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)

Scroll down for order.
BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON

) DOCKET NOS. 12 11201, 12 18012 & 12 18013

) RETROSPECTIVE RATING GROUP NO. 25

) CORRECTED DECISION AND ORDER
)(Corrects Holding in Docket No. 12 18012)

APPEARANCES:

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

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

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

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

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

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

In Docket No. 12 18013, the Department order of May 21, 2012 corrected and superseded an order dated November 8, 2011, and denied the enrollment of Shuel Wholesale Lumber, Inc.; Signs and Wonders, Inc., dba Fastsigns; and Final Touch Cleaning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

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

INTRODUCTION

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

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

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

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

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

FACTS

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

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

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

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

Dayna Smoot, a part owner of Shuel Wholesale Lumber, testified the company is a small 
commercial lumberyard in Yakima. Approximately 75 percent of its sales are to building 
contractors. The products sold to contractors include lumber, which employees may have cut to 
order, and other building supplies. The firm employs three co-owners, who have elected coverage, 
and one truck driver, who delivers lumber and building products to construction sites. Exhibit 5 
shows pictures of this firm's jobsite.
Lawrence Graves, the general manager of Carl's Building Supply, testified regarding this firm's activities. Its employees are engaged in similar activities to Shuel's workers, but Carl's is a larger company, with around 20 employees. It is located in Chimacum, on the Olympic peninsula, and sells building supplies to construction companies. Approximately 70 percent of its sales are to building contractors. Five of the firm's employees are truck drivers who deliver products to construction sites. Pictures of this jobsite and of the firm's employees can be found in Exhibit 7.

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

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

Tim Smolen, the Program Manager for the Department's Retrospective Rating Program, explained the Department uses a two step process when making a decision regarding a firm's enrollment application. First, a computer reviews the hours reported by the firm's employees to see if they are reported in risk classifications the Department has already assigned to the group it wants to join. The risk classifications approved for the firms involved in this appeal are those the Department has assigned to the construction and related services. We note the Department requires state fund employers to report the hours worked by its employees in specific risk classifications, as defined in WAC 296-17A, for rate-setting purposes. The computer will approve an enrollment classification if a firm has at least one hour in an acceptable risk class. Ninety-five percent of firm applications are approved based solely on this computer review. He identified Exhibit 9, a Department memo entitled "Retrospective Rating: Business and Industry Category Guide". He stated this document is a general guide to be used by industry retro groups regarding the risk classifications the Department considers appropriate for enrollment in specific groups. The risk classifications appropriate for the building industry are listed on pages 4-5 of the guide, because the BIAW group is in Group 3, for construction and related services.
If a firm does not pass the computer screening process, then a Department enrollment coordinator assigned to the retro group at issue will review the application. He could not clearly describe the criteria used by Department personnel when making a decision at this point. He testified he was not sure if a firm reporting only one hour in an appropriate risk classification would be admitted, or if his staff checks to see if a majority of the firm's reported hours are in an appropriate risk class. He was unfamiliar with the process Department staff had used to evaluate the seven firms involved in this appeal. Nonetheless, he testified they were denied admission because his staff did not believe the nature of these companies' operations aligned with the construction industry category (for example, they did not fit into this category). He did not discuss any specific facts that justified this conclusion. He was unaware whether any of the companies should have been grandfathered in.

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

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

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

Mr. Murphy testified that Shur-Way should have been admitted to the Group under the grandfather clause. He could not specifically explain why Puget Sound Steel's and Highway Specialties' applications were denied. The only rationale he offered for their denials was that their employees did not perform substantially similar tasks to employees in the construction industry. Obviously, his explanation regarding Puget Sound Steel was unsatisfactory, since Michelle O'Brien, the Department employee with the authority to make the final Department decision regarding
enrollment applications, later determined the firm should have been admitted because its
employees engaged in construction related activities. The Assistant Attorney General soon
stipulated this firm's application was erroneously denied. Concerning Highway Specialties, one
basis for the staff's denial of this application can be found in Exhibit 11. Based on a review of the
firm's website, Department staff concluded this firm's employees did not do any construction work.

Mr. Murphy testified that determining whether work was construction related was "all relative to a
person's employer." 9/12/12 Tr. at 159-60. For example, cutting lumber on a construction site to
put up a sign would not be a construction related activity unless the employee doing the work was
employed by a construction related company. Using this line of reasoning, the activities of a
Highway Specialties' employee while making and erecting a sign would not be construction related,
but the very same activities engaged in by a construction company's employee would be. Mr. Murphy also testified Highway Specialties did not report its employees worked sufficient hours
in risk classifications the Department considered construction related to allow it to join the Group.

