

NO. 70724-8-I

---

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

---

ANTHONY J. YUCHASZ,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

---

**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

---

ROBERT W. FERGUSON  
Attorney General

Paul Weideman  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3820

2011 FEB 17 11:33  
8

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUE.....3

III. STATEMENT OF THE CASE .....3

    A. Before He Was Injured At Work, Mr. Yuchasz’s Employer Provided Him With A Company Vehicle For Business Use And Paid For The Vehicle’s Fuel.....3

    B. After His Work Injury, The Company Vehicle Was No Longer Available And Mr. Yuchasz Paid For Gasoline To Commute To And From Work .....4

    C. The Department Excluded The Cost Of Gasoline That Mr. Yuchasz Used To Commute To And From Work When It Calculated His “Wages” Under RCW 51.08.178(1).....5

    D. The Board Concluded That The Department Correctly Excluded The Cost Of Gasoline That Mr. Yuchasz Used To Commute To And From Work From Mr. Yuchasz’s Wage Calculation.....6

IV. SUMMARY OF THE ARGUMENT.....8

V. STANDARD OF REVIEW.....9

VI. ARGUMENT .....10

    A. Under The Supreme Court’s Decision In *Cockle*, Gasoline For Commuting Purposes Is Not “Fuel” Under RCW 51.08.178(1) Because “Fuel” Is Limited To Heating Fuel That Is Critical To Protecting A Worker’s Basic Health And Survival.....10

        1. The Court of Appeals In *Cockle* Interpreted “Fuel” To Mean “Heat Or Warmth” .....10

|    |  |    |
|----|--|----|
| 2. | The Supreme Court in <i>Cockle</i> Agreed That Fuel Meant Heat As It Is Critical To Protecting A Worker’s Basic Health And Survival .....  | 13 |
| 3. | Gasoline To Drive To And From Work Is Not Critical To Protecting A Worker’s Basic Health And Survival But Is A Fringe Benefit.....   | 15 |
| B. | Only if This Court Does Not Follow <i>Cockle</i> Can Mr. Yuchasz Prevail .....   | 17 |
| 1. | Our Supreme Court’s Construction Of RCW 51.08.178(1) Operates As If Originally Written Into The Statute And This Court Should Decline Mr. Yuchasz’s Invitation To Re-Interpret The Statute.....                      | 17 |
| 2. | <i>Cockle</i> ’s “Basic Health And Survival” Test Applies To The Definition Of “Wages” In RCW 51.08.178(1), Including Board, Housing, And Fuel, And Not Just To The Phrase “Consideration of Like Nature” .....      | 20 |
| 3. | Because “Board” Means “Food” Rather Than “Utilities,” <i>Cockle</i> ’s Construction of “Fuel” To Mean Heating Fuel Does Not Create A Redundancy In RCW 51.08.178(1).....   | 23 |
| 4. | The Doctrine Of Liberal Construction Does Not Warrant A Different Result Because Our Supreme Court Applied That Doctrine in <i>Cockle</i> When It Adopted The “Basic Health And Survival” Test.....                  | 25 |
| C. | In Light Of The <i>Cockle</i> Decision, This Court Need Not Resort To Legislative History To Interpret RCW 51.08.178(1), But Even If It Does, The Legislative History Does Not Support Mr. Yuchasz’s Argument.....   | 27 |
| D. | This Court Should Consider As Persuasive Authority The Board’s Decisions In <i>Brammer</i> And <i>Yuchasz</i> Rejecting The Argument That Transportation Fuel Can Be Included As “Wages” Under RCW 51.08.178(1)..... | 30 |

|   |    |
|---|----|
| E. This Court Should Apply <i>Cockle</i> Rather Than Foreign<br>Case Law..... | 34 |
| VII. CONCLUSION .....   | 37 |

## TABLE OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| <i>Afoa v. Port of Seattle</i> ,<br>176 Wn.2d 460, 296 P.3d 800 (2013).....  | 9          |
| <i>Cockle v. Dep't of Labor &amp; Indus.</i> ,<br>96 Wn. App. 69, 977 P.2d 668 (1999), aff'd 142 Wn.2d 801<br>(2001).....                      | passim     |
| <i>Cockle v. Dep't of Labor &amp; Indus.</i> ,<br>142 Wn.2d 801, 16 P.3d 583 (2001).....   | passim     |
| <i>Cowiche Canyon Conservancy v. Bosley</i> ,<br>118 Wn.2d 801, 828 P.2d 549 (1992).....   | 19, 30     |
| <i>DeHeer v. Seattle Post-Intelligencer</i> ,<br>60 Wn.2d 122, 372 P.2d 193 (1962).....  | 19, 30     |
| <i>Dep't of Labor &amp; Indus. v. Allen</i> ,<br>100 Wn. App. 526, 997 P.2d 977 (2000).....  | 34         |
| <i>Dep't of Labor &amp; Indus. v. Shirley</i> ,<br>171 Wn. App. 870, 288 P.3d 390 (2012), <i>review denied</i> ,<br>177 Wn.2d 1006 (2013)..... | 33         |
| <i>Gallo v. Dep't of Labor &amp; Indus.</i> ,<br>155 Wn.2d 470, 120 P.3d 564 (2005).....   | 16, 22, 26 |
| <i>Hale v. Wellpinit Sch. Dist. No. 49</i> ,<br>165 Wn.2d 494, 198 P.3d 1021 (2009).....   | 18, 19     |
| <i>In re Brammer</i> ,<br>No. 06 10641, 2007 WL 1413101 (Wash. Bd. of Indus. Ins.<br>Appeals Feb. 7, 2007).....                                | 7, 30, 31  |
| <i>In re DeRidder</i> ,<br>No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins. Appeals<br>May 30, 2000).....                                    | 33         |

|   |        |
|---|--------|
| <i>In re Jornada Roofing 1, Inc.</i> ,<br>No. 08 W1050, 2010 WL 1170616 (Wash. Bd. Ind. Ins. Appeals<br>Jan. 27, 2010)..... | 33     |
| <i>In re Killian</i> ,<br>No. 06 17478, 2007 WL 4986270 (Wash. Bd. Indus. Ins. Appeals<br>Nov. 20, 2007) .....              | 33     |
| <i>In re Olsen</i> ,<br>No. 06 16795, 2007 WL 4986259 (Wash. Bd. Indus. Ins. Appeals<br>November 13, 2007) .....            | 33     |
| <i>In re Soesbe</i> ,<br>No. 02 19030, 2003 WL 22696947 (Wash. Bd. Ind. Ins. Appeals<br>Sept. 25, 2003).....                | 32     |
| <i>In re Thomas</i> ,<br>No. 00 10091, 2001 WL 1193934 (Wash. Bd. Ind. Ins. Appeals<br>July 31, 2001) .....                 | 32     |
| <i>In re Thomas</i> ,<br>Nos. 04 17345 & 04 17536, 2006 WL 2989442 (Wash. Bd. Indus.<br>Ins. Appeals May 17, 2006).....     | 33     |
| <i>In re Williams</i> ,<br>No. 00 11219, 2001 WL 1755668 (Wash. Bd. Indus. Ins. Appeals<br>December 20, 2001).....          | 33     |
| <i>In re Yuchasz</i> ,<br>No. 12 10803, 2013 WL 2476945 (Wash. Bd. of Indus. Ins.<br>Appeals Feb. 28, 2013).....            | 7      |
| <i>Johnson v. Morris</i> ,<br>87 Wn.2d 922, 557 P.2d 1299 (1976).....   | 18     |
| <i>Motheral v. Workers' Comp. Appeals Bd.</i> ,<br>130 Cal. Rptr. 3d 677, 199 Cal. App. 4th 148 (2011).....                 | 34, 36 |
| <i>O'Keefe v. Dep't of Labor &amp; Indus.</i> ,<br>126 Wn. App. 760, 109 P.3d 484 (2005).....                               | 32     |

