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Division III
State of Washington

NO. 31496-1-III

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

MARIA MACHADO,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES STATE OF
WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE.....2

III. STATEMENT OF THE CASE.....2

 A. To Become A Cherry Picker At Lyall Farms, A
 Prospective Employee Must Fill Out I-9 And W-4 Forms,
 And Obtain A Picker Number.....2

 B. Machado Did Not Fill Out I-9 and W-4 Forms Or Obtain
 A Picker Number, But Instead Picked Cherries Using Her
 Daughter-In-Law’s Picker Number, Without Lyall
 Farms’s Permission.....4

 C. Machado Applied For Workers’ Compensation Benefits,
 Which The Department Of Labor And Industries Denied
 Because She Was Not A Lyall Farms Employee.....6

IV. ARGUMENT8

 A. This Court Reviews The Trial Court’s Findings For
 Substantial Evidence.....8

 B. Substantial Evidence Shows That Machado Was Not A
 Lyall Farms Employee When She Was Injured.....9

 1. Lyall Farms did not have the right to control
 Machado’s physical conduct in the performance of
 her duties11

 2. Machado did not consent to the employee-employer
 relationship15

 C. Machado’s Arguments Lack Merit18

 1. Factual doubts are not to be resolved in favor of a
 claimant18

2.	Substantial evidence supports the finding that Machado and Rodriguez entered into a side agreement	18
3.	Substantial evidence supports the finding that Machado did not report to the owner of Lyall Farms or any designated representative	20
4.	Substantial evidence supports the finding that there was no mutual agreement to establish an employee-employer relationship between Machado and Lyall Farms	22
5.	It would be unreasonable and impracticable to find that Lyall Farms employed Machado when she unilaterally picked cherries under Rodriguez's picker number without permission	26
D.	This Court Should Not Award Machado Attorney Fees.....	27
V.	CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<i>Bennerstrom v. Dep't of Labor & Indus.</i> , 120 Wn. App. 853, 86 P.3d 826 (2004).....	12, 14
<i>Berry v. Dep't of Labor & Indus.</i> , 45 Wn. App. 883, 729 P.2d 63 (1986).....	9, 18
<i>Clausen v. Dep't of Labor & Indus.</i> , 15 Wn.2d 62, 129 P.2d 777 (1942).....	passim
<i>Doty v. Town of South Prairie</i> , 155 Wn.2d 527, 120 P.3d 941 (2005).....	14
<i>Ehman v. Dep't of Labor & Indus.</i> , 33 Wn.2d 584, 206 P.2d 787 (1949).....	9
<i>Fisher v. City of Seattle</i> , 62 Wn.2d 800, 384 P.2d 852 (1963).....	10, 15, 17
<i>Jackson v. Harvey</i> , 72 Wn. App. 507, 864 P.2d 975 (1994).....	10, 15, 16, 17
<i>Jenkins v. Dep't of Labor & Indus.</i> , 85 Wn. App. 7, 931 P.2d 907 (1996).....	8, 18
<i>Marsland v. Bullitt Co.</i> , 71 Wn.2d 343, 428 P.2d 586 (1967).....	10
<i>Novenson v. Spokane Culvert & Fabricating Co.</i> , 91 Wn.2d 550, 588 P.2d 1174 (1979).....	10, 15, 17
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	8, 9, 19
<i>Romo v. Dep't of Labor & Indus.</i> , 92 Wn. App. 348, 962 P.2d 844 (1998).....	8

<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	8, 9, 19
<i>Smick v. Burnup & Sims</i> , 35 Wn. App. 276, 666 P.2d 926 (1983).....	9
<i>Tobin v. Dep't Labor & Indus.</i> , 169 Wn.2d 396, 239 P.3d 544 (2010).....	28

Statutes

RCW 51.08.180	10
RCW 51.08.185	9
RCW 51.08.195	10
RCW 51.16.060	26
RCW 51.16.140(1).....	26
RCW 51.16.150	26
RCW 51.16.155	26, 27
RCW 51.32.010	9
RCW 51.52.115	8
RCW 51.52.130(1).....	28
RCW 51.52.140	8

Treatises

1 Arthur Larson and Lex K. Larson, Workmen's Compensation Law § 47.10 (1952).....	15
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Appendices

Appendix A: RCW 51.08.180: "Worker" - Exceptions

Appendix B: RCW 51.08.195: "Employer" and "worker" - Additional exception

Appendix C: Board Decisions

Appendix D: Superior Court Findings of Fact and Conclusions of Law and Judgment

I. INTRODUCTION

Maria Machado showed up at Lyall Farms, LLC, cherry orchard and picked cherries for two days. Rather than follow Lyall Farms's hiring policy by going to the orchard office, filling out I-9 and W-4 forms, and obtaining a picker number, Machado instead had a side agreement with her daughter-in-law, Maria Rodriguez, that they both would use Rodriguez's picker number and then split the proceeds. They did not tell Lyall Farms about this agreement, and Lyall Farms was unaware that Machado was in its orchard picking cherries. She did not obtain permission and used a ladder assigned to someone who did not show up.

Machado sought workers' compensation benefits for an injury she sustained at Lyall Farms. But the Department of Labor and Industries rejected her claim, and the Board of Industrial Insurance Appeals and the trial court affirmed that decision. The Board and trial court correctly found that Lyall Farms did not employ Machado.

This Court should affirm. Substantial evidence shows that Lyall Farms did not have the right to control Machado as an employee, where it did not know of her existence. Substantial evidence also shows that Machado did not consent to the employee-employer relationship, where she failed to satisfy the conditions of employment or otherwise to obtain a mutual agreement with Lyall Farms to forego those requirements.

II. ISSUE

Does substantial evidence support the trial court's finding that Machado was not a Lyall Farms employee when she injured herself?

III. STATEMENT OF THE CASE

A. **To Become A Cherry Picker At Lyall Farms, A Prospective Employee Must Fill Out I-9 And W-4 Forms, And Obtain A Picker Number**

Frank Lyall, along with his parents and brother, run and operate Lyall Farms LLC, a nearly 400 acre orchard that grows cherries, among other fruits. BR Lyall at 5-6.¹ A cherry harvest season usually lasts two to three weeks, and the trees are so full of fruit and foliage that it is difficult to see more than 20 feet when working in the orchard. BR Lyall at 10, 25-26. It is a "jungle." BR Lyall at 10.

During the 2006 harvest season, Lyall Farms hired between 150 to 170 people to pick the cherries. BR Lyall at 6. In order to be employed as a picker at Lyall Farms, a prospective employee needs to go to Lyall's mother's house or the orchard office and fill out W-4 and I-9 forms. BR Lyall at 6-7. The person would have to provide two pieces of acceptable identification and a social security number. BR Lyall at 6-7. There is no formal application, but someone might talk to the prospective employee to determine his or her qualifications. BR Lyall at 7. Lyall Farms assigns

¹"BR" refers to the Board's certified appeal board record. This brief references witness testimony by BR, last name, and page number.

the prospective employee a picker number, and he or she is then employed. BR Lyall at 6-7. Lyall Farms gives the employee a three by five inch card with their name and picker number on it. BR Lyall at 8-9.

The picker numbers serve two purposes. BR Lyall at 8-10. First, Lyall Farms uses the picker numbers to calculate the pickers' pay. BR Lyall at 8-9. When the pickers check out bins, they put their numbers on the bins. BR Lyall at 8-9. After filling the bins with cherries, the bins are weighed, and the weights are attributed to the picker numbers. BR Lyall at 8-9. The bins must have a picker number in order to go from the orchard to the warehouse. BR Lyall at 8. At the harvest's end, Lyall Farms pays the pickers based on the pounds attributed to the picker number. BR Rodriguez at 9; BR Rivera at 19.

Second, the picker numbers help Lyall Farms keep track of who is picking in the orchard. BR Lyall at 9-10. When Lyall Farms is not busy, it might send someone around to ask if people filled out their forms and obtained their picker numbers. BR Lyall at 9. Someone does not randomly check the workers for picker numbers. BR Lyall at 29. On occasion, a person might begin picking without a picker number or under a family member's picker number, but this practice violates law. BR Lyall at 31-32. Lyall Farms requires each person to have a separate picker number. BR Lyall at 32-33. If a prospective worker did not fill out the

paperwork, Lyall Farms “always” sends someone to check and make sure that the paperwork is completed. BR Lyall at 9. Someone who does not have a picker number would need to go to the office to fill out the paperwork and to obtain a picker number. BR Lyall at 8, 13, 33.

