

NO. 34504-8-II

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

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

CRYSTAL MALANG,

Respondent.

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APPELLANT REPLY BRIEF

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TABLE OF CONTENTS

I. OVERVIEW OF DEPARTMENT’S REPLY BRIEF1

II. THE BOARD AND DEPARTMENT CORRECTLY INVOKED SUBSECTION (4) OF RCW 51.08.178 TO “FAIRLY AND REASONABLY DETERMINE[]” A WAGE-EQUIVALENT FOR MALANG FROM HER ACTIVITIES IN SELF EMPLOYMENT.....3

A. Contrary To Malang’s Contention, The Word “Wages” Is Not Defined In RCW 51.08.178, And Therefore The Department Must Translate Malang’s Earning From Self-Employment Into A “Wage-equivalent”3

B. Contrary To Malang’s Contention, The Department Is Not Raising A New Theory In Arguing That The Board “Fairly And Reasonably Determined” Malang’s Wage-equivalent Under RCW 51.08.178(4)6

C. Contrary to Malang’s Contention, In Which She Relies On An Inapplicable Department Policy (No. 4.41), The Department’s Long-Established Policy (No. 4.42) Guided The Department’s Efforts To Translate Malang’s Self-Employment Gross Business Income Into Wages9

D. Malang’s Reliance On The *Black Real Estate* Case Is Misplaced Because That Case Had Nothing To Do With How To Determine The Wage Rate Of A Self-Employed Person.....11

E. The Department Is Realistic In Its Argument That Malang’s Gross Income Theory Yields Absurd Results.....15

1. Malang’s position that gross receipts = gross income = gross earnings = wages yields a hyper-inflated wage rate that disproportionately favors self-employed individuals over employees who work for wages15

F. Washington’s Child Support Statute Provides The Court With Insight Regarding The Common Sense Way To

	Determine Earning Capacity Where A Person Is Self-Employed	18
G.	Washington Appellate Courts Often Consider Case Law From Other Jurisdictions When It Is Helpful In Interpreting Analogous Provisions Of Washington’s Workers’ Compensation Statute	18
H.	Calculating A Sole Proprietor’s “Wage-Equivalent” Using The Method Suggested By Malang Will Harm Some Other Injured Workers	20
I.	Case Law Analyzing The Fundamental Purposes Of Time Loss Compensation Is Relevant Here	21
III.	THE BUSINESS EXPENSES THAT THE BOARD DEDUCTED WERE CORRECT FOR THE DETERMINATION OF MS. MALANG’S WAGE-EQUIVALENT FROM HER SELF EMPLOYMENT	21
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Ball-Foster Glass Container Co. v. Giovanelli</i> , 128 Wn. App. 846, 117 P.3d 365 (2005).....	18
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	5, 19
<i>Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.</i> , 76 Wn. App. 600, 886 P.2d 1147 (1995).....	14
<i>Erakovic v. Dep't of Labor & Indus.</i> , 132 Wn.App. 762, 134 P.3d 234 (2006).....	18
<i>Gallo v. Dep't of Labor & Indus.</i> , 155 Wn.2d 470, 120 P.3d 564 (2005).....	5
<i>Hertzke v. Dep't of Retirement Sys.</i> , 104 Wn. App. 920, 18 P.3d 588 (2001).....	9
<i>In re Carnahan</i> , 149 N.H. 433, 821 A.2d 1122 (2003).....	15
<i>Kilpatrick v. Dep't of Labor & Indus.</i> , 125 Wn.2d 222, 915 P.2d 519 (1995).....	18
<i>Kuhnle v. Dep't of Labor & Indus.</i> , 12 Wn.2d 191, 120 P.2d 1003 (1942).....	18
<i>Lloyds of Yakima Floor Center v. Dep't of Labor & Indus.</i> , 33 Wn. App. 745, 662 P.2d 391 (1982);.....	14
<i>Peter M. Black Real Estate Co. v. Dep't of Labor & Indus.</i> , 70 Wn. App. 482, 854 P.2d 46 (1993).....	12, 14
<i>Pollard v. Weyerhaeuser Co.</i> , 123 Wn. App 506, 98 P.3d 545 (2004).....	18
<i>Restaurant Dev., Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	5

<i>Shelton v. Azar</i> , 90 Wn. App. 923, 943 P.2d 352 (1998).....	18
<i>State Farm Mut. Auto. Ins. v. Amirpanahi</i> , 50 Wn. App. 869, 751 P.2d 329 (1988).....	8
<i>The Quadrant Corp. v. Growth Mgmt. Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	20
<i>Watson v. Dep't of Labor & Indus.</i> , 133 Wn. App. 903, 138 P.3d 177 (2006).....	5
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	18
<i>White v. Dep't of Labor & Indus.</i> , 48 Wn.2d 470, 294 P.2d 650 (1956).....	14

Statutes

RCW 26.19.071.....	17
RCW 51.....	18, 20
RCW 51.08.178.....	passim
RCW 51.08.180	12, 13, 14
RCW 51.08.195.....	14
RCW 51.12.110.....	12, 13
RCW 51.32.095.....	2
RCW 51.32.160.....	2
RCW 51.32.240.....	2

Decisions

<i>In re Black Real Estate,</i> BIIA Dec., 88 1191, 88 1192 (1989).....	14
<i>In re Daniel A. Renshaw,</i> BIIA Dckt. Nos. 02 16572, 02 16573 (Aug. 27, 2003).....	24
<i>In re Howard Fisher,</i> BIIA Dckt. No. 00 21778 (June 25, 2002).....	17
<i>In re Jerry Uhri,</i> BIIA Dec., 93 6908, 1995 WL 565948 (1995).....	6, 11, 17
<i>In re Kenneth Paige,</i> BIIA Dckt. Nos. 93 2534-36, 93-2547-49, 93-2633-35 (March 7, 1994).....	22

