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STATE OF WASHINGTON  
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NO. 34504-8-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Appellant,

v.

CRYSTAL C. ENGELHART MALANG,

Respondent.

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**APPELLANT'S BRIEF**

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## I. NATURE OF THE CASE

This workers' compensation case presents a first impression question regarding how to translate gross business receipts into a wage for a self-employed worker who has elected industrial insurance coverage under RCW Title 51. Monthly wage as of the date of injury is important under RCW Title 51 because the monthly wage determines the rate of wage-loss compensation, as well as other benefits. The word "wage" is not defined in RCW 51.08.178, which provides some formulas for computing the monthly wage. While this provision explains how to compute the monthly wage for most employees, it does not provide a formula to translate the self employment income into wages.

Subsection 4 of RCW 51.08.178 directs that in some circumstances where the wage is not fixed and not otherwise subject to determination under the formulas of the first two subsections of RCW 51.08.178, the monthly "wage" must be "reasonably and fairly determine[d]." Appellant, Department of Labor and Industries (Department) contends that, except in exceptional circumstances not here present, under RCW 51.08.178(4), to "reasonably and fairly" determine the monthly wage of a self-employed person, the law requires that one begins translating self employment income into a wage equivalent by first considering the *net* profit, after deducting ordinary out-of-pocket business expenses. The Department

appeals a wage determination by the superior court that treated all of Malang's *gross* business receipts as wages and thereby reversed the decisions of the Department and the Board of Industrial Insurance Appeals (Board) that had used an adjusted *net* profit formula to determine the wage of Crystal Engelhart Malang (Malang) for purposes of RCW 51.08.178.

On the date of her injury, Malang was a self-employed real estate agent working as an independent contractor with broker, Crescent Realty (Crescent). A self-employed person is a unique type of worker — acting both as her own employee and as her own employer. Malang was not receiving from her self-owned business a salary, and she was not receiving from her business any discrete amounts of money that could be deemed to be a wage in the ordinary sense of the word. The Legislature has not provided a formula to translate business income of this special type of worker into wages, leaving that to be done under subsection (4) of RCW 51.08.178 under such method as is “reasonabl[e] and fair[.]”

During the eleven months prior to Malang's injury at the end of November 2001, Crescent distributed to Malang \$65,729 in commissions (gross receipts for her business), from which, in reporting her individual income to the Internal Revenue Service (IRS), Malang deducted her business expenses of \$14,121, to derive a net business profit of \$51,608 during tax year 2001.

To determine the reasonable value of the wage-equivalent that Malang derived from her activities in self employment, the Department and the Board correctly translated Malang's gross business income from self employment into "wages" by adding her reported capital depreciation allowance (the one business expense that was not an actual out-of-pocket expense) of \$1,675 to her reported net business profit of \$51,608 and determined her 2001 "wages" to be \$53,283 or \$4,843.91 per month for the eleven months that she worked in 2001, immediately prior to her November 29, 2001 on the job injury. The superior court erroneously concluded, on the other hand, that her monthly wage must be calculated using Malang's 2001 gross business receipts of \$65,729, with no deduction for any business expenses.

## **II. ASSIGNMENT OF ERROR AND ISSUE**

### **A. Assignment Of Error**

The superior court erred in granting summary judgment to Malang and in awarding attorney fees. CP at 77-79.<sup>1</sup>

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<sup>1</sup> By separate order, the superior court ordered the Department to pay \$11,330 in reasonable attorney fees, plus costs in the amount of \$200.00. Supplemental Clerk's Papers, designated August 28, 2006 (Copies of documents attached as Appendix A). *See* RCW 51.52.130 (fourth unnumbered sentence). The Department does not contest the dollar amount of the awards of attorney fees and costs, but of course if this Court reverses the underlying summary judgment decision, then the award of attorney fees and costs will also be automatically reversed.

**B. Issue**

In 2001, Malang worked with Crescent as a self-employed real estate agent and independent contractor. Crescent deducted from Malang's commissions its own commissions and certain other direct broker expenses and a transaction fee. Crescent paid the remainder to Malang. In 2001 Crescent issued a 1099 IRS form showing Malang's miscellaneous income for 2001 to be \$65,728.80, which she in turn reported to the IRS as gross receipts or sales from self employment on her IRS form 1040, Schedule C. From her gross receipts or sales she deducted her own business expenses and reported a net profit from self employment of \$51,608 for 2001.

Did the Board of Industrial Insurance Appeals "reasonably and fairly" translate Malang's income from self employment into a wage equivalent within the meaning of RCW 51.08.178(4) when it used the sum of — 1) her 2001 net profits from her self employed real estate business as reflected on her IRS Schedule C and 2) the automobile depreciation (her only business expense that was not an actual out-of-pocket expense) she claimed on her IRS Schedule C — and then divided that sum by 11 (the number of months in 2001 that she worked in self employment prior to her November 29 injury) to determine the amount of her 2001 average monthly wage?

### III. STATEMENT OF THE CASE

#### A. Procedural Background

##### 1. Department Adjudication

Malang is a real estate agent with a long-term affiliation as an independent contractor with Crescent Realty. Tr. 11/30/04 Malang at 10-11, Exs. 21, 22.<sup>2</sup> Malang elected coverage under the Workers Compensation Act. Tr. 11/30/04 Malang at 31; RCW 51.12.110 (elective adoption). On November 29, 2001, while in the course of her activities as a real estate agent, Malang fell and injured her right ankle and neck. Tr. 11/30/04 Malang at 13-14. The Department received her claim on December 19, 2001, and allowed the claim on March 4, 2002. Certified Appeal Board Record (CABR) at 8, 43.

On May 11, 2004, the Department issued an order that set Malang's "monthly wage" under RCW 51.08.178. Consistent with Department policy, the Department used Malang's net profit (as opposed to gross receipts) plus vehicle depreciation from her 2001 income tax return to determine her annual income, then divided the annual income derived from self employment by (12) months to determine her average

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<sup>2</sup> The evidence in this case is contained in the Certified Appeals Board Record (CABR). This brief refers to each witness's testimony by the witness's surname and the page number of the transcript of the hearing or perpetuation deposition where the testimony was given.

monthly wage. Thus, the Department, recognizing that a self-employed person is both her own employer and her own employee, determined her monthly wage under RCW 51.08.178(4) by adjusting her gross income from her self-employment. The Department thus translated her business earnings into wages and set her average monthly wage at \$4,440.25, single with no children. CABR at 44, 53-54.

**2. Board Proceedings**

**a. Proceedings Before Industrial Appeals Judge**

Malang appealed the Department's wage-computation order to the Board. CABR at 49-54. She contended in briefing to the Industrial Appeals Judge (IAJ) that her date-of-injury wage for purposes of RCW 51.08.178 should be calculated simply by using her gross business receipts as reported by Crescent on her 2001 IRS Form 1099 Miscellaneous Income, with no deductions for any of her business expenses. CABR at 89-92; 75-84. Malang thus argued, in the alternative: 1) categorically, that none of her personal business expenses should be deducted from the miscellaneous income that Crescent paid her because there is no express language in RCW 51.08.178 which permits the Department to deduct expenses from income for any category of worker, self-employed or not; and 2) that her expenses were "discretionary"

business decisions that she made in connection with her real estate agent activities. *Id.*<sup>3</sup>

The Department countered that, consistent with longstanding Department policy, Board precedent, and legislative intent, self-employed workers are unique for purposes of wage computation under RCW 51.08.178. Self-employed workers are unique in that they are at the same time their own employer and employee. The Department argued that its net-income-plus-depreciation formula most reasonably and fairly translated Malang's income from self employment in a way that most accurately reflected her lost wage capacity — income from her labor that she used to live on day to day — at the time of her November 29, 2001 injury. CABR at 107–10.

Based upon the evidence and testimony presented and the briefing submitted, the IAJ issued a proposed decision. CABR at 39-45. In this proposed decision the IAJ found: “For purposes of the [Department] order setting the claimant’s rate of time-loss compensation benefits, the Department took the claimant’s net profit and loss in the amount contained in Schedule C attached to the claimant’s U.S. Individual Income Tax Return for 2001, and added to that the amount shown for depreciation on

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<sup>3</sup> The superior court adopted as its rationale only the first of these two alternative theories (CP at 77-79), and this Department brief addresses only the superior court rationale.

