

## Tellez, Norma

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### TIME-LOSS COMPENSATION (RCW 51.32.090)

#### Stay at work (RCW 51.32.090(4))

Although RCW 51.32.090(7) provides that no injured worker shall receive compensation for the day of injury or the three days' following the injury, the Department cannot deny the employer wage subsidies for the three-day period when an employer keeps an employee working under RCW 51.32.090(4). ...***In re Norma Telez, BIIA Dec., 12 14405 (2013)*** [Editor's Note: Affirmed, *Department of Labor & Indus. v. Cascadian Bldg. Maint.*, 185 Wn. App. 643 (2015).]

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1 disability. The Department has interpreted RCW 51.32.090(4)(c) to deny wage reimbursement to  
2 employers for the three-day period following the industrial injury. Its rationale for denial of wage  
3 reimbursement is based on RCW 51.32.090(7), which provides that no injured worker shall receive  
4 compensation for the day of injury or the three days following the day of injury, if the disability  
5 continues for a period of less than 14 consecutive days. We find the denial of reimbursement for  
6 the three-day period is not warranted under the statute.

7 The parties presented this case on stipulated facts and the employer filed a Motion for  
8 Summary Judgment. In deciding the Motion for Summary Judgment and rendering this Decision  
9 and Order, the following documents were considered:

- 10 1. The Stipulation of the Parties, filed on September 17, 2012;
- 11 2. The Employer's Motion for Summary Judgment, filed on September 24,  
12 2012;
- 13 3. The Department's Brief in response to the Employer's Motion for Summary  
14 Judgment, filed on October 10, 2012;
- 15 4. The Employer's Reply to Department's Response to Employer's Motion for  
16 Summary Judgment, filed on October 16, 2012; and
- 17 5. The oral argument of the parties, heard on October 25, 2012.

18 On September 17, 2012, the parties stipulated to the following facts:

- 19 1. Norma Tellez was employed by Cascadian Building Maintenance  
20 (Cascadian), and normally worked in the evenings Sunday through  
21 Thursday.
- 22 2. Ms. Tellez was injured in the course of her employment with Cascadian  
23 on the evening of Monday, January 9, 2012.
- 24 3. On Tuesday, January 10, 2012, Ms. Tellez filed an industrial insurance  
25 claim with the Department, and her claim was assigned Claim  
26 No. AQ-92360.
- 27 4. Also on Tuesday, January 10, 2012, Ms. Tellez's attending medical  
28 provider placed temporary restrictions on her related to her injury that  
29 meant she could not perform her job of injury and was temporarily  
30 disabled.
- 31 5. Cascadian had other work available that appeared to be within the  
32 restrictions Ms. Tellez's attending medical provider was placing on her.  
Cascadian drafted a light-duty job offer that complied with the  
requirements of RCW 51.32.090(4), and on Tuesday, January 10, 2012,  
asked Ms. Tellez's attending medical provider to approve it.
6. On Tuesday, January 10, 2012, Ms. Tellez's attending medical provider  
approved the light-duty job as being a job Ms. Tellez was physically

1 capable of doing. Ms. Tellez accepted the offer and worked the new job  
2 beginning on Tuesday, January 10, 2012. The schedule for the new work  
3 was the same as the schedule for her job of injury: in the evenings,  
Sunday through Thursday.

- 4 7. Ms. Tellez worked the new job on January 10, 11, 12, 15, 16, and 17,  
5 2012. On Sunday, January 22, 2012, prior to the start of her shift,  
6 Ms. Tellez's attending medical provider released her to the job of injury  
without restrictions. She returned to her job of injury that same evening.
- 7 8. On February 28, 2012, Cascadian submitted to the Department an  
8 application for Stay-at-Work benefits with all necessary documentation,  
9 seeking reimbursement for half of the wages it paid Ms. Tellez for the six  
10 days she worked the light-duty job (January 10, 11, 12, 15, 16, and 17,  
11 2012).
- 12 9. By order dated March 12, 2012, the Department paid Cascadian  
13 Stay-at-Work benefits in the form of a 50 percent wage reimbursement for  
14 employing Ms. Tellez on January 15, 16, and 17, 2012.
- 15 10. On March 14, 2012, Cascadian protested the Department's order of  
16 March 12 because it did not include reimbursement for the dates  
17 January 10, 11, and 12, 2012.
- 18 11. On April 18, 2012, the Department affirmed its order of March 12, 2012,  
19 and expressly denied Cascadian reimbursement for employing Ms. Tellez  
20 on January 10, 11, and 12, 2012.
- 21 12. On April 20, 2012, Cascadian appealed the Department's order of  
22 April 18, 2012, to the Board of Industrial Insurance Appeals. The appeal  
23 was assigned Docket No. 12 14405.

