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64162-0

NO. 64162-0-I

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

Juana Alegria,

Appellant,

v.

Department of Labor & Industries of the State of Washington,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

ANDREW J. SIMONS
Assistant Attorney General
WSBA #30186
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6302

FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 JAN 27 PM 4:25

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I. INTRODUCTION

This is a workers' compensation case brought under the Industrial Insurance Act, Title 51 RCW. Juana Alegria appeals from a superior court judgment that affirmed an order of the Board of Industrial Insurance Appeals that affirmed an order of the Department of Labor and Industries. The Department order denied Alegria's claim on the ground that she was injured during the course of her employment as a "domestic servant" in a private home and therefore excluded from workers' compensation benefits under RCW 51.12.020(1).

The superior court properly interpreted the plain language of the statute to hold Alegria's second job at a nightclub owned by the same homeowner who employed her did not change her "domestic servant" employment from being excluded under the Act. Alegria fails to demonstrate otherwise.

II. COUNTERSTATEMENT OF THE ISSUES¹

- A. Did the superior court correctly find, based on substantial evidence, that Alegria's babysitting and housekeeping work for a homeowner in his home was "domestic servant" employment for that homeowner, and therefore excluded from workers' compensation coverage under RCW 51.12.020(1)?
- B. Does the fact that Alegria was entitled to workers' compensation during her additional employment in homeowner's nightclub change the excluded nature of her "domestic servant" employment, during the course of which she was injured?

III. STATEMENT OF THE CASE

A. Facts

In early to mid 2004,² Alegria began to work full time in James Dore's private home located in Renton, Washington. Her job was to care

¹ These issues respond to the only issues raised in Alegria's Brief of Appellant. At the Board and in superior court, Alegria also included an argument asking for remand for further hearings. Alegria's Brief of Appellant, at 7, contains the following passage: "*In addition to the authorities cited in the Appellant's Trial and Reply briefs, previously filed in this matter and incorporated herein by this reference, with regards to the interpretation of the Industrial Insurance Act, the appellant would direct this Court to Doty v. Town of South Prairie, 155 Wn.2d 527, 120 P.3d 941 (2005).*" (Emphasis added). Appellate courts lack authority to remand workers' compensation cases to allow parties with the burden of proof, such as Alegria, a second chance to improve their case. *Salesky v. Dep't of Labor & Indus.*, 42 Wn.2d 483, 484-485, 255 P.2d 896 (1953); *Ivey v. Dep't of Labor & Indus.*, 4 Wn.2d 162, 164, 102 P.2d 683 (1940) ("[T]he [trial] court did not reverse the decision of the department upon the merits, but for the purpose of clearing the way for the taking of additional evidence . . . That, of course, must necessarily mean that the claimant had not sustained the burden of proof required of him by the statute.") In any event, as the Department has pointed out in a Motion to Strike accompanying this Brief of Respondent, it is improper for parties to incorporate trial court briefs by reference in appellate court briefs. *U.S. West Communications, Inc. v. Washington Util. & Transp. Com'n*, 134 Wn.2d 74, 111-112, 949 P.2d 1337 (1997) (to allow such incorporation by reference would be to render meaningless the Rules of Appellate Procedure).

² The 2004 date is an inference based on Alegria's testimony that she had worked in Dore's home for approximately two years before starting to work at his nightclub, and that it was about six months after she started in the nightclub that she was

for his son and cook and clean in Dore's home. Alegria 7-8, 35; Dore 38-39, 49.³ Alegria was the only person employed in the home as a baby sitter and housekeeper.⁴ Superior Court Finding of Fact (SFF) 1.3; Alegria 24; Dore 50, 53.⁵

Alegria was hired by Nancy Medina, the child's mother and Dore's girlfriend. Alegria 20-21; Dore 38-39. Alegria's primary language was Spanish, and she did not speak English. Alegria 23. Medina, who spoke Spanish, explained the job to her. Dore 44. Most of Alegria's contact was with Medina, because Dore spoke only English. Alegria 23. Dore owned the home and usually lived there but was gone for periods of time because of "personal problems" with Medina. Dore 38, 43, 46, 55. Alegria believed both Dore and Medina were her employers. Alegria 23.

For about two years, Alegria worked exclusively in Dore's home, taking care of his and Medina's child. Alegria 35. During that period,

injured in Dore's home on September 22, 2006. Alegria 7-8, 35. This would place her start date at the nightclub around March 2006 and her starting date of employment two years earlier in Dore's home in early to mid 2004.

³ The only two witnesses who testified in this case were Juana Alegria and James Dore. Citations to their testimony will be by last name and the page number of the May 6, 2008 transcript. The transcript is found at the end of the Certified Appeal Board Record.

⁴ Medina's grandmother and others would sometimes babysit, but were not paid. Dore 50.

⁵ The superior court adopted all of the findings made by the Board and made an additional finding. This brief refers to the superior court's findings of fact as SFF, and the Board's findings of fact as FF. Copies of the superior court judgment (CP 27-29), the Board decision in the Certified Appeal Board Record (BR) 1, 31-34, and the two Department orders that Alegria appealed (BR 37, 38) are attached as Appendices A, B, and C, respectively.

Dore paid her only in currency. Alegria 33-35 (distinguishing between being paid in “cash” for the first two years as opposed to being paid by check after that). After about two years, she began working a second job on Saturday and Sunday nights, one or two hours per night, at a nightclub Dore owned in Seattle. Alegria 9-10, 31. After she began working at the club, Dore would pay her for both jobs with one ADL check. Dore 49-50, 56-57. She sometimes helped clean the nightclub after it was closed. Alegria 9, 31; Dore 42. She also received tips, checking coats at the nightclub. Alegria 32, 36.

The corporate name of the nightclub was ADL, Inc. (ADL). Dore 40. As of the hearing at the Board, Alegria had never heard of ADL. Alegria 13. Medina managed the nightclub and explained Alegria’s nightclub duties to her. Dore 43-44. It was during this period of working two jobs that Alegria slipped and fell in Dore’s home while performing her babysitting and housekeeping work. Alegria 11, 18.

B. Procedure

Alegria was injured on September 22, 2006 while working in the home of James Dore, caring for his son. Alegria 6-7. Alegria filed a claim for workers’ compensation. FF 1. The Department denied her claim on the ground her employment was not covered by the Industrial Insurance Act. Certified Appeal Board Record (BR) 38; FF 1. Alegria

protested that order, and the Department issued an order affirming the claim denial. BR 37; FF 1.

Alegria appealed to the Board, where the issue on appeal was identified as whether “the claim should be allowed or excluded per domestic service exception.” BR 74. After a hearing, the Industrial Appeals Judge issued a proposed decision recommending that the Board affirm the Department’s denial order. BR 31-34.

The proposed decision included three key findings:

- On September 22, 2006, Ms. Alegria was injured while she was working at the private residence of James Dore, Jr., where she was regularly employed forty or more hours a week. BR 34; FF 2.
- In September 2006, Ms. Alegria was employed primarily for babysitting and housework in Mr. Dore’s home. Her work at business owned by Mr. Dore (corporate name ADL, Inc.) was limited and incidental, and did not change her primary role: performing household duties and caring for his child. BR 34; FF 3.
- On September 22, 2006, Ms. Alegria was injured while she was working as a domestic servant for James Dore, Jr., within the contemplation of RCW 51.12.020(1). BR 34; Conclusion of Law 2.⁶

Alegria petitioned the three-member Board for review. BR 6-14.

