

No. 08-2-00959-6

42018-0-02

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

NORTHWEST WALL & CEILING
CONTRACTORS ASSOCIATION,

Plaintiff/Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Defendant/Respondent.

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

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I. INTRODUCTION

Insurance is a highly regulated industry so that policyholders can be protected from mistakes and abuses by insurance companies. Washington state statutes make very clear that the business of insurance is held to high standards of good faith, fair dealing and honesty.

Washington State is one of only four states that still provide workers' compensation insurance exclusively through a government agency, the Department of Labor and Industries ("DLI"), rather than allowing employers to select coverage through private carriers. Like some private insurers, DLI also provides a "Retro" program that allows insureds to reduce the cost of their premiums by improving workplace safety and then sharing in the savings.

Private insurance companies are required to operate their Retro programs consistent with regulatory guidelines, such as ensuring their rates are determined by actuaries and the rates are adequate to cover expected claims. These principles are enforced by statute and administrative rules adopted by the Office of the Insurance Commissioner. Similarly, the Washington legislature mandated that our state-run insurance programs, and specifically

the Retro program, are to follow “recognized insurance principles.” As DLI’s current Retro Manager testified: “[I]t’s a recognized insurance principle that when you’re running a retro program, base rates need to be adequate and actuarially determined.”

DLI did not follow recognized insurance principles in this case in setting drywall rates. DLI encouraged participation in its Retro program but did not have its actuaries determine whether its rates were in fact adequate, as required by law. It provided admittedly inadequate rates without any warning of the inadequacy. It also failed to monitor its rates. DLI’s actions were contrary to recognized insurance principles and thus a violation of state law. As a result, Northwest Wall and Ceiling Contractor’s Association (“NWCCA”) was assessed \$610,834 in additional premiums and seeks a refund in this case.

Industrial Appeals Judge Janice Grant, after a four day trial, concluded that NWCCA was entitled to a refund based on DLI’s failures to follow recognized insurance principles. Rather than explaining why Judge Grant’s findings of fact were not supported by the record, the Board of Appeals instead determined that the insured, NWCCA, should have been sophisticated enough to figure out that the rates were not adequate on its own and should have

made its own decision to stay out of DLI's Retro program despite the lack of warning from DLI. The message from the Board was: "Buyer beware."

The impact of this ruling was to leave employers in this state unprotected from mistakes made by the DLI in setting adequate rates for the Retro program. This is in direct contrast to the insurance principles and rules followed by private carriers. Rather, given the Board's ruling, our citizens cannot rely on DLI to warn them when risk in the Retro program has significantly changed, exposing the insured employers to extra assessments for hundreds of thousands of dollars caused by DLI's own mistakes.

Existing statutes and public policy cannot support that outcome. This case is about enforcing recognized insurance principles and holding DLI to the requirement to either provide adequate rates or warn its insureds to reconsider their continued participation in the Retro program. DLI did neither and, therefore, did not follow state law. The superior court erred in affirming the Board's ruling and rejecting the findings of the trial judge. This Court should reverse the superior court and affirm Judge Grant's ruling.

II. ASSIGNMENTS OF ERROR

A. Assignments of error.

1. The following of the Board's¹ findings of fact are not supported by substantial evidence: (a) that portion of finding of fact 1 that states "for calendar years 1998 through 2001, the Department set base rates using the best information available at the time; (b) finding of fact 14;² and (c) that portion of finding of fact 22 that states: "The Department ... used the best information available at the time."

2. The following of the Board's conclusions of law are unsupported by any adequately supported finding of fact and are incorrect as a matter of law: conclusions of law 2-4.

3. The Board's conclusions of law are insufficient in that they fail to address DLI's violations of recognized insurance principles.

¹ Judge Casey simply adopted the Board's findings of facts and conclusions of law wholesale. She made no independent findings of fact or conclusions of law. Rather, at the hearing in which Judge Casey adopted the Board's (rather than Judge Grant's) findings and conclusions, she simply stated: "Well, if I didn't think there was sufficient support for the findings I guess I would have reversed." RP (6/3/11) at 4. After the attorney for the Department explained to Judge Casey that she had to make her *own* factual and legal findings and conclusions, Judge Casey re-read the Board's findings and stated: "Well, I am just looking at the Board's findings right now. I don't have any problem actually adopting them. I think the construction of the law is really what is at issue here. Let me just read those conclusions. The Court of Appeals really does not care what I think about this in any respect[.]" *Id.* at 6.

² Finding of Fact 14 states: "The Department requires three to five years of accumulated data to make statistically reliable predictions."

B. Issues pertaining to assignments of error.

Issue 1: Failure to Adopt Adequate Rates. DLI is contractually and statutorily obligated to run its Retro program consistent with recognized insurance principles, and recognized insurance principles require a retrospective insurer to adopt standard premium rates that are adequate and actuarially derived. DLI admits it had no idea whether the rates it implemented for drywall employers in the 1998-2000 plan years were adequate and that none of those rates was “an actuarially derived number.” Does that admitted failure demonstrate a violation of recognized insurance principles such that NWCCA must be refunded the money it was required to pay as a result of its participation in Retro for the 1998-2000 plan years?

Issue 2: Failure to Warn about Potential Inadequacy of Rates. DLI is contractually and statutorily obligated to run its Retro program consistent with recognized insurance principles, and recognized insurance principles require a retrospective insurer to warn its insureds about potential changes in the costs of coverage. DLI admits that it knew the rates it implemented for drywall employers in the 1998-2000 plan years were not actuarially derived and potentially inadequate. DLI made no effort to warn any drywall employer who was a participant in Retro of that fact. Rather, DLI admits that it continued to encourage participation in Retro for all employers, including drywall employers. Does that admitted failure demonstrate a violation of recognized insurance principles such that NWCCA must be refunded the money it was forced to pay as a result of its participation in Retro for the 1998-2000 plan years?

Issue 3: Failure to Monitor Rates for Adequacy. DLI is contractually and statutorily obligated to run its Retro program consistent with recognized insurance principles, and recognized insurance principles require a retrospective insurer to monitor its rates at the class level for rate adequacy. DLI admits that, despite the fact that it knew the rates it implemented for drywall employers in the 1998-2000 plan years were not actuarially derived and potentially inadequate, it made no effort to monitor its rates so as to warn any drywall employer who was a participant in Retro of that

fact. Does that admitted failure demonstrate a violation of recognized insurance principles such that NWCCA must be refunded the money it was forced to pay as a result of its participation in Retro for the 1998-2000 plan years?

Issue 4: Breach of Duty to Practice Honesty and Equity. DLI admits that it is obligated, in running Retro, to “act in good faith, abstain from deception, and practice honesty and equity.” It is undisputed that, after agreeing to waive a \$495,000 assessment for the 1997 plan year, DLI informed NWCCA that the initial problems with the 1997 drywall rates would be fixed. Relying on this misrepresentation, NWCCA agreed to remain in Retro for the 2000 plan year. NWCCA learned in 2005 that the 1997 rate problems had not been fixed for the 2000 plan year. Does DLI’s admitted failure to monitor and fix the Drywall Initiative rates constitute a failure to practice honesty such that NWCCA must be refunded the money it was forced to pay as a result of its participation in Retro for the 2000 plan year?

III. STATEMENT OF THE CASE

A. How “Retro” works.

DLI is required by law to provide, and “encourage broad participation” in, a Retro program. RCW 51.18.010. An employer who selects that Retro option pays a standard industrial insurance premium for the ensuing coverage year.³ At the end of that year, the Department retrospectively calculates the premium that the employer should have paid according to the employer’s actual claim experience, applies certain other factors, compares the retrospec-

³ See RCW 51.18.010 et seq.; WAC 296-17-91201 et seq.; see *Department of Labor & Industries of State of Wash. v. Fields Corp.*, 112 Wn. App. 450, 452, 45 P.3d 1121 (2002) (describing Retro program).

tive premium to the standard premium, and refunds or assesses the difference.

B. Importance of actuarial adequacy of rates used for calculating standard premium.

Former Department lead actuary Bill White, who designed Retro for the State of Washington, testified that the underlying notion of Retro is that it is “a partnership between an employer and the Department.”⁴ DLI is expected to “have the sophistication and the actuaries and the ability like any other insurance company to do their job and set rates where they’re supposed to be.”⁵ The employer’s responsibility, on the other hand, is to “take care of what they can control, which is workplace safety, and if somebody gets injured, getting them back on the job and basically holding down costs.”⁶ As White testified: “when those things come together, both sides win.”⁷

The testimony at the trial showed that Retro employers depend on DLI to set *adequate* rates. According to former Retro Program Manager Frank Romero, “every employer in the State of Washington” assumes that “the premium is going to be adequate to

⁴ Transcript (11/17/09) at 106.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

cover the losses.”⁸ Romero explained: “If you know going in to Retro that the premiums are not going to be adequate, you don’t go in to Retro.”⁹

Bill White’s practice was to tell employers that DLI would *protect* them from rate inadequacies: “I talked about this many times to players in the Retro groups that – I told them L&I will protect you from any rating inadequacy.”¹⁰ White explained that employers generally do not concern themselves with rate adequacy because they have other jobs to focus on: “They’re ... drywall employers. . . . But they’re not premium people, they’re not actuaries.”¹¹ DLI’s current Retro Program Manager, Diane Doherty, agreed: “I would not expect the man or woman on the street to be interested or able to” determine rate adequacy.¹² Thus, Doherty confirmed, “it would be reasonable ... for an employer in Retro to believe that the Department was setting adequate rates.”¹³

⁸ Transcript (11/16/09) at 14 (Romero).

⁹ Transcript (11/16/09) at 84 (Romero).

¹⁰ Transcript (11/16/09) at 144 (White).

¹¹ *Id.*

¹² Transcript (11/17/09) at 119-120 (Doherty). Doherty followed that statement by testifying that the Department does “consider Retro employers normal human beings.” *Id.*

¹³ *Id.* at 120.

C. The NWCCA Retro Group.

NWCCA had participated in Retro since the program's inception in 1983.¹⁴ Until 1997, NWCCA consistently received a refund from Retro, averaging a 17% refund on its premiums over those years.¹⁵ Until 1997, NWCCA had never received a negative total adjustment for a plan year; i.e., the base rates set by DLI had always been adequate to cover their losses as a group.¹⁶ The primary reason for NWCCA's success was its proactive approach to safety and returning workers to work.¹⁷

D. Compliance problems in the drywall industry and the Drywall Initiative.

In the mid 1990s, the drywall industry and DLI began to recognize the problem of unscrupulous drywall contractors who illegally failed to report hours to DLI so as to gain a competitive advantage over the legitimate contractors. These contractors were able to use their resulting savings in worker's compensation premiums to underbid legitimate contractors for the same work. Moreover, because the under-the-table employers were cheating the system, DLI had to continually raise premiums, which were primarily paid for by legitimate employers. (NWCCA's members

¹⁴ Exhibit 10.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ Transcript (11/20/09) at 14-15.

were an example of the “good guys,” that played by the rules.)¹⁸
From 1993 to 1997, premium rates for drywall employers in Washington skyrocketed.¹⁹

Throughout 1996, DLI and industry representatives worked to address this problem with a program DLI called the “Drywall Initiative.” The Initiative originally consisted of two changes in the way DLI collected premium from drywall employers. First, the Initiative changed the method of reporting for employers from hours worked to another unit of measurement: square footage of materials purchased. DLI believed square foot reporting would make it difficult, in Department audits, for employers to pay employees under the table so as to hide the amount of work they had done. Second, the Initiative introduced a discount for employers who complied with new, more stringent, reporting requirements. This combination of increasing the incentive to comply and increasing the ability to detect noncompliant employers would, it was hoped, enable DLI to “level the playing field” for legitimate contractors and reduce the overall premium rates for the drywall industry.²⁰

¹⁸ See Transcript (11/16/09) at 145-146 (employers in Retro are “the good guys”); Transcript (11/20/09) at 66 (“[T]hese are guys that work hard, spend a lot of time at it running good companies. They’re the model citizens.”).

¹⁹ See *generally* BR at 48-49 (Judge Grant’s description of the Drywall Initiative). Judge Grant’s ruling is attached as Appendix A to this brief.

²⁰ Transcript (11/16/09) at 29 .

E. DLI had non-actuary Frank Romero create the rates for the new Drywall Initiative classes rather than relying on its actuaries to set new rates.

Before it could implement the Drywall Initiative, DLI had to make two specific actuarial decisions. First, it had to decide how to convert its rates from an hours-worked reporting system to a square-footage reporting system. Second, it had to determine how large the discount should be, in order to induce more compliance in the industry and increase the total premium collected to cover expected claim costs.

Although DLI had a team of actuaries on staff to make these decisions (headed by Bill White), those actuaries played almost no role in making them.²¹ Rather, a non-actuary from Class Services, Frank Romero,²² created the rates and discount.²³ Romero has admitted that he was “[a]bsolutely not” considering the Retro program when he was setting the new drywall rates: “I didn’t care about Retro.”²⁴ He also did not try to achieve rate adequacy in setting the new rates: “That wasn’t taken into consideration, honestly, whether or not that rate was adequate or inadequate.”²⁵

²¹ Transcript (11/16/09) at 17-18 (Romero).

²² As noted below, Romero later moved from Class Services to become the Program Manager for Retro.

²³ Transcript (11/16/09) at 17.

²⁴ Transcript (11/16/09) at 93.

²⁵ Transcript (11/16/09) at 18.

Romero's focus was rather on creating incentives to boost compliance and bring in more premium dollars.²⁶

Complicating matters, these new conversions, rates, and discounts were also combined with other significant changes to DLI's drywall rules. Before the Drywall Initiative, there were only actually two classes of drywall workers: installers and finishers. The initial discount picked by Romero was 40% for installers and 30% for finishers.²⁷ However, DLI later divided those classes further so that, at one point, there were *ten* different drywall classifications.²⁸ DLI also adopted an "owner's exemption" *after* Romero had set the new drywall rates. This created a loophole that allowed unscrupulous business owners to not report the percentage of the drywall that they claimed they personally installed, impacting the amount of total drywall reported and throwing off Romero's already-suspect calculations.²⁹

This barrage of changes made it essentially impossible for Retro-participating drywall employers to predict the effects of the

²⁶ Transcript (11/16/09) at 17-18. To convert hours worked into square feet, Romero took an estimate of the total amount of drywall sold in the state from the previous year, estimated how much of that drywall had likely been sold for retail purposes or to self-insured installers, subtracted those retail and self-insured estimates from the total board-feet sold estimate, and then divided that number by the total premium reported in the state (in hours) from the prior year. Transcript at 40.

²⁷ For this reason, the discount was repeatedly referred to as a 35 percent average discount at the hearing.

²⁸ Transcript (11/16/09) at 72.

²⁹ Transcript (11/16/09) at 25.

Drywall Initiative on their potential refunds. As always, they relied on DLI for rate adequacy and turned their focus to increasing safety and reducing claims. That reliance was reasonable because Romero had indicated to them that “the premiums were going to be the same.”³⁰ That is, for “good guy” drywall employers, the Initiative was to be a “zero sum game.”³¹

Romero later conceded that these changes, and the lack of communication about the potential impact of these changes on Retro-participating drywall employers, made Retro “a trap for the unwary” for those employers after the Drywall Initiative.³² Bill White also testified that the potential impact on Retro of the Drywall Initiative should have been communicated explicitly to NWCCA. In fact, White testified that adequate communication *within* DLI would have led him to warn NWCCA against participating in Retro after the Drywall Initiative:

I would definitely have cautioned them that this group definitely needs to be aware of what we're doing so they can make an intelligent decision about their participation. . . . They should very seriously consider

³⁰ *Id.* at 70-71.

