

NO. 42018-0

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

NORTHWEST WALL & CEILING CONTRACTORS ASSOCIATION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

As required by the Industrial Insurance Act, RCW Title 51, the Department of Labor & Industries (Department) offers the retrospective rating (retro) program to qualifying employers or groups of employers as a voluntary incentive program to encourage workplace safety. The program offers employers an option to pay workers' compensation premiums based on their actual claim experience in the coverage year, calculated after the fact, instead of paying fixed premiums. Retro employers pay fixed "standard premiums" as a down payment towards their retro premiums and will either receive a refund or be assessed an additional premium.

Effective 1997, with public input, including input from the Appellant Northwest Wall and Ceiling Contractors Association (NWCCA), the Department adopted rules changing the method for calculating premiums on drywall work and offered qualifying employers substantial premium discounts. With full knowledge of this change and knowledge that its members were paying discounted premiums as down payments, NWCCA chose to continue to enroll in the retro program, giving its members the opportunity to earn a refund.

The Board of Industrial Insurance Appeals (Board) and the superior court correctly concluded that NWCCA may not now avoid paying its retro premiums based on its claim performance. NWCCA never

challenged the rules that set the drywall premium rates it now calls inadequate and, in any event, fails to show the rules are invalid. Substantial evidence supports the finding that the Department used the best available information in setting the rates and administered the retro program consistent with recognized insurance principles as required by the act. The Department asks this Court to affirm the superior court judgment.

II. COUNTERSTATEMENT OF THE ISSUES

1. The Department adopted the drywall premium rates and the retro premium calculation methods for the 1998, 1999, and 2000 coverage years by formal rule-making process. Can NWCCA challenge the rates as inadequate when it never challenged the rules adopting them? Did NWCCA waive the argument that the rules are invalid?
2. The Department actuary involved in the drywall premium setting for the 1998, 1999, and 2000 coverage years testified that the rates were reasonable and based on the best available information. The actuary monitored and carefully selected the data for the rate setting. Does substantial evidence support the finding that the drywall rates for the coverage years were adopted consistent with recognized insurance principles as required by RCW 51.16.035?
3. NWCCA was represented on the drywall advisory committee and attended public hearings that led to the major changes in the drywall premium rates in 1997 and was fully aware of the changes and the rates, which were in published rules. Did the superior court properly reject NWCCA's claim that the Department had a duty to warn the group that, because it paid lower premiums upfront, it would be more difficult to earn a refund? Did the court correctly conclude, based on substantial evidence, that the Department properly administered the retro program consistent with recognized insurance principles as required by RCW 51.08.010?

4. Did the superior court properly reject NWCCA's claim that the Department acted in any dishonest, deceptive, or unscrupulous manner in administering the retro program?

III. COUNTERSTATEMENT OF THE CASE

A. Industrial Insurance Premiums

All employers in Washington that do not qualify as self-insurers must secure the payment of workers' compensation benefits by insuring with the state fund. RCW 51.14.010. The Industrial Insurance Act requires the Department to adopt rules governing how to calculate insurance premiums. RCW 51.16.035(2).

The Department's rules establish over three hundred risk classifications used to classify employers and occupations according to their degree of hazard. WAC 296-17A. Each year, the Department sets base premium rates for each risk classification for two different funds: the accident and the medical aid funds. RCW 51.16.035(2); *see* WAC 296-17-895. All employers must quarterly report the amount of work being insured and pay premiums calculated by multiplying the rate for each risk class by the amount of work—generally measured in worker hours, but for drywall starting in 1997, measured in square feet of drywall, as discussed below. RCW 51.16.060.¹

¹ All employers insured by the state fund are assigned one or more risk classifications based on the nature of their business. WAC 296-17-31012. The actual premium rates employers pay are determined by multiplying the base rates for the

The basic premium rates the Department sets must be the lowest necessary to maintain the solvency of the accident and medical aid funds, which are used to pay the benefits of injured workers. RCW 51.16.035(1)(a). The rating system must be consistent with recognized principles of worker's compensation insurance and must be designed to encourage accident prevention. RCW 51.16.035(2). To be consistent with insurance principles, rates should be "reasonable and not excessive, inadequate or unfairly discriminatory." BR Ex 38 at 2.² At the fund level, the Department seeks to set rates that are sufficient to maintain the solvency of the funds. BR Vasek 11/20/09 at 83. At the class level, the Department seeks to set rates so that each class pays the same percentage of their expected costs. *Id.*

The premiums may turn out to be either inadequate or excessive after the fact, in light of actually collected premiums and filed claims. BR Malooly 11/16/09 at 103. As assistant director of insurance services of the Department Robert Malooly explained, "we can't tell in advance whether the rates are inadequate or not. It's only the evolving experience

accident and medical aid fund premiums for their assigned risk classes by an experience modification factor determined according to Department rules, WAC 296-17-850 through -890, then adding the supplemental pension fund premium rate, WAC 296-17-920.

² "BR" refers to the Certified Appeal Board Record, which is the record on review. Transcripts of the Board hearing are referred to as "BR" followed by the witness name, date, and page number. Exhibits admitted at the Board hearing are referred to as "BR Ex."

of those classes over many, many years that tells you whether or not the rate that was set for a given year is adequate or not.” BR Malooly 11/16/09 at 103. The Department makes changes in the classification rules through public hearing and rule-making processes. BR Malooly 11/16/09 at 105. When the Department sets new premium rates, it goes through the rulemaking process to adopt them as rules, publishes them in the state register, and sends employers notice of what their new rates will be. BR White 11/17/09 at 67-68.

B. Retrospective Rating (Retro)

Retrospective rating is a different way of determining the price of insurance coverage. Outside of retro, an employer will pay fixed premiums regardless of its actual claim experience for the year. BR Romero 11/16/09 at 12. In retro, an employer’s ultimate premium liability for the year will depend on the cost of its claims as explained below.

In 1980, the Legislature authorized the Department to insure groups of employers meeting certain qualifications. Laws of 1980, ch. 129, § 4 (amending RCW 51.16.035). In 1981, the Department then created the retro program, making it available to qualifying employers and groups of employers. Wash. St. Reg. 81-04-024 (February 18, 1981). In 1999, the Legislature required the Department to offer the retro program to

any employers or groups of employers who voluntarily elect to participate in the program and meet the requirements set by the retro statutes (RCW 51.18) and Department rules. Laws of 1999, ch. 7, § 2 (RCW 51.18.010). The Legislature directed the Department to adopt rules and administer the retro program in accordance with them, and directed that the rules must encourage broad participation. RCW 51.18.010(2).

Qualified employers or groups of employers enroll in a retro program for one-year coverage periods. RCW 51.18.010(3). A retro group must be sponsored by an organization, and employers enrolled in that group must be members of that organization. RCW 51.18.020(4). The retro program is designed to create an incentive for participating employers to keep the claim costs low by promoting worker safety. BR Romero 11/16/09 at 15-16.

The program works as follows. Before the coverage period begins, a group's sponsoring organization selects a maximum premium ratio and one of five plans, with varying risks, offered by the Department. Former WAC 296-17-914 (1998) (BR Ex 1); former WAC 296-17-91213 (1999) (BR Ex 35); former WAC 296-17-90436 (2000) (BR Ex 36). The selected maximum premium ratio determines the maximum amount the group sponsor can be assessed in additional premiums. Former WAC 296-17-

914 (1998) (BR Ex 1); former WAC 296-17-91213 (1999) (BR Ex 35); former WAC 296-17-90491(2000) (BR Ex 36).

Employers participating in retro, just like their non-retro counterparts, continue to pay fixed “standard premiums” quarterly for the ensuing coverage year. Former WAC 296-17-911 (1998) (BR Ex 1) (“Each employer included as a group member in the group dividend agreement will maintain an individual account with the department and continue to pay quarterly premiums based on assigned risk classification(s) and individual experience rating.”). At the end of the year, the Department evaluates the cost of the claims filed against the retro employers and calculates the group’s retro premiums. Former WAC 296-17-916 (1998) (BR Ex 1); former WAC 296-17-91219 (1999) (BR Ex 35); former WAC 296-17-90463 (2000) (BR Ex 36); BR Ex 40 at 2.³

As former Department classifications manager Frank Romero explained, for retro employers, the standard premium operates as a deposit towards their actual retro premium payment:

Every employer in the state fund pays a guaranteed premium. We call that the guaranteed cost pool. As you get into the retro discussion the guaranteed cost pool becomes the non-retro employers. On the retro side the

³ In the retro premium calculation, the “standard premiums” consist of the experience-modified accident and medical aid fund premiums retro employers paid; the supplemental pension fund premiums they paid are not included in this calculation. Former WAC 296-17-91202 (1999) (BR Ex 35); former WAC 296-17-90402 (2000) (BR Ex 36).

premium that's paid -- The guaranteed premium that employers pay becomes a deposit, and that deposit is held by the Department, and the Department then pays benefits and withdraws money from that deposit. Whatever's left over essentially is what the participant gets to keep.

BR Romero 11/16/09 at 12-13. While non-retro employers simply pay fixed premiums without worrying about potentially having to pay additional premiums, retro employers agree to pay retro premiums which can be higher or lower than the fixed premiums. BR Romero 11/16/09 at 51. Retro employers elect to enroll in the retro programs, essentially because they "expect to perform better, meaning less losses, less claims and costs, than the Department would expect through traditional rating processes." BR Doherty 11/17/09 at 117.

If the retro premiums turn out to be less than the standard premiums the group's members already paid, the Department pays the difference to the group sponsor as a refund; if the retro premiums turn out to be greater than the standard premiums, the Department directs the group sponsor to pay the difference as an assessment.⁴ Former WAC 296-17-904(10) (1998) (BR Ex 1); former WAC 296-17-91219 (1999); former WAC 296-17-91221 (1999) (BR Ex 35); former WAC 296-17-90463 (2000); former WAC 296-17-90469 (2000) (BR Ex 36).

⁴ How groups divide up any refund or responsibility for an assessment between the group's sponsor and the group's members is determined by the group.

