

NO. 73234-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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HENRY INDUSTRIES, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

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APPELLANT'S REPLY BRIEF

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## **I. INTRODUCTION**

The Department of Labor & Industries ("Department") responds to Henry Industries Inc.'s ("HII") opening brief by taking positions inconsistent with its prior legal position and statements. It continues to insist that the Court must give deference to the Department's interpretation of the Industrial Insurance Act ("Act" or "WIIA"), but then contends that the Court is not required to give consideration to any of the Department's own guidance, including its Field Audit Manual ("Manual"), which sets out the Department's position as to how the Act is to be interpreted and applied. It does so, namely, because the statements in the Manual do not support the position it now attempts to take, that the sole proprietor exception does not apply; whereas, in prior cases where the Department desired to exclude individuals from obtaining benefits, it insisted that the exception did apply. The Department's legal position in this matter is, at best, a misunderstanding and misapplication of existing law and, at worst, a disingenuous attempt to impose tax liability where none should be assessed.

HII has presented sufficient and substantial evidence showing that the work performed by the contractors was not personal: the Cartage Agreement requires the contractor to supply his or her own vehicle to perform the work; the Cartage Agreement allows the contractor to utilize

others to do the work, and, in fact, contractors did use others; any mandate that the contractor must personally perform the work is conspicuously absent from the Cartage Agreement; and the contractors are free to choose what routes they want to service. Furthermore, in each case involving courier services of which HII is aware, either the Board of Industrial Insurance Appeals ("Board" or BIIA") or a court have found that the provision of a vehicle, even if not a specialized vehicle, is essential to the contract and, therefore, is sufficient to satisfy the first prong of the *White* test, precluding mandatory workers' compensation coverage. *In re Yellow Book Sales & Distrib. Co.*, Dkt. No. 10 11146, 2011 WL 1903472 (Bd. of Indus. Ins. App. Mar. 30, 2011); *Subcontracting Concepts, LLC v. Dep't of Labor & Indus.*, No. 14-2-01221-4, Findings of Fact and Conclusions of Law and Judgment (Thurston Cty. Super. Ct. June 19, 2015), attached as Exhibit A.<sup>1</sup> The facts of the present case track nearly identically with *Yellow Book* and *Subcontracting Concepts*, and the Court should find that the individuals at issue in the audit are not covered workers.

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<sup>1</sup> Appellant has included a copy of this document for ease of reference, pursuant to Wash. R. App. P. 10.3(a)(8) and 10.4(c).

## II. ARGUMENT

### A. **Legal Conclusions, Including Whether an Individual Is a Worker Under the Statute, Are Reviewed *De Novo*.**

The parties agree that factual findings are reviewed under a "substantial evidence" standard and legal conclusions are reviewed *de novo*. See *B&R Sales, Inc. v. Dep't of Labor & Indus.*, 186 Wn. App. 367, 374, 344 P.3d 741 (2015); *Dep't of Labor & Indus. v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 529, 347 P.3d 464, *review granted*, 183 Wn.2d 1017, 355 P.3d 1153 (2015); Appellant's Opening Brief at 10. Additionally, HII does not dispute that whether a contract is personal is a mixed question of law and fact. *B&R Sales*, 186 Wn. App. at 376. The parties dispute, however, the characterization of what is a question of fact and what is a question of law. Controlling case law on this point instructs that what services are provided is a question of fact (reviewed under a substantial evidence standard), and whether those services constitute personal labor such that the individuals are "workers" is a question of law reviewed *de novo*.<sup>2</sup> *Id.*; *Lyons Enterprises*, 186 Wn. App. at 531; *Silliman v. Argus Servs., Inc.*, 105 Wn. App. 232, 236, 19 P.3d 428 (2001).

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<sup>2</sup> The Department recognizes that whether something constitutes personal labor is a mixed question of law and fact, but then limits its argument to a factual analysis and fails to address the ultimate legal conclusion, namely, that personal services are not the essence of the contract under the controlling legal precedent cited by HII.

The Department erroneously urges that whether an individual is a "worker" is a question of fact.<sup>3</sup> Respondent's Brief at 12. It is well settled, however, that issues involving matters of statutory interpretation are questions of law that are reviewed *de novo*. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014); *Xenith Group, Inc. v. Dep't of Labor & Indus.*, 349 P.3d 858, 860 (Wash. App. 2012) ("We review an agency's interpretation of a statute or regulation as a question of law *de novo*."); *Probst v. Dep't Labor & Indus.*, 155 Wn. App. 908, 915, 230 P.3d 271 (2010) ("We review questions of law, such as construction of statutes, *de novo* . . . ."); *R&G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 294, 88 P.3d 413 (2004). Interpreting the meaning of terms within a statute is clearly a matter of statutory interpretation that is subject to *de novo* review. *See Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 684, 162 P.3d 450 (2007) (finding that interpreting the meaning of "wages" under the BIIA was a question of law subject to *de novo* review). Moreover, the Washington Court of Appeals recently held that interpretation of "workers" under RCW 51.08.180 is a matter of statutory

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<sup>3</sup> The Department criticizes *Silliman* as reaching the conclusion that whether work is personal is a question of law without any analysis. Notably, *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 886 P.2d 1147 (1995), cited by the Department, also provides no analysis for its conclusion to the contrary. *Id.* at 608. Unlike the finding in *Dana's Housekeeping*, there is case law to support the *Silliman* decision that the meaning of undefined terms are matters of statutory construction, as set out herein.

interpretation, which is a question of law. *B&R Sales*, 186 Wn. App. at 376. As a result, although the Board in this case characterized its finding that labor was personal as a factual finding, the Court should nevertheless apply a *de novo* review of this question to reflect the legal nature of this issue. *Lyons Enterprises*, 186 Wn. App. at 529-30 ("But if a conclusion of law is labeled as a finding of fact, then it will be treated as a conclusion of law and reviewed de novo.").

