

FILED
SUPREME COURT
STATE OF WASHINGTON
2/26/2018 2:25 PM
BY SUSAN L. CARLSON
CLERK

NO. 95246-9
NO. 95442-9

SUPREME COURT OF THE STATE OF WASHINGTON

SWANSON HAY COMPANY,
a Washington corporation,
HATFIELD ENTERPRIZES, INC.
a Washington corporation,
SYSTEM-TWT TRANSPORT,
a Washington corporation,

Appellants,

v.

STATE OF WASHINGTON
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

MACMILLAN-PIPER, INC.,
a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

RESPONDENT'S
RESPONSE TO
MOTION TO
CONSOLIDATE

I. INTRODUCTION

The Court is scheduled to rule on the *Swanson Hay Co.* petitions on March 6, 2018, the same day as the carriers' reply on this motion. The Department believes the *Swanson Hay Co.* matters will be ready for this

Court's disposition on March 6. There is no reason to wait for the *MacMillan-Piper* case to be ready for the Court's consideration, as counsel for System-TWT Transport, Hatfield Enterprises, and MacMillan-Piper requested in their February 23 letter. The Court should independently consider the petitions on their merits, and if it grants review in all of the cases, it can consider whether to consolidate them for hearing.

In any event, the cases are not worthy of the Court's review, consolidated or not. The motion to consolidate—filed before the Court has even considered the petitions for review—is an unfounded attempt to call attention to the cases. The Court can take note that the issues raised are largely related. If the Court grants review of the cases—which it should not do—the Respondent would not oppose consolidation, though it would present some challenges in evaluating the different arguments, evidence, and scope and standards of review in each case.

II. STATEMENT OF FACTS

The Employment Security Department audited hundreds of trucking companies (“carriers”) to determine whether they had adequately reported and paid all unemployment insurance premiums on their workers’ wages under the Employment Security Act, Title 50 RCW. The Department concluded that “owner-operators”—truck drivers who use their own trucking equipment to transport goods for the carriers under a “lease

agreement,” and whom the carriers deem to be independent contractors exempt from coverage—performed services for the carriers that is covered as “employment” under the Act.¹ Accordingly, the Department issued tax assessments for unpaid unemployment insurance premiums on those wages.

Some of the carriers appealed the assessments. In all but one case, administrative law judges upheld the tax assessments, but modified their amounts. The unsuccessful carriers then filed petitions for review with the Department’s Commissioner, who upheld the modified assessments. Ten of the carriers then filed petitions for judicial review of the Department’s final orders in superior court in seven different counties across the state, which all upheld the final orders.² The carriers appealed to all divisions of the Court of Appeals.

All three divisions of the Court of Appeals have now issued opinions involving five of the carriers, and all have upheld the Commissioner’s decisions. *Swanson Hay Co., et al. v. Emp’t Sec. Dep’t*, 1 Wn. App. 2d 174, 404 P.3d 517 (2017) (involving the consolidated appeals of three carriers);

¹ In some cases, the Department determined that drivers who had their own motor carrier authority were excepted from unemployment insurance coverage. And in other cases, the Department by stipulation removed from its assessments the owner-operators who were themselves employers, or who formed corporate entities, or who performed no work in Washington.

² Three carriers voluntarily dismissed their superior court appeals, and superior courts upheld the Commissioner’s orders upon seven carriers’ appeals. Those seven carriers each appealed to the Courts of Appeals, and two of them have since voluntarily dismissed their appeals.

MacMillan-Piper Inc. v. Emp't Sec. Dep't, No. 75534-0-I, 2017 WL 6594805 (Wash. Ct. App. Dec. 26, 2017) (unpublished); *Gulick Trucking, Inc. v. Emp't Sec. Dep't*, No. 49646-1-II, 2018 WL 509096 (Wash. Ct. App. Jan. 23, 2018) (unpublished). The five carriers each petitioned this Court for review (with the most recent petition filed by Gulick on February 22, 2018). Three of the carriers bring this motion (System-TWT Transport and Hatfield Enterprizes, Inc. of the *Swanson Hay Co.* case, and MacMillan-Piper, Inc. of the *MacMillan-Piper, Inc.* case). There are some differences among the issues in the cases, but they are largely related.³

III. ARGUMENT

Appellants' consolidation request is an attempt to blur the differences among the cases and draw undue attention to them to influence

³ Each case has its own administrative record, and the evidence and testimony differs. In certain cases, the parties stipulated to an evidentiary record for the tribunals' consideration. The question of whether work performed by owner-operators is exempt under the independent contractor exception in RCW 50.04.140 is based on the relationship of each carrier with its owner-operators. Each carrier's contract with owner-operators has terms that are required by federal law, but each also has different, company-specific terms that are not federally required. The administrative law judges and Commissioner referred extensively to the unique terms in making factual findings and applying the law to the facts.

