

FILED
Court of Appeals
Division II
State of Washington
2/22/2018 2:49 PM
No. 49646-1-II

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

GULICK TRUCKING, INC., a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON, EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

PETITION FOR REVIEW

Aaron P. Riensche, WSBA #37202
Attorneys for Petitioner
OGDEN MURPHY WALLACE, PLLC
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

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A. IDENTITY OF PETITIONER

Petitioner Gulick Trucking, Inc. (“Gulick”) asks the Washington Supreme Court to grant review of the Court of Appeals, Division II, decision set forth in Part B.

B. ASSIGNMENT OF ERROR

Division II issued its decision on January 23, 2018. A copy of the decision is attached hereto in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Under RCW 50.04.140(1), workers are independent contractors if they work free from the employer’s control and outside its places of business and are independently established. The evidence showed that: (a) Gulick does not control the method and detail of owner/operators’ work; (b) owner/operators work on the open road; and (c) owner/operators make an enormous investment in establishing their own small businesses. Does the independent-contractor exception apply?

2. The Federal Aviation Administration Authorization Act (“FAAA”) preempts state action that relates to a price, route, or service of any motor carrier. By forcing carriers to treat owner/operators as employees, the Employment Security Department (“ESD”) restructures

longstanding industry dynamics, interferes with carriers' choices of business model, and penalizes carriers for using a system that responds efficiently to customers' needs. Is ESD's *en masse* owner/operator reclassification preempted by federal law?

D. STATEMENT OF THE CASE

1. Owner/operators in the Trucking Industry

Owner/operators have long been important in the trucking industry. CR1¹ at 92. They are used in most, if not all, sectors of the industry. *Id.* The contemporary American trucking industry, as a business with dramatically fluctuating demand, is structured around independent owner/operators who contract with carriers for the lease of trucking equipment. *Id.*

Gulick is one of many carriers who rely on independent owner/operators. *Id.* at 97. Federal law requires Gulick to engage owner/operators through an equipment-lease contract. 49 U.S.C. § 14102; 49 C.F.R. § 376.11(a). Federal regulations provide detailed terms that must be included in the contract. *See, e.g.*, 49 C.F.R. §§ 376.11, 376.12.

Although the equipment is leased to Gulick, owner/operators are free to accept or reject the loads that Gulick makes available. CR2 at

¹ The Commissioner's Record is cited herein as "CR" followed by the volume number.

892-93, 922-23, 940-41. If they accept a load, they decide what route to take from the origin to the destination. *Id.* at 894, 923, 940. If they do not like the offered loads, they will often find their own loads. *Id.* at 904, 941.

Gulick and the owner/operators split the fee paid by the customer, 80% to the owner/operator and 20% to Gulick. *Id.* at 898, 924, 937. From their shares, owner/operators must pay all costs associated with operating the equipment. CR2 at 899-900, 925-26, 937-38. Some owner/operators hire employees to operate the equipment and are responsible for all payroll costs. CR1 at 595; CR2 at 922.

2. Procedural History

The Gulick audit was conducted by Darith Lim (“Lim”), an auditor in ESD’s Underground Economy Unit. CR2 at 656. In his 3.5 years as an ESD auditor, Lim audited more trucking companies than he could count. *See* CR2 at 657. He estimated the number at between fifty and sixty. *Id.* at 658. The mere fact that a coworker had seen trucks parked near her home was sufficient to trigger the Gulick audit. *Id.*

In April 2013, Lim notified Gulick that he had reclassified 120 independent contractors as Gulick’s “employees.” CR1 at 386. It assessed unemployment taxes, penalties, and interest against Gulick in the amount of

\$155,133.33. *Id.* at 307. Gulick timely appealed to the Office of Administrative Hearings (“OAH”). *Id.* at 309.

The OAH issued an Initial Order in November 2014. CR2 at 1085. It found that ESD had shown that owner/operators provided personal services for wages to Gulick under RCW 50.04.100. *Id.* at 1088. It further found that Gulick could not establish the independent-contractor exception under RCW 50.04.140(1). *Id.* at 1089. On this latter point, it found that Gulick could not meet the first element of the test—i.e. that Gulick could not show that owner/operators were free from its direction or control—and that it was thus unnecessary to address the other two elements. *Id.*

Gulick petitioned for review by the ESD Commissioner’s Review Office (“CRO”). CR2 at 1093. The CRO affirmed and entered additional findings on the second and third elements of RCW 50.04.140(1), finding Gulick had not shown that owner/operators perform their work outside of Gulick’s places of business or that they were engaged in an independently established business, trade, or occupation. *Id.* at 1133–39. Gulick appealed to the Clark County Superior Court and eventually Division II, both of which affirmed the CRO. CP 192.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The overarching question in this case is whether owner/operators—as truck drivers who own their trucks, who are responsible for all costs associated with their operations, who bear the risk of loss and the rewards of profit, who decide whether and when they will work, who can reject any work offered to them, who decide how they will do the work when they accept it, and who have been treated broadly as independent contractors for decades—are independent contractors. Division II affirmed ESD’s decision that they are not. This was erroneous.

The legal issues presented here are pending before this Court in *Swanson Hay Co. v. ESD*, Case No. 95246-9, and *MacMillan-Piper, Inc. v. ESD*, Case No. 95442-9. The Court should consider the petitions in these cases together.

1. Owner/operators are independent contractors.

The independent-contractor exception applies where: (a) the worker is “free from control or direction” over the performance of services; (b) the worker performs such services outside of the employer’s “usual course of business” or “places of business”; and (c) the worker is engaged in an “independently established trade, occupation, profession, or business.” RCW 50.04.140(1). Division II based its decision on elements (a) and (c).

That analysis relied on three errors of note. First, it held that this Court’s precedent construing the term “control” is irrelevant in construing “freedom from control or direction” under RCW 50.04.140. Second, it permitted ESD to consider federally required contract terms in analyzing the “control” element. Finally, it gave inordinate weight to one fact—whether an owner/operator has federal authority to operate as a motor carrier—in analyzing the “independently established” question under element (c).

- a. The Court of Appeals incorrectly disregarded this Court’s instructions on the meaning of “control” in the employment context.

