

NO. 70724-8-I

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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ANTHONY J. YUCHASZ,

*Appellant,*

v.

DEPARTMENT OF LABOR & INDUSTRIES,

*Respondent.*

FILED  
 COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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ORIGINAL

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## COUNTER-STATEMENT OF THE ISSUE

The Department attempts to narrow the matter at issue in this case to only the cost of employer-provided fuel to transport injured workers to and from work. Brief of Respondent Department of Labor and Industries dated December 16, 2013, at 10 (hereinafter "Department's Brief"). However, this is an overly narrow view of the case. Rather, the issue here is whether the Department must include in the wage calculation the value of any fuel provided to the worker by the employer as part of the contract of hire, regardless of when and how the fuel is consumed.

### ARGUMENT

#### **A. The Definition of Fuel in RCW 51.08.178 is an Issue of First Impression**

The conclusion reached by the Washington Supreme Court in *Cockle* did not determine the meaning of "fuel," but instead determined "other consideration of like nature" to fuel, housing and board is "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival." *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001). To reach this conclusion, the

*Cockle* Court determined that food, shelter and fuel (notably not "warmth") all shared the "like nature" of being core, non-fringe benefits:

We therefore construe the statutory phrase "board, housing, fuel, or other consideration of like nature" in RCW 51.08.178(1) to mean readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. **Core, non fringe benefits such as food, shelter, fuel, and health care all share that "like nature."** By contrast, we do not believe injury-caused deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of "suffering" that Title 51 was legislatively designed to remedy. *See* RCW 51.12.010.

*Supra*, 822-823 (Italics in the original, bold added).

The Department argues the basic health and survival test defines both "other consideration" and fuel, housing and board, but this is not how the *Cockle* Court applied the test. Department's Brief, 10-17. In the first full paragraph of its decision, the *Cockle* Court placed "board, housing [and] fuel" in a separate category of enumerated items to which "consideration of like nature" was compared through the lens of the basic health and survival test. *Cockle*, 142 Wn.2d at 805. In fact, the entire context of the analysis in *Cockle* was the dispute over "*which* attribute" shared by "board, housing [and] fuel" should determine the "boundaries of the larger category" of "other consideration of like nature." *Id.* at 809 (Emphasis in the original).

The Department's argument also misconstrues the doctrine of ejusdem generis. The ejusdem generis rule holds that when general words follow an enumeration of words with “particular and specific” meanings, the “general words” are to be held to apply only to things of the same general class as the specifically mentioned, enumerated words. Black's Law Dictionary 517 (6<sup>th</sup> ed. 1990); *see generally City of Seattle v. State*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998). Applied here, the doctrine means that “fuel,” along with “housing” and “board,” define “like consideration,” and not the reverse.

The Department argues *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 484, 120 P.3d 564 (2005) holds that the basic health and survival test applies to "board, housing [and] fuel," but even a cursory reading of *Gallo* shows this is not the case. *Gallo* involved whether employer contributions to retirement funds and life insurance funds constitute "wages" under RCW 51.08.178, and the Supreme Court held they did not, on the basis retirement funds do not help workers survive because they are not available to the worker at the time of injury and life insurance does not replace wages. *Id.* Of more relevance is *Dep't of Labor and Indus. v. Granger*, 130 Wn.App. 489, 123 P.3d 858 (2005), where this Court held monies paid by the employer for health care benefits into a union fund were "wages," even though the worker was not yet

eligible to receive the benefits and did not receive the benefit directly. This Court did not give any weight to the Department's faulty interpretation of its own WACs, but instead found that because the employer was providing monies for the health care coverage, the worker was receiving that benefit at the time of injury. *Id.* at 496-497. At the time of his injury, Mr. Yuchasz, like Mr. Granger, was receiving consideration from his Employer in the form of a company vehicle and fuel, and like Mr. Granger, this consideration should have been found to be "wages," albeit more directly, because "fuel" is explicitly identified as "wages" in RCW 51.08.178.

The Department also suggests it is "significant" the Supreme Court quoted Division II of the Court of Appeals' opinion in *Cockle*, but in fact, the Supreme Court was simply restating the Court of Appeals' analysis to make clear its own interpretation of the law. The Supreme Court did not specifically adopt, as suggested by the Department, the Court of Appeals' designation of "fuel," but instead affirmed the Court of Appeals' general use of the doctrine of *eiusdem generis*, which the Supreme Court proceeded to use in its own analysis when it affirmed, modified and rejected different aspects of Division II of the Court of Appeals' decision. *Cockle*, 142 Wn.2d at 823.

The *Cockle* Court did not consider the specific definition of “fuel,” because if it had done so, the most cursory examination would have brought to light to fact the Legislature did not add “fuel” to the wage statute until 1971. Rather, the Supreme Court noted the general characteristics of “fuel” shared by “board” and “housing,” and used these general characteristics to arrive at the basic health and survival test. As for Division II of the Court of Appeals' statement that “fuel” means “warmth,” which has been interpreted by the Department to mean exclusively “warmth,” statements that are unnecessary to decide a case are obiter dictum, and not controlling precedent. *Noble Manor v. Pierce County*, 133 Wn.2d 269, 289, 943 P.2d 1378 (1997)(Madsen, J., concurring opinion).

Likewise, the Department errs in arguing “fuel” in RCW 51.08.178 must mean heating fuel because only fuel which provides heat or warmth is critical to protecting a worker's basic health and survival and would meet the test created by *Cockle*. The Department's argument is circular, and based on the faulty premise that the basic health and survival test applies to “fuel.” Fuel, along with housing and board, categorizes “other consideration of like nature” in the statute and applying the basic health and survival test to it would be defining fuel by comparing it to itself. Rather, the *Cockle* Court found that “Core, *non* fringe benefits such as

food, shelter, fuel, and health care all share that 'like nature.'" *Cockle*, 142 Wn.2d at 822-823.

