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No. 55160-4-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DEPARTMENT OF LABOR & INDUSTRIES,

*Appellant,*

v.

WILLIAM A. GRANGER,

*Respondent.*

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**RESPONDENT'S AMENDED BRIEF**

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2018/07/19 11:3:19



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**A. Statement of the Case**

The Board of Industrial Insurance Appeals and the superior court tried this case on stipulated facts.<sup>1</sup>

On April 20, 1995 William Granger was injured at work,<sup>2</sup> became totally disabled,<sup>3</sup> and was paid temporary total disability benefits (“TTD,” also known as “time loss” or “time-loss benefits”<sup>4</sup>) under the Industrial Insurance Act (“the Act”).<sup>5</sup> The *rate* at which any injured worker is paid TTD depends on his or her “monthly wages” at the time of injury:

(1) For the purpose 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. ...

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<sup>1</sup> CP, Appeal Board Record (“ABR”) 29-31.

<sup>2</sup> CP, ABR 30 lines 22-24 (“On April 20, 1995 the claimant was injured while in the course of his employment.”).

<sup>3</sup> CP, ABR 31 lines 2-3 (“As a direct and proximate cause of his industrial injury, the claimant has been unable to work since April 20, 1995.”).

<sup>4</sup> See *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000). (Respondent knows that underlining is not formal style; he underlines in this brief to conform to the preference expressed by a Division 1 judge at a recent seminar.)

<sup>5</sup> CP, ABR 51 (mentioning “the worker’s total timer loss compensation rates”), and ABR 71-75 (noting several “DO,” meaning “decision and order,” for “TLC paid,” meaning “time-loss compensation paid,” and the 10/31/96 “DO” spelling out “Time-loss benefits”).

RCW 51.08.178(1).<sup>6</sup> Because Mr. Granger was paid on an hourly basis, his “monthly wages” depended on his “hourly wage”:

...In cases where the worker’s wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of injury [by a multiplier corresponding to the number of days normally worked per month].

.... The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. ...

§178(1).

At the time of Mr. Granger’s injury a collective bargaining agreement (“CBA”) required his employer to pay him an hourly wage.<sup>7</sup>

The CBA further instructed the employer to *deliver*, or *deposit*, \$2.15 of that wage to the “Northwest Laborers-Employer’s Health and Security

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<sup>6</sup> The full statute is set out in the Appendix at p. A-1.

<sup>7</sup> CP, ABR 31 lines 4-6.

Compensation terms in employment contracts cannot define “wages” under the Act. See Lundborg v. Keystone Shipping Co., 138 Wn.2d 658, 668, 981 P.2d 854 (1999) (“unless specifically allowed by statute, worker compensation benefits are never subject to amendment by collective bargaining agreements,” referring to “a wide variety of contexts [in which] employment contracts abrogate” rights mandated in federal workers’ compensation statutes). See also Wingert v. Yellow Freight Sys., 146 Wn.2d 841, 851-52, 50 P.3d 256 (2002) (rejecting employer argument that a “collective bargaining agreement supersedes” a statute and regulation, and finding in favor of “employees [who] maintained that the statute restricts the scope of bargaining to wages and employment conditions that meet or exceed the statutory minimum standards”). See also RCW 51.04.060, “No evasion of benefits or burdens,” which prevents injured workers from giving up, or trading away, Act benefits (“No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.”).

Trust Fund” (“the Trust”).<sup>8</sup> The main purpose of the Trust was to fund<sup>9</sup> and administer a health-care benefits plan for the benefit of members and their families.<sup>10</sup> At the time of injury Mr. Granger was a member of the

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<sup>8</sup> CP, ABR 29 lines 20-21.

Such trusts are legal entities, established under the Labor Management Relations Act of 1947, 29 U.S.C. §186. *See, for example, Western Wash. Laborers-Employers Health & Sec. Trust Fund v. Merlino*, 29 Wn. App. 251, 254, 627 P.2d 1346 (1981) (“This is a joint labor-management trust created pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. §186.”). *See also Washington Teamsters Welfare Trust Fund v. DePiano*, 26 Wn. App. 52, 55, 612 P.2d 805 (1980) (“Teamsters Trust was a negotiated health and welfare trust presumably created pursuant to section 302 of the Labor Management Relations Act, 29 U.S.C. §186(c)(5)”), and *Trust Fund Services v. Glasscar, Inc.*, 19 Wn. App. 736, 737, 577 P.2d 980 (1978) (“The Trust Funds are joint labor-management trusts created pursuant to section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5).”).

<sup>9</sup> From wage deposits, investment returns, or a combination thereof; from trust money or by purchased insurance, or some combination of those; etc. *See* 29 U.S.C. §1102, “Every employee benefit plan shall – (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and requirements of this title, ...”; *id.* (fiduciaries “may employ one or more persons to render advice with regard to any fiduciary has under the plan”); *id.* at §1104(a)(c) (fiduciaries shall discharge duties for the exclusive purpose of providing benefits to participants and their beneficiaries, including “by diversifying the investments of the plan”; *id.* at §1102 (“Every employee benefit plan shall [...] (4) specify the basis on which payments are made to and from the plan”). *See also* 29 U.S.C. §1103, “Establishment of trust,” at subpart (a), “Benefit plan assets to be held in trust; authority of trustees”: “Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. ... [T]he trustee or trustees shall have exclusive authority and discretion to manage and control assets of the plan[.]”

<sup>10</sup> Medical benefits provided by the *Act* cover only the injured worker’s medical expenses for his or her injury – not his or her other medical expenses, and not health care for family members. *See Cockle v. Dep’t of Labor & Indus.*, 96 Wn. App. 69, 76, 977 P.2d 668 (1999), *affirmed as modified*, 142 Wn.2d 801, 167 P.3d 583 (2001):

We do not overlook that an injured worker receives medical care from the Department for conditions related to his or her industrial injury. He or she does not receive, however, medical care for conditions not related to the injury, or

Trust plan, based on his hour-bank balance,<sup>11</sup> and his employer was depositing money to his trust account.

Trust rules established various criteria for eligibility for payment of trust benefits. One criterion was that a member's "hour bank" exceed a certain minimum balance.<sup>12</sup> **The trust credited wages to a member's "hour bank" account hours once a month, based on wages earned in the *previous* month; accordingly, eligibility always depended on *past* wages, not wages at the time of injury.**<sup>13</sup> Further, at the time of injury a worker could have *earned* enough hour bank wages to be eligible for Trust benefits, but not *be* eligible because the Trust had not yet credited them to his or her account. At the time of injury Mr. Granger was actually earning the disputed \$2.15 an hour, and his employer was actually depositing the

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medical care for his or her family. See RCW 51.36.010.

(Hereafter, *Cockle v. Dep't of Labor & Indus.* is cited simply as "*Cockle*.")

<sup>11</sup> CP, ABR 29 lines 22-23 ("It is agreed that William Granger had a minimum of 200 hours which was required for eligibility.").

<sup>12</sup> See CP, ABR 29 line 20 - ABR 30 line 5 (describing "hour bank" operation and speaking of "the employee's 'bank'").

<sup>13</sup> CP, ABR 29 lines 23-26:

Once the minimum eligibility requirement is established, 120 hours will be deducted from the employee's "bank" for each month of coverage. This will provide coverage beginning the first day of the second month following each month in which 120 hours was deducted.

money to his Trust account; but his hour bank balance was below the minimum for claim payment.<sup>14</sup> There is no evidence that at the time of injury he had any outstanding health expenses that would have been eligible for trust payment had his hour-bank balance been above the minimum. However, because *if* there had been any the Trust would have denied payment,<sup>15</sup> the Department excluded the \$2.15 an hour from his “hourly wage” and “monthly wage.”<sup>15</sup>

The Board of Industrial Appeals reversed.<sup>16</sup> “The sole issue in th[e] appeal [wa]s whether the employer’s contribution to Mr. Granger’s

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<sup>14</sup> CP, ABR 30 lines 6-8:

William Granger had coverage until March 31, 1995 when his coverage lapsed because he did not have enough hours worked. It is agreed that his coverage had lapsed as of the date of his injury, April 20, 1995.

“As of April 20, 1995, Bill Granger had 64 hours in the ‘hour bank.’” *Id.*, line 25.

<sup>15</sup> CP, ABR 30 line 26 - ABR 16 line 2:

If, as of April 20, 1995, Bill Granger had filed a claim for medical benefits for treatment [with the Trust], he would have been denied coverage as of April 20, 1995 due to a lack of enough hours in the hours [sic] bank.”

<sup>15</sup> CP, ABR 31 lines 4-6 (“In accordance with the Union contract, the fringe benefit contributions included Health and Welfare [sic] of \$2.15 per hour, paid by the employer”), and ABR 31 lines 11-13 (“The employer did contribute towards claimant’s health insurance coverage, in the amount of \$136.32, for 64 hours the claimant worked in April 1995”).

<sup>16</sup> CP, ABR 15-24.

health care benefit should be included in the claimant's wage base when the actual use of the health care benefit is conditional on the number of hours worked."<sup>17</sup> This is the heart of the Board's analysis:

The purpose of time loss compensation is to **replace earning capacity**. ... [T]he industrial appeals judge focused on the conditions attached to the worker's ability to actually **realize** the benefit at the time he was injured, and not on the monetary benefit **received**. The analysis, however, should turn on the **receipt of the monetary benefit for coverage**, not the realization of the coverage itself.

...As stated above, the focus in *Cockle* is on the **payment** for the benefit. We should not shift focus on the conditions surrounding the **realization** of the benefit that comes within *Cockle*, as opposed to the value **paid** for the benefit, or we tread a perilous path. Health care benefits are rife with conditions that should not be considered in setting a wage basis that must include payment for health care benefits. ...