|   |            |
|---|------------|
| <i>Pearson v. Dep't of Labor &amp; Indus.</i> ,<br>164 Wn. App. 426, 262 P.3d 837 (2011).....   | 37         |
| <i>Piper v. Dep't of Labor &amp; Indus.</i> ,<br>120 Wn. App. 886, 86 P.3d 1231 (2004).....   | 17         |
| <i>Puget Sound Energy, Inc. v. Lee</i> ,<br>149 Wn. App. 866, 205 P.3d 979 (2009).....  | 33         |
| <i>Romo v. Dep't of Labor &amp; Indus.</i> ,<br>92 Wn. App. 348, 962 P.2d 844 (1998).....   | 9          |
| <i>Rose v. Dep't of Labor &amp; Indus.</i> ,<br>57 Wn. App. 751, 790 P.2d 201, <i>review denied</i> ,<br>115 Wn.2d 1010, 797 P.2d 512 (1990)..... | 13, 26     |
| <i>Silverstreak, Inc. v. Dep't of Labor &amp; Indus.</i> ,<br>159 Wn.2d 868, 154 P.3d 891 (2007).....   | 21         |
| <i>State v. Gore</i> ,<br>101 Wn.2d 481, 681 P.2d 227 (1984).....   | 17, 27     |
| <i>State v. Moen</i> ,<br>129 Wn.2d 535, 919 P.2d 69 (1996).....  | 10, 18, 19 |
| <i>Stertz v. Indus. Ins. Comm'n.</i> ,<br>91 Wash. 588, 158 P. 256 (1916) .....   | 35         |
| <i>Thompson v. Lewis County</i> ,<br>92 Wn.2d 204, 595 P.2d 541 (1979).....   | 35         |
| <i>Weyerhaeuser Co. v. Tri</i> ,<br>117 Wn.2d 128, 814 P.2d 629 (1991).....   | 31, 34     |

**Statutes**

|                                |        |
|--------------------------------|--------|
| Cal. Labor Code § 4454 .....   | 35, 36 |
| Laws of 1911, ch. 74, § 4..... | 28, 29 |
| Laws of 1911, ch. 74, § 5..... | 28, 29 |

|   |        |
|---|--------|
| Laws of 1971, 1st Ex. Sess., ch. 289, § 14..... | 10, 23 |
| RCW 51.08.178(1).....                           | passim |
| RCW 51.12.010 .....                             | 15     |
| RCW 51.32.090(3).....                           | 5      |
| RCW 51.51.115 .....                             | 35     |
| RCW 51.52.010 .....                             | 25, 26 |
| RCW 51.52.104 .....                             | 6      |
| RCW 51.52.115 .....                             | 9      |
| RCW 51.52.130 .....                             | 37     |
| RCW 51.52.140 .....                             | 9      |
| RCW 51.52.160 .....                             | 7      |

**Rules**

|                     |        |
|---------------------|--------|
| CR 56(c).....       | 9      |
| RAP 10.3(a)(6)..... | 19, 30 |
| RAP 10.3(a)(8)..... | 35     |

**Regulations**

|                        |    |
|------------------------|----|
| WAC 263-12-195(1)..... | 7  |
| WAC 296-14-524.....    | 14 |

**Other Authorities**

|   |            |
|---|------------|
| <i>Black's Law Dictionary</i> (9th ed. 2009)..... | 23, 25, 28 |
|---|------------|

Board of Industrial Insurance Appeals,  
*Tentative Significant Decisions (January – December 2013)*,  
available at  
[http://www.bia.wa.gov/Tentative\\_Sig\\_Dec/tentative\\_sigdec.htm](http://www.bia.wa.gov/Tentative_Sig_Dec/tentative_sigdec.htm) ..... 7

*Webster's Third New Int'l Dictionary of The English Language*  
(2002)..... 23, 24, 25, 28

## I. INTRODUCTION

This is a workers' compensation appeal involving the issue of whether the cost of gasoline to commute to and from work constitutes "wages" under RCW 51.08.178(1) for purposes of calculating a worker's benefits. Before his work injury, Anthony Yuchasz's employer provided a company car and paid for the gasoline that he used to commute to and from work. After his work injury, the car was not available and his employer did not reimburse him for the cost of gasoline that he used to commute.

Under RCW 51.08.178(1), "wages" include "the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire . . . ." In the seminal decision of *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001), our Supreme Court held that "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury *that are critical to protecting workers' basic health and survival.*" *Cockle*, 142 Wn.2d at 822 (emphasis added). In its analysis, the *Cockle* Court expressly approved of the Court of Appeals' interpretation of "fuel" under RCW 51.08.178(1) to mean "heat" (i.e. heating fuel).

Because gasoline to commute to work is a type of fuel that is not critical to protecting a worker's health and survival, the cost cannot be included in the worker's "wages" under *Cockle*. Rather, the employer's provision of gasoline to Mr. Yuchasz was a fringe benefit under *Cockle* that lowered Mr. Yuchasz's out-of-pocket commuting costs. It was unlike other core benefits that *Cockle* recognized as critical to the worker's health and survival, such as food, shelter, heating fuel, and health care.

Mr. Yuchasz urges this Court to apply what he perceives to be the "common definition" of fuel that existed in 1971 when the legislature enacted RCW 51.08.178(1). But he cites no authority for his assertions that the Legislature must have intended to include gasoline as "wages" because cars were prevalent in the American workplace in 1971. This Court should disregard any argument unsupported by authority and should apply *Cockle*.

Because gasoline for commuting purposes is not "fuel" under *Cockle*'s interpretation of RCW 51.08.178(1), the Department correctly excluded the cost of gasoline from Mr. Yuchasz's wages when it calculated his benefits. The Board of Industrial Insurance Appeals and the superior court correctly granted summary judgment to the Department on this basis. This Court should affirm.

## II. ISSUE

Under RCW 51.08.178(1), did the Department's wage calculation correctly exclude the cost of gasoline that Mr. Yuchasz's employer provided to him at the time of injury to commute to and from work where the employer's provision of gasoline was a fringe benefit that, unlike heating fuel, was not critical to protecting his basic health and survival?

## III. STATEMENT OF THE CASE

### A. **Before He Was Injured At Work, Mr. Yuchasz's Employer Provided Him With A Company Vehicle For Business Use And Paid For The Vehicle's Fuel**

On February 22, 2011, Mr. Yuchasz worked as an electrician for Computer Power and Service, Inc. BR 73, 92.<sup>1</sup> On that day, he injured his right rotator cuff at work when he lifted cables overhead into a bin on the back of a truck. BR 73. The Department allowed his workers' compensation claim and provided benefits. *See* BR 95-97.