The Board denied the petition and adopted the IAJ’s proposed order as the Board’s final order. BR 1; RCW 51.52.106.

⁶ While labeled a conclusion of law, the determination that Ms. Alegria was working for Mr. Dore (as opposed to ADL) was a finding of fact and must be treated as such. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact).

Alegria appealed to superior court for de novo review under RCW 51.52.115. After a bench trial, the superior court affirmed the Board's order. CP 27-29.

The superior court adopted as its own all of the findings and conclusions of the Board. CP 40-41; SFF 1.2; Superior Court Conclusion of Law 2.2. In addition, the superior court added the following finding of fact: "Ms. Alegria was injured during the course of her employment with Mr. Dore as a baby sitter and housekeeping in his private home on September 22, 2006. Ms. Alegria was the only person Mr. Dore employed at his home as a baby sitter and housekeeper." CP 40; SFF 1.3.

The superior court later denied Alegria's motion for reconsideration. CP 42. This appeal followed.

IV. STANDARD OF REVIEW

"RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act." *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826 (2004). The superior court reviews a Board decision de novo but "only in an appellate capacity" and "cannot consider matters outside the record or presented for the first time on appeal." *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969); RCW 51.52.115.

At the superior court, the “findings and decisions of the Board are prima facie correct and the burden of proof is on the party attacking them”: here, Alegria. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115. Alegria had the burden of proving that the Department erroneously denied her claim under RCW 51.12.020(1). See *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 660, 879 P.2d 326, 329 (1994) (worker appealed a claim denial based on an exclusion under RCW 51.12.020).

This Court reviews the superior court’s findings, as in other civil cases, to “see whether substantial evidence supports the findings” and “whether the court’s conclusions of law flow from” them. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 180-181, 210 P.3d 355), review denied, 220 P.3d 209 (2009); RCW 51.52.140 (“Appeal shall lie from the judgment of the superior court as in other civil cases.”)

Evidence is substantial if “sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). In determining whether substantial evidence exists, the Court must take the “record in the light most favorable to the party who prevailed in superior court”: here,

the Department. *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

This case involves the meaning of the “domestic servant” exclusion from the coverage under the Industrial Insurance Act – RCW 51.12.020(1).⁷ Statutory interpretation is a question of law reviewed de novo. *Willoughby v. Dep’t of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002); *Everist v. Dep’t of Labor & Indus.*, 57 Wn. App. 483, 485-486, 789 P.2d 760 (1990) (“The meaning of domestic servant is resolved as a matter of law because it involves defining a statutory term.”).

V. ARGUMENT

The Industrial Insurance Act excludes “domestic servant” from its coverage and defines “domestic servant” as a person employed in a “private home” by an employer with less than two employees working 40 or more hours a week. RCW 51.12.020(1). Here, Dore employed Alegria in two separate employments, one in Dore’s non-commercial capacity as a homeowner and the other in his commercial capacity as a nightclub business (ADL) owner. Substantial evidence supports the superior court finding below that Dore, not ADL, was Alegria’s employer at times when she was performing domestic servant duties in Dore’s personal home.

⁷ Copies of RCW 51.12.020, other cited statutes, and Washington Administrative Code (WAC) sections are attached as Appendix D.

Alegria does not dispute she was injured during the course of her employment as a housekeeper and babysitter in Dore's private home. In fact, she concedes she was performing "domestic type services" when injured. AB 6. Under the plain language of the statute, her employment of injury was that of a "domestic servant" excluded from the Act.

Alegria contends, without citing any authority, that the domestic servant exclusion does not apply because, (1) after working for Dore exclusively as a domestic servant in his home for currency paid directly by Dore, she began performing some incidental work at his ADL nightclub, and (2) both her domestic service work and her incidental ADL work were paid for by an ADL check. The language and purpose of the domestic servant exclusion, and the case law addressing similar issues, support the superior court's conclusion that Alegria's nightclub employment does not change the excluded nature of her domestic servant employment in which her injury occurred. The Court should affirm the superior court.

A. Alegria Was Injured in the Course of Her Employment as a Domestic Servant for Dore and Is Thus Excluded from Workers' Compensation under RCW 51.12.020(1)

Washington is one of the 26 states that exclude "domestic servants" from workers' compensation. 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 72.03 (2008 Ed.); 10 *Larson's Appendix A, Table 4. Washington's Industrial Insurance Act*

excludes “domestic servant” and defines “domestic servant” as one employed “in a private home by an employer” who has less than two regularly employed workers:

The following are the only employments which shall not be included within the mandatory coverage of this title: (1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

RCW 51.12.020(1).

This court has interpreted this domestic servant exclusion to apply to those hired “primarily for the performance of household duties and chores, the maintenance of the home, and the care, comfort and convenience of members of the household.” *Everist*, 57 Wn. App. at 486 n.5 (citation omitted). A “significant percentage” of a domestic servant’s duties can include caretaking for a particular individual, as long as the domestic servant has other “general household duties.” *Id.* at 487.

Here, it is undisputed that Alegria cared for Dore’s and Medina’s child in Dore’s private home and cooked and cleaned in his home. Alegria 7-8, 35; Dore 38-39, 49; FF 3. Such duties fall “squarely within the offices of a domestic servant.” *Everist*, 57 Wn. App. at 486. Alegria was the only such worker in Dore’s home. Alegria 24; Dore 50, 53; SFF 1.3.⁸

⁸ Alegria presented no evidence that ADL employed any other domestic servants in Dore’s home (or employed any other domestic servants in any other homes). Her

Therefore, under the plain language of the statute, she was a “domestic servant.” Because Alegria was injured during the course of her “domestic servant” employment, the superior court correctly concluded she was excluded from workers’ compensation.

B. Alegria’s Work at the ADL Nightclub Does Not Change the Excluded Nature of Her Domestic Servant Work

Alegria claims her employment with Dore included her work for Dore’s nightclub business (ADL) and argues the domestic servant exclusion applies only to employees whose “*sole* job function” for a particular employer is that of a domestic servant, and “*does not contemplate someone who fills more than one role for the same employer as [she] did in this case.*” AB 7-8 (emphasis in original).⁹ She suggests that a liberal construction supports her interpretation. AB 6, 8-9, 13-14.¹⁰

While the Industrial Insurance Act is remedial, the “primary goal of statutory construction is to carry out legislative intent,” and when a

assertion that there was no evidence of “how many other employees of ADL, Inc. may have been performing the same duties as the Appellant” is simply an attempt to shift the burden of proof on this issue. AB 10; *see also* RCW 51.52.050(2)(a) (“In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal.”).

⁹ Alegria suggests she engaged in one employment with ADL with several job functions. AB 7. But her suggestion is not based on the findings or evidence. This is not a case where Alegria worked in two separate jobs at the ADL-owned nightclub, e.g., as a cashier and a waitress. Alegria was employed by Dore for babysitting and housekeeping in his home, and was injured during the course of this “domestic servant” employment. FF 2; SFF 1.3.

