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**A. REPLY TO DEPARTMENT’S “ASSIGNMENT OF ERROR”
AND “ISSUE”**

1. Reply to “Assignment of Error”

Malang agrees that the ultimate issue is whether the summary judgment was correct. If it was, there is no separate issue regarding the superior court’s award of attorney fees; a reasonable fee was mandatory under RCW 51.52.130, because Malang obtained relief the Board had denied. The Department did not dispute either that a fee be awarded, or the amount of the fee. Accordingly, if this court affirms, the court need not address the fee the superior court awarded. Conversely, if the summary judgment were to be reversed, the attorney fee should be vacated as a matter of course.

2. Reply to “Issue”

Malang accepts the list of facts that comprise the first paragraph of the Department’s brief under “Issue.”¹

Malang disputes, however, the Department’s claim, in the second “Issue” paragraph² (and throughout the rest of its brief), that §178(4) governs the “wage” determination for self-employed workers, and that

¹ Appellant’s Brief (“AB”) 4.

² *Id.*

§178(4) directs that “wages” be determined in a manner that is “fair and reasonable,” which should include subtracting wage-related expenses from gross earnings.

The argument that §178(4) governs “wage” determinations for self-employed workers appears to be a new theory in the case, so the court should decline to consider it. In proceedings below, the Department mentioned §178(4) only in passing.³ Neither the Department order from which this case originated,⁴ nor the “Decision and Order” of the Board,⁵ nor the superior court summary judgment (the form of which the Department approved),⁶ even mentions §178(4). As a court of review,⁷ this court should decline to consider the Department’s new theory. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006) (“Under Rule 2.5(a) of the Rules of Appellate Procedure...appellate courts will generally not consider issues raised for the first time on appeal.”); *Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 467-68, 843 P.2d 1056 (1993)

³ The only mention is at CP 26 at lines 11-23.

⁴ Certified Appeal Board Record (“CABR”) 47.

⁵ CABR 1-12.

⁶ CP 77-79.

⁷ See RCW 2.06.030.

(same).

On the merits, the Department's arguments that §178(4) governs "wage" determination for self-employed workers, and that the statute authorizes the Department to determine self-employment "wages" by subtracting Schedule C expenses from gross earnings, are untenable. The arguments directly contradict clear Supreme Court authority, and conflict with the language of both subsection (4) and §178 as a whole.

B. COUNTER-STATEMENT OF THE CASE

1. Reply to "Department Adjudication"

The Department's assertion that in subtracting Malang's Schedule C deductions from her gross earnings, the Department was acting "consistent with Department policy,"⁸ is inaccurate. Department Policy 4.41, titled "Wage Definitions for Calculating Time-Loss," describes "wages" as gross earnings:

1. Time-loss compensation is calculated, [sic] based upon gross monthly wages, marital status and number of dependents.

Workers are entitled to a percentage of gross monthly wage, based upon their marital status and number of dependents. Wages shall be calculated in a fair and reasonable manner.

⁸ AB 5.

....

(Emphasis original.) This policy makes no distinction between workers who are self employed and those who are employed by others, and mentions no exclusions or deductions.⁹

2. Reply to “Board Proceedings”

Ms. Malang has no comment on this part of the Department’s brief.

3. Malang’s Statement of the Case

Ms. Malang was injured in the course of her work as a real estate agent for Crescent Realty, Inc. A contract between the broker and Malang called her an “independent contractor, hereinafter called the Sales Associate.”¹⁰ The contract provided that all commissions on transactions for which Malang was an agent were owned by the broker, and that the broker, after deducting certain expenses and transaction fees from each

⁹ Note that “[u]nlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law.” *Joyce v. State*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005).

¹⁰ CABR EXHIBITS, Exhibits 21 and 22:

THIS EXHIBIT is attached to and made part of that Broker-Sales Associate Agreement and Working Contract...by and between Crescent Realty, Inc., as Broker and Crystal Engelhart-Malang as an independent contractor, hereinafter called the Sales Associate.

The contracts of which Exhibits 21 and 22 were part are not in evidence.

commission,¹¹ would pay Malang a percentage of the balance.

Malang applied for workers' compensation benefits for her injury. The Department of Labor and Industries allowed her claim, and began to provide benefits. Malang became temporarily totally disabled, which made her eligible for temporary total disability benefits, also known as "time loss."¹² The rate at which time loss is paid depends on the injured worker's "wages" under RCW 51.08.178.¹³ The Department figured Malang's "wages" by totaling the commissions the broker paid her in the eleven months preceding the month of injury (action both Malang and the Department accept¹⁴), then subtracting expenses Malang deducted from her gross income on her IRS form 1040 Schedule C¹⁵ (Malang did object to this). This resulted in a time loss rate much lower than if her "wages"

¹¹ *Id.*

¹² See RCW 51.32.060 and 51.32.090, and *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000)

¹³ See footnote 11.

¹⁴ Both Malang and the Department accept this as proper. See AB p. 11 n.4. See also RCW 51.08.018, "Average monthly wage" ("For purposes of this title, the average monthly wage in the state shall be the average annual wage as determined under RCW 50.04.355 as now or hereafter amended divided by twelve.").

¹⁵ Other than depreciation. See AB 7 ("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 [earning] capacity...").

had been based on the total commissions Crescent paid her.^{16, 17}

Malang appealed to the Board. The Board affirmed the Department's deductions,¹⁸ by a split vote, two to one. The majority

¹⁶ See RCW 51.08.178(1), then see RCW 51.32.090 and 51.32.060.

¹⁷ At AB 16, where the Department begins to discuss the testimony of its witness Charles Hallett, the Department characterizes him as an "expert," because he was a CPA. This appeal concerns statutory interpretation. The only "experts" in regard to the meaning of statutes are the courts. *Cockle v. Dep't of Labor & Indus.*, *supra*, 142 Wn.2d at 812 ("it is emphatically the province and duty of the judicial branch to say what the law is and to determine the purpose and meaning of statutes," citation and internal punctuation omitted).

¹⁸ The Board figured plaintiff's "wages" by taking the net income figure from her IRS for 1040 Schedule C, line 31 (\$51,608.00), adding her automobile depreciation figure from line 13 (\$1,6775.00) to get a total of \$53,283.00, then dividing by 11 to get \$4,831.91.00 a month.

The Board decided that automobile depreciation, deducted by the Department, should be treated as "wages" because, the Board said, automobile use was "primarily for her own personal benefit in addition to contributing to her producing her gross or net income." CABR 10 at lines 10-13.

The Board affirmed the Department's deduction of other Schedule C deductions other than automobile depreciation, totaling \$12,446.00, which the Board reasoned had been "necessary to, or primarily furthering, the generation of the gross income reported on Schedule C." CABR 9 at lines 22-29 and CABR 10 at lines 10-13. These are the deductions the Board subtracted:

Car and truck expenses:	\$ 4,692.00
Insurance:	590.00
Legal and professional services:	225.00
Supplies:	2,272.00
Taxes and licenses:	112.00
Travel:	480.00
Meals and entertainment:	1,219.00
Other:	2,856.00
	<hr/>
	\$12,446.00

If the Board had not deducted the \$12,446.00, plaintiff's "wages" would have been \$5,975.36 ($\$65,728.80 \div 11$). The Board's calculation caused plaintiff to be underpaid temporary total disability benefits in the amount of \$678.87 per month, $\$5,975.36 - \$4,843.91 = \$1,131.45$. $\$1,131.45 \times 60\% = \678.87 per month. (Per RCW 51.32.060(1), applicable via RCW 51.32.090(1), the percentage by which monthly wage is multiplied to yield a temporary total disability rate depends on family composition. For a single adult, the figure is 60%.) Alternately: $\$12,446 \div 11 = \times 60\% = \678.87 per month. for the full year she was

explained its decision as follows:

...Ms. Malang did not present testimony to establish that her reported expenditure items or substantial portions thereof were other than for purely business purposes aimed at having an expected beneficial impact upon her gross commissions. ...

In sum, we find reflected on Ms. Malang's Schedule C for 2001, the amount of \$1,675 that the Department "added back in" to Ms. Malang's reported net income. Ms. Malang did not establish that any other item reported on Schedule C (that is, deducted from gross to arrive at net) should be "added back in" to arrive at her wage equivalent. Ms. Malang's Schedule C, Line 31, net income was reported as \$51,608. We "add back in" \$1,675 and arrive at a 2001 tax year personal, demonstrated **wage equivalent** \$53,283, which we determine best reflects **Ms. Malang's personal wage equivalent** for the year 2001.

CABR 7-8 (emphasis added). The dissenting Board member criticized the majority, saying:

DISSENT: Unfairly, and without statutory authorization, the majority decision penalizes Ms. Malang for being self-employed. Nothing in RCW 51.08.178 authorizes the Department or this Board to deduct further amounts from Ms. Malang's gross income after commission splits and fees to Crescent Realty. Nevertheless, that is what the majority has done by using Schedule C, Line 31, "net" income as a basis for calculating time loss compensation.

Had the Legislature intended that "net" wages be utilized for time loss compensation purposes, the Legislature would have so indicated. The word "net" is not found in RCW 51.08.178; nor is any other similar word found to modify wages. Neither has the Legislature delegated to the Department or this Board the discretion that wages or earnings are something less than actual wages and earnings.

Common sense and recognized public policy embodied in

totally disabled. *See* CABR 58 at the 2-6-02 entry, and CABR 61 at the 2-18-04 entry.)

statutory provisions such as RCW 51.32.090 reflect the important goal of returning an injured worker to his or her job of injury. Yet, the majority decision would deprive a self-employed injured worker, such as Ms. Malang, of a portion of her earnings replacement necessary to maintain the business structures that had been part of her earning capacity. **The majority, under the guise of not “adding back in,” has “subtracted out” a portion of Ms. Malang's earning capacity** – that is arguably necessary to maintain or re-establish her business. This is unfair. This does not reflect good public policy. **This is not authorized by statute. This deprives Ms. Malang of her entitlement as an injured worker.** The statutes reflect a presumption that an injured worker will have potential employment to which they will hopefully return when recovered sufficiently from his or her injury. Ms. Malang is self-employed and will hopefully return to her own business. Yet, the majority decision will incorrectly deprive Ms. Malang of necessary assistance in maintaining much of her business – such as her office and her license, and any other elements of her business which must be maintained in order for her to have employment to which she may return – in short, the business elements for which expenses were reported on Schedule C.

The provisions of RCW 51.32.090(1)(f) already direct that, as not married and without dependents, Ms. Malang will receive as time loss compensation only sixty percent of whatever is determined to be her monthly wage or equivalent at the time of injury, unless the amount is capped by the statutory maximum. The Legislature has thus already determined, as it has with all workers, how much time loss compensation shall reflect a discount or subtraction from Ms. Malang's full monthly earnings. Ms. Malang only asked that her earnings after payment of necessary commission splits and fees to Crescent be used and that she therefore receive, when totally disabled from her industrial injury, sixty percent of this amount. This would have been fair and consistent with the statute. The majority determination in the Decision and Order is not fair. Such a further reduction is not authorized by statute and usurps legislative prerogative.

I would hold that Ms. Malang's monthly wages at the time of injury were equal to the year 2001 earnings she reported to the U.S. Internal Revenue Service on Schedule C, Line 1, \$65,729, divided by eleven (the number of months worked). This produces a

monthly wage of \$ 5,975.36, which is fair and which is statutorily authorized by RCW 51.08.178.

CABR 10-12 (Fennerty, Board member, dissenting, underline original, bold added).

From the Board Malang appealed to superior court. There she moved for summary judgment, on three grounds: (1) the Act does not authorize the Department or the Board, in determining an injured worker's "wages," to deduct expenses related to wage production; (2) unlawfully, the Board determined Malang's "wages" differently because she was self employed than if she had been employed by another; and (3) several of the Board's deductions were not shown, by substantial evidence,¹⁹ to actually have been related, in type and/or amount, to wage production. The court granted summary judgment on the first ground, so did not reach the others.

This was the crux of the judgment:

1. At RCW 51.08.178, the Industrial Insurance Act defines "wages," and makes an injured worker's "monthly wages" the presumptive basis for disability compensation payable to the worker under the Act.

2. In determining an injured worker's "wages" and "monthly wages" under RCW 51.08.178, the Act does not authorize the Department of Labor and Industries or the Board of Industrial Insurance Appeals 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.

¹⁹ "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1075 (2006).

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.

3. RCW 51.08.178 required that plaintiff's “monthly wages” be determined from the \$65,729.00 in commissions the certified appeal [B]oard record shows she actually earned and received in the 11-month period the Board determined to have been determinative, without deduction of expenses related to production of that income.

CP 77-79. The Department appeals from that judgment.

C. SUMMARY OF ARGUMENT

RCW 51.08.178²⁰ defines “wages,” as gross earnings less specified

²⁰ The statute provides:

§ 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:

[by various factor corresponding to the number of days normally employed per 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.

....

The statute should be read as a whole. See Judd v. AT&T Co., 152 Wn.2d 195, 203, 95 P.3d

exclusions. Because the statute specifies certain exclusions, no others may be inferred. Therefore, the “wages” of an injured worker whose earnings include nothing excludable must be based on his or her gross earnings.

Section 178 provides that its definition of “wages” applies to “the worker,” *i.e.*, every worker the Act covers. Self-employed independent contractors are not covered automatically, but may elect coverage – which Ms. Malang did. The Act is remedial law, which should be applied broadly to benefit injured workers. Accordingly, as a covered “worker” Ms. Malang was entitled to the full measure of the “wages” remedy the Legislature provided in §178. The Department,²¹ by subjecting her to its notion of “wage equivalent” (which is not, in fact, equivalent) instead of “wages,” stripped her of her “wages” remedy.

Section 178 subsection (4), which the Department claims governs determination of Malang’s “wages,” does not do so: the Supreme Court has determined that “wages” must be determined under subsection (1),

337 (2004) (“To properly interpret a statute, courts must read statutory provisions together, not in isolation”); *Dahl-Smith v. Walla Walla*, 148 Wn.2d 835, 844, 64 P.3d 15 (2003) (“A statute should be read as a whole and the various provisions should be read in light of each other” (citation omitted)).

²¹ See *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 538 n.2, 886 P.2d 189 (1994):

We use the term “Department” broadly. The Industrial Insurance Act creates multiple levels of review within the agency, including review by the Department itself, by an industrial appeals judge within the Board of Industrial Insurance Appeals, and by the Board itself. A party's failure to appeal an adverse ruling to the next level transforms the ruling into a final adjudication by the Department.

unless the Department shows that some other subsection “specifically” applies, and subsection (4) does not specifically apply here. Moreover, the Department did not argue §178(4) below, so the court should decline to consider it now.

If the law authorized reducing self-employment earnings by expenses necessary to produce such earnings, some of the Board’s deductions were unjustified factually, because they were *unnecessary* and/or not costs to produce earnings. Malang raised these arguments in her summary judgment motion, but because of the superior court’s decision on the primary issue the court did not reach them..

Every step of the Department’s reasoning – that RCW 51.08.178 does not define “wages”; that “wages” for self employed workers should be determined differently than for other covered workers; that “wages” of self-employed workers should be governed by §178(4); that subsection (4) authorizes determining “wages” in whatever manner the Department deems “fair and reasonable”; and that the Department’s net earnings “wage equivalent” treats self employed workers like other workers, so is “fair and reasonable” – is untenable.