B. Machado Did Not Fill Out I-9 and W-4 Forms Or Obtain A Picker Number, But Instead Picked Cherries Using Her Daughter-In-Law’s Picker Number, Without Lyall Farms’s Permission

In July 2006, Maria Rodriguez began working as a Lyall Farms picker. BR Rodriguez at 7. Before beginning work, she provided her name and address, and received a picker number. BR Rodriguez at 10-11. After picking for two days, she filled out the application and continued picking cherries. BR Rodriguez at 10-11.

Rodriguez and her mother-in-law, Maria Machado, agreed that they would both pick under Rodriguez’s bin number and split the paycheck. BR Rodriguez at 9, 13-14. Neither Rodriguez nor Machado informed Lyall Farms about this arrangement. BR Rodriguez at 9. Although Machado claims that she intended to get a picker number, she never applied for one—either at Lyalls’ home or the office. BR Machado at 30-31, 36; BR Lyall at 11.

Machado showed up at Lyall Farms for about two days, picking cherries. BR Machado at 32. She used a Lyall Farms ladder assigned to

another picker who did not show up. BR Rodriguez at 9-10. Machado claims that field foreman Miguel Barajas and a young girl told her that somebody would come by to take her name and to provide the application paperwork. BR Machado at 35-36. But Rodriguez testified that Machado never talked to Barajas, and Lyall testified that Barajas's job description did not include randomly checking if people had picker numbers. BR Rodriguez at 14; BR Lyall at 12-13. Anyone without a picker number would be directed to go to the office to fill out the forms rather than be told to wait in the orchard. BR Lyall at 8, 13.

After two days, Machado fell from a ladder, injuring her back and legs. BR Machado at 31-32, 34. Rodriguez contacted Barajas. BR Rodriguez at 14; BR Lyall at 27-28. Lyall's wife or mother took Machado to the hospital. BR Machado at 32. That day, Lyall met Machado, who first told Lyall her last name was Perez, but when he asked for identification, she gave the name Reyes. BR Lyall at 28.

At the end of the season, Lyall Farms wrote a paycheck to Rodriguez for all the cherries that she and Machado had picked. BR Rodriguez at 9, 13. Pursuant to their side agreement, Rodriguez paid Machado half the paycheck. BR Rodriguez at 14; BR Machado at 36. Machado first went to the office after her injury, and she never applied for

a picker number and never filled out the paperwork to be employed as a Lyall Farms cherry picker. BR Machado at 30, 36.

C. Machado Applied For Workers' Compensation Benefits, Which The Department Of Labor And Industries Denied Because She Was Not A Lyall Farms Employee

Machado filed a claim for workers' compensation benefits with the Department of Labor and Industries. CP at 34. The Department denied the claim, reasoning that Machado and Lyall Farms did not have an employee-employer relationship. CP at 34. Machado appealed to the Board of Industrial Insurance Appeals. CP at 34.

After listening to the witnesses and weighing the evidence, the industrial appeals judge issued a proposed decision and order, concluding that the Industrial Insurance Act did not entitle Machado to benefits because she was not a Lyall Farms employee when she was injured. CP at 27-35. The three-member Board of Industrial Insurance Appeals denied Machado's petition for review and adopted the proposed decision and order in full. CP at 25.

Machado appealed to Yakima County Superior Court. CP at 1-2. On de novo review of the Board's decision, the trial court found that Machado was not a Lyall Farms employee and thus not entitled to benefits. CP at 34-35, 43. Adopting the Board's findings, the trial court found that when she fell from the ladder, Lyall Farms did not know that

Machado was working in the orchard or that Machado had an agreement with Rodriguez to use her picker number:

2. On July 1, 2006, Mrs. Machado incurred an injury when she fell from a ladder while she was harvesting cherries at an orchard owned by Lyall Farms.

3. Prior to the fall, Mrs. Machado's daughter-in-law, Maria Rodriguez, was employed as a harvest worker at Lyall Farms. Mrs. Machado accompanied her daughter-in-law to the orchard and they entered into an arrangement where they would both harvest cherries under Mrs. Rodriguez's designated picker number. The two would later split the proceeds of the check that was to be paid by Lyall Farms to Mrs. Rodriguez.

4. Prior to her fall, Mrs. Machado did not report to the owner of Lyall Farms or any designated representative. She did not obtain permission, and did not show the necessary identification or complete the requisite paperwork to work at the orchard.

5. The employer was neither aware that Mrs. Machado was working at the orchard, nor that she entered into an arrangement to harvest cherries under Mrs. Rodriguez's designated number. There was no mutual agreement to establish an employer-employee relationship between the claimant and Lyall Farms.

CP 34-35, 43. The trial court affirmed the Board's decision in full. CP

43-44. Machado now appeals.

IV. ARGUMENT

A. This Court Reviews The Trial Court's Findings For Substantial Evidence

Superior courts review workers' compensation appeals de novo, based on the evidence presented to the Board. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). Machado now asks for a de novo review of the record. App. Br. at 18. This Court, however, reviews the superior court's decisions using ordinary civil standards of review. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). While this Court reviews legal issues de novo, it reviews the superior court's factual findings for substantial evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Rogers*, 151 Wn. App. at 180. This Court views the evidence in the light most favorable to the non-appealing party. *Rogers*, 151 Wn. App. at 180.

Persons seeking industrial insurance benefits must prove their entitlement to such benefits, including that they are employees as defined by the Industrial Insurance Act. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996). Although the Industrial Insurance Act is to be liberally construed, such construction "only applies

in favor of persons who come within the Act's terms" and "does not apply to defining who those persons might be." *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1986). Liberal construction does not apply to factual questions. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

Machado challenges three specific findings and the overall finding that she was not a Lyall Farms employee. Whether a person is an employee under the Industrial Insurance Act is a factual question. *Smick v. Burnup & Sims*, 35 Wn. App. 276, 279, 666 P.2d 926 (1983). As Machado admits, this Court reviews the trial court's findings for substantial evidence, viewing the evidence in the light most favorable to the Department. *Ruse*, 138 Wn.2d at 5; *Rogers*, 151 Wn. App. at 180; App. Br. at 5-7.

B. Substantial Evidence Shows That Machado Was Not A Lyall Farms Employee When She Was Injured

Machado was not an employee under the Industrial Insurance Act when she was injured, so she was not entitled to benefits. To receive benefits, a claimant must be a "worker injured in the course of his or her employment." RCW 51.32.010. The terms "worker" and "employee" are synonymous. RCW 51.08.185. A "worker" is "every person in this state who is engaged in the employment of an employer under this title,

whether by way of manual labor or otherwise in the course of his or her employment.” RCW 51.08.180.² “[E]mployment,” in turn, constitutes “services performed by an individual for remuneration.” RCW 51.08.195. Our Supreme Court has explained that, for purposes of workers’ compensation, an employment relationship exists when (1) the employer has the right to control the worker’s physical conduct in the performance of her duties, and (2) the employee consents to this relationship. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979); *see also Marsland v. Bullitt Co.*, 71 Wn.2d 343, 345, 428 P.2d 586 (1967); *Fisher v. City of Seattle*, 62 Wn.2d 800, 804-06, 384 P.2d 852 (1963). Regarding the consent prong, a “mutual agreement must exist between the employee and the employer to establish an employee-employer relationship.” *Novenson*, 91 Wn.2d at 553; *see Fisher*, 62 Wn.2d at 804-05 (emphasizing necessity of mutual agreement).

Whether an employment relationship exists should be decided on the specific facts of each case. *Clausen*, 15 Wn.2d at 69. A claimant must demonstrate by objective evidence that an employment relationship existed. *Jackson v. Harvey*, 72 Wn. App. 507, 519, 864 P.2d 975 (1994).

²A worker may also be a person working under an independent contract, the essence of which is personal labor. RCW 51.08.180. Machado has not claimed that she was such an independent contractor.

