[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-7072

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN DOHERTY,
Appellant,

v.

TURNER BROADCASTING SYSTEMS, INC.,
Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Amicus Curiae Erica Hashimoto, appointed to present arguments in support of Mr. Doherty, hereby submits the following certificate as to parties, rulings, and related cases.

I. Parties and Amici

The parties to this proceeding in the district court and this Court are Plaintiff-Appellant Martin Doherty and Defendant-Appellee Turner Broadcasting System, Inc. This Court appointed Erica Hashimoto, Director of the Appellate Litigation Clinic at Georgetown University Law Center, as Amicus in support of Mr. Doherty.

II. Rulings Under Review

This appeal challenges the April 15, 2022 decision of the district court, the Hon. Trevor N. McFadden, granting summary judgment to Turner Broadcasting System, Inc.

III. Related Cases

This case has not previously been before this Court, and Amicus is not aware of any related cases.

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GLOSSARY OF ACRONYMS

DC Office of Workers' Compensation..... OWC

DC Workers' Compensation Act..... DC WCA

Internal Revenue Service .....IRS

Short-Term Disability ..... STD

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff-Appellant Martin Doherty raised a federal claim under 26 U.S.C. § 7434 alleging that Defendant-Appellee Turner Broadcasting Systems, Inc. ("Turner") willfully filed fraudulent information returns. On April 15, 2022, the district court issued a final order granting Turner's motion for summary judgment. JA784. Mr. Doherty filed a timely notice of appeal on May 10, 2022. JA785. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether there is a genuine dispute of material fact that the W-2s Turner filed on Mr. Doherty's behalf constituted fraudulent information returns, in contravention of 26 U.S.C. § 7434(a).

II. Whether there is a genuine dispute of material fact that Turner acted willfully, in violation of 26 U.S.C. § 7434(a), when it included Mr. Doherty's workers' compensation payments as taxable income on his W-2s.

STATEMENT OF THE CASE

Martin Doherty suffered a work-related injury at the end of December 2012. JA463. Employed in Washington, D.C. as a photojournalist for Turner Broadcasting Systems, Inc. ("Turner"), Mr. Doherty injured his shoulder, neck, and lower back while loading equipment into a work truck. JA463. The same night he experienced the injury, Mr. Doherty reported it to his supervisor and went to the emergency room to obtain medical care. JA348–49. Over the next few years, Mr. Doherty's injury required both shoulder surgery and rehabilitation related to ongoing pain in his neck and spine. JA463. Because of the injury and its associated complications, Mr. Doherty was on leave for various periods from 2014 to 2016, during which he received compensation from Turner.[1] *See* JA394 ¶ 2; JA543 ¶ 7. Turner does not

[1] Mr. Doherty was on leave for his 2012 injury from January 1, 2014 to April 8, 2014; March 4, 2015 to October 17, 2015; and January 1, 2016 until the end of June 2016. JA432 ¶ 7. Turner does not dispute these dates. *See* JA543 ¶ 7. Turner has also recognized that Mr. Doherty did receive workers' compensation payments for his 2012 injury directly from the company's workers' compensation insurer from March 3, 2014 to April 13, 2014 and again from December 19, 2016 to December 31, 2017. JA375 ¶ 16. According to Turner, some of the payments that Mr. Doherty received in 2016 were due to a 2015 workplace knee injury. JA395 ¶ 4; JA375 ¶ 17. Mr. Doherty, however, maintains that his 2016 leave was due to his December 2012 injury. JA432 ¶ 7.

dispute that Mr. Doherty suffered a work-related injury that necessitated leave. *See* JA543 ¶ 7.

Turner reported the injury-related compensation that Mr. Doherty received as part of his gross (and therefore taxable) income on his 2014, 2015, and 2016 W-2s. *See* JA397 ¶¶ 21-24. The D.C. Workers' Compensation Act ("DC WCA") obligates employers to provide wage loss payments and medical cost reimbursement (among other benefits) to employees who suffer a work-related injury. *See* D.C. Code §§ 32-1507(a), 32-1508(1)–(3). Pursuant to 26 U.S.C. § 104(a)(1), amounts received under a workers' compensation act are non-taxable. Mr. Doherty filed a pro se civil suit alleging that the disputed payments constituted workers' compensation under the DC WCA and that, under 26 U.S.C. § 7434(a), Turner willfully filed fraudulent information returns when it included the payments in his reported gross income.

I. STATEMENT OF FACTS

A. Turner's workers' compensation system.

At all relevant times, Turner had a workers' compensation policy that provided "special assistance" to employees with "job-related" injuries or illness. JA388. The Workers' Compensation Acknowledgement that

Mr. Doherty signed near the beginning of his employment attested that Turner "operate[d] under applicable state Workers' Compensation Laws." JA449; JA394 ¶ 1. When an employee was "injured at work," Turner would "pay medical and rehabilitation expenses" and, where required, also pay "a part of the employee's lost wages." JA449.

Turner's written workers' compensation policy provided additional guidance to employees and further detailed Turner's obligations. *See* JA388. To obtain coverage for medical and rehabilitation expenses, the policy instructed employees to inform the doctor that their medical condition was the basis for a workers' compensation claim. JA388. Turner's workers' compensation insurer (ESIS) would then pay the employee's medical bills and manage their claim. JA388.

For compensation of lost wages, the policy explained that an employee on workers' compensation leave remained on the company's payroll for up to 26 weeks. JA388. During this time, the employee was compensated at 100% of their base salary for weeks 1–10, 80% for weeks 11–16, and 60% for weeks 17–26. JA388. The policy also provided that an employee would receive more compensation during weeks 17–26 of leave if the 60% pay "f[ell] below the amount to which [the employee is]

entitled under applicable state law." JA388. Where "state law require[d] pay at a higher rate," Turner's workers' compensation insurer would "pay the difference" to bring the employee's income up to the "state-mandated" level. JA388. Payments made by Turner under the policy "[we]re intended [to] fulfill the Company's Workers' Compensation obligations." JA388. After twenty-six weeks of leave, payments were no longer made through Turner's payroll system. JA388. Instead, the company's workers' compensation insurer directly paid the employee what was "due . . . according to the state's Workers' Compensation laws." JA388.

Turner's workers' compensation policy stated that because the workers' compensation system "is affected by state laws, it differ[ed] from [Turner's] regular disability insurance and medical insurance programs in several ways." JA388. For employees who were "absent from work due to [their] own medical needs" for longer than seven consecutive days, Turner offered a Short-Term Disability Leave ("STD") policy. JA383. An employee was entitled to STD benefits for any "illness or injury" that made an absence from work "medically necessary." JA383.

Turner received tax deductions for compensation paid to employees through the STD policy. *See* JA508; JA781 n.6. The company's STD

policy compensated employees for up to 26 weeks—it provided 100% of an employee's base pay for weeks 1–10, 80% for weeks 11–16, and 60% for weeks 17–26. JA384.

B. Mr. Doherty files a claim application with the D.C. Office of Workers' Compensation, which determines it has jurisdiction over his claim.

In August 2013, Mr. Doherty filed a workers' compensation claim under the DC WCA for his 2012 work-related injury. JA461. The D.C. Office of Workers' Compensation ("OWC"), which had jurisdiction over Mr. Doherty's claim, *see* JA464, later held at least two conferences to address disputes related to the claim. *See infra* at 7–9.

