

NO. 66013-6

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

XENITH GROUP, INC.,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

III. STATEMENT OF THE ISSUES2

IV. STATEMENT OF THE FACTS.....3

 A. Department’s Premium Assessment against Xenith.....3

 B. Board Hearing and Testimony3

 C. Board Decision.....8

 D. Court Proceedings.....10

V. STANDARD OF REVIEW.....11

VI. ARGUMENT14

 A. One Who Contracts with Others Essentially for their
 Personal Labor is an “Employer” for Workers’
 Compensation, unless It Can Prove the Coverage
 Exception under RCW 51.08.19515

 B. Substantial Evidence Supports the Finding Xenith
 Contracted with Its Care Providers Essentially for Their
 Personal Labor18

 C. Xenith Failed to Prove the Six Elements for the
 Independent Contractor Coverage Exception under RCW
 51.08.195.....22

 D. *Novenson* “Control” and “Consent” Employment
 Relationship Test Does Not Override the Separate
 Statutory Coverage for Independent Contractors
 Providing Personal Labor31

VII. CONCLUSION36

TABLE OF AUTHORITIES

Cases

<i>Ball-Foster Glass Container Co. v. Giovanelli</i> , 163 Wn.2d 133, 177 P.3d 692 (2008).....	14
<i>Bennerstrom v. Dep't of Labor & Indus.</i> , 120 Wn. App. 853, 86 P.3d 826 (2004).....	9, 11, 31, 35
<i>Bolin v. Kitsap County</i> , 114 Wn.2d 70, 785 P.2d 805 (1990).....	34
<i>D'Amico v. Conguista</i> , 24 Wn.2d 674, 167 P.2d 157 (1946).....	31
<i>Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.</i> , 76 Wn. App. 600, 886 P.2d 1147 (1995).....	15, 20, 21, 34
<i>Dep't of Labor & Indus. v. Tacoma Yellow Cab Co.</i> , 31 Wn. App. 117, 639 P.2d 843 (1982).....	20
<i>Doty v. Town of S. Prairie</i> , 155 Wn.2d 527, 120 P.3d 941 (2005).....	13, 25
<i>Haller v. Dep't of Labor & Indus.</i> , 13 Wn.2d 164, 124 P.2d 559 (1942).....	18
<i>HJS Dev., Inc. v. Pierce County</i> , 148 Wn.2d 451, 61 P.3d 1141 (2003).....	25
<i>Jackson v. Harvey</i> , 72 Wn. App. 507, 864 P.2d 975 (1994).....	33
<i>Jamison v. Dep't of Labor & Indus.</i> , 65 Wn. App. 125, 827 P.2d 1085 (1992).....	31
<i>Johnson v. Tradewell Stores, Inc.</i> , 95 Wn.2d 739, 630 P.2d 441 (1981).....	13

<i>Lee’s Drywall Co. v. Dep’t of Labor & Indus.</i> , 141 Wn. App. 859, 173 P.3d 934 (2007).....	25, 27, 29
<i>Lloyd’s of Yakima Floor Center v. Dep’t of Labor & Indus.</i> , 33 Wn. App. 745, 662 P.2d 391 (1982).....	19, 21
<i>Malang v. Dep’t of Labor & Indus.</i> , 139 Wn. App. 677, 162 P.2d 450 (2007).....	passim
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996).....	33
<i>Meads v. Ray C. Roberts Post 969, Inc.</i> , 54 Wn. App. 486, 774 P.2d 49 (1989).....	33
<i>Minton v. Ralston Purina Co.</i> , 146 Wn.2d 385, 47 P.3d 556 (2002).....	32
<i>Norman v. Dep’t of Labor & Indus.</i> , 10 Wn.2d 180, 116 P.2d 360 (1941).....	passim
<i>Novenson v. Spokane Culvert & Fabricating Co.</i> , 91 Wn.2d 550, 588 P.2d 1174 (1979).....	passim
<i>Peter M. Black Real Estate Co. v. Dep’t of Labor & Indus.</i> , 70 Wn. App. 482, 854 P.2d 46 (1993).....	11, 12, 19, 21
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	12, 13
<i>R&G Probst v. Dep’t of Labor & Indus.</i> , 121 Wn. App. 288, 88 P.3d 413 (2004).....	13
<i>Rivard v. State</i> , 168 Wn.2d 775, 231 P.3d 186 (2010).....	33
<i>Ruse v. Dep’t of Labor & Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999).....	12
<i>Silliman v. Argus Servs., Inc.</i> , 105 Wn. Ap. 232, 19 P.3d 428 (2001).....	16, 18

<i>Tapper v. Employment Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	12
<i>Univ. of Wash. v. Marengo</i> , 122 Wn. App. 798, 95 P.3d 787 (2004).....	25
<i>W. Ports Transp., Inc. v. Employment Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	13
<i>Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	12
<i>White v. Dep't of Labor & Indus.</i> , 48 Wn.2d 470, 294 P.2d 650 (1956).....	passim

State Statutes

Washington Industrial Insurance Act, Title 51 RCW

RCW Title 51	2, 13, 14
RCW 51.04.010	32
RCW 51.04.060	15, 30
RCW 51.08.070	passim
RCW 51.08.080	14
RCW 51.08.180	passim
RCW 51.08.181	17
RCW 51.08.195	passim
RCW 51.12.010	13
RCW 51.12.020(1).....	35
RCW 51.12.070	27

RCW 51.12.070(3).....	27
RCW 51.14.010	14
RCW 51.32.010	32
RCW 51.48.131	11, 12, 25
RCW 51.52.115	12

Other Statutes

RCW 18.27	17
RCW 19.02.050	7
RCW 19.28	17
RCW 34.05	11
RCW 34.05.570(1)(a)	13
RCW 34.05.570(3)(e)	13

Federal Statutes

26 U.S.C. § 280A(a)	29
26 U.S.C. § 280A(c)(1).....	29

Court Rules

RAP 10.3(h)	2
-------------------	---

Administrative Regulations

WAC 458-20-101(6)(c)	7
----------------------------	---

Other Authorities

Laws of 1937, ch. 211, § 2..... 16

Laws of 1939, ch. 41, § 2..... 16

Laws of 1991, ch. 102, § 4..... 24

Laws of 2008, ch. 102, § 4..... 24

1991 Final Legislative Report, ESSB 5837 at 259 24

Appendices

- Appendix A: Copies of Board Decision and Superior Court Decision
- Appendix B: RCW 51.08.070, 180, and 195
- Appendix C: 1991 Final Legislative Report

I. INTRODUCTION

This is judicial review of the Board of Industrial Insurance Appeals' decision that upheld the Department of Labor & Industries' workers' compensation premium assessment. One who contracts with independent contractors essentially for their personal labor is an "employer" responsible for their premiums, unless it can prove all six elements for the coverage exception in RCW 51.08.195. The coverage exception requires proof, for example, that the contractors had accounts with the Department of Revenue and unified business identifier (UBI) numbers on the effective date or within reasonable time of their contracts.

Substantial evidence supports the Board's finding that Xenith Group, a homecare service company, contracted with its care providers essentially for their personal labor and was thus their "employer." Xenith contracted with the care providers to personally assist developmentally disabled clients, gave the care providers monthly paychecks, derived financial gains from the providers' hourly labor, and failed to prove the coverage exception. Realities, not the parties' characterization, determine coverage, and contractual waiver of statutory rights is "void." The superior court incorrectly applied the "control" and "consent" employment relationship test to override the statutory independent contractor coverage. The Court should reverse the superior court and affirm the Board decision.

II. ASSIGNMENTS OF ERROR¹

1. The superior court erred in entering Findings of Fact, Conclusions of Law and Judgment reversing the Board's decision. CP 21-26.
2. The superior court erred in denying the Department's motion for reconsideration. CP 35.

III. STATEMENT OF THE ISSUES

1. One who contracts with others essentially for their personal labor is an "employer," unless it can prove the coverage exception in RCW 51.08.195. Does substantial evidence support the finding that the essence of Xenith's contracts with its care providers was their personal labor, when the providers personally assisted disabled clients and received monthly pay from Xenith, and Xenith derived financial gains based on their hourly labor?
2. The coverage exception of RCW 51.08.195 requires proof of six elements. Did Xenith fail to prove the coverage exception because it failed to show, among other things, that its care providers had established accounts with the Department of Revenue and received UBI numbers on the effective date or within reasonable time of their contracts?
3. Title 51 RCW rejects the common law "employee" and "independent contractor" distinction and covers independent contractors who provide personal labor. Does the "control" and "consent" employment relationship test, developed in the employer immunity context based in part on the common law master-servant relationship, override the independent contractor statutory coverage?

¹ This is a judicial review case where Xenith (respondent) must assign error to the Board's findings and conclusions it challenges. See RAP 10.3(h); RCW 51.48.131 (appeal from a Board decision in a premium assessment case is governed by the administrative procedure act). "[A]ssignment of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

IV. STATEMENT OF THE FACTS

A. Department's Premium Assessment against Xenith

In August 2006, the Department received a workers' compensation claim that identified Xenith as the employer. Petersen 121; Wilcox 136.² Because Xenith had no workers' compensation account, the Department conducted an audit and issued an order against the company assessing unpaid premiums, interest, and penalty for the last three quarters of 2006 and the first quarter of 2007. Wilcox 136; Certified Appeal Board Record (BR) 46-47; Finding of Fact (FF) 6.³

After Xenith's protest, the Department re-assessed the premiums, interest, and penalty at \$63,320.21 in total for the fourth quarter of 2005 through the first quarter of 2007. Wilcox 141-142; BR Ex. 4. Xenith appealed the Department's assessment order to the Board. BR 52-54.

B. Board Hearing and Testimony

At the Board hearing, Xenith presented the testimony of its owner, Brad Petersen, and one of its care providers, Kadie England. The Department presented the testimony of its auditor, Lynda Wilcox.

² This brief refers to the testimony taken at the Board by the surname of the witness followed by the page number of the transcript where the testimony is found. The transcript is located in the Certified Appeal Board Record.

³ Findings of Fact refer to those made by the Board in its decision (BR 2-8). Copies of the Board decision and the superior court decision are attached as Appendix A.

Petersen and England testified about Xenith, its relationship with its care providers, and Petersen's new business Zenith Services, as follows.

Petersen formed Xenith Group around 2004 as its sole officer. Petersen 75, 88-89, 129. Xenith contracted with the Department of Social & Health Services (DSHS) Division of Developmental Disability to refer care providers to the homes of developmentally disabled persons qualified for publicly-funded care. Petersen 67-68, 89; FF 4. Xenith contracted with about 80 care providers to personally assist care qualified individuals (clients). Petersen 67-68, 70; England 7, 40; Board Exhibit (BR Ex.) 1 at 2; FF 4. Xenith had to conduct background checks on the care providers to ensure they had no history of felony or other offense that would disqualify them from providing care to DSHS clients. Petersen 68.

Petersen met with each of Xenith's care providers and asked them to sign a document ("Important Tax Information") that stated they were not Xenith's employees and were responsible for their own taxes and record keeping. Petersen 85-86; England 20, 25-26; BR Ex. 1 at 1; FF 6. The document said, among other things, "Xenith Group is not your employer. You ARE self-employed!" BR Ex. 1. Xenith also had them sign another document ("Acceptance of Responsibility Acknowledgment of Risk and Release") that stated, among other things, that they were not employees but were independent contractors:

1. I am not an employee of Xenith Group, Inc.
2. As an independent contractor, I will be entering in contract agreements to provide services either to an adult with developmental disabilities or to families of developmentally disabled children.

BR Ex. 1 at 2; Petersen 85-86; England 20, 25-26; FF 6. England testified she fully understood she was not Xenith's employee. England 31.

Xenith's care providers met with the families of qualified clients and, if they were a good match, scheduled the dates and the times for their services. England 9; FF 5. The care providers personally assisted these clients in bathing, dressing, cooking, shopping, general housekeeping, companionship, errands, and movements. England 24; FF 5. The clients provided any tools necessary for the care such as gloves. England 22. If a client did not like a particular care provider, the client could decline the provider's service and ask Xenith for another provider. England 17; FF 4. But this would not lead to the termination of the replaced care provider's contract with Xenith. England 22.

On a monthly basis, the care providers reported to Xenith the hours they worked in the prior month, and Xenith gave them paychecks, paying them about \$10 per hour for their reported work. England 14; Petersen 79-80, 92. Petersen testified DSHS mandated this hourly pay rate. Petersen 91. Meanwhile, Xenith reported the care providers' monthly

hours to DSHS, which then paid Xenith for these hours about \$15 per hour. Petersen 79-80, 92; FF 6. Xenith retained the difference between what it collected from DSHS and what it paid to its care providers – about \$5 per each hour worked. Petersen 80, 92.

Both Petersen and England insisted Xenith exercised no control over how the care providers worked and had no authority to fire them. Petersen 78-79, 83; England 16; FF 7. However, Petersen acknowledged that under its DSHS contract, Xenith was required to report to the agency any suspected abuse or neglect by its care providers. Petersen 97, 99, 113.

England testified that, outside of her contract with Xenith and DSHS qualified care, she sometimes offered care to some of her clients and got paid directly by those clients for the extra services. England 43-45. She testified she had a separate office on her property outside her home, where she kept her time sheets, client contact information, DSHS case manager contact information, and DSHS care assessment, and filed a tax return with the Internal Revenue Service (IRS) as a business for the year 2006. England 48-50. She said, “I was self-employed; I handled my own business records.” England 18. But she did not testify whether her records included all items of income and expenses, including those from her non-Xenith work, or whether she was maintaining such records on the effective date of her Xenith contract.

Petersen acknowledged that until December 2006, most of Xenith's care providers did not have UBI numbers:

Q: And up until about December of 2006, most of the providers did not have those UBI numbers?

A: That might be true. I didn't really - - I wasn't micromanaging then, and so . . .

Petersen 112. He explained that because one need not have a business license or UBI number to provide care, he "didn't feel that [he] had to impose that on people." Petersen 111. In December 2006, following the Department's audit, Xenith started asking its care providers to obtain a UBI number. Petersen 111-112. England testified she obtained a "nonreporting business license" from the Department of Revenue in 2006, after she started working with Xenith. England 32. But she did not recall and did not testify how soon after she contracted with Xenith she obtained the license. England 32. Asked whether she received a UBI number, she said, "I don't know what a UBI number is." England 32.⁴

⁴ The Department of Licensing administers the "UBI program," in which some state agencies, including the Departments of Labor & Industries and Revenue, are statutorily required to participate. WAC 458-20-101(6)(c); RCW 19.02.050. The Department of Licensing website directs those interested in starting a business to Master Business Application to, among other things, obtain a UBI number. *See* DOL, Frequently Asked Questions: Business Licensing, What is a UBI (Unified Business Identifier) number?, available at <http://www.dol.wa.gov/business/faqlicense.html>. The Department of Revenue website directs those wishing to register with the agency to file a Master Business Application with the Department of Licensing and states that once registered, one will receive a business license and a UBI number from the Department of Licensing. *See* Department of Revenue, Doing Business, Register my business, available at <http://dor.wa.gov/content/doingbusiness/registermybusiness>.

Petersen closed Xenith in January 2007 and started a new business Zenith Services in February 2007. Petersen 64, 106-107. He explained DSHS “no longer wanted to use an independent contractor model” and would no longer contract with Xenith, unless Xenith “decided to switch business practices.” Petersen 106. As to the change, Petersen said, “Well, significantly, we’ve become an employer.” Petersen 113. He explained Zenith Services supervises its care providers and does employee evaluations. Petersen 81. Zenith Services gives its care providers W-2 forms, while Xenith gave them 1099 forms. England 60. In January 2007, Petersen sent a letter to the care providers notifying them Xenith was cancelling their contracts but Zenith Services was offering them an “employee” position. BR Ex. 2; England 26-27.

England became a Zenith Services employee. England 7. Zenith Services care providers still provide one-on-one personal care to DSHS clients as they did with Xenith. England 61-63. Also, the methods of pay (care providers reporting their hours to and receiving paychecks from Xenith) remained the same with Zenith Services. Petersen 107-108.

C. Board Decision

The industrial appeals judge of the Board issued a proposed decision reversing the Department’s premium assessment order. BR 39-44. The Board judge applied, as dispositive, the “control” and “consent”

employment relationship test set forth by the Supreme Court in *Novenson* and followed by this Court in *Bennerstrom*. BR 42-44; *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 588 P.2d 1174 (1979); *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 86 P.3d 826 (2004). The Board judge concluded Xenith was not an “employer” under this test and was not subject to premiums. BR 42-43. The Department petitioned the 3-member Board for review, arguing the Board judge applied an incorrect test in precluding coverage. BR 22-31.

The Board granted review and issued a decision, rejecting the proposed decision and affirming the Department’s premium assessment. BR 2-8. The Board concluded the *Novenson* test does not preclude statutory independent contractor coverage. BR 3. The Board applied the statutory language defining “worker” to conclude Xenith was “employer” of its care providers, because Xenith contracted with them essentially for their personal labor. BR 3-4; FF 5; Conclusion of Law (CL) 3. The Board then noted the coverage exception in RCW 51.08.195 requires proving all of its six subsections and found Xenith failed to do so, especially given “the strict construction required to exempt coverage.” BR 4-6; CL 4.

The Board pointed out Xenith failed to show that its care providers had accounts with the Department of Revenue and UBI numbers and that they were “maintaining separate records that reflect all items and expenses

of their businesses,” within the meaning of subsections (5) and (6). BR 5; FF 8. The Board also found Xenith failed to prove its care providers “maintained completely separate places of business during the audit period” to satisfy subsection (3). FF 8. The Board further concluded Xenith failed to prove its contractors were free from control or direction under subsection (1). BR 6; FF 7. Although Xenith “chose not to” exercise control over its providers’ work, “Xenith’s responsibility to refer capable and compassionate care providers necessitates some element of control in the firm’s contracts with the care providers.” BR 6; FF 7.

D. Court Proceedings

King County Superior Court reversed the Board. CP 21-26. The court upheld the Board’s findings about the procedural aspects of the Department’s premium assessment and Xenith’s appeal (FF 1, 2) as well as undisputed facts about Xenith’s contract with DSHS and contracts with its care providers (FF 4, 6). CP 24 (conclusion of law 2.3). The superior court also upheld the Board’s finding about the undisputed methods of payment for the care providers’ work, as well as the finding there “is no evidence that the care providers were maintaining records regarding their own businesses independent of their dealings with Xenith.” CP 24 (conclusion of law 2.3); FF 6. However, the court rejected the Board’s finding about the essence of Xenith’s contracts with its care providers,

finding instead that “the essence of the referral contracts is not the ‘personal labor’ provided to Qualified Individuals by Care Providers. The contracts addresses [sic] administrative services Xenith provides to DSHS and Care Providers.” CP 24 (conclusion of law 2.6).

The superior court also cited *Novenson* and *Bennerstrom* and stated this case “comes down, in part, to the legal question as to whether the factors under RCW 51.08.195 are relevant if the *Bennerstrom* test [of common law based employment relationship] is not met. Here, that test was not met.” CP 24-25 (conclusion of law 2.7). The court then stated if RCW 51.08.195 applied, the evidence did not support the Board’s findings on it. CP 26. “For example, some of the contractors did not have UBI numbers, however, it was undisputed evidence that such numbers were not required by any agency at the time relevant; not even Xenith had one.” CP 26. However, Xenith did have a UBI number. BR 49, 52. The court denied reconsideration. CP 35. This appeal follows.

V. STANDARD OF REVIEW

The administrative procedure act (APA), chapter 34.05 RCW, governs judicial review of the Board decision in this workers’ compensation premium assessment case. RCW 51.48.131; *Peter M. Black Real Estate Co. v. Dep’t of Labor & Indus.*, 70 Wn. App. 482, 487, 854 P.2d 46 (1993). This Court “sits in the same position as the superior

court” and reviews the Board decision, applying the APA standards “directly to the record before the agency.” *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (citations omitted).

In reversing the Board, the superior court made its own findings and conclusions. CP 22-26. However, under the APA, the superior court acts “as an appellate court.” *Waste Mgmt.*, 123 Wn.2d at 633. Unless the superior court takes new evidence or addresses new issues meeting the APA exceptions, its findings are “not relevant” in appellate review. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 100 n.10, 11 P.3d 726 (2000) (citations omitted). Because the superior court did not take new evidence or address new issues, this Court reviews the Board decision “without consideration of the findings and conclusions of the superior court.” *Waste Mgmt.*, 123 Wn.2d at 633. The APA review standards applicable in this *premium assessment* case under RCW 51.48.131 contrast with those in *benefit eligibility* cases governed by RCW 51.52.115, where the superior court reviews the Board decision “de novo,” and an appellate court reviews the superior court’s findings. *See Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

At the Board, Xenith “had the burden of proof to show that the taxes assessed were incorrect.” *Peter M. Black Real Estate*, 70 Wn. App. at 486-487; RCW 51.48.131. Similarly in this Court, the “burden of

demonstrating the invalidity of [the Board decision] is on the party asserting invalidity”: *Xenith. W. Ports Transp., Inc. v. Employment Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002); RCW 34.05.570(1)(a).

To the extent Xenith assigns error to any of the Board’s factual findings, this Court must uphold them if supported by “substantial evidence, that is, evidence sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R&G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004) (citation omitted); RCW 34.05.570(3)(e). In reviewing the findings, this Court may not reweigh evidence. *W. Ports*, 110 Wn. App. at 449. To the extent Xenith does not assign error to the Board’s findings, the unchallenged findings are “verities on appeal.” *Postema*, 142 Wn.2d at 100 (citations omitted).

This case presents issues of statutory interpretation as to the meanings of “employer” and “worker” in RCW 51.08.070 and .180 and the coverage exception in .195. Although statutory interpretation is an issue of law, the Board’s interpretation of Title 51 RCW provisions, while not binding, is “entitled to great deference.” *Doty v. Town of S. Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005) (citation omitted). The act is remedial, and “a liberal construction is not only appropriate but mandatory.” *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981); RCW 51.12.010 (act “shall be liberally construed”).

Any ambiguity must be resolved “in favor of compensation for the injured worker.” *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 142, 177 P.3d 692 (2008) (citation omitted).

VI. ARGUMENT

At issue in this premium assessment case is the correctness of the Board’s decision that Xenith was an “employer” of its care providers for workers’ compensation. The industrial insurance act, Title 51 RCW, requires every “employer” to secure workers’ compensation by insuring with the state (through premiums) or self-insuring. RCW 51.14.010. Although the common law distinguishes “employees” and “independent contractors,” the act rejected this distinction in 1937 to cover independent contractors who provide personal labor. *See Norman v. Dep’t of Labor & Indus.*, 10 Wn.2d 180, 183, 116 P.2d 360 (1941). Under the act, Xenith was “employer” of its care providers, if it contracted with them essentially for their personal labor, unless Xenith proved the coverage exception in RCW 51.08.195. *See* RCW 51.08.070, .080, .195; *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 687-688, 162 P.2d 450 (2007).⁵

Substantial evidence supports the Board’s finding that the essence of Xenith’s contracts with its care providers was their personal labor. FF 5; CL 3. Xenith contracted with them to personally assist disabled clients,

⁵ Appendix B sets forth verbatim RCW 51.08.070, .180, and .195.

gave them monthly paychecks, and derived financial gains for their hourly labor. Although Xenith claimed it was a mere referral agency, the “realities of the situation,” not “the characterization of the parties’ relationship,” govern statutory coverage. *Dana’s Housekeeping, Inc. v. Dep’t of Labor & Indus.*, 76 Wn. App. 600, 607-608, 886 P.2d 1147 (1995). The realities were that the care providers provided nothing but their personal labor, from which Xenith derived benefit.

Further, the Board correctly concluded Xenith failed to prove each of the six elements required for the coverage exception under RCW 51.08.195 and was thus “employer” of its care providers. The care providers’ agreement with Xenith that Xenith was not their “employer” cannot remove Xenith’s responsibility under the act, which prohibits contractual avoidance or waiver of statutory duties or rights. RCW 51.04.060. Finally, the “control” and “consent” employment relationship test under *Novenson* derives in part from the common law master-servant relationship and was developed in the employer immunity context. It does not override the statutory independent contractor coverage here.

A. One Who Contracts with Others Essentially for their Personal Labor is an “Employer” for Workers’ Compensation, unless It Can Prove the Coverage Exception under RCW 51.08.195

The “employer” under the act is “broadly drafted to include those who hire independent contractors.” *Malang*, 139 Wn. App. at 687. The

act defines “employer” to mean any person or entity “all 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). The act defines “worker” to include “every person in this state who is engaged in the employment of *or who is working under an independent contract, the essence of which is his or her personal labor* for an employer.” RCW 51.08.180 (emphasis added).

The italicized language above in the current definitions of “worker” and “employer” (referring to independent contract) derives from 1937 and 1939 amendments to these definitions. Laws of 1937, ch. 211, § 2 (RCW 51.08.180); Laws of 1939, ch. 41, § 2 (RCW 51.08.070). Under the old definitions, “an independent contractor could not receive aid from the industrial insurance fund.” *Norman*, 10 Wn.2d at 183. After the 1937 amendment, “such person is entitled to receive compensation if the essence of the work he is performing is his personal labor.” *Id.*

In amending the definitions, the “legislative concern was that workers could be denied coverage by employers who wanted to avoid paying premiums by calling their employees independent contractors.” *Silliman v. Argus Servs., Inc.*, 105 Wn. Ap. 232, 236, 19 P.3d 428 (2001). The Legislature intended “to broaden the industrial insurance act, and

bring under its protection independent contractors whose personal efforts constitute the main essential in accomplishing the objects of the employment, and this, regardless of who employed or contracted for the work.” *Norman*, 10 Wn.2d at 184.

Thus, when independent contractors’ coverage is at issue, courts have consistently applied the test: “whether the essence of a particular independent contract is the personal labor of the independent contractors, within the purview” of the act. *E.g., White v. Dep’t of Labor & Indus.*, 48 Wn.2d 470, 471, 294 P.2d 650 (1956). If the essence of the contract is the contractors’ personal labor, they are covered “workers,” and their contracting entity “employer,” unless the coverage exception under RCW 51.08.195 applies. *Malang*, 139 Wn. App. at 688; RCW 51.08.070, .180.⁶

As shown below, substantial evidence supports the Board’s finding that the essence of Xenith’s contracts with its care providers was their personal labor, and the Board correctly concluded Xenith failed to prove the coverage exception under RCW 51.08.195. BR 3-5; FF 5-8; CL 3, 4.

⁶ RCW 51.08.181 provides a parallel exception in the case of construction contracts that require contractor registration under chapter 18.27 RCW or electrical contractor license under chapter 19.28 RCW. *See* RCW 51.08.070, .180. This case does not involve construction contracts.

B. Substantial Evidence Supports the Finding Xenith Contracted with Its Care Providers Essentially for Their Personal Labor

The “essence” of a contract means the “vital sine qua non, the very heart and soul” of the contract. *Haller v. Dep’t of Labor & Indus.*, 13 Wn.2d 164, 168, 124 P.2d 559 (1942) (essence of a contract was not personal labor when the parties must have known the contractor needed to employ another to perform work). “Personal labor” means “labor personal to the independent contractor.” *Silliman*, 105 Wn. App. at 238 (essence of a contract was not personal labor when the contractor employed others to do all of its contracted work).

In determining whether the essence of an independent contract is personal labor, courts examine “the contract itself, the work to be performed, the parties’ situation, and any other relevant circumstances.” *Malang*, 139 Wn. App. at 688. The Supreme Court in *White* delineated three circumstances where a contract is not for personal labor. A contract is not for personal labor if the independent contractor:

- (1) must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract;
- (2) obviously could not perform the contract without assistance; or
- (3) of necessity or choice employs others to do all or part of the work he has contracted to perform.

White, 48 Wn.2d at 474.

For example, the *White* Court held the essence of a contract was not personal labor, when the contract was for the contractors to move their own “expensive” donkey engine onto a timber tract to yard out and cold deck logs, and they had to employ another to do part of the work. *White*, 48 Wn.2d at 476-477. However, as to the first prong of the *White* test, this Court has held carpet layers’ driving their own trucks to transport floor covering materials to job sites did not preclude the finding that their personal labor, not the trucks, was the essence (“primary object”) of their contracts with a carpet retailer. *Lloyd’s of Yakima Floor Center v. Dep’t of Labor & Indus.*, 33 Wn. App. 745, 751-752, 662 P.2d 391 (1982).

As to the second and third prongs of *White*, this Court upheld the finding that the essence of a real estate company’s contracts with real estate agents was the agents’ personal labor, despite the agents’ hiring others to perform “ancillary tasks” (property repairs, inspections, title searches), because the agents did not delegate their contract duties to obtain and sell listings. *Peter M. Black Real Estate*, 70 Wn. App. at 488-490. Similarly, this Court upheld the finding that the essence of a taxi company’s contracts with cabdrivers, who leased taxicabs for a flat fee and a set rate per mile of use, was the drivers’ personal labor, despite the leases allowing them to hire qualified employees to drive, because the

“realities of the situation,” not “symbolic or meaningless acts,” showed they contributed “nothing to the contract except their personal labor.” *Dep’t of Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 123-125, 639 P.2d 843 (1982).

Personal labor must be “for an employer” under the definition of “worker” in RCW 51.08.180, but this language includes both “direct labor” for the employer and labor for the employer’s “benefit.” *Dana’s Housekeeping*, 76 Wn. App. at 608. In *Dana’s Housekeeping*, this Court upheld the finding that the essence of a homemaking service company’s contracts with its housecleaners it sends to its clients’ homes was their personal labor. *Id.* at 607-609. This Court rejected the company’s argument that the housecleaners’ labor was *for the customers*. *Id.* at 608. This Court held if “the realities demonstrate the labor is for [the company’s] benefit, the existence of a third party customer does not place the worker outside the scope of industrial insurance coverage.” *Id.* (citation omitted). This Court also rejected the argument that the essence of the contracts was “an agreement to accept referrals and share a fee”; this Court held the essence concerns “the *work* under the independent contract, not the characterization of the parties’ relationship.” *Id.* at 607.

The above cases show “the realities of the situation rather than the technical requirements of the test” determine “whether the contractor is

primarily providing personal labor.” *Peter M. Black Real Estate*, 70 Wn. App. at 488. These cases also recognize that the act “is to be liberally interpreted, and that the legislature has clearly intended to broaden the definition of ‘worker.’” *Lloyd’s*, 33 Wn. App. at 749.

The Board correctly applied the above principles to the facts in this case to find the essence of Xenith’s contracts with its care providers was their personal labor. BR 3-4; FF 5; CL 3. Xenith contracted with the care providers to personally assist developmentally disabled clients, and the providers assisted these clients in bathing, dressing, cooking, shopping, general housekeeping, companionship, errands, and movements. Petersen 67-68, 70; England 7, 24, 40; FF 4, 5. England testified the care providers gave “one-on-one” care. England 61. As the Board found, the “nature” of the contracts was “nothing but [their] personal labor.” BR 3; FF 5.

The care providers’ personal labor was *for Xenith*, because their personal labor was for Xenith’s benefit. Xenith reported the hours the care providers worked to DSHS to collect about \$15 per each hour of their work, and after paying the care providers about \$10 per hour, retained the difference of about \$5 per each hour of their work as business profits. England 14; Petersen 80, 92; FF 6. Regardless of Xenith’s mere referral characterization, the realities were that the care providers’ personal labor was for Xenith’s “benefit.” *Dana’s Housekeeping*, 76 Wn. App. at 608.

Further, none of the three exceptions under the *White* test applies here. The first prong does not apply, because the care providers did not have to own or supply machinery or equipment for the work; the clients provided tools such as gloves. *England* 22. Nor do the second and third prongs apply, because there is no evidence the care providers required any assistance from or hired others in performing their contractual care.

These facts are sufficient to persuade a fair-minded person that the essence of Xenith's contracts with its care providers was their personal labor within the meaning of RCW 51.08.070 and .180. The evidence was sufficient to show the care providers' personal efforts constituted "the main essential in accomplishing the objects" of their contracts. *Norman*, 10 Wn.2d at 184. Thus, substantial evidence supports the Board's finding and conclusion to this effect. FF 5; CL 3.

Because the essence of Xenith's contracts with its care providers was their personal labor, Xenith is responsible for workers' compensation premiums as their "employer," unless it proves the coverage exception under RCW 51.08.195. As shown below, Xenith failed to do so.

C. Xenith Failed to Prove the Six Elements for the Independent Contractor Coverage Exception under RCW 51.08.195

"RCW 51.08.195 creates an exception to the rule that independent contractors for personal labor are 'workers.'" *Malang*, 139 Wn. App. at

688. The statute provides that as an exception to the definitions of “employer” and “worker,” services performed for remuneration do not constitute covered employment if the facts in six subsections are shown:

As an exception to the definition of “employer” under RCW 51.08.070 and the definition of “worker” under RCW 51.08.180, services performed by an individual for remuneration shall not constitute the employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; *and*
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; *and*
- (3) The 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, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; *and*
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; *and*

- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; *and*
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

RCW 51.08.195 (emphasis added).

The Legislature enacted RCW 51.08.195 in 1991. Laws of 1991, ch. 102, § 4. Legislative history shows intent to eliminate confusion as to “whether there is an employer/employee relationship or whether the service is being provided by an independent contractor.” *See* 1991 Final Legislative Report, ESSB 5837 at 259. The Legislature enacted RCW 51.08.195 to provide a “six-part test that determines when services are performed by an independent contractor, and that no employer-worker relationship exists.” 1991 Final Legislative Report, ESSB 5837 at 259.⁷

Xenith, seeking to obtain the benefit of the coverage exception to avoid premiums, had the burden of proving the exception. *See* RCW

⁷ A copy of the 1991 final legislative report is attached as Appendix C. RCW 51.08.195 was amended in 2008, but the only change was from the language “As a separate alternative” to “As an exception.” Laws of 2008, ch. 102, § 4.

51.48.131; *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wn. App. 859, 868, 173 P.3d 934 (2007) (in premium assessment case, burden was on the prime contractor to show exception to prime contractor liability for premiums owed by its subcontractor). Xenith has to prove each of the six subsections that are connected with the word "and." BR 5; *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 473 n.94, 61 P.3d 1141 (2003) (statutory phrases separated by "and" are generally in the "conjunctive"). Thus, if Xenith failed to show "any one of these factors," the coverage exception does not apply, and its contractors were "workers" and Xenith their "employer." *Malang*, 139 Wn. App. at 689.

The six subsections as a whole contemplate that the contractors operate as an established "business" with state registration. See RCW 51.08.195. This reflects legislative intent that only a true, established business can be excluded from coverage as an "independent contractor." If there is any ambiguity, this Court must "construe exceptions to coverage narrowly" in favor of coverage. *Univ. of Wash. v. Marengo*, 122 Wn. App. 798, 804, 95 P.3d 787 (2004); RCW 51.12.010. Also, the Board's interpretation is "entitled to great deference." *Doty*, 155 Wn.2d at 537.

Here, Xenith failed to prove most, if not all, of the subsections, and subsections (5) and (6) are good examples. BR 5-6; FF 7, 8. Xenith failed to prove subsection (5) because it failed to show that on the effective date

or within reasonable time of their contracts, its care providers had “established” an account with the Department of Revenue *and* had “registered for *and* received” a UBI number. RCW 51.08.195(5) (emphasis added). Xenith did not produce copies of any of its care providers’ Department of Revenue accounts or UBI numbers. Xenith’s owner Petersen admitted not all of the company’s care providers had a UBI number, stating a UBI number was not required for them to perform work, and he did not want to impose the requirement. Petersen 111.

Xenith’s care provider England testified she did not know “what a UBI number is.” England 32. Although she testified she registered with the Department of Revenue after she began working with Xenith, she did not recall when she did the registration. England 32. There is no evidence as to when any of Xenith’s care providers received a UBI number (assuming they did receive one). Xenith began requiring its care providers to obtain a UBI number in December 2006 after the Department’s audit, shortly before Petersen closed Xenith in January 2007 and created Zenith Services in February 2007. Petersen 111-112. Under these facts, the Board correctly concluded Xenith failed to prove subsection (5), thus failing to prove the coverage exception under RCW 51.08.195. BR 4.

Xenith also failed to prove subsection (6), because it failed to show its care providers, on the effective date of their contracts, were

“maintaining a separate set of books or records that [reflected] all items of income and expenses of the business which [they were] conducting.” RCW 51.08.195(6). As the Board pointed out, this provision requires “meticulous” record keeping reflecting all items of income and expenses of the contractors’ businesses “as a whole,” not just their dealings with Xenith. BR 5. This interpretation is consistent with that adopted by this Court for an almost identical language in RCW 51.12.070, an exception to primary contractor liability for subcontractor premiums. *See Lee’s*, 141 Wn. App. at 870-871. This statute, like RCW 51.08.195, requires “the subcontractor maintains a separate set of books or records that reflect all items of income and expenses of the business.” RCW 51.12.070(3). This Court held the prime contractor did not meet this requirement where the contractor showed only that its subcontractor kept records of its dealings with the prime contractor, without “further evidence that [the sub] maintained records of all income, including income from sources other than [the prime], or any business expenses.” *Lee’s*, 141 Wn. App. at 871.

Here, England testified she handled her “own business records.” England 18. She pointed out her time sheets to Xenith, client contact information, DSHS case manager contact information, and DSHS care assessment. England 49. However, she did not identify or produce copies of any other items of her business income or *expenses*, including those

from her non-Xenith work for which she received direct payment from her clients. England 43-45. Nor did she testify she was maintaining any of her business records on the effective date of her contract with Xenith. There is no evidence other care providers were maintaining a separate record of business income or expenses at any time. Under these facts, the Board correctly concluded Xenith failed to meet subsection (6). BR 5.

Xenith may point out its care providers agreed in their contracts with Xenith to handle record-keeping and taxes as a self-employed entity. BR Ex. 1 at 1. However, subsection (6) requires that each contracted individual “is maintaining” separate business records on “the effective date of the contract of service.” RCW 51.08.195(6). It does not state the individual is merely responsible for doing so under a contract.

The Board also concluded that Xenith failed to meet subsection (3). FF 8. This subsection requires that the contractors either were “customarily engaged in an independently established trade, occupation, profession, or business” of the same nature involved in their contracts or had “a principal place of business for the business [they were] conducting that is eligible for a business deduction for federal income tax purposes.” RCW 51.08.195(3). Although England testified she engaged in care provider services before she contracted with Xenith, she testified she did not have a business license for it. England 7, 32. There is no evidence

England or any other care providers “customarily” engaged in care provider work as an “independently established” occupation or business.

Further, although England testified she had a separate office on her property outside her home, England 49, there is no evidence her office was eligible for a business deduction for IRS purposes. As this Court noted in *Lee’s* in interpreting a similar language, “a taxpayer is not eligible for a business deduction for use of a dwelling unit that the taxpayer also uses as a residence.” *Lee’s*, 141 Wn. App. at 868; 26 U.S.C. § 280A(a). “An exception allows a deduction to the extent it is allocable to a portion of the dwelling unit that the taxpayer uses exclusively as the principal place of business on a regular basis.” *Lee’s*, 141 Wn. App. at 868; 26 U.S.C. § 280A(c)(1). Xenith produced no evidence to prove England’s office or any other contractors’ offices (assuming they had separate offices) were “eligible for a business deduction for federal income tax purposes.” Thus, the Board correctly concluded Xenith failed to prove subsection (3).

Finally, the Board also concluded that Xenith failed to meet subsection (1). BR 6; FF 7. This subsection requires that the contractors have been and will be free from control or direction over their work “both under the contract of service and in fact.” RCW 51.08.195(1).

Petersen and England insisted Xenith exercised no control over the care providers’ work and had no authority to fire them. Petersen 78-79,

83; England 16. But Xenith conducted background checks to ensure its care providers had no history of offense such as felony that would disqualify them from the DSHS care. Petersen 68. In addition, Xenith had a duty to report any suspected abuse or neglect by the contractors. Petersen 97, 99, 113. These facts are sufficient to persuade a fair-minded person that Xenith had some elements of control over its care providers' work, although it "chose not to" exercise control. BR 6; FF 7. Given the narrow construction required for the coverage exception, the Board correctly concluded that Xenith failed to meet subsection (1).

Because Xenith failed to establish each of the six elements in RCW 51.08.195, it did not meet the coverage exception. Accordingly, it is an "employer" of its care providers under RCW 51.08.070 and responsible for workers' compensation premiums for them. Xenith may argue its contractors agreed Xenith was not their "employer" and they were not Xenith's "employees." However, Xenith may not contractually eliminate its responsibility as an "employer." The act prohibits avoidance or waiver of statutory duties or rights by contract and deems such a contract "pro tanto void." RCW 51.04.060.

D. *Novenson* “Control” and “Consent” Employment Relationship Test Does Not Override the Separate Statutory Coverage for Independent Contractors Providing Personal Labor

Xenith argued below, and the superior court agreed, that the “employment relationship” test as set forth by the Supreme Court in *Novenson* and applied by this Court in *Bennerstrom* precludes coverage in this case, regardless of the “independent contract” statutory coverage as set forth in RCW 51.08.070, .180, and .195. CP 24-25. The *Novenson* test derives in part from the common law master-servant relationships and may provide guidance in some cases. However, it does not govern or override the “independent contract” statutory coverage. BR 3.

As shown above, the definition of “worker” “includes both employees and those independent contractors” for personal labor. *Jamison v. Dep’t of Labor & Indus.*, 65 Wn. App. 125, 130, 827 P.2d 1085 (1992). The employer-employee relationship inquiry is relevant “except in some cases where the injured person is an independent contractor.” *D’Amico v. Conguista*, 24 Wn.2d 674, 679, 167 P.2d 157 (1946).

Novenson holds that a worker must consent to “employment relationship” with a particular entity, before his right to sue that entity in common law can be extinguished. *Novenson*, 91 Wn.2d at 551-552. The *Novenson* Court set forth the “control” and “consent” employment relationship test in a personal injury case, where the defendant asserted

immunity from suit as the plaintiff's "employer" under the industrial insurance act. *Novenson*, 91 Wn.2d at 551-552. The act is "the exclusive remedy" for injured workers against their employers and ensures speedy relief for the workers without requiring fault while granting "employers immunity from common law responsibility." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 389, 47 P.3d 556 (2002); RCW 51.04.010, .32.010.

Novenson, plaintiff day laborer, went to a temporary employment agency Kelley Labor, which assigned him to defendant Spokane Culvert. *Novenson*, 91 Wn.2d at 551. Novenson got his hands crushed while using a machine at Spokane Culvert and sued the company for negligence. *Id.* at 551. In reversing the summary judgment for Spokane Culvert on employer immunity, the Supreme Court set forth the 2-part employment relationship test combining the elements of "control" and "consent":

For purposes of [workers'] compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship.

Novenson, 91 Wn.2d at 553 (citation omitted).

The "control" element derives from the common law master-servant relationship and focuses on whether the "master" accepted and controlled the activities of the "servant." *Id.* at 553. *Novenson* adopted the "consent" element, which focuses on the "servant," because to impose

“employee” status on a worker to which he has not consented “might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages.” *Novenson*, 91 Wn.2d at 553-554.

Novenson was thus developed in the distinct employer immunity context and did not involve the “independent contract” statutory coverage. *See Meads v. Ray C. Roberts Post 969, Inc.*, 54 Wn. App. 486, 488-489, 774 P.2d 49 (1989) (citing *Novenson* as “Washington’s law on the issue of employer immunity”); *Jackson v. Harvey*, 72 Wn. App. 507, 518 n.5, 864 P.2d 975 (1994) (noting *Meads* “does suggest that the [*Novenson*] two-prong test is tailored to determining when immunity exists” but applying the test in favor of a worker who did not consent to exempt employment relationship). The *Novenson* test does not govern or override the independent contractor coverage. To conclude otherwise would render meaningless the portions of the statutory language added in the 1937 and 1939 amendments. *See Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (court must give effect to all statutory language and “render no portion meaningless or superfluous”).

“The common law distinguishes between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work

involved.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996). However, our Legislature rejected this common law distinction and extended coverage to independent contractors for personal labor *in addition to* those in the master-servant employment relationships. *Norman*, 10 Wn.2d at 184. Lack of control is one of the six elements to prove the *exception* to the independent contractor coverage. RCW 51.08.195(1). Requiring the employer’s control to prove independent contractor coverage would defeat the statutory language and purpose. *See Bolin v. Kitsap County*, 114 Wn.2d 70, 73-74, 785 P.2d 805 (1990) (declining to apply *Novenson* in holding a juror was a county’s “worker,” despite the involuntary nature of jury duty, because applying the “consent” element there would not serve the purpose of *Novenson* or the act).

The *Novenson* test may provide guidance in appropriate cases outside of the employer immunity context as an alternative to the test for independent contractor coverage. For example, when a claimant may not establish coverage as an independent contractor, the claimant may still qualify as an “employee” under the *Novenson* test. *See White*, 48 Wn.2d at 477 (although supplying machinery as necessary for contract may defeat the personal labor as the essence test for independent contractor coverage, one who supplies machinery may still show employer’s control to prove he is a covered “employee”); *Dana’s Housekeeping*, 76 Wn. App. at 607

n.2 (having concluded the housecleaners are covered independent contractors, “we do not address whether [they] are Dana’s employees”).

Finally, *Bennerstrom* does not require applying *Novenson* here. In somewhat similar but distinct factual circumstances, the claimant there contracted with DSHS to provide in-home care to his own mother who suffered from cognitive loss. *Bennerstrom*, 120 Wn. App. at 856. He claimed “he was an employee of both DSHS and his mother.” *Bennerstrom*, 120 Wn. App. at 857-858. Applying the *Novenson* test, this Court concluded the claimant was not a DSHS employee. *Id.* at 862-867. This Court declined to consider whether he was a covered “independent contractor,” because he provided “no citation to authority, persuasive argument, or analysis.” *Id.* at 866-867.⁸

Bennerstrom thus did not raise the independent contractor coverage issue. This case does. The established test on this issue is “whether the essence of a particular independent contract is the personal labor of the independent contractors.” *E.g., White*, 48 Wn.2d at 471. As shown above, the Board correctly applied this test to conclude Xenith was an “employer” of its care providers and was responsible for their workers’ compensation premiums.

⁸ This Court also held the claimant was his mother’s “domestic servant” exempt from coverage. *Bennerstrom*, 120 Wn. App. at 867-872; RCW 51.12.020(1) (excluding any person employed “in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment”).

VII. CONCLUSION

For the foregoing reasons, the Department asks this Court to reverse the superior court judgment and affirm the Board's decision.

RESPECTFULLY SUBMITTED this 22nd day of November 2010.

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: XENITH GROUP, INC.) DOCKET NO. 08 14796
2 FIRM NO. 122,988-00) DECISION AND ORDER

3 APPEARANCES:

4
5 Firm, Xenith Group, Inc., by
6 Slagle Morgan LLP, per
7 Joan L. G. Morgan

8 Interested Observer,
9 Lynda Wilcox, Litigation Specialist

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 H. Regina Cullen, Assistant

13 The firm, Xenith Group, Inc., filed an appeal with the Board of Industrial Insurance Appeals
14 on May 19, 2008, from an order of the Department of Labor and Industries dated April 24, 2008. In
15 this order, the Department modified the July 11, 2007 Notice of Assessment of Industrial Insurance
16 Taxes No. 0443329 and assessed taxes for Xenith Group, Inc., as an unregistered employer, for
17 the fourth quarter of 2005, all four quarters of 2006, and the first quarter of 2007, for a total
18 assessment of \$63,320.21. The Department order is **AFFIRMED**.

19 **DECISION**

20 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
21 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
22 Proposed Decision and Order issued on May 28, 2009, in which the industrial appeals judge
23 reversed and remanded the Department order dated April 24, 2008. All contested issues are
24 addressed in this order.

25 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
26 no prejudicial error was committed. The rulings are affirmed. We have granted review to discuss
27 the proper analysis of industrial insurance coverage for independent contractors who essentially
28 provide personal labor.

29 The firm, Xenith Group, Inc. (Xenith), a home care service agency, referred potential clients
30 to home care providers. The Department of Social and Health Services (DSHS) funded the care for
31 disabled individuals through the Division of Developmental Disabilities. Xenith connected the

1 disabled clients with providers and dispersed checks from the DSHS funding to the providers.
2 Xenith received \$15 from DSHS for each hour of care provided under the program. Xenith paid
3 each care provider \$10 per hour for providing services to the disabled clients.

4 Xenith contends that the care providers are sole proprietors or independent contractors for
5 whom coverage is not mandatory. Xenith argued that it had no control over the care providers.
6 The firm maintained that it was simply a service company that matched care providers to clients.
7 Xenith emphasized that the care providers interviewed their clients and negotiated the details of the
8 services to be provided.

9 The care providers entered into two specific contracts with the firm, indicating that they were
10 not employees of Xenith (Exhibit No. 1). This document declared to each provider that "You ARE
11 self-employed!" The document explained that Xenith withheld no money for taxes, including
12 workers' compensation. The contract stated that each provider would receive an IRS form 1099
13 and that each provider must keep their own meticulous records. The providers also signed a
14 liability release as an independent contractor (Exhibit No. 2). After the audit period, the Division of
15 Developmental Disabilities converted to an employee program and Xenith Group, Inc., became
16 Xenith Services. The care providers were subsequently employees and covered workers.

17 Xenith admitted that Melissa Owens, who was an office worker, was actually an employee
18 during the audit period.

19 Our industrial appeals judge found that there was no employer-employee relationship
20 between the care providers and Xenith. She based her conclusion on the Court of Appeals ruling in
21 *Bennerstrom v. Department of Labor & Indus.*, 120 Wn. App. 853 (2004). In *Bennerstrom*, the court
22 found no employment relationship between home care providers and DSHS. The basis for this
23 opinion was that the State exercised no control over the providers and the providers were clearly
24 informed that they were not employees. Our industrial appeals judge concluded the facts of the
25 present case rendered *Bennerstrom* controlling.

26 However, we believe that recent cases and statutory construction require us to delve deeper
27 into the employment relationship. Based on RCW 51.08.180(1), we find that the care providers
28 were independent contractors engaged in contracts "whose essence is their personal labor."
29 Although Xenith attempted to "contract away" the personal care providers' right to receive workers'
30 compensation benefits, the nature of that contract was nothing but personal labor. The duties as
31 described in the record included transportation, shopping, hygiene, toileting, assisting with
32

1 movement, walking, transfers to wheelchairs, and telephone use. All of these activities involve the
2 personal labor of the care provider.

3 This Board previously found that home healthcare providers were considered independent
4 contractors providing personal labor. As such, they were considered workers under
5 RCW 51.08.180(1). *In re Mary Bliss Maxwell*, BIIA Dec., 90 9855 (1991). While the *Brennerstrom*
6 court held that the Mr. Brennerstrom was not an employee of DSHS, two things appear significant.
7 First, Mr. Brennerstrom was providing care to his own mother. Second, DSHS was reimbursing him
8 directly through a completely different program. The program at issue was designed to allow
9 Mr. Brennerstrom to collect Medicaid funds, which were managed by DSHS, to care for his mother
10 rather than placing her in a nursing home. DSHS was providing money as the source of funds for
11 the operation.

12 Xenith, on the other hand, was taking a portion of the Developmental Disability program
13 money for referring care providers to eligible clients. Their middle-man status distinguishes Xenith
14 from the arrangement between Mr. Brennerstrom and DSHS as the funding agency. We agree with
15 our industrial appeals judge that Xenith's lack of control over the activities of the providers is
16 relevant. The agreements signed by the providers regarding their lack of an employment
17 relationship with Xenith are also relevant. While relevant, however, these two points are not
18 dispositive.

19 The inquiry into the employer-employee relationship must be thorough. When an
20 independent contractor is providing personal labor, they may still be exempt from coverage if they
21 fulfill the six-part test of RCW 51.08.195. In relevant summary, the statute states that the following
22 six requirements must be met for an independent contractor to be exempt from mandatory
23 coverage:

- 24 1. No control over the contractor.
- 25 2. The service provided is outside the usual business of (Xenith's)
26 enterprise.
- 27 3. The contractor is engaged in an independently established trade or has
28 a separate place of business eligible for an income tax deduction.
- 29 4. The provider is responsible for filing expenses with the Internal Revenue
30 Service.
- 31 5. The providers had established accounts with the Department of
32 Revenue, and all other agencies that are required in each case for the
type of business conducted, including the UBI number.

1 6. The provider is maintaining records that reflect items of income and
2 expenses of the business (not just the contract).

3 In order to receive the benefits of this statutory exemption, the firm has the burden to prove
4 that the assessment is incorrect. Attempts to exclude coverage should be strictly construed in favor
5 of finding coverage. See *McIndoe v. Department of Labor & Indus.*, 144 Wn.2d 252 (2001). The
6 statute is additive and Xenith must fulfill all six elements to exempt the care providers from
7 coverage.

8 During the time of the contract, Xenith admitted that not all of the providers had UBI
9 numbers. The firm claimed that most of the providers did not have business licenses because it
10 was not required by DSHS. One of the providers, Kadie Englund, testified that she had an office
11 detached from her home. Ms. Englund was aware of several other providers who had home
12 offices.

13 The statute also requires that the contractor conduct business in a different trade from that of
14 the firm. For example, a general contractor hires a painter to paint the finished walls in a new
15 home. The general contractor does not do any interior painting as part of its business. The painter
16 is a sole proprietor with a separate company, a different name, and a separate place of business.
17 The painting company paints houses for other contractors, businesses, and private individuals.
18 While Ms. Englund stated that she had clients she developed from other sources, it was clear that
19 the majority of work conducted by the providers came from Xenith's referrals.

20 Xenith admitted that not all of the care providers had UBI numbers. Xenith did not establish
21 that the providers had accounts with the Department of Revenue. Xenith also failed to show that
22 the care providers actually were maintaining separate records that reflect all items and expenses of
23 their businesses. This provision requires meticulous record keeping for each alleged independent
24 contractor's business as a whole. It is not confined to records for clients referred through Xenith.
25 Xenith informed the personal care providers that they were required to keep the records. The care
26 providers were required to submit records of their hours in order to be paid. However, we find no
27 evidence that the recordkeeping requirements were met for each alleged business as a whole.
28 Although Xenith attempted to comply with the statute, it failed to satisfy all requirements. Given the
29 strict construction required to exempt coverage, we conclude that Xenith was responsible for the
30 taxes assessed by the Department.

31 In addition to the statutory framework requiring coverage, there are public policy reasons that
32 are also persuasive on this issue. Xenith was taking one-third of the hourly rate out of the care
 providers' checks. Xenith also had a contract with the DSHS developmentally disabled program,

1 although the terms are unclear. If a caretaker wished to receive referrals through Xenith he or she
2 was required to sign the document disavowing an employment relationship. When a worker is
3 forced to sign a contract, which attempts to waive their right to industrial insurance benefits as a
4 condition of contracting with a firm, this Board has weighed in favor of finding an
5 employer-employee relationship. See *In re Dale Sanders*, BIIA Dec., 07 11358 (2008).

6 Xenith was a service company, which contracted to provide care for the disabled, a
7 vulnerable group in our society. There was testimony that some providers represented themselves
8 as affiliated with Xenith when interviewing clients. Xenith's director, Brad Petersen, was adamant
9 that Xenith did not exercise control over a care provider. Mr. Petersen asserted that he could not
10 terminate a care provider no matter what the conduct. In fact, he was made aware of a sexual
11 relationship between a developmentally disabled client and the care provider. Rather than
12 immediately intervening in this situation, Mr. Petersen made a complaint to an unnamed regulatory
13 agency.

14 Mr. Petersen's testimony was designed to prove that Xenith had no authority over the care
15 providers. However, we believe it illustrates the compelling reason why Xenith must exercise
16 control over providers who are giving care in their name. The firm's failure to take immediate action
17 does not persuade this Board that the firm did not have the power to do so. Rather, it suggests that
18 Xenith's responsibility to refer capable and compassionate care providers necessitates some
19 element of control in the firm's contracts with the care providers.

20 We find that the Department correctly assessed industrial insurance taxes against Xenith.

21 FINDINGS OF FACT

- 22 1. On July 11, 2007, the Department of Labor and Industries issued a
23 Notice and Order of Assessment of Industrial Insurance Taxes,
24 No. 0443329, directed to Xenith Group, Inc., an unregistered employer,
25 in which it requested premiums, penalties, and interest for the second
26 through the fourth quarters of 2006, and for the first quarter of 2007.
27 The Notice and Order of Assessment was received by Xenith on
28 September 24, 2007.

29 On October 5, 2007, Xenith filed a Protest and Request for
30 Reconsideration.

31 On October 10, 2007, the Department issued an order in which it placed
32 in abeyance its Notice and Order of Assessment.

On April 24, 2008, the Department issued an order in which it modified
the July 11, 2007 Notice and Order of Assessment to include the fourth
quarter of 2005 through the first quarter of 2007, for a total assessment
of \$63,320.21.

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On May 19, 2008, Xenith filed a Notice of Appeal with the Board of Industrial Insurance Appeals.

On June 13, 2008, the Board granted the appeal under Docket No. 08 14796, and agreed to hear the appeal.

2. Prior to July 11, 2007, the Department of Labor and Industries conducted an audit of Xenith. The Department, as a result of that audit, concluded that Xenith was an unregistered employer, engaged in the business of home care for the disabled, and had workers providing their personal labor.
3. For the fourth quarter of 2005, all four quarters of 2006, and the first quarter of 2007, there was an employer-employee relationship between Xenith and Melissa Owens, who provided clerical work to the firm.
4. For the fourth quarter of 2005, all four quarters of 2006, and the first quarter of 2007, the Department of Social and Health Services' Division of Developmental Disability contracted with Xenith to find care providers for the disabled. Xenith, in turn, contracted with multiple care providers. It referred them to disabled individuals who could interview, hire, and fire them.
5. The essence of the contract between Xenith and the care providers was to provide personal labor to the developmentally disabled. This personal labor included transportation, shopping, hygiene, toileting, assisting with movement, walking, transfers to wheelchairs, and telephone use.
6. The care providers signed documents indicating that they were not employees of Xenith and that no taxes, including industrial insurance premiums, would be withheld from their checks. The care providers were required to sign these documents before they were allowed to contract with disabled clients.

Xenith received the care providers' report of hours, received payment from DSHS through the Developmental Disabilities program, and issued checks to the care providers for statutorily-mandated compensation, based on hours worked. For each hour worked by the care providers, DSHS (through the Division of Developmental Disabilities) also paid Xenith for its services. There is no evidence that the care providers were maintaining records regarding their own businesses independent of their dealings with Xenith.
7. Xenith chose not to control the care providers' physical conduct in the performance of their duties, even when misconduct occurred. There is no evidence that they were unable to take action to protect their developmentally disabled clients from mistreatment.
8. Xenith did not provide UBI numbers for the care providers with whom it contracted. With some exceptions, the care providers were primarily providing services for clients referred to them by Xenith rather than clients from numerous sources. While some providers had separate

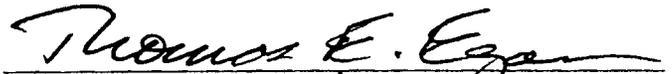
1 work stations, there was no evidence that they maintained completely
2 separate places of business during the audit period.

3 **CONCLUSIONS OF LAW**

- 4 1. The Board of Industrial Insurance Appeals has jurisdiction over the
5 parties to and the subject matter of this appeal.
6 2. During the fourth quarter of 2005, all four quarters of 2006, and the first
7 quarter of 2007, an employer-employee relationship existed between
8 Xenith and Melissa Owens, as contemplated by Chapter 51.08 RCW
9 and Chapter 51.12 RCW.
10 3. During the fourth quarter of 2005, all four quarters of 2006, and the first
11 quarter of 2007, the care providers were independent contractors, the
12 essence of which was their personal labor.
13 4. The firm failed to establish that it was entitled to the exemption to
14 mandatory coverage embodied in RCW 51.08.195.
15 5. The order of the Department of Labor and Industries dated April 24,
16 2008, is correct and is affirmed.

17 Dated: August 24, 2009.

18 BOARD OF INDUSTRIAL INSURANCE APPEALS

19 
20 THOMAS E. EGAN Chairperson

21 
22 FRANK E. FENNERTY, JR. Member

23 
24 LARRY DITTMAN Member
25
26
27
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30
31
32

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

XENITH GROUP, INC.)
)
Petitioner,)
v.)
DEPARTMENT OF LABOR & INDUSTRIES,)
)
Respondents.)

Cause No| 09-2-36529-6-SEA

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT**

CLERK'S ACTION REQUIRED

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|--|---|
| 1. Judgment Creditor: | Xenith Group, Inc |
| 2. Judgment Debtor: | State of Washington Department of Labor & Industries |
| 3. Principal Amount of Judgment: | -0- |
| 4. Interest to Date of Judgment: | -0- |
| 5. Statutory Attorney Fees: | \$200.00 |
| 6. Costs: | -0- |
| 7. Other Recovery Amounts | -0- |
| 8. Principal judgment amount shall bear interest at 0% interest per annum. | |
| 9. Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum. | |
| 10. Attorney for Judgment Creditor: | Joan L.G. Morgan |
| 11. Attorney for Judgment Debtor: | Masako Kanazawa, Assistant A.G. |

1 This matter came on regularly before the Honorable Jim Rogers of this Court on June 25,
2 2010. Xenith Group, Inc. (Xenith) appeared by counsel Joan Morgan. The Department of Labor &
3 Industries appeared by counsel Robert M. McKenna, Attorney General, per Masako Kanazawa,
4 Assistant Attorney General. The Court reviewed the records herein, including relevant portions of
5 the Certified Appeals Board Record, briefs filed in this appeal, and has considered argument offered
6 by both parties. Having been fully advised, the Court enters the following:

7 **FINDINGS OF FACT**

- 8 1.1 The Board of Industrial Insurance Appeals Findings of Fact #1 and #3 were not disputed.
- 9 1.2 Between October 1, 2005 and January 31, 2007, Xenith Group, Inc. held a contract with the
10 Department of Social and Health Services to serve as a referral resource and payroll agent
11 under the Division of Developmental Disabilities.
- 12 1.3 When an individual met the criteria for receiving government-paid in-home chore services
13 under DDD, a DSHS caseworker determined the number of hours per month and types of
14 services the Qualified Individual was approved to receive.
- 15 1.4 Qualified Individuals could hire family members or a friend to provide the services, or were
16 free to advertise as help-wanted, or seek referrals from any home health care agency, or seek
17 referrals from a DSHS-approved DDD referral agency such as Xenith Group, Inc.
- 18 1.5 Xenith Group, Inc. advertised for, took applications from, and maintained basic background
19 paperwork on individuals who wanted to be hired to work as in-home Care Providers. Upon
20 request from a Case worker or a Qualified Individual, and being provided some basic
21 background information about the Qualified Individual, Xenith Group identified potentially
22 suitable Care Providers. The Qualified Individual and prospective Care Provider were given
23 each other's contact information. Everything occurring after that was up to the prospective
24 Employer and prospective 'employee' to follow through with. The Qualified Individuals
25 could reject all the prospective Care Providers and remained free to do their own advertising,

1 hire a friend or family member, request additional referrals from Xenith, etc.

2 1.6 If the Qualified Individual offered the job and the prospective Care Giver accepted the offer,
3 the two of them decided the particular work schedule, made changes to it as was mutually
4 acceptable, and determined how/when the authorized types of services were provided. The
5 Qualified Individual could hire and fire Care Providers at will.

6 1.7 If the referral match was made via Xenith, a financial arrangement existed between DSHS
7 holding funds on behalf of the Qualified Individual, the Care Provider and Xenith. DSHS
8 did not send government funds with which to pay the Care Providers directly to the DDD
9 Qualified Individual/his or her Legal Guardian. The Qualified Individual/Legal Guardian
10 was never responsible for receiving money from DSHS and paying it over to the Care
11 Provider. The Care Provider was never at risk of not receiving his/her wages on-time and in-
12 full.

13 1.8 For the COPES program, DSHS itself received the reported hours worked and issued the
14 checks to the Care Providers. For the DDS program, some referral agencies like Xenith
15 meeting all the DSHS contract requirements were entrusted with reporting hours, receiving a
16 lump sum from DSHS, then distributing the funds in accord with the contracts.

17 1.9 Xenith issued checks to each Care Provider in the amount earned by number of hours worked
18 by hourly rate. Xenith issued 1099's to each Care Provider annually. From each lump sum
19 check from DSHS, Xenith retained its contractually authorized payment for its services
20 rendered to DSHS/Qualified Individuals and Care Providers. Xenith and the Care Providers
21 were both paid by DSHS from funds legally allotted to Qualified Individuals to spend on in-
22 home services.

23 1.10 The Qualified Individuals and Care Providers had the 'employer-employee' relationship with
24 control in the hands of the Qualified Individuals and consent to that control given by the Care
25 Providers.

1 1.11 Prospective or actually hired Care Providers did not consent to any employment relationship
2 with Xenith Group, Inc.

3 1.12 The referral contracts entered into by Xenith, DSHS/Qualified Individuals, and prospective
4 or actually hired Care Providers did not contract away anything with respect to the Industrial
5 Insurance Act.

6
7 **CONCLUSIONS OF LAW**

8 2.1 The Court has jurisdiction over the parties and the subject matter of this appeal.

9 2.2 During the time periods covered by the Labor & Industries audit in this appeal, there was no
10 covered relationship between Xenith Group, Inc. and any of the individuals encompassed by
11 the audit except Melissa Owen.

12 2.3 Substantial evidence supported the Board of Industrial Insurance Appeals Findings of Fact
13 1.1-1.4 and 1.6

14 2.4 Findings of Fact 1.8 and 1.9 are irrelevant and therefore are stricken.

15 ~~2.5 Finding of Fact 1.5 is erroneous in that Xenith did not refer care providers to DSHS~~

16 2.6 Finding of Fact 1.5 is erroneous in that the essence of the referral contracts is not the
17 'personal labor' provided to Qualified Individuals by Care Providers. The contracts
18 addresses administrative services Xenith provides to DSHS and Care Providers. Xenith
19 issued checks in amounts representing hours worked times hourly rate, representing pay for
20 work provided to Qualified Individuals.

21 2.7 The Board's Decision and Order was the result of an error of law in that its Finding of Fact
22 ~~1.7 and the other facts in the record called for the Department's April 24, 2008 order to be~~
23 ~~vacated with respect to all the Care Providers under *Novenson v. Spokane Culvert &*~~
24 ~~*Fabricating Co.*, 91 Wash.2d 550, 553, 588 P.2d 1174 (1979); *Fisher v. Seattle*, 62 Wash.2d~~
25 ~~*800, 384 P.2d 852 (1963)); *Marsland v. Bullitt Co.*, 71 Wash.2d 343, 428 P.2d 586*~~

1 (1967); Jackson v. Harvey, 72 Wn. App. 507, 515 (1994) (citing Lee v. Oregon E. & R.G. Scott
2 Realty Co., 96 S.W.2d 652, 654-55 (Mo.App.1936) and Bennerstrom v. DLI, 120 Wn.App
3 853, 86 P.3d 826 (2004). This case comes down, in part, to the

4 legal question as to whether the factors under RCW 51.08.195
5 are relevant if the Bennerstrom test is not met. Here,
6 **JUDGMENT** that test was not met. Additionally (next page) →

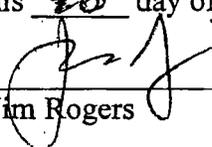
7 Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters judgment
8 as follows:

9 3.1 The Decision and Order of the Board of Industrial Insurance Appeals dated August 24, 2009
10 that affirmed the Department of Labor & Industries April 24, 2008 order in this case be and
11 is hereby affirmed to the extent of Melissa Owens and is otherwise REVERSED.

12 3.2 Appellant Xenith Group, Inc. is awarded and respondent Department of Labor & Industries is
13 ordered to pay, a statutory attorney fee of \$200.

14 3.3 Appellant Xenith Group, Inc. is awarded interest from the entry of this judgment as provided
15 by RCW 4.56.110.

16 3.4 The testimony of Ms. Wilcox is inadmissible opinion
17 ^{Silly}
18 DATED this 26 day of June, 2010 Evidence and was not
considered.


The Hon. Jim Rogers

1
2 SLAGLE MORGAN LLP

3 By _____
4 Joan L.G. Morgan
5 WSBA # 15359
6 Attorneys for Xenith Group, Inc.

7 And

8 ROBERT M. MCKENNA
9 Attorney General

10 By _____
11 Masako Kanazawa, WSBA #32703
12 Assistant Attorney General

13 (2.7 continued.) If the factors under
14 RCW 51.08.195 do apply, ~~the~~ certain of the
15 factual findings of the Board are not supported
16 by the evidence. For example, ~~the~~ some of
17 the contractors did ~~not~~ have UBI numbers, however,
18 it was undisputed ~~that~~ evidence that such
19 numbers were not required by any agency
20 at the time relevant; not even Xenith had one.

21 ~~was not supported by the evidence.~~ Also, ~~was~~ the
22 Xenith company presented evidence that only
23 one other person did business/worked at Xenith.
24 ~~order that~~ Finding FOP 8 is not supported by the
25 evidence. FOP 7 is simply puzzling. Protecting the
disabled is important but not part of this case and it
suggests that the Board was

FINDINGS OF FACT/CONCLUSIONS OF
LAW/JUDGMENT-6 reaching for a result.

SLAGLE MORGAN LLP
801 Second Avenue, Suite 1110
Seattle, WA 98104
(206) 344-8131

FILED
KING COUNTY WA STATE COURT

SEP - 3 2010

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

XENITH

Plaintiff,

NO. 09 2365296 SEA

vs.

ORDER ON MOTION

Sept Labor & Industries

(CLERK'S ACTION REQUIRED)

Defendant.

The above-entitled Court, having heard a motion

for reconsideration

IT IS HEREBY ORDERED that

motion is DENIED

DATED: 2 Sept 2010

JUDGE JAMES E. ROGERS

RECEIVED

SEP 15 2010

AGO L&I DIVISION
SEATTLE

RCW 51.08.070
“Employer” – Exception.

“Employer” means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all 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. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

RCW 51.08.180
“Worker” – Exceptions.

“Worker” means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

RCW 51.08.195
“Employer” and “worker” – Additional exception.

As an exception to the definition of “employer” under RCW 51.08.070 and the definition of “worker” under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

- (3) The 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, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

1991 FINAL LEGISLATIVE REPORT

Fifty-Second Washington State Legislature

1990 Second Special Session

1991 Regular and First Special Sessions

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ESSB 5837

C 246 L 91

Revising provisions for industrial insurance and employment compensation coverage.

By Senate Committee on Commerce & Labor (originally sponsored by Senators Anderson, Owen, Snyder and Matson).

Senate Committee on Commerce & Labor
House Committee on Commerce & Labor

Background: Under both industrial insurance and unemployment compensation laws, virtually every employee is covered but independent contractors and corporate officers are not. Many contracting and employment situations make it difficult to determine whether there is an employer/employee relationship or whether the service is being provided by an independent contractor. Business organizations and the duties of corporate officers are so varied that it is difficult to devise a definition that is workable.

Sole proprietors and partners are generally not covered by industrial insurance, except that building contractors and licensed electricians who registered or became licensed after July 26, 1981 are covered unless they take positive steps to withdraw from coverage.

Summary: The definitions of "worker" and "employer" are amended to include a six-part test that determines when services are performed by an independent contractor, and that no employer-worker relationship exists: (a) the individual performing the services is free from direction and control from the person purchasing the services; (b) the service performed is outside the usual course of business for the entity the service is performed for; (c) the individual is customarily engaged in the trade or business of the nature involved in the particular contract, or the individual has a place of business for that type of business that qualified for a business deduction for federal income tax purposes; (d) the individual is responsible for filing a schedule of expenses with the Internal Revenue Service for the type of business involved; (e) the individual has established an account with state agencies for the payment of taxes normally paid by such businesses; and (f) the individual is maintaining a separate set of books for the business.

Corporate officers are among the list of employments excluded from industrial insurance coverage. The definition of corporate officer is amended to indicate they must be voluntarily elected or appointed, that they must also be director and shareholder, and exercise substantial control in the daily management of the corporation, and that their duties do not include manual labor.

In the case of corporations that are not public companies, they may name up to eight officers who meet a

less stringent test, or may exclude any number of officers under the test applicable to public corporations.

The list of excluded employments is expanded to include newspaper carriers and insurance agents and brokers.

The definition for services performed by an independent contractor, rather than as employment subject to the unemployment compensation law, is expanded to include that same six-part test which is added to the industrial insurance law.

Votes on Final Passage:

Senate	48	1	
House	97	0	(House amended)
Senate	45	1	(Senate concurred)

Effective: January 1, 1992

SSB 5873

PARTIAL VETO

C 254 L 91

Providing insurance coverage for retired and disabled school district employees.

By Senate Committee on Ways & Means (originally sponsored by Senators McDonald, Gaspard, Saling, Snyder, L. Smith, Johnson, Bauer, Rasmussen and Barr).

Senate Committee on Ways & Means
House Committee on Appropriations

Background: State law provides that state employees who are retired or disabled may continue their participation in any insurance plans and contracts after retirement or disablement. Federal law requires this for 18 months after retirement. These employees bear the full cost of premiums required to provide coverage, and the rates charged for health care are developed from the same experience pool as active employees. Rates for a retired or disabled employee or the employee's dependents who are covered by Medicare are actuarially reduced to reflect the value of that care.

Summary: Retired or disabled school district employees may continue participation in any insurance plans and contracts for a period of at least 30 months after their retirement or disablement. The retired or disabled employee bears the full cost of premiums to provide the coverage.

Employees who retire after July 28, 1991, and those who retired in the 18-month period immediately prior to July 28, 1991, are eligible to participate. Employees who retired more than 18 months prior to July 28, 1991, and who were covered by a school district insur-

NO. 66013-6-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant,

v.

XENITH GROUP INC.,

Respondent.

NO. 66013-6-I

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on November 22, 2010, she caused to be served the Appellant's Brief and Declaration of Mailing in the below-described manner:

2010 NOV 22 PM 1:14
COURT OF APPEALS DIVISION I
CLERK

Via ABC Legal Messenger to the following:

ORIGINAL & COPY TO: Richard D. Johnson,
Court Administrator/Clerk
Court of Appeals Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

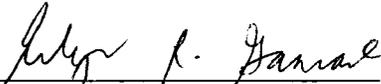
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ORIGINAL

COPY TO:

Joan Morgan
Slagle Morgan LLP
801 Second Ave., Suite 1110
Seattle, WA 98104-1576

DATED this 22nd day of November, 2010.



ERLYN R. GAMAD
Legal Assistant