A claimant's "bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Id.*

Here, substantial evidence shows that Lyall Farms did not have the right to exert control over Machado, where it was unaware Machado worked on the farm, did not direct Machado where to work, and did not pay Machado. Substantial evidence also shows that Machado did not consent to the employee-employer relationship, where she failed to satisfy the conditions of employment or otherwise to obtain a mutual agreement with Lyall Farms to forego those requirements.

1. Lyall Farms did not have the right to control Machado's physical conduct in the performance of her duties

Substantial evidence shows that Lyall Farms did not have the right to control Machado's physical conduct. It does not matter whether an employer actually controls the person's work, the employer must have the right to do so. *Clausen*, 15 Wn.2d at 69-70. Courts look to seven factors when determining if an employer has the right to control:

(1) who controls the work to be done; (2) who determines the qualifications; (3) setting pay and hours of work and issuing paychecks; (4) day-to-day supervision responsibilities; (5) providing work equipment; (6) directing what work is to be done; and (7) conducting safety training.

Bennerstrom v. Dep't of Labor & Indus., 120 Wn. App. 853, 863, 86 P.3d 826 (2004).

Here, substantial evidence shows that Lyall Farms did not have the right to control Machado. First, Lyall Farms did not know about Machado picking cherries in the orchard. Lyall testified that he had no record of Machado working on the farm, and Machado admitted that she never filled out the necessary forms or obtained a picker number. App. Br. at 10-11; BR Machado at 36; BR Lyall at 11. Machado concedes that Lyall Farms had no knowledge of her side agreement with Rodriguez to use her picker number and to split the proceeds. App. Br. at 9-10, 12.

Although Machado claimed that she talked with Barajas and a “young” “girl” about filling out the paperwork, other testimony discredited her version. BR Machado at 35-36. Regarding Barajas, Rodriguez—who had reason to bolster Machado’s version—testified that Machado did not talk to Barajas until after her injury. BR Rodriguez at 14. And Lyall testified that Barajas’s job description did not include randomly checking if people in the orchard had picker numbers. BR Lyall at 12-13, 29.

Regarding Machado’s claim that a young girl told her that someone would come by and provide the paperwork, the lack of specificity alone would allow the factfinder to find that such a conversation did not occur. *See* BR Machado at 35-36. Even if a young

girl did talk to Machado, there is no evidence establishing that the young girl was Lyall Farms's representative. If anything, the lone descriptor of this person (that she is young) might indicate that Lyall Farms did not task her with handling application procedures.³

Viewing the evidence in the light most favorable to the Department, Lyall Farms had no knowledge that Machado picked cherries in its orchard, acting pursuant to a side agreement with her daughter-in-law. Without the knowledge of Machado's existence, Lyall Farms could not have the right to control Machado's work. For this reason alone, Machado was not Lyall Farms's employee.

Even putting that fact aside for a moment, other factors indicate that Lyall Farms did not have a right to control Machado. While Barajas placed pickers in the rows, the pickers had control over their work. BR Lyall at 12. Given that Lyall Farms paid by the weight and that there is no evidence that Machado could not freely enter and leave the orchard throughout the day, a factfinder could reasonably infer that Machado determined how many cherries she wanted to pick in a given day. BR Rodriguez at 9; BR Rivera at 19. Given the pay structure and the harvest

³Machado later testified that "the girl that would come by" put a piece of paper on the bin and gave another piece of paper to Rodriguez for pay purposes. BR Machado at 36. It is unclear whether Machado referred to the same person, and even if so, these facts alone do not show that the girl had the power to hire Machado or otherwise to speak on Lyall Farms's behalf.

season's short duration, a factfinder could also infer that daylight ultimately dictated how much Machado worked. BR Lyall at 25-26. Machado thus controlled how and when she worked. *See Bennerstrom*, 120 Wn. App. at 863.

Machado also never received a paycheck from Lyall Farms, but instead Rodriguez paid Machado her half pursuant to their side agreement. BR Machado at 35. This is a particularly important factor because of the nature of the work and because the Supreme Court has held that "the very basis of the employee-employer relationship is the performance of service in return for some kind of remuneration therefor." *Doty v. Town of South Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005); *see also Clausen*, 15 Wn.2d at 69; RCW 51.08.195. Further, while Lyall Farms provided ladders and bins to its employees, Machado without permission borrowed a ladder assigned to someone who did not show up, putting her cherries in Rodriguez's assigned bins. BR Rodriguez at 9-10.

The evidence thus shows that Machado either acted on her own accord or acted pursuant to her side agreement with Rodriguez. Lyall Farms did not have a say. These factors thus show that Lyall Farms did not have a right to control Machado.⁴ Substantial evidence shows that

⁴As noted by the industrial appeals judge, Machado made no effort to show that she had an employee-employer relationship with Rodriguez when she put forth her case.

Machado failed to prove the first prong of the employee-employer test, so this Court should affirm.

2. Machado did not consent to the employee-employer relationship

Machado did not consent to the employee-employer relationship, where she failed to satisfy the conditions of employment or otherwise to obtain a mutual agreement to forego those requirements. In workers' compensation law, an employment relationship affects the employee's rights as much as the employer. *Jackson*, 72 Wn. App. at 516. The relationship is an agreement between the two, so "the consent of the employee in entering the relationship becomes crucial in ascertaining whether an employment relationship exists." *Id.* (citing *Novenson*, 91 Wn.2d at 555); *see also Fisher*, 62 Wn.2d at 805 (citing 1 Arthur Larson and Lex K. Larson, *Workmen's Compensation Law* § 47.10 (1952)).

While courts primarily focus on the employee's consent to the employment relationship, they also repeatedly have held that the employee and employer must mutually enter into the relationship. *Novenson*, 91 Wn.2d at 553; *Fisher*, 62 Wn.2d at 804; *Jackson*, 72 Wn. App. at 515, 518. A claimant's bare assertions do not establish an employment

CP at 34. The Department accordingly will not address whether such a relationship existed.

relationship, but she must prove such a relationship by objective evidence. *Jackson*, 72 Wn. App. at 519.

Here, to be a Lyall Farms's employee, a person had to fill out the forms and obtain a picker number. BR Lyall at 6-7. The forms ensured that Lyall Farms complied with state and federal law, while assigning picker numbers helped Lyall Farms keep proper records and provided a mechanism to pay its employees. BR Lyall at 8-10. To fill out the forms and obtain the picker number, the prospective employee would need to go to the orchard's office or to Lyall's home. BR Lyall at 6-7. Machado concedes that she neither filled out the necessary paperwork nor obtained a picker number. App. Br. at 10-12; BR Machado at 36; BR Lyall at 11. She also concedes that she never went to the office to get the paperwork and picker number. App. Br. at 10-12; 10/2/07 Tr. at 36; BR Lyall at 11. Machado thus did not consent to the employment relationship, where she failed to take the requisite steps to be a Lyall Farms employee.

Nor did Machado obtain implied permission from Lyall Farms to forego those requirements. Contrary to Machado's bare, self-serving assertions otherwise, no Lyall Farms representative knew that Machado picked cherries in its orchard. *Contra* App. Br. at 11-12. Both Rodriguez and Lyall disputed that Barajas talked with or had the power to hire Machado. BR Rodriguez at 14; BR Lyall at 12-13. And Machado's

description of a young girl talking to her is either not credible or not specific enough to establish that the girl was a Lyall Farms representative. *See* BR Machado at 35-36. Lyall Farms did not give implied permission to forego the paperwork and picker number requirements.

Further, if Lyall Farms learns about someone picking cherries without filling out the necessary paperwork or obtaining a picker number, the person would be directed to go to the orchard office. BR Lyall at 8, 13, 33. This process is contrary to Machado's assertion that Barajas and the young girl told her that someone would stop by and provide the paperwork. BR Machado at 35-36; App. Br. at 10, 15. That Lyall contradicted Machado's self-serving version shows that she is not credible and that she never took steps to obtain implied permission from Lyall Farms to forego the paperwork and picker number requirements. Since there was no implied permission to forego the forms and picker number requirements, no Lyall Farms representative hired Machado. Such mutual consent is necessary to establish an employee-employer relationship. *Novenson*, 91 Wn.2d at 553; *Fisher*, 62 Wn.2d at 804; *Jackson*, 72 Wn. App. at 515, 518. Substantial evidence shows that Machado did not consent to the employee-employer relationship.