I. OVERVIEW OF DEPARTMENT’S REPLY BRIEF

In its opening brief, the Department of Labor and Industries (Department) explained that, because subsections (1) and (2) of the wage computation statute at RCW 51.08.178 do not apply to the facts of this case involving a sole proprietor who did not earn “wages” in the ordinary sense of the term, the Board of Industrial Insurance Appeals (Board): (1) correctly invoked of RCW 51.08.178(4), which requires that a wage-equivalent be “fairly and reasonably determined,” and (2) correctly used an adjusted net profit method, deducting certain self-employment business expenses from the gross receipts Crescent Realty disbursed to Malang and reported on Form 1099 (Miscellaneous Income), to arrive at a wage-equivalent for Malang. This Board ruling was dictated by the statute and by common sense because Malang was engaged in activities both as employer and as *employee* at her own real estate business. AB at 27–35.¹

The Department further explained in its opening brief: (1) that other jurisdictions interpreting similar statutory schemes take a similar approach and reject the use of gross receipts or gross income of sole proprietors as “wages” (AB at 35–38); (2) that Malang’s gross receipts equals wages theory leads to particularly absurd results when applied to a

¹ “AB” refers to the Department’s appellant’s brief and “RB” refers to respondent’s brief.

sole proprietorship with high-gross-receipts and high-gross-expenses (AB at 38–41); and (3) that Malang’s gross receipts equals wages theory would adversely impact many injured workers under RCW 51.32.160, .240(5) .090(3), and .095 AB at 41–46.

Malang’s respondent’s brief opposes the Board’s and the Department’s reliance on RCW 51.08.178(4). With no statutory basis to explain or support her logic, Malang suggests instead that somehow RCW 51.08.178(1) directs that her gross receipts from her business, i.e., her gross income from self-employment, be averaged over the number of months in the year that she worked. RB at 16–31, 36–39. But RCW 51.08.178(1), by its express terms applies only to workers with *fixed* monthly, daily, or hourly wage rates. Malang fails to explain how this provision applies to her case, a sole proprietorship under which she paid herself no wages (certainly not wages fixed by the month, day, or hour) and where she offered no evidence as to the number of hours per day or days per week or days per month in which she was normally employed. RB at 16–31, 36–39.

Alternatively, she argues that assuming the Board and Department are correct, that her adjusted net profit, not gross receipts from self-employment, is properly used to “fairly and reasonably determine[.]” a wage-equivalent under RCW 51.08.178(4), Malang claims the expenses

that the Board deducted from her gross receipts were not mandatory business expenses and should not be deducted to determine her wage. RB at 33–36.

All of Malang’s strained arguments are unpersuasive, as well as unsupported by any statutory authority or case law, and the arguments defy common sense. Therefore, Malang’s arguments must be rejected.

II. THE BOARD AND DEPARTMENT CORRECTLY INVOKED SUBSECTION (4) OF RCW 51.08.178 TO “FAIRLY AND REASONABLY DETERMINE[]” A WAGE-EQUIVALENT FOR MALANG FROM HER ACTIVITIES IN SELF EMPLOYMENT

A. Contrary To Malang’s Contention, The Word “Wages” Is Not Defined In RCW 51.08.178, And Therefore The Department Must Translate Malang’s Earning From Self-Employment Into A “Wage-equivalent”

Throughout her brief to this Court, Malang argues that gross business receipts from self-employment are “gross earnings” and that “gross earnings” are the “wages” of a sole proprietor under RCW 51.08.178(1). *See, e.g.*, RB at 2, 16–19. Malang offers no authority for equating gross business receipts or gross income with gross earnings, or for her declaration that “the ordinary meaning of ‘wages’ is gross earnings.” RB at 2, 19. The definition of wages that Malang proposes would require this Court to revise or add words to RCW 51.08.178(1) because the Legislature did not include “gross earnings” in the text of the

statute, nor did the Legislature include any language in RCW 51.08.178 suggesting that gross receipts from self-employment equals wages.

Further, the Washington appellate cases upon which Malang relies to support her assertion that RCW 51.08.178(1) expressly and comprehensively defines the term “wages” must be distinguished from her case. As the Department explained in its appeal brief at page 27, nothing in the statute, RCW 51.08.178, or in the case law cited by Malang defines the word “wages,” nor does the statute and case law prescribe the method that must be used to translate earnings from self-employment into wages.

Contrary to Malang’s argument, RCW 51.08.178(1) cannot be used to determine Malang’s wages because there is no evidence that she paid herself a fixed monthly, daily or hourly wage, as required by express language of the fixed-wage calculation formulas found in RCW 51.08.178(1). In addition, Malang offered no evidence concerning the hours per day that she normally worked. Thus, nothing in the record permits the use of RCW 51.08.178(1) to determine her monthly wage.

All of the cases cited in Malang’s respondent’s brief in her attempt to support the contention that the word “wages” is defined in RCW 51.08.178(1) involved workers who were not self-employed and who earned a conventional fixed hourly cash wage. In *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 805, 16

P.3d 583 (2001), the injured worker was employed by the Pierce County Rural Library District, “working 40 hours per week and . . . was being paid \$5.61 an hour plus medical and dental care coverage for which her employer paid \$205.52 a month.” In the consolidated matters in *Gallo v. Department of Labor & Industries*, 155 Wn.2d 470, 474–80, 120 P.3d 564 (2005), the injured workers were all employed under collective bargaining agreements, which fixed their hourly cash wage. In *Watson v. Department of Labor & Industries*, 133 Wn. App. 903, 907, 915-16, 138 P.3d 177 (2006), this Court ruled that the worker’s hourly wage should be used to compute his monthly wage under RCW 51.08.178(1) (not an average wage over time under subsection (2)).

