plain language of RCW 51.08.178(4) does not support Mr. Hill’s strained argument that this provision applies any time the claimant does not believe his resulting time-loss compensation rate is fair. It may be that many injured workers feel the rate of time-loss compensation is not “fair.” Injured workers, however, are not compensated based on what they feel is fair. Rather, they are compensated based on calculations set forth in a statutory scheme, and that statutory scheme uses wage rate *at time of injury* as the standard.

Furthermore, Mr. Hill's argument and use of the word "fair" requires this Court to take the word out of context. "[A] single word in a statute should not be read in isolation". *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.2d 196 (2005). As the United States Supreme Court once observed, "A word is known by the company it keeps." *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 378, 164 L.Ed.2d 625, 126 S.Ct. 1843 (2006). Here "fair" must be read in the context of the statute as a whole. When the usage of "fair" in subsection 4 is viewed in this context, it becomes apparent that the proper question is not whether or not the wage and resulting time-loss compensation that was actually paid to Mr. Hill was fair, but, instead, whether the wage that he was paid can be determined with a reasonable and fair degree of accuracy.

Mr. Hill's argument also overlooks the fact that the legislature has set a minimum rate of time-loss compensation in RCW 51.32.060. RCW 51.32.090(1) (addressing time-loss compensation for temporary total disability) incorporates RCW 51.32.060 (addressing pension benefits for permanent total disability), so RCW 51.32.060 governs both the rate of time-loss compensation and the rate of total permanent disability. *Id.* Under RCW 51.32.060(1)(g), a worker who was injured on or prior to

July 1, 2008⁶ shall receive a certain minimum amount of time-loss compensation per month, which varies depending on whether the worker is single or married and depending on how many dependent children the worker might have. The legislature has thus decided that the minimum amount of time-loss that shall be paid to a worker who was injured before July 1, 2008 is a defined sum of money that ranges from \$185 a month to \$352 a month depending on whether the worker is married and whether the worker has any dependent children. *Id.*

Mr. Hill argues, in effect, that any time the calculation of a worker's wages under RCW 51.08.178(1) would result in a time-loss payment amount on which a worker cannot support him or herself, then the worker's wages must, instead, be calculated under RCW 51.08.178(4). AB 13-16. As noted above, nothing in RCW 51.08.178(4) supports this strained interpretation, and his interpretation ignores the fact that the legislature has specifically determined the minimum amount of time-loss that can be properly paid to an injured worker under RCW 51.32.060.

⁶ The legislature has substantially modified the minimum time-loss compensation rate effective July 2, 2008. Under RCW 51.32.060(5)(b), per section 2, chapter 284, Laws of 2007, for injuries incurred or occupational diseases that become manifest after July 1, 2008, the minimum time-loss compensation rate is either 15% of the average monthly wage in the state of Washington or 100% of the worker's actual wages at the time of injury, whichever is higher. *Id.* The minimum time-loss rate is further adjusted upwards \$10 if the worker is married and \$10 for each of the injured worker's children, up to a maximum of five children. *Id.* However, the new version of the statute does not apply to Mr. Hill, because the amendment to the statute expressly provides that it only applies to injuries and diseases occurring *after* July 1, 2008. *Id.*

Mr. Hill's strained interpretation of RCW 51.08.178(4) would render the legislature's determination of a minimum time-loss compensation rate meaningless. It is well-settled that the courts should not interpret a statute in a way that would make other, related statutes meaningless. *See, e.g., Cockle*, 142 Wn.2d at 809. Mr. Hill's invitation to this Court to circumvent the legislature's determination of the minimum time-loss that can be properly paid through an overbroad interpretation of RCW 51.08.178 must be rejected.

Mr. Hill's disagreement with the minimum time-loss that can be properly paid would be better addressed to the legislature rather than through his strained argument to this Court regarding RCW 51.08.178(4). *See, e.g., Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (noting that the primary purpose of statutory construction is to carry out legislative intent).

