Wren, Harry, Dec'd

RETROACTIVITY OF STATUTORY AMENDMENTS

Children's benefits (RCW 51.08.030)

The statute extending benefits to a worker's children beyond the age of 18 while enrolled in school does not apply to children whose parent was injured prior to the effective date of the statute. The law in effect at the time of injury applies.In re Harry Wren, Dec'd, BIIA Dec., 57,099 (1981) [dissent] [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 81-2-14630-9.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: HARRY L. WREN, DEC'D)	DOCKET NO. 57,099
)	
CL AIM NO F-551887)	DECISION AND ORDER

APPEARANCES:

Claimant, Harry L. Wren, Dec'd., by Lane, Powell, Moss & Miller, per Wilbur J. Lawrence

Employer, Seattle Transit System, None

Department of Labor and Industries, by The Attorney General, per Gayle Barry, Assistant

Appeal filed by the petitioner on June 23, 1980 from a decision of the Department of Labor and Industries in the form of a letter dated April 23, 1980, which denied petitioner's request for a continuation of benefits while enrolled in a full time course at an accredited school. **AFFIRMED.**

DECISION

This appeal comes on for review before the Board pursuant to a Petition for Review filed by the child-petitioner, Bonnie Lee Wren, hereinafter referred to as petitioner, and is submitted on stipulated facts which we summarize as follows:

Petitioner, who was born on February 17, 1959, is a surviving child of Harry L. Wren, who sustained a fatal industrial injury on May 29, 1967. At the time of Mr. Wren's death, the Industrial Insurance Act, hereinafter referred to as the Act, provided for the payment of death benefits in the form of monthly compensation for and on account of a surviving "child", as that term was defined therein.

The Act, at that time, defined "child" in material part as follows:

"'Child' means every natural born child . . . under the age of 18 years and over the age of 18 years if the child is a dependent invalid child . . ." Laws 1961, Chapter 23, sec. 51.08.030.

Inasmuch as petitioner was only seven years of age at the time of her father's fatal injury, she qualified as a "child" pursuant to the above-quoted definition, and for the monthly compensation benefits payable therefor. Prior to petitioner reaching her 18th birthday, the legislature, in 1969, amended the statutory definition of "child" so as to extend the age limitation from age 18 to 21,

provided that the "child" was permanently enrolled in a full-time course in an accredited school, to wit:

"'Child' whenever used in this chapter means every natural child . . . under the age of 18 years, or under the age of 21 years while permanently enrolled at a full-time course in an accredited school and over the age of 18 years if the child is an invalid child." (Emphasis supplied.)

On February 17, 1977, petitioner turned 18 and was then permanently enrolled full-time at an accredited school. On that date, however, the Department of Labor and Industries, hereinafter referred to as the Department, terminated her monthly compensation benefits pursuant to the 1961 statutory definition of "child", <u>supra</u>, the definition in effect at the time of her father's fatal injury, and under which her right to compensation accrued.

Thus, the issue which is squarely presented for decision by this case is whether petitioner's right to compensation is governed by the law in effect at the time of her father's fatal industrial injury (the 1961 definition of "child"), or by the law in effect at the time she turned age 18 (the 1969 definition of "child"). Parenthetically, it is to be noted that in 1977 the legislature again amended the statutory definition of "child" so as to further extend the age limitation from age 21 to 23 for those permanently enrolled in a full-time course in an accredited school. Laws 1977, 1st Ex. Sess., Chapter 323, sec. 4. For purposes of convenience and simplicity, however, we have treated the 1969 and 1977 amendments as one, inasmuch as it is conceded by the parties hereto that if the 1969 amendment applied to petitioner at age 18, the 1977 amendment likewise would apply to her at age 21.

The case brings into focus two general rules of law, the first of which applies to workers' compensation cases specially, and the second, to legislative enactments generally, to wit:

- The rights of the parties under the act are governed by the law in force at the time of injury, and not by the law in force at any subsequent time. Ashenbrenner v. Department of Labor and Industries, 62 Wn. 2d 22 (1963); and cases cited therein. This rule, of course, has no application where it clearly appears the legislature intended otherwise. Lynch v. Department of Labor & Industries, 19 Wn. 2d 802 (1944).
- A statute is presumed to operate prospectively only, unless a contrary intent clearly appears. <u>Lynch v. Department of Labor & Industries, supra,</u> and cases cited therein. This rule is variously stated to the effect that a statute will no be held to apply retrospectively in the absence of language clearly indicating such legislative intent. <u>Bodine v. Department of Labor & Industries</u>, 29 Wn. 2d 879 (1948).

These are two separate rules of law. They have, however, been employed conjunctively in workers' compensation cases. Although disparate in wording, they are, when applied to workers' compensation enactments, uniform in meaning, to wit: unless a contrary legislative intent clearly appears, a statute has no operative effect upon a prior injury. This proposition notwithstanding, petitioner contends that the legislature is free to enlarge, diminish, and even terminate rights and obligations conferred in a prior act, and its power to do so has been specifically upheld in Robinson v. McHugh, 158 Wash. 157 (1930); Denning v. Quist, 160 Wash. 681 (1931); Mattson v. Department of Labor & Indus-tries, 176 Wash. 345 (1934); and Lane v. Department of Labor & Industries, 21 Wn. 2d 420 (1944). We shall briefly review these cases in the order cited.

