

NO. 48477-3-II

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

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JAMES L. MILLER,

Respondent,

v.

SHOPE CONCRETE PRODUCTS CO.,

Co-Respondent,

and

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Appellant.

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**BRIEF OF APPELLANT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

A worker is not entitled to something that does not exist. A worker's wages under the Industrial Insurance Act are calculated based on the wages the employer was actually paying the worker at the time of the worker's injury, not based on the hypothetical wages that the employer might have paid the worker in the future. James Miller (Miller) concedes that his employer did not make any payments for health care benefits at the time of his October 2012 injury. Miller nonetheless contends that his wages at the time of his October 2012 injury must include the payments for health care benefits that his employer would have begun making in November 2012 if Miller was still working for the employer at that time.

Under the plain language of RCW 51.08.178, and under *Granger v. Department of Labor & Industries*, 159 Wn.2d 752, 759, 766-67, 153 P.3d 839 (2007), health care benefits are included in the calculation of a worker's wages at the time of his or her injury only if the employer was making payments on the worker's behalf for those benefits at the time of that injury. As Miller's employer was not making payments for health care benefits at the time of his injury, Miller is not entitled to have such payments included in the calculation of his wages, and the superior court erred when it concluded otherwise. This Court should reverse.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law 2.2, 2.3, 2.5, and 2.6.
2. The trial court erred in entering judgment against the Department of Labor and Industries (Department) on December 2, 2015, including awarding costs and attorney fees.

## III. STATEMENT OF THE ISSUE

RCW 51.08.178 and case law establish that health care benefits are included in a wage calculation if the employer was making payments for health care benefits at the time of the worker's injury. Is Miller entitled to have health care benefits included in the wage calculation when the undisputed evidence establishes that Miller's employer was not making payments for health care benefits at the time of his injury?

## IV. STATEMENT OF THE CASE

### A. **This Appeal Involves the Calculation of a Worker's Wages Under RCW 51.08.178**

A worker's wages earned at the time of the worker's industrial injury affect the calculation of a number of benefits that are available to injured workers under the Industrial Insurance Act, including temporary total disability benefits and permanent total disability benefits. For both benefits, a worker like Miller, who was single with two children at the time of his injury, receives wage replacement benefits equal to 64 percent

of the wages he or she was earning at the time of the injury. CP 102;  
RCW 51.32.060; RCW 51.32.090.

RCW 51.08.178 governs the calculation of a worker's wages under the Industrial Insurance Act. Under RCW 51.08.178(1), which the parties agree applies to Miller, the worker's wages are calculated based on the wages the worker was receiving from all employment at the time of injury, including health care benefits.<sup>1</sup>

**B. Miller's Employer Was Not Making Payments for Health Care Benefits at the Time of His Injury**

These facts are taken from the stipulated facts. CP 98-100. Miller began working for his employer, Shope Concrete Products Co. (Shope), on September 10, 2012. CP 99. Under his contract with Shope, Miller had to complete a 90-day orientation before he was eligible to begin receiving health care benefits. CP 99. In order to successfully complete the 90-day orientation period, Miller needed to actually work for the employer throughout that time period, and he needed to work at least 40 hours a week each week. CP 99.

Miller intended to work through the 90-day orientation. CP 99. He took the job with Shope, in part, because the company provided health care benefits as part of the compensation package. CP 99.

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<sup>1</sup> A copy of RCW 51.08.178 is in the appendix.

On October 25, 2012, before he had completed his 90-day orientation, Miller had an on-the-job injury involving his low back. CP 98-99. Miller never returned to work with Shope after his October 25, 2012 injury. CP 99. Shope has never made any payments on Miller's behalf for health care benefits, before or after the injury. CP 100. As of October 25, 2012, Shope made payments of \$260.69 a month for health care benefits for the employees who, unlike Miller, qualified for health care coverage. CP 99.

**C. The Board Decided That, Under *Granger*, Miller Was Not Entitled to Have Health Care Payments Included in His Wage Calculation, but the Superior Court Reversed the Board**

The Department calculated Miller's wages at an amount that did not include health care benefits. CP 99. Miller appealed this decision to the Board of Industrial Insurance Appeals (Board). CP 63-65.

