No. 90455-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH C. CRABB,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

MEMORANDUM OF AMICUS CURIAE WASHINGTON SELF-INSURERS ASSOCIATION SUPPORTING THE PETITION FOR REVIEW

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I. INTRODUCTION

The Washington Self-Insurers Association (WSIA), the statewide representative of major employers who insure their own workers' compensation programs, files this memorandum in support of the Department of Labor & Industries' (L&I or Department) petition for review. The legislative freeze on Cost of Living Adjustments (COLAs) for workers' compensation claimants that is at the center of this case was a major component of one of the most significant legislative amendments to the Industrial Insurance Act in recent times. Those amendments were themselves among the most contentious acts of the 2011 legislative session. Ensuring the Legislature's intent to save costs in the workers' compensation system and help pull the system out of financial duress is a matter of substantial public importance. RAP 13.4(b)(4).

Unfortunately, the Court of Appeals' published decision, resting on a demonstrably incorrect reading of an unambiguous statute, in the face of a clear legislative purpose, thwarts the intent of the Legislature, adds cost and administrative complexity to the industrial insurance system for the Department and self-insured employers, and worse, creates a fundamental and perpetuating unfairness in the system: higher income claimants will receive a COLA for 2011, with benefits calculated on a higher basis in each subsequent year, while lower income claimants will not.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSIA is a statewide membership organization representing the workplace safety and workers' compensation interests of major Washington employers who choose to self-insure their risk of workplace accidents, injuries, and illnesses. Founded in 1972, after the Legislature authorized workers' compensation self-insurance as the alternative to Washington's monopoly Industrial Insurance State Fund, WSIA speaks for the nearly four hundred employers who are self-insured, and the many companies that provide them professional workers' compensation and safety related services. WSIA speaks for all Washington employers on the costs of Washington's workers' compensation system.

WSIA members are major public and private sector employers, such as cities, counties, schools, hospitals, non-profit charities, and many of our state's most visible and iconic companies and brands. One in three workers in Washington is covered by a self-insured program, and self-insured employers account for $53 billion, or 60 percent, of the state's total payroll annually. Self-insured employers pay workers' compensation benefits directly out of company funds, subject to the regulatory and audit oversight of the L&I, and according to the same laws and regulations as the Department. WSIA often appears as amicus curiae in cases of substantial interest to the association's membership.

III. ISSUE OF CONCERN TO AMICUS CURIAE

Did the Legislature intend that claimants receiving temporary disability ("time loss") benefits at the statutory maximum level receive a COLA for 2011, which compounds in subsequent years, despite the Legislature's express elimination of COLAs for all claimants for 2011? *Cf. Dept. of Labor & Indus. Pet. for Rev.* at 2-3.

IV. STATEMENT OF THE CASE

WSIA adopts the statement of the case set forth by petitioner L&I, *Pet. for Review* at 3-6.

V. REASONS TO GRANT REVIEW

A. STABILIZING WORKERS' COMPENSATION COSTS AND TREATING CLAIMANTS FAIRLY ARE MATTERS OF SUBSTANTIAL PUBLIC IMPORTANCE.

There are two underlying currents to the question of statutory construction in this case. The first is the intent and purpose of the Legislature in 2011 to control costs in the Washington workers' compensation system by, among other things, freezing COLAs for time loss claimants for one year with no catch-up. The second is the expectation that the Legislature would treat all claimants fairly in this regard, that is, not provide for COLAs for claimants at the highest end of the wage replacement scale while freezing COLAs for claimants whose monthly benefits may be just one dollar less.

1. EHB 2123 (2011) expressly froze COLAs for 2011 to save system costs.

By 2011, the Department oversaw a state industrial insurance fund in considerable financial disarray. Hammered by investment losses during the great recession, a decline in hourly premium revenue due to persistent high unemployment, beleaguered by comparatively generous benefit payouts to more claimants for increasingly longer periods of time, and fresh off a double-digit tax increase on Washington's State Fund employers, L&I and the state's employer community both came to the 2011 session of the Legislature seeking urgent cost-saving action.