24 RCW 51.32.090 states:

25 (4)(b) Whenever the employer of injury requests that a worker who is  
26 entitled to temporary total disability under this chapter be certified by a  
27 physician or licensed advanced registered nurse practitioner as able to  
28 perform available work other than his or her usual work, the employer shall  
29 furnish to the physician or licensed advanced registered nurse practitioner,  
30 with a copy to the worker, a statement describing the work available with  
31 the employer of injury in terms that will enable the physician or licensed  
32 advanced registered nurse practitioner to relate the physical activities of  
the job to the worker's disability. . . .

(c) To further encourage employers to maintain the employment of  
their injured workers, an employer insured with the department and that  
offers work to a worker pursuant to this subsection (4) shall be eligible for  
reimbursement of the injured worker's wages for light duty or transitional  
work equal to fifty percent of the basic, gross wages paid for that work, for  
a maximum of sixty-six work days within a consecutive twenty-four month  
period. In no event may the wage subsidies paid to an employer on a

1 claim exceed ten thousand dollars. Wage subsidies shall be calculated  
2 using the worker's basic hourly wages or basic salary, and no subsidy shall  
3 be paid for any other form of compensation or payment to the worker such  
4 as tips, commissions, bonuses, board, housing, fuel, health care, dental  
5 care, vision care, per diem, reimbursements for work-related expenses, or  
6 any other payments. An employer may not, under any circumstances,  
7 receive a wage subsidy for a day in which the worker did not actually  
8 perform any work, regardless of whether or not the employer paid the  
9 worker wages for that day.

10 . . .

11 (h) An employer shall not receive any wage subsidies or  
12 reimbursement of any expenses pursuant to this subsection (4) unless the  
13 employer has completed and submitted the reimbursement request on  
14 forms developed by the department, along with all related information  
15 required by department rules. No wage subsidy or reimbursement shall be  
16 paid to an employer who fails to submit a form for such payment within one  
17 year of the date the work was performed. In no event shall an employer  
18 receive wage subsidy payments or reimbursements of any expenses  
19 pursuant to this subsection (4) unless the worker's physician or licensed  
20 advanced registered nurse practitioner has restricted him or her from  
21 performing his or her usual work and the worker's physician or licensed  
22 advanced registered nurse practitioner has released him or her to perform  
23 the work offered.

24 RCW 51.32.090(7) states:

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

32 The statute is not ambiguous or vague on its face. The legislative intent with regard to the  
Stay-at-Work statute is clearly stated in RCW 51.32.090(4)(a):

The legislature finds that long-term disability and the cost of injuries is  
significantly reduced when injured workers remain at work following their  
injury. To encourage employers at the time of injury to provide light-duty or  
transitional work for their workers, wage subsidies and other incentives are  
made available to employers insured with the Department.

The Department argues that the phrase "temporary total disability" in RCW 51.32.090(4)(b)  
should be read to include the word "benefits" as follows: "Whenever the employer of injury  
requests that a worker who is entitled to temporary total disability [benefits] under this chapter. . . ."

1 Although noting that the phrase can refer to either the condition of being incapable of performing  
2 any work in any gainful occupation or to the benefit payments the law provides for workers who are  
3 disabled, the Department argues that the Legislature chose not to couple entitlement to  
4 reimbursement to temporary total disability itself but instead to the entitlement to temporary total  
5 disability benefits.

6 The Department's contention that the Legislature intended to limit wage subsidies for  
7 employers under RCW 51.32.090(4) in the same manner as temporary total disability benefits are  
8 limited for injured workers under RCW 51.32.090(7) is not supported by the plain language of the  
9 statute. The plain language of RCW 51.32.090 encourages employers to offer appropriate  
10 light-duty work at the time of injury in order to permit injured workers to remain at work. The  
11 method of encouragement is wage subsidies and other financial incentives. Although the statute  
12 lists several circumstances that would render an employer ineligible for wage reimbursement (see  
13 Subsections (4)(c), (g), and (h)), it does not contain any language stating an employer is not eligible  
14 for wage reimbursement the first three days following an injury if the injured worker's disability  
15 continues less than 14 days.

16 To interpret the statute otherwise is contrary to the stated legislative intent because it would  
17 discourage employers from offering light-duty work "at the time of injury" in order for workers to  
18 "remain" at work. Furthermore, because the Legislature did not choose to insert the word "benefits"  
19 into RCW 51.32.090(4)(b) as proposed by the Department, such an interpretation would be contrary  
20 to the plain language of the statute.

