

NO. 48443-9-II

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

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MARGARET M. HOUSE,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR & INDUSTRIES**

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## I. INTRODUCTION

Unemployment compensation benefits received from the Washington State Employment Security Department are not “wages the worker was receiving from all employment” or “consideration . . . received from the employer.” RCW 51.08.178(1). The Department of Labor & Industries (Department) may not use them to calculate the amount of wages to set wage replacement benefits under the Industrial Insurance Act.

Margaret House concedes that the Employment Security Department paid the benefits and that “unemployment is, by its very definition, not employment.” App. Br. at 13, 15. These concessions resolve the case: the statute requires the payment of wages from an employer and from employment. The Department calculates a worker’s benefits under the Industrial Insurance Act based on a worker’s wages provided by an employer, not based on a worker’s receipt of governmental benefits provided by a non-employer. The Board of Industrial Insurance Appeals and superior court correctly determined that the Department cannot use unemployment compensation benefits to calculate House’s wages because they do not constitute wages. This Court should affirm.

## II. ISSUES

1. Are unemployment compensation benefits “wages” when RCW 51.08.178(1) includes in the wage rate only “wages the worker was receiving from all employment” or “consideration . . . received from the employer” and when an employer does not provide unemployment compensation benefits?
2. Are unemployment compensation benefits “of like nature” to board, housing, and fuel under *Cockle*,<sup>1</sup> when an employer does not pay such benefits under a contract of hire, when the worker can use the benefits to purchase anything and not merely necessities of life, and when nothing shows that those benefits are objectively critical to protecting a worker’s basic health and survival?

## III. STATEMENT OF THE CASE

### A. The Employment Security Department Paid House Unemployment Compensation Benefits

House worked as a maintenance worker for the City of Roy, Washington. CP 121-22. She performed gardening, landscaping, and water testing. CP 121-22.

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<sup>1</sup> *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) (holding that the wage rate includes employer-provided benefits that are objectively critical to protecting a worker’s basic health and survival, but the wage rate does not include other employer-provided non-critical benefits).

In January 2010, the City of Roy experienced financial trouble. CP 127-8. The City cut House's hours from 40 hours a week to 20 hours a week. CP 122. The City did not promise House that it would return her hours to full-time. CP 134.

House received unemployment compensation benefits in order to make up the eliminated hours. CP 122-23. House continued working part-time for the City throughout 2010 until she injured her back at work in October 2010. CP 123. The Department accepted her claim for workers' compensation benefits. CP 123.

Until November of 2010, House received unemployment compensation benefits while she worked for the City. CP 123-24. After her injury rendered her incapable of working, she began to receive time-loss compensation from the Department, but stopped receiving unemployment benefits. CP 123-24. Individuals may receive unemployment compensation benefits only if they can work, which House could not do after her injury rendered her incapable of employment. *See* CP 123-24; RCW 50.20.085.

**B. The Department Calculated House's Wage Rate Based on Wages Received From Her Employer, and the Board and Superior Court Affirmed**

The Department issued an order in October 2013 that calculated House's wages at the time of injury based on the facts that she worked

four hours a day, five days a week, and earned \$13.05 an hour. CP 148. The Department did not include House's unemployment compensation benefits in the wage calculation. CP 148. House appealed. CP 85.

The industrial appeals judge issued a proposed decision that recommended reversing the Department's wage order and directing it to include unemployment benefits in the wage calculation. CP 63-70. Upon the Department's petition for review, the Board affirmed the Department and ruled that unemployment benefits are not wages under the Industrial Insurance Act. CP 20-27. The Board reasoned that "[u]nemployment compensation alleviates economic uncertainty due to unemployment and provides benefits to assist with that uncertainty. The money received is not income." CP 22.