³¹ *Id.* NWCCA's Richard Mettler testified as follows: “Q. [It] was your understanding from Mr. Romero that it was going to be ... a zero sum game, correct? A. Exactly. The conversion had been done to equate premium, the initiative was about compliance, not about premium, and then it was expected to be a zero sum game.”

³² Transcript (11/16/09) at 24.

sitting this one out because the dice are loaded, you might say.”³³

It is undisputed that DLI did not provide disclosures of any nature to NWCCA.

DLI has since made several admissions that illustrate the need for such disclosure. It admits that it “did not have data to convert the hour classes to a square footage basis.”³⁴ Thus, “the discount implemented as part of the Drywall Initiative was not an actuarially derived number.”³⁵ But the Retro Manager in charge at the time of the hearing, Diane Doherty, testified that the rates for a Retro program *must* be actuarially derived: “it’s a recognized insurance principle that when you’re running a retro program, base rates need to be adequate and actuarially determined.”³⁶ This admission on the part of DLI highlights its violation of statutorily mandated insurance principles.

³³ Transcript (11/17/09) at 101 (White).

³⁴ Exhibit 7 (Request for Admission 6).

³⁵ Exhibit 7 (Request for Admission 4).

³⁶ Transcript (11/17/09) at 142. DLI also admitted that it “had not considered what impact discounting rates could have on the prospects of receiving a beneficial adjustment through Retrospective rating” at the time it adopted the Drywall Initiative, that it “did not attempt to determine the adequacy of the discounted rate implemented as part of the Drywall Initiative” before implementing that rate; that that the Drywall Initiative “significantly diminished the financial incentive of drywall employers to participate in Retro”; and that that no one in DLI ever warned NWCCA about the possible negative effects of the Drywall Initiative on their previously-successful Retro group. Exhibit 7 (Request for Admission 7, 30, 3, 47). In fact, the opposite occurred: DLI continued to “encourage[] participation in Retro by all employers including drywall employers.” *Id.*

Most importantly, Romero testified that DLI's failure to warn Retro-participating drywall employers fundamentally changed the nature of Retro:

That's no different than taking that standard premium and going to Vegas and putting it on the roulette wheel and spinning the wheel and hoping that you win. Sometimes you win, sometimes you lose. But Retro is not supposed to be that type of a program. Retro is a program where there's an acceptance of some risk, but it's not a gamble. L&I changed that agreement from being an agreement where there's an acceptance of some risk to a pure gamble.^[37]

If adequately informed about the change in the true nature of this "gamble," NWCCA would not have remained in Retro.

DLI failed to notice the warning signs from the early data reported under the Drywall Initiative and thus failed to disclose the new risks to NWCCA before NWCCA enrolled in Retro for the 1998 plan year.

The Drywall Initiative rates were implemented on January 1, 1997. Thus, DLI had 15 months of data on square-footage reporting as early as June 1998 (the same month that NWCCA committed to enrolling in Retro for the 1998-1999 plan year).³⁸ By using the 1997 data, DLI could have analyzed whether the many assumptions DLI had made in implementing the Drywall Initiative

³⁷ Transcript (11/16/09) at 24.

³⁸ Exhibit 7 (Request for Admission 11); 134 (Doherty). NWCCA was a "July group," meaning that its plan years began on July 1 of a year and ended on June 30. July groups must apply for Retro by April 30 and sign a Retro Agreement before July 1.

had resulted in adequate standard rates for drywall employers. Specifically DLI could have analyzed whether its new unit of exposure square feet – as combined with the discounted rates adopted for the taping and texturing classes and modified by the owner exemption – had the same relationship to the claimed losses reported that DLI had experienced under its old system. In other words, DLI could have gotten an idea whether it was delivering what it had said it would deliver to NWCCA: a “zero sum game.”

Unfortunately, by the time this 15 months’ worth of data was available, Bill White had retired from DLI, having been replaced by Bill Vasek.³⁹ Contrary to Romero’s expectations,⁴⁰ Vasek made the decision not to monitor or analyze the new data because “the claim data was too little and too immature at that time.”⁴¹ Vasek has not yet explained how that “immature” data would have been less helpful than Frank Romero’s initial speculation about what an appropriate rate might be. Regardless, DLI’s failure, negligent or otherwise, to examine that information meant they made no disclosure to NWCCA about the inadequacy of the drywall rates. As a result of DLI’s failure to disclose that inadequate drywall rates had corrupted the retro program, NWCCA continued to enroll in Retro for the 1998-1999 plan year in June 1998.

³⁹ Transcript (11/20/09) at 73 (Vasek).

⁴⁰ Transcript at (11/16/09) 22-23 (Romero).

⁴¹ Transcript (11/20/09) at 94 (Vasek).

G. Eleven months after signing up for the 1998-1999 plan year, NWCCA received a \$495,000 assessment for the 1997-1998 plan year.

In May 1999, DLI informed NWCCA of a \$495,000 assessment for the 1997-1998 plan year.⁴² By that time, Frank Romero had moved within DLI from Class Services, where he had designed and implemented the Drywall Initiative, to become DLI's Retro Manager. Upon receiving the assessment, NWCCA questioned Romero about the charge. Romero encouraged NWCCA to appeal the assessment.⁴³

Even so, Romero concedes that he did not at that time explain to NWCCA that the reason it had received the \$495,000 assessment was because the rates adopted as part of the Drywall Initiative were, as Romero later described them, "woefully inadequate."⁴⁴ NWCCA, uninformed about what had caused the \$495,000 assessment for 1997-1998 plan year, again enrolled in Retro for the 1999-2000 plan year.⁴⁵

H. DLI waived the \$495,000 assessment and, being convinced that the Retro problems were fixed, NWCCA enrolled in Retro for the 2000-2001 plan year.

By March 2000, Romero had finally learned that the reason for the massive assessment for the 1997-1998 plan year was the

⁴² Exhibit 12 (Timeline); Transcript (11/17/09) at 134 (Doherty).

⁴³ Transcript (11/16/09) at 31-32.

⁴⁴ Transcript (11/16/09) at 21.

⁴⁵ Exhibit 12.

insufficiency of the Drywall Initiative rates. DLI, through its Assistant Attorney General James Johnson, therefore agreed to waive the \$495,000 assessment for the 1997-1998 plan year because there had been no “meeting of the minds” between DLI and NWCCA regarding the Retro contract.⁴⁶ This settlement was approved by DLI and attorney Johnson as proper and equitable given the circumstances. Moreover, DLI and its counsel advised NWCCA that they may want to modify their plan settings for the current plan year (1999-2000).⁴⁷ NWCCA did so.⁴⁸

In May 2000, NWCCA received another large assessment from a prior plan year.⁴⁹ This assessment, applicable to the 1998-1999 plan year, was for \$310,672.⁵⁰ NWCCA had to decide by July 1, 2000, whether to stay in Retro for the 2000-2001 plan year. Based on the settlement discussions in March 2000, NWCCA believed (as Romero believed) that DLI had finally fixed the rate adequacy problem.⁵¹ In fact, after the hearing below, Judge Grant explicitly found that “NWCCA credibly believed that the problems causing the 1997 assessment by the Drywall Initiative had been

⁴⁶ Transcript (11/20/09) at 55 (Mettler).

⁴⁷ *Id.* at 53.

⁴⁸ *Id.* at 55.

⁴⁹ Exhibit 12.

⁵⁰ Exhibit 12.

⁵¹ Transcript (11/20/09) at 55. In fact, Romero had told Mettler: “we don’t expect to ever see you back here again.” *Id.* Mettler took this to mean that “they maybe knew there had been something not right and they had made amends and fixed it.” *Id.*

rectified” prior to enrolling in Retro for the 2000-2001 plan year.⁵² (The Board did not reject or address that finding.) Thus, NWCCA again enrolled in Retro for the 2000-2001 plan year.⁵³

I. **After receiving a \$424,447 assessment for the 1998-1999 plan year, NWCCA opted out of Retro before the beginning of the 2001-2002 plan year.**

In May 2001, NWCCA received a refund for the 1999-2000 plan year of \$302,413.⁵⁴ However, at the same time the refund was received, NWCCA received another assessment for the 1998-1999 plan year, this one for \$424,447. This brought the total assessment for the 1998-1999 plan year to \$735,119. By July 2001, NWCCA opted out of Retro.⁵⁵ Even so, in May 2002, NWCCA received another \$310,399 assessment for the 2000-2001 plan year.⁵⁶ This final assessment caused NWCCA to seek additional money from its members to pay off the liability and then close its Retro program down for good.⁵⁷

⁵² BR 62.

⁵³ Exhibit 12.

⁵⁴ Exhibit 12. NWCCA has since come to learn, and the Department admits, that the reason NWCCA received a refund for the 1999 year was because they had a truly “phenomenal” year in terms of keeping claims costs down. Transcript at 175. Thus, NWCCA was able to beat even the inadequate rates for that year. NWCCA’s refund for the 1999 plan year ended up totaling \$433,843. Judge Grant correctly offset NWCCA’s damages by this refund.

⁵⁵ Exhibit 12.

⁵⁶ Exhibit 12.

⁵⁷ Transcript (11/20/09) at 45 (Mettler).

J. In 2005, NWCCA learned from Bill White’s study that the rates implemented by the Drywall Initiative had never been actuarially derived or monitored.

Drywall rates continued to increase until 2004. In 2005, NWCCA asked former Department chief actuary Bill White for an actuarial study of the rate changes. White’s report – received by NWCCA in September 2005 – eventually showed that the drywall rates had been “woefully inadequate, as much as 30 percent inadequate,” since the Drywall Initiative.⁵⁸ DLI had, during each of the relevant plan years, “set rates that were far below what was necessary to cover any type of claim cost.”⁵⁹ This was the first notice NWCCA had that DLI had not addressed the actuarial problems that caused the initial \$495,000 assessment for the 1997-1998 plan year.

K. Appeals to the Board and superior court.

NWCCA immediately sought relief from DLI for plan years 1998-2000 in October 2005. The tortured appellate process from that point on has been detailed extensively in prior briefing.⁶⁰ That process included a ruling by Thurston County Superior Court Judge Gary R. Tabor to the effect that NWCCA “got blind-sided” by “the calculation by Labor & Industries as to the discount up-front.”⁶¹

⁵⁸ Exhibit 6.

⁵⁹ *Id.*

⁶⁰ BR 224-225.

⁶¹ BR 181.

Accordingly, though DLI had originally convinced the Board to reject NWCCA's appeal based on applying the wrong statute of limitation period, Judge Tabor reversed the Board and remanded for full consideration of the merits.⁶² DLI's failure to apply the proper statute of limitation equitably barred DLI from arguing the appeal was untimely. Judge Tabor also pointed out that it was inappropriate for DLI to argue that NWCCA should have foreseen, without disclosure by DLI, the problems with Retro:

I think that what cuts one way has to cut the same direction for everybody concerned. If the Department couldn't have known because they didn't know what the future held, then I don't see how you can say the petitioners were not vigilant in not determining that this [Retro] wasn't a good thing.⁶³

For that reason, Judge Tabor ordered that DLI must act equitably and consider the merits of each of NWCCA's claims.

Five months later, DLI issued a two-sentence order denying all relief.⁶⁴ DLI refused to reconsider, and NWCCA again asked the Board for relief.

⁶² BR 176.

⁶³ BR 90.

⁶⁴ BR 183 ("For the plan years at issue your members paid standard premiums at rates set in accordance with department rules, using base rates set by rule. For calendar years 1998-2001, the department set base rates using the best information available at the time.") In fact, the Department did not issue its decision until NWCCA had filed a motion to compel a decision with Judge Tabor.

The case came before Industrial Appeals Judge Janice Grant, who heard testimony over four days. After the hearing, Judge Grant issued a 22-page ruling, concluding: “The Department failed to determine rate adequacy or adhere to accepted insurance principles, as mandated by the retrospective rating plan rules, regarding NWCCA.”⁶⁵ Judge Grant ordered DLI to refund the assessments NWCCA had paid for the relevant plan years.⁶⁶

DLI petitioned the Board for review. In a nine-page decision, the Board summarily overturned Judge Grant’s decision. In doing so, the Board concluded that, without addressing DLI’s admissions to the contrary, DLI had no duty to investigate or inform Retro participants of “the possible consequences of properly adopted rules.”⁶⁷ Despite the fact that the rates in question were adopted without any attempt to determine adequacy, the Board minimized the failings of DLI, stating that DLI merely engaged in “a bit of educated guessing.”⁶⁸ In short, the Board excused DLI’s failure to act on the ground that “determining rate adequacy is like predicting the outcome of the Kentucky Derby in advance.”⁶⁹ Paradoxically,

⁶⁵ BR 64.

⁶⁶ BR 65.

⁶⁷ BR 7. (The Board’s ruling is attached as Appendix B to this brief.) Failure to inform its insureds constituted a misrepresentation contrary to state law requiring conduct consistent with high standards of honest conduct in the business of insurance.

⁶⁸ BR 4.

⁶⁹ BR 5.

the Board *blamed* NWCCA for *failing* to predict the impact of the inadequate rates: “Had NWCCA applied sufficient resources, it could have predicted the impact upon the group and its members.”⁷⁰ The Board’s decision does not explain how NWCCA could have done a better job of predicting the effects of the Drywall Initiative than DLI, which has six actuaries on staff⁷¹ and which does not require its Retro insureds to retain their own actuaries.⁷² Nor does the Board’s decision explain why DLI was not obligated to disclose the uncustomary level of uncertainty with which it was setting its rates to Retro-participating drywall employers, particularly given DLI’s own *admissions* that “recognized insurance principles” require insurers to inform insureds of major changes in the potential costs of coverage.⁷³

NWCCA again appealed to superior court. After the conclusion of oral arguments, Judge Casey in a three page letter decision adopted the Board’s findings and conclusions wholesale and made no new findings of fact or conclusions of law.⁷⁴ This appeal followed.

⁷⁰ BR 6.

⁷¹ Transcript (11/16/09) at 118 (Malooly).

⁷² Transcript (11/20/09) at 110 (Vasek).

⁷³ Exhibit 7 (Request for Admission 21).

⁷⁴ See CP 339-341. Judge Casey’s Letter Ruling is attached as Appendix C to this brief. The judgment entered by Judge Casey is attached as Appendix D to this brief.

IV. ARGUMENT

A. Standard of review.

Appellate review of a superior court's decision on an appeal from the Board is limited to "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Young v. Dept. of Labor and Industries*, 81 Wn. App. 123, 128, 913 P. 2d 402 (1996). Substantial evidence is evidence sufficient to persuade a "rational, fair-minded person" of the truth of the finding. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). This Court reviews conclusions of law de novo. *Young*, 81 Wn. App. at 128.

