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NO. 55160-4-I

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

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

WILLIAM A. GRANGER,

Respondent.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. NATURE OF THE CASE.....1

II. ASSIGNMENTS OF ERROR1

III. STATEMENT OF THE ISSUE5

Was The Superior Court Correct When It Determined That The Calculation Of Mr. Granger’s Monthly Wage Must Include The Reasonable Cost Of Health Care Benefits, Because On The Date Of His April 20, 1995 Industrial Injury Mr. Granger Was Not Eligible For And Therefore Not “Receiving” Employer Paid Health Care Benefits Within The Meaning Of RCW 51.08.178?.....5

IV. STATEMENT OF THE CASE6

A. Procedural History Of The Case.....6

1. Department action6

2. Board proceedings.....6

3. Superior Court proceedings.....7

B. Factual Background8

V. RELEVANT RCW AND WAC TEXT.....9

VI. STANDARD OF REVIEW.....11

VII. SUMMARY OF ARGUMENT.....13

VIII. ARGUMENT16

A. The Plain Language Of RCW 51.08.178 Requires A Worker To Be Receiving Benefits At The Time Of An Industrial Injury In Order For Those Benefits To Be Included As Part Of Monthly Wages, And Mr. Granger

Was Not Receiving Health Care Benefits At The Time Of His Industrial Injury.....	16
B. The Department’s administrative rule at WAC 296-14- 526 makes clear that ineligibility to receive health care benefits at the time of injury precludes inclusion of a value for such benefits in “monthly wage” computation under RCW 51.08.178.	22
C. The Department’s WAC Rule Applies Here, And The Department, Not The Quasi-judicial Board, Is The Administrative Entity Whose Interpretation Is Entitled To Deference.	23
D. RCW 51.08.178’s “Receiving At The Time Of The Injury” Requirement Helps Achieve “Sure And Certain” Relief, A Goal Of RCW 51.04.010.....	29
E. Where There Is No Loss Of Wages Or Benefits Due To Injury, There Can Be No Wage-Loss <i>Replacement</i> Under RCW Title 51.....	30
IX. CONCLUSION	32

TABLE OF AUTHORITIES

Cases

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 16 P.3d 583
(2001)..... passim

Dep't of Ecology v. Gwinn, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002)..... 12

Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d
626 (1991)..... 24

Dolman v. Dep't of Labor & Indus., 105 Wn.2d 560, 566, 716 P.2d
852 (1986)..... 25

Doty v. Town of South Prairie, 122 Wn. App. 333, 341, 93 P.3d 956
(2004)..... 22

Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727
(1997)..... 17

Everett Concrete Prods., Inc. v. Dep't of Labor & Indus., 109 Wn.2d
819, 821, 748 P.2d 1112 (1988)..... 12

Flanigan v. Dep't of Labor & Indus., 65 Wn. App. 119, 121, 827
P.2d 1082 (1992), *affirmed* 123 Wn.2d 418, 869 P.2d 14 (1994) 24

Frazier v. Dep't of Labor & Indus., 101 Wn. App. 411, 418-20, 3
P.3d 221 (2000)..... 21

Gallo v. Dep't of Labor & Indus., 119 Wn. App. 49, 81 P.3d 869
(2003)..... 5, 17, 21, 28

Harris v. Dep't of Labor & Indus., 120 Wn.2d 461, 471-74, 843
P.2d 1056 (1993)..... 16, 20, 21

Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 41, 992 P.2d
1002 (2000)..... 12

In re Chester Brown, BIIA Dec., 88 1326, (1989) (1989 WL
164604)..... 19, 20

<i>In Re Douglas A. Jackson</i> , BIIA Dec., 99 21831 (2001) (2001 WL 1328473).....	18, 19, 20
<i>Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.</i> , 45 Wn.2d 745, 747-748, 277 P.2d 742 (1954)	25
<i>Littlejohn Constr. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 423, 873 P.2d 583 (1994).....	13
<i>Pittston Stevedoring Corporation v. Dellaventura</i> , 544 F.2d 35, 49 (2d Cir. 1976).....	26
<i>Port of Seattle v. Pollution Control Hr'gs Bd</i> , 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004).....	13, 25, 27
<i>Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs</i> , 449 U.S. 268, 279, n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980).....	26, 27
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 5, 977 P.2d 570 (1999).....	11
<i>Senate Republican Comm. v. Pub. Disclosure Comm'n</i> , 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).....	12
<i>South Bend Sch. Dist. 118 v. White</i> , 106 Wn. App. 309, 23 P.3d 546 (2001).....	30, 31
<i>State v. MacKenzie</i> , 114 Wn. App. 687, 699, 60 P.3d 607 (2002)	24
<i>State v. Stannard</i> , 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)	28
<i>Walmer v. Dep't of Labor & Indus.</i> , 78 Wn. App. 162, 167, 896 P.2d 95 (1994).....	18

Statutes

RCW 51.08.178	22
RCW 51	passim

RCW 51.04.010	29
RCW 51.08.018	10
RCW 51.08.178	passim
RCW 51.08.178 (1).....	4, 19
RCW 51.08.178(1).....	passim
RCW 51.08.178(2).....	18
RCW 51.08.178(3).....	18
RCW 51.12.010	12
RCW 51.32.050, .060, .090	10
RCW 51.32.090(6).....	31
RCW 51.32.090(7).....	10
RCW 51.32.225(1).....	20
RCW 51.52.140	11
RCW 51.52.160	18
RCW Title 51	1, 14, 30
WAC 296-14-520 through 296-14-530	22
WAC 296-14-520 through -530.....	11
WAC 296-14-522(1).....	10
WAC 296-14-526	passim
WAC 296-14-526(1).....	22, 23
WAC 297-14-526.....	2, 3

I. NATURE OF THE CASE

The Department of Labor and Industries (“Department”) appeals from a Superior Court order entered September 29, 2004, in a workers’ compensation case under RCW Title 51.

