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Division I
State of Washington

NO. 74125-0

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

LSI LOGISTIC SERVICE SOLUTIONS, LLC, a Washington limited
liability company, LABELING SERVICES, INC., an inactive
Washington corporation,

Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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Appendix A: Board of Industrial Insurance Appeals' Proposed Decision and Order and the Board of Industrial Insurance Appeals' Final Order.

Appendix B: King County Superior Court Findings of Fact, Conclusions of Law, and Judgment.

I. INTRODUCTION

This is a routine substantial evidence case in which LSI Logistic Service Solutions, LLC (LSI), was correctly classified as a freight handler service in order to calculate its workers' compensation premiums. Substantial evidence supports the superior court's finding that LSI unloaded, inspected, labeled, repackaged and reloaded goods for shipping. LSI's president testified that the company performed these activities, and the company's website advertised these services to the public. This finding, in turn, supports the superior court's conclusion that LSI was a freight handler, not simply a warehouse that stored goods long-term.

The fundamental policy of the Industrial Insurance Act is to protect workers against the hazards of employment and the suffering and economic loss arising from workplace injuries. The Department of Labor and Industries has broad discretion to establish each employer's premium rate based on a risk classification specific to that employer. LSI asks this Court to conclude that it should pay premiums under the warehouse classification even though substantial evidence supports that it exposes its workers to risks associated with freight handling. Like the Board of Industrial Insurance Appeals and superior court, this Court should reject LSI's attempt to shoehorn its business activities into an ill-fitting

classification that does not accurately reflect the hazards that its workers face. This Court should affirm.

II. ISSUES

1. Does substantial evidence support the superior court's finding that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts when this finding is based in part on LSI's website and uncontroverted testimony from LSI's president?
2. Did the superior court correctly conclude that LSI was properly classified as a freight handler service, under WAC 296-17A-2002-13, when the classification reflects that workers were exposed to the hazards involved in handling and moving freight?
3. Is LSI entitled to attorney fees under the Equal Access to Justice Act when this Act only applies to actions arising under the Administrative Procedure Act and the APA does not apply to this action?

III. STATEMENT OF THE CASE

A. The Department Affirmed LSI's Risk Classification as a Freight Handler Service After Investigating LSI's Business Operations

Since 2010, the Department has classified LSI as a freight handler service, under WAC 296-17A-2002-13, for the purpose of calculating its industrial insurance premiums. BR 21, 27.¹ In 2013, LSI filed amended quarterly reports with the Department dating back to the second quarter of

¹ This brief cites documents in the certified appeal board record as "BR" and witness testimony in the board record as "TR."

2010 through the first quarter of 2013.² BR 27. In filing the amended reports, LSI requested to be classified as a general warehouse, under WAC 296-17A-2102-00, instead of a freight handler. BR 27. This would have reduced the amount due for premiums for that period by \$22,293.93. BR 27, 29-30.

The freight handling classification applies to a business when its operations include unloading, inspecting, labeling, reloading, or repackaging merchandise or freight that is owned by others. *See* WAC 296-17A-2002-13. The warehouse classification, in contrast, applies to a business when its operations generally only involve storing merchandise for long periods of time. *See* WAC 296-17A-2102-00.

The Department investigated LSI to determine if reclassification was appropriate by interviewing LSI's owner and employees, conducting an on-site visit to observe the actual business operations, and preparing a 42-page site survey report. TR 42-43, 49-50. Following its investigation, the Department confirmed that LSI was appropriately classified as a freight handler service and issued an order affirming that classification.

² LSI is the successor company to LLC Labeling Services, Inc. (Labeling). At the Board, the parties stipulated that (1) LSI and Labeling performed the same services throughout the relevant time period in this appeal and that (2) a determination with regard to the appeal would apply to both LSI and Labeling. TR 4, 40. In light of this stipulation, and to facilitate clarity, the Department refers to the two companies collectively as LSI.

BR 21, 34. LSI then appealed the Department order to the Board. BR 20, 34.