The first dispute related to wage loss compensation and reimbursements for mileage and prescription costs associated with Mr. Doherty's 2012 injury. JA468. The OWC held an Informal Conference in December 2014, during which the claim examiner ordered Turner to reimburse Mr. Doherty for the mileage and prescriptions costs associated with the injury. JA468. The examiner also concluded that Turner's wage loss payments to Mr. Doherty as of March 2014 "dropped below" the required amount under the DC WCA. JA468. Turner was then directed to "make payment" to offset the difference. JA468.

The OWC held another Informal Conference on June 14, 2016 to resolve the second dispute, which involved reimbursement for medical expenses, authorization for a neck MRI, and payment of wage loss benefits. JA463. Turner did not "dispute that a work related injury did occur" in December 2012, nor did it dispute that it had previously "paid benefits to [Mr. Doherty] as well as allowed continued medical treatment for said injury." JA465. The claim examiner concluded that Turner "did not have sufficient workers' compensation coverage as required by the [DC WCA]." JA464.

The examiner determined that Mr. Doherty had submitted the documentation necessary to obtain "payment/reimbursement" of all medical costs related to the 2012 "work-related" injury. JA465–66. The examiner also found that Mr. Doherty was authorized to undergo the MRI and obtain any "additional medical treatment" pertaining to his injury. JA466. Finally, regarding lost wages, the examiner concluded that Mr. Doherty "[wa]s entitled to the payment of any . . . benefits for which he [had] not been paid" during the disputed time periods, which

included dates in 2014 and 2015.[2] JA463; JA465. The examiner explained that Mr. Doherty was entitled to benefits of at least 66% of his average weekly wages pursuant to the DC WCA (citing D.C. Code §§ 32-1508(2)–(3)). JA465.

C. Turner and Mr. Doherty exchange emails regarding his payments and the workers' compensation policy.

Outside the OWC process, Mr. Doherty exchanged emails with Turner employees about his leave, his received payments, and Turner's workers' compensation policy—in particular, how his leave payments would affect his tax liability. *See infra* at 9–12.

In March 2013, Human Resources employee Danielle Morton explained to Mr. Doherty that he would receive his "regular pay from Turner" while he was "out on Worker's Comp[ensation]" leave, but that his pay would be "coded as WC [workers' compensation] pay." JA501. Morton also stated that "all [Mr. Doherty's] normal deductions" would be removed from his check. JA501. Several months later, Turner employee

[2] Specifically, the Memorandum of Informal Conference identifies the disputed time periods to be "3/03/14–04/13/15 [sic], 03/16/15–03/29/15, 08/02/15–08/30/15, 08/31/15–10/16/15, and 09/14/15–09/27/15." JA463.

Brett Hellenga represented to Mr. Doherty that the company's workers' compensation insurer "has to comply with all DC statutes in administering workers' comp[ensation] claims." JA456.

In October 2015, Mr. Doherty emailed Hellenga and Paul Miller, a Risk Manager at Turner, to assert that he retained an "active claim" for workers' compensation benefits and that he was owed tax-free payments under the DC WCA. JA482. Three months later, when Mr. Doherty asked Miller whether his "pay for this WC [workers' compensation] claim" is "taxable," Miller stated that "[**w**]**orkers' compensation benefits** are not considered **taxable** income at the state or federal level." JA458 (emphasis in original). Mr. Doherty then asked whether taxes would be deducted from his payments if he was "put . . . under STD." JA458. Miller responded in the affirmative and explained that Mr. Doherty would "be compensated under [the company's] STD program and paid salary in lieu of [workers' compensation] indemnity/income benefits." JA459. Miller stated that this was "to [Mr. Doherty's] advantage." JA459. Mr. Doherty disagreed, stating that, "if WC [workers' compensation] benefits are not taxable[,] the[n] [I] don't see how taxing me on [those benefits] meets the criteria." JA459.

In an April 2016 email to the company's payroll department, Mr. Doherty stated that his W-2 was "wrong" because it included his workers' compensation payments in his gross taxable income, and he requested a "corrected W-2." JA487. Later that month, a Payroll Tax Accountant told Mr. Doherty that she was "researching" his request and would follow up with him. JA494.

In May 2016, Mr. Doherty emailed Turner employee Tom Calender to again request a corrected W-2. JA518. Mr. Doherty explained that he was owed workers' compensation benefits tax-free for his 2015 leave, which he detailed to provide "context" as to why he believed the W-2 was "incorrect." JA518. Mr. Doherty also noted that his workers' compensation payments could have been "easily" itemized as non-taxable on his paystub, like healthcare premiums and 401k deductions, and he observed that he had raised this issue "many times" with Maureen DuMond, a Human Resources Manager. JA518. About two weeks later, DuMond emailed Mr. Doherty to confirm that his request for a corrected W-2 had been "received" and that the company would "need some time to review pay records." JA497.

Mr. Doherty again emailed Turner in January 2017 to notify the company that his "W-2 [wa]s wrong" and to ask that it be submitted to the company's tax department. JA496. In September 2017, he alerted Faye Barbour, Senior Counsel at Turner, that he had received a tax bill from the Internal Revenue Service ("IRS") because Turner had issued an "incorrect W-2." JA489. Mr. Doherty continued to raise the issue in 2018 when he emailed Barbour and Denise Giraudo, Turner's outside counsel, to "again request" that the company issue him "corrected W-2s for 2014, 2015 and 2016." JA491–92. He added that the IRS had placed a lien against him because Turner had reported his workers' compensation payments as taxable. JA492.

D. Mr. Doherty files a substitute W-2 and experiences tax consequences.

While communicating with Turner employees regarding his "incorrect" W-2s, Mr. Doherty filed a substitute W-2 in which he attested that Turner had issued an incorrect W-2 for the 2015 tax year. JA429 ¶ d. Mr. Doherty separately alerted the IRS of the inaccuracy of the 2015 W-2, and in response, Turner maintained that its accounting of Mr. Doherty's taxable income was "correct." JA430 ¶ d; JA470. For the 2015 tax year, the IRS determined that Mr. Doherty owed $16,814.46 in

unpaid taxes.[3] JA472. Additionally, the state of Maryland issued a $5,912.29 tax lien against him.[4] JA476.

II. PROCEDURAL HISTORY

On December 18, 2019, Mr. Doherty filed a pro se civil complaint in the District of Columbia Superior Court against Turner. JA21. Mr. Doherty sought civil damages under 26 U.S.C. § 7434 on the basis that Turner reported false information about his taxable income in his 2014, 2015, and 2016 W-2s, which he alleged constituted the willful filing of fraudulent information returns.[5] JA24.

Turner removed this case to the United States District Court for the District of Columbia, JA10, and the district court denied Mr. Doherty's motion to remand. JA29–32. Turner then filed a motion to dismiss Mr. Doherty's First Amended Complaint, which the district court

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[3] That number later increased to $22,147.57 due to accrued interest and penalty charges. JA474.

[4] It appears from the record that Mr. Doherty paid off this 2015 tax lien in two installments: $3,451.38 in May 2021, JA478, and $3,314.91 in September 2021, JA480. The sum of these numbers exceeds the $5,912.29 tax lien, and therefore may reflect additional penalties that were applied to the original lien.

[5] Mr. Doherty also raised other claims that were dismissed prior to discovery and are not discussed in this brief.

denied in relevant part. JA33. The court denied the motion as to the § 7434 claim because the complaint provided several detailed allegations that the W-2s were fraudulent, including Turner's refusal to correct the W-2s and Mr. Doherty's own calculations of what his taxable income should have been. JA38–39. These details, the court stated, put Turner "on fair notice of the fraud of which it is accused."[6] JA39 (internal citation omitted).