Under RCW 51.08.178, the “monthly wage” upon which a worker’s time loss compensation for an industrial injury is based includes only: (1) the cash wages that the worker was “*receiving at the time of the injury,*” plus (2) the value of certain core survival benefits, including health care benefits, that the worker was “*receiving at the time of the injury.*” See *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001). At issue in this case is whether the value of health care benefits should be included in “monthly wage” and derivative time loss calculation for Mr. Granger where he was **not receiving health care coverage at the time of his injury**, but his employer was making payments into a trust fund for his potential future benefit.

II. ASSIGNMENTS OF ERROR

The Department assigns error as follows to the Skagit County Superior Court’s September 29, 2004 Judgment, which includes Findings of Fact, Conclusions of Law, and an Order:

Assignment # 1. The trial court erred in its undesignated finding that adopts the findings of fact made by the Board of Industrial Insurance

Appeals to the extent that they state or imply that Mr. Granger was receiving health care benefits at the time of his injury and that such benefits were critical to protecting his basic health and survival per *Cockle*, when, in fact, Mr. Granger was not receiving nor eligible to receive benefits at the time of his injury.

Assignment # 2. The trial court erred in its undesignated finding that Mr. Granger's contract for hire included the amounts paid by the employer into the Northwest Laborer's Employer's Health and Security Trust Fund to the extent that it implies that Mr. Granger was receiving health care benefits at the time of his injury and that such benefits were critical to protecting his basic health and survival per *Cockle*, when, in fact, Mr. Granger was not receiving nor eligible to receive benefits at the time of his injury.

Assignment # 3. The trial court erred in its conclusion of law number 1 to the extent that it states or implies that WAC 297-14-526 does not apply or have the force of law, that WAC 297-14-526 contradicts or is inconsistent with *Cockle*, that the Department's interpretation [WAC 297-14-526] is not entitled to deference, or that Mr. Granger was receiving health care benefits at the time of his injury and that such benefits were critical to protecting his basic health and survival per *Cockle*, when, in fact, Mr. Granger was not receiving nor eligible to receive benefits at the time of his injury.

Assignment # 4. The trial court erred in its conclusion of law number 2 to the extent that it states or implies that WAC 297-14-526 does

not apply or have the force of law, that WAC 297-14-526 contradicts or is inconsistent with *Cockle*, that the Department's interpretation [WAC 297-14-526] is not entitled to deference, or that Mr. Granger was receiving health care benefits at the time of his injury and that such benefits were critical to protecting his basic health and survival per *Cockle*, when, in fact, Mr. Granger admittedly was not receiving nor eligible to receive benefits at the time of his injury.

Assignment # 5. The trial court erred in its conclusion of law number 3 in to the extent that it states “[a]mounts paid into union trust funds for health care benefits represent earning capacity for union workers regardless of whether the workers are eligible for the benefits provided by the fund” or that it implies that Mr. Granger lost health care benefits as a result of his injury and that those benefits were either reasonably identifiable or reasonably calculable, per the language contained in *Cockle*. Such benefits cannot be per se identified or calculated if they are not being received and if receipt is contingent upon several factors which have not yet occurred.

Assignment # 6. The trial court erred in its conclusion of law number 4, insofar as it states that “[t]ime loss compensation calculations under RCW 51.08.178 must include employer payments into health care funds under a union contract, even if the employee on whose behalf the payments were made is not entitled to health care coverage through his employment at the time of his industrial injury” or it implies that Mr.

Granger met the requirements of *Cockle* to include benefits he was admittedly not receiving nor eligible to receive at the time of his injury.

Assignment # 7. The trial court erred in its conclusion of law number 4 in stating or implying that employer payments (into health care funds under union contract, even if the employee on whose behalf the payments were made is not entitled to health care coverage through his employer at the time of industrial injury) constitutes “wages as set forth in RCW 51.08.178 (1) because they are of like nature to other nonmonetary forms of compensation listed in the statute, namely board, housing, and fuel.” RCW 51.08.178 (1) requires inclusion of health care benefits as part of a worker’s wages in a time loss compensation payment only when an employee is receiving benefits at the time of the injury, as time loss compensation is a benefit given to one to compensate one for wages lost during a time of temporary disability. If one is not receiving and is not eligible to receive a benefit, even where an employer is paying monies into a trust fund, that “benefit” is not part of what is considered “wages” under RCW 51.08.178 (1).

Assignment # 8. The trial court erred in its Order affirming the decision of the Board of Industrial Insurance Appeals, which required the Department to recalculate Mr. Granger’s time loss compensation benefits. The Department correctly calculated Mr. Granger’s time loss compensation benefits based upon his lost earning capacity and based upon the wages he was receiving at the time of his injury in April of 1995.

Assignment # 9. The trial court erred in its Order in awarding attorney fees because the Department, not Mr. Granger, should have prevailed.

III. STATEMENT OF THE ISSUE

Was The Superior Court Correct When It Determined That The Calculation Of Mr. Granger's Monthly Wage Must Include The Reasonable Cost Of Health Care Benefits, Because On The Date Of His April 20, 1995 Industrial Injury Mr. Granger Was Not Eligible For And Therefore Not "Receiving" Employer Paid Health Care Benefits Within The Meaning Of RCW 51.08.178?