Robinson and Denning both involved a 1929 amendatory act (Laws 1929, c 132, sec. 1), which terminated a worker's right to sue a third party employer tort-feasor, if, at the time of injury, either the worker or the employer was engaged in an extra-hazardous employment. The amendatory act contained a savings clause excepting therefrom any "appeal pending or right of appeal existing" as of the effective date of the act. In both cases, the contention before the court was that the amendatory act could not be applied retroactively so as to bar a cause of action arising out of an injury sustained prior to the passage of the act inasmuch as to do so would contravene the constitutional prohibition against the impairment of a vested right. The court held, again in both cases, that retroactive application of the act was not unconstitutional because there could be no vested right in a cause of action that was created solely by statute.

<u>Mattson</u> involved a 1927 amendatory act (Laws 1927, c 310, sec. 4) which imposed a threeyear time limitation upon a worker's right to file an application to reopen his claim for aggravation of disability. The amendment contained the following proviso:

"Provided, any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

At the time of the claimant's injury in <u>Mattson</u>, the law contained no time limitation for the filing of such an application. The Department ruled that the claimant's claim was governed by the three-year time limitation and thus denied his application to reopen the claim, which had not been filed within the three-year period. As in <u>Robinson</u> and <u>Denning</u>, <u>supra</u>, the contention on appeal before the court was that the retroactive application of the 1927 amendatory act violated the constitutional prohibition against the impairment of a vested right. The court disposed of the case by simply

stating that the constitutional question presented was no longer an open one, citing, among other cases, the <u>Robinson</u> and <u>Denning</u> cases, <u>supra</u>, and then stated:

"... The limitation contained in the act of 1927, which is complained of, is purely remedial and destroys no vested right."

Finally, the <u>Lane</u> case involved a 1941 amendatory act (Laws 1941, c 209, sec. 1), which expanded the three-year time limitation for aggravation reopenings (the time limitation imposed by the 1927 amendatory act involved in <u>Mattson</u>, <u>supra</u>) to five years, and contained the following proviso:

"Provided any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

The court held that the very wording of the proviso was so plain as to need no construction and made it clear that the five-year limitation was to apply retroactively, stating:

"... If the statute stopped at the proviso, then all that this court has said about applying statutes of limitation prospectively and that the law in force at the time the claim of an injured workman accrued must govern, would be applicable. It would seem as though the lawmakers sensed this and, to avoid such effect, added the proviso...."

The employer, however, contended that to apply the retroactive proviso to claims arising out of injuries sustained prior to the enactment of the amendatory act violated the constitutional prohibition against the impairment of a vested right. As to this contention, the court held:

"The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed. We held in Mattson v. Dept. of Labor & Industries, . . . that no vested right of an injured workman was affected when a limitation period was provided where none had existed before, and the same authority exists to enlarge the time for making claims for readjustment, and, for the same reason given in that case, no vested right of an employer would be affected."

Manifestly, we think, these four case are consonant with the two general rules of construction we set forth at the outset. In each case, the particular amendatory act under consideration, by its express wording, indicated a retrospective application. The question for decision in these cases

was not whether the amendatory act applied retroactively, but whether such an application contravened the constitutional proscription against impairment of a vested interest.

The net holding of all four cases is that there can be no vested interest in a right or remedy that owes its creation solely to statutory law.

Petitioner next cites us to four cases from other jurisdictions which, it is contended, indicate that the amendatory act here in question is remedial and, as such, should be applied retroactively, to wit: Rockledge v. Garwood, 65 NW 2d 785 (Mich. 1954); Imperial Knife Co. v. Gonsalves, 133 A. 2d 721 (R.I. 1957); Freij v. St. Peters Evangelical Lutheran Church, 250 NW 2d 78 (C.A. Mich. 1976); and Hastings v. Earth Satellite Corp., 628 F. 2d 85 (D.C. Cir. 1980). We shall proceed to examine these cases in the order cited.

Rockledge involved an amendatory act which permitted an injured worker to both take under the workers' compensation act and sue a third party tort-feasor, whereas under the original statute he was required to make an election. The Michigan Supreme Court found that the legislature intended the amendatory act to have a retroactive application as follows:

"... During the pendency of the bill, an amendment was proposed to the effect that the act should apply only to employees 'as shall not have heretofore elected a remedy', 1 Senate Journal, regular session, p. 491. This proposal was rejected and the bill became law. The intent thus expressed by legislative action should not be altered by judicial construction."

The remainder of the decision was addressed to the question of whether such a retrospective application of the statute was constitutionally valid. In this regard, the court held that the amendatory act was remedial, in that it simply restored in full to the worker his right of action for common law damages, and thus destroyed no vested right of the third party tort-feasor inasmuch as a statutory defense is not a vested right. Quite obviously, we think, this decision fully accords with our own court's decisions in Robinson, Denning, Mattson and Lane, supra.