Even under a "substantial evidence" standard, a party challenging the Board's factual findings need only show that "the decision was incorrect by a 'fair preponderance of the evidence.'" *Taylor v. Dep't of Labor & Indus.*, No. 28523-5-III, 2010 WL 3505110, at \*2, 157 Wn. App. 1055 (Sept. 9, 2010); *see also Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 253, 177 P.3d 180 (2008) ("the superior court may substitute its own findings and decision" for those made by the Board if it finds "from a fair preponderance of credible evidence, that the BIIA's findings and decision are incorrect"); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 315–16, 189 P.3d 178 (2008) (the court "may disregard the BIIA's findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive"). The focus on review is evaluating "whether substantial evidence supports the findings made after the superior court's de novo review, and whether the

court's conclusions of law flow from the findings." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996), *as amended on denial of reconsideration* (May 8, 1996). As explained in HII's opening brief and reiterated here, the Board disregarded evidence presented by HII on matters which the Department did not dispute; for instance, that contractors were permitted and did, in fact, use third parties to complete the contracted work. Because there is no evidence to the contrary, this Court should conclude from "a fair preponderance of credible evidence" that the Board's factual findings are incorrect and that the Board's legal conclusions did not flow from the substantial factual evidence. *Taylor*, 157 Wn. App. 1055; *Young*, 81 Wn. App. at 128. Accordingly, the Court is not bound by the Board's findings and may substitute its own judgment for that of the Board. *Young*, 81 Wn. App. at 123 (The Superior Court is bound by the Board's findings only if "the court 'finds itself unable to make a determination on the facts because the evidence is evenly balanced.'").

**B. HII's Contractors Are Not Providing Personal Services Under the Cartage Agreement.**

**1. *Requirements in a contract do not mandate a finding of personal labor.***

An independent contractor is a "worker" subject to coverage under the WIIA only if the contractor's personal labor is the essence of the

contract. RCW 51.08.180. "The 'essence' of a contract means 'the gist or substance, the vital sine qua non, the very heart and soul of his contract.'" *Lyons Enterprises*, 186 Wn. App. at 531. The Department attempts to establish that the contractors' personal work was required by relying on basic contractual provisions and/or practices that would be expected in any contractual relationship. Respondent's Brief at 19, 24, 26. Such basic contract requirements do not make a contract one that is essentially for personal labor. *See Yellow Book*, Dkt. No. 10 11146, 2011 WL 1903472 (the BIIA determined personal labor was not the essence of the contract despite contractual provisions relating to specific delivery times). Indeed, the Court would be hard pressed to find any contract that did not include such basic terms. Under the Department's theory, a contract that imposed any obligation beyond job completion would be personal. This simply is not the law. *Id.* The Department also points out that HII requires its contractors to undergo a background test. Respondent's Brief at 24. Because of the sensitive and highly regulated nature of the pharmaceuticals being transported, federal law requires that all couriers undergo a background test. Acting in compliance with the law, HII passes on this requirement, but it does not care who performs the work so long as the individual has passed the federally mandated background check. CABR Ex. 2-33, Cartage Agreement ¶ 3.c.5-6. The "gist or substance" of

the contract is that pharmaceuticals are delivered, not *who* delivers them. *Lyons Enterprises*, 186 Wn. App. at 531. The Department notably fails to point out that the operative provisions of the contract, i.e. what routes will be run, compensation terms, who will perform the work, etc., are either expressly left to the contractor's discretion through the verbiage in the contract, or are negotiated with HII at the outset of signing the agreement. CABR Ex. 2-33, Cartage Agreement ¶ 3.a, Schedule A; CABR Tr. 7/29/13 at 108:19–25, 112:1–4.

A recent decision from the Washington Court of Appeals supports HII's position that an independent contractor may be exempt from mandatory coverage under the WIIA despite specific requirements in the independent contractor agreement. *See Subcontracting Concepts, LLC v. Dep't of Labor & Indus.*, No. 14-2-01221-4, Findings of Fact and Conclusions of Law and Judgment (Thurston Cty. Super. Ct. June 19, 2015), attached as Exhibit A. Subcontracting Concepts ("SCI") is a settlement processing company that offers courier and logistic services to companies. *In re Subcontracting Concepts LLC*, No. 12 15210, 2014 WL 3382982, at \*1 (Wash. Bd. Indus. Ins. App. May 23, 2014). SCI entered into 87 independent contracts with individuals to provide the courier services. The independent contractor agreement between SCI and the contractors provides, among other things, that: the courier is required to

have a vehicle with certain specifications, maintain that vehicle, and provide immediate written notice to SCI and its customers when a vehicle is replaced; the contractor will be issued an identification card containing the name and/or logo of SCI and/or of the customer of SCI for whom the contractor is performing services; specific clothing may be required or requested by SCI and/or its customers; and the contractor may employ drivers to perform the delivery assignments so long as the third party meets the qualifications set forth in the contract. *Id.* at 3. After the Board affirmed the Department's assessment of taxes against it, SCI appealed to Superior Court. Exhibit A at 2 ¶ 1.3. On appeal, the Superior Court found, among other things, that "[t]here was not sufficient evidence to support the finding that the 87 independent contractors were 'workers' of SCI," and that the "'essence' of the contract . . . was something other than personal services." Exhibit A at 2 ¶ 1.5, 3 ¶ 2.3. Under the holding of *Subcontracting Concepts*, the requirement that contractors comply with basic contractual provisions does not mean that the essence of the contract is personal services.

**a. *White Test, Part 1: Provision of Equipment***

The Department's argument that "the presence of a car does not change the fact that the physical act of driving is labor" is unavailing. Respondent's Brief at 19. The test is not whether labor is performed, but

whether *personal* labor is the *essence* of the contract. RCW 51.08.180. If the test was nothing more than whether labor is performed, the only situation in which an independent contractor would not be covered would be where a piece of equipment is leased and no operator is involved. Existing case law demonstrates that this is not the case. *See Yellow Book*, Dkt. No. 10 11146, 2011 WL 1903472 (independent contractors who personally drove vehicles to deliver telephone books were not covered workers).

The Department also relies on *Lloyds of Yakima Floor Center v. Department of Labor & Industries*, 33 Wn. App. 745, 662 P.2d 391 (1982) and *B&R Sales*, 186 Wn. App. 367. The Department's reliance on these cases is misplaced. In both of those cases, it is clear that the contractors were hired for their specialized carpentry skills rather than the equipment they supplied. *See Lloyds*, 33 Wn. App. at 751 (referring to the carpenters as "experts in their field"); *B&R Sales*, 186 Wn. App. at 377-78 ("If the contracting party's primary object is to obtain the personal labor of a *skilled* contractor, the contractor is a 'worker' . . . even if the contractor must use specialized equipment. . . .") (emphasis added). Additionally, there was no evidence or suggestion in either case that the contractors had the contractual right to subcontract the work to anyone else, which further indicates that the contractors were hired for their personal labor. On the

contrary, in *Lloyds*, the trial court found that the agreement between the parties contemplated that the carpenter would perform the work himself. *Lloyds*, 33 Wn. App. at 751. This case is clearly distinguishable from HII's situation where the Cartage Agreement clearly contemplates that others may do the work. CABR, Ex. 2-33 Cartage Agreement ¶ 3. Indeed, in other cases in which a court has determined that the essence of a contractor's work is personal, the focus has been on the specialized skill or other personal attribute of the particular contractor. *See Lyons Enterprises*, 186 Wn. App. 518 (distributor entered into contracts with franchisees to promote business).