Answer: No. The sole issue in this case is the proper calculation of Mr. Granger's time loss compensation benefits. Time-loss benefits are determined based upon the monthly wages a worker was "receiving" from all employment "at the time of the injury." RCW 51.08.178(1). At the time of his injury, Mr. Granger was not eligible and, therefore, not *receiving* health care benefits. Accordingly, even though health care coverage can qualify under the "monthly wage" computation at RCW 51.08.178 as "consideration of like nature" to "board, housing [and] fuel," per the interpretation of RCW 51.08.178 in *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001), and *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 81 P.3d 869 (2003), no such consideration is included in the "monthly wage" computation here because Mr. Granger was not actually receiving the coverage or in-kind benefits at the time of injury.

IV. STATEMENT OF THE CASE

A. Procedural History Of The Case

1. Department action

On April 20, 1995, Mr. Granger sustained an industrial injury in the course of his employment with G.G. Richardson, Inc. Clerk's Papers [CP] 19. He filed a claim for industrial insurance benefits, and the Department of Labor and Industries allowed his claim. CP 19, 22.

On July 9, 2002, the Department issued an order affirming an earlier order calculating Mr. Granger's "monthly wage" under RCW 51.08.178 based on total gross monthly wages of \$2,847.68, and determining that Mr. Granger was a full time worker, single with zero (0) dependents. CP 20. The Department's "monthly wage" computation did not include any health care benefits in Mr. Granger's wages. Specifically, it did not include a value for the employer's contribution of \$2.15 per hour to a health and welfare trust fund under the union contract. CP 22.

2. Board proceedings

Mr. Granger appealed the Department's July 9, 2002, order to the Board of Industrial Insurance Appeals (hereinafter "Board"), seeking to establish that the hourly contributions to the union health care fund were part of his "monthly wage," notwithstanding the fact that, at the time of injury, his health benefits under the health plan were not effective. CP 17.

The Board assigned Mr. Granger's appeal Docket No. 02 17611. CP 16.

At the Board, the parties submitted the case for decision based on stipulated facts. CP 18, 41-42, 84-86. The Board's Industrial Appeals Judge issued a Proposed Decision and Order, which affirmed the Department's order. CP 40-49. However, Mr. Granger petitioned for review by the full Board, which granted his request and issued a decision and order on January 14, 2004. CP 15-23. The three-member Board reversed the IAJ's Proposed Decision and Order, reversed the Department order and remanded the claim to the Department with directions to recalculate Mr. Granger's "monthly wage" and "to include the employer-paid contribution to Mr. Granger's union health care benefit in determining his wages . . ." CP 23.

3. Superior Court proceedings

The Department appealed the Board order to the Superior Court in Skagit County. CP 1-12. The parties presented the case to the Superior Court by non-jury bench trial. On August 20, 2004, the Superior Court issued a Memorandum Decision affirming the Board's January 14, 2004 order, and thus, reversing the July 9, 2003 Department wage order. CP 114-115. The Court determined that, under RCW 51.08.178, the Department must include any "monthly wage" and "other consideration of like nature" in the calculation, and that since "Mr. Granger's health care

coverage was a substantial component of his negotiated ‘contract for hire’”, the Board correctly determined that “the claimant’s wages must include the employer[-]paid contribution to Mr. Granger’s union health care benefits.” *Id.* On September 29, 2004, the Superior Court entered a Judgment with Findings, Conclusions and an Order, affirming the January 14, 2002, Board order. CP 116-131.

The Department timely appealed the Superior Court’s decision to this Court. CP 132-149.

B. Factual Background

There is no dispute that Mr. Granger was not actually receiving health care benefits as of August 20, 1995. CP 47. He “had coverage until March 31, 1995 when his coverage lapsed because he did not have enough hours worked.” *Id.*

According to his union contract, Mr. Granger’s eligibility for health care coverage:

is determined on the basis of an hour bank system. It is agreed that [Mr.] Granger had a minimum of 200 hours, which was required for initial eligibility. Once the minimum eligibility requirement is established, 120 hours will be deducted from the employee’s “bank” for each month of coverage. This will provide coverage beginning the first day of the second month following each month in which 120 hours was deducted. An employee will continue to be covered as long as there are 120 hours or more in the “bank.” A maximum of nine consecutive months of prepaid continuous coverage (1,080 hours) can be accumulated.

Id.

Mr. Granger's industrial injury while in the employ of G.G. Richardson, Inc., occurred on August 20, 1995, when he had only 64 hours in the "hour bank" and did *not* have eligibility for health care coverage. *Id.*

On July 9, 2002, the Department issued an order calculating Mr. Granger's "monthly wage" under RCW 51.08.178 based on total gross monthly wages of \$2,847.68, and determining that he was a full time worker, single with zero (0) dependents. *Id.* The "monthly wage" order did not include any value for employer-paid health care benefits when calculating Mr. Granger's monthly wages, based on *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d at 822-23, because he was not *receiving* those benefits at the time of the industrial injury, nor was he eligible to receive health benefits at any time in the month of April, 1995. *Id.* Having not "lost" any health care benefits due to injury, there was nothing to replace. Benefits that are not received or actually available to the worker at the time of the industrial injury cannot be considered in the calculation of a worker's monthly wages under RCW 51.08.178.