House appealed to superior court. CP 1. The superior court entered judgment in favor of the Department and affirmed the Board's decision. CP 257-60. House appealed to this Court. CP 263

#### **IV. STANDARD OF REVIEW**

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). The court reviews the decision of the superior court rather than the Board's decision and the Administrative Procedure Act does not

apply. See *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140; RCW 34.05.030. The court limits its review to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Applying the deferential substantial evidence standard, the court views the evidence in the light most favorable to the prevailing party. *Rogers*, 151 Wn. App. at 180.

The court reviews questions of law de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). The Department administers the Industrial Insurance Act and as such the Court of Appeals affords substantial weight to the Department's interpretation of the Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012); *Dana's Housekeeping Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995)

## V. ARGUMENT

The wage rate calculation includes “wages the worker was receiving from all employment” or “consideration . . . received from the employer” only. RCW 51.08.178(1). As House concedes, unemployment compensation benefits are not from her employer or from employment.

App. Br. at 13, 15. This concession is fatal to her claim that the Department may use the unemployment compensation benefits in her wage rate calculation.

Additionally, not only are the benefits not cash wages received from an employer, they are also not “consideration of [a] like nature” for two reasons. First, a worker must receive such consideration from the employer, and House did not. Second, because House may use her unemployment compensation benefits for any purpose, they are not objectively critical in protecting her basic health and survival.

House’s theory that unemployment compensation benefits are analogous to “dual employment” lacks merit because a worker must receive any remuneration or consideration from an employer. National case law and case law from other contexts in Washington confirm that unemployment compensation benefits further social policy objectives and are not wages. This Court should affirm.

**A. A Worker Does Not Receive Unemployment Compensation Benefits From an Employer and Therefore the Department Properly Does Not Use Them To Calculate Wages**

**1. The plain language of RCW 51.08.178 includes only wages received from an employer in the calculation**

Under the Industrial Insurance Act, the Department calculates a worker’s benefit rate based on the worker’s wages at the time of injury,

and wages only include payments from an employer. RCW 51.08.178(1) states: “For the purposes of this title, the monthly wages the worker was receiving from all *employment* at the time of injury shall be the basis upon which compensation is computed . . . . The term “wages” shall include the reasonable value of board, housing, fuel, or other consideration of like nature *received from the employer* as part of the contract of hire . . . .” (Emphasis added.)

House’s employer, the City, paid her wages, while the Employment Security Department paid her unemployment compensation benefits. Since House concedes she did not receive the unemployment compensation benefits from her employer and that they were not from employment, RCW 51.08.178’s plain language controls to exclude them from the wage rate. App. Br. at 13, 15.

House’s unemployment compensation benefits cannot be included in her wage calculation under her theory that they are consideration “of like nature” to board, housing, and fuel under RCW 51.08.178(1). *See* App. Br. at 12. This is because such benefits are not “wages” under the Industrial Insurance Act unless an employer provides them: “[t]he term “wages” shall include the reasonable value of board, housing, fuel, or other consideration of like nature *received from the employer* as part of the contract of hire . . . .” RCW 51.08.178(1) (emphasis added). Because

the employer does not pay the worker unemployment compensation benefits, they do not constitute wages, regardless of whether those benefits bore any similarity to board, housing, and fuel.

Where a statute unambiguously provides for a result, a court is bound to follow the statutory directive. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). To argue ambiguity here, House points to *Cockle*'s determination that the phrase "consideration of like nature" was ambiguous. App. Br. at 16-17; *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). First, *Cockle* resolved the ambiguity with its test as to what constitutes "consideration of a like nature." Second, *Cockle* did not consider the language about receipt ambiguous, namely "wages the worker was *receiving from all employment*" or "consideration . . . *received from the employer.*" *Compare Cockle*, 142 Wn.2d at 808-810 (holding language about "consideration" ambiguous); RCW 51.08.178 (emphasis added).

