

Building Industry Association of Washington

RETROSPECTIVE RATINGS

Membership in group

Under RCW 51.18.040(6), a firm that has been a continuous member of a retrospective rating group prior to July 25, 1999, may continue to enroll in that group even if the firm is not substantially similar to the group's industry category.

A firm having employees whose activities are appropriately classified as construction-related may enroll in a retrospective rating group for businesses engaged in construction and related services. It is not necessary for a majority of the firm's employee hours to be in a construction activity under the provisions of either RCW 51.18.040(1) or WAC 296-17B-260.*In re Building Indus. Ass'n of Wash.*, BIIA Dec., 12 11201 (2013)

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: BUILDING INDUSTRY) DOCKET NOS. 12 11201, 12 18012 & 12 18013**
2 **ASSOCIATION OF WASHINGTON)**
3 **RETROSPECTIVE RATING GROUP NO. 25) CORRECTED DECISION AND ORDER**
4 **) (Corrects Holding in Docket No. 12 18012)**
5 **)**

6 **APPEARANCES:**

7 Firm, Association of Washington Business, per
8 Casey Sparber and Brian Bishop, Account Specialists

9 Retrospective Rating Group No. 25, Building Industry Association of Washington, by
10 Law Offices of Stephen T. Whitehouse, per
11 Julie Sund Nichols

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 James S. Johnson and Bonnie Kim, Assistants

15 In Docket Nos. 12 11201, 12 18012, and 12 18013 the Retrospective Rating Group No. 25,
16 administered by the Building Industry Association of Washington (BIAW), filed appeals with the
17 Board of Industrial Insurance Appeals on February 10, 2012, and July 17, 2012, respectively, from
18 orders of the Department of Labor and Industries dated December 9, 2011, May 18, 2012, and
19 May 21, 2012. The orders addressed the enrollment of many firms for the covered years beginning
20 July 1, 2011. The parties stipulated that the orders denied the enrollment of the seven specific
21 firms subject to these appeals.

22 In Docket No. 12 11201, the Department order dated December 9, 2011, which was
23 communicated to the BIAW on December 12, 2011, denied the enrollment of Puget Sound Steel;
24 Carl's Building Supply, Inc.; and Shur-Way Building Centers into Retrospective Rating Group
25 No. 25. The Department order is **REVERSED AND REMANDED**.

26 In Docket No. 12 18012, the Department order dated May 18, 2011 affirmed a prior order
27 dated January 11, 2012, which denied the enrollment of Highway Specialties, LLC, into
28 Retrospective Rating Group No. 25. The Department order is **REVERSED AND REMANDED**.

29 In Docket No. 12 18013, the Department order of May 21, 2012 corrected and superseded
30 an order dated November 8, 2011, and denied the enrollment of Shuel Wholesale Lumber, Inc.;
31 Signs and Wonders, Inc., dba Fastsigns; and Final Touch Cleaning Service into Retrospective
32 Rating Group No. 25. The Department order is **REVERSED AND REMANDED**.

1 **PRELIMINARY EVIDENTIARY MATTERS**

2 On March 21, 2013, this Board entered a Decision and Order in this appeal reversing Docket
3 Nos. 12 11201, 12 18012, and 12 18013 and remanding this matter to the Department to take
4 further actions consistent with the Decision and Order. After the Decision and Order was issued,
5 the Board noted that the order mistakenly stated on page 1, paragraph 3 that Docket No. 12 18012
6 was **affirmed**. As provided by CR 60(a), we issue this Corrected Decision and Order to fix this
7 error. The rest of the Decision and Order remains unchanged.

8 **INTRODUCTION**

9 As provided by RCW 51.52.104 and RCW 51.52.106, these three appeals are before the
10 Board for review and decision on timely Petitions for Review, filed by the BIAW and the
11 Department, to a Proposed Decision and Order issued on December 10, 2012. These consolidated
12 appeals concern whether seven companies should be allowed to enroll in the Retrospective Rating
13 Group No. 25 (the Group), administered by the BIAW, for the coverage year beginning July 1, 2011.
14 RCW 51.18.040(1) requires retrospective rating groups be comprised of employers who are
15 substantially similar when considering the services or activities performed by the employees. The
16 principal issue before us is to determine whether these firms have employees working for them
17 whose hours could appropriately be assigned to risk classifications related to the Group's industry
18 category, construction and related services. We must also determine whether some of these firms
19 are allowed to continue to enroll in the Group under the grandfather clause in RCW 51.18.040(6).
20 This clause allows firms who were enrolled in a retro group prior to July 25, 1999 to continue their
21 enrollment even if their employees' activities are not substantially similar to those of the group's
22 members.

23 The parties stipulated that two of the seven companies (Puget Sound Steel and Shur-Way
24 Building Centers) should be allowed to enroll in the Group. Our industrial appeals judge
25 determined two other companies (Final Touch and Shuel Wholesale Lumber) should be allowed to
26 enroll under the grandfather clause, but affirmed the Department's determination to reject the
27 enrollment applications for the remaining three companies (Carl's Building Supply, Fastsigns, and
28 Highway Specialties). He determined that these three companies' employees engage in activities
29 that are not substantially similar to those of the companies in the Group.