¹⁰ RCW 51.12.010 states in relevant part: “This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.”

statute's language is "plain and unambiguous its meaning must be primarily derived from the language itself." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The statutory language is ambiguous and subject to interpretation only if it is "susceptible to more than one reasonable interpretation." *Cockle*, 142 Wn.2d at 808. Alegria's proposed interpretation is not reasonable and does not create ambiguity in the statute.¹¹

Alegria claims the word "only" in the term "only employments" in the first sentence of RCW 51.12.020 shows intent to apply the domestic servant exclusion only to workers whose "only employment" with a particular employer is that of a domestic servant. AB 8; RCW 51.12.020 ("The following are the only employments which shall not be included within the mandatory coverage of this title . . ."). This argument fails, because the term "only employments" plainly refers to the 13 enumerated employments that *follow* the term. No reasonable reading of this term addresses – much less limits – how many other employments or "job functions" a domestic servant may have with a particular employer.

¹¹ Alegria cites *Doty v. Town of South Prairie*, 155 Wn.2d 527, 120 P.3d 941 (2005), as an example of how courts interpret ambiguous statutes and for its citation of *Cockle*, 142 Wn.2d at 811: "[W]here reasonable minds can differ over what Title 51 provisions mean," the "benefits of the doubt belong to the injured worker." AB 8-9. However, *Doty* never mentions RCW 51.12.020, and while *Doty* does discuss how the Court interprets ambiguous statutes, it explicitly holds that the statute there was "unambiguous and limited on its face." *Doty*, 155 Wn.2d at 538. Therefore, *Doty* has no relevance to Alegria's case.

The domestic servant provision contains no language limiting its application to those whose only employment with any particular employer is that of a domestic servant. In fact, each of the 13 excluded employments is stated without regard to whether the employee happens to have a separate employment with the same employer that is not excluded. *See* RCW 51.12.020. If the legislature intended such a “sole function” limitation, it could have done so by inserting “solely” or “only” into the statute, so the statute would then read: “Any person [solely or only] employed as a domestic servant” The legislature did not do that, and this Court may not add words into a statute the legislature chose not to use. *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 920, 215 P.3d 185 (2009) (“We cannot add words or clauses to a statute when the legislature has chosen not to include such language.”)

In fact, the number of employments a worker has is irrelevant to the two threshold questions in workers’ compensation coverage. First, was there an employer/employee relationship? Second, if so, was the employee injured during the course of that employment? *See* RCW 51.12.010; RCW 51.12.020. If the answers to both of these questions are yes, the employee is a covered worker, unless the employment falls within one of the excluded employments in RCW 51.12.020.

Alegria cites no authority, and the Department has found none, that supports her claim that a worker injured during the course of an excluded employment (e.g., domestic servant) is nonetheless covered for workers' compensation simply because her excluded employer (e.g., a homeowner) also runs a commercial business (e.g., a nightclub) and employs her there in a covered employment (e.g., nightclub worker). In fact, courts in other jurisdictions addressing similar circumstances have consistently held that having additional covered employment does not change the excluded nature of the employment in which the injury occurred.

For example, in *Blache v. Maryland Cas. Co.* 283 So.2d 319, 320 (La. Ct. App. 1973), a doctor employed the plaintiff in his clinic and also in his home as a domestic servant. She was injured while working as a domestic servant, which was not covered by Louisiana's workers' compensation law. *Blache*, 283 So.2d at 320. Her working for the same doctor in his clinic was irrelevant because "the fact remains that [she] was not performing any such services [in the clinic] at the time of her accident, and is therefore not covered under the act." *Id.* at 321.

Similarly, in *Brown v. Leavitt Lane Farm*, 340 N.W.2d 4 (Neb. 1983), the employer was engaged in both farming (excluded) and farming nutrition service (covered). The worker was only employed on the farm and was injured while performing farm work. The "dispositive question"

was “whether one employer can operate two different businesses, one subject to the workmen’s compensation law and one exempt.” *Brown*, 340 N.W.2d at 7. The Nebraska Supreme Court answered this question: “We hold that an employer may do so.” *Id.* at 8. The court reasoned that the state’s workers’ compensation act “does not contemplate that a person can be engaged in only one regular business” *Id.* (citation omitted).

Like the plaintiff in *Blache*, Alegria was employed as a domestic servant in the home of a person who also ran a business, for which she also worked. Like the doctor in *Blache*, Dore ran a business and also employed a domestic servant in his home. The implicit rule in *Blache* that a person can work two jobs, one covered by workers’ compensation and the other excluded, is consistent with that pronounced in *Brown* that an employer can operate two different businesses, one covered by workers’ compensation and the other excluded from it.

These decisions properly address the realities of multiple and separate employments. These decisions are also consistent with Washington’s workers’ compensation law. For example, Washington’s act requires the Department to “classify all occupations or industries in accordance with their degree of hazard” and determine premium rates accordingly. *See* RCW 51.16.035(1). Pursuant to this statute, the Department has differently classified restaurant workers (WAC 296-17A-

3905-07) and domestic servants (WAC 296-17A-6510-00). This statutory mandate and the Department's distinct risk classifications examine the nature of a particular employment, regardless of whether the employee has an additional employment with a different degree of hazard. There is no reason why the same principles do not apply for coverage determinations.

Washington's workers' compensation statutory scheme contemplates that Alegria's two separate employments be analyzed separately for purposes of statutory coverage. Alegria wore two "hats," one subject to the act (nightclub employment) and the other excluded from the act (domestic servant). Contrary to Alegria's claim, this separate analysis would not place any undue "burden" on her "to parse out from job function to job function whether she was a covered employee or not." AB 13. If she was injured while working in the nightclub, she would be covered. If she was injured while working in Dore's home as a domestic servant, as she did here, she is excluded from the coverage.

Nothing in the language of the domestic servant exclusion suggests intent to make a homeowner, who employed a domestic servant, responsible for workers' compensation premiums by hiring that same person to work in the homeowner's separate business.¹² Such a reading would gratuitously discourage a homeowner from hiring a domestic

¹² That homeowner would, in his or her role as business owner, be responsible for workers' compensation premiums for the employee's work in the business.

servant (excluded from workers' compensation) to work in other covered employment. Such a reading would also likely gratuitously discourage a business owner from hiring an employee he or she knew and trusted from his or her business to work in an exempt position in his or her home. In other words, Alegria's interpretation benefits neither employers nor workers. It is unlikely the legislature contemplated such a result. *See State v. Ettenhofer*, 119 Wn. App. 300, 304, 79 P.3d 478 (2003) (courts must avoid absurd results).

In summary, Alegria's separate nightclub employment did not change the excluded nature of her "domestic servant" employment in Dore's home.