C. Machado's Arguments Lack Merit

Machado makes several factual and legal arguments to bolster her theory. In so doing, she either misstates or provides an incomplete statement of the facts and law. This Court should reject them.

1. Factual doubts are not to be resolved in favor of a claimant

Machado argues that because courts construe the Industrial Insurance Act liberally, all doubts must be resolved in the worker's favor. App. Br. at 7. She posits that the trial court erred by not believing her testimony, implying that any evidentiary dispute should have been resolved in her favor. *See* App. Br. at 8-9, 13. This misstates the law.

The Industrial Insurance Act's liberal-construction requirement does not apply to factual questions, such as whether a person is covered as an employee. *Clausen*, 15 Wn.2d at 68; *Jenkins*, 85 Wn. App. 14; *Berry*, 45 Wn. App. at 884. Machado thus had to prove that she was an employee, and neither the Board nor the trial court had to resolve factual disputes in her favor. She failed to do so, and now misstates the law.

2. Substantial evidence supports the finding that Machado and Rodriguez entered into a side agreement

Machado challenges Finding 3, which finds that Machado and Rodriguez entered into an agreement to pick cherries under Rodriguez's picker number and to split the proceeds. App. Br. at 7; CP at 34.

Machado does not dispute the actual finding, but posits that the Board and trial court ignored testimony that the agreement was temporary. App. Br. at 7-8. She misapplies the substantial evidence test.

Under the substantial evidence test, the appellate court, viewing the evidence in the light most favorable to the non-appealing party, including all credibility determinations, ascertains whether substantial evidence supports the verdict. *See Ruse*, 138 Wn.2d at 5; *Rogers*, 151 Wn. App. at 180. While both Rodriguez and Machado claimed that Machado was going to fill out the application and obtain a picker number, the factfinder could find those statements not credible and not adopt Machado's proposed finding. *See* BR Rodriguez at 9, 13, 14; BR Machado at 30-31. Neither Rodriguez nor Machado deviated from their side agreement. Machado never went to the orchard office to obtain an application and picker number, even after her injury. App. Br. at 10-12; BR Machado at 36; BR Lyall at 11. And pursuant to the agreement, the paycheck for all the cherries went to Rodriguez, who paid Machado her half. BR Rodriguez at 9, 13-14; BR Machado at 36. At the orchard, Machado did not obtain permission to use a ladder, but instead used a ladder designated for someone who did not show up. BR Rodriguez at 9-10. Rodriguez's and Machado's actions contradict their testimony, so the

factfinder properly found them not credible. Substantial evidence supports Finding 3.

3. Substantial evidence supports the finding that Machado did not report to the owner of Lyall Farms or any designated representative

Machado challenges Finding 4, which finds that Machado did not report to the owner or any designated representative and that she did not obtain permission or complete the requisite paperwork to work at the orchard. App. Br. at 9-10; CP at 34. Machado argues that the finding is incorrect because she testified that she reported to two designated Lyall Farms employees. App Br. at 9-11. Again, Machado improperly asks this Court to act as factfinder and reweigh the evidence.

As discussed above, viewing the facts in the light most favorable to the Department, a factfinder could find that Machado's version of events was not credible. *See supra* IV.B.2. Rodriguez testified that Machado did not talk to Barajas until after her injury, and Lyall testified that Barajas's job description does not include randomly checking workers' picker numbers. BR Rodriguez at 14; BR Lyall at 12-13. And the description of the young girl was so vague that the factfinder could conclude either that she did not exist or that she was not a Lyall Farms representative. *See* BR Machado at 35-36.

Machado argues that not all employees complete the application process before picking cherries, and she was one such employee. App. Br. at 11. While Rodriguez, Rivera, and Lyall testified to instances where employees did not initially fill out the forms and obtain picker numbers, those circumstances are different than what occurred here. BR Rodriguez at 10-11; BR Rivera at 20, 22; BR Lyall at 8-9. Lyall Farms knew about Rodriguez and assigned her a picker number, while Machado never sought to obtain a picker number. BR Rodriguez at 10-11; BR Machado at 36; BR Lyall at 11. Rivera testified that she always obtained a supervisor's permission when adding another person to her picker number; Rodriguez and Machado never did. BR Rodriguez at 9; BR Rivera at 22; BR Machado at 30, 36. Lyall testified that if someone does not have a picker number, she would be directed to go to the orchard office to complete the application process. BR Lyall at 8. Since Lyall Farms was unaware of Machado's existence, it could not direct her to get the picker number. BR Lyall at 10-11. Machado's argument fails, and substantial evidence supports Finding 4.

4. Substantial evidence supports the finding that there was no mutual agreement to establish an employee-employer relationship between Machado and Lyall Farms

Machado next challenges Finding 5, which finds that there was no mutual agreement to establish an employee-employer relationship. App. Br. at 12-18. To not belabor the point, the analysis above shows that substantial evidence supports this finding. With that said, a few arguments that need to be addressed.

First, Machado's assertion that Barajas made hiring decisions is not supported by the testimony. *Contra* App. Br. at 15. While a former Lyall Farms employee, Rosa Rivera, testified that Barajas hired people, Lyall testified that Barajas is a field foreman, whose job is to place the pickers, assign ladders, and ensure quality control:

Q. Okay, and what does a field foreman do?

A. In Mr. Barajas's case, he doesn't check out bins except on very exceptional locations. That's usually done by other people. His job is to place pickers in certain rows that the cherries are – where they are ready to be picked, assign ladders, make – to a degree make sure that there is a certain amount of quality control. There is a number of different jobs in that part of – that part of the operation, and they somewhat overlap a bit.

BR Lyall at 12; BR Rivera at 20. Lyall never testified that Barajas made hiring decisions. If anything, since employees have to fill out paperwork and obtain a picker number at the orchard office or Lyall's home, the

testimony implies that only the Lyalls make hiring decisions. BR Lyall at 8, 13, 33. Regardless, this point is moot because Barajas did not talk to Machado until after the injury. BR Rodriguez at 14.

Second, Machado contends that if no employee-employer relationship existed, she would have been asked to leave the orchard. App. Br. at 16. This argument relies on the flawed assumption that Lyall Farms was aware of Machado picking cherries. Also, Lyall Farms would not have told Machado to leave, but to go to the orchard office to apply to become an employee. BR Lyall at 8, 13, 33. Machado's argument fails.

Third, Machado takes Lyall's testimony out of context when she quotes Lyall's testimony that "we always send somebody around to check and make sure that it's done if for some reason somebody may not initially filled one out." BR Lyall at 9; App. Br. at 16. Before making this statement, Lyall first explained that if someone has a bin in the orchard without a picker number, the person would be directed to go to the office and complete the application process. BR Lyall at 8. Lyall testified that if someone out in the orchard did not fill out the forms and obtain a picker number, then Lyall Farms might send a spare employee around to ask if the person filled out the forms and obtained a picker number. BR Lyall at 9. Responding to a clarifying question, Lyall then provided the statement at issue:

Q. And just so I am clear, the I-9 and the W-4 form, that's not something that's done - - or is that something that's done initially when they come in generally, or is that - - does that usually happen at another time?

A. It may be - - generally we try and do it initially, but for a number of reasons, sometimes it's not done immediately, and so - - but because, you know, to fulfill legal requirements, it's completely necessary, we always send somebody around to check and make sure that it's done if for some reason somebody may have not initially filled one out.

BR Lyall at 9. Lyall later clarified that someone does not "go out and randomly check the workers for picker numbers." BR Lyall at 29. Someone might go out to check on a picker number if a question about a worker's picker number comes up. BR Lyall at 29-30. Picker numbers are also used when assigning ladders. BR Lyall at 30.

Viewing the facts in the light most favorable to the Department, Lyall Farms always sends a representative out to follow through with the application process if it knows that a person picking cherries has not filled out the forms or obtained a picker number. BR Lyall 8-9. When there is a question about whether someone has a picker number, Lyall Farms might send a representative to check and see if she has a picker number. BR Lyall 8-9, 29. Lyall Farms does not randomly check for picker numbers. BR Lyall at 29.