CP, ABR 18 line 45 - ABR 19 line 19 (emphasis original). The superior court reached the same result, for the same reason:

**3. The purpose of time loss compensation is to replace lost earning capacity. Amounts paid into union trust funds for health care benefits represent earning capacity for union workers regardless of whether the workers are eligible for the benefits provided by the fund.**

4. Time loss compensation calculations under RCW 51.08.178 must include employer payments into health care funds under a union contract, even if the employee on whose behalf the payments

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<sup>17</sup> CP, ABR 15, lines 37-40.

were made is not entitled to health care coverage through his employment at the time of the industrial injury. Such payments are part of the term “wages” as set forth in RCW 51.08.178(1) because they are of like nature to the other nonmonetary forms of compensation listed in the statute, namely: board, housing, and fuel.

CP 118, lines 3-11 (emphasis added).<sup>18</sup> This appeal followed.

### **B. Summary of Argument**

The Industrial Insurance Act is a *self-contained*<sup>19</sup> social insurance<sup>20</sup> plan, enacted for the purpose of remediating work-related “suffering and economic loss.”<sup>21</sup> The Act’s primary means to that end is disability

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<sup>18</sup> The court was mistaken in stating that *time loss* is calculated under RCW 51.08.178; §178 determines “*monthly wage*,” from which time-loss rate calculated pursuant to RCW 51.32.090(1) and RCW 51.32.060(1). The court was also wrong to conclude *wage money* the employer delivered to the Trust was “nonmonetary” compensation. Nevertheless, the court’s ultimate decision was correct. This court may affirm on any ground within the pleading and the evidence. See authority in footnote 23.

<sup>19</sup> *Somsak v. Criton Techs./Heath Tecno*, 113 Wn. App. 84, 93, 52 P.3d 43 (2002), quoting *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (the “Industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers”).

<sup>20</sup> *Duskin v. Carlson*, 136 Wn.2d 550, 557-58, 965 P.2d 611 (1998) (citations omitted).

<sup>21</sup> See RCW 51.04.010 and RCW 51.12.010. RCW 51.04.010, “Declaration of police power - Jurisdiction of courts abolished,” provides:

The common law system governing the remedy of workers against employers form injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. **The remedy of the worker has been uncertain, slow and inadequate.** Injuries in

benefits that partially replace lost wages.<sup>22</sup> Wage-replacement benefits are based on each injured worker's "monthly wages" at the time of injury. RCW 51.08.178(1). For workers paid by the hour, the Act defines "monthly wages" in terms of "hourly wage," but does not define "hourly wage." Why not? The answer is: because its meaning is perfectly plain. "Hourly wage" means money an employer pays a worker per hour for work. The disputed \$2.15 an hour was part of Mr. Granger's "hourly wage." Accordingly, the judgment should be affirmed.<sup>23</sup>

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such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its sovereign power, declares that all phases of the premises are withdrawn from private controversy, and **sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided...**

(Emphasis added.) RCW 51.12.010 provides: "**This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.**" (Emphasis added). Literally scores of appellate decisions reiterate this principle. *See also Cockle*, 142 Wn.2d at 811 (fundamental purpose of the Act is to remediate work-related disability and/or death).

<sup>22</sup> *See* RCW 51.04.010, 51.12.010, 51.32.060, and 51.32.090.

<sup>23</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. The law allows a party to raise a new theory on appeal to *affirm* a judgment:

[A]ppellate courts will consider an argument advanced for the first time on appeal, when the purpose of the argument is to persuade the appellate court to affirm the trial court on a theory other than the theory originally relied upon by the trial court. *See* heading 46, below.

If the disputed money was not “hourly wage” *clearly* – in other words, if “hourly wage” were *ambiguous* – RCW 51.12.010 and a mountain of case law would require that the ambiguity be resolved in Mr. Granger’s favor. In a nutshell, RCW 51.12.010 provides that “[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment,” and *Cockle* states that “where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker[.]” “[T]he purpose of workers’ compensation, *and the principle which animates it*, is to insure against the

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2A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.5 (6<sup>TH</sup> ed. 2004). “Heading 46” begins:

**Generally.** A trial court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.

...

The rule, which is codified in RAP 2.5(a), is based upon the belief that if the trial court’s decision was correct, albeit for a different reason than that cited by the trial court, a retrial of the case would serve no useful purpose. ...

*Id.* (multiple citations omitted, emphasis original).

loss of earning capacity,”<sup>24</sup> *i.e.*, *actual earning capacity*.<sup>25</sup> The disputed \$2.15 an hour was part of Mr. Granger’s actual earning capacity; therefore, if “hourly wage” were ambiguous, the money was part of his “hourly wage,” and therefore his “monthly wages,” and the appealed judgment should be affirmed.

Cockle held that *employer-provided health insurance* is compensation in kind that qualifies as §178 “wages,” in the dollar amount the employer paid for it. Mr. Granger’s employer did not buy him health insurance; rather, Mr. Granger negotiated and contracted to require the employer to deposit part of his hourly wage to a benefits trust, which the Trust invested and administered for that purpose. As pointed out above at

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<sup>24</sup> Leeper v. Dep’t of Labor & Indus., 123 Wn.2d 803, 814, 872 P.2d 507 (1994) (emphasis original).

<sup>25</sup> Cockle., 142 Wn.2d at 811 (“an injured worker should be compensated based ...on his or her actual lost earning capacity,” internal punctuation and citations omitted); Dep’t of Labor & Indus. v. Avundes., 140 Wn.2d 282, 287, 996 P.2d 593 (2000) (“workers’ compensation benefits should reflect the worker’s lost earning capacity,” internal punctuation and citation omitted); Hubbard v. Dep’t of Labor & Indus., 140 Wn.2d at 41 (“the underlying purpose of the Act [] is to ensure against loss of wage-earning capacity and to provide sure and certain relief to injured workers regardless of fault,” citations omitted); Double D Hop Ranch v. Sanchez., 133 Wn.2d 793, 798, 947 P.2d 727 (1997) (“The purpose of time-loss compensation is to reflect a worker’s lost earning capacity,” citation omitted, emphasis added); Leeper v. Dep’t of Labor & Indus., 123 Wn.2d at 814 (“the purpose of workers compensation, *and the principle which animates it*, is to insure against the loss of earning capacity,” emphasis original). *See also* Cockle., 142 Wn.2d at 811 (“At the time of injury, Cockle was *capable of earning* not merely \$5.61 [etc.],” emphasis added).

p. 4, eligibility for Trust benefits did not mirror wages being earned and paid at the time of injury. “[T]he purpose of workers’ compensation benefits is to reflect *future* earning capacity rather than wages earned in past employment.” Kilpatrick v. Dep’t of Labor & Indus., 125 Wn.2d at 230 (emphasis added). If, nevertheless, this court were to focus on his Trust benefit eligibility instead of on his wages, no authority requires that an injured worker be able to *use* an in-kind benefit at the time of injury for the benefit purchase price to be “wages.” In Cockle the appellate courts did not inquire into *terms* of her insurance coverage; all that was relevant was that she *had* insurance, and the price the employer paid for it. By analogy, Mr. Granger was a member of the Trust plan; the fact that at the time of injury the Trust, operating under its own rules, would not have paid a claim if he had incurred a covered expense, should be immaterial to determination of his “hourly wage.”

The Department’s argument that Mr. Granger was not “receiving” the disputed money on the injury date because he was ineligible for trust benefits suffers from the same fault as the Department’s argument that the money that bought the benefit was not wages because he could not *use* the benefit. “*Receiving*” addresses *earning capacity*. Mr. Granger’s earning

capacity included the disputed \$2.15 an hour that his employer was actually paying for his work.

Section 178 does not mention benefit trusts, or trust benefits, or trust rules for eligibility for trust benefits. Because the Act is a self-contained insurance plan (and in light of the Act's remedial purpose and §178's purpose to capture earning capacity), to exclude actual hourly wages from §178 "hourly wage" based on *trust rules for trust benefits* eligibility would be wrong.

The Department also argues that notwithstanding §178's plain language, Mr. Granger's §178 wage should be less than his actual wage because, the Department claims, WAC 296-14-526 says so. On multiple grounds, the regulation has no proper place in this case.<sup>26</sup>

**N.B.:** The Supreme Court is in the process of deciding five consolidated appeals<sup>27</sup> in which the main issue is whether, under §178, money that employers deposit to benefits trusts pursuant to collective

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<sup>26</sup> See below at pp. 14-15 and 24-31.

<sup>27</sup> Kenneth Barber, Fred Jones, and Daniel Renshaw, Appellants, v. Dep't of Labor & Indus., Respondent, and James A. Dumont, Appellant, v. SuperValu, Inc. and Dep't of Labor & Indus., Respondents, Docket nos. 75064-5, 75070-0, 75071-8, and 75088-2; and, Paula Gallo v. Dep't of Labor & Indus., Docket no. 74849-7. The Supreme Court may have *Renshaw* as the lead name.

bargaining agreements is “hourly wage[s]” and, therefore, included in “monthly wages.” Oral argument in those appeals was held on November 16, 2004. Decision could come at any time.

**C. Reply to the Department’s “Argument”**

**1. Standard for review**

The ultimate issue in this appeal is the meaning of “hourly wage” in the Industrial Insurance Act, at RCW 51.08.178(1). Familiar universal principles of statutory construction apply here as in any case where the issue concerns statutory construction: (1) review is de novo;<sup>28</sup> (2) the goal is to determine legislative intent;<sup>29</sup> (3) where statutory language is ambiguous, courts interpret it, but “[i]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent”,<sup>30</sup> and (4) “When the language of a statute is plain,

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<sup>28</sup> *Washington Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003).

