

Brooks, David, Dec'd

COVERAGE AND EXCLUSIONS

Limited liability company

Limited liability companies are not the same as corporations or partnerships for industrial insurance purposes and they are not excluded from coverage. **...In re David Brooks, Dec'd, BIA Dec., 96 4438 (1998)** [dissent] [*Editor's Note*: Laws of 1999, ch. 68, (effective July 25, 1999) codified as RCW 51.12.020(13) allows limited liability companies the same treatment as corporations and partnerships for coverage under industrial insurance.]

Scroll down for order.

1 **DECISION**

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3 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
4 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
5 Proposed Decision and Order issued on July 14, 1997, in which the June 11, 1996 and June 14,
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7 1996 orders of the Department were reversed and remanded to the Department with directions to
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9 allow the claims.
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13 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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15 no prejudicial error was committed and the rulings are affirmed. The issue presented by these
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17 appeals and the evidence submitted by the parties are adequately set forth in the Proposed
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19 Decision and Order. We have granted review to clarify the reasons why we believe limited liability
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21 companies are not excluded from mandatory coverage pursuant to RCW 51.12.020.
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23 RCW 51.12.020 excludes particular employments and business forms from mandatory
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25 industrial insurance coverage. The Department asserts that limited liability companies are an
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27 unincorporated business form that are either analogous to a partnership, which is subject to
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29 RCW 25.04, or a corporation, subject to the provisions of RCW 23A. If a limited liability company
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31 were a partnership or corporation, its members or officers would have to elect coverage under
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33 RCW 51.12.020.
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35 Limited liability companies were authorized relatively recently by our Legislature in 1994.
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37 RCW 25.15. They are a "hybrid form" of business organization, bearing "characteristics that are
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39 common to both corporations and general partnerships." J. Maurice, *Operational Overview of the*
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41 *Washington Limited Liability Company Act*, 30 Gonz. L.Rev. 183, 184 (1995). The Department
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1 argues that, as a hybrid of two excluded forms of business, limited liability companies should also
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3 be excluded from coverage. We note that although this hybrid form bears characteristics common
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5 to corporations and partnerships, it is not specifically identified as one of the excluded business
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7 forms in RCW 51.12.020.

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9 We are not authorized to read into legislation those things that the Legislature may have left
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11 out unintentionally. The Supreme Court has stated, regarding exceptions to statutory schemes,
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13 that, "Where a statute provides for a stated exception, no other exceptions will be assumed by
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15 implication." *Jepson v. Department of Labor & Indus.*, 89 Wn.2d 394, 404 (1977). The stated
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17 exceptions for coverage under the Industrial Insurance Act are found, as previously noted, at
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19 RCW 51.12.020. Currently, there are twelve employments excluded from mandatory coverage
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21 under the Act.

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23 While the Limited Liability Company Act was enacted as a subsection of Title 25, that
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25 generally governs partnerships, the legislation clearly defined limited liability companies as a hybrid
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27 of a partnership and corporation. Had the Legislature intended participants in limited liability
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29 companies to be automatically excluded from the Industrial Insurance Act, it could have easily
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31 included a provision modifying RCW 51.12.020 when it adopted the Limited Liability Company Act,
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33 thus paralleling the exclusions provided to partners and corporate officers and directors.

