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STATE OF WASHINGTON
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No. 64162-0-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

JUANA ALEGRIA
Appellant

vs.

DEPARTMENT OF LABOR AND INDUSTRIES
Respondent

REPLY BRIEF OF APPELLANT JUANA ALEGRIA

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INTRODUCTION/ HISTORY

Comes now the Appellant, Juana Alegria, by and through her attorneys of record, the Walthew Law Firm per Robert J. Heller, and hereby files this Reply to the Respondent's Brief filed in the above captioned matter.

I. ASSIGNMENTS OF ERROR

The Appellant has submitted, and assigned as error, that the Findings of the Board of Industrial Insurance Appeals (Board) and the King County Superior Court were not supported by the law or the facts. The Respondent's Reply Brief questions the adequacy of this assignment.

Both the Board, in the Proposed Decision and Order, and the Superior Court made only two Findings of Fact germane to the issues before the Court of Appeal. At the Board the Findings were Nos. 2 and 3.

At Superior Court the Findings were Nos 1.2 and 1.3.

Both of these Findings are set forth in Appendices A and B of this Reply as well as in Appendices A and B of the Respondent's

Brief.

The Conclusions of Law which were based on these Findings are similarly set forth in these Appendices.

These Findings and Conclusions, and the Issue they raise, are summarized in the Issue Pertaining to Assignments of Error section of the original Appellant's Brief and this Reply.

As a review of the record and briefing herein reveals, all parties to this action have been well aware of the issues on appeal and have had an unfettered opportunity to be heard.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the Superior Court's Decisions of July 27, 2009, and August 14, 2009, affirming the Board's Decision that the Appellant was a domestic servant excluded from coverage under the Industrial Insurance Act, was in error as a matter of law and fact.

III. STATEMENT OF THE CASE

In brief recap of the Appellant's original statement of the case, there is no dispute in the record that the Appellant, Juana Alegria, sustained a significant injury while in the course of her employment.

The injury occurred at 13816 144th Ave. SE, Renton, Washington, 98059. This house is owned by James Dore. The record is unclear as to whether he resided there at the time of the injury having at some time separated from the resident at the time of injury, Nancy Medina. (CP#8: CABR: Testimony of James Dore at 39.)¹ The record is clear that the Appellant was an employee of and paid by Mr. Dore's business, ADL, Inc., through which he ran his restaurant/night club business. In fact, Mr. Dore, the principal owner of ADL, Inc., testified that "she worked at the restaurant, cleaning the restaurant, and then she was also engaged in babysitting or taking care of my son" (CP#8: CABR: Dore at 38-39, 43.)

The sole question presented for review at the Board, the Superior Court and this Court is whether this injured worker was excluded from coverage under the Act pursuant to the Domestic Servant exclusion set forth in RCW 51.12.020.

¹ References to the testimony in this matter are to the Certified Appeal Board Record (CABR) appearing at Clerk's Papers item 8.

IV. ARGUMENT

The Fundamental Purpose of the Industrial Insurance Act is to Give Sure and Certain Relief to Injured Workers and to Resolve All Doubts in Favor of the Worker.

Concurrent with the filing of its Reply Brief, the Respondent moved to have references in the Appellant's Brief to the Appellant's earlier briefs stricken as it was improper to incorporate by reference earlier briefs or memoranda. This Court granted this Motion.

In order to assure that the basis for the Appellant's argument is clear, The Appellant directs this Court to the discussion in her original Brief of the intent and purpose of the Industrial Insurance Act which has as its fundamental policy the following:

There is a hazard in all employments and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

RCW 51.12.010.

This Court is being asked to interpret the Domestic Servant exclusion from coverage set forth in the Industrial Insurance Act (RCW 51.12.020) which states

“The following are the only employments which shall not be included within the mandatory coverage of this title:

“(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.”

In interpreting the Act, the Courts of Washington state have repeatedly stated that the fundamental purpose of the Industrial Insurance Act is to give sure and certain relief to injured workers and to resolve all doubts in favor of the worker. RCW 51.12.010; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 915 P.2d 624 (1995); *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 600 P.2d 1015 (1979). These were the points and cases referenced in the Appellant's Brief by attempted incorporation of earlier briefing in this matter. It is with these directions as to the interpretation of the

Industrial Insurance Act in mind that this Court should consider the case of *Doty v. Town of South Prairie*, 155 Wn.2d 527, 120 P.3d 941 (2005).

The Court in *Doty* considered a statutory exclusion for a firefighter under the Act, and upheld the exclusion in a case where the firefighter performed only one function for the town and that function was excluded under the Act. The exclusion in *Doty* does not contemplate someone who fills more than one role for the same employer as the Appellant did in this case. The statute is silent as to someone who performs multiple roles, some covered and some not.