The Department admits that its speculation about “absurd” results does not apply to this case. There is no reason to believe it has *ever* occurred, or will ever occur. Moreover, courts do not *amend* statutes under the guise of statutory interpretation (which the Department’s “wage

equivalent” does) to avoid “absurd” or difficult results. Amending statutes is a legislative function.

Malang appreciates that in construing statutes, appellate courts rightly try to avoid deciding a case in a way that may create problems for later cases. Here, however, the Department’s arguments that to apply §178 as the superior court did will strip workers of benefits under other statutes are either wholly unrealistic, or result from the statute as the Legislature wrote it.

D. ARGUMENT

1. Standard of Review

This is the standard for review of a summary judgment that depended of determining the meaning of a statute:

In order to ascertain the meaning of [a statute], we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. If a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning. A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. This court does not subject an unambiguous statute to statutory construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate.

Cerrillo v. Esparza, 157 Wn.2d ___, 147 P.3d 155 (2006) (internal

punctuation and citations omitted). The Department's argument of a net earnings "wage equivalent" for self-employed workers reads into the statute language that is not there – and ignores language that *is* there.

The Department's argument for deference to its interpretation of the statute should be unavailing. Courts *deny* deference when an agency's decision exceeds its statutory authority, and "[t]he Department's authority does not extend beyond the statute." Department of Labor & Indus. v. American Adventures, 59 Wn. App. 790, 792, 801 P.2d 1032 (1990) (citation omitted). *See also Impoundment of Chev. Truck*, 148 Wn.2d 145, 157, 60 P.3d 53 (2002) (courts do not "defer to an agency the power to determine the scope of its own authority," citation omitted). Nothing in §178 authorizes the Department, in determining a worker's "wages," to treat self-employed workers differently than other Act-covered workers, or to subtract wage related expenses from earnings.

Further, "[n]o deference is to be accorded a policy that is wrong." White v. Salvation Army, 118 Wn. App. 272, 277, 75 P.3d 1990 (2003), *review denied*, 151 Wn.2d 1028, 94 P.3d 959 (2004) (citation omitted). *See also Cockle v. Dep't of Labor & Indus.*, *supra*, 142 Wn.2d at 812:

While we may defer to an agency's interpretation when that will help the court to achieve a proper understanding of the statute, such interpretation is not binding on us. Indeed, we have deemed such deference inappropriate when the agency's interpretation conflicts with a statutory mandate. Both history and uncontradicted authority make clear that it is the province and duty of the judicial branch to say what the law is and to determine the purpose and

meaning of statutes[.]

(Internal punctuation and citations omitted.)

Finally, in regard to deference, settled authority requires that where the Act is ambiguous, ambiguity be resolved in the injured worker's favor:

The 1971 Legislature also codified a principle already long recognized by our courts: "This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. In other words, where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 811, 16 P.3d 583

(2001) (citations omitted).²² See also RCW 51.04.010²³ and RCW

²² See also *Doty v. Town of South Prairie*, 155 Wn.2d 527, 533, 120 P.3d 941 (2005) (quoting *Cockle*).

²³ That statute – titled "Declaration of police Power – Jurisdiction of courts abolished" – provides, in part:

...The remedy of the worker has been uncertain, slow and inadequate. ... The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. ..."

"[L]egislative policy statements...are to be considered in construing, interpreting, and administering" a statute; "[s]uch declarations and recitals, while not operative rules of action, may play a very important part in determining what action shall be taken." *Judd v. AT&T Co.*, 152 Wn.2d at 203.

51.12.010.²⁴

2. RCW 51.08. §178 defines “wages,” as gross earnings after specified exclusions not present in this case

a. Section 178 defines “wages”

The Department’s claims that “[t]he word ‘wage’ is not defined in RCW 51.08.178,”²⁵ and that “[t]he term, ‘wages,’ is not itself defined under RCW Title 51,”²⁶ are simply wrong. Chapter 51.08 RCW is titled “Definitions,”²⁷ and RCW 51.08.178 is part of that chapter. Both the Supreme Court and this court have stated that §178 defines “wages.” *See Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005) (“The term ‘wages’ is defined in RCW 51.08.178(1)[.]”); *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 806 (“Time-loss and loss of earning power compensation rates are determined by reference to a

²⁴ That statute – titled “Employments covered – Declaration of policy” – provides:

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

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

²⁵ AB 1.

²⁶ AB 23.

²⁷ *See Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 810 (“The [1971] revision [to the Act] added a ‘wages’ section to Title 51 RCW’s definitional chapter and made compensation in many cases proportional to a worker’s actual ‘wages’ at the time of injury. RCW 51.08.178(1).”).

worker's 'wages,' as that term is defined in RCW 51.08.178"); *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 912, 138 P.3d 177 (2006) ("The industrial insurance statute defines monthly wages used to calculate benefits in RCW 51.08.178.").

b. Malang's "wages" must be determined under § 178(1)

In effect, the Department argues for determining Ms. Malang's "wages" under subsection (4) by default: because Malang was not paid by the month or day or hour as subsection (1) describes, and because subsection (1) does not authorize deduction of expenses the Department believes should be deducted (in other words, does not provide for her "wages" to be determined in a manner the Department considers to be "fair and reasonable"), subsection (4) must apply. This argument is untenable. In *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290, 996 P.2d 593 (2000), the Supreme Court held that "wages" *must* be determined under §178(1), unless the Department shows that some other subsection "specifically" applies:

In summary, when determining which section applies [the Department contended for subsection (2), while the worker contended for subsection (1)]...the default provision is subsection (1); it must be used unless the Department establishes it does not apply. RCW 51.08.178(1)...applies unless otherwise provided specifically in the statute concerned.

(Emphasis added.) The Court of Appeals has emphasized the directive term, "specifically":

RCW 51.08.178(1) states: ‘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.’”

Fred Meyer, Inc. v. Shearer, 102 Wn. App. 336, 339, 8 P.3d 310 (2000), review denied, 143 Wn.2d 1003, 21 P.3d 290 (2001) (emphasis the court’s). Subsection (4) does not “specifically” apply to Malang.

Therefore, Malang’s “wages” must be determined under subsection (1).

Further, the Department’s reading of subsection (4) is impossible to square with the plain language of that subsection. Subsection (4) states:

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, [then] 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.

(Emphasis added.) In other words, subsection (4) applies when a wage cannot be determined in a fair and reasonable manner under *another* subsection, in which circumstance, subsection (4) is applied by determining the wages of other workers in the same occupation. No party asked the Board to base Malang’s “wage” on other workers’ earnings,²⁸ and the Board did not purport to do so. Malang’s “wages” *could* be determined in a fair and reasonable manner under §178(1): by dividing her

²⁸ In fact the record contains no such evidence. See CABR 5 at lines 27-29: “Neither has the Department or Ms. Malang presented evidence of wages a comparably skilled and situated real estate agent such as Ms. Malang would earn if employed by a broker for wages, rather than through a commission split agreement such as between Ms. Malang and Crescent Realty.”

gross earnings by the number of months she worked to earn them, just as the Department would have done had she *not* been self employed.²⁹ The Department has conceded that this method is “fair and reasonable”; the Department disputes only the amount of earnings to be divided.

c. Section 178 defines Malang’s “wages” as her gross earnings

The *ordinary* meaning of “wages” is *gross* earnings. Ordinary meaning is modified where the Act so indicates,³⁰ and in §178(1) the Legislature expressly excluded certain earnings from “wages”: overtime pay,³¹ and tip income unless “reported to the employer for federal income

²⁹ Moreover, that is what the Department would have done if the employment contract had called Malang an employee instead of an independent contractor. Cf. *In re Clement J. McLaughlin*, Nos. 02 18933 and 02 18934 (Wash. Bd. of Indus. Ins. Appeals Significant Decision November 5 2003) (“The claimant does not dispute the Department’s use of \$1,500 per month base salary plus commissions, a total that averaged \$ 3,185.86 per month, as a component of his wage at the time of injury.”). See also Policy 4.41: “The worker’s wages used for gross monthly income can include different types of earnings [including] Commissions[.]”

³⁰ See *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 808:

Words are not to be given their ordinary meaning when a contrary intent is manifest. Thus, even if the Department is correct in its attribution of the “ordinary: meaning of “wages,” RCW 51.08.178 expressly expands that definition to include the “reasonable value” of in-kind work benefits such as “board, housing [and] fuel.” That definitional expansion clearly removes the term from its arguably more common usage and makes it manifest that the Legislature intended to include in “wages” the value of at least some in-kind work “benefits.”

Obviously this appeal does not involve in-kind compensation. However, the language of §178 as a whole, and of subsection (1) in particular, from application of *unius est exclusio alterius* (“specific inclusions exclude implication; see *Starr v. Employment Security*) shows the Legislature meant “wages” to mean gross earnings less only the two specified exceptions where present.

³¹ “The term ‘wages’...shall not include overtime pay except in cases under subsection (2) of this section.”

exclusion bars further exclusion by *implication*:

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* – specific inclusions exclude implication.

Starr v. Employment Security Dep't, 130 Wn. App. 541, 549, 123 P.3d

513 (2005). See also *Cerrillo v. Esparza*, *supra*. Accordingly, no earnings *other* than overtime pay and unreported tips may be excluded from “wages”; or, stated affirmatively, “wages” means *gross* earnings less only overtime pay and unreported tips, if any. Ms. Malang’s earnings included neither overtime pay nor tips. Therefore, her earnings to be divided by eleven to determine her “monthly wages” were her *gross* earnings.

Further, the Act is remedial law,³² which aims to mitigate work injury-related suffering and economic loss.³³ Remedial law should be read broadly to accomplish its aim,³⁴ with reasonable doubt resolved in the injured worker’s favor.³⁵ The Department cannot credibly deny that

³² See *Sebastian v. Dep’t of Labor & Indus.*, 142 Wn.2d 280, 284, 12 P.3d 594 (2000) (“the Act is patently remedial,” citation and internal punctuation omitted, and “We interpret the coverage provisions of remedial statutes broadly...”)

³³ RCW 51.12.010.

³⁴ *Sebastian v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 284 (“We interpret the coverage provisions of remedial statutes broadly...,” citation omitted).

³⁵ *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 811.

§178(1) on its face expresses gross earnings, since that is how the Department, itself, has defined “wages” in both regulation and policy. WAC 296-14-522, titled “What does the term ‘wages’ mean?” provides:

The term “wages” is defined as:

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

....

(Also notable is that the regulation does not differentiate between workers who are self employed and those who are employed by others.) Likewise, Department Policy 4.41, titled “Wage Definitions for Calculating Time-Loss,” describes wages as gross earnings, for all workers.³⁶

Finally, as to construction of §178, to give the statute the reading the Department wants would require adding language to the statute that the Legislature did not put there. See *Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005):

“A court must not add words where the legislature has chosen not to include them.” *Restaurant Development v. Canawill*, 150

³⁶ The regulation was issued in 2003. The policy was issued in 1992.

The record does not show when the *Department* started applying a net earnings rule to self-employed workers. To the best of Malang’s knowledge, the *Board* first stated its “wage equivalent” rule in *In re Wesley B. Steele*, No 03 16467 (Wash. Bd. of Indus. Ins. Appeals April 25, 2005). *Steele* involved §178(2). The next case in which the Board applied its “wage equivalent” was this one, *Malang*.

Wn.2d 674, 682, 80 P.3d 598 (2003) (citations omitted, emphasis added). See also *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (“Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute,” citation omitted). And, finally, **courts do not amend statutes by judicial construction, nor rewrite statutes to avoid difficulties in construing and applying them. There is a difference between adopting a saving construction and rewriting legislation altogether. We show greater respect for the legislature by preserving the legislature’s fundamental role to rewrite the statute than undertaking that legislative task ourselves.**

(Citations omitted, emphasis added.) The broad language of §178 – especially when read together³⁷ with the remedial purpose of RCW

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³⁷ See *Judd v. AT&T Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004) (“To properly interpret a statute, courts must read statutory provisions together, not in isolation”); *Dahl-Smith v. Walla Walla*, 148 Wn.2d 835, 844, 64 P.3d 15 (2003) (“A statute should be read as a whole and the various provisions should be read in light of each other” (citation omitted)).

51.04.010³⁸ and RCW 51.12.010³⁹ – supports that whether a worker

³⁸ That statute – titled “Declaration of police Power – Jurisdiction of courts abolished” – provides, in part:

...The remedy of the worker has been uncertain, slow and inadequate. ... The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. ...”

See also Judd v. AT&T Co., 152 Wn.2d at 203. (“legislative policy statements...are to be considered in construing, interpreting, and administering” a statute; “[s]uch declarations and recitals, while not operative rules of action, may play a very important part in determining what action shall be taken.”)

See also Sebastian v. Dep’t of Labor & Indus., *supra*, 142 Wn.2d at 284 (“We interpret the coverage provisions of remedial statutes broadly...”)

³⁹ That statute – titled “Employments covered – Declaration of policy” – provides:

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

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

See also Cockle v. Dep’t of Labor & Indus., *supra*, 142 Wn.2d at 811:

The 1971 Legislature also codified a principle already long recognized by our courts: “This Title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. In other words, where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

Dennis v. Dep’t of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citing cases both predating and postdating the 1971 codification of this principle); *see also Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997), 952 P.2d 590 (1998).

See also Doty v. Town of South Prairie, *supra*, 155 Wn.2d at 533 (quoting *Cockle*).

is self employed or employed by another, and whether the worker incurred expenses in generating his or her earnings, are immaterial to “wages.”^{40, 41}

d. Section 178 must be applied to Malang in the same manner as to any other “worker,” notwithstanding that she was self employed

Section 178 speaks simply of “worker[s]”:

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. ...

The Act defines “worker,” at RCW 51.08.180:

“Worker” – Exceptions

(1) **“Worker” means** every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also **every person in this state** who is engaged in in the employment of or **who is working under an**

⁴⁰ Malang points out that the term “net” appears nowhere in any benefits provision of the Act. The term appears exactly twice elsewhere in the Act: to specify the financial strength a company must have to be allowed to self insure, instead of insuring its employees through the Department, and in regard to retrospective rating groups. See RCW 51.14.010 and RCW 51.18.050.

⁴¹ At AB 21 footnote 9, the Department criticizes Malang’s argument, at superior court, that “wage equivalent” was ultra vires (meaning “done wholly without legal authorization or in direct violation of existing statutes,” *Department of Labor & Indus. v. Kantor*, 94 Wn. App. 764, 779, 973 P.2d 30, review denied, 139 Wn.2d 1002, 989 P.3d 1139 (1999) (citations and internal punctuation omitted)). The Department characterized Malang’s argument as “claiming that the Department and Board lacked authority to interpret” the “wage” statute. Actually, Malang argued that the Department and Board exceeded their authority by substituting “wage equivalent” for “wages” – in effect, legislating in the guise of interpretation.

independent contract,^[42] the essence of which is his personal labor for an employer under this title.

(Emphasis added.) The essence of Malang's contract with Crescent Realty⁴³ was her personal labor. Cf. Peter M. Black Real Estate Co., Inc. v. Dep't of Labor & Indus., supra, 70 Wn. App. at 489-90.⁴⁴ The Act excuses self-employed workers from mandatory coverage, but allows them to opt into the system:

Under RCW 51.12.020(5), sole proprietors or partners are expressly excluded from *mandatory* coverage and are not required to participate in Washington's workers' compensation system.