Up through the date of his work injury, Mr. Yuchasz used a company vehicle to perform his regular job duties. BR 92. The company vehicle contained the tools that he needed for his job. BR 92. He kept the company vehicle at home. BR 92. On workdays, he drove the company

---

<sup>1</sup> The record from the Board is paginated separately from the clerk's papers. The Board record consists of the certified appeal board record, which is cited as "BR," and the transcript from the August 16, 2012 summary judgment hearing, which is cited as "Tr. (08/16/12)."

vehicle to the first job site of the day and between job sites. BR 92. At the end of the workday, he drove the vehicle from the last job site to his home. BR 92.

The company paid for the fuel that Mr. Yuchasz put into the company vehicle. BR 73, 93. The company did not allow Mr. Yuchasz to use the vehicle for personal use. BR 93. The company did not consider the use of the company vehicle to be compensation; rather, the company considered the vehicle to be a tool that employees could use in the course of business to benefit the company. BR 93.

**B. After His Work Injury, The Company Vehicle Was No Longer Available And Mr. Yuchasz Paid For Gasoline To Commute To And From Work**

About six months after his work injury, Mr. Yuchasz returned to work in a light duty position at the company. BR 73. The company had reassigned the company vehicle that Mr. Yuchasz drove before his injury to another full-time, regular duty employee. BR 93. For his light duty position, therefore, Mr. Yuchasz drove his personal vehicle to and from work and between job sites. *See* BR 73. The company reimbursed him for the use of his personal vehicle, including the cost of gasoline, for driving between job sites.<sup>2</sup> *See* BR 93; Tr. (08/16/12) at 7. But the

---

<sup>2</sup> In his declaration that Mr. Yuchasz filed with his summary judgment motion at the Board, he stated that while working in the light duty position, he was not reimbursed for the cost of fuel for driving his personal vehicle. BR 73. At the oral argument on the

company did not reimburse him for the cost of gasoline for driving from his home to the first job site of the day or for driving from the last job site of the day to his home. *See* BR 93; Tr. (08/16/12) at 7.

**C. The Department Excluded The Cost Of Gasoline That Mr. Yuchasz Used To Commute To And From Work When It Calculated His “Wages” Under RCW 51.08.178(1)**

Mr. Yuchasz received loss of earning power benefits from August 16, 2011, the day he returned to light duty, to April 3, 2012.<sup>3</sup> BR 73-74. In order to determine the amount of Mr. Yuchasz’s benefits, the Department issued a wage order establishing \$6,351.76 as Mr. Yuchasz’s total gross monthly wages at the time of injury. BR 95. The Department calculated this figure by multiplying Mr. Yuchasz’s hourly compensation (\$39.04) by 8 hours per day and 4 days per week. BR 95. The Department also included \$910.00 in employer-paid health care benefits. BR 95. Under the category of “Housing/Board/Fuel,” the wage rate order

---

summary judgment motion, however, his counsel explained that although Mr. Yuchasz was “reimburse[d] . . . for fuel from job site to job site,” he was not reimbursed for “coming and going” to work. Tr. (08/16/12) at 7; *accord* BR 93. Based on counsel’s representations at the hearing, the Board accepted as true that the company reimbursed Mr. Yuchasz for the costs of driving between job sites but not for the costs of driving to or from his home. *See* BR 4. Thus, the only issue in this case is whether the cost of gasoline for Mr. Yuchasz to commute to and from work should be included in his “wages” under RCW 51.08.178(1).

<sup>3</sup> A worker is entitled to loss of earning power benefits if his work injury has caused his earning power to diminish by at least 5 percent compared to his earning power at the time of the injury. *See* RCW 51.32.090(3).

stated, “NONE per month.” BR 95. The Department subsequently affirmed this wage rate order in an order dated December 8, 2011. BR 97.

Mr. Yuchasz appealed the Department’s December 8, 2011 order to the Board. *See* BR 39. He moved for summary judgment, arguing that the Department should have included the value of gasoline that the company provided for the company vehicle when calculating Mr. Yuchasz’s wages. *See* BR 61-67. The industrial appeals judge agreed, issuing a proposed decision and order stating that his wages “included the reasonable value of fuel for him to travel to and from his home for his work for Computer Power & Services.” BR 35.

**D. The Board Concluded That The Department Correctly Excluded The Cost Of Gasoline That Mr. Yuchasz Used To Commute To And From Work From Mr. Yuchasz’s Wage Calculation**

The Department petitioned for review of the judge’s decision to the three-member Board. BR 10-14; *see* RCW 51.52.104. The Board reversed the judge’s proposed decision and granted summary judgment to the Department, concluding that “[t]he reasonable value of transportation fuel provided by the employer at the time of injury for going to and from work cannot be included in wages under RCW 51.08.178(1).” BR 6-7.

The Board’s decision relied on its previous decision in *In re Brammer*, No. 06 10641, 2007 WL 1413101 (Wash. Bd. of Indus. Ins.

Appeals Feb. 7, 2007). BR 5-6; *see also* BR 14-20. In that case, the Board applied the Supreme Court’s *Cockle* decision to determine that the word “fuel” in RCW 51.08.178(1) refers to home utilities, not transportation fuel. *In re Brammer*, 2007 WL 1413101 at \*4.

In this case, the Board affirmed the Department’s December 8, 2011 order. BR 7. The Board designated its decision in *In re Yuchasz*, No. 12 10803, 2013 WL 2476945 (Wash. Bd. of Indus. Ins. Appeals Feb. 28, 2013) as a tentative significant decision.<sup>4</sup> Board of Industrial Insurance Appeals, *Tentative Significant Decisions (January – December 2013)*, available at [http://www.biiia.wa.gov/Tentative\\_Sig\\_Dec/tentative\\_sigdec.htm](http://www.biiia.wa.gov/Tentative_Sig_Dec/tentative_sigdec.htm) (last visited December 12, 2013).

Mr. Yuchasz appealed to superior court. The parties filed cross-motions for summary judgment. CP 1-50, 53-61. The superior court affirmed the Board and granted summary judgment to the Department, concluding that “[t]he cost of transportation fuel provided to Mr. Yuchasz by his employer at the time of injury for travel between his home and work cannot be included as ‘wages’ under RCW 51.08.178(1).” CP 92.

Mr. Yuchasz appeals.

---

<sup>4</sup> The Board designates decisions as “significant” that it “considers to have an analysis or decision of substantial importance to the board in carrying out its duties.” WAC 263-12-195(1); *see also* RCW 51.52.160.

#### IV. SUMMARY OF THE ARGUMENT

A worker's monthly "wages" at the time of injury are the basis for calculating the worker's loss of earning power benefits. RCW 51.08.178(1); *see also Cockle*, 142 Wn.2d at 806. "Wages" include "the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire . . . ." RCW 51.08.178(1).

In *Cockle*, our Supreme Court held that the phrase "board, housing, fuel, or other consideration of like nature" means "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury *that are critical to protecting workers' basic health and survival.*" *Cockle*, 142 Wn.2d at 822 (emphasis added). In contrast, "the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival" are not included "wages" under RCW 51.08.178(1). *Cockle*, 142 Wn.2d at 823.

The gasoline that Mr. Yuchasz uses to commute to and from work is not critical to protecting his basic health and survival. It is not fuel that provides heat or warmth. Rather, like a subsidized bus pass or free employee parking, it is a fringe commuting benefit that lowers his out-of-

pocket costs. Because it is not critical to protecting his basic health and survival, it does not fall within *Cockle*'s definition of "wages."