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35 As the Limited Liability Company is a comparatively new statutory creation, it is possible that
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37 the Legislature did not consider this new form in the context of the Industrial Insurance Act.
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39 Whether the Legislature considered the industrial insurance ramifications or not we do not presume
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41 to add to the statutory list of excluded employments. While it is tempting to analogize
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1 Mr. Brooks' employment, in an exercise of form over substance, as an extension of a
2 partnership-type of business relationship, we decline to do so. The Legislature has very clearly
3 provided another, distinct, form of business enterprise. The fact that limited liability companies
4 were placed within RCW Title 25 governing partnerships is not enough for us to declare that a
5 limited liability company is a partnership for industrial insurance purposes.
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11 We are also guided by the directive of *Sacred Heart Medical Center v. Carrado*, 92 Wn.2d
12 631, 635 (1979), in which the court observed:
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15 It must be kept in mind that the industrial insurance act, while it changes
16 the common law, is remedial in nature and is to be liberally applied to
17 achieve its purpose of providing compensation to all covered persons
18 injured in their employment.
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20 The corollary--that exclusions from mandatory coverage should be strictly construed--flows from
21 the remedial purposes of the Act. In reaching this conclusion we rely, in part, upon the express
22 legislative intent to "embrace all employments" coupled with the requirement that the Act be
23 "liberally construed." RCW 51.12.010. See *In re KEW Construction*, BIIA Dec., 87 0152 (1988), at
24 4. We, therefore, find that limited liability companies are not the same as either a partnership
25 (RCW 51.12.020(5)) or a corporation (RCW 51.12.020(8)(b)) and are not thereby excluded from
26 coverage of the Industrial Insurance Act.
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34 After consideration of the Proposed Decision and Order and the Petition for Review filed
35 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
36 Decision and Order is supported by the preponderance of the evidence and is correct as a matter
37 of law.
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3 **FINDINGS OF FACT**
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- 5 1. On June 6, 1996, the claimant's spouse, Floretta Brooks, filed an
6 application for benefits with the Department of Labor and Industries
7 alleging that the claimant was killed during the course of his
8 employment with Aeromed, LLC, on January 8, 1996. On June 11,
9 1996, the claim was rejected on the basis that the claimant was a sole
10 proprietor or partner at the time of the injury and had not elected to be
11 insured under the provisions of the Industrial Insurance Act. On July 8,
12 1996, the claimant's spouse filed an appeal with the Board of Industrial
13 Insurance Appeals. On August 7, 1996, the Board issued an order
14 granting the appeal, assigning it Docket No. 96 4438.

15 On June 14, 1996, the Department issued another order denying the
16 claim for benefits filed by the claimant's spouse, Floretta Brooks, on the
17 basis that the claimant was not covered under the Industrial Insurance
18 Act. The claimant's spouse filed an appeal with the Board of Industrial
19 Insurance Appeals on July 8, 1996. On August 7, 1996, the Board
20 issued an order granting the appeal, assigning it Docket No. 96 4439.

- 21 2. On January 8, 1996, the claimant was killed operating an aircraft during
22 the course of his employment with Aeromed, LLC.
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24 3. As of January 8, 1996, the claimant was neither an officer, director nor
25 shareholder of a corporation, a sole proprietor, nor was he a partner in a
26 partnership. As of January 8, 1996, the claimant was a member of a
27 limited liability company. As of January 8, 1996, the claimant was a
28 worker for whom industrial insurance coverage was mandatory.
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30 **CONCLUSIONS OF LAW**
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- 32 1. The Board of Industrial Insurance Appeals has jurisdiction over the
33 parties and the subject matter of these appeals.
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35 2. At the time of his death on January 8, 1996, the claimant was not a
36 partner, sole proprietor, or an officer, director nor shareholder excluded
37 from mandatory coverage pursuant to RCW 51.12.020. As of
38 January 8, 1996, the claimant was a member of a limited liability
39 company for whom coverage under the Industrial Insurance Act was
40 mandatory.
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42 3. In the matter assigned Docket No. 96 4438, the order of the Department
43 of Labor and Industries dated June 11, 1996, that rejected the claim on
44 the basis that the claimant was a sole proprietor or partner at the time of
45 the injury and had not elected to be insured under the provisions of the
46 Industrial Insurance Act, is incorrect and is reversed. The claim is
47 remanded to the Department with direction to allow the claim.

1 4. In the matter assigned Docket No. 96 4439, the order of the Department
2 of Labor and Industries dated June 14, 1996, that denied the claim for
3 benefits filed by the claimant's spouse, Floretta Brooks, on the basis
4 that the claimant was not covered under the Industrial Insurance Act, is
5 incorrect and is reversed. This claim is remanded to the Department
6 with direction to allow the claim.
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8 It is so ORDERED.