Unlike *Lloyds* and *B&R Sales*, the contractors working on behalf of HII were not hired for any specialized skill. As the Department concedes, driving a vehicle is "ubiquitous" in today's world (Respondent's Brief at 22), and there can be no rational argument that operating a vehicle requires special skill by the contractor. Likewise, the Department's argument that skill is required in navigating roads is equally unavailing. Navigation requires nothing more than using GPS or other similar and readily available assistance. Moreover, in *Yellow Book*, which facts are nearly identical to the present case and which involves the use of independent contractors as couriers, the Board (finding that the contractors were exempt) emphasized the fact that the contractors were required by

contract to "supply machinery in the form of a car, pick-up, or other motorized machine in order to accomplish their deliveries." *Yellow Book*, Dkt. No. 10 11146, 2011 WL 1903472. The Board in *Yellow Book* did not include any discussion or focus on the specialized nature of the vehicle because none was required to qualify for the exemption under *White*. See generally *id.* Likewise, in *Subcontracting Concepts*, the Superior Court placed great emphasis on the fact that the contract required a vehicle, albeit not a specialized vehicle, to perform the courier services in reaching the decision that the contractors were not covered workers. See Tr. 3/6/15 at 11:1-15, attached as Exhibit B<sup>4</sup> (finding that, despite the Department's argument that a "particular" automobile was not required, that the vehicle was crucial to the contract). In fact, Judge Tabor specifically noted that many couriers use bicycles to perform their job, so the fact that the contract required a motorized vehicle was sufficient to meet the first prong of the *White* test and further noted that "[w]ithout the vehicle, there can be no contract." *Id.* at 11:1-20; Exhibit A at 3 ¶ 1.8. These facts are nearly identical to the case at bar. The Cartage Agreement in this case requires the use of a vehicle to perform the deliveries, without which, there would be no contract. Because the contractors were not hired for any specialized

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<sup>4</sup> Appellant has included a copy of this document for ease of reference, pursuant to Wash. R. App. P. 10.3(a)(8) and 10.4(c).

skill, the vehicle, which is critical to transport the pharmaceuticals, is the crucial part of the contract, and the labor was not personal to the contractors.

**b. *White* Test, Part 3: Right to Employ Others**

Under *White*, a contractor who by necessity or choice employs others to do all or part of the contracted work is exempt under the WIIA. *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956). In this case, delegation of contract duties to others is expressly permitted under the Cartage Agreement (*see* CABR Ex. 2-33, Cartage Agreement ¶ 3.a., c.), and Mr. Brett Henry testified that "oftentimes these drivers use employees or subcontractors to provide the labor needed." CABR Tr. 7/29/13 at 32:8–10.

The Department criticizes the authority relied up on by HII, *Massachusetts Mutual Life Insurance Co. v. Department of Labor & Industries*, 51 Wn. App. 159, 752 P.2d 381 (1988) and *Silliman v. Argus Services, Inc.*, 105 Wn. App. 232, 19 P.3d 428 (2001), arguing that in those cases, the independent contractors at issue actually used others to do the contracted work. *Id.* at 32. The situation in *Silliman* is distinguishable because Argus Services, the independent contractor, was an entity that necessarily had to use others to do the work; whereas in the present case,

the independent contractors are individuals who are able to perform the contract work if they choose. Even so, the Department's argument ignores the Court's clear and unequivocal recognition that "the Act does not cover an independent contractor when the contracting parties contemplate that the labor will be done by others, in whole or in part." *Mass. Mut. Life*, 51 Wn. App. at 164–65; *see also Yellow Book*, Dkt. No. 10 11146, 2011 WL 1903472 at \*2 (finding that the labor was not personal even though "[s]ome of the 72 deliverers could perform their contract without assistance"). There is no question or disagreement between the parties here that the Cartage Agreement allows for the delegation of duties to third parties. It expressly provides that the contractor "will be solely responsible for determining, providing, and assigning a *sufficient number of workers*," implying an indifference as to who performs the labor. CABR Ex. 2-33, Cartage Agreement ¶ 3.a. (emphasis added). Moreover, at no point in the Cartage Agreement does it mandate that the signor of the agreement must perform the work.

In response to the unrefuted evidence provided by Mr. Henry, the Department argues that the Board, as the fact-finder, is entitled to disregard evidence on credibility grounds. Respondent's Brief at 33. However, the Board did not hear the testimony live or observe the witness during questioning; rather, the Board made its assessment based on a

written transcript of the proceedings before Administrative Law Judge Morgan without the benefit of questioning Mr. Henry as to the source or extent of his knowledge. The Ninth Circuit has instructed that "[i]t is unreasonable to discredit the sworn testimony of a witness for the sole reason that there is no contemporaneous documentary evidence to support it," which is precisely what the lower court did in reviewing the Board's decision. *Vera-Villegas v. I.N.S.*, 330 F.3d 1222, 1234 (9th Cir. 2003). Moreover, the Court is not required to accept the Board's factual findings as true and may "substitute its own findings and decision" for those made by the Board if it finds "from a fair preponderance of credible evidence, that the BIIA's findings and decision are incorrect." *Jenkins*, 143 Wn. App. at 253; *see also Lewis*, 145 Wn. App. at 315–16 (the court "may disregard the BIIA's findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive"). Here, there is no basis for disregarding HII's sworn testimony, and it should be considered in both making a factual determination as to whether any contractors actually employed others or used subcontractors to do some or all of the work and in making a legal conclusion that relying on those individuals precludes a finding that the Cartage Agreement requires personal service. Regardless, Mr. Vince Martinez, Operations Manager, also testified that he is aware of situations

where route drivers in the Washington area used others to drive their routes for them. CABR Tr. 7/29/13 at 64:14-16, 69:21-26. Because Mr. Martinez is located in Washington and was in charge of account management for PharMerica (*id.* at 64:14-16, 65:2-5), he has a good foundation for his knowledge (the Board discredited Mr. Henry's testimony on the basis that he was not present in Washington), and such evidence should have been considered by the Board and should be considered by this Court. *Young*, 81 Wn. App. at 128 (The Superior Court is bound by the Board's findings only if "the court 'finds itself unable to make a determination on the facts because the evidence is evenly balanced.'").