The Board concluded that, under *Granger*, Miller was not entitled to have health care benefits included in the calculation of his wages at the time of his injury because his employer was not making any payments for health care benefits at that time.<sup>2</sup> CP 15; *Granger*, 159 Wn.2d at 759.

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<sup>2</sup> The Board also concluded that the Department's wage order should have taken into account the overtime hours that Miller regularly worked at the time of his injury, and directed the Department to include those amounts in the wage calculation. CP 15-16. The Department does not disagree with this aspect of the Board's decision and there is no question before this Court with regard to that issue.

Miller appealed to superior court. CP 1-7. The superior court reversed the Board, directing the Department to include health care benefits in the calculation of Miller's wages. CP 272-76.

The Department appeals. CP 277-84.

## V. STANDARD OF REVIEW

In a workers' compensation case, it is the decision of the trial court that the appellate court reviews, not the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Administrative Procedures Act does not apply to appeals involving disputes about what benefits an injured worker should receive under the Industrial Insurance Act. *Id.* at 180. Rather, in an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 179-81.

As this case was tried based on stipulated facts (CP 98-100), the questions raised by this appeal are pure questions of law. This Court conducts a de novo review of questions of law. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997).

The issues in this case turn in part on the proper interpretation of statutes within the Industrial Insurance Act. The proper interpretation of a

statute is also a question of law reviewed de novo. *See State v. Ashby*, 141 Wn. App. 549, 555, 170 P.3d 596 (2007). However, the Department's interpretations of the Industrial Insurance Act are entitled to deference, and the courts "give great weight to the agency's interpretation of the law it administers." *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

## VI. ARGUMENT

Miller is not entitled to have any amount for health care benefits included in the calculation of his wages at the time of his injury because his employer was not making any payments for health care at the time that he was injured. RCW 51.08.178 provides that a worker's wages under an industrial insurance claim are calculated based on the wages the worker was receiving at the time of the injury. RCW 51.08.178 further provides that a worker's wage calculation includes any payments for health care benefits made by the employer at the time that the injury occurred. Since the undisputed facts in this case establish that Miller's employer was not making any payments for health care benefits at the time of his injury, RCW 51.08.178's unambiguous language precludes Miller from having any amounts included in his wage calculation for health care benefits.

The superior court apparently relied upon the *Granger* decision in concluding that Miller's wages should include health care benefits, but

*Granger* supports the Department, not Miller. CP 282; *Granger*, 159 Wn.2d at 759. Under *Granger*, the dispositive issue when deciding whether health care benefits are included in a worker's wages is whether the employer was making any payments for health care benefits at the time that the worker was injured. *Granger*, 159 Wn.2d at 759. Since Miller's employer was not making payments for health care benefits at the time of his injury, *Granger* precludes Miller from having those payments included in the calculation of his wages. *Id.*

**A. Under the Plain Language of RCW 51.08.178, a Worker's Wages Are Calculated Based on the Wages the Worker Actually Received at the Time of the Worker's Injury**

Since Miller's employer was not making any payments for health care benefits at the time of his injury, RCW 51.08.178(1) precludes Miller from having such benefits included in his wage calculation.

RCW 51.08.178(1) provides that a worker's wages are calculated based on the wages the worker was "receiving . . . at the time of injury":

For the purposes of this title, the monthly wages *the worker was receiving from all employment at the time of injury* shall be the basis upon which compensation is computed

unless otherwise provided specifically in the statute concerned.<sup>3</sup>

This statute focuses on wages “receiv[ed] at the time of injury.” RCW 51.08.178(1). Thus, Miller’s wage calculation is tied to the wages he was receiving at the time of his injury, not to the wages he might have one day received in the future.

In 2007, the Legislature amended RCW 51.08.178 to expressly include health care benefits within the definition “wages.” *See* Laws of 2007, ch. 297, § 1. The statute includes in the wage calculation health care benefits paid by an employer at the time of the worker’s injury:

wages shall also include the *employer’s payment or contributions*, or appropriate portions thereof, *for health care benefits* unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided *at the time of injury*.