The formula the Department uses to calculate retro premiums is published in rules. BR Romero 11/16/09 at 52. The formula for the 1998, 1999, and 2000 coverage years was to multiply the aggregate standard premiums paid by the group members by the basic premium ratio and add the group's developed claim losses multiplied by a loss conversion factor:

$$\begin{aligned} &\text{Retrospective Rating Premium} = \\ &(\text{Basic Premium Ratio} \times \text{Standard Premium}) \\ &+ \\ &(\text{Loss Conversion Factor} \times \text{Developed Losses}). \end{aligned}$$

Former WAC 296-17-914 (1998) (BR Ex 1); former WAC 296-17-914 (1999) (BR Ex 35); former WAC 296-17-90491 (2000) (BR Ex 36).

The Department selects which basic premium ratio and loss conversion factor to use from plan tables included in its rules, based on the group's maximum premium ratio and plan selected before the start of the coverage year, and the size group, which is determined by the group's standard premiums. BR Romero 11/16/09 at 53. The basic premium ratios, loss conversion factors, and published in tables in the rules. BR Romero 11/16/09 at 54; former WAC 296-17-919 (1998 & 1999) (size group table); former WAC 296-17-90492 (2000) (size group table); former WAC 296-17-91901 through -91905 (1998) (plan tables); former

WAC 296-17-91402 through -91406 (1999) (plan tables); former WAC 296-17-90493 through -90497 (2000) (plan tables).⁵

A retro employer may estimate its break-even point by plugging into the formula the basic premium ratio and loss conversion factor determined by its size group, and plan and maximum premium ratio choices. BR White 11/17/09 at 7-8. Whether to participate in the retro program and which retro plan with varying risks to select are ultimately decisions for each employer to make, and the Department refrains from giving advice or making decisions for the employer in this respect. BR Malooly 11/16/09 at 119-20; BR Romero 11/16/09 at 58.

C. The 1997 Drywall Initiative and the Premium Rates Set for the Drywall Classes for the 1998, 1999, and 2000 Coverage Years

Before the 1997 drywall initiative, premiums for the drywall classification, like other classifications, were calculated based on the hours worked. BR Romero 11/16/09 at 11. From 1993 to 1997, premium rates for drywall classifications increased significantly because some employers in the industry were not reporting their hours and were avoiding paying required premiums. BR Romero 11/16/09 at 37; Finding of Fact (FF) 4.⁶

⁵ The size group table is changed annually when rates are set. The plan tables do not change from year to year, but during the period at issue were assigned different section numbers. A copy of the plan tables as they existed for all time relevant to this case can be found at Wash. St. Reg. 00-11-060 (June 6, 2000).

⁶ As NWCCA points out (Appellant's Brief 4 n.1) the superior court adopted the Board's findings of fact and conclusions of law, incorporating them by reference in the

By failing to report hours, non-compliant contractors were enjoying a significant competitive advantage over compliant (premium paying) contractors. BR Romero 11/16/09 at 19; FF 4. Some drywall employers and NWCCA's Richard Mettler came to the Department, complaining that drywall rates were going up every year and that the rates were too high. BR White 11/17/09 at 43; BR Mettler 11/24/09 at 14.

The Department instituted an initiative (drywall initiative) to change the behavior of non-compliant contractors into compliance. BR Romero 11/16/09 at 18-19. The Department made this change by rule for 1997. *See* Wash. St. Reg. 97-02-026 (January 15, 1997) (original emergency rules effective 1/1/97), 97-06-007 (March 19, 1997) ((original permanent rules effective 4/1/97), 97-08-043 (April 16, 1997) (modified emergency rules effective 4/1/97), 97-12-011 (June 18, 1997) (modified permanent rules effective 7/1/97); FF 11. The Department also conducted public hearings across the state on the drywall rates, and Mettler attended some of the hearings. BR Romero 11/16/09 at 39; Mettler 11/24/09 at 16; FF 10. NWCCA's Mettler advocated this change. BR Romero 11/16/09 at 42. Former classifications manager Romero explained that this change

judgment on appeal. CP 339-41. For clarity, this brief refers to the Board's findings of fact as "FF" followed by the number and the Board's conclusions of law as "CL" followed by the number. The Board's findings of fact and conclusions of law are located in the Board decision (BR 2-10). Copies of the superior court judgment and the Board decision are attached to this brief as Appendix A.

was consistent with recognized insurance principles, under which the exposure medium (e.g., material installed) must be independently verifiable. BR Romero 11/16/09 at 67-68. Romero explained that the square footage amount can be independently verified through a building permit, supply record, and a jobsite inspection. BR Romero 11/16/09 at 45-46.

In February 1997, the Department set up a drywall technical advisory committee to work with the industry. NWCCA's Mettler was on that committee as an industry representative. BR Romero 11/16/09 at 77; Mettler 11/24/09 at 20; FF 6, 7. NWCCA is a trade association of wall and ceiling contractors. BR Romero 11/16/09 at 11; FF 2.

As part of the drywall rules changes, the Department introduced a 2-tier rate structure: it created several new drywall classifications, half with discounted rates and the phrase "discounted rates" in their name, and half with rates that were 50 percent higher with "non-discounted rates" in their names. Former WAC 296-17-52116 through -52126 (1998) (drywall classifications 0524 through 0534); former WAC 296-17-89502 (1997) (setting rates for each class); FF 11.⁷

⁷ Copies of former WAC 296-17-52116 through -52126 and former WAC 296-17-89502 effective during the 1998, 1999, and 2000 coverage years for NWCCA are attached as Appendix B. The classifications were first adopted effective July 1997 and last modified effective October 1, 1998. The 1998 amendments made the definitions of

To qualify for the “discounted rates,” employers had to take specific steps, or they would be assigned to “non-discounted rates.” BR Romero 11/16/09 at 75; former WAC 296-17-45006(2) (1997); former WAC 296-17-35203(6) (1998). Employers who did not register with the Department or had been found to have been substantially cheating in reporting would not be eligible for the “discounted rates.” BR Romero 11/16/09 at 75; FF 11.

When the Department conducted public hearings on drywall rates, it received comments that employers should not be required to pay premiums on work done by those excluded from workers’ compensation coverage, such as business owners. BR Romero 11/16/09 at 68. The Department adopted rules, effective April 1997, allowing employers to deduct work performed by exempt persons. BR Romero 11/16/09 at 68.

NWCCA was aware of these changes. Before adopting these changes, the Department had meetings with the industry in which the Department told people, including NWCCA’s Mettler, that it would be adopting the discounted and non-discounted rates. BR Mettler 11/20/09 at 27; FF 10. Mettler recalled the discount was 35 percent. BR Mettler 11/24/09 at 40-41. NWCCA members discussed discounted versus non-

last modified effective October 1, 1998. The 1998 amendments made the definitions of the classification longer without changing the meaning (the Department did so for every classification at that time).

discounted rates and decided they “oughta look at going for the lower rate.” BR Mettler 11/24/09 at 21. NWCCA’s members qualified for the discounted rates, looked closely at their premiums after the changes, and did not see “anything major” with the new rates. BR Mettler 11/24/09 at 19.

After the Department made these changes, Mettler continued to serve on the drywall advisory committee. BR Mettler 11/24/09 at 20. The Department’s actuaries reported to the committee the amount of work being reported under the new rules, both in terms of square feet and premium dollars. BR Mettler 11/24/09 at 34-36.

Normally, the Department sets rates for a calendar year by using three to five years of claims and exposure data to adjust the rate set for the prior year. BR Vasek 11/20/09 at 79; BR White 11/16/09 at 151-52; BR White 11/17/09 at 86; FF 14. To be considered as a credible basis for rate setting, data must achieve a certain level of maturity. BR Vasek 11/20/09 at 92-93; FF 14. When claims first occur, there is very little cost information on them. BR Vasek 11/20/09 at 92. The reason not to use immature data in rate setting is because until the claims are of a certain maturity, the data is not of sufficient quality to evaluate the cost rates. BR Vasek 11/20/09 at 92; FF 15.

For setting new drywall rates, the Department had only the data from the hourly reporting system it was discontinuing:

We made a fundamental decision at that time, at the beginning, that all of the old data from the drywall classifications, we weren't going to use that, because this was a new day. We're going to have a new system, we're going to have better compliance, and we'll see how it comes out. So we didn't use that, which means that at the classification level the Department had no data to base anything on for the drywall risk classes.

BR White 11/16/09 at 137. Without several years of data available to use in setting rates for the new drywall classes, the Department needed a different approach. BR Romero 11/16/09 at 72-73.

Romero testified that a generally accepted insurance principle in setting premium rates is to use the best available information. BR Romero 11/16/09 at 94-95.

The Department started with hourly rates from the hourly classes, determined using the standard actuarial approach. BR Vasek 11/20/09 at 88. It converted the hourly rates to rates based on square feet using a conversion of 125 square feet per hour worked. BR Vasek 11/20/09 at 88; BR Ex 4; FF 12. The 125 square feet measurement was based on the testimony from drywall firms. BR Vasek 11/20/09 at 88; BR Ex 4; FF 12. For the discounted classes, the Department reduced the rate by 30 to 40

percent. BR Ex 4. The rates for the non-discounted classes were set 50 percent higher than the discounted rates. BR Ex 4.⁸

Then classifications manager Romero was the person who came up with the size of the discount, but the Department's actuaries approved it. BR Romero 11/16/09 at 17; BR Vasek 11/20/09 at 124-25. In changing the drywall reporting method and determining the size of the discount, the Department used its prior experience addressing a similar rate and compliance problem in the reforestation industry, where the Department successfully worked to increase compliance by changing the reporting method and offering a discount to complying employers. BR Vasek 11/20/09 at 78.

Bill White, then senior actuary for the Department, "blessed" the new discount rates, found them reasonable, and expected them to be adequate based on the reforestation experience. BR White 11/16/09 at 149; BR White 11/17/09 at 41, 42-43. Bill Vasek, the senior actuary who took over for White when the latter retired on January 1, 1998, also found the level of the discount reasonable in light of the reforestation experience. BR Vasek 11/20/09 at 88-89, 90. The reforestation experience the

⁸ Subsequently, when the Department divided the installation class into three classes, and the taping class into two classes, the Department also employed fractionalizing factors that are not at issue. *See* BR Ex 4.

Department considered involved actuarial analysis. BR Vasek 11/20/09 at 158.

For the 1998 coverage year, senior actuary Vasek was in charge of premium rate setting, and the Department used the same approach for setting the drywall rates as it did for the 1997 coverage year. BR Vasek 11/20/09 at 90-91; BR Ex 5. Vasek considered the data from the new drywall classes “too little and too immature” to use. BR Vasek 11/20/09 at 94, 92-93, 131 (“that data is too immature for rate setting purposes and that’s why we ignore it on a regular basis, and I don’t look at it today for that very reason”). Former senior actuary White later acknowledged that Vasek’s actuarial judgment to use the same approach for the 1998 year was reasonable under the circumstances. BR White 11/17/09 at 54.