C. The Domestic Servant Exclusion Does Not Turn on Whether the Homeowner Runs a Separate Commercial Enterprise, and Alegria's Reliance on *Dana's Housekeeping* Is Misplaced

Alegria claims that her employer, with respect to her domestic servant work, was a "commercial" entity – ADL.¹³ AB 10-12. She then argues that a "commercial" employer may not claim the domestic servant exclusion, citing *Dana's Housekeeping, Inc. v. Department of Labor &*

¹³ *See, e.g.*, AB 1 (Alegria was injured "while an employee of ADL, Inc."); 4 ("Appellant, at the time of her injury, was an employee of a commercial entity . . ."); 8 n.2 ("Appellant, at the time of her injury was clearly an employee of ADL . . ."); 11 ("Appellant was directly employed by the business entity ADL, Inc. to perform these multiple duties at different locations.").

Industries, 76 Wn. App. 600, 611, 886 P.2d 1147 (1995). Alegria’s claim lacks factual basis, and her reliance on *Dana’s Housekeeping* is misplaced.

Neither the Board nor superior court found that ADL was her employer with respect to her employment as a housekeeper and babysitter in Dore’s home. FF 2, 3; SFF 1.3. In fact, the superior court found Dore was the employer for her domestic servant work in his home:

Ms. Alegria was injured during the course of her employment with Mr. Dore as a baby sitter and housekeeper in his private home on September 22, 2006. Ms. Alegria was the only person Mr. Dore employed at his home as a baby sitter and housekeeper.

SFF 1.3. Substantial evidence supports this finding. *See, e.g.*, Sections III.A. and V.A. above.¹⁴

Importantly on this point, for the first two years of her relationship with Dore, Alegria exclusively performed domestic servant duties in Dore’s home and he paid her exclusively, personally, and directly with

¹⁴ In a single sentence, Alegria states broadly that she “assigns as error that the Findings of the Board of Industrial Insurance Appeals and the King County Superior Court are not supported by the law of the facts.” AB 2. She does not cite or quote any specific finding in her brief. Alegria has inadequately assigned error, and therefore the superior court findings are verities, and it is not necessary for the Department to show that substantial evidence supports the findings. *See* RAP 10.3(g) (“A separate assignment of error for each finding of fact a party contends was improperly made must be included with a reference to the finding by number.”); *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995) (where a party fails to assign error to a finding of fact, the finding is a verity); RAP 10.4(c) (the text of any challenged finding is to be set forth in or appended to a brief); *Macey v. Dep’t of Empl. Sec.*, 110 Wn.2d 308, 311, 752 P.2d 372 (1988) (court may dismiss appeal for the “serious deficiency” in brief of failing to set out text of challenged finding of fact or conclusion of law).

currency. Alegria 33-35. There could be no question that during that period she was employed by Dore as homeowner, not by ADL.

When, after two years, Alegria began performing some incidental work at the nightclub, nothing changed in her relationship to Dore as to her domestic servant activity in his home except that he began paying her by check from ADL instead of personally with his own currency. The method of payment did not transform the nature of her domestic servant work or of the employer-employee relationship between Alegria and Dore in that work.

Just as important, it is highly implausible that Alegria's domestic servant activities in Dore's home benefited the corporation in any way. Thus, it is implausible that she worked for the corporation in her domestic service work. Much more plausible is that Dore, who did not speak English and appears to have largely deferred to Medina on all aspects of both of Alegria's employments, started paying Alegria with ADL checks for convenience.¹⁵ Dore 49, 56-57.

Alegria's claim that ADL employed her as a domestic servant, not Dore, is based entirely on her receiving an ADL check for her domestic

¹⁵ Q (Alegria's counsel): "Was she paid for that work separately from her payment for the work she did in the club?" A (Dore): "As far as the – No. All of it – Her and Nancy [Medina] worked out whatever the deal was, and I was told this is what the deal was and paid her." Dore, 49. Q (Industrial Appeals Judge): "So the amount [was] dictated to you by Ms. Medina?" A (Dore): "Pretty much." Q: "And you would just write the check in that amount?" A: "Pretty much, yeah." Dore 56-57.

servant work (AB 4, 10) and being supervised (primarily) by Medina at both places (AB 8, footnote 2), but she provides no authority (and there is none) that these establish her employment was with ADL, rather than Dore, for her domestic servant work.

Even assuming that ADL (not Dore) employed her with respect to her domestic servant work, Alegria would still be excluded from workers' compensation. This is because she was injured while "employed as a domestic servant in a private home by an employer [ADL] who has less than two employees regularly employed forty or more hours a week in *such employment*." RCW 51.12.020(1) (emphasis added). Therefore, even if ADL was her employer for purposes of her domestic servant work, the plain language of the statute still applies to that particular employment.

Dana's Housekeeping does not support Alegria. That case involved a "homemaking service" business employing 140 housecleaners to clean the business's customers' homes. *Dana's Housekeeping*, 76 Wn. App. at 602. The housecleaners typically cleaned "many different homes each week." *Id.* at 603. The court read the domestic servant provision to be "plain" and to "not apply to a commercial entity contracting with numerous housecleaners to clean many different homes because the exclusion is limited to *a private home*." *Id.* at 610 (emphasis in original).

The court pointed to the “key words” in the statute – “a private home.” *Id.*¹⁶

Unlike the homemaking business in *Dana’s Housekeeping* that employed 140 employees to clean many different homes, Dore employed only Alegria to babysit and clean in his *single* home. Thus, the “plain” language of the exclusion squarely applies here.

Dana’s Housekeeping does not hold that the domestic servant exclusion cannot apply to the owner of a “commercial” entity. Rather, the court considered the language of the exclusion and its rationale “as requiring characterization of the employer, *in relation to the work and its location.*” *Dana’s Housekeeping*, 76 Wn. App. at 611, n.6 (emphasis added).

As the *Dana’s Housekeeping* court stated, the rationale of the domestic servant exclusion is two-fold: (1) “homeowners cannot pass through the insurance cost to an ultimate consumer, as can a business” and (2) “homeowners typically employ many different types of workers, making financial and administrative burdens on homeowners unreasonable if persons hired to help around the home were covered.” *Id.* at 609-610.

¹⁶ Alegria suggests the domestic servant exclusion must be liberally read for the worker, citing *Dana’s Housekeeping*. AB 6. But *Dana’s Housekeeping* found the language of the exclusion “plain.” 76 Wn. App. at 610. Thus, the language is not subject to interpretation. See *Cockle*, 142 Wn.2d at 807: When a statute’s language is “plain and unambiguous its meaning must be primarily derived from the language itself.”

This rationale does not apply to “commercial entities providing cleaning services to many, different households.” *Id.* at 611.

In explaining why the domestic servant exclusion does not apply to the “commercial” homemaking business, *Dana’s Housekeeping* cited to an Arizona case for the proposition that “domestic servant” must be defined “with reference to whether the master attempts to profit in an entrepreneurial capacity from the servant’s labor.” *Id.* (citing *Griebel v. Indus. Comm’n*, 650 P.2d 1252, 1255 (Ariz. Ct. App. 1982)). The exclusion applies to work that “does not contribute to the employer’s business, and *is thus noncommercial.*” 76 Wn. App. at 610 (emphasis added).

Here, the domestic servant rationale applies to Alegria’s babysitting and housekeeping work for Dore in Dore’s home. Dore cannot pass along the cost of Alegria’s domestic service to its “ultimate consumer,” because Dore is the ultimate consumer of Alegria’s service. *Dana’s Housekeeping*, 76 Wn. App. at 609-610. In other words, Dore was not profiting in any entrepreneurial capacity from Alegria’s labor; he was purchasing Alegria’s labor as a consumer. Further, it would create unreasonable “financial and administrative burdens” on Dore, if the person (Alegria) “hired to help around the home [was] covered.” *Id.* at 610.