RCW 51.08.178(1) (emphasis added).

The statute includes “payment . . . for health care benefits.”

RCW 51.08.178(1). This language plainly requires that an employer must make a payment for health care benefits for the Department to include the benefits in the wage rate calculation.

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<sup>3</sup> The statute specifically provides for the use of wages other than those received at the time of injury when a worker is exclusively seasonal, essentially part-time and/or intermittent, in which case the worker’s past earnings can be considered. RCW 51.08.178(2). But even for such workers, the statute precludes the use of post-injury wages. In any event, here, it is undisputed that Miller’s wages are properly calculated under RCW 51.08.178(1), not RCW 51.08.178(2), so his wages must be calculated based on his wages at the time of his injury.

The payment has to occur at the “time of injury.”

RCW 51.08.178(1). This is shown in multiple places in the statute. The first sentence of RCW 51.08.178(1) provides that the wage calculation is based on the wages received at the time of the worker’s injury. The statute also separately specifies in the second paragraph of subsection (1) that it is the employer’s payment for health care benefits “*at the time of injury*” that must be considered. *Id.* (emphasis added). Through these statutory provisions, the Legislature has emphasized its intent that it is the time of injury that is the relevant time period to look at, not the future.

Other aspects of the statute demonstrate that the employer has to be making payment of the health care benefits at the time of the injury. The statute’s provision that payments for health care benefits are not included in the wage calculation if the employer “continues” making the same payments after the injury further shows that health care benefits are not included in the wage calculation if the employer was not paying any money towards health care benefits at the time of the original injury. First, from a common sense standpoint, it would not make sense to inquire as to whether the employer was *continuing* to provide benefits after the injury at the same level as what was provided at the time of the injury unless the threshold inquiry was whether such benefits were being provided at the time of the injury. Second, from a logical standpoint, if the employer was

not paying *any* money towards health care benefits at the time of the injury, and then employer continued to not pay any money towards health care benefits after the injury, then the employer has continued to provide the same level of contributions towards health care benefits after the injury as it provided at the time of the injury: zero.

Under the unambiguous language, the employer must make a health care benefit payment at the time of injury for inclusion in the wage calculation. Despite the unambiguous language, the superior court concluded that RCW 51.08.178 was ambiguous. CP 282. RCW 51.08.178 is not ambiguous because it cannot reasonably be interpreted to mean that health care benefits are included based on amounts that the worker hoped would be paid in the future even if no amount was actually being paid by the employer at the time of that injury. A statute is ambiguous only if there is more than one interpretation of its language that is reasonable. *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 451-52, 312 P.3d 676 (2013). Miller's reading is not reasonable.

Here, the stipulated facts establish that Miller's employer was not making *any* payments for health care benefits on Miller's behalf at the time of Miller's injury. CP 100. Since Miller's employer was not making any payments for health care benefits at the time of his injury, Miller is not entitled to have any payments for health care benefits included in the

calculation of his wages at the time of his injury under the plain language of RCW 51.08.178(1).

**B. The Case Law, Including *Granger*, Reinforces the Conclusion That Miller Is Not Entitled to Have Health Care Benefits Included in His Wage Calculation**

Under the plain language of RCW 51.08.178, a worker's wages are calculated based on the wages the worker received at the time of injury, and, with regard to health care benefits, the wages are "received" at the time of injury only if the employer was making payments for those benefits at that time. Since Miller's employer was not making payments for health care benefits at the time of his injury, his wages at the time of injury cannot include health care benefits under the plain language of that statute. The case law, far from contradicting this rule, further reinforces that a worker may not have health care benefits included in a wage calculation if the worker's employer was not making any payments for health care benefits at the time of the injury. *See Granger*, 159 Wn.2d at 759.