30 The Department objects to our judge's decision to allow Final Touch to enroll in the Group
31 under the grandfather clause. It maintains this firm was not enrolled in the Group as of July 1999,
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1 and therefore is ineligible for admission based on this clause. The Department argues that Final
2 Touch's employees do not engage in construction and related activities substantially similar to the
3 Group's members. Accordingly, it contends its decision to deny its enrollment application was
4 correct. The Department believes our judge's decision to deny the remaining three firms'
5 enrollment in the Proposed Decision and Order is correct and should be affirmed.

6 The BIAW maintains the Department should have allowed all seven firms involved in these
7 appeals to enroll in the Group. Because the Department has agreed Puget Sound Steel and
8 Shur-way Building Centers' applications were erroneously denied, BIAW asks us to decide the
9 remaining five firms engage in construction related activities that are substantially similar to the
10 Group's members' activities. The BIAW acknowledges that Final Touch first enrolled in the Group
11 after 1999, and therefore is not eligible for enrollment under the grandfather clause. However, it
12 argues that this company's activities are related to the construction industry. Furthermore, it
13 maintains that Shuel Wholesale Lumber should not be approved for enrollment solely based on the
14 grandfather clause, because a wholesale lumberyard also engages in construction related
15 activities. In short, the BIAW maintains the Department should have granted all five firms'
16 enrollment applications because their employees' activities are construction related, and therefore
17 substantially similar to the activities of its Group's members' employees. Alternately, it also
18 maintains some of these firms should have been allowed to enroll based on the grandfather clause.
19 It argues that this clause allows a business that was a member of the Group prior to July 25, 1999
20 to continue its membership, even if it has not been continuously enrolled since that date.

21 We agree with the Department that our judge's decision to allow Final Touch to be
22 grandfathered into the Group was erroneous. This firm joined the Group too late to be admitted on
23 that basis. On the other hand, his determination that Shuel Wholesale Lumber must be allowed to
24 enroll in the Group based on this clause is correct. We do not conclude, however, that employees
25 of wholesale lumberyards engage in construction related activities and services substantially similar
26 to those of the Group's members. The Department correctly denied Carl's Building Supply's
27 enrollment application. Shuel's application can only be granted because it has been grandfathered
28 into the Group. Carl's Building Supply cannot be admitted into the Group under the grandfather
29 clause, because it has not been continuously enrolled since 1999. On the other hand, the
30 employees of Final Touch, Fastsigns, and Highway Specialties engage in some
31 construction-related activities and services. We conclude these three firms have employees
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1 working for them whose hours could appropriately be assigned to risk classifications related to the
2 construction industry or related services. Accordingly, the Department erred in denying these three
3 firms' enrollment applications.

4 **FACTS**

5 We have reviewed the evidentiary rulings in the record of proceedings and finds no prejudicial
6 error was committed. These rulings are therefore affirmed.

7 Our record in this matter is voluminous. The following is a brief summary of the testimony
8 relevant to our decision. We do not summarize the testimony of Puget Sound Steel's and Shur-
9 Way Building Centers' representatives, since the parties have stipulated their enrollment
10 applications should be granted. Puget Sound Steel can enroll in the Group because Department
11 staff decided its employees were engaged in construction related activities after hearing the
12 testimony of its representative. Shur-Way qualified for admission into the Group under the
13 grandfather clause. The remaining firms' representatives testified as follows.

14 Jeff Lemke, the owner of Fastsigns, stated his company manufactures and installs signs,
15 often while a building is being constructed. His employees manufacture signs and letters, dig
16 holes, assemble posts and frames, and install signs, both indoors and outdoors. The firm's main
17 customers are contractors, real estate "people," and property managers. It is a small firm, but
18 consistently has at least three people involved in sign production. The production staff also installs
19 the signs. Exhibit 1 depicts some of the signs manufactured and/or installed by the company.

20 James Versusky, a manager at Highway Specialties, indicated this firm manufactures
21 highway signs and barriers and delivers them to construction sites. Its customers are general
22 contractors and traffic control companies associated with construction. Its employees were
23 involved in manufacturing barricades and casting concrete. Some of the products manufactured by
24 the company and its jobsite are depicted in Exhibit 3.

25 Dayna Smoot, a part owner of Shuel Wholesale Lumber, testified the company is a small
26 commercial lumberyard in Yakima. Approximately 75 percent of its sales are to building
27 contractors. The products sold to contractors include lumber, which employees may have cut to
28 order, and other building supplies. The firm employs three co-owners, who have elected coverage,
29 and one truck driver, who delivers lumber and building products to construction sites. Exhibit 5
30 shows pictures of this firm's jobsite.

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1 Lawrence Graves, the general manager of Carl's Building Supply, testified regarding this
2 firm's activities. Its employees are engaged in similar activities to Shuel's workers, but Carl's is a
3 larger company, with around 20 employees. It is located in Chimacum, on the Olympic peninsula,
4 and sells building supplies to construction companies. Approximately 70 percent of its sales are to
5 building contractors. Five of the firm's employees are truck drivers who deliver products to
6 construction sites. Pictures of this jobsite and of the firm's employees can be found in Exhibit 7.

7 Brenda Ketchum, the owner and operator of Final Touch, testified her company's employees
8 perform janitorial work in commercial buildings; maid service in residences, and preoccupancy
9 clean-up of buildings for contractors after construction has been completed. Her company is
10 located in Bellingham. When she started her business, 20 years ago, 90 percent of her business
11 involved preoccupancy clean-up. When she testified, however, this portion of her business had
12 been reduced to approximately 5 percent, due to the construction slump caused by the economic
13 downturn.

