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NO. 78139-7

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STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

WILLIAM A. GRANGER,

Respondent.

**REPLY TO ANSWER TO PETITION FOR DISCRETIONARY
REVIEW**

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I. ARGUMENT IN REPLY

The Petition for Review of the Department of Labor and Industries (Department) raised the following issue:

For purposes of RCW 51.08.178, must a worker be deemed to be “receiving [health care benefits] at the time of the injury” where his employer was making contributions into a health care trust fund at the time of his injury but the worker was **not** eligible for health care coverage at the time of injury and, even if he had not been injured, he might never have become eligible for such health care coverage?

Petition at 2.

The Department’s Petition argued, among other things, that Division One erred in ruling that WAC 296-14-526 is inconsistent with RCW 51.08.178. Petition 1, 16-18 (addressing slip op. at 6-7 - - a copy of the slip opinion is attached to this Reply Brief). Mr. Granger had argued in the Court of Appeals that WAC 296-14-526 (copy attached to this Reply Brief) became effective after the facts of the case arose and therefore should not be considered at all. *See* Corrected Brief of Respondent at 25-28. The Court of Appeals, however, addressed the merits of the WAC rule. *See* slip op. at 6-7. Therefore, one must infer that the Court of Appeals rejected Mr. Granger’s “retroactivity” challenge. Mr. Granger has raised his “retroactivity” issue again in his Answer in this

Court.¹ See Granger Answer at 5, 7-9. Pursuant to RAP 13.4(d), the Department files this Reply Brief to address the new issue in Mr. Granger's Answer.

In his attacks on the purportedly impermissible "retroactive" application of the Department's administrative rule, Mr. Granger misreads the law regarding the application 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. As the Department explained in its briefing to the Court of Appeals, an interpretive rule is retroactive if it is intended to be so and is merely clarifying *or* curative *or* remedial. See See AB 23-29; see generally *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 Granger Answer at 7; See also Granger Corrected Respondent's Brief at 27-28.

¹ Mr. Granger also discusses, as if they were precedent, two *unpublished* Division Three Court of Appeals' decisions. See Granger Answer at 1, 9. Those decisions reached similar results to Division One's result here, but, contrary to Mr. Granger's assertions in his Answer, under distinctly different analysis. In any event, this Court should not consider those decisions, of course, because they are unpublished. RAP 10.4(h).

As the Department explained in briefing below, 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. *See* Department Reply Brief at 28-30. The courts in other jurisdictions have explained that interpretive rules, while applying to pre-adoption periods, are by nature incapable of having retroactive effect because, by their *interpretive* nature, interpretive rules 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 that explains the meaning of an existing statute 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).

Thus, Mr. Granger is wrong when he contends that Division One should not have considered, and this Court should not consider, WAC 296-14-526. Perhaps more important to the question immediately at hand (whether the Department's Petition should be granted), he misleads when

he asserts that: (1) Division One's published decision in this case extends only to cases that arose before WAC 296-14-526 was adopted, and (2) for that reason the decision will not have broad or long-lasting effect. *See Granger Answer* at 8-9. As explained above, Division One implicitly rejected Mr. Granger's retroactivity argument and considered WAC 296-14-526 on its merits. Therefore, the precedential effect of the published *Granger* decision is that WAC 296-14-526 is incorrect in its interpretation of RCW 51.08.178 in the instant factual context, a factual context that recurs on a regular basis in Washington. This Court should grant review to address the broad and far-reaching decision of Division One.

The Department recognizes that the ultimate question of statutory construction here is for this Court to decide. The Department asks only that its interpretation, which is reflected in WAC 296-14-526, be considered by this Court and be given due deference.

