

# Washington Claims School

Presented by Reinisch Wilson Weier PC  
June 14, 2017  Lake Oswego, Oregon



Reinisch  
Wilson Weier PC  
LAW OFFICES

# 2016 Significant Washington Appeals and Supreme Court Decisions

*Attorneys*  
*Charles P. Pearson*  
*Christy A. Doornink*

## **Washington Claims School**

Presented by Reinisch Wilson Weier PC  
June 14, 2017  Lake Oswego, Oregon

# Washington State Supreme Court Decisions

---

***Birrueta v. Department of Labor & Industries, 186 Wn.2d 537 (2016)***  
**Supreme Court of Washington, En Banc**

**Legal Issue:** May the Department of Labor and Industries recoup erroneous payments that were made pursuant to orders that were final and binding?

**Background:** The claimant was injured during his employment in 2004. Burdened with language and health barriers, the claimant innocently but mistakenly reported that he was married with one child, when, in fact, he was unmarried with no children. From that time through 2008, the Department of Labor and Industries issued multiple compensation orders with computations based on the claimant's incorrect familial status. All of these orders became final and binding by 2009. In 2011, the Department determined that the claimant was totally and permanently disabled and, thus, entitled to a pension. In completing the required pension paperwork, the Department learned that the claimant had not had a wife or a child at any time since the industrial injury. Consequently, the Department issued the two orders that are at issue on appeal: first, assessing an overpayment against the claimant for the computational difference since learning of the mistake; and, second, changing the claimant's marital status from married to unmarried effective the day after the Department learned of the claimant's true status.

The claimant appealed these orders to the Board of Industrial Insurance Appeals, contending that the Department's prior orders, which stated that the claimant was married at the time of injury, were final and binding on all parties, including the Department. The Board disagreed and held that the Department's updated orders were authorized by RCW 51.32.240(1), which provides for the recoupment of erroneous payments made by innocent misrepresentation.

The claimant then sought review in Washington Superior Court, which reversed the Board's decision and held that the Department was indeed without authority to contravene final orders by seeking recoupment of payments made thereunder. On appeal, the Court of Appeals of Washington affirmed the Superior Court's decision. The Washington Supreme Court granted the petition for review.

**Discussion & Holding:** In examining RCW 51.32.240(1), the Washington Supreme Court concluded that recoupment depended on the cause of the erroneous payment. The Supreme Court explained that if erroneous payments were caused by adjudicator error, then payments made pursuant to final orders could not be recouped. Adjudicator errors include only the types of errors that may be addressed on direct appeal based on the information in a worker's claim file, including errors of law, insufficiency of the evidence, and errors in applying the law to the available information. However, erroneous payments made because of non-adjudicator error were subject to recoupment regardless of the pertinent order's finality. Examples of non-adjudicator errors include clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient, or any other circumstance of a similar nature, all not induced by willful misrepresentation. The Supreme Court held that because the contested orders were both

timely and sought recoupment of an erroneous payment caused by a non-adjudicator error (i.e., the claimant's innocent misrepresentation), the orders were proper under RCW 51.32.240(1)(a) notwithstanding the finality of the prior orders that authorized the payments. The Supreme Court accordingly reversed the Court of Appeals' decision and allowed the Department's recoupment orders.

**Key Point #1:** The Department (or a self-insured employer) may recoup erroneous payments mandated in final orders only if the causative error was non-adjudicative. If the causative error was adjudicative in nature, then mistaken payments may not be recouped if made pursuant to a final order.

**Key Point #2:** Although not central to this case, it is also notable that RCW 51.32.240(1) limits the recoupment of payments to those made within the previous year.

---

---

***Kovacs v. Department of Labor & Industries, 186 Wn.2d 95 (2016)***  
**Supreme Court of Washington, En Banc**

**Legal Issue:** Under RCW 51.28.050, does the one-year claim-filing statute of limitations begin to run on the day of the injury or the following day?

**Background:** The claimant suffered an industrial injury on September 29, 2010. Yet, he waited to file an application for benefits until September 29, 2011. Upon the employer's protest, the Department of Labor and Industries rejected the claim as untimely under the claim-filing statute of limitations set forth in RCW 51.28.050. On appeal to the Board of Industrial Insurance Appeals, the Department's rejection was affirmed. However, on appeal to the Washington Superior Court, the claim was allowed as timely under RCW 51.28.050. Subsequently, the Court of Appeals of Washington disagreed and held that RCW 51.28.050 unambiguously meant that the claimant had one year to file his application for benefits from the day of his injury, September 29, 2010; thus, his application filed on September 29, 2011, was untimely. The Washington Supreme Court granted the claimant's petition for review.

**Discussion & Holding:** The crux of the dispute regarded whether the workers' compensation claim-filing statute of limitations followed general time-computation rules or was distinct. On one hand, the claimant argued that general time-computation rules applied, which exclude the day of the event (e.g., the day of the injury) in a statute of limitations calculation. On the other hand, the Department argued that there is a different rule for workers' compensation claims, whereby the one-year time limitation begins on the date of the injury. Quoting RCW 51.28.050, the Supreme Court pointed to the plain language of the statute—that no application shall be valid or claim thereunder enforceable unless filed within one year *after the day* upon which the injury occurred. Furthermore, upon review of the legislative history and related case law, the Supreme Court concluded that, at least in this regard, workers' compensation time-computation rules did not expressly differ from general time-computation rules and, therefore, should be treated the same. As such, the Supreme Court held that the one-year statute of limitations for filing a workers' compensation claim started the day following the injury, not the day of the injury. Accordingly, the claimant's filing was considered timely and the Department was ordered to accept his claim.

**Key Point:** In calculating the statute of limitations for filing a workers' compensation claim, the one-year period begins the day following the injury, not the day of the injury.

---

***Clark County v. McManus*, 185 Wn.2d 466 (2016)**  
**Supreme Court of Washington, En Banc**

**Legal Issue:** Must a Washington Superior Court judge instruct the jury to give special consideration to an attending physician's testimony?

**Background:** The claimant worked for Clark County operating a street sweeper from 1999 until 2011. He eventually quit work because of a debilitating, degenerative spinal disease affecting his low back, which he attributed to the bumpy ride when operating a street sweeper and poor ergonomic layout in the operator's cab. The claimant filed a claim for workers' compensation benefits, which was allowed by the Department of Labor and Industries. Consequent to the employer's appeal, the Board of Industrial Insurance Appeals affirmed.

