

FILED  
COURT OF APPEALS  
DIVISION II

2016 JUN -3 PM 3: 54

STATE OF WASHINGTON

BY                       
DEPUTY

No. 48477-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

JAMES L. MILLER,

Respondent,

v.

SHOPE CONCRETE PRODUCTS CO.,

and

DEPARTMENT OF LABOR AND INDUSTRIES OF  
THE STATE OF WASHINGTON,

Appellant,

---

RESPONDENT'S REPLY BRIEF

---

Jenna N. Savage, WSBA# 48329  
Vail, Cross-Eutencier & Associates  
819 Martin Luther King Jr. Way  
P.O. Box 5707  
Tacoma, WA 98415-0707  
(253) 383-8770  
Attorney for James L. Miller

ORIGINAL

**TABLE OF CONTENTS**

|   | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES.....   | ii          |
| I. INTRODUCTION.....  | 1           |
| II. ISSUE.....  | 2           |
| III. STATEMENT OF THE CASE.....   | 2           |
| IV. ARGUMENT.....   | 5           |
| A. The Purpose of the Industrial Insurance Act is to be Liberally<br>Construed in Favor of Injured Workers, such as Mr.<br>Miller.....  | 5           |
| B. The Case Law and Policy Support the Superior Court’s<br>Conclusion that Mr. Miller is Entitled to have Health Care<br>Benefits Included in His Wage Order.....                           | 8           |
| 1. The Purpose of Inclusion of Health Care Benefits in a<br>Wage Order is to Protect a Worker’s Basic Health and<br>Survival.....   | 8           |
| 2. The Inclusion of Health Care Benefits is Not Entirely<br>Contingent Upon Eligibility at the Time of Injury, but<br>Rather, the Focus of the Analysis is on Lost Earning<br>Capacity..... | 10          |
| C. Mr. Miller is Entitled to have Health Care Benefits<br>Included in his Wage Order.....   | 13          |
| V. CONCLUSION.....  | 16          |

## TABLE OF AUTHORITIES

Pages

### A. Table of Cases

|  |        |
|--|--------|
| <i>Clauson v. Dep't of Labor &amp; Indus.</i> ,<br>130 Wn.2d 580, 925 P.2d 624 (1996).....   | 6      |
| <i>Cockle v Dep't of Labor &amp; Indust.</i> ,<br>142 Wash.2d 801 (2001).....                | 9, 10  |
| <i>Dennis v. Dep't of Labor &amp; Indus.</i> ,<br>109 Wash.2d 467, 745 P.2d 1295 (1987)..... | 6      |
| <i>Dep't of Labor &amp; Indus. v. Granger</i> ,<br>159 Wash.2d 752, P.3d 839 (2007).....     | 11, 12 |
| <i>Dep't of Labor and Indus v. Johnson</i> ,<br>84 Wn. App 275, 928 P.2d 1138 (1996).....    | 6      |
| <i>Guijosa v. Wal-Mart Stores, Inc.</i> ,<br>101 Wn. App. 777, 792, 6 P.3d 583 (2000).....   | 7      |
| <i>Hastings v. Dep't of Labor and Indus.</i> ,<br>24 Wn.2d 1, 12 (1945).....                 | 5      |
| <i>Hilding v. Dep't of Labor and Indus.</i> ,<br>162 Wash. 168, (1931).....                  | 5      |
| <i>In re Estate of Kerr</i> ,<br>134 Wn.2d 328, 949 P.2d 810 (1998).....                     | 7      |
| <i>McIndoe v. Dep't of Labor &amp; Indus.</i> ,<br>144 Wn.2d 252, 26 P.3d 903 (2001).....    | 6      |
| <i>Nelson v. Department of Labor and Industries</i> ,<br>9 Wn.2d 621, 628 (1941).....        | 5      |
| <i>Wilber v. Dep't of Labor and Indus.</i> ,<br>61 Wn.2d 439, 378 P.2d 684 (1963).....       | 5      |

**B. Statutes**

Pages

|                                |       |
|--------------------------------|-------|
| Wash. Rev. Code 51.04.010..... | 5     |
| Wash. Rev. Code 51.12.010..... | 5, 15 |
| Wash. Rev. Code 51.08.178..... | 8, 9  |
| Wash. Rev. Code 51.52.130..... | 16    |

## **I. INTRODUCTION**

Comes now the Respondent, James L. Miller, by and through his attorney of record, Jenna N. Savage of the Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates, and hereby offers this brief in response to the brief of appellant Department of Labor and Industries.