In addition, the procedural posture of the cases differs, which affects the scope and standard of review. Each carrier argued that it established the independent contractor exception in RCW 50.04.140(1), which requires an employer's proof of three elements. In two cases pending before this Court, Hatfield and MacMillan, the Commissioner granted the Department's partial summary judgment motion with respect to the first element without reaching the other two elements. No other case resolved the independent contractor inquiry on summary judgment; they were instead decided upon evidence presented and/or stipulated by the parties. In some cases—e.g., Gulick—the Commissioner found that the carriers failed all three elements of RCW 50.04.140(1). And in the other cases—e.g., Swanson and System—the Commissioner found that the carrier failed the first and third elements. Some of the carriers raised arguments based on the auditors' conduct (e.g., Hatfield, System, and MacMillan), while others do not (e.g., Swanson and Gulick).

the Court's decision on whether to grant review. These cases each have their own evidentiary records; some were decided on only one element of the three-element independent contractor exception test, RCW 50.04.140(1), while others were decided on two elements or all three; some were decided on summary judgment as to the independent contractor issue, while others were not; and some carriers argue the audit conduct was arbitrary or capricious or violated their constitutional rights, while others do not. Whether substantial evidence supports the administrative orders' findings, and whether those findings support the unique conclusions, would be based on the individual records of the cases.

The fact that the Department audited hundreds of carriers for compliance with Title 50 RCW, and now there are only a handful of carriers who continue to raise some similar issues disputing their tax obligations, demonstrates that these cases are not worthy of this Court's review. But if the Court does grant review in the cases, the Department does not object to consolidation—despite the time and care in applying the differences in the arguments, evidence, findings and conclusions, and procedural histories.

IV. CONCLUSION

The Department respectfully asks the Court to deny review, but if review is granted, the Department does not oppose consolidation.

//

RESPECTFULLY SUBMITTED this 20th day of February, 2018.

ROBERT W. FERGUSON
Attorney General



Eric D. Peterson, WSBA No. 35555
Senior Assistant Attorney General
Leah E. Harris, WSBA No. 40815
Assistant Attorney General
800 Fifth Ave., Ste. 2000
Seattle, WA 98104-3188
206-464-7676
OID No. 91020

PROOF OF SERVICE

I, Dianne S. Erwin, certify that I served a copy of this document, **Respondent's Response to Motion to Consolidate**, on all parties or their counsel of record on the date below as follows:

Phil Talmadge
Thomas Fitzpatrick
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave SW, 3rd Fl. Ste C
Seattle, WA 98126-2138
Email: phil@tal-fitzlaw.com
tom@tal-fitzlaw.com

Aaron Riensche
Ogden Murphy Wallace, PLLC
901 Fifth Ave Ste 3500
Seattle, WA 98164-2008
Email: ariensche@omwlaw.com

Ryan R. McNeice
Becki Wheeler
McNeice Wheeler PLLC
P.O. Box 14758
11404 E Sprague Ave
Spokane Valley, WA 99214-0758
Email: ryan@mcneicelaw.com
becki@mcneicelaw.com

Laura Elizabeth Kruse
Betts Patterson & Mines PS
701 Pike St Ste 1400
Seattle, WA 98101-3927
Email: lkruse@bpmlaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26 day of February, 2018, at Olympia, Washington.


DIANNE S. ERWIN, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

February 26, 2018 - 2:25 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95442-9
Appellate Court Case Title: MacMillan-Piper, Inc. v. Department of Employment Security
Superior Court Case Number: 15-2-23444-7

The following documents have been uploaded:

- 954429_Answer_Reply_20180226142504SC796834_1471.pdf
This File Contains:
Answer/Reply - Answer to Motion
The Original File Name was AnsToMotConolidate.pdf

A copy of the uploaded files will be sent to:

- LeahH1@atg.wa.gov
- ariensche@omwlaw.com
- lalseaef@atg.wa.gov
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- tom@tal-fitzlaw.com

Comments:

Answer to Motion to Consolidate

Sender Name: Dianne Erwin - Email: DianneE1@atg.wa.gov

Filing on Behalf of: Eric Daniel Peterson - Email: ericp1@atg.wa.gov (Alternate Email: LALOLyEF@ATG.WA.GOV)

Address:
1125 Washington St. SE
PO Box 40110
Olympia, WA, 98504-0110
Phone: (360) 753-2261

Note: The Filing Id is 20180226142504SC796834