The employer appealed further to the Washington Superior Court. In formulating its jury instructions, the Superior Court denied the claimant's request that the jury be instructed to follow the Special Consideration Rule—which requires a jury to give careful thought to any testimony given by a claimant's attending physician. Ultimately, the Special Consideration Rule was not mentioned in the jury instructions. After deliberations, the jury determined that the claim should not have been allowed.

Upon the claimant's appeal to the Court of Appeals of Washington, the matter was remanded for a new trial on unrelated grounds. However, in doing so, the Court of Appeals ruled that the trial court did not error when it refused the claimant's request for an instruction on the Special Consideration Rule. The Washington Supreme Court granted the claimant's petition for review on this issue.

**Discussion & Holding:** As a threshold issue, the Supreme Court underscored that a trial court generally has the discretion whether to give a particular jury instruction to the extent that the decision is not based on an erroneous view of the law. As to whether the Special Consideration Rule must be addressed in jury instructions, the employer argued that an obligatory instruction would deprive the trial court of its discretion as to which instructions to give and would also confuse the jury into believing that the attending physician's testimony must be given greater weight. In examining existing case law, the Supreme Court rejected the employer's arguments and held that not only was instruction on the Special Consideration Rule not confusing, it was necessary for the jury to meaningfully review the Board's decision. This is because the Board had factored the Special Consideration Rule into its determination. Accordingly, the Supreme Court overturned the Court of Appeals decision and ruled that jury instructions explaining the Special Consideration Rule are obligatory, when applicable.

**Key Point:** When an attending physician testifies, the trial court must instruct the jury to give such testimony special consideration.

---

---

***Department of Labor & Industries v. Rowley*, 185 Wn.2d 186 (2016)**  
**Supreme Court of Washington, En Banc**

**Legal Issues:** In *Department of Labor & Industries v. Rowley*, there are two legal issues worth noting, as follows:

- \* First, which party bears the burden of proof regarding the Felony Payment Bar?
- \* Second, what evidentiary standard applies to a Felony Payment Bar determination?

**Background:** A truck driver, the claimant was injured when his truck veered off a highway overpass onto the roadway below. The responding police officer believed that drug use might have been involved and referred the claimant to a hospital for treatment. At the hospital, a nurse delivered to the police officer a bag purportedly taken from the claimant that the officer believed to contain residue of methamphetamines. When the claimant subsequently filed a workers' compensation claim, the Department of Labor and Industries denied the application under the Felony Payment Bar (RCW 51.32.020) because it was believed that the claimant was injured while committing a felony—possession of a controlled substance. The claimant appealed to the Board of Industrial Insurance Appeals. After considering testimony from several witnesses, the Board found that there was insufficient evidence to sustain the Department's decision and ordered the Department to approve the claim. The Department subsequently challenged that order in an appeal before a three-member Board panel, at the Washington Superior Court, and at the Court of Appeals of Washington. Every tribunal affirmed the Board's decision that the claimant was entitled to benefits. Yet, notably, all three tribunals disagreed as to the appropriate degree and allocation of the burden of proof. The Washington Supreme Court granted the Department's petition for review.

**Discussion & Holding:** First, the Supreme Court sought to determine which party bore the burden of proof regarding the Felony Payment Bar under RCW 51.32.020. Noting that the Industrial Insurance Act did not expressly address the issue, the Court looked to the nature and function of the rule. By way of background, a claimant must prove the elements of a workers' compensation claim in order to be entitled to benefits. The elements of a *prima facie* workers' compensation claim are (i) an injury (ii) occurring in the course of (iii) employment. However, the Department must prove any affirmative defenses that it raises. An affirmative defense does not refute the elements of a workers' compensation claim, but rather permits denial of the claim despite the existence of those elements. The claimant argued that the Department bore the burden of proof to invoke the Felony Payment Bar because the bar should be characterized as an affirmative defense to an otherwise meritorious benefits claim. In response, the Supreme Court pointed out that the Felony Payment Bar actually did negate the 'course of employment' element and was not appropriately classified as an affirmative defense. Nevertheless, the Supreme Court stated that the burden of proof should be on the employer for policy reasons. According to the Court, common sense dictates that a worker should not be required to prove a negative—i.e., the noncommission of a felony—in order to obtain workers' compensation benefits. The Supreme Court elaborated that a worker should not be required to rebut, with positive evidence and before any hearing occurs, the Department's bare assertion that he or she has committed a felony. Indeed, in this case the Department's order denying benefits did not even mention the nature of the alleged felony. A contrary conclusion would require courts to presume the commission or attempt of a felony, a presumption that would offend basic principles of judicial

fairness. As such, the Supreme Court held that the legislature intended to burden the Department with proving that a felony bars payment under RCW 51.32.020.

The next issue presented to the Supreme Court regarded what evidentiary standard applies to a Felony Payment Bar determination. The claimant argued that the Department must prove the claimant's commission or attempted commission of a felony by the clear, cogent, and convincing evidence standard. The Supreme Court disagreed—pointing out that no Washington court had ever applied the clear, cogent, and convincing evidence standard of proof of a felony in a civil case. Rather, the Court continued, Washington case law has long established that proof of a felony in a civil case must be made by the preponderance of the evidence. Accordingly, to reject an application for an otherwise meritorious claim under the Felony Payment Bar, the Department must be able to prove the claimant's commission or attempted commission of a felony by a preponderance of the evidence. The Supreme Court further assessed that, for evidentiary reasons discussed at length in the opinion, the Department had not been able to prove felonious attempt or commission by a preponderance of the evidence in this case. As such, the Supreme Court ruled that the Department must allow the claim.

**Key Point:** The Department (or a self-insured employer) must prove the claimant's commission or attempted commission of a felony by a preponderance of the evidence in order to successfully invoke the Felony Payment Bar.

---

---

***Department of Labor & Industries v. Lyons Enterprises Inc., 185 Wn.2d 721 (2016)***  
**Supreme Court of Washington, En Banc**

**Legal Issues:** In *Department of Labor & Industries v. Lyons Enterprises Inc.*, the following legal issues were raised:

- \* Can franchises be subject to the Industrial Insurance Act?
- \* Does hiring subordinate laborers except a franchisee from coverage under the Industrial Insurance Act?
- \* If a franchisee could hire subordinate laborers, but does not, is the franchisee excepted from coverage under the Industrial Insurance Act?

**Background:** The Industrial Insurance Act requires employers to report and pay workers' compensation premiums for all covered workers, including independent contractors, provided the principal-independent contractor relationship meets certain criteria.