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10 Dated this 9th day of February, 1998.

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12 BOARD OF INDUSTRIAL INSURANCE APPEALS
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15 /s/ _____
16 S. FREDERICK FELLER Chairperson
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19 /s/ _____
20 FRANK E. FENNERTY, JR. Member
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23 **DISSENT**
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25 I dissent from the majority's conclusion that limited liability companies are not excluded from
26 mandatory coverage under RCW 51.12.020. I disagree with the majority's assumption that the lack
27 of an amendment to RCW 51.12.020 when the Limited Liability Act was passed was a legislative
28 oversight. Limited liability companies are specifically authorized under Title 25 that governs and
29 regulates partnerships. As such, I believe that RCW 51.12.020(5), that excludes partnerships,
30 encompasses limited liability companies.
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37 In previous decisions regarding exclusion from mandatory coverage under the terms of
38 RCW 51.12.020, this Board has followed *State V. Bartley*, 18 Wn.2d 477, 481-482 (1943):
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41 In determining, in a given case, whether a partnership exists, there may
42 be disclosed by the evidence many elements pointing one way or the
43 other, not one of which may be said to be conclusive. The fact that the
44 parties to a business arrangement may call it a partnership does not
45 make it such. Many times form must give way to substance. There is
46 no fixed rule by which it may be determined whether, in a particular
47 case, there is a partnership relation. It all depends upon the intention of
the parties, and such intent must be ascertained from the agreement of

1 the parties, their acts and conduct, and all the facts and circumstances
2 of the case.

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4 In *Bartley*, the court looked beyond the appearance of formal compliance with the statute to
5 ascertain the realities of the parties' relationship. In the case before us, the facts indicate
6 Mr. Brooks' relationship with Aeromed, LLC, was that of a partner and not an employee,
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8 irrespective of the fact that the business was organized to meet the requirements of a limited
9 liability company for beneficial tax and liability purposes. The record demonstrates that Mr. Brooks
10 was the "initial registered agent" for the company and had a controlling ownership interest. The
11 operating agreement provided Mr. Brooks, with his 60 percent ownership interest, overriding
12 authority to make decisions on company matters without the consent of the three other members,
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14 individually or collectively. See *e.g.*, §§ 3.4, 3.6, 4.3, and 5.2 of the Operating Agreement of
15 Aeromed, LLC. This Operating Agreement shows that Mr. Brooks was not an employee of
16 Aeromed, LLC, and could control the manner of doing the work and the means by which the result
17 was to be accomplished. See *Hubbard v. Department of Labor & Indus.*, 198 Wash. 354, 359
18 (1939).
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22 Mr. Michael Schreiner, who had a 20 percent ownership interest in the company, testified
23 that he and Mr. Brooks elected not to obtain industrial insurance coverage for themselves in order
24 to save the company money. It is clear from his testimony that both understood that they were
25 assuming some risk by not obtaining coverage. Most importantly, it reflects their belief that they
26 had a choice as to whether to cover themselves, and demonstrates, through their actions and
27 conduct, their intent to operate as a partnership.
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30 This is truly a tragic case. However, the Legislature obviously intended to exclude
31 individuals who are in business for themselves from mandatory coverage requirements. Those
32 individuals, under RCW 51.32.030, are required to specifically request coverage in order to obtain
33 benefits. It was not the intent of the Legislature to extend compensation to individuals who have
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1 used their authority within a company to elect not to obtain coverage. Mr. Brooks' role with
2 Aeromed, LLC, was more akin to that of a partner--an excluded employment--and, as such, is
3 subject to the terms of RCW 51.12.020(5). The Department order rejecting the claim for benefits
4 should be affirmed.
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9 Dated this 9th day of February, 1998.

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11 BOARD OF INDUSTRIAL INSURANCE APPEALS
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14 /s/ _____
15 JUDITH E. SCHURKE Member
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