This Court should review Division II’s decision to disregard precedent construing the term “control.” The first element under RCW 50.04.140(1) contemplates control over the “*methods and details of doing the work.*” *Jerome v. Employment Sec. Dep’t*, 69 Wn. App. 810, 816, 850 P.2d 1345 (1993) (emphasis added) (quoting *Risher v. Dep’t of Labor & Indus.*, 55 Wn.2d 830, 834, 350 P.2d 645 (1960)). Because the Legislature did not define the term “control or direction” in RCW 50.04.140(1)(a), it is presumed to have meant the term to conform to its common-law meaning. *Caplan v. Sullivan*, 37 Wn. App. 289, 292, 679

P.2d 949 (1984) (citing *In re Marriage of Gimlett*, 95 Wn.2d 699, 701, 629 P.2d 450 (1981)).

This Court has established the common-law understanding of “control” in the employment context. See *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002). In *Kamla*, the Court explained that such “general contractual rights as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the contractor’s work.” *Id.* (quoting *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 445-56, 711 P.2d 1090 (1985)). “The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.” *Id.* at 120-21 (quoting *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991)).

That analysis is consistent with this Court’s interpretation of the Employment Security Act in *Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unempl. Comp. and Placement*, 23 Wn.2d 167, 172, 160 P.2d 614 (1945). There, the Court held that a “reservation by the employer of the right by himself to supervise the work for the purpose of merely determining whether it is being done in conformity to the contract does not affect the independence of the relationship.” *Id.*

Division II chose to disregard this Court’s instructions about the meaning of “control,” because the Employment Security Act was amended shortly after *Seattle Aerie* was decided. But the amendment Division II relies on was *not* to the independent-contractor exception in RCW 50.04.140. Rather, the Legislature amended RCW 50.04.100. That statute now provides that covered employment is “unlimited by the relationship of master and servant as known to the common law or any other legal relationship.” RCW 50.04.100.

Division II argues that this amendment “overruled” this Court’s “reliance upon common law principles to define an independent contractor” in *Seattle Aerie*. Opinion (“Op.”) at 13. But when “amending a statute, the legislature is presumed to know how the courts have construed and applied the statute.” *State v. Roggenkamp*, 153 Wn.2d 614, 629, 106 P.3d 196 (2005) (citing *In re Pers. Restraint of Quackenbush*, 142 Wash.2d 928, 936, 16 P.3d 638 (2001)). When the Legislature amends the statutory scheme but leaves unchanged a provision that this Court has previously construed, the Legislature acquiesces in that construction. *See id.* at 629–30 (despite multiple amendments to the vehicular-homicide and vehicular-assault statutes, the Legislature did not change the definition of “reckless manner” and thus acquiesced in this Court’s definition of that term). Further, once

this court construes a statute, “that construction operates as if it were originally written into it.” *Id.* at 629 (quoting *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976)).

The independent-contractor exception, when *Seattle Aerie* was decided, required proof that the worker “has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact.” *McDermott v. State*, 196 Wash. 261, 267, 82 P.2d 568 (1938) (quoting *Laws of 1937*, ch. 162, § 19(g), p. 609). After *Seattle Aerie*, the Legislature recodified the exception as RCW 50.04.140, without material changes to the “control or direction” element. *See* RCW 50.04.140(1)(a). As such, this Court’s construction of the original independent-contractor exception in *Seattle Aerie* operates as if originally written into the statute. *Roggenkamp*, 153 Wn.2d at 629. When the Legislature recodified the exception without material changes, it acquiesced in this Court’s interpretation. *See id.* at 630.

Division II’s rejection of this Court’s precedent—with its common-sense limitations on the meaning of “control”—leads to untenable results. For example, Division II held that “contractual obligations are evidence of control if they are obligations to perform some aspect of the service for which an individual is compensated.” *Op.* at 14. This analysis renders the

independent-contractor exception meaningless. Any enforceable contract imposes obligations to perform the service for which the worker is compensated. *See Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 184, 110 P.3d 733 (2005) (“contracts must be construed to avoid rendering contractual obligations illusory”).

Division II’s decision to ignore this Court’s pronouncements about the meaning of “control” merits review under RAP 13.4(b)(1).

- b. Division II erred in allowing ESD to consider federally required contract terms in analyzing the “control” element.

In finding control, ESD relied heavily on contract terms that were mandated by federal leasing regulations under authority delegated by Congress in 49 U.S.C. § 14102.² Using those terms to establish an employment relationship contravenes the letter and spirit of those

² *See* CR2 at 1129–30. *Cf.* 49 C.F.R. §§ 376.11(c) (requiring carrier to identify leased equipment as being in its service), 376.11(d)(1) (documentation must clearly indicate that the transportation is under the carrier’s responsibility), 376.12(c)(1) (requiring carrier to take exclusive, use, possession, and control of and full responsibility for the leased equipment), 376.12(e) (requiring the lease to clearly specify which party is responsible for removing identification devices from the equipment upon lease termination), 376.22 (requiring written agreement for a carrier to lease equipment that is under lease to another carrier), 379 app. A (specifying required retention periods for various categories of records and reports, including shipping documents and inspection and repair reports), 385.5 (unqualified drivers and improperly driven vehicles adversely affect carrier’s safety rating), 390.11 (carrier must require drivers to observe all duties imposed by Federal Motor Carrier Safety Regulations), 392.60 (requiring carrier to give written authorization for any passengers), 396.3 (carriers must systematically inspect or cause to be inspected all vehicles subject to their control and keep inspection and maintenance records).

regulations. The leasing regulations are *not* “intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee,” and an “independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.” 49 C.F.R. § 376.12(c)(4).

The Interstate Commerce Commission (“ICC”) promulgated these regulations to make it easier for injured third parties to assign responsibility for trucking accidents. *See Lease & Interchange of Vehicles – Declaratory Order*, 1994 Fed. Carrier Cas. P 38121, 1994 WL 70557, *6 (I.C.C. March 8, 1994). It did so by requiring the carriers to lease owner/operators’ equipment and “assume full direction and control of the vehicles . . . ‘as if they were the owners of such vehicles.’” *Tamez v. SW. Motor Transp., Inc.*, 155 S.W.3d 564, 572 (Tex. App. 2004) (quoting *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 37 (Tex. App. 2002)).