Imperial Knife, the second case to which we are cited, involved an amendatory act which provided that a partially incapacitated worker be compensated at the rate payable for total incapacity under certain prescribed conditions. The amendatory act was in the form of a proviso to the statute governing partial incapacity and prescribed as follows:

"... that where a partially incapacitated employee has made a bona fide attempt without success to obtain suitable work he is able to perform and the employer is unable to offer the employee suitable work he is able to perform or is unable to present evidence that such suitable work is available elsewhere, then said employee shall receive as weekly compensation the amount payable for total incapacity."

The case was before the Rhode Island Supreme Court on an appeal by an employer. The employer contended that inasmuch as the proviso changed the amount of compensation payable to a partially incapacitated worker it was substantive in nature and that under the law of Rhode Island substantive rights were governed by the law in force at the time of injury. In response thereto, the court noted that the supporting cases cited by the employer " . . . concerned the meaning of the substantive law providing for compensation or fixing the amount thereof, and naturally, they were governed by the statute as it existed at the time of injury . . ." The court then stated, "[i]n the instant case the question to be determined is one of legislative intent." The court then proceeded to set forth its holding in the following language:

"From the language of the amendment we are of the opinion that the legislature intended, in a realistic and practical fashion, to benefit a certain class of injured employees by treating them as totally incapacitated under certain conditions expressly stated in the last proviso of Art. II, sec. 11, as amended by chap. 3784. Viewed in this light, it is our opinion that the provisions appearing in the last proviso of said sec. 11 were intended to be procedural and to apply to all such cases which at the time of the passage of the amendment in question were not decided and would thereafter have to come before the Workmen's Compensation Commission; and, further, that such provisions apply to such proceedings in which the injury occurred prior to the effective date of the amendment in question."

It seems to us that the court's holding is in the nature of a "savings clause", in that it saves for consideration under the amendatory act those cases arising out of prior injuries that had not as yet been decided by the Workers' Compensation Commission as of the effective date of the amendatory act. In other words, for procedural purposes, the amendatory act was to be applied retroactively so that those cases which had not as yet been decided as of the effective date of the amendatory act would proceed to a final decision under the auspices of the amendatory act. We do not read the decision as holding that cases arising out of prior injuries that had already been determined as to partial incapacity would be governed by the amendatory act.

Next in the line is the <u>Freij</u> case. This case involved a statute which reduced workers' compensation weekly payments by five percent for each year following age 65. The purpose of the reduction was to offset social security benefits. The problem was that the statute contained no

exception for those workers who were not eligible for social security benefits. Consequently, even those workers over age 65 who were not receiving social security benefits were have their workers' compensation benefits reduced. Accordingly, the legislature amended the statute by adding thereto a new subsection which reads:

"Subsection (1) shall not apply to a person 65 years of age or over otherwise eligible and receiving weekly payments who is not eligible for benefits under the federal social security act"

The Michigan Court of Appeals held that the legislature intended the amendment to apply retroactively to prior injuries. In so holding, the court classified the amendment as "remedial" -- not in the sense of creating a new procedural remedy as opposed to a substantive right -- but in the sense that a correction was being made to cure an unintentional inequity.

"We are convinced that the legislature, by the passage of 1974 PA 184, intended to redress what they perceived to be a defect in the provision as originally stated It seems apparent that the 1974 amendment must have been intended to remedy what had come to be perceived as a pernicious consequence of the existing legislation; that benefit recipients not eligible for social security were having their benefits reduced even though they did not begin to receive social security payments."

The court also held that the amendatory act was "remedial" in the "remedial/substantive" sense of that term. This holding, however, was in response to the employer's contention that a retroactive application of the statute to prior injuries would impair a vested right. In this regard, the court stated that the amendment merely expanded an existing remedy rather than creating a new one, and thus, it did not impair any vested interest of the employer.

Needless to say, unlike the amendatory act before the Michigan court in <u>Freij</u>, the statutory amendment here before us was not enacted to correct a defect or remedy an unforeseen result stemming from the original statute under amendment.

Finally, we address the <u>Hastings</u> decision wherein the United States Court of Appeals for the District of Columbia had before it a 1972 amendment to the Workers' Compensation Act of the District of Columbia, which repealed a monetary limitation of \$24,000 upon recoveries for permanent partial disability. The court held that in the absence of any provision in the amendatory act prohibiting retroactive activity, the repeal of the \$24,000 ceiling would be applied retroactively so as to encompass those workers injured prior to the effective date of the amendment, but whose

awards for permanent partial disability had not as yet reached the \$24,000 ceiling as of the effective date of the amendment. The court resolved the case under a rather curious rule of statutory construction, to wit:

"The principles by which we must pass upon the retroactivity <u>vel non</u> of the repeal of the \$24,000 limitation were explained by the Supreme Court in <u>Bradley v. School Board</u>, 416 U.S. 696, 94 S. Ct 2006, 40 L. Ed 2d 476 (1974). We are instructed to apply the amendment unless there is statutory direction or legislative history to the contrary or unless to do so would be manifestly unjust."