Beginning with calendar year 1999, and continuing through calendar year 2001, the last rates that affected the 2000 coverage year, the Department was able to use the standard actuarial approach in adjusting the drywall rates. BR Vasek 11/20/09 at 94-95, 103; FF 13. This approach involved using data from the new drywall classes to adjust the prior year’s rates. BR Vasek 11/20/09 at 95. Although there was only limited claim data available for the 1999 year, “at least there was some information” sufficient for actuarial analysis. BR Vasek 11/20/09 at 95. With this approach, the Department expected drywall employers to bear

the same share of their losses as other employers. BR Vasek 11/20/09 at 97. Vasek testified that throughout the years at issue in this case, the Department used the data that was available, and did a reasonable analysis. BR Vasek 11/20/09 at 158.

In the fall of 2005, former senior actuary White analyzed what had happened with drywall rates from 1997 and 2006, and concluded that with hindsight the level of discounting used when setting rates in 1997 and 1998 turned out to have been too low. BR Ex 6. Current senior actuary Vasek thought White's conclusion was reasonable. BR Vasek 11/20/09 at 113. But he still thought the level of discounting used to set the initial rates was reasonable at the time the initial rates were set. BR Vasek 11/20/09 at 108-09. White agreed. BR White 11/16/09 at 149, 11/17/09 at 42-43.

D. NWCCA's Participation and Performance in the Retro Program in the 1998, 1999, and 2000 Coverage Years

NWCCA actively participated in the retro program for many years beginning in 1983, including the 1998, 1999, and 2000 coverage years. BR Romero 11/16/09 at 54; BR Mettler 11/20/09 at 11; BR Ex. 40; FF 2. Retro employers must select their plan and maximum premium ratio two months before the start of each coverage period. BR Doherty 11/17/09 at 161. NWCCA's coverage period started on July 1, and it had to make its

plan and maximum premium ratio choice by April 30. BR Doherty 11/17/09 at 162; FF 3. There is no dispute NWCCA knew the retro program involved a risk. FF 20. Nor is there any dispute that for the 1998, 1999, and 2000 coverage years, both NWCCA and its members voluntarily enrolled in the program and selected the plan and maximum premium ratio that would define the amount of risk they were willing to take. FF 19, 21.

Nothing in the drywall initiative changed how retro premiums would be calculated in any way. BR White 11/17/09 at 74-75. However, the discounts in the drywall premium after the drywall initiative reduced the standard premiums NWCCA's members paid upfront by about 15 percent. BR White 11/17/09 at 11-12. Thus, by enrolling as a retro group, NWCCA was agreeing to pay retro premiums calculated based on its members' actual claim losses, while being credited with the standard premiums its members had paid, which would be 15 percent lower. This is something NWCCA could have known at the time. BR White 11/17/09 at 12.

As it had in all previous years, when NWCCA enrolled in the retro program for the 1998 coverage year, it selected retrospective rating plan B with a maximum premium ratio of 1.25. BR Ex 24; BR Ex 40 at 2. Given the group's history of standard premiums, its basic premium ratio would

be zero. Former WAC 296-17-91902 (1998). Since the formula for calculating retro premiums is:

$$\begin{aligned} &\text{Retrospective Rating Premium} = \\ &(\text{Basic Premium Ratio} \times \text{Standard Premium}) \\ &+ \\ &(\text{Loss Conversion Factor} \times \text{Developed Losses}) \end{aligned}$$

and zero times anything is zero, this means the group's retrospective rating premiums would be determined simply by multiplying its developed losses by the applicable loss conversion factor. In other words, the ultimate premiums the group would pay would be determined by its losses, not the premiums members paid upfront.

NWCCA again elected to participate in the retro program for the 1999 coverage year. BR Ex 23. NWCCA made the same plan and risk choices. BR Mettler 11/20/09 at 53-54.⁹ However, half of its members that had enrolled in the group for the 1998 coverage year elected not to do so for the 1999 coverage year. BR Ex 9.

NWCCA again elected to participate in the retro program for the 2000 coverage year. BR Ex 22. Again, half of its members that had

⁹ Mettler's testimony explains that in conjunction with the resolution of NWCCA's appeals of its 1996 and 1997 adjustments, in the spring of 2000, NWCCA was allowed to switch its selections for the 1999-2000 coverage year to plan A with a maximum premium ratio of 1.15.

enrolled in the group for the 1998 coverage year elected not to do so. BR Ex 9. This time, NWCCA chose plan B with a 1.15 maximum premium ratio. BR Mettler 11/20 at 50-51. This still meant its retro premiums would still be determined by its losses. *See* Wash. St. Reg. 00-11-060 (June 6, 2000) for former WAC 296-17-90492 (2000) (group size table) and former WAC 296-17-90497 (2000) (plan B basic premium ratios and loss conversion factors table).

One way to gauge an employer's retro performance is to look at its loss ratio, which is the developed claim losses divided by the standard premiums. BR White 11/17/09 at 74. Because of the discounted standard premiums NWCCA paid upfront after January 1997, NWCCA could anticipate loss ratios that were 18 percent worse.¹⁰ BR White 11/17/09 at 75. Yet, even in this discount scheme, NWCCA could still get a refund, as it did for the 1999 coverage year. BR White 11/17/09 at 76; FF 17.

For the three coverage years at issue, the Department calculated NWCCA's retro premiums according to its published rules. BR White 11/17/09 at 85.

¹⁰ Ratios are 18 percent worse when standard premiums were 15 percent lower because standard premiums are in the denominator of the loss ratio. To see why this is, consider a retro participant with developed losses of \$100 and standard premiums of \$100. Their loss ratio would be 1.0. If their standard premiums dropped by 15 percent, but losses remained unchanged, their loss ratio would be \$100/\$85, which is 1.17647, about 18 percent higher.

For the 1998 coverage year, NWCCA experienced significant claim losses: the group had its worst loss ratio and was assessed additional premiums for the first time. BR Ex 40. Even without the 15 percent reduction in standard premiums (result of the drywall initiative), its loss ratio would have been 1.24,¹¹ still worse than its claim performance in all prior years. *See* BR Ex 40. NWCCA's claims costs exceeded the standard premiums its members had paid, resulting in a retrospective assessment in the amount of \$735,149. BR Ex 40; FF 23.

For the 1999 coverage year, NWCCA experienced much smaller losses, and the group received a refund. BR White 11/17/09 at 76; BR Ex 40. Without the 15 percent reduction in standard premiums, the loss ratio would have been 0.72,¹² its third-best year and best year since 1992. *See* BR Ex 40. NWCCA's claims costs were less than the standard premiums it paid, resulting in a refund of premium in the amount of \$433,843. BR Ex 40; FF 24.

For the 2000 coverage year, NWCCA's losses were worse than those it experienced in 1998, and the group was again assessed additional premiums. BR Ex 40. Even without the 15 percent reduction in standard

¹¹ From BR Ex 40: developed losses of \$5,251,622 divided by standard premiums of \$3,607,942 multiplied by 0.85 equals 1.237.

¹² From BR Ex 40: developed losses of \$1,598,883 divided by standard premiums of \$1,895,064 multiplied by 0.85 equals 0.717.

premiums, the loss ratio would have been 1.29,¹³ still worse than the group's loss ratio in 1998. See BR Ex 40. NWCCA's claims costs exceeded the standard premiums it paid, resulting in a retrospective assessment in the amount of \$309,528. BR Ex 40; FF 25.

As NWCCA's experience illustrates, "the premium, along with changes in losses, had equal impact on the group's successes." BR Doherty 11/17/09 at 144. Ultimately, an employer's success in the retro program is "relative to company performance," "not the adequacy of the rate." BR Vasek 11/20/09 at 142; FF 17, 18. Lower standard premium means only that the group pays less money upfront:

Let's look at it this way, the less money you pay up-front, the less money you're going to get on the back end. Yeah, the more money you pay up-front, the higher potential you have of money - - of getting money back at the end.

BR Vasek 11/20/09 at 142. The group can still get a refund if its actual claim losses produce retro premiums lower than the standard premiums. BR Vasek 11/20/09 at 119.

E. The Board and Court Proceedings

The Department adjusted NWCCA's retro premiums for the 1998, 1999, and 2000 coverage years, assessed additional premiums due for two

¹³ From BR Ex 40: developed losses of \$3,131,755 divided by standard premiums of \$2,063,520 multiplied by 0.85 equals 1.290.

of the three years, and credited NWCCA with a refund for the other year.¹⁴ BR Exs. 29, 31, 33; FF 1. NWCCA appealed the order affirming the final adjustments to the Board of Industrial Insurance Appeals. BR Ex 17; FF 1.

After a hearing, an industrial appeals judge (IAJ) of the Board issued a proposed decision reversing the assessment order. BR 44-65. The IAJ concluded that for the 1998, 1999, and 2000 coverage years, the Department failed to use the best available information in setting the premium rates and that the retro plan for NWCCA was inconsistent with recognized insurance principles as required by RCW 51.18.010. BR 64.

The Department petitioned the three-member Board to review the IAJ's proposed decision. BR at 29-38; FF 1. The Board granted the petition and issued a decision rejecting the proposed decision and affirming the Department's premium assessment order. BR 2-9. The

¹⁴ Since the discounting of drywall premiums actually began on January 1, 1997, it would also have affected standard premiums for NWCCA's 1996 and 1997 coverage years. An appeal NWCCA filed in 1999 and resolved by agreement in early 2000 settled all claims NWCCA had involving the period July 1, 1997, through June 30, 1998. BR Romero 11/16/09 at 64-65. Due to the substantial rules and rate changes the Department made between the time NWCCA committed to sponsor its retro group for the 1997 coverage year and the time the Department enrolled NWCCA, the Department agreed to cancel NWCCA's enrollment for 1997 under the theory that the changes in the law made between NWCCA's "offer" and the Department's "acceptance" resulted in a failure of the meeting of the minds. See BR Romero 11/16/09 at 32-33; BR Mettler 11/20/09 at 30-31 *see also* Wash. St. Reg. 97-12-011 (June 18, 1997). This case involves the impact the Department's decision to discount drywall premium rates had on NWCCA's retrospective rating adjustments for the period July 1, 1998 through June 30, 2001, a period during which there were no significant changes to the drywall rules.