B. LSI's Business Involved a Constant Movement of Merchandise as LSI Received, Processed, Labeled, Stored, Repackaged, and Then Shipped Merchandise to Customers

At the evidentiary hearing, LSI's president, Nic Klamke, testified about the business operations during the relevant assessment period. TR 5-39. LSI's business operations included receiving, handling, labeling, storing, repackaging, and shipping merchandise that was owned by others. TR 16, 31-33, 36-37; Ex. 1-2. As Klamke summarized: "We did not own the product. It came to our facility and . . . we would label it, store it, and then ship it out as required by the customer." TR 17; *see also* TR 16 ("So we build inventory, ship out, build inventory, ship out.").

Klamke described LSI's operations as "a constant movement" of merchandise. TR 22. LSI provided services to approximately 35 customers across a "wide spectrum" of industries. TR 23, 34. LSI initially received, processed, labeled, stored, and distributed canned salmon that was shipped to LSI from Alaska. TR 17. It operated out of a 178,000 square foot warehouse facility and shipped the canned salmon to multiple destinations. TR 17, 19. LSI then moved to a 117,000 square foot warehouse facility and diversified its merchandise to include bottled water, other beverage

containers, rice, salmon oil, sugar, and laminate flooring. TR 18, 19, 21-22.

The merchandise was shipped to LSI, often by the manufacturer, and described by Klamke as “cargo,” TR 18, or “freight.” TR 22, 32, 36, 44. It arrived in containers with multiple pallets, each pallet weighing approximately 2,000 pounds. TR 19. If the merchandise did not arrive palletized, then LSI “floor-loaded” the merchandise, which involved physically unloading the containers by hand and “piling the boxes onto a pallet.” TR 35-36.

LSI also ran merchandise through a production line that required specialized machinery:

We unload the pallets with forklifts, store them in the warehouse, get a release from our customer to order specific product, bring it to a production line We have production lines by size. The product is run through a machine with a magnet, drops every layer on a conveyer, it works its way down through – it’s inspected for vacuum... and then it’s labeled . . . through a labeling machine and a casing machine. Then it’s automatically stacked with a stacking machine.

TR 20. After the production line, merchandise was transported within the warehouse facility by a pallet jack, and temporarily stored until it was ready to be “loaded out” and distributed for a customer. TR 20, 34-37, 44.

When requested by a customer, LSI repackaged and shipped the merchandise out of its facility, often to a wholesaler or retailer. TR 33, 36-

37; Ex. 1-2. The merchandise was sometimes shipped or “export[ed]” within the same month it was received. TR 21. Other times, due to high volume, it was stored into the following year or longer, until LSI received a shipping order from its customer. TR 21. Klamke could not provide an accurate average storage time for merchandise, but said the business used an average storage time of six months to determine its square footage needs. TR 15 (“[I]t’s difficult to quantify the timeline. There is no cut and dry, came in, on average.”).

During his testimony, Klamke gave an example of the services LSI provided to one of its customers. TR 30-31. LSI repackaged and shipped a total of 2,700 units, in seven separate shipments, for that customer over the course of two years. TR 30-31. That was consistent with how LSI characterized its overall business operations—to receive, handle, and store merchandise from a manufacturer, and then repackage and ship the merchandise to a retailer. TR 31-33, 36-37, 44, Ex. 1-2.

LSI advertised multiple services to the public on its website, which stated: “In addition to warehousing space, LSI provides services” including “Labeling,” “Packaging,” “Routing,” “Return Processing,” “Bundling,” “Repackaging,” and “Special Handling.” Ex. 1. It advertised these services as “Value-Added Services.” Ex. 1. The website described additional services offered like “large-volume, pallet-level distribution,”

“import logistics,” “expedited container unloading of all types of material,” as well as “region[al] distribution” of merchandise. Ex. 2.

At the hearing, the Department presented testimony from Thomas Boyle, the account manager who investigated LSI and affirmed the freight handler classification. TR 41. Boyle described the details of his investigation, including his on-site visit to LSI, his personal observations, and his interviews of employees, as well as his training in assigning risk classifications. TR 41-43. He personally observed “employees mostly driving forklifts around with loads of goods. And they were either stacking them or getting them ready to be loaded onto a box trailer at the loading dock.” TR 42. And he explained how, during the investigation, LSI’s general manager described the business as a middle entity, where manufacturers would send merchandise to LSI and, in turn, LSI would then ship that merchandise out “and it eventually ends up at a retailer or a wholesaler.” TR 34, 44.