Reflecting the substantial public interest in our workers' compensation system, legislative debates over coverage eligibility and benefit levels invariably touch off a political struggle between labor unions, the claimants' bar, and the employer community. The 2011 session was no different, and workers' compensation reform had the Legislature bollixed up, unable to come to terms on a biennial state operating budget until workers' compensation reform was resolved in the last days of a protracted special session. *See, e.g.*, Sanjay Bhatt, *Workers' comp revamp goes to governor's desk*, The Seattle Times, May 23, 2011, *available at* http://seattletimes.com/html/businesstechnology

/2015130576_workerscomp24.html (last visited Aug. 29, 2014) ("Breaking through a key political obstacle to passing the state budget, the Legislature approved a bill Monday to rein in growing costs in the workers' compensation system…").[1]

In the end, then-Governor Christine Gregoire brought forward as an executive request bill what became Engrossed House Bill (EHB) 2123, a menu of cost-saving reforms to the workers' compensation system, intended to lift L&I out of its financial crisis. Laws of 2011, 1st Spec. Sess., ch. 37. The bill title of EHB 2123, expressing in most general terms the Legislative purpose in enacting it, is "An Act Relating to stabilizing workers' compensation premium rates and claim costs...". The Legislature went on to flesh out this purpose in an intent section:

> The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. The state must ensure that the workers' compensation system remains financially healthy in order to provide needed resources for injured workers. . . .

EHB 2123, § 1.

One of the ways the Legislature went about improving the financial health of the system was through freezing COLAs for claimants for the 2011-12 benefit year, and providing that year's lost COLA would

[1] Courts routinely take judicial notice of publicly available facts as reported in newspaper articles. *See, e.g., In re Simmons*, 65 Wn.2d 88, 93, 395 P.2d 1013 (1964); *Miller v. Yates*, 67 Wn. App. 120, 123, 834 P.2d 36 (1992).

not be caught up in future years by rebasing future COLAs starting in 2012. EHB 2123, § 201. According to the official legislative fiscal note provided to the Legislature by the Department, this COLA freeze would save the State Fund $31 million in Fiscal Year 2012, and because it would not be caught-up in subsequent years, the ongoing effect of the rebasing the COLA in 2012 would be estimated savings of $33 million to $40 million annually in Fiscal Years 2013-17. Department of Labor & Industries, Individual State Agency Fiscal Note, EHB 2123 (2011) at 12, *available at* https://fortress.wa.gov/binaryDisplay.aspx?package=30316 (last visited Aug. 29, 2014). Especially so that this provision of EHB 2123 could go into effect prior to the start of the July 1, 2011 benefit year, EHB 2123 contained a so-called "emergency clause" declaring that "[t]his act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately." EHB 2123, § 1101.

2. The Court of Appeals decision undermines the intent of the Legislature to save workers' compensation costs.

The effect of the Court of Appeals interpretation of the COLA freeze, that it does not apply to claimants whose benefits were calculated at the maximum allowable rate that year under RCW 51.32.090(9), will

chip away by some presently unknown figure the cost savings the Legislature intended by enacting EHB 2123. It will impose additional cost on the Industrial Insurance Act State Fund, and additional, unforeseen and unbudgeted cost on self-insured employers. It will impose additional administrative complexity and burden on both the Department and individual self-insured employers to determine the population of claimants who would be entitled, under the Court of Appeals' theory, to additional time loss compensation for the 2011 benefit year.