The Department's argument also assumes, without basis, that the only type of "fuel" that is critical to protecting a worker's basic health and survival is "fuel" that produces warmth. The Industrial Insurance Act was designed by the Legislature to reduce the suffering and economic loss that arise from injuries and deaths occurring in the course of employment. RCW 51.12.010. Survival after a work injury is more than just a matter of treating the physical suffering of the body, it is also about staving off the economic suffering and loss and the lost earning capacity that so often accompany a worker's physical injury. *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 952 P.2d 590 (1997).

For workers like Mr. Yuchasz, who was provided by his Employer with a vehicle to carry his electrician's tools and with vehicle fuel to travel from home to work and between job sites throughout the work day, the fuel provided allowed him to do his job without economic loss, particularly in this day and age of high fuel prices. Vehicle fuel was an in-kind component of Mr. Yuchasz's lost earning capacity at the time of his injury that was (1) readily identifiable, (2) reasonably calculable and (3) critical to protecting his basic health and survival. In fact, according to the Internal Revenue Service, the provision of a vehicle for an employee to

use for commuting and during the work day is taxable income to the worker. Internal Revenue Code Sec. 274; Treasury Regulations, Subchapter A, Sec. 1.132-5, see Appendix, Exhibit 1. However, the value of the fuel provided to Mr. Yuchasz should have been included in his wage rate, not because it meets the basic health and survival test, but because it is exactly the kind of “fuel” enumerated in RCW 51.08.178 in 1971.

**B. Clarifying the Definition of Fuel in RCW 51.08.178 Does Not Overturn Cockle**

The Department argues judicial clarification of the meaning of fuel in RCW 51.08.178 will undermine the basic health and survival test of *Cockle* and overturn the precedent established regarding the meaning of “other consideration of like nature,” but this is not the case. Department's Brief, 17-27. Instead, it will rectify what the Department itself acknowledges is a “historical inaccuracy” in the *Cockle* decision,<sup>1</sup> rooted in Division II of the Court of Appeals apparent assumption that “fuel” as a form of wages was added to the Industrial Insurance Act in the early 1900s, and must therefore mean the most basic kind of “warmth” from

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<sup>1</sup> The Department acknowledges that “to the extent the *Cockle* decision found that fuel was part of the statute in 1911, this determination is incorrect,” but argues this “historical inaccuracy” is not relevant. Appellant's Brief, 14; Department's Brief, 23, Footnote 6.

wood for the fire or coal for the furnace. Department's Brief, 23, Footnote 6.

If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *Cockle*, 142 Wn.2d at 807. In 1971, when “fuel” was added to RCW 51.08.178 as a form of “wages” for which injured workers must be compensated, “fuel” meant vehicle fuel. The Department refuses to acknowledge this common definition of fuel on the basis Mr. Yuchasz has cited no authority for this fact; however, facts that are generally known within a court's jurisdiction may be recognized by the appellate court. Department's Brief, 19; Evidence Rule 201; *State v. Royal*, 122 Wn.2d 413, 858 P.2d 259 (1993).

The automobile was already well entrenched in the American workplace and economy by 1971. In fact, motor vehicle travel increased across the 1960s from 719 billion vehicle miles traveled in 1960, to 1,016 billion vehicle miles traveled in 1968. General Reports Division, U.S. Department of Commerce, 91st Annual Edition, Statistical Abstract of the United States (1970), 22. By 1970, 47.7% of households had one vehicle, and 29.3% had two vehicles. U.S. Department of Energy, Vehicle Technologies Office, *Household Vehicle Ownership, 1960-2010* (2012), [http://www1.eere.energy.gov/vehiclesandfuels/facts/2012\\_fotw727.html](http://www1.eere.energy.gov/vehiclesandfuels/facts/2012_fotw727.html).

Only 17.5% of households did not have a motor vehicle at all. *Id.* During the oil crises in 1973 and 1979, Americans faced persistent gas shortages, soaring prices (much like today) and long lines at the fuel pumps. Greg Myre, *Gas Lines Evoke Memories of Oil Crises in the 1970s*, National Public Radio (2012), <http://www.npr.org/blogs/pictureshow/2012/11/10/164792293/gas-lines-evoked-memories-oil-crisis-in-the-1970s>.

At the same time, the use of electric power was rapidly increasing, from 842 billion kilowatt hours in 1960, to 1,552 billion kilowatt hours in 1969. General Reports Division, U.S. Department of Commerce, 91st Annual Edition, *Statistical Abstract of the United States* (1970), 21. This was particularly true in Washington. After World War II, electric home heating became practical and consumers were encouraged to use it in increasing amounts. David Wilma, *Seattle City Light Inaugurates Kill-A-Watt to Conserve Electricity on July 17, 1973*, HistoryLink.org (2000), [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=2910](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=2910). *Id.* Electricity use increased tenfold between 1937 and 1962, while Seattle City Light cut its rates. *Id.* In 1973, Seattle City Light inaugurated the Kill-A-Watt conservation program to combat rising demand. *Id.* Coal production, however, dropped between 1967 and 1968, while the marketed production of natural gas, which has never been referred to as "fuel," increased across the 1960s. General Reports Division, U.S. Department of

Commerce, 91st Annual Edition, Statistical Abstract of the United States (1970), 23.