This case originates under RCW Title 51, the Industrial Insurance Act (“the Act”) from an Administrative Law Review (ALR) appeal from a January 15, 2015 Decision and Order of the Board of Industrial Insurance Appeals (“the Board”). The Board concluded the Department correctly calculated Mr. Miller’s compensation rate in regard to health care benefits.

Mr. Miller appealed that decision to the Superior Court asserting that the Board had erred in not requiring the Department to include health care benefits in his wage order as a result of the Board’s misapplication of the law and policy of the Act.

The Superior Court reversed the Board’s decision after considering briefing and oral argument. Judgment was entered on December 2, 2015. This appeal by the Department follows.

As will be described further below, the law and policy of the Act leads to the conclusion that the Superior Court was correct in deciding that the Department should include health care benefits in Mr. Miller’s wage

order, in order to adhere to the underlying purpose and policy of the Act of reducing economic harm to injured workers. The Superior Court's decision to reverse the Board, upholds the purpose and policy of the Act by holding that Mr. Miller is entitled to have healthcare benefits included in his wage order, thereby properly accounting for the full scope of his lost earning capacity.

## **II. ISSUE**

Whether the Department of Labor and Industries should have included James L. Miller's expected health care benefits in its August 6, 2013 wage order, despite the fact he was injured prior to completing his 90-day orientation period.

## **III. STATEMENT OF THE CASE**

On October 25, 2012, James L. Miller suffered an industrial injury to his low back while working for Shope Concrete Products Co (hereinafter "Shope"). CP<sup>1</sup> at 98. Mr. Miller filed a claim for benefits on October 29, 2012. CP at 98. The Department of Labor and Industries (hereinafter "the Department") issued an order allowing Mr. Miller's claim on November 6, 2012, and benefits were provided. CP at 98. On August 6, 2013, the

---

<sup>1</sup> The record of proceedings in this case is the Clerk's Papers. This will be cited CP.

Department issued a wage order setting Mr. Miller's gross wages at \$3,335.20 per month. CP at 99. The Department calculated this wage rate by multiplying the hourly rate of \$18.95 per hour, 8 hours a day, 5 days a week, and did not include any overtime or any health care benefits. CP at 99.

Per the Shope Employee Handbook (hereinafter Handbook), Mr. Miller was eligible for health care benefits after an orientation period of ninety days of employment. CP at 99. The Handbook provides that all full time employees are eligible for group benefits. CP at 99. The Handbook defines full time employees as those who regularly work at least a 40-hour workweek. CP at 99. The reason Mr. Miller accepted the job with Shope was in part because of the health care benefits the company provided as part of his compensation package. CP at 99. Mr. Miller intended to work for the company through the orientation period and become eligible for health insurance as part of his compensation package from Shope. CP at 99. Mr. Miller began work with Shope on or about September 10, 2012. CP at 99. Mr. Miller hasn't physically worked at Shope since the date of injury, October 25, 2012. CP at 99. After his injury, Mr. Miller continued to receive a salary of \$1,516.00 every two weeks from Shope until April 21, 2013. CP at 99.

At the time of Mr. Miller's industrial injury on October 25, 2012, Shope contributed \$260.69 per month for health insurance benefits for its eligible employees. CP at 100. Shope has never contributed any money towards any benefit program on behalf of Mr. Miller. CP at 100. It is Shope's policy that an employee must be physically working their regular schedule after the 90 day Orientation Period in order to qualify for benefits. CP at 100.

On September 24, 2013 Mr. Miller filed a protest and request for reconsideration of the August 6, 2013 order. CP at 100. That protest was denied and the Department affirmed the August 6, 2013 order and on October 25, 2013 the claimant filed a timely appeal of the October 25, 2013 order with the Board of Industrial Insurance Appeals (hereinafter "the Board"). CP at 100. On January 15, 2015 the Board issued a decision and order finding that the compensation rate was correctly calculated in regard to health care benefits. CP at 15.