The Department further argues that the testimony provided by Mr. Henry has been refuted. Respondent's Brief at 33. This argument is discredited by the record. The Department argues that because the auditor removed two individuals from the tax assessment on the basis that they used other employees and did not provide personal labor, he implicitly concluded that the remaining individuals did not rely on employees to do any of the work. *Id.* at 33-34. The auditor testified, however, that he did not speak to each of the contractors at issue in the audit; in fact, he testified he could only remember speaking to two individuals. CABR Tr. 7/29/13 at 155:24-156:11. The Department cannot contradict sworn

testimony provided by Mr. Henry (or Mr. Martinez) when it did not even speak to each of the contractors at issue in the audit to ask whether those individuals ever relied on others to perform the contracted work.

The substantial evidence in the record supports that independent contractors were permitted to and did, in fact, rely on others to perform some or all of the contracted work. Consequently, they are exempt from mandatory coverage under the third prong of the *White* test.

**2. *The Department's admission regarding stat contractors clearly demonstrates that they are not covered workers.***

There is no dispute among the parties that independent contractors providing personal labor are covered workers under the WIIA, so long as the contractor's personal labor is the *essence* of the contract. RCW 51.08.180. The dispute in this case is whether the essence of the independent contractor's contracts is to provide personal labor to HII. "Personal labor' means labor personal to the independent contractor," where the contract "contemplated a specific type of labor, not a specific laborer." *Silliman*, 105 Wn. App. at 238.

HII uses two types of contractors—route and stat contractors. CABR Tr. 7/29/13 at 15:23–16:7. Route contractors run regular routes, which are obtained by bidding on available contracts. *Id.* at 18:7–17. Stat

contractors, on the other hand, do not have regular service contracts but are called on an as-needed basis. *See id.* at 15:23–17:7. A stat contractor's function is to provide urgent delivery services in emergency situations at the direction of the customer. *Id.*<sup>5</sup> The Department admits in its response brief that when searching for a stat contractor to make a delivery, HII would often call "three or four" contractors before finding somebody who would accept the delivery job. Respondent's Brief at 7.

Washington courts have found that where independent contractors employ others to do some or all of the contracted work, the work is not personal under the Act. *Silliman*, 105 Wn. App. at 238 (finding that where an individual actually employs others to do all or part the work, the contracted work is not personal); *Mass. Mut. Life Ins.*, 51 Wn. App. at 165 (same); *White*, 48 Wn.2d at 474 (if a contractor "by necessity or choice employs others to do all or part of the work he has contracted to perform," then the labor is not personal). Reasoning by analogy, if employing others to do some or all of the contracted work effectively excludes coverage under the Act, then declining to perform work altogether must have the

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<sup>5</sup> The Department continually refers to stat contractors are being "on call." Respondent's Brief at 3. While a stat contractor is on a list of individuals who can be called in an emergency situation, this does not require stat contractors to be available 24 hours per day, or even to be available at all. CABR Tr. 7/29/13 at 16:8–14. In other words, they are not required to answer the call or to take the delivery if called. Stat contractors are contacted by dispatchers for HII and are free to decline deliveries as they wish, in which case, the dispatcher will contact another stat contractor until one is available and willing to perform the delivery. *Id.* at 16:8–14; 69:2-20.

same effect—where somebody refuses to provide services under the contract, that person's personal labor cannot be the "very heart and soul" of the contract. *Lyons Enterprises*, 186 Wn. App. at 531. Declining work clearly falls within the *White* test. Any argument to the contrary is illogical, and the Department's unambiguous and unequivocal admission clearly demonstrates that the work performed by stat contractors is not personal. Consequently, individuals who do exclusively stat work are not covered workers.

**C. A Plain Reading of the Statute Demonstrates That Sole Proprietors Are Exempt From Coverage.**

The Department's argument that the sole proprietor exemption does apply hinges primarily on its assertion that coverage for independent contractors would never apply because any person who is self-employed will necessarily be sole proprietors or exempt as officers of the business. Respondent's Brief at 43. But, all independent contractors are not sole proprietors. Entities may be independent contractors of another company, and individuals may choose to organize their self-employment as a corporation rather than be a sole proprietor. If the Court were to accept the Department's argument, it would render the sole proprietor exception wholly meaningless because it would apply only if the labor was not personal, at which point, it is not necessary because such contractors are

already excluded. The Department argues that the reading it suggests does not render the exclusion meaningless "because many sole proprietors either do not provide personal labor to others under an independent contract . . . or do provide some personal labor . . . but the essence of the work under the contract" is not personal labor. Respondent's Brief at 46. Under the Department's option A—the sole proprietors do not provide personal labor—mandatory coverage does not apply because the test for coverage, providing personal labor that is the essence of the contract, has not been met. The same is true of the Department's option B—the personal labor provided is not the essence of the contract—the test for coverage is not met. Because the threshold for imposing mandatory coverage under the Act is not met in either situation the Department advances, there is no need for an exception to the rule, rendering it totally meaningless.

The Department also ignores the fact that sole proprietors can elect coverage if they so choose, *Dosanjh v. Bhatti*, 85 Wn. App. 769, 775, 934 P.2d 2010 (1997), and in fact, in this case, such coverage was required by the Cartage Agreement. CABR Ex. 2-33, Cartage Agreement ¶ 5.b. ("Contractor agrees to maintain Occupational/Accidental insurance coverage or workers compensation coverage on Contractor and any individuals working for Contractor as employees or independent contractors."). The Department argues that the statute is to be construed to

promote broad workers' compensation coverage, but the Court does not have authority to mandate coverage where an individual has the option to elect coverage but has declined to do so.

The Department has failed to explain its inconsistent positions regarding this exception, which also weighs in favor of applying the exception in this case. Indeed, in both its Manual and in *Department of Labor & Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), the Department has taken the position that the plain language of the statute applies to exempt an individual from coverage. *Fankhauser*, 121 Wn.2d at 309 (the Department argued that "the *plain language* of the Act *unambiguously* excludes the claimants from workers' compensation coverage" because they were self-employed sole proprietors who did not elect optional coverage) (emphasis added); CABR Ex. 34, Reference Manual at 000391 ("The excluded employments in RCW 51.12.020 are exempt from mandatory coverage regardless of whether the individual supplies only their personal labor."); *see also* CABR Ex. 41, Education Sheet at p. 10 (bates stamp 000247) ("Sole proprietors are not mandatorily covered by industrial insurance."). The Department is not entitled to deference where it consistently changes its legal position to fit whatever argument is convenient to its position at the time.