## V. STANDARD OF REVIEW

Superior court review of a Board decision is de novo but must be 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). The Board's findings and conclusions are prima facie correct. RCW 51.52.115; *Romo*, 92 Wn. App. at 353.

The superior court considered this case on summary judgment. This Court reviews summary judgment motions de novo, engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013); *see also* RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

This case involves the meaning of the word "fuel" in RCW 51.08.178(1). Statutory construction is a question of law reviewed de novo. *Cockle*, 142 Wn.2d at 807. The primary goal of statutory construction is to carry out the legislature's intent. *Cockle*, 142 Wn.2d at 807. "[W]here a statute has been construed by the highest court of the

state, the court's construction is deemed to be what the statute has meant since its enactment." *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996).

## VI. ARGUMENT

### A. Under The Supreme Court's Decision In *Cockle*, Gasoline For Commuting Purposes Is Not "Fuel" Under RCW 51.08.178(1) Because "Fuel" Is Limited To Heating Fuel That Is Critical To Protecting A Worker's Basic Health And Survival

Mr. Yuchasz asserts that the Department should have included in its wage calculation the cost of the employer-reimbursed gasoline to transport Mr. Yuchasz to and from work. *See* App. Br. 7. In his view, "fuel is fuel and the statute does not indicate it is anything more or less." App. Br. 11. But, as the Board and superior court correctly perceived, this overly broad view that the cost of any fuel provided to the worker for any reason must be included in the wage calculation disregards case law that interprets the term "fuel" in RCW 51.08.178(1) to mean heating fuel that is critical to protecting a worker's basic health and survival. Therefore, Mr. Yuchasz's argument fails.

#### 1. The Court of Appeals In *Cockle* Interpreted "Fuel" To Mean "Heat Or Warmth"

The Legislature enacted RCW 51.08.178(1)'s definition of "wages" in 1971. *See* Laws of 1971, 1st Ex. Sess., ch. 289, § 14. RCW 51.08.178(1) reads in relevant part: "The term 'wages' shall include the

reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire . . . .” RCW 51.08.178(1). A worker’s monthly “wages” at the time of injury are the basis for calculating the worker’s loss of earning power benefits. RCW 51.08.178(1); *see also Cockle*, 142 Wn.2d at 806.

The Court of Appeals first interpreted the meaning of the term “fuel” in RCW 51.08.178(1). *See Cockle v. Dep’t of Labor & Indus.*, 96 Wn. App. 69, 977 P.2d 668 (1999), *aff’d* 142 Wn.2d 801 (2001). There, the issue was whether employer-paid health insurance premiums constituted “consideration of like nature” to “board, housing, and fuel” such that the amount of the employer’s premiums should be included as “wages” under RCW 51.08.178(1). *See Cockle*, 96 Wn. App. at 71, 86.

This issue necessarily required the Court of Appeals to interpret the phrase “board, housing, and fuel” in order to determine what constituted “consideration of like nature” to these three items. *See Cockle*, 96 Wn. App. at 74-76. In its statutory analysis, the court observed that, by enacting RCW 51.08.178(1), the Legislature had recognized three categories of in-kind consideration that an employer provides to a worker: (1) board, housing, and fuel; (2) “other consideration of like nature” to board, housing, and fuel; and (3) other consideration *not* of like nature to board, housing, and fuel. *Cockle*, 96

Wn. App. at 74. The court observed that the first two categories of in-kind consideration counted as “wages” under RCW 51.08.178(1) while the third category did not. *Cockle*, 96 Wn. App. at 74.

With regard to the first category—“board, housing, and fuel”—the court stated that the Legislature included these items in the definition of “wages” under RCW 51.08.178(1) because each was a necessity of life:

It is not hard to discern why the legislature provided that items in the first category shall count as “wages.” Board means food. Housing means shelter. *Fuel means heat or warmth*. Each is a necessity of life, without which the injured worker cannot survive a period of even temporary disability. Before the worker’s injury, each was an item that the employer was supplying in kind. After the worker’s injury, each is an item that the worker must replace *during the period of his or her disability*. Thus, each is an item that the worker must replace out of time-loss compensation, and each is an item that should be included in the basis from which time-loss compensation is computed.

*Cockle*, 96 Wn. App. at 74 (first emphasis added).

Thus, the Court of Appeals explicitly interpreted the term “fuel” as “heat or warmth” as part of its statutory analysis. *Cockle*, 96 Wn. App. at 74. Applying *eiusdem generis*, a well-established rule of statutory construction, the court held that the reasonable value of health insurance had to be included as “wages” under RCW 51.08.178(1). *See Cockle*, 96 Wn. App. at 86.

## 2. The Supreme Court in *Cockle* Agreed That Fuel Meant Heat As It Is Critical To Protecting A Worker's Basic Health And Survival

Our Supreme Court affirmed the Court of Appeals' decision. *Cockle*, 142 Wn.2d at 823. Significantly, for this case, the Supreme Court quoted and adopted the Court of Appeals' interpretation of "fuel" as "heat":

The Court of Appeals correctly rejected the "any and all forms of consideration" standard in *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 758, 790 P.2d 201, review denied, 115 Wn.2d 1010, 797 P.2d 512 (1990).<sup>5</sup> Rather, it applied the ejusdem generis rule to arrive at a narrower construction: "It is not hard to discern why the legislature provided that [food, shelter, and heat] shall count as 'wages.' . . . Each is a necessity of life, without which the injured worker cannot survive a period of even temporary disability."

*Cockle*, 142 Wn.2d at 821 (alterations in original) (citation and footnote omitted) (quoting *Cockle*, 96 Wn. App. at 74).

The Supreme Court stated that it "would modify that analysis only slightly." *Cockle*, 142 Wn.2d at 821. Specifically, rather than adopting the Court of Appeals' "necessity of life" test, the Court construed the phrase "board, housing, fuel, or other consideration of like nature" to

---

<sup>5</sup> The Court of Appeals in *Cockle* had rejected the worker's argument, based on *Rose*, that "wages" under RCW 51.08.178(1) included "any and all forms of consideration received by the employee from the employer in exchange for work performed." See *Cockle*, 96 Wn. App. at 76 (quoting *Rose*, 57 Wn. App. at 758). The court explained that the quoted language in *Rose* was non-precedential dictum. *Cockle*, 96 Wn. App. at 77.

mean “readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of injury *that are critical to protecting workers’ basic health and survival.*” *Cockle*, 142 Wn.2d at 822 (emphasis added).

Accordingly, the *Cockle* Court’s holding makes clear that the only components of a worker’s lost earning capacity—whether in the form of board, housing, fuel, or whether in the form of consideration of like nature to these items—that can be included in the worker’s wage calculation are those components that “are critical to protecting workers’ basic health and survival.” *Cockle*, 142 Wn.2d at 822. Under this construction of the term “wages” in RCW 51.08.178(1), only fuel that is critical to protecting a worker’s basic health and survival—i.e., fuel that provides “heat and warmth”—constitutes “fuel” under RCW 51.08.178(1). *See Cockle*, 142 Wn.2d at 822; *Cockle*, 96 Wn. App. at 74 (“Fuel means heat or warmth.”).