As stated earlier, it is on this point that *Doty* is instructive. The Supreme Court in *Doty* addressed the interpretation of exclusionary language by referencing *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801 at 811, 16 P3d 583 (2001): “[W]here reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation’s fundamental purpose, the benefits of doubt belong to the injured worker”

Once again, the Domestic Servant exclusion does not

contemplate someone who fills more than one role for the same employer as the Appellant did in this case. In fact, the exclusion does not even mention such a situation. Had the legislature intended a broader application of the exclusion it could have done so. It did not. Instead it referenced domestic servant as one of “the only employments which shall not be included” in coverage.

As such, the exclusion, as it applies to this specific fact pattern, is ambiguous and subject to interpretation. In other words, reasonable minds can differ. Doubt should be resolved in favor of the Appellant.

V. CONCLUSION

It cannot be overstated that too often the fundamental purpose of the statute, that the Industrial Insurance Act is to be liberally construed with doubts resolved in favor of the injured worker, is added to a brief as an almost boiler plate exhortation to the fact finder. See: RCW 51.12.010; *Cockle*, 142 Wn.2d at 811; *Clauson*, 130 Wn.2d at 584.

But, as raised in the Appellant’s Brief, cases occasionally

present themselves where this priority not only states the intent of the Act generally, but also has specific application to the facts of the case. This is one of those cases.

The domestic servant exclusion provisions are to be interpreted in a manner consistent with the intent of the Act: liberally with doubts resolved in favor of the injured worker. Insofar as the exclusion contains no reference to the fact situation presented in this case, doubts as to the application of the exclusion must be resolved in favor of the injured worker, Juana Alegria. Doing so honors the letter, spirit and the intent of the law.

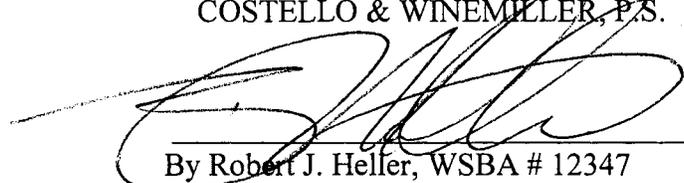
This Court's review of the Superior Court's determination is limited to determining if there is substantial evidence to support the lower court's findings of fact and whether that Court's conclusions of law properly flow therefrom. RCW 51.52.140; *Bayliner Marine Corp. v. Perrigoue*, 40 Wn. App. 110, 697 P.2d 277 (1985). The Appellant respectfully submits that the Superior Court's determination was in error as a matter of law and fact.

Once again, the Appellant requests this Court to set aside the

Judgment of the Superior Court in this matter and enter an Order ruling that the Appellant is not a domestic servant, as defined under the Industrial Insurance Act, is entitled to Industrial Injury benefits and remanding this matter to the Department of Labor and Industries to provide such relief as may be available to an injured worker under the law and the facts of this case.

DATED this 12th day of March, 2010.

WALTHER, THOMPSON, KINDRED,
COSTELLO & WINEMILLER, P.S.



By Robert J. Heller, WSBA # 12347
Attorney for Appellant

SUPERIOR COURT JUDGMENT

Appendix A

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

JUANA ALEGRIA,

Plaintiff,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES, STATE OF
WASHINGTON,

Defendant.

NO. 08-2-38115-3 KNT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|--|--|
| 1. Judgment Creditor: | State of Washington Department of Labor and Industries |
| 2. Judgment Debtor: | Juana Alegria |
| 3. Principal Amount of Judgment: | - 0 - |
| 4. Interest to Date of Judgment: | - 0 - |
| 5. Statutory Attorney Fees: | \$200.00 |
| 6. Costs: | \$0 |
| 7. Other Recovery Amounts: | \$0 |
| 8. Principal Judgment Amount shall bear interest at 0% per annum. | |
| 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum. | |

1 10. Attorney for Judgment Creditor:

Andrew J. Simons
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

2
3
4 11. Attorney for Judgment Debtor:

Robert J. Heller
Attorney at Law
Walthew, Thompson, Kindred, Costello &
Winemiller, P.S.
123 Third Ave. South
Seattle, WA 98104

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6
7 This matter came on regularly before the Honorable Michael Heavey in open court on
8 June 8, 2009. Appellant, Juana Alegria, did not appear but was represented by counsel, Robert
9 J. Heller; the Defendant, Department of Labor and Industries (Department), appeared by
10 counsel, Robert M. McKenna, Attorney General, per Andrew J. Simons, Assistant Attorney
11 General. The Court reviewed the records and files herein, including the Certified Appeal
12 Board Record and briefs submitted by counsel, and heard argument of Counsel. Therefore,
13 being fully informed, the Court makes the following:

14 **I. FINDINGS OF FACT**

15 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board). The
16 Industrial Appeals Judge issued an initial Proposed Decision and Order on August 7,
17 2008 from which Plaintiff filed a timely Petition for Review. The Board denied
18 Plaintiff's Petition for Review, and on October 21, 2008 ordered that the Proposed
19 Decision and Order become the Decision and Order of the Board. Plaintiff timely
20 appealed the Board's Decision and Order to this Court.