14 Several witnesses employed by the Department described the decision making process
15 involved in its adjudication of firms' applications to enroll in retrospective rating groups. They also
16 testified why the applications of the firms involved in these appeals were rejected.

17 Tim Smolen, the Program Manager for the Department's Retrospective Rating Program,
18 explained the Department uses a two step process when making a decision regarding a firm's
19 enrollment application. First, a computer reviews the hours reported by the firm's employees to see
20 if they are reported in risk classifications the Department has already assigned to the group it wants
21 to join. The risk classifications approved for the firms involved in this appeal are those the
22 Department has assigned to the construction and related services. We note the Department
23 requires state fund employers to report the hours worked by its employees in specific risk
24 classifications, as defined in WAC 296-17A, for rate-setting purposes. The computer will approve
25 an enrollment classification if a firm has at least one hour in an acceptable risk class. Ninety-five
26 percent of firm applications are approved based solely on this computer review. He identified
27 Exhibit 9, a Department memo entitled "Retrospective Rating: Business and Industry Category
28 Guide". He stated this document is a general guide to be used by industry retro groups regarding
29 the risk classifications the Department considers appropriate for enrollment in specific groups. The
30 risk classifications appropriate for the building industry are listed on pages 4-5 of the guide,
31 because the BIAW group is in Group 3, for construction and related services.

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1 If a firm does not pass the computer screening process, then a Department enrollment
2 coordinator assigned to the retro group at issue will review the application. He could not clearly
3 describe the criteria used by Department personnel when making a decision at this point. He
4 testified he was not sure if a firm reporting only one hour in an appropriate risk classification would
5 be admitted, or if his staff checks to see if a majority of the firm's reported hours are in an
6 appropriate risk class. He was unfamiliar with the process Department staff had used to evaluate
7 the seven firms involved in this appeal. Nonetheless, he testified they were denied admission
8 because his staff did not believe the nature of these companies' operations aligned with the
9 construction industry category (for example, they did not fit into this category). He did not discuss
10 any specific facts that justified this conclusion. He was unaware whether any of the companies
11 should have been grandfathered in.

12 Michael Murphy is an industrial insurance underwriter who was on loan to the Department's
13 retro division for around nine months, from April to December 2011. He was involved in a team that
14 denied the applications from Shur-Way Building Centers, Puget Sound Steel, and Highway
15 Specialties. He described the general criteria the team used when reviewing applications for
16 admission to retro groups. Basically, the team sought to determine whether a firm was substantially
17 similar to companies already in the group it wanted to join, because the companies in a retro group
18 should be homogeneous. Specific factors the team considered in making their enrollment decisions
19 concerned:

- 20 1. Whether the firm's industrial insurance account was in good standing,
- 21 2. Whether the firm was in good financial standing,
- 22 3. The ownership of the firm, and
- 23 4. The risk classification of the firm's employees.

24 These specific criteria are generally consistent with the requirements in the relevant rule,
25 WAC 296-17B-250, discussed in more detail below.

26 Mr. Murphy testified that Shur-Way should have been admitted to the Group under the
27 grandfather clause. He could not specifically explain why Puget Sound Steel's and Highway
28 Specialties' applications were denied. The only rationale he offered for their denials was that their
29 employees did not perform substantially similar tasks to employees in the construction industry.
30 Obviously, his explanation regarding Puget Sound Steel was unsatisfactory, since Michelle O'Brien,
31 the Department employee with the authority to make the final Department decision regarding
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1 enrollment applications, later determined the firm should have been admitted because its
2 employees engaged in construction related activities. The Assistant Attorney General soon
3 stipulated this firm's application was erroneously denied. Concerning Highway Specialties, one
4 basis for the staff's denial of this application can be found in Exhibit 11. Based on a review of the
5 firm's website, Department staff concluded this firm's employees did not do any construction work.
6 Mr. Murphy testified that determining whether work was construction related was "all relative to a
7 person's employer." 9/12/12 Tr. at 159-60. For example, cutting lumber on a construction site to
8 put up a sign would not be a construction related activity unless the employee doing the work was
9 employed by a construction related company. Using this line of reasoning, the activities of a
10 Highway Specialties' employee while making and erecting a sign would not be construction related,
11 but the very same activities engaged in by a construction company's employee would be.
12 Mr. Murphy also testified Highway Specialties did not report its employees worked sufficient hours
13 in risk classifications the Department considered construction related to allow it to join the Group.

14 Valerie Hines was employed as a customer services specialist in the Department's Employer
15 Services Division when Highway Specialties' application was denied. In that position, she
16 processed firms' enrollment applications to join retrospective rating groups. She also generally
17 described the Department's decision making process regarding these applications. She agreed the
18 computer screening process would result in the admission of a company that reported at least one
19 hour of employee activities in a risk classification relevant to the retro group it sought to join. She
20 testified Highway Specialties' application was rejected based on its name, the information in its
21 website, and the number of employee hours it reported by risk classification to the Department.
22 The principal factor was a decision the risk classifications Highway Specialties used for reporting
23 purposes were not construction related. She could not specifically explain why they were not
24 construction related. She was also aware the company had been previously admitted to the Group
25 and could not explain what had changed concerning its operations to justify its rejection. In short,
26 she could not specify why the Department determined Highway Specialties' activities were not
27 construction related.