Reference to <u>Bradley</u>, <u>supra</u>, discloses the Supreme Court's "instruction" to be:

"An appellate court must apply the law in effect at the time it renders its decision, Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary."

It is sufficient to say that the rule of statutory construction as enunciated in <u>Hastings</u> and <u>Bradley</u> finds no constituency in the law of Washington. Quite the contrary, it is the very antithesis to the rule that a statute will be presumed to operate prospectively, unless a contrary legislative intent clearly appears. Be that as it may, the <u>Hastings</u> court proceeded to find an affirmative congressional intent that the amendatory repeal was to apply retroactively by reviewing the legislative history of prior amendments to the \$24,000 ceiling, to wit:

"We find no congressional intention that the repeal not be applied retroactively. The statutory language, to be sure, does not specifically require retroactive application of the repeal. We think, though, that the absence of a provision <u>prohibiting</u> retroactivity is significant. Congress before 1972 had thrice amended the Act's benefit limitations. Each prior amendment was, by its terms, made inapplicable to injuries or deaths occurring before the date of enactment. The 1972 Congress, by its silence, deviated from the past practice of specifically providing for non-retroactivity." (Emphasis by the court.)

As a further ground for its holding, the <u>Hastings</u> court went on to distinguish between amendments that change substantive rights and those that are directed at the remedy, with the notation that courts are much more inclined to give retroactive application to the latter than the former inasmuch as changes in remedy "often do not involve the same degree of unfairness." The court classified the amendatory act repealing the \$24,000 permanent partial disability ceiling as remedial in that it merely adjusted the extent of liability in a situation where the possibility of liability was already known.

The purpose underlying the court's discussion as to remedial and substantive rights in this case is unclear. The court had already held the amendatory act before it to be retroactive on the basis of congressional intent. Thus, its subsequent "remedial/substantive" discussion appears to be gratuitous and in the nature of dicta. Of course, under the rule of construction announced by the court at the outset of its decision to the effect that a statute would not be held retroactive if to do so would be "manifestly unjust", the court may have been attempting to satisfy this aspect of the rule through its "remedial" classification and its assertion that changes in remedy "often do not involve the same degree of unfairness: as substantive changes. This notion, however, would seem to be negated by the court's footnote admission that a retroactive application of the act before it was indeed unfair, to wit:

"The distinction between retroactive changes in <u>principles</u> of liability and changes in <u>remedy</u> for such liability does not mean that retroactive changes in remedy cannot also be unfair. They obviously can be so, particularly in the context of insurance. Actuarial calculations are based on the expected <u>magnitude</u> of liability in addition to its expected <u>frequency</u>. Thus, insurers are harmed when their past premiums prove to be inadequate fully to reflect the increased liability mandated by a retroactive change in remedy. Such is the case with the repeal of section 14(m). Insurers doubtless set their premiums based on the expectation that recoveries would be limited to \$24,000." (Emphasis by the court.)

Perhaps a better explanation of the court's remedial classification and its attendant discussion thereof can be found in the constitutional aspects of the case. In the main body of the opinion, there is no reference to any constitutional question having been raised in the case. However, one of the footnotes discloses that the employer did challenge a retroactive application of the statute on constitutional grounds, which the court, in the same footnote, summarily rejected, to wit:

"Earth Satellite contends that giving retroactive effect to the repeal of the \$24,000 limitation would offend due process. This argument is without merit. E.g., <u>Usery v. Turner Elkhorn Mining Co.</u>, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 2d 752 (1976); <u>American Stevedores</u>, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976)."

In any event, once the wheat is extracted from the chaff, we find that, although the rule of statutory construction proclaimed in <u>Hastings</u> conflicts with the rule of construction which obtains in Washington the court's actual holding, i.e., its retroactive application of the statute <u>based upon</u> congressional or legislative intent is in accord with this state's law.

We have set forth the above four cases in some detail. Our purpose has not been to unduly prolong this decision, but to demonstrate and underscore what we conceive the law to be. The basic thesis underlying petitioner's position herein is that the question of retroactive application hinges upon the determination of whether the changes or rights affected by the amendatory act are remedial or substantive in nature. In support of her contention that the proper classification is remedial and not substantive, petitioner has quoted to us at some length language from the foregoing cases. We, however, see the proper approach to the resolution of this case differently. To borrow a phrase of Justice Cardozo, whose wisdom has also been alluded to by petitioner, this case does not turn upon "the tyranny of labels." See Palko v. Connecticut, 318 U.S. 319 (1937). As we view the law, petitioner's theory of the case puts the cart before the horse. To our mind, the first and foremost inquiry is one of legislative intent. If it be found that the legislature intended the statute to operate retrospectively, then the question regarding the violation of constitutional safequards arises and the remedial/substantive dichotomy becomes directly relevant in the sense that it becomes determinative as to whether a retroactive application of the law abridges a vested interest. If a statute is remedial in nature, then the courts are inclined to find that no vested interest has been breached, and thus, there is no constitutional bar to its retroactive application. In other words, simply because a statute is remedial does not ipso facto decree its retroactive application. To the contrary, the determination of retroactivity rests squarely upon the question of legislative intent. See Layton v. Home Indemnity Co., 9 Wn. 2d 25 (1941); Bodine v. Department of Labor & Industries, 29 Wn. 2d 879 (1948).