Furthermore, in *Rose*, this Court rejected arguments very similar, if not identical, to the ones Mr. Hill makes here. *Rose* upheld L&I's calculation of the claimant's wages based on the actual wages paid to the worker, even though the worker was only paid \$1 *a day* for his labor at the time of his injury. 57 Wn. App. at 754. In *Rose*, the injured worker, like Mr. Hill, was incarcerated at the time of his industrial injury, working at an "Honor Camp". *Id.* at 758. The claimant earned a wage of \$1 *a day*,

but the record showed that a “civilian” doing work comparable to what the claimant was doing would have earned \$9.92 *an hour*. *Id.* at 753. L&I calculated the claimant’s wages based on his actual time-of-injury earnings of \$1 a day, and it paid him time-loss at the statutory minimum of \$185 a month. *Id.* at 753. The *Rose* court upheld L&I’s wage calculation, and it expressly determined that Mr. Hill’s wages were properly calculated based on his actual earnings rather than based on the comparable wages he would have earned as a non-inmate worker doing the same tasks. *Id.* at 757-759.

The *Rose* court explained that where the wages paid to an inmate are a “determinable sum,” then the inmate’s wages should be calculated pursuant to RCW 51.08.178(1) based on the actual wages earned, rather than under RCW 51.08.178(4) based on the comparable wage that would have been earned had he or she not been an inmate. *Id.* at 758.

Mr. Hill, similarly, earned a “determinable sum” which can be readily calculated under RCW 51.08.178(1). Therefore, per *Rose*, that “sum” must be used to calculate his wages, even though it is substantially less than what he would have earned had he not been an inmate. *Id.* at 757-759.

B. Department Of Correction's Characterization Of Mr. Hill's Wage As A "Gratuity," And Similar Prison-Work Statutory References, Do Not Change The Character Of The Payments From "Wage" Status For Purposes Of RCW 51.08.178

Mr. Hill makes another argument that is similar to another rejected by *Rose*. Mr. Hill argues that the payments made to him by Correctional Industries were a "gratuity" rather than a "wage," and that, therefore, he received no "wages" at the time of his injury. AB 11-12, 15. From this, he argues that, since he has no actual "wages," his "wages" cannot be determined, and RCW 51.08.178(4) must be used. AB 11-12, 15. In support of this strained argument, Mr. Hill notes that DOC, in response to a discovery request, characterized his earnings as a "gratuity" rather than a "wage." See AB 7. Mr. Hill suggests that L&I is somehow bound by DOC's characterization of the payments to him for his work, and that it follows that under the facts of this case he was not paid a wage at the time of his injury. AB 11-12, 15.

Mr. Hill's arguments in this regard, like his other arguments, are meritless. In *Rose*, the claimant argued that he was not paid a "wage" for his work for the "Honor Camp" and that the payments were merely an "incentive" to participate in the Honor Camp program. *Id.* at 758. From this, he argued that it somehow followed that his wages must be calculated based on the comparable wage that he would have earned as a civilian

worker. *Id.* This Court rejected this argument, and explained that regardless of whether the payments from DNR to the claimant were characterized as “wages” or as an “incentive,” the payments “clearly constituted consideration for work performed,” and, as such, those payments were his wages under RCW 51.08.178(1). *Id.* at 759.

Rose thus shows that cash payments by employers to workers as consideration for work performed are wages as a matter of law under RCW 51.08.178, regardless of what label might be attached to them by the parties. *Id.* at 759. Here, similarly, Mr. Hill was paid \$0.85 an hour for his work for Correctional Industries. Regardless of whether these payments are characterized as “wages” or as a “gratuity[ies]” by Mr. Hill and by DOC, the payments are clearly consideration for the work Mr. Hill performed, and thus, those payments are his wages as defined by RCW 51.08.178. *Id.* at 759; *see also* WAC 296-14-522(1) (L&I rule including in “wages” “[t]he gross cash wages paid by the employer for services performed,” and providing further that “[c]ash wages’ means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law.”).

Moreover, the notion that L&I is somehow constrained by DOC’s description of the payment as a “gratuity” in a discovery response is

absurd. L&I has consistently viewed the payments Mr. Hill received for his work from DOC as his wages. Indeed, L&I calculated his wages based on those payments in the very order that is under appeal in this case, and that decision that would not make any sense if L&I had not viewed those payments as Mr. Hill's wages.