Board concluded that for “the plan years at issue, the Department set base rates using the best information available at the time in keeping with RCW 51.08.010.” BR 10 (conclusion of law 3); FF 22. The Board pointed out that the terms of the retro program are “governed by the statute and [administrative] code provisions” and “NWCCA has failed to show how the Board may provide relief without invalidating the code provisions.” BR 6-7.

Thurston County Superior Court affirmed the Board decision, adopting all of the Board findings and conclusions. CP 339-41. The court concluded that “the Department complied with its statutory obligations.” CP 315-17. This appeal follows.

IV. STANDARD OF REVIEW

The Industrial Insurance Act governs the standard of review in this case. At the Board, NWCCA had “the burden of proceeding with the evidence to establish a prima facie case for the relief.” RCW 51.52.050(2)(a). The superior court review of a Board decision is de novo but limited to the Board record. RCW 51.52.115. The Board “findings and decisions” are “prima facie correct,” and NWCCA had the burden of proving otherwise. RCW 51.52.115.¹⁵

¹⁵ NWCCA cites to and asks this Court to “adopt [IAJ] Grant’s reasoning.” Appellant’s Brief 2, 29, 35. However, this Court reviews the Board decision, not the IAJ’s proposed decision rejected by the Board. RCW 51.52.115. An IAJ’s proposed

The appeal in this Court lies “from the judgment of the superior court as in other civil cases.” RCW 51.52.110. NWCCA has challenged a decision the Department made in its role as administrator of the Industrial Insurance Act. The Legislature has entrusted administration of the Act to the Department, and charged it to administer the Industrial Insurance Program according to rules. *See* RCW 51.04.020. Specifically, rates and rating systems must be adopted as rules, RCW 51.16.035, and the Retrospective Rating program must be administered according to rules, RCW 51.18.010(2).

Anyone aggrieved by a decision the Department makes in its role as administrator of Washington’s industrial insurance system must appeal that decision first to the Board, RCW 51.52.060(1)(a), then to superior court. RCW 51.52.110. At superior court, the evidentiary record created at the Board is reviewed *de novo* to determine whether the Board has acted within its power, and correctly found the facts and construed the law. RCW 51.52.115. In an appeal from such a superior court decision, this Court reviews the superior court decision to see if the court’s findings are supported by substantial evidence, and whether the court’s conclusions

decision is not a Board decision, unless the Board formerly adopts it. *Stratton v. Dep’t of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). The Board is the final fact-finding authority in an industrial insurance case and has the power to reject the IAJ’s decision “on all issues, including credibility of witnesses” observed only by the IAJ. *Rosales v. Dep’t of Labor & Indus.*, 40 Wn. App. 712, 715, 700 P.2d 748 (1985).

flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Here, the superior court judgment incorporates by reference all of the Board findings and conclusions. CP 339-41. Thus, both parties refer to the Board findings as those of the superior court.

Evidence is substantial if “sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). This Court must view “the record in the light most favorable to the party who prevailed in superior court”: the Department. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). The Court of Appeals does not weigh evidence or make credibility determinations on appeal. *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Likewise, the reviewing court will not substitute its judgment for that of the fact finder even though it might have resolved a factual dispute differently. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

NWCCA assigns error to the Board's findings of fact 1 and 22, only to the extent they state that for the 1998, 1999, and 2000 coverage years, the Department used the best available information in setting the premium rates. Appellant's Brief 4. NWCCA also assigns error to the Board's finding of fact 14 that the Department requires three to five years

of accumulated data to make statistically reliable predictions. Appellant's Brief 4. NWCCA does not assign error to or otherwise challenge any other findings of fact. The unchallenged findings are verities. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002).

As discussed below, the Department's position is that NWCCA cannot now challenge the rates as they were promulgated by rule. To the extent the Court considers a challenge to the rules; they are reviewed under the arbitrary and capricious standard to determine whether the agency action was willful and unreasoning and taken without regard to attendant facts and circumstances. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). "Where there is room for two opinions, an action taken after due consideration is not arbitrary or capricious, even though a reviewing court may believe it to be erroneous." *Id.* at 905 (quotations omitted). The wisdom or desirability of a rule is not before the reviewing court. *Armstrong v. State*, 91 Wn. App. 530, 537, 958 P.2d 1010 (1998).

Questions of law are subject to de novo review. *Willoughby*, 147 Wn.2d at 730. The court gives "substantial weight to an agency's interpretation of the law within its expertise, such as regulations the agency administers." *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 293, 253 P.3d 430 (2011).

V. ARGUMENT

NWCCA argues the Department failed to meet its statutory duty to set premium rates and operate the retro program consistent with recognized insurance principles. There are three statutory provisions that set forth the relevant duties. First, the Department shall adopt rules governing the method of premium calculation and rating system consistent with recognized principles of workers' compensation insurance. RCW 51.16.035(1). Second, the rates shall be the lowest necessary to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles. RCW 51.16.035. Finally, the retro plan shall be consistent with recognized insurance principles and shall be administered according to the rules adopted by the Department. RCW 51.08.010(2). The Board and the superior court correctly concluded that the Department complied with its statutory duties. CL 2, 3; CP 315-17.

It is undisputed that under RCW 51.16.035, the Department set the drywall premium rates for the relevant coverage years by formal rule-making process and published the rates in published rules. NWCCA never challenged the validity of these rules, which are presumptively valid and binding. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 446-47, 120 P.3d 46 (2005). By not challenging the rules, NWCCA waived

any argument about the validity of the rates. Even if the rates could be challenged, substantial evidence supports the finding that the Department set the premium rates and administered the retro program with respect to NWCCA in accordance with its rules and recognized workers' compensation insurance principles. FF 22; CL 2, 3; CP 315-17, 339-41.

In evaluating the drywall premium rules for the relevant time periods, this Court must see if they were reasonable "at the time [they were] made," not whether the *result* was reasonable in hindsight. *See Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501-02, 39 P.3d 961 (2002) (internal quotation omitted). Substantial evidence, including actuaries Vasek and White's testimony, supports the finding that the rates were reasonable and consistent with RCW 51.16.035. In setting the premium rates for the 1998 coverage year, the Department monitored but made a reasonable actuarial judgment not to rely on immature data under the new reporting system.

Further, NWCCA was aware of the major change in the drywall premium rates in 1997 and how its retro premiums would be calculated, which were all in published rules and were presumptively available to NWCCA. It is a "universal maxim that ignorance of the law excuses no one." *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (rejecting workers' compensation claimant's claim for relief

from claim-filing deadline). The Board and the superior court properly rejected NWCCA's claim that the Department acted in a dishonest, deceptive, or unscrupulous manner in administering the retro system.

A. NWCCA Waived Its Challenge to the Department's Drywall Premium Rate Setting, Because NWCCA Never Challenged the Rules or Rule Making Process Adopting the Rates

NWCCA challenges as inadequate the drywall premium rates that were set for the 1998, 1999, and 2000 coverage years in published regulations (former WAC 296-17-52116 through -52126 (1998) and former WAC 296-17-89502 (1997) (App. B). Appellant's Brief 26-27; RCW 51.16.035(1)(a). NWCCA claims "rate adequacy is required by recognized insurance principles." Appellant's Brief 26. However, because NWCCA never challenged the rules setting the premium rates, the rates adopted in the rules are valid and binding, and NWCCA waived any contrary argument.

The Administrative Procedure Act (APA), RCW 34.05, "governs challenges to the validity of agency regulation." *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 771, 66 P.3d 1102 (2003) (citation omitted). NWCCA never cited to the APA or challenged the rules made pursuant to an express statutory grant of authority. *See* RCW 51.16.035(2) (Department "shall formulate and adopt rules governing the method of premium calculation and collection and providing for a rating system").

An administrative rule promulgated pursuant to delegated authority has “the force of law.” *Campbell v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). Administrative rules “bind the court if they are within the agency’s delegated authority, are reasonable, and were adopted using the proper procedures.” *Ass’n of Wash. Bus.*, 155 Wn.2d at 446-47. NWCCA never argued before, and does not argue here, that the rules setting the drywall rates for the relevant coverage years exceeded the Department’s statutory grant of authority. Thus, the rules are valid and binding. *See id.* Further, by not challenging the rules at the superior court, NWCCA waived any claim that they are invalid. RAP 2.5(a). This Court should thus reject NWCCA’s argument that challenges the setting of the drywall premium rates for the coverage years at issue.

In any event, as shown below, NWCCA fails to show the rules adopting the premium rates for the coverage years at issue are inconsistent with recognized insurance principles as required by RCW 51.16.035(2).

B. The Department Properly Adopted the Drywall Rates for the Relevant Coverage Years, Consistent with the Statutory Requirement and Recognized Insurance Principles

NWCCA challenges, as inadequate and not actuarially determined, the discounted drywall premium rates for its 1998, 1999, and 2000

coverage years, which were set by the 1998, 1999, 2000, and 2001 rates rule-makings.¹⁶ See WAC 296-17-89502 as adopted by Wash. St. Reg. 97-24-062 (December 17, 1997); 98-24-094 (December 16, 1998); 99-24-055 (December 15, 1999); and 00-23-101 (December 6, 2000). Substantial evidence supports the finding that the Department used the best available information in adopting the rates at issue, consistent with recognized principles of workers' compensation insurance as required by RCW 51.16.035. FF 22; CL 2, 3; CP 315-17, 339-41. The Department's rate setting was not arbitrary and capricious as it gave due regard to the information available at the time of decision-making.

The Legislature directs the Department to set workers' compensation premium rates by rules and adopt rates that are the "*lowest necessary* to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles." RCW 51.16.035(1)(a) (emphasis added). "[R]ate-making by nature is a prospective endeavor." BR White 11/17/09 at 49; BR Ex 38 at 2 ("Ratemaking is prospective because the property and casualty insurance rate must be developed prior to the transfer of risk."). This Court may not

¹⁶ Because NWCCA's retro coverage years began on July 1, while the Department adjusts rates each calendar year, each coverage year at issue involves two sets of rates: for coverage year 1998, rates for calendar years 1998 and 1999; for coverage year 1999, rates for calendar years 1999 and 2000; and for coverage year 2000, rates for calendar years 2000 and 2001.

judge the drywall premium rates adopted in Department rules with hindsight. *See Rios*, 145 Wn.2d at 501-02; *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 427, 980 P.2d 701 (1999).