28 Timothy Lundin was also a customer services specialist during the period relevant to this
29 appeal. He worked as an enrollment coordinator in the Department's retro division. He agreed that
30 firms' applications to join a retro group were computer approved if they reported only one hour in an
31 accepted risk class for the group. He reviewed Shuel Wholesale Lumber's, Fastsigns', and Final
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1 Touch's applications. During his review, he focused primarily on the risk classifications assigned to
2 these firms' employees and compared them to the classifications the Department listed as
3 appropriate for the Group. He relied heavily on Exhibit 9, the memo described previously by
4 Mr. Smolen, in making his recommendations. He also looked at the firm's website. He testified he
5 made recommendations to Michelle O'Brien, who made the ultimate decisions to deny these
6 applications. He recommended denial of all three companies for the following reasons. Shuel is a
7 lumber yard. Because a lumber yard is essentially a retail operation, its employees' activities are
8 not construction related. Fastsigns was denied because none of the risk classes assigned to its
9 employees fit the construction industry. Exhibit 15 lists the hours assigned to its employees. He
10 acknowledged that Fastsigns' employees installed signs outside of buildings. Department rules
11 required the firm to report the hours its employees spent in these activities in Classification 0403,
12 which applies to contractors erecting signs. If Fastsigns had appropriately reported its employees'
13 hours in this risk class, it would have been automatically approved for enrollment based on the
14 computer screening process, because this risk class was on the Department approved list for the
15 Group. Final Touch was denied because a majority of its business did not involve post-construction
16 clean-up.

17 Michelle O'Brien is the Underwriting Manager of the Department's Retrospective Rating
18 Program. She was the person who made the ultimate decisions to deny the applications of the
19 firms involved in these appeals to join the Group. She agreed the computer review of firms'
20 applications would result in the admission of a company if at least one hour of work was reported in
21 an appropriate risk classification. Exhibit 19 was identified as a Department guide of the
22 classifications relevant to the wood frame industry. If a firm reported at least one hour of work in
23 the classifications listed in this exhibit, the computer would approve its classification. (We note this
24 is a different list than the list in Exhibit 9, the memo Mr. Lundin relied upon when making his
25 recommendations.) When Department staff reviewed a firm's operations to see if it should be
26 admitted to a retro group, their review focuses on the "main nature of its business." 9/13/12 Tr. at
27 54-55.

28 She denied admission to the Group for the companies involved in this appeal for the
29 following reasons:

- 30 1. Final Touch was not in the construction business, because a majority of its
31 employees' hours involved maid service in residential homes. However, she
32 acknowledged, preoccupancy clean-up is defined as a construction activity in

1 Exhibit 19. Employee hours doing this work should be reported in Classification
2 6602. Had Final Touch reported any hours in this risk class, which would have
3 been appropriate, it would have automatically been enrolled in the Group based
4 on the computer review process.

- 4 2. She could not specifically articulate the Department's rationale for denying the
5 commercial lumberyards' applications. She acknowledged commercial lumber
6 yards delivered products to construction sites. She acknowledged concrete and
7 gravel dealers who delivered products to sites were allowed to enroll in the
8 Group because the Department considered these activities construction related.
9 She could not explain why the Department treated lumber yards differently from
10 these dealers in determining whether they could enroll in the Group.
- 9 3. She also could not give specific reasons the Department denied the applications
10 of the other firms involved in this appeal. She testified the Department should
11 assign Fastsigns an additional classification, Class 0403, because its
12 employees were involved in sign installation. If the firm had used this risk
13 classification, its application to enroll in the Group would have been approved.
14 However, she testified the retro staff lacked the authority to change the risk
15 classifications assigned to a firm. Similarly, she acknowledged Highway
16 Specialties workers were involved in manufacturing concrete barriers and sign
17 slugs. Employee hours in those activities could have been appropriately
18 reported in classification 3105. Had Highway Specialties used this risk
19 classification in its reports, the Department would have allowed it to enroll in the
20 Group.

17 The BIAW also presented the testimony of three former Department employees. Laura
18 Smith worked in the retro unit for 15 to 20 years before she retired, during the fall of 2010. She
19 handled enrollment applications for the BIAW Group from the mid-1980s until her retirement. From
20 2003 through August 2008, the Department allowed the BIAW to enroll lumber yards in the Group.
21 The risk classification assigned to lumber yards, Class 2009 00 (for building materials dealer/
22 lumber yard) was listed as an accepted risk class for enrollment in Exhibit 21. See, p. 7. This is a
23 list of all the classifications assigned to the BIAW Group in August 2008, which she prepared and
24 sent to a BIAW employee. She testified that Exhibit 9, a Department guide to its retrospective
25 rating program, was only created as a marketing guide, which the various groups could use to
26 solicit applications. It does not list all the acceptable risk classes appropriate for the groups
27 because it was not intended to be an exhaustive list nor a basis for enrollment denial.

28 Chris Johnson worked for 21 years for the Department, before becoming a BIAW loss control
29 field representative, in January 2008. She spent her last five years as a Department employee in
30 its retro program, and was involved in making enrollment decisions. She testified the Department
31 was involved in some statutory and rule changes regarding retro group enrollment in 1999 that
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1 would have disqualified some companies. Accordingly, a grandfather clause was developed stating
2 that any company enrolled in a retro group prior to July 25, 1999 could be allowed to reenroll. She
3 did not believe firms had to be continuously enrolled since then to have their applications approved.
4 She acknowledged Final Touch had only been continuously enrolled in the Group since 2005.
5 However, Shuel Wholesale Lumber had been continuously enrolled in the Group since 1992. She
6 also testified she would have enrolled lumber yards in the BIAW Group when she worked for the
7 retro group (2003-2007). She stated there were currently approximately 30 lumber yards still in the
8 Group, but she was not sure how many of these firms were admitted based on the grandfather
9 clause.