II. CONCLUSION

For the reasons stated in the Department's Petition and in this Reply, the Department requests that this Court grant its Petition to address

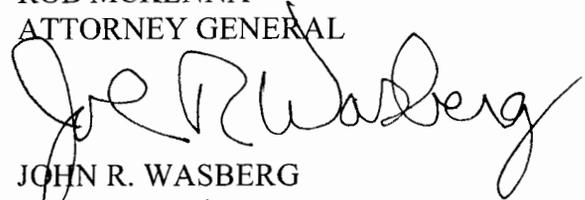
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whether WAC 296-14-526 correctly applies RCW 51.08.178.

RESPECTFULLY SUBMITTED this 23rd day of January, 2006.

ROB MCKENNA
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "John R. Wasberg". The signature is written in a cursive style with a large, looping initial "J".

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND)
INDUSTRIES OF THE STATE OF)
WASHINGTON,)
)
Appellant,)
)
vs.)
)
WILLIAM A. GRANGER,)
)
Respondent.)
_____)

DIVISION ONE
No. 55160-4-1

**ORDER GRANTING MOTION
TO PUBLISH OPINION**

The respondent, William A. Granger, having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed October 31, 2005, shall be published and printed in the Washington Appellate Reports.

Done this 21st day of November, 2005.

For the Court:



Judge

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STATE OF WASHINGTON
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benefit that Granger was receiving at the time of his injury, which is critical to his health and survival, we affirm.

I.

Granger filed an application for benefits with the Department of Labor and Industries after he sustained an industrial injury on April 20, 1995 while working for G.G. Richardson, Inc. The Department issued an order allowing the claim and awarding time-loss benefit compensation. In July 2004, the Department issued an order affirming an earlier order that set Granger's monthly wages at \$2,847.68 for purposes of calculating his time-loss compensation. The Department did not calculate health care benefits into Granger's monthly wages.

At the time of injury, Granger was a member of Union Local 292 of Washington and Northern Idaho District Counsel of Laborers. According to the Northwest Laborers-Employer's Health and Security Trust Fund, eligibility for medical benefits was determined on the basis of an hour bank system. For every hour that Granger worked, G.G. Richardson paid \$2.15 per hour into the union trust fund for health care coverage. After working a minimum of 200 hours, Granger became eligible for medical benefits. The employer deducted 120 hours from his bank each month for medical coverage, and Granger could claim medical benefits so long as his hour bank did not drop below 120 hours.

Although Granger had previously become eligible for medical benefits, he did not have enough hours in his "hour bank" on the date of his injury for him to qualify for health care coverage. Granger's eligibility would have been reinstated once his hour bank was rebuilt to 120 hours, so long as that occurred within 10

months. Otherwise, Granger would have forfeited his hours in the hour bank, and his medical coverage would have been reinstated only after he worked the minimum 200 hours for new employees.

Granger appealed the Department's order to the Board of Industrial Insurance Appeals, arguing that the value of the employer-paid contribution for health and welfare benefits of \$2.15 per hour should be included in the formula used to calculate his wages at the time of injury, and the resulting time-loss benefits. The parties submitted the case for decision based on stipulated facts. While the Industrial Appeals Judge affirmed the Department's order, on appeal, the Board reversed the appeal judge's decision. The Board remanded the claim, ordering the Department to recalculate Granger's monthly wages and include the employer-paid contribution to Granger's union health care benefit.

The Department appealed the Board's decision and order. The superior court affirmed the Board's decision after a bench trial. The Department appeals the superior court's judgment. We heard oral argument on July 11, 2005, but stayed our decision pending Gallo v. Department of Labor and Industries.¹

II.

An appeal to this court from a superior court review of a Board decision "is governed by RCW 51.52.140, which provides that 'the practice in civil cases shall apply to appeals prescribed in this chapter.'"² We must interpret RCW

¹ No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

² Kingery v. Dep't of Labor & Indus., 80 Wn. App. 704, 708, 910 P.2d 1325 (1996) (quoting RCW 51.52.140), aff'd, 132 Wn.2d 162, 937 P.2d 565 (1997).