C. The Board and the Superior Court Affirmed the Department’s Classification of LSI as a Freight Handler Service

After the evidentiary hearing, the industrial appeals judge issued a proposed decision and order that affirmed the Department’s order. BR 12-18. The industrial appeals judge reasoned that LSI was not a warehouse because it was a freight handler operating out of a warehouse:

LSI was in the business of storing, packaging, repackaging and shipping products to other entities. LSI's employees regularly unloaded goods, repackaged and reloaded goods for shipment and used equipment like forklifts and pallet jacks. LSI was a freight handler whose business was located at a warehouse. Simply locating the business in a physical warehouse was insufficient to make [LSI] eligible for classification as [a] warehouse[.]

BR 17. The proposed decision and order was then adopted by the Board, and LSI appealed to the superior court. BR 1-3, CP 1-4.³

The superior court affirmed the Board's decision and entered findings of fact and conclusions of law. CP 43-46. Based on its de novo review of the record, the superior court entered a finding that employees of LSI "unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts." CP 44. The superior court, in turn, concluded that LSI was correctly classified as a freight handler. CP 44-45. LSI now appeals to this Court. CP 47-48.

IV. STANDARD OF REVIEW

In an industrial insurance appeal, like this case, it is the decision of the superior court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009). The court reviews the superior court's decision under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from

³ The proposed decision and order, and the Board's decision affirming the same, are attached as Appendix A. The superior court's findings of fact, conclusions of law, and judgment is attached as Appendix B.

the judgment of the superior court as in other civil cases.”); *see Rogers*, 151 Wn. App. at 179-81. The court’s review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the trial court’s de novo review, and if the court’s conclusions of law flow from the findings. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). Applying the deferential substantial evidence standard, the court views the evidence in the light most favorable to the prevailing party. *Rogers*, 151 Wn. App. at 180. Credibility determinations are solely for the trier of fact and are not reviewable on appeal. *Watson v. Dep’t of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006).

LSI incorrectly asserts that review in this case is governed by the Administrative Procedure Act (APA), RCW 34.05. But the APA governs judicial review in an industrial insurance case only if a “notice of assessment” is on appeal. RCW 51.48.131; *Peter M. Black Real Estate Co. v. Dep’t of Labor & Indus.*, 70 Wn. App. 482, 487, 854 P.2d 46 (1993). A notice of assessment orders payment for amounts that an employer failed to pay. RCW 51.48.131. In contrast, this case involved a request for a

reclassification only. BR 21; *see* RCW 51.16.035; WAC 296-17-31012.⁴ As such it invokes the appeal provisions of RCW 51.52.050, .060, .115, and .140. It did not involve a notice that payments were due—a notice of assessment. *See* BR 21. The APA judicial review provisions are not triggered therefore by RCW 51.48.131, and the ordinary standard of review applies. RCW 51.52.140.

V. ARGUMENT

Substantial evidence supports the superior court’s finding that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts. LSI’s president testified that LSI unloaded pallets and containers and inspected and labeled products. TR 20, 23, 35. He also testified that LSI “loaded out” items after they had been stored. TR 36. LSI’s website advertised “Value-Added Services” in addition to providing warehousing space, which included “Labeling and Packaging,” “Repackaging,” “Routing,” and “Special Handling.” Ex. 1. The Department’s account manager observed LSI workers preparing shipments, and LSI’s general manager characterized the company as a middle entity that shipped merchandise to wholesalers and retailers. TR 34, 42, 44. This abundant evidence directly supports the superior court’s finding.

⁴ LSI had already paid the amounts due under the freight handler classification when it filed its original reports and sought a refund by requesting reclassification.

The superior court’s finding, in turn, supports the conclusion that LSI was properly classified as a freight handler, not a warehouse, for purposes of workers’ compensation premiums. LSI’s business activities were consistent with all of the features of the freight handling classification, which applies to businesses located in warehouses “engaged in packing, handling, shipping or repackaging merchandise or freight.” WAC 296-17A-2002-13. A warehouse, in contrast, generally only receives and stores merchandise for a long period of time—the word “ship,” or “shipment,” is absent from the warehouse classification. WAC 296-17A-2102-00. This Court should affirm because the freight handler classification most accurately reflects LSI’s business operations and the hazards posed to its workers.