10 Frank Romero has been employed at the BIAW for 7 years, but worked for the Department
11 for the previous 27 years. During his last seven years of Department employment, he managed its
12 Retrospective Rating Program. He was involved in drafting RCW 51.18, the chapter regarding
13 retrospective rating plans that became effective July 1, 1999. He testified at length regarding his
14 interpretation of the statute. He testified the legal standard for enrolling firms in groups is set forth
15 in RCW 51.08.040(1). The key issue is whether the companies are substantially similar,
16 considering the services and activities of the applicant and the firms already in the group. He
17 believes that making a decision solely based on risk classifications would be incorrect. Risk
18 classifications were developed to set uniform pricing standards for firms' rates. Because the
19 premiums of firms in retro groups are ultimately based on the claims experience of the groups'
20 members, these risk classifications are not relevant in making enrollment decisions. He noted the
21 statute was based on legislative policy to promote broad participation in retro groups because they
22 improve work-place safety.

23 Mr. Romero developed the Department computer screening policy that allows enrollment in a
24 retro group as long as a firm reports at least one hour of employee activity in an accepted risk
25 class. He testified that Final Touch's and Highway Specialties' employees' hours were clearly
26 misclassified. He believed both firms would have been admitted to the Group if their hours had
27 been correctly assigned. When he managed the retro program he would also have admitted all
28 three lumber yards to the Group. The employees of these firms were exposed to the same hazards
29 as construction companies' employees. For example, both types of employees cut lumber and
30 delivered materials to construction sites. In the same vein, he thought Highway Specialties should
31 be admitted to the Group because its employees also were exposed to the hazards of construction
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1 when they installed signs. He believed the Department's focus during enrollment decisions should
2 be on whether a firm's employees' activities are substantially similar to the retro group members'
3 activities. This also involves a determination of whether these employees are exposed to similar
4 hazards.

5 DECISION

6 **Relevant Law:** The legislative framework governing how retrospective rating groups should
7 operate is in RCW Chapter 51.18. The statutory criteria for determining which firms can enroll in
8 retro groups is found in RCW 51.18.040(1). This section of the statute states:

9 In order to ensure that all retrospective rating groups are made up of
10 employers who are substantially similar, considering the services or
11 activities performed by the employees of those employers, the
12 sponsoring entity of a retrospective rating group shall select a single,
13 broad industry or business category for each retrospective rating group.
14 Once an industry or business category is selected, the department shall
allow all risk classifications reasonably related to that business or industry
category into that retrospective rating group.

15 Based on this language, we readily conclude the legislature intended to ensure that retro groups
16 consist of substantially similar employers, based on a consideration of their employees' services or
17 activities. This same language can be found in the statute governing the criteria the Department
18 should use in deciding whether a new retro group should be approved. RCW 51.08.020(7) requires
19 retro groups to be composed of "employers who are substantially similar considering the services or
20 activities performed by the employees of those employers."

21 This language therefore requires retro groups be fairly homogenous, because the employers
22 in the group must be substantially similar. To that end, RCW 51.08.040(1) mandates the
23 Department to allow all firms who have been assigned risk classifications reasonably related to the
24 retro group's business or industry category to enroll in the group. There is no minimum threshold
25 stated in the statute: it does not require a particular number of employee hours in the relevant risk
26 classes for a firm's enrollment. It is also important to recognize the statute does not exclude firms
27 whose employees' hours are not reported in risk classifications reasonably related to the retro
28 group's industry category from enrollment. The statute does not mandate the admission of these
29 firms, but their applications can be approved if their employees engage in activities substantially
30 similar to those of employees of firms in the group. We have previously approved the admission of
31 the city of Oak Harbor to the Group, based on a determination its employees' activities were
32 substantially similar to those of its members. *In re Building Industry Association of Washington,*

1 Dckt. No. 07 23702, (June 24, 2009). Our decision was based on the fact that a majority of the
2 city's employees' hours involved construction and related activities.

3 In adjudicating this appeal, we are also mindful of the legislative directive to foster broad
4 participation by businesses in retro groups. RCW 51.18.005 states the legislature finds retro plans
5 have been highly effective in improving workplace safety and injured worker outcomes, and in
6 reducing claim costs. Accordingly, the Legislature directed the Department to adopt rules that
7 "shall encourage broad participation" by employers in groups. RCW 51.18.010(2).

8 As of 2010, there are two Department rules delineating the requirements a firm must meet to
9 be admitted to a retro group. Under WAC 296-17B-250, an employer qualifies for membership in a
10 retro group if the employer:

- 11 (1) Has an industrial insurance account in good standing;
- 12 (2) Is a dues paying member of the organization sponsoring the group;
- 13 (3) Is not enrolled in retrospective rating either as a member of a group or
14 individually for the coverage period; and
- 15 (4) The employer satisfies the homogeneity requirement of WAC 296-17B-260.

16 WAC 296-17B-260 states an employer may enroll in a group only if:

- 17 (1) We determine that the risk classes appropriately assigned to the employer are
18 related to the industry category selected by the sponsoring organization for the
19 group;
- 20 (2) The employer shares common ownership with an employer enrolled in the group
21 that satisfies the requirements of subsection (1) of this section; or
- 22 (3) The employer has been a member of the group since prior to July 25, 1999.