⁴² This means independent contractors. See In re Peter M. Black Real Estate Co., Inc., Nos. 88 1191 and 88 1192 (Wash. Bd. of Indus. Ins. Appeals Significant Decision March 23, 1989), *affirmed sub nom. Peter M. Black Real Estate Co., Inc. v. Dep't of Labor & Indus.*, 70 Wn. App. 482, 854 P.2d 46 (1993):

In 1937, however, the Legislature expanded the definition of workman (now "worker") to include within the terms of the Act independent contractors whose personal labor constituted the essence of the contract. Laws of 1937, ch. 211, § 2, p. 1030. The relevant statute, RCW 51.08.180, now reads, in part:

"worker" means every person in the state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment.

⁴³ As far as shown by CABR EXHIBITS, Exhibits 21 and 22.

⁴⁴ At the end of its analysis the court summarized, at 490:

In examining the "realities of the situation", it is clear that real estate agents must work for one broker; only that broker can pay them. The agents can share their commissions only through their broker and they are not legally authorized to hire others to perform their licensed function for the broker. The contracts here required a great deal of personal labor; in order to list and sell property, the agents had to make and maintain contacts community-wide. The agents are not excluded from worker status under the third *White* factor.

Neither are they considered “workers” or “employees” automatically covered under the statute. **Sole proprietors or partners may opt into the system under RCW 51.12.110 and RCW 51.32.030...**

Department of Labor & Indus. v. Fankhouser, 121 Wn.2d 304, 309-10, 849 P.2d 1209 (1993) (footnote and citations omitted, emphasis added).⁴⁵

Ms. Malang opted in, by buying coverage.^{46,47} Accordingly, she was a

⁴⁵ See also RCW 51.12.020: “There is a hazard in *all* employment and it is the purpose of this title to embrace *all* employments which are within the legislative jurisdiction of this state.” (Emphasis added.)

See also *In re Peter M. Black Realty*, *supra*:

Although the 1937 amendment expanded the definition of “worker”, the expansion was not complete. As stated by the court in *Haller v. Department of Labor and Industries*, 13 Wn.2d 164, 167 (1942) the amendment evidenced a legislative intention “to extend industrial insurance protection to some, but not all, independent contractors” (Emphasis added). The *White* court, too, recognized that even with the 1937 amendment there would remain independent contractors who would not be subject to the mandatory coverage of the Act. It noted that while a person might be an independent contractor not covered under the Act, that did not prevent him or her from having the protection of the Act if he or she desired to qualify as a working employer, gave necessary notice to the director, and paid the necessary premiums. 48 Wn.2d 477-478; See RCW 51.12.115 and RCW 51.32.030.

⁴⁶ CABR TRANSCRIPTS, Malang testimony at p. 31 lines 13-25.

⁴⁷ In *In re Peter M. Black Real Estate Co., Inc.*, *supra*, the Board concluded that real estate agents who, by contract, were “independent contractors,” were, nevertheless, also “workers” for whom the Act required the employing real estate broker to pay Industrial Insurance Act premiums. The case reached the Court of Appeals, which affirmed the Board. *Peter M. Black Real Estate Co. v. Dep’t of Labor & Indus.*, 70 Wn. App. 482, 854 P.2d 46 (1993). The court focused on the web of statutes that regulate real estate practice:

Washington Real Estate Licensing Law

The sale of real estate is a highly regulated profession. We briefly note several statutes that control the agent/ broker relationship. Brokers are responsible for the conduct of agents licensed under them. RCW 18.85.155. **Brokers must adequately supervise their licensed agents or face sanctions.** RCW 18.85.230(25). **Brokers are to retain the licenses of agents working under them and must return the license of any agent who ceases to represent the broker to the State.** RCW 18.85.320. **The broker's name must appear on the agent's advertisements.** RCW 18.85.230(11). Brokers may divide their commissions only

covered “worker.” As such, the Act afforded her the same treatment as other covered “worker[s].” See *Thompson v. Dep’t of Labor & Indus.*, 192 Wash. 501, 506, 73 P.2d 1320 (1937) (the Act gives the same protection under the elective coverage as under mandatory coverage). “Nowhere in

with agents licensed to work for them or with other brokers; **agents are prohibited from dividing their commissions with any person, except through their brokers.** RCW 18.85.330. **Agents may accept commissions only from the broker with whom they are licensed.** RCW 18.85.230(22). **In general, agents must work with a broker to sell and list real estate and can sell and list only for the one broker with whom they associate.** See RCW 18.85.010(1), (2); .230(11), (22); .320; .330.

70 Wn. App. at 487-88 (emphasis added).

...All the listings are officially the broker's. This situation presents co-workers joining together to market the company's product, real estate listings. The agents are then compensated according to their proportionate effort. ... In examining the “realities of the situation,” it is clear that real estate agents must work for one broker; only that broker can pay them. The agents can share their commissions only through their broker and they are not legally authorized to hire others to perform their licensed function for the broker. The contracts here required a great deal of personal labor; in order to list and sell property, the agents had to make and maintain contacts community-wide. ...

Id. at 490 (emphasis added).

“Significant cases” are those the Board has designated as leading cases for Board practice. See RCW 51.52.160, “Publication and indexing of significant decisions,” and WAC 263-12-195, “Significant decisions.” However, all Board decisions have the same precedential value, at the Board. See *In re Frances J. Wareing*, Bd. of Indus. Ins. Appeals No. 02 11829 (July 2, 2003):

Our industrial appeals judge was, of course, correct in citing *Nilson* in issuing the Proposed Decision and Order. **Although *Nilson* is not a designated significant decision of the Board of Industrial Insurance Appeals, it is entirely appropriate to cite any prior Board decision that would help guide the parties in resolution of matters on appeal. It is our obligation to ensure consistency in all our rulings, irrespective of whether they are designated as one of our significant decisions published in accordance with RCW 51.52.160.** *In re Diane Deridder*, Bd. of Indus. Ins. Appeals No. 98 22312 (May 30, 2000). We also note that it is both the responsibility and prerogative of the Board to review decisions based upon subsequent legal authority and different factual patterns to ensure that our application of the law is not only consistent, but also correct. ...

RCW Title 51 is there even a hint that the legislature intended some covered employees to be treated differently than others.” Johnson v. Tradewell Stores, 95 Wn.2d 739, 745, 630 P.2d 441 (1981). In Johnson the court emphatically rejected different treatment, condemning it as “manifestly arbitrary, unreasonable, inequitable, and unjust,” 95 Wn.2d at 744, and declaring it a violation of the state and federal constitutions:

It is a manifest injustice of the most egregious nature, and we hold it to be a violation of the equal protection clause of the Fourteenth Amendment and Const. art. 1, § 12 to classify one group of employees so that they receive fewer benefits than similarly situated employees simply because the employer chooses to be self-insured.

Id. at 745.⁴⁸ Accordingly, Malang’s “wages” must be determined in the same manner as any other covered “worker”⁴⁹ – *i.e.*, according to its language, based on her gross earnings less only earnings the Legislature specifically excluded.

⁴⁸ In Johnson the issue was whether employees of employers who elect to self insure should be treated differently than workers insured by state-fund employers. Malang was insured by the state fund, but she elected to self insure, by buying coverage. The factual variation between *Malang* and *Johnson* should be immaterial.

⁴⁹ See Cobra Roofing v. Dep’t of Labor & Indus., 157 Wn.2d 90, 99, 135 P.2d 913 (2006) (“Application of statutory definitions to the terms of art is essential to determining the plain meaning of the statute,” citation omitted). See also RCW 51.04.060, titled “No evasion of benefits or burdens”:

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

**3. The Department’s argument for “wage equivalent” is
unsound**

**a. The Board’s “wage equivalent” cannot supplant or modify
statutory “wages”**

The Department’s argument that the Board’s “wage equivalent” makes self-employed “wages” equivalent to “wages” of workers employed by others is spurious, legally and factually. Legally, as addressed above, the Department was obligated to apply the Act’s *language*. The Department had no authority to extract legislative *policy* from §178, then create and substitute an approach that the Department believed best expressed the policy for some workers. The Department did not *apply* §178 and §180; the Department *rewrote* them. See *Parentage of C.A.M.A.*, *supra*, 154 Wn.2d at 69 (quoted above at p. 21). If the Legislature had intended that “wages” be determined differently for workers who are self employed, or intended to apply a net earnings “wage equivalent” to such workers, it knew how to say so. See *Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004), *review denied*, 139 1002, 989 P.2d 1139 (1999):

If the legislature intended to create an exemption for situations in which the parent organization does not participate, it would have done so in the language of the statute. It didn’t.

Where the legislature expressed no intent to treat self-employed workers differently from other “worker[s],” or to apply a net earnings “wage

equivalent” to certain “worker[s],” the Board’s decision was wrong, and the superior court’s judgment was correct.

b. “Wage equivalent” is not, in fact, equivalent to “wages”

The Department argues that its “wage equivalent” makes self-employed workers’ “wages” equivalent to “wages” of other workers.⁵⁰ If that were true, the Department’s “wage equivalent” (alternately termed an “adjusted net profit translation of Malang’s gross receipts”⁵¹) would still be invalid because the language of §178 and §180 does not permit it – but it is not true. Ms. Malang had the capacity to earn the gross commissions Crescent actually paid her. Just like other workers, her “wages” must reflect her actual earning capacity⁵² – not her earnings less expenses for which she spent part of her earnings.

In arguing that “[u]nder Malang’s gross-receipts-equals-wages approach, agents who are identically situated in terms of properties sold,

⁵⁰ See, for example, AB 39-41.

⁵¹ AB 39.

⁵² See *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 811:

Since the 1971 revision of Title 51 RCW, this court has emphasized that an injured worker should be compensated based not on an arbitrarily set figure, but rather on his or her actual “lost earning capacity.” *Double D. Hop Ranch*, at 798 (citing *Kilpatrick v. Dep’t of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994)).

See also *Department of Labor & Indus. Avundes*, *supra*, 140 Wn.2d at 288; *Watson v. Dep’t of Labor & Indus.*, *supra*, 133 Wn. App. at 915 (“Our Supreme Court explained that the proper analytical focus is on the worker’s lost earning capacity, not his work history,” citation omitted).

gross commissions earned, and 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 agreement with the broker,”⁵³ which would be “strained and absurd,”⁵⁴ the Department precisely describes its *own* argument and the result therefrom. As a matter of law, whether or not Malang was an independent contractor and self employed, having elected Act coverage she was a “worker” under §178, and entitled to have her “wages” determined in the same manner as to any other worker, *i.e.*, per §178 and WAC 296-14-522, on gross receipts less only overtime pay and unreported tips.⁵⁵

c. Schedule C deductibility should be immaterial to “wages”

Schedule C deductibility should be immaterial to “wages.” The federal tax code is a different system, with different motives and goals, than the Act. See *In re Jerry W. Uhri*, No. 93 6908 (Wash. Bd. of Indus. Ins. Appeals March 30, 1995) (“The incentives inherent in the Internal Revenue Code which militate against an accurate reflection of business income on tax

⁵³ AB 40.

⁵⁴ *Id.*

⁵⁵ See *In re Daniel A. Renshaw*, *supra*; *In re William A. Granger*, No. 02 16711 (Wash. Bd. of Indus. Ins. Appeals January 14, 2004), *affirmed sub nom. Department of Labor & Indus. v. Granger*, 130 Wn. App.489, 123 P.3d 858 (2005), *review granted*, 2006 Wash. Lexis 628 (2006) (under WAC 296-14-522, “wages” means gross earnings). The regulation became effective on June 15, 2003. By then, the Department had already been basing “wages” on gross earnings for at least 11 years, per Policy 4.41, *supra*.

returns makes the Department's reliance on tax returns as a basis to determine wages unreasonable.”). *See also In re Roy E. Macomber, Jr.*, Nos. 98 14451 and 98 21315 (Wash. Bd. of Indus. Ins. Appeals August 25, 2000):

[In *In re Jerry Uhri*,] we determined that Mr. Uhri's wages were not reasonably and fairly calculable based on the evidence the Department used, his income tax returns. We observed that a business owner would be foolish not to make the bottom line, net income from a business, as small a figure as possible for tax purposes. We also noted the incentives inherent in the Internal Revenue Code, which militate against an accurate reflection of the business income on tax returns, make reliance on tax returns unreasonable as a basis to determine wages.

Further, the language of §178, on its face, shows the Legislature had federal tax law in mind when it drafted the statute.⁵⁶ Where the Legislature specifically excluded certain earnings from “wages” unless reported for federal taxation, but expressed no other tax-related exclusion, the court should infer that the Legislature *intended* that no other aspect of tax reporting affect “wages”⁵⁷ (especially when §178 is a remedial statute, and to

⁵⁶ *See* RCW 51.08.178(1) (“[T]ips shall also be considered wages only to the extent such tips are reported to the employer for federal tax purposes.”).

⁵⁷ *See In re Cathy Pearsall-Stipek*, 141 Wn.2d 756,794, 10 P.3d 1034 (2000) (Talmadge, J., dissenting) (“The Legislature created the crimes of perjury in the first and second degree with materiality of the falsehood squarely in mind.”). *See also Allen v. Dep’t of Employment Security*, 83 Wn.2d 145, 150, 516 P.2d 532 (1973):

...Thus it is apparent that the legislature contemplated that claims could and would be filed which were not compensable. We must assume that the legislature had this fact in mind when it enacted RCW 50.20.070, providing that the additional period of disqualification for misrepresentation would commence the first week that a claimant filed a claim after notification of the department's determination.

deduct Schedule C expenses from earnings reduces the statute's remedial effect). However, even if the statute's silence about taxation except for tips had been *unintentional*, the statute should be applied as written. See *State v. Roggencamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005):

...Nor are we permitted to presume the omission of that language was unintentional and therefore inconsequential. *In re Custody of Smith*, 137 Wn.2d 1, 12, 969 P.2d 21 (1998) (“A ‘court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.’” (quoting *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Retired Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979))), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 403, 573 P.2d 10 (1977) (“We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally. We must assume the legislature meant what it said.” (citations omitted)).

(Emphasis added.)⁵⁸

4. If §178 allowed the Department to deduct Schedule C expenses that were “necessary to, or primarily furthering, the generation of the gross income,” the record does not show substantial evidence that the types and amounts of expenses the Board deducted from plaintiff’s earnings were such expenses

Because the superior court determined that deduction of any

⁵⁸ Moreover, the tax code makes expenses the Board characterized as “necessary to, or primarily furthering, the generation of the gross income” deductible by *all* workers, not just workers who are self-employed. If Crescent and Malang had called her an employee instead of an independent contractor, the expenses she deducted in Schedule C would have been deductible on Schedule A, at line 20, “Unreimbursed employee expenses – job travel, union dues, job education, etc.” See CABR EXHIBITS, Exhibit 20.

expenses was unlawful, it did not reach the question of whether particular deductions were supported by substantial evidence. For the same reason, this court should not need to reach the question, either. Nevertheless, Malang sets out the argument, for whatever use it may be.