V. RELEVANT RCW AND WAC TEXT

RCW 51.08.178 controls the computation of the "*monthly wages* the worker was receiving from all employment *at the time of injury.*" This

determination of “monthly wages” being received at time of injury generally controls the industrial insurance compensation rate for temporary total disability (time loss) and other wage-based compensation. *See* RCW 51.32.050, .060, .090.¹ Since 1971, for regularly employed workers on a fixed hourly wage such as Mr. Granger, “monthly wage” has been computed under the formula of RCW 51.08.178(1). *See* Laws of 1971, ch. 289, § 14. Days-per-week multipliers specified in the first unnumbered paragraph of subsection (1) are applied against the “daily wage” computed under the second unnumbered paragraph of subsection (1).

Two types of consideration make up “monthly wage” under RCW 51.08.178. First, the statute implicitly includes all “cash wages,” which the Department defines as “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.” WAC 296-14-522(1).

Second, in addition to cash wages, certain classes of benefits and other consideration are included, as follows:

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

¹ Rates are subject to caps tied to the “state average wage” computed under RCW 51.08.018. *See, e.g.,* RCW 51.32.090(7). Mr. Granger is not seeking to be compensated at a rate greater than the cap.

RCW 51.08.178(1).

As to both types of consideration, cash wage and non-cash benefits and other consideration of like nature to board, housing and fuel, only that consideration that the worker “*was receiving at the time of the injury*” is included in “monthly wage.” RCW 51.08.178(1). At issue in this case is whether the contingent future benefits or expectancies at issue here qualify as the latter form of consideration and whether those contingent future benefits or expectancies are benefits Mr. Granger was “receiving at the time of the injury.”

WAC 296-14-526 is part of the Department’s package of “Cockle Rules” (WAC 296-14-520 through -530) adopted to interpret RCW 51.08.178 and implement the Supreme Court’s *Cockle* decision. WAC 296-14-526 explains in relation to the instant factual context, inter alia, that the “receiving at the time of the injury” requirement of RCW 51.08.178 is not met unless “[t]he worker was actually eligible to receive the benefits” at the time of the injury.

VI. STANDARD OF REVIEW

The standard of review in a workers’ compensation appeal from a superior court decision is the same as in other civil cases. RCW 51.52.140; *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This case poses a question of statutory interpretation, a

question of law reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

In determining the meaning of a statute, this Court looks first to the relevant statutory language. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). This Court gives words their plain and ordinary meaning unless a contrary intent is evidenced in the statute or related statutes. *Dep't of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). In the absence of clear language expressing legislative intent, this Court next looks to the underlying purpose of the provisions at issue. *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 41, 992 P.2d 1002 (2000).

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010. This rule of construction, however, does not authorize a court to construe unambiguous language or to render an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). Nor does the rule of liberal construction trump other rules of statutory construction. *Id.*

Department interpretations of the statutes it administers are entitled to great deference, and the courts "must accord substantial weight to the

[Department's] interpretation of the law" that the Department administers. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation). Where, as here, the Department's interpretation of a compensation statute conflicts with the Board's interpretation, it is the Department's interpretation, not the quasi-judicial Board's interpretation, that is entitled to deference. *See generally Port of Seattle v. Pollution Control Hr'gs Bd*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004); *see also* discussion *infra* Part VIII.D.

VII. SUMMARY OF ARGUMENT

At the time of his injury, Mr. Granger was not receiving health benefits nor was he eligible to receive health benefits. Necessarily, when the Department calculated Mr. Granger's time loss compensation rate pursuant to RCW 51.08.178(1), the Department appropriately did not include a value for health care benefits or any other benefits.

The plain language of RCW 51.08.178(1) states that the Department should include in a time loss compensation calculation those benefits that the worker was "*receiving at the time of injury.*" That language is not complex, ambiguous or difficult to understand. The Department must, in essence, take a snapshot of whatever benefits and wages the worker was receiving on the date of the injury and calculate a

time loss compensation rate. At the time of the industrial injury, Mr. Granger had not yet satisfied a condition precedent to receiving health care benefits.

In essence, Mr. Granger argues he is *entitled* to benefits because his employer was making payments into a union health care benefit fund at the time of the injury. CP 107-113. However, Mr. Granger's argument fails because he cannot show he sustained an actual loss of either wages or benefits that were due to him under for his work on the date of his injury, April 20, 1995. Time loss compensation payments are intended to serve as a substitute for actual lost wages during a period of temporary disability. Consequently, time loss compensation must reflect the wages and core survival benefits that the worker was actually receiving at the time of the injury. Just as important, only wages and core survival benefits that were actually lost can be part of wage-replacement compensation. If a worker was not, at the time of injury, receiving or otherwise deriving any real, actual or tangible value from a benefit, as in Mr. Granger's case concerning the contributions his employer made into the trust fund, there is no actual loss, and thus nothing for which there must be compensation or replacement under RCW Title 51.

Furthermore, the meaning of "receiving" is plain. One knows when he is in receipt of something – be that thing a benefit of employment

or other tangible possession. He may use it, spend it, save it, throw it away or do any number of things with it entirely at his will. When one is in receipt of something he actually takes delivery of it, he actually obtains it – he actually has control of over it. It means something to him to be in receipt of that thing. If one is not able to use a benefit, to spend it, to save it, to throw it away and has not taken delivery of it, and has absolutely and entirely no control over it whatsoever, he is not in receipt of that thing.

Under the plain meaning of the statute, Mr. Granger was not “receiving” the health care benefits at issue in this case when he incurred her industrial injury on August 20, 1995. Mr. Granger had no right to those benefits. He could not use them for their intended purpose. He had no control over them whatsoever. He simply had not received, was not receiving and was not eligible to receive health care benefits at the time of the industrial injury. Because Mr. Granger was not receiving health care benefits on August 20, 1995, the Department properly did not include the value of his employer’s contributions to the trust fund in his “monthly wage” computation under RCW 51.08.178 (or in his derivative time loss compensation rate). The Department wage calculation order of July 9, 2002, was correct and should be affirmed.