In 1971, there was no practical reason for the Legislature to include “fuel” used for home heating purposes in RCW 51.08.178. The strict definition of “fuel” advocated by the Department would not include electric heat or natural gas heat, both of which were widespread in 1970. At the same time, RCW 51.08.178 specifically includes wages in the form of “board” and “housing,” akin to “room and board.” Statutes are not to be construed in a manner that renders any portion thereof meaningless, and adding housing fuel to “housing” is essentially meaningless. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). Of particular note in the Department's Brief, while the Department devotes some time to the meaning of “board,” it scarcely mentions “housing,” as utilities like heat, light or air conditioning are typically inseparable from employer-provided housing. Department's Brief, *passim*.

As for the Department's assertion vehicle fuel is a “fringe” benefit that an employer might elect to pay like vanpools or bike lockers, this argument is unsupportable unless it is first accepted, incorrectly, that “fuel” means only “heating fuel” meant to help a worker survive cold weather.

**C. The Department's Interpretation of RCW 51.08.178 is not Entitled to Deference**

The Department argues its interpretation of "fuel" in RCW 51.08.178 is entitled to deference, but the position advocated by the Department in this case is not consistent with the Department's treatment of fuel as a form of wages elsewhere. When considering whether a worker is in the course of employment and thus covered by the protections of the Industrial Insurance Act, it has been determined employment begins when a worker commences to earn his pay. *West v. Mount Vernon Sand & Gravel, Inc.*, 56 Wn.2d 752, 355 P.2d 795 (1960). A worker is in the course of employment while going to or from work in a vehicle furnished by the employer. *Westinghouse Elec. Corp. v. Dep't of Labor and Indus.*, 94 Wn.2d 875, 621 P.2d 147 (1980). A worker is also in the course of employment when the employer has a customary or contractual obligation to furnish the worker with compensation for mileage to and from work. *Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990). The mileage payment a covered worker receives is payment for fuel, and should be considered part of the worker's wages under RCW 51.08.178. It would be an anomalous result to cover an injured worker while in an vehicle paid for by the employer, while at the same time failing to include the value in the injured worker's time loss rate.

The Department's own WAC 296-14-522, entitled "What does the term 'wages' mean?", states "wages" includes both "gross cash wages paid by the employer for services performed" and "the reasonable value of board, housing, fuel and other consideration of like nature received from the employer" that are part of the contract of hire. WAC 296-14-522(1) and (3), see Appendix, Exhibit 2. WAC 296-14-524, entitled "How do I determine whether an employer provided benefit qualifies as 'consideration of like nature' to board housing and fuel?", defines "other consideration of like nature" as employer provided benefits "objectively critical to protecting the worker's basic health and survival at the time of injury," but in no way suggests "fuel" means heat or warmth or that the test in the WAC applies to define "fuel," or "board" or "housing," for that matter. WAC 296-14-524, see Appendix, Exhibit 3.

Furthermore, the Department argues the non-significant Board decision *Brammer* and the "tentative" Significant Decision in this case should be considered persuasive authority, but *Brammer* is redolent of the self-same "historical inaccuracy" acknowledged by the Department in the *Cockle* decision from Division II of the Court of Appeals, and *Yuchasz* merely recycles the Department's circular arguments. *In re Brammer*, Dckt. No. 06 10641 (February 7, 2007); *In re Yuchasz*, Dckt. No. 12 10803 (February 28, 2013). In addition, unpublished decisions cannot be

cited as authority on appeal, and non-significant decisions from the Board of Industrial Insurance Appeals are analogous and should not be relied upon. General Rule 14.1. Neither *Brammer* nor *Yuchasz* is persuasive.

Of more note is the case law from other jurisdictions cited in the Appellant's Brief, which the Department alleges is irrelevant in light of *Cockle*. Appellant's Brief, 12; Department's Brief, 34. However, as previously stated, the Department's argument is only valid if it is presupposed the Washington Supreme Court strictly defined "fuel" in *Cockle*, which is not the case. As such, the case law regarding the meaning of "fuel" in other jurisdictions cited by the Appellant is persuasive, particularly the *Motheral* case, as the California wage statute defined in that case is more similar than different to the statute at issue here. *Motheral v. Workers' Comp. Appeals Bd.*, 130 Cal.Rptr.3d 677, 679, 199 Cal.App. 4th 148 (2011).

**D. Any Doubts or Ambiguities Must Be Resolved in Favor of Mr. Yuchasz**

The It is well established that "[a]ny doubts and ambiguities in the language of the Industrial Insurance Act must be resolved in favor of the injured worker in order to minimize 'the suffering and economic' loss that may result from work-related injuries." *Harry v. Buse Timber & Sales, Inc.*, 161 Wn.2d 1, 8, 201 P.3d 1011 (2009)(citing RCW

51.12.010; *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001); *Cockle*, 142 Wn.2d at 811.) This is especially true where, as here, the matter at issue is one of first impression, and where interpretive doctrines like *eiusdem generis* are applied restrictively by a government agency in a way that is contrary to the legislative intent behind remedial legislation like the Industrial Insurance Act. In *Silverstreak, Inc. v. Dept. of Labor and Indus.*, 159 Wn.2d 868, 899, 154 P.3d 891 (2007), the Washington Supreme Court made it clear that when *eiusdem generis* is applied restrictively in a way that leaves workers without protection, it is being applied incorrectly.

#### **CONCLUSION**

Excluding vehicle fuel from Mr. Yuchasz's wage calculation violates the Legislature's intent in expressly including "fuel" as a form of in-kind benefit in the wage statute, and violates the Legislative intent to compute wages fairly, to reduce both suffering and economic loss. Accordingly, Mr. Yuchasz respectfully renews his request for reversal of the order of the Superior Court excluding "fuel" from his wage calculation and an award of attorneys' fees and costs.