A. The Industrial Insurance Act Establishes the Department’s Authority to Assign Each Employer a Risk Classification That Fairly Reflects the Hazardous Nature of Its Operations

The Department assigned the freight handler classification to LSI because it best reflected the freight handling hazards faced by LSI’s workers. Its workers did not merely store items in a warehouse but, instead, loaded, unloaded, and packaged merchandise for shipment. The Industrial Insurance Act’s fundamental policy is to protect workers against the hazards of employment and the suffering and economic loss arising from workplace injuries. RCW 51.12.010. Therefore, every employer is

required to secure workers' compensation by insuring with the state (through premiums) or self-insuring. *Xenith v. Dep't of Labor & Indus.*, 167 Wn. App. 389, 349 P.3d 858 (2012); see RCW 51.14.010. A core purpose of the Industrial Insurance Act "is to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer." *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009).

The Department is directed and empowered by the Legislature to establish each employer's premium rate and collect premiums owed. RCW 51.16.035; see *Washington State Sch. Dir.'s Ass'n v. Dep't of Labor & Indus.*, 82 Wn.2d 367, 380-81, 510 P.2d 818 (1973). Premiums are calculated by a formula that includes a base rate for a particular type of business operation or industry, referred to as a risk classification. RCW 51.16.035; WAC 296-17-31011. The Department has "broad discretion" to classify occupations and industries based on their degrees of hazard and to calculate the corresponding premium rate. *Di Pietro Trucking Co. v. Dep't of Labor & Indus.*, 135 Wn. App. 693, 704, 145 P.3d 419 (2006); *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 613, 886 P.2d 1147 (1995). The base rate for each risk classification represents the average liability, i.e., exposure to hazard, that is common to that business or industry. WAC 296-17-31002. By classifying LSI as a

freight handling business, the Department accounted for the risk LSI's activities posed to its workers.

There are over 300 main risk classifications, and approximately 1,000 subclassifications. WAC 296-17-31029(2); *see* WAC 296-17A-0101 through WAC 296-17A-7400. The multitude of potential classifications highlights why courts consistently affirm the Department's broad discretion in this context: "It is recognized that [risk] classifications must be made and that in making them, dividing lines must be drawn some place." *Washington State Sch. Dir.'s Ass'n*, 82 Wn.2d at 376; *see also Di Pietro*, 135 Wn. App. at 704. Substantial judicial deference to an agency's analysis is appropriate "when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

The risk classification system is an objective method of collecting premiums and distributing the risk of liability among employers who share common hazards and potential for loss. WAC 296-17-31011(1). The goal is to produce fair premium rates that reflect the hazardous nature of each industry. *Id.* For example, employers engaged in more hazardous industries, like logging, will be assigned a risk classification with a higher base rate than employers in less hazardous industries, like retail stores. *Id.*

In assigning a classification, the Department looks at “the nature of [the] business operation(s) in the state of Washington.” WAC 296-17-31012(1). To determine the most accurate risk classification, the Department collects enough information to frame “a clear understanding of the precise nature of the business and the hazards [the] business poses to [its] workers.” WAC 296-17-31012(3).

B. Substantial Evidence Supports the Superior Court’s Finding That LSI Unloaded, Inspected, Labeled, Repackaged, and Reloaded Goods for Shipping

The superior court determined that LSI was properly classified as a freight handler service based on the finding that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping. BR 2. The superior court’s finding was well-supported by substantial evidence in the record.

The freight handler classification contemplates businesses such as LSI that operate freight handling businesses out of warehouses. WAC 296-17A-2002-13 identifies warehouses as one of the customary physical locations for freight handling. LSI’s business operations were consistent with all of the features described in the freight handler classification. WAC 296-17A-2002-13 provides a variety of operational features that support classifying a business as a freight handler service. These features include business activities that the superior court specifically cited in its

finding, including unloading, inspecting, labeling, repackaging, and reloading goods for shipment:

Applies to establishments engaged in *packing, handling, shipping, or repackaging merchandise or freight which is owned by others* and is not covered by another classification, (N.O.C.). General *cargo is usually in boxes, cartons, crates, bales, or bags . . .* These establishments are generally located at railroad yards, airports, *or warehouses . . .* This classification includes the repackaging of goods from damaged containers. Employees of freight handler services perform duties such as, but not limited to, *unloading, checking in and weighing goods, sorting and repackaging goods, tiering (placing in a series of rows one above the other), and reloading goods for shipment . . .* Machinery and equipment includes, but is not limited to, *pallet jacks, hand trucks, forklifts, boom trucks, mobile cranes or overhead track cranes, and hand tools . . .*

Special notes: Establishments engaged as *freight handlers have the hazard of the continual movement of goods*, in contrast to warehousing operations in classification 2102-00 that usually store goods for long periods of time. In addition, freight handling services providers do not operate warehouses and storage facilities as a general rule.