Mr. Hill cites no authority, and L&I is aware of none, for the notion that a party is bound by an argument made by an aligned party in a prior proceeding. Also, "it is well established that a party concession or admission concerning a question of law or the legal effect of a statute as opposed to a statement of fact is not binding on the court." *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) (citations omitted). In any event, the record in this case makes it apparent that Mr. Hill received "wages" of \$0.85 an hour for his work. For this Court to hold that the payments were not his wages would be contrary both to the holding in *Rose* and to fundamental common sense. *Rose*, 57 Wn. App. at 758-759.

Mr. Hill also attempts to buttress his "gratuities" argument based on the legislature's usage of the terms "gratuities" and "wages" in RCW 72.09.100 and RCW 72.09.111(1), although his argument in this

regard is not entirely clear. AB 7⁷, 11-12. Mr. Hill notes that payments for work by prisoners in Class I prison work are labeled as “wages” under RCW 72.09.100, while payments for work by prisoners in Class II, III⁸ and IV work are labeled “gratuities” by RCW 72.09.100(2), (3), and (4). Notably, inmate workers working under Class I are entitled to wages that is comparable to what is paid for work of a similar nature in free society in their locality as determined by the Director of the DOC, and, in any event, not less than the federal minimum wage if the Director cannot identify comparable local work. *See* RCW 72.09.100(1)(e). Conversely, Class II laborers, like Mr. Hill, are compensated for their work based on a “gratuity scale” determined by the Director, and, unlike Class I workers, they are *not* entitled to earn the comparable wage earned by a free worker nor are they entitled to receive at least the federal minimum wage. RCW 72.09.100(2)(e).

Mr. Hill does not argue that DOC violated RCW 72.09.100 by paying him a “gratuity” as defined by RCW 72.09.100(2) that was less than the “wage” he would have earned had he been performing Class I labor, nor does he argue that he was performing Class I rather than Class II labor at the time of his injury. Rather, he appears to argue that

⁷ The Department presumes that Mr. Hill’s reference to a non-existent RCW 72.29.100 at AB 7 was intended to reference RCW 72.09.100.

⁸ Prisoners in Class III work are not eligible for industrial insurance. RCW 72.60.102.

since he was a Class II worker, then, under the plain language of RCW 72.09.100, he was not paid a “wage” as defined by RCW 51.08.178.

His argument fails. RCW 72.09.100 uses the term “gratuity scale” to differentiate between the compensation paid to Class I workers (who are entitled to receive wages comparable to the work performed by free laborers, RCW 72.09.100(1)(e)) and the compensation paid to Class II workers (who are not entitled to such comparable wages, and who may be paid less than the federal minimum wage, RCW 72.09.100(2)(e)). RCW 72.09.100’s different terms for the different forms of compensation paid to different classes of inmate workers does not change the fundamental fact that the sums paid to Class II workers for their labor is consideration for work performed, and, thus, is a “wage” for the purposes of the Industrial Insurance Act. As *Rose* explains, the label applied by a party to the consideration provided by an employer to a worker for work performed does not change its fundamental character into anything other than a “wage” as defined by RCW 51.08.178. 57 Wn. App. at 759.

In this regard, it must be noted that RCW 72.09.111(3)(c) also authorizes “incentive payments” to those doing Class I, II and IV prison work, which are to be payments over and above “wages” and “gratuities.” This is the very language that was used by the claimant in *Rose* in his attempt to argue that the payments he received for his work were not

wages. *Rose* rejected this argument, finding that the “incentives” paid by DOC for the claimant’s work was his wages within the meaning of RCW 51.08.178(1).