<sup>29</sup> See, for example, *State ex rel. Citizens v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004) (“The court’s fundamental objective is to ascertain and carry out the legislature’s intent,” citation omitted), and *State v. Thomas*, 150 Wn.2d 666, 670, 80 P.3d 168 (2003) (“The appellate court’s paramount duty is to discern and implement the intent of the legislature,” citation omitted).

<sup>30</sup> *State ex rel. Murphy v. Citizens*, 151 Wn.2d at 242 (citation omitted). The court has held this “repeatedly.” *Shoop v. Kittitas County*, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003).

there is no room for judicial construction because legislative intent is determined solely from the language used.” *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995) (citations omitted).<sup>31</sup> In addition to those principles, however, there are others specific to the Act. Chief among them is the Legislature’s declaration,<sup>32</sup> in RCW 51.12.010, that the Act’s purpose is to minimize work-related suffering and economic loss, and the corollary, that any ambiguity in Act provisions must be resolved in injured workers’ favor. *See* RCW 51.12.010 (requiring liberal construction), and *Cockle*, 142 Wn.2d at 811 (the liberal construction rule requires that “where reasonable minds can differ over what Title 51 RCW provisions mean...the benefit of the doubt belongs to the injured worker). “A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are

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<sup>31</sup> *See also Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 238, 59 P.3d 655 (2002) (“If [a] statute is unambiguous, its meaning is to be derived from the plain language of the statute *alone*,” emphasis added). *See also State ex rel. Citizens v. Murphy*, 151 Wn.2d at 242 (“If, after this inquiry, the statute remains susceptible of more than one *reasonable* meaning, the statute is ambiguous and it is appropriate to resort to construction aides, including legislative history,” citations omitted, emphasis added.)

<sup>32</sup> Policy statements like the Legislature’s in RCW 51.12.010 “are to be considered in construing, interpreting and administering” a statute, and, by implication, related regulations. *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 403-04, 95 P.3d 337 (2004). “Such declarations and recitals, while not operative rules of action, may play a very important part in determining what action shall be taken.” *Id.* (citation omitted.)

conceivable.”<sup>33</sup> Mr. Granger contends that “hourly wage” is plain and unambiguous, and plainly includes the disputed \$2.15 an hour. If, however, the term were ambiguous, RCW 51.12.010 and *Cockle* would require that unless the trial court’s judgment was clearly *unreasonable*, it must be affirmed.

The Department argues that a regulation – WAC 296-14-526 – is “*entitled to great deference*”<sup>34</sup> and that the court “*must accord [it] substantial weight.*”<sup>35</sup> Those statements are not correct, for multiple reasons. First, on its face the regulation is limited to compensation in kind,<sup>36</sup> but Mr. Granger’s employer paid him “hourly wage[s].” Second, WAC Chapter 296-14-520 through 528 did not exist when Mr. Granger was injured, workers’ compensation rights are governed by the law in effect on the injury date, and the regulation cannot apply retroactively.<sup>37</sup> Third, because “hourly wage” has a plain meaning consistent with the Act the

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<sup>33</sup> *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2004) (citation omitted).

<sup>34</sup> Appellant’s Brief (“AB”) 13, citing *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

<sup>35</sup> *Id.*

<sup>36</sup> See pp. 24-25 below.

<sup>37</sup> See pp. 25-28 below.

Department lacked authority to “interpret” it.<sup>38</sup> Fourth, if “hourly wage” were ambiguous so subject to interpretation, WAC Chapter 296-14-520 through 528 resolves the ambiguity contrary to the established purpose of the statute and against the injured worker, both of which make the regulations unlawful and therefore unworthy of deference.<sup>39</sup>

**2. The Department’s argument that the judgment violates §178’s plain language is unsound**

At AB 16-22 the Department argues that “the plain language of §178 requires a worker to be receiving benefits at the time of an industrial injury in order for those benefits to be included as part of monthly wages, and Mr. Granger was not receiving health care benefits at the time of his industrial injury.”<sup>40</sup> 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.” That does not track §178, and it is wrong.

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<sup>38</sup> See pp. 28-29 below.

<sup>39</sup> See pp. 29-31 below.

<sup>40</sup> AB 16.

Mr. Granger’s employer was paying *money* for work, part of which the employment contract required the employer to deposit to the trust. The *Trust* applied Mr. Granger’s money (together with wages deposited by other employers, and for other workers) to benefits. The *Trust* decided what benefits to provide, and on what conditions. There is no evidence that Mr. Granger’s *employer* had a hand in any of that.<sup>41</sup> The *Act* does not mention trusts or trust benefits, so the Department had authority in those matters. Since the Act is a self-contained insurance plan, rules of other insurance plans, outside of the Act, should have no proper place in determining an injured worker’s “wages.”<sup>42</sup>

The Department’s argument that the appealed judgment conflicts with *Cockle*<sup>43</sup> is unsound. The Supreme Court, at the outset of its analysis in *Cockle*, distinguished “hourly wages” – *money* wages – from

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<sup>41</sup> See 29 U.S.C. §1102, “Establishment of plan” (“(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument[,] [which] [s]hall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan”); *id.* at §1105 (trustees’ fiduciary duties); *id.* at §1102 (fiduciaries may delegate administrative functions, but not fiduciary ones).

<sup>42</sup> In *Cockle* the court did not look into the insurance policy for terms of coverage; the fact that the employer provided health insurance determined the “wage” issue.

<sup>43</sup> Starting at AB 16.

compensation *in kind*:

Since the question before us is which *in-kind* forms of consideration “received from the employer as part of the contract of hire” are “of like nature to board, housing and fuel, we need not cite those portions of Title 51 RCW’s “wages” definition relating to *monetary* forms of consideration such as *hourly or daily pay rate*[.]

Cockle, 142 Wn.2d at 807 n.2 (emphasis original).<sup>44</sup> The fact that an employment contract dedicates wage money to use for particular benefits does not change *money* wages into compensation *in kind*. See *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 340, 8 P.3d 310 (2001), *review denied*, 143 Wn.2d1003, 21 P.3d 290 (2002) (“Since vacation, holiday, sick leave, and funeral benefits are not in-kind consideration but rather are payments in

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<sup>44</sup> See Cockle, 96 Wn. App. at 73 n.8:

Consideration furnished in cash is not in issue here. For a case in which it was in issue, see Rose v. Department of Labor & Indus., 57 Wn. App. 751, 758, 790 P.2d 201, *review denied*, 115 Wn.2d 1010, 797 P.2d 512 (1990).

Then see *id.*, 96 Wn. App. at 76:

In reaching this result, we reject Cockle’s reliance on Rose v. Dep’t of Labor and Industries [*supra*]. In a single sentence of Rose, we said that the term “wages” “include[s] any and all forms of consideration received by the employee from the employer in exchange for work performed.” When we said that, we were discussing whether the term “wages” includes consideration paid in *cash* for work done by a prison inmate. We were not considering whether the term “wages” includes each and every form of consideration that an employer might supply to a worker in kind. Viewed with the benefits of hindsight, the quoted language was non-precedential dictum with respect to consideration furnished in kind. ...

(Italics original, bold added.)

cash, *Cockle* is not controlling.”).

The Department’s argument about “[c]onsideration that is to be received at some unknown time in the future”<sup>45</sup> addresses *investment return*, not wages. At the time of injury Mr. Granger’s employer was paying him money hourly wages, which included the disputed \$2.15 an hour. The Department’s arguments of *In re Douglas A. Jackson*, BIIA Dec., 99 21831 (2001)<sup>46</sup> and *In re Chester Brown*, BIIA Dec., 88 1236 (1989)<sup>47</sup> are not pertinent to this appeal. Those cases rejected claims that “wages” “at the time of injury” should be based on anticipated future earnings that differed from the claimants’ wages at the time of injury.<sup>48</sup> *Mr. Mr. Granger* is arguing the “hourly wage” his employer was paying him *at the time of injury*. The *Department* is arguing *future benefits*.

Beginning at AB 20-21 the Department shifts focus somewhat to

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<sup>45</sup> AB 17.

<sup>46</sup> AB 18.

<sup>47</sup> AB 19.

<sup>48</sup> The Department is incorrect when it says (at AB 18 footnote 2) that determination of earning capacity permits looking backward but not forward. The Act compensates lost *future* earnings, so in assessing earning capacity looks forward. See *Cockle*, 96 Wn. App. at 81 n.17, citing *Kilpatrick v. Department of Labor and Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994) for the statement that “[t]he purpose of workers’ compensation benefits is to reflect future earning capacity rather than wages earned in past employment.”

“receiving,” arguing that because Mr. Granger was not eligible for trust benefits at the time of injury he was not “receiving” those “benefits,” so the “benefits” should be excluded from his “wages.” This argument violates the fundamental rule of statutory construction that a statute is read as a *whole*, with regard for the statute’s *purpose*:

[I]t would be wrong to concentrate solely on the meaning of [a disputed term] in isolation. The meaning of a particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole.

Davis v. Dep’t of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999) (citation omitted). See also City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002)<sup>49</sup> (“The ‘plain meaning’ rule includes not only the ordinary meaning of the words, but the underlying legislative purpose and closely related statutes to determine the proper meaning of the statute”), and State v. Manro, 125 Wn. App. 165, 173, 104 P.3d 708 (2005) (“We interpret statutory language in context of the entire statute and its purpose,” citation omitted).<sup>50</sup> The purpose of §178 is to capture *earning* capacity. Section 178 makes this explicit, by basing “hourly wage” the basis for “monthly

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<sup>49</sup> *But cf.* footnote 31.