If the Act allowed the Department to limit “wages” to gross wages less expenses necessary to or primarily for wage production, the Board’s conclusions that certain of Malang’s Schedule C deductions fit that description – at all, and in the amounts the Board deducted – are not supported by substantial evidence in the record. The only Schedule C expense that substantial evidence shows Malang *had* to incur to produce earnings was her business license. Other expenses were *unnecessary*, in that neither the law nor her contract with her broker⁵⁹ required them. Malang, personally, decided to make them – at all, and in the amounts she did.⁶⁰

⁵⁹ CABR EXHIBITS, Exhibits 21 and 22.

⁶⁰ Department witness Hallett’s testimony that real estate businesses *commonly* choose to make similar types of expenditures does not make the expenses *necessary* – either the *type* of expense (for example, a mechanic may choose to buy safety toe boots, or not), or the *amount* (for example, a mechanic who chooses to buy safety toe boots may buy the cheapest ones, or the most expensive).

The Board’s deductions of car/truck expenses, legal and professional fees, and office expenses conflict with the Board’s decision in *In re Kenneth E. Paige*, Nos. 93 2534 [etc.] (Wash. Bd. of Indus. Ins. Appeals March 7, 1994). Mr. Paige “was working at two jobs: his regular full-time employment with Metal Masters Corporation, and self-employment in a charter boat business.” In determining his wages from the boat business, the Board held that car/truck expenses, legal and professional fees, and office expense were “*not necessary for the generation of income[.]*” (Emphasis added.) (The Board also concluded that self-employment expenses for advertising, insurance, supplies, fuel, utilities, taxes and licenses *were* necessary for the generation of income.)

“Gross wages” should include voluntary deductions:

To provide further interpretation of the court's ruling in *Cockle*, the Department promulgated new Washington Administrative Code provisions. The WAC provisions attempt to synthesize *Cockle* with the wage definition embodied in RCW 51.08.178. WAC 296-14-522(1) defined wages as the gross cash wages paid by the employer for services performed prior to any mandatory deductions. "Gross" means "exclusive of deductions," according to *Webster's II Riverside University Dictionary*. Since the term "gross" was not defined in the code, it is appropriate to use the dictionary definition. *Maplewood Estates, Inc., v. Department of Labor & Indus.*, 104 Wn. App. 299, 306 (2000). **The gross wage should, therefore, include both mandatory and voluntary deductions.**

In re Daniel A. Renshaw, Nos. 02 16572 and 02 16573 Wash. Bd. of Indus. Ins. Appeals August 27, 2003).⁶¹

Certain other deductions were problematic for additional reasons. Malang testified that the expense on her Schedule C line 17 was for preparation of her tax return.⁶² Tax return preparation is not an expense of *producing* income; it is a *consequence* of income. Moreover, whether a worker incurs such expense has nothing to do with whether he or she is self-employed or employed by another.

Ms. Malang testified that the deduction on Schedule C at line 27, “Other expenses,” was for “appreciation, gifts for my clients, things I

⁶¹ In *Renshaw* the employment contract in which the deductions were set out happened to have been a collective bargaining agreement, *i.e.*, the employment contract; see *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d at 474 and 475.

⁶² CABR Transcripts, Malang testimony at p. 34 lines 17-21.

contribute to in the community.”⁶³ That is not substantial evidence that the expenditures were “necessary to, or primarily furthering, the generation of the gross income.” “[A]ppreciation” and “contributions to the community” are too vague for the Board to have reasonably concluded anything about them. Gifts to people who were current clients thanked them for their business Malang *already* had, so their cost was not an expenses of producing earnings. Any beneficial effect that gifts to current clients might have on potential clients who might hear about her generosity are too remote to conclude that gift expense was “necessary to, or primarily furthering” commissions. As cited above, application of law to facts is reviewed as a question of law, and the Act should be applied in injured workers’ favor.⁶⁴ The Board’s conclusions that Malang’s “other expenses” were “necessary to, or primarily furthering,” generating her gross commissions, in the sum in her Schedule C, is unsound.

5. The Department’s argument of *Cockle* is unsound, because *Cockle* was not about “income”

The Department’s assertion, at AB 32, that in *Cockle v. Dep’t of Labor & Indus.*, the court “focus[ed] on labor derived *income* that the injured worker was living on at the time of injury” (emphasis added) is dead

⁶³ *Id.*, p. 34 line 51 - p. 35 line 4.

⁶⁴ RCW 51.12.010; *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 811.

wrong. *Cockle* concerned consideration *in kind*, not money wages. See

Cockle, supra, 142 Wn.2d at 807 n.2:

Since the question before us is which *in-kind* forms of consideration “received from the employer as part of the contract of hire” are “of like nature” to board, housing and fuel, we need not cite those portions of Title 51 RCW’s “wages” definition relating to *monetary* forms of consideration such as an *hourly or daily pay rate*, as the dissent urges. itself.”

(Emphasis original.)

Further, contrary to the Department’s claim, Ms. Malang’s gross earnings were available for her to live on in the very same way as the gross earnings of “worker[s]” who are not self employed. Many “worker[s]” employed by others spend money on things they need for work. Mechanics, and construction workers and others buy tools and special clothing. School teachers buy classroom supplies. A comprehensive list would be long. Such “worker[s]” do not need those things any less than Ms. Malang needed the things the in her Schedule C. (Arguably they need them *more* than some of the things the Board deducted from Ms. Malang’s earnings.) Yet, earnings-related expenses are not deducted in determining the “wages” of “worker[s]” who are not self employed.

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6. The Department’s argument about “business expenses that Malang paid before she was injured but which she will not incur during her periods of disability” has nothing to do with this case

The Department’s argument that “business expenses that Malang paid before she was injured but which she would not incur during her periods of disability” “cannot be counted as lost wages” because “they are not goods and services that are needed during disability,”⁶⁵ and represent “no real economic loss,”⁶⁶ have nothing to do with this case. The record does not establish that any of Malang’s Schedule C expenses stopped during her total disability. (Except for automobile expense, all of the deducted expenses very well may have continued.) More important, however, are the obvious facts that (1) §178 defines “wages” in terms of *earnings*, and (2) because of the injury, Ms. Malang lost all her *earnings*. Whether she stopped *spending* her earnings on certain things is irrelevant to “wages” as defined in the statute.

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⁶⁵ This is a criterion in *Cockle v. Dep’t of Labor & Indus.*, *supra*, for determining whether compensation *in kind* qualifies as “wages.” It has nothing to do with *money* “wages.” See *Cockle*, 142 Wn.2d at 807 n.2

⁶⁶ AB 33-34.

7. The Department’s argument that “employer expenses are not part of wages whether the worker is self-employed or not” conflicts with statutory definitions of “worker” and “employer”

The Department’s argument that Schedule C “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,”⁶⁷ ignores or distorts the Act’s definitions of “worker” and “employer.” As addressed above, “worker,” in RCW 51.08.180, expressly includes independent contractors who choose to insure under the Act. Further, the essence of the definition of “worker” is performance of personal services. The essence of the definition of “employer,” in RCW 51.08.070, is receipt of services. The essence of the contract between Malang and Crescent Realty was that she performed services, which Crescent received. See above at p. 24, citing *Peter M. Black Real Estate Co., Inc. v. Dep’t of Labor & Indus.*, 70 Wn. App. at 489-90.

The Department’s connected argument that “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

⁶⁷ AB 34-35 (emphasis the Department’s).

receipts,”⁶⁸ is illogical. Ms. Malang earned and owned the money she spent on her Schedule C items. The same is not true of the factory worker in regard to the factory owner’s business expenses.

8. The Department’s argument about “absurd results when applied to high-gross-income/high-gross-expenses” fantasizes a case that has never happened; realistically will never happen; and addresses legislative, not judicial, power

It is the Department’s “hypothetical” about “high-gross-income/high-gross-expenses,” not the superior court’s decision, that is absurd.⁶⁹ A case of \$1,000,000 earnings with \$950,000 in earnings-related expenses has never happened. Nothing *like* it has ever happened. Realistically, it will never happen.

Moreover, “when interpreting a statute, ‘this court is required to assume the Legislature meant exactly what it said and apply the statute as written.’” *State v. Roggencamp, supra*, 153 Wn.2d at 625 (citations and internal punctuation omitted). As addressed above, Legislature in §178 defined “wages” as gross earnings less two specified exceptions. If there is a problem with that, it for the Legislature to address, not the courts. “Courts do not amend statutes by judicial construction, nor rewrite statutes to avoid

⁶⁸ AB 35.

⁶⁹ AB 38.

difficulties in construing and applying them.” *State v. Robbins*, 138 Wn.2d 486, 504 n.11, 980 P.2d 725 (1999) (Sanders, J., dissenting) (citations omitted and punctuation omitted). *See also Amalgamated Transit Union v. State*, 145 Wn.2d 544, 560, 40 P.3d 656 (2002) (“it is the legislature’s job – not ours – to stem the tide of potential absurd results that might result from impartially applying the plain meaning of statutory language,” citation and internal punctuation omitted).

9. The Department’s arguments that to base “wages” on gross earnings would harm workers’ rights under other statutes should be addressed to the Legislature, not the court, and are flawed

The Department’s arguments that §178 could impair other workers’ rights under other benefits statutes⁷⁰ should be directed to the Legislature, not the courts.

Benefits for total disability (both temporary and permanent) are paid as a percentage of the injured worker’s “wages”; the *higher* a worker’s “wages,” the *higher* the pension benefit.⁷¹ Similarly, in regard to temporary partial disability benefits,⁷² the *higher* an injured worker’s “earning power”

⁷⁰ AB 41-46.

⁷¹ Subject to the ceiling in RCW 51.32.060(5) and RCW 51.32.090(7).

⁷² Department’s argument at AB 45.

(i.e., “wage”⁷³), the *more* likely the worker is to qualify and the *higher* the benefit is likely to be. (Exceptions can be conceived, but whether they would ever actually occur is purely speculative.)⁷⁴

It is true that where a person receiving pension benefits retains earning capacity, the Department sometimes asserts that the retained earning capacity disqualifies the pensioner for total disability benefits, then cancels pension benefits, demands that benefits paid be refunded, and imposes a fraud penalty.⁷⁵ However, this risk is the *same* for *all* workers, self-employed or not. The Department takes such actions already, for workers who are *not* self employed. See, for example, *In re Norman L. Pixler*, No. 88 1201 (Wash. Bd. of Indus. Ins. Appeals Significant Decision November 7, 1989).⁷⁶

⁷³ *Cockle v. Dep’t of Labor & Indus.*, *supra*, 142 Wn.2d at 806 (“Time-loss and loss of earning power compensation rates are determined by reference to a worker’s ‘wages,’ as that term is defined in RCW 51.08.178”).

⁷⁴ The Department’s argument that self-employed workers’ “wages” should be based on *net* earnings would encourage pensioners with self-employment income to inflate expenses to reduce “wages.” See *In re Kenneth E. Borek*, No. ____ (Wash. Bd. of Indus. Ins. Appeals ____).

⁷⁵ AB 42-44.

⁷⁶ Entitlement to pension benefits depends on *earning capacity*, not necessarily *actual earnings*. See, for example, *In re Susan W. Shoemaker*, No. 00 21434 (Wash. Bd. of Indus. Ins. Appeals January 18, 2002):

We agree with Ms. Shoemaker that the mere fact that she is working part-time does not disqualify her from obtaining pension benefits. Part-time employment paying less than full-time employment at minimum wage is not gainful employment for a worker who was working full-time at the time of the industrial injury. *In re Norman Pixler*, BIIA Dec., 88,1201 (1989). [W]orking 20 hours a week does not disqualify Ms. Shoemaker from obtaining a pension.

The Department’s argument that basing “wages” on gross earnings “makes it likely that many self-employed workers will be deemed to be ‘gainfully employed’ and therefore not eligible for vocational rehabilitation services”⁷⁷ is similarly flawed. Eligibility for vocational services depends on statutory criteria, which concern, exclusively, restoring *employability*, i.e., *ability to perform and obtain employment*. See RCW 51.32.095.⁷⁸ Earnings,

(The Board denied Shoemaker a pension, but on other grounds: “In conclusion...because Ms. Shoemaker did not present persuasive medical evidence regarding her physical limitations, and presented no expert vocational testimony regarding her employability, we do not find her permanently totally disabled.”) See also *In re Del Sorenson*, No. 89 2696 (Wash. Bd. of Indus. Ins. Appeals Significant Decision February 27, 1991):

[T]he underlying rationale of *Pixler* with regard to benefit fraud cases holds true in time loss compensation or loss of earning power compensation cases as well as in pension cases. That is, **the mere showing that a worker was at a place of employment or engaged in a job task is not necessarily material.**

(Emphasis added.) The risk that pension benefits will be revoked arises when the Department believes a pensioner’s earning capacity exceeds his or her actual earnings. For example, assume a pensioner works as an auto mechanic on his own, pretty much full time, but has little or no *net* earnings because expenses for a garage, utilities, supplies, and so on consume most or all of what he earns. The Department would argue that his work nevertheless shows earning capacity, because where he can do the work for himself, he could do it for someone else who would pay him an hourly wage.

⁷⁷ AB 44.

⁷⁸ The statute provides, in pertinent part:

RCW 51.32.095 Vocational rehabilitation services – Benefits – [Etc.]

(1) One of the primary purposes of this title is to enable the injured worker to **become employable at gainful employment**. ... Where...vocational rehabilitation is both necessary and likely to enable the injured worker to **become employable at gainful employment**, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section.

(2) When in the sole discretion of the supervisor or the supervisor's designee vocational rehabilitation is both **necessary and likely to make the worker employable at gainful employment**, then the following order of priorities shall be

per se, do not demonstrate ability to perform and obtain work; unless earnings show employability, they do not disqualify the worker from vocational services. See *Kuhnle v. Department of Labor & Indus.*, 12 Wn.2d 191, 198 (1942),⁷⁹ where the Supreme Court held that an injured worker's

used:

- (a) Return to the previous job with the same employer;
- (b) Modification of the previous job with the same employer including transitional return to work;
- (c) A new job with the same employer in keeping with any limitations or restrictions;
- (d) Modification of a new job with the same employer including transitional return to work;
- (e) Modification of the previous job with a new employer;
- (f) A new job with a new employer or self-employment based upon transferable skills;
- (g) Modification of a new job with a new employer;
- (h) A new job with a new employer or self-employment involving on-the-job training;
- (i) Short-term retraining and job placement.

....

(7) The benefits in this section shall be provided for the injured workers of self-insured employers. ...

(8) Except as otherwise provided in this section, the benefits provided for in this section are available to any otherwise eligible worker regardless of the date of industrial injury. However, claims shall not be reopened solely for vocational rehabilitation purposes.

(Emphasis added.)

⁷⁹ One of the most widely cited authority in workers' compensation law.

earnings from supervising the work of others and performing some work on a farm he owned did not rule out that he was unemployable. *See also In re John F. Berg*, Nos. 02 23331 and 02 15732 (Wash. Bd. of Indus. Ins. Appeals May 25, 2004), where the Board decided that \$177,773.00 in self-employment earnings from a business Berg actively managed were not “wages” (*i.e.*, did not show earning capacity), because they did not result solely from his own work.⁸⁰ The Board characterized his earnings as “return on investment,” and observed that “[i]t is well-settled law that a return on an investment, even if the owner must attend to it as a business proprietor, is not a wage for benefits compensation purposes.” Since “return on investment” does not evidence earning capacity, it would not have disqualified Berg from vocational services.