After discovery, the parties filed cross-motions for summary judgment on the remaining § 7434 claim. JA334; JA422. Mr. Doherty also filed a motion to strike some of Turner's summary judgment exhibits and discovery responses. JA548.

The district court granted summary judgment for Turner and denied Mr. Doherty's motions. JA774. The court concluded there was no genuine dispute of material fact as to two elements of the claim: whether the W-2s at issue were fraudulent and whether Turner acted willfully. JA774. The court rejected Mr. Doherty's theory that Turner's improper

[6] After Mr. Doherty filed a Second Amended Complaint, Turner filed a partial motion to dismiss that did not address the § 7434 claim but sought to dismiss Mr. Doherty's other claims, JA58, which the district court granted, JA239.

inclusion of the workers' compensation payments in his gross income rendered the W-2s fraudulent. JA778–80. The court concluded that Mr. Doherty was paid through Turner's STD program, which the court reasoned was so different from the DC WCA that "no reasonable jury could conclude that Doherty received payments 'under [the District's] workmen's compensation act[ ].'" JA779 (quoting 26 U.S.C. § 104(a)(1)) (alteration marks in original).

Second, the court held that there was no genuine dispute of material fact over Turner's willfulness in filing the information returns. JA780. Citing *Cheek v. United States*, 498 U.S. 192, 201 (1991), the court stated that willfulness under 26 U.S.C. § 7434 required evidence demonstrating that Turner "filed the W-2s with knowledge that the STD program violated the WCA." JA780–81. The court acknowledged that a Turner human resources representative had told Mr. Doherty in an email in 2013 that the "regular pay" he received while injured would be "coded as WC [Workers' Compensation] pay." JA781 (citing JA501). But the court dismissed the 2013 email as prematurely occurring "well before the W-2s at issue," and it concluded that the email did not "suggest that Turner knew its STD policy violated any law." JA781. The court also

observed that Turner received a tax deduction for reporting the compensation as STD payments, but it determined that this evidence did not suggest willfulness. JA781.

Mr. Doherty filed a notice of appeal. JA785. He also filed a pro se Statement of Issues to be Raised that identified seven discrete legal issues. Statement of Issues to be Raised. Mr. Doherty later filed a motion before this Court to vacate the district court's grant of summary judgment. Mot. to Vacate, at 1–2. Turner opposed. Appellee's Mot. Opp'n, at 1. This Court denied the motion, which it construed as a motion for summary reversal, because the merits of the parties' positions were not so clear as to warrant summary action. Order, Doc. No. 1961436, at 1.

In the same order, the Court appointed undersigned counsel as amicus curiae "to present arguments in favor of appellant's position." *Id.* The Court noted that, "[w]hile not otherwise limited, amicus is directed to address whether the district court correctly granted summary judgment dismissing [Mr. Doherty]'s claim that [Turner] willfully filed fraudulent information returns in violation of 26 U.S.C. § 7434." *Id.*

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment for Turner. The court determined that no reasonable jury could find that (1) Turner filed fraudulent information returns and (2) Turner did so willfully, in violation of 26 U.S.C. § 7434. But because genuine disputes of material fact exist as to both elements, this Court should reverse and remand for further proceedings.

A reasonable jury could conclude that the W-2s Turner filed for Mr. Doherty were "fraudulent" because Turner misreported his workers' compensation benefits as part of his taxable, gross income. The parties agree that Mr. Doherty suffered a work-related injury in December 2012. Payments received under the DC WCA are excludable from gross income and are therefore non-taxable, and there is ample record evidence demonstrating that the disputed payments in this case were, indeed, received under the DC WCA. First, the D.C. Office of Workers' Compensation found that Mr. Doherty was entitled to—and Turner was required to pay—compensation under the DC WCA. Second, the facial differences between Turner's workers' compensation policy and short-term disability policy, as well as Turner's own representations that the

payments *were* workers' compensation, further evince that the payments were made under the DC WCA. Accordingly, the W-2s misrepresented Mr. Doherty's gross income by improperly including (and reporting as taxable) his workers' compensation benefits.

There are also genuine disputes of material fact as to whether Turner "willfully" filed the fraudulent W-2s. The district court erred by applying the heightened willfulness standard articulated in *Cheek v. United States*, 498 U.S. 192 (1991), which requires an intentional and voluntary violation of a known legal duty in the unique context of criminal tax fraud. *Id.* at 201. The court should have instead applied a recklessness standard that is traditionally encompassed by willfulness in civil statutes. Under this standard, a reasonable jury could find that Turner knew—or at a minimum, clearly ought to have known—that it was reporting false information on Mr. Doherty's W-2s by including his workers' compensation payments within his gross (and therefore taxable) income. The OWC's findings and Turner's own communications with Mr. Doherty demonstrate Turner's reckless disregard. Furthermore, even under the *Cheek* willfulness standard, there is sufficient record evidence demonstrating that Turner voluntarily and intentionally violated a

known legal duty when it filed fraudulent W-2s on Mr. Doherty's behalf. Indeed, Turner had a motive for doing so: it received a tax deduction by reporting Mr. Doherty's workers' compensation payments as short-term disability benefits.

ARGUMENT

This Court reviews the district court's grant of summary judgment *de novo*. *Hurd v. District of Columbia*, 997 F.3d 332, 337 (D.C. Cir. 2021). In doing so, this Court must view the evidence—and all the reasonable inferences therein—in the light most favorable to the nonmoving party. *See id.* Where record evidence could lead a reasonable jury to conclude in favor of the nonmoving party, there is a genuine dispute of material fact that precludes summary judgment. *See Thompson v. District of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016).

The district court erred by granting summary judgment for Turner. Because the D.C. Workers' Compensation Act is a "workmen's compensation act," any payments received under the Act are excludable from gross income and are non-taxable.[7] *See* 26 U.S.C. § 104(a)(1)

[7] The district court implicitly—and correctly—presumed that the DC WCA was a workers' compensation act under 26 U.S.C. § 104(a)(1). *See* JA779. Courts have determined that a statute falls within § 104(a)(1)'s definition of a "workmen's compensation act" when it "require[s], as a precondition to eligibility for benefits, that the injury be incurred in the course of employment." *Take v. Comm'r*, 804 F.2d 553, 557 (9th Cir. 1986). *See also* 26 C.F.R. § 1.104-1(b) (defining a "workmen's compensation act" as "statute[s] in the nature of a workmen's compensation act which provid[e] compensation to employees for

(excluding from gross income any "amounts received under workmen's compensation acts").[8] But when Turner provided compensation to Mr. Doherty for his work-related injury, it categorized these payments as taxable short-term disability benefits rather than non-taxable workers' compensation under the DC WCA—and Turner reported this compensation as part of Mr. Doherty's gross income in his 2014, 2015, and 2016 W-2s. The record evidence could lead a reasonable jury to conclude that by doing so, Turner willfully filed fraudulent information returns in violation of 26 U.S.C. § 7434(a).

The parties agree about several key aspects of Mr. Doherty's claim. They agree that Mr. Doherty suffered a work-related injury in December 2012, JA465, that he was on leave because of this injury in the years

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personal injuries or sickness incurred in the course of employment"). The DC WCA has this very precondition. *See* D.C. Code §§ 32-1501(12), 32-1503(a)(1)–(2) (explaining that an eligible injury must "aris[e] out of an in the course of employment").