21 1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 3.
22 The Court adopts as its Findings of Fact, and incorporates by this reference the Board's
23 Findings of Facts Nos. 1 through 3 of the October 21, 2008 Decision and Order which
24 adopted the August 7, 2008 Proposed Decision and Order.

25 1.3 Ms. Alegria was injured during the course of her employment with Mr. Dore as a baby
26 sitter and housekeeper in his private home on September 22, 2006. Ms. Alegria was the
only person Mr. Dore employed at his home as a baby sitter and housekeeper.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

1 2.2 The Board's Conclusions of Law Nos. 1 through 3 are correct. The Court adopts as its
2 Conclusions of Law, and incorporates by this reference, the Board's Conclusions of
3 Law Nos. 1 through 3 of the October 21, 2008 Decision and Order which adopted the
4 August 7, 2008 Proposed Decision and Order.

5 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
6 judgment as follows:

7 **III. JUDGMENT**

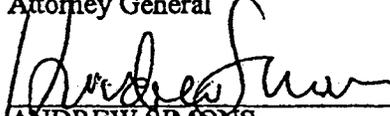
8 3.1 It is hereby ORDERED, ADJUDGED AND DECREED that the October 21, 2008
9 Board of Industrial Insurance Appeals Decision and Order which adopted the August 7, 2008
10 Proposed Decision and Order which affirmed the August 29, 2007 Department order should be
11 and is hereby affirmed.

12 DATED this July 27, 2009 JUL 27 2009
13 July 27, 2009

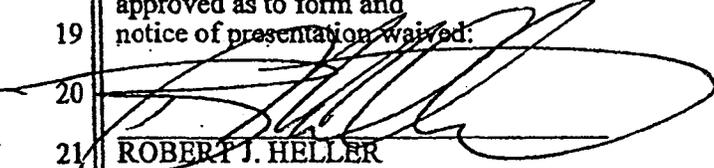
14 **MICHAEL HEAVEY**

15 Michael Heavey, J U D G E

16 Presented by:
17 ROBERT M. MCKENNA
18 Attorney General

19 
20 ANDREW SIMONS
21 Assistant Attorney General 7/13/09
22 WSBA No. 30186

23 Copy received,
24 approved as to form and
25 notice of presentation waived:

26 
27 ROBERT J. HELLER
28 WSBA No. 12347
29 Attorney for Plaintiff-Claimant

BOARD DECISION

Appendix B

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.bia.wa.gov
(360) 753-6824

In re: **JUANA ALEGRIA**

Docket No. 07 23407

Claim No. AE-43776

**ORDER DENYING PETITION
FOR REVIEW**

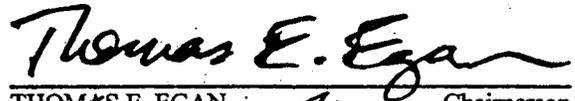
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **CAROL J. MOLCHIOR** on **August 7, 2008**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **October 2, 2008**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: October 21, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS


THOMAS E. EGAN Chairperson


FRANK E. FENNERTY, JR Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: JUANA ALEGRIA)

DOCKET NO. 07 23407

2 CLAIM NO. AE-43776)

PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Carol J. Molchior

4 APPEARANCES:

5
6 Claimant, Juana Alegria, by
7 Salazar Law Offices, per
8 Antonio Salazar

9 Employer, ADL, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Andrew J. Simons, Assistant

14 The claimant, Juana Alegria, filed an appeal with the Board of Industrial Insurance Appeals
15 on October 11, 2007, from an order of the Department of Labor and Industries dated August 29,
16 2007. In this order, the Department affirmed the June 1, 2007 Department order, which rejected
17 the claim because the claimant was excluded from mandatory coverage under the provisions of the
18 industrial insurance laws and the employer had not made provisions for coverage by means of
19 elective adoption. The Department order is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On December 12, 2007, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history establishes the Board's jurisdiction in this appeal.

23 **ISSUE**

24 The issue presented by this appeal is whether this claim should be
25 allowed or excluded under RCW 51.12.020(1), the domestic servant
26 section.

27 **EVIDENCE**

28 **Juana Alegria**

29 Juana Alegria testified through an interpreter that she is 69 years old. She was employed by
30 Jim Dore for two years, until she was injured on September 22, 2006. Her job was housework,
31 babysitting a child, cooking, cleaning and laundry from 8:00 a.m. to after midnight. She worked 16
32 hour days, Monday through Friday, and was paid by check.