VIII. ARGUMENT

A. The Plain Language Of RCW 51.08.178 Requires A Worker To Be Receiving Benefits At The Time Of An Industrial Injury In Order For Those Benefits To Be Included As Part Of Monthly Wages, And Mr. Granger Was Not Receiving Health Care Benefits At The Time Of His Industrial Injury.

The plain meaning of statutory language controls where a word or phrase is unambiguous. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 471-74, 843 P.2d 1056 (1993).

The applicable statute in this case, RCW 51.08.178, plainly states:

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

[Emphasis added]

The statute is specific and unambiguous on the issue posed here. One must determine a worker's entitlement to cash wages and covered fringe benefits based upon what the worker was "receiving at the time of the injury." As noted *supra* Part IV.B., Mr. Granger concedes that "his coverage had lapsed as of the date of his injury, April 20, 1995." CP 47. In essence, Mr. Granger is arguing and the Board determined that he is entitled to benefits he was not receiving and was not eligible to receive on April 20, 1995. This argument does not harmonize with the seminal case

of *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001). *Cockle* involved the appropriate inclusion or exclusion of benefits in a time loss calculation, necessarily looked exclusively to RCW 51.08.178 in making its decision. The Court explicitly stated: “Time-loss and loss of earning power compensation rates are determined by reference to a worker’s ‘wages’ as that term is defined in RCW 51.08.178 at the time of the injury.” *Cockle*, 142 Wn.2d at 806. The Court in *Cockle* thus was as specific as the statute: time loss and loss of earning power compensation rates are based upon an employee’s wages “at the time of the injury.” *Id.*

The worker’s wages are not based on an arbitrarily set figure. Rather, they are based on the measure of the worker’s actual “lost earning capacity” set forth in RCW 51.08.178, with its “receiving at the time of the injury” requirement and its other limitations. *E.g.*, *Cockle*, 142 Wn.2d at 810; *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997); *see also Gallo*, 119 Wn. App. at 57. By definition then, monthly wages cannot include wages that the worker never had and, consequently, never lost. *Cockle*, 142 Wn.2d at 814-815.

Consideration that is to be received at some unknown time in the future is not included and is not within the scope of RCW 51.08.178. The indisputable policy choice of the Legislature is to take a snapshot of what

is actually being received at the time of injury in order to compute the monthly wage.² Accordingly, a benefit for which Mr. Granger was not eligible but for which, as of April 20, 1995, Mr. Granger may or may not achieve eligibility at some point in the future, must be excluded from the monthly wage computation under RCW 51.08.178.

Although it is the interpretation of the Department that is due deference here (*see infra* Part VIII.C.), this Court may consider Board decisions for any persuasive value.³ To that end, the Board's decision in *In Re Douglas A. Jackson*, BIIA Dec., 99 21831 (2001) (2001 WL 1328473), may be helpful. In *Jackson*, the Board agreed with the Department's interpretation of RCW 51.08.178 and what is meant by the statute's specific language concerning wages and benefits the worker was "receiving at the time of the injury." In *Jackson*, the claimant was working part-time, four hours per day, five days per week at the time of

² In a few circumstances, the statute allows a look backward – to compute the value of some bonuses received in the previous 12 months (RCW 51.08.178(3)), or to average wages received in a past, representative 12-month period for certain classes of workers (RCW 51.08.178(2)); but the statute does not allow a worker to take into account what the worker might have been entitled to receive at some *future* time after the date of the injury.

³ Board decisions are not precedential but may be considered for any persuasive value. *Walmer v. Dep't of Labor & Indus.*, 78 Wn. App. 162, 167, 896 P.2d 95 (1994). All of the decisions discussed herein (with the exception of the Board's decision in the instant case) have been designated by the Board as "Significant Decision(s)." RCW 51.52.160 requires the Board to designate some of its decisions as "significant decisions," and to publish those decisions. Those Significant Decisions are accessible on the Internet at the Board's web page address at <http://www.wa.gov/biia/>. In addition, Board decisions, both those that have been designated as "significant" and those that have not been so designated, can be accessed on WESTLAW at WAWC-ADMIN.

the injury. He testified that he had planned to return to full-time employment, and requested that his time loss compensation rate be calculated as if he were working full-time.

In rejecting his argument based on the language of the statute, the Board stated:

Mr. Jackson has supplied no legal authority to support his argument that his time-loss compensation should be calculated as if this anticipated future change in his hours actually had occurred. RCW 51.08.178 (1) specifically states that the wages that are used to calculate time loss compensation are those that the worker was receiving 'at the time of the injury.'... We note that if anticipated changes of circumstances could be used to support a recalculation of wages to increase time-loss compensation, changes in circumstances such as layoffs, plant closures, etc., could be used to decrease those benefits.

Jackson, at 2.

The Board addressed a similar issue in *In re Chester Brown*, BIIA Dec., 88 1326, (1989) (1989 WL 164604). In *Brown*, the claimant alleged that if he could "prove he had the ability to earn more money than he was actually earning at the time of his injury, then that earning capacity, rather than his actual wage at the time of the injury, should be considered the basis for the calculation of loss of earning power benefits." *Brown*, at 2.

