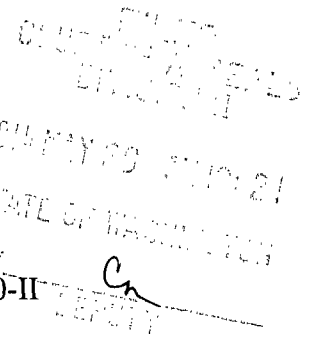

No. 45033-0-II

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

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

LYON ENTERPRISES, INC. d/b/a JAN-PRO CLEANING SYSTEMS, Appellant,

Appellant.

BRIEF OF AMICUS CURIAE FILED BY NORTHWEST FRANCHISING, INC. DBA COVERALL OF WASHINGTON

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I. NATURE OF CASE

Northwest Franchising, Inc. d/b/a Coverall of Washington (Coverall) submits this Amicus brief in support of Lyons Enterprises, Inc.'s (Lyons) appeal of the April 9, 2012 Washington Board of Industrial Appeals (the "BIAA") decision that Lyons' individual franchise owners are Lyons' "workers" under the Industrial Insurance Act ("IIA") and the Superior Court order that affirmed the BIAA decision and overruled the BIAA's determination that employees' of Lyons' franchisees are Lyons' "workers" under the IIA.

Coverall, like Lyons, sells cleaning franchises to independent businesses. Coverall's interest in this appeal is not merely academic. Like Lyons, the Department of Labor and Industries (the "Department") has audited Coverall and determined—contrary to past practice—that Coverall's franchise owners are "workers" under the IIA. Coverall requested reconsideration of the Department's assessment over one year ago, but the Department has failed to act on Coverall's request. Practically speaking then, the outcome of the Lyons appeal will significantly impact Coverall's fate.

The BIAA's unprecedented determination that Lyons' franchise owners are Lyons' "workers" under the IIA is legally and factually incorrect. More, it is bad policy. It will destroy or greatly impair franchising in Washington generally, will greatly harm Lyons, Coverall, other cleaning franchisors and the hundreds of independent franchise owners who rely on their franchisors to provide them with support. The decision is not only wrong, but it is disastrous for Washington businesses.

II. BACKGROUND ON COVERALL

Coverall has been selling franchises in Washington since 1991. Coverall is a service franchisee of Coverall of North America ("CNA"). Service franchisees, such as Coverall, are independent businesses licensed by CNA to use the Coverall name, design, and business model to offer and sell janitorial franchises. As a service franchisee of CNA, Coverall offers and sells cleaning franchises in Pierce, King, Snohomish, Thurston, Kitsap and Mason County, Washington. Under franchise agreements between Coverall and the franchisees, Coverall sub-licenses use of the Coverall® name and trademarks to the franchisees. For an additional fee, Coverall also recruits cleaning customers, provides billing and collection services,

and performs other services for the franchisees, as provided in the Franchise Agreements between Coverall and each of the franchisees.

The Coverall brand is an internationally recognized commercial cleaning system brand. Its cleaning system is unique and is the subject of a pending patent known as the "Health Based Cleaning System and Method" patent pending serial #12/574520 filed 10/6/2009, with the U.S. Patent and Trademark office. The business operates on a franchise model under which CNA or its regional service franchises, such as Coverall, sell franchises to independent franchise business owners who operate their commercial cleaning franchises as independent businesses.

RCW 19.100.010(4)(a) defines a "franchise" as an agreement, expressed or implied, oral or written, by which:

> (i) a [franchisee] is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the [franchisor];
>
> (ii) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol designating, owned by or licensed by the [franchisor]; and
>
> (iii) The [franchisee] pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.

Washington state law requires that franchisors register their franchise offerings prior to offering the franchises for sale in Washington. RCW 19.100.030. As required, Coverall duly registered its franchise offerings with the Washington State Department of Financial Instruments, under DFI file number 70006968. Audited Financial Statements are required by FIPA in order to sell franchises in the State. Coverall's Audited Financial Statements have shown revenue from the Cleaning Contract is 100% owned by the franchisee. Coverall's Support Service Fee and Royalty revenue is 15% of the Cleaning Contract service fee.

III. PRIOR TO 2010, THE DEPARTMENT NEVER ASSERTED THAT COVERALL'S OR LYONS' FRANCHISE OWNERS WERE COVERED WORKERS

Shortly after the Department audited Lyons in 2010, the Department audited Coverall. In both audits, the Department changed course 180 degrees from its prior practice, claiming that the independent franchise owners are covered workers. When the Department audited Lyons in 2005 it found no problems with Lyons' franchisees. Likewise, when the Department contacted Coverall in late 1992 it found no problems

with Coverall's treatment of its franchisees.[1] Lyons and Coverall set their fees and prices based on the costs of doing business in Washington and based on the Department's prior practice. The sudden and unprecedented imposition of IIA premiums for the employees of hundreds of separate businesses likely represents the difference between thriving or going out of business.