Alegria claims Dore “clearly derived benefit from having [her] paid as an employee of ADL, Inc.” AB 12. But there is no evidence ADL claimed or received any benefits by paying Alegria with a corporate check for her domestic service for Dore. ADL derived profits from her nightclub work, not from her domestic service Dore purchased for himself.¹⁷

In summary, the superior court correctly concluded that Alegria’s employment of injury – babysitting and housekeeping for Dore in Dore’s home – was “domestic servant” employment excluded from Title 51. Alegria’s nightclub employment does not change the excluded nature of her domestic servant employment.

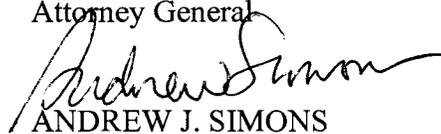
¹⁷ Without any support in the record, Alegria suggests that ADL somehow broadly classified her as an ADL employee for her domestic servant work for Dore, and that this alleged classification was a sham carried out for tax purposes. AB 12. The record does not support the allegation, and, in any event, actual employment relationships, not sham or form, are what matter under the Industrial Insurance Act. *See generally Sonners, Inc., v. Dep’t of Labor & Indus.*, 101 Wn. App. 350, 356-358, 3 P.3d 756 (2000). Alegria also suggests ADL attempted to deprive her of workers’ compensation. AB 12-13. But she points to no evidence in the record to support her suggestion.

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 26th day of January, 2010.

ROBERT M. MCKENNA
Attorney General



ANDREW J. SIMONS
Assistant Attorney General
WSBA No. 30186
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

SUPERIOR COURT JUDGMENT

Appendix A

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

JUANA ALEGRIA,

Plaintiff,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES, STATE OF
WASHINGTON,

Defendant.

NO. 08-2-38115-3 KNT

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: | Juana Alegria |
| 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. | |

- 1 10. Attorney for Judgment Creditor: Andrew J. Simons
2 Office of the Attorney General
3 800 Fifth Avenue, Suite 2000
4 Seattle, WA 98104
- 5 11. Attorney for Judgment Debtor: Robert J. Heller
6 Attorney at Law
7 Walthew, Thompson, Kindred, Costello &
8 Winemiller, P.S.
9 123 Third Ave. South
10 Seattle, WA 98104

11 This matter came on regularly before the Honorable Michael Heavey in open court on
12 June 8, 2009. Appellant, Juana Alegria, did not appear but was represented by counsel, Robert
13 J. Heller; the Defendant, Department of Labor and Industries (Department), appeared by
14 counsel, Robert M. McKenna, Attorney General, per Andrew J. Simons, Assistant Attorney
15 General. The Court reviewed the records and files herein, including the Certified Appeal
16 Board Record and briefs submitted by counsel, and heard argument of Counsel. Therefore,
17 being fully informed, the Court makes the following:

18 **I. FINDINGS OF FACT**

- 19 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board). The
20 Industrial Appeals Judge issued an initial Proposed Decision and Order on August 7,
21 2008 from which Plaintiff filed a timely Petition for Review. The Board denied
22 Plaintiff's Petition for Review, and on October 21, 2008 ordered that the Proposed
23 Decision and Order become the Decision and Order of the Board. Plaintiff timely
24 appealed the Board's Decision and Order to this Court.
- 25 1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 3.
26 The Court adopts as its Findings of Fact, and incorporates by this reference the Board's
Findings of Facts Nos. 1 through 3 of the October 21, 2008 Decision and Order which
adopted the August 7, 2008 Proposed Decision and Order.
- 1.3 Ms. Alegria was injured during the course of her employment with Mr. Dore as a baby
sitter and housekeeper in his private home on September 22, 2006. Ms. Alegria was the
only person Mr. Dore employed at his home as a baby sitter and housekeeper.

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

II. CONCLUSIONS OF LAW

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

1 2.2 The Board's Conclusions of Law Nos. 1 through 3 are correct. The Court adopts as its
2 Conclusions of Law, and incorporates by this reference, the Board's Conclusions of
3 Law Nos. 1 through 3 of the October 21, 2008 Decision and Order which adopted the
4 August 7, 2008 Proposed Decision and Order.

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

7 **III. JUDGMENT**

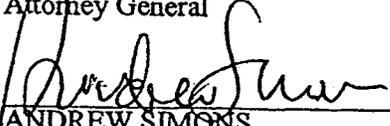
8 3.1 It is hereby ORDERED, ADJUDGED AND DECREED that the October 21, 2008
9 Board of Industrial Insurance Appeals Decision and Order which adopted the August 7, 2008
10 Proposed Decision and Order which affirmed the August 29, 2007 Department order should be
11 and is hereby affirmed.

12 DATED this 27 ^{JUL 27 2009} ~~July of July, 2009~~.

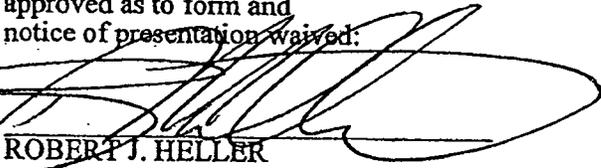
13 **MICHAEL HEAVEY**

14 Michael Heavey, JUDGE

15 Presented by:
16 ROBERT M. MCKENNA
17 Attorney General

18 
19 ANDREW SIMONS
20 Assistant Attorney General 7/13/09
21 WSBA No. 30186

22 Copy received,
23 approved as to form and
24 notice of presentation waived:

25 
26 ROBERT J. HELLER
WSBA No. 12347
Attorney for Plaintiff-Claimant

BOARD DECISION

Appendix B

**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: **JUANA ALEGRIA**

Docket No. 07 23407

Claim No. AE-43776

**ORDER DENYING PETITION
FOR REVIEW**

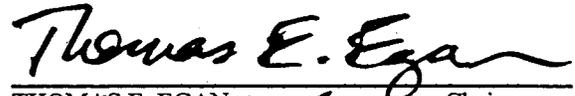
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **CAROL J. MOLCHIOR** on **August 7, 2008**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **October 2, 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: October 21, 2008.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: JUANA ALEGRIA) DOCKET NO. 07 23407
2 CLAIM NO. AE-43776) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Carol J. Molchior
4

5 APPEARANCES:

6 Claimant, Juana Alegria, by
7 Salazar Law Offices, per
8 Antonio Salazar

9 Employer, ADL, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Andrew J. Simons, Assistant

14 The claimant, Juana Alegria, filed an appeal with the Board of Industrial Insurance Appeals
15 on October 11, 2007, from an order of the Department of Labor and Industries dated August 29,
16 2007. In this order, the Department affirmed the June 1, 2007 Department order, which rejected
17 the claim because the claimant was excluded from mandatory coverage under the provisions of the
18 industrial insurance laws and the employer had not made provisions for coverage by means of
19 elective adoption. The Department order is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On December 12, 2007, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history establishes the Board's jurisdiction in this appeal.