Lyons Enterprises is a regional franchisor of an international janitorial franchise, Jan-Pro Cleaning Systems. A Washington-based franchisee becomes part of the Jan-Pro network by entering a franchise agreement with Lyons, under which royalties and franchise fees are paid. In return for the payments, franchisees are permitted to use the Jan-Pro brand and trademarks in its business and are instructed on Jan-Pro's proprietary cleaning methods. All Lyons's franchisees are independent businesses who carry their own business licenses. The franchise agreement does not explicitly require franchisees to perform any cleaning themselves and the franchisees are required to pay Industrial Insurance Act premiums for any employees they decide to hire. The franchise agreement permits franchisees to hire, fire, and train their own subordinates without Lyons's review. Upon entering into cleaning contracts with customers,

Lyons offers the accounts to one of its franchisees to perform; however, Lyons continues to own the contractual rights thereunder. If a franchisee accepts a cleaning contract from Lyons, the franchisee performs commercial cleaning services directly for the customers. Franchisees must supply their own equipment and supplies, but Lyons controls where and from whom the supplies and equipment may be obtained. The franchise agreement also contains a non-compete agreement that prevents franchisees from engaging in commercial cleaning services of any kind for one year following the conclusion of the franchise agreement.

In 2010, the Department of Labor and Industries completed an audit of Lyons and determined that all of Lyons's franchisees, except the 18 who employed subordinates, were covered workers under RCW 51.08.180. The audit also found that Lyons substantially controlled its franchisees under RCW 51.08.195(1) and, therefore, did not meet that provision's exception to coverage. Specifically, the Department determined that Lyons controlled the methods used by its franchisees, as well as their opportunities for revenue and profit. The audit also concluded that the indefinite nature of the relationship between Lyons and its franchisees was akin to an employer-employee relationship rather than a business-to-business relationship.

The parties would subsequently petition for review and appeal to the Board of Industrial Insurance Appeals, the Washington Superior Court, and the Court of Appeals of Washington—all of which arrived at different conclusions regarding whether all, some, or none of Lyons's franchisees were covered workers under the Industrial Insurance Act. Finally, the Washington Supreme Court granted the Lyons's petition for review.

**Discussion & Holding:** The Washington Supreme Court identified multiple issues central to resolving the dispute in this case, as follows:

First, in determining whether franchises are subject to the Industrial Insurance Act or solely governed by the Franchise Investment Protection Act, the Supreme Court examined the purposes, texts, and legislative histories of both laws. Considering the requirement that the Industrial Insurance Act be construed liberally to cover all employment within the jurisdiction of the state, as well as Franchise Investment Protection Act's aim of protecting franchisees, the Supreme Court held that the Industrial Insurance Act is also applicable to franchises provided the franchisees meet the Act's definition of a covered worker.

Next, the Supreme Court assessed whether Lyons's franchisees were covered workers pursuant to the Industrial Insurance Act. Under RCW 51.16.060, a finding that franchisees are covered workers is a prerequisite to the imposition of Industrial Insurance premiums. The Industrial Insurance Act defines "worker" as the following:

[E]very person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment.

Lyons did not dispute that its franchisees are independent contractors—which are expressly within the Industrial Insurance Act's definition of 'worker.' Yet, in order for Lyons's franchisees to be covered under the Act, the object of the independent contract must be the franchisee's



personal labor. The Supreme Court stated that to establish whether the essence of a contract is that of personal labor, a court should examine the relationship holistically, including the nature of the contract, the work to be done, the situation of the parties, and other attendant circumstances. On this note, prior case law specifically determined that independent contractors would not be covered under the Industrial Insurance Act if they (i) had to provide their own machinery or equipment, (ii) could obviously not perform the contract without assistance, or (iii) employed others to do all or part of the work under contract.

Lyons contended the relationship between it and its franchisees was that of a bilateral contract between two independent businesses and did not expressly require the franchisees' personal labor. The Supreme Court disagreed, noting that the primary object of the contracts between Lyons and its franchisees was the labor required to clean its customers' buildings. Furthermore, considering the factors set forth in RCW 51.08.195 and case law, the Supreme Court determined that Lyons and their franchisees' businesses were intimately intertwined and that Lyons substantially controlled the franchisees. Accordingly, the Supreme Court held that the essence of Lyons's franchise agreements is personal labor and that its franchisees were, therefore, covered workers under the Industrial Insurance Act—with the caveat that a franchisee was excepted if he or she hired subordinate laborers, as discussed below.

Alternatively, Lyons argued that the franchisees were not performing personal services because their respective franchise agreements permitted the hiring of subordinate workers to do all or part of the work under the contract. The Court rejected this rationale. The mere possibility that a franchisee could outsource all or part of the labor owed under a contract was insufficient to exclude it from the definition of a covered worker. Rather, only a franchisee that actually employed subordinates was not considered a covered worker under the Industrial Insurance Act. For the reasons discussed above, the Supreme Court concluded that Lyons's franchisees that did not employ subordinates were covered workers under the Industrial Insurance Act. The Supreme Court thusly remanded the matter to the Board in order to factually determine which franchisees employ, and which do not employ, subordinate laborers in order to accurately assess workers' compensation premiums against Lyons.

**Key Point #1:** Franchises are subject to the Industrial Insurance Act if a franchisee meets the definition of a covered worker under the Act.

**Key Point #2:** A franchisee whose business is intimately tied with the franchisor, and where the franchisor substantially controls the franchisee, will likely be determined to be a covered worker under the Industrial Insurance Act.

**Key Point #3:** A franchisee that hires subordinate laborers is not considered a covered worker under the Industrial Insurance Act. However, a franchisee that could hire subordinates, but does not, is not necessarily excepted from the definition of a covered worker under the Act.

**Post Script:** In 2016, the Court of Appeals of Washington decided *Henry Industries, Inc. v. Department of Labor & Industries*, 195 Wn. App. 593 (2016), which regarded highly similar factual and legal issues as discussed by the Washington Supreme Court in *Lyons Enterprises Inc.* In *Henry Industries*, drivers who contracted with a courier company to perform courier services for third parties were covered workers under the Industrial Insurance Act, such that the company was required to pay workers' compensation insurance premiums for the drivers, notwithstanding that the vehicles provided by the drivers themselves were critical to their

completing delivery services and the drivers could use subcontractors to complete deliveries. The Court of Appeals determined that the vehicles at issue did not amount to specialized equipment and the company failed to show that its drivers actually delegated a significant portion of their delivery duties to others. Like in *Lyons Enterprises Inc.*, the drivers in *Henry Industries* were found to be covered workers under the Act despite their registration as independently licensed businesses and purported non-employee status.