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

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

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

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

1. Final Touch was not in the construction business, because a majority of its employees' hours involved maid service in residential homes. However, she acknowledged, preoccupancy clean-up is defined as a construction activity in
Exhibit 19. Employee hours doing this work should be reported in Classification 6602. Had Final Touch reported any hours in this risk class, which would have been appropriate, it would have automatically been enrolled in the Group based on the computer review process.

2. She could not specifically articulate the Department’s rationale for denying the commercial lumberyards’ applications. She acknowledged commercial lumberyards delivered products to construction sites. She acknowledged concrete and gravel dealers who delivered products to sites were allowed to enroll in the Group because the Department considered these activities construction related. She could not explain why the Department treated lumber yards differently from these dealers in determining whether they could enroll in the Group.

3. She also could not give specific reasons the Department denied the applications of the other firms involved in this appeal. She testified the Department should assign Fastsigns an additional classification, Class 0403, because its employees were involved in sign installation. If the firm had used this risk classification, its application to enroll in the Group would have been approved. However, she testified the retro staff lacked the authority to change the risk classifications assigned to a firm. Similarly, she acknowledged Highway Specialties workers were involved in manufacturing concrete barriers and sign slugs. Employee hours in those activities could have been appropriately reported in classification 3105. Had Highway Specialties used this risk classification in its reports, the Department would have allowed it to enroll in the Group.

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

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

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

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

DECISION

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

- In order to ensure that all retrospective rating groups are made up of employers who are substantially similar, considering the services or activities performed by the employees of those employers, the sponsoring entity of a retrospective rating group shall select a single, broad industry or business category for each retrospective rating group. 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.

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

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

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

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

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

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

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

Accordingly, under Department rules, our decision must consider whether the appealing firms' employees worked in a risk class "appropriately assigned" to construction and related services in adjudicating whether their enrollment applications should be approved. The only exception relevant to these appeals is whether a firm can qualify for admission based on the grandfather clause. We note the Department rules set forth criteria for admission to a retro group that appears more restrictive than the governing statute's requirements. RCW 51.18.040(1) does not limit enrollment solely to employers with employees working in risk classifications assigned to the retro group's industry category. The provisions of this section allows participation if employees engage in substantially similar services or activities as the groups' members' employees without 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
rule, we are applying this rule’s requirements to the facts of these appeals. See, Snohomish County et al v. State of Washington et al, 69 Wn. App. 655 (1993).

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

Substantially Similar Requirement: We have concluded Fastsigns, Final Touch, and Highway Specialties all had employees engaged in substantially similar activities to those of employees enrolled in the Group. The Department staff has acknowledged they all have employees whose activities, if appropriately classified, are construction related. It is not necessary for a majority of these firms’ employees’ hours to be in construction activities under the provisions of either RCW 51.08.040(1) or WAC 296-17B-260. The Department’s own computer program only requires a minimum of one hour in a construction risk class for admission. Department employees testified all three of these firms’ employees engaged in labor that could be reclassified in risk categories assigned to the construction industry. For Fastsigns, it would be classification 0403, the installation of signs. For Final Touch, it would be classification 6602, for preoccupancy clean-up.
For Highway Specialties, it would be classification 3105, regarding the construction of concrete barriers and sign slugs.

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

The Department staff failed to present any persuasive rationale for their denials of Fastsigns’, Final Touch’s, and Highway Specialties’ applications, other than their failure to report hours in classifications they accepted as construction related. However, Department staff obviously used different guides in determining which classifications were appropriate. Some staff used Exhibit 9, which is an underinclusive list of the relevant classifications. Because it was intended to be used as a marketing guide, its list was only designed to be illustrative, not comprehensive. Other staff used Exhibit 19, a list of classifications the Department believed appropriate for reporting the activities of firms engaged in wood-frame building construction projects. This list could also exclude relevant classifications, because it is limited to a particular type of construction project. It is unclear whether the list of construction related activities programmed into the Department’s computer was the same as Exhibit 9 or 19, or differed from both guides. Furthermore, the computer and Department staff used different thresholds for the number of hours in approved classifications required for admission to a group. The computer screening would result in enrolling a firm that reported only one employee hour in a relevant risk classification. The Department staff obviously required more than one hour of relevant employment when making their
enrollment decisions, but we remain unclear what minimum threshold they used in making their
decisions. The lack of consistency in the Department’s decision making process regarding firms’
enrollment applications is troubling. The staff’s determinations regarding the firms’ applications
were based on a minimum level of research: a quick review of the firm’s website and the forms in
which they reported their employees’ hours. We therefore did not find their explanations of why
they denied these three firms’ enrollment applications persuasive. We have concluded all three of
these firms’ applications should be granted.