1 Her employer owned a business, a drinking and dancing nightclub. She did cleaning there
2 approximately two hours a week. She was paid for both jobs by one check, approximately \$1,200
3 per month. She cannot read.

4 Ms. Alegria was injured at the house while she was babysitting. She fell and could not get
5 up. The wife's niece found her and called someone.

6 Mr. Jimmy's house was in Renton. He was at the nightclub in Seattle every night.
7 Ms. Alegria would sleep at the house. The wife, Nancy Merina, told her to sleep at the house. She
8 had a business to run. She got checks from her office and gave them to Ms. Alegria. She would
9 drive Ms. Alegria to the nightclub. Ms. Alegria does not drive. Sometimes she checked coats at the
10 nightclub from 9:00 p.m. to 2:00 a.m., receiving tips, and then she would clean until 3:30 a.m. She
11 only worked at the club in her last six months with Mr. Dore, and it was not a sure job. It was not so
12 much. She worked more at the house.

13 For the first two years, Ms. Alegria was paid in cash. When she started working at the club
14 they paid her by check.

15 James Dore, Jr.

16 James Dore testified that he resides in Renton. Juana Alegria worked at the restaurant, as
17 well as taking care of the son he had with Nancy Medina. (Ms. Alegria had, through the interpreter,
18 spelled the last name of "Nancy" differently, but she was obviously the same person referred to by
19 both witnesses). Ms. Alegria was probably hired by Ms. Medina. Ms. Alegria lived part of the time
20 in Normandy Park, and then she would come and live at his house for part of the week. The
21 corporate name of the restaurant was ADL, Inc. Ms. Medina managed the club with Mr. Dore, but
22 doing the day-to-day management.

23 When Ms. Alegria started working at the club, Ms. Medina would have explained her job
24 duties to her. Ms. Medina spoke Spanish. Mr. Dore signed Ms. Alegria's paychecks. She was
25 paid by checks written at the club. His contact with her was limited, because he doesn't speak
26 Spanish. Ms. Medina had more daily contact with her.

27 Ms. Alegria's job at the house was taking care of Mr. Dore's son and cooking. How she was
28 paid for the house work and the club work was a deal between Ms. Medina and Ms. Alegria, and he
29 doesn't know what deal they worked out. He was told what to pay her, and he wrote her a check
30 every two weeks that included both the house work and the club work. Mr. Dore left the house
31 between six and eight every morning and got back at five; he does not actually know how many

1 hours Ms. Alegria was there per week. In the house, he was Big Jimmy, and his son was Little
2 Jimmy. Mr. Dore was absent from the home at times, due to personal issues with Ms. Medina.

3 **DECISION**

4 The issue presented by this appeal is whether this claim should be allowed or excluded
5 under RCW 51.12.020(1), which excludes, from coverage, any person employed as a domestic
6 servant in a private home by an employer who has less than two employees regularly employed
7 forty or more hours a week in such employment. A domestic servant has been defined as: "A
8 person hired or employed primarily for the performance of household duties and chores, the
9 maintenance of the home, and the care, comfort and convenience of the members of the
10 household." *Bennerstrom v. Department of Labor & Indus.*, 120 Wn.App. 853 at 870 (2004);
11 *Everist v. Department of Labor & Indus.*, 57 Wn. App. 483 at 486 (1990).

12 Ms. Alegria was injured in a private home, and she was primarily employed for babysitting
13 and housework in that home. Her work at the club was incidental. As she said: "That wasn't my
14 work. My work was at his house." (5/6/08 Tr. at 30). She was paid with ADL Inc. checks, and her
15 employer, James Dore, Jr., benefited from the limited work she did at his club, but it did not change
16 her primary role as a domestic servant for the family of Mr. Dore.

17 I conclude that the August 29, 2007, Department order which affirmed the June 1, 2007
18 Department order, which rejected this claim, is correct and should be affirmed.

19 **FINDINGS OF FACT**

- 20 1. On May 22, 2007, Juana Alegria, claimant, filed an application for
21 benefits with the Department of Labor and Industries alleging that she
22 sustained an injury while in the course of her employment with ADL Inc.
23 on September 22, 2006. The claim was allowed and benefits were paid.
24 On June 1, 2007, the Department issued an order that rejected the claim
25 on grounds that claimant was excluded from mandatory coverage under
26 the Act, and the employer had not provided coverage by elective
27 adoption. On July 30, 2007, the claimant filed a protest or request for
28 reconsideration with the Department, of the Department order dated
29 June 1, 2007. On August 29, 2007, the Department issued an order that
30 affirmed the Department order dated June 1, 2007. On October 11,
31 2007, claimant filed a Notice of Appeal with the Board, from the
32 Department order dated June 1, 2007. On November 2, 2007, the
Board issued an order granting the appeal, assigning it Docket
No. 07 23407, and directing that further proceedings be held in this
matter.