1. The Department properly adopted the drywall premium rates for the 1998 calendar year

The superior court correctly concluded that the Department properly adopted the drywall premium rates for the 1998 calendar year.

Due to the change in the basis for premium reporting (from hours worked to material installed) effective 1997, in setting the drywall rates for the 1998 coverage year, the Department lacked actuarial data under the new system. BR Romero 11/16/09 at 72-73. Former classifications manager Romero testified that generally accepted insurance principle requires using the best available information. BR Romero 11/16/09 at 94-95. Senior actuary Vasek confirmed that in setting the drywall rates for the relevant years, the Department used the best available information. BR Vasek 11/20/09 at 158; FF 22. For 1998, as it had done when setting the initial rates in 1997, the Department used actuarially derived hourly rates from the old risk classes, converted them to a material basis using the industry standard 125 square feet per hour conversion factor, then applied the same discount factors used in 1997. Both Vasek and White agreed this

was reasonable and appropriate. BR Vasek 11/20/09 at 90-91; BR Ex 5; BR White 11/17/09 at 54.

NWCCA complains that non-actuary Romero “created the [drywall] rates and discounts.” Appellant’s Brief 11, 27. To the contrary, Romero testified that he did not set the rates: that was done by the Department’s actuary unit. BR Romero 11/16/09 at 71 (“I didn’t set the rates.”). He did, however, determine the level of the discount.

NWCCA asserts that it is a violation of insurance principles to have had a non-actuary making such an important decision in rate setting, and derides the discount as not being “an actuarially derived number.” Appellant’s Brief 5, 14, 27. But its authority for the proposition that insurance principles require rates to be actuarially derived is the testimony of Diane Doherty. Appellant’s Brief 14. Ms. Doherty, a manager at the Department, is neither an actuary nor an expert on rate setting.

Two actuaries, actual insurance experts, did testify. Former chief actuary White and current chief actuary Vasek both testified that they were involved in the rate-setting and both found the proposed rate changes, including the discount, reasonable in light of the reforestation experience. BR Vasek 11/20/09 at 124-25; BR White 11/16/09 at 149, 11/17/09 at 41-43. Asked whether Romero’s involvement in the rate setting violated insurance principles, White answered, “You know, I don’t

think so.” BR White 11/17/09 at 95. Thus, it is not surprising that the Board and the superior court did not find Mr. Romero’s involvement to be a violation of insurance principles.

NWCCA claims the Board’s findings and conclusions do not address the questions related to rate adequacy and argues the alleged omission is a reversible error. Appellant’s Brief 27. To the contrary, findings of fact 14, 15, and 22 address and reject NWCCA’s rate adequacy argument. In any event, “lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof” (here, NWCCA). *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

NWCCA contends the Department “did not even attempt to determine the adequacy of the new drywall rates before implementing them.” Appellant’s Brief 26. NWCCA points to Romero’s testimony wherein he said he did not consider adequacy. Appellant’s Brief 27. NWCCA is wrong. The Department did consider the rate adequacy pursuant to RCW 51.16.035. Senior actuary Vasek considered it at the fund level. BR Vasek 11/20/09 at 82-83. He explained that rate adequacy in workers’ compensation insurance is to ensure the overall solvency of the accident and medical aid funds at the fund level, not at the classification level. BR Vasek 11/20/09 at 82-84. He explained, “What

we try to do on a class basis is we try to set rates so that the expected costs, the expected cost of the rates are equal in order to have fairness in the fund . . . we want to make sure that one employer is not being charged for a greater percentage of their costs than another employer.” BR Vasek 11/20/09 at 83. Both White and Vasek reviewed the discount factor at the time and found it reasonable based on what was known then. BR White 11/17/09 at 41, 42-43, 11/16/09 at 149; Vasek 11/20/09 at 88-89, 90. White explained that in applying insurance principles, “you really have to look at the context and not just say, ‘Well, you’re too low. You violated a principle’ or ‘You’re too high and you violated a principle.’ You got to look at the context and intent and everything that’s involved.” BR White 11/17/09 at 95.

Thus, substantial evidence supports the findings that the rates set initially for the discounted drywall classes were set considering the best information available at the time. FF 22. By considering all the available information and giving it due regard, the Department did not act arbitrarily or capriciously. The Board and the superior court correctly concluded that the Department complied with the statutory requirements in setting the rates. CL 2, 3; CP 315-17, 339-41.

2. The Department properly adopted the drywall premium rates for calendar years 1999, 2000, and 2001

In setting the drywall rate for the 1999 through 2001 calendar years, the Department chose to use the standard actuarial approach to rate setting, using the data under the new premium reporting system. BR Vasek 11/20/09 at 94-95, 103; FF 15. NWCCA argues that the Department failed to follow the recognized insurance principle, claiming the Department failed to monitor the progress of the drywall initiative. Appellant's Brief 31-32. The Board and the superior court properly rejected this argument.

As NWCCA's Mettler acknowledged, after implementing the drywall initiative, the Department's actuaries periodically monitored and reported to the drywall advisory committee the amount of work drywall employers were reporting to the Department, both by the amount of material and by premium dollars. BR Mettler 11/24/09 at 34-36. Vasek prepared reports and informed the committee about the level of the premiums being reported. BR Vasek 11/20/09 at 89, 106.

Former senior actuary White testified that by the 1999 ratemaking, enough data showed that the hoped-for increased compliance was not occurring and that the Department should have raised the rates. BR White 11/17/09 at 93. However, senior actuary Vasek, who took over from White and was in charge of the 1999 coverage year rate setting, disagreed. Vasek testified that at the time of the rate setting, the Department still

could not tell whether the drywall initiative was a success or a failure, because “whenever you start a new program, you don’t necessarily reach success immediately.” BR Vasek 11/20/09 at 96-97. Vasek believed giving the new data the weight assigned by the standard actuarial analysis was a more appropriate approach. BR Vasek 11/20/09 at 96-103.

As Vasek’s testimony demonstrates, the Department’s decision to use the standard actuarial approach without increasing the base rates for the 1999 and 2000 coverage years does not represent its disregard of available data, but a judgment, after reviewing the data, as to what approach was the most appropriate. BR Vasek 11/20/09 at 98. White acknowledged that whether to wait to see the progress of the drywall initiative or increase the rates then was a matter of actuarial judgment. BR White 11/17/09 at 93. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Rios*, 145 Wn.2d at 501 (quoting *Hillis v. Dep’t. of Ecology*, 131 Wash.2d 373, 383, 932 P.2d 139 (1997)).

Thus, substantial evidence supports the finding that for calendar years 1999 through 2001, the Department set drywall premium rates using the best information available, consistent with the requirements of

RCW 51.16.035 and RCW 51.08.010. FF 22; CL 2, 3; CP 315-17, 339-41.

C. The Department Properly Informed the Public, Including NWCCA, about the Major Changes in the Drywall Premium Rates through Rule-Making and Public Hearing Processes

NWCCA claims the Department breached a duty to warn the group that the drywall premiums were inadequate, such that its participation in retro would be a pure gamble. Appellant's Brief 28-30. Both factually and legally, this argument should be rejected.

First, as previously discussed and as the Board and superior court appropriately found, the drywall rates were not inadequate. To the contrary, the rates were reasonably based on the best information available at the time. It is nonsensical to demand that the Department warn about rates that were thought adequate at the time.

Moreover, factually the record simply does not support the idea that the reduction in standard premiums NWCCA experienced as a result of the changes to the drywall program rendered NWCCA's participation in retro a "pure gamble." Actuary White testified that the discounted premium rates reduced NWCCA's standard premiums by about 15 percent, BR White 11/17/09 at 11. NWCCA received refunds of 15 percent or more of standard premiums nine times in the thirteen coverage years it participated in before the drywall changes. *See* BR Ex

40. In each of these years, even if its members' standard premiums had been 15 percent lower NWCCA would either have paid no additional assessment or have earned a refund.

Thus, NWCCA's history demonstrated that even with the reduction in standard premiums caused by the drywall changes, it could have earned a refund if it controlled losses, but would have had to pay additional premiums if it did not. Indeed, in the three years at issue here, NWCCA had one year where it was successful at controlling losses and earned a refund, and two years where it was not successful at controlling losses, and was assessed additional premiums. That is not a "pure gamble," that is how Washington's retrospective rating works.

Second, as a matter of law, NWCCA's breach of duty to warn argument should fail because, to the extent that any notice might have been due NWCAA, it was amply provided through rulemaking. The Department adopted the new drywall rates as rules, which gave NWCAA (and everyone else) notice of the major change in drywall standard premiums. At the same time, the rules governing the calculation of retrospective rating premiums were unchanged, putting NWCCA (and everyone else) on notice that standard premiums continued to act merely as a down payment to be applied toward retro premiums. Together, this provided NWCCA with any warning necessary to be able to determine

how the change in drywall base rates could affect its prospects for earning a refund in retro.

The drywall initiative certainly produced a major change in the premiums drywall employers pay. However, NWCCA cannot claim the Department did not inform it about the changes. The Department adopted the discounted rates through a formal rule-making process, and the discounted classifications were identified as “discounted rates.” Former WAC 296-17-52116 through -52126 (1998) and former WAC 296-17-89502 (App. B) (1997); BR Romero 11/16/09 at 42-43; FF 11. Moreover, the NWCCA actually collaborated with the Department in the process that led to the adoption of the rates, and NWCCA was fully aware of the discounts. BR Mettler 11/20/09 at 27, 11/24/09 at 16, 19, 21, 40-41.

Further, the drywall initiative did not change the methods to calculate NWCCA’s retro premiums, and these methods were in published rules. Former WAC 296-17-914 (1998 & 1999) (BR Ex 1, 35); former WAC 296-17-90491 (2000) (BR Ex 36). Under the rules, both before and after the drywall changes, NWCCA’s size, together with its plan and risk choices meant that its retro premiums would be determined by its losses. *See* BR Ex 40, former WAC 296-17-90497 (2000) as found in Wash. St. Reg. 00-11-060 (June 6, 2000). And under the rules, the standard premiums employers paid would merely act as a down payment toward

retro premium liability NWCCA voluntarily took on. Former WAC 296-17-904(10) (1998) (BR Ex 1); former WAC 296-17-91219 (1999), former WAC 296-17-91221 (1999) (BR Ex 35); former WAC 296-17-90463 (2000); former WAC 296-17-90469 (2000) (BR Ex 36).