23 Accordingly, under Department rules, our decision must consider whether the appealing
24 firms' employees worked in a risk class "appropriately assigned" to construction and related
25 services in adjudicating whether their enrollment applications should be approved. The only
26 exception relevant to these appeals is whether a firm can qualify for admission based on the
27 grandfather clause. We note the Department rules set forth criteria for admission to a retro group
28 that appears more restrictive than the governing statute's requirements. RCW 51.18.040(1) does
29 not limit enrollment solely to employers with employees working in risk classifications assigned to
30 the retro group's industry category. The provisions of this section allows participation if employees
31 engage in substantially similar services or activities as the groups' members' employees without
32 regard to specific risk classification. WAC 296-17B-260 only allows firms reporting employee hours
in a relevant risk class to enroll. However, since we lack the authority to invalidate a Department

1 rule, we are applying this rule's requirements to the facts of these appeals. See, *Snohomish*
2 *County et al v. State of Washington et al*, 69 Wn. App. 655 (1993).

3 **Grandfather Clause:** Under RCW 51.18.040(6), firms who have been members of a retro
4 group prior to July 25, 1999 may continue to enroll in that group, even if they are not substantially
5 similar to the group's industry category. Although the statute does not specify the firms must have
6 been continuously enrolled since 1999, that is the only reasonable interpretation of its directive.
7 Firms who were enrolled in a retro group as of July 1999 can continue in that group, even if they
8 otherwise would not qualify for admission. However, a firm that leaves a retro group and then
9 seeks to reenroll, must meet one of the two other criteria for homogeneity stated in
10 WAC 296-17B-260. The BIAW urges us to determine that a firm who was a member as of July
11 1999 and subsequently leaves the Group can be grandfathered in for perpetuity. Under this
12 argument, a firm enrolled in July 1999 who left the Group in 2000 and seeks reenrollment now or in
13 the future, would have to be admitted under the grandfather clause. We do not believe the
14 legislature intended this result. The parties stipulated Shur-Way Building Centers qualified for
15 enrollment in the Group based on the grandfather clause. The only other firm before us who
16 qualifies for enrollment under this clause is Shuel Wholesale Lumber. Carl's Building Supply
17 cannot be grandfathered into the Group because it was not enrolled in it during fiscal years 2009
18 and 2010. Accordingly, neither Final Touch, nor any of the four other companies whose
19 applications we are adjudicating, can enroll in the Group under the grandfather clause. When the
20 Department denied their 2011 enrollment applications, none of these five companies had been
21 continuously employed in the Group since July 1999.

22 **Substantially Similar Requirement:** We have concluded Fastsigns, Final Touch, and
23 Highway Specialties all had employees engaged in substantially similar activities to those of
24 employees enrolled in the Group. The Department staff has acknowledged they all have
25 employees whose activities, if appropriately classified, are construction related. It is not necessary
26 for a majority of these firms' employees' hours to be in construction activities under the provisions
27 of either RCW 51.08.040(1) or WAC 296-17B-260. The Department's own computer program only
28 requires a minimum of one hour in a construction risk class for admission. Department employees
29 testified all three of these firms' employees engaged in labor that could be reclassified in risk
30 categories assigned to the construction industry. For Fastsigns, it would be classification 0403, the
31 installation of signs. For Final Touch, it would be classification 6602, for preoccupancy clean-up.

1 For Highway Specialties, it would be classification 3105, regarding the construction of concrete
2 barriers and sign slugs.

3 The Department maintains that if we determine a firm's employee hours could be more
4 appropriately classified in a different risk class, than the firm would still not qualify for enrollment
5 because it would not be in "good standing" with the Department. It assumes the new classifications
6 would have resulted in higher premiums, and therefore the firm would not have fully paid its 2011
7 premiums. It therefore would not be in "good standing," as required by WAC 296-17B-250(1). We
8 reject this argument. We are not reclassifying these firms' hours for rate-setting purposes: we are
9 simply determining a different classification is appropriate for the purposes of making an enrollment
10 decision. Finally, the Department stipulated one company, Puget Sound Steel, should be admitted
11 because its employees' activities were substantially similar to the Group's members without any
12 concern about this issue. Based on our review of the record, we have concluded three other
13 companies all have employees engaged in activities substantially similar to those of the BIAW
14 Group's members. Our decision cannot be applied retroactively to be a basis for concluding these
15 firms' industrial insurance accounts were not in good standing in 2011, when they applied to join the
16 Group.

17 The Department staff failed to present any persuasive rationale for their denials of
18 Fastsigns', Final Touch's, and Highway Specialties' applications, other than their failure to report
19 hours in classifications they accepted as construction related. However, Department staff obviously
20 used different guides in determining which classifications were appropriate. Some staff used
21 Exhibit 9, which is an underinclusive list of the relevant classifications. Because it was intended to
22 be used as a marketing guide, its list was only designed to be illustrative, not comprehensive.
23 Other staff used Exhibit 19, a list of classifications the Department believed appropriate for
24 reporting the activities of firms engaged in wood-frame building construction projects. This list
25 could also exclude relevant classifications, because it is limited to a particular type of construction
26 project. It is unclear whether the list of construction related activities programmed into the
27 Department's computer was the same as Exhibit 9 or 19, or differed from both guides.
28 Furthermore, the computer and Department staff used different thresholds for the number of hours
29 in approved classifications required for admission to a group. The computer screening would result
30 in enrolling a firm that reported only one employee hour in a relevant risk classification. The
31 Department staff obviously required more than one hour of relevant employment when making their
32

1 enrollment decisions, but we remain unclear what minimum threshold they used in making their
2 decisions. The lack of consistency in the Department's decision making process regarding firms'
3 enrollment applications is troubling. The staff's determinations regarding the firms' applications
4 were based on a minimum level of research: a quick review of the firm's website and the forms in
5 which they reported their employees' hours. We therefore did not find their explanations of why
6 they denied these three firms' enrollment applications persuasive. We have concluded all three of
7 these firms' applications should be granted.