The ICC later enacted 49 C.F.R. § 376.12(c)(4) specifically to prevent states from using regulatory compliance as proof of an employment relationship in contexts beyond responsibility for accidents. The ICC explained that “*most courts have correctly interpreted the appropriate scope of the control regulation and have held that the type of control required by the regulation does not affect ‘employment’ status*”

Petition to Amend Lease & Interchange of Vehicle Regulations, 8 I.C.C.2d 669, 671 (I.C.C. June 29, 1992) (emphasis added). But “some courts and State workers’ compensation and **employment agencies**” had improperly used compliance with the leasing regulations as “prima facie evidence of an employer-employee relationship” and had erroneously found that it “evidences the type of control that is indicative of an employer-employee relationship.” *Id.* (emphasis added). The ICC thus adopted § 376.12(c)(4) to reinforce its “view of the **neutral effect of the control regulation**” and to save tribunals time and “**lessen the likelihood that they will reach the wrong conclusions.**” *Id.* (emphasis added).

Multiple courts around the country have rejected the notion that a state can use compliance with the leasing regulations as evidence of an employment relationship. *See, e.g., Hernandez v. Triple Ell Transp., Inc.*, 175 P.3d 199, 205 (Idaho 2007) (“adherence to federal law” was not evidence of a carrier’s control over an owner/operator); *CEVA Freight, LLC v. Employment Dep’t*, 279 Or. App. 570, 379 P.3d 776, 781, *review denied*, 360 Or. 751 (2016) (federal requirements “do not suggest a conclusion one way or the other concerning [carrier]’s relationship with its owner-operators

or whether they were employees or independent contractors”).³ By holding to the contrary, Division II propagates the exact error that the ICC sought to avoid in implementing 49 C.F.R. § 376.12(c)(4).

This error presents an issue of substantial public interest because its logical effect is to disqualify all owner/operators in the state from the independent-contractor exception. The federally required terms are necessarily found in all carriers’ contracts with owner/operators. That ESD views the federally required terms as license to reclassify all owner/operators in the state as employees is illustrated by its auditors’ interactions with Gulick. ESD’s auditors told Gulick, before they had seen any documents, that they were not authorized to treat owner/operators as independent contractors. *See* CR2 at 846–47. Because the practical effects of Division II’s decision are to disqualify an entire industry from the protections of RCW 50.04.140, review is warranted under RAP 13.4(b)(4).

³ *See also Wilkinson v. Palmetto State Transp. Co.*, 676 S.E.2d 700, 705 (S.C. 2009), *cert. denied*, 130 S. Ct. 741 (2009) (federal regulation “is not intended to affect” the independent-contractor determination under state law); *Tamez*, 155 S.W.3d at 573 (leasing regulations are not intended to “have any impact on the type of relationship that exists between the carrier-lessee and the contractor-lessor”) (quoting *Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F.Supp.2d 374, 383 (D. Conn. 2003)); *Ruiz v. Affinity Logistics Corp.*, 887 F.Supp.2d 1034, 1041 n. 7 (S.D. Cal. 2012) (“fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship”) (citing *Sida of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975)).

- c. In analyzing the third element, Division II gave inordinate weight to whether owner/operators had their own federal operating authority.

The third element of the independent-contractor test is met if the workers are “customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.” RCW 50.04.140(1)(c). Several factors, including the worker’s investment in the business and provision of the necessary equipment, the provision of insurance, and the impact on the worker’s business if the relationship is terminated, are indicia of being independently established. *Jerome*, 69 Wn. App. at 815. Division II’s analysis of this element relied heavily on whether owner/operators had their own federal operating authority. This was erroneous.

Obtaining federal authority involves filling out a form on the internet and paying a \$300 fee. CR2 at 797. It would be pointless, however, for an owner/operator to undertake this expense, because federal regulations require that the equipment be operated under the *carrier’s* federal authority. *See* CR2 at 798; 49 C.F.R. § 390.21(b)(2). Most small-business owners would balk at the notion that paying for a license they cannot use is somehow the defining characteristic of an independent business.

The Idaho Supreme Court rejected precisely that argument in *W. Home Transp., Inc. v. Idaho Dep't of Labor*, 155 Idaho 950, 318 P.3d 940, 943–44 (2014). The Court had previously established the same “bright-line rule” that ESD offers here, i.e. that owner/operators could not meet this element if they operated under the carrier’s federal authority. *See id.* at 942–43 (citing *Giltner, Inc. v. Idaho Dep't of Commerce & Labor*, 145 Idaho 415, 179 P.3d 1071, 1076 (2008)).

In *W. Home*, the Court held that its prior decision had “proven *unjust, unwise, and incorrect* because it fails to consider the nature of the owner/operator’s business, which serves a distinct market in the interstate trucking industry.” *Id.* at 943 (emphasis added). The crucial distinction was that the “business or service provided by an owner/operator is not the transportation of goods for manufacturers or shippers; rather, it is the transportation of goods for motor carriers” *Id.* Because federal operating authority is unnecessary to this model, whether an owner/operator has such authority is “*completely inconsequential and irrelevant.*” *Id.* (emphasis added). The court thus took the unusual step of overruling its own precedent after only a few years. *Id.*

Division II’s endorsement of ESD’s unjust, unwise, and incorrect position merits review under RAP 13.4(b)(4).

- d. Division II erred in declining to consider the second element of the exception test.

Division II chose not to address Gulick's arguments regarding the second element. Op. at 8 n. 4. Presumably, it believed that review of this issue was rendered unnecessary by its disposition of the other two elements. Because that disposition was erroneous, the decision not to review the second element was also erroneous.

2. Federal law preempts ESD's interference with Gulick's business model.

Division II's decision not only misapplies the independent-contractor exception, but also endorses an interpretation that makes it impossible for any owner/operator to ever be an independent contractor under RCW 50.04.140. This result follows from Division II's decision that compliance with federally required terms shows control under RCW 50.04.140(1)(a). Op. at 11–12. It also follows from Division II's analysis of the “independently established” element in RCW 50.04.140(1)(c). Division II held that the owner/operators' use of Gulick's operating authority and Gulick's payment to owner/operators' regardless of whether payment was received from the customer precluded a finding that owner/ operators were independently established. Op. at 16-17.