In essence, NWCCA appears to be claiming that it was entitled to a warning that the reduction in the standard premiums its members would pay upfront (down payment towards its retro premiums) would make it harder to earn a refund. But that is simply how the retro program operates, which was and continued to be spelled out in published rules. Under those rules, retro adjustments are simply the difference between standard premiums and retro premiums. Reducing what is paid upfront without changing how the ultimate price is determined increases the potential for having to pay additional premiums. *See* BR Vasek 11/20/09 at 142.

The Board and the superior court properly rejected NWCCA's duty to warn argument and correctly concluded that the Department properly administered the retro program with respect to NWCCA consistent with RCW 51.08.010. BR 6; CL 2, 3.

D. *Woodworker's Supply, Involving New Mexico's Trade Practices Act and Fraudulent Inducement, Is Inapposite and Does Not Support NWCCA, and NWCCA's Equity Claim Lacks Merit*

NWCCA argues that the Department violated its duty to act in good faith, abstain from deception, and practice honesty and integrity.

Appellant's Brief 32-33. NWCCA calls the Department's conduct in this case "indistinguishable" from the private insurer in *Woodworker's Supply, Inc. v Principal Mutual Life Insurance Co.*, 170 F.3d 985 (10th Cir. 1999). NWCCA's reliance on *Woodworker's Supply* is misplaced and the Board and the superior court properly rejected this argument.

Woodworker's Supply involved a manufacturer's claim against a private insurer under New Mexico's trade practices statutes and common law fraudulent inducement. *Woodworker's Supply*, 170 F.3d at 994. Unlike Washington's workers' compensation retro program, which is governed by RCW Title 51 and Department rules, the retro program involved in *Woodworker's Supply* involved an insurer providing a premium contract bid that had two rates: a preliminary rate and a contract rate. *Id.* at 988. The insured would pay the preliminary rate, and then depending on losses could be required to pay more, up to the contract rate. *Id.* at 988. The insurer there offered a negotiated contract rate and a preliminary rate that was 25 percent lower than the contract rate. *Id.*

The court in *Woodworker's Supply* upheld the jury verdict that the insurer violated New Mexico's trade practices statutes, pointing out that the insurer knew the premium rate was inadequate "prior to the time the agreement went into effect" and did not disclose its method for deciding whether to add a surcharge to the preliminary rate or increase annual rates.

Id. at 994. In upholding the jury verdict that the insurer committed a fraud, the court further pointed out that the insurer had superior knowledge about its calculation methods for the underrated premiums it offered, and “a reasonable jury could infer that [the insurer] intentionally chose not to disclose the inadequacy of the proposed rates in order to ensure it received [the manufacturer’s] business. *Id.*

Unlike the private insurer in *Woodworker’s Supply*, who chose not to disclose the method to calculate the insured’s premiums for its own gain, the Department calculated NWCCA’s retro premiums in accordance with its published rules. Further, unlike the finding in that case that the insurer knew, at the time of the agreement, that the preliminary rates were inadequate, as shown above, the trier of fact in this case rejected NWCCA’s claim that the Department knew the drywall rates were inadequate. FF 14, 15. *Woodworker’s Supply* is thus inapposite here.¹⁷

NWCCA cites an equitable estoppel case to claim government agencies must be scrupulously just. Appellant’s Brief at 25, 33; *State ex rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 435 (1965). But NWCCA does not make any argument or analysis as to how equitable

¹⁷ The insurer in *Woodworker’s Supply* appeared to have offered a low-ball preliminary rate knowing that its rates were so inadequate that the insured would ultimately have to pay the contract rate. *Woodworker’s Supply*, 170 F.3d at 988-89. That is not retrospective rating; that is bait and switch.

estoppel applies in this case. Thus, to the extent NWCCA suggests equitable estoppel, this Court should reject it as inadequate. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (“[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.”).¹⁸

The Industrial Insurance Act requires the Department to administer the retro program in accordance with the rules it adopts and recognized insurance principles. RCW 51.08.010(2). As the Board and the superior court concluded, the Department satisfied this statutory duty. CL 2, 3; CP 315-17, 339-41. The Department adopted the drywall premium rates for the relevant coverage years through formal rule-making and public hearing processes and calculated NWCCA’s retro premiums in accordance with its published rules available to NWCCA. There is no basis in NWCCA’s claim that the Department acted in a dishonest, deceptive, or unscrupulous manner.

¹⁸ In any event, equitable estoppel does not apply here. Equitable estoppel “against the government is disfavored.” *State v. Yates*, 161 Wn.2d 714, 738, 168 P.3d 359 (2007). To assert estoppel, NWCCA must show “by clear, cogent, and convincing evidence” the following five elements: (1) the Department’s “admission, statement, or act inconsistent with the claim afterwards asserted”; (2) “action by [NWCCA] on the faith of such admission”; (3) “injury to [NWCCA] resulting from permitting [the Department] to contradict or repudiate such admission, statement, or act”; (4) estoppel is “necessary to prevent a manifest injustice”; and (5) estoppel would not impair “the exercise of governmental functions.” *Yates*, 161 Wn.2d at 738 (internal quotation omitted). There is no clear, cogent, and convincing evidence or finding that the Department made any inconsistent statement to NWCCA.

E. Because NWCCA Does Not Prevail, It Is Not Entitled to Pre-judgment Interest or Attorney Fees

NWCCA argues it is entitled to prejudgment interest. Appellant's Brief 34. As shown above, NWCCA does not prevail in this appeal and is thus not entitled to pre-judgment interest under RCW 51.52.112.

NWCCA also requests attorney's fees under RCW 51.52.130(1). However, regardless of whether NWCCA prevails in this appeal, the statute does not provide for attorneys' fees for an employer challenging its obligation to pay premiums. Therefore, NWCCA has not shown a right to attorney's fees, even if it prevails in this appeal.

VI. CONCLUSION

For the reasons stated above, the Department asks this Court to affirm the superior court judgment in this case.

RESPECTFULLY SUBMITTED this 6th day of January, 2012.

ROBERT M. MCKENNA
Attorney General



JAMES S. JOHNSON
Assistant Attorney General
Attorney for Respondent

PROOF OF SERVICE

I certify that I served a copy of this document on all parties
or their counsel of record on the date below as follows:

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and via email to:

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by placing them with ABC-Legal Messengers, Inc.

by giving them to overnight messenger service.

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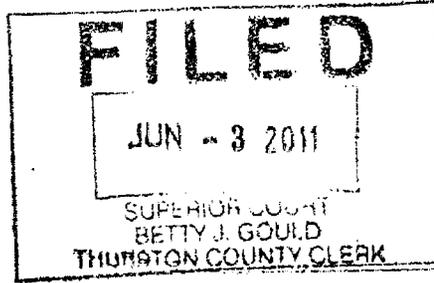
I certify under penalty of perjury under the laws of the state
of Washington that the foregoing is true and correct.

DATED this 6th day of January, 2012, at Tumwater,
Washington


JEREI BARGABUS
Legal Assistant

APPENDIX A

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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.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

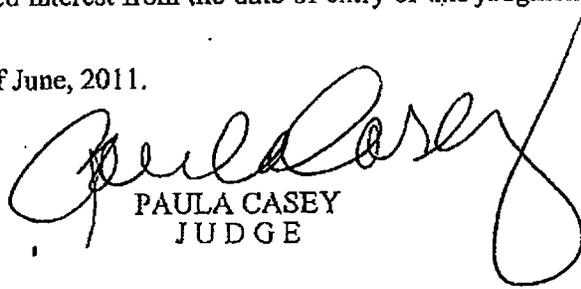
III. JUDGMENT

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.

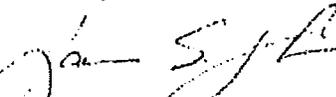
3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 31st 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

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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

ATTORNEY GENERAL'S OFFICE
L&I DIVISION OLYMPIA
2010 JUN 18 AM 9:44
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APPEARANCES:

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

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

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

DECISION

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

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

We have granted review to specifically address NWCCA's request for relief from retrospective rating assessments based on allegations that the Department of Labor and Industries breached statutory, contractual, or other recognized duties so as to justify relief from rating assessments for Plan Years 1998, 1999, and 2000. We do not find that NWCCA is entitled to such 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
32

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.

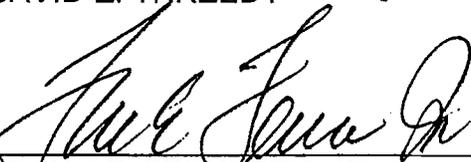
7 **CONCLUSIONS OF LAW**

- 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
26
27
28
29
30
31
32

APPENDIX B

be required to pay premiums in the nondiscounted classification(s).

(3) **Can I be disqualified from using the discounted rates?** Yes, as opposed to failing to qualify because you did not meet the conditions of subsection (2) of this section, your business will be disqualified from using the discounted premium rates if you do not file premium reports on time; if you fail to pay premiums on time; if you under report or misclassify the work performed by your employees; if you fail to maintain the payments in a payment agreement you have entered into with us; or fail to meet any other condition set forth in this rule.

(4) **How long will I be disqualified from using the discounted classifications?** If we disqualify your business from using the discounted classifications, the disqualification will be for three years (thirty-six months) from the period of last noncompliance.

(5) **I have several businesses, if one of my businesses is disqualified from using the discounted rates will that affect my other businesses?** Yes, if you have ownership interest in a business which has been disqualified from using the discounted rates, and you also have ownership interest in other construction businesses which have separate industrial insurance accounts or subaccounts, all businesses in which you have ownership interest will be disqualified from using the discounted rates. This includes a business which you own or owned that is in bankruptcy status and for which you have not entered into a payment agreement, if you owe us any money; or money that you owe us which we wrote off as an uncollectible debt.

(6) **What if I make a mistake in how I reported to you, should I correct the error?** Yes, you should send in a revised report with an explanation of the error you are trying to correct. If we audit your business, and we determine that you have under reported exposure in any classification assigned to your business, all exposure which you reported in the discounted classifications for the audit period will be reclassified to the nondiscounted classifications.