IV. WITHOUT FORMAL RULEMAKING OR AN OPPORTUNITY FOR PUBLIC COMMENT, THE DEPARTMENT HAS CHANGED COURSE CLAIMING THAT FRANCHISEES ARE THE "WORKERS" OF THEIR FRANCHISORS

The Board's decision that Lyons' franchisees are covered workers is wholly unprecedented and contrary to its 2005 audit of Lyons and its position taken in 1993 with Coverall. Before making such a drastic change that threatens the livelihood of all janitorial franchisors, the Department should be compelled to allow the stakeholders an opportunity to address the issue.

The Department's briefing claims that Lyons' assertion that the Department has changed course was made "without citation to the record."

[1] Attached as Appendix 1 is a copy of a contact log obtained by Public Records Act request from the Department of Labor and Industries reflecting contacts between the Department and Coverall, including a contact on December 4, 1992.

Respondent's Brief at 30. This is demonstrably false—Lyons presented evidence that it had been audited in 2005, just four years before the subject audit, and that the 2005 audit correctly determined that the Lyons' franchise owners were not Lyons' covered "workers." Brief of Appellant at 14 (*citing* CP 2137-38; CP 873-79). The Department now claims that the 2005 audit results were a "mistake", but provides no evidence to support this other than the testimony of its Litigation Specialist Mr. Billings who had no basis for his assertion where he did no investigation into the prior audit.[2]

Tellingly, the Department fails to cite to a single case or BIAA decision where franchisees were held to be the covered workers of the franchisor. In its answer to the Amicus Brief of the International Franchise Association® ("IFA"), the Department claims that the lack of any published cases does not demonstrate that it has changed its position. While it is logically true that a lack of published opinions does not conclusively demonstrate that the Department has changed course, the Department overlooks the fact that it had, in fact, taken a contrary position

[2] More, as a Litigation Specialist, Mr. Billings is required to testify consistently with Department policy. In fact, documents produced pursuant to Public Disclosure Act requests show that Litigation Specialists are prohibited from testifying as to their own opinions. Appendix 2.

in 2005 with Lyons, and in 1992 with Coverall. This combined with the conspicuous absence of prior published authority demonstrates that the Department has in fact changed course.[3]

The truth is that neither Coverall nor Lyons had ever been assessed premiums for their franchise owners at any time before the Department audited Lyons in 2010. The Department is treating the Lyons case as a test case. In 2010, the Department audited Lyons and then initiated several audits of other janitorial franchises. The Department then terminated all pending audits, (except for the Coverall audit) while awaiting the results of the Lyons matter.[4] The Department cannot deny that it has repeatedly advised franchisors like Lyons and Coverall that their franchisees are not covered "workers" under the IAA.

The Department's abrupt change in policy is tantamount to unauthorized rulemaking without the benefit of any notice or opportunity to comment. As Amicus IFA has pointed out, the Legislature is presumed

[3] Moreover, in response to Public Disclosure Act requests, the Department has failed to indentify a single instance prior to the instant case where franchisees were determined to be covered workers of their franchisors.

[4] Attached as Appendix 3 are copies of documents obtained by Public Disclosure Requests showing that the Department cancelled other audits of janitorial franchisors. Despite repeated requests, the Department refuses to tell Coverall why it terminated all of its audits of other cleaning franchisors, but did not do so for Coverall.

to know how an agency has interpreted a statute, and thus it is inappropriate for an agency to change the interpretation of its statute in the absence of a change by the Legislature. Brief of Amicus IFA at 6, *citing, Dot Foods, Inc. v. Washington Dept. of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009).

Here, the Department has fundamentally changed course and is not being frank with this Court that its position is utterly unprecedented. Businesses like Lyons and Coverall have relied on the Department's prior practice and the abrupt change threatens those businesses and franchising generally. There is simply not enough profit for the franchisors to absorb the burden of paying IIA premiums for all of their franchisees.

V. THE DEPARTMENT HAS THE RELATIONSHIP BETWEEN THE FRANCHISOR AND THE FRANCHISEE BACKWARDS

The Department has the relationship between the franchisee and franchisors completely backwards—once the franchisee purchases a business, the franchisor provides the franchise with services, not the other way around. The franchisee in turn provides services to its customers.

Franchisors like Lyons (and Coverall) provide the franchisee with services such as marketing assistance, collection assistance, billing

assistance, use of the franchisor's marks and goodwill, etc. *See also* RCW 19.100.010(4)(a). These services provided by the franchisor to the franchisee represent the "essence" of the contract and form the very heart of the franchisee/franchisor relationship.

The franchisee in turn has the opportunity to make use of the superior know how and marks associated with an established brand, thereby mitigating the risks and uncertainties in owning a business in providing cleaning services to its customers. In other words, the relationship between the franchisor and franchisee is not a contract for the franchisee to provide the franchisor "personal services," but is instead a contract by which the franchisor provides the franchisee a variety of services, use of established marks, business planning and the like.