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

**Estoppel:** The BIAW maintains commercial lumber yards should be allowed to enroll in the
Group based on the doctrine of equitable estoppel. This argument is based on the fact that in 2008
Laura Smith, who was then a Department employee, sent BIAW staff a list of all the risk
classifications assigned to the BIAW Group at that time. *See, Exhibit 21.* This list included the
classification appropriate for lumber yards, classification 2009 00. The BIAW maintains the
Department should be stopped from eliminating this classification from its list of acceptable risk
classifications for enrollment in its Group, based on this doctrine. It cites *Kramervecky v. Department of Labor & Indus.*, 122 Wn.2d 738 (1993) as support for its position.

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

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

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

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

FINDINGS OF FACT


2. The Building Industry Association of Washington (the BIAW) sponsors and administers Retrospective Rating Group No. 25 (the Group), for businesses engaged in construction and related services.

3. Seven employers, specifically Puget Sound Steel, Carl's Building Supply, Shur-Way Building Center, Highway Specialties, Shuel Wholesale Lumber, Fastsigns, and Final Touch Cleaning Services, filed enrollment applications with the Department to enroll in the Group for the coverage year beginning July 1, 2011. The Department initially denied all of their applications.

4. During the course of this litigation, the parties stipulated Puget Sound Steel's and Shur-Way Building Center's applications to enroll in the Group for the coverage year beginning July 1, 2011 should be granted. Shur-Way qualified for admission to the Group because it was continuously enrolled since July 25, 1999. Puget Sound Steel qualified for enrollment because the Department determined its employees were engaged in construction related activities. The parties further stipulated three employers designated as 080450-1, 080450-5, and 080450-7 were erroneously listed as members of the Group and should be removed from the list of group members for the coverage year beginning July 1, 2011.

5. Shuel Wholesale Lumber had been continuously enrolled in the Group since July 25, 1999, when it filed its enrollment application to continue its membership in the Group for the coverage year beginning July 1, 2011.

6. Puget Sound Steel, Fastsigns, Final Touch, and Highway Specialties all have employees engaged in substantially similar activities to those of 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.
8. The Department has never officially adopted a policy that lumber yards should be admitted to the BIAW Group. While some lumber yards were previously allowed to enroll in the Group, the Department never promised the BIAW or the members of the Group that lumber yards would be allowed to enroll in the Group for the coverage year beginning July 1, 2011.

**CONCLUSIONS OF LAW**

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. As provided by the provisions of RCW 51.18.040(1) and WAC 296-17B-260(1), Puget Sound Steel, Highway Specialties, Fastsigns, and Final Touch Cleaning Service all qualified for enrollment in the BIAW Group for the coverage year beginning July 1, 2011. They all had employees working in activities whose hours could be appropriately reported in risk classifications appropriate to the construction industry and related services, who engaged in activities substantially similar to the activities of employees of the Group's members.

3. As provided by the provisions of RCW 51.18.040(6), Shur-Way Building Centers and Shuel Wholesale Lumber qualified for enrollment in the BIAW Group for the coverage year beginning July 1, 2011, since they had been continuously enrolled in the Group since July 25, 1999.

4. Carl's Building Supply did not qualify to enroll in the BIAW Group for the coverage year beginning July 1, 2011, under either RCW 51.18.040(6), the grandfather clause, or under RCW 51.18.040(1) and WAC 296-17B-260(1). It has not been continuously enrolled in the Group since July 25, 1999 and it does not have employees engaged in activities substantially similar to group members, or whose hours could be appropriately reported in risk classifications appropriate to the construction industry and related services.

5. Carl's Building Supply, or any commercial lumber yard that does not otherwise qualify for enrollment in the Group under either 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.
designated as 080450-1, 080450-5, and 080450-7 from the list of enrolled Group members for the same coverage year.

7. In Docket No. 12 18012, the Department order dated May 18, 2012, is reversed. This matter is remanded to the Department with directions to issue an order approving the application of Highway Specialties, LLC to enroll in the BIAW Group for the coverage year beginning July 1, 2011.

8. In Docket No. 1218013, the Department order dated May 21, 2012, is reversed. This matter is remanded to the Department with directions to issue an order approving the applications of Shuel Wholesale Lumber, Inc., Final Touch Cleaning Service, Inc., and Signs and Wonders, Inc. dba Fastsigns, Inc. to enroll in the BIAW Group for the coverage year beginning July 1, 2011.

Dated: March 27, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
JACK S. ENG Member