As stated in HII's opening brief, the Department's own documents demonstrate that at least 20 of the 33 individuals identified in the audit are, or have been at one time, registered with the Washington State Department of Revenue as sole proprietors; and of those 20 individuals, 12 currently have active accounts with the Department of Revenue and did so in 2010. CABR Ex. 44, State Business Records Database Detail. At no point in the administrative proceedings did the Department provide any argument or evidence to overcome this undisputed fact, instead choosing to wholly ignore it. Because there is no dispute that at least 12 of the 33 individuals included in the audit are sole proprietors and, therefore, expressly excluded from coverage under the Act, HII cannot be liable for taxes owed on behalf of those individuals. Further, those individuals and the remaining 21 contractors are excluded from coverage regardless of their status as a sole proprietor because, as has been established, their contracts with HII are not for personal labor.

### **III. CONCLUSION**

The evidence in the record establishes that the contractors are not workers under the Act because the essence of their contract is not personal labor. The Department's documents and guidance support this conclusion. The contractors are exempt under exceptions recognized by Washington courts because they provide expensive machinery that is necessary to

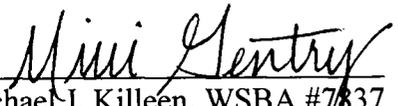
complete the object of the contract, they have the option to use others in completing the contracted work, and testimonial evidence demonstrates that some contractors exercised that option. For these reasons, Henry Industries respectfully requests this Court to find that these contractors are exempt from mandatory coverage under the WIIA.

DATED this 18th day of December, 2015.

By Mimi Gentry  
for Molly E. Walsh  
Stinson Leonard Street LLP  
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mimigentry@dwt.com

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and not a party to the within cause.

2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101.

3. On the 18<sup>th</sup> day of December, 2015, I caused true copies of the following documents:

BRIEF OF APPELLANT HENRY INDUSTRIES, INC.

to be served via e-mail and by U.S. mail on counsel for the Department at the following address:

Katy J. Dixon  
Assistant Attorney General  
Office of the Attorney General of Washington  
Labor & Industries Division  
7141 Clearwater Drive SW  
P.O. Box 40121  
Olympia, WA 98504-012  
katyd@atg.wa.gov

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

Executed this 18<sup>th</sup> day of December, 2015, at Seattle, WA.

*Valerie Macan*  

---

Valerie Macan

**APPENDIX**

**Document**

**Exhibit**

*Subcontracting Concepts, LLC v. Dep't of Labor & Indus.*,  
No. 14-2-01221-4, Findings of Fact and Conclusions  
of Law and Judgment (Thurston Cty. Super. Ct. June 19, 2015)..... A

*Subcontracting Concepts, LLC v. Dep't of Labor & Indus.*,  
No. 14-2-01221-4, Ruling from ALR Hearing  
(Thurston Cty. Super. Ct. March 6, 2015).....B

# EXHIBIT A

**FILED**

JUN 19 2015

Superior Court  
Linda Myhre Enlow  
Thurston County Clerk

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON**

SUBCONTRACTING CONCEPTS, LLC,  
  
Petitioner,  
  
vs.  
  
WASHINGTON STATE DEPARTMENT  
OF LABOR AND INDUSTRIES,  
  
Respondent.  
  
Formerly:  
  
In Re: SUBCONTRACTING CONCEPTS,  
LLC,  
  
Firm No. 166,698-00

NO. 14-2-01221-4

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND  
JUDGMENT

**Clerk's Action Required**

**JUDGMENT SUMMARY (RCW 4.64.030)**

- 1. Judgment Creditor: SUBCONTRACTING CONCEPTS, LLC
- 2. Judgment Debtor: WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES
- 3. Principal Amount of Judgment: \$192,428.60
- 4. Interest to Date of Judgment: \$23,091.43
- 5. Reasonable Attorney Fees: ~~\$11,803.50~~ \$10,000 <sup>aw</sup> 
- 6. Costs: \$529.32
- 7. Other Recovery Amounts: \$0
- 8. Principal Judgment Amount shall bear interest at 12 percent per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12 percent per annum.
- 10. Attorney for Judgment Creditor: Sean Walsh, WSBA#39735
- 11. Attorney for Judgment Debtor: Katy J. Dixon, AAG, WSBA#43469

1 This matter came on regularly before the Honorable Gary R. Tabor, in open court on  
2 March 6, 2015. The Petitioner, SUBCONTRACTING CONCEPTS, LLC (hereinafter "SCI"),  
3 appeared by its counsel, Sean Walsh of AMS LAW, PC; the Respondent, Department of Labor  
4 and Industries (hereinafter the "Department"), appeared by its counsel, Robert Ferguson,  
5 Attorney General, per Katy J. Dixon, Assistant Attorney General. The Court, after reviewing  
6 the records and files herein including the Certified Appeal Board Record and briefs submitted by  
7 counsel, as well as oral argument of Counsel, makes the following:

8 **I. FINDINGS OF FACT**  
9

10 1.1 On April 5, 2012, the Department affirmed the Notice and Order of Assessment No. 0477342  
11 (the Assessment) dated December 23, 2008, assessing \$139,135.54 in premiums for 87  
12 independent contractors for the third and fourth quarters of 2006.

13 1.2 On April 27, 2012, SCI timely appealed the Assessment to the Board of Industrial Insurance  
14 Appeals (hereinafter "BIIA"). Hearings were held at the BIIA on September 24<sup>th</sup> and 25<sup>th</sup>,  
15 2013. On December 23, 2013 the Industrial Appeals Judge issued a Proposed Decision and  
16 Order reversing the Department's order, after which the Department timely filed a Petition  
17 for Review. On May 23, 2014, the BIIA issued a Decision and Order affirming the  
18 Assessment.

19 1.3 On June 23, 2014 SCI timely filed Notice of Appeal to this Court, which heard this matter  
20 on March 6, 2015. On that date pursuant to RCW 51.52.112 SCI paid in full all taxes,  
21 penalties, and interest to the Department, a payment in the amount of \$192,428.60.

22 1.4 There was not a sufficient factual basis for the BIIA's May 23, 2014 Decision and Order.

23 1.5 There was not sufficient evidence to support the finding that the 87 independent contractors  
24 were "workers" of SCI as that term is defined in RCW 51.08.180.  
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- 1.6 There was not sufficient factual basis to support a finding that the 87 independent contractors were by their position working for SCI, or providing any services in a way that would make them “workers” of SCI.
- 1.7 The realities of the situation support finding that SCI was not an “employer” as that term is defined in RCW 51.08.070. Although SCI received certain moneys, SCI’s role was not as an employer, but as an administrative agency that was basically handling certain paperwork.
- 1.8 The contract, admitted into evidence as Exhibit 6, and relied upon in the May 23, 2014 Decision and Order to establish the 87 independent contractors were “workers”, required those 87 independent contractors to have an automobile. Each contract, with specificity, identifies the use of a vehicle in the performance thereof. Without the vehicle, there can be no contract.