The Department’s representation that in *In re Del Sorenson, supra*, “Applying its net income approach to post-injury self-employment, the

⁸⁰ The Board explained:

Undoubtedly, the claimant's business enterprises earned him a meaningful profit in 2000. His business gain for the year may have been the result of a number of factors other than Mr. Berg's personal efforts. Vocational Consulting, Inc. could have, for example, received an inordinate number of business referrals from customers. Economic variance in the larger marketplace, low interest rates, the number of workers injured and claims filed, and the good will Vocational Consulting, Inc. has, in the relevant community, contributed to the corporation's success. Significantly, Mr. Berg had twelve other vocational counselors working for him in 2000. Those other workers undoubtedly played a large role in the year-end profitability of Vocational Consulting, Inc. When Mr. Berg's evidence did not describe a direct relationship between his work and the business profit, he failed to satisfy his burden of proof. We conclude that the Department correctly excluded Mr. Berg's corporate profits from Mr. Berg's wages when it determined the amount of loss of earning power benefits he was entitled to under Docket No. 03 23331. The Department order of December 17, 2002, is affirmed.

Board takes into account a pensioned barber shop owner's business expenses, including advertising and supplies,"⁸¹ is simply not true. There was no "wages" issue in *Sorenson*. The case said nothing about a "net earnings approach to post-injury self-employment."

10. The Department's argument that the definition of "net income" in the child support statute should affect the definition of "wages" in §178 is unsound

The Department's argument that "wages" in §178 should be mean earnings net of self-employment expenses because that is how the Legislature, in the child support statute, defined "net income,"⁸² is unsound.

⁸¹ AB 44.

⁸² AB 31-32 . See RCW 26.19.071(1) and (3). Then see RCW 26.19.071(5):

(5) *Determination of net income.* The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

- (a) Federal and state income taxes;
- (b) Federal insurance contributions act deductions;
- (c) Mandatory pension plan payments;
- (d) Mandatory union or professional dues;
- (e) State industrial insurance premiums;
- (f) Court-ordered spousal maintenance to the extent actually paid;
- (g) Up to two thousand dollars per year in voluntary pension payments actually made if the contributions were made for the two tax years preceding the earlier of the (i) tax year in which the parties separated with intent to live separate and apart or (ii) tax year in which the parties filed for dissolution; and
- (h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about

Courts reject arguments “that language used or not used in different chapters of the RCW should dictate the proper interpretation of a statute in an unrelated, separate, and distinct chapter.” *In re Detention of Capello*, 114 Wn. App. 739, 751, 60 P.3d 620 (2002), *review denied*, 149 Wn.2d 1032, 75 P.3d 968 (2003). This general rule is underscored by the Supreme Court’s statements that the Industrial Insurance Act is *self-contained* law,⁸³ governed by definitions in, and specific to, the Act.⁸⁴

Further, RCW 26.19.071 *specifically shows* legislative intent to define “*net* income.” The Legislature showed no similar intent in §178 (or in any other benefits provision of the Act⁸⁵). Rather, the fact that the Legislature, in RCW 26.19.071, *specified* deduction of self-employment expenses (along with seven other types of expense) from gross income for child support, but not for “wages” in RCW 51.08.178, shows that the

which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

(Italics original.)

⁸³ *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999) (the “Industrial Insurance Act is a self-contained system that provides specific procedures and remedies for injured workers”).

⁸⁴ *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) (“The right to workers’ compensation benefits is statutory, and a court will look to the provisions of the Act to determine whether a particular worker is entitled to compensation,” citation omitted).

⁸⁵ See footnote 40.

Legislature (1) intended that “wages” in the Industrial Insurance Act and “net income” in the child support law mean different things, and (2) intended that “wages” §178 mean gross earnings less only the two exceptions subsection (1) specifies.

11. Statutes and cases from other jurisdictions are irrelevant to proper understanding of the Industrial Insurance Act

The three pages the Department devotes to arguing cases from other jurisdictions, interpreting other jurisdictions’ statutes,⁸⁶ should be disregarded, because our Supreme Court has expressly rejected foreign statutes and cases as irrelevant to proper understanding of our Industrial Insurance Act:

Foreign jurisdictions have split over what work benefits are properly included in “wages” for purposes of determining workers’ compensation. But **we have already noted the danger in using foreign case law to construe Title 51 RCW provisions:**

Before discussing cases from other states it should be mentioned that the [workers’ compensation] statutes in other states are different from ours. In 1916 we said in *Stertz v. Industrial Insurance Comm’n*, 91 Wash. 588, 604, 158 P. 256 (1916), “to seek authority in the decisions of other states is useless, for other statutes have no resemblance to ours.”

Thompson v. Lewis County, 92 Wn.2d 204, 208-09, 595 P.2d 541 (1979); *see also Sacred Heart Med. Ctr. v. Dep’t of Labor & Indus.*, 92 Wn.2d 631, 639, 600 P.2d 1015 (1979) (Stafford, J., dissenting) (“**We consistently have held that our industrial insurance act is unique and that the opinions of other states’ courts are of little assistance as an interpretative medium.**”).

⁸⁶ AB 35-37.

Cockle v. Dept' of Labor & Indus., *supra*, 142 Wn.2d at 815 (citation omitted, emphasis added). (The Department made virtually the same argument in *Cockle v. Dep't of Labor & Indus.*, *supra*. Nevertheless, both this court and our Supreme Court decided that case directly contrary to both a United States Supreme Court decision and the decidedly majority view of other states. See *Cockle*, 142 Wn.2d at 815, and 816 n.7.)

D. REQUEST FOR ATTORNEY FEE

If Malang prevails in this appeal, she requests an attorney fee pursuant to RCW 51.52.130, "Attorney and witness fees in court appeal."

E. CONCLUSION

The superior court read and applied RCW 51.08.178 correctly, in determining that Ms. Malang's "wages" should be based on her gross earnings, not the Department's extra-statutory "wage equivalent." This court should affirm.

DATED this 14 day of October 2006.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS



Terry J. Barnett, WSB 8080, Attorneys for
Respondent Malang

CERTIFICATE OF MAILING

I certify that on the date entered below, I delivered a copy of
RESPONDENT'S BRIEF to ABC Legal Messengers for service to:

Pat L. DeMarco, AAG
Attorney General for the State of Washington
1019 Pacific avenue, 3d Flor
Tacoma, WA 98402

DATED this 20 of October 2006.



Michelle E. Rhodes, Legal Assistant

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STATE OF WASHINGTON
BY _____
DEPUTY

RCW 26.19.071**Standards for determination of income.**

(1) **Consideration of all income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for purposes of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

(2) **Verification of income.** Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

(3) **Income sources included in gross monthly income.** Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:

- (a) Salaries;
- (b) Wages;
- (c) Commissions;
- (d) Deferred compensation;
- (e) Overtime;
- (f) Contract-related benefits;
- (g) Income from second jobs;
- (h) Dividends;
- (i) Interest;
- (j) Trust income;
- (k) Severance pay;
- (l) Annuities;
- (m) Capital gains;
- (n) Pension retirement benefits;
- (o) Workers' compensation;
- (p) Unemployment benefits;
- (q) Spousal maintenance actually received;
- (r) Bonuses;

(s) Social security benefits; and

(t) Disability insurance benefits.

(4) Income sources excluded from gross monthly income. The following income and resources shall be disclosed but shall not be included in gross income:

(a) Income of a new spouse or income of other adults in the household;

(b) Child support received from other relationships;

(c) Gifts and prizes;

(d) Temporary assistance for needy families;

(e) Supplemental security income;

(f) General assistance; and

(g) Food stamps.

Receipt of income and resources from temporary assistance for needy families, supplemental security income, general assistance, and food stamps shall not be a reason to deviate from the standard calculation.

(5) Determination of net income. The following expenses shall be disclosed and deducted from gross monthly income to calculate net monthly income:

(a) Federal and state income taxes;

(b) Federal insurance contributions act deductions;

(c) Mandatory pension plan payments;

(d) Mandatory union or professional dues;

(e) State industrial insurance premiums;

(f) Court-ordered spousal maintenance to the extent actually paid;

(g) Up to two thousand dollars per year in voluntary pension payments actually made if the contributions were made for the two tax years preceding the earlier of the (i) tax year in which the parties separated with intent to live separate and apart or (ii) tax year in which the parties filed for dissolution; and

(h) Normal business expenses and self-employment taxes for self-employed persons. Justification shall be required for any business expense deduction about which there is disagreement.

Items deducted from gross income under this subsection shall not be a reason to deviate from the standard calculation.

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census.

[1997 c 59 § 4; 1993 c 358 § 4; 1991 sp.s. c 28 § 5.]

NOTES:

Severability -- Effective date -- Captions not law -- 1991 sp.s. c 28: See notes following RCW 26.09.100.

RCW 51.04.010**Declaration of police power -- Jurisdiction of courts abolished.**

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

RCW 51.04.060

No evasion of benefits or burdens.

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

[1977 ex.s. c 350 § 3; 1961 c 23 § 51.04.060. Prior: 1911 c 74 § 11; RRS § 7685.]

RCW 51.08.018

"Average monthly wage."

For purposes of this title, the average monthly wage in the state shall be the average annual wage as determined under RCW 50.04.355 as now or hereafter amended divided by twelve.

[1977 ex.s. c 323 § 3; 1971 ex.s. c 289 § 15.]

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.

RCW 51.08.070**"Employer" -- Exception.**

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as a separate alternative, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195.

For the purposes of this title, a contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not an employer when:

- (1) Contracting with any other person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;
- (2) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;
- (3) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and
- (4) The work which the person, firm, or corporation has contracted to perform is:
 - (a) The work of a contractor as defined in RCW 18.27.010; or
 - (b) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.

[1991 c 246 § 2; 1981 c 128 § 1; 1977 ex.s. c 350 § 12; 1971 ex.s. c 289 § 1; 1961 c 23 § 51.08.070. Prior: 1957 c 70 § 9; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

NOTES:

Effective date -- Conflict with federal requirements -- 1991 c 246: See notes following RCW 51.08.195.

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

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.

<http://search.leg.wa.gov/pub/textsearch/ViewHtml.asp?Action=Html&Item=1&X=10181...> 10/18/2006

RCW 51.08.180**"Worker" -- Exceptions.**

(1) "Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as a separate alternative, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

(2) For the purposes of this title, any person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not a worker when:

(a) Contracting to perform work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;

(b) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;

(c) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and

(d) The work which the person, firm, or corporation has contracted to perform is:

(i) The work of a contractor as defined in RCW 18.27.010; or

(ii) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.

(3) Any person, firm, or corporation registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW including those performing work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is a worker when the contractor supervises or controls the means by which the result is accomplished or the manner in which the work is performed.

(4) For the purposes of this title, any person participating as a driver or back-up driver in commuter ride sharing, as defined in RCW 46.74.010(1), is not a worker while driving a ride-sharing vehicle on behalf of the owner or lessee of the vehicle.

[1991 c 246 § 3; 1987 c 175 § 3; 1983 c 97 § 1; 1982 c 80 § 1; 1981 c 128 § 2; 1977 ex.s. c 350 § 15; 1961 c 23 § 51.08.180. Prior: 1957 c 70 § 20; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1937 c 211 § 2; RRS § 7674-1.]

NOTES:

Effective date -- Conflict with federal requirements -- 1991 c 246: See notes following RCW 51.08.195.

RCW 51.12.010

Employments included -- Declaration of policy.

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

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

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

RCW 51.12.020**Employments excluded.**

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

- (1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.
- (2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer. For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.
- (3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.
- (4) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.
- (5) Sole proprietors or partners.
- (6) Any child under eighteen years of age employed by his or her parent or parents in agricultural activities on the family farm.
- (7) Jockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW.
- (8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.
- (b) Alternatively, a corporation that is not a "public company" as defined in *RCW 23B.01.400(21) may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or may exempt any number of officers if all the exempted officers are related by blood within the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.
- (c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(d) A corporation may elect to cover officers who are exempted by this subsection in the manner provided by RCW 51.12.110.

(9) Services rendered by a musician or entertainer under a contract with a purchaser of the services, for a specific engagement or engagements when such musician or entertainer performs no other duties for the purchaser and is not regularly and continuously employed by the purchaser. A purchaser does not include the leader of a group or recognized entity who employs other than on a casual basis musicians or entertainers.

(10) Services performed by a newspaper carrier selling or distributing newspapers on the street or from house to house.

(11) Services performed by an insurance agent, insurance broker, or insurance solicitor, as defined in RCW 48.17.010, 48.17.020, and 48.17.030, respectively.

(12) Services performed by a booth renter as defined in ****RCW 18.16.020**. However, a person exempted under this subsection may elect coverage under RCW 51.32.030.

(13) Members of a limited liability company, if either:

(a) Management of the company is vested in its members, and the members for whom exemption is sought would qualify for exemption under subsection (5) of this section were the company a sole proprietorship or partnership; or

(b) Management of the company is vested in one or more managers, and the members for whom the exemption is sought are managers who would qualify for exemption under subsection (8) of this section were the company a corporation.

[1999 c 68 § 1; 1997 c 314 § 18. Prior: 1991 c 324 § 18; 1991 c 246 § 4; 1987 c 316 § 2; 1983 c 252 § 1; 1982 c 63 § 15; 1981 c 128 § 3; 1979 c 128 § 1; 1977 ex.s. c 323 § 7; 1973 c 124 § 1; 1972 ex.s. c 43 § 7; 1971 ex.s. c 289 § 3; 1961 c 23 § 51.12.020; prior: 1955 c 74 § 3; prior: 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part.]

NOTES:

Reviser's note: *(1) RCW 23B.01.400 was amended by 2000 c 168 § 1, changing subsection (21) to subsection (22); and was subsequently amended by 2002 c 297 § 9, changing subsection (22) to subsection (24).

** (2) RCW 18.16.020 was amended by 2002 c 111 § 2, deleting the definition of "booth renter."

Severability -- 1991 c 324: See RCW 18.16.910.

Effective date -- Conflict with federal requirements -- 1991 c 246: See notes following RCW 51.08.195.

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

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

RCW 51.14.010

Duty to secure payment of compensation -- Options.

Every employer under this title shall secure the payment of compensation under this title by:

- (1) Insuring and keeping insured the payment of such benefits with the state fund; or
- (2) Qualifying as a self-insurer under this title.

[1971 ex.s. c 289 § 26.]

NOTES:

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

RCW 51.18.050**Retrospective rating groups -- Probationary status -- Denial of future enrollment.**

(1) Any retrospective rating group required to pay additional net premium assessments in two consecutive coverage periods shall be immediately placed on probationary status. Once a group is placed on probationary status, the department shall review the group's workplace safety and accident prevention plan and its methods for cooperation with department claims management activities. Following the review, the department shall make recommendations for corrective steps that may be taken to improve the group's performance.

(2) If the same retrospective rating group is required to pay an additional net premium assessment in the third consecutive coverage period, that group shall be denied future enrollment in the state's retrospective rating plan. In addition, the sponsoring entity of the failed group may not sponsor another group in the same business or industry category for five coverage periods from the ending date of the failed group's last coverage period.

(3) This section applies prospectively only and not retroactively. It applies only to net assessments received by a retrospective rating group for plan years beginning after July 25, 1999.