The *Cockle* Court also distinguished “fringe benefits” from “nonfringe benefits.” *Cockle*, 142 Wn.2d at 822-33. “Core, nonfringe benefits” like food, shelter, fuel and health care all share the “like nature” of being critical to protecting a worker’s basic health and survival. *Cockle*, 142 Wn.2d at 822-23; *see also* WAC 296-14-524 (defining “consideration of like nature”). As such, these core, nonfringe benefits

must be included in the worker's "wages" under RCW 51.08.178(1). See *Cockle*, 142 Wn.2d at 822-23.

In contrast, "fringe benefits" are those benefits that are not critical to protecting a worker's basic health and survival. See *Cockle*, 142 Wn.2d at 823. As the Court explained, the Act's overarching objective was to reduce to a minimum "the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle*, 142 Wn.2d at 822 (quoting RCW 51.12.010). Because the injury-caused deprivation of fringe benefits—i.e. those benefits that are not critical to basic health and survival—was not the kind of "suffering" that the Act was designed to remedy, they cannot be included in the worker's wages. *Cockle*, 142 Wn.2d at 823.

**3. Gasoline To Drive To And From Work Is Not Critical To Protecting A Worker's Basic Health And Survival But Is A Fringe Benefit**

The gasoline at issue here powered Mr. Yuchasz's car and helped him to get to work; it did not provide heat and warmth. Unlike the core, nonfringe benefits of heating fuel, food, shelter, and health care, it was not critical to protecting his basic health and survival.

Instead, employer-reimbursed gasoline to commute between home and work is a fringe benefit under *Cockle* that lowers a worker's out-of-pocket commuting costs. It is similar to other fringe benefits that an

employer might elect to pay for or to subsidize in order to reduce the costs or the difficulty of its employees' commutes, such as on-site parking, bus passes, ferry tickets, vanpools, shuttle service, electric vehicle charging stations, and bike lockers. Although such commuting benefits may be valuable to employees because they lower commuting costs, *Cockle* excludes them from the worker's "wages" under RCW 51.08.178(1) because they are not critical to protecting employees' basic health and survival. *See Cockle*, 142 Wn.2d at 822-23. "[T]he legislature did not intend that all consideration given in exchange for work is to be included in 'wages.'" *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 484, 120 P.3d 564 (2005) (quoting RCW 51.08.178(1)).

Mr. Yuchasz suggests that all "fuel" is a nonfringe benefit because, like "board" and "housing," the Legislature specifically mentioned it in RCW 51.08.178(1). App. Br. 13. And he notes that *Cockle* characterizes "fuel" as a "[c]ore, nonfringe benefit[]." App. Br. 15 (quoting *Cockle*, 142 Wn.2d at 823). But these arguments disregard the substance of *Cockle*'s holding, which is that "[c]ore, nonfringe benefits" must be included as "wages" because, by their nature, they are critical to protecting a worker's basic health and survival. *Cockle*, 142 Wn.2d at 822-23. Heating fuel that enables a worker to survive cold weather meets this test; gasoline that allows a worker to drive to work

does not. The *Cockle* Court recognized this distinction with regard to the meaning of “fuel” by approving the Court of Appeals’ application of *ejusdem generis*, including its construction of the term “fuel” as “heat.” *Cockle*, 142 Wn.2d at 821 (quoting *Cockle*, 96 Wn. App. at 74).

**B. Only if This Court Does Not Follow *Cockle* Can Mr. Yuchasz Prevail**

Mr. Yuchasz’s theories depend on this Court not following *Cockle*. But this Court must follow *Cockle*. See *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (“[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.”); accord *Piper v. Dep’t of Labor & Indus.*, 120 Wn. App. 886, 890, 86 P.3d 1231 (2004) (observing that Supreme Court’s interpretation of workers’ compensation statute was “controlling and binds us until the Supreme Court decides otherwise.”).

**1. Our Supreme Court’s Construction Of RCW 51.08.178(1) Operates As If Originally Written Into The Statute And This Court Should Decline Mr. Yuchasz’s Invitation To Re-Interpret The Statute**

Mr. Yuchasz invites this Court to disregard *Cockle*’s holding that the components that the Legislature included as “wages” under RCW 51.08.178(1)—including “fuel”—are limited to items “that are critical to protecting workers’ basic health and survival.” *Cockle*, 142 Wn.2d at 822. Instead, he urges this Court to apply what he perceives to be the

“ordinary” or “common” definition of fuel in 1971. *See* App. Br. 4, 10, 14. Specifically, Mr. Yuchasz asserts that the 1971 Legislature must have meant “gasoline” when it included the term “fuel” in the statute because, in 1971, “the common definition of fuel would have been gasoline, not utilities” and because automobiles “were in wide use” and “were prevalent in the American workplace” at that time. *See* App. Br. 3, 10. These arguments are unavailing.

It is a fundamental rule of statutory interpretation that “once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it.” *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)). The court’s construction of a statute is deemed to be what the statute has meant *since its enactment*. *Moen*, 129 Wn.2d at 538; *accord Hale*, 165 Wn.2d at 506.

Under these basic principles of statutory interpretation, this Court should not substitute *Cockle*’s “basic health and survival” test with Mr. Yuchasz’s proposed “common definition of fuel.” Our Supreme Court’s construction of the phrase “board, housing, fuel, or other consideration of like nature” to include only those components of a worker’s lost earning capacity “that are critical to protecting workers’ basic health and

survival” operates as if it were originally written into the statute. *See Hale*, 165 Wn. 2d at 506. That is what RCW 51.08.178(1) has meant since the Legislature enacted it in 1971. *See Moen*, 129 Wn.2d at 538.

The Department disputes that the “common definition of fuel” in 1971 was “gasoline, not utilities” and that fuel “would have meant vehicle fuel or gasoline” in 1971 rather than other types of fuel. App. Br. 4, 10. Mr. Yuchasz cites no authority for these assertions. *See* App. Br. 4, 10. An appellate court does not consider argument unsupported by citation to authority. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *see also DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (a court may generally assume that where no authority is cited, counsel has found none after a diligent search). Nor does Mr. Yuchasz cite authority for his related assertions that in 1971 “the automobile was prevalent in the American workplace” and that “workers were often provided with company cars or fuel to aid with their work.” *See* App. Br. 3, 10. This Court should disregard these assertions as well. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809; *DeHeer*, 60 Wn.2d at 126.

In any case, Mr. Yuchasz’s proposed “common definition” of fuel in 1971 and the prevalence of automobiles and company cars in 1971 is immaterial to the issue before this Court because this Court must apply

*Cockle*'s interpretation of RCW 51.08.178(1). Employer-reimbursed gasoline for commuting purposes does not meet *Cockle*'s "basic health and survival" test.

**2. *Cockle*'s "Basic Health And Survival" Test Applies To The Definition of "Wages" In RCW 51.08.178(1), Including Board, Housing, And Fuel, And Not Just To The Phrase "Consideration of Like Nature"**

Mr. Yuchasz appears to assert that *Cockle*'s "basic health and survival" test applies only to determining what constitutes "other consideration of like nature" under RCW 51.08.178(1). *See* App. Br. 9, 13. Because, in his view, employer-reimbursed gasoline is "fuel" and not "consideration of like nature," the *Cockle* test does not apply. *See* App. Br. 13. This argument lacks merit.