By focusing on the services the franchisee provides to its customers, the Department fundamentally misunderstands the nature of the business relationship between the franchisee and the franchisor. The "essence" of the agreement is not the provision of cleaning services by the franchisee to its customer, but rather is to allow the franchisee to use the franchisor's marks and marketing plans in exchange for a fee.

This case is thus different from *Dana's Housekeeping, Inc. v. Department of Labor and Industries*, 76 Wn. App. 600, 886 P.2d 1147 (1995). In that case, Dana's Housekeeping was sharing fees for housekeeping work. Here, by contrast, the franchisees are paying fees for use of established marks, a marketing plan and numerous other services. The business of the franchisee is separate from the business of the franchisor. *Coast to Coast Stores, Inc. v. Gruschus*, 100 Wn.2d 152, 667 P.2d 619 (1983). The Department is conflating the two, mistaking the work of the franchisee for the work of the franchisor.

VI. THE IIA DOES NOT APPLY BECAUSE THE "ESSENCE" OF THE FRANCHISOR/FRANCHISEE RELATIONSHIP IS NOT THE PROVISION OF "PERSONAL LABOR."

Here, because the "essence" of the agreement between the franchisor and the franchisee is not the provision of cleaning services, the IIA is completely inapplicable. The IIA applies only to "employers" — defined as persons or entities who "while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, *the essence of which is the personal*

labor of such worker or workers." RCW 51.08.070 (emphasis added).[5] Yet, the "essence" of the franchisor/franchisee relationship between Lyons and its franchisees is not for the franchisees to provide Lyons with personal labor, but is instead for Lyons to provide the use of its marks and marketing plans and business format to its franchisees. Consequently, this matter is not governed at all by the IIA.

In establishing the Franchise Investment Protection Act (FIPA), the Legislature defined the elements of a franchise. Stated another way, when a contract contains certain elements, the "essence" of the contract is a franchise, not a contract for personal labor. The franchise is a different business than the franchisee's business, a point the Department fails to comprehend. *Coast to Coast Stores*, 100 Wn.2d 147 at 152. The "essence" of a contract where one allows another to use certain marks, charges a fee for such use is a franchise agreement, not a contract for the provision of "personal labor."

The Department's fixation on the "control" the franchisor has over its franchisees is a red herring. The Department overlooks the fact that the

[5] Much of the parties' briefing to date refers to RCW 51.08.080, which uses the same 'essence" test referenced to in RCW 51.08.070 to determine if the worker is required to be covered by the IIA.

indicia of "control" it cites are not controls over who or when the franchisees provide services to their customers, but instead are in place to ensure that all customers receiving cleaning services from Jan Pro franchisees experience the same level of quality and service. This is no different than McDonalds's or Coverall's control over its franchisees to ensure all customers patronizing McDonalds or Coverall, have the same quality service. The franchise owners greatly benefit from this uniformity because consumers are more likely to purchase goods or services where they know the quality and service will be uniform.

The franchisee's provision of cleaning services to the franchisee's customers is left to the franchisee's control. The franchisee is free to hire their own employees to perform the work, to set their own hours, and to do all of the things that independent businesses do in their interactions with their customers. In short, the franchisees control their own independent businesses. They are not agents of, employees of, or workers of Lyons. Nor, are they providing services to Lyons, instead it is the other way around—Lyons is providing them with services.

Just as the Department's fixation on "control" is misplaced, so too is its belief that every worker in Washington must be covered by worker's

compensation. This is simply not true. RCW 51.08.070 and RCW 51.08.080 apply only to situations where the essence is personal labor, not where a franchisor provides use of its marks, marketing plan and other services in exchange for a fee. Our Supreme Court recognizes that not all contracts are covered by the IIA in *White v. Dept. of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956).

The legislature generally exempts business owners (like the franchisees here) from mandatory industrial insurance coverage. RCW 51.12.020. Washington law explicitly exempts all sole proprietors, all partners, all limited liability company members in member-managed LLCs, and all limited liability company members who are also managers, if the LLC is manager-managed. *Id.* The Department's zeal to force all workers to be covered by the IIA ignores the Legislature's recognition that business owners who also perform work for their businesses (like most of the franchise owners here) are simply not required to be covered by the IIA and that they have the option to determine whether they do or do not want that coverage.

VII. ADOPTING THE DEPARTMENT'S POSITION IS BAD POLICY, WILL IMPAIR SERVICE FRANCHISING IN WASHINGTON, WILL GREATLY HARM CLEANING SERVICE FRANCHISORS LIKE COVERALL AND LYONS AND WILL HARM THE INDEPENDENT FRANCHISE OWNERS

If this Court adopts the Department's radical new position, it will have a devastating impact on service franchising in Washington. As Amicus IFA has pointed out, franchising provides an engine for economic growth and new business opportunities for thousands of Washington businesses. Brief of Amicus IFA at 2. Among this group are cleaning franchisors like Lyons and Coverall and their hundreds of franchisees.