This then brings us to the question of legislative intent in the instant case. Legislative history sheds some light upon the point. The term "child" was defined in the original Act of 1911 as follows:

"The word 'child', as used in this act, includes a posthumous child, a child legally adopted prior to the injury, and an illegitimate child legitimated prior to the injury." Laws 1911, Chapter 74, sec. 3.

Thus, as originally defined, the term "child" contained no reference to age. The limitation as to a child's age was originally contained in that section of the law setting forth the compensation schedule. See Laws 1911, Chapter 74, sec. 5. This continued to be the case until 1957 when the legislature adopted the device of placing the age limitation in the statutory definition of "child" itself, instead of providing therefor in the compensation schedule. See Laws 1957, Chapter 70, sec. 7. In

the original act of 1911 the age limitation for "child" was 16 years and continued to be such until 1941 when an amendatory act was passed increasing the compensation schedule and raising the age limitation for a child to 18 years. Laws 1941, Chapter 209, sec. 1(a)(1). This 1941 amendatory act contained no language whatsoever to indicate whether the legislature intended it to apply prospectively or retroactively. It is this very statutory provision, section 1(a)(1), that came before the court in Lynch v. Department of Labor & Industries, 19 Wn. 2d 802 (1944), wherein it was held, under the rule that a statute will be presumed to operate prospectively only unless a contrary legislative intent clearly appears, that this provision had prospective application only and did not apply to injuries sustained before its effective date. The only distinction between the 1941 provision raising the age limitation to 18 and the 1969 provision before us, raising the age limitation to 21, is that the former was to the compensation schedule, whereas the latter is to the statutory definition of "child." This, we submit, is a distinction without a difference.

Further examination of the history of the act shows that where the legislature has intended to increase the compensation for prior injuries it has made special financing arrangements therefor. Beginning in 1947, the legislature started granting increases in compensation for prior pensioners. In so doing, the legislature expressly provided:

"... That no part of said additional payment shall be payable from the Accident Fund or be charged against any class under the industrial insurance law."

* * * * *

"There is hereby appropriated from the General Fund the sum of four million, five hundred thousand dollars (\$4,500,000) for the payment of the additional amounts required by this act." Laws 1947, Chapter 223, secs. 1 and 2.

Further increases in compensation for prior pensioners were granted in 1957, 1961, and 1965. In each case, payment out of the accident fund was prohibited and general fund monies were provided. See Laws 1957, Chapter 196; Laws 1961, Chapter 23, section 51.32.070; Laws 1965, Chapter 166, section 1. In 1971 a further increase was granted but the financing therefor was terminated from the general fund through the creation of the supplemental pension fund. Laws 1971, 1st Ex.Sess., Chapter 289, sections 9 and 17. The provision granting increased compensation for prior pensioners and the supplemental pension fund which finances such increases are currently codified as RCW 51.32.072 and 51.32.073, respectively.

It is to be further noted that the compensation increases relating to prior injuries provided for in RCW 51.32.075 are also financed out of the supplemental pension fund. RCW 51.32.073. This fund is entirely separate and distinct from the accident fund, the fund which finances all injury compensation costs, as opposed to injury medical costs. The accident fund is made up exclusively of employer premiums which are determined in amount for each employer by his individual accident cost experience as well as the cost experience of all accidents occurring in his particular risk class. On the other hand, the supplemental pension fund is made up of contributions from the entire community of employers and workers and are paid in at a set and uniform rate, as determined from time to time by the director of the Department. These payments are on a matching basis, i.e., each employer matches the contribution of each of his workers.

Thus, it can be seen that, historically, whenever the legislature has increased compensation relative to prior injuries, it has made pro- vision to ensure that the cost thereof was not borne by the accident fund, and, in turn, by the individual employer or class of employers involved in any particular prior injury claim. This was done -- and the conclusion seems inescapable -- to obviate any question as to the constitutionality of such retrospective increases on the ground that they impaired vested rights. In this regard, it is well to bear in mind that the root purpose underlying all workers' compensation laws is to provide not only for workers a relief that is sure and certain, but also to limit employers' liability to a determinate level. 81 Am. Jur. 2d Workmen's Compensation § 2. From a constitutional standpoint, the troublesome problem that arises when increased compensation is granted for prior injuries is exemplified by the case of <u>Preveslin v. Derby</u>, 112 Conn. 129, 151 A. 518 (1930), as follows:

"The legislature may regulate the remedy and the method of procedure under a past as well as a future contract, but it cannot impose new restrictions upon the enforcement of the past contract so as materially to lessen its value and benefit to either party. O'Connor v. Hartford Acc. & Ind. Co., 97 Conn. 9, 115 A. 484.