Respectfully submitted this 17 day of January, 2014.

**THE LAW OFFICE OF WILLIAM D. HOCHBERG**



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Attorney for Appellant

**APPENDIX**

Treasury Regulations, Subchapter A, Sec. 1.132-5 (Excerpted)..... Exhibit 1

WAC 296-14-522..... Exhibit 2

WAC 296-14-524..... Exhibit 3

## Treasury Regulations, Subchapter A, Sec. 1.132-5 (Excerpted): Sec. 1.132-5 Working condition fringes

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(a) *In general*—(1) *Definition*. Gross income does not include the value of a working condition fringe. A “working condition fringe” is any property or service provided to an employee of an employer to the extent that, if the employee paid for the property or service, the amount paid would be allowable as a deduction under section 162 or 167.

(i) A service or property offered by an employer in connection with a flexible spending account is not excludable from gross income as a working condition fringe. For purposes of the preceding sentence, a flexible spending account is an agreement (whether or not written) entered into between an employer and an employee that makes available to the employee over a time period a certain level of unspecified non-cash benefits with a pre-determined cash value.

(ii) If, under section 274 or any other section, certain substantiation requirements must be met in order for a deduction under section 162 or 167 to be allowable, then those substantiation requirements apply when determining whether a property or service is excludable as a working condition fringe.

(iii) An amount that would be deductible by the employee under a section other than section 162 or 167, such as section 212, is not a working condition fringe.

(iv) A physical examination program provided by the employer is not excludable as a working condition fringe even if the value of such program might be deductible to the employee under section 213. The previous sentence applies without regard to whether the employer makes the program mandatory to some or all employees.

(v) A cash payment made by an employer to an employee will not qualify as a working condition fringe unless the employer requires the employee to—

(A) Use the payment for expenses in connection with a specific or pre-arranged activity or undertaking for which a deduction is allowable under section 162 or 167,

(B) Verify that the payment is actually used for such expenses, and

(C) Return to the employer any part of the payment not so used.

(vi) The limitation of section 67(a) (relating to the two-percent floor on miscellaneous itemized deductions) is not considered when determining the amount of a working condition fringe. For example, assume that an employer provides a \$1,000 cash advance to Employee A and that the conditions of paragraph

(a)(1)(v) of this section are not satisfied. Even to the extent A uses the allowance for expenses for which a deduction is allowable under section 162 and 167, because such cash payment is not a working condition fringe, section 67(a) applies. The \$1,000 payment is includible in A's gross income and subject to income and employment tax withholding. If, however, the conditions of paragraph (a)(1)(v) of this section are satisfied with respect to the payment, then the amount of A's working condition fringe is determined without regard to section 67(a). The \$1,000 payment is excludible from A's gross income and not subject to income and employment tax reporting and withholding.

(2) *Trade or business of the employee*—(i) *General*. If the hypothetical payment for a property or service would be allowable as a deduction with respect to a trade or business of an employee other than the employee's trade or business of being an employee of the employer, it cannot be taken into account for purposes of determining the amount, if any, of the working condition fringe.

...

(b) *Vehicle allocation rules*—(1) *In general*—(i) *General rule*. In general, with respect to an employer-provided vehicle, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the availability of the vehicle. For example, assume that the value of the availability of an employer-provided vehicle for a full year is \$2,000, without regard to any working condition fringe (*i.e.*, assuming all personal use). Assume Further that the employee drives the vehicle 6,000 miles for his employer's business and 2,000 miles for reasons other than the employer's business. In this situation, the value of the working condition fringe is \$2,000 multiplied by a fraction, the numerator of which is the business-use mileage (6,000 miles) and the denominator of which is the total mileage (8,000 miles). Thus, the value of the working condition fringe is \$1,500. The total amount includible in the employee's gross income on account of the availability of the vehicle is \$500 (\$2,000–\$1,500). For purposes of this section, the term "vehicle" has the meaning given the term in §1.61–21(e)(2). Generally, when determining the amount of an employee's working condition fringe, miles accumulated on the vehicle by all employees of the employer during the period in which the vehicle is available to the employee are considered. For example, assume that during the year in which the vehicle is available to the employee in the above example, other employees accumulate 2,000 additional miles on the vehicle (while the employee is not in the automobile). In this case, the value of the working condition fringe is \$2,000 multiplied by a fraction, the numerator of which is the business-use mileage by the employee (including all mileage (business and personal) accumulated by other employees) (8,000 miles) and the denominator of which is the total mileage (including all mileage accumulated by other employees) (10,000 miles). Thus, the value of the working condition fringe is \$1,600; the total amount includible in the employee's gross income on account of the availability of the vehicle is \$400 (\$2,000–\$1,600). If, however, substantially all of the use of the automobile by other employees in the employer's business is limited to a certain period, such as the last three months of the

year, the miles driven by the other employees during that period would not be considered when determining the employee's working condition fringe exclusion. Similarly, miles driven by other employees are not considered if the pattern of use of the employer-provided automobiles is designed to reduce Federal taxes. For example, assume that an employer provides employees A and B each with the availability of an employer-provided automobile and that A uses the automobile assigned to him 80 percent for the employer's business and that B uses the automobile assigned to him 30 percent for the employer's business. If A and B alternate the use of their assigned automobiles each week in such a way as to achieve a reduction in federal taxes, then the employer may count only miles placed on the automobile by the employee to whom the automobile is assigned when determining each employee's working condition fringe.

(ii) *Use by an individual other than the employee.* For purposes of this section, if the availability of a vehicle to an individual would be taxed to an employee, use of the vehicle by the individual is included in references to use by the employee.