House does not articulate how the court can reasonably construe RCW 51.08.178(1)'s language to include unemployment compensation benefits as "wages" when that statute restricts the definition of wages to payments received from an employer as consideration for employment. A court finds ambiguity in a statute only if there is more than one reasonable interpretation. *State v. Velasquez*, 176 Wn.2d 333,336,292

P.3d 92 (2013). *See also Slauch v. Dep't of Labor & Indus.*, 177 Wn. App. 439, 451-52, 312 P.3d. 676 (2013). No one can reasonably construe RCW 51.08.178(1) to include benefits not paid by an employer. With only one interpretation of the statute possible, House's arguments fail.

## **2. Case law supports the Department, not House**

Not only does House's argument that wages include payments made by someone other than an employer conflict with the plain language of RCW 51.08.178(1), it also conflicts with the case law. As *Doty* explains, "wages" under the Industrial Insurance Act consist only of remuneration from an employer for work performed. *Doty v. Town of South Prairie*, 155 Wn.2d 527, 544-45, 120 P.3d 941 (2005). Aside from the fact that House did not receive unemployment compensation benefits from her employer, unemployment compensation benefits are not remuneration for work performed, but a government-provided benefit designed to assist people who have been unsuccessful in securing employment. Therefore, under *Doty*, the unemployment compensation benefits do not constitute wages.

Additional support for this conclusion comes from *Erakovic*, which held that payments by an employer for government programs (social security, Medicare, and industrial insurance) are not "wages" under the Industrial Insurance Act because the employer does not provide

them under the worker's contract of hire. *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 769-70, 134 P.3d 234 (2006). Thus, while it is true that an employer makes payments to government entities on the worker's behalf, the employer's payments to those entities are not wages because they are not consideration for work performed by the worker, but rather payments that the employer is required to make by operation of law. *See id.*

Here, House seeks to have the unemployment compensation benefits themselves, not her employer's premiums paid to the Employment Security Division, included in her wage calculation. The unemployment compensation benefits that House received are even further removed from being something that could be viewed as a "wage." An employer's payments to government entities for various benefit programs because the latter are at least payments by the worker's employer that have some value to the worker. These payments are made as a result of employment, while unemployment compensation benefits are not provided by the employer and are not provided under a contract of employment. Indeed, it is the absence of employment that triggers unemployment compensation, not the fact of employment. Under the logic of *Erakovic*, unemployment compensation benefits do not constitute

wages because the employer does not provide them under a contract of hire. *See Erakovic*, 132 Wn. App. at 720.

Similarly, in *Ferencak*, the court held it would not include employer's payments into the unemployment compensation fund in a worker's wages. *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 726-27, 175 P.3d 1109 (2008). Unemployment benefits are government paid benefits, subsidized in part by employer premiums. RCW 50.24.010. However, the fact that an employer pays premiums for unemployment compensation insurance does not turn the premiums—and any subsequent benefits—into wages from the employer because the employer does not pay premiums under the contract of hire but under state law requiring the payment. *Ferencak* observed that the court has recognized that unemployment benefits are not wages. *Id.* at 725-26.

Case law, far from supporting House's arguments, reinforces the conclusion that under RCW 51.08.178 a worker's wages consist only of the payments that come from an employer as consideration for the work that the worker performed for that employer. Unemployment compensation benefits do not come from an employer and are not consideration for work performed, and therefore, are not wages.

**B. Unemployment Compensation Benefits Are Not “Consideration of Like Nature” to Board, Housing, and Fuel Because Such Benefits Are Not Objectively Critical to a Worker’s Basic Health and Survival**

Because unemployment compensation benefits are not compensation received from an employer under the worker’s contract of hire, RCW 51.08.178 does not include them as wages. But even aside from the fact that those governmental benefits did not come from an employer, House has failed to establish that they are “consideration of like nature” to board, housing, and fuel because she did not show that they are objectively critical in protecting her basic health and survival.

