Granger, William

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

The cost of an employer's contribution for a worker's healthcare benefit is included in the worker's wages; it is irrelevant whether the worker had worked sufficient time to be entitled to receive the healthcare benefits themselves. **….*In re William Granger*, BIIA Dec.,, 02 17611 (2004)** [*Editor's Note*: *Affirmed, Department of Labor & Indus. v. Granger*, 159 Wn.2d 752 (2007).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WILLIAM A. GRANGER	)	**DOCKET NO. 02 17611**
	)	
CLAIM NO. P-031960	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, William A. Granger, by
HWZ Injury Law Firm, per
Gerry Zmolek

Employer, G. G. Richardson, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Patricia L. Allen, Assistant

The claimant, William A. Granger, filed an appeal with the Board of Industrial Insurance Appeals on August 14, 2002, from an order of the Department of Labor and Industries dated July 9, 2002. In this order, the Department affirmed its order of May 24, 2002, in which the Department calculated the claimant's time loss compensation rate, based on a monthly gross wage of $2,847.68, and determined that the social security offset was established by the order dated June 21, 1996. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on August 4, 2003, in which the industrial appeals judge affirmed the order of the Department dated July 9, 2002.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The sole issue in this appeal is whether the employer's contribution to Mr. Granger's 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.

Mr. Granger petitions from our industrial appeals judge's determination that the employer's contribution to Mr. Granger's union health care fund should not be included in the wage base upon which his time loss compensation rate is based. The industrial appeals judge reasoned that since the claimant needed to work more hours to "bank" before he could use the coverage, that the

employer's contribution should not be included in the wage base. His focus was on the conditions associated with receiving the medical care as opposed to the fact that the employer was contributing to the health care benefit. We believe that a close reading of *Cockle v. Department of Labor & Indus*., 142 Wn.2d 801 (2001), in conjunction with the Board's recent decision in *In re Fred L. Jones*, Dckt. No. 02 11439 (August 28, 2003), mandates a contrary result. Though not mentioned in the Proposed Decision and Order, the interpretive WAC 296-14-526 states that a worker must be able to receive a union health care benefit in order to include the premium payment as part of wages, nevertheless, we are not bound by that interpretation and believe that *Cockle* dictates that the focus should be on the employer payment for the health care benefit, not the conditions of realization of the coverage. If we tread the latter path 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 of benefits.

The effect of the regulations that set forth the Department's interpretation of what constitutes wages is discussed in *In re Fred L. Jones:*

> The Department's rules consist of five new sections, WAC 296-14-520, 296-14-522, 296-14-524, 296-14-526, 296-14-528 and 296-14-530. There is no explicit statutory authority to promulgate rules interpreting RCW 51.08.178 ("Wages"). The Department must rely on the authority provided in RCW 51.04.020(1), which allows the director to "[e]stablish and adopt rules governing the administration of [Title 51]." The rules are properly characterized as "interpretive," as that term is defined in the Washington Administrative Procedures Act (APA):, Title 34 RCW
>
> > An "interpretive rule" is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers.
>
> RCW 34.05.328(5)(c)(ii). The authority for the rules' substance must therefore derive from existing law. We note that the Department specifically references *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001) as authority, from which we infer that the rules interpret RCW 51.08.178 in light of the Department's interpretation of the Supreme Court decision in *Cockle.*
>
> Interpretive rules promulgated under the federal Administrative Procedures Act do not have the force of law. *Winans v. W.A.S., Inc.,* 112 Wn.2d 529, 537 (1989). We find no Washington case law specifically adopting the federal treatment of interpretive rules. However, the Washington State Legislature, in RCW 34.05.001 of the state APA, did indicate its intent that the law be interpreted "consistently

> with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." RCW 34.05.001. Commentators have suggested that the federal and Washington State's APAs are sufficiently similar and therefore, similar to the federal statute, Washington State's interpretive rules do not have the force of law. *See Washington Administrative Law Practice Manual* § 7.02(c). We conclude that the Department's new rules represent the Department's interpretation, only, rather than legislation with the force of law.

Jones, at 4-5.

WAC 296-14-522 breaks down wages into three categories:

> (1) The **gross cash wages** paid by the employer for services performed. "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law. Tips are also considered wages but only to the extent they are reported to the employer for federal income tax purposes.
>
> (2) **Bonuses** paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation.
>
> (3) **The reasonable value of board, housing, fuel and other consideration of like nature** received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.

(Emphasis added.)

A section of the new rule includes an exception that excludes, from the "wages" definition, employer payments into trust funds for benefits that do not satisfy the "of like nature" test:

> Payments for items other than board, housing, fuel or other consideration of like nature made by the employer to a trust fund or other entity for fringe benefits do not constitute wages.

WAC 296-14-524 describes "of like nature" as "[A] benefit [that] must be objectively critical to protecting the worker's basic health and survival at the time of injury or date of disease manifestation. The benefit must be one that provides a necessity of life at the time of injury or date of disease manifestation without which employees cannot survive a period of even temporary disability."