(iii) *Provision of an expensive vehicle for personal use.* If an employer provides an employee with a vehicle that an employee may use in part for personal purposes, there is no working condition fringe exclusion with respect to the personal miles driven by the employee; if the employee paid for the availability of the vehicle, he would not be entitled to deduct under section 162 or 167 any part of the payment attributable to personal miles. The amount of the inclusion is not affected by the fact that the employee would have chosen the availability of a less expensive vehicle. Moreover, the result is the same even though the decision to provide an expensive rather than an inexpensive vehicle is made by the employer for bona fide noncompensatory business reasons.

(iv) *Total value inclusion.* In lieu of excluding the value of a working condition fringe with respect of an automobile, an employer using the automobile lease valuation rule of §1.61-21(d) may include in an employee's gross income the entire Annual Lease Value of the automobile. Any deduction allowable to the employee under section 162 or 167 with respect to the automobile may be taken on the employee's income tax return. The total inclusion rule of this paragraph (b)(1)(iv) is not available if the employer is valuing the use or availability of a vehicle under general valuation principles or a special valuation rule other than the automobile lease valuation rule. See §§1.162-25 and 1.162-25T for rules relating to the employee's deduction.

(v) *Shared usage.* In calculating the working condition fringe benefit exclusion with respect to a vehicle provided for use by more than one employee, an employer shall compute the working condition fringe in a manner consistent with the allocation of the value of the vehicle under section 1.61-21(c)(2)(ii)(B).

(2) *Use of different employer-provided vehicles.* The working condition fringe exclusion must be applied on a vehicle-by-vehicle basis. For example, assume that automobile Y is available to employee D for 3

days in January and for 5 days in March, and automobile Z is available to D for a week in July. Assume further that the Daily Lease Value, as defined in §1.61-21(d)(4)(ii), of each automobile is \$50. For the eight days of availability of Y in January and March, D uses Y 90 percent for business (by mileage). During July, D uses Z 60 percent for business (by mileage). The value of the working condition fringe is determined separately for each automobile. Therefore, the working condition fringe for Y is \$360 ( $\$400 \times .90$ ) leaving an income inclusion of \$40. The working condition fringe for Z is \$210 ( $\$350 \times .60$ ), leaving an income inclusion of \$140. If the value of the availability of an automobile is determined under the Annual Lease Value rule for one period and Daily Lease Value rule for a second period (see §1.61-21(d)), the working condition fringe exclusion must be calculated separately for the two periods.

(3) *Provision of a vehicle and chauffeur services*—(i) *General rule*. In general, with respect to the value of chauffeur services provided by an employer, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 and 167 if the employee paid for the chauffeur services. The working condition fringe with respect to a chauffeur is determined separately from the working condition fringe with respect to the vehicle. An employee may exclude from gross income the excess of the value of the chauffeur services over the value of the chauffeur services for personal purposes (such as commuting) as determined under §1.61-21(b)(5). See §1.61-21(b)(5) for additional rules and examples concerning the valuation of chauffeur services. See §1.132-5(m)(5) for rules relating to an exclusion from gross income for the value of bodyguard/chauffeur services. When determining whether miles placed on the vehicle are for the employer's business, miles placed on the vehicle by a chauffeur between the chauffeur's residence and the place at which the chauffeur picks up (or drops off) the employee are with respect to the employee (but not the chauffeur) considered to be miles placed on the vehicle for the employer's business and thus eligible for the working condition fringe exclusion. Thus, because miles placed on the vehicle by a chauffeur between the chauffeur's residence and the place at which the chauffeur picks up (or drops off) the employee are not considered business miles with respect to the chauffeur, the value of the availability of the vehicle for commuting is includible in the gross income of the chauffeur. For general and special rules concerning the valuation of the use of employer-provided vehicles, see paragraphs (b) through (f) of §1.61-21.

...

(c) *Applicability of substantiation requirements of sections 162 and 274 (d)*—(1) *In general*. The value of property or services provided to an employee may not be excluded from the employee's gross income as a working condition fringe, by either the employer or the employee, unless the applicable substantiation requirements of either section 274(d) or section 162 (whichever is applicable) and the regulations thereunder are satisfied. The substantiation requirements of section 274(d) apply to an employee even if the requirements of section 274 do not apply to the employee's employer for deduction purposes (such as when the employer is a tax-exempt organization or a governmental unit).

(2) *Section 274(d) requirements.* The substantiation requirements of section 274(d) are satisfied by “adequate records or sufficient evidence corroborating the [employee's] own statement”. Therefore, such records or evidence provided by the employee, and relied upon by the employer to the extent permitted by the regulations promulgated under section 274(d), will be sufficient to substantiate a working condition fringe exclusion.

(d) *Safe harbor substantiation rules—(1) In general.* Section 1.274–6T provides that the substantiation requirements of section 274(d) and the regulations thereunder may be satisfied, in certain circumstances, by using one or more of the safe harbor rules prescribed in §1.274–6T. If the employer uses one of the safe harbor rules prescribed in §1.274–6T during a period with respect to a vehicle (as defined in §1.61–21(e)(2)), that rule must be used by the employer to substantiate a working condition fringe exclusion with respect to that vehicle during the period. An employer that is exempt from Federal income tax may still use one of the safe harbor rules (if the requirements of that section are otherwise met during a period) to substantiate a working condition fringe exclusion with respect to a vehicle during the period. If the employer uses one of the methods prescribed in §1.274–6T during a period with respect to an employer-provided vehicle, that method may be used by an employee to substantiate a working condition fringe exclusion with respect to the same vehicle during the period, as long as the employee includes in gross income the amount allocated to the employee pursuant to §1.274–6T and this section. (See §1.61–21(c)(2) for other rules concerning when an employee must include in income the amount determined by the employer.) If, however, the employer uses the safe harbor rule prescribed in §1.274–6T(a)(2) or (3) and the employee without the employer's knowledge uses the vehicle for purposes other than de minimis personal use (in the case of the rule prescribed in §1.274–6T(a)(2)), or for purposes other than de minimis personal use and commuting (in the case of the rule prescribed in §1.274–6T(a)(3)), then the employees must include an additional amount in income for the unauthorized use of the vehicle.