Under Mr. Hill’s apparent interpretation of RCW 72.09.100, a Class I worker receives a wage as defined by RCW 51.08.178, while a Class II worker receives only a gratuity and not a wage, and, therefore, must have his wages calculated under RCW 51.08.178(4). Nothing in RCW 72.09.100, RCW 72.09.111, or RCW 51.08.178 suggests that the legislature used the word “gratuity scale” when describing the payments paid to Class II workers for their labor in order to ensure that their wages on a subsequent workers’ compensation claim would be calculated under RCW 51.08.178(4) based on the hypothetical wage earned by a person doing “like or similar” work, while the wages paid to Class I workers in the event that they suffered an industrial injury would be calculated based on their actual wages pursuant to RCW 51.08.178(1).

Rather, the only reasonable inference is that the legislature’s intent was to allow Class I workers to earn a higher rate of compensation than Class II workers, and it used different terms to describe the payments that are made to the different classes of inmate workers in order to further highlight this different treatment directed by the legislature. Mr. Hill provides no support for the idea the legislature’s intent in using the word

“gratuity scale” when describing the payments made to Class II workers for their labor was to ensure that such workers would have their “wages” calculated under RCW 51.08.178(4) instead of RCW 51.08.178(1).

Mr. Hill’s reference to the dictionary definition of “gratuities” merely serves to highlight the absurdity of his argument, as it is readily apparent that the payments made to him by Correctional Industries for his labor were neither “gifts” nor a “tip.” The payments made by Correctional Industries to Mr. Hill were not a “gift” – they were payments made in consideration for work performed. Furthermore, it strains the definition of the term beyond its breaking point to say that Correctional Industries paid Mr. Hill a “tip” of \$.85 an hour for his labor: this was not a tip, it was a wage.

Furthermore, if this Court were to conclude that Class I workers have their worker’s compensation wages calculated based on their actual wages, while Class II workers have their worker’s compensation wages calculated based on RCW 51.08.178(4), this could lead to the absurd result of Class II workers having a higher wage calculation under RCW 51.08.178(4) than Class I workers would receive under RCW 51.08.178(1). This is because a Class I worker’s wages are calculated by the Director of the DOC based on his or her determination of the comparable wages earned by a person doing similar work in the

locality, or at the federal minimum wage if the *Director of DOC* cannot locate a comparable wage. While this is not entirely clear, it would appear that any challenge by a Class I worker to the wage selected by the Director of DOC, if it is appealable at all, would be reviewed for abuse of discretion. Conversely, an inmate performing Class II labor whose wages were calculated by L&I under RCW 51.08.178(4) would merely have to show that a preponderance of the evidence supports a higher wage than the one selected by L&I.

Furthermore, RCW 51.08.178(4), unlike RCW 72.09.100(1), does not authorize L&I to set a claimant's wages using the *federal* minimum wage in the event that L&I has difficulty identifying a comparable wage. It is well settled that a statute will not be defined in a way that leads to strained, absurd, or unlikely results. *State v. Eaton*, 168 W.2d 476, 484, 229 P.3d 704 (2010). Because Mr. Hill's strained interpretation of the interplay between RCW 72.09.100 and RCW 51.08.178 would lead to absurd and unlikely results, his interpretation must be rejected by this Court.

C. L&I Properly Did Not Include In Its Wage Calculation Any Values For Board, Housing, And Health Care Because Those In-Kind Benefits Were Mere Incidents Of Mr. Hill's Incarceration

In the alternative, Mr. Hill appears to argue that if the Court concludes that L&I properly used RCW 51.08.178(1) to calculate his time-of-injury wages, then the Court should order L&I to include in its wage calculation the value of the food and housing and health benefits that DOC provided to him as an inmate. AB 15.⁹ However, like his other arguments, this argument was squarely rejected by *Rose* under facts that cannot be rationally distinguished from the facts in this case. *Rose*, 57 Wn. App. at 759-760. *Rose* remains an accurate statement of the law on this issue, and *Rose* requires this Court to reject that argument in this case as well. *Id.*

In *Rose*, the Court of Appeals rejected an argument by the inmate that his time-of-injury monthly wage computation should be adjusted to include the value of the food and “housing” provided to him by the State. *Id.* The Court held that a payment is only a wage if it is “consideration for work performed”. *Id.* *Rose* held that the payments by the State for an inmate’s food and “housing” were not “consideration for work performed,” but, rather, were payments that the State was legally obligated

⁹ L&I is skeptical that most inmates would view the fact that they are “provided” with “housing” in a correctional facility as a result of being incarcerated as a “benefit” provided by the State.

to make on behalf of all inmates. *Id.* Since the claimant in *Rose* would have received “housing” and food while he was incarcerated whether he worked at the Honor Camp or not, the payments made by the State for “housing” and food could not be properly included in the calculation of his wages at the time of his injury. *Id.*

Mr. Hill makes the unfounded argument that the Supreme Court’s *Cockle* decision somehow overturned *Rose*’s holding that an inmate’s food and shelter is not included in the calculation of the inmate’s wages at the time of his or her industrial injury. AB 14-15 (citing *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801). This argument is meritless, as the *Cockle* decision involved issues that are completely inapposite to the issues raised by this appeal: *Cockle* did not disturb *Rose*’s core holding that a payment is *not* a wage if it is *not* consideration for work performed.

As noted above, *Rose* held that food and housing provided to inmates in light of their custodial status are not “wages” within the meaning of RCW 51.08.178 because they are not “consideration for the work performed.” *Rose*, 57 Wn. App. at 759-760. Prior to discussing the in-kind benefits, in discussing the one dollar per day payment to Mr. Rose for his work, *Rose* observed, in dicta, that “the term wage, as used by the Legislature in the statute, would appear to encompass *anything* given in consideration for the work performed.” *Id.* at 758. (emphasis added).

In *Cockle*, the key issue was whether employer-provided health care benefits are wages, within the meaning of RCW 51.08.178(1). *Cockle* held that they are. *Id.* at 821-822. The Court reached this conclusion by applying *ejusdem generis* analysis to the statutory phrase “consideration of like nature” to “board, housing, and fuel.” *Cockle*, 142 Wn.2d at 805-823. The Court concluded that a benefit is “like” board housing and fuel if it is “critical to protecting workers’ basic health and survival.” In discussing its holding, *Cockle* expressed disagreement with what it characterized as *Rose’s* statement that “wages” includes “any and all forms of consideration”. *Id.* at 821.

However, while *Cockle* disagreed with *Rose’s* dicta that “anything given in consideration for the work performed” must be considered in the calculation of the worker’s wages, *Cockle* did not, *in any way*, suggest that the Court disagreed with *Rose’s* holding that an inmate’s housing and food are not included in the calculation of the inmate’s time-of-injury “wages” where those “benefits” are not provided to inmates as consideration for the work performed. *See Cockle*, 142 Wn.2d at 821, (discussing *Rose*, 57 Wn. App. 751). Furthermore, the claimant in *Cockle* received health care coverage in consideration for work performed, so the *Cockle* court had no occasion to decide whether a claimant who is receiving a “benefit” for reasons unrelated to employment is entitled to have that “benefit”

included in the claimant's wage calculation. *Cockle*, 142 Wn.2d 801. *Cockle* certainly does not stand for the notion that a benefit that is *not* provided in consideration for work performed is somehow a "wage" under RCW 51.08.178. *See id.*

Furthermore, in six cases decided after *Cockle*, the courts have, albeit in different contexts, stressed that a payment cannot be considered a "wage" unless it was "consideration for work performed." For example, in *Doty v. Town of South Prairie*, 155 Wn.2d 527, 543, 120 P.3d 941 (2005) the Supreme Court concluded that a claimant was a volunteer, and thus not subject to coverage under the Industrial Insurance Act unless the Town opted for coverage for its volunteers, even though the claimant was paid a variety of different benefits by the Town. The Supreme Court reasoned that the payments made to the claimant by the Town were not "remuneration for services performed," but, rather, were payments that were intended to be reimbursements for expenses incurred in the course of volunteer work. *Id.* at 543. Thus, *Doty* shows that it is still the law, even after the issuance of the *Cockle* decision, which the payment of an in kind benefit cannot be considered a "wage" unless it was paid in consideration for work performed. *Id.*

Somewhat similarly, in *Malang v. Department of Labor & Industries*, 139 Wn. App. 677, 686 n. 5, 162 P.3d 450 (2007) this Court

noted that *Rose*'s holding that "wages" only include "consideration . . . for work performed" is still an accurate statement of the law, even though *Cockle* held that "wages" do not include *all* consideration for work performed, and that it only includes an "in kind" benefit if is "critical to protecting the worker's basic health and survival."

Finally, in four other cases involving challenges by workers to the Department's calculation of the worker's wages at the time of the injury (as well as a host of other issues that are irrelevant to this case), an appellate Court noted that a payment by an employer to an employee can only be viewed as a "wage" if it is consideration for work performed. *See Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 770, 134 P.3d 234 (2006) (employer payments for certain government social welfare programs are not consideration for work); *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 725, 175 P.3d 1109 (2008) (same) affirmed on interpreter issues, __Wn.2d __, __ P.3d __, 2010 WL 2432085 (2010); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 690-691, 175 P.3d 1117 (2008) (same) affirmed on interpreter issues, __Wn.2d __, __ P.3d __, 2010 WL 2432085 (2010); *Mestrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 712-713, 176 P.3d 536 (2008) (same) affirmed on interpreter issues, __Wn.2d __, __ P.3d __, 2010 WL 2432085 (2010). In sum, Mr. Hill, like the claimant in *Rose*, did not

receive “housing” and food in *consideration for his employment*. *Rose*, 57 Wn. App. at 759-760. Rather, he received “housing” and food and health care from DOC as a result of his status as an inmate. *Id.* at 759-760. The wage he received from Correctional Industries for his work was \$0.85 an hour, and there is no evidence that Correctional Industries provided Mr. Hill with additional or superior food or housing or health care as a further incentive to work in that program. Because Mr. Hill did not receive food or “housing” or health care in consideration for his work, but received them as a result of being an inmate, his wages at the time of his injury cannot properly include the value of the food and “housing” and health care he received.

D. Mr. Hill Cannot Properly Argue For “Change Of Circumstances” Relief Under RCW 51.28.040

Mr. Hill argued to the Superior Court that he was entitled to relief under RCW 51.28.040 – the “change of circumstances” statute – based on the fact that he was released from prison and, therefore, no longer received food or “housing” or health care from the State, as he had while he was incarcerated. CP at 13-24. Mr. Hill’s appellate brief fails to make any clear argument based on RCW 51.28.040, but the brief does makes broad allegations regarding Mr. Hill’s economic situation after his release from

prison. L&I will, in an abundance of caution, address any possible argument Mr. Hill might make regarding RCW 51.28.040.

Under narrow factual circumstances which are not present here, a worker may receive relief under RCW 51.28.040, even if he or she failed to timely appeal a wage order, if the worker can show that there was a change in his or her factual circumstances which took place after L&I issued its wage order. *See, e.g., Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 834-838, 125 P.3d 202 (2005). Specifically, a worker who failed to appeal a wage order can receive relief if he or she can show: a) that the worker was receiving an in kind benefit at the time of the injury; b) the worker was still receiving the benefit at the time of issuance of the wage order; and c) the employer terminated the in-kind benefit after the wage order was issued. *Id.*; *see also Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 396-397, 132 P.3d 148 (2006).

In this case, it makes no sense to ask whether Mr. Hill experienced a change of circumstances, because he filed a timely appeal from L&I's wage order. Thus, he need not show that a "change" in his circumstances occurred after L&I issued its wage order – rather, he must demonstrate that the order was incorrect. For the reasons discussed above, Mr. Hill has failed to show that L&I's wage order was incorrect.

On a related note, in order for a worker to be entitled to an adjustment to a time-loss rate pursuant to the change of circumstances statute, the “change” that the worker experienced must be relevant to the proper calculation of the worker’s wages. *See generally Hyatt*, 132 Wn. App. at 396-397; *Lynn*, 130 Wn. App. At 834-838. Here, the food, housing and health care provided to Mr. Hill by the State was not part of his wages, because it was not consideration for work performed. *Rose*, 57 Wn. App. at 759-760. Therefore, his loss of those “benefits” is not a change of circumstances that would justify a change to his wage calculation, because the thing he lost was not relevant to the proper calculation of his wages in the first place.