But these factors are federal requirements. *See* 49 C.F.R. §§ 376.12(f), 390.21(b)(2).

Under ESD’s interpretation, the impossibility of using independent-contractor owner/operators would alter longstanding industry dynamics in a way that is preempted by federal law. Congress has expressly preempted any state action relating to carriers’ prices, routes, or services:

. . . States may not enact or enforce a law, regulation, or other provision having the force and effect of law ***related to a price, route, or service of any motor carrier*** . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added).

When Congress deregulated the trucking industry, it sought to remove obstacles to “national and regional carriers attempting to conduct a standard way of doing business.” *Cole v. City of Dallas*, 314 F.3d 730, 734 (5th Cir. 2002) (quoting H.R. CONF. REP. No. 103–677, at 87). Congress’s “overarching goal” was to “ensure transportation rates, routes, and services that reflect ‘maximum reliance on competitive market forces,’ thereby stimulating ‘efficiency, innovation, and low prices,’ as well as ‘variety’ and ‘quality.’” *Rowe v. New Hampshire Motor Transport Ass’n*, 552 U.S. 364, 371, 128 S. Ct. 989, 169 L.Ed.2d 933 (2008) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct. 2031, 119 L.Ed.2d 157

(1992)). Congress thus sought to leave operational decisions, “where federally unregulated, to the competitive marketplace.” *Id.* at 373. It would be inconsistent with this effort to allow “a patchwork of state service-determining laws, rules, and regulations.” *Id.* Accordingly, the U.S. Supreme Court follows Congress’s mandate to apply a “***broad preemption interpretation***” to this legislation. *Id.* at 370 (emphasis added) (quoting H.R. Conf. Rep. 103-677, at 83 (1994)).

Multiple courts have held that forcing carriers to reclassify owner/operators as employees is preempted. The Ninth Circuit observed that a provision requiring carriers at the Port of Los Angeles to transition from owner/operators to employee drivers was “highly likely to be shown to be preempted.” *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1056 (9th Cir. 2009). The district court later enjoined the owner/operator phase-out as preempted under the FAAAA, and the Ninth Circuit affirmed. *Am. Trucking Associations, Inc. v. City of Los Angeles*, No. CV 08-4920CASCTX, 2009 WL 1160212, at *7 (C.D. Cal. Apr. 28, 2009), *affirmed in part*, 596 F.3d 602, 604–05 (9th Cir. 2010). *See also In re Fed. Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 566 N.W.2d 299, 307–08 (1997) (state regulation mandating that a truck be operated by employees of the carrier was preempted), *review denied*, 587

N.W.2d 632 (Mich. 1998), *cert. denied*, 525 U.S. 1018 (1998). And the First Circuit recently applied FAAAA preemption to the Massachusetts independent-contractor statute. *See Massachusetts Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016).

ESD's wholesale prohibition on independent contractors is a drastic change to longstanding industry dynamics. Washington law has historically recognized that owner/operators are independent contractors. For example, ESD found owner/operators to be independent contractors for purposes of the Employment Security Act in *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 39, 917 P.2d 136 (1996). Indeed, ESD's Status Manual still instructs auditors that true owner/operators are independent contractors. CR1 at 545. Gulick submitted unchallenged expert testimony establishing that ESD's reclassification scheme will impact the industry. *See* CR1 at 93, 99, 106.

Preemption arises when the state requires carriers to provide employee-type benefits to independent owner/operators. *See Schwann*, 813 F.3d at 436–39; *Healey*, 821 F.3d at 193. Here, ESD forces all carriers in Washington to provide owner/operators with a benefit that has always been reserved for employees: unemployment insurance. Moreover, ESD's punitive tax rate penalizes businesses that use a flexible work force, by

raising the business's tax rate every time an employee claims unemployment benefits. *See* RCW 50.29.021(2), .025; WAC 192-320-005. Because carriers engage owner/operators for the purposes of having a flexible supply of equipment, Gulick's Controller explained that this "situation would break [Gulick's] business model." CR1 at 101.

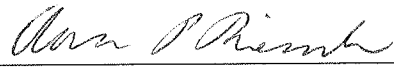
In short, ESD's reclassification scheme has far-reaching effects, sufficient to trigger FAAAA preemption and presenting a significant question under the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, warranting review under RAP 13.4(b)(3). *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (preemption doctrine derives from Supremacy Clause) (citing *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988)).

F. CONCLUSION

For the reasons discussed above, this Court should grant review.

RESPECTFULLY SUBMITTED this 22nd day of February, 2018.

OGDEN MURPHY WALLACE, PLLC

By 

Aaron P. Riensche, WSBA #37202
Attorneys for Petitioner

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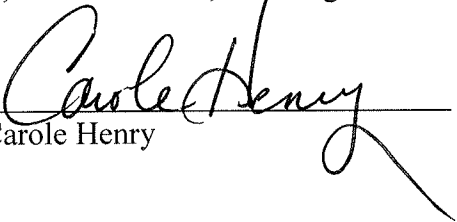
DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of Appellant's Petition for Review in Court of Appeals, Division II, Cause No. 49646-1 to the following parties:

Eric D. Peterson
Leah Harris
Assistant Attorney General
Licensing and Administrative Law Division
800 Fifth Avenue
Suite 2000
MS TB-14
Seattle, WA 98104-3188
ericp1@atg.wa.gov
leahh1@atg.wa.gov
lalseacf@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 22nd day of February, 2017 at Seattle, Washington



Carole Henry

APPENDIX

{APR1676805.DOCX;1/12595.000001/ }

January 23, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GULICK TRUCKING, INC., a Washington
corporation,

Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

No. 49646-1-II

UNPUBLISHED OPINION

JOHANSON, J. — Gulick Trucking Inc. seeks review of the Employment Security Department's (ESD) assessment of delinquent unemployment insurance taxes on the basis that Gulick's truck drivers were covered employees, rather than independent contractors, under Washington's Employment Security Act (ESA), Title 50 RCW. Gulick argues that federal law preempts the ESD from reclassifying Gulick's owner-operator drivers as covered employees and, alternatively, that Gulick established all three prongs of the ESA's independent contractor exemption. We follow the decision of Division Three of this court in *Swanson Hay Co. v. Employment Security Department*, 1 Wn. App. 2d 174, 404 P.3d 517 (2017), and affirm the ESD commissioner's decision.