---

***Spivey v. City of Bellevue*, \_\_\_ Wn.2d \_\_\_ (2017)**  
**Supreme Court of Washington**

**Legal Issues:** In *Spivey v. City of Bellevue*, there are three legal issues worth noting, as follows:

- \* First, in a jury trial at the Washington Superior Court, who determines whether the Firefighters' Presumption has been rebutted—the judge or the jury?
- \* Second, does the presumption of correctness afforded to the Board of Industrial Insurance Appeals subsume all other presumptions?
- \* Finally, if the employer introduces contrary evidence, should the jury still be instructed as to the Firefighters' Presumption?

**Background:** The Supreme Court of Washington heard the consolidated appeals of two cases regarding highly similar facts and legal issues, collectively entitled *Spivey v. City of Bellevue*, as follows:

*Case #1 – Larson:* This claimant was diagnosed with malignant melanoma in his lower back. He had worked as a firefighter and emergency medical technician for the City of Bellevue since 1979. The claimant filed a claim with the Department of Labor and Industries, seeking coverage for his melanoma as an occupational disease. The Department allowed the claim, applying the rebuttable presumption granted firefighters in RCW 51.32.185(1) that certain diseases, including cancer, are occupational diseases (hereinafter referred to as the “Firefighters’ Presumption”). On appeal at the Board of Industrial Insurance Appeals, both parties offered evidence regarding whether the claimant’s melanoma arose from the distinctive conditions of his employment as a firefighter. The Board agreed with the employer and reversed the benefits award. The claimant appealed to Washington Superior Court.

At the Superior Court jury trial, the employer moved for the court to rule that it had established by a preponderance of the evidence that the claimant’s melanoma was unrelated to his work as a firefighter and that the Firefighters’ Presumption had thusly been rebutted. With the presumption rebutted, the employer argued that the burden of proving causation would then fall on the claimant. In denying the employer’s motion, the court instead instructed the jury to decide whether the employer had proved that the Firefighters’ Presumption was rebutted—effectively using the presumption to place the burden of proof on the employer. The jury found for the claimant and the Superior Court entered judgment forcing claim allowance. Appealed further, the Court of Appeals of Washington affirmed.

*Case #2 – Spivey:* Also a firefighter for the City of Bellevue, this claimant was likewise diagnosed with melanoma. Unlike the *Larson* case, the Department rejected the claim due to

evidence that the melanoma had non-work-related origins. On appeal to the Board, both parties offered evidence regarding whether the claimant's melanoma arose from the distinctive conditions of his employment as a firefighter. The Board affirmed the Department's rejection, finding that the employer had rebutted the Firefighters' Presumption. The claimant appealed to Superior Court.

At the Superior Court jury trial, the employer moved for the court to rule that it had established by a preponderance of the evidence that the claimant's melanoma was unrelated to his work as a firefighter and that the Firefighters' Presumption had therefore been rebutted. Unlike the *Larson* case, the court granted the employer's motion and removed the issue from the jury's consideration—placing the burden of proving causation on the claimant. The claimant moved for interlocutory review of that decision. At its discretion, the Washington Supreme Court consolidated the *Larson* and *Spivey* appeals for simultaneous review.

**Discussion & Holding:** The Washington Supreme Court noted that, in general, the burden of proving an occupational disease under the Industrial Insurance Act falls to the worker and, thus, to receive benefits, a worker must show that his or her injury arose from employment. However, under RCW 51.32.185(1), there is a statutory presumption that melanoma in firefighters is an occupational disease for workers' compensation purposes. As a case of first impression, there are three determinative issues worth parsing.

First, the Supreme Court set out to assess who should determine whether the Firefighters' Presumption had been rebutted—the Superior Court judge (i.e., the determination is a question of law) or the jury (i.e., the determination is a question of fact). Central to its analysis, the Supreme Court highlighted the statutory language establishing the Firefighters' Presumption, which stated that the presumption may be rebutted by a preponderance of the evidence. From this language, the Court determined that, in a Superior Court jury trial, whether the Firefighters' Presumption was rebutted was a question of fact to be determined by the jury, rather than a question of law to be decided by the judge. On these grounds, the Supreme Court held that the Superior Court in *Spivey* was incorrect to grant the employer's motion and remove the issue of the presumption's rebuttal from the jury's consideration, constituting reversible error.

Next, the Supreme Court endeavored to order and rank the pertinent presumptions. As discussed above, firefighters enjoy a presumption at the Board level that certain diseases arise naturally out of the conditions of their employment as firefighters—known as the Firefighters' Presumption under RCW 51.32.185. Yet, at the Superior Court level, Board findings and decisions are presumed correct under RCW 51.52.115, whereby the burden of proof is on a claimant to prove that the Board determination is incorrect (hereinafter referred to as the “Board-is-Correct Presumption”). Considering the interplay of the Board-is-Correct Presumption and the Firefighters' Presumption, does the Firefighters' Presumption apply at the Superior Court level if the Board had determined that it had been rebutted? In *Larson*, the employer argued that the Firefighters' Presumption did not apply at the Superior Court level because the Board-is-Correct Presumption controlled all presumptions at the Superior Court level, subsuming the Firefighters' Presumption. The Supreme Court disagreed, clarifying that although the Board-is-Correct Presumption requires the party challenging a Board decision to show that the decision was not supported by sufficient evidence, it does not change the burdens that were applicable at the Department and Board levels. Said differently, the party challenging a Board decision simply must show that the Board did not meet the applicable burden or adhere to the applicable presumption. Thus, in *Larson*, the Firefighters' Presumption continued to exist

at the Superior Court level and the claimant's burden (as the challenging party) was merely to show that the Firefighters' Presumption was not rebutted at the Board. As such, the Supreme Court approved of the jury instructions put forth in *Larson* as accurately reflecting the interplay of these two presumptions.