(2) *Period for use of safe harbor rules.* The rules prescribed in this paragraph (d) assume that the safe harbor rules prescribed in §1.274–6T are used for a one-year period. Accordingly, references to the value of the availability of a vehicle, amounts excluded as a working condition fringe, etc., are based on a one-year period. If the safe harbor rules prescribed in §1.274–6T are used for a period of less than a year, the amounts referred to in the previous sentence must be adjusted accordingly. For purposes of this section, the term “personal use” has the same meaning as prescribed in §1.274–6T (e)(5).

(e) *Safe harbor substantiation rule for vehicles not used for personal purposes.* For a vehicle described in §1.274–6T(a)(2) (relating to certain vehicles not used for personal purposes), the working condition fringe exclusion is equal to the value of the availability of the vehicle if the employer uses the method prescribed in §1.274–6T(a)(2).

(f) *Safe harbor substantiation rule for vehicles not available to employees for personal use other than commuting.* For a vehicle described in §1.274-6T(a)(3) (relating to certain vehicles not used for personal purposes other than commuting), the working condition fringe exclusion is equal to the value of the availability of the vehicle for purposes other than commuting if the employer uses the method prescribed in §1.274-6T(a)(3). This rule applies only if the special rule for valuing commuting use, as prescribed in §1.61-21(f), is used and the amount determined under the special rule is either included in the employee's income or reimbursed by the employee.

(g) *Safe harbor substantiation rule for vehicles used in connection with the business of farming that are available to employees for personal use—(1) In general.* For a vehicle described in §1.274-6T(b) (relating to certain vehicles used in connection with the business of farming), the working condition fringe exclusion is calculated by multiplying the value of the availability of the vehicle by 75 percent.

(2) *Vehicles available to more than one individual.* If the vehicle is available to more than one individual, the employer must allocate the gross income inclusion attributable to the vehicle (25 percent of the value of the availability of the vehicle) among the employees (and other individuals whose use would not be attributed to an employee) to whom the vehicle was available. This allocation must be done in a reasonable manner to reflect the personal use of the vehicle by the individuals. An amount that would be allocated to a sole proprietor reduces the amounts that may be allocated to employees but is otherwise to be disregarded for purposes of this paragraph (g). For purposes of this paragraph (g), the value of the availability of a vehicle may be calculated as if the vehicle were available to only one employee continuously and without regard to any working condition fringe exclusion.

(3) *Examples.* The following examples illustrate a reasonable allocation of gross income with respect to an employer-provided vehicle between two employees:

...

(h) *Qualified nonpersonal use vehicles. (1) In general.* Except as provided in paragraph (h)(2) of this section, 100 percent of the value of the use of a qualified nonpersonal use vehicle (as described in §1.274-5T(k)) is excluded from gross income as a working condition fringe, provided that, in the case of a vehicle described in paragraph (k) (3) through (8) of that section, the use of the vehicle conforms to the requirements of that paragraph.

(2) *Shared usage of qualified nonpersonal use vehicles.* In general, a working condition fringe under paragraph (h) of this section is available to the driver and all passengers of a qualified nonpersonal use vehicle. However, a working condition fringe under this paragraph (h) is available only with respect to the driver and not with respect to any passengers of a qualified nonpersonal use vehicle described in §1.274-5T(k)(2)(ii) (L) or (P). In this case, the passengers must comply with provisions of this section (excluding this paragraph (h)) to determine the applicability of the working condition fringe exclusion. For example, if

an employer provides a passenger bus with a capacity of 25 passengers to its employees for purposes of transporting employees to and/or from work, the driver of the bus may exclude from gross income as a working condition fringe 100 percent of the value of the use of the vehicle. The value of the commuting use of the employer-provided bus by the employee-passengers is includible in their gross incomes. See §1.61–21(f) for a special rule to value the commuting-only use of employer-provided vehicles.

(i) [Reserved]

(j) *Application of section 280F.* In determining the amount, if any, of an employee's working condition fringe, section 280F and the regulations thereunder do not apply. For example, assume that an employee has available for a calendar year an employer-provided automobile with a fair market value of \$28,000. Assume further that the special rule provided in §1.61–21(d) is used yielding an Annual Lease Value, as defined in §1.61–21(d), of \$7,750, and that all of the employee's use of the automobile is for the employer's business. The employee would be entitled to exclude as a working condition fringe the entire Annual Lease Value, despite the fact that if the employee paid for the availability of the automobile, an income inclusion would be required under §1.280F–6(d)(1). This paragraph (j) does not affect the applicability of section 280F to the employer with respect to such employer-provided automobile, nor does it affect the applicability of section 274 to either the employer or the employee. For rules concerning substantiation of an employee's working condition fringe, see paragraph (c) of this section.

(k) *Aircraft allocation rule.* In general, with respect to a flight on an employer-provided aircraft, the amount excludable as a working condition fringe is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the flight on the aircraft. For example, if employee P and P's spouse fly on P's employer's airplane primarily for business reasons of P's employer so that P could deduct the expenses relating to the trip to the extent of P's payments, the value of the flights is excludable from gross income as a working condition fringe. However, if P's children accompany P on the trip primarily for personal reasons, the value of the flights by P's children are includible in P's gross income. See §1.61–21 (g) for special rules for valuing personal flights on employer-provided aircraft.

