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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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EDDIE OHMS AND AUDREY OHMS,

Appellants,

vs.

KPS HEALTH PLANS,

Respondent.

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BRIEF OF RESPONDENT

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ORIGINAL

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## I. STATEMENT OF CASE

This case involves a specific exclusion (Exclusion 28) in respondent KPS Health Plans' health insurance contract with appellant Eddie Ohms, which excludes coverage for:

Services for any occupational illness or injury **arising out of**, or in the course of, an activity **pertaining to** any trade, business, employment (including self-employment) or occupation for wages or profit.

(CP 224) (emphasis added). Ohms is a self-employed long-haul truck driver. (CP 237). He is seeking coverage for an injury sustained in an accident while on a “business trip” – he was driving the truck back to his home base in Montana for repairs after delivering a load of cargo in Florida. (CP 249). The issue presented is whether Ohms' injury “arose out of” or was “in the course of” an activity “pertaining to” his occupation as a truck driver.

Ohms is the owner/operator of his own truck and trailer. (CP 238-39). He technically leases the truck and trailer to a company called System Transport, which takes 18% of the revenue generated by the vehicle in exchange for finding cargo for him to transport. (CP 240). Ohms generally is paid by the mile for cargo he transports. (Id.).

Ohms lives in Darby, Montana. (CP 237). When picking up a load of cargo, Ohms often has to drive some distance away from his home base – with an empty trailer – to pick it up. This is called a “deadhead”, and Ohms is not directly compensated for this portion of a trip. (CP 243-44). When Ohms delivers a load

System Transport attempts to arrange for him to pick up a new load near the place of delivery, and then continues this process until Ohms can deliver a load back in Spokane (where System Transport is located). (CP 244-45). If no loads back to Spokane are available, Ohms would have to deadhead back home.

Ohms' injury occurred on the return portion of a trip to deliver cargo to Florida. First, while on the way from Spokane to Miami, Ohms was involved in an accident on October 21, 2004 in Gainesville, Florida. He was not seriously injured in this first accident. (CP 247-48). His truck/trailer was drivable, but sustained too much damage to carry a load. (CP 249). As a result, Ohms transferred the cargo to another System Transport truck (CP 33) and began driving back to Montana with an empty trailer. (CP 249). Ohms needed to get the truck/trailer back to Montana to repair the extensive damage sustained in the accident. (Id.).

Ohms treated his trip from Florida back to Montana as a business-related activity. He continued to keep track of his gas receipts and mileage, and gave those to his accountant when he returned. (CP 249). This is because an owner/operator can take a business expense tax deduction for gasoline. (CP 242). It was on this business trip – an owner/operator driving his truck back home so it could be repaired and placed back into service – that a second accident occurred on October 28, 2004 in Louisiana. (CP 251). In this accident Ohms suffered the injury for which he sought health insurance coverage.

After the accident System Transport submitted a claim to KPS for Ohms' medical bills. (CP 207). Communications to KPS from System Transport and from Ohms made it clear that the claim related to an occupational injury. The initial notice letter from System Transport stated that Ohms was not covered under "State Industrial Insurance" and did not have "workers compensation or any occupational accident/incident coverage", and therefore that the medical bills needed to be paid by health insurance. (CP 214). Donnalee Austin, the KPS claims handler, understood based on this statement that the accident was related to Ohms' occupation as a truck driver. Otherwise, it would have made no sense to reference industrial insurance, workers compensation or occupational coverage. (CP 207).

Ohms himself specifically told KPS that it should not be paying his medical bills. (CP 207). He subsequently completed a standard "Subrogation Inquiry Form" (SIF) regarding the Louisiana accident. Question 7 asked: "Is this injury/condition job or work related?" Ohms circled "Yes", and signed the form. (CP 208, 218-19).

KPS denied coverage for Ohms' medical expenses based on Exclusion 28.

Austin explained the basis for her decision:

The primary deciding factors were that at the time of the accident Ohms was driving his commercial truck and he was returning to his home base after delivering a load. Other important factors were a statement of Ohms himself that his injury was work related

and the implication by his employer that the accident was work related.

(CP 208-209).

Interestingly, in his deposition Ohms for the first time claimed that his representation on the SIF that his injury was work related was a “mistake”. However, even though Ohms’ attorney had several argumentative communications with KPS regarding the claim after the SIF was submitted, vigorously contested KPS’s denial of coverage and filed an internal appeal of the denial, he never mentioned any alleged “mistake” or ever claimed that the SIF was inaccurate. (CP 208-209).