In statutory construction, courts do not add words to an enactment where the Legislature chose not to include the words or phrases in the statute. *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 683, 80 P.3d 598 (2003). Contrary to this well-established rule of statutory construction, Malang’s theory of the case invites the Court to add words and phrases to RCW 51.08.178(1). The Legislature did not include in the text of this provision the words “gross earnings” or “gross receipts.” Further, this Court would have to add a whole new “wage” formula to RCW 51.08.178(1) because Malang asks this Court to calculate her wages by averaging her gross receipts (which she characterizes as “gross

earnings”) over the number of months in the year that she engaged in self-employment. RB at 18–19. This is a method for calculating wages which the Legislature did not elect to include in RCW 51.08.178(1). Under the rules of statutory construction, this Court should decline Malang’s invitation to rewrite RCW 51.08.178(1) to fit her case.

B. Contrary To Malang’s Contention, The Department Is Not Raising A New Theory In Arguing That The Board “Fairly And Reasonably Determined” Malang’s Wage-equivalent Under RCW 51.08.178(4)

Malang contends that the Department’s reliance on RCW 51.08.178(4) to explain why the Department and Board translated Malang’s earnings from self-employment into a wage-equivalent represents a new theory the Department never raised before the Board or Superior Court. RB at 2. Malang ignores that the Board in its Decision and Order, after explaining that subsections RCW 51.08.178(1)(2) do not apply on these facts, explained that one must determine Malang’s monthly wage in a “*fair and reasonable* manner . . . that strives to treat her consistent with the manner in which true hourly, daily, or monthly wage earners are treated . . .” CABR at 5–6; *see also, In re Jerry Uhri*, BIIA Dec., 93 6908, 1995 WL 565948 (1995) (holding that a wage-equivalent for a self-employed convenience store owner must be determined under subsection (4); in that case, because such a wage-

equivalent could not be “fairly and reasonably determined” per subsection (4) under the facts of that case, the Board applied the last-resort provision of subsection (4) not applicable here, matching the worker to fixed-wage workers in analogous jobs).

Similarly, in its brief at Superior Court in this case, the Department posited an argument that RCW 51.08.178(4) applies here. CP at 25–26. The Department argued that the only way to reasonably and fairly determine Malang’s wage was to put her “on the same footing as employees whose wages do not include business expenses.” CP at 26.

Apparently Malang consistently misunderstood the Department and the Board analysis in this case. Only by applying the “fairly determined” standard contained in RCW 51.08.178(4) to the evidence Malang produced is there any statute-based way to translate Malang’s gross business receipts (which she labels “gross earnings”) derived from her sole proprietorship into wages.

It is undisputed that Malang did not pay herself an hourly wage, nor did she provide evidence of the number of hours per day that she normally worked, both mandatory requirements for application of RCW 51.08.178(1). She offered no record of her customary hours of work to permit the Department or the Board to reasonably and fairly determine the average daily hours that she worked. These elements,

essential to determine wages under the fixed-wage formulas of RCW 51.08.178(1), are missing in Malang's case.

Further, Malang's vague and conclusory suggestion that the Legislature intended that RCW 51.08.178(1) to apply in her case is unpersuasive. From the evidence in this record, the only provision in RCW 51.08.178 under which the Department and the Board could possibly determine a "monthly wage" for Malang from self-employment is the "fairly and reasonably determine" provision of subsection (4), which is the position that the Department and the Board have consistently taken in this case.

To the extent that the Department's argument and the Board's ruling below did not expressly invoke the "fairly and reasonably determine" provision of RCW 51.08.178(4), the principles supporting the identical Department and Board approaches have been consistent throughout this case. Even if one assumes that the Department's citation to RCW 51.08.178(4) in support of its argument is new, it is not a "new theory" but simply new "authority" to support a consistently made argument. *See, e.g., State Farm Mut. Auto. Ins. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329 (1988).

Finally, even if the Department is raising a new argument, this Court has inherent authority to consider all issues necessary to resolve the

case. *Hertzke v. Dep't of Retirement Systems*, 104 Wn. App. 920, 928, 18 P.3d 588 (2001). Again, because RCW 51.08.178(1) and (2) by their express language cannot apply to these facts, Malang offers this Court no alternative statutory basis that would allow her wage to be determined at all. There is no choice on this record but to “fairly and reasonably determine” a wage-equivalent under RCW 51.08.178(4).

C. Contrary to Malang’s Contention, In Which She Relies On An Inapplicable Department Policy (No. 4.41), The Department’s Long-Established Policy (No. 4.42) Guided The Department’s Efforts To Translate Malang’s Self-Employment Gross Business Income Into Wages

Malang contends Department Policy 4.41 (see Appendix A to this brief) defines “wages” as “gross earnings.” RB at 3, 19, 21. Malang has misstated the policy. To begin, nowhere in Policy 4.41 does the Department define “wages” as “gross business receipts” or “gross earnings,” nor does the Department mention self-employment income anywhere in that policy. *See* App. A. This policy instead, uses “earnings” in the narrow sense of traditional “wages” paid by an employer to an employee; the policy addresses “gross monthly wages,” the need to consider “earnings from all employment,” and the different types of “earnings” included in a worker’s wages. The predicate statutory authority for Policy 4.41 is not RCW 51.08.178(4) so on its face 4.41 cannot not apply to Malang’s case.