FACTS

I. BACKGROUND

Gulick is an interstate motor carrier based in Vancouver, Washington that provides refrigerated carrier services. Gulick employs both company drivers, who drive equipment leased

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by Gulick, and owner-operators, who drive equipment that they either own or lease from third parties. The majority of Gulick's drivers are owner-operators, and by relying on owner-operators, Gulick ensures that it has the flexibility to meet fluctuating demand without having to purchase trucks and trailers or terminate employees when demand lags.

II. ESD AUDIT AND ASSESSMENT ORDER

In 2012, the ESD audited Gulick and reclassified 120 owner-operators as Gulick's "employees" for unemployment insurance tax purposes under the ESA. The ESD issued an order and notice of assessment for delinquent contributions, penalties, and interest. Stipulations between the parties subsequently reduced the total amount owed.

III. OFFICE OF ADMINISTRATIVE HEARINGS PROCEEDINGS

Gulick appealed the ESD's order and assessment notice to the Office of Administrative Hearings (OAH). Before Gulick's hearing, it moved for summary judgment, arguing that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501, preempted reclassification of its owner-operators under the ESA.¹

An administrative law judge (ALJ) denied Gulick's summary judgment motion regarding federal preemption as a matter of law, and the parties stipulated that Gulick's supporting declarations would be included in the record for purposes of appeal. Regarding the reclassification

¹ The FAAAA's preemption statute applies to motor carriers of property and subject to exceptions not relevant here says that

a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier . . .) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1).

of Gulick's owner-operators as covered "employees," after an evidentiary hearing, the ALJ also entered an initial order that Gulick's owner-operators were in Gulick's employment and that they were not exempt independent contractors.

IV. ESD COMMISSIONER PROCEEDINGS

Gulick then petitioned the commissioner for review of the OAH's summary ruling and initial order. The commissioner affirmed the OAH's decision.²

First, the commissioner addressed Gulick's federal preemption argument. The commissioner summarized Gulick's declarations submitted in support of its OAH summary judgment motion, in which various industry authorities described the reclassification's impact. The commissioner then adopted the OAH's analysis that the FAAAA did not preempt the ESA, as applied to motor carriers in the trucking industry.

Second, the commissioner concluded that the owner-operators were in Gulick's "employment," as defined by the ESA.

Third, the commissioner examined whether the ESA's independent contractor exemption applied and analyzed each of the exemption's three prongs. In doing so, the commissioner relied extensively upon the owner-operators' contracts with Gulick.³

Under the first prong, "freedom from control or direction," the commissioner noted "some autonomy" of owner-operators. Administrative Record (AR) at 1128. Namely, owner-operators could reject loads offered by Gulick; could arrange for loads with other brokers; selected their own

² The commissioner's 33-page order did not delineate individually numbered findings and conclusions.

³ The parties agree that the contracts in our record are materially identical.

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routes; were responsible for proper and secure loading and providing labor to load, transport, and unload commodities; paid equipment operation, maintenance, and repair costs; maintained various insurances; and had the right to employ drivers and had sole responsibility over their employees.

However, the commissioner concluded that Gulick failed to show that its owner-operators were free from Gulick's control or direction. Gulick "exert[ed] extensive controls over the methods and details of how the driving services are to be performed" that were "generally incompatible with freeing the owner-operators from [Gulick's] control and direction." AR at 1129, 1130. That is, Gulick exclusively possessed, controlled, and used trucking equipment during the agreement's term, and owner-operators could not transport unauthorized passengers or property and had to display identification showing that Gulick was operating the equipment and immediately remove the identification from the equipment when the agreement terminated. Gulick could fine owner-operators for failure to meet appointments or follow temperature requirements and could retake possession of equipment and complete a failed delivery.

Further, Gulick required owner-operators to conduct daily equipment inspections and deliver vehicle inspection reports. Gulick required that owner-operators furnish accessories to load and transport freight, contact Gulick immediately in event of incidents, check that cargo conformed to the loading manifest, and notify Gulick of discrepancies or be fined. Gulick also required owner-operators to pay usage fees and furnish accessories to install a telecommunication device in their trucks and to cooperate fully with dispatch and transport commodities in a manner that promoted Gulick's goodwill and reputation. Finally, Gulick could terminate the agreement upon a number of conditions, including failure to maintain equipment as defined by Gulick's maintenance guidelines.

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Under the second prong, the commissioner concluded that Gulick failed to meet either alternative: that the services be performed outside Gulick's usual course of business or all places of business of Gulick for which such service was performed.

Under the third prong, whether owner-operators were independently established businesses, the commissioner noted that "some of the traditional factors" weighed in favor of finding independently established businesses. AR at 1138. For instance, some owner-operators had registered sole proprietorships. And owner-operators provided their own trucks and other supplies, made substantial investments in their businesses by purchasing trucks or trailers, and operated their businesses in their trucks. Other traditional factors weighed against such a finding—Gulick provided protection from customers' nonpayment, owner-operators could not haul third-party loads without Gulick's permission, owner-operators had to display Gulick's identification on their equipment, and Gulick prohibited owner-operators from competing or soliciting customers for the term of an agreement plus five years.

Ultimately, the commissioner concluded that the evidence weighed against owner-operators being independent contractors based on an additional, industry-specific consideration: "whether an owner-operator has his or her own [federal] operating authority so as to be able to independently engage in interstate transportation of goods." AR at 1139. Because owner-operators did not have operating authority to independently engage in interstate transportation of goods, this "paramount" factor weighed against them being independent contractors. Having concluded that the reclassification was not preempted and that Gulick failed to meet any of the three prongs for the independent contractor exemption under the ESA, the commissioner affirmed the OAH.

V. JUDICIAL REVIEW

Gulick sought review of the commissioner's decision in the superior court. After the superior court affirmed the commissioner's decision, Gulick appealed.