23 **ISSUE**

24 The issue presented by this appeal is whether this claim should be
25 allowed or excluded under RCW 51.12.020(1), the domestic servant
26 section.

27 **EVIDENCE**

28 **Juana Alegria**

29 Juana Alegria testified through an interpreter that she is 69 years old. She was employed by
30 Jim Dore for two years, until she was injured on September 22, 2006. Her job was housework,
31 babysitting a child, cooking, cleaning and laundry from 8:00 a.m. to after midnight. She worked 16
32 hour days, Monday through Friday, and was paid by check.

1 Her employer owned a business, a drinking and dancing nightclub. She did cleaning there
2 approximately two hours a week. She was paid for both jobs by one check, approximately \$1,200
3 per month. She cannot read.

4 Ms. Alegria was injured at the house while she was babysitting. She fell and could not get
5 up. The wife's niece found her and called someone.

6 Mr. Jimmy's house was in Renton. He was at the nightclub in Seattle every night.
7 Ms. Alegria would sleep at the house. The wife, Nancy Merina, told her to sleep at the house. She
8 had a business to run. She got checks from her office and gave them to Ms. Alegria. She would
9 drive Ms. Alegria to the nightclub. Ms. Alegria does not drive. Sometimes she checked coats at the
10 nightclub from 9:00 p.m. to 2:00 a.m., receiving tips, and then she would clean until 3:30 a.m. She
11 only worked at the club in her last six months with Mr. Dore, and it was not a sure job. It was not so
12 much. She worked more at the house.

13 For the first two years, Ms. Alegria was paid in cash. When she started working at the club
14 they paid her by check.

15 James Dore, Jr.

16 James Dore testified that he resides in Renton. Juana Alegria worked at the restaurant, as
17 well as taking care of the son he had with Nancy Medina. (Ms. Alegria had, through the interpreter,
18 spelled the last name of "Nancy" differently, but she was obviously the same person referred to by
19 both witnesses). Ms. Alegria was probably hired by Ms. Medina. Ms. Alegria lived part of the time
20 in Normandy Park, and then she would come and live at his house for part of the week. The
21 corporate name of the restaurant was ADL, Inc. Ms. Medina managed the club with Mr. Dore, but
22 doing the day-to-day management.

23 When Ms. Alegria started working at the club, Ms. Medina would have explained her job
24 duties to her. Ms. Medina spoke Spanish. Mr. Dore signed Ms. Alegria's paychecks. She was
25 paid by checks written at the club. His contact with her was limited, because he doesn't speak
26 Spanish. Ms. Medina had more daily contact with her.

27 Ms. Alegria's job at the house was taking care of Mr. Dore's son and cooking. How she was
28 paid for the house work and the club work was a deal between Ms. Medina and Ms. Alegria, and he
29 doesn't know what deal they worked out. He was told what to pay her, and he wrote her a check
30 every two weeks that included both the house work and the club work. Mr. Dore left the house
31 between six and eight every morning and got back at five; he does not actually know how many
32

1 hours Ms. Alegria was there per week. In the house, he was Big Jimmy, and his son was Little
2 Jimmy. Mr. Dore was absent from the home at times, due to personal issues with Ms. Medina.

3 **DECISION**

4 The issue presented by this appeal is whether this claim should be allowed or excluded
5 under RCW 51.12.020(1), which excludes, from coverage, any person employed as a domestic
6 servant in a private home by an employer who has less than two employees regularly employed
7 forty or more hours a week in such employment. A domestic servant has been defined as: "A
8 person hired or employed primarily for the performance of household duties and chores, the
9 maintenance of the home, and the care, comfort and convenience of the members of the
10 household." *Bennerstrom v. Department of Labor & Indus.*, 120 Wn.App. 853 at 870 (2004);
11 *Everist v. Department of Labor & Indus.*, 57 Wn. App. 483 at 486 (1990).

12 Ms. Alegria was injured in a private home, and she was primarily employed for babysitting
13 and housework in that home. Her work at the club was incidental. As she said: "That wasn't my
14 work. My work was at his house." (5/6/08 Tr. at 30). She was paid with ADL Inc. checks, and her
15 employer, James Dore, Jr., benefited from the limited work she did at his club, but it did not change
16 her primary role as a domestic servant for the family of Mr. Dore.

17 I conclude that the August 29, 2007, Department order which affirmed the June 1, 2007
18 Department order, which rejected this claim, is correct and should be affirmed.

19 **FINDINGS OF FACT**

- 20 1. On May 22, 2007, Juana Alegria, claimant, filed an application for
21 benefits with the Department of Labor and Industries alleging that she
22 sustained an injury while in the course of her employment with ADL Inc.
23 on September 22, 2006. The claim was allowed and benefits were paid.
24 On June 1, 2007, the Department issued an order that rejected the claim
25 on grounds that claimant was excluded from mandatory coverage under
26 the Act, and the employer had not provided coverage by elective
27 adoption. On July 30, 2007, the claimant filed a protest or request for
28 reconsideration with the Department, of the Department order dated
29 June 1, 2007. On August 29, 2007, the Department issued an order that
30 affirmed the Department order dated June 1, 2007. On October 11,
31 2007, claimant filed a Notice of Appeal with the Board, from the
32 Department order dated June 1, 2007. On November 2, 2007, the
Board issued an order granting the appeal, assigning it Docket
No. 07 23407, and directing that further proceedings be held in this
matter.

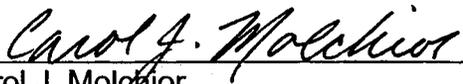
- 1 2. On September 22, 2006, Ms. Alegria was injured while she was working
2 at the private residence of James Dore, Jr., where she was regularly
3 employed forty or more hours a week.
- 4 3. In September 2006, Ms. Alegria was employed primarily for babysitting
5 and housework in Mr. Dore's home. Her work at a business owned by
6 Mr. Dore (corporate name ADL, Inc.) was limited and incidental, and did
7 not change her primary role: performing household duties and caring for
8 his child.

9 **CONCLUSIONS OF LAW**

- 10 1. The Board of Industrial Insurance Appeals has jurisdiction over the
11 parties to and the subject matter of this appeal.
- 12 2. On September 22, 2006, Ms. Alegria was injured while she was working
13 as a domestic servant for James Dore, Jr., within the contemplation of
14 RCW 51.12.020(1).
- 15 3. The order of the Department of Labor and Industries dated August 29,
16 2007 is correct and is affirmed.

17 It is **ORDERED**.

18 DATED: AUG 07 2008

19 
20 Carol J. Molchior
21 Industrial Appeals Judge
22 Board of Industrial Insurance Appeals
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DEPARTMENT ORDERS

Appendix C

PRVDR VALLEY MEDICAL CENTER
VALLEY MEDICAL CENTER
PO BOX 34551
SEATTLE WA 98124-1551

STA: OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

CLAIM ID : AE43776 TYPE : RE
MAILING DATE : 08-29-07 WRKPOS : PM32
INJURY DATE : 09-22-06 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

CLMT JUANA ALEGRIA
130 SW 194TH ST
NORMANDY PARK WA 98166

NOTICE OF DECISION

	ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL	
	INSURANCE APPEALS, P.O. BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON	
	AN ELECTRONIC FORM FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/) WITHIN 60 DAYS	
	AFTER YOU RECEIVE THIS NOTICE, OR THE SAME SHALL BECOME FINAL.	