By contrast, Policy 4.42 (see App. B to this brief) is squarely on point. Expressly relying on RCW 51.08.178(4) as its predicate statutory authority, this policy must be employed to “**Establish Wages for Sole Proprietors, Corporate Officers and Partners.**” Thus, Malang’s reliance on Department Policy 4.41 is misplaced.

Policy 4.42 addresses the steps that must be taken to translate self-employment income into a wage-equivalent. The policy obligates Department adjudicators to investigate the employment pattern of the self-employed individual, to gather acceptable tax or payroll information, and to use that information to fairly determine an appropriate wage-equivalent for purposes of paying time loss compensation.

Policy 4.42 reflects a thoughtful approach to determine wage-equivalents for those types of individuals – sole proprietors, corporate officers and partners – who do not receive a wage in the ordinary sense of the term, i.e., do not receive remuneration given by a separate employer to an employee for services. *See* AB at 29. Under Policy 4.42, in trying to fairly and reasonably determine a wage-equivalent per RCW 51.08.178(4), Department adjudicators are required to look at all relevant information, including:

- Tax records (which fairly represent work patterns)
- Payroll records (to identify wages paid to the worker)

- Employer’s Quarterly Report of Hours for Industrial Insurance
- Other records, such as quarterly reports, check registers and time records (to document the worker’s work schedule)

See App. B. The explanatory information in the “task”, “attachment” and “sample” documents sections of Policy 4.42 further emphasize that all relevant information is to be considered. See App. B.

The Department’s reasoned approach under Policy 4.42 and RCW 51.08.178 is consistent with the Board’s longstanding case-by-case approach to determining the wage-equivalent for workers not in ordinary employer-employee relationships. See, e.g., *In re Jerry Uhri*, BIIA Dec., 93 6908, 1995 WL 565948 (1995). In sum, contrary to Malang’s contentions, Department policy supports the Department and Board interpretations in this case, not Malang’s interpretation.

D. Malang’s Reliance On The *Black Real Estate* Case Is Misplaced Because That Case Had Nothing To Do With How To Determine The Wage Rate Of A Self-Employed Person

Citing the premiums-assessment decision of this Court in *Peter M. Black Real Estate Co. v. Department of Labor & Industries*, 70 Wn. App. 482, 488, 854 P.2d 46 (1993) (*Black Real Estate*), Malang appears to contend (erroneously) that she was a “worker” for Crescent Realty within the meaning of RCW 51.08.180, and that this somehow would mean that

all of the gross income she received in her commission-sharing arrangement with Crescent constituted “wages” within the meaning of RCW 51.08.178(1). *See, e.g.*, RB 24–28, 39. The *Black Real Estate* case, however, had nothing to do with the determination of wages of self-employed persons. That case addressed solely the question of whether a firm contracting for the personal services of an independent contractor (or self-employed person) must pay premiums for industrial insurance for that person.

While it makes no difference to the principles of law applicable in this case, Malang fails to recognize that she is differently situated from the real estate salespersons in the *Black Real Estate* case, in that the *Black* company’s real estate agents were automatically included as “workers” for the firm there, while Malang was covered here only because she, as sole proprietor, elected coverage for herself under RCW 51.12.110. CABR at 2, 21; RB at 11, 26. More importantly, contrary to Malang’s suggestion that the Department is improperly treating some workers differently than others (RB at 28), nothing in the *Black Real Estate* decision suggests that the independent contractor salespersons in that case would have been able to include all of their gross income as “wages” under RCW 51.08.178. For all independent contractors (or self-employed persons) (along with corporate officers and partners – *see* App. B) not paid a fixed hourly,

daily, weekly or monthly wage per RCW 51.08.178(1), the wage-equivalent must be, where possible, “reasonably and fairly determined” per RCW 51.08.178(4). *See* AB at 28.

Malang never acknowledges that her commission-sharing with Crescent yields “gross business receipts” paid to her as Miscellaneous Income and reported on Form 1099, not gross wages reported on a W-2. Instead, as noted above, on almost every page of her brief she labels her gross business receipts under her commission-sharing arrangement with Crescent as “gross earnings” that she then equates to “gross wages.” Such labeling, however, does not answer the question as to what part of the commissions – the gross income from her business – were the equivalent of wages, “reasonably and fairly determined” under RCW 51.08.178(4), an equivalent that accurately captures her lost individual earning capacity related to her self-employment. Nor is that pivotal question answered by the fact that some salespersons may be deemed to be “workers” for the brokers with whom they share real estate commissions, while others are considered sole proprietors or self-employed.

Finally, while it does not make a difference in the analysis in this case, Malang appears to be confused regarding the effect of RCW 51.08.180’s provision treating as a “worker” an independent contractor whose personal services are the essence of the contract. She

asserts that if an independent contractor is a “worker” pursuant to this provision in RCW 51.08.180, the contractor must elect coverage per RCW 51.12.110 in order to have industrial insurance coverage. *See, e.g.,* RB at 11, 19 n.19, 24–28, 31, 39–40. That is incorrect.