ANALYSIS

I. ESA BACKGROUND AND STANDARDS OF REVIEW

The ESA requires “employers” to pay unemployment insurance taxes for persons engaged in “employment.” *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 203, 393 P.3d 761, *cert. denied*, 138 S. Ct. 261 (2017). Under RCW 50.04.100, “employment” includes “personal service, of whatever nature” performed under a contract.

The ESA definition of employment is “exceedingly broad” and includes even those who are “independent contractors” at common law, *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 458, 41 P.3d 510 (2002), “so long as they perform ‘personal services’ under a contract and an exemption does not apply.” *Wash. Trucking Ass'ns*, 188 Wn.2d at 203. In the employment security context, the relationship between two parties “is more likely . . . to be viewed as employment [than in any other context].” *Swanson Hay*, 1 Wn. App. 2d at 181.

An aggrieved employer may appeal an ESD assessment to an ALJ. RCW 50.32.010, .030. Review of the ALJ's decision is by the commissioner, and the commissioner's ruling is subject to judicial review under the Administrative Procedures Act (APA), ch. 34.05 RCW. RCW 50.32.070, .120. Under the APA, we review the commissioner's ruling, not the ALJ's or superior court's ruling. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). “[W]e apply the appropriate standards of review from [the APA,] RCW 34.05.570[,] directly to the agency

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record.” *Affordable Cabs, Inc. v. Dep’t of Emp’t Sec.*, 124 Wn. App. 361, 366, 101 P.3d 440 (2004).

The party challenging the agency’s action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a). Our review is de novo, and we grant relief if “[t]he agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d); *Affordable Cabs*, 124 Wn. App. at 367.

II. *SWANSON HAY*

Swanson Hay addresses the same issues on virtually identical facts to those presented here. *See* 1 Wn. App. 2d 174. Although opinions of other divisions of this court are not binding on us, we should follow them if their reasoning is sound. *West v. Pierce County Council*, 197 Wn. App. 895, 899, 391 P.3d 592 (2017). We agree with *Swanson Hay*’s analysis, and, accordingly, we adopt its reasoning and result to resolve the primary issues presented here, as set forth below.

III. FEDERAL PREEMPTION

The parties dispute whether the FAAAA preempted reclassification of Gulick’s owner-operators for ESA purposes. We agree with *Swanson Hay* that the FAAAA does not preempt the reclassification.

The FAAAA’s preemption statute prohibits states from enacting or enforcing “a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). *Swanson Hay* held that this statute did not preempt the ESD from assessing unemployment taxes on amounts paid to owner-operators. 1 Wn. App. 2d at 198. *Swanson Hay* reached this conclusion after rejecting reliance on *Western Ports* and determining that the ESA’s definition of “employment” applied only to the imposition

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of unemployment insurance taxes. 1 Wn. App. 2d at 190-92, 194. The carriers failed to show that the reclassification essentially dictated their prices, routes, or services, so that their preemption arguments failed. *Swanson Hay*, 1 Wn. App. 2d at 196-98.

We adopt this analysis, and we hold that as a matter of law, the FAAAA does not preempt the reclassification at issue here.

IV. INDEPENDENT CONTRACTOR EXEMPTION

Gulick does not assert that the commissioner erred when it determined that the owner-operators were in Gulick's "employment" under the ESA. Rather, the parties dispute whether the commissioner erred when it determined that Gulick failed to meet any of the three prongs of the independent contractor exemption to the ESA. We hold that the commissioner correctly determined that Gulick failed to meet the first and third prongs and, accordingly, we affirm the commissioner's decision.⁴

In addition to reviewing questions of law de novo, we review the commissioner's factual findings for substantial evidence—that which is sufficient to persuade a fair-minded person of the truth or correctness of the agency's order. *Affordable Cabs*, 124 Wn. App. at 367; RCW 34.05.570(3)(e).

To show that an owner-operator fits within the independent contractor exemption, the carrier must show that

(1)(a) [s]uch individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and

⁴ We do not reach the second prong.

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(b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

RCW 50.04.140. The carrier must establish all three prongs. *W. Ports*, 110 Wn. App. at 452. We must construe exemptions to the ESA narrowly. RCW 50.01.010; *Wash. Trucking Ass'ns*, 188 Wn.2d at 203.

In *Swanson Hay*, the carriers failed to show that owner-operators met the first or third prongs of the independent contractor exemption so that the owner-operators were not exempt from ESA coverage. 1 Wn. App. 2d at 215, 219.

A. FREEDOM FROM CONTROL OR DIRECTION

The first prong of the independent contractor exemption is whether an “individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact.” RCW 50.04.140(1)(a). Gulick asserts that the commissioner erred when it determined that the owner-operators were not free from Gulick’s control and direction. Gulick advances several arguments in support of its position—that the commissioner (1) mischaracterized lease terms and misapplied the law by relying on (2) federally required terms, (3) terms showing “general contractual rights,” and (4) terms showing mere obligations or liquidated damages. Br. of Appellant at 15. These arguments fail for the reasons set forth below.

1. LEGAL PRINCIPLES

Related to the first prong of the independent contractor exemption, the commissioner may consider federally mandated terms in carriers’ contracts with owner-operators to determine

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whether the owner-operators were free from control or direction. *Swanson Hay*, 1 Wn. App. 2d at 212. A federal regulation, 49 C.F.R. § 376.12(c)(4), states that certain federally required provisions are not intended to affect whether the driver is an independent contractor of the authorized carrier lessee. This regulation does not dictate what terms states may consider when determining whether a carrier has shown that its drivers are free from control or direction. *Swanson Hay*, 1 Wn. App. 2d at 203.

Additionally, statutory, not common law, definitions are applicable to the definitions of “employment” and “freedom from control” under the ESA. *Swanson Hay*, 1 Wn. App. 2d at 206-08.