Machado showed up to the orchard without going to the office, used Rodriguez's bin and a ladder assigned to someone else, and never talked to Lyall Farms representatives until after her injury. BR Rodriguez at 9-10, 14; BR Machado at 36; BR Lyall at 12-13. Lyall Farms thus did not know that Machado was picking cherries in its orchard, so it would not have asked her about filling out forms or obtaining a picker number. Reading Lyall's testimony in its proper context demonstrates that Lyall Farms acted consistently with its policies. Machado's argument fails.

Finally, Machado makes much of the fact that she used a Lyall Farms ladder. App. Br. at 16, 18-19. She neglects to mention that Lyall Farms assigned the ladder to someone else who had a picker number. BR Rodriguez at 9-10. Rodriguez testified that Barajas told her that the ladder was not usable. Br. Rodriguez at 10. Using the ladder violated Lyall Farms's policy that workers present their card with their name and picker number to get a ladder. BR Lyall at 16. Machado thus used a ladder that Rodriguez knew was not usable and that was assigned to somebody else. The Board and trial court could reasonably find that Machado was not acting pursuant to a mutual agreement to have an employee-employer relationship, but rather that she acted pursuant to her side agreement with Rodriguez, leaving Lyall Farms in the dark.

5. It would be unreasonable and impracticable to find that Lyall Farms employed Machado when she unilaterally picked cherries under Rodriguez's picker number without permission

This Court should agree with the Board's conclusion that it "would be unreasonable and impractical to unilaterally impose an employer-employee relationship upon the employer under these circumstances." CP at 33. State law requires firms to pay premiums to the Department for their employees for workers' compensation insurance. RCW 51.16.060, .140(1). Adopting Machado's reasoning, a firm would have to pay premiums for the workers it knows about, as well as the people who unilaterally enter its property and act pursuant to a side agreement with another employee. Firms that failed to pay premiums on these unknown workers would be subject to penalties. *See* RCW 51.16.150, .155.⁵

⁵RCW 51.16.150 provides:

If any employer shall default in any payment to any fund, the sum due may be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. If such default occurs after demand, the director may require from the defaulting employer a bond to the state for the benefit of any fund, with surety to the director's satisfaction, in the penalty of double the amount of the estimated payments which will be required from such employer into the said funds for and during the ensuing one year, together with any penalty or penalties incurred. In case of refusal or failure after written demand personally served to furnish such bond, the state shall be entitled to an injunction restraining the delinquent from prosecuting an occupation or work until such bond is furnished, and until all delinquent premiums, penalties, interest, and costs are paid, conditioned for the prompt and punctual making of all payments into said funds during such periods, and any sale, transfer, or lease attempted to be made by such delinquent during the period of any of

Machado's proposed scheme would not only be impracticable and unreasonable for firms, but it also would be difficult for the Department to enforce. The Board properly recognized this concern, and this Court should do the same.

D. This Court Should Not Award Machado Attorney Fees

This Court should deny Machado's attorney fee request. App. Br. at 20. Attorney fees may be awarded to a worker who prevails in court only if (1) the Board decision is "reversed or modified" and (2) the litigation's result affected the Department's "accident fund or medical aid

the defaults herein mentioned, of his or her works, plant, or lease thereto, shall be invalid until all past delinquencies are made good, and such bond furnished.

RCW 51.16.155 provides:

In every case where an employer insured with the state fails or refuses to file any report of payroll required by the department and fails or refuses to pay the premiums due on such unreported payroll, the department shall have authority to estimate such payroll and the premiums due thereon and collect premiums on the basis of such estimate.

If the report required and the premiums due thereon are not made within ten days from the mailing of such demand by the department, which shall include the amount of premiums estimated by the department, the employer shall be in default as provided by this title and the department may have and recover judgment, warrant, or file liens for such estimated premium or the actual premium, whichever is greater.

The director or the director's designee may compromise the amount of premiums estimated by the department, whether reduced to judgment or otherwise, arising under this title if collection of the premiums estimated by the department would be against equity and good conscience.

fund.” RCW 51.52.130(1); *Tobin v. Dep’t Labor & Indus.*, 169 Wn.2d 396, 405-06, 239 P.3d 544 (2010). Because Machado should not prevail in this appeal, this Court should deny her attorney fee request.

V. CONCLUSION

Machado was not a Lyall Farms employee, so the Board and trial court properly concluded that she was not entitled to workers’ compensation benefits. This Court should affirm.

RESPECTFULLY SUBMITTED this 30th day of July, 2013.

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Attorney General



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Appendix A

RCW 51.08.180: "Worker" - Exceptions

RCW 51.08.180

"Worker" — Exceptions.

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

[2008 c 102 § 3; 1991 c 246 § 3; 1987 c 175 § 3; 1983 c 97 § 1; 1982 c 80 § 1; 1981 c 128 § 2; 1977 ex.s. c 350 § 15; 1961 c 23 § 51.08.180. Prior: 1957 c 70 § 20; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1937 c 211 § 2; RRS § 7674-1.]

Notes:

Conflict with federal requirements -- Severability -- 2008 c 102: See notes following RCW 51.08.070.

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

Appendix B

RCW 51.08.195: "Employer" and "worker" - Additional exception

RCW 51.08.195

"Employer" and "worker" — Additional exception.

As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

[2008 c 102 § 4; 1991 c 246 § 1.]

Notes:

Conflict with federal requirements -- Severability -- 2008 c 102: See notes following RCW 51.08.070.

Effective date -- 1991 c 246: "This act shall take effect January 1, 1992." [1991 c 246 § 10.]

Conflict with federal requirements -- 1991 c 246: "If any part of this act is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is hereby declared to be inoperative solely to the extent of the conflict, and such finding or determination shall not affect the operation of the remainder of this act. The rules under this act shall meet federal requirements which are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state." [1991 c 246 § 9.]

Appendix C

Board Decisions

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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

In re: **MARIA MACHADO**

Docket No. 06 22466

Claim No. AB-28403

**ORDER DENYING PETITION
FOR REVIEW**

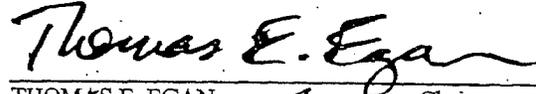
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **DANIEL W. JOHNSON** on **December 12, 2007**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **January 30, 2008**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: February 05, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS



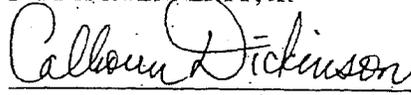
THOMAS E. EGAN

Chairperson



FRANK E. FENBERTY, JR.

Member



CALHOUN DICKINSON

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

APPENDIX A

31496 1-000000025

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

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OFFICE OF THE ATTORNEY GENERAL
500 MORAIN #1250
KENNEWICK, WA 99336

Dated at Olympia, Washington 2/5/2008
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:


DAVID E. THREEDY
Executive Secretary

31496 1-000000026

BEFORE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: MARIA MACHADO) DOCKET NO. 06 22466
2 CLAIM NO. AB-28403) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Daniel W. Johnson
4

5 APPEARANCES:

6 Claimant, Maria Machado, by
7 Smart, Connell & Childers, P.S., per
8 Christopher L. Childers

9 Employer, Lyall Farms by
10 Frank Lyall, Owner

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Mark Bunch, Assistant Attorney General

14
15 The claimant, Maria Machado, filed an appeal with the Board of Industrial Insurance Appeals
16 on December 26, 2006, from an order of the Department of Labor and Industries dated October 24,
17 2006. In that order, the Department rejected the claim. The Department order is **AFFIRMED**.

18 PROCEDURAL AND EVIDENTIARY MATTERS

19 On March 19, 2007, the parties agreed to include the Jurisdictional History in the Board's
20 record. That history establishes the Board's jurisdiction in this appeal. At the initial hearing the
21 parties further agreed that on or about July 1, 2006, Mrs. Machado incurred an "injury" within the
22 meaning of that term as set forth in the RCW 51.08.100. Based upon the stipulation the parties
23 agreed medical testimony was not necessary.

24 RELIEF REQUESTED

25 The claimant contends the Department should have allowed her claim for an industrial injury
26 that occurred on July 1, 2006, while she was in the course of employment with Lyall Farms.