As noted above, however, WAC 296-14-526 goes further, and states that a worker must be able to receive a union health care benefit to have the employer contribution included in the base wage:

> 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.

We believe this interpretative WAC, which does not have the force of law, is in fact contrary to *Cockle* and its interpretation of RCW 51.08.178 because the WAC focuses on the conditions of eligibility as opposed to the payment of the benefit. In the *Cockle* case, the worker's health care coverage was suspended from the date of her injury through certain periods because she was not working enough hours to qualify under the rules of her employer's health care program, and the court ordered that the benefit be taken into consideration in establishing the total wage.

Mr. Granger's case was submitted on stipulated facts, which are set forth in the Proposed Decision and Order at pages 2-3. Briefly, the claimant received health care coverage through his union. His various employers paid for the union health care benefit, as for other benefits, into the union trust fund, and his employer at the time of injury was responsible for that payment. The ability to **use** the health care benefit was dependent on the number of hours worked—by analogy, a kind of "waiting period" dependent on length of employment. Initial ability to use the benefit was dependent on having worked 200 hours, thereafter, one had to maintain a minimum of 120 hours in the health care "bank," and if the minimum was not maintained for a certain period of time, the worker had to begin again. On March 31, 1995, Mr. Granger's banked hours were below the minimum required. Although the employer was paying the health care benefit, as of the date of injury, April 20, 1995, Mr. Granger had only 64 hours in the "bank." In May 1995, the employer paid $136.32 for Mr. Granger's April health care benefit. Effective May 1995, the employer ceased paying the health care benefit; Mr. Granger paid for his own coverage. The Department failed to include the employer's health care payment in the claimant's wage base in its post-*Cockle* "rate" order, which was affirmed on July 9, 2002.

The purpose of time loss compensation is to **replace earning capacity**. This includes not only monetary wages, but also "other consideration of like nature." The Washington Supreme Court construes the phrase "board, housing, fuel, or other consideration of like nature" in

RCW 51.08.178 as "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. Core, non-fringe benefits such as food, shelter, fuel, and health care all share that 'like nature.'" *Cockle*. In Mr. Granger's case the 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.

WAC 296-14-524 and *Cockle* make it clear that health care is a "non-fringe" benefit.[1] 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 base that must include payment for health care benefits. We have granted review to include the employer contribution for health care and to add a necessary conclusion of law regarding the definition of wages.

FINDINGS OF FACT

1. On May 2, 1995, the claimant, William A. Granger, filed an application for benefits with the Department of Labor and Industries, in which he alleged he sustained an industrial injury on April 20, 1995, while working in the course of his employment with G.G. Richardson, Inc.

   On June 27, 1995, the Department issued an order that provided the claim is allowed; and that time loss compensation benefits shall be paid.

   On November 25, 1996, the Department issued an order that provided that a permanent partial disability award is for 5 percent of the left arm at or above the deltoid insertion or by disarticulation at the shoulder; and that the claim is closed.

[1] In *In re Fred L. Jones*, a case in which the claimant argued that all benefits paid to reach a prevailing wage requirement should be included in determining his wage base, we discussed what aspects of union trust fund payments by an employer were to be included in determining L&I wage replacement, and the application of the Department's new WACs (296-14-520 et. seq.) interpreting *Cockle*. In that case, we decided (among other things), that vacation pay that was subject to cash "draws" should be included in wages, contrary to the Department's WACs that we deem interpretive only. The focus was on **replacement** for monetary wage components and those benefits necessary to health and survival. There is a suggestion in that case that because a worker could receive health coverage for several months if there were sufficient "banked hours," regardless of employer payments, that the worker's circumstances would not change until the hours are below minimum (*Jones,* at 3). That does not take into account that the benefit would be lost without further employer payments, and focuses on the receipt, as opposed to the payment of, the benefit. The statement following that suggestion, however, once again stresses that the focus is on the form of consideration **paid**, however, and health care benefits were not the central issue in that case. We did not intend to shift the focus from the employer payment of the benefit to conditions of receipt of the benefit.

On December 2, 1996, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated November 25, 1996.

On December 19, 1996, the Board issued an order returning the case to the Department for further action.

On October 29, 1999, the Department issued an order that provided that the worker would receive benefits every 14 days until otherwise notified; that time loss compensation was paid from October 12, 1999 through October 25, 1999; that the time loss compensation rate was set at $1,507.50 per month based on single with no dependents, wages of $2,847.68 per month, a date of injury of April 20, 1995, wages of $16.18 per hour at 8 hours per day, 5 days per week; and that a deduction was taken for an assessed overpayment.

On December 13, 1999, the claimant filed a Protest and Request for Reconsideration with the Department from the Department order of October 29, 1999.

On December 14, 1999, the Department issued an order that provided that the order of October 29, 1999, is modified from a final to an interlocutory order; and that the claim remains open for authorized treatment and benefits.

On November 26, 2001, claimant's counsel sent a letter to the Department requesting the Department to recalculate benefits in light of *Cockle* (information related to health insurance benefits will be provided when available.)