B. DLI failed to run Retro consistent with recognized insurance principles.

"Administrative agencies are bound by their own rules." *Skamania County v. Woodall*, 104 Wn. App. 525, 539, 16 P.3d 701 (2001). During the pertinent years, DLI was required to ensure that "[t]he Retrospective rating plan shall be consistent with recognized insurance principles." RCW 51.18.010; WAC 296-17-912 (filed 1981) ("The Retrospective rating plan shall be consistent with recognized insurance principles and shall be administered

according to rules, scales, tables, formulas, schedules, and factors promulgated by the department.”); *WR Enterp., Inc. v. Dep’t of Labor and Indus.*, 147 Wn.2d 213, 224, 53 P.3d 504 (2002) (“RCW 51.16.035 requires the Department to classify occupations and industries according to risk and base rates on these classifications in accordance with recognized insurance principles”) (citing *Wash. State School Directors Association v. Dept. of Labor & Indus.*, 82 Wn.2d 367, 510 P.2d 818 (1973)).

DLI’s Assistant Director of Insurance Services, Robert Malooly, testified that “recognized insurance principles” means more than simply following WAC regulations.⁷⁵ Rather, that phrase also includes “good basic practice in insurance.”⁷⁶ Likewise, DLI had an underlying duty to be “scrupulously just” with NWCCA:

The conduct of government should always be scrupulously just in dealing with its citizens; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.

State ex rel. Shannon v. Sponburgh, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965).

⁷⁵ Transcript (11/16/09) at 107.

⁷⁶ *Id.*

1. DLI violated recognized insurance principles because it did not even attempt to determine the adequacy of the new drywall rates before implementing them.

DLI has consistently maintained that it does not determine rate adequacy on the classification level, only the fund level.⁷⁷ Whatever viability that theory may have with respect to the State's non-Retro insurance customers, it was undisputed at the hearing that *Retro* participants must necessarily depend on DLI to use adequate rates. DLI's own Retro manager was unequivocal on this point: "it would be reasonable ... for an employer in Retro to believe that the Department was setting adequate rates."⁷⁸

A Retro participant's reliance on DLI is also reasonable because rate adequacy is required by recognized insurance principles. For instance, the Casualty Actuary Society's Statement of Principles,⁷⁹ which reflects recognized insurance principles,⁸⁰ requires insurers to set adequate rates.⁸¹ The Washington insurance code also requires that premium rates must be adequate. See RCW 48.19.020. Although this requirement is contained in the laws applicable to private insurers, even Bill Vasek⁸² agreed that

⁷⁷ Exhibit 7 (Request for Admission 6).

⁷⁸ Transcript (11/17/09) at 120 (Doherty).

⁷⁹ Exhibit 38.

⁸⁰ See Transcript (11/20/09) at 138 (Vasek).

⁸¹ See Exhibit 38 at 2 ("Principle 4: A rate is reasonable and not excessive, *inadequate*, or unfairly discriminatory if it is an actuarially sound estimate of the estimated value of all future costs associated with an individual risk transfer.").

⁸² Transcript (11/20) at 137.

the adequacy principle itself is equally applicable to DLI.⁸³ And to remove any doubt, Doherty testified at the hearing: “it’s a recognized insurance principle that *when you’re running a Retro program*, base rates need to be adequate and actuarially determined.”⁸⁴

The base rates implemented by DLI were neither adequate nor actuarially determined. The person who chose the rates, Frank Romero, made clear that adequacy was not even one of his considerations: “That wasn’t taken into consideration, honestly, whether or not that rate was adequate or inadequate.”⁸⁵ Likewise, DLI *admitted* that “the discount DLI implemented as part of the Drywall Initiative was not an actuarially derived number.”⁸⁶

By failing to even attempt to determine rate adequacy at the level that mattered to Retro employers – the class level – DLI ignored the needs of its insureds and violated recognized insurance principles. The Board’s findings of fact and conclusions of law do not address this point, and this Court should reverse on that ground alone.

⁸³ Vasek distinguished the situation in which the Department is specifically attempting to return surplus money to all premium payers at the fund level through rates that are intentionally inadequate. There is no allegation that the Department was attempting to do so in this case.

⁸⁴ Transcript (11/17/09) at 142 (emphasis added).

⁸⁵ Transcript (11/16/09) at 18.

⁸⁶ BR at Ex. 7 (RFA #4).

2. DLI violated recognized insurance principles because it failed to inform NWCCA of a major change in the potential cost of coverage.

DLI's primary defense of the inadequacy of its rates is that it was simply impossible to know whether its new rates would be adequate. Malooly asserted that predicting rate adequacy at the time of the implementation of the Drywall Initiative would have required "a crystal ball."⁸⁷ Malooly also testified that predicting rate adequacy is like "predicting the outcome of the Kentucky Derby in advance."⁸⁸

But these claims could not excuse DLI's failure to *communicate* with its Retro employers. It was undisputed at the hearing that it is a "recognized insurance principal" that "insurers have a duty to inform insureds of major changes in the potential costs of coverage."⁸⁹ DLI has admitted that it had "ready means available for communicating, to all drywall Retro participants," about its knowledge of "the adequacy of the discounted rate."⁹⁰ DLI admitted that the Drywall Initiative "significantly diminished the financial incentive of drywall employers to participate in Retro."⁹¹ Even so, DLI made no attempt to warn "any drywall employers

⁸⁷ Transcript (11/16/09) at 114-115.

⁸⁸ Transcript (11/16/09) at 119.

⁸⁹ Exhibit 7 (Request for Admission 21).

⁹⁰ Exhibit 7 (Request for Admission 10).

⁹¹ Exhibit 7 (Request for Admission 30).

regarding the Drywall Initiative and its potential effect on the advisability of Retro.”⁹²

Despite Judge Grant’s finding that “[t]he Department violated the principle that insurers have a duty to inform the insureds of major changes in the potential costs of coverage,”⁹³ the Board concluded that NWCCA’s employers should have learned of these new risks *on their own*. The Board reached that conclusion even though it was undisputed that Romero had given NWCCA the impression that “the premiums were going to be the same.”⁹⁴

The Board also concluded, without any supporting analysis, that NWCCA “could have predicted the impact upon the group and its members” if it had “applied sufficient interest and resources.”⁹⁵ But even Bill White – the person who designed the Retro program and who served as chief actuary for DLI at the time of the Drywall Initiative – admits that he did not make the connection between the Drywall Initiative and Retro. Frank Romero – who designed the Drywall Initiative immediately before becoming the Program Manager of Retro for DLI – also did not make that connection. It is

⁹² Exhibit 8 (Interrogatory 7); *see also* Exhibit 7 (Request for Admission 3).

⁹³ BR at 60-61.

⁹⁴ NWCCA’s Richard Mettler testified as follows: “Q. [It] was your understanding from Mr. Romero that it was going to be ... a zero sum game, correct?
A. Exactly. The conversion had been done to equate premium, the initiative was about compliance, not about premium, and then it was expected to be a zero sum game.” *Id.* at 70-71.

⁹⁵ BR 6.

unrealistic to expect NWCCA to be able to do the analysis that DLI admits it either could not do or failed to do.

The Board also asserts that NWCCA's failure-to-disclose claim relies on the notion "that the Department knew from inception that the Drywall Initiative was ill-considered."⁹⁶ That statement shows that the Board fundamentally misunderstood the failure-to-disclose claim as outlined carefully in Judge Grant's ruling. NWCCA does not claim that DLI should have known from the outset that the Drywall Initiative would fail. However, DLI should have known from the outset that its changes would significantly increase the financial risk to any Retro participant who was also a drywall employer. DLI is not required by law to have successful initiatives. But DLI is *required by law* to follow recognized insurance principles, which *require warnings* concerning major changes in the potential costs of coverage. Judge Grant correctly ruled that DLI should have foreseen those potential changes for drywall employers and warned about continued participation in Retro. The Board and Judge Casey incorrectly rejected that ruling. This Court should reverse on that ground alone.

⁹⁶ BR 6.

3. DLI violated recognized insurance principles because it chose not to monitor the new drywall rates for adequacy after implementing them.

After its initial failure to warn NWCCA in 1997 of the major shift in risk associated with Retro, DLI continued to violate recognized insurance principles by failing to *monitor* the adequacy of the new base rates as new data came in. Robert Malooly testified that it is a “recognized insurance principle” that “an insurer must monitor rates, as time goes on, to get closer to the true cost of insurance.”⁹⁷

Bill Vasek testified that he did not do so because – even once DLI had 15 months’ worth of information – that information was “not worth looking at.”⁹⁸ There is no dispute that the 15 months’ worth of hard data was not as good as the normal amount of data that DLI uses in setting rates. But that 15 months’ worth of data was undoubtedly more informative than the information that had initially been used to set the Drywall Initiative rates: no information.

As Bill White testified, analyzing the data that was 15 months old would have disclosed to DLI that “the program had failed and they had a serious problem with rate adequacy.”⁹⁹ And even if that

⁹⁷ Transcript (11/16/09) at 115-116 (“Q. You do that because it’s a recognized principle of insurance? A. In our case it is.”).

⁹⁸ Transcript (11/20/09) at 146-147.

⁹⁹ Transcript (11/16/09) at 136.

initial analysis would not have been as reliable as analysis based on greater information, it could have been disclosed to any Retro-participating drywall employers so they could fully understand the unusually high risk of Retro participation after the Drywall Initiative. Thus, as Romero testified: “The Department had the information available to it, and the Department did not use that information.”¹⁰⁰

Given Malooly’s testimony that insurers must monitor rates for adequacy, this failure alone violated recognized insurance principles and entitles NWCCA to relief. The Board and Judge Casey failed to hold DLI accountable for this violation of DLI’s statutory duty. This Court should reverse on that ground alone.

4. DLI’s conduct in this case is materially indistinguishable from that of the private insurer in the *Woodworker’s Supply* case.

In *Woodworker’s Supply*, Principal Mutual offered a retrospective insurance program to gain the business of a potential insured. *Woodworker’s Supply, Inc. v. Principal Mutual Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999). But Principal failed to tell the insured that its underwriter “had serious doubts about the adequacy of the rates.” *Id.* at 988. Principal did not change its rates, and the insured ended up with a significant assessment. The insured ultimately sued Principal for fraudulent inducement of the insurance contract. Affirming a jury verdict in the insured’s favor, the Tenth

¹⁰⁰ Transcript (11/16/09) at 30.

Circuit pointed out that a party to a contract “has the duty to disclose if he knows that the other party to a contemplated transaction is acting under a mistaken belief, or if he has superior knowledge not within the reach of the other party.” *Id.* at 994.

DLI admitted at trial that, as a government agency, it owed NWCCA “a duty to act in good faith, abstain from deception, and practice honesty and equity.”¹⁰¹ In fact, our State requires its agencies to be “scrupulously just” in dealing with the public. *Shannon*, 66 Wn.2d at 143-44. Here, DLI knew (1) how important rate adequacy was to Retro participants,¹⁰² (2) that Retro participants were relying on DLI to implement adequate rates,¹⁰³ and (3) that its rates had been set without considering adequacy.¹⁰⁴ Given these facts, DLI had the duty to disclose the facts to which it had superior knowledge – i.e., the potential for massively inadequate base rates. If DLI had investigated and disclosed the risks that the Drywall Initiative introduced to Retro, NWCCA would not have remained in Retro for the 1998-2000 plan years and would not have had to pay \$610,834 in assessments. This Court should order DLI to refund to NWCCA the extra money that it paid in retrospective premiums for those plan years.

¹⁰¹ Exhibit 7 (Request for Admission 62).

¹⁰² Transcript (11/17/09) at 87 (Romero).

¹⁰³ Transcript (11/17/09) at 14, 84 (Romero).

¹⁰⁴ Exhibit 7 (Request for Admission 7).

C. DLI also owes prejudgment interest and attorney fees.

Upon prevailing, NWCCA will be entitled to prejudgment interest on its long-delayed refunds. See *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 522, 598 P.2d 1372 (1979). Likewise, NWCCA is entitled to its trial and appellate attorney fees under RCW 51.52.130(1). See RAP 18.1.

V. CONCLUSION

No drywall employer should have been in Retro during the early years of the Drywall Initiative. But DLI forgot about Retro participants in designing the Drywall Initiative. Because they forgot, they made no effort to (1) ensure that their rates were, in fact, adequate, (2) inform the drywall employers who were Retro participants about the significant level of uncertainty associated with the new rates, and (3) take advantage of the data they *did have* to determine whether their initial guess had been near the mark. Recognized insurance principles applicable to all insurers, and particularly Retro insurers, require those efforts. NWCCA signed up for a program that would be run according to recognized insurance principles. They did not get the benefit of their bargain. They rather got \$610,834 in assessments.

This Court should adopt Judge Grant's reasoning and rectify that injustice, ordering DLI to refund the assessments to NWCCA. The person who created the Retro Program (Bill White) and the person who spearheaded the Drywall Initiative (Frank Romero) each testified that doing so was appropriate. This Court should also order DLI to compensate NWCCA for its prejudgment interest and statutory attorney fees.

Respectfully submitted this 7 day of October, 2011.

STAFFORD FREY COOPER

By: 

James T. Yand, WSBA #18730

Peter J. Mullenix, WSBA #37171

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled BRIEF OF APPELLANT on the following individual:

Counsel for Respondent Department
of Labor and Industries:

James S. Johnson
Attorney General of Washington
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
TEL: (360) 586-7077
FAX: (360) 586-7717

- VIA FACSIMILE
- Via First Class Mail
- Via Messenger
- Via Email

DATED this 7th day of October, 2011, at Seattle, Washington.



Nori Skretta

APPENDICES

Appendix A Proposed Decision and Order of the BIIA dated March 8, 2010

Appendix B Decision and Order of the BIIA dated June 16, 2001

Appendix C Letter Opinion of Judge Casey dated April 5, 2011

Appendix D Findings of Fact and Conclusions of Law and Judgment dated June 3, 2011 by Judge Casey

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: NORTHWEST WALL & CEILING) DOCKET NO. 09 14561
2 CONTRACTORS ASSOCIATION)
3 FIRM NO. 49) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Janice A. Grant

5 APPEARANCES:

6
7 Retrospective Rating Group, Northwest Wall & Ceiling Contractors Association, by
8 Stafford Frey Cooper, per
9 James T. Yand and Peter J. Mullenix

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 James S. Johnson, Assistant

13 The Retrospective Rating Group, Northwest Wall and Ceiling Contractors Association
14 (NWCCA), filed an appeal with the Board of Industrial Insurance Appeals on May 4, 2009, from an
15 order of the Department of Labor and Industries dated April 9, 2009. In this order, the Department
16 affirmed a Department order dated March 4, 2009 that denied the firm's request for relief for the
17 final adjustment for Plan Years beginning July 1, 1998, July 1, 1999, and July 1, 2000. The
18 Department order is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

19 On November 16, 2009, the parties agreed to include the Jurisdictional History as amended
20 in the Board's record. That history establishes the Board's jurisdiction in this appeal.

21 An Interlocutory Order Setting Briefing Schedule and Confirming Parties' Agreements was
22 issued on October 8, 2009. On October 16, 2009, NWCCA filed a Trial Memorandum of the
23 Northwest Wall and Ceiling Contractors Association, together with a Declaration of Counsel and
24 eleven exhibits. On November 2, 2009, this judge sent a letter to the parties confirming an
25 extension of the remaining briefing dates. On November 6, 2009, the Department filed a
26 Department's Pre-Hearing Brief. On November 12, 2009, NWCCA filed a Reply Memorandum.