[1999 c 7 § 6.]

RCW 51.32.060**Permanent total disability compensation -- Personal attendant.**

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

(a) If married at the time of injury, sixty-five percent of his or her wages but not less than two hundred fifteen dollars per month.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages but not less than two hundred fifty-two dollars per month.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages but not less than two hundred eighty-three dollars.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages but not less than three hundred six dollars per month.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages but not less than three hundred twenty-nine dollars per month.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages but not less than three hundred fifty-two dollars per month.

(g) If unmarried at the time of the injury, sixty percent of his or her wages but not less than one hundred eighty-five dollars per month.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages but not less than two hundred twenty-two dollars per month.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages but not less than two hundred fifty-three dollars per month.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages but not less than two hundred seventy-six dollars per month.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages but not less than two hundred ninety-nine dollars per month.

(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages but not less than three hundred twenty-two dollars per month.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

[1993 c 521 § 2; 1988 c 161 § 1. Prior: 1986 c 59 § 1; 1986 c 58 § 5; 1983 c 3 § 159; 1977 ex.s. c 350 § 44; 1975 1st ex.s. c 224 § 9; 1973 c 147 § 1; 1972 ex.s. c 43 § 20; 1971 ex.s. c 289 § 8; 1965 ex.s. c 122 § 2; 1961 c 274 § 2; 1961 c 23 § 51.32.060; prior: 1957 c 70 § 31; 1951 c 115 § 2; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

NOTES:

Effective date -- 1993 c 521: See note following RCW 51.32.050.

Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161: See notes following RCW 51.32.050.

Effective date -- 1975 1st ex.s. c 224: See note following RCW 51.04.110.

RCW 51.32.090**Temporary total disability -- Partial restoration of earning power -- Return to available work -- When employer continues wages -- Limitations. (Expires June 30, 2007.)**

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered

nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

[2004 c 65 § 9. Prior: 1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4; prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

NOTES:

Report to legislature -- Effective date -- Expiration date -- Severability -- 2004 c 65: See notes following RCW 51.04.030.

Effective date -- 1993 c 521: See note following RCW 51.32.050.

Effective date -- 1993 c 299: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 299 § 2.]

Effective date -- 1993 c 271: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993]." [1993 c 271 § 2.]

Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161: See notes following RCW 51.32.050.

Expiration date -- 1986 c 59 § 2; Effective dates -- 1986 c 59 §§ 3, 5: "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

Program and fiscal review -- 1985 c 462: See note following RCW 41.04.500.

RCW 51.32.090

Temporary total disability -- Partial restoration of earning power -- Return to available work -- When employer continues wages -- Limitations. (Effective June 30, 2007.)

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician as able to perform available work other than his or her usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician to relate the physical activities of the job to the worker's disability. The physician shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's

recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages.

(7) In no event shall the monthly payments provided in this section exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the work force, benefits shall not be paid under this section.

[1993 c 521 § 3; 1993 c 299 § 1; 1993 c 271 § 1; 1988 c 161 § 4. Prior: 1988 c 161 § 3; 1986 c 59 § 3; (1986 c 59 § 2 expired June 30, 1989); prior: 1985 c 462 § 6; 1980 c 129 § 1; 1977 ex.s. c 350 § 47; 1975 1st ex.s. c 235 § 1; 1972 ex.s. c 43 § 22; 1971 ex.s. c 289 § 11; 1965 ex.s. c 122 § 3; 1961 c 274 § 4; 1961 c 23 § 51.32.090; prior: 1957 c 70 § 33; 1955 c 74 § 8; prior: 1951 c 115 § 3; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

NOTES:

Reviser's note: This section was amended by 1993 c 271 § 1, 1993 c 299 § 1, and by 1993 c 521 § 3, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 1993 c 521: See note following RCW 51.32.050.

Effective date -- 1993 c 299: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 299 § 2.]

Effective date -- 1993 c 271: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 7, 1993]." [1993 c 271 § 2.]

Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161: See notes following RCW 51.32.050.

Expiration date -- 1986 c 59 § 2; Effective dates -- 1986 c 59 §§ 3, 5: "Section 2 of this act shall expire on June 30, 1989. Section 3 of this act shall take effect on June 30, 1989. Section 5 of this act shall take effect on July 1, 1986." [1986 c 59 § 6.]

Program and fiscal review -- 1985 c 462: See note following RCW 41.04.500.

RCW 51.32.095**Vocational rehabilitation services -- Benefits -- Priorities -- Allowable costs -- Performance criteria. (Expires June 30, 2007.)**

(1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section.

(2) When in the sole discretion of the supervisor or the supervisor's designee vocational rehabilitation is both necessary and likely to make the worker employable at gainful employment, then the following order of priorities shall be used:

- (a) Return to the previous job with the same employer;
- (b) Modification of the previous job with the same employer including transitional return to work;
- (c) A new job with the same employer in keeping with any limitations or restrictions;
- (d) Modification of a new job with the same employer including transitional return to work;
- (e) Modification of the previous job with a new employer;
- (f) A new job with a new employer or self-employment based upon transferable skills;
- (g) Modification of a new job with a new employer;
- (h) A new job with a new employer or self-employment involving on-the-job training;
- (i) Short-term retraining and job placement.

(3)(a) Except as provided in (b) of this subsection, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, transportation, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed three thousand dollars in any fifty-two week period except as authorized by *RCW 51.60.060, and the cost of continuing the temporary total disability compensation under RCW 51.32.090 while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(b) Beginning with vocational rehabilitation plans approved on or after July 1, 1999, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed four thousand dollars in any

fifty-two week period except as authorized by *RCW 51.60.060, and the cost of transportation and continuing the temporary total disability compensation under RCW 51.32.090 while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(c) The expenses allowed under (a) or (b) of this subsection may include training fees for on-the-job training and the cost of furnishing tools and other equipment necessary for self-employment or reemployment. However, compensation or payment of retraining with job placement expenses under (a) or (b) of this subsection may not be authorized for a period of more than fifty-two weeks, except that such period may, in the sole discretion of the supervisor after his or her review, be extended for an additional fifty-two weeks or portion thereof by written order of the supervisor.

(d) In cases where the worker is required to reside away from his or her customary residence, the reasonable cost of board and lodging shall also be paid.

(e) Costs paid under this subsection shall be chargeable to the employer's cost experience or shall be paid by the self-insurer as the case may be.

(4) In addition to the vocational rehabilitation expenditures provided for under subsection (3) of this section, an additional five thousand dollars may, upon authorization of the supervisor or the supervisor's designee, be expended for: (a) Accommodations for an injured worker that are medically necessary for the worker to participate in an approved retraining plan; and (b) accommodations necessary to perform the essential functions of an occupation in which an injured worker is seeking employment, consistent with the retraining plan or the recommendations of a vocational evaluation. The injured worker's attending physician or licensed advanced registered nurse practitioner must verify the necessity of the modifications or accommodations. The total expenditures authorized in this subsection and the expenditures authorized under RCW 51.32.250 shall not exceed five thousand dollars.

(5) The department shall establish criteria to monitor the quality and effectiveness of rehabilitation services provided by the individuals and organizations used under subsection (1) of this section. The state fund shall make referrals for vocational rehabilitation services based on these performance criteria.

(6) The department shall engage in, where feasible and cost-effective, a cooperative program with the state employment security department to provide job placement services under this section.

(7) The benefits in this section shall be provided for the injured workers of self-insured employers. Self-insurers shall report both benefits provided and benefits denied under this section in the manner prescribed by the department by rule adopted under chapter 34.05 RCW. The director may, in his or her sole discretion and upon his or her own initiative or at any time that a dispute arises under this section, promptly make such inquiries as circumstances require and take such other action as he or she considers will properly determine the matter and protect the rights of the parties.

(8) Except as otherwise provided in this section, the benefits provided for in this section are available to any otherwise eligible worker regardless of the date of industrial injury. However, claims shall not be reopened solely for vocational rehabilitation purposes.

[2004 c 65 § 10; 1999 c 110 § 1. Prior: 1996 c 151 § 1; 1996 c 59 § 1; 1988 c 161 § 9; 1985 c 339 § 2; 1983 c 70 § 2; 1982 c 63 § 11; 1980 c 14 § 10. Prior: 1977 ex.s. c 350 § 48; 1977 ex.s. c 323 § 16; 1972 ex.s. c 43 § 23; 1971 ex.s. c 289 § 12.]

NOTES:

***Reviser's note:** RCW 51.60.060 expired June 30, 1999, pursuant to 1994 c 29 § 8.

<http://search.leg.wa.gov/pub/textsearch/ViewHtml.asp?Action=Html&Item=2&X=10181...> 10/18/2006

Report to legislature -- Effective date -- Expiration date -- Severability -- 2004 c 65: See notes following RCW 51.04.030.

Effective date -- 1999 c 110 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1999." [1999 c 110 § 3.]

Legislative finding -- 1985 c 339: "The legislature finds that the vocational rehabilitation program created by chapter 63, Laws of 1982, has failed to assist injured workers to return to suitable gainful employment without undue loss of time from work and has increased costs of industrial insurance for employers and employees alike. The legislature further finds that the administrative structure established within the industrial insurance division of the department of labor and industries to develop and oversee the provision of vocational rehabilitation services has not provided efficient delivery of vocational rehabilitation services. The legislature finds that restructuring the state's vocational rehabilitation program under the department of labor and industries is necessary." [1985 c 339 § 1.]

Severability -- 1985 c 339: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1985 c 339 § 6.]

Severability -- 1983 c 70: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 70 § 5.]

Effective dates -- Implementation -- 1982 c 63: "Section 4 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 26, 1982]. All other sections of this act shall take effect on January 1, 1983. The director of the department of labor and industries is authorized to immediately take such steps as are necessary to insure that this act is implemented on its effective dates." [1982 c 63 § 26.]

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

RCW 51.32.095

Vocational rehabilitation services -- Benefits -- Priorities -- Allowable costs -- Performance criteria. (Effective June 30, 2007.)

(1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section.

(2) When in the sole discretion of the supervisor or the supervisor's designee vocational rehabilitation is both necessary and likely to make the worker employable at gainful employment, then the following order of priorities shall be used:

- (a) Return to the previous job with the same employer;
- (b) Modification of the previous job with the same employer including transitional return to work;
- (c) A new job with the same employer in keeping with any limitations or restrictions;
- (d) Modification of a new job with the same employer including transitional return to work;
- (e) Modification of the previous job with a new employer;
- (f) A new job with a new employer or self-employment based upon transferable skills;
- (g) Modification of a new job with a new employer;
- (h) A new job with a new employer or self-employment involving on-the-job training;
- (i) Short-term retraining and job placement.

(3)(a) Except as provided in (b) of this subsection, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, transportation, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed three thousand dollars in any fifty-two week period except as authorized by *RCW 51.60.060, and the cost of continuing the temporary total disability compensation under RCW 51.32.090 while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(b) Beginning with vocational rehabilitation plans approved on or after July 1, 1999, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed four thousand dollars in any fifty-two week period except as authorized by *RCW 51.60.060, and the cost of transportation and continuing the temporary total disability compensation under RCW 51.32.090 while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(c) The expenses allowed under (a) or (b) of this subsection may include training fees for on-the-job training and the cost of furnishing tools and other equipment necessary for self-employment or reemployment. However, compensation or payment of retraining with job placement expenses under (a) or (b) of this subsection may not be authorized for a period of more than fifty-two weeks, except that such period may, in the sole discretion of the supervisor after his or her review, be extended for an additional fifty-two weeks or portion thereof by written order of the supervisor.

(d) In cases where the worker is required to reside away from his or her customary residence, the reasonable cost of board and lodging shall also be paid.

(e) Costs paid under this subsection shall be chargeable to the employer's cost experience or shall be paid by the self-insurer as the case may be.

(4) In addition to the vocational rehabilitation expenditures provided for under subsection (3) of this section, an additional five thousand dollars may, upon authorization of the supervisor or the supervisor's designee, be expended for: (a) Accommodations for an injured worker that are medically necessary for the worker to participate in an approved retraining plan; and (b) accommodations necessary to perform the essential functions of an occupation in which an injured worker is seeking employment, consistent with the retraining plan or the recommendations of a vocational evaluation. The injured worker's attending physician must verify the necessity of the modifications or accommodations. The total expenditures authorized in this subsection and the expenditures authorized under RCW 51.32.250 shall not exceed five thousand dollars.

(5) The department shall establish criteria to monitor the quality and effectiveness of rehabilitation services provided by the individuals and organizations used under subsection (1) of this section. The state fund shall make referrals for vocational rehabilitation services based on these performance criteria.

(6) The department shall engage in, where feasible and cost-effective, a cooperative program with the state employment security department to provide job placement services under this section.

(7) The benefits in this section shall be provided for the injured workers of self-insured employers. Self-insurers shall report both benefits provided and benefits denied under this section in the manner prescribed by the department by rule adopted under chapter 34.05 RCW. The director may, in his or her sole discretion and upon his or her own initiative or at any time that a dispute arises under this section, promptly make such inquiries as circumstances require and take such other action as he or she considers will properly determine the matter and protect the rights of the parties.

(8) Except as otherwise provided in this section, the benefits provided for in this section are available to any otherwise eligible worker regardless of the date of industrial injury. However, claims shall not be reopened solely for vocational rehabilitation purposes.

[1999 c 110 § 1. Prior: 1996 c 151 § 1; 1996 c 59 § 1; 1988 c 161 § 9; 1985 c 339 § 2; 1983 c 70 § 2; 1982 c 63 § 11; 1980 c 14 § 10. Prior: 1977 ex.s. c 350 § 48; 1977 ex.s. c 323 § 16; 1972 ex.s. c 43 § 23; 1971 ex.s. c 289 § 12.]

NOTES:

***Reviser's note:** RCW 51.60.060 expired June 30, 1999, pursuant to 1994 c 29 § 8.

Effective date -- 1999 c 110 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1999." [1999 c 110 § 3.]

Legislative finding -- 1985 c 339: "The legislature finds that the vocational rehabilitation program created by chapter 63, Laws of 1982, has failed to assist injured workers to return to suitable gainful employment without undue loss of time from work and has increased costs of industrial insurance for employers and employees alike. The legislature further finds that the administrative structure established within the industrial insurance division of the department of labor and industries to develop and oversee the provision of vocational rehabilitation services has not provided efficient delivery of vocational rehabilitation services. The legislature finds that restructuring the state's vocational rehabilitation program under the department of labor and industries is necessary." [1985 c 339 § 1.]

Severability -- 1985 c 339: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1985 c 339 § 6.]

Severability -- 1983 c 70: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 70 § 5.]

Effective dates -- Implementation -- 1982 c 63: "Section 4 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 26, 1982]. All other sections of this act shall take effect on January 1, 1983. The director of the department of labor and industries is authorized to immediately take such steps as are necessary to insure that this act is implemented on its effective dates." [1982 c 63 § 26.]

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

RCW 51.52.130**Attorney and witness fees in court appeal.**

If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board. If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.

[1993 c 122 § 1; 1982 c 63 § 23; 1977 ex.s. c 350 § 82; 1961 c 23 § 51.52.130. Prior: 1957 c 70 § 63; 1951 c 225 § 17; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

NOTES:

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

RCW 51.52.160

Publication and indexing of significant decisions.