[8] "Gross income" includes compensation for services, such as employment. 26 U.S.C. § 61(a)(1). "Taxable income" means gross income minus the deductions allowed by the Internal Revenue Code. *Id.* § 63(a). Because payments made under "workmen's compensation acts" are excluded from gross income under 26 U.S.C. § 104(a)(1), they are not included in taxable income and are thus nontaxable.

following the incident, JA394, and that Turner (or its insurer) provided compensation payments to him while on leave, JA396–97. And as the parties recognize, W-2s constitute "information returns" under § 7434. JA38. The erroneous grant of summary judgment relied solely on the district court's findings regarding fraudulence and willfulness. But because genuine disputes of material fact exist as to both elements, this Court should reverse the decision and remand for further proceedings.

I. A REASONABLE JURY COULD CONCLUDE THAT THE DISPUTED W-2S WERE FRAUDULENT INFORMATION RETURNS.

Misreporting Mr. Doherty's gross income on an information return constitutes a fraudulent representation. *See Butler v. Enter. Integration Corp.*, 459 F. Supp. 3d 78, 106–07 (D.D.C. 2020); *Greenwald v. Regency Mgmt. Servs., LLC*, 372 F. Supp. 3d 266, 271 (D. Md. 2019). The fraudulence of the disputed W-2s therefore turns on whether the payments made to Mr. Doherty were "received under" the DC WCA and, accordingly, should not have been included in his gross income. *See* 26 U.S.C. § 104(a)(1).

The factual record demonstrates genuine disputes of material fact suggesting that the disputed payments for Mr. Doherty's work-related

injury were "received under" the DC WCA. First, the D.C. Office of Workers' Compensation found that Mr. Doherty was entitled to receive—and Turner was obligated to pay—benefits under the DC WCA. Second, Turner's own policies and representations further demonstrate that the payments fulfilled Turner's obligations under the DC WCA.

A. The D.C. Office of Workers' Compensation determined that Mr. Doherty was eligible for, and in fact received, compensation for his workplace injury under the DC WCA.

Mr. Doherty raised claims regarding Turner's compensation and medical reimbursement for his 2012 injury on at least two occasions before the OWC, JA463–68, which is specifically authorized to investigate claims filed under the DC WCA, *see generally* D.C. Mun. Regs. Tit. 7 §§ 211.1, 299.1. The OWC's resolution of these prior disputes demonstrates that the payments at issue in this appeal were compensation that the DC WCA required Turner to provide.

The OWC's findings confirmed that, due to his work-related injury, Mr. Doherty was entitled to wage benefits and reimbursement of medical costs under the Act. JA463–68. It concluded that Turner needed to pay more to adequately adhere to the DC WCA's requirements, *see* JA464–65, an obligation that would apply to Turner only if the payments did

constitute workers' compensation payments governed by the Act. And indeed, the OWC recognized that Turner had already paid some "benefits to [Mr. Doherty] as well as allowed continued medical treatment for said injury," demonstrating that Turner's earlier payments satisfied the company's preexisting and ongoing obligations under the DC WCA. JA465.

The OWC's findings demonstrate that Turner was obliged to provide workers' compensation benefits to Mr. Doherty under the DC WCA for his 2012 injury. And if Turner's injury-related compensation at issue before the OWC (during periods of time in 2014 and 2015) constituted benefits under the DC WCA, *see* JA463–66, then it stands to reason that all the statutorily-mandated payments paid by Turner constituted workers' compensation benefits under the Act.

B. Turner's representations and policies show that Mr. Doherty was paid workers' compensation under the DC WCA.

The true nature of the workers' compensation payments is further supported by Turner's own representations and policies. The district court erred when it determined that no reasonable jury could conclude that Turner made the disputed payments under the DC WCA because of

the differences between the Act and Turner's STD policy. *See* JA779. The district court was right that there are differences between the two. But that is precisely the point: the two policies are facially distinguishable, and ample record evidence demonstrates that the payments to Mr. Doherty were made pursuant to Turner's workers' compensation policy (and its obligations under the DC WCA) rather than its STD program.

Turner's workers' compensation policy was expressly created to "fulfill the Company's Workers' Compensation obligations" under local workers' compensation statutes. JA388. Turner employees are eligible to receive workers' compensation benefits only if, like Mr. Doherty, they experience "a *job-related injury*." JA388 (emphasis added). This tracks the express precondition of benefits under the DC WCA. *See* D.C. Code § 32-1501(12) (limiting benefits to an "accidental injury or death arising out of and in the course of employment"). By contrast, an employee can qualify for Turner's STD program if, as a result of *any* illness or injury, "it is medically necessary for [an employee] to be absent from work." JA383.

Additional differences emphasize how Turner's workers' compensation policy "differs from the Company's regular disability insurance and medical insurance programs" because it "is affected by," and must comply with, state workers' compensation laws. *See* JA388. For one, Turner's STD policy did not provide reimbursement or direct payment for medical bills and costs, which was provided only for work-related injuries under its workers' compensation policy. *Compare* JA388 (stating that the insurer pays the medical bills so employees need not use their own medical insurance) *with* JA383–84 (no such provision). Payment or reimbursement for medical costs is a requirement under the DC WCA, DC Code § 32-1507, and indeed, Turner did provide such benefits to Mr. Doherty. *See* JA465–66, 468 (requiring Turner to reimburse).

Moreover, although Turner's STD policy limits the wage benefits during weeks 17–26 to 60% of an employee's salary, its workers' compensation policy expressly permits an increase to these benefits if needed to comply with local workers' compensation laws. *Compare* JA388 (explaining that the 60% wage benefit will be supplemented to satisfy local workers' compensation statutes where necessary) *with*

JA384 (no such supplement). And as the OWC determined, Turner was required to make additional payments to remedy its noncompliance when it provided compensation falling below the DC WCA's statutory amount. *See* JA465–66, 468.

The record also demonstrates that even Turner understood that the payments it provided to Mr. Doherty were workers' compensation benefits. Turner employees communicated to Mr. Doherty that not only was he "out on Worker[s'] Comp," but also that his pay—though it was equivalent to his "regular pay"—was nonetheless "coded as WC [Workers' Compensation] pay." JA501.

The district court erred by reasoning that because Turner's STD policy paid more than the minimum amounts demanded by the DC WCA during certain weeks, no reasonable jury could find that Mr. Doherty received payments under the Act. *See* JA779. Whether a payment is "received under" a workman's compensation act under § 104(a)(1) "depends upon whether the payment is made because of the injuries sustained in the line of duty, *not upon the amount paid*." *Dyer v. Comm'r*, 71 T.C. 560, 562 (1980) (emphasis added). Indeed, anticipating an employer program that compensates employees in excess of a statutory

minimum, the Internal Revenue Code regulations state that § 104(a)(1) does not apply "to amounts . . . in excess of the amount provided in the applicable workmen's compensation act or acts." 26 C.F.R. § 1.104-1(b). Perhaps in recognition of this regulation, Turner acknowledged that "benefits paid to employees under Defendant's policy *beyond* what an employee would be entitled to under his/her local workers' compensation law are taxed in accordance with all federal, state, and local tax laws." JA395 ¶ 8 (emphasis added). As this statement implicitly acknowledges, the amount of compensation required under the DC WCA should *not* be taxed, even if the surplus amounts would be.

And even if Turner initially made payments to Mr. Doherty under its STD program, those payments would still be considered compensation under the DC WCA. *Felder v. D.C. Department of Employment Services*, 97 A.3d 86 (D.C. 2014), cited by the district court, is illustrative. *See* JA780. In *Felder*, an employee received employer-funded STD payments for a work-related injury before the employer agreed to pay benefits under the DC WCA. 97 A.3d at 87–88. The *Felder* court concluded that the STD payments constituted "advance payments of compensation" under the DC WCA that entitled the employer to a credit against its

ongoing obligations to pay workers' compensation benefits. *Id.* at 88 (citing D.C. Code § 32-1515(j)). This was so because the STD payments were "paid by the employer during a period of disability" and were paid "to replace income lost by virtue of the [work-related] injury." *See id.* at 89–90. Because both of these conditions are also met here, the payments—even if they were initially characterized as STD payments—still constitute compensation under the DC WCA.