*Cockle* limits the scope of the phrase “other consideration of like nature” to components of a worker’s lost earning capacity “that are critical to protecting workers” basic health and survival, and deems this an “objective” test. *Cockle*, 142 Wn.2d at 822. Board, housing, and fuel, and employer-provided health care benefits, are necessities of life basic to a worker’s health and survival. *Id.* In contrast, a recipient can use unemployment compensation benefits for any purpose and the Unemployment Compensation Act does not limit their use to furthering the worker’s basic health and survival. Furthermore, while House argues that unemployment compensation benefits preserve her basic health and survival, the record does not support this assertion. *See App. Br.* at 14.

Because House has not shown that unemployment compensation benefits are objectively critical to protecting her health and survival, she cannot prevail in her claim that they are “of like nature” to board, housing, and fuel. *See Cockle*, 142 Wn.2d at 822.

To satisfy the *Cockle* test, the worker must show that a payment for an in-kind benefit is objectively critical to protecting a worker’s basic health and survival. House contends that the unemployment compensation benefits were necessary for her to remain financially stable. App. Br. at 14-15. This contention lacks support in the record, but also financial stability, while desirable, is not a necessity of life in the same way that food, warmth, a place to live, and medical care are necessities of life. The mere fact a worker could use unemployment compensation benefits to help purchase board, housing, fuel, and medical care does not transform unemployment compensation benefits into a necessity of life, because a worker may use unemployment compensation benefits to purchase anything, not simply such necessities.

It would render the *Cockle* test meaningless to hold that money that can be used to purchase a necessity of life thereby becomes a necessity of life, because this would effectively make any consideration that has economic value a necessity of life. The purpose of the *Cockle* test is to limit the scope of the in-kind benefits included in “wages” to those

ear-marked for necessities of life—excluding non-essentials. *Cockle* expressly rejected the contention that the Department should include any and all forms of consideration that are valuable to a worker in a worker's wage calculation. *See Cockle*, 142 Wn.2d at 820-21. As a practical matter, a ruling that any payment that can be used to purchase a necessity of life is itself a necessity of life would mean that any and all forms of consideration are included in a wage calculation, contrary to *Cockle*'s rejection of that very rule.

Notably, *Gallo* ruled that retirement benefits are not included in a wage calculation because they are not objectively critical to protecting a worker's basic health and survival. *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 491-92, 120 P.3d 564 (2005). A worker can use retirement benefits, like unemployment compensation benefits, to purchase the necessities of life, and, indeed, a retired individual will often depend on that income in order to help pay for those necessities. Nonetheless, retirement benefits do not satisfy the *Cockle* test and so the Department does not include them in the wage calculation. *Gallo*, 155 W.2d at 474. Unemployment compensation benefits similarly fail the *Cockle* test and so RCW 51.08.178 does not permit their inclusion in a worker's wage calculation.

**C. House Did Not Receive Unemployment Compensation Benefits From an Employer and Therefore House's Situation Is Not Akin to That of a Dual-Employed Worker**

Because a worker does not receive unemployment benefits from the employer, RCW 51.08.178 precludes their inclusion in the wage rate. House argues that even though her employer did not pay the unemployment compensation benefits, the court should still include them in the calculation of her wages because she alleges her situation is “analogous” to that of dual employment. App. Br. at 15-16. House stresses that her unemployment compensation benefits were “another form of income.” App. Br. at 15. However, House’s receipt of unemployment compensation benefits in addition to wages is not “analogous” to dual employment because a dual-employed worker receives wages from two employers while House received wages only from the City.

The concept of “dual employment” is based on the legal rule that, under the Industrial Insurance Act, the Department calculates a worker’s benefits based on the wages earned from “all employment” at the time of an injury. Thus, if two different employers employed a worker at the time of an injury, the Department would use wages received from both employers to calculate the wage rate, even if the worker was injured while in the course of employment of only one of those employers. RCW

51.08.178. This is because RCW 51.08.178(1) expressly directs the Department to use all wages earned from “all employment” at the time of an injury to calculate the wages. House concedes that unemployment benefits are not from an employer and not from employment, resolving this case. App. Br. at 13, 15.