WAC 296-17A-2002-13 (emphases added).

First, substantial evidence supports that LSI engaged in packing, handling, shipping, or repackaging merchandise owned by others. WAC 296-17A-2002-13. LSI's president testified that its primary business was to receive shipments of merchandise owned by others, run it through a production line, repackage it, and then ship it to multiple destinations: "We did not own the product. It came to our facility and . . . we would

label it, store it, and then ship it out as required by the customer.” TR 17. At the customer’s request, LSI would ship the freight out to an end user, such as a retailer or wholesaler. TR 17, 33, 36, 44. The operations were summarized: “So we build inventory, ship out, build inventory, ship out.” TR 16. LSI had approximately 35 customers across a “wide spectrum” of industries. TR 23, 34. With one customer as an example, LSI repackaged and shipped a total of 2,700 units, in seven separate shipments, over the course of two years. TR 30-31. The evidence on this point was substantial: LSI’s business was to receive merchandise owned by others, label, temporarily store, repackage and then ship the merchandise out to an end user—all of which was consistent with the assigned freight handler classification.

Second, LSI’s own representative described the shipments received as “cargo” or “freight.” TR 18, 22, 32, 36. And his use of that terminology is consistent with the plain, ordinary meaning, as used in the freight handling classification. *See Webster’s Third New International Dictionary* 908 (2002) (broadly defining “freight” as “something that is loaded for transportation”). It is even consistent with the definition of freight as included in LSI’s own briefing. *See App. Br. 11* (defining freight, without specific citation, as “the system by which goods are carried from one place to another.”). LSI received shipments in containers with multiple pallets,

with each pallet weighing approximately 2,000 pounds. TR 19. The shipments were sometimes “floor-loaded,” which required physically unloading the containers by hand and then “piling the boxes onto a pallet.” TR 35-36. The business also operated from within a 178,000 square foot warehouse facility, and then a 117,000 square foot warehouse facility, in which the merchandise was transported internally by fork lifts and pallet jacks. TR 19, 34-35. The merchandise was then stored temporarily in the warehouse until it was ready to be loaded for transportation for a customer. TR 18, 34, 36, 44. These are all operational features consistent with the freight handler classification.

Third, substantial evidence in the record demonstrated that LSI’s business also involved unloading, sorting, tiering, and reloading merchandise for shipment. WAC 296-17A-2002-13. LSI provided more than just storage, and more than just shipping, for its customers. It also processed the merchandise it received by labeling, casing, and repackaging as requested by the customer. TR 20, 36-37; Ex. 1. These types of additional services required a detailed production line:

We unload the pallets with forklifts, store them in the warehouse, get a release from our customer to order specific product, bring it to a production line We have production lines by size. The product is run through a machine with a magnet, drops every layer on a conveyer, it works its way down through—it’s inspected for vacuum . . . and then it’s labeled . . . through a labeling machine and a

casing machine. Then it's automatically stacked with a stacking machine.

TR 20. This production line required the type of unloading, sorting, and tiering activities described in the freight handler classification. And in addition to the pallet jacks and forklifts used to move merchandise within the facility, LSI's description of the production line adds further support to the freight handler classification, which includes similar specialized machinery.

Finally, there was substantial evidence that LSI's business involved the hazard of the continual movement of goods. WAC 296-17A-2002-13. LSI's president described the business operations as "a constant movement" of merchandise. TR 22. The sheer volume and frequency of shipping also supports that characterization. TR 30-31. But looking beyond LSI's terminology, and even beyond its shipping frequency, the continual movement of goods is supported by LSI's overall business operation. LSI was a middle entity between one customer and another end user. TR 33, 44. This often involved a manufacturer and a wholesaler or retailer. TR 33, 36, 44. To the extent LSI temporarily stored merchandise, that service was incidental to its primary operation: processing, facilitating, and distributing the movement of goods from point A to point B.