2. MISCHARACTERIZATION OF LEASE TERMS

Gulick argues that certain contract provisions’ references to “equipment” show that the provisions were evidence of control over the *equipment*, not over the owner-operators. Thus, Gulick argues that the commissioner erred when it relied on these provisions to show control over *owner-operators*.⁵ We disagree.⁶

The commissioner found that many lease terms that referred to the “equipment” showed control over owner-operators. The provisions allowed Gulick to complete a delivery if an owner-operator failed to deliver a shipment, required owner-operators to complete inspections of the equipment at certain times, allowed Gulick to place equipment out of service that did not meet

⁵ Gulick argues that the commissioner improperly relied upon terms showing control over *equipment* as showing control over *owner-operators*. Gulick provides no legal argument, and its argument is an attack on whether substantial evidence supports the commissioner’s determination in this regard. Thus, it is addressed first.

⁶ *Swanson Hay* did not address a similar argument.

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federal or Gulick's standards, required owner-operators to provide loading and transportation accessories, forbade owner-operators from transporting unauthorized people or property, required owner-operators to display Gulick's identification during the term of the agreement, allowed Gulick to terminate an agreement for reasons including an owner-operator's failure to maintain the equipment by Gulick's guidelines, and required owner-operators to install a communications device in the equipment.

Nearly all of these provisions also expressly reference the owner-operator. By requiring the *owner-operator* to do something, these provisions are evidence of control over the owner-operator. Further supporting that the contracts contemplate control over the owner-operators is that the first section of the contract is titled "furnishing of transportation service." AR at 327 (capitalization and underlining omitted). The cited contract provisions and the contract as a whole thus provide evidence sufficient to persuade a fair-minded person that the contract contemplated control over the owner-operators. The commissioner's finding that the contract was evidence of control over "driving services" is accordingly supported by substantial evidence. *See Affordable Cabs*, 124 Wn. App. at 367. The commissioner did not err when it relied on contract provisions that showed control over the equipment as well as over owner-operators.

3. FEDERALLY REQUIRED TERMS

Gulick argues that the commissioner misapplied the law when it relied on federally required terms.⁷ But in *Swanson Hay*, Division Three of this court rejected the same argument

⁷ These terms included the following: furnish and display Gulick's identification, 49 C.F.R. § 376.11(d)(1); Gulick's exclusive possession, control, and use of the equipment during the agreement, 49 C.F.R. § 376.12(c)(1); daily equipment inspections and delivery of reports, 49 C.F.R. § 379 app. A, part K(2); 49 C.F.R. § 396.11; 49 C.F.R. §§ 396.3, .13; and Gulick's right to place equipment out of service that did not meet federal standards, 49 C.F.R. § 385.5.

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and held that RCW 50.04.140 has “no textual basis for concluding that the control exercised by the employer must be control it has freely chosen to exercise, as opposed to control it is required to exercise by law.” 1 Wn. App. 2d at 210. We follow Division Three’s reasoning that “federally mandated control counts” and reject Gulick’s argument to the contrary. *Swanson Hay*, 1 Wn. App. 2d at 212. RCW 50.04.140 does not limit the evidence of freedom from control or direction to only freely chosen employer control. *Swanson Hay*, 1 Wn. App. 2d at 211.

Gulick also identifies a specific federal regulation, 49 C.F.R. § 376.12(c), that Gulick claims bars the ESD from looking to federally required contract provisions. But again, *Swanson Hay* examined and rejected this argument. 1 Wn. App. 2d at 201-03. *Swanson Hay* identified the provision, which states that certain required provisions are not intended to affect whether the driver is an independent contractor, as showing that the provisions were not intended to create “federal-law based vicarious liability.” 1 Wn. App. 2d at 201. We agree that 49 C.F.R. § 376.12(c)’s language does not bar the ESD from looking to federally required contract provisions when determining employer control. Thus, we reject Gulick’s argument.⁸

⁸ At oral argument, Gulick faulted *Swanson Hay*’s analysis of this issue because Gulick claimed that the *Swanson Hay* decision failed to consider the Interstate Commerce Commission’s 1992 statement that federally required control does not affect employment status and is meant to have a neutral effect. Wash. Court of Appeals oral argument, *Gulick Trucking, Inc. v. Emp’t Sec. Dep’t*, No. 49646-1-II (Dec. 7, 2017) at 13 min., 44 sec. (on file with court); see *Petition to Amend Lease & Interchange of Vehicle Regulations*, 8 I.C.C.2d 669, 671 (I.C.C. June 29, 1992). But *Swanson Hay* relied upon the language of the neutrality provision itself, which similarly expresses that the regulations are not intended to affect “employment” status. 49 C.F.R. 376.12(c)(4). Further, the 1992 statement that Gulick points out is consistent with *Swanson Hay*’s reasoning that the neutrality provision takes a “hands off” approach . . . to deciding matters of state law.” 1 Wn. App. 2d at 202. Gulick’s argument is unpersuasive as a reason to depart from *Swanson Hay*’s holding that federally required terms count when determining control under the ESA.

4. “GENERAL CONTRACTUAL RIGHTS”

Gulick argues that the commissioner erred because it relied on “general contractual rights”—the rights to supervise and ensure compliance. Br. of Appellant at 19. This argument derives from *Seattle Aerie No. 1 of the Fraternal Order of Eagles v. Commissioner of Unemployment Compensation & Placement*, 23 Wn.2d 167, 160 P.2d 614 (1945). But as *Swanson Hay* recognized, *Seattle Aerie*’s reliance upon common law principles to define an independent contractor was overruled by the legislature when it enacted RCW 50.04.100. 1 Wn. App. 2d at 205. That statute defines ESA-covered “employment” as “unlimited by the relationship of master and servant as known to the common law or any other legal relationship.” RCW 50.04.100. We agree with *Swanson Hay* on this point.

Relatedly, Gulick argues that the term “control or direction” in RCW 50.04.140(1)(a) is undefined so that common-law tests apply. Again, *Swanson Hay* rejects this argument by correctly reasoning that the common law understanding of *control* does not apply to cases under Title 50 RCW because the legislature chose to abandon common law definitions when it adopted RCW 50.04.140(1)(a). 1 Wn. App. 2d at 207. We adopt *Swanson Hay*’s reasoning and reject Gulick’s arguments about “general contractual rights.”