The Board found that a worker who anticipates a future increase in cash wages cannot, if the wage increase has not occurred at the time of

injury, demand inclusion of that anticipated wage or salary increase in the computation. *Brown*, at 2. The legislative scheme simply does not permit such evasion of the statutory computation formula of RCW 51.08.178. The money that would come with such an expected future wage increase is not money that the worker was “receiving at the time of the injury” within the meaning of RCW 51.08.178. *Id.*

Unfortunately, the Board did not follow the logic of its prior Significant Decisions in *Jackson* and *Brown* when deciding Mr. Granger's case. Under the reasoning of *Jackson* and *Brown*, a merely anticipated increase in future wages cannot be included in a time loss compensation calculation. Because the Court in *Cockle* treats health care benefits the same way as hourly monetary pay, then just as an anticipated increase in monetary pay would not be included in a time loss compensation calculation, an anticipated receipt of health care benefits cannot be included in a time loss compensation calculation if that benefit has not yet been realized at the time of the injury.

Aside from the *Jackson* and *Brown* cases at the Board level, there are no Washington cases that directly address the “receiving” question under RCW 51.08.178. However, this conclusion derives from the plain and unambiguous language of the statute. *Harris*, 120 Wn.2d at 471-74 (“receiving” under RCW 51.32.225(1) must be given its plain meaning,

i.e., to “take possession or delivery of;” liberal construction rule does not apply when interpreting the unambiguous term, “receiving”); *see also Frazier v. Dep’t of Labor & Indus.*, 101 Wn. App. 411, 418-20, 3 P.3d 221 (2000) (explaining the *Harris* Court’s interpretation of “receiving”). Because Mr. Granger was not “receiving” or eligible to receive health care or other benefits at the time of her injury, those contributions cannot be counted in his monthly wage computation under RCW 51.08.178.

The Court of Appeals, Division Three, recently held that contributions an employer was making to a CBA retirement trust fund at the time of injury are not included in “monthly wage” under RCW 51.08.178, either as cash wages or as benefits of like nature to board, housing and fuel. *Gallo v. Dep’t of Labor & Indus.*, 119 Wn. App. 49, 58-60, 81 P.3d 869 (2003), *petition for review granted*, 99 P.3d 895 (2004). *Gallo* held that such benefits cannot be included in the wage computation as consideration of like nature to board, housing and fuel because the CBA retirement plan contributions “are not immediately available” to the worker at the time of injury, a prerequisite for giving “wage” credit to fringe benefits under RCW 51.08.178. *Gallo*, 119 Wn. App. at 60. The same reasoning applies here – the contributions to the union health care fund were not “immediately available” to Mr. Granger at the time of injury and hence the value of the contributions cannot be included in his

wage calculation. *Id.*; see also *Doty v. Town of South Prairie*, 122 Wn. App. 333, 341, 93 P.3d 956 (2004).⁴

B. The Department’s administrative rule at WAC 296-14-526 makes clear that ineligibility to receive health care benefits at the time of injury precludes inclusion of a value for such benefits in “monthly wage” computation under RCW 51.08.178.

WAC 296-14-526(1) addresses the question of whether the value of “consideration of like nature” to board, housing and fuel (such as employer-provided health care benefits) is always included in determining a worker’s “monthly wage” computation under RCW 51.08.178.⁵ The answer under subsection (1) of section 526 of the WAC rule is that the value of such “like nature” consideration is not always included. The value of other consideration of like nature is included in the worker’s monthly wage under subsection (1) only where:

(a) The employer, through its full or partial payment, *provided the benefit to the worker at the time of the injury* or on the date of disease manifestation.

(b) The *worker received the benefit at the time of the injury* or on the date of disease manifestation.

This section is satisfied if, at the time of the injury or on the date of disease manifestation:

⁴ Employer-paid disability insurance premiums do not come within RCW 51.08.178 because they “are not immediately available” where the worker is not presently eligible, and they “are therefore not ‘critical’ to the worker’s ‘basic health and survival’ at the time of injury”.

⁵ See WAC 296-14-520 through 296-14-530, the Department’s “Cockle rules,” that were made a part of the record below. BR 21-24.

(i) The employer made payments to a union trust fund or other entity for the identified benefit; *and*

(ii) *The worker was actually eligible to receive the benefit.*

WAC 296-14-526 (Emphasis added).⁶

Mr. Granger does not meet the requirements of WAC 296-14-526(1) because, at the time of his industrial injury, he was not actually eligible to receive the health care benefits. This point is undisputed. *See* CP 41-42.

C. The Department's WAC Rule Applies Here, And The Department, Not The Quasi-judicial Board, Is The Administrative Entity Whose Interpretation Is Entitled To Deference.

The Department requests that this Court defer to its interpretation of RCW 51.08.178 under WAC 296-14-526. WAC 296-14-526 became effective on June 15, 2003. The Board determined that the rule is an

⁶ WAC 296-14-526(1) also includes the following example:

At the time of the worker's industrial injury, the employer paid two dollars and fifty cents for each hour worked by the employee to a union trust fund for medical insurance on behalf of the employee and her family. *If the employee was able to use the medical insurance at the time of her injury, the employer's monthly payment for this benefit is included in the worker's monthly wage, in accordance with (d) of this subsection.* This is true even where the worker's eligibility for this medical insurance is based primarily or solely on payments to the trust fund from past employers. (Emphasis added)

interpretive rule, but “does not have the force of law[, and] is in fact contrary to Cockle and its interpretation of RCW 51.08.178 because the WAC focuses on the conditions of eligibility as opposed to the payment of the benefit.” CP 18. The Superior Court agreed with the Board. CP 114-115, 116-131. However, while the Department agrees that the rule is interpretive, the Department disagrees with the contention that the rule does not have force of law or apply to this case.