<sup>50</sup> See also Ecology v. Campbell and Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002), analyzing the plain-meaning rule.

wages.” A closely related statute – RCW 51.32.090, the statute that authorizes TTD – mirrors that intent by providing that TTD be paid on wages an injured worker was “earning” at the time of injury:

Should a worker suffer a temporary total disability and should his or her employer at the time of injury continue to pay him or her the wages he or she was *earning* at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

§190(6) (emphasis added.)<sup>51</sup> *Earning* – not “taking possession or delivery of”<sup>52</sup> – is the construction of “receiving” that tracks the purpose of §178.

Cockle observed:

Embracing the lost earning power standard, Justice Marshall wrote:

**For the purposes of determining a worker’s earning power, there is no principled distinction between direct cash payments and payments into a plan that provides benefits to the employee.** If the employer had agreed to pay some fixed amount of money to its employees who, in turn, paid the amount into benefit funds, that amount would satisfy the majority’s definition of wages since the benefit has a present value that can be readily converted into a cash equivalent on the basis of its market value. In my view, the result should not change simply because the company agrees to eliminate an unnecessary transaction by paying the contributions directly to the Trust funds.

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<sup>51</sup> In Cockle, 142 Wn.2d at 815 n.6, the court construed this language to mean that where an employer continues to pay *some* but *not all* wages during total disability, total disability benefits *would* be paid, *on the wages lost*.

<sup>52</sup> AB 21.

Cockle, 142 Wn.2d at 818 (quoting Marshall, J., dissenting, citation and internal punctuation omitted, emphasis added).<sup>53</sup> This statement underscores the “practical and reasonable interpretation” the Act “requires.” Adams v. Dep’t of Labor & Indus., 74 Wn. App. 626, 629, 875 P.2d 8 (1994), *affirmed*, 128 Wn.2d 224, 905 P.2d 1220 (1995) (quoting Kuhnle v. Dep’t of Labor & Indus., 12 Wn.2d 191, 198, 120 P.2d 1003 (1942), internal punctuation omitted).<sup>54</sup> Mr. Granger had the *capacity* to earn the disputed \$2.15; he was actually earning it. He was *receiving* the money.

If his employer had delivered the \$2.15 an hour directly to him and *he* had sent it on to the Trust, would the Department contend the money was not “wages” even if was ineligible for trust benefits, or could not otherwise “use” or “receive” the benefit?<sup>55</sup> In Cockle, there was no

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<sup>53</sup> Quoting United States Supreme Court Associate Justice Thurgood Marshall, dissenting from the majority decision in Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs, 461 U.S. 624, 103 S. Ct. 2045, 76 L. Ed. 2d 194 (1983) – a case the Department, in Cockle, relied on heavily but our court rejected. Unlike Cockle, which dealt with employer-purchased health insurance, Morrison-Knudsen involved the same factual situation as here, *i.e.*, collective bargaining agreement-mandated hourly wage deposits to benefit trusts.

<sup>54</sup> See also Thurston County v. Cooper Point Ass’n., 148 Wn.2d 1, 12, 57 P.3d 1156 (2002) (“Under this approach [*i.e.*, applying plain meaning], it is appropriate for a court to give...a nontechnical statutory term its dictionary meaning.”).

<sup>55</sup> *E.g.*, if the Trust became insolvent, he incurred no covered expenses, he had not satisfied a deductible, etc.

evidence that Dianne Cockle could “use” her health insurance, or that she “took possession of” it. The Department has tacitly conceded that Mr. Granger’s “hourly wage[s]” included money his employer sent directly to the United States government for income taxes and Medicare, and to the Department of Employment Security for unemployment coverage, even though he never “took possession of” that money, and could not then “use” either the money or any benefit to which the money was applied. The disputed \$2.15 an hour was part of his “wages” because it was money he *earned* for work (and his employer *paid* him), notwithstanding *delivery* to the Trust. The Trust was not his employer. His employer paid him the same “hourly wage” no matter what the Trust did or did not do. **His employer was actually paying him the \$2.15 an hour. Ineligibility for trust benefits was not ineligibility for “hourly wage[s].”** His benefits status with the trust should be immaterial to §178.

The Department’s reliance on *Gallo v. Dep’t of Labor & Indus.* should be unpersuasive. As noted above<sup>56</sup> the Supreme Court is reviewing *Gallo* in regard to an issue very close to the issue here, so to treat *Gallo* as authoritative seems premature. Further, the Department’s argument is

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<sup>56</sup> See above at pp. 12-13, text and footnote 27.

problematic. The Department points out (accurately) that according to Gallo, deposits to retirement pension trusts are not “wages” because “plan contributions ‘are not immediately available’ to the worker at the time of injury” (because Ms. Gallo could not retire then and draw retirement pension benefits); then the Department argues that “[t]he same reasoning applied here – *i.e.*, the contributions to the union health care fund were not ‘immediately available’ to Mr. Granger at the time of injury and hence the value of the contributions cannot be included in his wage calculation.”<sup>57</sup> The money deposited to Mr. Granger’s health-and-welfare trust account would *never* “be available to him” – no matter what his eligibility for trust benefits.

### **3. WAC 296-14-526 is inapplicable on its face**

At AB 22-23 the Department argues that “whether the value of ‘consideration of like nature’ to board, housing and fuel (such as employer-provided health care benefits) is always included in determining a worker’s ‘monthly wage’ computation under RCW 51.08.178(1)” is determined by WAC 296-14-526(1). That regulation says:

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

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<sup>57</sup> AB 22.

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

“Consideration of like nature” is not at issue in this case. See *Cockle*, 412 Wn.2d at 807 n.2, contrasting wages in money and in kind (quoted above at p. 17), and *Rose v. Dep’t of Labor & Indus.* (above at footnote 44). Mr. Granger’s employer paid him money “hourly wage[s],” only. Where “hourly wage” money is paid is immaterial to §178. The *purpose* for which “hourly wage” money is *spent, or invested*, is immaterial. What the worker gets in *return* for his money is immaterial. What matters is the money the employer pays the worker per hour for work.

**4. The Department’s argument that this court should defer to the Department’s “interpretation” of §178 in WAC 296-14-526 is unsound, on multiple grounds**

At AB 23-29 the Department argues that “the Department’s WAC rule applies here, and the department, not the quasi-judicial board, is the administrative entity whose interpretation is entitled to deference.”<sup>58</sup> The Department’s concern that “Mr. Granger will surely argue that the Board’s interpretation here deserves deference and the Department’s interpretation

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<sup>58</sup> AB 23.

does not<sup>59</sup> is an unwarranted assumption; this court is reviewing the *superior court's* judgment, not the Board's decision.<sup>60</sup> That aside, the Department's "interpretation" certainly does *not* deserve deference, because (1) the regulation did not exist at the time of injury, when Mr. Granger's Act rights became fixed, and can not apply retroactively, and (2) the regulation is invalid.

Mr. Granger was injured in 1995.<sup>61</sup> WAC Chapter 296-14-520 through 528 was adopted in 2003.<sup>62</sup> Workers' compensation rights are governed by the law in effect on the injury date. *See Seattle School Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 358, 804 P.2d 621 (1991) (noting "the well established rule under the Industrial Insurance Act which fixes rights and liabilities on the date of the industrial injury," and stating that "It has long<sup>63</sup> been the rule that the rights of parties under the

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<sup>59</sup> AB 24.

<sup>60</sup> The appealed judgment says nothing about *deference* to the Board. The judgment shows only that the court analyzed the issue in the same way as the Board and reached the same conclusion.

<sup>61</sup> CP, ABR 30, lines 23-24.

<sup>62</sup> *See* the Appendix.

<sup>63</sup> At least as far back as 1931, in *Foster v. Dep't of Labor & Indus.*, 161 Wash. 54, 148-49, 296 P.2d 148 (1931) (citations to foreign cases, omitted).

workers' compensation statute governed by the law in force at the time the injury occurred," citations omitted, emphasis added.)

No part of WAC 296-14-520 through 528 could apply retroactively. The Department claims otherwise, arguing *State v. MacKenzie*, 114 Wn. App. 687, 60 P.3d 607 (2002). Again, the Industrial Insurance Act is a self-contained remedial benefits plan; *MacKenzie* did not involve the Act, so to use it to displace the rule that workers' compensation rights are fixed by the law in effect on the injury date would be improvident. Moreover, *MacKenzie* would *deny* retroactive application. *MacKenzie* says a regulation may operate retroactively if it was enacted to *clarify internal inconsistency in the pertinent statute, and affects only procedure, not any substantive right*:

... [T]he effective date of an administrative regulation does not prohibit the regulation from applying retroactively where the purpose of the regulation is curative or remedial in nature.

**When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative.**<sup>64</sup> Here, the regulation attempted to correct an oversight in establishing the admissibility of standards for breath alcohol test resulted, and to ensure that these

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<sup>64</sup> Citing *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 308-09, 12 P.3d 585 (2000); *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 560-62, 663 P.2d 482 (1983), and *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 595-96, 600-01, 973 P.2d 1011 (1999).

standards remained consistent with existing regulations. Therefore, the regulation was clearly intended to be curative.

Further, **an amendment is deemed remedial when it relates to practice, procedure or remedies, and does not affect a substantive or vested right.**<sup>65</sup> If a statute is remedial in nature and retroactive application would further its purpose, the courts may apply the rule retroactively.<sup>66</sup> Here, the amendment clearly stated, “This provision is remedial in nature,” related to the procedure for establishing admissibility standards for breath alcohol tests, and affected no substantive or vested rights.

MacKenzie, 114 Wn. App. at 699-700 (emphasis added). WAC 296-14-526 is the *opposite* of remedial; it *restricts* §178. The Department has shown no inconsistency in §178. And, the regulation *does* affect a substantive right – the amount of Mr. Granger’s entitlement to total disability benefits (both temporary and permanent<sup>67</sup>). For any of those reasons, let alone all of them, the regulation, if valid, may not apply retroactively.