(l) [Reserved]

(m) *Employer-provided transportation for security concerns—(1) In general.* The amount of a working condition fringe exclusion with respect to employer-provided transportation is the amount that would be allowable as a deduction under section 162 or 167 if the employee paid for the transportation. Generally, if an employee pays for transportation taken for primarily personal purposes, the employee may not deduct any part of the amount paid. Thus, the employee may not generally exclude the value of employer-provided transportation as a working condition fringe if such transportation is primarily personal. If, however, for bona fide business-oriented security concerns, the employee purchases transportation that provides him or her with additional security, the employee may generally deduct the excess of the

amount actually paid for the transportation over the amount the employee would have paid for the same mode of transportation absent the bona fide business-oriented security concerns. This is the case whether or not the employee would have taken the same mode of transportation absent the bona fide business-oriented security concerns. With respect to a vehicle, the phrase "the same mode of transportation" means use of the same vehicle without the additional security aspects, such as bulletproof glass. With respect to air transportation, the phrase "the same mode of transportation" means comparable air transportation. These same rules apply to the determination of an employee's working condition fringe exclusion. For example, if an employer provides an employee with a vehicle for commuting and, because of bona fide business-oriented security concerns, the vehicle is specially designed for security, then the employee may exclude from gross income the value of the special security design as a working condition fringe. The employee may not exclude the value of the commuting from income as a working condition fringe because commuting is a nondeductible personal expense. However, if an independent security study meeting the requirements of paragraph (m)(2)(v) of this section has been performed with respect to a government employee, the government employee may exclude the value of the personal use (other than commuting) of the employer-provided vehicle that the security study determines to be reasonable and necessary for local transportation. Similarly, if an employee travels on a personal trip in an employer-provided aircraft for bona fide business-oriented security concerns, the employee may exclude the excess, if any, of the value of the flight over the amount the employee would have paid for the same mode of transportation, but for the bona fide business-oriented security concerns. Because personal travel is a nondeductible expense, the employee may not exclude the total value of the trip as a working condition fringe.

...

(n) *Product testing*—(1) *In general*. The fair market value of the use of consumer goods, which are manufactured for sale to nonemployees, for product testing and evaluation by an employee of the manufacturer outside the employer's workplace, is excludible from gross income as a working condition fringe if—

- (i) Consumer testing and evaluation of the product is an ordinary and necessary business expense of the employer;
- (ii) Business reasons necessitate that the testing and evaluation of the product be performed off the employer's business premises by employees (*i.e.*, the testing and evaluation cannot be carried out adequately in the employer's office or in laboratory testing facilities);
- (iii) The product is furnished to the employee for purposes of testing and evaluation;

(iv) The product is made available to the employee for no longer than necessary to test and evaluate its performance and (to the extent not exhausted) must be returned to the employer at completion of the testing and evaluation period;

(v) The employer imposes limits on the employee's use of the product that significantly reduce the value of any personal benefit to the employee; and

(vi) The employee must submit detailed reports to the employer on the testing and evaluation. The length of the testing and evaluation period must be reasonable in relation to the product being tested.

....

(o) *Qualified automobile demonstration use—(1) In general.* The value of qualified automobile demonstration use is excludable from gross income as a working condition fringe. "Qualified automobile demonstration use" is any use of a demonstration automobile by a full-time automobile salesman in the sales area in which the automobile dealer's sales office is located if—

(i) Such use is provided primarily to facilitate the salesman's performance of services for the employer; and

(ii) There are substantial restrictions on the personal use of the automobile by the salesman.

...

(p) *Parking—(1) In general.* The value of parking provided to an employee on or near the business premises of the employer is excludable from gross income as a working condition fringe under the special rule of this paragraph (p). If the rules of this paragraph (p) are satisfied, the value of parking is excludable from gross income whether the amount paid by the employee for parking would be deductible under section 162. The working condition fringe exclusion applies whether the employer owns or rents the parking facility or parking space.

(2) *Reimbursement of parking expenses.* A reimbursement to the employee of the ordinary and necessary expenses of renting a parking space on or near the business premises of the employer is excludable from gross income as a working condition fringe, if, but for the parking expense, the employee would not have been entitled to receive and retain such amount from the employer. If, however an employee is entitled to retain a general transportation allowance or a similar benefit whether or not the employee has parking expenses, no portion of that allowance is excludable from gross income under this paragraph (p) even if it is used for parking expenses.

(3) *Parking on residential property.* With respect to an employee, this paragraph (p) does not apply to any parking facility or space located on property owned or leased by the employee for residential purposes.

(4) *Dates of applicability.* This paragraph (p) applies to benefits provided before January 1, 1993. For benefits provided after December 31, 1992, see §1.132-9.

(q) *Nonapplicability of nondiscrimination rules.* Except to the extent provided in paragraph (n)(3) of this section (relating to discriminating classifications of a product testing program), the nondiscrimination rules of section 132 (h)(1) and §1.132-8 do not apply in determining the amount, if any, of a working condition fringe.

(r) *Volunteers—(1) In general.* Solely for purposes of section 132(d) and paragraph (a)(1) of this section, a bona fide volunteer (including a director or officer) who performs services for an organization exempt from tax under section 501(a), or for a government employer (as defined in paragraph (m)(7) of this section), is deemed to have a profit motive under section 162.

...