27 Hearings were held in the above-entitled matter on November 16, 17, 20, and 24, 2009. The
28 following witnesses testified in this matter on the hearing dates indicated below:

29 November 16, 2009: Frank Romero, Robert Malooly, William White

30 November 17, 2009: William White, Diane Doherty

31 November 20, 2009: Richard Mettler, William Vasek

1 November 24, 2009: Richard Mettler

2 All rulings made at these hearings are affirmed. No perpetuation depositions were taken.

3 Board Exhibit Nos. 1 through 46 were marked. At the hearing on November 16, 2009, the
4 parties stipulated to the admission of Exhibit Nos. 2, 3, 4, 5, 9, 15 through 24, 27 through 34, 37,
5 and 39. All exhibits were admitted except Exhibit No. 26, which was rejected as cumulative, and
6 Exhibit Nos. 41 through 45, which were not offered. The following exhibits were admitted:

7	<u>Exhibit No.</u>	<u>Hearing Date</u>	<u>Description</u>
8	1.	11/17/09	Retrospective Rating Manual effective 1/1/98
9	2.	11/16/09 (stip.)	Department order dated 3/4/09
10	3.	11/16/09 (stip.)	Department order dated 4/9/09
11	4.	11/16/09 (stip.)	Drywall classes
12	5.	11/16/09 (stip.)	Former classes per hour
13	6.	11/16/09	Report by William White dated 9/30/05
14	7.	11/17/09	Dept's Answers to NWCCA's First Requests for Admission
15	8.	11/17/09	Dept's Answers to NWCCA's First Set of Interrogatories and Requests for Production
16	9.	11/16/09 (stip.)	List of Ass'n Retro Members for plan years 1998-1999, 1999-2000, and 2000-2001
17	10.	11/17/09	Graph: Retro Rating Adjustment History
18	11.	11/17/09	Table: Adjustments for plan years 1983-2000
19	12.	11/17/09	Timeline
20	13.	11/17/09	Declaration of Diane Doherty
21	14.	11/17/09	Dept's second and last adjustment order for plan year 1998
22	15.	11/16/09 (stip.)	Letter from Dick Mettler to Diane Doherty dated 2/23/06
23	16.	11/16/09 (stip.)	Department order dated 6/13/09
24	17.	11/16/09 (stip.)	NWCCA's appeal to Dept's 6/13/09 order
25	18.	11/16/09 (stip.)	NWCCA Group Retro Rating Agreement for plan year 1999
26	19.	11/16/09 (stip.)	Letter from Diane Doherty to Dick Mettler dated 2/3/06
27	20.	11/16/09 (stip.)	Letter from Dept to Dick Mettler dated 3/1/06
28	21.	11/16/09 (stip.)	Letter from Diane Doherty to Dick Mettler dated 6/13/06
29	22.	11/16/09 (stip.)	Affidavit of Gary Jost dated 1/23/07
30	23.	11/16/09 (stip.)	Affidavit of Philip Ramey dated 1/31/07
31	24.	11/16/09 (stip.)	Affidavit of Brent Smith dated 1/23/07
32	25.	11/24/09	Affidavit of Dick Mettler dated 1/22/07
	26.	11/16/09	(Rejected)
	27.	11/16/09 (stip.)	Dept's notice and first adjustment for plan year 1997 dated 5/5/99
	28.	11/16/09 (stip.)	Dept's notice and first adjustment for plan year 1998 dated 5/8/00
	29.	11/16/09 (stip.)	Dept's notice and second adjustment for plan year 1998 dated 5/9/01
	30.	11/16/09 (stip.)	Dept's first adjustment for plan year 1999 dated 5/9/01
	31.	11/16/09 (stip.)	Dept's second adjustment for plan year 1999 dated 5/9/02
	32.	11/16/09 (stip.)	Dept's first adjustment for plan year 2000 dated 5/9/02
	33.	11/16/09 (stip.)	Dept's notice and second adjustment for plan year 2000 dated 4/18/03

- 1 34. 11/16/09 (stip.) Dept Retro Evaluations 1998-2000
- 2 35. 11/17/09 Retrospective Rating Manual effective 1/1/99
- 3 36. 11/17/09 Retrospective Rating Manual effective 7/1/00
- 4 37. 11/16/09 (stip.) Superior Court Order dated 11/21/08
- 5 38. 11/16/09 Statement of Principles Regarding Property and Casualty
Insurance
- 6 39. 11/16/09 (stip.) Memo dated 12/30/96 regarding Drywall Initiative
- 7 40. 11/17/09 NWCCA Retro Performance Data 1983-2000, incl. adjustments
- 8 41. 11/24/09 (Not offered)
- 9 42. 11/24/09 (Not offered)
- 10 43. 11/24/09 (Not offered)
- 11 44. 11/24/09 (Not offered)
- 12 45. 11/24/09 (Not offered)
- 13 46. 11/24/09 Average Standard Premium Rates

14 This matter was previously appealed to Thurston County Superior Court on the issue of the
15 timeliness of the appeal. The court reversed the Department's denial of relief and remanded the
16 case to the Board to address the merits. The court ordered:

17 This matter is remanded to the Department for consideration of the
18 merits of each of the Association's claims for refund/adjustment for the
19 1998-1999, 1999-2000, and 2000-2001 plan years. The Department
20 must consider all the NWCCA's claims for refund/adjustment as though
21 those claims were timely made. Should an appeal to the Board be
22 necessary, the Board must also consider the Association's claims as
23 though they were timely made and appropriately filed, including claims
24 for breach of contract and tort.

25 Ex. No. 37.

26 **ISSUE**

27 Is the Firm, Northwest Wall and Ceiling Contractors Association, entitled
28 to relief from the Department's adjustment for Retrospective Rating
29 Program plan years beginning on July 1 of 1998, 1999, and 2000?

30 **EVIDENCE PRESENTED**

31 NWCCA presented the testimony of Frank Romero, Robert Malooly, William White,
32 Diane Doherty, and Richard Mettler. The Department presented the testimony of William Vasek.

All admitted evidence was taken into consideration. All relevant evidence, to the extent it is
necessary for the determination of the issues on appeal, will be discussed below.

Background - Retro

Under Washington's Industrial Insurance Act, an employer has the option of enrolling in what
the Department of Labor and Industries refers to as a "retrospective rating program" (hereafter
retro). RCW 51.18.010 et seq.; WAC 296-17-91201 et seq. Retro provides employers an

1 opportunity to partner with the Department to promote workplace safety and have fewer accidents.
2 11/16/09 Tr. at 14. Participation in the program is voluntary, and carries with it the risk that
3 participants will have to pay additional premiums. An employer who selects that retro option pays a
4 standard industrial insurance premium for the coming coverage year. In the years immediately
5 following the plan year, the Department retrospectively calculates the premium that the employer
6 should have paid according to the employer's actual claim experience, applies certain factors
7 beyond the control of the employer, compares the retrospective premium to the standard premium,
8 and refunds or assesses the difference. The key to success for a retro participant is to keep their
9 retro premiums below their standard premiums.

10 A Retrospective Rating Group consists of a group of employers from the same industry who
11 combine their premiums and are treated as though they were one employer. NWCCA is one such
12 group, comprised solely of drywall contractors. NWCCA was an active participant in the
13 Department's Retrospective Rating Program since the Department began that program in 1983.
14 For NWCCA, retrospective rating plan years began on July 1 and ended on June 30 of the following
15 year. Until 1997, NWCCA always received a positive return for its participation in retro, averaging a
16 17 percent refund on the premiums over those years. NWCCA members used the base premium
17 set by the Department to bid its work for construction projects.

18 Retro premiums are calculated according to the following formula: standard premiums are
19 multiplied by the basic premium ratio, then added to the total of developed losses multiplied by the
20 loss conversion factor. The Department's rules contain tables listing Basic Premium Ratios and
21 Loss Conversion Factors. The Department will use a particular loss conversion factor and basic
22 premium ratio depending on (1) the size of the group, measured by the standard premiums
23 members pay during the plan year; (2) the group's plan selection; and (3) the group's maximum
24 premium ratio (MPR) selection.

25 An important measure of a retro group's performance is its loss ratio, which is its developed
26 losses divided by its standard premiums. NWCCA's two worst loss ratios came in plan years 1998
27 and 2000. NWCCA had a positive return in plan year 1999. The difficulty with loss ratios, and
28 particularly non-final loss ratios, is that they can vary greatly from one assessment to the next. This
29 variance is due, in part, to base rates that the Department changes from year to year, and partly
30 because the preliminary ratios are often provided before a retro group has the opportunity to reduce
31 the year's losses by investigating claims and providing out-of-work employees with light duty work
32 opportunities.

1 The Drywall Initiative

2 From 1993 to 1997, industrial insurance premium rates for drywall employers in Washington
3 State increased significantly due to drywall contractors failing to report hours and thereby obtaining
4 a competitive advantage over the contractors who complied with the reporting requirements. The
5 noncompliant employers' practices resulted in the Department continually raising premiums, which
6 were primarily paid by the compliant employers. Prior to 1997, NWCCA, through Richard Mettler,
7 was represented on the Drywall Technical Advisory Committee. That committee discussed options
8 to resolve underreporting, non-reporting, and creative reporting of worker hours by many drywall
9 contractors. The committee recommended to the Department that the Department change its rate
10 structure from being based on worker hours to a rate based on square feet of materials. That
11 committee also recommended to the Department that it implement a discount for those drywall
12 contractors in compliance with accurate reporting to the Department, and recommended a
13 non-discount rate for drywall contractors not in compliance.

14 During 1996, the Department and industry representatives worked to address this problem
15 with a program called the Drywall Initiative. The Department implemented this Initiative effective
16 January 1, 1997. The Initiative consisted of two changes in the way the Department collected
17 premiums from drywall employers. First, the Initiative changed the method of reporting for
18 employers from one unit of measurement (hours worked) to another unit (square feet of drywall).
19 This change occurred with the goal of making it more difficult for employers to pay their employees
20 under-the-table and to increase the incentive to comply with the reporting requirements. Second,
21 the Initiative introduced a discount for employers who completed new, more stringent
22 documentation requirements. As NWCCA's representative, Richard Mettler went with
23 Frank Romero to several public hearings across the state to help explain the reasons for and goals
24 of the Initiative.

25 Prior to implementing the Drywall Initiative, the Department relied on Frank Romero, the
26 Department's head of Classification Services, to make the actuarial decisions regarding the rate
27 conversion from hours worked to square footage reporting system, and the amount of the employer
28 discount. The Department's actuaries played almost no role in these decisions. Mr. Romero
29 estimated the amount of reportable drywall that had been sold in the state in the previous year. He
30 testified that this amount may also have been the average of the previous three years. He then
31 determined how much in premium dollars would be expected for the 1997 year, and then divided
32 the total square footage by the total premium he believed was needed by the Department to

1 determine the pre-discounted square footage rates for the Drywall Initiative. He eventually decided
2 on a 35 percent discount, based on the assumption that the Initiative would result in full compliance
3 from drywall employers.

4 NWCCA approved the Department's proposed discount rates of 40 percent for drywall
5 installation and 30 percent for drywall taping and texturing, and approved the non-discount rate of
6 150 percent of the prior standard premium. 11/20/09 Tr. at 27. Prior to 1997, a comparison of the
7 discounted and non-discounted rates with the prior year's standard premium was provided to all
8 employers. 11/16/09 Tr. at 42-43. Contractors expressed concern in the public hearings about the
9 Department's proposed conversion to 125 square feet per hour. NWCCA's members did not
10 believe it was necessarily out of line. 11/24/09 Tr. at 19.

11 At the time the Drywall Initiative rates were implemented on January 1, 1997,
12 the Department had data on square footage reported in June 1997, but did not check or report on
13 compliance levels at that time. NWCCA enrolled in Retro in June 1997 for the 1997 plan year. In
14 June 1998, NWCCA enrolled in Retro for the 1998 plan year. In May 1999, the Department issued
15 NWCCA a final assessment of \$495,000 for the 1997 plan year. NWCCA disputed that charge,
16 appealing to Mr. Romero in his capacity as the Department's new Retro manager. In March 2000,
17 the Department agreed to waive NWCCA's \$495,000 assessment for the 1997 plan year.
18 In May 2000, NWCCA received another negative assessment. This assessment was applicable to
19 the 1998 plan year, in the amount of \$310,672. NWCCA enrolled in retro for the 2000 plan year.
20 In May 2001, NWCCA received a refund of \$302,413 for the 1999 plan year. NWCCA's total refund
21 for the 1999 plan year was \$433,843. Their claimed damages in this appeal are offset in that
22 amount.

23 At the same time that the May 2001 refund was received, NWCCA received another
24 assessment for the 1998 plan year in the amount of \$424,447, which brought the total assessment
25 for the 1998 plan year to \$735,119. By July 2001, NWCCA opted out of retro. In May 2002,
26 NWCCA received an assessment for the 2000 plan year in the amount of \$310,399. NWCCA
27 sought additional money from its members to pay this assessment.

28 Testimony

29 Francis (Frank) A. Romero is employed as a loss control field representative by the
30 Building Industry Association of Washington (BIAW). Prior to that employment, Mr. Romero was
31 employed by the Department of Labor and Industries for 32 years, until October 31, 2005.
32 Mr. Romero worked in various capacities for the Department, including classification program

1 manager, and retrospective rating program manager from December 23, 1997 until his retirement in
2 October of 2005. Mr. Romero drafted the regulations that the Department's retro rating program
3 uses. He testified that as long as NWCCA had a yearly refund, the bids were accurate and covered
4 the cost of workers compensation premiums, but if the rates were inadequate, NWCCA members
5 had to pay the additional assessments without being able to pass along the cost to the project bid.
6 11/16/09 Tr. at 86-88; 11/20/09 Tr. at 9-11.

7 Mr. Romero testified that employers who join retro are assuming that the premium is going to
8 be adequate to cover their losses. He testified that the term "adequate" as used in the industry,
9 means a reasonable premium is being exchanged for the unknown risk the insurer is taking on.
10 11/16/09 Tr. at 14. He testified that the Department assigns classifications to work activities for
11 employees, and sets rates for each of those classifications. Mr. Romero is not an actuary, but he
12 was the person at the Department who set the drywall rates in 1996 as part of the Drywall Initiative.
13 He would set the base rate, and then the Department's actuaries, including Bill White at that time,
14 would monitor the rate for adequacy and would make any necessary adjustments based on the
15 available data. Mr. Romero did not recall whether any of the Department actuaries assisted him in
16 setting the rates in 1996, although he testified "I know that the rate was at some point in time
17 blessed by the actuaries." 11/16/09 Tr. at 17-18. He testified that he did not know whether the
18 rates were adequate or inadequate for the Drywall Initiative at the time he set them because his
19 focus was on creating incentives to increase compliance, not the rates themselves.

20 At the time he set the rates, Mr. Romero was aware of two pilot programs similar to the
21 Drywall Initiative that had been implemented in Pierce and Thurston Counties. He used the data
22 from those programs to determine how to convert from hours worked to square feet.
23 11/16/09 Tr. at 35-36. Mr. Romero's rate calculation did not take into account any potential effects
24 of an "owner deduction," which was later added by the Department by rule effective April 1, 1997.
25 The owner deduction allowed the total square feet reported, and therefore the total premiums
26 collected, to be decreased for work performed by people who were excluded from mandatory
27 coverage. 11/16/09 Tr. at 68. Also in April of 1997, the Department went from four classes to ten
28 classes. 11/16/09 Tr. at 72.

29 Mr. Romero testified that, for the 1998 plan year rates, the Department had at least six
30 months of information available from 1997, and in 1999, the Department had at least 18 months of
31 information available, on which to base the drywall rates. He testified that it was not until 2001 or
32 2002 that the actuaries actually started using the data that was being reported to set those rates.