27 EVIDENCE PRESENTED

28 **Maria E. Rodriguez**

29 Maria E. Rodriguez is Maria Machado's daughter-in-law. They worked together picking
30 cherries in July 2006. 10/2/07 Tr. at 7. Mrs. Machado started working two days after
31 Mrs. Rodriguez. They entered into an arrangement where they would harvest cherries together and
32 share the proceeds. 10/2/07 Tr. at 8. After Mrs. Machado had been working for three or four days

1 she fell from a ladder and was taken to the hospital. Mrs. Rodriguez explained that ladders used to
2 pick cherries were left at the end of the day, and on the following morning the workers would begin
3 where they left off. They were paid by the pound when the cherry harvest was finished. The
4 harvest lasted two weeks.

5 On cross-examination Mrs. Rodriguez testified that under the arrangement with
6 Mrs. Machado each would be paid for one half of the bins they picked. They did not discuss their
7 arrangement with the owner. 10/2/07 Tr. at 9. They obtained the ladder her mother-in-law used
8 from another worker who did not work during those days. 10/2/07 Tr. at 10. When Mrs. Rodriguez
9 started the employer took her name and address, and gave her a picker number. After two days
10 she filled out an application. 10/2/07 Tr. at 11. She never harvested cherries without a picker
11 number.

12 On further examination Mrs. Rodriguez said the supervisor, Mr. Barajas, would check to
13 make sure people were working. Other people would periodically come to check the number on the
14 bins. When the bins were filled those people would take them away and weigh them to see how
15 many pounds the workers picked. The arrangement was Mrs. Rodriguez would split her paycheck
16 with Mrs. Machado after they were paid. 10/2/07 Tr. at 13. Before Mrs. Machado fell they were
17 picking three bins per day. Each picked one half of the bins. According to Mrs. Rodriguez,
18 Mrs. Machado was going to get her own number so that she could work. They would see
19 Mr. Barajas every day. However, Mrs. Machado did not speak to Mr. Barajas until after she fell.
20 10/2/07 Tr. at 14. After the harvest was completed Mrs. Rodriguez obtained a check in her name,
21 and she gave half of the proceeds from that to Mrs. Machado for "whatever she earned." 10/2/07
22 Tr. at 16. Mrs. Rodriguez does not know of any other workers at the orchard who had a similar
23 arrangement.

24 **Rosa Rivera**

25 Ms. Rivera was picking cherries at the orchard when Mrs. Machado fell from a ladder and
26 injured herself in July 2006. Ms. Rivera started working at the beginning of the cherry season, and
27 had worked at that orchard for three or four years. 10/2/07 Tr. at 18. Before she started work she
28 received a picker number. She would place the number on her bin so she would get credit for the
29 cherries that she picked. When they came to collect the bin they would ask for her name and would
30 put the number on the bin. The employer kept track of the number of pounds per bin so they could
31 pay the correct amount to the workers. The workers were paid by the pound and received a check
32 at the end of the season. 10/2/07 Tr. at 19.

1 Mr. Barajas was the main person who hires the workers. At the beginning of the season
2 Ms. Rivera called Mr. Barajas and he told her when the cherry harvest started. On that day the
3 workers went to a trailer at the orchard where they were hired. When they were hired the workers
4 had to fill out an application and were assigned a number. They were then directed to get a ladder
5 and go to an area in the orchard to begin picking cherries. Sometimes the workers do not fill out an
6 application, so the new person works under an existing workers' number. Mrs. Rivera has two
7 teenage sons who have picked under her number, and there are others who have family members
8 who have picked under only one person's name. According to Ms. Rivera they always ask for
9 permission. 10/2/07 Tr. at 21.

10 On cross-examination Ms. Rivera said she obtains the number from someone at the trailer at
11 the beginning of the season. Each time someone else is brought into work they have to ask
12 permission. 10/2/07 Tr. at 22. When she took her brother to work they didn't give him a number
13 until he filled out the paperwork. She explained that after one has been working for a few days they
14 can bring another person to the field and ask for permission for the new person to work. The
15 employer grants permission and gives the new worker a ladder. The worker usually does not fill out
16 paperwork immediately because they are already in the field, but the paperwork is filled out within a
17 few days. In her brother's case they put his name on a bin. He did not get a number, and at the
18 end of the season they gave him a check under his name.

19 **Maria Machado**

20 Mrs. Machado lives with her daughter-in-law, Maria Rodriguez. 10/2/07 Tr. at 29. She is 60
21 years old. In the summer of 2006 she was picking cherries when she had an injury. She went to
22 work with her daughter-in-law after the cherry harvest had already started. She was going to fill out
23 an application, but they weren't filling them out that day, so she arranged to work under her
24 daughter-in-law's picker number. They were going to split the pay until she filled out her own
25 application. 10/2/07 Tr. at 30. Mrs. Machado did not try to hide from the supervisors. If she had
26 been asked to fill out an application by the supervisor she would have complied. 10/2/07 Tr. at 31.
27 She had never harvested cherries before that season. She was working for two days before she
28 fell from the ladder. After she fell the owner of the orchard took her to the hospital. Mrs. Machado
29 went back to the orchard the next day to let them know she would not be able to continue working.
30 At the end of the season her daughter-in-law shared part of her check. 10/2/07 Tr. at 35.

31 On cross-examination Ms. Machado said on the first day that she worked Mr. Barajas told
32 her to keep working and someone would come by with papers to fill out. 10/2/07 Tr. at 35. Later a

1 young lady came by and Mrs. Machado asked whether they were going to take her name or bring
2 some papers. She was told someone would come later. Mrs. Machado never received money
3 directly from the employer. Before the accident she had never been to the office trailer on the
4 property. She never received a picker number because the girl that would come by always gave
5 the paper to her daughter-in-law. That was how they kept track of how much they would be paid for
6 their work. 10/2/07 Tr. at 35-36.

7 **Frank A. Lyall**

8 Mr. Lyall is part owner and manager of Lyall Farms, LLC. 10/4/07 Tr. at 5. In July 2006 his
9 business employed 150 to 170 pickers for the cherry harvest. When harvest workers are hired they
10 either come to the owner's home, or a small trailer that is the designated office. In order to sign up
11 the workers need to complete an I-9 form, which requires them to show two pieces of acceptable
12 identification, and provide a social security number. The employer does not require any other
13 special application. 10/4/07 Tr. at 7. To keep track of the cherries the workers harvest each is
14 assigned a card with a number and the workers' name. The number is entered into the computer
15 and is also used on a ticket that records the weight of each bin. The orchard has employees go out
16 to the orchard to pick up the bins and take them to the warehouse to be weighed. According to
17 Mr. Lyall there have been instances in the past where supervisors have discovered workers without
18 a picker number. If someone doesn't have a number they are sent to the office to complete the
19 forms so they get proper credit for their work. 10/4/07 Tr. at 8. The main reason for assigning a
20 picker number is so that the workers are paid correctly. Another reason is to keep track of who is in
21 the field.

22 The July 2006 employment records reveal that Mrs. Machado was never issued a picker
23 number, and Mr. Lyall is not aware of her ever requesting one. 10/4/07 Tr. at 11. She has never
24 directly received any payment from his company. Mr. Lyall testified the employer does not allow
25 workers to just show up at the orchard and take someone else's ladder that was not at work that
26 day. He acknowledged that situation can happen, but they want workers who have been assigned
27 to a ladder and a place to pick. Each worker should have a card bearing their own name and
28 number. 10/4/07 Tr. at 16.

29 On cross examination Mr. Lyall testified the 2006 cherry harvest lasted eight days. 10/4/07
30 Tr. at 25. Part of the reasoning behind assigning ladders is to avoid a dispute over a ladder. The
31 bins are checked for a picker number, and as long as the bin has a number it is sent off to be
32 weighed. There is no reason for interaction between the checker and the picker. 10/4/07 Tr. at 27.

1 Mr. Lyall's first recollection of any contact with Mrs. Machado was after she fell on July 1, 2006. He
2 went to the place where she was picking and took down her name and address. At that point she
3 gave two last names, neither of which was Maria Machado. 10/4/07 Tr. at 28.