The numerous genuine disputes of material fact detailed above demonstrate that the workers' compensation payments were improperly included as gross income on the disputed W-2s. And this improper inclusion is a misrepresentation that renders the information returns fraudulent. *See Butler*, 459 F. Supp. 3d at 106–07; *Greenwald*, 372 F. Supp. 3d at 271.

II. MR. DOHERTY RAISED GENUINE DISPUTES OF MATERIAL FACT AS TO TURNER'S WILLFULNESS.

The record also raises a genuine dispute of material fact about whether Turner "willfully" filed fraudulent W-2s on his behalf. *See* 26 U.S.C. § 7434(a). First, the district court erred when it applied the more demanding definition of willfulness from *Cheek v. United States*, 498 U.S. 192 (1991), which was intended for the specific context of criminal tax

evasion. The district court should have instead applied a recklessness standard to discern willfulness in Mr. Doherty's civil claim. Alternatively, even under *Cheek*'s heightened definition of willfulness, genuine disputes of material fact exist to preclude summary judgment.

A. Because a showing of recklessness can establish willfulness in the civil context, Mr. Doherty has pointed to material facts giving rise to a genuine dispute that Turner acted willfully.

The word "willfully" is "sometimes said to be a 'word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan v. United States*, 524 U.S. 184, 191 (1998). For civil statutes, a showing of recklessness suffices to establish willfulness. In *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), the Supreme Court explained that where "willfulness is a statutory condition of civil liability," it includes "not only knowing violations of a standard, but reckless ones as well." *Id.* at 57. The Court noted that this "standard" construction "reflects common law usage" in the civil context, which "treat[s] actions in 'reckless disregard' of the law as 'willful' violations." *Id.* (referencing the "general rule that a common law term in a statute comes with a common law meaning"). For that reason, there is "general consensus among courts" that, for civil statutes, willfulness includes

reckless disregard in addition to "that which is intentional, knowing, or voluntary." *Bedrosian v. U.S. Dep't of the Treasury*, 912 F.3d 144, 152 (3d Cir. 2018).

Under this proper standard, Mr. Doherty has successfully raised a dispute of material fact as to Turner's willfulness. Within the meaning of 26 U.S.C. § 7434(a), a party has acted recklessly when it knew or "clearly ought to have known" of a "grave risk" that it was reporting false information in an information return. *See Bedrosian*, 912 F.3d at 153; *see also Safeco*, 551 U.S. at 68 (describing a reckless violation as an "action entailing an unjustifiably high risk of harm that is either known or so obvious it should be known" (internal quotation omitted)). The OWC's findings as well as Turner's own policies and representations provided to Mr. Doherty demonstrate Turner's willfulness under this standard.

In this case, Turner knew—or at a minimum, clearly ought to have known—that it was providing workers' compensation payments to Mr. Doherty. As an initial matter, the OWC's findings put the company on notice that its payments to Mr. Doherty constituted workers' compensation within the meaning of the DC WCA. Turner cannot now

feign ignorance about the nature of the payments, especially since it was represented by counsel during both the 2014 and 2016 Informal Conferences held by the OWC. *See* JA463, 468. And as the district court recognized, Mr. Doherty identified at least one reason why Turner would choose to report his workers' compensation benefits as short-term disability benefits: it received tax deductions for doing so. *See* JA781 (citing JA508).

Turner's own policies and representations further demonstrate its recklessness. As an employer attesting to being compliant with "applicable state Workers' Compensation Laws," JA449, Turner knew or should have known that taxing these workers' compensation benefits would contravene 26 U.S.C. § 104(a)(1). Indeed, its own employees confirmed both that Mr. Doherty's payments would be "coded as WC [workers' compensation] pay," JA501, and that "**workers' compensation benefits** are not considered **taxable** income at the state or federal level," JA458.

Mr. Doherty also made repeated exhortations to Turner that highlighted its error. For example, he filed a substitute W-2 with his 2015 tax return that made his objection clear. JA428–29. And the record

demonstrates that Mr. Doherty told Turner on at least four occasions that his workers' compensation payments were, by law, non-taxable. *See, e.g.*, JA482 ("I am due $1416 a week tax free under the DC statutes."); JA459 ("[I]f WC benefits are not taxable then [I] don't see how taxing me on them meets the criteria."); JA487 ("$46161.16 of my yearly pay was Workers Compensation and is non-taxable."); JA518 ("In DC work comp benefits are non-taxable.").

These facts collectively demonstrate Turner's knowledge or reckless disregard of the true nature of the disputed payments, and this record is therefore sufficient to raise a genuine dispute as to its willfulness. *See, e.g.*, *Blanton v. Off. of the Comptroller of the Currency*, 909 F.3d 1162, 1173–74 (D.C. Cir. 2018) (holding that the defendant acted recklessly when he was "made aware" of, and "alerted" to, the risks of his behavior); *Yellow Pages Photos, Inc. v. Ziplocal LP*, 795 F.3d 1255, 1272 (11th Cir. 2015) (holding that the defendant-company's "full[]" awareness of its duties under the Copyright Act militated in favor of a finding of recklessness).

B. Even if the *Cheek* standard applies to Mr. Doherty's claim, genuine disputes of material fact preclude summary judgment.

The district court's application of *Cheek* in the civil context misunderstood the *Cheek* standard's circumscribed function. *See* JA780–81. In the narrow context of criminal tax evasion, the Supreme Court has held that willfulness means the "voluntary and intentional violation of a known legal duty." *Cheek*, 498 U.S. at 200 (discussing 26 U.S.C. §§ 7201, 7203). But even if the *Cheek* standard is applied, record evidence demonstrates that Turner acted with such willfulness. *See Cheek*, 498 U.S. at 200.

As courts have emphasized, the *Cheek* standard was intended to be cabined to the "highly technical" context of criminal tax evasion. *United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 150 (D.D.C. 2020) (quoting *United States v. Burden*, 934 F.3d 675 (D.C. Cir. 2019)); *see also Cheek*, 498 U.S. at 200 (characterizing criminal tax offenses as warranting "special treatment"). The *Cheek* Court aimed to protect hapless individuals from being made criminals because of a "bona fide misunderstanding" of criminal tax law. *See Cheek*, 498 U.S. at 200 (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)). But the

policy concerns that animated *Cheek* are absent here, where Turner—a sophisticated company responsible for preparing and filing information returns—is facing civil damages rather than criminal punishment.

Because of *Cheek*'s narrow holding and the particular policy concerns that animated it, other circuits have declined to apply its willfulness standard to civil tax statutes. *See, e.g.*, *Denbo v. United States*, 988 F.2d 1029, 1034 (10th Cir. 1993) (differentiating between "criminal intent in [ ] one area . . . and . . . civil liability in the other"); *Domanus v. United States*, 961 F.2d 1323, 1325–26 (7th Cir. 1992) (declining to "incorporate" the "special definition" of criminal willfulness into the context of a statute providing for civil penalties); *Lefcourt v. United States*, 125 F.3d 79, 83 (2d Cir. 1997) (rejecting *Cheek*'s willfulness definition for "civil tax penalties"). Tailored to the unique context of criminal tax evasion, the *Cheek* standard constitutes the exception, not the rule.