1 He further testified that the drywall discounted rate for non-retro participants was "woefully
2 inadequate." He understood that discounted rate was 35 percent but later learned that it was
3 40 percent, creating a situation within the drywall industry itself where employers not participating in
4 retro received a discount, and employers in retro were penalized. 11/16/09 Tr. at 22, 27.
5 He testified that the Department should have fully disclosed to all retro participants in the drywall
6 industry that the premium rates were inadequate, and that they were more inadequate than all other
7 rates. He testified as follows regarding rate inadequacy:

8 Well, what you're doing is you're gambling. You're gambling that you're
9 going to have a favorable outcome, which retro is not a gamble. Retro
10 is a risk, but it's not a gamble. In retro you know you're going to have
11 losses, and you make the assumption that your premium is going to be
12 adequate to cover the loss. In this case you're saying, we know that the
13 premium is going to be woefully inadequate. We know there's going to
14 be loss. You're gambling that the smaller premium that you're paying is
15 still going to be sufficient. That's no different than taking that standard
16 premium and going to Vegas and putting it on the roulette wheel and
17 spinning the wheel and hoping that you win. Sometimes you win,
18 sometimes you lose. But retro is not supposed to be that type of a
19 program. Retro is a program where there's an acceptance of some risk,
20 but it's not a gamble. L&I changed that agreement from being an
21 agreement where there's an acceptance of some risk to a pure gamble.

22 11/16/09 Tr. at 23-24. Mr. Romero testified that the Department knew the rate was wrong by
23 April 1, 1997, when the Department decided to allow owners to deduct a percentage of the drywall
24 that they participated in installing, resulting in taking a huge percentage of the material off of the
25 table that the Department thought they would be receiving premiums on. With the start of the
26 Drywall Initiative in January of 1997, the assumption was that all board feet were going to be
27 reported. Further, the compliance levels did not go up, contrary to the Initiative's goal.

28 Mr. Romero testified that the Department is required to comply with generally accepted
29 insurance principles, and that it violated certain insurance principles in this case. He opined that
30 the Department violated its mandate under RCW 51.16.035 to create an incentive system to
31 encourage workplace safety and better claims management by not setting premium rates which
32 were the lowest necessary to maintain actuarial solvency of the accident and medical aid funds.
33 11/16/09 Tr. at 26. He further opined that the Department unfairly discriminated between different
34 classes, and between retro and non-retro employers within the drywall class, by having a rating
35 system that heavily discounted the drywall rate at either 35 or 40 percent, which was significantly
36 higher than the other classes. He opined that by offering a significant discount within drywall to

1 non-retro employers, and taking away the incentive for retro employers, the retro employers were
2 treated differently and worse than the non-retro participants. 11/16/09 Tr. at 26-27. He testified
3 that the Department knew its premiums were woefully inadequate and did not disclose that to the
4 retro participants. He testified that the information was available to the Department, but no one in
5 the Department was tracking the data.

6 Mr. Romero's understanding was that the Department's failure to disclose inadequate rates
7 was the reason for NWCCA's protest in this appeal. While he was at the Department, Mr. Romero
8 handled a prior protest from NWCCA involving the 1997 plan year. He testified that plan year 1997
9 resulted in an additional assessment. He worked with NWCCA and the assistant attorney general
10 to settle that case, "[B]ecause in my heart of hearts I believe that we had no insurance contract,
11 that we had done something that was inexcusable." 11/16/09 Tr. at 31. He recalled that that
12 protest was filed in late 1998 or early 1999. That appeal was resolved by March of 2000, resulting
13 in the Department waiving the charge, so that NWCCA paid the standard premium like everyone
14 else, and was not liable for the assessment. 11/16/09 Tr. at 65.

15 Mr. Romero testified that the situation with plan year 1997 was the same as that involving
16 the plan years at issue in this appeal. Mr. Romero reviewed William White's rate study of
17 September 2005, and testified that that study showed that the rates for the plan years at issue were
18 "very inadequate" and that the Department had information on the current square foot system that
19 was available to it that it did not use. 11/16/09 Tr. at 33. Mr. Romero testified that the Department
20 is required to use the best the information that was available for rate making, which in this case
21 would have been the current information on the square footage system that was available, but not
22 used.

23 Robert Malooly has been employed by the Department as the assistant director of
24 insurance services since 2003. As assistant director, Mr. Malooly oversees the Department's
25 insurance services, including retro, classification, and actuarial. He was not with the Department at
26 the time the Drywall Initiative was developed and implemented. He was not aware of who set the
27 drywall rates.

28 Mr. Malooly testified that even if he was aware that the Department had set base rates for
29 standard premiums without regard to whether or not those rates were adequate, that would not
30 affect his opinion that the Department had treated NWCCA equitably. 11/16/09 Tr. at 102.
31 He testified that there were many discussions about how the drywall rate would change involving all
32 of the parties, and that it was NWCCA's decision, not the Department's, to participate in retro.

1 He testified that every year there are some rates that are inadequate or excessive, and the
2 Department cannot tell in advance whether the rates are adequate or not. He further testified that
3 his decision would also not be affected even if the Department did not monitor the rates and
4 therefore failed to discover an inadequacy. Mr. Malooly testified that he would expect an
5 association such as NWCCA, with a track record of 14 years worth of refunds prior to the
6 assessments, "to be aware of any changes the Department makes and factor those changes into
7 their decision as to whether they should continue in retro or not." 11/16/09 Tr. at 105. He testified
8 that retro is a speculative endeavor, but it is a good thing for many employers because they run
9 safer operations than the average employer in their industry, and offer light duty, early return to
10 work, and other options to workers in order to lower their costs to insure. 11/16/09 Tr. at 120.

11 Mr. Malooly has about 25 years of experience in the insurance industry, and is aware of
12 recognized insurance principles and the Department's requirement to run retro consistent with
13 those principles. He testified that as a non-profit government insurance entity, the Department's
14 goal is to set rates as close to break-even as possible and that the rates are fair, but it will not know
15 for many years whether that rate was excessive or inadequate. Mr. Malooly recalled seeing
16 Bill White's report, and considers Mr. White to be a very good actuary. Mr. Malooly understood that
17 the rates implemented with the Drywall Initiative during the 1998 to 2000 plan years were
18 subsequently shown to be inadequate. 11/16/09 Tr. at 123.

19 William (Bill) White has been employed for over 30 years in the workers compensation
20 field. Mr. White was the chief actuary for the Department from 1976 until January 1, 1998. He is a
21 fellow of the Casualty Actuary Society. Since his retirement, Mr. White has worked on contract both
22 for the Department and employers. Mr. White designed the Department's retrospective rating
23 program around 1981. He testified that since 1989, the plan tables have remained essentially
24 unchanged, but the group size table changes from year to year. He testified that it was reasonable
25 for the Department to change how drywall was being reported with the development of the Drywall
26 Initiative in 1996-1997, due to the reporting problems. He had some involvement in and agreed
27 with the Department's decision to have both discounted and nondiscounted drywall classes.
28 11/17/09 Tr. at 41.

29 Mr. White is familiar with the Statement of Principles regarding property and casualty
30 insurance rate making, and testified that this document has been adopted by the Casualty Actuary
31 Society. 11/16/09 Tr. at 129; Ex. No. 38. Mr. White testified that part of the actuary's job of rate
32

1 making is to establish a base classification rate that employers in different industries would have to
2 pay, per hour generally, for their insurance, based on sound actuary principles.

3 In 2005, NWCCA contacted Mr. White with their concern that their drywall rates had
4 increased over the last few years much more than other rates in the classification system.
5 Mr. White studied the rate adequacy issue on behalf of NWCCA, and wrote a report dated
6 September 30, 2005, called Wallboard Workers' Compensation Rate Trends in Washington State
7 1997 to 2006. 11/16/09 Tr. at 134; Ex. No. 6. Mr. White analyzed whether the Drywall Initiative
8 worked by looking at the number of square feet or hours of wallboard (Mr. White's term for drywall)
9 was reported to the Department both before and after the Initiative started. Based on his analysis,
10 Mr. White concluded that the discounted class should have merited only a 7 percent discount
11 instead of a 35 percent discount, and the undiscounted class, instead of just maintaining the rate
12 level it was at, actually needed a 22 or 23 percent increase. The final outcome was that both rates
13 were inadequate. 11/16/09 Tr. at 141. On cross-examination, Mr. White testified that if the
14 discounted classes and nondiscounted classes were put together, the decrease in their standard
15 premium would be 15 percent. 11/17/09 Tr. at 11-12. Mr. White concluded that the Drywall
16 Initiative did not work, unlike prior programs, such as the reforestation program, which successfully
17 corrected a reporting problem in that industry. 11/16/09 Tr. at 148.

18 Mr. White opined that the Department made a mistake in not looking at the available
19 information to determine a rate level that was adequate, at a level back up to where it was before
20 the discount started. He testified that it was possible for the Department to look at the premiums in
21 the Fall of 1998 and determine that there was no increase in reporting, so the rates would be
22 inadequate and would need to be adjusted back up to the level they were at before the discount.
23 11/17/09 Tr. at 56-58, 66. He testified that the Department could have either corrected the rates or
24 forgiven NWCCA's enrollment in retro, or at least warn them that they were being given inadequate
25 premiums to support their retro program. He opined that it was not reasonable for the Department
26 to "just leave people hanging." 11/17/09 Tr. at 66-67. He opined that the Department was
27 responsible for this oversight, even though unintentional, and should not ask, in essence, that
28 NWCCA pay for the Department's mistake.

29 Mr. White testified that the rates are published in the state register, and the employers are
30 sent notices of these rates. Whether adequate or inadequate, employers know what their rates are,
31 and they can then estimate their standard premium based on their historical experience with how
32 much work they have. 11/17/09 Tr. at 70. He agreed that if the standard premium is reduced by

1 15 percent, the employer's loss ratio will change, but the consequence of the standard premium
2 reduction, although quantifiable, is only quantifiable if you have the skills and think to use those
3 skills. He maintained that for the 1999 plan year, there was enough information available to the
4 Department that it should have done something to correct the situation. 11/17/09 Tr. at 93.

5 On cross-examination, Mr. White reviewed NWCCA's adjustment history and noted that from
6 plan years 1990 through 1993, NWCCA had over 30 percent of premium returned to them nearly
7 every plan year. Exhibit No. 40. That history showed the loss ratios for those years varied from
8 .66 to .82. He opined that if those loss ratios had been sustained with the 15 percent reduction in
9 standard premium, NWCCA still could have had a return. In plan years 1994 and 1995, and the
10 first half of plan year 1996, there were no discounted premiums because those discounts did not
11 begin until January 1, 1997. 11/17/09 Tr. at 80. The loss ratio was 1.18 in 1994 and 1.15 in 1995.
12 If the discounted premiums were in place with that experience in 1994 and 1995, NWCCA would be
13 assessed for a loss because the standard premiums would decrease by 15 percent.

14 Mr. White testified that when NWCCA made their decision to re-enroll in retro in 1998, they
15 were not aware of their performance of the immediately preceding years, and their decision was
16 based on their history of good performance, including the published rates. Mr. White testified that
17 the Department followed the rules in publishing the rates and basing premiums on those rates.
18 11/17/09 Tr. at 85. He testified that while he was chief actuary, he looked at a three-to-five year
19 window of data to give the class increased credibility. In reviewing the data for new rates set in
20 2002 for new risk classes, Mr. White noted that the 2002 rates were close to adequate, with a
21 2 percent change from 2002 to 2003 for the discounted class. There was a 2 percent change for
22 that class from 2003 to 2004, and a 4 percent change from 2004 to 2005. There was a 2 percent
23 decrease in 2005 to 2006.

24 Mr. White's opinion was that Frank Romero had considerable expertise in classifications and
25 he would usually accept Mr. Romero's judgment about initial rates. Mr. White acknowledged that
26 even he himself, as the Department's chief actuary of the state fund during 1997, "failed to think to
27 say anything to the folks in retro about this discount plan and the effect it was going to have on one
28 of their clients." 11/17/09 Tr. at 100. He testified that he should have cautioned a retro group such
29 as NWCCA to "very seriously consider sitting this one out because the dice are loaded, you might
30 say." 11/17/09 Tr. at 101. He testified that the rate was significantly inadequate, such that the
31 performance adjustment factor could not account for it, and a reasonable participant in retro would
32 not anticipate it. He testified that in 1997 the Department knew the level of premium, the owner

1 exemption, and the fact they had a retro group of drywall contractors, before they set the 1998
2 rates. 11/17/09 Tr. at 110. He testified that these factors were known and should have been
3 disclosed to NWCCA to evaluate before committing to re-enrolling in retro.

4 Diane Doherty has been employed with the Department since February 1986 and is the
5 manager of the retro program. Ms. Doherty has worked in various capacities for the Department,
6 including clerk-typist, loss control consultant, safety education representative, and, since 1995, in
7 retro. Ms. Doherty was not the manager of retro at the time of the Drywall Initiative in 1996 and
8 1997. She did not set the rates or make decisions about what should be communicated to retro
9 employers during that time. Ms. Doherty testified that the Department has a duty to set rates that it
10 reasonably expects to be adequate. 11/17/09 Tr. at 120. She was not aware of any
11 communications sent by the Department to drywall employers warning them about the Drywall
12 Initiative. She testified that the Department encouraged participation in retro by all employers, but
13 had not considered the impact that discounting rates could have on the prospects of receiving
14 beneficial adjustment through retrospective rating. She agreed that the Department had a duty to
15 monitor the adequacy of the drywall initiative rates after it implemented them, and did not monitor
16 those rates. 11/17/09 Tr. at 126.

17 Ms. Doherty denied NWCCA's appeal of assessments in plan years 1998 and 2000 in 2006,
18 and offset the refund in plan year 1999. Her denial was based on her opinion that the Department
19 had acted on the best available information. Ms. Doherty testified that by June of 1998, the
20 Department had 15 months of Drywall Initiative data to review. 11/17/09 Tr. at 135. She testified
21 that NWCCA received a refund in plan year 1999 in spite of the Drywall Initiative, due to having a
22 great year in terms of claims, and also reducing their risk a slight amount by changing their plan.
23 She testified that the refund was in an amount over \$400,000 and showed a loss ratio of
24 84 percent. 11/17/09 Tr. at 152; Ex. No. 40. She testified that with the second adjustment of 1998,
25 NWCCA was assessed a total of over \$700,000, with a loss ratio of 146 percent.

26 Ms. Doherty testified that the Department has a duty to run retro consistent with recognized
27 insurance principles, including the duty to inform insureds of major changes in the potential costs of
28 coverage, as much as they are known. Ms. Doherty testified that she believed the Department
29 acted in good faith and honestly in enrolling NWCCA in retro.

30 Richard (Dick) Mettler has served as the executive director of the Northwest Wall and
31 Ceiling Contractors Association since April 1, 2008. Prior to that position, Mr. Mettler managed

1 NWCCA's safety and claims programs since August of 1993. Mr. Mettler served as the industry
2 representative on the Drywall Technical Advisory Committee.

3 NWCCA is a contractor's organization comprised of union contractors predominantly in the
4 drywall/commercial construction industry in the Western Washington market area. Mr. Mettler
5 explained that NWCCA is different from Northwest Wall and Ceiling Bureau, which is an
6 organization that provides technical support for the wall and ceiling industry in a widespread area
7 including Washington State, Portland, Oregon, and Canada. Mr. Mettler testified as follows
8 regarding the reason that NWCCA is protesting the assessments from the Department in this case:

9 We are protesting because we discovered a few years ago that there
10 were some rates that were given that were insufficient to cover our
11 workers' comp. premiums, and being in a retrospective rating program,
12 we were assessed additional penalties because of those mistakes the
13 Department made in assigning those rates or determining those rates
14 and we think that's rather unfair and we're here to see if we can resolve
15 that issue of fairness.