13 Based upon the foregoing Findings of Fact, the Court now makes the following:

14 **II. CONCLUSIONS OF LAW**

- 15 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.
- 16 2.2 The 87 independent contractors were not providing any services to SCI in a way that would make “workers” of SCI under RCW 51.08.180.
- 17
- 18 2.3 The “essence” of the contract, Exhibit 6, was something other than personal services, and so the 87 independent contractors were not “workers” under RCW 51.08.180.
- 19
- 20 2.4 SCI was not an “employer” of the 87 independent contractors under RCW 51.08.070.
- 21 2.5 The BIIA May 23, 2014 Decision and Order affirming Notice and Order of Assessment No. 0477342 is not appropriate being 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, and the Petitioner, SCI, is entitled to relief therefrom.
- 22  
23  
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1 2.6 The BIIA May 23, 2014 Decision and Order affirming Notice of Assessment No.  
2 0477342 is not appropriate because of an erroneous interpretation or application of the  
3 law, and the Petitioner, SCI, is entitled to relief therefrom.  
4

5 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters  
6 judgment as follows:

7 **III. JUDGMENT**

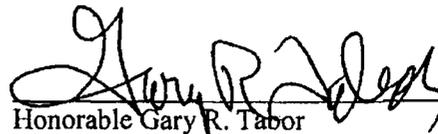
8 3.1 The May 23, 2014, Board Order affirming the Notice and Order of Assessment No.  
9 0477342 is hereby reversed.

10 3.2 The Department is ordered to refund to SCI the full amount of any assessed taxes,  
11 penalties or interest that were already paid, together with interest on such sums accruing  
12 from the date such taxes penalties or interest were paid.

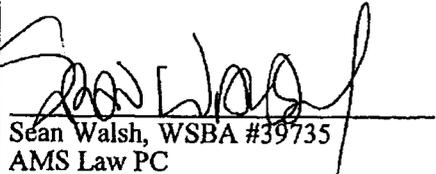
13 3.3 The Petitioner is awarded and the Respondent is ordered to pay reasonable attorney fees  
14 and costs incurred per RCW 4.84.080 and the Equal Access to Justice Act (RCW  
15 4.84.340 - .360) in the amount of ~~\$11,000.00~~ <sup>10,000.00 (see) KJD</sup> in attorney's fees and \$529.32 in costs.

16 3.4 The Petitioner is awarded interest from the date of entry of this judgment as provided by  
17 RCW 4.56.110.

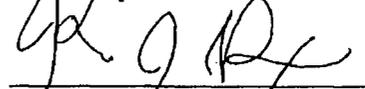
18 DATED this 19th day of June, 2015.

19  
20  
21   
Honorable Gary R. Tabor

22 Presented by:  
23 AMS Law PC

24   
25 Sean Walsh, WSBA #39735  
26 AMS Law PC  
Attorney for Petitioner

Copy received,  
Approved as to form and  
notice of presentation waived:

  
Katy J. Dixon, WSBA # 43469  
Assistant Attorney General  
Attorney for Respondent

# EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

---

SUBCONTRACTING CONCEPTS LLC, )  
 )  
 Petitioner, )  
 )  
 vs. ) SUPERIOR COURT NO. 14-2-01221-4  
 )  
 WASHINGTON STATE DEPARTMENT )  
 OF LABOR AND INDUSTRIES, )  
 )  
 Respondent. )

---

THE HONORABLE GARY R. TABOR PRESIDING

Ruling from ALR hearing  
March 6, 2015  
2000 Lakeridge Drive SW  
Olympia, Washington

Court Reporter  
Ralph H. Beswick, CCR  
Certificate No. 2023  
1603 Evergreen Pk Ln SW  
Olympia, Washington

A P P E A R A N C E S

For the Petitioner: Sean Walsh  
AMS Law  
975 Carpenter Road NE, Suite 201  
Lacey, WA 98516

For the Respondent: Katy Janelle Dixon, AAG  
PO Box 44172  
Olympia, WA 98504-0121

\*\*\*\*\*

1  
2 THE COURT: All right. Thank you.

3 Counsel, I am prepared to rule. I always give this  
4 disclaimer: In that I've just heard your arguments, for  
5 the Court to be ruling might be troubling to a casual  
6 observer thinking this is a complex issue, and how can a  
7 judge just hear a few minutes of argument and then rule.  
8 Well, there is a whole process involved here, and I do like  
9 to do my preparation up front, and that is that I consider  
10 your briefs, and I consider the record, and I try to  
11 understand what the issues are. And so I've done that in  
12 this particular case, and I am going to be ruling.

13 I do like to get to the point, but another disclaimer is  
14 that I understand that when we're talking about the kind of  
15 money that's involved here, 139,000, and there might be  
16 interest and so forth, either side, depending on how I  
17 rule, could obviously appeal. What I'm telling you is that  
18 I understand that I am to decide this case, basically an  
19 appeal that Superior Court does on a regular basis in these  
20 kinds of matters. That does not preclude some other court  
21 reviewing what I do. But my disclaimer is that doesn't in  
22 any way reduce the burden that I have. I'll just candidly  
23 tell you I want to get this right when I rule. I don't  
24 want to be overruled by a higher court. Does that  
25 sometimes happen? Clearly, it does. On the other hand, my

1 obligation here today is to call this as I see it based  
2 upon the facts in this case and the law as I understand it.  
3 So I'll tell you where I'm going to go, and then I'll go  
4 back and explain some of my reasoning.

5 I guess a final disclaimer is that I understand by  
6 ruling at the beginning of my remarks someone might not  
7 hear another word that I say. I think that happens  
8 sometimes. But that's why we have a court reporter, and  
9 hopefully, my remarks can be reviewed.

10 When I first became a judge, an older, wiser individual  
11 that was a judge said, you know, one of the things you have  
12 to understand is as a judge, it's not your goal to be  
13 popular to the majority of the individuals in your  
14 courtroom. You may have a whole courtroom full of people  
15 that feel strongly about an issue. That's not the  
16 determination. As a matter of fact, most times when you  
17 rule, half the room's going to be mad at you. That judge  
18 went on to say when you rule, you might make everybody mad.

19 Well, I understand all that, but here is the way I see  
20 this: I believe that the petitioner in this case should  
21 prevail, and I am going to enter findings that the Board of  
22 Industrial Insurance was mistaken in their decision. I  
23 believe they were mistaken factually, and I understand what  
24 the test is here. It's not for me to resolve the facts;  
25 it's for me to determine whether there was a sufficient

1 factual basis for their decision. I do not believe that  
2 there was, and I'll reiterate the reasons for that here in  
3 a moment.