But in any event, summary judgment in favor of Turner was improper even if *Cheek* defines willfulness. Turner's own representations to Mr. Doherty indicate that the "legal duty" to exclude workers' compensation payments from taxable income was known to the company.

And, material facts in the record—particularly, emails between Mr. Doherty and Turner employees—demonstrate that Turner's violation of that known legal duty was voluntary and intentional.

First, the record demonstrates that, contrary to the district court's determination, Turner *did* have "antecedent knowledge" of a legal duty. *See* JA781. Turner knew that "**workers' compensation benefits** are not considered **taxable** income at the state or federal level." *See* JA458 (emphasis in original).

Second, a reasonable jury could find that Turner's violation of this known legal duty was voluntary and intentional. As the district court acknowledged, Turner had a financial motive, in the form of tax deductions, to misreport Mr. Doherty's gross income in his W-2s. *See* JA781. Motive suggests intent. Turner has also repeatedly refused to amend the W-2s despite the OWC's findings regarding Mr. Doherty's workers' compensation benefits, *see supra* at 23–24, and despite his sustained objections to the reporting of his workers' compensation payments as taxable, *see supra* at 32–33. An employer's repeated refusal to amend tax filings, despite being confronted by evidence of their inaccuracy, can support an inference that the employer's behavior is

voluntary and intentional within the meaning of *Cheek*. *Shiner v. Turnoy*, 29 F. Supp. 3d 1156, 1162–63 (N.D. Ill. 2014); *see also United States v. Bertram*, 762 F. App'x 1 (D.C. Cir. 2019) (finding a voluntary and intentional violation of a known legal duty when the defendant was warned "over and over again" of the consequences of his behavior, yet did not alter it).

The record evidence demonstrating Turner's knowledge of the legal duty to exclude Mr. Doherty's workers' compensation payments from his taxable income, and Turner's voluntary and intentional refusal to do so, raises a genuine dispute of material fact as to Turner's willfulness. Consequently, summary judgment in favor of Turner was improper, even when willfulness is defined according to the *Cheek* standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment and remand.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,804 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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I, Tiffany Yang, certify that on November 29, 2022, I electronically filed the foregoing Opening Brief of Court-Appointed Amicus Curiae via this Court's CM/ECF system, which will send notice of such filing to counsel of record and Appellant Mr. Doherty in the above-captioned case.

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26 U.S.C. § 104:

(a) **In general**. --Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include--

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

(3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)); and

(6) amounts received pursuant to--

(A) section 1201 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796); or

(B) a program established under the laws of any State which provides monetary compensation for surviving dependents of a public safety officer who has died as the direct and proximate result of a personal injury sustained in the line of duty,

except that subparagraph (B) shall not apply to any amounts that would have been payable if death of the public safety officer had occurred other than as the direct and proximate result of a personal injury sustained in the line of duty.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

(b) **Termination of application of subsection (a)(4) in certain cases**.--

(1) In general.--Subsection (a)(4) shall not apply in the case of any individual who is not described in this paragraph if--

(2) Individuals to whom subsection (a)(4) continues to apply.--An individual is described in this paragraph if--

(A) on or before September 24, 1975, he was entitled to receive any amount described in subsection (a)(4),

(B) on September 24, 1975, he was a member of any organization (or reserve component thereof) referred to in subsection (a)(4) or under a binding written commitment to become such a member,

(C) he receives an amount described in subsection (a)(4) by reason of a combat-related injury, or

(D) on application therefor, he would be entitled to receive disability compensation from the Department of Veterans Affairs.

(3) Special rules for combat-related injuries.--For purposes of this subsection, the term "combat-related injury" means personal injury or sickness--

(A) which is incurred--

(i) as a direct result of armed conflict,

(ii) while engaged in extrahazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

In the case of an individual who is not described in subparagraph (A) or (B) of paragraph (2), except as provided in paragraph (4), the only amounts taken into account under subsection (a)(4) shall be the amounts which he receives by reason of a combat-related injury.

(4) Amount excluded to be not less than veterans' disability compensation.--In the case of any individual described in paragraph (2), the amounts excludable under subsection (a)(4) for any period with respect to any individual shall not be less than the maximum amount which such individual, on application therefor, would be entitled to receive as disability compensation from the Veterans' Administration.

(c) **Application of prior law in certain cases**.--The phrase "(other than punitive damages)" shall not apply to punitive damages awarded in a civil action--

(1) which is a wrongful death action, and

(2) with respect to which applicable State law (as in effect on September 13, 1995 and without regard to any modification after such date) provides, or has been construed to provide by a court of competent jurisdiction pursuant to a decision issued on or before September 13, 1995, that only punitive damages may be awarded in such an action.

This subsection shall cease to apply to any civil action filed on or after the first date on which the applicable State law ceases to provide (or is no longer construed to provide) the treatment described in paragraph (2).

(d) **Cross references**.--

(1) For exclusion from employee's gross income of employer contributions to accident and health plans, see section 106.

(2) For exclusion of part of disability retirement pay from the application of subsection (a)(4) of this section, see section 1403 of title 10, United States Code (relating to career compensation laws).

26 U.S.C. § 7434:

(a) **In general**.--If any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return.

(b) **Damages**.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the greater of $5,000 or the sum of--

(1) any actual damages sustained by the plaintiff as a proximate result of the filing of the fraudulent information return (including any costs attributable to resolving deficiencies asserted as a result of such filing),

(2) the costs of the action, and

(3) in the court's discretion, reasonable attorneys' fees.

(c) **Period for bringing action.**--Notwithstanding any other provision of law, an action to enforce the liability created under this section may be brought without regard to the amount in controversy and may be brought only within the later of--

(1) 6 years after the date of the filing of the fraudulent information return, or

(2) 1 year after the date such fraudulent information return would have been discovered by exercise of reasonable care.

(d) **Copy of complaint filed with IRS**--Any person bringing an action under subsection (a) shall provide a copy of the complaint to the Internal Revenue Service upon the filing of such complaint with the court.

(e) **Finding of court to include correct amount of payment**.--The decision of the court awarding damages in an action brought under subsection (a) shall include a finding of the correct amount which should have been reported in the information return.

(f) **Information return**.--For purposes of this section, the term "information return" means any statement described in section 6724(d)(1)(A).

D.C. Code § 32-1503. Coverage.

(a) Except as provided in subsections (a-1) through (a-3) of this section, this chapter shall apply to:
  (1) The injury or death of an employee that occurs in the District of Columbia if the employee performed work for the employer, at the time of the injury or death, while in the District of Columbia; and
  (2) The injury or death of an employee that occurs outside the District of Columbia if, at the time of the injury or death, the employment is localized principally in the District of Columbia.

(a-1) No employee shall receive compensation under this chapter and at any time receive compensation under the workers' compensation law of any other state for the same injury or death.

(a-2) This chapter shall not apply if the employee injured or killed was a casual employee except that for the purposes of this chapter, casual, occasional, or incidental employment outside of the District of Columbia by a District of Columbia employer of an employee regularly employed by the employer within the District of Columbia shall be construed to be employment within the District of Columbia.

(a-3) An employee and his employer who are not residents of the District of Columbia and whose contract of hire is entered into in another state shall be exempted from the provisions of this chapter while such employee is temporarily or intermittently within the District of Columbia doing work for such nonresident employer, if such employer has furnished workers' compensation insurance coverage under the workers' compensation or similar laws of such other state, so as to cover such employee's employment while in the District of Columbia. The benefits under this chapter or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in the District of Columbia.