In *Granger*, the Supreme Court considered an earlier version of RCW 51.08.178 that did not expressly state whether health care benefits are included in a worker's wage calculation or not. *Granger*, 159 Wn.2d at 758. The Supreme Court held that the key issue when deciding if health care benefits should be included in the calculation of the worker's wages

is whether the employer was making payments for the worker's health care benefits at the time of the injury. *Granger*, 159 Wn.2d at 761. The *Granger* Court was faced with a fact pattern dissimilar to the facts here: in that case, the worker's employer was making payments on the worker's behalf for health care benefits at the time of his injury, but the worker was not eligible to use the health care benefits at that time. *Id.* at 756-57. This was true because the worker's employer was required to make payments into a trust fund on the worker's behalf, but in order to have coverage through the trust fund the worker must have accumulated enough "banked hours," and he had not accumulated enough "banked hours" to secure coverage at the time of his injury. *Id.*

The *Granger* Court concluded that the dispositive question was whether the worker's employer was making payments on the worker's behalf for health care benefits at the time of the worker's injury and that it was immaterial whether the worker actually had coverage at the time of the injury. *Id.* at 761. Since the worker's employer was making payments on the worker's behalf for those benefits at the time of his injury, the worker was entitled to have those payments included in his wage calculation. *Id.* As *Granger* explained, when deciding if a worker is "receiving" health care benefits at the time of an injury, "the focus is upon payment for the benefit and not entitlement to the coverage." *Id.*

*Granger* does not stand for the proposition that a worker who anticipates receiving health care benefits in the future is entitled to have the future benefits included in his or her wage calculation even if the employer was not making payments towards that benefit at the time of the injury. Throughout the opinion, the *Granger* Court stressed that inclusion of health care benefits within the wage calculation turns on the worker's employer making payments for health care benefits at that time.

*Granger*, 159 Wn.2d at 759-61.

The Department argued that the *Granger* Court would in effect be giving the worker the benefit of anticipated health care benefits if it ruled that the employer's payments for health care benefits should be included in the worker's wage calculation. The *Granger* Court emphasized that that was not what it was doing. *Granger*, 759 Wn.2d at 760, n.1. Rather, *Granger* held that the worker in that case was actually *receiving* health care benefits at the time of his injury because his employer was actually making payments for those benefits at that time. *Id.* at 760-61.

Miller would have the Court extend this rule to anticipated wages, but *Granger* rests on the notion of examining what the employer is actually paying, which by its terms cannot include something the employer is not paying.

The rule that the Supreme Court announced in *Granger*—that health care benefits are included in a worker’s wage calculation if the employer was making payments on the worker’s behalf for health care benefits at the time of the injury—is consistent with the analysis that the Court employed in earlier decisions involving a worker’s wages at the time of injury and employer-provided benefits. *See Granger*, 159 Wn.2d at 761; *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 820-21, 16 P.3d 583 (2001); *see Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 491, 120 P.3d 564 (2005).

In *Cockle*, the Supreme Court also considered the previous version of the statute that did not specifically address health care benefits. *Cockle*, 142 Wn.2d at 805.<sup>4</sup> In doing so, it held that employer-provided health care benefits should be included in the wage calculation and that the benefit amount should be calculated based on what the employer actually paid on the worker’s behalf for health care benefits. *Id.* at 820-21.

In discussing how to calculate the value of the worker’s employer-provided health care benefits, the *Cockle* Court concluded that a worker’s health care benefits should not be calculated based on their “*hypothetical* market value” and should instead be calculated “simply by

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<sup>4</sup> RCW 51.08.178(1) was amended to expressly include health care benefits within the definition of wages in 2007, six years after *Cockle* was decided. *See* Laws of 2007, ch. 297, § 1.

the monthly premium *actually* paid by an employer to secure it—or, in the case of a group plan, the worker’s portion thereof.” *Cockle*, 142 Wn.2d at 820-21. (emphasis in original).

Here, Miller’s employer did not actually pay any amount for health care benefits on his behalf either at the time of his injury or at any time before or after that. Thus, under the analysis that the *Cockle* Court used, there is no amount that can properly be included in the calculation of his wages because the “premium *actually* paid” for such benefits was zero. *Cockle*, 142 Wn.2d at 820-21. This makes sense, because, at the time of his injury, Miller did not have any employer-provided health care benefits because his employer was not providing him with those benefits at that time. What Miller had was the hope of one day receiving health care benefits in the future. But the Industrial Insurance Act directs that a worker’s wages be calculated based on the wages actually received at the time of the injury, not based on the wages that the worker hopes to one day receive. RCW 51.08.178(1).