Lyons established its pricing for the sale of its franchise businesses based on the reasonable assumption that it is not responsible for paying IIA premiums for its many franchise owners. CP 2138-39. Lyons is not alone in following this fundamental principle of business. Coverall and all other service franchisors likewise set the prices for the sales of franchise opportunities and the prices for the services they offer their franchisees based on the reasonable belief that they are not responsible for paying IIA premiums for their franchisees.[6] Lyons, Coverall and other service

[6] As noted, the Department had previously agreed with this view in prior communications with Lyons and Coverall.

franchises will face severe economic hardship if the Department's position is affirmed undercutting the pricing models they have used in selling their franchises. It is exceedingly unlikely that any Service Franchisor can survive if forced to pay the IIA premium when the Service Franchisor's total revenue is only a small fraction of the Service Contracts.

The devastating impact of the BIIA's decision extends also to the franchisees who have invested many thousands of dollars in purchasing their franchise opportunities in the belief that their franchisor would be there to provide them with the sales, marketing and brand support that they need to operate their businesses, at a cost less than they could provide for themselves, thereby taking advantage of a fully developed operating system. The Department's position, if affirmed, will likely cost hundreds of small business owners their businesses thereby harming the very people the Department claims will benefit from its position.

VIII. CONCLUSION

This Court should reverse the BIAA and the Superior Court Order that the Lyons franchisees are covered workers. The Department's radical change in course is factually and legally incorrect and will have far reaching and dire consequences if adopted.

RESPECTFULLY SUBMITTED this 28th day of May, 2014.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By _____
Geoff J. M. Bridgman, WSBA #25242
Attorneys for Amicus Curiae Northwest Franchising, Inc. dba Coverall of Washington

APPENDIX 1

#19

Create Date	Message
5/28/2013	COLLECTION WRKASN TRANSFERRED FROM BEVERLY HARDEMAN TO DARREN HATCH *
5/14/2013	SENT TO IMAGING 5/13/2013 SM13
3/5/2013	OAN ON NOA 576583 HELD IN ABEYANCE CERT. MAIL DELIVERY ACCEPTED 03/01/13 SIGNED BY 9171999991703200610801 ENTERED BY MELANIE SWANIGAN
3/4/2013	HN 576583 ORIGINAL LEGAL PACKET REPRINTED ON 03/04/13 BY BEVERLY HARDEMAN
2/26/2013	NO F 576583 FINAL DATE UPDATED FROM 02/04/13 TO 02/28/13 BY BEVERLY HARDEMAN TO ALLOW FOR HN PER TIMELY REQUEST FOR RECONSIDERATION
2/26/2013	NOA 576583 HELD IN ABEYANCE ON 02/26/13, BY BEVERLY HARDEMAN
2/26/2013	RECD CALL FROM JACQUELYN CLARK, ATTNY'S OFFICE, CKING ON STATUS OF RECONS IDERATION. CREATED HN PER RMES. TO LESLIE PESTERFIELD, ATTNY, 901 5TH AVE SUITE 3500, SEATTLE 98104
2/5/2013	NO F 576583 ORIGINAL LEGAL PACKET REPRINTED ON 02/05/13 BY BEVERLY HARDEMAN
2/5/2013	REQUEST FOR RECONSIDERATION RECD 2/4/13 FROM OGDEN, MURPHY WALLACE; LESLI E PESTERFIELD. TRANSMITTAL SENT TO DAC
2/5/2013	Account flagged for Reconsideration
2/5/2013	E-MAIL TO KIM HARDEMAN: RECONSIDERATION OF NOF 0576583 THE PROTEST WAS REC EIVED ON 01/31/13. LITIGATION SPECIALIST ASSIGNED IS BILLIE MERSON. PLEAS E ISSUE ABEYANCE ORDER. PLEASE SET RECONSIDERATION FLAG IN ADIT. THERE IS N O NEED TO FORWARD A COPY OF THE ABEYANCE ORDER UNLESS REQUESTED. TAKE NO CO LLECTION ACTION ON THE AMOUNT UNDER RECONSIDERATION, UNTIL YOU RECEIVE INST RUCTIONS REGARDING A DECISION. THANK YOU.
1/24/2013	Updated mailing address in ARC from RADD info in LINIIS as the 1/10/13 account statement was returned. No ARC update since 2006.
1/7/2013	NO F 576583 CERT. MAIL DELIVERY ACCEPTED 01/04/13 SIGNED BY 9171999991703200925820 ENTERED BY MELANIE SWANIGAN
1/7/2013	NO F 576583 FINAL DATE UPDATED FROM 02/04/13 TO 'BLANK' BY SUZETTE MASON
1/7/2013	NO F 576583 SERVICE DATE CHANGED FROM 01/04/13 TO 00/00/00 SERVICE STATUS CHANGED FROM DELIVERY ACCEPTED TO 'BLANK' RECEIVED BY NAME CHANGED FROM 9171999991703200925820 TO 'BLANK' BY SUZETTE MASON ON 01/07/13
1/7/2013	NO F 576583 CERT. MAIL DELIVERY ACCEPTED 01/04/13 SIGNED BY