4 Secondly, I believe that their understanding of the  
5 facts led them to make a legal mistake, and that is  
6 specifically finding that the 87 independent contractors  
7 were primarily using their personal labor, and that was the  
8 essence of their work for SCI, and I disagree with that.

9 All right. Let me go back and make some other remarks  
10 then. First of all, I understand that there is a  
11 procedural process for this all coming about, and so first  
12 of all, there was a ruling below by the Department of Labor  
13 and Industries that issued this assessment saying the taxes  
14 were ordered. That was back in December of 2008. There's  
15 no dispute but that there were then timely requests for  
16 review, and ultimately there was a review by a industrial  
17 appeals judge, Christopher Swanson, and his determination  
18 which was December 23rd, 2013. I don't know whether it's  
19 happenstance that we're talking about almost exactly five  
20 years to the day from the decision by Labor and Industries  
21 to make this assessment. And then there was an appeal by  
22 Labor and Industries of that ruling, and ultimately, the  
23 Board of Industrial Insurance took this matter for review.  
24 There was further briefings by everyone concerned, and they  
25 issued a ruling.

1           There are three members of the Board of Industrial  
2 Insurance that heard this matter, and the majority  
3 determined that they would reverse the decision of the  
4 industrial appeals judge. There was one dissent, and  
5 Mr. Jack Eng wrote a dissenting opinion which is attached  
6 to the decision and order of the board.

7           It's not for me to say, well, I add up who's for this  
8 and who's against this and I determine that based upon the  
9 most people for a particular position that that's how I'm  
10 going to rule. That is not the test for me. However, I  
11 will tell you that I have considered the decisions as  
12 articulated by both the industrial appeals judge and by the  
13 dissenter in the Board of Industrial Insurance decision and  
14 I agree with much that they have to say.

15           Let me start by pointing out that I believe that  
16 Ms. Dixon very candidly said that the real essence of the  
17 contract is the reality of the situation. I think several  
18 people have expressed that the contract, when you look at  
19 that -- and by the way, that was a little confusing. I  
20 thought it said it was Exhibit No. 6, and yet when I went  
21 searching for that, it appears that it was Exhibit No. 4.  
22 Now, maybe there's some mislabeling of that, but I'm  
23 looking at the final stack that I have here, and on page 13  
24 -- I'm sorry. It's Exhibit 3. On page 14 of what's  
25 numbered as exhibits -- and by the way, this is not the way

1 I like to see Bates numbers applied. I like to have Bates  
2 numbers applied all the way through so that I can refer to  
3 a particular Bates number without it being confused with  
4 some other page number. And so this says page 14 of the  
5 exhibits. It also says page 424, and it says Exhibit 3.  
6 But in any event, that's the contract we're talking about,  
7 and in some ways that contract was somewhat confusing.  
8 I'll note that that was discussed by Jack Eng in his  
9 dissent, and he specifically says at page 12, "I ...  
10 recognize that the Subcontracting Concepts facts are a bit  
11 confusing, when considering the various contracts ...." He  
12 goes on to say that he believes that the agreements require  
13 the use of a vehicle and that it was vehicle performance  
14 and not personal performance that was really the reason  
15 that he dissented.

16 Going back to Industrial Appeals Judge Swanson's  
17 discussion, he says at the bottom of page six of his  
18 opinion, "I am convinced that the testimony of Mr. Briggs,  
19 Mr. Chernetskiy, Mr. Weekly and Mr. Momotyuk and Mr. Foster  
20 are an accurate representation of how SCI actually  
21 operates." He considered that in light of the language  
22 that was troubling as to various contracts. They  
23 explained, however, that many of these contracts were  
24 actually drafted by another business, and that was US  
25 Dispatch, and only later conveyed to SCI.

1           The bottom line is this: And I have reviewed a number  
2 of the statutes involved, the RCWs. I've also looked at a  
3 WAC that was cited, and that was WAC 296-17-87306 talking  
4 about employee leasing firms. I don't believe that's  
5 really before this court. I don't have to make a decision  
6 about that. I think it's clear that the Department was not  
7 arguing that SCI was in fact such. They hinted that that  
8 might be an analogy, but I'm not going there.

9           I reviewed RCW 51.08.180 which defines a worker,  
10 51.08.195 which defines an employer, 51.12.020, and I think  
11 that was cited a moment ago in error by the petitioner.  
12 You said 15.12.020, but it's 51.12. In any event, I knew  
13 what you were talking about, and that's where it discusses  
14 sole proprietors.

15           Let me talk about that issue, and then I'll come back to  
16 some of the issues. The Board in making their decision  
17 says we're not going to consider the sole proprietor issue  
18 because it wasn't properly presented to us. However,  
19 they've put the Department in a position of having to  
20 defend that, and the Department has defended it by saying  
21 well, it doesn't apply. Why didn't the board just say  
22 that? It would have been much simpler because then I'd  
23 have something specifically to look at if I ever got to  
24 that point.

25           The reality is that I don't get to that point because

1 I'm making this decision based upon other criteria, and  
2 that other criteria is specifically whether or not the  
3 workers were by their position employees of SCI that were  
4 providing their personal services. I do not believe that's  
5 the case. I do not believe that the facts bear that out.  
6 I believe that the testimony that was received -- and one  
7 of the reasons for having a hearing and testimony is for a  
8 judicial officer, in this case the administrative hearings  
9 officer, can assess credibility as a person is testifying  
10 and can consider what they have to say in light of other  
11 issues in the case, in this case some of the contracts or  
12 the agreements.

13 It appears clear to me that while SCI receives certain  
14 moneys -- they receive two dollars for each of the  
15 settlement checks they were providing to these independent  
16 contractors, and they received a monthly amount for  
17 services, \$18.67 I believe -- that is not conclusive in  
18 this particular case to make them employees. As a matter  
19 of fact, the way all that worked out it appears to me that  
20 SCI, instead of being an employer in this case, was an  
21 administrative agency that was basically handling certain  
22 paperwork, and in doing so, the independent contractors are  
23 not their employees.

24 Now, I don't know the repercussions of saying, as I am  
25 saying, that they were not employees. I think probably to

1 be absolutely fair what I'm really saying is there was not  
2 sufficient proof. I guess I'll just jump to that.

3 One of the things that I'm asked to do in this  
4 particular case by petitioner is in the alternative -- let  
5 me just turn to the back of your brief. You say to enjoin,  
6 stay or set aside the Department's notice and order of  
7 assessment. I am doing that. You then say or in the  
8 alternative, make a declaratory ruling that the firm is not  
9 an employer. What I'm actually saying here is that there  
10 were insufficient facts for them to establish that this was  
11 an employee relationship, and that they were mistaken then  
12 in imposing the financial obligation of paying into Labor  
13 and Industries in this particular case.