The Board's decision was then appealed to Pierce County Superior Court and was assigned to the Honorable Judge Brian M. Tollefson. CP at 1, 273. Both parties provided trial briefs and presented oral argument. CP at 273. Having considered the briefing and argument, on December 2, 2015, the Court entered Findings of Fact, Conclusions of Law, and Judgment which reversed the Board's January 15, 2015 Decision and Order, and

remanded it to the Department with instructions to issue a further order establishing Mr. Miller's compensation rate based on an hourly rate of \$18.95 an hour, 8.625 hours a day, 5 days a week, plus employer provided health care benefits, as a single individual with two dependent children. CP at 275. The Department has appealed this decision to the Washington State Court of Appeals, Division Two. CP at 277.

#### **IV. ARGUMENT**

##### **A. The Purpose of the Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers, such as Mr. Miller.**

The Industrial Insurance Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 12 (1945); *Nelson v. Department of Labor and Industries*, 9 Wn.2d 621, 628 (1941); and *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 174 (1931).

RCW 51.04.010 declares "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault". Similarly, RCW 51.12.010 provides: This

title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

The Washington Supreme Court has repeatedly stated that. “The Industrial Insurance Act mandates that its provisions be ‘liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring during the course of employment’ and courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 257, 26 P.3d 903 (2001), citing *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995); *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) (“All doubts as to the meaning of the Act are to be resolved in favor of the injured worker.”); *Dep’t of Labor and Indus v. Johnson*, 84 Wn. App 275, 277-78, 928 P.2d 1138 (1996).

The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Dennis v. Dep’t of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987).

Under accepted canons of statutory interpretation, each statutory provision should be read by reference to the whole Act. “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000). Historically, the Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. “The purpose of reading statutory provision in pari material with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision ‘as constituting a unified whole, to the extent that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes.” *In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), citing *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

These guiding principles are critical to cases such as Mr. Miller’s. It is necessary to keep them in mind when considering a case such as this regarding statutory language and the potential economic loss suffered by Mr. Miller. In its brief, the Department takes the position that there is no ambiguity in the relevant statute, and therefore the plain language of the statute must control. However, as discussed in the remainder of this brief, this assertion is flawed, and the Department’s reading of the statute would

produce an unjust result that is contrary to the spirit of the Industrial Insurance Act. In order to effectuate the purposes of the Act and reduce the economic harm suffered by Mr. Miller, the Superior Court properly concluded that Mr. Miller's health care benefits should be included in his wage order.

**B. The Case Law and Policy Support the Superior Court's Conclusion that Mr. Miller is Entitled to have Health Care Benefits Included in His Wage Order.**

Upon consideration of both case law and policy, it is clear that the Superior Court was correct in concluding that the Board should include health care benefits as part of Mr. Miller's wage order. Relevant case law in this matter shows that Mr. Miller's expected health care benefits constitute consideration of like nature under RCW 51.08.178, which were received by Shope as a part of the contract for hire. Furthermore, the case law shows that the proper analysis for inclusion of health care benefits in a wage order focuses on the injured worker's lost earning capacity, not merely eligibility or actual payment. Furthermore, a plain language reading of the statute produces harsh results that are contrary to the policy of the Act.

1. The Purpose of Inclusion of Health Care Benefits in a Wage Order is to Protect a Worker's Basic Health and Survival.

RCW 51.08.178 sets forth the definition of wages and the method computing a worker's monthly wages as a basis for compensation. The

statute reads, in relevant part: “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 to hire.” RCW 51.08.178. In interpreting this statute, the Washington State Supreme Court has found the language “consideration of like nature” to include health care benefits provided by the employer. *Cockle v Dep’t of Labor & Indust.*, 142 Wash.2d 801 (2001). In *Cockle*, the Court was asked for the first time to determine whether the value of employer-provided health care coverage should be included in the basis used to calculate workers’ compensation payments. *Id.* at 805. In that case, Ms. Cockle’s employer paid her an hourly rate as well as her health insurance premiums. *Id.* When Ms. Cockle was injured in the course of her employment, the Department calculated her wage rate to include her hourly wage, but not her health care coverage. *Id.* at 805-06. The Court held that the health care benefits should be included in the wage order, stating that health care coverage was one of the core, nonfringe benefits that must be included in a consideration of wages under the statute. *Id.* at 822-23.