Interpretive rules are retroactive if so intended, as here. *See State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002) (regardless of its effective date, a newly adopted agency rule, like a newly adopted statute, applies retroactively if: (1) the rule is clarifying, curative, or remedial; and (2) the intent of the promulgating agency is that the rule apply retroactively)

Mr. Granger will surely argue that the Board’s interpretation here deserves deference and the Department’s interpretation does not. *See CP 109-113*. He would have it exactly backwards.

As explained *infra* Part VIII.C., this Court should give great weight to the Department’s interpretation of the provisions of RCW 51. *Flanigan v. Dep’t of Labor & Indus.*, 65 Wn. App. 119, 121, 827 P.2d 1082 (1992), *affirmed* 123 Wn.2d 418, 869 P.2d 14 (1994); *Dep’t of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991) (deference is due the Department except where Department’s interpretation of the

compensation provisions of RCW 51 directly conflicts with the statute). The reason such deference should be given to the Department is that the Department is the exclusive, first-line, policy-making agency that the Legislature has tasked with administering the Industrial Insurance Act. *See generally Port of Seattle v. Pollution Control Hr'gs Bd*, 151 Wn.2d at 593-94; *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986).

Conversely, because the Board is a quasi-judicial review agency only, not a policy-making agency, its interpretations of Title 51 RCW should not be given judicial deference or at least should not be given the same deference as is given the Department's interpretations.⁷ *Port of Seattle*, 151 Wn.2d at 593-94; *see also Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 45 Wn.2d 745, 747-748, 277 P.2d 742 (1954) (explaining the difference between the Department's role and the Board's role which is strictly quasi-judicial).

⁷ The Department acknowledges that, on occasion, the Washington courts have suggested that deference is due the Board's interpretations of Title 51 RCW. However, the Department contends that analysis of the underlying reasons for this rule of construction, as set out above, reveals that such deference to the Board is inappropriate. Also note that such comments appear to have been made without any real consideration of the differing roles of the Department and the Board. *See, e.g., Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991) (suggesting deference to a Board interpretation, by citing as support *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d at 566 (1986), a decision in which the Supreme Court in fact deferred to the interpretation of the Department).

No reported Washington decision has yet spoken to the question of whether, when there is disagreement between the Department and the Board in interpretation of the compensation provisions of RCW 51, it is the Department, as first-line administrative agency, or the Board, as the quasi-judicial reviewing entity, to whom greater deference should be given. However, it is well-established federal doctrine that only the decisions of policy-making, regulatory agencies are entitled to special deference in statutory interpretation. See *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 279, n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980) (declaring that because the Benefits Review Board under the Federal Longshore Harbor Workers' Compensation Act (LHWCA) "is not a policy-making agency . . . its interpretation of the LHWCA thus is not entitled to any special deference from the courts"; *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (distinguishing between purely "umpiring" or quasi-judicial agencies, on the one hand, and "policy-making" agencies, on the other).

Because the Department is the state-agency equivalent of the "policy-making" agency, the Federal Office of Workers' Compensation Programs in the *Potomac* and *Pittston Stevedoring* cases, while the Board is the state-agency equivalent of the "umpiring," quasi-judicial agency in

Potomac (the Federal Benefits Review Board), it is the Department, not the Board, whose interpretation should be given greater deference here. Directly on point in this regard is the Washington Supreme Court's decision in the *Port of Seattle* case.

In *Port of Seattle*, the Supreme Court held that, because the Department of Ecology was the agency that the Legislature had entrusted with administration of the environmental standards, the Court must defer to the Department of Ecology in its interpretation of statutes and its regulations relating to such standards, not to the Pollution Control Hearings Board, the quasi-judicial review agency that reviews Department of Ecology decisions. *Port of Seattle*, 151 Wn.2d at 593-94. Similarly here, this Court should defer to the Department's interpretation of RCW 51.08.178 and WAC 296-14-526, not to the Board's interpretation.

Here, the Board declared that Mr. Granger's circumstance comes within RCW 51.08.178 because inclusion turns "on the *receipt of the monetary benefit* for coverage, not the realization of the coverage itself." CP 19 (Emphasis added). The Superior Court and the Board simply failed to grasp the difference between money wages and fringe benefits, as well as failing to grasp that "receiving at the time of the injury" requirement of RCW 51.08.178 has a contextual meaning where in-kind benefits are involved. Health benefits and other in-kind benefits are not a "monetary

benefit” and an employer’s contribution to pay for such benefits is not a “monetary benefit.” *See Gallo*, 119 Wn. App. at 58-59. And, where non-monetary benefits are involved, such as here, the statutory test for inclusion of in-kind benefits, including the “receiving at the time of the injury” test, must be met. *Id.*

Another defect in the interpretation by the Board and Superior Court focusing on the condition, as opposed to the realization of the coverage, is that their approach fails to take into account that the union contract caps the number of hours that can be banked. A worker can accumulate only 1080 hours in the health benefits hours-bank. CP 21, 89. Presumably where a worker is at the cap, the employer does not make any contributions. Thus, if a worker is injured at a point when the worker is at the cap, there will be no current employer contribution and hence the value of the health benefits coverage will not be included in “monthly wage” computation under the Board and Superior Court approach.

This is a strained result. Strained results are to be avoided in statutory interpretation. *See generally State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). The strained result under the interpretation of the Board and Superior Court is avoided under the Department’s statutory-text based interpretation of RCW 51.08.178 (“receiving at the time of the injury”).