**D. The Liberal Construction Doctrine Does Not Override a Plain Statutory Directive**

The liberal construction doctrine does not aid House because the liberal construction doctrine does not override a statute’s plain language, and RCW 51.08.178 unambiguously provides a worker must receive the wages or consideration from an employer to include them in the wage rate. House invokes the doctrine of liberal construction to argue that public policy dictates that the court treat unemployment compensation benefits as wages or consideration from her employer. App. Br. at 5. But “[i]t is a well-settled rule that so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy.” *Raum*, 171 Wn. App. at 155 n.28 (quoting *DeLong v. Parmelee*, 157 Wn. App. 119, 146, 236 P.3d 936 (2010)) (internal quotation marks omitted); *see also Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993).

The Legislature's intent is the heart of any statutory inquiry. If the Legislature had wanted to use payments made by government agencies such as unemployment compensation benefits to calculate workers' compensation benefits, the Legislature would have done so. It did not.

**E. Other Jurisdictions and Washington Cases in Other Contexts Hold That Unemployment Compensation Benefits Are Not Wages**

The rule that unemployment compensation benefits are not wages is echoed nationally. Professor Larson recognizes that “[u]nemployment benefits received during ‘down-times’ while otherwise employed by the employer, are not ‘wages’ and accordingly, are not used to compute the average weekly wage.” 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.01(2)(b) (2012); *see also Strand v. Hansen Seaway Serv., Ltd.*, 614 F.2d 572, 576 (7th Cir. 1980) (unemployment compensation benefits not “earnings” for federal longshore benefits); *In re Mike's Case*, 895 N.E. 512, 515-169 (Mass. App. Ct. 2008) (unemployment compensation benefits cannot be used in determining wages for workers' compensation); *Zanger v. Indus. Comm'n*, 715 N.E.2d 767, 770 (Ill. App. Ct. 1999) (unemployment compensation benefits not wages for workers' compensation purposes); *Parise v. Indus. Comm'n*, 492 P.2d 426, 428 (Ariz. Ct. App. 1971)

(unemployment benefits excluded from wage computation because they are a “wage substitute,” not a wage).

In other contexts, the Washington courts have recognized that unemployment compensation benefits are not wages. The court has held the government provides unemployment compensation benefits as a matter of social policy, not as income:

we conclude that unemployment compensation benefits simply are not “income from work” . . . the benefits are provided to alleviate economic insecurity “due to unemployment.” RCW 50.01.010. The [Unemployment Compensation Act] repeatedly refers to the compensation as “benefits” and not “income.”

*Loran v. Dairyland Ins. Co.*, 42 Wn. App. 17, 20, 707 P.2d 1378 (1985) (citing RCW 50.20, *et seq.*). The court in *Wheeler* in considering the collateral source rule for torts stated “unemployment compensation is not pay or wages. It constitutes a collateral benefit that workers receive from the State in furtherance of a separate social policy.” *Wheeler v. Catholic Archdiocese*, 65 Wn. App. 552, 571, 829 P.2d 196 (1994), *rev’d on other grounds*, 124 Wn.2d 634 (1994).

Unemployment compensation benefits are benefits received from the government as part of a social policy designed to protect against downturns in the economy. *See Loran*, 42 Wn. App. at 20. The Legislature did not intend for such benefits to be included in the wage rate, as it

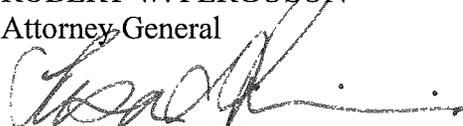
specifically included only consideration received from the employer and wages from employment.

## VI. CONCLUSION

The unemployment compensation benefits House received were not wages from “employment,” nor “consideration of like nature . . . received from the employer.” The Department correctly excluded the unemployment compensation benefits from the wage calculation. This Court should affirm the Board’s and superior court’s decisions affirming the Department.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of August, 2016.

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DEPARTMENT OF LABOR AND  
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Respondent.

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PEGGY BERTRAND  
Legal Assistant

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