4 Mr. Lyall further testified there was no employee designated to randomly check workers for
5 picker numbers. If a question came up someone might be checked. An example would be when
6 there is an issue regarding the assignment of a ladder. Ordinarily the bin has a picker number, and
7 it is rare that one comes in without one. 10/4/07 Tr. at 30. Mr. Lyall testified that it is illegal for
8 someone to bring a family member or some other person to work under the same picker number
9 and split the proceeds. 10/4/07 Tr. at 31. Legally they have to show proper identification to be
10 assigned a picker and employer number. The employer has no objection to family members
11 picking together in the same area. However, the employer would have an objection if a worker
12 comes in at the end of the year with all the tickets under one picker number. Under that
13 circumstance the employer would insist on splitting the check between the pickers.
14 10/4/07 Tr. at 31-32. The other family members all need a picker number and need to show
15 identification. According to Mr. Lyall, Mrs. Machado would have had plenty of opportunity to fill out
16 the W-4 or I-9 forms. 10/4/07 Tr. at 33. She could have stopped by the office to fill them out the
17 morning before she started. There is no financial advantage to having multiple employees work
18 under one number, because the employer has to pay the same for every pound of cherries
19 harvested. 10/4/07 Tr. at 33. Mr. Lyall said his company makes it a point to avoid employing
20 people off the books. Failing to do so could expose them to all sorts of problems. He
21 acknowledges that it is sometimes difficult to police. 10/4/07 Tr. at 39-41.

22 DECISION

23 The parties agree that on July 1, 2006, Mrs. Machado incurred an injury within the meaning
24 of RCW 51.08.100. 10/2/07 Tr. at 4. The sole controversy in this case arises over claimant's
25 contention that an employment relationship existed between her and Lyall Farms. The
26 requirements for determining whether an employment relationship exists are outlined in *Jackson v*
27 *Harvey*, 72 Wash. App. 507 (1994). In *Jackson*, the court noted that when determining the
28 existence of an employer-employee relationship the courts originally looked to the doctrine of
29 respondeat superior, and examined the degree of control an employer exercised over the employee
30 in question. However, subsequent cases in the workers' compensation context mandated that
31 there must also be evidence of a mutual agreement between the employer and employee before
32 such a relationship can be established. *Jackson* at 515. The *Jackson* court cited the Supreme

1 Court decision set forth in *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d.550 (1979),
2 that said:

3 The right of control is not the single determinative factor in Washington.
4 A mutual agreement must exist between the employee and employer to
5 establish an employee-employer relationship.

6 *Novenson* at 553.

7 The *Novenson* court quoted *Fisher v. Seattle*, 62 Wn. 2d 800 (1963) that held:

8 Unlike the common law, compensation law demands that, in order to
9 find and employer-employee relation, a *mutual* agreement must exist
10 between the employer and employee.

11 *Fisher* at 804-805.

12 That rule is consistent with RCW 51.08.070 that defines an employer as one "who *contracts* with
13 one or more workers" (Emphasis added). Since the requisite elements of a contract include a
14 meeting of the minds, that is an implicit element of the statutory definition. Thus, a mutual
15 agreement is required under both the applicable statute and case law.

16 In the instant case a controversy exists over whether the employer, Lyall Farms, agreed or
17 consented to any employer-employee relationship with Mrs. Machado. In this regard
18 Mrs. Machado's testimony about her contacts with employer representatives before the industrial
19 injury is vague. More importantly, her testimony is directly at odds with the testimony of her
20 daughter-in-law, Maria Rodriguez. Mrs. Rodriguez said they had an arrangement where they would
21 split the pay for bins that were loaded and credited under Mrs. Rodriguez' picker number. 10/2/07
22 Tr. at 13. At the end of the harvest season the employer was to pay Mrs. Rodriguez, and out of that
23 paycheck she would reimburse Mrs. Machado for "whatever she earned." 10/2/07 Tr. at 16.
24 Mrs. Rodriguez *expressly denied* that they discussed the arrangement with the owner. 10/2/07 Tr.
25 at 9. Furthermore, Mrs. Rodriguez testified that although Mrs. Machado intended to get her own
26 number, she did not speak with Mr. Barajas until after she fell from the ladder.¹ 10/2/07 Tr. at 14.

27 Mr. Lyall testified that it is the employer's policy to require all workers to come to the orchard
28 office and show two pieces of acceptable identification, including a social security number, and sign
29 up for work. At that point they are issued a picker number so that workers can be paid accurately
30

31 ¹Note Mrs. Rodriguez testified that Mrs. Machado started working *two days after* Mrs. Rodriguez first started working
32 (the first day of harvest). 10/2/07 Tr. at 7. On cross-examination Mrs. Rodriguez testified she initially gave her name,
address, and was issued a number, and then *two days after* that she filled out an application. 10/2/07 Tr. at page 11.
That contradicts Mrs. Machado's testimony that the employer was not filling out applications that day. 10/2/07 Tr. at 30.

1 for the fruit they harvest. 10/4/07 Tr. at 6-9. The business records do not indicate that
2 Mrs. Machado was issued a picker number, and he is not aware of her requesting one.
3 10/4/07 Tr. at 11. According to Mr. Lyall, the company does not allow workers to simply show up at
4 the orchard and take someone else's ladder who was not at work that day. All workers are required
5 to have a card bearing their own name and picker number. 10/4/07 Tr. at 16, 31, and 32.
6 Mrs. Machado would have had plenty of opportunity to come to the trailer and show the necessary
7 identification, complete her paperwork, and obtain her own picker number. 10/4/07 Tr. at 33.

8 Weighing the testimony outlined above Mrs. Machado has not persuasively established that
9 there was a mutual agreement between her and Lyall Farms to establish an employer-employee
10 relationship. The greater preponderance of evidence supports a finding that the employer was
11 neither aware Mrs. Machado was working at the orchard, or that she entered into a separate
12 arrangement to harvest cherries under Mrs. Rodriguez's designated number.

13 There is some evidence of prior occurrences where the employer allowed employees to work
14 at the orchard without completing the necessary paperwork. Mrs. Rivera initially testified that on
15 some occasions workers would bring family members to pick under another's number until an
16 application could be completed. 10/2/07 Tr. at 20. However, in the example she described
17 regarding her brother, the employer paid the brother under his own name, even though he had not
18 received an independent picker number. 10/2/07 Tr. at 23. More importantly, Mrs. Rivera testified
19 that on those occasions where additional family members show up to work they always ask for
20 permission.² 10/2/07 Tr. at 21. That situation is clearly distinguishable from the instant facts where
21 Mrs. Machado failed to obtain permission before she began working.

22 The facts of this case demonstrate that there are logistical problems associated with keeping
23 track of workers during harvest that occurs over a very short period of time and involves hiring 150
24 to 200 temporary workers. That problem was exacerbated in this case by the fact that
25 Mrs. Machado used the ladder of another worker who had previously been issued one, but did not
26 return to work. 10/2/07 Tr. at 10. Although a more effective means of keeping track of the identity
27 of workers could likely have been implemented, it would be unreasonable and impractical to
28 unilaterally impose an employer-employee relationship upon the employer under these
29 circumstances. Such a precedent would open the door to all kinds of problems over which an
30 employer would have no reasonable means of control.

31
32 ² Mrs. Rivera's testimony in this regard actually corroborates the employer's position that some permission or
acknowledgment was required before an employee begins working.

1 Some argument may be made in this case that there may be coverage under the Industrial
2 Insurance Act by virtue of the employer-employee relationship that potentially existed between
3 Mrs. Machado and her daughter-in-law, arising out of their arrangement to split the proceeds of the
4 harvest. However, no effort was made on claimant's behalf to raise that as an alternative position,
5 nor was there any attempt to join Mrs. Rivera as a party to these proceedings. Furthermore, the
6 evidence surrounding the nature and extent of their relationship is vague and probably insufficient
7 to make any meaningful determination in that regard. Since it is Mrs. Machado's burden to
8 establish her right to receive benefits, the failure to establish any alternate theory of recovery works
9 against her. The Department order that rejected the claim because claimant was unable to
10 substantiate and employer-employee relationship at the time of her injury is **AFFIRMED**.