(b) Every employer subject to this chapter shall be liable for compensation for injury or death without regard to fault as a cause of the injury or death.

(c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(d) Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.

(e) The requirements of this chapter shall apply with regard to the nonprisoners employed in a prison industries program operating on the grounds of a District correctional facility, whether within the District or elsewhere, and maintained in accordance with the Prison Industries Act of 1996. The requirements of this chapter also shall apply with regard to prisoners employed in a prison industry approved under the Bureau of Justice Assistance Private Sector Prison Industry Enhancement Certification Program as defined in § 24-231.01(1).

D.C. Code § 32-1507. Medical services, supplies, and insurance.

(a) The employer shall furnish such medical, surgical, vocational rehabilitation services, including necessary travel expenses and other attendance or treatment, nurse and hospital service, medicine, crutches, false teeth or the repair thereof, eye glasses or the repair thereof, artificial or any prosthetic appliance for such period as the nature of the injury or the process of recovery may require. The employer shall furnish such additional payment as the Mayor may determine is necessary for the maintenance of an employee undergoing vocational rehabilitation, not to exceed $50 a week.

(a-1)(1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter.

(2) For purposes of this subsection, the phrase "eligible to receive" means:

(A) An employee is away from work due to a job-related injury for which the employee has filed a claim for workers' compensation benefits under this chapter; or

(B) An employer has knowledge of a job-related injury of an employee who is away from work due to the job-related injury pursuant to which workers' compensation benefits may become due under § 32-1515.

(3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

(4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

(5) Each provider of medical care or services pursuant to this chapter shall use a standard coding system for reports and bills generated pursuant to this chapter. Medical care and services shall be billed at the rate established in the medical fee schedule adopted by the Mayor. This fee schedule shall be based on 113% of Medicare's reimbursement amounts.

(b)(1), (2) Repealed.

(3) The employee shall have the right to choose an attending physician to provide medical care under this chapter. If, due to the nature of the injury, the employee is unable to select a physician and the nature or the injury requires immediate treatment and care, the employer shall select a physician for him. Where medically necessary or advisable, or at the request of the employee, the attending physician shall consult with the employee's personal physician.

(4) The Mayor shall supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have the authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may order a change of physician or hospital when in his judgment such change is necessary or desirable.

(5) Each person who provides medical care or service under this chapter shall utilize a standard coding system for reports and bills pursuant to rules issued by the Mayor. Medical care and service shall be billed at a usual and customary rate.

(6) Any medical care or service furnished or scheduled to be furnished under this chapter shall be subject to utilization review. Utilization review may be accomplished prospectively, concurrently, or retrospectively.

(A) In order to determine the necessity, character, or sufficiency of any medical care or service furnished or scheduled to be furnished under this chapter and to allow for the performance of competent utilization review, a utilization review organization or individual used pursuant to this chapter shall be certified by the Utilization Review Accreditation Commission.

(B) When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual.

(C) If the medical care provider disagrees with the opinion of the utilization review organization or individual, the medical care provider shall have the right to request reconsideration of the opinion by the utilization review organization or individual 60 calendar days from receipt of the utilization review report. The request for reconsideration shall be written and contain reasonable medical justification for the reconsideration.

(D) Disputes between a medical care provider, employee, or employer on the issue of necessity, character, or sufficiency of the medical care or service furnished, or scheduled to be furnished, or the fees charged by the medical care provider shall be resolved by the Mayor upon application for a hearing on the dispute by the medical care provider, employee, or employer. A party who is adversely affected or aggrieved by the decision of the Mayor may petition for review of the decision by the District of Columbia Court of Appeals.

(E) The employer shall pay the cost of a utilization review if the employee seeks the review and is the prevailing party.

(7) Medical care providers shall not hold employees liable for service rendered in connection with a compensable injury under this chapter.

(c) Vocational rehabilitation shall be designed, within reason, to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of injury. The Mayor shall monitor the provision of vocational rehabilitation of employees with disabilities and determine the adequacy and sufficiency of such rehabilitation. Where, in the judgment of the Mayor, the employer fails or refuses to provide adequate and sufficient rehabilitation services as required in subsection (a) of

this section, the Mayor may order that the supplier of such services be changed, and may use the special fund provided in § 32-1543 in such amounts as may be necessary to procure such services, including necessary prosthetic appliances or other apparatus. When the Mayor pays for such services out of the special fund, he shall institute proceedings against such employer to recover the amounts expended.

(d) If the employer fails to provide the medical or other treatment, services, supplies, or insurance coverage required to be furnished by subsections (a) and (a-1) of this section, after request by the injured employee, such injured employee may procure the medical or other treatment, services, supplies, or insurance coverage and select a physician to render treatment and services at the expense of the employer. The employee shall not be entitled to recover any amount expended for the treatment, service, or insurance coverage unless the employee requested the employer to furnish the treatment or service or to furnish the health insurance coverage and the employer refused or neglected to do so, or unless the nature of the injury required the treatment or service and the employer or his superintendent or foreman having knowledge of the injury neglected to provide the treatment or service; nor shall any claim for medical or surgical treatment be valid or enforceable, as against the employer, unless within 20 days following the 1st treatment the physician giving the treatment furnishes to the employer and the Mayor a report of the injury or treatment, on a form prescribed by the Mayor. The Mayor may, however, excuse the failure to furnish such report within 20 days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments, and health insurance coverage during such period, unless the circumstances justified the refusal.

(e) Whenever, in the opinion of the Mayor, the injured employee or

his employer, a physician has improperly estimated the degree of permanent disability or the extent of temporary disability occasioned by the injury or where in the opinion of such parties a physician recommends a treatment for an injury not generally recognized by the medical community the Mayor shall cause such employee to be examined by another physician selected by the Mayor and to obtain from such physician a report containing his estimate of such disabilities and a recommendation for treatment. If the report of such physician shows that the estimate of the former physician is improper or that the treatment recommended is not one that is generally recognized in the medical community, the Mayor shall have the power in his discretion to charge the cost of such examination to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, or, in appropriate cases, to the special fund.

(f) All fees and other charges for such treatment or service shall be limited to such charges as prevail in the same community for similar treatment of injured persons and shall be subject to regulation by the Mayor.

(g) The liability of an employer for medical treatment as provided in this section shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or suit has been brought against such 3rd party. The employer shall, however, have a cause of action against such 3rd party to recover any amounts paid by him for such medical treatment in like manner as provided in § 32-1535(b).

(h) When an employer and employee so agree in writing, nothing in this chapter shall be construed to prevent an employee, whose injury or disability has been established in accordance with the provisions of this chapter, from relying in good faith, on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized church or religious denomination, by a duly accredited practitioner thereof, and having nursing services appropriate therewith, without suffering loss or diminution of the compensation benefits under this chapter; provided, the employee shall submit to all physical examinations required by this chapter.

(i) The employee and employer are entitled upon request to all medical reports made pursuant to claims arising under this

chapter.

D.C. Code § 32-1508. Compensation for disability.