"In a case where larger compensation was awarded under an act in force when the accident occurred, the court held:

'If such be the intention of the act, it cannot under the plain provisions of both the federal and state Constitutions be given that effect so far as concerns rights and obligations which accrued before its passage.

* * * * *

Upon the happening of an industrial accident the right to receive compensation becomes vested and the obligation

to pay it fixed. To change such vested rights and fixed obligations by statute would clearly be to impair the obligation of contracts."

Insofar as we have been able to determine, the question as to whether the rights of the parties under our Act are deemed to arise out of the contract of employment in which the Act necessarily inheres has never been squarely presented for decision in this state. It would appear, however, that Thorpe-v. Department of Labor & Industries, 145 Wash. 498 (1927), would have some bearing upon the point. In that case, the court held that a widow's right to compensation was governed by the statutory schedule of compensation in force at the time of her husband's injury rather than that in force at the time of his death. As part of the rationale in support of its holding, the court quoted with approval from the case of Quilty-v. Connecticut Company, 96 Conn. 124, 113 A. 149 (1921), as follows:

"The right to compensation arises from the contractual relation between the employer and the employee existing at the time of the injury, and the statute then in force in relation to compensation formed a part of the contract of employment, and determined the substantive rights and obligations of the parties.

"The obligations of the employer to dependents of an employee in case of the death of an injured employee are equally substantive obligations, and are also fixed and determined by the statute in force at the time of the injury."

Regardless of whether the rights of the parties arise out of the employment contract or out of the Act alone, and aside from any constitutional question, the critical point to be gleaned from the history of enactments granting increased compensation for prior injuries is that the legislature, without exception, also enacted special financing provisions so as to insulate the accident fund from the cost thereof. Accordingly, had the legislature intended the amendatory act before us and its attendant compensation costs to apply to prior injuries, would it not have made special provision, as before, for the financing thereof? We think so; not having done so, compels the inference that the statute was not intended to apply to prior injuries.

Petitioner, however, asserts that the amendment does not really increase the compensation payable for a "child" but merely extends the time limitation for a "child" to receive compensation at the same monetary level as that payable prior to the amendment. The subtlety of this distinction, we think, would be lost on the employer or employers whose cost experience would have to be charged with these extended payments. Excepting awards for permanent partial disability,

compensation for an injury can be increased in two ways -- by raising the monthly amount payable over a like period of time, or by paying a like monthly amount over an extended period of time. Either way, it constitutes increased compensation payable for and on account of an industrial injury.

Petition next refers to RCW 51.32.025. This section was enacted in 1975 and reads in its entirety as follows:

"Any payments to or on account of any child or children of a deceased or temporarily or totally permanently disabled workman pursuant to any of the provisions of chapter 5.32 RCW shall terminate when any such child reaches the age of eighteen years unless such child is a dependent invalid child or is permanently enrolled at a full time course in an accredited school, in which case such payments after age eighteen shall be made directly to such child. Payments to any dependent invalid child over the age of eighteen years shall continue in the amount previously paid on account of such child until he shall cease to be dependent. Payments to any child over the age of eighteen years permanently enrolled at a full time course in an accredited school shall continue in the amount previously paid on account of such child until he reaches an age over that provided for in the definition of 'child' in this title or cease to be permanently enrolled whichever occurs first. Where the workman sustains an injury or dies when any of his children is over the age of eighteen years and is either a dependent invalid child or is a child permanently enrolled at a full time course in an accredited school the payment to or on account of any such child shall be made as herein provided." Laws 1975, 1st ex.s. c.224, sec. 11.

It appears to be petitioner's position that assuming, <u>arguendo</u>, that the legislature did not make its intent as to retroactive application apparent in the enactment of the 1969 amendment redefining "child", it remedied any uncertainty or ambiguity upon this point with the enactment in 1975 of RCW 51.32.025, <u>supra</u>. Petitioner argues that this is the only possible purpose underlying the enactment of this provision because otherwise it is superfluous inasmuch as the term "child" had already been redefined in the 1969 amendment, and the payments required under RCW 51.32 to children under 18 and invalid children had been mandated by the Act since the time of its original enactment in 1911.

In response, we would point out that this 1975 enactment directs that after age 18 the compensation for a child shall be paid directly to the child, whereas prior to the enactment such payments went to the parent or person having legal custody of the child. RCW 51.32.010. In other words, it is not a superfluous enactment.

Petitioner, however, points in particular to the words "any payments" and "any child" which, she alleges, are all-encompassing and cannot be construed as simply referring to payments for children of workers injured in the future. This "literal-word" type of argument was made to the court and rejected in Ashenbrenner v. Department of Labor & Industries, supra ("When the supervisor of industrial insurance shall determine that permanent total disability results from the injury the workman shall receive monthly . . ."). (Emphasis supplied.) This argument can be applied to virtually any statute that does not expressly state that it shall operate prospectively only. If such were the law, the rule to the effect that statutes will be presumed to operate in futuro only, unless a contrary intent clearly appears, would have never found its way into the lawbooks.