LSI's repeated assertion that it merely received merchandise "for the purpose of storage" conceals the multitude of additional services it provided. App. Br. 12, 16. LSI did not serve as a mere warehouse facility for customers to store and retrieve property. The evidence established that LSI received merchandise for a variety of logistical purposes. And under substantial evidence review, inferences from that evidence must be drawn in the Department's favor, not LSI's.

In addition to testimony from LSI's president, LSI's own website also confirmed it was more than a warehouse, stating: "*In addition to warehousing space, LSI provides services*" including labeling, packaging, routing, return processing, bundling, repackaging, and special handling. Ex. 1 (emphasis added). The website further described additional operations like "large-volume, pallet-level distribution," "import logistics," "expedited container unloading of all types of material," as well as "region[al] distribution" of merchandise. Ex. 2. LSI served as a middle entity between one customer and an end user, and provided logistical services beyond warehousing. All of those operations exposed LSI's workers to the hazard of the continual movement of goods.

For the reasons above, substantial evidence supports the superior court's finding of fact in this case. LSI misapprehends the standard of review when it suggests, without citing any authority, the only way a

classification is legally supported is when a Department employee observes the specific business activity that supports the classification. App. Br. 12-13. Yet in one breath, LSI admits that it “occasionally [has] to re-package goods,” which directly supports the superior court’s finding, while in the next it says there is no substantial evidence that it repackaged goods because a Department employee only witnessed “goods being stacked for storage and being made ready to be loaded on a box trailer.” App. Br. 12-13. Not only does this argument ask this Court to ignore facts, which it cannot do on substantial evidence review, it turns the standard of review on its head by asking this Court to rebalance evidence in LSI’s favor. But on substantial evidence review, all reasonable inferences must be viewed in the Department’s favor.

The evidence here was sufficient to persuade a fair-minded, rational person that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts. LSI’s website, its president, and its general manager, all provided evidence that LSI performed these types of activities. This Court should affirm that substantial evidence supports the superior court’s finding of fact about LSI’s business operations.

C. The Superior Court Correctly Concluded That LSI Was Properly Classified as a Freight Handler Service

1. The Freight Handler Classification Accurately Reflected the Nature of LSI's Business Operations and the Hazards Posed to Its Workers

The superior court's finding supports the conclusion that LSI was properly classified as a freight handler. CP 44-45. Because substantial evidence supports the superior court's finding about LSI's business activities (unloading, inspecting, labeling, repackaging, and reloading goods for shipment), which supports the freight handler service classification, this Court should affirm.⁵

The superior court correctly concluded LSI was properly classified as a freight handler rather than a warehouse. Contrary to LSI's arguments, the business activities that the superior court found it engaged in do not support a warehouse classification. That classification does not reflect the nature of LSI's business and the hazards it posed to its workers. The warehouse classification generally covers only business activities that are required to store merchandise for long periods of time:

Applies to establishments operating as warehouses for general merchandise. This merchandise belongs to a customer and is *usually stored for long periods of time*. Products typically involved are bulk, nonperishable

⁵ The superior court's findings of fact 6 and 7 that LSI was a freight handler under the regulation are conclusions of law, not findings of fact. CP 45. Thus, they should be reviewed as conclusions of law. See *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013).

materials Work contemplated by this classification includes, but is not limited to: *Maintaining the facility; Moving merchandise within the facility; Recordkeeping; Routine maintenance; Security* Equipment and machinery used includes: Cleaning and recordkeeping supplies; Forklifts; Pallet jacks; Shop vehicles

Special note: Even though this type of operation may handle some “grocery” products, it differs from 2102-11 in that the products being handled in 2102-00 are in bulk packaging (not cases of consumer-size packages), do not belong to the business that is warehousing them, and are *not intended for sale to a wholesaler/retailer*.

WAC 296-17A-2102-00 (emphasis added).