### 21 **FINDINGS OF FACT**

- 22 1. On July 26, 2012, an industrial appeals judge certified that the parties  
23 agreed to include the Jurisdictional History in the Board record solely for  
24 jurisdictional purposes.
- 25 2. Norma Tellez was employed by Cascadian Building Maintenance, Ltd.,  
26 (Cascadian) and was injured in the course of her employment with  
27 Cascadian on the evening of Monday, January 9, 2012.
- 28 3. On Tuesday, January 10, 2012, Ms. Tellez filed an industrial insurance  
29 claim with the Department, and her claim was assigned Claim  
30 No. AQ-92360. Also on Tuesday, January 10, 2012, Ms. Tellez's  
31 attending medical provider placed temporary restrictions on her related to  
32 her injury that meant she could not perform her job of injury, and as such,  
she was temporarily disabled.
4. Cascadian had other work available that appeared to be within the  
restrictions Ms. Tellez's attending medical provider was placing on her.

1 Cascadian drafted a light-duty job offer that complied with the  
2 requirements of RCW 51.32.090(4), and on Tuesday, January 10, 2012,  
3 asked Ms. Tellez's attending medical provider to approve it. On Tuesday,  
4 January 10, 2012, Ms. Tellez's attending medical provider approved the  
light-duty job as being a job Ms. Tellez was physically capable of doing.

- 5 5. Ms. Tellez accepted the offer and worked the new job beginning on  
6 Tuesday, January 10, 2012. The schedule for the new work was the  
7 same as the schedule for her job of injury: in the evenings, Sunday  
8 through Thursday. Ms. Tellez worked the new job on January 10, 11, 12,  
9 15, 16, and 17, 2012.
- 10 6. On Sunday, January 22, 2012, prior to the start of her shift, Ms. Tellez's  
11 attending medical provider released her to the job of injury without  
12 restrictions. Ms. Tellez returned to her job of injury that same evening.
- 13 7. On February 28, 2012, Cascadian submitted an application for  
14 Stay-at-Work benefits with all necessary documentation to the  
15 Department, seeking reimbursement for half of the wages it paid Ms.  
16 Tellez for the six days she worked the light-duty job: January 10, 11, 12,  
17 15, 16, and 17, 2012. By order dated March 12, 2012, the Department  
18 paid Cascadian Stay-at-Work benefits in the form of a 50 percent wage  
19 reimbursement for employing Ms. Tellez on January 15, 16, and 17, 2012.
- 20 8. On March 14, 2012, Cascadian protested the Department's March 12,  
21 2012 order because it did not include reimbursement for the  
22 dates January 10, 11, and 12, 2012. On April 18, 2012, the  
Department affirmed its order of March 12, 2012, and expressly  
denied Cascadian reimbursement for employing Ms. Tellez on the dates  
January 10, 11, and 12, 2012. On April 20, 2012, Cascadian appealed the  
April 18, 2012 Department order to the Board of Industrial Insurance  
Appeals. The appeal was assigned Docket No. 12 14405.
- 23 9. The pleadings and evidence submitted by the parties demonstrate that  
there is no genuine issue as to any material fact.

#### **CONCLUSIONS OF LAW**

- 24 1. Based on the record, the Board of Industrial Insurance Appeals has  
25 jurisdiction over the parties and the subject matter in this appeal.
- 26 2. The employer is entitled to a decision as a matter of law as provided by  
27 CR 56.
- 28 3. Under RCW 51.32.090, the employer, Cascadian Building Maintenance,  
29 Ltd., is entitled to reimbursement for Norma Tellez's wages for light-duty or  
30 transitional work equal to 50 percent of the basic gross wages paid for that  
31 work for the days of January 10, 2012, January 11, 2012, and January 12,  
32 2012.

1 4. The Department order dated April 18, 2012, is incorrect and is reversed.  
2 This matter is remanded to the Department with direction to reimburse the  
3 employer, Cascadian Building Maintenance, Ltd., for wages paid to  
4 Ms. Tellez, as provided by RCW 51.32.090, for the days of January 10,  
2012, January 11, 2012, and January 12, 2012.

5 Dated: March 28, 2013.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7  
8 /s/ \_\_\_\_\_  
9 DAVID E. THREEDY Chairperson

10  
11 /s/ \_\_\_\_\_  
12 FRANK E. FENNERTY, JR. Member

13  
14 /s/ \_\_\_\_\_  
15 JACK S. ENG Member