A sole proprietor who is an independent contractor providing only personal services is automatically a covered “worker” for the entity for whom the services are being provided, and in that circumstance the entity receiving the services (not the independent contractor) is required to pay industrial insurance premiums to the Department. *See, e.g., Black Real Estate*, 70 Wn. App. at 488 (“The primary issue is whether the company’s agents are workers under RCW 51.08.180(1). If they are, the company [Black] must pay industrial insurance premiums for the agents.”)²

Only if an independent contractor: (1) provides something more than personal services, or (2) is otherwise excluded under the registered contractor exception in RCW 51.08.180, or (3) is excluded under the six-part test of RCW 51.08.195 must the independent contractor elect coverage and pay premiums to cover himself or herself. *Black Real*

² Malang demonstrates her confusion when (RB at 26 n.45) she unknowingly contradicts her own assertions by quoting from that part of the Board’s Significant Decision in *In re Black Real Estate*, BIIA Dec., 88 1191, 88 1192, 1989 WL 164566 at *4 (1989) where the Board explained that the seminal decision under the “independent worker” provision in *White v. Department of Labor & Industries*, 48 Wn.2d 470, 477-78, 294 P.2d 650 (1956), noted that independent contractors who are “workers” under RCW 51.08.180 are automatically covered, while independent contractors who are not “workers” under RCW 51.08.180 have the option of electing coverage.

Estate, 70 Wn. App. at 488; *Lloyds of Yakima Floor Center v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 753, n.3, 662 P.2d 391 (1982); *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 606–07, 886 P.2d 1147 (1995).

Here, there is no dispute that Malang elected coverage for herself, so she apparently was otherwise excluded from coverage under one of the three exceptions just noted. But, as noted above, it is not relevant to this appeal how Malang obtained industrial insurance coverage. All that matters is that she was both her own employer and employee (or, put another way, owner and employee), that she (as her own employer) did not pay herself (as her own employee) a fixed hourly, daily, weekly or monthly wage rate RCW 51.08.178(1), and therefore a wage-equivalent had to be “fairly and reasonably determined” per RCW 51.08.178(4) in order to determine her lost wage earning capacity. See AB at 23–24, 27–34.

E. The Department Is Realistic In Its Argument That Malang's Gross Income Theory Yields Absurd Results

- 1. Malang's position that gross receipts = gross income = gross earnings = wages yields a hyper-inflated wage rate that disproportionately favors self-employed individuals over employees who work for wages**

The Department explained in appellant's brief at pages 38–41 that Malang's theory that gross business receipts = gross business income =

gross earnings = sole proprietor wages produces particularly absurd results for those sole proprietorships that expend high costs to produce high gross receipts. Malang contends otherwise. RB at 40–41. But she is not in touch with the reality of sole proprietorships. Her argument invites the court to adopt a rule that hyper-inflates a worker’s true earning capacity, thus favoring self-employed individuals over workers employed for fixed wages, something that the Legislature could not have intended.

For example in *In re Carnahan*, 149 N.H. 433, 821 A.2d 1122 (2003), the court confronted this issue in the context of long haul truck drivers. Some long-haul drivers work for a fixed wage; others are self-employed. As noted in appellant’s brief on pages 38-39, were the court to adopt the “gross receipts = gross income = gross earnings = wages” approach proffered by workers such as Carnahan and Malang (who argue that business expenses should not be deducted from gross income), the lost earning capacity of these self-employed workers would be unrealistically inflated over the wages paid to other workers.

2. Employer expenses are not part of wages

Malang asserts that because she “earned and owned” the money that she expended for items listed on her 1040 Schedule C, that her gross receipts, not her adjusted net income, are her “wages.” RB at 31–32, 39–40. Common sense compels rejection of her theory.

For example, a bookstore owner who operates a “brick and mortar” bookstore could claim as wages his gross sales under Malang’s hyper-inflated wage theory, because he earned and owned the money that he eventually used to operate his store, i.e., in purchasing his retail stock and making an array of other business expenditures. Malang’s theory fails because in order for the owner to generate those sales he has to incur expenses for such things as rent or purchase of a building, electricity to light and heat the store, books to sell, advertising, cash registers, and the cost of labor to help make the sales. While the business owner has discretion over many of these expenditures and decides how lavish or Spartan his business will be run, the amount of money that the owner actually expends to make his sales is not income or wages to the owner but instead, for purposes of RCW 51.08.178, represent the non-wage element of the gross receipts of the business.

Board decisions helping to demonstrate the absurdity of Malang’s position include *In re Howard Fisher*, BIIA Dckt. No. 00 21778 (January 25, 2002) (farmer in self-employment) and *In re Jerry Uhri, supra* (convenience store owner). As just explained, common sense dictates the conclusion that it is absurd to consider gross receipts of a farmer or convenience store owner as the equivalent of wage for that sole proprietor. The dollar figures for gross receipts vs. business expenditures in the

Fisher and *Uhri* cases, as in the instant case, may not be extreme. Principle and common sense must guide the Court's analysis, however, and there is no principled or common sense way to distinguish such sole proprietorships in a way that would allow Malang to treat all of her gross receipts as wages.

F. Washington's Child Support Statute Provides The Court With Insight Regarding The Common Sense Way To Determine Earning Capacity Where A Person Is Self-Employed

Malang suggests that the Court don blinders and refuse to look to the way another statute, Washington's child support statute, RCW 26.19.071, and case law thereunder recognize that gross receipts from self-employment is not equal to individual earning capacity. RB at 46-48. While RCW 26.19.071 does not apply here, the same common sense principle that leads to its net-income approach should lead to a net-income approach here, where RCW 51.08.178(4) leaves it open to this Court to so apply common sense to "fairly and reasonable determine" Malang's wage-equivalent. *See* AB at 31-32.