Create Date	Message
	9171999991703200925820 ENTERED BY MELANIE SWANIGAN
1/2/2013	NO F 576583 ISSUED 01/02/13, $99,909.56, ITEMS 094, 12/12 BY CARMEN RIOJAS
12/26/2012	FIELD AUDIT COMPLETED, ASSIGN TO COLLECTIONS
12/24/2012	Audit assignment has been completed. See FACT for details. Auditor Name: Gina Bautista. Revenue Agent: CARMEN RIOJAS. Revenue Agent Supervisor: DARREN HATCH.
6/22/2010	THIRD PARTY RCVRY FCTR ESTABLISHED ACCT 598557 CLM Y925960
5/13/2010	LEGAL NAME AND DBA UPDATED PER MASTER LICENSE SERVICE.
2/20/2009	Returned PDU v/m from Bill re: statement rec'd; left message advising accou nt is at a zero balance.
2/11/2009	WAIVER FOR $99.28 ON ACCOUNT 598,557-00 FOR QTR 12/31/2008
2/11/2009	WAIVER FOR $19.86 ON ACCOUNT 598,557-00 FOR QTR 12/31/2008
2/11/2009	SYSTEM DID NOT POST PAYMENT WHICH WAS TIMELY.
2/6/2009	DR LETTER SENT AMT: $119.14 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
10/10/2008	*** BUSINESS CHANGE REQUEST - REPLACE MAILING ADDR ONLY - EFFECTIVE 01/01/0001 - OLD ADDRESS NEW ADDRESS ---------- ---------- BUSINESS NAME: THELEN COMMERCIAL CLEANING CORTHELEN COMMERCIAL CLEANING COR ADDRESS: 320 ANDOVER PARK E STE 250 320 Andover Park E Suite 250 CITY/STATE: TUKWILA, WA Tukwila, WA ZIP CODE: 98188-7646 98188 PHONE: <425>251-1600 <206>575-3700
6/28/2008	FY 2007 DIVIDEND AMOUNT $202.09 FORMULA: FY08 AF $1,394.74 X 14.49% = $202.09 WARRANT ID NUMBER: 069286L IN AMOUNT OF $202.09 MAILED TO: THELEN COMMERCIAL CLEANI 320 ANDOVER PARK E STE 250 TUKWILA WA 981887646
1/23/2007	CORRECTED 2007 RATE NOTICE SENT DUE TO CLAIM FREE TABLE ADJUSTMENT.
3/15/2006	COLLECTION WRKASN COMPLETED BY EMILY PARMENTER
3/15/2006	ACCT HAS CREDIT OF 163.97 ENDING ASSIGNMENT
2/28/2006	IN RCPT OF $1322.64 -CK#004575 ON 2/28/06
2/23/2006	PREDICTIVE DIALER WORK ASSIGNMENT FOR DU01
2/16/2006	DL LETTER SENT AMT: $1,757.88 PERIOD: 12/31/05 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
3/9/2005	TR LETTER SENT AMT: $ SENT TO: QR, , , , LETTER REQUESTED BY ROBERT SMITH
3/12/2002	ENTERED HOURS FOR QR014 ON ACCOUNT.