Finally, the Supreme Court resolved a rift in Washington law regarding the legal effect of rebutting a presumption. One cadre of Washington courts has utilized a theory of presumptions known as the Thayer Theory (also known as the Bursting Bubble Theory), which states that a presumption disappears after the opposing party introduces contrary evidence. Under the Thayer Theory, the presumption is never mentioned to the jury if contrary evidence has been introduced. Another line of cases adhered to a theory of presumptions known as the Morgan Theory, which shifts both the burden of producing evidence and the burden of persuasion to the opponent of the presumption. The Morgan Theory recognizes that special policies behind a presumption may require that a jury be informed of its existence, even if some rebuttal evidence had been produced. In other words, the Thayer Theory minimizes the importance of the presumption, while the Morgan Theory gives the presumption a lasting effect throughout the proceedings. In examining the Firefighters' Presumption under RCW 51.32.185, the Supreme Court held that the legislative intent of the statute was to shift both the burden of producing evidence and the burden of persuasion to the opponent of the presumption—in accordance with the Morgan Theory of presumptions. Furthermore, the Supreme Court noted policy considerations referenced in other jurisdictions justifying the stronger presumption in favor of firefighters. Accordingly, the Supreme Court held that the Morgan Theory applies to the Firefighters' Presumption under RCW 51.32.185—i.e., once a firefighter shows that he or she suffers from a qualifying disease, RCW 51.32.185(1) imposes on the employer the burden of establishing otherwise by a preponderance of the evidence and that the jury should be instructed as such. The Court stressed, however, that this standard did not impose on the employer the burden of proving the specific cause of the firefighters' melanoma. Rather, it required that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighters' diseases were, more probably than not, caused by non-occupational factors. As such, the Supreme Court upheld the *Larson* instruction to the jury to consider the Firefighters' Presumption. Notably, while the Supreme Court held that Firefighters' Presumption follows the Morgan Theory of presumptions, it declined to adopt a general rule that the Morgan Theory applies to all presumptions found in Washington law.

**Key Point #1:** Whether the Firefighters' Presumption has been rebutted is a question of fact to be determined by the jury, rather than a question of law to be decided by the judge.

**Key Point #2:** The presumption of correctness afforded the Board's decision does not erase all other presumptions; rather, the party challenging a Board decision simply must show that the Board did not meet the applicable burden or adhere to the applicable presumption.

**Key Point #3:** The Firefighters' Presumption follows the Morgan Theory of presumptions, which shifts both the burden of producing evidence and the burden of persuasion to the opponent of the presumption to the employer.

# Washington Court of Appeals Decisions

---

## ***Felipe v. Department of Labor & Industries*, 195 Wn. App. 908 (2016)** **Court of Appeals of Washington, Division I**

**Legal Issue:** Is it error to instruct a jury that a claimant's closed-head injury and related symptoms must be corroborated with objective medical findings?

**Background:** The claimant suffered a closed-head injury after he fell from a ladder at work in 2011, which resulted in post-concussive syndrome that he alleged developed into headaches, memory loss, and depression. He subsequently applied for workers' compensation benefits and the claim was allowed by the Department of Labor and Industries. After subsequent medical treatment, the Department closed this claim in 2012. Later that year, the claimant filed an application to reopen his claim based on a purported worsening of his industrial injury-related condition—which was denied by the Department for want of corroborative objective findings. Upon the claimant's appeal to the Board of Industrial Insurance Appeals, the Board affirmed the Department's order denying his application to reopen the claim.

Upon appeal to the Washington Superior Court, the judge instructed the jury that proof of the claimant's alleged aggravation had to be supported by medical testimony based on objective findings. The claimant objected to the instruction, arguing that the nature of his injury excused him from presenting objective evidence of aggravation. The jury returned a verdict for the Department. The claimant further appealed to the Court of Appeals of Washington.

**Discussion & Holding:** As a threshold issue, a trial court generally has the discretion whether to give a particular jury instruction to the extent that the decision is not based on an erroneous view of the law. As to whether the Superior Court's jury instruction was proper under Washington law, the Court of Appeals looked to the Washington Supreme Court's opinion in *Price v. Department of Labor & Industries*, 101 Wn.2d 520 (1984), which stands for the proposition that psychiatric disabilities need not be corroborated by objective findings. In this vein, the claimant analogized his headache pain, depression, and memory problems, stemming from his post-concussive syndrome, to a psychological or psychiatric disability because his symptoms could not be measured, felt, or seen by a physician. The Department responded that *Price* applies only to claims involving psychological conditions and, here, the claimant suffered a physical injury. The Court of Appeals adopted the claimant's argument, interpreting *Price* to mean that if the symptoms of a condition are exclusively subjective in nature, a jury instruction requiring proof by objective evidence is improper. The Court of Appeals pointed out that the Washington Pattern Jury Instructions specifically stated that such a jury instruction should not be included in a matter pertaining to post-concussion syndrome. Here, the symptoms of the claimant's alleged aggravation were subjective in nature and neither party had suggested that his headaches, memory loss, or depression could be seen, felt, or measured by a physician. Therefore, the Superior Court was held to have erred by instructing the jury that the claimant had to support his aggravation with expert medical testimony based on objective findings. As such, the Court of Appeals reversed and remanded the case for a new trial.

**Key Points:** If the symptoms of a medical condition are exclusively subjective in nature, a jury instruction requiring proof by objective evidence is improper.

---

***Harder Mechanical, Inc. v. Tierney*, 196 Wn. App. 384 (2016)**  
**Court of Appeals of Washington, Division I**

**Legal Issue:** Is a continually on-call laborer, who rarely receives enough work to fill 40 hours a week, engaged in intermittent work or full-time work for the purposes of a monthly-wage computation?

**Background:** The claimant was a member of a union—the United Association of Plumbers and Pipefitters Local 26 in Tacoma, Washington. The claimant became a journeyman in 1980 and worked out of the Local 26 union hall. The union used a rotating dispatch system to fill the demands of contractors in a way intended to give every member on the list a fair opportunity to work. In this type of work, it was rare for union members to work 40-hour weeks consistently throughout an entire year. Moreover, Local 26 had high unemployment rates during the economic downturn that began in 2008.

Claimant's union referred him to work for a temporary full-time job beginning on April 6, 2012, with the employer in this case. The job was expected to last less than a week. While on the job, the claimant injured his left shoulder. He subsequently filed a claim for worker's compensation with the Department of Labor and Industries.

By statute, the amount of time-loss compensation for an injury claim must be calculated on the basis of the monthly wages the worker was receiving from all employment at the time of injury. However, for workers like this claimant, whose wages are not fixed by the month, the monthly wage is calculated by one of two methods under RCW 51.08.178. One method calculates the monthly wage as a multiple of the daily wage the worker was receiving at the time of the injury, depending on how many days a week the worker was normally employed. This is the default method used in most cases. The second method is used in cases where the worker's employment is exclusively seasonal in nature or where the worker's current employment, or his or her relation to his or her employment, is essentially part-time or intermittent. When the second method is used, the total wages earned over a twelve-month period are divided by twelve to determine the monthly wage. The claimant was earning a good daily wage during his temporary job with the employer, but he had many stretches of unemployment in the preceding years. Consequently, his monthly wage is considerably higher if calculated by the first method rather than by the second. Using the first method, which is for full-time workers whose wages are not fixed by month, the Department determined the claimant's time-loss benefits to be approximately \$8,000 per month. It would have been less than half that amount if the Department had classified the claimant as an intermittent worker, in which case the second method would have been applied.