Money was paid *to* a health care benefit fund but Mr. Granger was admittedly not receiving that money at the time of his injury, nor was he receiving the health care benefits. Accordingly, the contributions to the fund cannot be included under RCW 51.08.178.

D. RCW 51.08.178's "Receiving At The Time Of The Injury" Requirement Helps Achieve "Sure And Certain" Relief, A Goal Of RCW 51.04.010.

The law on this issue is unambiguous. One calculates time-loss and other wage-loss benefits based upon the "monthly wages" the employee was receiving at the time of the injury. RCW 51.08.178. WAC 296-14-526 is on point, specifically stating that a worker is entitled to the value of what an employer pays into a trust fund only if the worker is actually presently eligible the value of that benefit.

The language of RCW 51.08.178 is set forth clearly to avoid scenarios such as this one where a worker or employer or the Department might seek to argue for inclusion based on generalities about the underlying purpose of RCW 51. It is necessary to have a uniform, fair, prompt, sure and certain application of the law, which requires a clear and principled standard. *See generally* RCW 51.04.010 (goal of the IIA to provide "sure and certain" relief to workers).

The "receiving at the time of the injury" standard is there for the same reason that there exist effective dates of legislation, start and end

dates for contracts, and statutes of limitation. It is necessary to set a point at which the rights and responsibilities of individuals become fixed in order to bring certainty into what would otherwise be chaos and conflicting claims. Public policy dictates that it be so. “Receiving” must mean having a current right to the employer-funded health benefits at the time of injury or manifestation of an occupational disease.

E. Where There Is No Loss Of Wages Or Benefits Due To Injury, There Can Be No Wage-Loss Replacement Under RCW Title 51.

Under RCW Title 51, when a worker is injured during the course of employment, he is eligible to receive time loss compensation as a temporary substitute for his *actual lost wages*. See, e.g., *Cockle*, 142 Wn.2d at 815 n.6. Time loss compensation is paid due to the fact that the worker is temporarily disabled and unable to earn wages. Time loss compensation benefits should proportionally reflect a worker’s wages as received at the time of the injury, as per RCW 51.08.178(1). *South Bend Sch. Dist. 118 v. White*, 106 Wn. App. 309, 23 P.3d 546 (2001). Moreover, time loss compensation logically must proportionally reflect that which the worker was *actually receiving*, and thus, *actually lost*, as a result of the industrial injury and period of temporary disability.

In discussing the nature and purpose of time loss compensation benefits, the Court in *South Bend School District 118* states:

[T]he basic purpose of temporary disability compensation is to replace the money a worker loses by reason of temporary inability to work due to an industrial injury. However, where a worker receives his normal salary from his employer in spite of his inability to work, he has not lost anything financially and there is nothing to replace, and the basic purpose of temporary disability compensation is not met.

South Bend Sch. Dist. 118, 106 Wn. App. at 316.

Although this case is obviously factually different,⁸ the logic and reasoning behind the Court's position in *South Bend School District 118* is sound and applicable in this instance. Considering the basic premise and purpose of time loss compensation payments, i.e., as a replacement or substitute for lost wages, one must have *actually sustained a financial loss of wages or benefits* in order to receive compensation for loss of health care benefits in one's time loss compensation calculation.

Here, it is undisputed that Mr. Granger did not receive health care benefits as employer-provided consideration at the time of his industrial injury. CP 18. Additionally, health care benefits were not in effect, nor was he entitled to receive health care benefits at the time of his industrial injury. CP 17, 50. He cannot dispute that the payments made by his employer into the union trust fund at the time of his injury had no actual or

⁸ At issue in *South Bend School District 118* was whether (1) ordinary sick leave or (2) shared sick leave constituted wage-continuation for purposes of RCW 51.32.090(6). Division Two held that the former constituted wage continuation and that the latter did not. *Id.* at 313-21.

practical value to him, as he could not use these monies to see any health care practitioner or for any purpose whatsoever. If he went to see a doctor in April of 1995, he had to pay for the visit himself.

Therefore, when Mr. Granger became temporarily disabled and unable to work, he *suffered no financial loss concerning health care benefits*, as, at the time of injury, he was not receiving them and receiving no actual value from the payments his employer made into the union trust fund. Succinctly stated, there is nothing to replace. If there is nothing to replace, there is nothing for which Mr. Granger must be compensated.

Moreover, if the Department is required to include health care benefits in his time loss compensation rate, he is being overcompensated for his temporary disability, as the Department is being required to do more than replace or compensate for the financial loss sustained resulting from a temporary disability. Ultimately, and presumably in situations and cases yet to come, this financial burden falls squarely upon employers required to pay premiums to the Department and on self-insured employers, most of whom will pass part of that burden on to the public eventually.

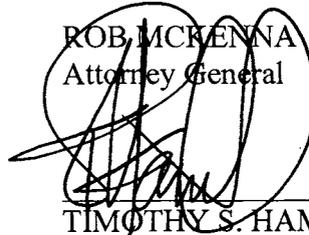
IX. CONCLUSION

Accordingly, the Department respectfully requests that this Court reverse the order entered by the Skagit County Superior Court on

September 29, 2004 (which affirmed the Board's order dated January 14, 2002) and, thereby affirm the Department's July 9, 2002 wage order.

RESPECTFULLY SUBMITTED this 8th day of March, 2005.

ROB. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Timothy S. Hamill", is written over a horizontal line. The signature is somewhat stylized and overlaps the text below it.

TIMOTHY S. HAMILL, WSBA #24643
Assistant Attorney General