8 We are not concluding the employees of the three commercial lumber yards engaged in
9 activities substantially similar to the Group's members. While Shur-Way Building Centers and
10 Shuel Wholesale Lumber must be admitted under the grandfather clause, they do not qualify for
11 admission on any other basis. Carl's Building Supply cannot be admitted because its employees'
12 activities were not substantially similar to those of the Group's members. There is no evidence that
13 any of these firms' employees' hours should have been appropriately classified in risk
14 classifications the Department has determined are appropriate to the construction industry or
15 related services. While the Department used to consider Classification 2009 00, for lumber yard
16 employees, a construction related service, it no longer did so as of 2011. We are not persuaded
17 employee hours reported in this classification are construction related. Commercial lumber yards
18 are essentially retail operations, even though they sell primarily to contractors. Their employees
19 are primarily involved in selling and moving products in the yard itself, and they are not exposed to
20 the risks of a construction site except when delivering products. We do not believe lumber yards'
21 employees worked in risk classifications reasonably related to the construction industry. In short,
22 commercial lumber yards' employees' activities are not substantially similar to the Group's
23 members. The Department's decision to deny Carl's Building Supply's application is therefore
24 correct.

25 **Estoppel:** The BIAW maintains commercial lumber yards should be allowed to enroll in the
26 Group based on the doctrine of equitable estoppel. This argument is based on the fact that in 2008
27 Laura Smith, who was then a Department employee, sent BIAW staff a list of all the risk
28 classifications assigned to the BIAW Group at that time. See, Exhibit 21. This list included the
29 classification appropriate for lumber yards, classification 2009 00. The BIAW maintains the
30 Department should be stopped from eliminating this classification from its list of acceptable risk

1 classifications for enrollment in its Group, based on this doctrine. It cites *Kramervecky v.*
2 *Department of Labor & Indus.*, 122 Wn.2d 738 (1993) as support for its position.

3 Under *Kramervecky*, a claim of equitable estoppel requires clear, cogent, and convincing
4 evidence of:

- 5 1. An admission by the government inconsistent with its later claim;
- 6 2. Reliance on the admission;
- 7 3. Injury to the relying party;
- 8 4. The necessity of using this doctrine to prevent a manifest injustice, and
- 9 5. No impairment of governmental function by the application of this doctrine.

10 The Department never admitted that lumber yards were substantially similar to construction
11 companies and should be admitted to the BIAW Group as of 2011. A list of the classifications
12 assigned to employees of Group members in 2008 is not an admission or promise by the
13 Department that firms reporting employee hours in those classifications would be guaranteed
14 enrollment in future years. It was merely a description of the current state of affairs supplied to the
15 BIAW by a Department employee. It is unreasonable for the BIAW to assume this list expressed
16 Department policy that would still be applied years later. This document did not describe any
17 policy, and there is no evidence Ms. Smith had any authority to formulate or articulate Department
18 policy at that time. Furthermore, we have concluded the Department's previous policy to allow
19 lumber yards to enroll in the Group was mistaken. Denying an agency the power to correct a
20 mistake would arguably impair a government function. Finally, we cannot conclude the
21 Department's denial of lumber yards' enrollment applications to a retro group constitutes a manifest
22 injustice. There is no evidence in our record to support such a finding.

23 **Conclusion:** Based on our review of the record in this appeal, the Petitions for Review
24 submitted by both parties, and the Department's response to the BIAW's Petition for Review, we
25 have reached the following conclusions. In Docket No. 12 11201, we are reversing the December
26 9, 2011 Department order and directing the Department to approve Shur-Way Building Centers'
27 and Puget Sound Steel's 2011 applications to enroll in the Group. We are directing it to deny Carl
28 Building Supply's application and to remove the three firms the parties stipulated had been
29 erroneously listed as BIAW Group members from its membership list. In Docket No. 12 18012 we
30 are reversing the May 18, 2012 Department order and directing the Department to approve
31 Highway Specialties' 2011 application to enroll in the Group. In Docket No. 12 18013, we are
32

1 reversing the May 18, 2012 Department order and directing the Department to approve Shuel
2 Wholesale Lumber's, Final Touch's, and Fastsigns' 2011 applications to enroll in the Group.