Create Date	Message
9/20/2001	EF LETTER SENT SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
7/29/2000	FY 1999 DIVIDEND AMOUNT $453.76 FORMULA: FY99 AF $1,473.25 X 30.8% = $453.76 WARRANT ID NUMBER: 069631F IN AMOUNT OF $453.76 MAILED TO: THELEN COMMERCIAL CLEANI 543 INDUSTRY DR TUKWILA WA 98188
2/11/1999	FY 1998 WARRANT NUMBER 055572Y FOR $533.19
1/24/1999	FY 1998 DIVIDEND AMOUNT $533.19 FORMULA: FY98 AF $1,650.76 X 32.3% = $533.19 WARRANT IN AMOUNT OF $533.19 MAILED TO: THELEN COMMERCIAL CLEANI 543 INDUSTRY DR TUKWILA WA 98188
4/8/1998	TR LETTER SENT AMT: $ SENT TO: QR, , , , LETTER REQUESTED BY LINDA WALKER
4/7/1998	TR LETTER SENT AMT: $ SENT TO: QR, , , , LETTER REQUESTED BY PEGGY DEAVEN
12/1/1997	DR LETTER SENT AMT: $57.87 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
11/16/1997	DL LETTER SENT AMT: $1,455.10 PERIOD: 09/30/97 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
4/22/1996	ADJUSTMENTS MADE FOR ONE TIME WAIVER. RELEASE FROM COLLECTIONS, NO BALANCE DUE. RELEASE TO GENERALS.
4/22/1996	COLLECTION WRKASN COMPLETED BY WARREN BRESKO BALANCE DUE. RELEASE TO GENERALS.
4/17/1996	REQUEST FOR WAIVER REVIEWED FIRM HAS SENT DOCUMENTATION THAT THEY INDEED STOPPED PAYMENT ON THE ORIGI NAL PAYMENT THAT WAS LOST IN THE MAIL. WHEN REPLACEMENT POSTS RO TO MAKE ADJ TO THE ACCOUNT AND RELEASE FROM COLLECTIONS
4/10/1996	95/4 RPT AND PAYMT. OF $1,170.02 RECD. 04/10/96. FIRST INTERSTATE BANK OF W A, TUKWILA BR., ACCT. #305 985201, CHECK #006774.
4/10/1996	COPY OF STOP PMNT FORM WILL BE FAXED OVER.
3/28/1996	SPOKE WITH CHRISTY. SHE IS GOING TO PUT A STOP PMNT ON THE CK. WILL BE ISSUING A NEW ONE, AND WILL FAX OVER 954.
3/28/1996	ADJUSTED 954 VIA ADIT FROM FAXED REPORT RECVD IN SEAT.
3/27/1996	CALLED NUMBER LISTED AND LM ON VM FOR THE FIRM IN REGARDS TO 954.
3/20/1996	JILL HARRISON, PARALEGAL KNOWS OF NO INVOLVEMENT WITH FIRM. NUMBER LISTE D IS BAD.
3/19/1996	CALLED AND LM AT 334PM IN REGARDS TO TAXES ON A ANSWERING MACHINE. MIGHT NOT BE THE FIRM'S VM.
3/11/1996	COLTN-WRKASN TO WARREN BRESKO

Create Date	Message
2/20/1996	DL LETTER SENT AMT: $2,560.25 PERIOD: 12/31/95 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
8/24/1995	NA LETTER SENT AMT: $ SENT TO: QR, , , , LETTER REQUESTED BY LINDA WALKER
6/19/1995	NA LETTER SENT AMT: $ SENT TO: QR, , , , LETTER REQUESTED BY ALLEGRA GALLEGOS
5/8/1995	DR LETTER SENT AMT: $257.48 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
5/18/1993	CR LETTER SENT AMT: -$258.35 SENT TO: QR, , , , LETTER REQUESTED BY SYSTEM
12/4/1992	P/C TO FIRM. ADDED CLASS 6602 TO PASS CLAIM N518297. FIRM SELLS JANITORAL SUPPLIES & FRANCHISES & THE RESPONSIBILITY FOR AT LEAST SOME OF THE SALESMA N INCLUDES TRAINING THE FRANCHISE PEOPLE IN THE JANITORIAL TRADE INCLUDING THE OPERATION OF THE EQUIPMENT. EXPLAINED THAT PEOPLE INVOLVED IN TRANING FOR JANITORIAL OPERATIONS NEED TO BE REPORTED UNDER THAT CLASS. RATES NOTIC E & LETTER TO BE SENT.
1/3/1992	DR LETTER SENT AMT: $10.78 SENT TO: QR, , , , LETTER SENT BY: ET60
10/7/1991	ADDED PHONE NUMBER PER CORRESPONDENCE RECEIVED 060591
5/20/1991	INACT 6602, ADD 4904 & 6303 THE FIRM ONLY SELLS THE FRANCHISES FOR JANITORI AL BUSINESSES, THEY DO NOT DO THE SERVICES THEMSELVES PER TEL CALL

APPENDIX 2

Firm Appeals Staff Meeting
May 19, 2011 - 10:00 –3:00
TC3

	Time	Topic	Discussion Leader	Decision	Desired Outcomes
1.	10:00–10:05	• Safety Topic	Christina/ Chaney		IS
	10:05-10:15	• Introductions	All		IS
2.	10:15-11:50	• Drywall Training	Jerry		IS
3.	11:50-12:00	• WAC 296-17-3503	Jerry		IS
	12:00-1:00	• **Lunch**	All		
4.	1:00-2:30	• Testifying	Gary		IS
5.	2:30-3:00	• Case Studies	All		IS

Decision Styles: D = Directive, I = Input, C = Consensus, E = Empowered, IS = Information sharing no decision

DISCUSSION Sequence (#3) Decision Style (IS)

Topic: __WAC 296-17-3503_____ **Responsibility** __Jerry Billings_____

Viewpoints:

Jerry Billings: I recently noticed that section 2 of this WAC has been changed. Owner optional coverage is now 160 hours if full time and minimum wage with 520 hour cap if part time or piece meal (need clarification on this section. See attachment #2)