Other cases are consistent with the rule that the wage calculation is based on what the employer paid at the time of injury. *E.g. Gallo*, 155 Wn.2d at 491 (“[T]he question is whether the employer was providing [the retirement benefit] at the time of the injury. Clearly, the workers were ‘receiving’ the retirement benefit at the time of the injury because the

employer was making payments into the retirement trust.”); *Erakovic v. Dep’t of Labor & Indus.*, 132 Wn. App. 762, 772-73, 134 P.3d 234 (2006) (benefits must have been “funded by the employer at the time of the injury,” which means that the employer must have been making “payments” for the benefit “at the time of the injury.”); *Ferencak v. Dep’t of Labor & Indus.*, 142 Wn. App. 713, 723-24 165 P.3d 1109 (2008) (wages not based on events “in the future”), *aff’d sub nom. on other grounds Kustura v. Dep’t of Labor & Indus.*, 169 Wn.2d 81, 87, 175 P.3d 853 (2010).

The case law amply shows that the trial court erred by including hypothetical wages in Miller’s wage calculation.

**C. A Worker’s Earning Capacity Is Measured Based on the Wages Earned at the Time of Injury**

Although the courts have recognized that RCW 51.08.178 should be interpreted in the way that leads to best reflecting a worker’s lost earning capacity, RCW 51.08.178(1) unambiguously directs the use of a worker’s wages at the time of the injury. Miller argues that because he anticipated receiving health care benefits after his industrial injury, health care benefits are part of his earning capacity even though his employer was not making payments for them at the time of his injury. CP 245-54. However, Miller’s earning capacity at the time of his injury is measured

based on the wages he actually received at the time that he was hurt, and, at the time of that injury, he was not receiving health care benefits because his employer was not making payments for them. There are no wages to replace if the wages are not paid in the first place.

While the *Granger* Court emphasized the importance of properly calculating a worker's lost earning capacity at the time of an injury, it based its holding that the worker's health care benefits were part of his lost earning capacity on the fact that his employer was actually making payments for health care at the time that he was injured. *Granger*, 159 Wn.2d at 762-63. The worker in *Granger* was receiving a valuable form of consideration at the time of his injury: payments by his employer, on his behalf, for health care benefits. *Id.* Therefore, the employer's payments for health care benefits were part of the worker's wages at the time of his injury and constituted part of his lost earning capacity at the time that he was hurt. *Id.* Conversely, Miller's employer was not making any payments for health care benefits at the time of his injury, and, therefore, health care benefit payments were not part of his wages at the time of his injury and do not constitute a portion of his lost earning capacity.

Liberal construction does not provide for a different result and, if it applied, it would not favor Miller's approach because it would lead to artificially inflating the lost earning capacity of some workers while

artificially decreasing the wages of others. The trial court pointed to liberal construction in its decision, but, contrary to the trial court's conclusion, liberal construction cannot apply here because the statute is not ambiguous. *See* CP 282; *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n. 28, 286 P.3d 695 (2012) (liberal construction does not apply to unambiguous statutes in RCW Title 51).

The rule of law Miller seeks here, while favorable to him, is not necessarily in the interests of injured workers as a class, and would result in a rule that does not reflect the lost earning capacity of workers. Miller suggests that a worker's wages should not be calculated based merely on the wages the worker was receiving at the time of the injury but should also take into account anticipated changes to the worker's wages. CP 252. While such a rule would help Miller since he is seeking to have health care benefits included in his wage calculation based on his expectation that they might be added to his wages in the future, it could be harmful to a worker who was receiving health care benefits at the time of his injury but whose employer intended to terminate the health care benefits, or otherwise reduce the worker's wages, in the near future. If a worker's "earning capacity" is not tied to the wages at the time of injury, but rather takes into account anticipated changes to the worker's wage rate, then, logically, it should take into account both anticipated *increases* in wages

(whether in the form of newly provided health care benefits or other anticipated changes to the worker's compensation package) and anticipated *decreases* to such wages. The liberal construction standard should not be used to support a rule of law that is helpful to some workers but harmful to others. In any event, the statute unambiguously provides for a different outcome than the one Miller seeks, and the liberal construction is of no aid in such a situation.