Schedule C, and came up with total earnings for 2001.” CABR at 45, Finding of Fact 4.

The IAJ agreed with the Department that its formula used to translate Malang’s self employment gross business receipts into wages was the correct formula under RCW 51.08.178(4). CABR at 43, 45, IAJ’s proposed Conclusion of Law 2. However, the IAJ proposed that the May 11, 2004 order be reversed and remanded “to the Department to calculate the claimant’s rate of time-loss compensation benefits utilizing the same formula as the Department used before, but directed that the commissions and expenses be taken from the commissions that she generated during the 12-month period beginning with November 29, 2000 through November 28, 2001. . . ” *Id.* Conclusion of Law 3.

**b. Board’s Decision And Order**

Malang petitioned the Board for review of the proposed decision, again claiming that the \$65,729 in gross receipts paid to her by Crescent more accurately reflected her date-of-injury wage earning capacity. CABR at 16-25 (arguing that all of the miscellaneous income received from Crescent — not her employer — was somehow wages despite the lack of any evidence that she — as her own employer — ever paid herself a wage). A majority of the Board issued a Decision and Order that, under more refined legal analysis than that in the IAJ’s proposed decision, again

agreed with the Department's adjusted net income approach. CABR at 1-12.

The Board's Decision and Order began its analysis by explaining that wage determination under RCW 51.08.178 focuses on earning capacity but only "*demonstrable* earning capacity reflected in *actual earnings or compensation at some particular point or during some particular period*, and not mere hypothetical or potential earning capacity." CABR at 3. Next, the Board explained (discussing a number of prior Board significant decisions) that individual income tax returns are sometimes, but not always, the key to determining earning capacity of sole proprietors, so long as the returns allow one to "fairly and reasonably" determine that earning capacity. CABR at 4-5; *see also* RCW 51.08.178(4).

Quoting from a prior Board significant decision that relied in part on a South Carolina appellate court decision, the Board explained that using gross receipts or sales for a sole proprietor is misleading "because it may include paid or reimbursed business expenses that are not properly considered as an element of total earnings." CABR at 5 (Decision and Order relying in part on *Stephen v. Avins Constr. Co.*, 478 S.E.2d 74 (S.C. App. 1996) and cases cited therein). Then the Board noted that, like other self-employed persons, Malang (unlike hourly wage-earners who are not

at the same time their own employees and their own employers) “controls the portion of her gross proceeds available for her own use in contrast to that portion of her gross income employed by her for business operating expenses.” CABR at 5.

The Board next explained, in analysis that is pivotal to its conclusion that a net-income method must be used to translate Malang’s gross business receipts or sales, i.e., her commissions, into the equivalent of wages. The Board thus explained its view that paid or reimbursed business expenses that generate income are not themselves part of income for purposes of the wage translation calculation:

The fact that a cost or expenditure reported on IRS Schedule C is controllable or discretionary, while a factor to consider, does not necessarily alone convince us that the cost or expenditure should be “added back in” to Ms. Malang’s Schedule C reported net profit to establish her earnings or wage-equivalent under RCW 51.08.178. The amount of the cost or expenditure item may have been controllable by Ms. Malang to different degrees. We are also aware, however, as emphasized by Mr. Hallett, [the Department’s CPA expert witness] that the level of expenditures or costs for certain items by Ms. Malang likely was expected to, and indeed did, have a corresponding “impact . . . on other items on that form, including gross receipts.” Tr. 11/30/04 Hallett at 77. *For instance, Mr. Hallett testified that the type of automobile driven or the amount of money spent on advertising is generally expected to have a corresponding effect on the income side of the business expenditure: business income equation.* Mr. Hallett’s point is well-taken. Some expenditure or cost items, if added “back in” to Line 31 Schedule C reported net profit, would result in an

inaccurate reflection of lost earning capacity or wages for purposes of RCW 51.08.178. *Adding some items back in to net profit would artificially inflate actual earning capacity or wages, because without the particular expenditure Ms. Engelhart Malang would not have had the earning capacity reflected in the reported gross or the reported net profit.* This underscores the importance of the point we made in [*In re Wesley Steele*, Dckt. No. 03 16476, 2005 WL 1658440 (April 25, 2005)] — that use of a gross value is problematic because it may include paid or reimbursed business expenses that are not properly considered as an element of total earnings.

CABR at 6 (Emphasis added).

Consistent with this analysis, the Decision and Order concluded that Malang's date-of-injury monthly wage was yielded by dividing by eleven (months) the sum of: 1) her net profits found on the 2001 Schedule at C, Line 31 and 2) the vehicle depreciation figure (as noted, the only expense figure not representing out-of-pocket costs) of \$1,675 that Malang had claimed to the IRS for 2001. CABR 1-12. Using this method, the Board established Malang's monthly wages at the time of injury at \$4,843.91. *Id.*<sup>4</sup>

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<sup>4</sup>. The only differences between the Department's Order, the IAJ's PD&O and the Board's Decision and Order were which months and how many months to use to determine the average monthly wage and the earnings for those months. The Department considered only Ms. Malang's 2001 income from self employment but averaged that amount over 12 months, even though she was injured at the end of November and therefore was unable to work in December 2001. The IAJ agreed the self employment income should be averaged over 12 months but added to the sum of self employment income, Ms. Malang's December 2000 self employment income. The Board's decision, with which the Department accepts and defends in this appeal, averaged her 2001 self-employment income over the 11 months she actually worked in self employment during 2001.

### 3. Superior Court Proceedings

Malang appealed to Pierce County Superior Court, where Malang moved for summary judgment. Supplemental Clerks Papers (*See* App.A). The trial court adopted Malang's gross income theory for calculating sole proprietor wage under RCW 51.08.178, and therefore granted her motion, reversing the Board and Department decisions. CP at 77-79.<sup>5</sup> The Department appealed to this Court.

#### B. Facts

Malang has worked as an independent real estate agent since 1979. Tr. 11/30/04 Malang at 10. She first affiliated with Crescent Realty in 1987, and Crescent has provided her with brokerage services continuously since then. Tr. 11/30/04 Malang at 11. Each year, she has re-negotiated with Crescent the amount of the commission split between Crescent and

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<sup>5</sup> Begging the question before the court — i.e., How is a self-employed worker's gross business income translated into "wages"? — the trial court simply assumed that gross business income is "wages" (not offering any explanation how money paid by Crescent (not her employer) somehow translated in its entirety into "wages" paid by her actual employer (i.e., herself as business entity):

In determining an injured worker's "wages" and "monthly wages" under RCW 51.08.178, the Act does not authorize the Department . . . or the Board . . . to deduct, from the wages an injured worker was actually earning and receiving at the time of injury, the worker's expenses related to the production of such wages. Consequently, the Board's deduction from plaintiff's commissions — i.e., her actual wages — of expenses the Board termed "necessary to, or primarily furthering, the generation of the gross income reported," was unlawful.

CP at 78 (p. 2 of Summary Judgment Order).

herself.<sup>6</sup> Tr. 11/30/04 Malang at 12-13; Tr. 11/30/04 Hallett at 65-66, Ex. 22.

Under the 2001 agreement, all commissions initially belong to Crescent (as broker), who tenders Malang's (the agent's) split after Crescent deducts its commissions and expenses. Tr. 11/30/04 Malang at 23, 40, Ex. 22. A total of \$15,206 represented Crescent's portion of the commissions generated from the services Malang rendered in 2001. Tr. 11/30/04 Malang at 14, Ex. 22. Subject to its \$15,206 annual guarantee, Crescent retained fifty percent of the net commission actually received by Crescent for each closed property transaction in which Malang was the "listing agent," and Crescent agreed to compensate her fifty percent of the net commissions actually received by Crescent for each closed property transaction in which Malang was the "selling agent." Tr. 11/30/04 Malang at 14, Exs. 4-12, 22. The agreement also provided that, in addition to its other expenses, Crescent was entitled to a \$150 transaction fee for each of the first 15 transactions, subject to a \$2,000 maximum. Tr. 11/30/04 Malang at 14; Ex. 22.

The first commission transaction under her 2001 Commission Agreement occurred on January 22, 2001, when she received a

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<sup>6</sup> The Split Commission Agreement refers to Malang as a "sales associate." In her testimony she refers to her position as "real estate agent." For purposes of this case, these titles describe the same work.

commission for a referral. Tr. 11/30/04 Malang at 29, Exs. 3, 5. The last transaction under this agreement was recorded on December 26, 2001. Ex. 3.<sup>7</sup> According to the summary that Crescent Realty prepared to capture Malang's 2001 commissions, Crescent received \$87,051.75 in commissions from her 2001 activities as an independent contractor. From this amount, Crescent deducted \$15,883.16 in Broker commissions, and \$5,439.79 in Broker Expenses.<sup>8</sup> Crescent distributed commissions to Malang in the amount of \$65,728.80 during tax year 2001. Tr. 11/30/04 Malang at 28, Exs. 3, 20.

On her United States Individual Tax Return for 2001 (IRS 1040 form) Malang reported \$51,608 in net business income on Line 31 of Schedule C and on Line 12 of her IRS 1040 form. Ex. 20. According to Malang, these deductions represented "business choices that I make to

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<sup>7</sup> For purposes of reported income for tax purposes, Crescent included one commission transaction from the Commission Agreement executed in 2000. The January 3, 2001 transaction is under the previous split arrangement. Tr. 11/30/04 Malang at 25; Ex. 3.

<sup>8</sup> In addition to the \$150 per transaction fee Crescent charged on each of Malang's transactions, Crescent recovered other direct costs such as its advertising in publications such as "Harmon Homes," "Realty Review," and the "Tacoma New Tribune;" it also deducted the cost to post the "for sale" sign and information sheet box at the property. Crescent captured its phone expenses, certain taxes and fees, and Exceptions and Omissions Insurance premiums associated with each property transaction that closed. Ex. 4-17 reveal the nature and amount of the Broker's costs for each of Malang's 2001 commission transactions. Ex. 4-17. Crescent calculated Malang's commission by first deducting from the gross commission for disbursement Crescent's expenses (which also included the \$150 per transaction fee). What remained is called the Assoc. Share of Commissions, which was then split between the Broker and the Associate according to the terms of the split agreement. See Ex. 4-12.

expand my business.” Tr. 11/30/04 Malang at 32. She reported the following personal business expenses on her Schedule C that year, which she deducted from her gross receipts —

Gross Receipts or sales from 2001 Form 1099		\$65,729
Car & Truck Expenses	\$4,692	
Depreciation	\$1,675	
Insurance (other than health)	\$590	
Legal & Professional Services	\$225	
Supplies	\$2,272	
Taxes & Licenses	\$112	
Travel	\$ 480	
Meals & Entertainment	\$1,219	
Other Expenses 1. Telephone \$ 961 2. Internet Access \$1,020 3. Dues \$ 855 4. Misc. \$20	\$2,856	
Total expenses before expenses for business use of home	(\$14,121)	\$14,121
Net Profit		\$51,608

In her testimony, Malang offered no explanation about her business deductions for 2001, but instead focused on the specifics of her business expenses from 2000, testifying as to 2000 that she could have driven a less expensive car or could have chosen to advertise less.

Tr.11/30/04 Malang at 32. She testified further that in 2000 the insurance deduction that she claimed on Schedule C represented her auto and office insurance that was separate and apart from the errors and omissions insurance provided by Crescent. Tr. 11/30/04 Malang at 33-34. She stated that the deduction for legal and professional services represented what it cost to have her tax return prepared; her office expenditures represented her purchases of office equipment. Tr. 11/30/04 Malang at 34. The deduction she took for meals and entertainment represented a business decision on her part. Tr. 11/30/04 Malang at 34. She described the "other expenses" reflected in her 2000 Schedule C as "Appreciation, gifts for my clients, things I contribute to in the community." Tr. 11/30/04 Malang at 34-35. However, on her Schedule C she identified these "other expenses" as Internet access, Dues and Telephone." Ex. 19.

The Department's expert Charles Hallett, a licensed CPA, possesses a special expertise in financial arrangements and taxation of businesses including various real estate companies and self employed real estate agents. Tr. 11/30/04 Hallett at 48. He explained that there are two models that are on opposite ends of the spectrum of broker-agent commission agreements in the real estate industry. Tr. 11/30/04 Hallett at 65-67.

At one extreme is the "Century 21 model." Tr. 11/30/04 Hallett at 66. Under this model the company retains a higher percentage of the commission and covers more of the agents' expenses, resulting in a smaller percentage of the commission paid to the individual agent. Tr. 11/30/04 Hallett at 66. At the other extreme is the "RE/MAX model." In this model the sales agents are more experienced and are able to negotiate a smaller broker split and the self-employed agent assumes more of her own business costs and expenses. Tr. 11/30/04 Hallett at 66-67. CPA. Hallett noted that arrangements vary greatly: "I don't think any two companies do it exactly the same." Tr. 11/30/04 Hallett at 65. Reviewing Malang's split agreements with Crescent, CPA Hallett concluded that the Malang/Crescent agreement fell between the two extremes. Tr. 11/30/04 Hallett at 65 -67.

CPA Hallett reviewed Malang's 2001 Schedule C and personal income tax return. He acknowledged that some of the reported expenditures appearing on her Schedule C as business expenses were controllable and represented discretionary business decisions made by Malang. Tr. 11/30/04 Hallett at 75-77. However, CPA Hallett made the common sense observation that the level of these so-called discretionary expenditures or costs are likely to, and, in his opinion, indeed did, have a corresponding positive "impact ... on other items on that form including

gross receipts.” Tr. 11/30/04 Hallett at 77. Some examples he gave were: 1) that the type of car an agent drives affects the kind of clientele she may attract; and 2) the amount the agent spends on advertising is likely to directly correlate to an increase in gross income. Tr. 11/30/04 Hallett at 77. CPA Hallett opined that if these kinds of expenditures were added back into Malang’s net profit from self employment, her “earning capacity” would be inflated. Tr. 11/30/04 Hallett at 52.

In support of this point, CPA Hallett testified that data is available in the real estate industry that compares business expenditures on various items with gross income generated. Tr. 11/30/04 Hallett at 75. One such source is the Association of Realtors internet website on which is posted average expenses that different realtors incur at different levels of income. Tr. 11/30/04 Hallett at 92. CPA Hallett testified that the business expenditures reported by Malang on her 2001 Schedule C were in line with her reported self-employment income, when her reported expenses and income were compared against the data regarding reported expense-to-income ratio for other realtors. Tr. 11/30/04 Hallett at 92.

As noted above, the Department and the Board agreed that for purposes of wage calculation under RCW 51.08.178(4), net income, not gross receipts or sales, most “reasonably and fairly” reflects Malang’s lost “earning capacity” — her loss of the “wages” on which she had been

living. Thus, the Department and Board both concluded that the most fair and reasonable method to capture the equivalent of wages was to begin with her net profit from her 2001 Schedule C and then add back into the net profit those deductions that did not represent an out-of-pocket expense. In Malang's case, her federal tax depreciation deduction — an accounting fiction that does not represent an out-of-pocket expenditure — was the only item from her business expenses that needed to be added into her net profit to best determine her actual 2001 earning capacity. Using this adjusted net profit for the tax year 2001, the Board concluded that the best way to translate this annual income into an equivalent of a monthly wage was to divide the adjusted net by the 11 months that Malang worked in 2001 before her industrial injury. CABR at 9-10.

#### IV. STANDARD OF REVIEW

Review of superior court decisions in workers' compensation cases is under the ordinary standard for civil cases. RCW 51.52.140; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). This case requires that this Court review the superior court's summary judgment ruling that construed RCW 51.08.178. Statutory construction is a question of law reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

In determining the meaning of a statute, this Court is required to first look to the relevant statutory language. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). The court must give words in a statute (here, the term “wage” and the phrase “fairly and reasonably” in RCW 51.08.178) their plain and ordinary meaning unless a contrary intent is evidenced in the subject statute or from related provisions which disclose legislative intent about the provision in question. *Dep't of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). A statute that is clear on its face is not subject to statutory construction, and this Court must “simply apply it.” *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993).

The provisions of Washington's Industrial Insurance Act are “liberally construed.” RCW 51.12.010; *see also Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1993). This rule of construction, however, does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997).

A court should not, under the guise of statutory construction, distort a statute's meaning in order to make it conform to the court's own

views of sound social policy. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999); *see also Rhoad v. McLean Trucking, Dep't of Labor & Indus.*, 102 Wn.2d 422, 425-26, 686 P.2d 483 (1984) (“a court may not read into a statute those things which it conceives the Legislature may have left out unintentionally”); *State v. Halsten*, 108 Wn. App. 759, 764, 33 P.3d 751 (2001) (“[t]he drafting of a statute is a legislative, not a judicial function”). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Comm. v. Pub. Disclosure Com'n*, 133 Wn.2d at 243.

Department and Board interpretations of the Industrial Insurance Act are entitled to great deference, and the courts “must accord substantial weight to the agenc[ies’] interpretation of the law.” *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (recognizing that deference is due the interpretations of both the Department and Board).<sup>9</sup>

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<sup>9</sup> In the administrative and superior court proceedings below, Malang asserted that the Department and Board decisions were ultra vires, claiming that the Department and Board lacked authority to interpret RCW 51.08.178 in the way that they did here. This contention is without any merit. In fact, numerous court decisions, including *Littlejohn* and *Ackley-Bell*, hold that interpretations of RCW Title 51 by both the Department and the Board are accorded deference. The Board and Department interpretations here of RCW 51.08.178(4)'s “wage” and “reasonably and fairly determine” language are entitled to deference.

## V. KEY STATUTORY PROVISION RCW 51.08.178

RCW 51.08.178<sup>10</sup> guides the determination of the “monthly wages the worker was receiving from all employment at the time of injury.” This

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<sup>10</sup> RCW 51.08.178 (set forth in full in Appendix B) provides in relevant part as follows:

(1) For purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker’s wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury [by multipliers depending on the number of days-per-week employed]

The term “wages shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker’s employment is exclusively seasonal in nature or (b) the worker’s current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant’s employment pattern.

(3) [Bonuses are included in some circumstances]

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

determination of wages at time of injury generally controls the industrial insurance compensation rate for death, permanent total disability (pension), temporary total disability (time loss), and temporary partial disability. See RCW 51.32.050, .060, .090. The term, “wages,” is not itself defined under RCW Title 51. The meaning of the undefined term, “wages,” along with the meaning of the subsection (4) phrase, “reasonably and fairly determined,” are the focal points of this case.

Since 1971, for regularly employed workers on a fixed hourly wage, “monthly wage” has been computed under the mechanical formula of subsection (1) of RCW 51.08.178. For workers whose wages are not fixed by the hour or month or otherwise, and who are employed only intermittently, wages are computed under the 12-month averaging scheme of subsection (2) of RCW 51.08.178.

Finally, subsection (4) of RCW 51.08.178 applies in those situations where neither subsection (1) or (2) reasonably and fairly compute the wage of the injured worker. Subsection (4) provides as follows:

*In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.*

RCW 51.08.178(4) (Emphasis added). The bolded language effectively provides that where the wage computation formulas of subsections (1) and (2)

of RCW 51.08.178 do not apply, as here, then “wage” is to be computed under a method that “reasonably and fairly” determines it. Thus, this case focuses on the provision of subsection (4) that provides for a determination of “wages” — here, for a self-employed worker — based on what is “reasonabl[e] and fair[.]”

## VI. SUMMARY OF ARGUMENT

In RCW 51.08.178, the Legislature provided some formulas for determining “monthly wages,” but the Legislature has not defined the base term, “wages.” None of the formulas articulated in RCW 51.08.178 apply to Malang, a self-employed real estate agent who generated income by means of commissions and whose business incurred a variety of expenses necessary to generating those commissions. The guiding principle found in RCW 51.08.178 is that the method employed to translate a self-employed individual’s gross business receipts into a wage equivalent must be one that “reasonably and fairly” determines her lost earning capacity.

The purpose of any wage determination under RCW 51.08.178 is to determine the “lost earning capacity” of an injured worker based on the worker’s past earnings that were consideration for labor performed and were used by the worker to live. It was “reasonabl[e] and fair[.]” for the Department and the Board to use a **net** income approach to translate Malang’s gross receipts from self employment into wage or “lost earning

capacity.” It is not “reasonable and fair” for Malang and the superior court to consider her **gross receipts or sales** synonymously as a wage. For a self-employed person, it is critical to keep in mind that the same person is both worker and employer. As employer, the person incurs certain expenses in order to generate income. The receipts that are used to pay those expenses, while coming to the self-employed person’s hands as the employer’s gross receipts at some point, are not reflective of the sole proprietor’s earning capacity. Such receipts cannot be realistically viewed as wage payments from the business. Just as the hourly wage earner at a large factory cannot count any part of her employer’s expenses of operation as part of her wages, a self-employed person cannot count gross receipts that are used to pay income-generating ordinary business expenses as part of her “wages.” Case law here and elsewhere supports this common sense proposition.

While Malang’s gross-receipts-equals-wages theory does not appear totally absurd here because Malang’s real estate business incurred only limited expenses, the theory logically extends to yield ludicrous results where the self-employment business is a high-gross-income/high-business-expense operation. For example, a loss due to injury of a million dollars in annual receipts does not reflect a lost earning capacity of a million dollars where the business annually incurred \$950,000 in business

expenses; the lost earning capacity is \$50,000, not a million dollars. There is no principled way for Malang to distinguish her situation from that hypothetical situation, and therefore her gross-income-equals-wages theory fails.

Finally, Malang's gross-receipts-equal-wages theory inflates wages (if not creates wages out of thin air) for purposes of calculating time loss compensation benefits for self employed persons under RCW 51.32.090 and would in addition have disastrous ramifications for workers under a number of other RCW Title 51 benefit provisions. Malang's gross receipts equals wages theory is likely to adversely impact many workers who, unable to return to their customary employment at the time of injury, engage in self-employment post-injury. For example, if Malang's theory is applied, many workers could lose pensions (RCW 51.32.160), be charged with fraud (RCW 51.32.240(5)), lose eligibility for vocational rehabilitation services (RCW 51.32.095), and lose temporary partial disability benefits (RCW 51.32.090(3)) because Malang's theory of imputing substantial (inflated) present earning capacity for workers who in reality do not have such earning capacity leaves these marginally self employed individuals with no workers' compensation benefits and little or nothing in earnings to live on.

## VII. ARGUMENT

### A. **Reducing Gross Receipts From Self-Employment By Deducting All Business Expenses Except Depreciation Is The Translation Method That “Fairly And Reasonably” Determines The Self-Employed Worker’s Monthly Wage Equivalent, i.e., Lost Earning Capacity, For Purposes Of RCW 51.08.178(4)**

The purpose of any wage determination under RCW 51.08.178 is to determine the “lost earning capacity” of an injured worker based on the worker’s past earnings that were consideration for labor and were used by the worker to live. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d at 811 (“[A]n injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her actual ‘lost earning capacity.’”)

In RCW 51.08.178, the Legislature provided some explicit formulas to help determine monthly wages in certain categorical situations, but the Legislature omitted a definition of the base term, “wages.” *See supra* Part V briefly discussing and excerpting from RCW 51.08.178. Nor do any of the explicit formulas of RCW 51.08.178 apply to self-employed workers, such as Malang, a self-employed real estate agent who generated income by means of commissions and whose business incurred a variety of expenses necessary to generating those commissions. “Cockle: Importing Health Benefits Into Wages — An Invitation For Legislative Review Of The Wage Definition Under

Washington's Industrial Insurance Act," 25 *Seattle Univ. L. Rev.* 637, 667, n. 206 (2002).

The guiding principle found in RCW 51.08.178 to apply when determining the wage equivalent of self-employed persons like Malang is that the method used to translate her gross business receipts into a wage must be one that "reasonably and fairly" determines her "lost earning capacity." Here, the Department and the Board (CABR 1-12) "reasonably and fairly" used an adjusted net profit method to translate Malang's self-employment gross business receipts into a wage equivalent that most accurately reflects actual "lost earning capacity." It is not "fair and reasonable" for Malang and the superior court to use a **gross** business receipts equals wages method to translate self-employment income into a wage because her gross receipts overstate her lost earning capacity.

Malang and the superior court simplistically equated the gross receipts that Malang's self-employment generated from contract with Crescent as "wages." This makes no sense, however, unless Crescent was Malang's "employer" in the ordinary sense of the word. But Malang herself, not Crescent, is the employer here.

As noted above, the term wages is undefined. Because the Legislature has not defined the term, wages, in RCW 51.08.178, the term should be given its ordinary meaning. *United States v. Hoffman*, 154

Wn.2d 730, 741, 116 P.3d 999 (2005). “Wages” means — 1) “payment of usually monetary remuneration *by an employer ... for labor or services . . .* “*Webster’s Third New International Dictionary* at 2568-69 (2002) (Emphasis added); 2) “remuneration to an individual for personal services received *from an employer . . . Black’s Law Dict.* at 1610 (8<sup>th</sup> Ed.) Ed. (Emphasis added). *See also* WAC 296-14-522 (“Wages” means “The gross cash wages *paid by the employer for services performed.*) (Emphasis added).

Thus, payment of Malang’s commission splits by Crescent to Malang does not constitute her wage. And, there is no evidence that Malang’s self-employment business paid her a salary. Accordingly, as the Board explained below (CABR at 1-12), and as is done in other jurisdictions (*see infra* Part VII.C), one must translate Malang’s self-employment gross business receipts into wage equivalent by a method that is “reasonabl[e] and fair[.]” within the meaning of RCW 51.08.178(4).

Ms. Malang’s adjusted net profit from self-employment best defines her wages. As the Board explained in this case, the legislative goal, as recognized by the Supreme Court in *Cockle*, 142 Wn.2d at 811, is that wage determinations under RCW 51.08.178 determine “earning capacity” but only “*demonstrable* earning capacity reflected in *actual earnings or compensation at some particular point or during some*

*particular period*, and not mere hypothetical or potential earning capacity.” CABR at 3.

And, as the Board further explained in this case (discussing a number of prior Board decisions), individual income tax returns are sometimes, but not always, the key to determining “earning capacity” of sole proprietors, so long as the returns allow one to reasonably and fairly determine that earning capacity. CABR at 4-5; *see also* RCW 51.08.178(4). Gross receipts for a sole proprietor is misleading “because it may include paid or reimbursed business expenses that are not properly considered as an element of total earnings.” CABR at 5 (Board’s decision, relying in part on *Stephen v. Avins Constr. Co.*, 478 S.E.2d 74 (S.C. App. 1996) and cases cited therein).

Moreover, again as the Board correctly noted in this case, like other self-employed persons, Malang (unlike hourly wage-earners who are not at the same time their own employees and their own employers) “controls the portion of her gross proceeds available for her own use in contrast to that portion of her gross income employed by her for business operating expenses.” CABR at 5.

Finally, the Board was also correct when it pointed out that including Malang’s business expenditures in her “wage” translation “would artificially inflate actual earning capacity or wages, because

without the particular expenditure Ms. Malang would not have had the earning capacity reflected in the reported gross or the reported net profit ... use of a gross value is [thus] problematic because it may include paid or reimbursed business expenses that are not properly considered as an element of total earnings [i.e., wages].” CABR at 6.

For these reasons, the Board correctly held in this case that Malang’s date-of-injury wages was most reasonably and fairly calculated by dividing by eleven (months) the sum of: 1) her net profits found on the 2001 Schedule at C, Line 31 and 2) the vehicle depreciation figure (as noted, the only expense figure not representing out-of-pocket costs) of \$1,675 that Malang had claimed to the IRS for 2001. CABR at 1-12. The Board correctly translated Malang’s self-employment income into “monthly wages at the time of injury” of \$4,843.91. *Id.*

While there is no prior on-point reported Washington appellate decision in the workers’ compensation context, some support for the adjusted net income approach is provided in the Washington Legislature’s and courts’ approach to determining “income” under RCW 26.19.071 for purposes of calculating child support obligations. Like workers’ compensation the goal in the context of child support is to determine actual personal income. For self-employed persons, net income must be determined for the business, with deduction of ordinary business expenses.

*Id.* Depreciation expenses generally may not be deducted unless they reflect an actual reduction in the party's personal income, such as where the party spends money to replace worn equipment. *In re marriage of Stenshoel*, 72 Wn. App. 800, 807, 866 P.2d 635 (1993), citing *McAuliffe v. McAuliffe*, 613 A.2d 20, 22 (Pa. Super. 1992). The Department and Board approaches here, in adding back in to the "wage" determination the depreciation figure in all circumstances, give injured workers the benefit of the doubt, and may be subject to debate, but presumably Malang does not challenge this aspect of the Department and Board approaches.

Some additional support for the Department and Board adjusted net-income approach to determine self-employment wages is provided in the Washington Supreme Court's analysis concerning the "consideration of like nature" test for in-kind benefits under RCW 51.08.178. In *Cockle*, 142 Wn.2d at 821-23, the Supreme Court, in affirming the decision of the Court of Appeals, held that health care benefits are consideration of like nature because health care benefits, like the board, housing and fuel benefits enumerated in the statute's *ejusdem generis* test, are necessities for daily living during temporary disability periods. Thus, the "wage" focus is on labor-derived income that the injured worker was living on at the time of injury. *Id.* Applying that standard here, what Malang was living on at the time of her injury was not

her gross receipts but her net income from her self-employment business.

Finally, it is important to remember that the notions of “gainful employment”, “wage,” “economic loss,” and “lost earning capacity” are all inextricably tied together under the Industrial Insurance Act. *See generally*, “Cockle: Importing Health Benefits Into Wages,” 25 *Seattle Univ. L. Rev.* at 668. Thus, an injury must have caused a worker to lose some or all of the consideration for services that she was receiving before the injury (and that she was living on) in order for the consideration to be included in her wage computation. *Cockle*, 142 Wn.2d at 815, n. 6 (where employer continues to provide health benefits during disability period there has not been a loss of such for wage-computation purposes); *Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 493-95, 120 P.3d 564 (2005) (same); *South Bend Sch. Dist. 18 v. White*, 106 Wn. App. 309, 314, 23 P.3d 546 (2001) (where employer provides sick leave pay during disability periods, wages have not been lost and workers’ compensation benefits cannot be paid); *Erakovic v. Dep’t of Labor & Indus.*, 132 Wn. App. 762, 774-75, 134 P.3d 234 (2006) (an injured worker need not replace industrial insurance premiums when disabled by injury, so, for this reason among others, such premiums cannot be considered as lost earning capacity or wages).

Thus, even if we do not keep straight, as we must, Malang's very separate roles as her own employer and her own employee and how business expenses to the employer are not personal income to the employee (*see infra* Part VII.B), those business expenses that Malang paid before she was injured but which she will not incur during her periods of disability cannot be counted as part of her lost wages. The goods and services for which those expenditures were made during non-disability periods are not goods and services that are needed during disability periods — there is therefore no real economic loss due to injury. *See Cockle*, 142 Wn.2d at 815, n. 6; *Gallo*, 155 Wn.2d 493-95; *South Bend Sch. Dist. 18 v. White*, 106 Wn. App. at 314; *Erakovic*, 132 Wn. App. at 774-75.

**B. Employer Expenses Are Not Part Of Wages Whether The Worker Is Self-Employed Or Not**

When looking at gross receipts and expenses of a self-employed person, it is critical to keep in mind that the same person is both worker and employer. As employer, the person incurs certain expenses in order to generate gross receipts or sales. Those expenses, while coming into the self-employed person's hands in that person's employer role as gross receipts at some point, are not reflective of earning capacity of that person as employee. Just as the hourly wage earner at a large factory cannot

count any part of her employer's expenses of operation as part of her "wages," a self-employed person cannot count gross receipts, which includes that portion that is used to pay income-generating ordinary business expenses as part of her "wages." Common sense, plus a line of well-reasoned decisions from the Washington Board,<sup>11</sup> and workers' compensation case law from other jurisdictions (*see infra* Part VII.C) all support this proposition.

**C. Other Jurisdictions Considering The Same Question — How To Translate Gross Receipts From Self Employment Into The Equivalent Of Wages — Have Rejected Use Of Gross Income**

Courts in other jurisdictions use a net income approach to translate gross business receipts of sole proprietors (or self-employed persons) into wages for workers compensation purposes (with the main variation being whether, as the Department and Board do under their method, depreciation is added back in to net income to reach the wage equivalent). Professor Larson's treatise on workers' compensation states, "generally profits from a business, whether commercial or farm are not considered as wages for purposes of establishing average wage." Arthur Larson & Lex Larson, *Larson's Workers' Compensation Law* 92.01[2][e] (2000). *See, e.g.,*

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<sup>11</sup> In addition to the Board decision in this case (CABR 1-12), *see also In re Del Sorenson*, BIIA Dec. 89 2696, 1991 WL 87430 (1991) (Significant decision per RCW 51.52.160); *In re Jake Van Oostrum*, Dckt. No. 92 5550, 1993 WL 387183 (August 31, 1993); *In re David Miles*, Dckt. No. 99 22460, 99 22461, 2001 WL 1328422 (August 17, 2001).

*LaFleur v. Hartford Ins. Co.*, 449 So.2d 725, 728-29 (La. Ct. App. 1984)) (profits, not gross income, from self-employment held equivalent to wages); *Broussard v. Zim's Alignment Serv., Inc.*, 488 So.2d 395, 396 (La. Ct. App. 1986) (deducting out-of-pocket business expenses, but not depreciation which the court said was a general tax incentive from the federal government — an inducement to businesses to continue their business activity — that was not determinative in translating gross business income into wage); *Florida Timber Products v. Williams*, 459 So.2d 422, 423 (Fla. Dist. Ct. App. 1984) (business expenses, including depreciation, deducted from gross business income to translate that figure into wage of self-employed logging contractor); *Hull v. Aetna Ins. Co.*, 529 N.W.2d 783, 790 (Neb. 1995) (“[W]e hold that a self-employed claimant’s average weekly wage ... shall be based upon the claimant’s gross income less business expenses, i.e., net income.”); *Tozer v. Scott Wetzel Services, Inc.*, 883 P.2d 496, 499 (Colo.App.1994) (net income method used for determining “wages” from self-employment in janitorial business); *Elliott v. El Paso County*, 860 P.2d 1363, 1365-67 (Colo. 1993) (net income must be used in order to determine what personal wages have actually been lost, and depreciation figures must be looked at on a case by case basis to assess whether they should be included as business expenses); *Pioneer Const. v. Conlon*, 780 P.2d 995, 998-99 (Alaska 1989)

(addressing net income method used to determine “wages” from self-employment landscaping business); *D & C Express, Inc. v. Sperry*, 450 N.W.2d 842, 844-45 (Iowa 1990) (holding depreciation to be one factor used in determination of taxable income for purposes of calculating average weekly wage from self-employment); *Baldwin v. Piedmont Woodyards*, 293 S.E.2d 814, 815-16 (N.C. App. 1982) (applying net income approach to self-employed worker, and holding that though depreciation allowed by the Internal Revenue Service may not coincide precisely with actual depreciation, it should be deducted from self-employed claimant’s gross earnings); *Meredith Const. Co. v. Holcombe*, 466 S.E.2d 108, 110-11 (Va. Ct. App. 1996) (net income approach must be used to compute “wages” for self-employed brick mason).

The Department’s research indicates that the net profit approach it uses to translate gross business receipts from self-employment into a wage equivalent is the same approach used by an overwhelming majority of other jurisdictions. Indeed, the Department did not find any jurisdiction where the courts, in the absence of an explicit legislative directive on point, currently follow a gross receipt equal wages approach to determining the wage equivalent for workers engaged in self-employment.

**D. Engelhart Malang's Gross-Receipts-Equals-Wages Theory Leads To Absurd Results When Applied To High-Gross-Income/High-Gross-Expenses, Self-Employment Businesses**

A statute should not be construed in a manner that yields absurd or strained results. *Dahl-Smyth, Inc. v. Walla Walla*, 148 Wn.2d 835, 844, 64 P.3d 15 (2003). The dollar amount of Malang's business expenses may seem relatively small and therefore her gross-receipts-equals-wages position may not seem patently absurd on its face. However, the absurdity of her theory is easily illustrated by hypothetically adjusting her gross income (plus depreciation) to \$1,000,000 and gross expenses (without depreciation) to \$950,000. Surely, the absurdity of such a self-employed worker claiming "lost earning capacity" and hence "wages" of \$1,000,000 in this circumstance is obvious. And, there is no principled way for Malang to distinguish her circumstances from those of the hypothetical — the same logic obtains. Her theory must be rejected because it yields absurd results. *Dahl-Smyth, Inc.*, 148 Wn.2d at 844.

In *In re Carnahan*, 149 N.H. 433, 821 A.2d 1122 (2003), a long-haul truck driver who engaged in self employment as an independent contractor demanded that his gross receipts be used to determine his average weekly wage. The court rejected, as absurd, his argument and ruled that Carnahan should be treated the same as a long-haul trucker employed for a wage. The New Hampshire court used Carnahan's net

profits to calculate his wages, reasoning that Carnahan's construction produces an absurd result. The court explained its reasoning as follows: An independent contractor with a gross income of \$200,000 who incurs \$150,000 in business expenses would have "gross earnings" of \$200,000. At the same time, an employee who does the same work, receiving a salary of \$50,000, while his employer covers business expenses of \$150,000, would only have "gross earnings" of 50,000. Nothing in the statute suggests that self employed contractors should receive such a windfall. *Carnahan* at 435.<sup>12</sup>

In the proceedings below, Malang asserted that the Department and Board were treating her unfairly in comparison to workers who are not self-employed. CP at 12 (citing *Johnson v. Treadwell Stores*, 95 Wn.2d 739, 745, 630 P.2d 441 (1981) (The Supreme Court declared: "Nowhere in RCW Title 51 is there even a hint that the legislature intended some covered workers to be treated differently than others.") The situation is quite the reverse, however. The Department and Board engaged in their adjusted net profit translation of Malang's gross receipts in order to treat her, and other self-employed workers, the same as other workers are

---

<sup>12</sup> Carnahan reported \$129,729 in gross receipts or sales in the year of his injury then deducted ordinary business expenses and depreciation on his truck in the amount of \$102,184. *Carnahan*, 149 N.H. at 435. This is a slightly less generous approach than the method used to translate Malang's gross receipts from self employment because the Department and the Board in Washington favorably adjusted her net profit in the amount of her reported depreciation,. CABR at 10, Conclusion of Law 10.

treated in the computation of wages, and to avoid absurd or strained results.

CPA Hallett explained that his accounting firm handles matters for a number of real estate companies, and they each take a different approach to allocating commissions and expenses for their agents. Tr. 11/30/04 Hallett at 65. Some companies pay business expenses for their agents but take a correspondingly bigger part of the commissions. Tr. 11/30/04 Hallett at 66. Other companies take a smaller part of the commission but require the agent to pay more of the business expenses. Tr. 11/30/04 Hallett at 66-67.

Under Malang's gross-receipts-equals-wages approach, agents who are identically situated in terms of properties sold, gross commissions earned, and gross business expenses related thereto — and in terms of actual take-home pay — would be deemed to have different wages based solely on the commissions-expenses arrangement with the broker. This is a strained and unfair result that must be rejected in favor of the “reasonabl[e] and fair[.]” adjusted net-profit approach followed by the Board and Department. *See* RCW 51.08.178(4) (“wages” are to be determined “reasonably and fairly”); *Johnson v. Treadwell Stores*, 95 Wn.2d at 745 (all covered workers should be treated similarly); *Dahl-Smyth, Inc.*, 148 Wn.2d at 844 (statute should be construed to avoid

strained results); *see also School Dist. 401 v. Minturn*, 83 Wn. App. 1, 6, 8, 920 P.2d 601 (1996) (RCW 51.08.178 must be construed and applied so as to reflect reality and to avoid results that nonsensically and unrealistically inflate wages).

**E. Malang's Gross-Receipts-Equals-Wages Theory Would Produce The Result She Wants Here Under RCW 51.32.090(1), But It Would Adversely Impact Injured Workers Under RCW 51.32.160 (Pension Continuation), .240(5) (Fraud), .090(3) (Temporary Partial Disability), And .095 (Vocational Rehabilitation Services Eligibility)**

As the Department noted above, the wage computation not only determines the rate of wage-loss compensation under RCW 51.32.090, but wage computation also determines many other benefits under various other sections of RCW Title 51. All of these benefits and all of these statutory provisions must be considered together in a coherent fashion. *Dahl-Smyth, Inc.*, 148 Wn.2d at 844.

The full ramifications of Malang's gross-receipts-equals-wages theory will have disastrous consequence for workers under many other sections of RCW Title 51. This Court should reject Malang's theory because it violates the fundamental rule of statutory construction, — that courts do not assign a meaning to a statute that will result in absurd or strained consequences. *Dahl-Smyth*, 148 Wn.2d at 844. And, in recognizing the disastrous consequences of Malang's theory for workers

in many other contexts outside the confines of Malang's result-oriented theory in her case, this Court should reject any notion that the rule of "liberal construction" under RCW 51.12.010 supports application of Malang's theory.

Malang's gross-receipts-equals-wages theory inflating wages (if not creating wages out of thin air) for self-employed persons in order to achieve a higher time loss rate in her particular case fails to take into account the fact that inflated wages affects injured workers in other contexts under the Industrial Insurance Act. In a wide variety of contexts, her theory would deprive injured workers who engage in self-employment following injury from essential benefits. For example, workers engaged in self-employment could lose pensions, be accused of fraud, lose eligibility for vocational rehabilitation services and lose temporary partial disability benefits based on a theory that the workers have present earning capacity that in fact does not exist.

**Loss of pension:** Some injured workers engage in self-employment when they cannot return to their customary employment after an on the job injury. Injured workers who have been placed on the workers' compensation disability pension rolls for permanent total disability (RCW 51.32.060) can work part time and earn some income but risk being automatically removed from the pension rolls if they engage in

“gainful employment for wages.” RCW 51.32.160(2). Malang’s theory inflates wages earned in self-employment because it ignores the value of the income generating business expenses a self employed person incurs to generate his gross receipts. While these expenses contribute to the self employed individual’s ability to generate a business income, the self employed individual cannot use these same funds to purchase the essentials necessary to maintain his wellbeing, things like housing, food, clothing, and transportation. The effect of such an inflated wage makes it likely some very marginally self-employed injured workers on pensions will be deemed to be “gainfully employed” and therefore no longer eligible for pension benefits. Malang’s theory works to the detriment of this class of injured workers who will end up with little or nothing to live on as either industrial insurance benefits or personal income.

**Fraud exposure:** Indeed, pensioned workers may be accused of fraud if they engage in “gainful employment” while drawing pensions. RCW 51.32.240(5). Malang’s theory, which results in an inflated wage in the self-employment context because it ignores business expenses makes it very likely that some self-employed injured workers on pensions will be targeted and accused of fraud. *Cf. In re Del Sorenson*, BIIA Dec. 89 2696, 1991 WL 87430 (1991) (Significant Decision) (Applying its net income approach to post-injury self-employment, the Board takes into account a

pensioned barber shop owner's business expenses, including advertising and supplies, and Board therefore rejects fraud theory). Again, Malang's theory thus works to the detriment of injured workers who will end up with little or nothing to live on as either industrial insurance benefits or personal income. Her theory also exposes workers drawing time loss benefits and partial time loss benefits to fraud accusations for the same reasons. Finally her theory also works a detriment to the Department, who in its fiduciary duty must allocate its scarce administrative resources to investigate spurious fraud accusations.

**Loss of eligibility for vocational services:** Injured workers are generally ineligible for vocational rehabilitation benefits if the Department determines that they are able to perform and obtain gainful employment. RCW 51.32.095(1). Malang's gross-receipts-equals-wages theory which inflates wages in the self-employment context because it ignores business expenses incurred to generate profit, makes it likely that many self-employed injured workers will be deemed to be "gainfully employed" and therefore not eligible for vocational rehabilitation services. Malang's theory thus once again works to the detriment of injured workers who will end up with little or nothing to live on as either industrial insurance benefits or personal income.

**Loss of eligibility for temporary partial disability benefits:**

Injured workers are eligible for partial time loss compensation (also known as “temporary partial disability benefits” and “loss of earning power benefits”) during temporary disability periods where the workers have lost wages of more than five percent (5%) as compared to their date-of-injury wages. RCW 51.32.090(3). As noted above, it is common for workers to engage in self-employment when they are unable to return to the former jobs after injury.

Malang’s theory inflating wages in the self-employment context by ignoring business expenses makes it likely self-employed injured workers will be ineligible for temporary partial disability benefits or will receive markedly reduced benefits. *Cf. In re Jake Van Oostrum*, Dckt. No. 92 5550, 1993 WL 387183 (August 31, 1993) (In holding an injured worker eligible for temporary partial disability benefits, the Board rejects a gross income theory of wages and applies a net income approach for a worker engaged in self-employment post-injury); *In re David Miles*, Dckt. No. 99 22460, 99 22461, 2001 WL 1328422 (August 17, 2001) (Board applies Department net income approach and explains, at pages 3 and 4, why depreciation, because it not an out-of-pocket expense, is added back into wages of a worker engaged in self-employment post-injury). Malang’s theory thus works to the detriment of injured workers in yet another

context, leaving workers with little or nothing to live on as either industrial insurance benefits or personal income.

In sum, workers will lose pensions, be accused of fraud, lose eligibility for vocational rehabilitation services, and lose temporary partial disability benefits under Malang's (and the superior court's) gross receipts equal wages because it theory imputes inflated present earning capacity for self-employed workers who in reality do not have such earning capacity; and who would, as a consequence of application of her theory, be stripped of workers' compensation benefits and left with little or no actual present earnings to live on.

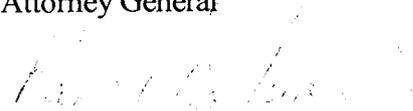
### **VIII. CONCLUSION**

For the foregoing reasons, the Department requests that this Court reverse the superior court order of summary judgment for Malang, and that this Court reinstate and affirm the Board's Decision and Order of August 25, 2005, which calculated Malang's wages at the time of her industrial injury using the 2001 adjusted net profit from her self employment. The Board's calculation best translated the income

she derived from self employment into her lost "earning capacity"  
following Malang's November 29, 2001 industrial injury.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of September,  
2006.

ROB MCKENNA  
Attorney General

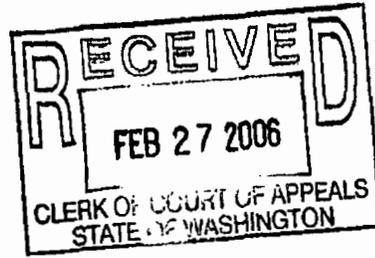


PAT L. DeMARCO  
Assistant Attorney General  
WSBA No. 16897  
Attorney for Respondent  
Phone Number: 253-593-5243

# APPENDIX A



05-2-11627-2 25048989 NACA 03-02-06



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

In Re:  
CRYSTAL ENGLEHART MALANG,  
  
Plaintiff,  
v.  
DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,  
  
Defendant.

Cause No. 05-2-11627-2

DEPARTMENT'S NOTICE OF  
APPEAL TO DIVISION II

**FILED**  
IN COUNTY CLERK'S OFFICE

A.M. FEB 28 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

The Department of Labor and Industries of the State of Washington, defendant, seeks review under RAP 2.2 by the designated appellate court of: (1) the trial court's findings of fact and conclusions of law entered and filed on January 27, 2006; (2) the trial court's judgment entered on January 27, 2006. Copies of the referenced documents are attached to this notice.

DATED this 27 day of February, 2006.