(s) *Application of section 274(a)(3)—(1) In general.* If an employer's deduction under section 162(a) for dues paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose is disallowed by section 274(a)(3), the amount, if any, of an employee's working condition fringe benefit relating to an employer-provided membership in the club is determined without regard to the application of section 274(a) to the employee. To be excludible as a working condition fringe benefit, however, the amount must otherwise qualify for deduction by the employee under section 162(a). If an employer treats the amount paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose as compensation under section 274(e)(2), then the expense is deductible by the employer as compensation and no amount may be excluded from the employee's gross income as a working condition fringe benefit. See §1.274-2(f)(2)(iii)(A).

(2) *Treatment of tax-exempt employers.* In the case of an employer exempt from taxation under subtitle A of the Internal Revenue Code, any reference in this paragraph (s) to a deduction disallowed by section 274(a)(3) shall be treated as a reference to the amount which would be disallowed as a deduction by section 274(a)(3) to the employer if the employer were not exempt from taxation under subtitle A of the Internal Revenue Code.

...

(t) *Application of section 274(m)(3)—(1) In general.* If an employer's deduction under section 162(a) for amounts paid or incurred for the travel expenses of a spouse, dependent, or other individual accompanying an employee is disallowed by section 274(m)(3), the amount, if any, of the employee's working condition fringe benefit relating to the employer-provided travel is determined without regard to the application of section 274(m)(3). To be excludible as a working condition fringe benefit, however, the amount must otherwise qualify for deduction by the employee under section 162(a). The amount will

qualify for deduction and for exclusion as a working condition fringe benefit if it can be adequately shown that the spouse's, dependent's, or other accompanying individual's presence on the employee's business trip has a bona fide business purpose and if the employee substantiates the travel within the meaning of paragraph (c) of this section. If the travel does not qualify as a working condition fringe benefit, the employee must include in gross income as a fringe benefit the value of the employer's payment of travel expenses with respect to a spouse, dependent, or other individual accompanying the employee on business travel. See §§1.61-21(a)(4) and 1.162-2(c). If an employer treats as compensation under section 274(e)(2) the amount paid or incurred for the travel expenses of a spouse, dependent, or other individual accompanying an employee, then the expense is deductible by the employer as compensation and no amount may be excluded from the employee's gross income as a working condition fringe benefit. See §1.274-2(f)(2)(iii)(A).

(2) *Treatment of tax-exempt employers.* In the case of an employer exempt from taxation under subtitle A of the Internal Revenue Code, any reference in this paragraph (t) to a deduction disallowed by section 274(m)(3) shall be treated as a reference to the amount which would be disallowed as a deduction by section 274(m)(3) to the employer if the employer were not exempt from taxation under subtitle A of the Internal Revenue Code.

[T.D. 8256, 54 FR 28608, July 6, 1989, as amended by 8451, 57 FR 57669, Dec. 7, 1992; T.D. 8457, 57 FR 62196, Dec. 30, 1992; T.D. 8666, 61 FR 27006, May 30, 1996; T.D. 8933, 66 FR 2244, Jan. 11, 2001]

## **WAC 296-14-522**

### **What does the term "wages" mean?**

The term "wages" is defined as:

(1) The gross cash wages paid by the employer for services performed. "Cash wages" means payment in cash, by check, by electronic transfer or by other means made directly to the worker before any mandatory deductions required by state or federal law. Tips are also considered wages but only to the extent they are reported to the employer for federal income tax purposes.

(2) Bonuses paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation.

(3) The reasonable value of board, housing, fuel and other consideration of like nature received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.

Exception: Payments for items other than board, housing, fuel or other consideration of like nature made by the employer to a trust fund or other entity for fringe benefits do not constitute wages.

[Statutory Authority: RCW [51.04.010](#), [51.04.020](#) and [142 Wn.2d 801 \(2001\)](#). WSR 03-11-035, § 296-14-522, filed 5/15/03, effective 6/15/03.]

## **WAC 296-14-524**

# **How do I determine whether an employer provided benefit qualifies as "consideration of like nature" to board, housing and fuel?**

To qualify as "consideration of like nature" the employer provided benefit must meet all of the following elements:

(1) The benefit must be objectively critical to protecting the worker's basic health and survival at the time of injury or date of disease manifestation.

(a) The benefit must be one that provides a necessity of life at the time of injury or date of disease manifestation without which employees cannot survive a period of even temporary disability.

(b) This is not a subjective determination. The benefit must be one that virtually all employees in all employment typically use to protect their immediate health and survival while employed.

(c) The benefit itself must be critical to protecting the employee's immediate health and survival. The fact that a benefit has a cash value that can be assigned, transferred, or "cashed out" by an employee and used to meet one or more of the employee's basic needs is not sufficient to satisfy this element.

(2) The benefit must be readily identifiable. The general terms and extent of the benefit must be established through the employer's written policies, or the written or verbal employment contract between the employer and worker (for example, a collective bargaining agreement that requires the employer to pay a certain sum for the employee's health insurance).

(3) The monthly amount paid by the employer for the benefit must be reasonably calculable (for example, as part of the employment contract, the employer agrees to pay three dollars for each hour worked by the employee for that person's health insurance).

Examples of benefits that qualify as "consideration of like nature" are medical, dental and vision insurance provided by the employer.

Examples of benefits that do **not** qualify as "consideration of like nature" are retirement benefits or payments into a retirement plan or stock option, union dues and life insurance provided by the employer.

[Statutory Authority: RCW [51.04.010](#), 51.04.020 and 142 Wn.2d 801 (2001). WSR 03-11-035, § 296-14-524, filed 5/15/03, effective 6/15/03.]

**CERTIFICATE OF MAILING**

*Yuchasz v. Dep't of Labor and Indus.*  
Court of Appeals Division I No. 70724-8-I

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I certify that a copy of the document(s) attached hereto was mailed,  
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