14 What I started to say a few moments ago is I don't know  
15 the repercussions of that as far as was there somebody else  
16 that was an employer. I understand there's been an  
17 argument by the petitioner that I ought to find that US  
18 Dispatch was the employer, but they're not a party to this  
19 case, and I don't know whether anybody's going to do that  
20 or not. I guess I'm just making it clear that I'm not  
21 deciding that here today.

22 So I've pointed out several times that the operative  
23 language that I am to decide is whether or not the  
24 independent contractors were providing personal services to  
25 SCI in a way that would make them employees, and I've found

1 that they were not. I'll go a step further and indicate  
2 that I believe that the contract required those independent  
3 contractors to have an automobile. The Department has  
4 argued, well, it wasn't really any particular automobile;  
5 it was just that they used whatever automobile they had,  
6 but I think candidly it was acknowledged that an automobile  
7 was required. If there was a bicycle, that wouldn't be  
8 sufficient, and yet couriers all the time ride bicycles in  
9 other contexts. So the fact that they were couriers, I  
10 don't really know what the span of distance would be that  
11 these folks had to provide services, but the contract did  
12 require a motor vehicle, not a bicycle, and not walking or  
13 running, not peddling one of those carts that has places  
14 for people to sit. We're not talking about any of those  
15 things.

16 And I will note that in the dissent by Mr. Eng he stated  
17 at page 12, lines nine and ten, "Nonetheless, each  
18 contract, with specificity, identifies the use of a vehicle  
19 in the performance, thereof. Without the vehicle, there  
20 can be no contract." And I agree with that language.

21 And so for the reasons that I did not find that there  
22 was proof of the independent contractors providing personal  
23 services under the realities of the situation and the fact  
24 that they were required to have automobiles as a part of  
25 their job, I don't find that it was proper for the Board of

1 Industrial Insurance to uphold this assessment. And so in  
2 saying that, I am overruling them in this particular case.  
3 I'm not remanding it. I'm not asking that it be sent back  
4 to the Board to decide anything. I am telling the  
5 Department that their assessment is not appropriate, and so  
6 I am directing that there be a refund to SCI of the full  
7 amount of any assessed taxes, penalties or interest that  
8 were already paid in and that it would be appropriate to  
9 award interest back to them from the date such taxes,  
10 penalties or interest were paid.

11 As to costs, fees and expenses, I'm not today going to  
12 rule on that. There are some arguments that were at least  
13 made in passing. I don't know what those costs, fees and  
14 expenses that are suggested by petitioner would be, nor do  
15 I understand exactly the position of the Department in this  
16 case. I did see that you were saying that you made a good-  
17 faith -- or the Department made a good-faith decision and  
18 that might affect the outcome. So I've not decided that  
19 issue, and that will have to be presented to me at some  
20 future time.

21 So let me pause here and inquire. I've always tried to  
22 be as specific as I can be. Sometimes I say things that  
23 are confusing. So are there any questions about how I've  
24 ruled here today? Let me turn to the petitioner first.

25 MR. WALSH: I --

1 THE COURT: If you're confused, that's not good.

2 MR. WALSH: No. I'm not certain that I have a  
3 question. I think I know what the answer is. So but I'm  
4 going to ask it anyway. It sounds to me that you found two  
5 things: One, that there was insufficient -- there was not  
6 sufficient evidence to support the finding that the 87  
7 independent contractors were employees under the statute of  
8 SCI, and secondly, that the contract in this case was a  
9 contract for something more than personal services,  
10 specifically the vehicles.

11 THE COURT: I would say something other than  
12 personal services, something other.

13 MR. WALSH: Something other than. Okay. What isn't  
14 clear to me is that two separate rulings or is the reason  
15 that you found that there was insufficient facts to support  
16 that finding in the record because of the nature of the  
17 contract?

18 THE COURT: I'll try to address that in a moment.  
19 Let me see if the Department has questions.

20 MS. DIXON: My only question was whether you'd like  
21 additional briefing on the costs and fees issue, if that  
22 would be set for argument for another time or how you would  
23 like to proceed.

24 THE COURT: You would need to set that, the two of  
25 you. I mean, the petitioner will have to request what you

1 believe the fees and costs were, but there's an issue about  
2 whether the entire amount requested would be appropriate,  
3 or I guess for that matter if any would be appropriate.  
4 I'll hear argument about that. I'm not deciding that  
5 today, although it was referred to.

6 But to get back to the request by petitioner a moment  
7 ago, my ruling is that there was insufficient proof that  
8 the independent contractors were providing personal  
9 services, and one of the reasons that I don't believe they  
10 were providing personal services, and I disagree with the  
11 finding of fact that they were, is I believe that the  
12 contract required something other than personal services,  
13 that is it required the use of an automobile, and I've  
14 addressed that. I think that that takes it out of the  
15 realm of providing personal services. But if I'm wrong  
16 about that, I'm still determining that there was not a  
17 sufficient factual basis to prove that it was personal  
18 services, aside from the automobile issue. That's as  
19 succinct as I know how to be.

20 So there needs to be a proposed order. You may have  
21 that today. I do accept pen and ink changes if you want to  
22 enter that. But since there will be a necessity of further  
23 hearing in this matter, you may want some time to put  
24 together an order that's commensurate with my ruling here  
25 today. So I'll leave that to the parties.

1 Do you think you have an order for now?

2 MR. WALSH: No, I don't, Your Honor. I was going to  
3 request either we schedule a day for presentation of that  
4 at this point or we can discuss it and schedule that later.

5 THE COURT: If you would schedule it based upon a  
6 notice to set, which is required. I'm not going to set it  
7 here today. I don't know what my future calendars look  
8 like. Okay?

9 MS. DIXON: Okay.

10 THE COURT: All right. I want to thank you both for  
11 your arguments, both written and oral. I know that often  
12 parties have strongly held opinions based upon representing  
13 their clients zealously. I will tell you that reasonable  
14 minds often differ, but the role of this court is to try to  
15 make the right decision, and I've done my best. You may  
16 disagree. In any event, I'll see you both sometime in the  
17 future I guess on the issue of costs and so forth. Thank  
18 you very much. We'll be in recess.

19 (A recess was taken.)

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## CERTIFICATE OF REPORTER

STATE OF WASHINGTON     )  
                                  ) ss.  
COUNTY OF THURSTON    )

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript and that the transcript is a true and complete record of my stenographic notes.

Dated this 10th day of March, 2015.

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RALPH H. BESWICK, CCR  
Official Court Reporter  
Certificate No. 2023