Subsequently, Ohms did settle his personal injury claim against the driver who caused the Louisiana accident. (CP 252). As part of the settlement, 100% of Ohms’ medical bills were paid. (CP 254). Nevertheless, Ohms filed suit against KPS in an attempt to recover the amount of the bills a second time.<sup>1</sup> Ohms also argued that KPS had acted in bad faith in denying coverage under Exclusion 28.

On cross-motions for summary judgment, the Honorable Leonard Costello of the Kitsap County Superior Court granted KPS’s cross-motion for summary

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<sup>1</sup> Even if Ohms could claim coverage under KPS’s policy, KPS would have the right to receive reimbursement from the settlement of any medical expenses paid. KPS’s right to subrogation is moot if no coverage exists.

judgment and ruled as a matter of law that Exclusion 28 precluded coverage for Ohms' claim. (CP 275-78). In his letter opinion, Judge Castello rejected Ohms' argument that the exclusion was limited to injuries occurring during the "course of" employment, holding that inclusion of the term "arising out of" unambiguously made the exclusion broader. (CP 274). Judge Costello also dismissed Ohms' bad faith claim. (CP 274, 276).

## II. ARGUMENT

### A. **BECAUSE OHMS WAS RETURNING HOME AFTER DELIVERING CARGO SO THAT HE COULD REPAIR HIS VEHICLE, HIS INJURY DID ARISE OUT OF AN ACTIVITY PERTAINING TO HIS OCCUPATION.**

#### 1. **The Language of KPS's Exclusion is Unambiguous, and the Court Should Enforce the Exclusion as Written.**

Ohms points out that *ambiguous* exclusionary language should be interpreted in a way that favors the insured. However, the law is equally clear that an *unambiguous* exclusion must be enforced as written:

If an ambiguity is found in an exclusionary clause, the ambiguity is strictly construed against the insurer. If, however, the language in an insurance policy is clear and unambiguous, **the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.**

Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (citations omitted, emphasis added).

The Supreme Court recently emphasized that the controlling factor in insurance policy interpretation is the clear policy language. The court stated: (1)

“Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists”; (2) “But while exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results”; (3) “[I]n Washington the expectations of the insured cannot override the plain language of the contract.” Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005).

In this case, Ohms quite simply is attempting to rewrite the language of KPS’s policy. He repeatedly argues that he was not “working”, “on duty”, carrying a load or being “paid” at the time of the accident. However, under the plain language of KPS’s policy those factors are completely immaterial. The only question is whether Ohms’ injury “arose out of” or was “in the course of” an activity “pertaining to” his occupation as a self-employed truck driver. That language is unambiguous, and must be enforced to exclude coverage in this case.

**2. The Language of Exclusion 28 is Broad, and Unambiguously Excludes Coverage for Any Injury That is Connected in Some Way to Ohms’ Occupation.**

The actual language of Exclusion 28 is crucial in this case. KPS’s policy excludes coverage for:

Services for any occupational illness or injury **arising out of**, or in the course of, an activity **pertaining to** any trade, business,

employment (including self-employment) or occupation for wages or profit.

(CP 224) (emphasis added).

KPS's exclusion does contain the traditional "course of employment" test for determining the scope of the exclusion. However, it also includes extra language making it very clear that the exclusion's scope is broader than the claimant's course of employment. Exclusion 28 precludes coverage for injury "arising out of" or in the course of employment. And the exclusion refers expansively not just to the claimant's employment, but to any activity "pertaining to" that employment. To the extent that "in the course of" is ambiguous in certain contexts, this extra language removes any uncertainty about the scope of the exclusion.

The key phrase in the exclusion is "arising out of". A long line of Washington cases have emphasized that the term is unambiguous and must be interpreted very broadly.

The phrase "arising out of" is unambiguous and has a broader meaning than "caused by" or "resulted from." The phrase is understood to mean "originating from," "having its origin in," "growing out of," or "flowing from".

Allstate Ins. Co. v. Bowen, 121 Wn. App. 879, 887, 91 P.3d 897 (2004), *quoting* Toll Bridge Authority v. Aetna Ins. Co., 54 Wn. App. 400, 44, 773 P.2d 906 (1989). *See also* McCauley v. Metropolitan Property & Casualty Ins. Co., 109

Wn. App. 628, 633, 36 P.3d 1110 (2001); Beckman v. Connolly, 79 Wn. App. 265, 273-74, 898 P.2d 357 (1995).

