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**COURT OF APPEALS FOR DIVISION I**

**STATE OF WASHINGTON**

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DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

WILLIAM A. GRANGER,

Respondent.

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

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## I. SUMMARY OF DEPARTMENT'S REPLY BRIEF

The Argument portion of Mr. Granger's Respondent's Brief (RB) is largely dedicated to a new theory he admittedly raises for the first time in this Court. *See* RB 8, fn 23,<sup>1</sup> 13-39. At the Board, Mr. Granger in effect conceded that employers who provide health benefits through contributions to a collective bargaining agreement (CBA) trust fund are providing health benefits, not direct money wages. CP 29-36. Until now, Mr. Granger's ground for relief has always been his theory that workers contingently earning credits toward possible future eligibility for health benefits need not be eligible for health benefits at the time of the injury to be deemed as receiving health benefits at the time of injury. CP 27-31, 107-113.

The new theory Mr. Granger advances to this Court stands in stark contrast to his theory at the Board and in superior court. He now argues that his employer's contributions to his CBA health benefit trust fund (and contributions to any other CBA trust funds to him and to all other union workers) did not constitute and would never constitute the providing of fringe benefits for purposes of RCW 51.08.178. Instead, Mr. Granger now

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<sup>1</sup> "The court will observe that this theory was not articulated below, and differs from the ground on which the trial court decided the case."

claims his employer's contributions would always constitute direct "money wages" to the worker at the moment when the contributions were made. *See, e.g.*, RB 7 fn. 18, 8, 10-12, 17-25, 30, 37.

His fringe-benefits-are-really-cash-wages theory is a legal fiction intended to allow Mr. Granger in this case to evade RCW 51.08.178's "receiving at the time of the injury" requirement that he cannot meet if the CBA health benefits are treated as what they are, i.e., employer-provided health benefits. *See* discussion at AB 16-32. The legal fiction pursued here by Mr. Granger for the first time would also allow all union workers in all cases to transform all of their CBA fringe benefits into cash wages, and thus allow them to evade: (1) the requirement of RCW 51.08.178 that, in order to be included in "monthly wage," a class of fringe benefits must be "consideration of like nature" to "board, housing [and] fuel;" and (2) the exclusion of health benefits from "wage" consideration -- and hence the obtaining of a double recovery -- where the CBA trust fund continues to provide the benefits during disability periods (*see Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 814-154, 16 P.3d 583 (2001) (double recovery not permitted)).

Because Mr. Granger failed to raise his fringe-benefits-are-really-cash-wages theory at the Board, he waived the right to argue the theory on court review of the Board's decision. *See generally* RCW 51.52.104.

Moreover, even if this Court were to address Mr. Granger's new theory, the identical theory has been persuasively rejected by Division Three of the Court of Appeals in *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 58-60, 81 P.3d 869 (2003), *review granted*, 152 Wn.2d 1011, 99 P.3d 89 (2004). In *Gallo*, the court recognized that "[i]n essence, the trust fund contributions are not a direct wage payment, but are separate contributions to fringe benefits indexed to the number of hours worked." *Id.* at 58. *Gallo* was correctly decided and should be followed here if this Court reaches Mr. Granger's new theory.

Finally, to the extent that one can parse Mr. Granger's brief to find argument purporting to support the completely different theory that he argued below, he fails to persuade. There is no merit to his fall-back, alternative argument that he was "receiving" health care benefits at the time of his injury. It is, after all, undisputed that "his coverage had lapsed as of the date of his injury", at which point, he had at most a contingent future expectancy of such coverage. CP 29-31. Therefore, the cash value of the employer's contributions to the CBA health care trust fund during Mr. Granger's periods of ineligibility are properly not included in his "monthly wage" under RCW 51.08.178. *See* AB 61-32.

**II. MR. GRANGER WAIVED THE RIGHT TO ARGUE HIS  
FRINGE-BENEFITS-ARE-REALY-CASH-WAGES  
THEORY BY NOT RAISING THIS THEORY AT THE  
BOARD**

As noted, Mr. Granger devotes almost the entirety of his Respondent's Brief to his new theory that CBA trust contributions for health benefits are somehow in fact "money wages" or, in other words, fringe-benefits-are-really-cash-wages. By failing to raise the argument at the Board, particularly after the Board's Industrial Appeals Judge entered a proposed order affirming the Department's decision, he waived the argument. *See* RCW 51.52.104 (in a petition for review from an IAJ's proposed decision, a party must expressly state the grounds for review); *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 711, n. 5, 57 P.3d 248 (2002) (failure to raise a theory in one's petition to the Board waives argument on the theory on judicial appeal); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (same); *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 782-83, 658 P.2d 27 (1983) (same); *Garrett Freightlines v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 346, 725 P.2d 463 (1986) (same).

Mr. Granger's Respondent's Brief completely ignores the dispositive waiver defect in his theory. He merely argues inappositely that he can raise a new theory in this court because he is seeking only

affirmance of the superior court decision. RB 7 fn. 18, 8-9 fn. 23 (citing RAP 2.5). However, RAP 2.5 does not override RCW 51.52.104. His fringe-benefits-are-really-cash-wages theory was forever abandoned when he failed to raise it at the Board.

Furthermore, the Department was prejudiced by Mr. Granger's delay in raising his new theory at the Board. The Department almost certainly would have made a different record had Mr. Granger raised this theory at the Board. The Department likely would have put the entirety of the CBA, as well as the trust agreement and the trust plans, into the record. These documents would have shown in several ways the strained nature of Mr. Granger's bold claim that *fringe benefits* are actually *money wages*. See further discussion of relevance of these documents to the fringe-benefits-are-really-cash-wages theory *infra* Part III.

Also, the Department likely would have put on a witness to speak for the employer to demonstrate that the employer bargained for a CBA package with a certain mix of non-taxable fringe benefits and taxable money wages, not for a single lump of money as Mr. Granger appears to conclusorily contend under his new theory. See, e.g., RB 7 fn. 18, 17-25.<sup>2</sup>

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<sup>2</sup> Mr. Granger also asserts at RB 17 that his employer had no influence over the makeup of benefits provided to workers under the CBA. This assertion is pure argument based on nothing in the record, and the assertion could have been refuted if the Department had had the opportunity to respond at the Board to Mr. Granger's money-wage theory. Employers bargain with unions for a mix of fringe benefits and money

Below, Mr. Granger chose at the Board to concede that CBA health benefits are not cash wages, and it is neither lawful nor fair for him to drastically change his theory at this late juncture.

**III. MR. GRANGER'S FRINGE-BENEFITS-ARE-REALY-CASH-WAGES THEORY IS WITHOUT MERIT**

Assuming for the sake of argument that Mr. Granger has not waived his fringe-benefits-are-really-cash-wages theory, it remains without merit. Health benefits and other fringe benefits provided under a CBA are not money wages or cash wages as contended by Mr. Granger. "Cash wages" are, in fact, defined by code 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).