Petitioner further notes that RCW 51.32.025, <u>supra</u>, was just one section of an amendatory act wherein another section, section 12 (RCW 51.32.072), increased compensation for total disability and death benefits arising out of prior injuries by indexing such compensation to the state's average monthly wage. In light of this section, petitioner asserts it is simply unthinkable that the legislature would raise compensation for children of workers previously injured, but deny them educational benefits in one and the same amendatory act.

This argument, of course, merely reflects petitioner's characterization of these amendatory Needless to say, RCW 51.32.025 does not deny education benefits to anyone. provisions. Petitioner speaks as though a child's enrollment in school at or after age 18 constitutes the legal fulcrum, so to speak, for compensation. The enabling basis for compensation, however, is the worker's injury, not the child's enrollment in school. See Thorpe v. Department of Labor & Industries, 145 Wash. 498 (1927). To our mind, section 12 of the 1975 amendatory act more undermines than supports the petitioner's argument. As we have previously noted herein, historically the legislature has provided for special funding or financing whenever it has granted increased compensation in regard to prior injuries. Section 12 marks no exception. The increases granted therein are financed out of the supplemental pension fund. No provision for financing, however, was made with respect to section 11 (RCW 51.32.025). Moreover, not only is section 12 (RCW 51.32.072) expressly worded so as to apply to prior injuries, it also states "[n]otwithstanding any other provision of law" which is the phraseology specifically commended to the lawmakers by the court for use when an enactment is intended to apply retroactively to a prior injury. Ashenbrenner v. Department of Labor & Industries, supra. Under the maxim expressio unius,

retroactive operation of any other section of the 1975 amendatory act not using this phraseology would be contraindicated.

As a closing comment in regard to RCW 51.32.025, we would not that six years elapsed between the 1969 enactment redefining "child" and the 1975 enactment of RCW 51.32.025. During this period, the Department consistently applied the 1969 law solely to injuries occurring on or after the effective date thereof in accordance with the rule that a statute is presumed to operate prospectively only, unless a contrary intent clearly appears. If, as petitioner contends, this administrative construction of the 1969 law was contrary to the legislative intent, then it seems inevitable to us that the lawmakers would have corrected the matter in 1975 in plain and unmistakable terms when they enacted RCW 51.32.025, at which time the very subject of compensation for children over age 18 was squarely before them. Not having done so, we think the lawmakers must be deemed to have acquiesced in the Department's construction. Cf. Hart v. Peoples Nat'l Bank, 91 Wn. 2d 197 (1978) and Washington Assoc. of County Officials v. Washington Public Employees Retirement Board, 89 Wn. 2d 729 (1978).

Finally, petitioner argues that the application of the 1969 amendatory act to her factual situation does not constitute a retroactive application thereof because the law was already in effect prior to the time she turned age 18. Again, this argument presupposes that the operative legal nexus for compensation as a child's enrollment in school at or after age 18. As heretofore noted, a child's compensation, be it payable before or after age 18, is payable for and on account of the parent/worker's industrial injury. Thus, it is the date of such injury which determined whether the application thereto of any given statute which regulates the compensation payable for injury is retroactive or prospective. Petitioner's argument in this respect is essentially akin to that presented to the court in the early case of Talbot v. Industrial Insurance Commission, 108 Wash. 232 (1919). This was the first case to come before our court on the question as to whether increased compensation granted by an amendatory act applied to prior industrial injuries. At the time, our Act was still in its first decade of existence, and the rule to the effect that the law in force at the time of injury controls had not as yet been formulated or enunciated in the case law of this state.

In <u>Talbot</u>, the claimant became permanently and totally disabled at a time when the statute in force fixed the compensation for those so disabled at a minimum of \$20 a month and a maximum of \$35 a month. The 1917 legislature amended the statute so as to provide that, in cases of permanent and total disability, where the character of the injury was such as to render the worker

so physically helpless as to require the constant services of an attendant, the monthly compensation was to be increased by \$20. This amendment went into effect less than a month after the occurrence of the claimant's injury. The arguments to the court in regard to whether the application of the statute to the claimant's situation constituted a retrospective application, and the court's disposition thereof are set forth in the opinion as follows:

"Counsel for the commission, while conceding that Talbot's condition is and has been, since he was injured, such as to bring his case under the amendment of 1917, if he had been injured after the going into force of the amendment, contends that his case does not come under the amendment because of his injury occurring before the amendment went into force. The argument is, in substance, that to award him such increased allowance would be to give the amendment a retroactive effect, and that there is nothing in the amendatory act suggesting any such legislative intent. We may concede, for argument's sake, that to award Talbot such increased allowance for any time he was in a helpless condition prior to the going into effect of the amendment would be to give it a retroactive effect, contrary to the intent of the legislature. The trial court, reversing the commission's refusal to award the claimed increased allowance, decided that Talbot was entitled thereto, but only from the date of the going into effect of the amendment, and directed the commission to make such allowance, commencing as of that date, and continue the same 'so long as the plaintiff by reason of his said injuries shall require the services of a constant attendant.' We are of the opinion that this is not the giving to the amendment a retroactive effect, contrary to the intention of the legislature. The power of the legislature to provide for such an increased monthly allowance in such cases is not questioned by counsel for the commission, the only question here presented being as to the legislative intent in enacting the amendment."