The other important term is “pertaining to”. Dictionary definitions indicate that pertain means “to be connected or associated” and to “have reference or relevance”. The phrase “pertaining to” means “having to do with”. (CP 230-34). In other words, the exclusion applies if an activity is related in some way to the claimant’s work.

In this case, the unambiguous meaning of “arising out of” and “pertaining to” shows that Exclusion 28 applies to Ohms’ injury. Ohms’ employment or occupation was a self-employed truck driver. His activity at the time of the accident was driving his commercial truck and trailer back to his home base after transporting cargo to Florida. Ohms admits that delivering his load to Florida was in the course of his occupation as a truck driver. Certainly returning home “grew out of” or “flowed from” the original delivery, and also was “connected or associated” and “had to do with” that delivery. It makes no sense to suggest that driving to Florida related to his employment, but that driving back home did not. But for Ohms’ occupation, he would not have been in Louisiana at the time of the accident.

For the same reasons, even without the broader language Exclusion 28 would apply. The return leg of a business-related trip clearly was “in the course

of” Ohms’ occupation as a truck driver. Ohms remained in the course of his occupation until he made it back home.

The purpose of the trip back to Montana also is significant, and establishes that Ohms’ injury both occurred in the course of and arose from his occupation as a truck driver. Ohms was driving his truck and trailer back to Montana – empty and without receiving any additional compensation – so that he could get it repaired. As the owner of the truck/trailer, it was part of his self-employment “job” to get it back to Montana for repairs so he could resume hauling loads and earning income. Donnalee Austin of KPS emphasized this factor:

I think that if he is the owner-operator of that vehicle, he has full responsibility to get that vehicle back and that is part of his job . . . . It is very clear-cut to me that this gentleman owns and operates his vehicle. This is his business and his livelihood. He has to get it home or he has to pay someone to get it home. It would be a business expense if he pays somebody. It is part of the business operation.

(CP 257-58). Arranging for the repair of his only business asset clearly was within the course of Ohms’ occupation, and certainly “flowed from” and “had to do with” that occupation.

Ohms decided to drive his truck/trailer back from Florida himself, but he also could have selected alternatives that would have made it even more obvious that the return trip to Montana was directly related to his self employment. As Austin noted, if Ohms had hired someone else to drive the truck back to Montana, the amount paid would have been treated as a business expense. If the truck was

not drivable and Ohms had to transport the truck back to Montana using some other method, that transportation fee would have been a business expense.

Finally, if Ohms had been an employee of System Transport rather than self-employed, he obviously would have been paid to drive the truck back to Spokane – even if not hauling a load. In that situation, System Transport could hardly argue Ohms was not in the course of his employment. The result does not change just because Ohms is self employed. In fact, self employment is broader than “paid” employment.

It is impossible to disassociate Ohms’ driving the truck back home for repairs after delivering a load from his self employment as a truck driver. Ohms obviously thought his trip was connected to his occupation, because he affirmed on the Subrogation Inquiry Form that his accident had been work related. Even if that answer somehow was a “mistake”, more telling is the fact that Ohms kept track of his gas and mileage on the return trip and gave that information to his accountant so he could claim a tax deduction. Claiming a mileage deduction on business income tax forms would amount to tax fraud if the trip was not in the course of or arising out of Ohms’ occupation as a truck driver.

**3. Whether or Not Ohms was “Working”, “On Duty”, Carrying a Load or Being “Paid” is Completely Immaterial to the Analysis of Exclusion 28, and Does not Affect Application of the Exclusion.**

Ohms protests over and over that he was not “working” at the time of the accident, and that he was not “on duty”, carrying a load or being “paid”.

However, Ohms' argument that Exclusion 28 somehow is inapplicable because of these "undisputed facts" is misguided.

**First**, Exclusion 28 does **not** state that Ohms must have been working, on duty, carrying a load or being paid at the time of the injury. The policy language is much broader. One of the fundamental principles of insurance policy interpretation is that the policy language controls, and yet Ohms completely ignores what the exclusion actually provides. No coverage exists if Ohms' injury arose out of or in the course of an activity pertaining to his occupation as a truck driver. As discussed above, applying the actual language to the facts of this case results in no coverage, regardless of whether he thought he was "working".