(7) **If I disagree with an audit or other decision can I still use the discounted rates while we are resolving the issue?** Yes, if you are involved in a dispute with us over the status of an independent contractor, the issue being whether an individual is a covered worker; the proper classification of work your employees performed; or under reporting; you may qualify for the discounted classifications by paying the disputed amount while the issue is under dispute. In the event the issue is resolved in your favor we will refund any moneys which you paid which were disputed. We will not pay interest on the refunded amount. If you do not pay the audit balance or disputed amount when requested or post an equivalent bond, you will not be permitted to use any of the discounted classifications.

(8) **I am the owner of the business, and I do some of the work myself, can I deduct the work I do from the total square feet to be reported to you?** Yes, as an owner of the business you can deduct the amount of work that you did from the total square feet which you are going to report to us.

(9) **How do I calculate and report this deduction to you?** To claim this deduction you must send us a report which shows by job, project, site or location the total amount

of material that was installed or finished at that job, project, site or location; the amount of material which you as the owner installed and/or finished at the job, project, site or location; the hours that it took you to install and/or finish the material you are claiming deduction for; the total material installed and/or finished by employees at the job, project, site or location; and the hours the employees worked by job, project, site or location. This report must accompany the quarterly report in which you are claiming a deduction. If there are several owners, you must supply this information for each owner you wish to claim a deduction for.

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-45006, filed 5/27/97, effective 7/1/97; 97-06-007, § 296-17-45006, filed 2/24/97, effective 4/1/97.]

WAC 296-17-52107 Repealed. See Disposition Table at beginning of this chapter.

WAC 296-17-52112 Repealed. See Disposition Table at beginning of this chapter.

WAC 296-17-52114 Repealed. See Disposition Table at beginning of this chapter.

WAC 296-17-52115 Repealed. See Disposition Table at beginning of this chapter.

WAC 296-17-52116 Classification 0524.

Wallboard installation - discounted rate

This classification excludes wallboard taping and texturing work which is to be reported separately in classification 0525.

Special note: The basis of premium for this classification is material installed (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-06-007, § 296-17-52116, filed 2/24/97, effective 4/1/97.]

WAC 296-17-52117 Repealed. See Disposition Table at beginning of this chapter.

WAC 296-17-52118 Classification 0526.

Wallboard taping - discounted rate

This classification excludes wallboard installation, wallboard priming and texturing, wallboard stocking, and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52118, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52119 Classification 0527.

Wallboard priming and texturing - discounted rate

This classification includes incidental painting when performed by employees of an employer subject to this classification, but excludes wallboard installation, wallboard taping, wallboard stocking, and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52119, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52120 Classification 0528.

Wallboard stocking by nonmaterial dealer employees - discounted rate

This classification excludes wallboard stocking by building material dealer employees which is to be reported separately in classification 1101, wallboard installation, wallboard taping, wallboard priming and texturing and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material stocked (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52120, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52121 Classification 0529.

Wallboard scrapping by nonmaterial dealer employees - discounted rate

This classification excludes wallboard scrapping by building material dealer employees which is to be reported separately in classification 1101, wallboard installation, wallboard taping, wallboard stocking, and wallboard priming and texturing which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material stocked (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52121, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52122 Classification 0530.

Wallboard installation - nondiscounted rate

This classification excludes wallboard taping, wallboard priming, wallboard texturing work, wallboard stocking and wallboard scrapping which is to be reported separately in the classification applicable to the work being performed. This classification does not apply to employees of a building material dealer engaged in stocking or scrapping which are to be reported separately in classification 1101.

Special note: The basis of premium for this classification is material installed (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52122, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52123 Classification 0531.

Wallboard taping - nondiscounted rate

This classification excludes wallboard installation, wallboard priming and texturing, wallboard stocking, and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52123, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52124 Classification 0532.

Wallboard priming and texturing - nondiscounted rate

This classification includes incidental painting when performed by employees of an employer subject to this classification, but excludes wallboard installation, wallboard taping, wallboard stocking, and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52124, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52125 Classification 0533.

Wallboard stocking by nonmaterial dealer employees - nondiscounted rate

This classification excludes wallboard stocking by building material dealer employees which is to be reported separately in classification 1101, wallboard installation, wallboard taping, wallboard priming and texturing and wallboard scrapping which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material stocked (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52125, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52126 Classification 0534.

Wallboard scrapping by nonmaterial dealer employees - nondiscounted rate

This classification excludes wallboard scrapping by building material dealer employees which is to be reported separately in classification 1101, wallboard installation, wallboard taping, wallboard stocking, and wallboard priming and texturing which is to be reported separately in classification applicable to the work being performed.

Special note: The basis of premium for this classification is material stocked (square feet).

[Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52126, filed 5/27/97, effective 7/1/97.]

WAC 296-17-855 Experience modification. The basis of the experience modification shall be a comparison of the actual losses charged to an employer during the experience period with the losses which would be expected for an average employer reporting the same exposures in each classification. The comparison shall contain actuarial refinements designed to mitigate the effects of losses which may be considered catastrophic or of doubtful statistical significance, due consideration being given to the volume of the employer's experience. Except for those employers who qualify for an adjusted experience modification as specified in WAC 296-17-860 or 296-17-865, the experience modification shall be calculated from the formula:

$$\text{MODIFICATION} = \frac{A_p + W A_e + (1-W) E_e + B}{E + B}$$

The components A_p , $W A_e$, and $(1-W) E_e$ are values which shall be charged against an employer's experience record. The component, E , shall be the expected value of these charges for an average employer reporting the same

0518-02 Metal service station canopy: Erection

Applies to contractors engaged in the erection of metal service station canopies. Work contemplated by this classification includes, but is not limited to, raising and securing metal frames, members, or I-beams into place with a boom or crane and securing by bolt, rivet or weld.

This classification excludes the removal or installation of underground tanks which is to be reported separately in classification 0108, and the removal or installation of service station pumps which is to be reported separately in classification 0603.

[Statutory Authority: RCW 51.16.035, 99-18-068, § 296-17-52110, filed 8/31/99, effective 10/1/99; 98-18-042, § 296-17-52110, filed 8/28/98, effective 10/1/98; 96-12-039, § 296-17-52110, filed 5/31/96, effective 7/1/96. Statutory Authority: RCW 51.04.020(1) and 51.16.035, 93-12-093, § 296-17-52110, filed 5/31/93, effective 7/1/93; 89-24-051 (Order 89-22), § 296-17-52110, filed 12/1/89, effective 1/1/90.]

WAC 296-17-52111 Classification 0519.**0519-00 Building construction sheet metal work, N.O.C.**

Applies to contractors engaged in the installation or repair of sheet metal work in building construction, not covered by another classification (N.O.C.). Work contemplated by this classification applies to interior and exterior sheet metal work for residential or commercial buildings and includes wood frame, pole buildings, and nonwood frame buildings. This classification includes the installation of metal siding, gutters and downspouts, nonstructural sheet metal patio covers/carports, metal industrial shelving, stainless steel counter tops, and interior wall panels (such as the back splash behind stoves or sinks). Contractors who operate a sheet metal fabrication shop or prefabricate the gutters, downspouts and posts in a shop away from the construction site are to be assigned classification 3404 for the shop operations. When a contractor's business is assigned classification 3404 for shop operations then classification 5206 "Permanent yard or shop" is no longer applicable to the contractor's business for the storage of materials or repair to equipment.

This classification excludes sheet metal work as part of heating ventilation and air conditioning systems installation which is to be reported separately in classification 0307; the installation of aluminum or sheet metal as part of roof work which is to be reported separately in classification 0507; the installation of light weight sheet metal tool sheds which is to be reported separately in classification 0516; and the installation of commercial metal carports and service station canopies which is to be reported separately in classification 0518.

[Statutory Authority: RCW 51.16.035, 99-18-068, § 296-17-52111, filed 8/31/99, effective 10/1/99; 98-18-042, § 296-17-52111, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020(1) and 51.16.035, 89-24-051 (Order 89-22), § 296-17-52111, filed 12/1/89, effective 1/1/90.]

WAC 296-17-52113 Classification 0521.**0521-00 Painting building interiors; wallpaper hanging/removal**

Applies to contractors engaged in painting building interiors regardless of the height inside the building. This classification includes building interiors such as, but not limited to, single and multiple story residential houses and commercial

buildings, warehouses, factories, coliseums, theaters, stores and churches. The following structures are examples which would *not meet* the definition of a building or qualify as interior painting: Bridges, refineries, grain silos, water towers, service station canopies, or tanks. Paint is applied by brush, roller or spray to a variety of surfaces such as wood, wallboard, plaster, stucco, metal, concrete, or other types of surfaces found within the interior of a building. This classification includes all preparation work such as the set up of scaffolding, sanding, removal of old paint or asbestos, taping or masking, and clean up work. This classification also includes the hanging or removal of wallpaper. The process of hanging wallpaper includes cleaning or scraping walls to ensure the wallpaper will adhere to the surface. Depending on the type of wallpaper, adhesive is applied to the wall surface, the wallpaper, or both. Patterns are matched and the strip is applied to the surface and brushed smooth to remove the air pockets. This process is repeated until the entire job is complete. This classification also includes refinishing or resurfacing of tubs, sinks, appliances and countertops.

This classification excludes exterior painting of buildings or structures which is to be reported separately in classification 0504. Classifications 0521 and 0504 may be assigned to the same employer provided accurate records are maintained which distinguish interior building painting contracts from exterior building or structure painting contracts. This classification also excludes contractors engaged in waterproofing buildings or structures N.O.C., pressure washing services or sandblasting of buildings or structures, lead paint abatement, and the exterior painting of buildings or structures, including interior/exterior tanks which are all to be reported separately in classification 0504; painting of murals or other artwork on the interior of buildings which is to be reported separately in classification 4109; and painting of murals or other artwork on the exterior of buildings which is to be reported separately in classification 0403.

[Statutory Authority: RCW 51.16.035, 99-18-068, § 296-17-52113, filed 8/31/99, effective 10/1/99; 98-18-042, § 296-17-52113, filed 8/28/98, effective 10/1/98; 96-12-039, § 296-17-52113, filed 5/31/96, effective 7/1/96.]

WAC 296-17-52116 Classification 0524.**0524-00 Wallboard installation - discounted rate (to be assigned only by the drywall underwriter)**

Applies to contractors engaged in the installation or repair of wallboard. This classification includes the installation of wallboard, drywall, or sheetrock in all types of residential or commercial buildings or structures. Material is generally delivered to the construction site by employees of the building material dealers. This classification includes delivery of materials to the construction site when performed by employees of the wallboard contractor. The process consists of cutting wallboard with a utility knife, hacksaw, or power saw to the desired size and then butting material into place and nailing or screw fastening to wood or aluminum wall studs. Electrical box, window, or door openings are cut out where needed. Installation may require the use of scaffolding, ladders, specialty lifts, or stilts when working at heights, including the use of T holders or hydraulic lifts to hold material being installed on ceilings.