51.08.178. Statutory construction is a question of law, which we review de novo.³

This appeal turns on the meaning of "receiving . . . at the time of injury" for purposes of RCW 51.08.178. The Department argues that the trial court erred because Granger was not eligible to claim health care benefits at the time of his injury, and therefore was not "receiving" the benefit of the employer's contributions. In response, Granger argues that the term "receiving" refers to whether his employer was paying consideration at the time of injury, not whether he was eligible to claim the benefit.

Compensation rates for time-loss and loss of earning power 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."⁴ Monthly wages include both cash wages and other consideration paid by the employer that is critical to protecting the worker's basic health and survival.⁵

In pertinent part, RCW 51.08.178 provides:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned.

.....

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the

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

⁴ Cockle, 142 Wn.2d at 806.

⁵ Cockle, 142 Wn.2d at 822.

employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section.^[6]

In Cockle v. Department of Labor and Industries,⁷ our Supreme Court considered whether the value of employer-provided health care coverage is “other consideration of like nature.”⁸ Concluding that this phrase is ambiguous, the court engaged in statutory construction.⁹ Because the statute is remedial in nature, the court liberally construed the statute, and resolved doubts in favor of the worker.¹⁰ It explained that “Title 51 RCW’s overarching objective is ‘reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’”¹¹ The court noted that wage calculation under the statute was changed by the 1971 Legislature to reflect a worker’s actual “lost earning capacity,”¹² and that “the workers’ compensation system should continue ‘serv[ing] the [Legislature’s] goal of swift and certain relief for injured workers.’”¹³ The court then construed the phrase “board, housing, fuel, or other consideration of like nature”¹⁴ to mean “readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of

⁶ RCW 51.08.178(1).

⁷ 142 Wn.2d 801, 16 P.3d 583 (2001).

⁸ Cockle, 142 Wn.2d at 805.

⁹ Cockle, 142 Wn.2d at 821-22 (citing Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991)).

¹⁰ Cockle, 142 Wn.2d at 819-20.

¹¹ Cockle, 142 Wn.2d at 822 (quoting RCW 51.12.010).

¹² Cockle, 142 Wn.2d at 822 (quoting Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727 (1997)).

¹³ Cockle, 142 Wn.2d at 822 (quoting Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

¹⁴ RCW 51.08.178(1).

injury that are critical to protecting workers' basic health and survival."¹⁵ The court further explained that "[c]ore, nonfringe benefits such as food, shelter, fuel, and health care all share that 'like nature.'"¹⁶

The circumstances we are presented with differ from those in Cockle because, unlike Granger, at the time of her injury, Cockle was eligible to claim health care benefits.¹⁷ But this distinction is immaterial to our determination that Granger was receiving health care benefits at the time of injury.

In Gallo v. Department of Labor and Industries,¹⁸ our Supreme Court clarified that the "receiving . . . at the time of injury" limitation under RCW 51.08.178 asks "whether the employer was providing consideration of like nature at the time of the injury."¹⁹ In Gallo, the court decided whether consideration paid by employers for certain benefits, such as retirement plans, apprentice-programs, and life insurance, constituted "other consideration of like nature" under RCW 51.08.178(1). It analyzed each contribution under the test set forth in Cockle, explaining that not all contributions are critical to the basic health and survival of the worker, and concluded that the contributions in question did not constitute wages.²⁰

The Department argued in Gallo, as it does here, that "receiving . . . at the time of injury" means that the worker must be able to claim the benefit at the time

¹⁵ Cockle, 142 Wn.2d at 822.

¹⁶ Cockle, 142 Wn.2d at 822-23.

¹⁷ Cockle, 142 Wn.2d at 805-06.

¹⁸ No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

¹⁹ Gallo, 2005 Wash. LEXIS 797 at *34.