*Cockle*'s "basic health and survival" test applies to "fuel." The court's holding makes this explicit:

We therefore construe the statutory phrase "board, housing, *fuel*, or other consideration of like nature" in RCW 51.08.178(1) to mean readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury *that are critical to protecting workers' basic health and survival*.

*Cockle*, 142 Wn.2d at 822 (emphases added). The court did not limit the "basic health and survival" test to items that are "consideration of like nature" to board, housing, and fuel. Rather, it concluded that *any* in-kind component of a worker's lost earning capacity—including board, housing,

and fuel or any employer-provided consideration that shares a “like nature” with these three things—must be critical to protecting a worker’s basic health and survival in order to be counted as “wages” under RCW 51.08.178(1). *See Cockle*, 142 Wn.2d at 822.

Mr. Yuchasz’s attempt to limit *Cockle* to the general term “consideration of like nature” misperceives the *ejusdem generis* canon of construction. That canon requires that the general terms that appear in a statute in connection with specific terms be given meaning and effect only to the extent that those general terms suggest similar items to those designated by the specific terms. *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007). Under the canon, the specific terms modify or restrict the application of general terms, where both are used in sequence. *Silverstreak*, 159 Wn.2d at 882.

The *Cockle* Court’s *ejusdem generis* analysis therefore required it to compare the general words in RCW 51.08.178(1)’s definition of “wages” (“consideration of like nature”) to the words of a particular and specific meaning (“board, housing, fuel”) that immediately preceded those general words. *See Cockle*, 142 Wn.2d at 808-10, 821-23. The Court had to construe “board, housing, [and] fuel” in order to determine how these specific terms modified or restricted the application of the general term “consideration of like nature.” *See Silverstreak*, 159 Wn.2d

at 882; *Cockle*, 142 Wn.2d at 821-23. Thus, the Court necessarily construed “fuel” as part of its analysis.

Additionally, in *Gallo*, our Supreme Court rejected a similar argument that *Cockle*’s holding was limited to the phrase “other consideration of like nature.” See 155 Wn.2d at 483. In that case, several workers argued that the Court’s reasoning in *Cockle* did not apply “because *Cockle* held only that the term ‘other consideration’ is ambiguous.” *Gallo*, 155 Wn.2d at 484. The Court observed that *Cockle* construed the definition of “wages,” not just the phrase “consideration of like nature”:

The workers misread *Cockle*. Although the court’s discussion of wages focused on the “other consideration” language in RCW 51.08.178(1), it did so in construing the term “wages,” which is defined as including “the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire.”

*Gallo*, 155 Wn.2d at 484.

Accordingly, Mr. Yuchasz’s suggestion that *Cockle* does not apply to the meaning of “fuel” under RCW 51.08.178(1) lacks merit. The Court had to construe the meaning of “board, housing, [and] fuel” in order to reach its holding. See *Cockle*, 142 Wn.2d at 821-23. And it explicitly approved the Court of Appeals’ definition of “fuel” as “heat.”

*Cockle*, 142 Wn.2d at 821 (quoting *Cockle*, 96 Wn. App. at 74). The *Cockle* Court’s construction of “fuel” controls here.<sup>6</sup>

**3. Because “Board” Means “Food” Rather Than “Utilities,” *Cockle*’s Construction of “Fuel” To Mean Heating Fuel Does Not Create A Redundancy In RCW 51.08.178(1)**

Mr. Yuchasz argues that “defining ‘fuel’ to mean utilities creates a redundancy in the statute” because “the common definition of ‘board’ or ‘room or board’ is ‘housing, food, and utilities.’” App. Br. 9. Therefore, in his view, because “board” or “room and board” already include utilities like heating, it would be redundant to interpret “fuel” to mean heating fuel. See App. Br. 9. This argument fails for two reasons.

First, this argument explicitly conflates the narrower term “board” with the broader term “room and board.” See App. Br. 9. By doing so, it fails to recognize that the two terms mean different things. While “board” means food, “room and board” means food and lodging. Compare *Black’s Law Dictionary* 196 (9th ed. 2009) (“Board” means “[d]aily meals furnished to a guest at an inn, boardinghouse, or other lodging.”) and *Webster’s Third New Int’l Dictionary of The English Language* 243 (2002) (“Board” means “food in the form of daily meals often provided as

---

<sup>6</sup> The Department agrees with Mr. Yuchasz that “to the extent the *Cockle* decision found that fuel was part of the statute in 1911, this determination is incorrect.” App. Br. 14. The Legislature did not enact a definition of “wages” until 1971. See Laws of 1971, 1st Ex. Sess., ch. 289, § 14. But that historical inaccuracy does not change the substance of the *Cockle* Court’s statutory analysis.

payment for services.”) with *Webster’s Third New Int’l Dictionary* 1972 (“Room and board” means “lodging and food usu. specifically earned or furnished.”). It makes sense that the “room” in “room and board” would mean a heated room.

Mr. Yuchasz’s redundancy argument disregards this distinction. He cites no authority that the term “board” alone, as opposed to the more expansive term “room and board,” means “utilities.” All three sources that Mr. Yuchasz cites to support his argument—two websites (US Legal.com and Wiki Answers) and a student guide from the University of Washington—define the more expansive term “room and board.” See App. Br. 9-10. Therefore, these sources are not instructive on the meaning of “board” alone.

Second, this argument disregards how the Court of Appeals and Supreme Court have interpreted the term “board.” The Court of Appeals stated, “Board means food.” *Cockle*, 96 Wn. App. at 74. The Supreme Court also referred to “board” as “food.” See *Cockle*, 142 Wn.2d at 821 (quoting *Cockle*, 96 Wn. App. at 74), 822-23 (“[c]ore, nonfringe benefits such as food, shelter, fuel, and health care all share that ‘like nature.’”). These judicial interpretations are wholly consistent with the definition of “board” in dictionaries that Washington courts regularly use for statutory

interpretation. See *Black's Law Dictionary* 196; *Webster's Third New Int'l Dictionary* 243..

Accordingly, there is no redundancy. "Board" means food. "Fuel" means heating fuel. The courts' interpretation of "board" as "food" and "fuel" as "heating fuel" gives meaning to both statutory terms and avoids redundancy and superfluosity.

**4. The Doctrine Of Liberal Construction Does Not Warrant A Different Result Because Our Supreme Court Applied That Doctrine in *Cockle* When It Adopted The "Basic Health And Survival" Test**

To support his statutory arguments, Mr. Yuchasz cites the principle that the Industrial Insurance Act is to be liberally construed with doubts resolved in favor of the worker. App. Br. 7, 17. He cites RCW Title 51's objective to "reduc[e] to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." App. Br. 7 (citing RCW 51.52.010). Mr. Yuchasz asserts that a liberal interpretation of the term "fuel" in RCW 51.08.178(1) "can only result in the conclusion that it is meant to include vehicle fuel or gasoline." App. Br. 17. He is incorrect.

Mr. Yuchasz's argument fails to account for the fact that our Supreme Court has already construed the statute and announced its meaning, resolving any ambiguity in the statute. And, in doing so, the

*Cockle* Court cited and discussed the rule of liberal construction and applied the policy of reducing a worker's suffering and economic loss to a minimum. *Cockle*, 142 Wn.2d at 811, 821-23. Specifically, the Court explained that while "[c]ore, nonfringe benefits" like food, shelter, fuel, and health care all fell within RCW 51.08.178(1)'s definition of "wages," the injury-caused deprivation of the reasonable value of fringe benefits (like the gasoline here) that were not critical to protecting workers' basic health and survival did not "qualif[y] as the kind of 'suffering' that Title 51 RCW was legislatively designed to remedy." *Cockle*, 142 Wn.2d at 822-23. Thus, *Cockle* applied these principles and this Court may not reweigh them.