THE DEPARTMENT OF LABOR AND INDUSTRIES HAS RECONSIDERED THE ORDER OF 06-01-07.
THE DEPARTMENT HAS DETERMINED THE ORDER IS CORRECT AND IT IS AFFIRMED.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY LINDA L MILDVELDT
ACCOUNT MANAGER
(360) 902-5626

CLAIMANT COPY

Appeal 10/27/07

PRVDR VALLEY MEDICAL CENTER
VALLEY MEDICAL CENTER
PO BOX 34551
SEATTLE WA 98124-1551

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504

CLAIM ID : AE43776 TYPE : RJ
MAILING DATE : 06-01-07 WRKPOS : PM32
INJURY DATE : 09-22-06 UNIT : E
SERVICE LOCATION : SEATTLE
ACCOUNT ID : 0-00
CLASS : 0000

CLMT JUANA ALEGRIA
130 SW 194TH ST
NORMANDY PARK WA 98166

NOTICE OF DECISION

	THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU	
	UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR	
	RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE	
	BOARD OF INDUSTRIAL INSURANCE APPEALS. IF YOU FILE FOR RECONSIDERATION,	
	YOU SHOULD INCLUDE THE REASONS YOU BELIEVE THIS DECISION IS WRONG AND	
	SEND IT TO: DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA	
	98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER. IF YOU	
	FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE APPEALS,	
	PO BOX 42401, OLYMPIA, WA 98504-2401 OR SUBMIT IT ON AN ELECTRONIC FORM	
	FOUND AT [HTTP://WWW.BIIA.WA.GOV/](http://www.BIIA.WA.GOV/).	

THIS CLAIM FOR BENEFITS IS HEREBY REJECTED FOR THE FOLLOWING REASON(S):

THE CLAIMANT WAS EXCLUDED FROM MANDATORY COVERAGE UNDER THE PROVISIONS OF THE INDUSTRIAL INSURANCE LAWS AND THE EMPLOYER HAD NOT MADE PROVISIONS FOR COVERAGE BY MEANS OF ELECTIVE ADOPTION.

ANY AND ALL BILLS FOR SERVICES OR TREATMENT CONCERNING THIS CLAIM ARE REJECTED, EXCEPT THOSE AUTHORIZED BY THE DEPARTMENT FOR DIAGNOSIS.

SUPERVISOR OF INDUSTRIAL INSURANCE

BY LINDA L MILDFELDT
ACCOUNT MANAGER
(360) 902-5626

CLAIMANT COPY

**RCW 51.12.020
AND
OTHER CITED STATUTES
AND
WASHINGTON
ADMINISTRATIVE CODE
SECTIONS**

Appendix D

RCW 51.12.010 Employments included — Declaration of policy.

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

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

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

RCW 51.12.020 Employments excluded.

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

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

(2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer. For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.

(3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.

(4) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(5) Sole proprietors or partners.

(6) Any child under eighteen years of age employed by his or her parent or parents in agricultural activities on the family farm.

(7) Jockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW.

(8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.

(b) Alternatively, a corporation that is not a "public company" as defined in *RCW 23B.01.400(24) may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or may exempt any number of officers if all the exempted officers are related by blood within the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.

(c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

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

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

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

(11) Services performed by an insurance producer, as defined in RCW 48.17.010(5), or a surplus line broker licensed under chapter 48.15 RCW.

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

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

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

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

[2009 c 162 § 33; 2008 c 217 § 98; 1999 c 68 § 1; 1997 c 314 § 18. Prior: 1991 c 324 § 18; 1991 c 246 § 4; 1987 c 316 § 2; 1983 c 252 § 1; 1982 c 63 § 15; 1981 c 128 § 3; 1979 c 128 § 1; 1977 ex.s. c 323 § 7; 1973 c 124 § 1; 1972 ex.s. c 43 § 7; 1971 ex.s. c 289 § 3; 1961 c 23 § 51.12.020; prior: 1955 c 74 § 3; prior: 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part.]

Notes:

***Reviser's note:** RCW 23B.01.400 was amended by 2009 c 189 § 1, changing subsection (24) to subsection (25).

Effective date -- 2009 c 162: See note following RCW 48.03.020.

Severability -- Effective date -- 2008 c 217: See notes following RCW 48.03.020.

Severability -- 1991 c 324: See RCW 18.16.910.

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

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

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

RCW 51.16.035 Classifications — Premiums — Rules — Workers' compensation advisory committee recommendations.

(1) The department shall classify all occupations or industries in accordance with their degree of hazard and fix therefor basic rates of premium which shall be:

(a) The lowest necessary to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles; and

(b) Designed to attempt to limit fluctuations in premium rates.

(2) The department shall formulate and adopt rules governing the method of premium calculation and collection and providing for a rating system consistent with recognized principles of workers' compensation insurance which shall be designed to stimulate and encourage accident prevention and to facilitate collection. The department may annually, or at such other times as it deems necessary to achieve the objectives under this section, readjust rates in accordance with the rating system to become effective on such dates as the department may designate.

(3)(a) After the first report is issued by the state auditor under RCW 51.44.115, the workers' compensation advisory committee shall review the report and, as the committee deems appropriate, may make recommendations to the department concerning:

(i) The level or levels of a contingency reserve that are appropriate to maintain actuarial solvency of the accident and medical aid funds, limit premium rate fluctuations, and account for economic conditions; and

(ii) When surplus funds exist in the trust funds, the circumstances under which the department should give premium dividends, or similar measures, or temporarily reduce rates below the rates fixed under subsection (1) of this section, including any recommendations regarding notifications that should be given before taking the action.

(b) Following subsequent reports issued by the state auditor under RCW 51.44.115, the workers' compensation advisory committee may, as it deems appropriate, update its recommendations to the department on the matters covered under (a) of this subsection.

(4) In providing a retrospective rating plan under RCW 51.18.010, the department may consider each individual retrospective rating group as a single employing entity for purposes of dividends or premium discounts.

[2005 c 410 § 1; 1999 c 7 § 8; 1989 c 49 § 1; 1980 c 129 § 4; 1977 ex.s. c 350 § 24; 1971 ex.s. c 289 § 16.]

Notes: **Applicability -- 2005 c 410 § 1:** "Section 1 of this act applies to industrial insurance rates adopted by the department of labor and industries that take effect on or after January 1, 2008." [2005 c 410 § 2.] **Severability -- 1999 c 7:** See RCW 51.18.900. **Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

RCW 51.52.106 Review of decision and order.