16 11/20/09 Tr. at 6. Mr. Mettler testified that these insufficient rates came about in 1997 as a result of
17 the Drywall Initiative. He testified that in plan years prior to the Initiative, NWCCA had received
18 multiple adjustments, and would periodically have an assessment for one of the adjustments, but
19 they always saw a positive refund at the end of each plan year. Mr. Mettler testified that NWCCA
20 saw positive refunds due to what he called "good hard claims work" as a result of developing and
21 maintaining effective safety programs.

22 NWCCA relied on the Department to set rates that were going to be adequate to cover
23 losses for their industry, and believed that the Department did not set adequate rates with the
24 change brought about by the Drywall Initiative. Mr. Mettler did not know going into that Initiative
25 that there was going to be any impact on the retro program. To his knowledge, none of NWCCA's
26 members ever took the owner deduction. 11/24/09 Tr. at 26. He attended a number of meetings in
27 1997, which he termed stakeholder meetings, in which Frank Romero, the Department's
28 representative, discussed the reporting problems in the industry, the pilot projects in Pierce and
29 Thurston Counties, and his calculations and the proposed changes in reporting from hours worked
30 to square feet. Mr. Mettler testified that there was never any discussion at these meetings about
31 the impact, if any, the Initiative might have on retro. Based on these meetings and his discussions
32 with Mr. Romero, Mr. Mettler understood that the Drywall Initiative would make it easier for the
Department to audit employers and level the playing field by converting the reporting mechanism,

1 but that it would be a "zero sum game" for retro, such that the retro program would stay the same.
2 11/20/09 Tr. at 24.

3 Mr. Mettler testified that plan year 1997-1998 was the first full year involving the changed
4 premium structure from hours worked to square feet. He was surprised when he received the first
5 adjustment for that plan year in the Spring of 1999 and saw that NWCCA had been assessed.
6 He talked to Mr. Romero, who recommended protesting that assessment. NWCCA filed a protest,
7 and resolution was reached between NWCCA and the Department in March of 2000, essentially
8 voiding NWCCA's retro contract for plan year 1997. 11/20/09 Tr. at 30-31.

9 In April 1998, NWCCA had to decide whether to enroll for plan year 1998. In June 1998,
10 NWCCA formally enrolled in that plan year, choosing to do so based on their history of good
11 performance. At that time, they had not received the negative adjustment for the previous plan
12 year. In April 1999, NWCCA had to commit to retro for plan year 1999. In May 2000, NWCCA
13 received its first adjustment for plan year 1998, which assessed \$310,000. 11/20/09 Tr. at 33-34.
14 NWCCA chose to enroll in plan year 2000. In his discussions with Mr. Romero, Mr. Mettler
15 believed that the rate problems had been corrected by the Department, and NWCCA would benefit
16 from being in retro. 11/20/09 Tr. at 56. NWCCA decided not to enroll for plan year 2001 based on
17 their belief that there was too much risk. By this time, NWCCA had received several negative
18 assessments, resulting in erasing the safety fund they had built up, and causing their members to
19 pay the assessments themselves. NWCCA has not been in retro since that time.
20 11/20/09 Tr. at 45.

21 In 2004, Mr. Mettler met with William White at the suggestion of the third party administrator
22 to help him understand why the drywall industry rate increases seemed to be significantly higher
23 than the state average. Mr. White conducted an analysis and produced a report of that analysis in
24 September 2005. 11/20/09 Tr. at 49. After reviewing the report, Mr. Mettler met with Department
25 representatives at the end of October 2005, including Robert Malooly and William Vasek, as well as
26 William White, and Brent Kohler, third party administrator. At that meeting, Mr. White discussed his
27 analysis and his report. Mr. Mettler recalled that Mr. Vasek agreed with the figures in Mr. White's
28 report. No resolution of the plan years at issue was reached at that meeting. Thereafter,
29 Mr. Mettler discussed the situation with Diane Doherty, who informed him of the process to appeal
30 the Department's assessments for the plan years at issue, and NWCCA filed its protest.

31 Mr. Mettler testified that he was aware there was a retro formula and that the retro rates
32 were published, but he did not have the expertise to assess all the variables and analyze the data

1 to determine how NWCCA might perform in a given plan year. He testified that the Department
2 never provided them any information as a result of the Drywall Initiative to suggest that they needed
3 to do some statistical analysis or at least be more aware of the possible consequences of that
4 Initiative. He recalled that William White attended a couple of Drywall Technical Advisory
5 Committee meetings in 1997, and that William Vasek and another representative named
6 Gary Griesmeyer attended a couple meetings in 1998. He did not recall Mr. Vasek talking about
7 rates, but he did recall Mr. Griesmeyer presenting information on the square feet and the premiums
8 being reported. 11/24/09 Tr. at 36. He testified that, prior to 1998, NWCCA just received raw data
9 with no trend information or analysis, and he could not tell from the raw data whether compliance
10 was increasing. He testified that the Committee had requested information from the Department on
11 compliance levels, and the first time he was provided with more information by the Department was
12 at the last Committee meeting he attended in 2004 or 2005. 11/24/09 Tr. at 39.

13 Bill Vasek has been employed by the Department since 1990, initially as an actuary under
14 senior actuary Bill White at that time, and then as senior actuary himself beginning in 1998.
15 Mr. Vasek is a fellow with the Casualty Actuarial Society.

16 Mr. Vasek participated in the calculation of the 1998 drywall rates and prepared some
17 information to assist people understand the rates. 11/20/09 Tr. at 74-75; Ex. No. 5. He testified
18 that he had some discussions with Bill White and Gary Griesmeyer, an actuary analyst, about the
19 first rates in 1997 but he recalled that he was not involved in calculating the 1997 rates. Mr. Vasek
20 defined "rate adequacy" as a way to keep the accident fund and medical aid fund solvent by
21 collecting enough money in the funds to cover the benefits and expenses that would be paid out of
22 these funds. 11/20/09 Tr. at 82. He testified that at times the Department set rates at levels that
23 were less than necessary to pay for the costs of the claims, such as the years between 1996 and
24 2002, when the Department purposefully set rates that were not adequate because there were
25 excess funds that the Department returned to the employers through dividends in order to reduce
26 the fund levels.

27 Mr. Vasek testified that the Department had no data from which to set rates on a square feet
28 basis in 1997, and that it converted the hourly rate to a rate based on square feet using a
29 conversion of 125 square feet per hour worked. He testified that this figure was based on
30 information from drywall firms that that was a reasonable conversion rate. He testified that the
31 Department's discount levels of 40 percent for the installation classes and 30 percent for the taping
32 and texturing classes was reasonable in light of the model that they had in mind at that time, based

1 on a similar situation in the reforestation class. 11/20/09 Tr. at 88-89. Mr. Vasek attended some
2 Drywall Technical Advisory Committee meetings. At those meetings, Mr. Vasek reported on the
3 level of square feet being reported quarterly in the drywall industry.

4 Mr. Vasek explained that the data he reviews needs to be at a certain level of maturity or
5 else he ignores that type of information for rate setting. He testified that for plan year 1998, the
6 most recent year reviewed would have been fiscal year 1996 (ending June 30, 1996) and so there
7 was insufficient claims data on which to base cost rates. Premiums are normally reported more
8 quickly than claims, so for 1998 rate making, there was about one quarter's worth of information
9 available, beginning on April 1, 1997.

10 DECISION

11 As the appealing party in this matter, NWCCA has the burden of proving, by a
12 preponderance of the credible evidence, that it is entitled to relief from the Department's final
13 adjustment for Retrospective Rating Plan years 1998, 1999, and 2000. RCW 51.52.050.
14 The specific issue in this appeal is whether the Department set rates based on the best data
15 available at the time it set those rates, respecting its mandate to follow generally accepted
16 insurance principles under RCW 51.18.010. The Board's powers are limited to those expressly
17 granted by the legislation that created it. Since the Board has no equitable powers under
18 Chapter 51 RCW, it may only, under the doctrine of stare decisis, apply equitable principles
19 determined by the appellate courts in similar cases. See, e.g., *In re James Neff*, BIIA Dec.,
20 92 2782 (1994); *In re Seth Jackson*, BIIA Dec., 61,088 (1982).

21 Based on the record in this appeal, I conclude that NWCCA has sustained its burden of proof
22 and has established that the Department did not set rates based on any review of the best data
23 available at the time. The evidence is persuasive that, specifically regarding this retro group and
24 these plan years at issue, the Department erred in failing to respond to the rate inadequacy caused
25 by the Drywall Initiative until 2002, even though it had sufficient information available to respond
26 years earlier. While recognizing that the retro group assumes a risk when they enroll in retro,
27 NWCCA's members suffered financial harm in this case as a result of the Department setting
28 premiums that it knew or should have known were woefully inadequate.

29 The retrospective rating plan has a statutory mandate to be consistent with recognized
30 insurance principles. RCW 51.18.010; WAC 296-17-912 (1998); *WR Enterprises, Inc.*
31 *v. Department of Labor & Indus.*, 147 Wn.2d 213, 224, 53 P.3d 504 (2002). The Department
32 violated the principle that insurers have a duty to inform the insureds of major changes in the

1 potential costs of coverage. In this case, the Department did not inform NWCCA of any major
2 change in the potential cost of coverage. Further, the Department did not make sure that base
3 rates were adequate and actuarially determined. Both Mr. Romero and Mr. White testified that the
4 Department knew that the Drywall Initiative rates were inadequate during the disputed plan years.
5 Mr. White and Ms. Doherty agreed that the Department had a duty to find out whether its base rates
6 were adequate before it implemented them. In this case, the Department had no idea whether the
7 rates it implemented would be sufficient to cover the costs of the employers' claims.

8 RCW 48.19.020 requires that premium rates for insurance shall not be excessive,
9 inadequate, or unfairly discriminatory. The witnesses testifying for both the Department and
10 NWCCA believed that the fundamentals of the generally recognized insurance principles are the
11 same, whether the entity is private or public. The evidence established that the Department
12 encouraged participation in retro by drywall employers, and that, as a governmental agency, it had
13 a duty to follow the rules.

14 The facts in this case establish that the Department did not attempt to determine the
15 adequacy of the discounted rates before implementing those rates. The Department's actuaries
16 played almost no role in setting the discounted rates. The rates set did not take into account the
17 diminished premiums that would result because of the owner exemption. The pre-discounted
18 Drywall Initiative rates were premised on the notion that the Drywall Initiative would result in full
19 reporting of drywall sold in Washington State to capture previously noncompliant employers, and
20 the Department did not monitor for increased compliance nor change its rates once the evidence
21 was available from 1997 to show that the Initiative had not increased compliance, and the
22 Department continued to encourage participation in retro and did not warn drywall employers of the
23 failure to achieve increased compliance with the discounted rates.

24 In reaching the conclusion that NWCCA is entitled to relief in this appeal, I have given
25 significant weight to the testimony of Frank Romero and William White. Both Mr. Romero and
26 Mr. White worked a number of years as Department professionals in the area of retro. The record
27 establishes that Mr. Romero is not an actuary, yet as the head of the Department's classification
28 services, he set the rates for the new classes created as a result of the Drywall Initiative.
29 The Department did not have data to convert the drywall hour classes to a square feet basis in
30 1997. The discount implemented as part of the Drywall Initiative was not an actuarially derived
31 number. NWCCA was unaware of the guesswork by the Department in setting the new rates under
32 this Initiative, so it continued its participation in retro in the years immediately following that

1 Initiative. Mr. White is held in high regard by professionals in his field. Mr. White conducted an
2 independent study, albeit some years after the plan years at issue, regarding the effect of the
3 Drywall Initiative, and confirmed that the Department took no action to correct the situation or at
4 least caution the retro employers about the situation, even though it had sufficient information at the
5 time it set rates in plan years 1998, 1999, and 2000 to do so.

6 The Department's position is that NWCCA knew about the changes in drywall reporting more
7 than a year before the plan year 1998 coverage, that NWCCA was ignoring its loss ratio history,
8 and that the Department set rates based on the best data available at the time. The record
9 established that the Department had previously waived an assessment for NWCCA for plan year
10 1997 for the same situation. Due to the time lag, the resolution of that assessment was not seen
11 until 2000, and NWCCA had already been assessed by that time for plan year 1998. The evidence
12 established that NWCCA credibly believed that the problems causing the 1997 assessment by the
13 Drywall Initiative were rectified, and so they re-enrolled in retro.

14 I agree with the Department that employers assume a risk when they enroll in retro.
15 However, the Department still has the duty to insure that base rates are actuarially determined,
16 adequate based on the best information available at the time, and not discriminatory. The record
17 does not support a finding that the Department's failure to review available data was intentional;
18 nonetheless, conducting that review would have made a difference in the Department either
19 correcting the situation at an earlier stage, or in the information they passed on to the retro groups
20 regarding how the drywall premiums were calculated and how they were (or were not) achieving
21 greater compliance, so that the retro groups could make an informed decision about re-enrolling in
22 retro. Under these circumstances, the Department should refund the assessments for the plan
23 years at issue to NWCCA.

24 Based on this record, I conclude that NWCCA has established by a preponderance of
25 credible evidence that for plan years beginning July 1, 1998, 1999, and 2000, the Department did
26 not set base rates using the best information available at the time, and therefore NWCCA is entitled
27 to relief due to rate inadequacy and failure to comply with RCW 51.18.010. The Department order
28 dated April 9, 2009 should be reversed and the matter remanded to the Department to issue an
29 order that grants relief to Northwest Wall and Ceiling Contractors Association for plan years
30 beginning July 1 of 1998, 1999, and 2000.

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FINDINGS OF FACT

1
2 1. The Department of Labor and Industries issued a rate notice to the Firm,
3 Northwest Wall and Ceiling Contractors Association on (date unclear
4 from record). On February 27, 2006, NWCCA protested the
5 Department's rate notice and requested relief from the Department's
6 final adjustment for the Retrospective Rating Program plan years
7 beginning on July 1 of 1998, 1999, and 2000.

8 On June 13, 2006, the Department issued an order determining that it
9 could not reconsider plan years beginning July 1 on 1998, 1999, and
10 2000 because a protest was not received within the 30 day time
11 limitation, and therefore those Retrospective Rating Program plan years
12 were final and binding. On July 14, 2006, NWCCA appealed the
13 Department's June 13, 2006 order. On July 26, 2006, the Board
14 granted NWCCA's appeal and assigned it Docket No. 06 17036.

15 A hearing was held, and on March 22, 2007, a Proposed Decision and
16 Order was issued that determined NWCCA's protest was untimely filed.
17 On January 8, 2008, the Proposed Decision and Order was reissued to
18 NWCCA upon the firm's showing that it did not receive the Board's
19 March 22, 2007 Proposed Decision and Order. On April 1, 2008, the
20 Board issued a Decision and Order determining that NWCCA's protest
21 was untimely filed. On April 23, 2008, NWCCA appealed the Board's
22 April 1, 2008 Decision and Order in Thurston County Superior Court.
23 On November 21, 2008, the Superior Court issued an order reversing
24 the Board's April 1, 2008 Decision and Order and remanding the matter
25 to the Department for consideration of the merits.