5. CONTRACTUAL OBLIGATIONS AND LIQUIDATED DAMAGES

Gulick contends that something more than contractual obligations must be identified in order to conclude that an individual is subject to control or direction. And Gulick argues that liquidated damages cannot be used as evidence of control. We reject Gulick’s arguments.⁹

⁹ *Swanson Hay* did not address a similar argument.

A contractual obligation is a legal duty that arises from a contract. BLACK'S LAW DICTIONARY 1242-43 (10th ed. 2014). Liquidated damages are amounts contractually stipulated as a reasonable estimation of damages in the event of a breach. BLACK'S 473.

Gulick provides no authority or legal argument for why contractual obligations and liquidated damages cannot be evidence of control or direction under RCW 50.04.140(1)(a). Rather, Gulick relies upon speculation that only an illusory contract would not contain evidence of control and argument that it is commercially reasonable to include liquidated damages clauses. Because Gulick bears the burden to show that the independent contractor exemption applies, its arguments fail. *See Swanson Hay*, 1 Wn. App. 2d at 215.

Further, it is logical that contractual obligations are evidence of control if they are obligations to perform some aspect of the service for which an individual is compensated. Similarly, by incentivizing compliance with contractual obligations, liquidated damages provisions can also be evidence of control. We reject Gulick's arguments.

6. CONCLUSION REGARDING FREEDOM FROM CONTROL AND DIRECTION

Gulick's arguments that the commissioner erred when it determined that Gulick failed to show that the owner-operators were free from control or direction all fail. The commissioner properly relied upon evidence that Gulick exerted control and direction over the owner-operators—Gulick's exclusive possession, control, and use of the trucking equipment during the agreement's term; fines for failure to meet appointments or follow temperature requirements; Gulick's ability to retake possession of equipment and complete a failed delivery and to terminate the agreement upon a number of conditions; the prohibition against owner-operators transporting unauthorized passengers or property; and the requirements that owner-operators had to display

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identification showing Gulick operated the equipment, remove the identification when the agreement terminated, conduct daily equipment inspections, deliver vehicle inspection reports, furnish accessories to load and transport freight, contact Gulick immediately in event of incidents, check that cargo conformed to loading manifests, notify Gulick of discrepancies or be fined, pay usage fees and furnish accessories to install a telecommunication device in their trucks, cooperate fully with dispatch, and transport commodities in a manner that promoted Gulick's goodwill and reputation.

Accordingly, we affirm the commissioner's determination that Gulick failed to establish the independent contractor exemption under the first prong. Thus, the owner-operators were covered employees under the ESA.

B. CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED BUSINESS

The third prong of the independent contractor exemption is whether "[s]uch individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." RCW 50.04.140(1)(c). Gulick argues that the commissioner erred under this prong when it overlooked evidence of independently established businesses and instead relied upon evidence that owner-operators did not have their own federal operating authority. Based on *Swanson Hay*, we disagree.

We traditionally rely upon a seven-factor test to determine whether an alleged employee was engaged in an independently established business:

- (1) [W]orker has separate office or place of business outside of the home;
- (2) worker has investment in the business;
- (3) worker provides equipment and supplies needed for the job;
- (4) the alleged employer fails to provide protection from risk of injury or non-payment;
- (5) worker works for others and has individual business cards;
- (6) worker is registered as independent business with state; and
- (7) worker

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is able to continue in business even if relationship with alleged employer is terminated.

Swanson Hay, 1 Wn. App. 2d at 216 (quoting *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 44, 917 P.2d 136 (1996)). The seventh factor is the most important. *Swanson Hay*, 1 Wn. App. 2d at 216. Further, in the trucking industry, whether the owner-operators have independent federal operating authority is relevant under the third prong. *Swanson Hay*, 1 Wn. App. 2d at 218.

Here, the commissioner determined that some factors weighed in favor of owner-operators having independently established businesses: their places of business were outside their homes, in their trucks (factor 1); they made substantial investments (factor 2); they provided equipment and supplies (factor 3); and some had registered sole proprietorships during the covered period (factor 6). But the remaining factors, including the most important factor, weighed against owner-operators having their own businesses: Gulick provided protection against nonpayment (factor 4), and Gulick forbade its owner-operators from working for other carriers without permission or competing with Gulick during or for five years following the agreement (factor 5).

Most importantly, none of the owner-operators had their own operating authority because they all chose to operate under Gulick's authority (factor 7). *See Swanson Hay*, 1 Wn. App. 2d at 218. The commissioner explained that "one of the unique characteristics about the trucking industry is the federal requirement that an owner-operator obtain an operating authority . . . in order to engage in the business of transporting goods in interstate commerce." AR at 1137. "[O]therwise, the owner-operator must operate under another carrier's operating authority." AR at 1137.

Gulick's argument that the commissioner should not have relied upon whether the owner-operators had independent operating authority fails. *See Swanson Hay*, 1 Wn. App. 2d at 218. The

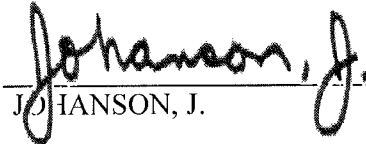
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commissioner did not overlook evidence favoring Gulick but made findings related to each prong and carefully weighed the evidence. *Swanson Hay* also rejected the out-of-state authority upon which Gulick relies. 1 Wn. App. 2d at 217. We affirm the commissioner's determination that Gulick failed to meet the third prong of the independent contractor exemption.¹⁰


CONCLUSION

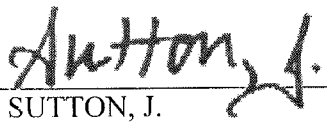
We affirm the ESD commissioner's decision that the FAAAA did not preempt the reclassification and that Gulick failed to establish the first and third prongs of the independent contractor exemption under RCW 50.04.140.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


JOHANSON, J.

We concur:


MAXA, A.C.J.


SUTTON, J.

¹⁰ Gulick argues that we should not defer to the commissioner. But no deference to the commissioner is required to affirm its decision as set forth above.

OGDEN MURPHY WALLACE, PLLC

February 22, 2018 - 2:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49646-1
Appellate Court Case Title: Gulick Trucking, Inc., Appellant v. State of Washington Employment Security Department, Respondent
Superior Court Case Number: 15-2-04271-1

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