11 FINDINGS OF FACT

- 12 1. On July 17, 2006, Maria Machado, claimant, filed an Application for
13 Benefits with the Department of Labor and Industries alleging that she
14 sustained an injury while in the course of her employment with Lyall
15 Farms. On July 26, 2006, the Department issued an order that rejected
16 the claim because the Department was unable to substantiate an
17 employer-employee relationship at the time of the alleged injury. On
18 September 19, 2006, the claimant filed a Protest and Request for
19 Reconsideration of the July 26, 2006 order. On October 24, 2006, the
20 Department issued an order affirming the July 26, 2006 order. On
21 December 22, 2006, the claimant filed a Notice of Appeal of the
22 October 24, 2006 order. On February 1, 2007, the Board issued an
23 Order Granting Appeal and assigned Docket No. 06 22466. Further
24 proceedings were held.
- 25 2. On July 1, 2006, Mrs. Machado incurred an injury when she fell from a
26 ladder while she was harvesting cherries at an orchard owned by Lyall
27 Farms.
- 28 3. Prior to the fall, Mrs. Machado's daughter-in-law, Maria Rodriguez, was
29 employed as a harvest worker at Lyall Farms. Mrs. Machado
30 accompanied her daughter-in-law to the orchard and they entered into
31 an arrangement where they would both harvest cherries under
32 Mrs. Rodriguez's designated picker number. The two would later split
the proceeds of the check that was to be paid by Lyall Farms to
Mrs. Rodriguez.
4. Prior to her fall, Mrs. Machado did not report to the owner of Lyall Farms
or any designated representative. She did not obtain permission, and
did not show the necessary identification or complete the requisite
paperwork to work at the orchard.

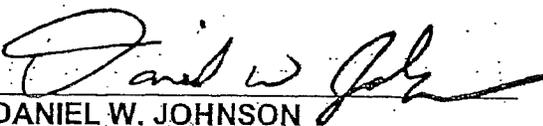
- 1 5. The employer was neither aware that Mrs. Machado was working at the
2 orchard, nor that she entered into an arrangement to harvest cherries
3 under Mrs. Rodriguez's designated number. There was no mutual
4 agreement to establish an employer-employee relationship between the
5 claimant and Lyall Farms.

6 **CONCLUSIONS OF LAW**

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the
8 parties to and subject matter of this appeal.
9 2. Lyall Farms did not have an employment contract with Maria Machado,
10 and was not her employer within the meaning of RCW 51.08.070.
11 3. Mrs. Machado failed to substantiate an employer-employee relationship
12 at the time of her injury. The October 24, 2006 Department order is
13 **AFFIRMED.**

14 It is **ORDERED.**

15 DATED: DEC 12 2007

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17 **DANIEL W. JOHNSON**
18 Industrial Appeals Judge
19 Board of Industrial Insurance Appeals
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CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

MARIA MACHADO
525 ROUSE RD #15
SUNNYSIDE, WA 98944

CL1

CA1

CHRISTOPHER L CHILDERS, ATTY
SMART CONNELL & CHILDERS, PS
PO BOX 228
YAKIMA, WA 98907-0228

EM1

LYALL FARMS
1221 OLMSTEAD RD
GRANDVIEW, WA 98930

ELR1

LYALL FARMS
WASHINGTON STATE FARM BUREAU
PO BOX 8690
LACEY, WA 98509

AG1

MARK BUNCH, AAG
500 MORAIN #1250
KENNEWICK, WA 99336

Dated at Olympia, Washington 12/12/2007
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 
DAVID E. THREEDY
Executive Secretary

In re: MARIA MACHADO
Docket No. 06 22466

31496 1-000000036

Appendix D

Superior Court Findings of Fact and Conclusions of Law and
Judgment

FILED

2013 FEB 28 P 2:08

KIM EATON
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA COUNTY

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

MARIA MACHADO,	
	Plaintiff,
v.	
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,	
	Defendant.

NO. 08-2-00848-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT
Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|--|--|
| 1. Judgment Creditor: | State of Washington Department of Labor and Industries |
| 2. Judgment Debtor: | Maria Machado |
| 3. Principal Amount of Judgment: | - 0 - |
| 4. Interest to Date of Judgment: | - 0 - |
| 5. Statutory Attorney Fees: | \$200.00 |
| 6. Costs: | -0- |
| 7. Other Recovery Amounts: | -0- |
| 8. Principal Judgment Amount shall bear interest at 0% per annum. | |
| 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum. | |
| 10. Attorney for Judgment Creditor: | Dale E. Becker |
| 11. Attorney for Judgment Debtor: | Christopher L. Childers |

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
1433 Lakeside Court, #102
Yakima, WA 98901

31496 1-000000042

1 This matter came on regularly before the Honorable Michael McCarthy, in open court on
2 February 28, 2013. The Plaintiff, Maria Machado, appeared by her counsel,
3 Christopher L. Childers; and the Defendant, Department of Labor and Industries (Department),
4 appeared by its counsel, Robert W. Ferguson, Attorney General; per Dale E. Becker, Assistant
5 Attorney General, and Frank Lyall of Lyall Farms also appeared. The Court reviewed the
6 records and files herein including the Certified Appeal Board Record, and briefs submitted by
7 counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the
8 following:

9 I. FINDINGS OF FACT

10 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on October 2
11 and 4, 2007 and no depositions were taken.

12 Thereafter, an Industrial Appeals Judge issued a Proposed Decision and Order on
13 December 12, 2007, from which Plaintiff filed a timely Petition for Review on January
14 30, 2008. On February 5, 2008, the Board having considered the Plaintiff's Petition for
15 Review, issued an Order Denying Petition for Review as its Final Order.

16 Plaintiff thereupon timely appealed the Board's February 5, 2008 order to this Court.

17 1.2 The Board's Findings of Fact are supported by a preponderance of the evidence. The
18 Court adopts as its Findings of Fact, and incorporates by this reference, the Board's
19 Findings of Facts Nos. 1 through 5 of the December 12, 2007 Proposed Decision and
20 Order adopted by the Board of Industrial Insurance Appeals as its Final Order on
21 February 5, 2008.

22 Based upon the foregoing Findings of Fact, the Court now makes the following:

23 II. CONCLUSIONS OF LAW

24 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

25 2.2 The Board's Conclusions of Law are correct and should be affirmed. The Court adopts
26 as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions
of Law Nos. 1 through 3 of the December 12, 2007 Proposed Decision and Order,
adopted by the Board of Industrial Insurance Appeals as its Final Order on February 5,
2008.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
judgment as follows:

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III. JUDGMENT

- 3.1 The February 5, 2008 Board of Industrial Insurance Appeals Order Denying Petition for Review which affirmed the Department of Labor and Industries' October 24, 2006 order, is hereby affirmed.
- 3.2 The Defendant is awarded, and the Plaintiff 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 28th day of February, 2013.



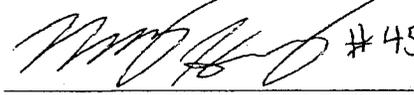
 JUDGE MICHAEL MCCARTHY

Presented by:
ROBERT W. FERGUSON
Attorney General



 DALE E. BECKER, WSBA #21274
 Assistant Attorney General

Copy received,
Approved as to form and
notice of presentation waived:

 #45465 For

 CHRISTOPHER L. CHILDERS, WSBA #34077
 Attorney for Plaintiff

NO. 31496-1-III

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

MARIA MACHADO,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES STATE OF
WASHINGTON,

Respondent.

CERTIFICATE OF
SERVICE

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served the BRIEF OF RESPONDENT and this CERTIFICATE OF SERVICE to counsel for all parties on the record in the below described manner:

Via Electronic Filing to:

Renee Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, Washington 99201-1905
(509)456-4288

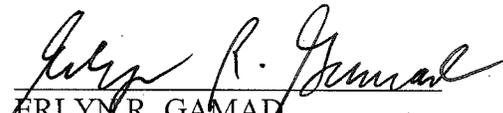
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Via Facsimile at (509) 735-2073 and VIA First Class United States Mail, Postage Prepaid to:

Marcus R. Henry
Smart Connell Childers & Verhulp, P.S.
PO Box 7284
Kennewick, WA 99336

RESPECTFULLY SUBMITTED this 30th day of July, 2013.


ERLYN R. GAMAD
Legal Assistant