**D. Miller Should Not Receive an Award of Attorney Fees**

The Board properly concluded that Miller was not entitled to have health care benefits included in his wage calculation because his employer was not making payments for health care benefits at the time of his injury, and the superior court should have affirmed the Board. The superior court granted an award of costs and attorney fees to Miller based on its decision to reverse the Board's order and grant relief to him. However, since the superior court erred when it reversed the Board's decision, it also erred when it awarded costs and fees to Miller. Therefore, the grant of costs and attorney fees should be reversed.

**VII. CONCLUSION**

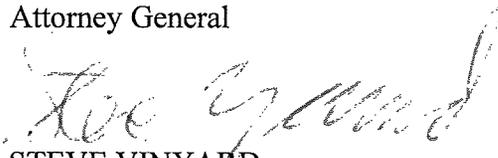
Miller is not entitled to have any amount for health care benefits included in his wage calculation because his employer was not making any payments for health care benefits at the time of his injury.

RCW 51.08.178 unambiguously ties the calculation of a worker's wages to the wages paid by the employer at the time that the worker was hurt, and, at the time Miller was hurt, his employer was not making any payments for health care benefits. Consistent with RCW 51.08.178, *Granger* held that the key issue when deciding if health care benefits are included in the calculation of a worker's wages is whether the employer was making payments for health care benefits at the time of the worker's injury.

The superior court erred as a matter of law when it ruled that Miller was entitled to have health care benefits included in his wage calculation because Miller's employer was not making payments for health care benefits at the time of his injury. This Court should reverse.

RESPECTFULLY SUBMITTED this 22 day of March, 2016.

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# APPENDIX

West's Revised Code of Washington Annotated  
 Title 51. Industrial Insurance (Refs & Annos)  
 Chapter 51.08. Definitions

**51.08.178. "Wages"--Monthly wages as basis of compensation--Computation thereof**

West's Revised Code of Washington Annotated Title 51. Industrial Insurance Effective: July 22, 2007 (Approx. 2 pages)  
 Proposed Legislation

Effective: July 22, 2007

West's RCWA 51.08.178

**51.08.178. "Wages"--Monthly wages as basis of compensation--  
 Computation thereof**

Currentness

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer's payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

**NOTES OF DECISIONS (91)**

Construction and application  
 Liberal construction  
 "Wages"  
 Time-loss compensation, generally  
 Calculation, generally  
 Benefits critical to protecting basic health and survival  
 Health benefits  
 "Reasonable value"  
 Bonuses  
 Consideration  
 Other consideration  
 Exclusively seasonal  
 Intermittent workers  
 Default calculation method  
 Shift differential pay  
 Benefits in lieu of work  
 Failure to appeal  
 Waiver  
 Attorney fees

(4) 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.

#### **Credits**

[2007 c 297 § 1, eff. July 22, 2007; 1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

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#### **Notes of Decisions (91)**

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West's RCWA 51.08.178, WA ST 51.08.178

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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**End of Document**

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NO. 48477-3-II

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

JAMES L. MILLER,

Respondent,

v.

SHOPE CONCRETE PRODUCTS, CO.

Co-Respondent,

and

WASHINGTON STATE  
DEPARTMENT OF LABOR  
AND INDUSTRIES,

Appellant.

DECLARATION  
OF SERVICE

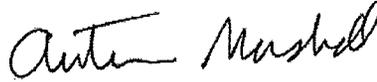
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Appellant and this Declaration of Service to all parties on the record as follows:

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

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DATED this 28<sup>th</sup> day of March, 2016, at Tumwater, Washington.



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**WASHINGTON STATE ATTORNEY GENERAL**

**March 28, 2016 - 10:02 AM**

**Transmittal Letter**

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Court of Appeals Case Number: 48477-3

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