Mr. Yuchasz suggests that the Legislature's purpose to "reduc[e] to a minimum the economic loss arising from injuries" will not be achieved unless the Department includes the cost of employer-reimbursed gasoline in his wage calculation. *See* App. Br. 15 (citing RCW 51.52.010). But, as *Cockle* explained, not all in-kind consideration counts as "wages" under RCW 51.08.178(1). *Cockle*, 142 Wn.2d at 822 (stating that the Court of Appeals correctly rejected the "any and all forms of consideration" standard articulated in *Rose*, 57 Wn. App. at 758); *accord Gallo*, 155 Wn.2d at 484 ("[T]he legislature did not intend that all consideration given in exchange for work is to be included in 'wages.'").

Here, the Department correctly applied *Cockle* by including \$910.00 in employer-paid health care benefits in Mr. Yuchasz's wage calculation and by excluding the cost of employer-reimbursed gasoline, a fringe benefit that was not critical to protecting his basic health and survival. *See* BR 95.

**C. In Light Of The *Cockle* Decision, This Court Need Not Resort To Legislative History To Interpret RCW 51.08.178(1), But Even If It Does, The Legislative History Does Not Support Mr. Yuchasz's Argument**

Mr. Yuchasz argues that the legislative history of RCW 51.08.178(1) "implies that the Legislature intended for fuel to include fuel for transportation." App. Br. 1. Specifically, he argues that had the authors of RCW 51.08.178(1) intended for "fuel" to mean only fuel used to heat a house, "they could have simply stated 'utilities' or *continued to use the term 'board.'*" App. Br. 11 (emphasis added). He asserts that "[u]tilities the worker received as wages were already included by way of the term 'board.'" App. Br. 3.

This Court should decline Mr. Yuchasz's invitation to resort to legislative history. Our Supreme Court construed the meaning of "fuel" in *Cockle*, and that construction controls here. *See Gore*, 101 Wn.2d at 487.

In any case, Mr. Yuchasz's legislative argument lacks merit. First, he relies entirely on the section of the 1911 statute (Laws of 1911, ch. 74,

§ 4) that pertains to employer premiums, not worker benefits (Laws of 1911, ch. 74, § 5). *See* App. Br. 8. Second, as explained above, because “board” means food, not utilities, the inclusion of the term “board” in the 1911 Act did not indicate a legislative intent to include utilities. *See Cockle*, 142 Wn.2d at 821; *Cockle*, 96 Wn. App. at 74; *Black’s Law Dictionary* 196; *Webster’s Third New Int’l Dictionary* 243.

Before 1971, a worker’s benefits under the Act were not based on his or her “wages” but, rather, on a statutorily fixed compensation schedule. *See Cockle*, 142 Wn.2d 810. When the Legislature adopted the Act in 1911, it enacted a “schedule of contribution” that established the employer’s premiums (Laws of 1911, ch. 74, § 4) and a “schedule of awards” that established the worker’s benefits (Laws of 1911, ch. 74, § 5). The worker’s benefits were fixed by the Legislature and did not depend on the worker’s wages. *See* Laws of 1911, ch. 74, § 5. Over the next 60 years, the Legislature periodically increased the amount of benefits payable under the schedule. *See Cockle*, 142 Wn.2d 810.

The statute that Mr. Yuchasz relies on for his legislative history argument (Laws of 1911, ch. 74, § 4) is not the compensation schedule for workers but the “schedule of contribution” that established an employer’s premiums. That statute stated that an employer had to pay into the state treasury “a sum equal to a percentage of [its] total payroll for that year” in

accordance with a designated risk schedule for different industries. Laws of 1911, ch. 74, § 4. That statute defined “pay roll” to include “the entire compensation received by every workman employed in extra hazardous employment . . . *whether payable in money, board, or otherwise.*”<sup>7</sup> Laws of 1911, ch. 74, § 4 (emphasis added).

Thus, section 4’s “schedule of contribution” had nothing to do with the amount of benefits that a worker *received* under the Act. As explained above, a different portion of the statute set uniform compensation rates for injured workers. *See* Laws of 1911, ch. 74, § 5; *see also* *Cockle*, 142 Wn.2d at 810. Section 4 of the statute did not define “wages.” Thus, Mr. Yuchasz’s assertions that the value of utilities that the worker received as wages “were already included by way of the term ‘board’” and that “board” was “originally included in the wage statute” are incorrect. *See* App. Br. 3, 14; *see* Laws of 1911, ch. 74, § 5.

Accordingly, the 1911 Act did not indicate a legislative intent to include the amount that a worker received in “board” in the calculation of the worker’s wages for benefit purposes. Instead, it indicated a legislative

---

<sup>7</sup> This portion of the statute read in its entirety:

In computing the pay roll the entire compensation received by every workman employed in extra hazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium, or otherwise, and whether payable in money, board or otherwise.

Laws of 1911, ch. 74, § 4.

intent to include the amount that an employer paid in “board” in the calculation of the employer’s “total pay roll” for purposes of premium calculation. Therefore, Mr. Yuchasz’s argument that the Legislature could have continued to use the term “board” to mean “utilities” is based on a faulty statutory premise and an incorrect understanding of the meaning of term “board.” *See* App. Br. 11.

Finally, Mr. Yuchasz speculates that “the necessity of workers to travel” combined with “the high cost of fuel” in 1971 make it likely that the Legislature included fuel in the 1971 statute in order to compensate workers for the gasoline they needed to drive to and from work. *See* App. Br. 3-4. But he cites no legislative history to support this argument and thus the Court should disregard it. *See* App. Br. 3-4; *Cowiche Canyon Conservancy*, 118 Wn.2d at 809; *DeHeer*, 60 Wn.2d at 126; RAP 10.3(a)(6). And this argument disregards *Cockle*’s holding.

**D. This Court Should Consider As Persuasive Authority The Board’s Decisions In *Brammer* And *Yuchasz* Rejecting The Argument That Transportation Fuel Can Be Included As “Wages” Under RCW 51.08.178(1)**

After *Cockle*, the Board addressed the exact issue that Mr. Yuchasz raises in this appeal. *See In re Brammer*, 2007 WL 1413101 at \*4-5. In *Brammer*, the employer provided the worker with a pick-up truck for personal and business use and paid for the truck’s fuel. 2007

WL 1413101 at \*2. The employer also provided a residence for the worker and paid for heat and electricity for the residence. 2007 WL 1413101 at \*2. The worker argued that the Department should have included the transportation fuel, heating, and electricity costs in calculating his wages under RCW 51.08.178(1). *Brammer*, 2007 WL 1413101 at \*2.

The Board rejected the argument that the cost of the truck's fuel should be included in the worker's "wages" under RCW 51.08.178(1). *Brammer*, 2007 WL 1413101 at \*4. Relying on the Court of Appeals' and the Supreme Court's *Cockle* decisions, the Board explained that the term "fuel" in RCW 51.08.178(1) "refer[s] to home utilities expenses, not transportation costs." *Brammer*, 2007 WL 1413101 at \*4. Accordingly, the Board held that the Department properly excluded the employer-paid transportation fuel costs from the wage calculation. *Brammer*, 2007 WL 1413101 at \*4.