After the filing of a petition or petitions for review as provided for in RCW 51.52.104, the proposed decision and order of the industrial appeals judge, petition or petitions for review and, in its discretion, the record or any part thereof, may be considered by the board and on agreement of at least two of the regular members thereof, the board may, within twenty days after the receipt of such petition or petitions, decline to review the proposed decision and order and thereupon deny the petition or petitions. In such event all parties shall forthwith be notified in writing of said denial: PROVIDED, That if a petition for review is not denied within said twenty days it shall be deemed to have been granted. If the petition for review is granted, the proposed decision and order, the petition or petitions for review and the record or any part thereof deemed necessary shall be considered by a panel of at least two of the members of the board, on which not more than one industry and one labor member serve. The chairman may be a member of any panel. The decision and order of any such panel shall be the decision and order of the board. Every final decision and order rendered by the board shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the board's order based thereon. The board shall, in all cases, render a final decision and order within one hundred and eighty days from the date a petition for review is filed. A copy of the decision and order, including the findings and conclusions, shall be mailed to each party to the appeal and to his attorney of record.

[1982 c 109 § 9; 1975 1st ex.s. c 58 § 4; 1971 ex.s. c 289 § 23; 1965 ex.s. c 165 § 4; 1963 c 148 § 7; 1961 c 23 § 51.52.106. Prior: 1951 c 225 § 13.]

Notes:

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

RCW 51.52.110 Court appeal — Taking the appeal.

Within thirty days after a decision of the board to deny the petition or petitions for review upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the final decision and order of the board upon such appeal has been communicated to such worker, beneficiary, employer or other person, or within thirty days after the appeal is denied as herein provided, such worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court. If such worker, beneficiary, employer, or other person fails to file with the superior court its appeal as provided in this section within said thirty days, the decision of the board to deny the petition or petitions for review or the final decision and order of the board shall become final.

In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the department's records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county. In all other cases the appeal shall be to the superior court of Thurston county. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer. The department shall, in all cases not involving a self-insurer, within twenty days after the receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. If the case is one involving a self-insurer, such self-insurer shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed to be at issue. In such cases the department may appear and take part in any proceedings. The board shall serve upon the appealing party, the director, the self-insurer if the case involves a self-insurer, and any other party appearing at the board's proceeding, and file with the clerk of the court before trial, a certified copy of the board's official record which shall include the notice of appeal and other pleadings, testimony and exhibits, and the board's decision and order, which shall become the record in such case. No bond shall be required on appeals to the superior court or on review by the supreme court or the court of appeals, except that an appeal by the employer from a decision and order of the board under *RCW 51.48.070, shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay: PROVIDED, HOWEVER, That whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director, the department shall have the right of appeal to the superior court.

[1988 c 202 § 49; 1982 c 109 § 6; 1977 ex.s. c 350 § 80; 1973 c 40 § 1. Prior: 1972 ex.s. c 50 § 1; 1972 ex.s. c 43 § 36; 1971 ex.s. c 289 § 24; 1971 c 81 § 122; 1961 c 23 § 51.52.110; prior: 1957 c 70 § 61; 1951 c 225 § 14; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Cf. Title 8 RAP, RAP 18.22.

***Reviser's note:** RCW 51.48.070 was repealed by 1996 c 60 § 2.

Severability -- 1988 c 202: See note following RCW 2.24.050.

RCW 51.52.115 Court appeal — Procedure at trial — Burden of proof.

Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board. The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110: PROVIDED, That in cases of alleged irregularities in procedure before the board, not shown in said record, testimony thereon may be taken in the superior court. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court: PROVIDED, That any award shall be in accordance with the schedule of compensation set forth in this title. In appeals to the superior court hereunder, either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law. Where the court submits a case to the jury, the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court.

[1961 c 23 § 51.52.115. Prior: 1957 c 70 § 62; 1951 c 225 § 15; prior: (i) 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part. (ii) 1949 c 219 § 6; 1939 c 184 § 1; Rem. Supp. 1949 § 7697-2.]

RCW 51.52.140 Rules of practice — Duties of attorney general — Supreme court appeal.

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

[1961 c 23 § 51.52.140. Prior: 1957 c 70 § 64; 1951 c 225 § 19; prior: 1949 c 219 § 6, part; 1943 c 280 § 1, part; 1931 c 90 § 1, part; 1929 c 132 § 6, part; 1927 c 310 § 8, part; 1911 c 74 § 20, part; Rem. Supp. 1949 § 7697, part.]

Notes:

Rules of court: Method of appellate review superseded by RAP 2.1, 2.2.

WAC 296-17A-3905-07 Restaurants serving spirits or hard liquor

Applies to establishments engaged in the operation of a restaurant having a license to sell spirits or hard liquor, beer and wine in connection with their food preparation and service. This classification includes the preparation and service of food and beverages at sit down restaurants and lounges. Such establishments have extensive cooking facilities and equipment to prepare full meals. Typical occupations covered by this classification include, but are not limited to, bartenders, hostesses, waiters, waitresses, valet parking attendants, cooks, busboys, dishwashers, cashiers, and managerial staff. This classification also includes the preparation of "take-out food" that customers pick up directly from the restaurant for consumption away from the premises and the operation of a card room in connection with the restaurant.

This classification excludes establishments engaged as a restaurant without a license to sell spirits or hard liquor which are to be reported separately in classification 3905-00; taverns which are to be reported separately in classification 3905-06; catering services which are not part of a restaurant operation which are to be reported separately in classification 3909; musicians who are to be reported separately in classification 6605; and entertainers such as dancers who are to be reported separately in classification 6620.

Special note: Care should be exercised when dealing with establishments that provide entertainment such as musicians, entertainers, disc jockeys or piano players who may be exempt from coverage as an independent contractor. Musicians or entertainers who are considered to be employees of a restaurant are to be reported separately in classification 6605.

WAC 296-17A-6510-00 Domestic servants/home care assistants employed in or about the private residence of a home owner

Applies to individuals employed by a home owner to provide domestic services/home care assistants in or about the home owner's private residence. This classification includes services such as, but not limited to, cooking, housekeeping, caring for children, caring for the elderly and handicapped including personal care such as bathing, body care, dressing and help with ambulating, as well as companionship, running errands, shopping, gardening, caretaker at homeowner's residence, and transporting members of the household by vehicle to appointments, after school activities, or similar activities. This classification also includes the care of animals not used for a business at the homeowner's residence.

This classification is subject to the provisions of RCW 51.12.020 - Employments excluded - which states in part: "The following are the only employments which shall not be included within the mandatory coverage of this title:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

(2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer...." This classification is also subject to the provisions of RCW 51.12.110 which allows the employer to elect optional coverage for domestic servants and caretakers.

This classification excludes entities whose nature of business is to provide chore services which are to be reported separately in classification 6511; domestic (residential) cleaning or janitorial services which are to be reported separately in classification 6602; lawn and yard maintenance services which are to be reported separately in classification 0308; skilled or semiskilled nursing care which is to be reported separately in classification 6110; and new construction which would be reported in the classification appropriate for that phase of construction.

[Statutory Authority: RCW 51.16.035 and 51.16.100. 07-12-047, § 296-17A-6510, filed 5/31/07, effective 7/1/07. 07-01-014, recodified as § 296-17A-6510, filed 12/8/06, effective 12/8/06. Statutory Authority: RCW 51.04.020, 51.16.035, and 51.12.120. 03-23-025, § 296-17-72201, filed 11/12/03, effective 1/1/04. Statutory Authority: RCW 51.16.035. 98-18-042, § 296-17-72201, filed 8/28/98, effective 10/1/98.