This classification excludes wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534; interior painting work which is to be reported separately in classification 0521; plastering, stuccoing or lathing work which is to be reported separately in classification 0303; and the framing of nonbearing walls when performed by the drywall contractor which is to be reported separately in classification 0516.

Special note: *The basis of premium for this classification is material installed (square feet).* For contractors to be assigned and continue to report in this classification, their account must remain in good standing and conform to the conditions specified in the special drywall industry rule.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52116, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-06-007, § 296-17-52116, filed 2/24/97, effective 4/1/97.]

WAC 296-17-52118 Classification 0526.

0526-00 Wallboard taping - discounted rate (to be assigned only by the drywall underwriter)

Applies to contractors engaged in taping wallboard in residential or commercial buildings or structures. This process occurs after wallboard, drywall, or sheetrock has been installed and involves taping the seams, and spreading joint compound over the seams and nail or screw heads. When dry, the seams are sanded to remove any rough edges.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: *The basis of premium for this classification is material finished (square feet).* For contractors to be assigned, and continue to report in this classification, their account must remain in good standing and conform to the conditions specified in the special drywall industry rule.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52118, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52118, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52119 Classification 0527.

0527-00 Wallboard priming and texturing - discounted rate (to be assigned only by the drywall underwriter)

Applies to contractors engaged in priming and texturing wallboard in residential or commercial buildings or structures. Priming is the application of an undercoating that may be applied either directly to the wallboard or after it has been textured. The priming application is necessary for any subsequent painting work. Texture is a putty-like material that is sprayed over the prepared wallboard in a clump-like application. The clumps are smoothed with a trowel or a wide putty

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knife. This classification includes incidental painting w performed by employees of the priming and texturing contractor.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 05 wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: *The basis of premium for this classification is material finished (square feet).* For contractors to be assigned, and continue to report in this classification, the account must remain in good standing and conform to the conditions specified in the special drywall industry rule.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52119, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52119, filed 5/27/97, effective 7/1/97]

WAC 296-17-52120 Classification 0528.

0528-00 Wallboard stocking by nonmaterial dealer employees - discounted rate (to be assigned only by the drywall underwriter)

Applies to contractors or employees of contractors engaged in the process of stocking drywall. This activity usually entails placing the needed amount of drywall within the various rooms of the residential or commercial building or structure being built.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: *The basis of premium for this classification is material finished (square feet).* For contractors to be assigned, and continue to report in this classification, their account must remain in good standing and conform to the conditions specified in the special drywall industry rule.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52120, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52120, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52121 Classification 0529.

0529-00 Wallboard scrapping by nonmaterial dealer employees - discounted rate (to be assigned only by the drywall underwriter)

Applies to contractors or employees of contractors engaged in the process of scrapping drywall. This activity entails the picking up and discarding of the wallboard remnants and scraps.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing

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which is to be reported separately in classification 0527 or 0532; and wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533.

Special note: The basis of premium for this classification is material finished (square feet). For contractors to be assigned, and continue to report in this classification, their account must remain in good standing and conform to the conditions specified in the special drywall industry rule.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52121, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52121, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52122 Classification 0530.

0530-00 Wallboard installation - nondiscounted rate (to be assigned only by the drywall underwriter)

Applies to contractors engaged in the installation or repair of wallboard. This classification includes the installation of wallboard, drywall, or sheetrock in all types of residential or commercial buildings or structures. Material is generally delivered to the construction site by employees of the building material dealers. This classification includes delivery of materials to the construction site when performed by employees of the wallboard contractor. The process consists of cutting wallboard with a utility knife, hacksaw, or power saw to the desired size and then butting material into place and nailing or screw fastening to wood or aluminum wall studs. Electrical box, window, or door openings are cut out where needed. Installation may require the use of scaffolding, ladders, specialty lifts, or stilts when working at heights, including the use of T holders or hydraulic lifts to hold material being installed on ceilings.

This classification excludes wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534; interior painting work which is to be reported separately in classification 0521; plastering, stuccoing or lathing work which is to be reported separately in classification 0303; and the framing of nonbearing walls when performed by the drywall contractor which is to be reported separately in classification 0516.

Special note: The basis of premium for this classification is material installed (square feet).

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52122, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52122, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52123 Classification 0531.

0531-00 Wallboard taping - nondiscounted rate (to be assigned only by the drywall underwriter)

Applies to contractors engaged in taping wallboard in residential or commercial buildings or structures. This process occurs after wallboard, drywall, or sheetrock has been installed and involves taping the seams, and spreading joint

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compound over the seams and nail or screw heads. When dry, the seams are sanded to remove any rough edges.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52123, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52123, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52124 Classification 0532.

0532-00 Wallboard priming and texturing - nondiscounted rate (to be assigned only by the drywall underwriter)

Applies to contractors engaged in priming and texturing wallboard in residential or commercial buildings or structures. Priming is the application of an undercoating that may be applied either directly to the wallboard or after it has been textured. The priming application is necessary for any subsequent painting work. Texture is a putty-like material that is sprayed over the prepared wallboard in a clump-like application. The clumps are smoothed with a trowel or a wide putty knife. This classification includes incidental painting when performed by employees of the priming and texturing contractor.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52124, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52124, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52125 Classification 0533.

0533-00 Wallboard stocking by nonmaterial dealer employees - nondiscounted rate (to be assigned only by the drywall underwriter)

Applies to contractors or employees of contractors engaged in the process of stocking drywall. This activity usually entails placing the needed amount of drywall within the various rooms of the residential or commercial building or structure being built.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing

which is to be reported separately in classification 0527 or 0532; and wallboard scrapping by nonmaterial dealer employees which is to be reported separately in classification 0529 or 0534.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52125, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52125, filed 5/27/97, effective 7/1/97.]

WAC 296-17-52126 Classification 0534.

0534-00 Wallboard scrapping by nonmaterial dealer employees - nondiscounted rate (to be assigned only by the drywall underwriter)

Applies to contractors or employees of contractors engaged in the process of scrapping drywall. This activity entails the picking up and discarding of the wallboard remnants and scraps.

This classification excludes wallboard installation which is to be reported separately in classification 0524 or 0530; wallboard taping which is to be reported separately in classification 0526 or 0531; wallboard priming and texturing which is to be reported separately in classification 0527 or 0532; and wallboard stocking by nonmaterial dealer employees which is to be reported separately in classification 0528 or 0533.

Special note: The basis of premium for this classification is material finished (square feet).

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-52126, filed 8/28/98, effective 10/1/98. Statutory Authority: RCW 51.04.020, 51.16.035 and 51.32.073. 97-12-011, § 296-17-52126, filed 5/27/97, effective 7/1/97.]

WAC 296-17-522 Classification 0601.

0601-00 Electrical wiring in buildings; electrical wiring, N.O.C.; Permanent flood lighting: Installation

Applies to contractors engaged in the electrical wiring of buildings, or in electrical wiring not covered by another classification (N.O.C.). Work contemplated by this classification is characterized as general electrical work, including installation, service or repair at residential and commercial settings. This classification includes electrical work which generally begins at the power meter and extends to the inside or outside of the building or its exterior setting, including, but not limited to, the installation of the breaker panel, fuses, plugs and snap switches, rough-in electrical work to include the stringing of insulated or encased wiring and mounting of plug-in or switch housing boxes, installation of plug-in, dimmer and switch units; installation of light fixtures, recessed canister and fluorescent lighting, track lighting, and other interior and exterior lighting fixtures, installation of ceiling fans, and the installation of residential and commercial appliances such as built-in microwaves, dishwashers, electric ovens and oven hoods. This classification also includes the installation of permanent flood lighting at stadiums and parks. Generally, flood lighting fixtures are mounted onto poles, buildings, or other structures; the erection or construction of those structures is not included in this classification.

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This classification excludes the installation of overhead or underground power lines and poles by an electric utility company which is to be reported separately in classification 1301; the installation of overhead power lines by a nonelectric utility contractor which is to be reported separately in classification 0509; and the installation of underground power lines by a nonelectric utility contractor which is to be reported separately in classification 0107.

0601-07 Electrical machinery and auxiliary apparatus: Installation and repair

Applies to contractors engaged in the installation and repair of electrical machinery and auxiliary apparatus such as, but not limited to, heavy motors, generators, converters, transformers, compressors and power switchboard equipment. Generally, this type of work occurs at industrial or commercial plants, power plants, or sites where large machinery is to be installed. Work contemplated by this classification includes extending insulator or encased wiring or cable from the power meter, breaker or control panel to the physical location where the machinery is to be installed, and incidental wiring of the machinery or auxiliary apparatus.

0601-08 Temporary floodlights or search lights: Erection

Applies to contractors engaged in the erection or set up of temporary floodlights away from the contractor's premises. Usually, these lights are mounted on a truck or trailer, then transported to the customer site or location where they are operated with use of a generator. Uses of temporary floodlights and searchlights include, but are not limited to, advertising grand openings or special sales at shopping malls, auto dealers, grocery and outlet stores, marking the location of special events such as carnivals or concerts, or at construction project sites.

This classification excludes the erection of permanent floodlight fixtures to poles, buildings or structures which is to be reported separately in classification 0601-00.

0601-15 Television cable: Installation service or repair in buildings by contractor

Applies to contractors engaged in the installation, service or repair of television cable in buildings. This classification includes the installation of television cable lines in residential and commercial buildings and includes the dropping of lines from the pole to the house, mounting of cable control panel boxes to the exterior of buildings, extending cable, mounting multiple line adapter units and relay switches, and affixing the cable end for hook-up to televisions and other stereo components.

This classification excludes the installation of underground or overhead television cable lines when performed by a television cable company which is to be reported separately in classification 1305; installation of underground television cable lines when performed by a nontelevision cable company contractor which is to be reported separately in classification 0107; and installation of overhead television cable lines from pole to pole by a nontelevision cable company contractor which is to be reported separately in classification 0509.

[Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-522, filed 8/28/98, effective 10/1/98; 85-24-032 (Order 85-33), § 296-17-522, filed