G. Washington Appellate Courts Often Consider Case Law From Other Jurisdictions When It Is Helpful In Interpreting Analogous Provisions Of Washington's Workers' Compensation Statute

In response to the Department's explanation that courts in other jurisdictions use a net income approach to translate gross business receipts

into a wage-equivalent (AB at 35–37), Malang asserts that Washington courts do not consider foreign statutes and cases in interpreting RCW Title 51. RB at 48–49. In fact, however, it is not uncommon for Washington appellate courts to consider case law authority from other jurisdictions when interpreting analogous provisions or answering analogous questions under RCW Title 51. *See, e.g., Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 134 P.3d 234 (2006); *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 915 P.2d 519 (1995); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 137, 814 P.2d 629 (1991); *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 197–200, 120 P.2d 1003 (1942); *Pollard v. Weyerhaeuser Co.*, 123 Wn. App. 506, 512, 98 P.3d 545 (2004); *Shelton v. Azar*, 90 Wn. App. 923, 922–26, 954 P.2d 352 (1998); *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 852–53, 117 P.3d 365 (2005). Notably, even the *Cockle* majority opinion relied in part on the analysis in Justice Marshall's dissent in a case interpreting a federal Longshore wage statute, as well as the holdings of other courts considering that United States Supreme Court opinion. *Cockle*, 142 Wn.2d at 817–19.

As noted in its opening brief, the Department's research reflects that the vast majority of states follow a strict net profits approach when called upon to translate self-employment income into wages in the

industrial insurance context. AB at 35–37. In fact, when measuring lost earning capacity for the self-employed, the majority of states deduct the depreciation allowance, contrary to the more generous practice of the Department and Board in Washington. AB at 35–37.

H. Calculating A Sole Proprietor’s “Wage-Equivalent” Using The Method Suggested By Malang Will Harm Some Other Injured Workers

In its opening brief, the Department explained that Malang’s hyper-inflated approach to calculating a wage for sole proprietors will adversely affect injured workers in a number of other contexts. AB at 41–46. Malang suggests this is a matter for the Legislature, not the courts. RB at 41. But she apparently fails to understand that statutory construction requires that one determine how a statute such as RCW 51.08.178 fits into the entire statutory scheme. *The Quadrant Corp. v. Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

Malang also appears to try to contest some of the propositions that the Department explained at AB at 41–46 regarding ramifications of Malang’s theory for other sections of RCW Title 51. RB at 41–46. But her discussion in this regard is not directly responsive in some respects, does not make sense in other respects, and as a whole is unpersuasive.

I. Case Law Analyzing The Fundamental Purposes Of Time Loss Compensation Is Relevant Here

In its opening brief, the Department asserted that case law under RCW 51.08.178 looking at the purpose of wage loss compensation is helpful to understanding why the Department and Board are correct in their net-income approaches here. AB at 32–34. In her response at respondent’s brief, pages 36–38, Malang apparently fails to grasp that the ultimate goal of the courts in these cases was to carry out legislative intent, and this required an attempt to capture an injured worker’s lost earning capacity following an industrial injury. Here, as in those cases, the goal is to reasonably and fairly determine Malang’s lost wage earning capacity.

III. THE BUSINESS EXPENSES THAT THE BOARD DEDUCTED WERE CORRECT FOR THE DETERMINATION OF MS. MALANG’S WAGE-EQUIVALENT FROM HER SELF EMPLOYMENT

In its opening brief in this Court, the Department recounted the facts regarding Malang’s business expenditures and the testimony of CPA Hallett, the Department’s expert witness, explaining that these expenditures helped her business generate income and that these expenses must be deducted from her gross business receipts to prevent inflating her true earning capacity. AB at 14–18.³ The Department also quoted in its

³ Included were car and truck expenses, “broker expenses,” insurance (other than health), legal and professional services, supplies, travel, meals and entertainment, telephone, internet access, dues, and miscellaneous. AB at 15.

opening brief (AB at 10–11) from the Board’s Decision and Order where the Board explained that, while some of these expenditures “may have been controllable by Ms. Malang to different degrees,” each had a corresponding “impact . . . on . . . gross receipts.” CABR at 6.

Malang responds with an argument that the Board rejected in her case. She claims that no deduction from gross income should be taken for business expenses that are controllable or discretionary by the business operator. RB at 34–36 (asserting in RB at 35 that her only necessary expense was her business license). Malang’s argument is unsupportable in law or common sense.⁴ A convenience store operator has broad discretion as to what items to carry, whether to advertise, what kind of signage to use, how to furnish the store, and a vast array of other things. A farmer has discretion as to what to cultivate, who to buy product from, what equipment to use, whether to do repairs himself, and a vast array of other things. But if a convenience store operator or farmer elects industrial insurance coverage, the wage-equivalent under RCW 51.08.178(4) for the convenience store operator or farmer should not turn on whether the

⁴ Malang cites a Board non-significant decision in *In re Kenneth Paige*, BIIA Dckt. Nos. 93 2534-36, 93-2547-49, 93-2633-35 (March 7, 1994) where the Board’s findings of fact, with no accompanying analysis, appear to suggest that the Board excluded certain discretionary business expenditures in computing “wages” for purposes of determining temporary partial disability benefits under RCW 51.32.090(3). It is difficult, if not impossible, to determine the Board’s reasoning in *Steele*, but if the discretionary nature of business expenses was the basis for the Board’s findings in *Steele*, the Board was wrong there, and the Board’s reasoned analysis in the instant case should be adopted here.

expenditure was discretionary, but on whether, as the Board reasoned here, it was a reasonable expenditure in pursuit of the generation of gross income for the business enterprise. CABR at 6.

Thus, as the Board explained here, what is determinative is whether the expenditures at issue can reasonably be seen to promote the business enterprise and contribute to the business receipts. CABR at 6. As Malang put it herself, expenses incurred were intended to “facilitate her business.” Tr. 11/20/04 Malang at 25. Here, all of the expenditures that the Board deducted from Malang’s gross receipts fit that test.

For instance, on Schedule C of the income tax forms in the record here, Malang included, *inter alia*, telephone, internet access, and dues. Exs. 19, 20. In a business where Malang must stay “connected” to the real estate market, buyers, and sellers, as well as other agents, to be productive and competitive, these expenditures appear essential to promote her business and to generate real estate sales. These expenditures appear therefore “necessary to or primarily furthering” Malang’s ability to generate her gross commissions, and should as the Board concluded, legitimately be deducted from her gross receipts as a business expense. CABR at 6–7.

Similarly, other business expenditures like advertising, transportation costs, meals and entertainment also contribute to Malang’s

economic success. See Exs. 19, 20; Hallett 75–77, 92. These too represent business expenditures that should be deducted from Malang’s gross receipts to most accurately capture her lost earning capacity. These same principles apply to the other business expenses that Malang declared on her Schedule C. These expenses contributed to Malang’s ability to generate the gross receipts disbursed to her.

Malang also asserts that “[t]ax return preparation is not an expense of *producing* income; it is a *consequence* of income.” RB at 35. And she asserts that gifts for clients and contributions to the community relate to business that she “already had, so this cost was not an expenses [sic] of producing earnings.” RB at 36. In both respects, however, she missed the purpose of the expenditures, which was to ensure that her business enterprise continue to generate income in the future. She made these expenditures because she wanted to generate even more new business from her past and present clientele.

Finally, Malang appears to be confused when she quotes from Board discussion in *In re Daniel A. Renshaw*, BIIA Dckt. Nos. 02 16572, 02 16573, 2003 WL 22479584 (Aug. 27, 2003), regarding a deduction the employer made, per a collective bargaining agreement, from a union worker’s cash wage to an account. RB at 35. The Board held that under the circumstances of that case the deduction resembled direct deposit of

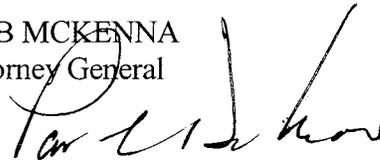
cash to a bank account, and that this therefore should be deemed to be part of the worker's cash wage for purposes of RCW 51.08.178(1). This discussion in *Renshaw* has no logical connection to the self-employment-wage-equivalent issue here under RCW 51.08.178(4).

IV. CONCLUSION

For the foregoing reasons and for the reasons set forth in the appellant's brief, 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. Consistent with the "fairly and reasonably determined provisions of RCW 51.08.178(4), the Board's calculation best translated the income to most closely reflect Malang's true earning capacity at the time of her injury.

RESPECTFULLY SUBMITTED this 15th day of December, 2006.

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Assistant Attorney General
Attorney for Respondent

Appendix A

Claims Adm. Policy Manual

Policy 4.41
Effective 4-20-92

- **Contract of hire** — The reasonable value of board, housing, meals, clothing allowance, fuel, or other similar considerations received from the employer as a part of the contract of hire. **Note:** The contract of hire is an oral or written agreement reached between the employer and worker regarding the terms and conditions of employment.
- **Commissions**—Commissions earned but not paid prior to the date of injury should be calculated into the gross monthly wage. (See Task 4.41-A.)
- **Annual, monthly or quarterly bonuses already received** by the worker in the twelve months immediately preceding the injury.
- **Tips** when they are reported to the employer by the worker for federal income tax purposes; or when tips are distributed by the employer to the employee. (Tips are included only for injuries occurring on or after June 9, 1988.)
- **Gratuities** — Gratuities are mandatory service charges added to a customer's check by management. (Gratuities are included only for injuries occurring on or after June 9, 1988.)
- **Overtime hours**— Overtime hours will be calculated at the regular hourly wage. (See Attachment 4.41-A for an example.)

Exception:

- 3a. If the worker is exclusively seasonal, essentially part-time, or intermittent, total wages include overtime pay.
 - 3b. If no work history has been established, the monthly wage shall be computed based upon the average wage of similarly employed workers.
4. **The claims manager must consider the worker's employment pattern in determining wages.**

In calculating a worker's gross monthly wage, claims managers must consider worker's employment pattern in determining wages earned. (See Task 4.41-A for specific calculations and Attachment 4.41-A for examples.) Employment patterns include the following:

- When an employee works in **full-time regular employment**, the wages are calculated by multiplying the hourly wage by 176, the daily wage by 22, or the weekly wage by 4.4. The monthly wage is used as is. Full-time regular employment means eight hours a day and five days per week equaling 40 hours.

Claims Adm. Policy Manual

Policy 4.41
Effective 4-20-92

—**Construction workers** and workers from other similar industries are considered full-time when their employment pattern shows regular and continuous employment, interrupted only by job completion and unavoidable lay-offs.

- When an employee works in an **exclusively seasonal** position, wages are calculated by dividing by twelve the total wages earned, including overtime wages, from all employment in any twelve successive calendar months preceding the injury. Calculations must be based upon employment that fairly represents the worker's employment pattern at the time of injury. The work pattern is considered exclusively seasonal when work is entirely dependent on the seasons and no other work is performed by the worker.
- When a worker is employed **essentially part-time**, wages are calculated by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury. Calculations must be based upon employment that fairly represents the worker's employment pattern at the time of injury. In essentially part-time work, the employee works fewer hours than ordinarily worked by other employees in that job.
- When a worker is employed in a **regular part-time** job, wages are calculated based upon the number of hours worked per day and days worked per week. This does not include overtime pay, but does include overtime hours. (See Attachment 4.41-A for an example.) In regular part-time work, employees work a set time per month, which is typical for the other employees in a similar position.
- When a worker is employed in **intermittent** employment, wages are calculated by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury. Calculations must be based upon employment that fairly represents the worker's employment pattern at the time of injury.

Intermittent employment is not regular or continuous in the future. It may be full-time, extra-time or part-time and has definite starting and stopping points with recurring time gaps.

Claims Adm. Policy Manual

Policy 4.41
Effective 4-20-92**Exceptions:**

- 4a. If a worker is a **school district employee**, hired on an annual contract with payment in twelve monthly installments, that employee is required to work 180 to 185 days between September and June. Gross monthly wage will be calculated by dividing the total yearly salary by the number of contracted days multiplied by 22.

Time loss would be payable during school closure if the injury occurred during regular school time and all other criteria are met.

5. The first time-loss payment is based on reported wages.

When time-loss is initially paid, it is based on the worker's monthly wage reported to the department. The wage information is obtained from the worker's or employer's section of the accident report, or from telephone contact. When there is a discrepancy in information, claims manager should use information from the employer.

- 5a. If this wage information cannot be obtained immediately, the worker is paid minimum benefits based on his or her marital and dependent status to ensure a payment is made **within 14 days** of receiving the accident report.

6. Workers receive a percentage of gross monthly wage, considering marital status and dependents at the time of injury.

Workers are entitled to 60% of their gross monthly wage unless 60% is less than minimum compensation rate or exceeds the maximum compensation rate. (See *Claims Manager Manual*, Chapter D for minimum and maximum time-loss compensation rates.)

An additional 5% is added if the worker is married or separated at the time of the injury. For purposes of wage calculation, a worker is considered married until a divorce decree is awarded. (See exception #6a below.) *Washington state does not recognize common law marriage.*

Workers are entitled to an additional 2% (not to exceed 5 children or 10%) of the gross monthly wage for each child when:

- A dependent is born before the date of injury and is not over the age of 18 (or up to the age of 23 if enrolled full time in an accredited school). (See RCW 51.08.030 and RCW 51.32.025.)

Claims Adm. Policy Manual

Policy 4.41
Effective 4-20-92

- A dependent is over the age of 18 and is a dependent as a result of a physical, mental or sensory handicap. (This does *not* apply to dependents who reside in a state institution.)
- A dependent is born after the injury where conception occurred prior to the injury and the date of birth is on or after June 11, 1986. The dependent is added to the claim after birth. (See Policy 4.21.)

Exception:

- 6a. If both husband and wife have open compensable claims, the worker receiving the highest wages will claim the children. Both parties will receive 5% for their spouse.

7. The child's portion of time loss must be sent to the child's legal custodian.

The person with legal custody receives the child's portion of compensation.

Exception:

- 7a. If the accident report does not indicate who the legal custodian is, the department withholds the child's portion of compensation until the legal custodian is established. The following court documents prove legal custody: a divorce decree, separation agreement, or court order. (See RCW 51.32.010.)

Appendix B

POLICY 4.42

Section: Time-loss Compensation Rates **Effective:** 11-15-98

Title: Establishing Wages for Sole Proprietors,
Corporate Officers and Partners **Cancels:** Policy 4.42
date 7-2-97

See Also: RCW 51.08.178(4) (monthly wages)
RCW 51.32.030 (compensation for corporate employer)
Policy 5.81 (paying LEP compensation)

Approved by: 
Ron Gray for the Insurance Services Policy Council

This policy applies when an adjudicator receives a claim from a sole proprietor, corporate officer or partner, for which employer services has determined coverage.

1. Adjudicator contacts policy manager if questioning elected coverage.

Policy managers in Employer Services determine worker's compensation coverage for claims. If an adjudicator receives information that raises questions about coverage on a particular claim, the adjudicator contacts the policy manager.

2. Worker must provide wage information.

When a worker contends time-loss compensation, the adjudicator calculates the wages. To validate the information on the accident report, the adjudicator must obtain wage information from the worker. Acceptable documentation includes:

- Tax records (which fairly represent work patterns).
- Payroll records (to identify wages paid to the worker).
- Employers Quarterly Report of Hours for Industrial Insurance.
- Other records, such as quarterly reports, check registers and time records (to document the workers work schedule).

3. If needed, adjudicator bases wages on similar occupation.

If the worker cannot provide acceptable documentation of wages for the time of injury but can establish the work pattern, the adjudicator bases wages on the wages for similar occupation. (See RCW 51.08.178(4).)

4. While waiting for wage information, adjudicator pays at lowest rate.

While waiting for acceptable documentation of the worker's wages at the time of injury (see Section 2, above), the adjudicator pays time-loss compensation at the lowest rate based on the documentation that is in the file. If there is no wage information in the file, the adjudicator pays at the minimum rate. Until the wage is established, the adjudicator must use **interlocutory Orders** for these payments.

Policy author: Juanita Perry, (360) 902-4260
For technical questions: State Fund Claims Training, (360) 902-4576
Self-Insurance Claims Training, (360) 902-6904

Appendix C

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.

1 **PROOF OF SERVICE**

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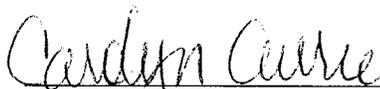
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Hand delivered by Carolyn Currie, Legal Assistant

8 I certify under penalty of perjury under the laws of the state of Washington that the
9 foregoing is true and correct.

10 DATED this 18th day of December, 2006, at Tacoma, Pierce County, Washington

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