ROB MCKENNA  
Attorney General

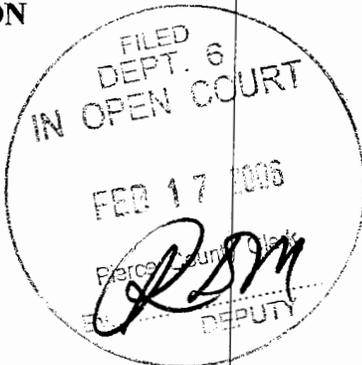
KAY A. GERMIAT  
Assistant Attorney General  
WSBA #18532

FEB 21 2005

FILED  
PIERCE COUNTY

**SUPERIOR COURT FOR THE STATE OF WASHINGTON**

**PIERCE COUNTY**



**CRYSTAL C. ENGELHART MALANG, )**

**No. 05-2-11627-2**

**Plaintiff, )**

**v. )**

**ORDER TO PAY**

**DEPARTMENT OF LABOR AND )  
INDUSTRIES of the State of Washington,) )**

**ATTORNEY FEE AND COSTS**

**Defendant. )**

On authority of RCW 51.52.130, plaintiff moved for the court to order defendant Department of Labor and Industries to pay her attorneys reasonable fees and costs for having obtained judgment reversing the "Decision And Order" of the Board of Industrial Insurance Appeals ("the Board") in *In re Crystal C. Engelhart Malang*, BIIA Docket No. 04 16364 (August 25, 2005), which determined her "wages" under RCW 51.08.178. The court finds the statute applies, and that the Department owes fees and costs. The statute provides, in pertinent part:

ORDER TO PAY ATTORNEY FEE AND COSTS - PAGE 1

ORIGINAL

**RUMBAUGH RIDEOUT BARNETT & ADKINS**

820 A Street, Suite 220 • P.O. Box 1156

Tacoma, Washington 98401

Tacoma 253.756.0333 • Seattle 253.838.0309

Fax 253.756.0355

0256889 KAG/KG

§ 51.52.130. Attorney and witness fees in court appeal

1 If, on appeal to the superior or appellate court from the decision and order of the  
2 board, said decision and order is reversed or modified and additional relief is granted  
3 to a worker or beneficiary...a reasonable fee for the services of the worker's or  
4 beneficiary's attorney shall be fixed by the court. ... If in a worker or beneficiary appeal  
5 the decision and order of the board is reversed or modified and if the accident fund or  
6 medical aid fund is affected by the litigation...the attorney's fee fixed by the court, for  
7 services before the court only, and the fees of medical and other witnesses and the  
8 costs shall be payable out of the administrative fund of the department. ...

9 In *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), the Supreme Court  
10 required that lower courts, in ordering defendants to pay reasonable attorney fees under fee  
11 shifting statutes, make findings of fact and conclusions of law sufficient for review of such  
12 awards. Accordingly, the court finds facts and draws legal conclusions as follows:

13 CONCLUSION OF LAW:

14 1. In determining reasonable attorney fees, courts should be guided by the lodestar  
15 method. Under this method, the court must determine, first, a reasonable number of hours the  
16 plaintiff's attorneys devoted to the case (including, in workers' compensation appeals, time  
17 spent unsuccessfully), as shown by contemporaneous time records, and second, reasonable  
18 hourly fee rates for each attorney, which may include consideration of contingent fee risk.

19 FINDINGS OF FACT:

20 1. In regard to attorneys' fees under RCW 51.52.130, the court finds as follows:

21 a. The tasks plaintiff's attorney performed and his time devoted to them, as set out  
22 their fee declaration, were reasonable.

23 b. A reasonable lodestar rate for plaintiff's attorney in this case is \$300.00 an hour,  
24 based on these facts:

ORDER TO PAY ATTORNEY FEE AND COSTS - PAGE 2

1 (1) Fee contingency. Plaintiff's attorneys undertook representation under a  
2 contingent fee contract.

3 (2) Level of skill the litigation required. The case presented an issue of first  
4 impression in the courts, on which the Board of Industrial Insurance Appeals had consistently  
5 decided cases contrary to the outcome urged by plaintiff.

6 (3) Attorney experience. Plaintiff's attorney has practiced workers' compensation  
7 law for 28 years.

8 (4) Attorney reputation. Plaintiff's attorney is well known and regarded in workers'  
9 compensation practice. He has litigated many workers' compensation appeals in the superior  
10 courts, the Court of Appeals, and the Supreme Court. He has written for other workers'  
11 compensation attorneys in the field, and been an invited speaker at major CLE seminars. He  
12 was chosen as a *Law & Politics* SuperLawyer in workers' compensation for 2003, 2004, and  
13 2005.

14 (5) Previous fee awards. Plaintiff's attorney was awarded fees at \$300.00 an hour in  
15 several workers' compensation appeals in 2005 and 2004.

16 2. In regard to costs under RCW 51.52.130, I find that plaintiff should be reimbursed  
17 for her filing fee in this court, which was \$200.00.

18 **ACCORDINGLY, I order the Department of Labor and Industries plaintiff's**  
19 **attorney, Terry J. Barnett, reasonable attorneys' fees in the amount of \$11,330.00, and**

20 **////**  
21  
22  
23  
24

ORDER TO PAY ATTORNEY FEE AND COSTS - PAGE 3

costs in the amount of \$200.00.

DATED this 17 day of February 2006.

  
Rosanne Buckner, Superior Court Judge

Presented by:

Rumbaugh, Rideout, Barnett & Adkins

  
Terry J. Barnett, WSB 8080,  
Attorneys for plaintiff

Approved as to form:

Rob McKenna, Attorney General

See attached page  
Kay A. Geriat, WSB 18352, AAG  
Attorneys for defendant



ORDER TO PAY ATTORNEY FEE AND COSTS - PAGE 4

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RECEIVED

MAY 31 2006

OFFICE OF ATTORNEY GENERAL  
TACOMA GENERAL SERVICES UNIT

PIERCE COUNTY SUPERIOR COURT, STATE OF WASHINGTON

CRYSTAL C ENGELHART MALANG

MARCH 27, 2006

Petitioner,

NO. 05-2-11627-2

vs.

COURT OF APPEALS DIV II NO. 34504-B

CRESCENT REALTY INC AND DEPT  
OF LABOR & INDUSTRIES

CLERK'S PAPERS PER  
REQUEST OF THE APPELLANT  
TO THE COURT OF APPEALS DIV II

Respondent.

HONORABLE  
Trial Judge

KAY ALLISON GERMIAT  
PO Box 2317  
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ATTORNEY FOR RESPONDENT

10290225 CIA RD  
2256 889 Sup

**PIERCE COUNTY SUPERIOR COURT, STATE OF WASHINGTON**

CRYSTAL C ENGELHART MALANG

MARCH 27, 2006

Petitioner,

NO. 05-2-11627-2

vs.

COURT OF APPEALS DIV II NO. 34504-B

CRESCENT REALTY INC AND DEPT  
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CLERK'S PAPERS PER  
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TO THE COURT OF APPEALS DIV II

Respondent.

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Attachments:

ADMINISTRATIVE RECORD FILED 10-11-05.

SENT UNDER SEPARATE COVER.

# APPENDIX B

**RCW 51.08.178****"Wages" — Monthly wages as basis of compensation — Computation thereof.**

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

[1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

**Notes:**

**Severability -- Effective date -- 1977 ex.s. c 323:** See notes following RCW 51.04.040.

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

FILED  
COURT OF APPEALS  
DIVISION II

06 SEP -5 PM 4:55

STA. WASHINGTON  
BY [Signature]  
DEPUTY

NO. 34504-8-II

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

Crystal C. Engelhart Malang ,

Respondent,

v.

Department of Labor & Industries, of  
the State of Washington,

Appellant.

DECLARATION OF  
MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I hand delivered the Appellant's Brief to counsel for all parties on the record by hand delivery to the addressed as follows:

Terry Barnett  
Attorney at Law  
820 A Street, Suite 220  
Tacoma, WA 98401

Clerk of the Court  
Court Of Appeals Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

DATED this 5<sup>th</sup> day of September, 2006.

[Signature]  
Tracy Lane Patton  
Legal Assistant 2