The board shall publish and index its significant decisions and make them available to the public at reasonable cost.

[1985 c 209 § 1.]

WAC 263-12-195 Significant decisions.(1) The board's publication "*Significant Decisions*," prepared pursuant to RCW 51.52.160, contains the decisions or orders of the board which it considers to have an analysis or decision of substantial importance to the board in carrying out its duties. Together with the indices of decision maintained pursuant to WAC 263-12-016(4), "*Significant Decisions*" shall serve as the index required by RCW 42.17.260 (4)(b) and (c).

(2) The board selects the decisions or orders to be included in "*Significant Decisions*" based on recommendations from staff and the public. Generally, a decision or order is considered "significant" only if it provides a legal analysis or interpretation not found in existing case law, or applies settled law to unusual facts. Decisions or orders may be included which demonstrate the application of a settled legal principle to varying fact situations or which reflect the further development of, or continued adherence to, a legal principle previously recognized by the board. Nominations of decisions or orders for inclusion in "*Significant Decisions*" should be submitted in writing to the executive secretary.

(3) "*Significant Decisions*" consists of microfilmed copies of the decisions and orders identified as significant and headnotes summarizing the proposition or propositions for which the board considers the decisions or orders "significant." Indices are also provided to identify each decision or order by name and by subject. Permanent revisions and additions to "*Significant Decisions*" are prepared annually. A cumulative supplement is prepared annually between permanent updates and is provided to subscribers of "*Significant Decisions*." The cumulative supplement contains decisions or orders identified by the board as "significant" in the interim between permanent updates.

(4) Copies of "*Significant Decisions*" and permanent updates are available to the public at cost. Requests for information concerning the purchase of "*Significant Decisions*" should be directed to the executive secretary.

[Statutory Authority: RCW 51.52.020. 91-13-038, § 263-12-195, filed 6/14/91, effective 7/15/91.]

WAC 296-14-522 What does the term "wages" mean?The term "wages" is defined as:

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

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

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

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

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

POLICY 4.41

Section: Time Loss Rates

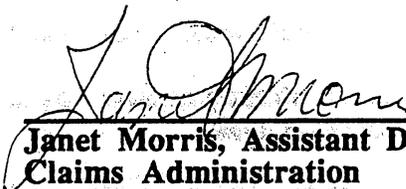
Effective: 4-20-92

**Title: Wage Definitions for
Calculating Time-Loss**

**Cancels: Policy 4.41
Effective 6-9-88
Policy 4.31
Effective 9-10-86**

**See Also: CM manual, Chapt.D
RCW 51.08.178
RCW 51.32.010
RCW 51.32.060**

Approved by:



**Janet Morris, Assistant Director
Claims Administration**

This policy applies when calculating time-loss compensation for full-time, part-time, intermittent or seasonal workers.

1. **Time-loss compensation is calculated, based upon gross monthly wages, marital status and number of dependents.**

Workers are entitled to a percentage of gross monthly wage, based upon their marital status and number of dependents. Wages shall be calculated in a fair and reasonable manner.

2. **Employment patterns and all income at the time of injury are needed in calculating the worker's gross monthly wage.**

To calculate a worker's gross monthly wages, the claims manager must consider earnings from all employment at the time of injury and the worker's employment pattern.

3. The worker's wages used for gross monthly income can include different types of earnings.

In calculating gross monthly wages for a worker, earnings could include:

- **Shift differential** — Workers on swing or graveyard shift receive more than workers doing similar work during the day. The additional pay is referred to as shift differential.
- **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.

— **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.

Exceptions:

- 4b. 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.)
- 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.)

FILED
COURT OF APPEALS
DIVISION II

08 OCT 20 PM 1:51

STATE OF WASHINGTON

BY TERRY

No. 34504-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant,

v.

CRYSTAL MALANG

Respondent.

RESPONDENT'S SUPPLEMENTAL CITATION

Terry J. Barnett, WSB 8080
Rumbaugh Rideout Barnett & Adkins
820 A Street, Suite 220
Tacoma, WA 98402
253.756.0333

ORIGINAL

RESPONDENT'S BRIEF contained an incomplete citation to the Borek case at the Board of Industrial Insurance Appeals. The complete citation is: In re Kenneth E. Borek, No. 01 18639 (Bd. of Indus. Ins. Appeals, December 12, 2002).

A copy of the Board's decision, comprised of a "Proposed Decision And Order" and an "Order Denying Petition For Review" (the latter stating that "the Proposed Decision and Order is the final decision of this Board") is attached hereto.

DATED this 23 day of October 2006.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS



Terry J. Barnett, WSB 8080, Attorneys for
Respondent Malang

CERTIFICATE OF MAILING

I certify that on the date entered below, I delivered a copy of RESPONDENT'S SUPPLEMENTAL CITATION to ABC Legal Messengers for service to:

Pat L. DeMarco, AAG
Attorney General for the State of Washington
1019 Pacific avenue, 3d Floor
Tacoma, WA 98402

DATED this 23 of October 2006.



Michelle E. Rhodes, Legal Assistant

1 Mr. Borek testified he worked various hours—some days he worked 2 to 3 hours, and other days he
2 worked all day and averaged a couple of 8-hour days a week. Mr. Borek testified that as a broker,
3 he made \$1,000 per month plus \$200 in expenses such as broker's license, multiple listing fees,
4 and Board of Realty membership fees.
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9 Mr. Borek testified that at the time of his industrial injury he was also involved in the frozen
10 food business and remodeling houses. Regarding the frozen food business, Mr. Borek stated in
11 approximately 1989 or 1990, he paid an initial investment of \$50,000 for a franchise/distributorship.
12
13 Mr. Borek testified that he called his business Quit, Inc. (Quit), and solicited locations such as
14 skating rinks and taverns for which he provided pizza, ovens, and other products. Mr. Borek stated
15 besides the initial \$50,000, he also put in \$30,000 for equipment such as pickup, trailer with a large
16 freezer, ovens, and inventory. Mr. Borek stated he spent 2 to 3 days a week on this pizza
17 business, not solid 8-hour days, but at least 2 days. Mr. Borek stated he did not receive wages
18 from Quit, but reinvested everything to build up for his retirement. According to Mr. Borek, he
19 reported that he made \$1,500 per month from Quit, but he testified he had no idea where that figure
20 came from. Mr. Borek stated in 1992, his income from Quit exceeded his expenses and specifically
21 noted that his gross income from Quit in 1991 was \$21,458, in 1992 was \$11,174, and in 1993 was
22 \$14,060. Mr. Borek stated his plan was to use this business as a supplement to his retirement
23 because he had no other retirement plan.
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37 Regarding the remodeling businesses, Mr. Borek stated he had been buying, fixing up and
38 selling rental houses and apartments for the past 30 to 40 years. Mr. Borek stated he had no fixed
39 wages but reinvested and rolled over his money. Mr. Borek also stated he had business losses and
40 lost \$50,000 when he sold his real estate business. Mr. Borek testified that at the time of the
41 industrial injury, he was in the process of remodeling a triplex, which he eventually made \$30,000.
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43 Mr. Borek stated that in 1993, he netted \$17,000 from his remodeling business. Mr. Borek was
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1 unable to say how much work he did in this business but noted that at times he worked 60 to
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3 80 hours per week in his businesses.
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5 John R. Borek testified that he is the claimant's son and is also a certified public accountant
6 and prepared the claimant and his wife's 1992 and 1993 income tax return. According to
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8 Mr. John Borek, his father's 1992 Schedule D showed the sale of an investment property on
9 North 30th in Tacoma with a taxable gain of \$35,032. Mr. Borek stated that the claimant sold the
10 property for \$58,000, had a basis or cost of \$22,968, and realized a taxable income of \$35,032.
11
12 Regarding the pizza business, Mr. John Borek noted that the claimant's 1992 tax returns showed
13 gross receipts for sale of \$14,060, cost of goods sold was \$6,135, and gross profit was \$7,925
14 before expenses. Mr. John Borek stated the claimant's Schedule C showed real estate sales
15 commission of \$11,174, expenses of \$6,769 and a net profit of \$4,405.
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22 According to Mr. John Borek, the claimant's 1993 tax return Schedule C showed wages
23 received at Harborview of \$4,333 taxable wages, which was about \$1,000 per month. He stated
24 the claimant's Schedule D showed the sale of a house with a taxable gain of \$17,280. Regarding
25 the pizza business in 1993, Mr. John Borek testified that the claimant reported gross receipts of
26 \$9,819, costs of \$3,476, for a gross profit of \$6,343 before adding in expenses for repair,
27 maintenance, and tax interest for a net loss of \$8,078. Mr. Borek stated his father had carry over
28 losses from previous years and had no taxable income. He stated in 1992, the Quit business
29 showed a profit of \$7,925 before expenses.
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38 Martha Foley testified that she is a vocational rehabilitation counselor and was asked by the
39 claimant's counsel to look at the claimant's work background and his earning capacity at the time of
40 injury and establish comparable wages for people who sell pizzas and supplies to taverns and
41 people brokering the sale and rehabilitation of homes in Gig Harbor and Tacoma. According to
42 Ms. Foley, Mr. Borek stated he had two sources of income: 1) as a route sales driver for a pizza
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1 company; and 2) buying, remodeling and reselling homes. Ms. Foley testified the claimant reported
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3 that he made approximately \$1,500 per month from the pizza business, which was about \$9 per
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5 hour wages. Ms. Foley stated she spoke to two suppliers and they expected their drivers with
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7 established routes to average \$3,000 per month in the year 2000. Ms. Foley stated in 1992, wages
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9 were not tracked as closely and she was unable to find very specific retail trades or pizza delivery
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11 driver information but did find that the general retail hourly wages were close to what the claimant
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13 reported he made. She stated the normal retail trade average wages in 1992 was \$7.12 per hour
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15 so given the range would be as little as \$5 and as much as \$8 to \$9. Ms. Foley stated wages in
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17 Gig Harbor are about 10 percent higher which made his wages reflective of what Mr. Borek stated
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19 he made. Ms. Foley stated the claimant's wages were reflective of what would be statistically
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21 accurate.

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23 Regarding the rehabilitative work, Ms. Foley stated there was a wide span of dollars
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25 depending on the economy at the time of the property sale but stated the range was \$10,000 to
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27 \$30,000 per remodeled home. Ms. Foley states in the year 2002, she did an Internet survey and
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29 used the US Bureau of Statistical Information and Washington Employment Occupational
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31 Information and got back as far as 1992. Ms. Foley testified she found that carpentry was the
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33 average of all construction; and in 1992, the annual hourly wage was \$14.15. According to
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35 Ms. Foley, \$14.15 per hour and an average of \$10,000 to \$30,000 per home rehabilitation would be
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37 typically accurate for 1993. Ms. Foley stated numerous factors were included in that amount, and it
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39 was not just from work. Ms. Foley testified that she could not say how many hours per week the
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41 claimant worked in his job.

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43 Theodore R. Foshaug testified that he is a Workers Compensation Adjudicator 3 for the
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45 Department of Labor and industries and started working on Mr. Borek's case in 1996. According to
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47 Mr. Foshaug, the Department's March 2, 2001 order states per RCW 51.08.178, wages are being

1 set in accordance to Department Policy 4.42; according to Schedule C of 1993 tax return a negative
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3 annual income of \$3,488 is shown; and based on a negative amount you are entitled to a minimum
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5 rate of \$302.23 based on married with no dependents. Mr. Foshaug testified that the Department's
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7 Policy 4.42 states "[T]here is no standard method for establishing wages for sole proprietors,
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9 corporate officers, and partners. The adjudicator must use information from a variety of sources to
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11 make the best adjudicative decision possible. . . ." 7/18/02 Tr. at 8. Mr. Foshaug testified that
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13 according to Policy 4.42, the acceptable documents the adjudicator may use to establish wages in
14
15 the top priority are tax records that fairly represent work patterns. Mr. Foshaug stated the August 9,
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17 2001 Department order set the time-loss compensation rate at \$341.77 per month based on the
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19 claimant's 1993 Schedule C and according to Department policy. Mr. Foshaug stated the order
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21 noted that \$361.08 was the wage set by the Department upon which the time-loss compensation
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23 rate would be calculated. Mr. Foshaug stated the wage was set by the Department using the
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25 claimant's Schedule C of 1993 tax return and a negative annual income.

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27 Charles E. Hallett testified that he is a certified public accountant and was asked by the
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29 Department to evaluate Mr. Borek's records. According to Mr. Hallett, there are 2 types of income:
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31 1) earned income; and 2) investment income, which is passive income. Mr. Hallett noted there is
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33 also business income that you provide a service and receive compensation such as wages.
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35 Mr. Hallett stated the claimant's 1993 tax return and records show that the only earnings the
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37 claimant received from any type of compensation was \$4,333 from Harborview Realty. Mr. Hallett
38
39 noted that regarding the business return, the claimant declared zero earnings.

40
41 Regarding whether Mr. Borek reported any earnings in his business that would include
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43 buying, remodeling or selling homes, Mr. Hallett noted that the casual sale of rental property was
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45 shown on Mr. Borek's tax return but did not meet the threshold of a business and was more
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47 investment related. Mr. Hallett stated he could find no proof or evidence that Mr. Borek ever has a

1 remodeling business but noted that activity was shown as an investment. Mr. Hallett testified that
2 the claimant's tax returns on Schedule D showed the claimant sold property resulting in \$17,280 of
3 investment income from a capital gain. Mr. Hallett stated nothing was reported from
4 self-employment earnings or wages. He noted that buying and selling of casual sales of investment
5 property equals an investment. Mr. Hallett stated that Quit had no earnings reported on the
6 claimant's personal income tax and showed a net loss from operations. Mr. Hallett testified there
7 was never any money available to pay the claimant wages at any time, not from reinvestment, but
8 simply because the business operated at a loss. Mr. Hallett testified the Quit business lost many
9 thousands of dollars in 1990, a few less thousand dollars in 1991, made approximately \$4,405 in
10 1992, and then lost a lot of money again in 1993. According to Mr. Hallett, Quit never showed signs
11 of sustaining a profit.

12
13 Mr. Hallett also testified that the claimant's tax returns showed losses that included operating
14 losses from business, capital losses, and investment interest losses. Mr. Hallett testified that he
15 could not find in Mr. Borek's tax return any notation of receiving approximately \$200 per month for
16 expenses at Harborview Realty.

17 DECISION

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19 The claimant, Kenneth E. Borek, has the burden to prove, by a preponderance of the
20 evidence, that he is entitled to the industrial insurance benefits, which he is seeking. *Olympia*
21 *Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949). Here, the issue is whether the
22 Department correctly determined the claimant's rate of industrial insurance benefits; and if not, what
23 was the appropriate category or categories under RCW 51.08.178. From the onset, the record
24 shows that Mr. Borek was very active in many enterprises. The claimant maintains that at the time
25 of the industrial injury, he was involved in 3 businesses that should be reflected in the calculation of
26 his wages. He argues his 3 sources of income were working as a broker for Harborview Realty,

1 owning a pizza business, and operating a remodeling business and should be used in calculating
2
3 his time-loss compensation rate.