**A. The Court of Appeals correctly rejected an identical fringe-benefits-are-really-cash-wages theory in *Gallo v. Department of Labor and Industries*.**

In *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 809-10, 16 P.3d 583 (2001), the Supreme Court rejected a non-union worker's lost-earning-capacity theory under which she urged that all consideration (including all forms of fringe benefits) under any employment contract constitutes "money wages" under RCW 51.08.178.

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wages in CBAs, thus guiding what will be included in the fringe benefits package. Furthermore, half of the trustees overseeing CBA trust plans are representatives of employers. *See generally* 29 U.S.C. § 186.

The union worker here, Mr. Granger, has a convoluted argument that repackages the all-consideration, all-money-wage theory rejected by the *Cockle* Court.

Mr. Granger argues that his employer's contributions to CBA fringe benefits trust funds are consideration for work, even when the contributions were made at times when he was not eligible for the benefits. *See, e.g.*, RB 7 fn. 18, 10-12, 17-25. He then argues for inclusion of this employment-related "consideration" from his employer, conclusorily asserting that, somehow, because the contributions were provided to a trust under a CBA, the contributions reflect his "earning capacity." *See, e.g.*, RB 17-25.

Mr. Granger then asks this Court to adopt a legal fiction under which employer contributions to CBA fringe benefits trust funds, even during periods when the worker has no right to benefits under the trust funds, are deemed "money wages." *Id.* As noted *supra* Part I, Division Three of the Court of Appeals rejected an identical money wages argument in *Gallo*, 119 Wn. App. at 58. This Court should reject Mr. Granger's argument for the same reason as the court in *Gallo*. Namely, under the CBA, health care benefits were not immediately available to Mr. Granger at the time of injury.

**B. In arguing that earning capacity that might be reflected in a CBA fringe benefit must be reflected in “monthly wage” computation under RCW 51.08.178, Mr. Granger is just re-packaging the “money wage,” all-consideration argument that was rejected in *Cockle*.**

In *Cockle*, the worker asked the Court of Appeals and the Supreme Court to ignore the statutory restriction on what fringe benefits may be included in RCW 51.08.178’s “monthly wage” formula. Ms. Cockle argued that a literal reading of the statutory limitation on such inclusion did not take into account that including all consideration -- all money wages and all fringe benefits -- better reflected a disabled worker’s lost earning capacity, and all consideration therefore should be deemed to be part of “money wage” under RCW 51.08.178. The Court of Appeals and the Supreme Court rejected this invitation to judicial legislation.

The Court of Appeals explained that Ms. Cockle’s lost-earning-capacity-based, all-consideration, all-money-wages legal fiction might make *economic* sense, but the theory did not make *legal* sense under the limited role of the courts to act judicially, not legislatively. *Cockle v. Dep’t of Labor & Indus.*, 96 Wn. App. 69, 77, 977 P.2d 668 (1999). The Court of Appeals explained that, because the Legislature had limited the inclusion of fringe benefits in “monthly wage” under RCW 51.08.178 to those types of benefits that are of “like nature” to “board, housing, [and] fuel”, values could be included in the “monthly wage” formula only for

“those items of in-kind consideration that a worker must replace while disabled.” *Id.*

The Supreme Court agreed, explaining that the Legislature intended a “limited ejusdem generis construction” (i.e., “like-nature” analysis) where fringe benefits were at issue. 142 Wn.2d at 809-10, 821 (“the Court of Appeals correctly rejected the ‘any and all forms of consideration standard’”). The same all-consideration, all-money-wages legal fiction theory, re-packaged by a union worker trying in vain to distinguish CBA fringe benefits, was again rejected in *Gallo*, 119 Wn. App. at 58 (the “argument is . . . tantamount to the [all consideration] argument [rejected by the Supreme Court in *Cockle* in favor of a more narrow construction of RCW 51.08.178]”).

Like the worker in *Cockle*, Mr. Granger’s primary premise for his fringe-benefits-are-really-cash-wages argument is that there is an implied principle under RCW Title 51 that “monthly wage” computation must fully reflect all lost earning capacity. *See e.g.*, RB 17-24. From this *Cockle*-rejected premise, he argues that including in “monthly wage” all money that an employer pays to a CBA trust, regardless of whether the worker actually receives any benefit from the contribution, achieves a better reflection of lost earning capacity. *Id.* This Court should reject the

theory as did Division Three. *See Gallo*, 119 Wn. App. at 58 (*citing Cockle*, 142 Wn.2d at 821).

**C. Payment of fringe benefits through a middleman does not convert the fringe benefits to “cash wages.”**

Mr. Granger’s elusive fringe-benefits-are-really-money-wages theory (to the extent that it does not rely on mere labeling or on the *Cockle*-rejected lost-earning-capacity argument) seems to turn on the fact that the CBAs use middlemen, i.e., the trusts, to deliver fringe benefits. *See, e.g.*, RB 17-25. Mr. Granger’s argument apparently is that, because his employer sends cash to a middlemen-CBA-trust to purchase health benefits, the contributions were thereby somehow converted into direct *cash wages* to him personally. *Id.*

There is no support in RCW 51.08.178 for this argument, nor is there support in case law, in logic, or in common sense. *See Gallo*, 119 Wn. App. at 58-59. In addition, Mr. Granger’s middleman argument is refuted by *Cockle*, where the Supreme Court deemed health insurance to have been received from Ms. Cockle’s employer even though the employer made premium payments to a middleman third party, an insurance company, which actually provided the benefits. *Cockle*, 142 Wn.2d at 805-06.

An employer's payment to a middleman to negotiate with a third person to provide a specific fringe benefit to a worker is not a direct payment of cash to the worker. Mr. Granger offers no logical explanation or case authority to explain how a contrary conclusion could be justified. Indeed, the compensation portion of every wages-and-benefits package of every CBA that we have seen<sup>3</sup> belies such a characterization of "benefits" as cash wages. Thus, "wage" is used in the above-described narrow sense in CBAs, while "benefits" and "fringe benefits" are used as terms having discretely different meaning from "wage."<sup>4</sup> *See Gallo*, 119 Wn. App. at

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<sup>3</sup> Mr. Granger's CBA is not part of the record here because he did not pursue his "money wages" theory at the Board, and therefore the Department did not see any need to make the CBA a part of the record. *See* discussion *supra* Part II.

<sup>4</sup> Mr. Granger completely misses the point when he asserts (without citation to relevant supporting authority) that the CBA distinction between cash wages and fringe benefits either: 1) represents a conflict between the CBA and RCW 51; or 2) somehow might implicate RCW 51.04.060's bar to waiver of benefits. *See, e.g.*, RB 2. To the contrary, the courts *must* look to CBAs and trust plans to determining whether workers are being paid money wages or instead are being paid fringe benefits. *See Gallo*, 119 Wn. App. at 58. Would Mr. Granger tell the IRS not to look to the CBAs and trust plans to determine whether he was receiving taxable money wages as opposed to untaxable fringe benefits? The Department is not arguing that CBAs can override workers' compensation law. The Department *is* arguing that bona fide elements of CBAs and trust plans inform whether consideration is "money wages" or instead is "fringe benefits," just as employment contracts inform on other questions that arise in workers' compensation law. *See, e.g., Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 710, 54 P.3d 71 (2002) (bona fide leasing contract informed the answer to the question regarding possible employment relationship and workers' compensation coverage, and the pivotal contract was not a waiver of benefits under RCW 51.04.060). Moreover, where the CBAs and trust plans have been carefully structured for tax law, labor relations law, overtime-pay law, and other purposes to ensure that the "fringe benefits" do *not* have the character of "money wages," this fact informs whether fringe benefits have the character of "money wages" in the context of workers' compensation law. *See* discussion *infra* Part III.F..

58. Moreover, consistent with this characterization, the two categories are treated differently in CBA computation of overtime pay.<sup>5</sup>

Mr. Granger nonetheless appears to claim that, merely because his employer paid cash to a trust to provide health benefits, these payments (and the payments to all other CBA fringe benefits trusts) constitute “money wages,” and hence the payments come within the ordinary meaning of the discrete terms “wages” or “hourly wages” in RCW 51.08.178. RB 17-25. The argument ignores, inter alia, the realities of the CBA, and the argument also evades RCW 51.08.178, the *Cockle* decision, and basic guides to statutory construction.

Furthermore, the apparent rationale underlying Mr. Granger’s middleman-based “money wages” theory is not restricted to collective bargaining circumstances, and his theory thus produces strained, if not absurd, results. *See Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 799, 947 P.2d 727 (1997) (“This court will not construe statutes in a way that leads to unlikely, absurd, or strained results.”). Under his fringe-benefits-are-really-cash-wages theory, if, under an employment contract

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<sup>5</sup> While Mr. Granger’s tactical decision at the Board resulted in his CBA not becoming a part of the record (*see* discussion *supra* Part II), CBAs generally define “wage” for purposes of minimum wage and overtime statutes as “cash wage” or “money wage,” to the exclusion of any employer contributions for fringe benefits. This provision favoring the employer is consistent with RCW 49.46.130, which requires that overtime premium pay be based on such cash wage and does not require inclusion of fringe benefits in the base pay upon which overtime premium pay is based.

(whether collectively or individually bargained), one's employer pays cash to a middleman to contract with a third person to provide in-kind fringe benefits, the benefits are included in "monthly wage" even if clearly not of "like nature" to board, housing and fuel.

Assume that an employment contract provides workers with season's tickets to the games of a local sports team, seats at the symphony, or membership in a country club. If the employer's payments first go to a middleman, then, under Mr. Granger's theory, the payments would automatically be included in the RCW 51.08.178 computation as "money wages." On the other hand, if the employer cuts out the middleman and directly provides the in-kind benefits, then the employer's contribution would not be included in "monthly wage" because the benefits do not meet *Cockle's* "core survival" like-benefits test. Mr. Granger's middleman distinction thus exalts form over substance and produces absurd results. *See generally Sanchez*, 133 Wn.2d at 799.

In the end, there is no difference between an employer providing workers with insurance through the employer's: (1) direct payments to an insurance company; (2) self-funding and administering the fringe benefits; or (3) providing workers with insurance through payments to a middleman, such as a trust. *See Gallo*, 119 Wn. App. at 58-59.

**D. The fact that some workers on Prevailing Wage Act jobs have differing wage and benefits packages from each other is irrelevant to the issue posed here under RCW 51.08.178.**

In Mr. Granger's discussion of the Prevailing Wage Act,<sup>6</sup> he suggests that it is absurd to compute "monthly wages" for union and non-union workers differently if they are both entitled to the same aggregate value of compensation when working the same public works job.<sup>7</sup> He posits a situation where union and non-union workers are employed together on a "public works" project governed by the "Prevailing Wage Act" (RCW 39.12). *Id.*<sup>8</sup>

Like the rest of his fringe-benefits-are-really-cash-wages theory, this element of Mr. Granger's new argument should not be considered because there is no prior briefing and hence no prior Board or superior court analysis of this unformed theory. *See* RAP 10.3(a)(5). In addition, there is no evidence in the record to suggest how RCW 39.12 is applied in

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<sup>6</sup> RB 37-40.

<sup>7</sup> Mr. Granger's claim of absurdity based on the prevailing wage statute contains a false premise, in that nothing in RCW 39.12 would prevent non-union workers from asking for and receiving the same fringe benefits as union workers when employed on a public works job.

<sup>8</sup> While both his unformed theory and his hypothesized scenario are not clear, he is apparently hypothesizing a situation where, under RCW 39.12, union workers whose CBAs put them at or above the "prevailing wage" rate would not receive "wages" credit under RCW 51.08.178 for the combined value of "cash wages" plus "fringe benefits" provided under the CBA. For comparison purposes, he hypothesizes that some non-union workers on the PWA projects would not receive fringe benefits, e.g., perhaps choosing to receive all cash, and would thus receive higher "wages" credit under RCW 51.08.178 than would the union workers.

any factual context, and he cites no authority to suggest that there is any relevance to his hypothetical scenario. *Id.*

Moreover, let us assume that the Court entertains Mr. Granger's apparent assumption that, in *select* limited circumstances, *select* non-union workers on *select* "public works" projects would receive hourly wages all in cash, while some union workers on the same projects would receive lesser money wages along with their employers' contributions to fringe benefits. The resulting differential wage calculations under RCW 51.08.178 would simply reflect the clear legislative policy choice that distinguishes between money wages and fringe benefits. Only the union workers would actually be receiving fringe benefits.

If union workers question the public policy justification for this statutory scheme, the arena for seeking change is the Legislature. If and when such overtures are made to the Legislature, however, one wonders how a Labor spokesperson would explain why it is "fair" to conflate "money wages" and "fringe benefits" only for *union* workers, thus favoring *union* workers greatly over non-union workers in the vast majority of wage-computation circumstances. Perhaps the same Labor spokesperson would also be asked to explain why it is "fair" under the I.R.C. to tax the non-union worker's "money wages" but not the union worker's "fringe benefits."

In the end, whether one is comparing workers on the same job or workers on different jobs (and regardless of whether one is comparing union workers and non-union workers or comparing union workers against each other across the spectrum of unions), there is in fact no absurdity in applying the distinction of RCW 51.08.178 between different categories of consideration (cash wages vs. fringe benefits of various types). Fringe benefits are not money wages under RCW 51.08.178. The Legislature made a choice, distinguishing between the two categories of consideration. Computation must adhere to that careful choice. Only if non-cash compensation meets the *Cockle* test can it be included in “monthly wage” computation. *Gallo*, 119 Wn. App. at 59.

**E. Mr. Granger’s “plain meaning” argument in support of his fringe-benefits-are-really-cash-wages legal fiction is unsupported and would render superfluous the distinction between “wages” and “benefits” in many Washington statutes.**

Mr. Granger asserts conclusorily throughout his Respondent’s Brief that the phrase “hourly wage” is not ambiguous, and that the dictionary meaning of the phrase includes fringe benefits when provided under a CBA. *See, e.g.*, RB 8, 13-16. However, he does not set forth any dictionary definitions to support his claim. The vast majority of dictionary definitions (and certainly ordinary usage) do not support the claim. For instance, *Webster’s New 20<sup>th</sup> Century Dictionary Unabridged* (2d ed.

1979) defines “wage” at 2053 as “*money* paid to an employee for work done, and usually figured on an hourly, daily, or piecework basis: often distinguished from salary . . . .” (Emphasis added). The same dictionary defines “fringe benefit” at 734 as “a payment *other than wages or salary* made to an employee in the form of a pension, vacation, insurance, etc. . . . .” (Emphasis added).<sup>9</sup>

Moreover, his fringe-benefits-are-really-cash-wages theory conflating “wages” and “benefits” would render superfluous language in RCW 51.08.178 and in many Washington statutes using those terms in a manner that suggests their mutual exclusivity, or at least demonstrates that “wages” does not subsume “benefits.” In rejecting Ms. Cockle’s all-consideration argument positing that “hourly wage” (which *she* contended was ambiguous) included fringe benefits, the *Cockle* Court recognized that the discrete word, “wages,” viewed in isolation, is used in RCW 51.08.178

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<sup>9</sup> Similarly, *Random House Unabridged Dictionary* (2d ed. 1993) defines “wage” at 2136 as “*money* that is paid or received for work or services, as by the hour, day, or week . . . .” while defining “fringe benefit” at 769 as “any of various benefits, as free life or health insurance, paid holidays, a pension, etc., received by an employee *in addition to regular pay* . . . .” *The World Book Encyclopedia* (1986) Vol. L at 7, differentiates between “wages” and “fringe benefits” as discrete and mutually exclusive elements of labor contracts. *The American Heritage Dictionary* (2d College Ed.) defines “fringe benefit” at 535 (emphasis added) as “an employment benefit given *in addition to one’s wages*.” In addition, legal encyclopedias also differentiate between “wages” and “fringe benefits” as discrete and mutually exclusive categories of consideration for work. *See, e.g.*, 48 Am. Jur. 2d “Labor and Labor Relations” (separately addressing in the labor relations context “wages [and hours]” (*Id.* §§ 3166-3168) and “benefits,” including in the latter term such fringe benefits as health, life and accident insurance, as well as pension plans, vacation and holiday benefits (*Id.* §§ 3170-3173)).

in a sense that is not inclusive of all fringe benefits. *Cockle*, 142 Wn.2d at 810.

Similar restrictive use of the isolated word, "wages," is found in references to "wages" in other RCW 51 statutes, as well as in other statutes outside of RCW 51. For example, RCW 51.32.055(7) and (9) allow self-insured employers to close their own claims, but only where the employers return workers to jobs that have "comparable *wages and benefits*" to those held at the time of injury. If the discrete term "wages" in RCW 51 includes "benefits," it would be redundant for the Legislature to expressly refer to both "wages" and "benefits" in RCW 51.32.055. *See generally Allstate Insur. Co. v. Peasley*, 131 Wn.2d 420, 431, 932 P.2d 1244 (1997) (redundancies are avoided in statutory construction).

Furthermore, Mr. Granger's theory that CBA "fringe benefits" are actually "money wages" would render superfluous the reference to "benefits" or "fringe benefits" in such statutes as RCW 49.66.110(3) (Labor Regulations). That statute provides that, in settling certain labor disputes, arbitrators shall consider the "overall compensation of employees having regard not only to wages . . . but also . . . for all fringe benefits received." *Id.* Under the workers' cash-wages theory, all fringe benefits would constitute money wages under all labor agreements. Hence, there would be no need to expressly reference both "wages" and "benefits" in such

statutes. Mr. Granger's fringe-benefits-are-really-cash-wages theory thus contradicts the fundamental statutory construction principle that the Legislature is presumed not to engage in meaningless acts. *Peasley*, 131 Wn.2d at 431.

**F. Mr. Granger's theory that fringe-benefits-are-really-cash-wages is inconsistent with the federal statutory schemes that drove the structuring of the CBA and trust plans in the first place.**

Mr. Granger's theory that all CBA benefits actually are "money wages" is inconsistent with the federal statutes that drove the structuring of the consideration elements of the CBA trust plans in the first place. It is a significant tax advantage to both employers and workers that benefits plans be "qualified" under federal income tax law -- employers can deduct contributions under 26 U.S.C. § 404, while workers are not charged with receipt of income when contributions are made, nor is corpus income immediately taxable. *See* Michael J. Canan, *Qualified Retirement Plans*, Chapter 13 ("Deductibility of Employer Contributions") (2004 ed.) ("Canan").

What drives these tax advantages is that employer contributions, by virtue of the trust scheme, are not cash transfers to the employees. *Id.* If Mr. Granger had raised his new wages theory at the Board, the Department almost certainly would have put on evidence to show that Mr.

Granger's employer and other employers were part of the process of bargaining for the specific composition of the wages and benefits package under the CBA.

CBA trust plans through which employers provide benefits to their workers must conform to the comprehensive and detailed requirements of the following federal laws: (1) labor laws<sup>10</sup>; (2) ERISA<sup>11</sup>; and (3) the Internal Revenue Code laws governing the income tax status of benefits provided through "qualified trusts" and "tax exempt trusts."<sup>12</sup> It is not reasonable or logical for Mr. Granger to argue that providing benefits under this carefully structured arrangement is a direct transfer of money wages from the employer to the worker for purposes of RCW 51.08.178.<sup>13</sup>

**G. Mr. Granger misplaces reliance for his new theory on Justice Marshall's dissent in the United States Supreme Court decision in the *Morrison-Knudsen* case.**

In an effort to support his fringe-benefits-are-really-cash-wages argument, Mr. Granger relies on language in a dissenting opinion by Justice Marshall in *Morrison-Knudsen Constr. Co. v. Director, OWCP*,

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<sup>10</sup> See, e.g., 29 U.S.C. § 186.

<sup>11</sup> See 29 U.S.C. § 1001 et. seq.

<sup>12</sup> See Canan, ch. 13.

<sup>13</sup> The Department is not arguing that tax treatment of certain benefits under the IRC determines the status of such benefits as "wages" under RCW 51.08.178; rather, the Department is arguing that the treatment of benefits as something other than "cash wages" under the IRC reflects their status as "benefits," not "cash wages," under both statutory schemes. Whether certain benefits are taxed under the IRC and whether certain benefits are of like nature to "board, housing [and] fuel" under RCW 51.08.178 is determined by the respective statutory schemes.

461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983). RB 21-22. He implies both that *Cockle* “adopted” Justice Marshall’s analysis, and that Marshall’s analysis supports Mr. Granger’s new theory. *Id.* Neither suggestion is correct. *Gallo*, 119 Wn. App. at 58-59.

*Morrison-Knudsen* was an 8-1 decision, with Justice Marshall as lone dissenter. Marshall took issue with the majority’s decision rejecting inclusion of CBA benefits as “wages” under a federal statute that closely paralleled the Washington wage statute. The *Cockle* majority rejected the ejusdem generis, like-benefits analysis of the *Morrison-Knudsen* majority as applied to health benefits. The *Cockle* majority did not, however, adopt the all-consideration, all-money-wages views suggested in the most sweeping part of Marshall’s dissent. Instead, the *Cockle* majority engaged in careful ejusdem generis analysis and issued a statutory-text-based holding that stands in stark contrast to many of the broad-brush passages in Marshall’s dissent.

Like some other dissenting opinions, Marshall’s dissent in *Morrison-Knudsen* includes sweeping public policy discussion that likely would have been limited had his view won the day, and had he been

writing a majority opinion to be signed by at least four other justices.<sup>14</sup> Thus, his dissent begins with some very broad policy statements not tied in any way to the statutory text at issue in the case. *See* 461 U.S. at 638-40.

The *Cockle* majority opinion provides an excerpt from this part of Justice Marshall's *Morrison-Knudsen* dissent, but, contrary to the suggestion by Mr. Granger, the *Cockle* majority did so to frame the competing policy issues with which it was wrestling, not to adopt the views. Nothing in the *Cockle* majority opinion indicates that the Supreme Court "adopted" Justice Marshall's broadly stated views in this regard. As we have shown *supra* Part III.B., the *Cockle* Court in fact rejected Ms. Cockle's all-consideration, all-money-wage argument. 142 Wn.2d at 809-10, 822.

Thus, the *Cockle* Court not only failed to adopt Justice Marshall's broadly stated all-consideration theory, but the Court in fact rejected that theory. *Id.* Indeed, the only part of Justice Marshall's dissent that the *Cockle* majority expressly adopted was his point that employer-cost (as opposed to market value) is the appropriate basis for determining the value of any included employer-funded benefits. *Cockle*, 142 Wn.2d at 820-21.

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<sup>14</sup> *See, e.g.*, Robert Post, *The Supreme Court Opinion As Institutional Practice: Dissent, Legal Scholarship, And Decision-making In The Taft Court*, 85 Minn. L. Rev. 1267, 1384, n. 255 (2001) (quoting Justice Holmes' view that dissenters have freedom to articulate "some proposition broader than it is wise to attempt except in a dissent").

Mr. Granger is also off the mark in suggesting that Justice Marshall's dissent supports his claim that, because his employer uses cash to make contributions to trust funds, this somehow makes the purchased fringe benefits somehow "money wages." See RB 21-22. In the statutory-text-based part of the analysis, the Marshall dissent expressly characterizes contributions to health and welfare trust funds as "non-cash . . . fringe benefits" that are "functionally equivalent" under like-benefits analysis to an employer's direct providing of non-cash benefits of "board, rent, housing [and] lodging" under the federal statute at issue there. *Morrison-Knudsen*, 461 U.S. at 641-42 (Marshall's dissent). Hence, contrary to Mr. Granger's claim that Justice Marshall's dissent supports his new theory, the dissent actually asserts that the union workers choose collectively to forgo "cash payments" in exchange for "fringe benefits." 461 U.S. at 641; see discussion in *Cockle*, 142 Wn.2d at 817-19. See also *Hilyer v. Morrison-Knudsen Constr. Co.*, 670 F.2d 208, 211 (D.C. Cir. 1981) (The D.C. Circuit Court opinion in *Morrison-Knudsen* explained that trust funds are the "means by which a company provides life insurance, health insurance, retirement benefits, and career training for its [union] employees.").

Thus, all nine members of the *Morrison-Knudsen* Court and all three members of the Circuit Court agreed that an employer's

contributions to trusts to pay for fringe benefits are not payments of “cash” wages, but instead are the providing of fringe benefits. Moreover, not one word in *Cockle* suggests that the Washington Supreme Court viewed the employer-provided trust benefits addressed in *Morrison-Knudsen* as being cash wages and not fringe benefits. Indeed, in our research, we have not been able to find any authority from any jurisdiction that supports Mr. Granger’s money-wage argument to the contrary.

In summary, there is no support in *Cockle* or in the Marshall dissent from *Morrison-Knudsen* for Mr. Granger’s new theory. See *Gallo*, 119 Wn. App. at 58-59. Contributions for benefits do not come within RCW 51.08.178 unless they qualify under “consideration of like nature” to “board, housing [and] fuel.” Only if contributions to benefits trust funds from the employer support benefits that are of “like nature” to board, housing and fuel, *and only if the benefits are being received at the time of the injury*, can they be included under RCW 51.08.178.

#### **IV. MR. GRANGER WAS NOT RECEIVING HEALTH BENEFITS AT THE TIME OF HIS INJURY**

Mr. Granger has offered little argument beyond his new fringe-benefits-are-really-cash-wages theory to support the Board and superior court decisions. Parsing his brief and giving him every benefit of the doubt, however, it is conceivable that Respondent’s Brief can be

interpreted as alternatively attempting to defend the Board and superior court decisions on the rationale he argued below and on the rationale on which the decisions were in fact made. As the Department explained in its opening brief, that rationale is unsupportable.

Health benefits for which Mr. Granger was not eligible, and for which he may or may not ever achieve eligibility, do not meet the “receiving at the time of the injury” requirement of RCW 51.08.178. *See* AB 16-22.<sup>15</sup> Mr. Granger’s Respondent’s Brief seems to have five points of response: (1) that somehow, despite its clear “receiving at the time of the injury” requirement, section 178 is not explicit enough to exclude health benefits one is not receiving;<sup>16</sup> (2) the *Cockle* decision somehow supports inclusion of health benefits for which one is ineligible because the *Cockle* Court did not expressly address the specific terms of Ms. Cockle’s eligibility for benefits;<sup>17</sup> (3) the employer contributions to the trust fund, even though not being received by Mr. Granger in any form at the time of his injury, nonetheless reflect his earning capacity, which per se makes the value of the contributions part of his monthly wage under

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<sup>15</sup> Mr. Granger inexplicably asserts that: “What the Department really is arguing is that Mr. Granger’s employer gave him the equivalent of health insurance, but since on the injury date the Trust would have denied a health-care cost claim if he had submitted one, the \$2.15 an hour the employer was depositing to the Trust was not ‘wages’.” RB 16 (emphasis added). Mr. Granger misstates the Department’s argument which is that Mr. Granger had no health care coverage at the time of his injury. *See* AB 16-32.

<sup>16</sup> RB 12.

<sup>17</sup> RB 11, 17 fn. 42, 22-23.

RCW 51.08.178,<sup>18</sup> (4) that the Board was correct when it elusively and conclusorily declared in this case that the analysis “should turn on the receipt of the monetary benefits for coverage, not the realization of the coverage itself”;<sup>19</sup> and (5) it is administratively difficult to take into account health benefits eligibility of injured workers.<sup>20</sup>

These five points of apparent response by Mr. Granger are without merit. *First*, the “receiving at the time of the injury” requirement of the statute is explicit language that expressly precludes the inclusion of any in-kind benefits (like health benefits) that are not available to a worker for use at the time of injury. *See* AB 16-32. *Second*, the reason that the *Cockle* Court did not discuss the terms of Ms. Cockle’s insurance coverage is that she was covered at the time of her injury and she lost coverage during her disability period because she was reduced to part-time hours. *Cockle*, 142 Wn.2d at 814-15. If Ms. Cockle had been a part-time or probationary library employee at the time of her injury and therefore without health insurance coverage at the time of her injury, the Court certainly would not have ruled in her favor on speculation that she might be moved into a full-time position in the future or that she would stay employed long enough to qualify for health insurance.

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<sup>18</sup> RB12.

<sup>19</sup> RB 6.

<sup>20</sup> RB 33-35.

*Third*, as noted *supra* Part III.B., the mere fact that consideration for employment may arguably reflect earning capacity does not bring the consideration within section 178. *Fourth*, as the Department explained in its opening brief, the Board simply overlooked the “receiving at the time of the injury requirement” of section 178 when it declared that the “realization of . . . coverage” does not matter under section 178. *See* AB 16-32. Moreover, the Board’s assertion that “analysis should turn on the receipt of the monetary benefits for coverage,” if it means that the worker must be receiving either money or benefits at the time of injury, does not support its conclusion, as Mr. Granger had at most a contingent future expectancy of health benefits and was not actually “receiving” either monetary benefits or coverage. *Cf. Gallo*, 119 Wn. App. at 58-60.

*Fifth* and finally, Mr. Granger’s claims of administrative burdens are an exercise in both hyperbole and irrelevancy.<sup>21</sup> It is not difficult to determine whether, at the moment of injury, a worker was or was not eligible to use health insurance. Moreover, Mr. Granger’s invoking<sup>22</sup> of the Board’s concerns about possible “waiting periods, deductibles and a myriad of conditions placed on actual receipt of [health] benefits” (*see* CP

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<sup>21</sup> Mr. Granger attempts to argue the administrative-difficulty question based on several documents that are not in the Board record. *See* RB 32-33 (discussing documents he sets forth at A-18 through A-24 in the Appendix to his Respondent’s Brief). These documents do not support his argument, and, more importantly, evidence not in the record should not be considered. RAP 10.3(a)(4), (a)(5).

<sup>22</sup> RB 33-34.

18), does not advance his case, because all that matters is whether a worker had some form of health insurance coverage at the moment of injury.<sup>23</sup>

**V. WAC 296-14-526 APPLIES AND CORRECTLY  
INTERPRETS RCW 51.08.178**

In addition to attacking the Department's *Cockle* rules as being inapplicable in light of his new theory (*cf.* RB 24-25 to Part III of this Reply Brief *infra*), Mr. Granger argues that the Department's rules are inconsistent with RCW 51.08.178 and are also irrelevant because they were adopted after the date of Mr. Granger's injury. RB 25-31. For all of the reasons set forth above in this Reply Brief and in the Department's opening brief, Mr. Granger's attacks on the correctness of the rules should be rejected. As to his attacks on the "retroactivity" of the rules, Mr. Granger misreads the law regarding the retroactivity of interpretive rules that are being relied upon, as here, solely as persuasive authority regarding an administrative agency's interpretation of a statute that the agency administers. *See* AB 23-29.

As the Department explained in its opening brief, an interpretive rule is retroactive if it is intended to be so and is merely clarifying *or*

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<sup>23</sup> The Board did not explain what it meant by "waiting periods." If by this the Board meant the circumstances here, periods during which there is no coverage at all, then of course the value of the contributions clearly cannot be included. *See* AB 16-32. Beyond that, however, whether health insurance coverage exists is a simple-determined, all-or-nothing proposition.

curative or remedial. See *State v. MacKenzie*, 114 Wn. App. 687, 699, 60 P.3d 607 (2002). Mr. Granger's attack on the Department's argument appears to misread the disjunctive nature of the test under the case law. He incorrectly assumes that an interpretive rule is not retroactive unless it is clarifying *and* curative *and* remedial. See RB 27-28.

Perhaps a better way of explaining why interpretive rules (as opposed to legislative rules that would have the force of law) are to be considered as to pre-rule-adoption periods is that asserted by courts in some other jurisdictions. Those courts have explained that interpretive rules are by nature incapable of having retroactive effect because, by their *interpretive* nature, they merely reiterate what the Legislature has already said in a pre-existing statute. *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 422 (D.C. Cir. 1994); see also *Farmers Tel. Co. v. F.C.C.*, 184 F.3d 1241, 1249-50 (10th Cir. 1999) (holding that the question of retroactivity does not arise when an administrative rule is merely interpretive; recognizing that an agency rule is no more retroactive in its operations than is a judicial determination construing and applying a statute to a case at hand); see also *Amoco Production Co. v. New Mexico Taxation and Revenue Dept.*, 74 P.3d 96, 101 (N.M. App. Ct. 2003).

At bottom, this dispute over retroactivity may not be worth the energy that the parties are expending on it. The ultimate question of

statutory construction here is for this Court to decide. The Department asks only that its interpretation, which is reflected in its *Cockle* rules, and is also set forth in the briefing of this case, be given due deference by this Court.

**VI. WHERE THERE IS NO LOSS OF WAGES OR BENEFITS  
DUE TO INJURY, THERE CAN BE NO WAGE-LOSS  
REPLACEMENT UNDER RCW 51**

Mr. Granger makes two basic challenges to the Department's argument that "where there is no loss of wages or benefits due to injury, there can be no wage-loss replacement." AB 30-32. First, he appears to argue that, in interpreting RCW 51.08.178, one cannot reason by logical extension, by analogy, or by looking at the statute in context with other statutory provisions. *See* RB 35. This of course is an unsupportable attack. Second, Mr. Granger argues that his injury *did* cause him to lose the \$2.15 an hour that his employer was contributing to the CBA benefits trust. This conclusory assertion goes to the heart of the case and has already been thoroughly refuted in the Department's opening brief and throughout this brief.

**VII. MR. GRANGER'S ATTORNEY FEE REQUEST IS  
FLAWED**

The Department does not contest that, if Mr. Granger prevails in this Court, which he should not, then he will be entitled to reasonable

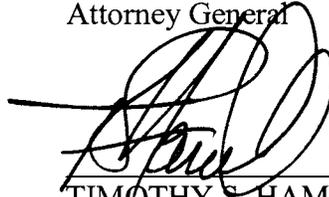
attorney fees under RCW 51.52.130. The Department wishes to clarify, however, that any attorney fee award would be under the fourth sentence of RCW 51.52.130, not the first sentence of RCW 51.52.130 quoted by Mr. Granger at RB 40. *See Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004), *review denied*, 152 Wn.2d 10322 (2004) (the fourth sentence of RCW 51.52.130 is the sole source of fee-awarding authority); *see also* Appendix A to this Reply Brief (annotated tracing of the historical development of the text of RCW 51.52.130 from its inception in 1911, including citations to more than 20 appellate court decisions spanning more than 90 years, all consistently grounded in the proposition that what is now the fourth sentence of RCW 51.52.130 is the sole source of authority for a court to award attorney fees against the Department).

### VIII. CONCLUSION

For the reasons stated above, and in the Department's opening brief, this Court should reverse the superior court and Board decisions, and this Court should remand this matter to superior court, directing that the Department's wage-computation order of July 9, 2002 be affirmed because Mr. Granger was, in fact, not receiving nor eligible for health care benefits at the time of his injury.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2005.

ROB MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Timothy S. Hamill", written over a horizontal line.

TIMOTHY S. HAMILL  
WSBA #24643  
Assistant Attorney General

**APPENDIX A**

**APPENDIX A**

**ANNOTATED TRACING OF DEVELOPMENT OF RCW 51.52.130; ALSO  
TRACING OF DEVELOPMENT OF RCW 51.52.120**

**RCW 51.52.130**

**1911 c 74 § 20, part:**

**Fee-fixing authority --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case,

**Fee-awarding authority --**

and, if the decision of the department shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation.

*See Boyd v. Pratt*, 72 Wash. 306, 308, 130 P. 371 (1913); *O'Brien v. Industrial Insur. Dep't*, 100 Wash. 674, 681, 171 P. 1018 (1918)

**1927 c 310 § 8, part:**

**Fee-fixing authority --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case,

**Fee-awarding authority --**

~~((and, if the decision of the department))~~ and if the decision of the joint board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident fund is affected by the litigation.

**1929 c 132 § 6, part:**

**Fee-fixing authority --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case,

**Fee-awarding authority --**

and if the decision of the joint board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the ((administration)) administrative fund, if the accident fund is affected by the litigation.

**1931 c 90 § 1, part:**

**Fee-fixing authority (no change) --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case,

**Fee-awarding authority (no change) --**

and if the decision of the joint board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund, if the accident fund is affected by the litigation.

*See Wintermute v. Dep't of Labor & Indus.*, 183 Wash. 169, 176, 48 P.2d 627 (1935); *Dessen v. Dep't of Labor & Indus.*, 190 Wash. 69, 75, 66 P.2d 867 (1937). These two decisions are discussed in *Bodine v. Dep't of Labor & Indus.*, 29 Wn.2d 879, 884-87, 190 P.2d 89 (1948).

**1943 c 280 § 1, part:**

**Fee-fixing authority --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the ((court)) Court in the case,

**Fee-awarding authority --**

and if the decision of the ((joint board)) Joint Board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund, if the accident fund is affected by the litigation.

*See Boeing Aircraft Co. v. Dep't of Labor & Indus.*, 26 Wn.2d 51, 58, 173 P.2d 164 (1946); *Bodine v. Dep't of Labor & Indus.*, 29 Wn.2d 879, 884-87, 190 P.2d 89 (1948)

**Prior: 1949 c 219 § 6, part:**

**Fee-fixing authority (no change) --**

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the Court in the case,

**Fee-awarding authority --**

and if the decision of the (~~Joint~~) Board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the Department, if the (~~accident fund~~) Accident Fund is affected by the litigation.

**1951 c 225 § 17 (Fee-fixing and fee-awarding authority placed in stand-alone section for the first time):**

**Fee-fixing authority –**

~~((It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to))~~ If, on appeal to the court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the court, a reasonable fee for the services of the workman's or beneficiary's attorney shall be fixed by the (~~Court~~) court (~~(in the case,))~~. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director of labor and industries and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director of labor and industries or by the board is inadequate for services performed before the department or board, or if the director of labor and industries or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

**Fee-awarding authority --**

~~((and if))~~ If the decision and order of the (~~Board shall be~~) board is reversed or modified (~~(; such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the Department,))~~ and if the (~~Accident Fund is affected by the litigation~~) accident fund is affected by the litigation then the attorney's fee fixed by the court for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

*See Harbor Plywood Corp. v. Dep't of Labor & Indus., 48 Wn.2d 553, 558-60, 295 P.2d 310 (1956); Trapp v. Dep't of Labor & Indus., 48 Wn.2d 560, 561, 295 P.2d 315 (1956); Borenstein v. Dep't of Labor & Indus., 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957)*

**1957 c 70 § 63 (Fee-fixing and fee-awarding authority section re-adopted without change):**

**Fee-fixing authority --**

If, on appeal to the court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the court, a reasonable fee for the services of the workman's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director of labor and industries and the

board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director of labor and industries or by the board is inadequate for services performed before the department or board, or if the director of labor and industries or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

**Fee-awarding authority --**

If the decision and order of the board is reversed or modified and if the accident fund is affected by the litigation then the attorney's fee fixed by the court for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

**1961 c 23 § 51.52.130:**

**Fee-fixing authority --**

If, on appeal to the court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the court, a reasonable fee for the services of the workman's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director (~~((of labor and industries))~~) and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director (~~((of labor and industries))~~) or by the board is inadequate for services performed before the department or board, or if the director (~~((of labor and industries))~~) or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

**Fee-awarding authority (no change) --**

If the decision and order of the board is reversed or modified and if the accident fund is affected by the litigation then the attorney's fee fixed by the court for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

**1977 ex. s. c 350 § 82:**

**Fee-fixing authority --**

If, on appeal to the court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a (~~((workman))~~) worker or beneficiary, or in cases where a party other than the (~~((workman))~~) worker or beneficiary is the appealing party and the (~~((workman's))~~) worker's or beneficiary's right to relief is sustained by the court, a

reasonable fee for the services of the ((workman's)) worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

**Fee-awarding authority (no change) --**

If the decision and order of the board is reversed or modified and if the accident fund is affected by the litigation then the attorney's fee fixed by the court for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

*See Maxwell v. Dep't of Labor & Indus.*, 25 Wn. App. 203, 204-210, 607 P.2d 310 (1980); *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742-44, 630 P.2d 441 (1981). The dispute in *Johnson* regarding lack of authority to award fees against self-insurers for court work of worker attorneys led to the 1982 amendment, set forth immediately below, adding a second sentence to the fee-awarding authority under the statute to authorize attorney fee awards against self-insured employers.