**Second**, while Ohms' arguments might be relevant to an hourly employee, they make no sense when applied to a self-employed truck driver. It is true that Ohms was not working or on duty *for System Transport*. But that does not mean that he was not engaged in activity pertaining to his self-employment. Being a self-employed truck driver involves much more than being "on duty" or hauling loads. Other self-employment "work" – for which a self-employed truck driver receives no specific compensation – includes cleaning, maintaining, repairing and inspecting the vehicle, as well as handling any number of administrative and logistical tasks. And self-employment "work" clearly includes driving a truck/trailer back home after delivering a load, especially for the purpose of obtaining necessary repairs.

**4. The Fact That Ohms Had the Freedom to Use His Truck for Non-Business Purposes is Immaterial Because at the Time of the Accident Ohms was Not on A “Personal” Trip.**

Ohms argues that he owned his truck, and because he was “off duty” he was free to drive it wherever he wished. He points out that he and his wife would take the truck on trips to casinos, camping, fishing and shopping. Ohms claims that he was “merely driving his personally owned truck” at the time of the accident.

The analysis in this case certainly might be different if Ohms had been driving the truck on a personal trip. However, at the time of the accident Ohms was not going camping or fishing or shopping with his wife. He was not on vacation or taking some “personal” detour that had nothing to do with his occupation as a truck driver. Instead, his trip from Florida to Georgia was **solely** related to his occupation. Ohms was on a business trip. He was driving back to Montana after transporting a load of cargo to Florida, and was bringing the truck back to Montana so it could be repaired and he could resume earning income. The trip clearly arose out of or was in the course of an activity pertaining to his occupation as a self-employed truck driver, and the fact that on other occasions he used the truck for non-business purposes makes no difference.

**5. Application of Exclusion 28 in This Case is Supported by the Terms “Occupational Injury” and “In the Course Of”.**

Ohms argues that application of Exclusion 28 in this case would render the terms “occupational injury” and “in the course of” meaningless. He claims that

reference to “occupational injury” means that he had to be “working” for the exclusion to apply. He also claims that the broader term “arising out of” renders “in the course of” superfluous. However, Ohms’ reading of the plain language of Exclusion 28 is misguided.

Exclusion 28 is an “occupational injury” exclusion, but use of the term does not create some additional requirement. Instead, the remainder of the exclusion *defines* “occupational injury”. In other words, the exclusion provides that an occupational injury is one “arising out of, or in the course of, an activity pertaining to any . . . employment.” Any other interpretation of “occupational injury” would render the remainder of the exclusion meaningless.

Even if “occupational injury” had some meaning independent of the rest of Exclusion 28, Ohms’ injury fell within the plain meaning of that term. As discussed above, Ohms’ conduct was directly related to his occupation as a self-employed truck driver. Ohms can provide no support for his argument that a self-employed person is only involved in his occupation when he is “on duty” or being paid by some third party.

Ohms’ argument that giving meaning to the term “arising out of” renders the term “in the course of” meaningless also must be rejected. Ohms argues that if “arising out of” has a broad meaning, the exclusion would not need to contain the phrase “in the course of”. However, the two phrases do have different meanings, and insurance companies often are forced to use somewhat redundant

language in exclusions to foreclose twisted or hypertechnical interpretations. KPS undoubtedly wanted to make it clear that by expanding the scope of the exclusion to activities “arising out of” employment, it still intended to rely on the traditional “in the course of” test when appropriate.

In any event, as discussed above and in Section 6 below, the broader “arising out of” and “pertaining to” language is not even necessary in this case. Driving a truck back to the home base for repairs after delivering a load was “in the course of” an activity pertaining to Ohms’ occupation as a self-employed truck driver.

**6. Cases Interpreting the Term “In the Course Of” Under the Workers’ Compensation Statute Establish that Ohms was in the Course of His Occupation at the Time of the Accident.**

Ohms cites a few inapposite workers’ compensation cases to support his claim that he was not “working” in the course of his employment. He makes the statement that even if he had purchased workers’ compensation coverage, that coverage would have been inapplicable because he was not within the course of employment. A review of Washington workers’ compensation cases establishes that Ohms’ argument is completely wrong. These cases clearly establish that Ohms was within the course of his employment for workers’ compensation purposes at the time of the Louisiana accident.

RCW 51.32.010 provides that a “worker injured in the course of his or her employment” is entitled to workers’ compensation benefits.<sup>2</sup> The general rule is that a worker is within the “course of employment” if

the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, **whether he was engaged at the time in the furtherance of the employer’s interest.**

Cochran Electric Co. v. Mahoney, 129 Wn. App. 687, 693, 121 P.3d 747 (2005), quoting Lunz v. Dep’t of Labor & Industries, 50 Wn.2d 273, 278, 310 P.2d 880 (1957) (emphasis added).