Compensation for disability shall be paid to the employee as follows:

(1) In case of total disability adjudged to be permanent, 66 2/3% of the employee's average weekly wages shall be paid to the employee during the continuance thereof. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any 2 thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined only if, as a result of the injury, the employee is unable to earn any wages in the same or other employment;

(2) In case of disability total in character but temporary in quality, 66 2/3% of the employee's average weekly wages shall be paid to the employee during the continuance thereof;

(3) In case of disability partial in character but permanent in quality, the compensation shall be 66 2/3% of the employee's average weekly wages which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with paragraph (2) or (4) of this subsection respectively, and shall be paid to the employee, as follows:

(A) Arm lost, 312 weeks' compensation;
(B) Leg lost, 288 weeks' compensation;
(C) Hand lost, 244 weeks' compensation;
(D) Foot lost, 205 weeks' compensation;
(E) Eye lost, 160 weeks' compensation;
(F) Thumb lost, 75 weeks' compensation;
(G) First finger lost, 46 weeks' compensation;
(H) Great toe lost, 38 weeks' compensation;
(I) Second finger lost, 30 weeks' compensation;
(J) Third finger lost, 25 weeks' compensation;
(K) Toe other than great toe lost, 16 weeks' compensation;
(L) Fourth finger lost, 15 weeks' compensation;
(M) Compensation for loss of hearing of 1 ear, 52 weeks. Compensation for loss of hearing of both ears, 200 weeks, provided that the Mayor may establish a waiting period, not to exceed 6 months, during which an employee may not file a claim for loss of hearing resulting from nontraumatic causes

in his occupational environment until the employee has been away from such environment for such period, and provided further, that nothing in this subparagraph shall limit an employee's right to file a claim for temporary partial disability pursuant to paragraph (5) of this section;

(N) Compensation for loss of more than 1 phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the 1st phalange shall be one half of the compensation for loss of the entire digit;

(O) Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot;

(P) Compensation for loss of binocular vision or for 80% or more of the vision of an eye shall be the same as for loss of the eye;

(Q) Compensation for loss of 2 or more digits, or 1 or more phalanges of 2 or more digits, of a hand or foot, may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot;

(R) Compensation for permanent total loss of use of a member shall be the same as for loss of the member;

(S) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. Benefits for partial loss of vision in 1 or both eyes, or partial loss of hearing in 1 or both ears shall be for a period proportionate to the period benefits are payable for total bilateral loss of vision or total binaural loss of hearing as such partial loss bears to total loss;

(T) The Mayor shall award proper and equitable compensation for serious disfigurement of the face, head, neck or other normally exposed bodily areas not to exceed $7,500;

(U) In any case in which there shall be a loss of, or loss of use of, more than 1 member or parts of more than 1 member set forth in subparagraphs (A) to (S) of this paragraph, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part

thereof, which awards shall run consecutively, except that where 1 injury affects only 2 or more digits of the same hand or foot, subparagraph (Q) of this paragraph shall apply; and

(U-i) In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment may be utilized, along with the following 5 factors:

(i) Pain;

(ii) Weakness;

(iii) Atrophy;

(iv) Loss of endurance; and

(v) Loss of function.

(V)

(i) In other cases the employee shall elect:

(I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and

(II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.

(ii) The compensation shall be 66 2/3% of the greater of:

(I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee has a disability; or

(II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee had the disability and the actual wage of the job that the employee holds when the employee returns to work.

(iii) If the employee voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the employee becomes disabled shall be deemed to be the

amount the employee would earn if the employee did not voluntarily limit his or her income or did accept employment commensurate with the employee's abilities. Notwithstanding the provisions of this section, in the case of injury occurring on or after April 16, 1999, the periods of compensation set forth in subparagraphs (A) through (S) of this paragraph shall each be reduced by a proportion of 25% of the stated period of weeks, rounded upward to the nearest whole week.

(W) The compensation and remuneration payable to a professional athlete claimant pursuant to subparagraph (V)(ii) of this paragraph shall be determined by referring to the date of the claimant's disability and a date that is not later than the date on which the claimant's employment as a professional athlete would have ended, as determined pursuant to § 32-1501(17C), if the disability for which he or she seeks compensation and remuneration pursuant to subparagraph (V) (ii) of this paragraph had not occurred.

(4) Any compensation to which any claimant would be entitled under paragraph (3) of this section, excepting paragraph (3)(V) of this section, shall, provided the death arises from causes other than the injury, be payable in full to and for the benefit of the persons following:

(A) If there be a surviving spouse or domestic partner and no child of the deceased to such spouse or domestic partner;

(B) If there be a surviving spouse or domestic partner and surviving child or children of the deceased, one half shall be payable to the spouse or domestic partner and the other one half to the surviving child or children;

(C) The Mayor may in his discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement, the appointment for such a purpose shall not be necessary;

(D) If there be a surviving child or children of the deceased but no surviving spouse or domestic partner, then to such child or children;

(E) If there be no surviving spouse or domestic partner and no surviving children, such unpaid amount of the award shall be

paid to the survivors specified in § 32-1509 (other than a spouse, domestic partner, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in § 32-1509(4), but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each.

(5) In case of temporary partial disability, the compensation shall be 66 2/3% of the injured employee's wage loss to be paid during the continuance of such disability, but shall not be paid for a period exceeding 5 years. Wage loss shall be the difference between the employee's average weekly wage before the employee had the disability and the employee's actual wages after the employee had the disability. If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after the employee had the disability shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.

(6)

(A) If an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability and shall be the payment of:

(i) All medical expenses;

(ii) All monetary benefits for temporary total or partial injuries; and

(iii) Monetary benefits for permanent total or partial injuries up to 104 weeks.

(B) The special fund shall reimburse the employer solely for the monetary benefits paid for permanent total or partial injuries after 104 weeks.

(C) The requirements of this paragraph shall apply to injuries occurring prior to April 16, 1999.

(7) In each case, payment of benefits shall be 66 2/3% of the employee's average weekly wage.

(8) The Mayor may approve lump-sum settlements agreed to in writing by the interested parties, discharging the liability of the employer for compensation, notwithstanding §§ 32-1516 and 32-1517, in any case where the Mayor determines that it is in the best interest of an injured employee entitled to compensation or individuals entitled to benefits pursuant to § 32-1509. The Mayor shall approve the settlement, where both parties are represented by legal counsel who are eligible to receive attorney fees pursuant to § 32-1530. These settlements shall be the complete and final dispositions of a case and shall be a final binding compensation order.

(9) Repealed.

(10) An award for disability may be made after the death of an injured employee from causes other than work-related injury. If the award made is for permanent partial disability, pursuant to paragraph (3)(A) through (U) of this section, the award shall be payable in full pursuant to paragraph (4) of this section. If the award made is for any other category of disability, the amount of the award shall be computed from the date of the injury to the date of death, and shall be payable in full in the same manner as an award payable pursuant to paragraph (4) of this section.

D.C. Code § 32-1515. Payment of compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The 1st installment of compensation shall become due on the 14th day after the employer has knowledge of the job-related injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, biweekly, except where the Mayor determines that payment in installments should be made monthly or at some other period.

(c) Upon making the 1st payment and upon suspension of payment for any cause, the employer shall immediately notify the Mayor in accordance with a form prescribed by the Mayor that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the Mayor, on or before the 14th day after he has knowledge of the alleged injury or death and its relationship to the employment, a notice in accordance with a form prescribed by the Mayor stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10% thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the Mayor after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which

shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in § 32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(g) Within 16 days after final payment of compensation has been made, the employer shall send to the Mayor a notice, in accordance with a form prescribed by the Mayor, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Mayor within such time the Mayor shall assess against such employer a civil penalty in the amount of $100.

(h) The Mayor: (1) May upon his own initiative at any time in a case in which payments are being made without an award; and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation or from the employer, that the right to compensation is controverted, or where payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Whenever the Mayor deems it advisable he may require any employer to make a deposit with the District of Columbia Treasurer to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the Mayor.

(j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of

his employment, shall be considered advance payments of compensation.

(k) An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the Mayor, whenever required.