The Board agreed, however, that the Department should have included the heating and electricity costs in the wage calculation because "[t]hese are expenses for fuel." *Brammer*, 2007 WL 1413101 at \*4. This interpretation of what constitutes "fuel" under RCW 51.08.178(1) is consistent with the holding in *Cockle* and "is entitled to great deference." *See Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Mr. Yuchasz argues that it is error for courts to consider a non-significant decision of the Board. *See* App. Br. 6, 14. He cites a footnote from a single Division Two case for the proposition that “[i]t is well established that decisions that have not been designated by the [Board] as significant decisions will not be considered by the appellate court.” App. Br. 14 (citing *O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn. App. 760, 767 n.3, 109 P.3d 484 (2005)).

The footnote in *O’Keefe* does not state that appellate courts will not consider non-significant decisions. *See* 126 Wn. App. at 767 n.3. Rather, it states that the parties cited two Board cases as authority “but the Board did not designate them as significant decisions.” 126 Wn. App. at 767 n.3. Earlier in its decision, the *O’Keefe* court analyzed two significant decisions of the Board to support its analysis. 126 Wn. App. at 767 (citing *In re Thomas*, No. 00 10091, 2001 WL 1193934 (Wash. Bd. Ind. Ins. Appeals July 31, 2001), and *In re Soesbe*, No. 02 19030, 2003 WL 22696947 (Wash. Bd. Ind. Ins. Appeals Sept. 25, 2003)). That the *O’Keefe* court elected to consider two significant decisions but declined to consider two non-significant decisions does not support Mr. Yuchasz’s broad assertion that appellate courts will not consider non-significant decisions. *See* App. Br. 14.

On the contrary, appellate courts often cite and discuss non-significant Board decisions as persuasive authority to support their legal analysis. For example, in a recent case, this Court cited and discussed the Board's application of the multiple proximate cause doctrine in two non-significant decisions. *See Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006, (2013) (citing *In re Killian*, No. 06 17478, 2007 WL 4986270 (Wash. Bd. Indus. Ins. Appeals Nov. 20, 2007), and *In re Thomas*, Nos. 04 17345 & 04 17536, 2006 WL 2989442 (Wash. Bd. Indus. Ins. Appeals May 17, 2006)). In another case, the Court reviewed two non-significant Board decisions regarding second injury fund relief. *See Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 890, 205 P.3d 979 (2009) (citing *In re Olsen*, No. 06 16795, 2007 WL 4986259 (Wash. Bd. Indus. Ins. Appeals November 13, 2007), and *In re Williams*, No. 00 11219, 2001 WL 1755668 (Wash. Bd. Indus. Ins. Appeals December 20, 2001)). The Board considers all of its opinions, whether significant or not. *See, e.g., In re Jornada Roofing I, Inc.*, No. 08 W1050, 2010 WL 1170616 (Wash. Bd. Ind. Ins. Appeals Jan. 27, 2010) (quoting *In re DeRidder*, No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins. Appeals May 30, 2000)) (the Board was bound by a "duty of consistency" to follow prior

decisions, whether designated significant or not, unless articulable reasons existed for not doing so).

Therefore, this Court may consider *Brammer* as persuasive authority. Even if this Court declines to consider *Brammer*, however, the tentative significant decision of *Yuchasz* is persuasive authority as to the Board's interpretation of "fuel" in RCW 51.08.178(1). See BR 6-7; *Tri*, 117 Wn.2d at 138. In particular, the Board's view should be followed as it is consistent with the Department's view, which is entitled to deference. See *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

**E. This Court Should Apply *Cockle* Rather Than Foreign Case Law**

Mr. Yuchasz cites a California Court of Appeals case and a blank form from Texas titled "Employer's Wage Statement" to argue that other jurisdictions have interpreted "fuel" to mean "vehicle fuel." App. Br. 12 (citing *Motheral v. Workers' Comp. Appeals Bd.*, 130 Cal. Rptr. 3d 677, 679, 199 Cal. App. 4th 148 (2011)); see also Ex. 4. This argument lacks merit.

This Court should not consider the "Employer's Wage Statement" form from Texas. This is hearsay evidence, not legal authority, and it was not presented to the Board. As such, it is not part of the record on review

and should not be considered now. See RCW 51.51.115 (superior court shall not receive evidence in addition to that presented to the Board); RAP 10.3(a)(8).

With regard to the California case, the *Cockle* Court specifically warned about “the danger in using foreign case law to construe Title 51 provisions.” *Cockle*, 142 Wn.2d at 815. As the Court explained:

[T]he [workers’ compensation] statutes in other states are different from ours. In 1916 we said in *Stertz v. Industrial Insurance Commn.*, 91 Wash. 588, 604, 158 P. 256 (1916), “[t]o seek authority in the decisions of other states is useless, for other statutes have no resemblance to ours.”

*Cockle*, 142 Wn.2d at 815 (quoting *Thompson v. Lewis County*, 92 Wn.2d 204, 208–09, 595 P.2d 541 (1979)).

*Cockle*’s warning about analogizing foreign law applies here. *Motheral* construes a California statute defining “average weekly earnings” that differs significantly from RCW 51.08.178(1). The California statute includes “the market value of board, lodging, fuel, and other advantages received by the injured employee as part of his remuneration” in the definition of the worker’s “average weekly earnings.” Cal. Labor Code § 4454. And it excludes “any sum which the employer pays to or for the injured employee to cover any special expenses entailed on the employee by the nature of his employment.” Cal. Labor Code § 4454.

The issue in *Motheral* was whether a worker's car allowances of \$187.50 per month and \$0.15 per mile, both of which the employer had to pay the worker under the terms of a written employment contract, constituted "remuneration" or a "special expense[]" under section 4454. See *Motheral*, 130 Cal. Rptr. 3d at 679, 681-82. The court held, without analyzing whether the car allowances constituted "fuel" or "other advantages," that the allowances were "remuneration" because the employer had to pay them under the contract whether or not the worker drove. *Motheral*, 130 Cal. Rptr. 3d at 682.

RCW 51.08.178(1) does not make a distinction between remuneration and special expenses. Additionally, where the California statute includes all "other advantages" that a worker receives as remuneration—whether or not they are like "board, lodging, and fuel"—the Washington statute includes only those items that are "consideration of like nature" to "board, housing, [and] fuel." Compare RCW 51.08.178(1) with Cal. Labor Code § 4454. *Cockle* construed this to mean only those items that are critical to protecting the worker's basic health and survival. This Court must do the same. *Motheral* has no application here.

Because Mr. Yuchasz should not prevail in this appeal, he is not entitled to attorney fees. Fees are awarded against the Department only if the worker requesting fees prevails in the action and if the accident fund or

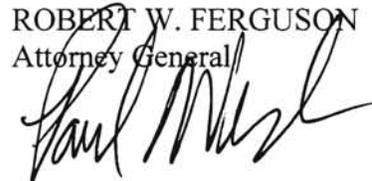
medical aid fund is affected by the litigation. RCW 51.52.130; *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

**VII. CONCLUSION**

For the foregoing reasons, the Department asks this Court to affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2013.

ROBERT W. FERGUSON  
Attorney General



PAUL WEIDEMAN  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 389-3820