Obviously no regulation can apply retroactively unless it is valid, and WAC 296-14-526 is *invalid*. “Hourly wage” has a plain meaning,

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<sup>65</sup> Citing *In re Personal Restraint of Matteson*, 142 Wn.2d at 308-09, and *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990).

<sup>66</sup> Citing *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d at 47.

<sup>67</sup> And the amount of *permanent* total disability benefits, if his total disability turns out to be permanent. See RCW 51.32.060(1) and RCW 51.32.090(1).

agencies lack authority to “interpret” plain statutory language, and courts do not defer to such “interpretation”:

## ANALYSIS

### Statutory Interpretation

An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule making process. However, **we accord no deference to an agency's rule where no ambiguity exists**. Courts retain the ultimate authority to interpret a statute.

*Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004).<sup>68</sup>

Second, where statutes *are* ambiguous courts reject administrative interpretations that are unsound. *See Cockle*, the Supreme Court said:

While we may defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute, such interpretation is not binding on us. Indeed, **we have deemed such deference inappropriate when the agency's interpretation conflicts with a statutory mandate**. Both 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**. ...

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<sup>68</sup> Emphasis added. *See also id.* at 593:

Courts retain the ultimate authority to interpret a statute. Whether a court accords deference to an agency's construction of the statute depends on whether the statute is ambiguous. *See Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). A statute is ambiguous if it is susceptible to more than one meaning. *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995).

142 Wn.2d at 812 (citations and internal punctuation omitted, emphasis added). See also *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003), *review denied*, 151 Wn.2d 1028, 94 P.3d 359 (2004), where the court said:

... “The weight to be given an administrative policy depends upon the thoroughness evidenced in its consideration, the validity of its reasoning, and all those factors that give it power to persuade, if lacking power to control.” **“No deference is to be accorded a policy that is wrong.** Moreover, it is and always has been for the courts, not administrative agencies, to declare the law and interpret statutes.”<sup>[69]</sup>

WAC 296-14-526 violates RCW 51.12.010’s mandate that “where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation’s fundamental purpose, the benefit of the doubt belongs to the injured worker[.]” *Cockle*, 142 Wn.2d at 811 (citations omitted). The regulation also wrongly excludes from “hourly wage” money the term plainly *includes*, resulting in “wages” that are less than actual earning capacity. An “agency exceeds its rulemaking authority to the extent it modifies or amends precise requirements of statute.” *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 83, 11 P.3d 726 (2000)

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<sup>69</sup> Quoting *Othello Cmty. Hosp. v. Employment Sec. Dep’t*, 52 Wn. App 592, 596, 762 P.2d 1149 (1988), *review denied*, 112 Wn.2d 1018, \_\_\_ P.2d \_\_\_ (1989) (citing *Soriano v. United States*, 494 F.2d 681 (9<sup>th</sup> Cir. 1974), emphasis added).

(characterizing *Winans v. W.A.S., Inc.*, 112 Wn.2d 529, 540, 772 P.2d 1001 (1989), as having stated that “regulations must be consistent with statutes under which they are promulgated,” and citing *Baker v. Morris*, 84 Wn.2d 804, 809-10, 529 P.2d 1091 (1974)). See also *Caritas Servs. v. Dep’t of Social & Health Servs.*, 123 Wn.2d 391, 415, 869 P.2d 28 (1994), citing *Winans*, 112 Wn.2d at 540-41, as authority for the statement that “even if DSHS had the power to issue retroactive regulations, agencies do not have the power to amend unambiguous statutory language.” This rule applies with added force to regulations pertaining to the Industrial Insurance Act, because of the Legislature’s mandate that the Act is a remedial law.

**5. The Department’s reading of §178 – not the trial court’s – would impede “sure and certain relief”**

At AB 29-30 the Department argues that the appealed judgment impedes “sure and certain relief” for injured workers,<sup>70</sup> when in fact it does

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<sup>70</sup> “Sure and certain relief” comes from RCW 51.04.010, “Declaration of police power - Jurisdiction of courts abolished,” which provides:

The common law system governing the remedy of workers against employers form injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. **The remedy of the worker has been uncertain, slow and inadequate.** Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare

*not*, but the Department's own argument surely *does*.

The application form for workers' compensation benefits already asks the injured worker and his or her employer to state the worker's "hourly wage."<sup>71</sup> The Department already sends every claimant (of both state fund and self-insured employers) a booklet that addresses workers'

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of its wage worker. The state of Washington, therefore, exercising herein its sovereign power, declares that all phases of the premises are withdrawn from private controversy, and **sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided...**

(Emphasis added.) *See also* RCW 51.32.210, "Claims of injured workers, prompt action – Payment – Acceptance – Effect," which provides:

Claims of injured workers of employers who have secured the payment of compensation by insuring with the department shall be promptly acted upon by the department. **Where temporary disability compensation is payable, the first payment thereof shall be mailed within fourteen days after receipt of the claim** at the department's offices in Olympia and shall continue at regular semimonthly intervals.

(Emphasis added.) The same requirement applies in self-insured claims. (In Chapter 51.14 RCW, the Act authorizes employers to self insure for workers' compensation risk, and administer their own workers' compensation claims, either directly or through third-party administrators.) *See* RCW 51.32.190(3), which provides:

Upon making the first payment of income benefits, the self-insurer shall immediately notify the director in accordance with a form to be prescribed by the director. Upon request of the department on a form prescribed by the department, the self-insurer shall submit a record of the payment of income benefits including initial, termination or terminations, and change or changes to the benefits. **Where temporary disability compensation is payable, the first payment thereof shall be made within fourteen days after notice of claim and shall continue at regular semimonthly or biweekly intervals.**

(Emphasis added.)

<sup>71</sup> Self-insuring employers use similar forms, which vary in format.

compensation rights<sup>72</sup> – including, specifically, “wage-replacement benefits.” Those could explain “hourly wage” in one sentence. The Department already follows up with letters requesting further information.<sup>73</sup> The appealed judgment imposes *no* additional burden on the Department or on self-insuring employers, so should not delay provision of benefits.

In contrast, the Department’s argument that “wages” should depend on whether, at the time of injury, an injured worker was eligible to “use” or “receive” trust benefits under his or her particular CBA, would drastically slow payment of wage replacement benefits. The Board pointed out the *legal* difficulties that the Department’s approach would cause: “If we tread the latter path<sup>[74]</sup> in considering employer contributions to health care, we could end up trying to determine the ‘wage base’ effect of waiting periods, deductibles, exclusions, and a myriad of conditions placed on actual receipt

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<sup>72</sup> For state-fund employees the booklet is titled “Workers’ Guide to Industrial Insurance Benefits.” For employees of self-insured employers the booklet is titled “Employees of Self-Insured Businesses: A Guide to Industrial Insurance Benefits.” See the Appendix for the booklet covers and tables of contents.

<sup>73</sup> See the Appendix.

<sup>74</sup> *I.e.*, the path of WAC 296-14-526, which includes employer-paid health-care premium in “wages” only if the worker is eligible to use such benefits on the injury date; see ABR 16, lines 7-14.

of benefits.”<sup>75</sup> *Administrative* trouble would be even worse.<sup>76</sup> In every claim where an injured worker’s employment contract provided for hourly wages to be deposited to trusts the Department would have to contact a trust administrator to request the worker’s eligibility status under the particular CBA on a particular injury date, then deal with the information it got back. There is no way the Department can do that within 14 days of claim receipt.<sup>77</sup>

Delay would be further exacerbated by trusts being slow to respond, or refusing to provide information altogether. Trust administrators typically manage benefits plans for multiple unions, under multiple CBAs. To provide eligibility information for every injured worker would take substantial resources; trust administrators would owe it to their clients to

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<sup>75</sup> ABR 16, lines 14-17.

<sup>76</sup> See *Cockle*, 142 Wn.2d at 820-21:

[T]he Court of Appeals correctly noted that the Department is not entitled to disregard statutory provisions merely because it finds them inconvenient. That said, however, we would reject as unnecessary the Court of Appeals’ requirement that the “reasonable value” of a benefit like health care coverage be measured by its *hypothetical* market value rather than simply by the monthly premium *actually* paid by the employer to secure it – or, in the case of a group plan, the worker’s portion thereof.

<sup>77</sup> See RCW 51.32.090(3) and RCW 51.32.210, set out in footnote 53.

refuse to provide services for free, and the Act does not provide for payment. The Trusts are entities established under and regulated by federal law;<sup>78</sup> they are not parties to the Act, and the Department has no authority to *make* them do anything.

**6. The Department’s argument that “where there is no loss of wages or benefits due to injury, there can be no wage-loss replacement” under the Act is immaterial, because the appealed judgment did not determine wage replacement**

At AB 30-32 the Department argues that “where there is no loss of wages or benefits due to injury, there can be no wage-loss *replacement*”<sup>79</sup> under the Act. The appealed judgment did not determine wage replacement benefits; it determined “monthly wage.” (As addressed above, *wages* and *wage replacement* are governed by different statutes, and “monthly wage” is determined without regard for wage loss.<sup>80</sup>) Needless to say, this court is a court of *review*. The court should not address a matter outside the judgment before it.

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<sup>78</sup> See footnote 8.

<sup>79</sup> AB 30 (emphasis original).

<sup>80</sup> See footnote 19.

Further, Mr. Granger *did* lose wages because of his injury; when he became totally disabled and stopped work his employer stopped paying him wages, including the disputed \$2.15 an hour.<sup>81</sup>

The Department's argument that Mr. Granger "cannot dispute that the payments made by his employer into the union trust fund at the time of his injury had no actual or practical value to him"<sup>82</sup> is unsound, both factually and legally. Factually, wage deposits at the time of injury built eligibility for trust benefits in later months. Legally, "actual or practical value" appears nowhere in §178 or in any pertinent authority.