The employer appealed the Department's calculation to the Board of Industrial Insurance Appeals and, subsequently, to the Washington Superior Court, arguing that the second method should have been used because the claimant was more accurately described as an intermittent

worker. In both instances, the Department's order was affirmed. The Superior Court's decision was further appealed to the Court of Appeals of Washington.

**Discussion & Holding:** In weighing which method of calculation should have been utilized, the Court of Appeals examined the nature of the claimant's employment. The Court of Appeals commented that the work of a pipefitter dispatched from a union hall is by nature often accompanied by periods of unemployment and typically involves temporary relationships with a number of employers as the worker moves from one project to the next. But when work is available, it is typically full-time and well-paid. The parties agreed that the claimant's position as a pipefitter was not essentially intermittent. Rather, the question was whether the claimant's relationship to his employment was intermittent, which would require using the second method of calculation. In determining whether a worker's relation to his employment is intermittent, all relevant factors must be considered, including the worker's intent, the nature of the work, the relation with the current employer, and the worker's work history. As part of this endeavor, the Court of Appeals examined at length the evidence before the Board.

At the hearing before the Board, the claimant testified that in the five years before his injury, he always had his name on the union dispatch list waiting for work whenever he was not actually working. The claimant increased his ability to get jobs by signing the dispatch list to work as either a pipefitter or plumber in all geographical zones covered by Local 26. He testified that he always kept his cell phone with him during the hours the union dispatcher might call with a job. He said he rarely missed a call from the union dispatcher, and, if he did, he would call right back. Yet, the record indicates that the claimant was unemployed about thirty-one of the forty-two months before his injury. Dispatch records showed that in the five years before his injury, he accepted around nineteen jobs from the dispatcher, but did not actually work six of these jobs. Once, it turned out that having valid car insurance was one of the requirements for getting onto the job site, and the claimant had not paid his car insurance. Once, he was rejected by an employer. On two occasions, he did not report to the job on the date and time specified; although he did not specifically remember why he did not report, he said he probably got sick or his car would not start. On two other occasions, he notified the dispatcher at least twelve hours before the start time that he could not work the job. The claimant recalled that, in August 2011, he cancelled a job because he had a knee injury. Also, the claimant missed some dispatch calls when he was in jail for several months at the end of 2011.

Having considered the gaps in the claimant's work history and the evidence that he did not always accept work when it was available, the Board nevertheless found that the claimant intended to work full-time. At the Court of Appeals, the employer argued that the law and the facts dictate a different outcome, as the claimant's actions evidence a lack of intent to remain employed full-time insofar as he passed up many opportunities for work. Yet, the Board viewed the evidence in a different light, accepting as reasonable the claimant's explanations that illness or transportation problems made him unable to work some of the jobs he had accepted. While the inference that the claimant intended to work only occasionally may have been available, the Board did not draw that inference. On this record, the Court of Appeals could not say the Board's finding that the claimant intended to work full-time was unsupported by substantial evidence. Further, the Court of Appeals also noted that the proper analytical focus was lost earning capacity. Despite the claimant's periods of unemployment, he had the capacity to find full-time work, and substantial evidence supports the Board's finding that he intended to do so. Thus, it was not inconsistent with the law and the facts for the Board to conclude that the claimant's lost earning capacity is best reflected by full-time wages. As such, the Court of

Appeals affirmed the Superior Court's decision, upholding the Board's determination that the claimant's relationship to his employment was not intermittent.

**Key Point #1:** In determining whether a worker's relation to his employment is intermittent or full-time, all relevant factors must be considered, including the worker's intent to work, the worker's capacity for work, the nature of the work, the relation with the current employer, and the worker's work history.

**Key Point #2:** Gaps in a worker's work history and evidence that the worker does not always accept work when it is available does not necessarily render him or her an intermittent worker for wage-computation purposes, provided that sufficient explanations can be provided that would evince the worker's intent and capacity to be engaged in full-time employment.

---

---

***Department of Labor & Industries v. Ortiz*, 194 Wn. App. 146 (2016)**  
**Court of Appeals of Washington, Division III**

**Legal Issue:** When the Department of Labor and Industries, pursuant to a settlement agreement, pays back-dated pension benefits directly to the claimant without regard to time-loss benefits previously paid by the self-insured employer, resulting in double benefits to the claimant, can the self-insured employer recover the time-loss benefits from the Department under the Second Injury Fund?

**Background:** In a matter before the Board of Industrial Insurance Appeals, the self-insured employer and the claimant entered into a settlement agreement that retroactively placed the claimant on the pension rolls—despite having received time-loss compensation for much of that time period. As part of that agreement and the Board's order, the Department of Labor and Industries was required to consider Injury Fund relief. The Department subsequently agreed to Second Injury Fund relief, paying the backdated and ongoing pension amounts directly to the claimant. Having received the settlement-allotted backdated pension payment from the Department, as well as the previously paid time-loss compensation for that same time period from the self-insured employer, the claimant had then received double recovery in the amount of a \$237,000 overpayment. Upon demand by the self-insured employer, the claimant refused to repay this amount, stating that the funds had already been spent. When the self-insured employer sought reimbursement of its overpaid time-loss from the Department, the Department denied the request on the basis that such repayment should have been expressly included in the Board order.

On appeal, the Board subsequently reversed the Department's overpayment decision, requiring it to make full reimbursement for the self-insured employer's prior time-loss payments to the claimant. The Department paid the amount to the self-insured employer, but appealed further to the Washington Superior Court.

On appeal, the Superior Court ruled that the self-insured employer was in better position than the Department to discover any overpayment because, although the Department typically sent retroactive payments to employers, it did not do so here because the previous time-loss payments were not expressly contemplated in the settlement agreement or the Board order (i.e., the Department was allegedly unaware of the time-loss payments). The Superior Court thusly



ordered the self-insured employer to return the payment that it had received from Department. Both the self-insured employer and the claimant appealed to the Court of Appeals of Washington.