26 On March 4, 2009, the Department issued an order denying NWCCA's
27 request for relief on the basis that for the plan years beginning on
28 July 1 of 1998, 1999, and 2000, the firm's members paid standard
29 premium rates set in accordance with Department rules, using base
30 rates set by rule, and that for calendar years 1998 through 2001, the
31 Department set base rates using the best information available at the
32 time. On March 5, 2009, the Department issued an order that was
identical to its order dated March 4, 2009.

On March 25, 2009, NWCCA protested the Department's March 4, 2009
order. On April 9, 2009, the Department issued an order affirming its
March 4, 2009 order. On May 4, 2009, NWCCA appealed the
Department's April 9, 2009 order. On June 2, 2009, the Board granted
NWCCA's appeal, assigning it Docket No. 09 14561.

2. NWCCA was an organization comprised solely of drywall contractors.
NWCCA was an active participant in the Department's Retrospective
Rating Program since the Department began that program in 1983.
For NWCCA, retrospective rating plan years began on July 1 and ended
on June 30 of the following year. Until 1997, NWCCA always received a
positive return for its participation in retro, averaging a 17 percent refund
on the premiums over those years.

- 1 3. From 1993 to 1997, industrial insurance premium rates for drywall
2 employers in Washington State increased significantly due to drywall
3 contractors failing to report hours and thereby obtaining a competitive
4 advantage over the contractors who complied with the reporting
5 requirements. The Department responded by developing and
6 implementing the Drywall Initiative effective January 1, 1997.
- 7 4. The Drywall Initiative consisted of two changes in the way the
8 Department collected premiums from drywall employers. First, the
9 Initiative changed the method of reporting for employers from one unit of
10 measurement (hours worked) to another unit (square feet of drywall).
11 This change occurred with the goal of increasing the incentive to comply
12 with the reporting requirements. Second, the Initiative introduced a
13 discount for employers who completed new, more stringent
14 documentation requirements.
- 15 5. In the four years after the Drywall Initiative, NWCCA had three
16 assessments: \$495,000 for plan year 1997 (eventually negated by the
17 Department), \$735,149 for plan year 1998, and \$309,528 for plan year
18 2000. During that time frame, NWCCA had one refund, in the amount of
19 \$433,843, for plan year 1999.
- 20 6. The Department did not attempt to determine the adequacy of the
21 discounted rates for NWCCA before implementing those rates. The
22 Department's actuaries played almost no role in setting the discounted
23 rates. The rates set did not take into account the diminished premiums
24 that would result because of the owner exemption. The Department did
25 not rely on the best available information to track the impacts of the
26 Drywall Initiative regarding NWCCA.
- 27 7. The Department failed to determine the rate adequacy or adhere to
28 accepted insurance principles, as mandated by the retrospective rating
29 plan rules, regarding NWCCA.

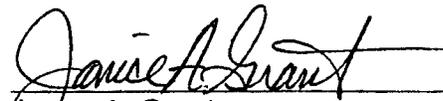
CONCLUSIONS OF LAW

- 30 1. The Board of Industrial Insurance Appeals has jurisdiction over the
31 parties to and the subject matter of this appeal.
- 32 2. For plan years beginning July 1 of 1998, 1999, and 2000, the
Department did not set base rates using the best information available
at the time. The retrospective rating plan for NWCCA was inconsistent
with recognized insurance principles as required by RCW 51.18.010.

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3. The order of the Department of Labor and Industries dated April 9, 2009 is incorrect and is reversed and this matter is remanded to the Department with directions to issue an order refunding the assessments to Northwest Wall and Ceiling Contractors Association for plan years beginning July 1 of 1998, 1999, and 2000.

DATED: MAR 08 2010



Janice A. Grant
Industrial Appeals Judge
Board of Industrial Insurance Appeals

APPENDIX B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: NORTHWEST WALL & CEILING) DOCKET NO. 09 14561
2 CONTRACTORS ASSOCIATION)
3 FIRM NO. 49) DECISION AND ORDER

4 APPEARANCES:

5 Retrospective Rating Group, Northwest Wall & Ceiling Contractors Association, by
6 Stafford Frey Cooper, per
7 James T. Yand and Peter J. Mullinix

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 James S. Johnson, Assistant

11 The Retrospective Rating Group, Northwest Wall and Ceiling Contractors Association
12 (hereafter NWCCA), filed an appeal with the Board of Industrial Insurance Appeals on May 4, 2009,
13 from an order of the Department of Labor and Industries dated April 9, 2009. In this order, the
14 Department affirmed a Department order dated March 4, 2009, in which the Department denied the
15 Retrospective Rating Group's request for relief for the final adjustment for plan years beginning
16 July 1, 1998; July 1, 1999; and July 1, 2000. The Department order is **AFFIRMED**.

17 **DECISION**

18 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
19 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
20 Order issued on March 8, 2010, in which the industrial appeals judge reversed and remanded the
21 Department order dated April 9, 2009. All contested issues are addressed in this order.

22 The Board has reviewed the procedural and evidentiary rulings in the record of proceedings
23 and finds that no prejudicial error was committed. The rulings are incorporated by reference and
24 are affirmed.

25 We have granted review to specifically address NWCCA's request for relief from
26 retrospective rating assessments based on allegations that the Department of Labor and Industries
27 breached statutory, contractual, or other recognized duties so as to justify relief from rating
28 assessments for Plan Years 1998, 1999, and 2000. We do not find that NWCCA is entitled to such
29 relief from this Board and affirm the Department order of April 9, 2009.

1 Our industrial appeals judge has summarized the evidence relevant to this appeal in the
2 Proposed Decision and Order. We expand on that summary only to the extent necessary to explain
3 our decision.

4 As this Board has observed, retrospective ratings groups are authorized and governed by
5 the provisions of Chapter 51.18 RCW and by the provisions of Chapter 296-17 WAC, beginning
6 with WAC 296-17-90401. In general, retrospective rating is an incentive program, voluntarily joined
7 by individual qualified employers and qualified groups of employers. Retrospective rating groups
8 must be made up of employer members engaged in substantially similar business operations,
9 considering the nature of the services or work activities performed. Retrospective rating groups
10 select options with varying caps on the amount of risk they are willing and able to take. The terms
11 of the relationship among the participants within a retrospective rating group are determined by the
12 rating group, not the Department.

13 Retrospective rating involves a process wherein the Department of Labor and Industries
14 retrospectively examines premiums paid by the participating employer or employer group for three
15 past rating years at issue, comparing premiums paid with losses incurred and anticipated due to
16 industrial injury and occupational disease claims arising and assigned to participating employer
17 accounts in the rating years at issue. Liability for a given fiscal year is not fully determined until the
18 third and final adjustment relative to and following the year in which the industrial injury occurred or
19 in which the occupational disease was diagnosed. Based on formulas applied, a premium rebate
20 (refund) may be provided, or an additional assessment (penalty) may be assessed. Whether a
21 retrospective rated employer or group receives a rebate or incurs an additional assessment
22 depends substantially upon the premium:loss ratio for the three rating years in question.
23 Retrospective rating groups thus assume a significant level of risk, up to the plan cap, or stop loss
24 level, which reflects the level of risk that the group is willing to accept.

25 The premium side of a retrospective rating group's ratio is comprised by the group
26 membership in terms of the totality of premiums paid by the group's employer members for hours in
27 the respective risk/rate job classifications. To reduce losses, a retrospective rating group can
28 promote safety, monitor and intervene in claims at the Department, and promote early return to
29 work and other programs that minimize claim costs.

30 In the early 1990s, the drywall industry in Washington was in a state of turmoil with respect
31 to ever-increasing industrial insurance premiums. The turmoil was widely believed to be due to the
32 failure of many drywall contractors to accurately report the number of hours being worked by

1 employees, a failure that allowed dishonest contractors to pay less in premiums than honest
2 contractors and for the dishonest contractors to have a considerable competitive advantage in
3 bidding new jobs. Although some hyperbole may have been involved, anecdotal reports suggested
4 that one-half to two-thirds of all drywall work was either under-reported or not reported at all.
5 Honest contractors, who were indirectly paying the claim costs for dishonest contractors, demanded
6 change.

7 In response, the Department of Labor and Industries met with industry representatives in a
8 program that came to be known as The Drywall Initiative. NWCCA was represented in the Drywall
9 Initiative by the Drywall Technical Advisory Committee. After much discussion and a lengthy
10 comment period, new rules were adopted that abandoned the hourly basis for reporting industrial
11 insurance premiums, focusing instead on the number of square feet of drywall that went into a
12 given job. Essentially, the more drywall that was installed on a job, the greater the total industrial
13 insurance premium that would be owed by the contractor, regardless of how many employee hours
14 were allegedly involved with the installation. One advantage to using the square foot method was
15 that drywall suppliers were a fairly reliable source as to how much drywall was being installed, the
16 implication being that suppliers prepared an invoice or similar documentation as to how much
17 drywall was delivered to a particular job for a particular contractor. The change in rules went into
18 effect on January 1, 1997.

19 The problem with converting to the square foot method of reporting is that there was no way
20 to precisely convert hours-worked to square-feet-of-drywall. Because of this problem, the
21 Department was necessarily forced to engage in a bit of educated guessing. The Department
22 estimated the amount of reportable drywall that had been sold in the state the previous year and
23 divided by the total premium amount the Department anticipated would be needed to cover claims,
24 yielding a premium/square-foot for the future year that was thought to be adequate. Given that the
25 Department was estimating, two related points deserve consideration. First, it was difficult for the
26 Department's estimate to be informed by its actuaries. Actuaries look back in time, using three to
27 five years of data to mathematically predict the future. Given that a new measuring standard had
28 been adopted, no such data was available. Second, the Department's estimate may have
29 influenced, however subtly, by industry representatives who were interested in seeing that
30 premiums were kept as low as reasonably possible. Ultimately, the Department decided to adopt a
31 conversion factor of 1-hour's-work = 125 sq. ft-of-installed-drywall.

1 In addition to estimating future drywall premiums, the Department and industry
2 representatives made three assumptions that no one seemed to question. It was believed that the
3 newly adopted rules would result in dramatically increased industrial insurance reporting by drywall
4 contractors. Given the difficulty that a contractor would have in denying that a certain amount of
5 work had been performed, it was assumed that (1) there would be full compliance from drywall
6 employers; (2) the reporting would be accurate; and (3) a larger pool of premium dollars would be
7 collected.

8 Acting on the assumption that more premium dollars would be forthcoming, the Department
9 established a base rate paid by all contractors and went a step further, offering employers
10 discounts if they met new, more rigorous reporting requirements. It appeared that contractors who
11 had previously failed to report hours would finally be held accountable.

12 Unfortunately, the assumptions proved to be overly optimistic. Over a period of several
13 years, and with the benefit of experience, it was learned that reporting improved, but only
14 incrementally. Apparently, disreputable contractors found new ways to avoid premium obligations
15 and it gradually became apparent that there may not have been as many dishonest contractors as
16 first thought. Perhaps anecdotal reports of widespread abuse by non-compliant drywall employers
17 were overstated. Whatever the reason, the premium pool did not dramatically increase. At the
18 same time, claims costs continued to rise. The premiums paid by NWCCA members for the plan
19 years of 1998 and 2000 proved to be too low when compared with claim costs. Ultimately, this
20 imbalance gave rise to the retrospective assessments at issue here.

21 NWCCA alleges that the Department knew, or should have known, to charge higher
22 premiums in 1998 and 2000 such that retrospective assessments would not have been necessary.
23 Obviously, this allegation benefits from a decade of hindsight and ignores both the purpose of the
24 Drywall Initiative and the fact that employers impact claim costs positively and negatively by their
25 behavior. Employers who are lax with respect to monitoring workplace safety, efficient claims
26 administration, and early return to work opportunities can reasonably expect higher claims costs.
27 Similarly, it can be difficult for the Department to predict how vigorously drywall employers will
28 pursue safety and efficiency. As Robert Malooly, assistant director of insurance services for the
29 Department, testified, determining rate adequacy is like predicting the outcome of the Kentucky
30 Derby in advance.

31 NWCCA argues that the Department failed to warn drywall employers that participation in the
32 Drywall Initiative would make participation in a retrospective rating program more risky. This

1 assumes that the Department knew from inception that the Drywall Initiative was ill-considered.
2 There is no evidence to that effect. To the contrary, the Drywall Initiative appears to have been a
3 reasonable and prudent response to industry complaints of significant non-compliance by many
4 drywall employers.

5 NWCCA's suggests liability for the assessment lies with the Department and that NWCCA
6 had no responsibility for reasoning through its decision to participate in a retrospective rating plan.
7 This is largely unpersuasive. The Department was not and is not a guarantor of automatic annual
8 refunds to a retrospective rating group. Participation in a retrospective rating program is voluntary.
9 RCW 51.18.010(1)(a). It involves risk. Participating employers choose the amount of risk they are
10 willing to assume. More to the point, an employer may protect itself from liability by declining to join
11 a retrospective rating group altogether, thereby placing the risk for industrial insurance losses in the
12 hands of the Department of Labor and Industries.

13 Nothing in the evidence before us convinces us that the change in the basic reporting unit
14 (from hourly to square foot) was unknown or unexpected by NWCCA and its constituent members.
15 Had NWCCA applied sufficient interest and resources, it could have predicted the impact upon the
16 group and its members. Collectively, NWCCA members contributed millions of dollars in premiums
17 during the years in question and contemplated hundreds of thousands of dollars in potential refunds
18 or assessments. Through its own efforts, it could have forecast the consequences of the change
19 for its members and the group's success or liability.

20 NWCCA suggests that the Board should apply equitable principles used in the law of
21 contracts, including insurance contracts, in order to provide relief here, arguing that the Department
22 had superior ability to forecast the adequacy of premiums for plan years 1998 and 2000. Because
23 it did not advise NWCCA members of the potential of increased risk, the Department was negligent
24 in meeting its contractual obligations and the retrospective rating agreement should be reformed or
25 rescinded under equitable principles. It is questionable, however, whether contract law
26 appropriately applies in the manner suggested by NWCCA. As we noted in *In re Contractors'*
27 *Alliance*, Docket No. 05 22737 (September 26, 2007), the retrospective rating program is governed
28 by statute and by adopted Washington Administrative Code provisions. Although it is true that an
29 agreement is made by the retrospective rating group to do certain things as a condition of
30 retrospective program participation, the terms of the program are governed by the statute and code
31 provisions. This Board declines to invalidate those provisions. In light of the fact that the code

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1 provisions, when applied to the facts of this case, direct the retrospective rating results, NWCCA
2 has failed to show how the Board may provide relief without invalidating the code provisions.

3 Finally, NWCCA argues that the Department of Labor and Industries failed to follow
4 recognized insurance principles as mandated by RCW 51.18.010(2), claiming the Department failed
5 to set rates based on the best data available at the time it set those rates. In making this argument,
6 however, NWCCA ignores the point that actuarial data requires a period of at least three years of
7 experience, and preferably five, to be sufficiently mature to be reliable. Had there been no change
8 in the basic reporting unit, NWCCA's argument would have considerable weight, but that is not the
9 case. It also bears mentioning that liability for a given plan year is not fully determined until the
10 third and final adjustment following the year in which the industrial injury occurred or in which the
11 occupational disease was diagnosed.