The Court there found that Ms. Cockle’s health care coverage was a substantial component of her negotiated contract of hire compensation, and thus part of her wages as defined in RCW 51.08.178. *Id.* at 806. In making this finding, the Court stated that “consideration of like nature” includes

benefits, such as health care coverage, that are readily identifiable and reasonable calculated in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. *Id* at 822.

Here, Mr. Miller's expected health care benefits are most certainly consideration of like nature under the statute. Just like in *Cockle*, the health care benefits that Mr. Miller was promised were a substantial component of his negotiated contract for hire with Shope, because these promised benefits were one of the main reasons Mr. Miller took the job at Shope to begin with. It should be further pointed out that Mr. Miller's expected health care benefits were not some mere remote, potential benefit he may or may not someday obtain. While the Department's brief implies that the health care benefits hypothetical nature, this is not so, as it was clear from the outset the amount of health care benefits he would receive and when he would receive them.

2. The Inclusion of Health Care Benefits Is Not Entirely Contingent Upon Eligibility at the Time of Injury, but Rather, the Focus of the Analysis is on Lost Earning Capacity.

When considering whether or not health care benefits should be included in a wage order, the primary concern of the analysis is on the injured worker's lost earning capacity. In its brief, the Department puts

improper emphasis on whether or not the Shope was actually making payments for health care benefits at the time Mr. Miller was injured. However, in order to conduct an analysis that is consistent with the policy of the Act, the proper inquiry is to what the lost earning capacity of the injured worker is, under his particular set of facts.

The Washington State Supreme Court further analyzed the issue of inclusion of health care benefits in a wage order in the case of *Granger*. *Dep't of Labor & Indus. v. Granger*, 159 Wash.2d 752, P.3d 839 (2007). In that case, the Court was asked to determine whether the payments that an employer was making to an employee's health care trust fund at the time of the employee's injury should be included in the wage calculation if the employee was not entitled to the trust benefits at that time. *Id* at 759. In *Granger*, Mr. Granger's employer paid a certain amount of money per hour into a medical benefits trust account, and once the employee had worked the requisite amount of hours he or she would be eligible for the health care coverage. *Id* at 756. At the time of Mr. Granger's injury, he had insufficient hours to be eligible and therefore his health care coverage had lapsed. *Id*. The Court found that health care benefits paid by his employer to the trust account should be part of his earning capacity. *Id* at 766.

Importantly, the court in *Granger* found that Mr. Granger's eligibility for the health care benefits at the time of his injury was not the

deciding factor in whether he was to receive compensation as part of the wage order. *Id.* The Court stated that when Mr. Granger was injured on the job, he lost the ability to bank hours which is required for eligibility for health care benefits, finding that “here, Granger lost the capacity to earn the health care payments and thus this should be reflected in his time-loss compensation”. *Id.* The Court found that but for his injury, Mr. Granger would have been eligible to receive the health care benefits. The injury prevented Mr. Granger from working the requisite hours to qualify him for the benefits.

Like *Granger*, Mr. Miller lost the ability to complete the orientation period that was required of him for eligibility for health care benefits. In both cases, there is an issue of eligibility, however *Granger* clearly establishes that eligibility for health care benefits at the time of injury is not dispositive on the issue of inclusion in the wage order. The Department focuses squarely on the fact that the in that particular case, the court was persuaded by Mr. Granger’s argument that he was receiving the benefit because his employer was making payments for those healthcare benefits into a trust. However, to draw the conclusion that the employer must be making some payment somewhere in order for the benefit to be considered received under the statute improperly ignores the court’s greater objective of accounting for Mr. Granger’s lost earning capacity.

To adopt the Department's interpretation would favor injured workers like Granger with employers who pay into trusts until eligibility for health care benefits is established, over injured workers like Mr. Miller with employers who choose to have orientation periods. This result is unjust and unfair, and most certainly inconsistent with the underlying policy and purpose of the Act to protect injured workers and reduce economic hardship.

**C. Mr. Miller is Entitled to have Health Care Benefits Included in his Wage Order.**

Taking into account both case law and policy, the Board should include health care benefits as part of Mr. Miller's wage order.

First, Mr. Miller would have been eligible for the health care benefits but-for his injury, and therefore he should be entitled to them included in his wage order. As discussed in *Cockle* and *Granger*, the health care benefits have been determined to be a critical part of protecting workers' basic health and survival. Both the *Cockle* and the *Granger* Court saw the importance of health care benefits as part of the lost earning capacity of a worker, and have held firmly that it is not merely a determination of what the worker was receiving at the moment of injury, but what earning capacity was lost when the injury occurred.

As discussed above, the Court in *Granger* made it clear that eligibility for a certain benefit, such as health care benefits, at the time of the injury is not the deciding factor in whether the injured worker is to receive compensation for that benefit as part of the wage order. In this case, Mr. Miller was not eligible for health care benefits at the time of his injury, but it is clear that but-for his industrial injury he would have received the benefits from the company. This is evidenced by the fact that the company kept Mr. Miller on salary after his industrial injury. Mr. Miller continued to receive a salary from his employer for six months after the October 25, 2012 injury, well after his probationary period would have ended. This shows that the employer intended to keep him as part of the company, and invest in his future with the company.

Mr. Miller's eligibility at the time of injury should not be the determining factor in whether he receives compensation for the health care benefits. Like in *Granger*, Mr. Miller's injury prevented him from successfully completing the orientation period and receiving the health care benefits. Therefore, like in that case, his health care benefits should be included in his wage order.

Second, policy requires that the anticipated health care benefits should be included in his wage order. The Act requires that it be liberally construed in favor of the injured worker, and it should be interpreted to

minimize the suffering and economic loss that arises from injuries in the course of employment. RCW 51.12.010. Part of Mr. Miller's expectation when taking the job with Shope Concrete, and part of the benefit package that was part of his employment contract, was the health care benefits. Like in *Cockle*, the health care coverage was a substantial component of Mr. Miller's contract of hire compensation with Shope. These health care benefits are incredibly vital to the well-being of workers, and can oftentimes be the reason for a chosen employment. A promised benefit, which is part of the basis for employment with that chosen company, should not be allowed to be taken away simply because a worker was injured on the job. Here, Mr. Miller was promised health care benefits, and the promise of those benefits was a significant reason for his decision to work for Shope Concrete. That benefit should not be allowed to now be revoked or undone because he was not eligible for the benefits on the exact date of his injury. It is clear that the company intended to give him the benefits, as he was kept on salary long after his orientation period. It is also clear that Mr. Miller intended to remain with the company long after his orientation, as receiving these health care benefits was a critical part of his employment with the company. In order to reduce suffering and hardship to the injured worker, as the purpose of the Act demands, these sort of expected benefits should be part of the wage order. Both Mr.

Miller and Shope Concrete expected these benefits to be part of his compensation package, and they were a substantial component of his contract with the company.

To achieve the purpose and spirit of the Act, Mr. Miller's health care benefits should be included in his wage order.

#### V. CONCLUSION

Mr. Miller respectfully requests that the Court affirm the Superior Court's reversal of the Board's Decision and Order. The Superior Court properly found that under both case law and policy, Mr. Miller is entitled to have health care benefits included in his wage order, and its decision should therefore be upheld.

Mr. Miller further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 3<sup>rd</sup> day of June, 2016.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and  
ASSOCIATES

By: 

JENNA N. SAVAGE  
WSBA No. 48329  
Attorney for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

2016 JUN -3 PM 3: 54

CERTIFICATE OF MAILING STATE OF WASHINGTON

SIGNED at Tacoma, Washington.

BY  \_\_\_\_\_  
DEPUTY

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 3rd day of June, 2016, the document to which this certificate is attached, Respondent's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Defendant's counsel as follows:

Steve Vinyard  
Assistant Attorney General  
P.O. Box 40121  
Olympia, WA 98504-0121

DATED this 3<sup>rd</sup> day of June, 2016.

  
LYNN M. VENEGAS, Secretary