The Department's related argument, that "if the Department is required to include health care benefits in his time loss compensation rate, he is being overcompensated his temporary [total] disability, as the Department is being required to do more than replace or compensate for the

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<sup>81</sup> See CP, ABR 31 lines 7-15:

15. In accordance with the Union contract, the employer withheld funds out of the claimant's paycheck for health and welfare benefits, but does not actually pay the premium until the following month. ...

16. The employer did contribute towards claimant's health insurance coverage...for the 64 hours the claimant worked in April 1995.

17. As of May 1995, the health benefits contributed by the employer were terminated.

<sup>82</sup> AB 30-31.

financial loss sustained as a resulting from a temporary [total] disability,”<sup>83</sup> makes no sense. As pointed out in the previous paragraph the appealed judgment replaces nothing; it establishes the presumptive basis<sup>84</sup> for wage replacement under RCW 51.32.090. A *result* of acknowledging the disputed \$2.15 an hour as “hourly wage” will be partial replacement of that money by TTD, pursuant to RCW 51.32.060 and .090; and that is as it *should* be, because the evidence is clear that Mr. Granger’s employer paid him that money while he was working, and stopped paying it when he became totally disabled.<sup>85</sup>

**7. The Department’s argument and regulations would result in different statutory “wages” for workers whose actual wages, and actual earning capacities, are the same**

The Department’s argument that §178 means to exclude some actual wages §178 “wages” urges reading the statute in manner that, inevitably, would produce results that are strained or absurd. Needless to say, that is undesirable:

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<sup>83</sup> AB 32.

<sup>84</sup> Rebuttable under §090(6).

<sup>85</sup> See footnote 80.

When interpreting a statute, we first look to the ordinary meaning of the words used by the legislature. We will adopt the interpretation of statutes which best advances the legislative purpose and avoids unlikely, absurd, or strained consequences.

Thurston County v. City of Olympia, 151 Wn.2d 171, 175, 86 P.3d 151

(2004) (citation omitted). Consider the facts in one of the cases now being deliberated by the Supreme Court, Fred Jones v. Dep't of Labor & Indus. Jones was working as a carpenter on a “prevailing wage” job.<sup>86</sup> Per RCW 39.12.015, the Department of Labor & Industries publishes a list of hourly wages for all trades,<sup>87</sup> or trade and grade,<sup>88</sup> on such work, and all contractors must pay all workers at those rates.<sup>89</sup> Jones was a union member. His union contract (and most such collective bargaining agreements) provided that while prevailing wages replaced CBA-mandated wages, those wages still had to be *delivered* according to the CBA, *i.e.*, part to paychecks, part to governments, and part to trusts. Assume that on the date and job where he was injured a nonunion carpenter also was hurt.

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<sup>86</sup> See RCW Chapter 39.12, “Prevailing Wages On Public Works.”

<sup>87</sup> “All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.”

<sup>88</sup> *E.g.*, journeyman and apprentice.

<sup>89</sup> See RCW 39.12.020, “Prevailing rate to be paid on public works [etc.]”

Both of them had to be paid the same actual hourly wage; but all of the nonunion worker's money (less tax and similar mandatory deductions) would have been delivered to his paychecks. (The nonunion worker would not have been entitled to trust participation or benefits, because he was not a union member.) According to the Department, Jones's "hourly wage" was less than his coworker's, when plainly their actual wages were the same. The same strained, absurd result would occur on *nonprevailing* wage jobs, for example: (1) multi-employer construction sites, where some employers are union and others are not; or (2) single employers where some trades are union and others not; or (3) single employers where within a trade some workers are union and others not, but all workers within the trade are paid at CBA-mandated rates;<sup>90</sup> or (4) as a result of variation in trust benefits and rules (similar to different insurance companies charging the same premium for different coverages, and on different conditions). According to the Department, in each of those circumstances workers' "hourly wages" should depend not on what employers were paying employees for work, but on what the employees got for their money – an

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<sup>90</sup> According to the United States Department of Labor, approximately 40,000 Washington workers. United state Department of Labor, Bureau of Labor Statistics, APPENDIX pgs. A-51, table and footnotes 1 and 2.

untenable result under §178.

**D. Request for Reasonable Attorney Fee and Costs**

RAP 18.1(a) provides that “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses as provided in this rule,” in a separate section of his brief. RCW 51.52.130, “Attorney and witness fees in court appeal,” requires the court to award reasonable fees to an injured worker who successfully defends his right to benefits on appeal:

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, a reasonable fee for the services of the worker’s or beneficiary’s attorney shall be fixed by the court. ...

If appellant prevails here, he requests a reasonable fee and costs.

**E. Conclusion**

The trial court was right to conclude that the disputed \$2.15 an hour was part of Mr. Granger’s “wages” under RCW 51.08.178(1), so the judgment should be affirmed. Mr. Granger requests a reasonable attorney

fee and costs, in amounts to be determined by post-decision motion.

DATED this 18 day of April 2005.

Respectfully submitted,

Rumbaugh Rideout Barnett & Adkins

  
\_\_\_\_\_  
Terry J. Barnett, WSB 8080, Attorneys  
for respondent William A. Granger

CERTIFICATE OF SERVICE BY MAIL

I certify that on the date noted below, I mailed a copy of this pleading to:

Timothy S. Hammill, AAG  
120 South Third Street #100  
Yakima, WA 98901-2869

DATED this 18 day of April 2005.

  
\_\_\_\_\_  
Michelle Rhodes, Legal Assistant

APPENDIX

**RCW 39.12.015**

**Industrial statistician to make determinations of prevailing rate.**

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

[1965 ex.s. c 133 § 2.]

**RCW 51.04.010****Declaration of police power -- Jurisdiction of courts abolished.**

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

**RCW 51.04.060**

**No evasion of benefits or burdens.**

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

[1977 ex.s. c 350 § 3; 1961 c 23 § 51.04.060. Prior: 1911 c 74 § 11; RRS § 7685.]

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

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

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

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

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

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

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

[1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

**NOTES:**

**Severability -- Effective date -- 1977 ex.s. c 323:** See notes following RCW 51.04.040.

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

<http://search.leg.wa.gov/pub/textsearch/ViewHtml.asp?Action=Html&Item=1&X=4061442...> 4/6/2005

**RCW 51.12.010**

**Employments included -- Declaration of policy.**

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

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

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

**RCW 51.32.060****Permanent total disability compensation -- Personal attendant.**

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

(a) If married at the time of injury, sixty-five percent of his or her wages but not less than two hundred fifteen dollars per month.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages but not less than two hundred fifty-two dollars per month.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages but not less than two hundred eighty-three dollars.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages but not less than three hundred six dollars per month.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages but not less than three hundred twenty-nine dollars per month.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages but not less than three hundred fifty-two dollars per month.

(g) If unmarried at the time of the injury, sixty percent of his or her wages but not less than one hundred eighty-five dollars per month.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages but not less than two hundred twenty-two dollars per month.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages but not less than two hundred fifty-three dollars per month.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages but not less than two hundred seventy-six dollars per month.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages but not less than two hundred ninety-nine dollars per month.

(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages but not less than three hundred twenty-two dollars per month.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

[1993 c 521 § 2; 1988 c 161 § 1. Prior: 1986 c 59 § 1; 1986 c 58 § 5; 1983 c 3 § 159; 1977 ex.s. c 350 § 44; 1975 1st ex.s. c 224 § 9; 1973 c 147 § 1; 1972 ex.s. c 43 § 20; 1971 ex.s. c 289 § 8; 1965 ex.s. c 122 § 2; 1961 c 274 § 2; 1961 c 23 § 51.32.060; prior: 1957 c 70 § 31; 1951 c 115 § 2; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

#### NOTES:

**Effective date -- 1993 c 521:** See note following RCW 51.32.050.

**Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161:** See notes following RCW 51.32.050.

**Effective date -- 1975 1st ex.s. c 224:** See note following RCW 51.04.110.

**RCW 51.32.090****Temporary total disability -- Partial restoration of earning power -- Return to available work -- When employer continues wages -- Limitations. (Expires June 30, 2007.)**

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered

nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

[2004 c 65 § 9. Prior: 1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4; prior: 1988 c 161 § 3; 1986 c 59 § 3; 1986 c 59 § 2; prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

#### NOTES:

**Report to legislature-&hyphen;Effective date-&hyphen;Expiration date-&hyphen;Severability -- 2004 c 65:** See notes following RCW 51.04.030.

**Effective date -- 1993 c 521:** See note following RCW 51.32.050.

**Effective date -- 1993 c 299:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 299 § 2.]

**Effective date -- 1993 c 271:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993]." [1993 c 271 § 2.]

**Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161:** See notes following RCW 51.32.050.

**Expiration date -- 1986 c 59 § 2; Effective dates -- 1986 c 59 §§ 3, 5:** "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

**Program and fiscal review -- 1985 c 462:** See note following RCW 41.04.500.

#### RCW 51.32.090

**Temporary total disability -- Partial restoration of earning power -- Return to available work -- When employer continues wages -- Limitations. (Effective June 30, 2007.)**

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician as able to perform available work other than his or her usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician to relate the physical activities of the job to the worker's disability. The physician shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's

recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

[1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4. Prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989, pursuant to 1986 c 59 § 6); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

#### NOTES:

**Reviser's note:** This section was amended by 1993 c 271 § 1, 1993 c 299 § 1, and by 1993 c 521 § 3, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Effective date -- 1993 c 521:** See note following RCW 51.32.050.