3. The Court of Appeals decision unfairly favors higher earners at the expense of lower earners in the system.

Worst of all, the Court of Appeals' decision introduces a disparate treatment into the workers' compensation system. Although one overarching policy goal of the Industrial Insurance Act is to provide "sure and certain relief" for claimants, RCW 51.04.010, and one specific policy goal of EHB 2123 is "achieving the best outcomes for injured workers" while protecting the financial solvency of the system, EHB 2123, § 1, the Court of Appeals has now created "haves" and have-nots" in the workers' compensation system in that claimants at the maximum time loss rate in 2011 will effectively receive a COLA for that year, while claimants whose time loss benefit was even one dollar less in 2011 would not. And even worse yet, that disparate treatment will have an ongoing, multi-year

impact as time loss claimants at the maximum rate will continue to effectively have COLAs including for the 2011 benefit year, while claimants below the cap will not have that year taken into account in future COLA adjustments. The difference compounds each year as the gap between the higher income claimants and lower income claimants widens. No amount of "liberal construction" makes it conceivable to think the Legislature would have intended such an absurd result.

Thus, this matter features an extremely important public benefit system providing coverage to all workers in Washington; a significant legislative act, formally introduced at the request of the Governor, aimed to avoid costs in that system; a clear legislative enactment that, to that end and among other things, froze the 2011 COLA for all claimants, with a legislative declaration of emergency; a Court of Appeals decision that undermines that legislative intent, and increases cost and administrative burden; and a Court of Appeals decision that creates a fundamental, ongoing, self-perpetuating fundamental unfairness among claimants in the system, benefitting higher-income claimants. These are clearly matters of substantial public importance under RAP 13.4(b)(4) and merit this court's review.

B. RCW 51.32.075 AND RCW 51.32.090 ARE SUSCEPTIBLE TO ONLY ONE REASONABLE INTERPRETATION.

The crux of Crabb's argument, which was rejected by the Department and the Board of Industrial Insurance Appeals, two administrative bodies with presumed expertise over our state's industrial insurance system, is that when the Legislature froze the COLA for 2011 in EHB 2123, it made no reference to the maximum time loss cap in RCW 51.32.090(9), which is calculated each year by the same measure as the COLA in RCW 51.32.075 – the percentage year-over-year change in the state's average monthly wage. Thus, it is at least ambiguous whether the Legislature meant for maximum time loss claimants to continue to receive a COLA increased by the percentage of change in the state's average monthly wage in 2011. Since it's at least ambiguous, the Court of Appeals reasoned, the tie-goes-to-the-runner effect of "liberal construction" required adopting Crabb's interpretation. *Crabb v. Dept. of Labor & Indus*, No. 44343-1-II, June 5, 2014, slip op. at 7-8.

On the contrary, there is only one reasonable way to read the interplay between RCW 51.32.075 and RCW 51.32.090 that is consistent with the plain language of the statutes, and the intent of the Legislature's 2011 COLA freeze: Amendments to RCW 51.32.075 froze COLA increases for 2011 for all time loss claimants. RCW 51.32.090(9) operates

as a cap on time loss payments, providing that "in no event" shall the time loss payments "exceed" a given percentage of the state's average monthly wage. RCW 51.32.075 directs that Crabb's previously calculated time loss payment will not be adjusted for COLA in 2011. RCW 51.32.090 mandates that whether it is adjusted for COLA or not, "in no event" may the benefit "exceed" the stated maximum. RCW 51.32.090(9) by its own terms does not act as a benefit adjustment; only RCW 51.32.075 does. Nor are the two in conflict, insofar as Crabb's unadjusted 2011 benefit does not exceed the maximum. The Legislature did not amend RCW 51.32.090(9) when it amended RCW 51.32.075 because it didn't have to. Far from this lack of legislative action being evidence of some conceivable legislative intent to continue higher benefits for higher earners in the system while lower earners sit it out, rather, it is a simple instance of the two statutory provisions operating *in pari materia* to effectuate a very clear legislative design to eliminate all COLAs for the 2011 benefit year.

VI. CONCLUSION

The court should grant review under RAP 13.4(b)(4).

Respectfully submitted this 29th day of August, 2014.

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