4
5 Time-loss compensation rates are determined by reference to a worker's "wages," as that
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7 term is defined in RCW 51.08.178, at the time the injury. See *Cockle v. Department of Labor &*
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9 *Indus.*, 142 Wn.2d 801 (2001). RCW 51.08.178, the statute that governs computation of time-loss
10
11 compensation rates, states in part:

- 12
13 1) For the purpose of this title, the monthly wages the worker was receiving
14 from all employment at the time of injury shall be the basis upon which
15 compensation is computed unless otherwise provided specifically in the
16 statute concerned. In cases where the worker's wages are not fixed by
17 the month, they shall be determined by multiplying the daily wage the
18 worker was receiving at the time of injury;

19

20 The term "wages" shall include the reasonable value of board, housing,
21 fuel or other consideration of like nature received from the employer as
22 part of the contract of hire, but shall not include overtime pay except in
23 cases under subsection (2) of this section.

- 24
25 2) In cases where (a) the worker's employment is exclusively seasonal in
26 nature or (b) the worker's current employment or his or her relationship
27 to his or her employment is essentially part time or intermittent, the
28 monthly wage shall be determined by dividing by twelve the total wages
29 earned, including overtime, from all employment in any twelve
30 successive calendar months preceding the injury which fairly represent
31 the claimant's employment pattern;
- 32
33 3) If, within the twelve months immediately preceding the injury, the worker
34 has received from the employer at the time of injury a bonus as part of
35 the contract hire, the average monthly value of such bonus shall be
36 included in determining the worker's monthly wages;
- 37
38 4) In cases where a wage has not been fixed or cannot be reasonably and
39 fairly determined, the monthly wage shall be computed on the basis of
40 the usual wage paid other employees engaged in like or similar
41 occupations where the wages are fixed.

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43 As noted in *Cockle*,

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45 The guiding principle in construing provisions of the Industrial Insurance
46 Act is that the Act is remedial in nature and is to be liberally construed in
47 order to achieve its purpose of providing compensation to all covered

1 employees injured in their employment, with doubts resolved in favor of
2 the worker . . . an injured worker should be compensated based not on
3 an arbitrarily set figure, but rather on his or her actual "lost earning
4 capacity."

5
6 *Cockle*, at 811.

7
8 **1) Harborview Realty work.**

9
10 From the onset, both parties appear to be in agreement that the Department order dated
11 August 9, 2001 is incorrect because it failed to include at least the \$1,000 per month the claimant
12 received from Harborview Realty. The claimant argues that Harborview Realty also gave him
13 approximately \$200 per month for expenses such as broker fees, multiple listing fees, and
14 association dues. I have reviewed the decision in *Cockle* and must determine that the expenses
15 and fees, as outlined by Mr. Borek, do not rise to the level of core elements that should be
16 compensated under Subsection 1 or were part of his contract. Mr. Borek has not made a prima
17 facie case that he was paid an additional \$200 per month that should be added into his monthly
18 wage. Thus, the several hundred dollars of additional money Mr. Borek stated Harborview gave
19 him per month should not be added in his wage determination. Clearly, Mr. Borek is entitled to
20 have the \$1,000 per month wages from Harborview used in the calculation of his time-loss
21 compensation rate.
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34 **2) Pizza/Frozen Foods and Remodeling.**

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36 The real issue in this case is whether Mr. Borek appreciated any income or wages from his
37 self-employment in the pizza/frozen food or remodeling businesses. The claimant argues that
38 RCW 51.08.178(4) should apply to calculating his wages regarding these two businesses because
39 his tax records do not accurately reflect his wages pursuant to *In re Jerry Uhri* BIIA Dec., 93 6908
40 (1995) especially in light of his carry over losses. Regarding the remodeling business, the claimant
41 argues that employees in like or similar occupations make \$10,000 to \$30,000 per home remodel.
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1 Mr. Borek argues that he made \$17,280 in 1993, which equals \$1,728 per month. Regarding the
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3 pizza business, Mr. Borek argues that according to Ms. Foley, \$1,500 per month would be
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5 reasonable for employees engaged in like or similar occupation where the wages are fixed.
6

7 The Department argues that the claimant is asking the Department to underwrite his
8
9 self-employment and insure its profitability. According to the Department, the claimant's pizza
10
11 business was a money loser rather than a source of income and never showed any profits. The
12
13 Department argues that with both the pizza and remodeling businesses, the claimant failed to show
14
15 any meaningful way to calculate the hours he spent working. Further, the Department argues that
16
17 the claimant's tax returns show his remodeling earnings were never reported as a business but
18
19 rather as a capital gain.

20
21 I recognize that the claimant argues against the use of his income tax records as a basis in
22
23 determining if he appreciated any income from his self-employment pursuant to the *Uhri* decision.
24
25 The Department clearly used Mr. Borek's 1993 tax returns as a basis for figuring his income. In
26
27 *Uhri*, the Board determined that Mr. Uhri's wages were not reasonably and fairly determined based
28
29 on his tax returns. The Board in *Uhri* noted that gross income to a business does not equal wages
30
31 and that the incentives inherent in the Internal Revenue Code which mitigate against an accurate
32
33 reflection of business income on tax returns makes the Department's reliance on tax returns as a
34
35 basis to determine wages unreasonable. The Board in *Uhri* ultimately determined that Mr. Uhri, an
36
37 owner of a convenience/grocery store, did not have wages that had been fixed and could not be
38
39 reasonably and fairly determined based on his income tax return and used Subsection 4.

40
41 I recognize the holding in *Uhri* and understand the incentives inherent in the tax code, which
42
43 mitigate against an accurate reflection of business income on tax returns. Nonetheless, the
44
45 evidence presented at the hearing was not limited to the claimant's tax returns. Two certified public
46
47 accountants testified as well as a vocational witness. Mr. Borek's son testified as the accountant

1 who prepared the claimant's 1993 tax returns. In reviewing the evidence, I am persuaded by the
2
3 testimony and opinions of Mr. Hallett regarding his interpretation of the claimant's actual earnings.
4
5 Mr. Hallett reviewed extensive records and gave a reasoned explanation of the claimant's business
6
7 activities. After carefully reviewing the evidence presented, I must conclude that that Mr. Borek, as
8
9 the appealing party, has failed to establish that he indeed made any type of wage or income from
10
11 either the pizza or remodeling businesses within the meaning of the industrial insurance act.
12
13 Mr. Borek clearly stated that he never took any draw or wage from the pizza business but
14
15 reinvested that money. In a private enterprise such as the pizza/frozen food enterprise, clearly
16
17 there could have been income but the claimant failed to show by a preponderance of the evidence
18
19 that he indeed was making an income or wage from this franchise. Based on the evidence
20
21 presented, Mr. Borek's monthly wage from the pizza and remodeling businesses in 1993 could be
22
23 fairly determined and there was none.

24
25 In rendering this decision, I have looked at evidence presented in the light most favorable to
26
27 the claimant and still must conclude that Mr. Borek has failed to establish by a preponderance of
28
29 the evidence that appreciated any wages or income from his pizza or remodeling businesses. I
30
31 recognize that Mr. Borek has had many business endeavors that have resulted in the carry over
32
33 losses, which decreased his income on his tax returns. Nonetheless, based on the evidence
34
35 presented, especially considering the testimony of the accountants and Ms. Foley, the claimant has
36
37 failed to show by a preponderance of the evidence that he is entitled to additional wages beyond
38
39 the \$1,000 per month that he made at Harborview Realty. The statute does not mandate that the
40
41 prospective wages or income be used but what the claimant was entitled to at the time of the injury.

42
43 Clearly, Mr. Borek is an entrepreneur that has many business deductions and losses to
44
45 offset any income in his tax return. Nonetheless, he failed to present convincing evidence that he
46
47 indeed was receiving income beyond the \$1,000 per month from Harborview Realty. Even if I were

1 to determine that Subsection 4 applies, I was not persuaded by Ms. Foley's testimony because her
2
3 opinions lacked foundation and were not convincing. Ms. Foley candidly admitted that she needed
4
5 additional information from the claimant but did not obtain that information.
6

7 Thus, the Department order dated August 9, 2001, is incorrect and must be reversed to
8
9 recalculate the claimant's time-loss compensation rate using a monthly wage of \$1,000.
10

11 FINDINGS OF FACT

- 12
- 13 1. On June 17, 1994, the claimant, Kenneth E. Borek, filed an application
14 for benefits alleging that he had sustained an industrial injury on
15 September 29, 1993, during the course of his employment at
16 Harborview Realty, Inc. The claim was allowed and benefits were paid.
17 On February 16, 1996, the Department issued an order that set the
18 claimant's time-loss compensation rate at \$654.56 based on married
19 with dependents and wages of \$1,000 per month. On March 22, 1996,
20 the claimant filed a Protest and Request for Reconsideration of the
21 Department order dated February 16, 1996. On March 2, 2001, the
22 Department issued an order stating wages set according to Department
23 policy, according to Schedule C of your 1993 tax return, a negative
24 annual income of \$3,488 is shown; based upon a negative amount, you
25 are entitled to a minimum rate of \$302.23 based on married with no
26 dependents. On March 20, 2001, the claimant filed a Notice of Appeal
27 of the Department order dated March 2, 2001. On April 3, 2001, the
28 Department modified the March 2, 2001 order from final to interlocutory,
29 and the Board returned the claim to the Department. On August 9,
30 2001, the Department issued an order that set the claimant's time-loss
31 compensation rate at \$341.77 per month based on married with zero
32 dependents, and wages of \$361.08 per month and a date of injury of
33 September 29, 1993.
34

35 On August 13, 2001, the claimant filed a Notice of Appeal regarding the
36 Department's August 9, 2001 order. On September 24, 2001, the Board
37 of Industrial Insurance Appeals granted the appeal, assigned it Docket
38 No. 01 18639, and ordered that further proceedings be held in this
39 matter.
40

- 41 2. On September 29, 1993, Mr. Borek sustained an injury during the
42 course of his employment with Harborview Realty, Inc., when his car
43 was rear-ended while he was going to a real estate meeting.
44
45
46
47

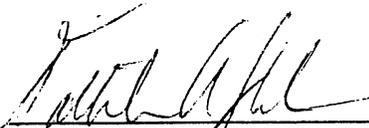
- 1 3. During the calendar year 1993, Mr. Borek's wages as a real estate
2 broker were \$1,000 per month.
3
4 4. Mr. Borek had a franchise/distributorship called Quit, Inc., and provided
5 frozen pizzas, ovens and other products to various locations such as
6 skating rinks and taverns. Mr. Borek also bought, fixed up and sold
7 houses for the past 30 to 40 years.
8
9 5. During the calendar year 1993, Mr. Borek did not receive any
10 self-employment wages or income from his pizza/frozen food or
11 remodeling businesses.
12

13 **CONCLUSIONS OF LAW**

- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the
15 parties and subject matter of this appeal.
16
17 2. Mr. Borek was paid a monthly wage of \$1,000 within the meaning of
18 RCW 51.08.178(1).
19
20 3. Mr. Borek did not receive a wage within the meaning of RCW 51.08.178
21 from his pizza/frozen food or remodeling businesses in 1993.
22
23 4. The Department of Labor and Industries' order dated August 9, 2001, is
24 incorrect and is reversed. The claim is remanded to the Department
25 with directions to recalculate the claimant's time-loss compensation rate
26 using wages of \$1,000 per month, and marital status of married with
27 zero dependents.
28

29
30 It is so **ORDERED**.

31
32 Dated this 21st day of October, 2002.

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37 

38 **KATHLEEN A. STOCKMAN**
39 Industrial Appeals Judge
40 Board of Industrial Insurance Appeals
41
42
43
44
45
46
47

CERTIFICATE OF SERVICE BY MAIL

I certify that I have this day served the attached Order upon the parties to this proceeding and their attorneys or authorized representatives, as listed below, by mailing to each a true copy thereof by delivery to Consolidated Mail Services for placement in the United States mail, postage prepaid.

KENNETH E BOREK 17692 N PHOENICIAN DR SURPRISE, AZ 85374-3003	CL1
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RICHARD E WEISS, ATTY
SMALL SNELL WEISS & COMFORT PS
PO BOX 11303
TACOMA, WA 98411-0303

CA1

KAY A GERMIAT, AAG
OFFICE OF THE ATTORNEY GENERAL
1019 PACIFIC AVE 3RD FLR
TACOMA, WA 98402-4411

AG1

Dated at Olympia, Washington 10/31/2002

BOARD OF INDUSTRIAL INSURANCE APPEALS

State of Washington

By: 
DAVID E. THREEDY
Executive Secretary

In re: KENNETH E BOREK
Docket No. 01 18639

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

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

In re: **KENNETH E BOREK**

Docket No. 01 18639

Claim No. N-919439

**ORDER DENYING PETITION
FOR REVIEW**

On October 21, 2002, a Proposed Decision and Order was entered in the above-entitled appeal by Industrial Appeals Judge KATHLEEN A STOCKMAN, copies of which were duly mailed and communicated to the parties and their representatives of record.

A Petition for Review of said Proposed Decision and Order was filed on November 22, 2002 by the Claimant, as provided by RCW 51.52.104.

Pursuant to RCW 51.52.106, the Board has considered the Proposed Decision and Order and Petition or Petitions for Review and declines to review the Proposed Decision and Order and therefore denies the Petition or Petitions for Review filed herein, and the Proposed Decision and Order is the final order of this Board.

Any party aggrieved by this order must, within thirty (30) days of the date the order is received, file an appeal to superior court in the manner provided by law. The statutes governing the filing of an appeal are contained on the "Notice to Parties" which accompanied the Proposed Decision and Order.

Dated this 12th day of December, 2002.

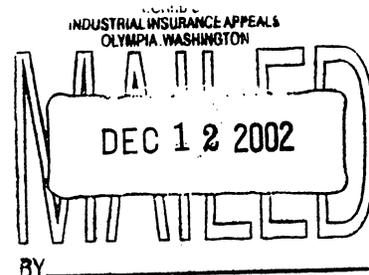
BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan
THOMAS E. EGAN Chairperson

Judith E. Schurke
JUDITH E. SCHURKE Member

c: DEPARTMENT OF LABOR AND INDUSTRIES
KENNETH E BOREK
RICHARD E WEISS, ATTY
OFFICE OF THE ATTORNEY GENERAL

RECEIVED
OCT 20 2006
Rumbaugh, Rideout, Barnett & Adkins



CERTIFICATE OF SERVICE BY MAIL

I certify that I have this day served the attached Order upon the parties to this proceeding and their attorneys or authorized representatives, as listed below, by mailing to each a true copy thereof by delivery to Consolidated Mail Services for placement in the United States mail, postage prepaid.

KENNETH E BOREK
17692 N PHOENICIAN DR
SURPRISE, AZ 85374-3003

CL1

CA1

RICHARD E WEISS, ATTY
SMALL SNELL WEISS & COMFORT PS
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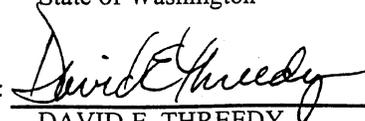
KAY A GERMIAT, AAG
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TACOMA, WA 98402-4411

FILED
COURT OF APPEALS
06 OCT 23 PM 1:52
STATE OF WASHINGTON
BY _____
IDENTITY

Dated at Olympia, Washington 12/12/2002

BOARD OF INDUSTRIAL INSURANCE APPEALS
State of Washington

By:



DAVID E. THREEDY
Executive Secretary