In <u>Lynch v. Department of Labor & Industries</u>, 19 Wn. 2d 82 (1944), the contention was again made to the court that simply to apply an amendatory act granting increased compensation for injury <u>after the act's effective date</u> to cases of prior injury did not constitute a retroactive application of the statute, citing <u>Talbot</u>, <u>supra</u>, as controlling authority. The court rejected the contention as follows:

"We shall not endeavor to minimize the force of that decision [Talbot], although upon a casual reading it may appear to be at variance with what we believe to be the weight of general authority on the subject of the retroactive application of increased pensions. However, a close analysis of the language above quoted convinces us that it is not out of harmony with our present view of the law upon the subject or with the weight of authority thereon. It will be noted that in the Talbot case the

court did not say that the allowance of the increased payment was in 'no sense' a retroactive application of the amendatory statute, but simply said that so to apply the amendment did not amount to giving it a retroactive effect contrary to the intention of the legislature. The court further specifically stated that the only question presented in the case was the legislative intent in enacting the statute. In other words, the court determined from all the circumstances and considerations connected with the particular legislation that it was the intent of the legislature that the amendment should be applied to injuries occurring before its effective date." (Emphasis by the court.)

Ashenbrenner v. Department of Labor & Industries, 62 Wn. 2d 22 (1963), may be termed the "watershed" case as to the question of whether the application of an amendatory act after its effective date to prior injuries constitutes a retroactive application thereof. In that case, the court was squarely presented with a choice -- it could either follow <u>Talbot</u> or <u>Lynch</u>. The court chose to follow Lynch, as follows:

"Appellant cites, in support of her position, the case of <u>Talbot v. Industrial Ins. Comm.</u>, 108 Wash. 231, 183 Pac. 84, 187 Pac 410 (1919), but that case is not applicable here for the reasons stated in the <u>Lynch</u> case, <u>supra</u>, which was decided much later, and in which the <u>Talbot</u> case was carefully analyzed and described as not being in conflict with the present view of the law or the weight of authority, because of the particular circumstances and considerations pertaining to the legislation there involved."

The <u>Talbot</u> decision is noted in an Annotation in 82 ALR 1244 as being <u>contra</u> to the weight of authority in the law on workers' compensation. Moreover, in a decision handed down barely three years subsequent to <u>Talbot</u> and involving a case on "all fours" therewith, the Nevada Supreme Court flatly refused to follow <u>Talbot</u>. <u>Virden v. Smith</u>, 210 P. 129 (1922). The amendatory act there in question was identical in wording to that before the court in <u>Talbot</u> with the exception that the increased compensation provided for in <u>Virden</u> for a constant attendant to the physically helpless worker was \$30 per month instead of \$20. In short, <u>Talbot</u> has not been followed in either our own or any other jurisdiction.

All told, we hold that the compensation for a "child" is governed by the law in force at the time of the parent/worker's industrial injury. We anchor our holding in the rule that a statute must be presumed to operate prospectively only, unless a contrary intent clearly appears. Not only does a contrary intent fail to clearly appear in this case, but, to our mind, the indicia of legislative intent that does appear reinforces the presumption of prospective operation.

As a final word, we have been mindful throughout our consideration of this matter of the well-established case law rule cited to us by petitioner to the effect that the Act is to be liberally construed in favor of its beneficiaries. We fully agree therewith; for that matter, so do the lawmakers. RCW 51.12.010. This rule, however, should not be used to rationalize a legislative intent that does not otherwise appear. As stated in <u>Virden v. Smith</u>, <u>supra</u>:

"... Although the Workmen's Compensation Act is in derogation of the common laws, it is remedial legislation, and should be liberally construed to effectuate its pur pose. This class of legislation, however, constitutes no exception to the general rule. It is deemed prospective and not retroactive in its operation. The rule of construction in this regard is of strict application."

Inasmuch as all factual matters in this appeal are stipulated and uncontested, no formal findings need be entered. RCW 51.52.106. The decision of the Department of April 23, 1980, denying petitioner's request for a continuation of compensation benefits after age 18 is correct, and should be affirmed.

It is so ORDERED.

Dated this 9th day of September, 1981.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/
MICHAEL L. HALL Chairman
/s/
PHILLIP T. BORK Member

DISSENTING OPINION

I hereby dissent from the Board majority. I concur with the Petition for Review and incorporate it herein by reference. The change in statute should be retroactive as it was a remedy to correct an injustice. To deny retroactivity is to support an injustice that was recognized by the legislature.

It is important to remember that the Act is to be and should be <u>liberally construed</u> on behalf of the worker and his dependents.

Dated this 9th day of September, 1981.

/s/ FRANK E. FENNERTY, JR. Member