**Effective date -- 1993 c 299:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 299 § 2.]

**Effective date -- 1993 c 271:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993]." [1993 c 271 § 2.]

**Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161:** See notes following RCW 51.32.050.

**Expiration date -- 1986 c 59 § 2; Effective dates -- 1986 c 59 §§ 3, 5:** "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

**Program and fiscal review -- 1985 c 462:** See note following RCW 41.04.500.

**RCW 51.32.210****Claims of injured workers, prompt action -- Payment -- Acceptance -- Effect.**

Claims of injured workers of employers who have secured the payment of compensation by insuring with the department shall be promptly acted upon by the department. Where temporary disability compensation is payable, the first payment thereof shall be mailed within fourteen days after receipt of the claim at the department's offices in Olympia and shall continue at regular semimonthly intervals. The payment of this or any other benefits under this title, prior to the entry of an order by the department in accordance with RCW 51.52.050 as now or hereafter amended, shall be not considered a binding determination of the obligations of the department under this title. The acceptance of compensation by the worker or his or her beneficiaries prior to such order shall likewise not be considered a binding determination of their rights under this title.

[1977 ex.s. c 350 § 55; 1972 ex.s. c 43 § 26.]

**RCW 51.36.010****Extent and duration. (Expires June 30, 2007.)**

Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice, if conveniently located, and proper and necessary hospital care and services during the period of his or her disability from such injury, but the same shall be limited in point of duration as follows:

In the case of permanent partial disability, not to extend beyond the date when compensation shall be awarded him or her, except when the worker returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him or her shall cease; in case of temporary disability not to extend beyond the time when monthly allowances to him or her shall cease: PROVIDED, That after any injured worker has returned to his or her work his or her medical and surgical treatment may be continued if, and so long as, such continuation is deemed necessary by the supervisor of industrial insurance to be necessary to his or her more complete recovery; in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or her or he or she is placed upon the permanent pension roll: PROVIDED, HOWEVER, That the supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications, but not including those controlled substances currently scheduled by the state board of pharmacy as Schedule I, II, III, or IV substances under chapter 69.50 RCW, which are necessary to alleviate continuing pain which results from the industrial injury. In order to authorize such continued treatment the written order of the supervisor of industrial insurance issued in advance of the continuation shall be necessary.

The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease.

[2004 c 65 § 11; 1986 c 58 § 6; 1977 ex.s. c 350 § 56; 1975 1st ex.s. c 234 § 1; 1971 ex.s. c 289 § 50; 1965 ex.s. c 166 § 2; 1961 c 23 § 51.36.010. Prior: 1959 c 256 § 2; prior: 1943 c 186 § 2, part; 1923 c 136 § 9, part; 1921 c 182 § 11, part; 1919 c 129 § 2, part; 1917 c 28 § 5, part; Rem. Supp. 1943 § 7714, part.]

**NOTES:**

**Report to legislature -- Effective date -- Expiration date -- Severability -- 2004 c 65:** See notes following RCW 51.04.030.

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

**RCW 51.36.010****Extent and duration. (Effective June 30, 2007.)**

Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician of his or her own choice, if conveniently located, and proper and necessary hospital care and services

during the period of his or her disability from such injury, but the same shall be limited in point of duration as follows:

In the case of permanent partial disability, not to extend beyond the date when compensation shall be awarded him or her, except when the worker returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him or her shall cease; in case of temporary disability not to extend beyond the time when monthly allowances to him or her shall cease: PROVIDED, That after any injured worker has returned to his or her work his or her medical and surgical treatment may be continued if, and so long as, such continuation is deemed necessary by the supervisor of industrial insurance to be necessary to his or her more complete recovery; in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or her or he or she is placed upon the permanent pension roll: PROVIDED, HOWEVER, That the supervisor of industrial insurance, solely in his or her discretion, may authorize continued medical and surgical treatment for conditions previously accepted by the department when such medical and surgical treatment is deemed necessary by the supervisor of industrial insurance to protect such worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications, but not including those controlled substances currently scheduled by the state board of pharmacy as Schedule I, II, III, or IV substances under chapter 69.50 RCW, which are necessary to alleviate continuing pain which results from the industrial injury. In order to authorize such continued treatment the written order of the supervisor of industrial insurance issued in advance of the continuation shall be necessary.

The supervisor of industrial insurance, the supervisor's designee, or a self-insurer, in his or her sole discretion, may authorize inoculation or other immunological treatment in cases in which a work-related activity has resulted in probable exposure of the worker to a potential infectious occupational disease. Authorization of such treatment does not bind the department or self-insurer in any adjudication of a claim by the same worker or the worker's beneficiary for an occupational disease.

[1986 c 58 § 6; 1977 ex.s. c 350 § 56; 1975 1st ex.s. c 234 § 1; 1971 ex.s. c 289 § 50; 1965 ex.s. c 166 § 2; 1961 c 23 § 51.36.010 . Prior: 1959 c 256 § 2; prior: 1943 c 186 § 2, part; 1923 c 136 § 9, part; 1921 c 182 § 11, part; 1919 c 129 § 2, part; 1917 c 28 § 5, part; Rem. Supp. 1943 § 7714, part.]

#### NOTES:

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

**RCW 51.52.130****Attorney and witness fees in court appeal.**

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, 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. 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, 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, 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.

[1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § 51.52.130. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

**NOTES:**

**Effective dates -- Implementation -- 1982 c 63:** See note following RCW 51.32.095.

**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.

[Statutory Authority: RCW 51.04.010, 51.04.020 and 142 Wn.2d 801 (2001). 03-11-035, § 296-14-526, filed 5/15/03, effective 6/15/03.]

# REPORT OF INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE Y723750

This report is an application for industrial insurance benefits from the Washington state fund, which is administered by the Department of Labor and Industries. We are responsible for ensuring prompt medical care for workers who suffer job-related injuries or occupational diseases. If you are eligible, we will pay your medical bills and a portion of lost wages if you are unable to work. This report has sections to be completed by you, the doctor who treats your injury or disease and your employer. Each section will be considered in making a decision on your application for benefits.

**FOR BEST SERVICE:**

- **Use a ball-point pen. Press hard.** The last page of the report is yours. Please review it before you complete the form. It contains information about your application, your legal rights, a list of our service locations and an identification card that can be used in getting medical services necessary for the treatment of your job-related injury or occupational disease.
- **Answer all questions completely.** Your answers will enable us to make a decision on your application. Without full information, your benefits may be delayed.
- **Report your marital status, dependent and wage information including medical, dental & vision benefits.** This information is used to calculate your time-loss or wage-replacement benefits if you are unable to work due to a job-related injury or occupational disease.
- **Describe the accident in detail.** If an arm was injured in a fall, tell us which arm and describe how the fall occurred.

Department of Labor & Industries  
Insurance Services Division  
PO Box 44299  
Olympia WA 98504-4299

**MEDICAL PERSONNEL (NOTE: MEDICAL COMPLETION INSTRUCTIONS ON PAGE 2)**

Give the last page of this form to patient *before* you complete your section. After you complete the medical section, send page 1 to the address listed to the left. Keep page 2 and send the remainder to the patient's employer.

<b>PLEASE PRINT LEGIBLY AND PRESS FIRMLY</b>				Language Preference (circle one) English Spanish Russian Korean Chinese Vietnamese Laotian Cambodian Other			
1. Name (First-middle-last)		2. Sex Select one Male Female		14. Date of injury Month-day-year		15. Time of injury Select one AM PM	
3. Social Security number		4. Home phone ( )		5. Birthdate Month-day-year		16. Shift Select one Day Swing Night	
6. Home address Number and street Apt. number		7. Height Ft-In		17. Part of body injured or exposed Right ankle, left index finger, lungs, etc			
9. Mailing address (if different from home address) Number and street or P.O. Box number		10. Marital Status Select one Married Widowed Separated Single Divorced		18. Describe in detail how your injury or exposure occurred include tools, machinery, chemicals or fumes that may have been involved			
11. Dependent Children Include unborn, estimate birthdate. Benefits will be based, in part, on number of legally dependent children. If you don't have custody, complete item 13		12. Spouse's name		19. Were you doing your regular job? Select one YES Employer NO Premises Jobsite Other		20. Where did the injury or exposure occur? Select one	
Name		Relationship		Legal custody Select one YES NO		Address	
				YES NO		City State ZIP code	
				YES NO		22. Was this incident caused by failure of a machine or product OR someone who is not a co-worker? Select one YES NO POSSIBLY	
				YES NO		23. List any witnesses	
				YES NO		24. When will you return to work? / /	
13. Name and address of children's legal guardian						25. When did you last work? / /	
29. Business name of employer		30. Type of business		31. How long have you worked there? Select appropriate unit of time Years Months Weeks Days		32. Employer phone number ( )	
33. Employer address City State ZIP code		34. Your job title and duties Write amount, select rate		35. Rate of pay at this job Hour Week \$ Day Month		36. Hours/day	
						37. Days/week	
39. How many paying jobs do you have?		40. Are you? <input type="checkbox"/> Owner <input type="checkbox"/> Partner <input type="checkbox"/> Corp. Officer		41. Signature NOTE: READ LEGAL NOTICES ON LAST PAGE I declare that these statements are true to the best of my knowledge and belief. In signing this form, I permit doctors, hospitals or clinics to release medical reports generated by themselves & others to the Dept. of Labor and Industries. <b>X</b>		38. Additional earnings (daily average) Select one Piecework Tips Commission Bonuses	
		<input type="checkbox"/> Does Not Apply <input type="checkbox"/> Corp Shareholder <input type="checkbox"/> Corp Director <input type="checkbox"/> Optional Coverage				26. Did you report the incident to your employer? Name/title of person reported to YES NO	
						27. Date you reported it Month-day-year	
						28. Was your employer contributing to your and/or family's medical, dental and/or vision insurance on the day you were injured? Select one YES NO	