²⁰ Gallo, 2005 Wash. LEXIS 797 at *2.

of the injury. Our Supreme Court rejected this assertion, and clarified that a worker receives wages when the employer provides consideration.²¹

Because Granger's employer was paying \$2.15 per hour for his health care coverage, Granger was receiving that benefit at the time of injury. And Cockle makes clear that health insurance payments are "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival," and therefore properly calculated into a worker's monthly wages under RCW 51.08.178.²²

While rejecting the argument that retirement benefits are "other consideration of like nature" for purposes of wage calculation, the Gallo court explained that employer payments into retirement plans are not benefits critical to the basic health and survival of a worker at the time of injury because "they are not intended to be, nor are they generally immediately available to the worker at the time of injury."²³ Similarly, Granger's health benefits were not immediately available to him at the time of injury. But employer payments for health care coverage are distinguishable from retirement payments. Unlike retirement benefits, health care benefits are intended for the basic health and survival of the worker while employed. And, although Granger's health care coverage had temporarily lapsed, the employer was replenishing his bank with each hour he worked and Granger would have soon realized the benefit.

²¹ Gallo, 2005 Wash. LEXIS 797 at *34.

²² Cockle, 142 Wn.2d at 822.

²³ Gallo, 2005 Wash. LEXIS 797 at *34.

The Department argues that WAC 296-14-526 directly addresses the question presented by Granger's case. Under WAC 296-14-526, the value of other consideration of like nature is included in the worker's monthly wages only where the worker was actually eligible to receive the benefit.²⁴ Although an appellate court defers to an "agency's interpretation when that will help the court achieve a proper understanding of the statute," such interpretations are not binding.²⁵ If the agency's interpretation conflicts with a statutory mandate, deference is inappropriate.²⁶ "[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is" and to "determine the purpose and meaning of statutes."²⁷

Because Cockle and Gallo dictate that health care payments made by an employer at the time of a worker's injury must be included in the calculation of the worker's monthly wages for purposes of RCW 51.08.178, WAC 296-14-526 is not controlling.

Granger requests attorney fees under RCW 51.52.130, which provides:

If, on appeal to the superior or appellate court from the decision and order of the board . . . 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, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . If . . . in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, . . . the attorney's fee fixed

²⁴ WAC 296-14-526(1)(b)(ii).

²⁵ Cockle, 142 Wn.2d at 812 (quoting Clark County Citizens United, Inc. v. Clark County Natural Res. Council, 94 Wn. App. 670, 677, 972 P.2d 941 (1999)).

²⁶ Cockle, 142 Wn.2d at 812 (citing Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)).

²⁷ Cockle, 142 Wn.2d 812 (quoting Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981)).

by the court, for services before the court only, . . . shall be payable out of the administrative fund of the department.^[28]

Because the Department appealed and Granger's right to relief is sustained, we award reasonable attorney fees for services before this court only.²⁹

AFFIRMED.

Baker, J

WE CONCUR:

Appelwick, J

Grosse, J

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²⁸ RCW 51.52.130.

²⁹ Piper v. Dep't of Labor & Indus., 120 Wn. App. 886, 890, 86 P.3d 1231, rev.denied, 152 Wn.2d 1032 (2004).

APPENDIX B

APPENDIX B

WAC 296-14-526 Is the value of "consideration of like nature" always included in determining the worker's compensation?

(1) No. The value of other consideration of like nature is only included in the worker's monthly wage if:

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

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

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

(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.

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.

(c) The worker or beneficiary no longer receives the benefit and the department or self-insurer has knowledge of this change. If the worker continues to receive the benefit from a union trust fund or other entity for which the employer made a financial contribution at the time of injury or on the date of disease manifestation, the employer's monthly payment for the benefit is not included in the worker's monthly wage.

Example: An employer contributes two dollars and fifty cents for each hour an employee works into a union trust fund that provides the employee and her family with medical insurance. If the employer stops contributing to this fund, but the worker continues to receive this benefit, the employer's monthly payment for the medical insurance is not included in the worker's monthly wage.

(2) This rule does not permit the department or self-insurer to alter, change or modify a final order establishing the worker's monthly wage except as provided under RCW 51.28.040.