**1982 c 63 § 23:**

**Fee-fixing authority (no change) --**

If, on appeal to the court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained by the court, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

**Fee-awarding authority --**

If the decision and order of the board is reversed or modified and if the accident fund is affected by the litigation then the attorney's fee fixed by the court for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, if the decision and order of the board is reversed or modified resulting in additional benefits by the litigation that would be paid

from the accident fund if the employer were not self-insured, then the attorney fees fixed by the court for services before the court, only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

*See Simpson Timber Co. v. Smith*, 37 Wn. App. 796, 800, 682 P.2d 969 (1984); *Siegrist v. Dep't of Labor & Indus.*, 39 Wn. App. 500, 504, 694 P.2d 1110 (1985); *Spring v. Dep't of Labor & Indus.*, 39 Wn. App. 751, 757, 695 P.2d 612 (1985); *Rosales v. Dep't of Labor & Indus.*, 40 Wn. App. 712, 716, 700 P.2d 748 (1985); *Ziegler v. Dep't of Labor & Indus.*, 42 Wn. App. 39, 43-44, 708 P.2d 1212 (1985); *Carnation Co. v. Hill*, 54 Wn. App. 806, 812-13, 776 P.2d 158 (1989) *affirmed* 115 Wn.2d 184, 187-89, 796 P.2d 416 (1990).

### **1993 c 122 § 1:**

#### **Fee-fixing authority --**

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained (~~((by the court))~~), a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court.

#### **Fee-awarding authority --**

If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation (~~((then))~~), or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, (~~((if the decision and order of the board is reversed or modified resulting in additional benefits by the litigation that would be paid from the accident fund if the employer were not self-insured, then))~~) the attorney fees fixed by the court, for services before the court(;) only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

*See Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 421, 869 P.2d 14 (1994) (analysis may be under pre-1993 version of statute); *Jackson v. Harvey*, 72 Wn. App. 507, 521, 864 P.2d 975

(1994) (analysis clearly under 1993 amendments to statute); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889-91, 86 P.3d 1231 (2004) *review denied*, 152 Wn.2d 1032 (2004).

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**RCW 51.52.120**

**1947 c 246 § 3:**

It shall be unlawful for an attorney engaged in the representation of any claimant to charge for services in the Department or on hearing before the joint board, any fee in excess of a reasonable fee, of not less than 10% nor more than 35% of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the Director of Labor and Industries for services performed by an attorney for a claimant prior to application for a hearing before the joint board. Such reasonable fee for services performed by an attorney for a claimant before the joint board shall be fixed by the board taking into consideration the fee previously allowed by the director, and it may review upon such hearing the fee fixed by the director. It shall be unlawful for any attorney engaged by any claimant in representation before the Department or the joint board to charge or receive directly or indirectly any fee or expenses in excess of that fixed as herein provided.

*Bodine v. Dep't of Labor & Indus.*, 29 Wn.2d 879, 190 P.2d 89 (1948)

**1951 c 225 § 16:**

It shall be unlawful for an attorney engaged in the representation of any ((claimant)) workman or beneficiary to charge for services in the ((Department or on hearing before the joint board,)) department any fee in excess of a reasonable fee, of not less than ((10%)) ten per cent nor more than ((35%)) thirty-five per cent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the ((Director of Labor and Industries)) director of labor and industries for services performed by an attorney for ((a claimant prior to application for a hearing before the joint board)) such workman or beneficiary, prior to the notice of appeal to the board. ((Such reasonable fee for services performed by an attorney for a claimant before the joint board shall be fixed by the board taking into consideration the fee previously allowed by the director, and it may review upon such hearing the fee fixed by the director. It shall be unlawful for any attorney engaged by any claimant in representation before the Department or the joint board to charge or receive directly or indirectly any fee or expenses in excess of that fixed as herein provided.)) If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his attorney in proceedings before the board if written application therefor is made by the attorney. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director of labor and industries, for services before the department,

and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney.

**1961 c 23 § 51.52.120:**

It shall be unlawful for an attorney engaged in the representation of any workman or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not less than ten (~~per cent~~) percent nor more than thirty-five (~~per cent~~) percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director (~~of labor and industries~~) for services performed by an attorney for such workman or beneficiary, prior to the notice of appeal to the board. If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his attorney in proceedings before the board if written application therefor is made by the attorney. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director (~~of labor and industries~~), for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney.

**1965 ex.s. c 63 § 1:**

(1) It shall be unlawful for an attorney engaged in the representation of any workman or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not (~~less than ten percent nor~~) more than (~~thirty five~~) thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director for services performed by an attorney for such workman or beneficiary, prior to the notice of appeal to the board if written application therefor is made by the attorney, workman or beneficiary.

(2) If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his attorney in proceedings before the board if written application therefor is made by the attorney, workman or beneficiary. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board. Any person who violates any provision of this section shall be guilty of a misdemeanor.

**1977 ex.s. c 350 § 81:**

(1) It shall be unlawful for an attorney engaged in the representation of any ~~((workman))~~ worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director for services performed by an attorney for such ~~((workman))~~ worker or beneficiary, prior to the notice of appeal to the board if written application therefor is made by the attorney, ~~((workman))~~ worker or beneficiary.

(2) If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a ~~((workman))~~ worker or beneficiary, or in cases where a party other than the ~~((workman))~~ worker or beneficiary is the appealing party and the ~~((workman's))~~ worker's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his or her attorney in proceedings before the board if written application therefor is made by the attorney, ~~((workman))~~ worker or beneficiary. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board. Any person who violates any provision of this section shall be guilty of a misdemeanor.

**1982 c 63 § 22:**

(1) It shall be unlawful for an attorney engaged in the representation of any worker or beneficiary to charge for services in the department any fee in excess of a reasonable fee, of not more than thirty percent of the increase in the award secured by the attorney's services. Such reasonable fee shall be fixed by the director for services performed by an attorney for such worker or beneficiary, prior to the notice of appeal to the board if written application therefor is made by the attorney, worker or beneficiary.

(2) If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his or her attorney in proceedings before the board if written application therefor is made by the attorney, worker or beneficiary. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney, worker, or beneficiary. The department or self-insured employer, as the case may be, shall be served a copy of the application and shall be entitled to appear and take part in the proceedings. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board. Any person who violates any provision of this section shall be guilty of a misdemeanor.

**1990 c 15 § 1:**

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

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