Under this general rule it is beyond dispute that a worker is in the “course of employment” when returning home from an employment-related trip. E.g., Cochran, 129 Wn. App. at 690, 693-95 (claimant riding home on a bicycle after dropping off his employer’s service van at a garage for regular maintenance); Morris v. Dep’t of Labor & Industries, 179 Wash. 423, 425, 427, 38 P.2d 395 (1934) (claimant driving home after visiting a perspective customer at employer’s request); Hilding v. Dept. of Labor & Industries, 162 Wash. 168, 169, 173, 298 P. 321 (1931) (claimant driving home after traveling to another city to work at employer’s request). As the court stated in Morris: “During the time of his actual

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<sup>2</sup> RCW 51.32.030 states that a self-employed person who requests coverage is entitled to the same benefits as a worker, and RCW 51.12.095(2) specifically states that an owner/operator of a truck may elect workers’ compensation coverage.

return and actual completion of his mission, [the claimant] was still in the course of his employment.” 179 Wash. at 427.

Further, a more specific rule directly applies to Ohms’ accident. Washington recognizes the “traveling employee” rule, under which “an employee injured while traveling at the direction of his employer is acting within the course of employment.” Shelton v. Azar, Inc., 90 Wn. App. 923, 935, 954 P.2d 352 (1998). See also Ball-Foster Glass Container Co. v. Giovanelli, 128 Wn. App. 846, 117 P.3d 365 (2005), *rev. granted*, 156 Wn.2d 1024 (2006).

When employees are required by their employers to travel to distant jobsites, courts generally hold that they are within the course of their employment **throughout the trip**, unless they are pursuing a distinctly personal activity.

90 Wn. App. at 933 (emphasis added). The court in Shelton also quoted from a workers’ compensation treatise:

Employees whose work entails travel away from the employer’s premises are held in the majority of jurisdiction[s] to be within the course of employment **continuously during the trip**, except when a distinct department [sic] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Id., quoting Larson, Law of Workmen’s Compensation § 25 (1990).

The court in Ball-Foster very liberally applied the traveling employee rule. In that case, the claimant had been sent to Seattle for a job that would last several weeks. On a Sunday in which he was not scheduled to work the claimant was injured while walking to a park to listen to music. 128 Wn. App. at 848-49. The

court held that the claimant was entitled to workers' compensation benefits because he was a traveling employee. Walking to a park on a day off was within the course of employment, just like sleeping in hotels and eating in restaurants. Id. at 853-54.

The Supreme Court has granted review in Ball-Foster, and it is possible that Division I's extremely broad application of the traveling employee rule will not stand. However, the facts of our case easily fall within the basic parameters of the rule. Everyone would concede that the claimant in Ball-Foster would still be in the course of employment when traveling home from Seattle after the completion of the job.

In this case, Ohms was within the "course of employment" at the time of his Louisiana accident under both the general rule and the traveling employee rule. As in Cochran, Morris and Hilding, Ohms was on his way home after traveling to another state for a business task – to deliver cargo. And as in stated in Shelton and Ball-Foster, Ohms remained within the course of employment **continuously** during his entire trip. He would have been in the course of employment if injured at a hotel or restaurant, and certainly was within the course of employment while driving his truck back to Montana. More fundamentally, Ohms was engaged in the furtherance of his business interests, he was getting the truck/trailer back home for repairs after delivering a load.

Even without any reference to case law, the facts of Ohms' accident fall squarely within the plain language of Exclusion 28. The workers' compensation cases interpreting "course of employment" confirm that Exclusion 28 would be applicable even without the broader terms "arose out of" and "pertaining to".

**B. BECAUSE KPS' DENIAL OF COVERAGE WAS REASONABLE, THE TRIAL COURT PROPERLY DISMISSED OHMS' BAD FAITH AND CONSUMER PROTECTION ACT CLAIMS.**

In addition to breach of contract, Ohms asserted claims for bad faith and violation of the Consumer Protection Act. Assuming this Court affirms the trial court's decision on application of Exclusion 28, the bad faith/CPA claims obviously are moot and properly dismissed. However, even if the Court for some reason finds questions of fact regarding coverage, the trial court's dismissal of the bad faith/CPA claims should be affirmed.