**Discussion & Holding:** In its analysis, the Court of Appeals highlighted the Department's concession that it typically would have reimbursed the self-insured employer from the Second Injury Fund rather than send the payment directly to the claimant. On this occasion, the Department alleged that it sent the pension payment directly to the claimant because it was unaware that it would result in double payment. However, the Court of Appeals noted that the Department knew or should have known that the claimant had received past time-loss payments for the period in question, having access to the claim file, and, thus, should have been aware of the potential double payment. The essential question was what to do in light of the error.

Applying rules of statutory construction, the Court of Appeals noted that the purpose of the Second Injury Fund is to encourage employers to hire previously disabled workers, to defray costs associated with employing such workers, and to support return-to-work outcomes for injured workers. The Court of Appeals found that in light of the purposes of the Second Injury Fund, it was proper for the Department to reimburse the self-insured employer for the overpayment caused by the backdated pension award. The Court of Appeals concluded that the self-insured employer should not have to bear the risk of non-recovery where the Department made the error that caused the double payment. The Court also explained, from a practical perspective, the Department was the only party likely to recover any of the excess payments made to the claimant, since it was making ongoing pension payments and could seek recoupment through that process. By contrast, the employer no longer had any payment obligations to the claimant and had less effective means of seeking recovery. As such, the Court of Appeals reversed the decision of the Superior Court and required the Department to make full reimbursement for the self-insured employer's prior time-loss payments to the claimant.

**Key Points:** On one hand, by insuring employers against the additional costs of hiring previously disabled workers, the law underlying the Second Injury Fund will be construed flexibly to promote the hiring of such workers—which includes protecting employers from undue costs. On the other hand, the Court of Appeals' decision took into consideration the Department's fault for the overpayment. If the self-insured employer was at fault for the overpayment, then perhaps the Court of Appeals would have held that the employer bore the liability for that overpayment, notwithstanding public policy implications.

---

***Sims v. Department of Labor & Industries, 195 Wn. App. 273 (2016)***  
**Court of Appeals of Washington, Division II**

**Legal Issue:** Is a worker entitled to a permanent partial disability award arising from a workplace injury that occurred subsequent to unrelated permanent total disability?

**Background:** The claimant suffered two industrial injuries over a decade, both of which resulted in workers' compensation claims—the interplay of which underpins the legal issues in this matter, as follows.

*The 2003 industrial injury claim:* In 2003, the claimant injured himself at work. He filed a workers' compensation claim, which the Department allowed. In April 2010, the Department closed the claim and determined that the claimant was permanently partially disabled because of the 2003 injury. Despite the claimant's protest, the Department affirmed closure. The claimant then appealed to the Board of Industrial Insurance Appeals, claiming that he was permanently and totally disabled rather than partially disabled because of the 2003 injury.

*The 2012 industrial injury claim:* While the above-described appeal was pending before the Board, the claimant suffered another, distinct injury at work in March of 2012 for which the claimant filed another workers' compensation claim. The Department allowed the claim as well and determined that the claimant was entitled to receive medical treatment and other benefits.

*Again as to the 2003 industrial injury claim:* In August 2012, the Board reversed the Department order dated September 24, 2010, which had determined that claimant was permanently partially disabled subsequent to the 2003 industrial injury. In doing so, the Board found that the claimant was actually totally and permanently disabled as of September 24, 2010. The Department issued a correcting and superseding order in September 2012. (The Court of Appeals did not discuss this logical inconsistency. Said differently, in August of 2012, the Board determined the claimant to be totally permanently disabled under the 2003 industrial injury claim as of September 24, 2010, *despite the fact that the claimant evidently worked thereafter*—e.g., at the job of injury for the 2012 industrial injury claim.)

*Again as to the 2012 industrial injury claim:* In February 2013, the Department closed the claim for the March 2012 injury without a permanent partial disability award. The claimant protested the decision, which the Department affirmed—stating that the claimant was not entitled to a permanent partial disability award for the March 2012 injury because he was pensioned with a total disability as of September 2010 pursuant to the 2003 industrial injury claim. The claimant appealed to the Board and, subsequently, to the Washington Superior Court—both of which affirmed the Department's closure order. The claimant further appealed to the Washington Court of Appeals.

**Discussion & Holding:** In analyzing this matter, the Court of Appeals did not break new ground, but reaffirmed longstanding Washington law. As a threshold matter, the Court outlined the nature of both types of disability awards. While a permanent partial disability award consists of a one-time payment as compensation, a permanent total disability award (also known as a pension) causes the worker to receive a monthly payment in an amount based on a percentage of his or her wages. The question at bar was whether a worker could receive both types of awards and in what order. Most commonly, a worker might progress from partially disabled to totally disabled. In that case, if the worker's subsequent total disability arises from the same injury, the amount of the partial disability award is deducted from the total disability benefits. However, if the subsequent total disability arises from an unrelated injury, the worker is still entitled to a full pension for the subsequent total disability, notwithstanding the payment of a lump sum for his or her prior injury. Here, however, the reverse order of events is at issue—the claimant was deemed to be totally disabled prior to when he would have been issued the permanent partial disability award that he sought. Here, the Court of Appeals restated the rule of law that a worker who has been classified as permanently and totally disabled with a pension cannot recover disability benefits for a second injury that occurred after being permanently and totally disabled.

The claimant argued that he was entitled to the permanent partial disability award arising out of his March 2012 industrial injury claim because that injury occurred before the Department's September 2012 order determining that he was permanently and totally disabled because of his 2003 industrial injury. The Department contended that the claimant was not entitled to the permanent partial disability award because that subsequent injury occurred after the effective date of the September 2012 order, which was September 24, 2010. The Court of Appeals agreed with the Department and held that the effective date of the total disability, rather than the date of the determination, controlled whether the other claim's award was issuable as prior to the total disability, or non-issuable as subsequent to the total disability. Accordingly, the Court of Appeals affirmed that the claimant was not entitled to the subsequent partial disability award.

**Key Point #1:** A worker is not entitled to an award of permanent partial disability that arises subsequent to permanent total disability.

**Key Point #2:** The effective date of permanent total disability, rather than the date of the determination of the disability, controls from when total disability status is applied.

---

***Jaimes v. NDTs Construction, Inc.*, 195 Wn. App. 1 (2016)**  
**Court of Appeals of Washington, Division I**

**Legal Issue:** What determines the existence of an employment relationship in the workers' compensation context?

**Background:** This opinion regards a civil law suit.

The plaintiff in this case engaged in sporadic task-specific jobs as a day laborer. In June 2012, a construction worker that he met on the street told him about a potential job. When the plaintiff reported to the job site, he met a man named Strizheus who told the plaintiff that he would be working for a company called NDTs, performing small general labor jobs. Over the following three months, the plaintiff was sent by Strizheus to various jobsites to work and was paid in cash by Strizheus. When the plaintiff was injured on a job, he approached Strizheus asking about health insurance and workers' compensation. Strizheus told the plaintiff that the plaintiff was responsible for paying his own health insurance and workers' compensation, as he was not an employee.