OUTCOME (Resolution/ Recommendations):

N/A

DISCUSSION Sequence (#4) Decision Style (IS)

Topic: __Testifying_____ **Responsibility** __Gary Edwards_____

Viewpoints:

Gary Edwards: Recently I've been doing some case analysis. One conclusion I've reach is: Why do we have a reporting scheme for salaried workers? How did that come about? We need to know the why and how of what we're doing so we're able to educate the judges. Instead of responding to a question in court with, "the policy calls for it" when the judge asks why, we need to have an explanation. The salaried worker rule came into being because it was too difficult to track their hours accurately. On the other hand, part time salaried workers do not benefit unless they keep records. If there are no records, we have to report 160 "assumed" hours regardless of actual time worked. I will be sending out new letters to the audit staff to educate them on this issue. We need to always ask, "Why are we doing this?" The AG's don't even know this information.
Benjamin Quaynor: Why can't we split hours between a standard exception class and a business class?
Gary Edwards: It's a rating construct. Standard exception class is highly restrictive. We encounter 4904 often. As soon as splitting is allowed, it's no longer an exception class. There is a very restrictive set of rules. It makes a big difference to people who primarily hire clerical staff.
Jerry Billings: It's not treated separately unless they want to meet specific exceptions. For example, not lifting boxes, doing rough work, etc.
Gary Edwards: EXPECTATION: The expectation is that every Litigation Specialist will attend EVERY hearing in person unless they have received prior approval from me or if it is a dismissal hearing that the BIIA has stated must be conducted over the phone.
(Discussion between Lit. Specs. on how often firms no-show their hearings and how many times they have to no-show before they receive an Order Dismissing Appeal.)

Gary Edwards: Why am I insistent that we attend all hearings in person?
Kevin Guichon: It is important to attend hearings in person so we have the ability to assess the firm in person and respond accordingly.
Gary Edwards: Reviewing the transcript is very important. If we're there, it is much easier to discuss issues in the case/trial with the AG, witnesses, etc. This gives us the opportunity to listen to the entire testimony; including the employers'. Sometimes the AGs need help with presenting their cases. We have gone through some program changes recently. Now the Litigation Specialist retains all Settlement Authority (not the AG). In addition, they have all accountability. They do not have the authority to give independent discretion. If the management has taken a position on the case, the Litigation Specialist must testify on that position. If the Litigation Specialist has an issue testifying on the position, they must discuss it with management first. They are not allowed to testify any differently. If asked to give a personal opinion, the response should be "I don't have one".
EXPECTATION: The Litigation Specialist must inform Gary Edwards if the AG attempts to give independent discretion or if the Litigation Specialist is put under any kind of pressure by the AG.
Jerry Billings: A good way to answer an opinion question is "Based on what I've seen, they do not meet the criteria".
Kevin Guichon: Discussion is one of the key reasons for the "how/why" piece of testifying.

Outcome (Resolution/ Recommendations):

EXPECTATION: The expectation is that every Litigation Specialist will attend EVERY hearing in person unless they have received prior approval from me or if it is a dismissal hearing that the BIIA has stated must be conducted over the phone.

EXPECTATION: The Litigation Specialist must inform Gary Edwards if the AG attempts to give independent discretion or if the Litigation Specialist is put under any kind of pressure by the AG.

DISCUSSION Sequence (# 5) Decision Style (IS)

Topic: __Case Studies_____ **Responsibility** __All_____

Viewpoints:

CASE #1: TACOMA DAIRY (Attachment #3)

Linda Williams: When you decide to write up case studies, make sure to send a copy to Christina. This case study is regarding the Tacoma Dairy (read the case study out loud, see attachment)
Jerry Billings: Had the previous owner been assessed?
Linda Williams: Yes. (explained the process of assessment when a sale closes)

APPENDIX 3

From Grayson, Gary S (LNI) **Date** Tuesday, October 30, 2012 5:23:19 PM
To Vargas, Katherine L (LNI)
Cc Bunten, Theresa A (LNI)
Subject Franchise Janitorial Letter for Review/Vanguard Cleaning Services

AL9999 Write Your Own Letter20121025-161145.docx (15 KB HTML) **Vanguard Letter.docx** (16 KB HTML)

Kathy:

Just checking in to see if you had a chance to review the proposed letter we would like to send out to Vanguard Cleaning Services. This is an old audit and I would like to clear it from my inventory.

Thank you for your assistance

Regards.
Gary

From: Snyder, Kathy (LNI)
Sent: Friday, October 26, 2012 1:18 PM
To: Vargas, Katherine L (LNI); Bunten, Theresa A (LNI)
Subject: FW: AL9999 Write Your Own Letter20121025-161145

Hi Kathy.

Gary has worked on adapting the Lyons letter for the audit of the franchisor rather than the franchise. The Vanguard letter is the collaborative attempt and the AL9999 is the first draft. We would like your opinion on whether this will suffice so we can close this assignment out by the 31st.