Furthermore, there is no legal authority of any kind for the notion that a change in Mr. Hill’s life situation that has nothing to do with the loss of an employer-provided benefit that was part of Mr. Hill’s employment contract can either constitute a change of circumstances within the meaning of that statute or support an adjustment to the claimant’s time-loss compensation rate. Mr. Hill is not entitled to relief under RCW 51.28.040.

Finally, while the record is not completely clear on this point, the most reasonable inference from the record is that Mr. Hill was released from prison at some point after his industrial injury but *before* the

Department issued the January 3, 2007 wage order which is the crux of this appeal. This can be inferred from the fact that the Department paid Mr. Hill time-loss prior to December of 2006, but it issued the wage order on appeal on January 3, 2007. Under RCW 51.32.040, the Department does not pay time-loss to individuals who are under judgment and sentence. As *Lynn* and *Hyatt* each recognized, an event which occurred *before* the Department issued its wage order cannot constitute a change of circumstances which occurred subsequent to that order. *See Lynn*, 130 Wn. App. at 834-838; *see also Hyatt*, 132 Wn. App. at 396-397. Therefore, Mr. Hill's release from prison at some point prior to January 3, 2007 does not and cannot constitute a change of circumstances which would merit granting him relief from the January 3, 2007 order.

E. Inmate Workers Are Not Covered Under Washington State Minimum Wage Act

Mr. Hill's brief makes the meritless assertion that Correctional Industries paid him a wage that was in violation of Washington's Minimum Wage Act. AB 11-13. From the unsupported premise that Correctional Industries paid him an unlawful wage, Mr. Hill then argues, based on discussion in a treatise on workers' compensation law,¹⁰ that it is

¹⁰ Mr. Hill cites to an older edition of the treatise. The treatise's discussion of the unlawful wage question that Mr. Hill references is now found in 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, chapter 93 (2009) ("Calculation of wage basis and benefits").

improper to calculate his wages on his L&I claim based on an illegal wage. While the discussion in the treatise supports the idea (assuming away the jurisdictional problem of addressing fair wage issues in workers' compensation cases) that it may be improper to use an unlawful actual wage to calculate the benefits of an injured worker, Mr. Hill has failed to show that the wage paid to him by Correctional Industries was unlawful.

Indeed, RCW 49.46.010(5)(k) specifically provides that work done by an inmate for Correctional Industries is not subject to the Minimum Wage Act. RCW 49.46.010(5)(k). Therefore, by its plain terms, the statute does not apply to his work. Mr. Hill fails to provide either legal authority or even a coherent argument which would explain why the statutory exception for wages paid to inmates does not apply to his case. His argument that the Minimum Wage Act was violated is meritless, as is his argument that his employer's alleged violation of that Act somehow supports his request for an increase to the calculation of his wages under RCW 51.08.178.

F. Liberal Construction Of Title 51 Does Not Change The Outcome Of This Case

Finally, Mr. Hill argues that the trial court's decision upholding L&I is contrary to the general principle contained in the Act that its provisions are "to be liberally construed in favor of the injured worker to

reduce to a minimum the suffering and economic loss arising from injuries.” RCW 51.12.010. AB 11. While it is true that the statute is liberally construed when its meaning is ambiguous, the plain language of RCW 51.08.178 shows that L&I properly calculated Mr. Hill’s wages at the time of his industrial injury. The liberal construction provision does not allow a court to ignore the plain language of the statute. *See* discussion *supra* Part IV. This Court should reject Mr. Hill’s invitation to do so in his case.

VII. CONCLUSION

For the reasons discussed above, L&I respectfully requests that the Court affirm the Superior Court’s granting of L&I’s Motion for Summary Judgment as a matter of law on the issue of whether the L&I was correct in determining the wage.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

JAMES B. HILL,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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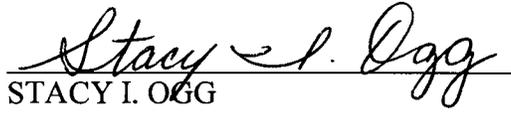
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