42. Diagnosis		43. ICD Diag. codes □□□.□□ □□□.□□ □□□.□□		44. Date you first saw patient for this condition Month-day-year		48. Was the diagnosed condition caused by this injury or exposure? Circle one of four PROBABLY (50% or more) YES POSSIBLY (Less than 50%) NO		49. Will the condition cause the patient to miss work? Circle one; if YES, estimate no. of days NO YES _____ days	
45. Subjective complaints supporting your diagnosis						50. Is there any pre-existing impairment of the injured area? NO YES Circle one; if YES, describe briefly or attach report			
46. Objective findings supporting your diagnosis Include physical, lab and X-ray findings						51. Has patient ever been treated for the same or similar condition? NO YES Circle one; if YES, give year, name of physician and city of treatment			
47. Treatment and diagnostic testing recommendations						52. Are there any conditions that will prevent or retard recovery? NO YES Circle one; if YES, describe briefly or attach report			
						53. Referral physician Complete if you refer patient to another doctor for follow-up Name Telephone ( ) Address			
54. Name of hospital or clinic Name Telephone ( )			55. Attending physician Name Telephone ( )			L&I USE ONLY			
Address			Address						
City State ZIP code			City State ZIP code			58. Signature Licensed physician must sign report <b>X</b>			
56. Place of service Select one Inpatient ER Outpatient Office Clinic			57. Provider number For billing purposes			Today's Date			

1 & 1 COPY  
A-13

53. Name and title of person completing form		75. Injured worker's name		CLAIM NUMBER: <b>Y723750</b>	
60. Name of business		76. Social Security Number	77. Date of injury or last occupational exposure Month-day-year	78. When was it reported to you? Month-day-year Time Select one: AM PM	
61. Business mailing address and phone number Telephone City State ZIP + 4		79. Describe in detail how the incident occurred			
62. Business location (if different from mailing address) Number and street City State ZIP + 4		80. Was this incident caused by failure of a machine or product OR someone who is not a employee? Select one: YES NO POSSIBLY			
63. UBI and L&I account ID	64. Worker's risk classification code	65. Hrs./dy.	81. Part of body injured or exposed	82. Do you question the validity of this claim? Select one: if YES, explain below YES NO	
66. Rate of pay Write amount, select rate Hour Week Day Month	67. Worker is: <input type="checkbox"/> Owner <input type="checkbox"/> Corp. Shareholder <input type="checkbox"/> Partner <input type="checkbox"/> Corp. Director <input type="checkbox"/> Corp. Officer <input type="checkbox"/> Optional Coverage	68. Does business have a maritime function? Select one: YES NO	83. Comments Please review the worker's section for completeness and accuracy. If any answers need clarification, an explanation or completion, please give the number of the question and explain below.		
69. Avg. daily earnings from piecework, tips or commissions. List amount, specify source	70. When will your employee return to work? Month-day-year	71. When did your employee last work? Month-day-year	84. Were you contributing to this worker and/or family's medical, dental and/or vision insurance on date of injury? YES NO	85. If so, how much did you pay? Day Wk. Mo.	86. Was this medical insurance in effect on the day of the injury? YES NO
72. Did the injury cause employee to miss time from work, will you pay wages? Select one: if YES, select appropriate pay YES NO Vacation Sick Contractual Other	73. Did the injured worker die? Select one: YES NO	87. Temporary light duty work available during rehabilitation? YES NO		88. Who can we contact about a transitional job? Name: Ph. #:	
74. I declare these statements are true to the best of my knowledge and belief. Date		89. List any witnesses		L&I USE ONLY	
X Sign and send original to L&I at P.O. Box 44299, Olympia WA 98504-4299					

1. Name (First-middle-last)		2. Sex Select one: Male Female	14. Date of injury Month-day-year	15. Time of injury Select one: AM PM	CLAIM NUMBER: <b>Y723750</b>
3. Social Security number	4. Home phone	5. Birthdate Month-day-year	16. Shift Select one: Day Swing Night	17. Part of body injured or exposed Right ankle, left index finger, lungs, etc.	
6. Home address Number and street City State ZIP code		7. Height Ft-in	18. Describe in detail how your injury or exposure occurred Include tools, machinery, chemicals or fumes that may have been involved		
9. Mailing address (if different from home address) Number and street or P.O. Box number City State ZIP code		10. Marital Status Select one: Married Widowed Separated Single Divorced	19. Were you doing your regular job? Select one: YES NO		20. Where did the injury or exposure occur? Select one: Employer Premises Jobsite Other
11. Dependent Children Include unborn, estimate birthdate. Benefits will be based, in part, on number of legally dependent children. If you don't have custody, complete item 13.		12. Spouse's name		21. Address where injury or exposure occurred Business name if at business location Address County City State ZIP code	
Name Relationship Legal custody Select one: YES NO Birthdate Month-day-year				22. Was this incident caused by failure of a machine or product OR someone who is not a co-worker? Select one: YES NO POSSIBLY	
13. Name and address of children's legal guardian				23. List any witnesses	
29. Business name of employer		30. Type of business	31. How long have you worked there? Select appropriate unit of time: Years Months Weeks Days		32. Employer phone number ( )
33. Employer address City State ZIP code		34. Your job title and duties	35. Rate of pay at this job Write amount, select rate: Hour Week Day Month		36. Hours/day
39. How many paying jobs do you have?		40. Are you? <input type="checkbox"/> Owner <input type="checkbox"/> Partner <input type="checkbox"/> Corp. Officer <input type="checkbox"/> Does Not Apply <input type="checkbox"/> Corp. Shareholder <input type="checkbox"/> Corp. Director <input type="checkbox"/> Optional Coverage	41. Signature I declare that these statements are true to the best of my knowledge and belief. In signing this form, I permit doctors, hospitals or clinics to release medical reports generated by themselves & others to the Dept. of Labor and Industries. X Today's date / /		
NOTE: READ LEGAL NOTICES ON LAST PAGE					

42. Diagnosis		43. ICD Diag. codes	44. Date you first saw patient for this condition Month-day-year	48. Was the diagnosed condition caused by this injury or exposure? Circle one: of four PROBABLY (50% or more) YES POSSIBLY (Less than 50%) NO	49. Will the condition cause the patient to miss work? Circle one: if YES, estimate no. of days NO YES _____ days
45. Subjective complaints supporting your diagnosis		46. Objective findings supporting your diagnosis Include physical, lab and X-ray findings		50. Is there any pre-existing impairment of the injured area? Circle one: if YES, describe briefly or attach report NO YES	
47. Treatment and diagnostic testing recommendations		51. Has patient ever been treated for the same or similar condition? Circle one: if YES, give year, name of physician and city of treatment NO YES		52. Are there any conditions that will prevent or retard recovery? Circle one: if YES, describe briefly or attach report NO YES	
54. Name of hospital or clinic Name Telephone ( ) Address City State ZIP code		55. Attending physician Name Telephone ( ) Address		53. Referral physician Complete if you refer patient to another doctor for follow-up Name Telephone ( ) Address	
56. Place of service Select one: Inpatient ER Outpatient Office Clinic		57. Provider number For billing purposes		58. Signature Licensed physician must sign report X Today's Date / /	
L&I USE ONLY					

# Workers' Guide to

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## Industrial Insurance Benefits



Department of  
**LABOR AND  
INDUSTRIES**



## Guide to Benefits

This is your guide to industrial insurance benefits. It explains the benefits available to you if you are injured on the job or develop an occupational disease. These benefits vary, depending on the injury. They can include paid health care, wage replacement and other services to aid you in your recovery and return to work.

This guide summarizes what happens when you file a claim, and how you can help make the process work smoothly for you. It also explains your rights and responsibilities, and tells you what choices you have if you disagree with a decision. This booklet, however, is not a legal interpretation of the law.

If you are injured on the job in Washington, you are insured by the Washington State Fund, unless your employer is self-insured, as some 400 employers in Washington are. (L&I publishes a different guide for workers employed by self-insured businesses.) If your claim is accepted, the benefits and level of service to which you are entitled are set by the state Legislature and administered by the Department of Labor and Industries. Our goal is to provide quality services to help you recover and return to work as soon as possible.

Information is current as of July 2001.  
Updates will be added as changes occur.

**For more information:**  
Call L&I's toll-free information line  
1-800-LISTENS (1-800-547-8367)

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# Employees of Self-Insured Businesses:

A Guide to Industrial  
Insurance Benefits



## Employees of self-insured businesses' Guide to Industrial Insurance

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STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291, OLYMPIA, WASHINGTON 98504-4291

July 1, 2003

CLAIM NUMBER  
INJURY DATE  
CLAIMANT

1. Was your employer contributing to your and/or your family's health care benefits on 06/28/2001, AND was this coverage in effect on that date? If no, stop here and return this form within 15 days. If yes, please continue.

If you were covered by employer-paid health care insurance, you will need to contact your employer, health care insurance company, or union local and ask them to respond to the following questions:

2. How much did the employer pay for health care benefits for this employee and his family on a monthly basis?

Note: If this employee was covered under a group plan and the individual cost is unknown, please provide that portion of your premium that represents the amount paid per worker.

3. Was the worker covered on 06/28/2001?

If yes, is he still covered?

If not, what date did coverage end or is there an anticipated termination date?

Have there been any periods of time when coverage stopped and then was reinstated since 06/28/2001?

If yes, please provide the dates that coverage stopped and started.

Please complete this form and return by 07/31/2003.

I verify that the above information is true.

\_\_\_\_\_  
Signature of employer or representative

\_\_\_\_\_  
Phone Number

ORIG: WORKER -  
CC: EMPLOYER -



STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

DIVISION OF INDUSTRIAL INSURANCE  
PO BOX 44291, OLYMPIA, WASHINGTON 98504-4291

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\_\_\_\_\_  
Signature of employer or representative

ORIG: EMPLOYER - 1  
CC: WORKER -