Thank you for your help in advance.

From: Grayson, Gary S (LNI)
Sent: Friday, October 26, 2012 12:49 PM
To: Snyder, Kathy (LNI)
Subject: FW: AL9999 Write Your Own Letter20121025-161145

Thanks Kathy.....I have attached a revised letter (Vanguard Letter) that incorporates the changes you have suggested.

Hopefully we will hear back from Kathy V. fairly quickly so I can get this audit out of my inventory by month end.

Gary

From: Snyder, Kathy (LNI)
Sent: Friday, October 26, 2012 11:50 AM
To: Grayson, Gary S (LNI)
Cc: Jauregui, Bonnie (LNI); Dickey, Lindsay M (LNI)
Subject: FW: AL9999 Write Your Own Letter20121025-161145

I have attached the changes that I think would hopefully clarify some issues for them. See what you think and if it looks good to you, I would like to send a copy to Kathy V. Then I will call her next week to make sure that it is sufficient in her mind.

When we were talking about this at the sups meeting, there is quite a bit of concern that no one gets a bill or a free ride in a no change.

Please make sure that you have changes the status to an investigation

From: Grayson, Gary S (LNI)
Sent: Thursday, October 25, 2012 5:25 PM
To: Snyder, Kathy (LNI)
Subject: AL9999 Write Your Own Letter20121025-161145

Kathy:

Attached is my draft letter to Vanguard regarding the cancelation of the audit. I used the word "cancelation" only because I was not sure if there is another term being used for the action being taken on these audits.

Please feel free to make any comments or corrections to my draft letter.

Thank you for all your help with this audit.

Gary

October 25, 2012

VANGUARD CLEANING SYSTEMS OF WASHINGTON
ATTN: ANITA HARDY
6912 220TH STREET SW #306
MT LK TERRACE, WA 98043

Account ID: 077,765-00
Unified Business Identifier (UBI): 602 449 450

Dear Mrs. Hardy:

The Department of Labor & industries (L&I) is in the process of reviewing firms that are in the business of franchising commercial janitorial businesses and has a case pending in the appeal process. This review is to determine if firms like Hardy & Associates, Inc. dba Vanguard Cleaning Systems of Washington are required to provide industrial insurance coverage for their franchisees and the franchisee's employees performing janitorial services.

While this review is taking place and until the case is decided, active audits that are being performed on these firms are being closed without assessing premiums or penalties. You should be aware however, that when L&I has completed their review, your firm may again be selected for audit and a determination made that your franchisees and their employees are subject to industrial insurance coverage and your firm responsible for the payment of premiums for them.

Thank you for your assistance and cooperation during the time leading up to the closing of this audit. It is our hope that this will reduce any concern you have about an open audit of your company being continued at the current time.

Please do not hesitate to contact me directly if you have any questions regarding the above.

Sincerely,

Gary Grayson
L & I Auditor
Phone: 425-290-1372
Email: grga235@lni.wa.gov
729 - 100th Street SE
Everett, WA 98208-3727

October 25, 2012

VANGUARD CLEANING SYSTEMS OF WASHINGTON
ATTN: ANITA HARDY
6912 220TH STREET SW #306
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Account ID: 077,765-00
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Dear Mrs. Hardy:

The Department of Labor & industries (L&I) is in the process of reviewing firms that are in the business of franchising commercial janitorial businesses. This review is to determine if firms like Hardy & Associates, Inc. dba Vanguard Cleaning Systems of Washington are required to provide industrial insurance coverage for franchisees performing janitorial services.

While this review is taking place, active audits that are being performed on these firms are being canceled without prejudice. You should be aware however, that when L&I has completed their review, your firm may again be selected for audit and a determination made that your franchisees are subject to industrial insurance coverage.

Thank you for your assistance and cooperation during the time leading up to the cancelation of this audit.

Please do not hesitate to contact me directly if you have any questions regarding the above.

Sincerely,

Gary Grayson
L & I Auditor
Phone: 425-290-1372
Email: grga235@lni.wa.gov
729 - 100th Street SE
Everett, WA 98208-3727

No. 45033-0-II

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

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent,

v.

LYON ENTERPRISES, INC. d/b/a JAN-PRO CLEANING SYSTEMS, Appellant,

Appellant.

CERTIFICATE OF SERVICE

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Attorneys for Amicus Curiae Northwest Franchising, Inc., dba Coverall of Washington

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served a copy of the Motion to File Brief of Amicus Curiae and Brief of Amicus Curiae Filed by Northwest Franchising, Inc. DBA Coverall of Washington on May 29, 2014 via Legal Messenger as follows:

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Steven Vinyard
Attorney General's Office
7141 Clearwater Drive SW
Olympia, WA 98504-0121

DATED this 28th day of May, 2014.

Sheryl Bordeaux