In March 2014, the plaintiff filed a civil suit for negligence in Washington Superior Court naming as defendants a number of individuals and entities related to Strizheus, including NDTs Construction and Superior Floors. The trial court dismissed all these defendants on summary judgment, concluding that they were immune from suit as the employers of the plaintiff. The plaintiff appealed only the dismissal of one of the defendants, Superior Floors.

**Discussion & Holding:** At the Washington Court of Appeals, the plaintiff contended that there was no evidence that he consented to an employment relationship with Superior Floors and, therefore, Superior Floors was subject to suit under 51.24.030(1) as a third party. Thus, the necessary determination was whether there was an employment relationship between Superior Floors and the plaintiff. For purposes of workers' compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties and (2) there is consent by the employee to this relationship. While the right of control is not by itself determinative, the absence of employee's consent is. Unlike the common law, workers' compensation law demands that, in order to find an employer-employee relationship, a mutual agreement must exist between the employer and the employee.

The spotlight is on the plaintiff, and the question is whether he had a mutual agreement with Superior Floors. Notably, the Plaintiff did not receive a paycheck or anything else in writing from Superior Floors. Strizheus did not inform him at any time before the accident that Superior Floors was his employer. In fact, it does not appear that Superior Floors or anyone else kept him or any other day laborer on the books as an employee. There is no evidence of all those things that every employer is required to do, such as employee reporting, payment of industrial insurance premiums, internal revenue withholding, and general bookkeeping and accounting concerning these daily laborers. Moreover, when the plaintiff was injured, Strizheus told him he was not an employee. On this record, there is not even an inference that the plaintiff consented to be employed by Superior Floors. In sum, taken in the light most favorable to the plaintiff as the nonmoving party, there was a genuine issue of material fact as to whether the plaintiff consented to an employer-employee relationship with Superior Floors. Because the absence of consent is dispositive, the Court did not address the control prong of the test for an employment

relationship in the workers' compensation context. The Court of Appeals held that summary judgment to Superior Floors was improper and reversed the Superior Court's ruling.

**Key Points:** For purposes of workers' compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties and (2) there is consent by the employee to this relationship. While the right of control is not by itself determinative, the absence of employee's consent is.

---

***Miller v. Shope Concrete Products Company*, \_\_\_ Wn. App. \_\_\_ (2017)  
Court of Appeals of Washington, Division I**

**Legal Issue:** Should a probationary employee, who did not receive employer-paid healthcare benefits at the time of injury, have such benefits factored into his monthly wage computation based on the anticipation that such benefits would be forthcoming post-probation?

**Background:** A new employee, the claimant began his employment subject to the completion of a 90-day probationary period. Once employees completed the probationary period, the employer customarily provided qualifying employees with healthcare benefits. Approximately 45 days at his new position, the claimant suffered a lower back injury—causing him not to return to work with the employer. Due to the claimant's probationary status, the employer had never paid or contributed funds towards present or future healthcare benefits on his behalf. As part of his workers' compensation claim, the claimant applied to the Department of Labor and Industries for wage benefits. After the Department calculated his wages without any reference to healthcare benefits, the claimant protested before eventually appealing the issue to the Board of Industrial Insurance Appeals, arguing that he was entitled to the same wage computation as a regular employee (e.g., healthcare benefits). Although the Board agreed with the Department's computation, the Washington Superior Court would later hold that claimant was indeed entitled to have his wages computed as if he were a regular employee.

**Discussion & Holding:** For wage-computation purposes, the tendency to view 'wages' expansively is not new to Washington law. In 2001, the Washington Supreme Court decided *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801 (2001). In *Cockle*, the Supreme Court analyzed whether 'wages' included healthcare benefits under the 1988 version of RCW 51.08.178. Unlike today's post-*Cockle* iteration, the 1988 version of RCW 51.08.178 did not expressly include healthcare benefits as a component of 'wages' for the purpose of wage computation. Nevertheless, the Supreme Court held that healthcare benefit payments or contributions made on an employee's behalf must be included when computing an injured worker's monthly wage.

Subsequently, the Washington Supreme Court issued another impactful opinion regarding what are now known as *Cockle* benefits. In *Department of Labor & Industries v. Granger*, 159 Wn.2d 752 (2007), the Supreme Court considered whether employer payments made towards then-unredeemable healthcare benefits should have been computed as part of an injured worker's monthly wage. In that case, the employer contributed a fixed sum per each hour the employee worked into a trust for the employee's benefit; however, actual healthcare benefits were not redeemable until the employee worked a set amount of time. The employee argued, and the

Supreme Court agreed, that trust payments that had been made before the time of injury should have been factored into the employee's monthly wage, even though the employee did not have access to said funds or related healthcare benefits at the time of injury. The Supreme Court explained that the proper focus under RCW 51.08.178 is the employer's payment of the benefits, not their receipt by the employee. The fact that the employer in *Granger* had made healthcare payments on the employee's behalf, regardless of whether the employee received any benefits at the time of injury, was to be considered part of the employee's wage under Washington law. Shortly after the *Granger* opinion, the Washington State Legislature amended RCW 51.08.178 to expressly include healthcare benefits under the definition of 'wages.'

In this context, the recent Court of Appeals of Washington decision in *Miller* could be seen as a bookend, limiting the ever-expanding definition of 'wages' under RCW 51.08.178. In considering the issues before it, the Court of Appeals of Washington honed in on the deciding issue in *Granger*—whether the employer had made payments on the claimant's behalf before the time of injury. Because the claimant conceded that the employer had not made any payments or contributions on the claimant's behalf before the time of injury, the Court of Appeals held that it was error to rule that claimant was entitled to a wage computation that included a value attributable to employer-provided healthcare benefits. Accordingly, the Court of Appeals reversed the Superior Court's ruling and reinstated the Department's order computing the claimant's monthly wage without employer-provided healthcare benefits.

**Key Points:** Unearned future compensation, even if promised or anticipated, should not be included in present monthly-wage computations.

---



© 2017 Reinisch Wilson Weier PC. All rights reserved.  
Seminar and attorney presentations are for educational  
purposes only. Please consult your attorney for legal  
advice on a specific claim, case or issue.  
[www.rwwcomplaw.com](http://www.rwwcomplaw.com)