12 In sum, NWCCA has not identified, in statutory or regulatory law, any Department duty to
13 investigate and inform NWCCA or its members of the possible consequences of properly adopted
14 rules relative to NWCCA's plan choices, membership choices, or other NWCCA decisions. It has
15 not shown how the Department's action, or lack of action, rose to the level of breaching any duty.
16 In short, it has not shown why NWCCA members should be relieved of retrospective assessments
17 that are otherwise authorized by law. The Department order under appeal is affirmed.

18 FINDINGS OF FACT

- 19 1. The Department of Labor and Industries issued a rate notice to the
20 Retrospective Rating Group, Northwest Wall and Ceiling Contractors
21 Association (NWCCA). On February 27, 2006, NWCCA protested the
22 Department's rate notice and requested relief from the Department's
23 final adjustment for the Retrospective Rating Program plan years
24 beginning on July 1, 1998; July 1, 1999; and July 1, 2000.

25 On June 13, 2006, the Department issued an order in which it
26 determined that it could not reconsider plan years beginning on July 1,
27 1998, 1999, and 2000 because a protest was not received within the
28 30-day time limitation, and therefore those determinations regarding the
29 Retrospective Rating Program plan years were final and binding. On
30 July 14, 2006, NWCCA appealed the Department's June 13, 2006 order.
31 On July 26, 2006, the Board granted NWCCA's appeal and assigned it
32 Docket No. 06 17036.

Following a formal hearing, a Proposed Decision and Order was issued
on March 22, 2007, in which the industrial appeals judge determined
that NWCCA's protest was not timely filed. On January 8, 2008, the
Proposed Decision and Order was reissued to NWCCA upon the
Retrospective Rating Group's showing that it did not receive the Board's
March 22, 2007 Proposed Decision and Order. On April 1, 2008, the

1 Board issued a Decision and Order in which it determined that
2 NWCCA's protest was not timely filed. On April 23, 2008, NWCCA
3 appealed the Board's April 1, 2008 Decision and Order in Thurston
4 County Superior Court. On November 21, 2008, the Superior Court
5 issued an order in which it reversed the Board's April 1, 2008 Decision
6 and Order and remanded the matter to the Department for consideration
7 on the merits.

8 On March 4, 2009, the Department issued an order in which it denied
9 NWCCA's request for relief on the basis that the plan for years
10 beginning on July 1, 1998, 1999, and 2000, the Retrospective Rating
11 Group's members paid standard premium rates set in accordance with
12 Department rules. The Department used base rates set by rule, and for
13 calendar years 1998 through 2001, the Department set base rates using
14 the best information available at the time. On March 5, 2009, the
15 Department issued an order that was identical to its order dated
16 March 4, 2009.

17 On March 25, 2009, NWCCA protested the Department's March 4, 2009
18 order. On April 9, 2009, the Department issued an order in which it
19 affirmed its March 4, 2009 order. On May 4, 2009, NWCCA appealed
20 the Department's April 9, 2009 order. On June 2, 2009, the Board
21 granted NWCCA's appeal under Docket No. 09 14561.

- 22 2. NWCCA was an organization comprised of drywall contractors and was
23 an active participant in the Department's retrospective rating program for
24 several years, including plan years 1998, 1999, and 2000.
- 25 3. NWCCA's retrospective rating plan years began July 1 of each year and
26 ended on June 30 of the following year.
- 27 4. From 1993 to 1997, industrial insurance premiums for drywall employers
28 in Washington State increased significantly, due in part to non-compliant
29 drywall contractors failing to report worker hours and pay industrial
30 insurance premiums related to those hours.
- 31 5. By failing to report hours, non-compliant contractors obtained a
32 significant competitive advantage over compliant contractors who
correctly reported.
6. During the mid-1990s, the Department and drywall industry
representatives worked to address the problem of non-compliant
employers. The program that followed became known as the Drywall
Initiative.
7. During the mid-1990s, NWCCA was represented on the Drywall
Technical Advisory Committee by Richard Mettler.
8. Prior to January 1, 1997, industrial insurance premiums for drywall
contractors were based on the number of hours worked by employees.
9. The Drywall Technical Advisory Committee recommended to the
Department that it change its rate structure from one that was based on
hours worked to one based on square feet of drywall material installed.

- 1 10. Pursuant to its statutory rule-making authority, the Department
2 conducted public hearings to discuss the Drywall Initiative and the
3 proposal to change to square foot reporting.
- 4 11. On January 1, 1997, the Department implemented the provisions of the
5 Drywall Initiative, changing the method of calculating drywall premiums
6 from one unit of measurement (hours worked) to another unit of
7 measurement (square feet of drywall). The Drywall Initiative introduced
8 discounts for compliant contractors who completed new, more stringent
9 documentation requirements.
- 10 12. Contemporaneous with the change in the unit of measurement, the
11 Department adopted 1 hour of work as being the equivalent of
12 125 square feet of drywall (1 hour = 125 square feet).
- 13 13. Following the change in the reporting unit of measurement, the
14 Department began to develop new actuarial data.
- 15 14. The Department requires three to five years of accumulated data to
16 make statistically reliable predictions.
- 17 15. Industrial insurance claims may remain open for several years. Liability
18 for a given plan year is not fully determined until the third and final
19 adjustment following the year in which an industrial injury occurred or in
20 which an occupational disease was diagnosed.
- 21 16. The employer, not the Department, controls work place safety, the work
22 environment, and the activities of workers at a given job site.
- 23 17. Retrospective rating group employers can minimize claim costs by
24 promoting workplace safety, monitoring claims at the Department, and
25 providing early return-to-work opportunities for injured workers, among
26 other things. By minimizing claim costs, retrospective rating group
27 employers can earn refunds.
- 28 18. Retrospective rating group employers that fail to promote work place
29 safety, monitor claims, and provide return-to-work opportunities may
30 incur higher claim costs and be assessed additional premiums.
- 31 19. NWCCA's participation in the retrospective rating program was
32 voluntary.
20. NWCCA was aware that the retrospective rating program involved risk.
21. For plan years 1998, 1999, and 2000, NWCCA and its constituent
members selected the amount of risk they were willing to undertake.
22. For plan years 1998, 1999, and 2000, NWCCA members paid standard
premium rates set in accordance with Department rules. The
Department used base rates set by rule, and used the best information
available at the time.
23. With respect to plan year 1998, NWCCA's claims costs exceeded
premiums, resulting in a retrospective **assessment** against NWCCA in
the amount of \$735,149.

- 1 24. With respect to plan year 1999, NWCCA's claims costs were less than
2 premiums, resulting in a **refund** of premium to NWCCA in the amount of
3 \$433,843.
4 25. With respect to plan year 2000, NWCCA's claim costs exceeded
5 premiums, resulting in a retrospective **assessment** against NWCCA in
6 the amount of \$309,528.

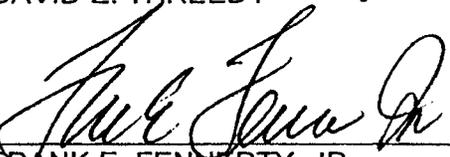
7 **CONCLUSIONS OF LAW**

- 8 1. The Board of Industrial Insurance Appeals has jurisdiction over the
9 parties and subject matter of this appeal.
10 2. For the plan years beginning July 1, 1998; July 1, 1999; and July 1,
11 2000, NWCCA members paid standard premiums at rates set in
12 accordance with Department rules. The Department used base rates
13 set by rules in accordance with RCW 51.18.010.
14 3. For the plan years at issue, the Department set base rates using the
15 best information available at the time in keeping with RCW 51.18.010.
16 4. The order of the Department of Labor and Industries dated April 9, 2009,
17 is correct and is **AFFIRMED**.

18 Dated: June 16, 2010.

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

20 
21 DAVID E. THREEDY Chairperson

22 
23 FRANK E. FENNERTY, JR. Member

24 
25 LARRY DITTMAN Member

APPENDIX C

Superior Court of the State of Washington For Thurston County

Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Christine A. Pomeroy, Judge
Department No. 3
Gary R. Tabor, Judge
Department No. 4



APR - 5 2011

Chris Wickham, Judge
Department No. 5
Anne Hirsch, Judge
Department No. 6
Carol Murphy, Judge
Department No. 7
Lisa L. Sutton, Judge
Department No. 8

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

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APR 08 2011

STAFFORD FREY COOPER

April 5, 2011

James T. Yand
Attorney at Law
601 Union St Ste 3100
Seattle WA 98101-1374

Penny Allen
James Johnson
Assistant Attorney General
PO Box 40121
Olympia WA 98504-0121

Re: *NWWCCA v State L&I*
Thurston County Cause No. 08-2-00959-6

LETTER OPINION

Dear Counsel:

Appellants petitioned for review of a the Decision of the Board of Industrial Insurance Appeals affirming the Department of Labor and Industry's Order dated April 9, 2009, assessing premiums due.

In 1983, the Department of Labor and Industry's created a retrospective rating program (hereinafter referred to as Retro) for industrial insurance, intended to assist participating employers in achieving lower industrial insurance costs by proactively addressing worker safety and rehabilitation. Participation in the program has always been voluntary. Under the system, participating employers pay standard premiums, but later have costs of claims evaluated and adjustments to premiums made either up or down.

SCANNED

Responding to increasing premium rates for drywall employers, in 1997, significant changes were made to the Retro program, with the idea of reducing insurance costs to safety-conscious drywall employers by increasing the participation of those employers that had not historically paid premiums. Prior to 1997, premiums were based on reports of hours-worked. After 1997, premiums were based on square-feet-installed. The plan was to increase compliance with reporting requirements by employers who had failed to report the extent of work done by their employees. Discounted rates were also made available to qualifying employers who met specific documentation requirements.

Appellants had participated in the Retro program since 1983. Before the change in formula, appellants had been satisfied with the Retro program and had received advantage from participation. After the change in formula, appellants believed the program failed them and here challenge new Retro premiums. Appellants participated in the new program for years 1997 through 2000, and requests relief for years 1998, 1999, and 2000.

It is argued that, beginning in 1997, rates were set too low and Appellants were not warned. Appellants argue that the Department did not use the best information available in setting new rates.

The Board determined that there was no way to base the new program rates on actuarial data, because there was no historic data to use for square-foot reporting. Three to five years of data is required for actuarial predictions.

The Board also determined the assumptions relied on in setting the new rates were reasonable. It was reasonable to expect that the new system of reporting would catch those employers who had not traditionally reported work and increase the premium pool. However, the premium pool did not rise and costs of claims continued to increase.

The Board determined that the Department had no better means of setting rates for the new program than it used which was the best available information at the time and had no duty to insure Retro participants from the risk they assumed by voluntary participation in the new program.

All Counsel
April 5, 2011
Page 3

I agree with the Board and find that the Department complied with its statutory obligations. The Board's decision is affirmed.

Yours very truly,

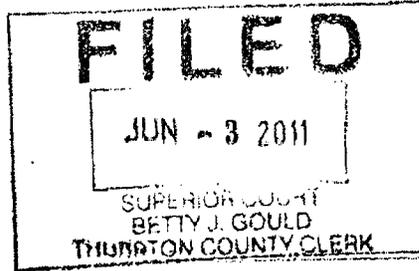
A handwritten signature in black ink, appearing to read "Paula Casey", with a large, sweeping flourish extending to the right.

Paula Casey
Judge

PC/tw

APPENDIX D

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1 EXPEDITE 2011 JUN -3 AM 11:51
2 No Hearing Set
3 Hearing is Set ATTORNEY GENERAL'S OFFICE
4 Date: 6/3/2011 DIVISION OLYMPIA
5 Time: 11:00 AM
6 Honorable Paula Casey

7 STATE OF WASHINGTON
8 THURSTON COUNTY SUPERIOR COURT

9 NORTHWEST WALL & CEILING
10 CONTRACTORS ASSOCIATION,

11 Appellant,

12 v.

13 DEPARTMENT OF LABOR AND
14 INDUSTRIES,

15 Respondent.

NO. 08-2-00959-6

~~PROPOSED~~ FINDINGS OF FACT
AND CONCLUSIONS OF LAW
AND JUDGMENT

16 JUDGMENT SUMMARY (RCW 4.64.030)

- 17 1. Judgment Creditor: State of Washington Department of Labor and Industries
- 18 2. Judgment Debtor: Northwest Wall & Ceiling Contractors Association
- 19 3. Principal Amount of Judgment: - 0 -
- 20 4. Interest to Date of Judgment: - 0 -
- 21 5. Statutory Attorney Fees: \$200.00
- 22 6. Costs: - 0 -
- 23 7. Other Recovery Amounts: \$0
- 24 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 25 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.
- 26 10. Attorney for Judgment Creditor: JAMES S. JOHNSON

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

1

ATTORNEY GENERAL OF WASHINGTON
Labor & Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

1 11. Attorney for Judgment Debtor: JAMES T. YAND
2

3 This matter came on regularly before the Honorable Paula Casey, in open court on
4 February 18, 2011. The Appellant, Northwest Wall & Ceiling Contractors Association,
5 appeared by James T. Yand counsel; the Respondent, Department of Labor and Industries
6 (Department), appeared by its counsel, Robert M. McKenna, Attorney General, per James S.
7 Johnson, Assistant Attorney General. The Court reviewed the records and files herein,
8 including the Certified Appeal Board Record, and briefs submitted by counsel, and heard
9 argument of Counsel.

10 Therefore, being fully informed, for the reasons stated in its letter opinion of April 5,
11 2011, the Court makes the following findings of fact, conclusions of law, and judgment:

12 I. FINDINGS OF FACT

13 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on November
14 6, 2007.

15 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on
16 March 8, 2010, from which Respondent filed a timely Petition for Review on April 19,
17 2010. On May 6, 2010, the Board, having considered Appellant's Petition for Review,
18 granted review and issued its Decision and Order on June 16, 2010, affirming the
19 Department's order.

20 Appellant thereupon timely appealed the Board's June 16, 2010 order to this Court.

21 1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts
22 as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts
23 Nos. 1 through 25 of the June 16, 2010 Decision and Order of the Board of Industrial
24 Insurance Appeals.

25 II. CONCLUSIONS OF LAW

26 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the
Board's Conclusions of Law Nos. 1 through 4 of the June 16, 2010 Decision and Order
of the Board of Industrial Insurance Appeals.

2.3 The Board's June 16, 2010 Decision and Order is correct and is affirmed.

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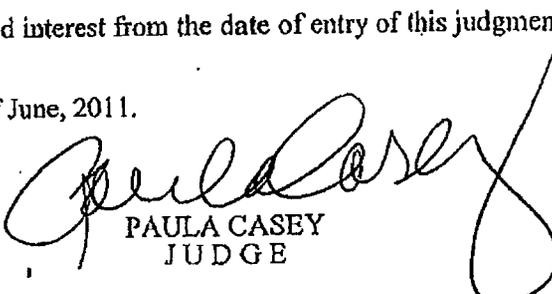
III. JUDGMENT

3.1 The June 16, 2010 Board of Industrial Insurance Appeals Decision and Order which affirmed the Department of Labor and Industries April 9, 2009 order, be and the same is hereby affirmed.

3.2 The Respondent is awarded, and the Appellant is ordered to pay, a statutory attorney fee of \$200.00.

3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 3rd day of June, 2011.


PAULA CASEY
JUDGE

Presented by:
ROBERT M. MCKENNA
Attorney General


JAMES S. JOHNSON
WSBA #23093
Assistant Attorney General

Copy received:

JAMES T. YAND
WSBA # 18730
Attorney for Appellant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT