

No. 66013-6

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

DEPARTMENT OF LABOR & INDUSTRIES,
Appellant,

v.

XENITH GROUP, INC., Respondent.

XENITH GROUP, INC.'S RESPONDING BRIEF

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ORIGINAL

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I. INTRODUCTION

“An employment relationship for purposes of the workers’ compensation laws does not exist absent (a) the employer having a right to control the employee’s physical conduct in the performance of the employee’s duties and (b) the employee’s consent to the employment relationship. *Bennerstrom v. Dept. of Labor & Industries*, 120 Wash.App. 853, 856, 86 P.3d 826, *review denied* 152 Wash.2d 1031 (2004) (hereafter *Bennerstrom*) citing *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash.2d 550, 553, 588 P.2d 1174 (1979)¹

In the Fall of 2006, the Department of Labor & Industries (hereafter Department or L&I) commenced auditing Xenith Group, Inc. It was a home health care provider referral agency under contract to the Department of Social and Health Services (DSHS), specifically the Department of Developmental Disabilities (DDD.) The owner, Mr. Bradley Peterson, supplied L&I with all the documents it asked for, experienced an on-site visit from the auditor, and answered what few

¹See also *Fisher v. City of Seattle*, 62 Wash.2d 800, 384 P.2d 852(1963) (“an employee cannot have an employer thrust upon him against his will or without his knowledge”); *Marsland v. Bullitt Co.*, 71 Wash.2d 343 428 P.2d 586 (1967); *Stelter v. Dept. Labor & Industries*, 147 Wash.2d 702, 709, 57 P.3d 248(2002); and *Jackson v. Harvey*, 72 Wash.App. 507, 864 P.2d 975 *review denied* 124 Wash.2d 1003, 877 P.2d 1287 (1994) The employment relationship cannot exist under RCW Title 51 unless both requirements have been satisfied. *Novenson*, 91 Wash.2d at 553.

questions were asked. He did not understand why the Department imposed retroactive Employer status on the company from October 2005 through the first quarter of 2007 for the in-home care providers.

Although he had an extensive background in social work, including working for DSHS in its Department of Developmental Disabilities (hereafter DDD), Mr. Peterson was new to private enterprise. DSHS explicitly had an independent contractor (self-employment) model for providing in home care services, as described in *Bennerstrom*, and that is what Mr. Peterson followed. He wished to comply with all the contractual as well as applicable federal and state laws, including workers' compensation. To determine how to actually set up and run the agency, he worked with a private consultant who had set up similar businesses. He communicated with other home care referral agencies contracted with DSHS, plus he worked with an attorney and an accounting firm which, in turn, had received input from L&I on the business. "I thought we were doing all the right things." Peterson 109:24-5².

He appealed L&I's assessment to the Board of Industrial Insurance Appeals (hereafter Board or BIIA) and again retained legal counsel. The

² In harmony with the Department's style of referring to testimony from the Certified Appeal Board Record, explained in its Footnote 2, references are to the surname of the witness followed by the page number where the testimony is found.

factual investigation revealed what is now in the evidentiary record for this Court's consideration. The employer-employee consent/control requirements are black letter law and specific legal research quickly revealed *Bennerstrom*.

Xenith Group had no more of a covered relationship with care provider than DSHS did with Mr. Bennerstrom. The assessment against Xenith Group must be reversed as to those hours attributed to the in-home care givers. Neither the Board in its Decision & Order nor the Department in the Appellant's Brief identified material facts, a change in law, or public policy grounds which should cause this Court to ignore or overrule *Bennerstrom*.

II. ASSIGNMENTS OF ERROR

1. The BIIA erred in Findings of Fact #3 and 4, plus Conclusions of Law #2 and 3³ because Xenith Group, Inc. ceased doing business January 31, 2007 therefore all liability for assessments must terminate that date and not the end of the first quarter. BR 7-8.

2. The BIIA erred in Finding of Fact #5, sentence one, by characterizing the essence of the *contract between Xenith Group and care providers* as providing personal labor to the developmentally disabled. BR 7. The essence of the Xenith Group contract with the care providers was to alert them of opportunities for employment. If a care provider got hired, Xenith Group was a collection point for hours worked and would disburse funds to the care provider from the COPES program as controlled by DSHS.

³ Findings of Fact and Conclusions of Law refer to those made by the BIIA in its Decision & Order (BR 2-8)

3. The BIIA erred in Finding of Fact #6, the final sentence, in which it indicated “there is no evidence” the care providers were maintaining records regarding their own businesses independent of their dealings with Xenith. BR 7. There is evidence that at least six were, although the reason for reversing the assessment does not turn on correcting that erroneous part of this finding of fact.

4. The BIIA erred in making Finding of Fact #7 which states, “Xenith chose not to control the care providers’ physical conduct in the performance of their duties, even when misconduct occurred. BR 7. There is no evidence that they were unable to take action to protect their developmentally disabled clients from mistreatment.” The first statement is contrary to the undisputed facts. The second sentence should be stricken as it reflects the BIIA being upset about what it perceives to be the inadequacy of the state law which mandates that certain people/companies report suspected abuse or neglect of vulnerable individuals to the proper authorities. A home health care referral agency under contract with DSHS was a mandated reporter. Mr. Peterson followed the law and the contract. Finding of Fact #7 is where the BIIA reflects its complete departure from the undisputed evidence of the hiring and firing power held by the clients and respecting choices of who they allow into their lives to provide the help they need to avoid being placed in a nursing home.

5. The BIIA’s Conclusions of Law #3 and 4 are correct if one engages in RCW 51.08.180 and RCW 51.08.195 analyses, but should be stricken. BR 7. Under the facts and applicable law, the BIIA should not have engaged in that analysis due to lack of evidence of an employer-employee relationship between Xenith Group and the care providers.

6. The BIIA erred in failing to make a legal conclusion on the consent/control case law.

7. The BIIA’s Conclusion of Law #6 is erroneous because the assessment of April 24, 2008 extends past the January 31, 2007 date related to Xenith Group, the only legal entity in this appeal. BR 8. Had the BIIA followed the substantial evidence and correct line of legal authority, the Department’s assessment of April 24, 2008 would be affirmed only as to Melissa Owens, a clerical worker, but reversed for all the care providers upon whose hours the premiums were assessed.

III. STATEMENT OF THE ISSUES

1. Does substantial evidence support the existence of a Title 51 RCW covered relationship between Xenith Group home care referral agency and the care providers?

2. Does substantial evidence support the existence of an employer-employee relationship between the care providers and the clients receiving home care services?

IV. STATEMENT OF FACTS

Mr. Bradley Peterson has spent his career in service to individuals with physical and/or mental disabilities, primarily via the Department of Social and Health Services Department of Developmental Disabilities. (Hereafter DSHS or DDD) See resume. CABR Exhibit 3. That is where he was working before founding a home health care referral agency called Xenith Group, Inc. in 2004. Peterson 88:24-89:2 and 89:17-26. A State worker thought Mr. Peterson would do a good job and he took that to heart, leaving his DSHS job to help service the needs of the developmentally disabled population in a new way. Peterson 74:19-25.

What did Xenith Group do under its referral contract with DSHS? It sought qualified care providers to work with DSHS clients. Peterson 75:1. under a DSHS contract. Its relationship with the care providers and

DSHS clients may be better understood from the testimony of a care provider, Ms. Kadie England.

Since 2002, Ms. England had been working as an independent, self-employed home care services provider. One of her college classmates was working via referrals from the Xenith Group and in 2006 Ms. England contacted Mr. Peterson. They met to go over the paperwork about self-employment, filing taxes and keeping her receipts and records. England 8:16-9:3 Ms. England and every one else who contracted to receive referrals via Xenith Group received CABR Exhibit 1 which announced first thing on page 1 that, “Xenith Group is not your employer. You are self-employed.” Page 2 was signed by every care provider and it states in pertinent part that:

I, the undersigned hereby agree as follows:

1. I am not an employee of Xenith Group Inc.
2. As an independent contractor⁴, I will be entering into contract agreements to provide services either to an adult with developmental disabilities or to families of developmentally disabled children.
3. The recipient of services and/or their families are my employer, and will hire, supervise and fire me.

7. This agreement ‘[is] effective the date I begin providing Medicaid Personal care services as an independent contractor for clients referred to me by Xenith Group Inc.

⁴ To him, “independent contractor” meant self-employed. Peterson 68:25-69:3.

Mr. Peterson made it clear people seeking his referral services that they were not going to be an employee of Xenith Group. The relationship between Xenith Group and the care providers was that of a referral agency to independent contractors. Peterson 68:22-25. They signed documents acknowledging they came to Xenith group as independent contractors and were responsible for their own taxes. They also signed release forms. Peterson 85:19-86:1. The release documents were signed by every single person within the audit period. Peterson 86:2-20.

After that, Xenith Group served as the middleman to put care providers in contact with prospective clients.⁵ Ms. England would receive the prospective clients' names and a copy of a DDD care assessment⁶ from Xenith Group. England 9:16-19 Along with the DD care assessment, there is an algorithm they use to determine the maximum number of hours of service that can be provided to the client. You can work fewer than that but not more. England 11:4-16.

⁵ These were individuals who met definitions under the DDD and needed help with care tasks in their home, such as eating or bathing, transferring, bed mobility, locomotion in room, outside of room; personal hygiene, toileting, etc. England 6:23-7:3

⁶ Once a year the DDD case managers do a review of the client to see if he/she is eligible for services and what tasks they're specifically eligible for. That's how the tasks a care provider was going to be doing or not doing got determined. England 9:24-10:7.

She and the client/families would interview each other in the home⁷ and see if the schedule they wanted care for matched her availability. They would negotiate hours, times and dates and, if it seemed like a good match sometimes they would start services but not always. They would try it and the needs might have been too difficult or the client decided it wasn't working.⁸ England 9:4-15.

She worked for the client, meaning the developmentally delayed child/his or her Family or an adult. England 10:14-18. Xenith Group was not telling her what to do. England 14:3-5. Mr. Peterson testified the relationship between the care provider and the individual to whom they were providing services was whatever working relationship the two of them formulated. Xenith Group lacked behavioral or supervisory control. Peterson 78:21-22. Xenith Group also did not provide any tools or equipment to help care providers in their business. Peterson 79:14-21; 96:6-8 The client hired or fired the care providers and decided who to work with or not. The client was the employer. Peterson 69:4-9.

Ms. England was even asked the following questions and responded at 31:2-8.

⁷ The services from care providers were given in the client's home environment or a community setting, depending on client desire or need. Peterson 82:11-21.

⁸ Xenith Group did not have the authority to fire providers who were working with a client. Peterson 79:10-13

Q: At any point before a date effective February 1st of 2007, did you consent to or believe you were an employee of Xenith Group?

A: I fully understood that I was not an employee of Xenith Group.

Q: And for the period before February 1st, 2007, if you needed to use the term “employer,” who was your employer?

A: The clients.

In terms of the compensation aspect, the DDD paid her and set the hourly rates for the contracted work.⁹ England 10:20-26. She would fill out timesheets and send them to DDD, as well as call in her hours in to Xenith Group by the 4th of the month. Around the 10th of the month she'd receive a pay check issued by Xenith Group for her DDD hours.¹⁰ England 11:17-22.

She would also work hours that were directly, privately paid by some families beyond what they had as their DD allotment. In 2006-7 of her ten clients, three were not via Xenith Group. Of the remaining seven, about five of them were paying her for extra time beyond the DD hours reported/paid via Xenith Group. England pages 40-47.

Things changed dramatically for the care providers and Mr. Peterson in January-February 1, 2007. In January, care providers were

⁹ There was a DDD standard pay rate for each care provider and the federal government participates in setting that rate and how it is broken down. Xenith Group received \$15/hour from DSHS and disbursed the required \$10/hour to the care providers. Peterson 91:11-16 and 92:1-12

¹⁰ Sometimes a client received more than 40 hours a week of government paid services from a single care provider because they had higher needs. Most people worked less than 40 hours a week. Peterson 83:26-84:6 and 84:11-15.

offered an opportunity to become employees of a new company called Zenith Services. As noted in the Introduction, DSHS determined it would no longer enter into contracts based on an independent contractor business model. Ms. England accepted an offer to be an employee of Zenith Services on February 1, 2007. England 7:4-8.

Her description of Zenith Services operations stands in clear contrast to the prior self-employed care provider working for her client/employer. Ms. England has continued to do care giving as well as being a supervisor doing employee evaluations and client home visits. She helps set up call staffing, matching providers to clients, setting up schedules, making sure providers are sticking to the client care assessment, and making sure they understand Zenith Services' and DDD policies and rules. England 15:9-26. That oversight didn't exist for Xenith Group. England 16:24. There was nobody doing the kinds of things she does as supervisor when it was Xenith Group. England 17:1-2.

Now clients and the care providers can come to her with problems to which she helps find solutions. England 16:3-8. Before February 1, 2007, if a client or the guardian had an issue with the provider, the client had responsibility to address it with the provider. If the client didn't feel comfortable, he/she took the concerns to a *case manager*. The client could

fire the provider. Xenith Group didn't play a role in that. England 17:3-13. Zenith Services does. England 17:14-15.

Xenith Group had a referral/payroll relationship with the care providers which lacked the employer-employee relationship necessary to come under Title 51 RCW mandatory coverage. Zenith Services has paid L&I premiums for its employees since the day it started, with full control and with the full consent of its employees to work for the new company.

V. STANDARD OF REVIEW

The Administrative Procedure Act governs judicial review of the Board's decision in this assessment case. RCW 51.48.131. RCW 34.05.570(3) states, Relief of agency orders in adjudicative proceedings. The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review...;
- (i) The order is arbitrary and capricious.

The agency action under review is the BIIA's final decision and order which affirmed the assessment. *Maplewood Estates v. Dept. of Labor & Industries*, 104 Wash.App. 299, 302-303, 17 P.3d 621(2001)
The Board's legal conclusions are reviewed de novo. *Wash. State Dept. of*

Labor & Industries v. Mitchell Bros. Truck Line, Inc., 113 Wash.App. 700, 704, 54 P.3d 711(2002). Where the assigned error relates to statutory construction, de novo review is also proper. *Id.* at 705.

VI. LEGAL ANALYSIS AND ARGUMENT

A. The Gatekeeper: Control/Consent Employment Relationship Tests¹¹

The Department and BIIA essentially argue that where the term “independent contractor” is used in the language of a business, and the nature of the service is personal labor, the results of an audit will rise and fall on solely the statutory factors of RCW 51.08.195. This position can only be maintained by ignoring the body of law on control/consent that has coexisted with the independent contractor case law and statutes for decades.

B. A Brief History Of Independent Contractors Under Title 51 RCW

Norman v. Dept. of Labor & Industries, 10 Wash.2d 180, 116 P.2d 360(1941) involved a gentleman who got hurt burning poison ivy on land owned by Spokane County as he was performing the employment he had

¹¹ The Department’s sole witness was not familiar with the law which talks about the requirement for mutual consent for an employer-employee relationship to exist. Wilcox 171:14-18.

contracted to do. L&I rejected his claim because it was not extrahazardous and because he was an independent contractor who did not report his hours to L&I. The superior court reversed and allowed the claim. The Department appealed. The *Norman* court discusses the 1937 amendments to Title 51 RCW which modified the definition of workman to:

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 personal labor for any employer coming under this act whether by way of manual labor or otherwise in the course of his employment.

Prior to the effective date of the 1937 amendment, an independent contractor simply could not receive aid from the industrial insurance fund. This coverage expansion was made more definite by the terms of the 1939 amendment defining the term Employer, which provided,

Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise...all while engaged in this state in any extrahazardous work, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, in extra-hazardous work.”

Norman at 183-184.

We hold that it was the intention of the legislature 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.

Id. at 184.

The 1991 amendments to RCW 51.08.195 added six factors that had to be shown to exist before an exempt independent contractor relationship can be found. Almost three-quarters of the Department's brief is devoted to reciting facts and quoting law showing Xenith Group did not prove each care giver met all the factors of RCW 51.08.195. Xenith Group agrees it did not, but that is not dispositive of the appeal and does not call for the assessment to be affirmed.

C. A Brief History Of The Consent/Control Requirement For Mandatory Coverage to Exist

Under our Workmen's Compensation Act definite conditions must exist at the time of an injury in order to entitle one to the benefits of the act. First, the relationship of employer and employee must exist between the injured person and his employer (except in some cases where the injured person is an independent contractor)..."

D'Amico v. Conguista 24 Wash.2d 674, 683-4, 167 P.2d 157(1946)

Jackson v. Harvey, 72 Wash.App. 507, 514-16, 864 P.2d 975 review

denied 124 Wash.2d 1003, 877 P.2d 1287 (1994) provides an excellent

overview of the historic underpinnings and evolution of the control-

consent gatekeeper test for Title 51 RCW employer-employee mandatory

coverage.

In deciding upon the existence of an employee-employer relationship, courts originally looked to *respondeat superior*, asking what degree of control an employer exercised over the employee. *Hubbard v. Department of Labor & Indus.*, 198 Wash. 354, 88 P.2d 423 (1939). The contractual terms, if any, did not

alone establish the degree of control. Rather, courts looked to all of the “surrounding indicia of control”. Hubbard, 198 Wash. at 360, 88 P.2d 423.

By 1959, the Washington Supreme Court began looking more to the agreement between the worker and employer in determining whether an employment relationship existed. In Wilkie v. Department of Labor & Indus., 53 Wash.2d 371, 334 P.2d 181 (1959), a logger asked a man working nearby to help in repairing a tractor. The man agreed, and was subsequently injured while working on the tractor. There had been no discussion of employment terms. The court held that the helper was entitled to worker's compensation. The brief exchange between the two men, coupled with the “going set rate” of \$2.00/hour in the area, supported the jury's determination that the two men created an employee-employer contract. Wilkie, 53 Wash.2d at 376, 334 P.2d 181.

Subsequent to Wilkie, Washington courts explicitly adopted a two-prong test for determining whether an individual has entered an employee-employer relationship in the worker's compensation context:

For purposes of workmen's 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 v. Spokane Culvert & Fabricating Co., 91 Wash.2d 550, 553, 588 P.2d 1174 (1979) (citing Fisher v. Seattle, 62 Wash.2d 800, 384 P.2d 852 (1963)); Marsland v. Bullitt Co., 71 Wash.2d 343, 428 P.2d 586 (1967). Thus, the employment relationship must be entered into mutually by the employer and employee. Novenson, 91 Wash.2d at 553, 588 P.2d 1174.

As indicated, at common law whether an employment relationship existed or not was determined by the extent of control the employer had over the employee's activities. Novenson, at 554, 588 P.2d 1174. This was so because the law primarily sought to establish the

bounds of vicarious liability. Thus, whether or not someone was an employee affected the rights as between an injured third person and the alleged employer. The employee was not affected by the determination concerning the scope of his or her employment. Novenson, at 554, 588 P.2d 1174.

In worker's compensation law, however, the existence of an employment relationship affects the rights of the employee as much as the employer. The relationship is an agreement between the two. Therefore, for worker's compensation purposes the consent of the employee in entering the relationship becomes crucial in ascertaining whether an employment relationship exists.^{FN3} Novenson, at 555, 588 P.2d 1174.

FN3 Novenson cites Fisher, which in turn cites 1B A. Larson, Workmen's Compensation Law §§ 47.42(a), 48.10 (1978). Larson explains that, because both an employee and an employer lose and gain certain rights when entering into an employment relationship, these rights are reciprocal, requiring mutual agreement.

With respect to consent, there must be clear evidence of a mutual agreement between the employee and employer such that the employee has clearly consented to be the "employee" of the "employer." Rideau v. Cort Furniture Rentals, 110 Wash.App. 301 (2002) The Jackson court found Missouri was in such harmony with Washington State's view of the vital nature of consent, it was best to let Missouri say it straight out, no edits or paraphrasing:

It is out of accord with the spirit and purpose of the compensation law that an employee when injured be put to the task of guessing who his employer is to whom he must look for compensation, and be bandied about from one to another, so that in the end all may escape. Lee v. Oreon E. & R.G. Scott Realty Co., 96 S.W.2d 652, 654-55 (Mo.App.1936)

D. The Coverage Determination Context is Irrelevant

The Department's Statement of Issue No. 3 asks whether control/consent employment relationship tests developed in the *employer immunity* context override the statutory language about independent contractors. There are three contexts in which this type of covered relationship question arises: 1) an actual L&I claim filed and the allowance or rejection order gets appealed¹²; 2) an audit of an alleged employer results in an appealed assessment order¹³; or 3) a third-party action involves issues of employer/fellow servant immunity.¹⁴ The control/consent requirements of the law, as well as the statutory language about independent contractors, have coexisted for decades. The context of the dispute changes nothing because either there is or is not a covered relationship no matter who asks the question or why. The appellate decisions reflect no differences in reasoning based on the context, nor should they.

¹² See e.g., *Bennerstrom; Norman, and Stelter*.

¹³ *Sonnens v. Dept. of Labor & Industries*, 101 Wash. App. 350, 3 P.3d 756 review denied 142 Wash. 2d 1008, 16 P.3d 1266 (2000) and *Dana's Housekeeping, Inc. v. Dept. of Labor & Industries*, 76 Wash. App. 600, 886 P.2d 1147(1995)

¹⁴ Novenson.

E. The Bennerstrom Decision Calls for the Assessment to be Vacated

This Court has already visited facts similar to those of Xenith Group and conducted similar legal analysis in *Bennerstrom v. Dept. of Labor & Industries*, 120 Wash.App. 853, 86 P.3d 826, *review denied*. 152 Wash.2d 1031 (2004) That decision stemmed from an injury claim filed with L&I by a COPES-funded worker who got hurt on his way to the library to study something work-related. The Department rejected his claim. The BIIA rejected his claim. The Superior Court granted summary judgment to DSHS and L&I holding there was no coverage. This Court affirmed the Superior Court, and the Washington Supreme Court denied a petition for review. DSHS had no employer relationship with Mr. Bennerstrom.

Mr. Bennerstrom was being paid by DSHS to provide in-home care to his disabled mother. He contracted with DSHS under the Community Operations Program Entry System (COPES) where federal and state funds are used to pay for the services to Medicaid clients who would otherwise have to be placed in nursing homes. There was a written agreement between Bennerstrom and DSHS setting forth a number of terms and conditions, including a statement of work and the compensation schedule by which DSHS was paying him.

Exhibit 1 in *Bennerstrom* was a copy of that contract and, prominent among its terms was, “Contractor Not Employee of DSHS.” It also stated, “The Contractor agrees not to make any claim, demand, or application to or for any right or privilege applicable to a DSHS or Washington State employee, including, but not limited to, workmen’s compensation coverage...” He was informed at his initial training he was not an employee of DSHS. He’d received another unspecified document stating he was not a DSHS employee, and he’d written a letter to DLI stating he was not a DSHS employee. “These uncontested facts support the conclusion that no employment relationship exists.” *Id.* at 860.

This Court held that no employment relationship existed even though DSHS created the service plan, had the ability to monitor Bennerstrom’s care for his mother, and issued W-2s and paychecks. None of those activities provided any evidence of consent on his part to an employment relationship. *Id.* at 861. Despite his failure to meet the consent prong of the two part test, the Court addressed the control prong.

Bennerstrom alleged DSHS controlled him by requiring him to attend classes, developing a service plan, setting his rate of pay, deducting taxes from his paycheck, monitoring his performance, and retaining the right to terminate the relationship. The Court responded that the service plan

simply identified the areas in which the COPES client needed assistance and what services were required to meet the needs. The plan was based on her needs, not those of DSHS. DSHS still did not control Mr. Bennerstrom's physical performance of his duties. *Id.* at 863. The Legislature set the rates of pay for COPES workers, not DSHS. *Id.* at 865. He used his own equipment. *Id.* at 864. DSHS's rights to visit and monitor his activities were consistent with that of a government agency's duty to monitor performance under a contract involving the expenditure of public funds, not the type of control an employer exerts over an employee.

If Kadie England was injured when servicing a client and filed an L&I claim against Xenith Group, Inc. how should this Court rule?¹⁵ Everything which was material to the gatekeeper test of control/consent in *Bennerstrom* is present with Xenith Group and the care providers.

Ms. England's representative, un rebutted testimony was that:

- She was self-employed and did not consent to being an employee of Xenith Group.
- The referral agency was just a middleman helping her gain access to clients more easily and steadily than when she was locating them on her own.¹⁶

¹⁵ What if Ms. England had filed an L&I claim against her client? She has the requisite employer-employee relationship in the nature of a statutorily defined covered independent contractor. However, she would face the same result as Mr. Bennerstrom who was found to be a domestic servant excluded from coverage under RCW 51.12.020(1).

¹⁶ She was particularly interested in working with developmentally disabled clients so contracting with Xenith Group allowed her to have more clientele of

- The employers were her clients, meaning the disabled individuals or their families who qualified for the COPES funds.
- DSHS assessment plans described the types of services the client qualified to receive and set the number of hours per month of services which were authorized.
- She performed her work at the client's home or wherever else the services needed to be delivered.
- Xenith Group didn't tell her what to do and provided no supervision either under the written contract or in fact.
- The client provided the supplies (e.g. rubber gloves), set the hours/days of work, and had the power to hire or fire her.
- DSHS/DDD set the compensation rates, not Xenith Group
- She submitted written timesheets to DSHS and Xenith Group.
- She received a 1099 at year end, not a W2, from Xenith Group for the DSHS work.

This record reflects that Xenith Group had even *fewer* forms of what could be argued as control over the Care Givers than the DSHS had over individuals like Mr. Bennerstrom.

The Department's sole witness "didn't think it [*Bennerstrom*] applied...because the son wasn't sent by a for-profit company." Wilcox 153:2-25 Nowhere in Title 51 RCW or related case law does the existence of a covered relationship turn on whether a for-profit versus non-profit company or a government agency is involved.

The BIIA disposed of *Bennerstrom* stating, "recent cases and statutory construction require us to delve deeper into the employment

the type she desired. England 38:2-39:2

relationship.” CABR 3:26-27 The sole case it cited after 2004 was its own *In re Dale Sanders Trucking Co.*, BIIA Sig. Dec. (2008). The BIIA announced that it weighs in favor of finding an employer-employee relationship “when a worker is forced to sign a contract which attempts to waive their right to industrial insurance benefits as a condition of contracting with a firm.” Neither the statute nor case law allows the BIIA to tilt a decision in favor of coverage merely because something titled “independent contractor-type agreement” exists in the record. Indeed,

Appellant asks for a liberal construction of the Workmen’s Compensation Act in order to allow respondent its benefits. We cannot agree with this suggestion. Workmen’s compensation acts are liberally construed to those who come within its provisions. However, individuals who make applications for benefits are held to strict proof of their right to receive those benefits.

D’Amico v. Conguista 24 Wash.2d 674, 167 P.2d 157(1946) *Citing Kirk v. Dept. of Labor & Industries*, 192 Wash. 671, 74 P.2d 227(1937); *Clausen v. Dept. of Labor & Industries*, 15 Wash.2d 62, 129 P.2d 777(1942); and *DeHaas v. Cascade Frozen Foods, Inc.* 23 Wash.2d 754, 162 P.2d 284(1945).

Sanders involved disputed evidence over actual business operations which did not match with what was written in independent contractor truck lease back agreements. (Two witnesses even testified they’d never signed the contract.) The BIIA upheld the Department’s

determination that a covered relationship existed between the trucking company and its drivers. Nowhere in the *Sanders* decision did it refer to weighing any of the evidence differently than usual.

Circa 2009 and focusing on Xenith Group, L&I and the BIIA have taken positions contrary to the ones they espoused in *Bennerstrom*. There has been no change in the law. There are no materially different facts. The Department simply argues *Bennerstrom* does not control because the independent contractor issue was not expressly addressed. It was neither necessary nor appropriate for the Court to do so because the *Bennerstrom* facts did not permit the legal inquiries to get past the consent-control gatekeeper. Likewise, it not necessary for the Court to engage in extended analysis of the statutory independent contractor issue now because the material, undisputed facts about Xenith Group and the care providers do not move this case past the Title 51 RCW gatekeeper either.

VII. CONCLUSION

Statutory analysis of independent contractor issues under RCW 51.08.180 and RCW 51.08.195 do not come into play unless and until the existence of a work relationship involving control by an employer and clear consent to employment by an individual has been demonstrated. The Industrial Appeals Judge correctly applied the relevant law to the undisputed facts in her Proposed Decision & Order which overturned the

Department's assessment as to the care providers. The Superior Court Judge also correctly applied the relevant law to the undisputed facts and reversed the Department/BIIA. Substantial evidence plus the relevant law requires the BIIA's decision which affirmed the assessment to be overturned. The Superior Court decision should be affirmed.

VIII. REQUEST FOR ATTORNEY FEES/COSTS

Should Xenith Group, Inc. prevail, the Court is respectfully requested to award attorneys fees and statutory costs to be paid by the Department of Labor & Industries for the services required to respond to this appeal, in an amount to be determined per the Rules of Appellate Procedure.

Dated this 31st day of December, 2010.

Respectfully resubmitted,

SLAGLE MORGAN, LLP

By: Joan L.G. Morgan
Joan L.G. Morgan, WSBA #15359
Attorney for Respondent Xenith Group, Inc.

Appendix A

Exhibit 1 to BIIA Record

Xenith Group
914-16th Avenue #3
Seattle, Washington
98122

IMPORTANT TAX INFORMATION

1. **Xenith Group is not your employer. You ARE self-employed!**
2. **Xenith Group takes NO money out of your monthly paycheck for income tax purposes, FICA, L&I or any other standard deductions usually taken out of your paycheck by your typical employer.**
3. **Since you are self-employed, you must do ALL your own record keeping. Recording, reporting, filing and paying of taxes and other requires fees and/or paperwork by the federal and local governments are your responsibility.**
4. **Keep excellent records. Make copies of your documentation every month. Keep your mileage and times worked in an annual folder along with your Incident/Accident Forms, gloves and Records of Care sheets. Please do not turn in illegal paperwork! We will not accept liability for late paychecks if your time sheet or other documentation is messy or improperly filled out and is delayed. If your documentation is illegible, recopy it neatly before turning it in!**
5. **Save all your receipts for gas, cell phone... as well as any community fees not collected by client/parent/guardian (such as movies, swimming fees, restaurants, etc.) Any monies directly incurred as a result of your care for Xenith Group clients can be deducted! Your timesheet record of hours worked MUST coincide with your receipt dates and times if you are audited! Xenith Group will never ask to see your personal records, but the IRS might! Integrity and honest are always the best deterrents to otherwise considered criminal behavior, namely- cheating on your income taxes!**
6. **You will receive a 1099 Form from Xenith Group at the end of January each year. Please use this form to file your personal income tax in compliance with the federal and local regulations. Xenith Group also files this 1099 as required by law with the government IRS. Other than your pay stubs, your 1099 is the only "official" information you will receive from Xenith group to document your income. For a back-up to your 1099, be sure to save your pay stubs from each check you receive from Xenith Group. At the end of the year, your 1099 should match the sum of all your pay stubs for the year.**

While being self-employed has its overall flexibility and other great advantages, keep in mind that effective record-keeping is your best ally should you ever be selected for a random tax audit. It's always a good idea to inquire of a professional tax consultant (we have a recommendation if you need a good one) regarding any deductions you may be entitled to or information/records you might also need while filing.

If you have any further questions, please do not hesitate to call the office during regular business hours.

Industrial Board of Insurance Appeals
In re: Xenith Group
Docket No. _____
Exhibit No. 1
 ADM. 2-26-09 Date REJ.

Office hours are Monday through Thursday from 9 AM to 5 PM.

**ACCEPTANCE OF RESPONSIBILITY
ACKNOWLEDGEMENT OF RISK AND RELEASE**

I, the undersigned hereby agree as follows:

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.
3. The recipient of service and/or their families are my employer, and will hire, supervise and fire me.
4. Xenith Group Homecare Inc. is in no way liable for any wrongdoings, neglect, or abuse or any type of accident/incident that I am involved in.
5. I hereby accept and assume all responsibility and risk arising from my participation in providing these services.
6. I hereby release and forever discharge and agree to indemnify, defend, and hold harmless Xenith Group Homecare Inc. and it's owners, subsidiaries, affiliates, agents, employees, and officers from any and all liabilities, claims, demands, or action which are related to, arise out of, or are any way connected to my providing the above mentioned services.
7. This agreement effective the date I begin Providing Medicaid Personal care services as an independent contractor for clients referred to me by Xenith Group/ Xenith Group Inc.

Signed _____

Date _____

Printed name _____

Witness _____

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the 3rd day of January, 2011, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

DOCUMENT: XENITH GROUP, INC., RESPONDENT'S BRIEF

ORIGINAL: Clerk U.S. Mail
+ ONE COPY Washington State Court of Appeals, Hand Delivery
Division I _____
One Union Square
600 University Street
Seattle, WA 98101-1176

COPY: Counsel for the Department of U.S. Mail
Labor & Industries Hand Delivery
Masako Kanazawa _____
Office of the Attorney General
800 Fifth Avenue, Suite 2000
MS TB-14
Seattle, WA 98104-3188

Brad D. Petersen U.S. Mail
Zenith Services, Inc. Hand Delivery
PO Box 2668 _____
Lynnwood, WA 98036

By: 