On May 24, 2002, the Department issued an order that provided that the worker's total time loss compensation rate was calculated by taking into account the following: the wage for the job of injury was based on $16.18 per hour, 8 hours per day, 5 days per week, totaling $2,847.68 per month and a date of injury of April 20, 1995. Additional wages for the job of injury included: health care benefits $-0- per month; tips $-0- per month; bonuses $-0- per month; overtime $-0- per month; housing/board/fuel $-0- per month; equipment/clothing $-0- per month; and driver mileage $-0- per month. The worker's total gross wage was $2,847.68 per month and the worker's marital status eligibility on the date of this order was single with 0 dependents. A social security offset had been established by the order of June 21, 1996.

On May 31, 2002, the claimant filed a Protest and Request for Reconsideration with the Department from the Department order dated May 24, 2002.

On July 9, 2002, the Department issued an order that affirmed the Department order of May 24, 2002.

On August 14, 2002, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals.

On September 16, 2002, the Board of Industrial Insurance Appeals issued an order granting the appeal, assigning it Docket No. 02 17611, and ordered that further proceedings be held.

2. On April 20, 1995, the claimant sustained an industrial injury while working in the course of his employment with G.G. Richardson, Inc.

3. On July 9, 2002, the Department issued an order that affirmed its order of May 24, 2002, which stated the claimant's time loss compensation rate was calculated by taking into account the following: the wage for job injury was based on $16.18 per hour, 8 hours per day, 5 days per week, totaling $2,847.68 per month, and a date of injury of April 20, 1995. The order did not provide for health care benefits. It calculated the worker's total gross wage as $2,847.68 per month, marital status as single with no dependents, and stated that a social security offset had been established by an order dated June 21, 1996.

4. The order of July 9, 2002, did not include any health care benefits in the claimant's wages.

5. William A. Granger was a 31-year member of the Union Local 292 of Washington and Northern Idaho District Counsel of Laborers.

6. According to the Northwest Laborers-Employer's Health and Security Trust Fund, revised September 1999, eligibility for medical benefits is determined on the basis of an hour bank system. It is agreed that William A. Granger had previously established a minimum of 200 hours, which was required for initial eligibility. Once the minimum eligibility requirement was established, 120 hours would be deducted from the employee's "bank" for each month of coverage. This would provide coverage beginning the first day of the second month following each month in which 120 hours was deducted. An employee would continue to be covered as long as there are 120 hours or more in the "bank." A maximum of nine consecutive months of prepaid continuous coverage (1,080 hours) could be accumulated.

7. When the hours in the "hour bank" drop below 120 they remain in the bank for ten months from the last date of eligibility (from hours worked or COBRA self payments), after which the "bank" is forfeited.

8. Although William A. Granger was not able to use his health care coverage after March 31, 1995, because he did not have enough hours

in the "hour bank," the employer paid Mr. Granger's health care benefit for work performed in the month of April 1995, which included the date of injury, and hours were being accumulated in Mr. Granger's "hour bank."

9. According to the union agreement, reinstatement of eligibility occurs if the "hour bank" shows a total of at least 120 hours within the ten calendar month period immediately following the termination of his eligibility. Such reinstatement will become effective on the first day of the second calendar month in which this requirement is met. If coverage is not reinstated within a ten calendar month period, any reserve hours in the "hour bank" will be forfeited. The worker will again become eligible for coverage upon completion of the initial eligibility requirement for new employees.

10. According to the union contract, when a worker moves from one employer to another his protection may continue, even though he is unemployed between jobs, provided he has sufficient accumulated hours credited to him. The new employer has to contribute to the trust fund for the worker.

11. The claimant, William A. Granger, began work for G.G. Richardson, Inc., at the Troutline Chelan job site, beginning at 7 a.m. on April 17, 1995.

12. On April 20, 1995, the claimant was injured while in the course of his employment. The Department accepted the claim for injury to the back, neck, arms, and hip.

13. As of April 20, 1995, William A. Granger had 64 hours in the "hour bank."

14. As a direct and proximate result of his industrial injury, Mr. Granger has been unable to work since April 20, 1995.

15. William A. Granger's rate of pay was $16.18 per hour. In accordance with the union contract, the contributions to the union trust fund included health and welfare of $2.15 per hour, paid by the employer.

16. The employer contributed towards the claimant's health insurance coverage, in the amount of $136.32, for the hours the claimant worked in April 1995.

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

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Pursuant to RCW 51.08.178 and *Cockle v. Department of Labor & Indus*., 142 Wn.2d 801 (2001), the claimant's wages, upon which the rate of time loss compensation is based, must include the cash wages received, as well as the reasonable value of board, housing, fuel and other consideration of like nature, which includes employer payments for health care to the union trust fund.

3. The Department order of July 9, 2002, is incorrect and is reversed. This matter is remanded to the Department of Labor and Industries to include the employer-paid contribution to Mr. Granger's union health care benefit in determining his wages, and to take such other action as is in accordance with the law and the facts.

It is so **ORDERED**.

Dated this 14th day of January, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member