To succeed on a bad faith claim, an insured must show that the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded". Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). "If the insurer's denial of coverage is based on a reasonable interpretation of the insurance policy, there is no action for bad faith." Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 322 (2002). Similarly, under the Consumer Protection Act "[a] denial of coverage does not constitute an unfair or deceptive act or practice as long as it is based on reasonable conduct of the insurer", even if the denial ultimately is proved incorrect. Id. at 434.

In this case, the discussion above demonstrates that KPS's denial of coverage based on Exclusion 28 was reasonable. The fact that Judge Costello was convinced that KPS's position was correct is evidence enough that KPS's position was not frivolous. Despite Ohms' argument that bad faith is a question of fact, this Court easily can evaluate the reasonableness of KPS's coverage decision as a matter of law.

Further, Ohms' own signed statement representing that his injury was work related is sufficient to eliminate the bad faith/CPA claims. Ohms argues that his claim in his deposition that his representation had been a "mistake" automatically makes KPS's reliance on that statement unreasonable. However, as pointed out in the statement of facts, neither Ohms or his attorney ever claimed until his deposition that his signed statement was a mistake despite vigorous protestations and appeals of KPS's coverage decision. It was not until several months after this lawsuit was filed that Ohms for the first time decided that he had made a "mistake". As a matter of law, KPS was entitled to rely on Ohms' original, uncoached statement that his injury was work related.

Ohms argues that KPS should be faulted for not conducting more "investigation" of his claim. However, extensive investigation was not necessary because the facts were undisputed. It was clear from the very beginning that the accident occurred while Ohms was driving his commercial truck back home after delivering a load in Florida, and that the purpose of the trip was to get the vehicle

repaired. System Transport made it clear that Ohms' injury was work related by referencing industrial insurance, workers' compensation and occupational coverage. Ohms acknowledged in a signed statement that the accident was work related. What more investigation was needed to evaluate the occupational injury exclusion?

Ohms complains that KPS did not change its mind after he submitted a statement that he was not "on duty" for System Transport or being paid by System Transport at the time of the accident. However, KPS disagreed and still disagrees that this information made any difference in evaluating Exclusion 28 because his injury arose out of or was in the course of an activity pertaining to his occupation. Because KPS's position is more than reasonable, it is not bad faith to disregard an insured's irrelevant factual arguments.

Finally, Ohms claims that KPS violated a laundry list of WAC 284-30-330 provisions. However, other than the investigation issue discussed above, at the trial court Ohms offered no explanation or evidence supporting his claims, and also has provided no support for these claims in this Court. Because nothing in the record supports the allegations that KPS violated any WACs, Ohms' claims must be rejected.

### **III. CONCLUSION**

The only reason Ohms sought coverage from KPS is because, as a self-employed truck driver, he decided not to purchase workers' compensation

insurance. The cases are clear that Ohms was in the course of employment for workers' compensation purposes at the time of his injury. However, because he decided to self insure he is attempting to stretch the scope of health insurance coverage to cover what should be a workers' compensation claim.

Exclusion 28 was designed to prevent what Ohms is attempting. Health insurers do not want to serve as a substitute for workers' compensation insurance. Policyholders could not afford health insurance premiums if health insurers are forced to cover work-related injuries.

KPS was proactive in drafting its occupational injury exclusion in a way that it eliminated any "grey area". Not only does Exclusion 28 cover injuries sustained "in the course of" employment, but KPS also extended the exclusion to injuries "arising out of" employment. Not only does Exclusion 28 exclude coverage for employment activities, but KPS extended the exclusion to exclude coverage for activities "pertaining to" employment. This language is very broad, and does eliminate any uncertainty regarding the scope of the exclusion.

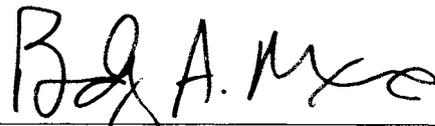
At the time of his injury Ohms was on the return portion of a business trip. He was engaged in an activity solely arising from a business purpose – driving the truck home (1) after delivering a load of cargo (2) in order to repair his only business asset. But for his occupation, Ohms never would have been in Louisiana and never would have been injured in this accident.

The trial court properly dismissed Ohms' claims. Respondent KPS Health Plans respectfully requests that this Court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 29 day of June, 2006.

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By:



BRADLEY A. MAXA  
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DECLARATION OF SERVICE

I declare that I sent out for delivery on this 29th day of June, 2006  
a true and correct copy of the BRIEF OF RESPONDENT on the following  
at the address and in the manner described below:

U.S. MAIL

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE  
LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING  
IS TRUE AND CORRECT.

  
FARAH J. DEROSIER

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