3 **FINDINGS OF FACT**

- 4 1. On June 15, 2012, in Docket No. 12 11201, and on August 13, 2012, in
5 Docket Nos. 12 18012 and 12 18013 an industrial appeals judge certified
6 that the parties agreed to include the Jurisdictional Histories in the Board
7 record solely for jurisdictional purposes.
- 8 2. The Building Industry Association of Washington (the BIAW) sponsors
9 and administers Retrospective Rating Group No. 25 (the Group), for
10 businesses engaged in construction and related services.
- 11 3. Seven employers, specifically Puget Sound Steel, Carl's Building Supply,
12 Shur-Way Building Center, Highway Specialties, Shuel Wholesale
13 Lumber, Fastsigns, and Final Touch Cleaning Services, filed enrollment
14 applications with the Department to enroll in the Group for the coverage
15 year beginning July 1, 2011. The Department initially denied all of their
16 applications.
- 17 4. During the course of this litigation, the parties stipulated Puget Sound
18 Steel's and Shur-Way Building Center's applications to enroll in the Group
19 for the coverage year beginning July 1, 2011 should be granted. Shur-
20 Way qualified for admission to the Group because it was continuously
21 enrolled since July 25, 1999. Puget Sound Steel qualified for enrollment
22 because the Department determined its employees were engaged in
23 construction related activities. The parties further stipulated three
24 employers designated as 080450-1, 080450-5, and 080450-7 were
25 erroneously listed as members of the Group and should be removed from
26 the list of group members for the coverage year beginning July 1, 2011.
- 27 5. Shuel Wholesale Lumber had been continuously enrolled in the Group
28 since July 25, 1999, when it filed its enrollment application to continue its
29 membership in the Group for the coverage year beginning July 1, 2011.
- 30 6. Puget Sound Steel, Fastsigns, Final Touch, and Highway Specialties all
31 have employees engaged in substantially similar activities to those of
32 employees of businesses in the BIAW Group. They all have employees
whose hours, if appropriately classified, are related to the construction
and related services industry area.
7. Carl's Building Supply is a commercial lumber yard. Its employees did not
engage in substantially similar activities to those of employees of
businesses in the BIAW Group. They do not have employees whose
hours, if appropriately classified, are related to the construction and
related services industry area. Carl's Building Supply had not been
continuously enrolled in the Group since July 25, 1999, when it filed its
application to enroll in the Group for the coverage year beginning July 1,
2011.

- 1 8. The Department has never officially adopted a policy that lumber yards
2 should be admitted to the BIAW Group. While some lumber yards were
3 previously allowed to enroll in the Group, the Department never promised
4 the BIAW or the members of the Group that lumber yards would be
5 allowed to enroll in the Group for the coverage year beginning July 1,
6 2011.

7 **CONCLUSIONS OF LAW**

- 8 1. Based on the record, the Board of Industrial Insurance Appeals has
9 jurisdiction over the parties to and the subject matter of these appeals.
- 10 2. As provided by the provisions of RCW 51.18.040(1) and
11 WAC 296-17B-260(1), Puget Sound Steel, Highway Specialties,
12 Fastsigns, and Final Touch Cleaning Service all qualified for enrollment in
13 the BIAW Group for the coverage year beginning July 1, 2011. They all
14 had employees working in activities whose hours could be appropriately
15 reported in risk classifications appropriate to the construction industry and
16 related services, who engaged in activities substantially similar to the
17 activities of employees of the Group's members.
- 18 3. As provided by the provisions of RCW 51.18.040(6), Shur-Way Building
19 Centers and Shuel Wholesale Lumber qualified for enrollment in the
20 BIAW Group for the coverage year beginning July 1, 2011, since they had
21 been continuously enrolled in the Group since July 25, 1999.
- 22 4. Carl's Building Supply did not qualify to enroll in the BIAW Group for the
23 coverage year beginning July 1, 2011, under either RCW 51.18.040(6),
24 the grandfather clause, or under RCW 51.18.040(1) and
25 WAC 296-17B-260(1). It has not been continuously enrolled in the Group
26 since July 25, 1999 and it does not have employees engaged in activities
27 substantially similar to group members, or whose hours could be
28 appropriately reported in risk classifications appropriate to the
29 construction industry and related services.
- 30 5. Carl's Building Supply, or any commercial lumber yard that does not
31 otherwise qualify for enrollment in the Group under either
32 RCW 51.18.040(6), the grandfather clause, or under RCW 51.18.040(1)
and WAC 296-17B-260, cannot be allowed to enroll in the Group under
the doctrine of equitable estoppel, as stated in *Kramervecky v.*
Department of Labor & Indus., 122 Wn.2d 738 (1993).
6. In Docket No. 12 11201, the Department order dated December 9, 2011,
is reversed. This matter is remanded to the Department with directions to
issue an order approving the applications of Shur-Way Building Centers
and Puget Sound Steel, and denying the application of Carl's Building
Supply, Inc., to enroll in the BIAW Group for the coverage year beginning
July 1, 2011. The Department is further directed to remove three firms

1 designated as 080450-1, 080450-5, and 080450-7 from the list of enrolled
2 Group members for the same coverage year.

- 3 7. In Docket No. 12 18012, the Department order dated May 18, 2012, is
4 reversed. This matter is remanded to the Department with directions to
5 issue an order approving the application of Highway Specialties, LLC to
6 enroll in the BIAW Group for the coverage year beginning July 1, 2011.
- 7 8. In Docket No. 1218013, the Department order dated May 21, 2012, is
8 reversed. This matter is remanded to the Department with directions to
9 issue an order approving the applications of Shuel Wholesale Lumber,
10 Inc., Final Touch Cleaning Service, Inc., and Signs and Wonders, Inc. dba
11 Fastsigns, Inc. to enroll in the BIAW Group for the coverage year
12 beginning July 1, 2011

13 Dated: March 27, 2013.

14 BOARD OF INDUSTRIAL INSURANCE APPEALS

15 /s/ _____
16 DAVID E. THREEEDY Chairperson

17 /s/ _____
18 FRANK E. FENNERTY, JR. Member

19 /s/ _____
20 JACK S. ENG Member