While there are some features common to both freight handlers and warehouses—for example, both may operate within a warehouse facility, maintain merchandise owned by others, and use forklifts or pallet jacks—there are several key distinctions between the two classifications. Most significantly, freight handlers provide a wider and more complex range of services than warehouses. Freight handlers provide services like packing, handling, shipping, or repackaging merchandise owned by others. WAC 296-17A-2002-13. As discussed above, substantial evidence supports that LSI provided these services. Freight handlers like LSI also unload, check in, sort, and tier merchandise, and then reload merchandise for shipment with specialized machinery. *Id.* Warehouses, in contrast, generally only receive and store merchandise. WAC 296-17A-2102-00. Warehouse operations are far more limited and those operations are ancillary to the

storage-based operation—they involve only basic facility maintenance, recordkeeping, and “moving merchandise *within the facility*.” *Id.* (emphasis added). The word ship, or shipment, is absent from the general warehouse classification. *Compare* WAC 296-17A-2002-13 (freight handlers “reload[] goods for shipment”). LSI’s arguments ignore that shipping was one of its primary activities.

These distinctions are underscored by the “special note” to the freight handler classification confirming that freight handlers are subjected to “the hazard of the continual movement of goods.” WAC 296-17A-2002-13. This is contrasted with warehouse operations that “usually store goods for long periods of time.” *Id.*

LSI’s argument that it should be classified as a general warehouse has no merit. Naturally, some of LSI’s most basic operational features fit within the terms of the warehouse classification, like temporarily storing merchandise owned by others and using forklifts or pallet jacks to move merchandise within the facility. But LSI did much more than that. It was not just a “busy warehouse,” as it claims, nor was that the basis for the analysis in this case. App. Br. 13.

LSI was a freight handler service that operated from a warehouse facility. Substantial evidence supports the superior court’s finding that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for

shipping. Goods were received from one customer, often a manufacturer, and then shipped by LSI to another customer, often a wholesaler or retailer. These operations are consistent with all of the features described in the freight handler classification. None of these operations are included in the warehouse classification and, in fact, partly conflict with that classification. *See* WAC 296 17A-2102-00 (warehoused merchandise is not intended for sale to wholesaler or retailer). Here, in clear contrast to the warehouse classification, LSI *intended* the cargo in its facilities to be sold to the wholesaler or retailer. That is an essential component of its business model. This analysis alone supports the superior court's conclusion.

LSI latches onto a lone phrase in the warehouse classification regulation that merchandise "is usually stored for long periods of time" in order to argue it is a warehouse under WAC 296-17A-2102-00. App. Br. 14-15. Ignoring the remaining context of this regulation and the freight handler classification regulation, LSI then presupposes that a six month average storage time qualifies LSI for the warehouse classification. App. Br. 14-15. This analysis misstates the record and misapprehends the law.

It first misconstrues the evidence, which must be viewed in the light most favorable to the Department on substantial evidence review. LSI's president testified that he could not provide an accurate average

storage time for all of its merchandise. TR 15 (“[I]t’s difficult to quantify the timeline. There is no cut and dry, came in, on average.”). Also, LSI shipped merchandise to customers in several separate batches. TR 30-31. So even if it took six months or a year to ship *all* of the customer’s merchandise, it is a reasonable inference from the record on substantial evidence review that LSI may have shipped that merchandise weekly or monthly in several separate shipments. *See, e.g.*, TR 30-31. And LSI sometimes shipped merchandise the same month it was received. TR 21. Contrary to LSI’s arguments, the record does not support that its goods “had an average storage time of about six months.” App. Br. 4.

Besides misconstruing the evidence, LSI’s reading of the two classifications is fundamentally flawed. LSI’s argument incorrectly presumes if merchandise is stored for a period of six months, then there cannot be a “continual movement of goods” under the freight handler classification and the company must automatically be classified as a warehouse. WAC 296-17A-2002-13. That is incorrect. The freight handler classification does not preclude temporary storage of merchandise in the context of other operations; it merely confirms that freight handlers “do not operate warehouses and storage facilities *as a general rule.*” *Id.* (emphasis added). There is no conflict between temporary storage and freight handling. To the contrary, much of the activities that freight

handlers perform—like, checking in, sorting, repackaging, tiering, and reloading merchandise for shipment—require temporary storage as a part of the freight handling operation. Indeed, that the regulation identifies warehouses as one of the customary physical locations for freight handlers further indicates that freight handlers can store merchandise.

The implication from LSI's argument is that "continual movement" should be read only in its most literal sense, and merchandise cannot ever stop at a freight handling facility before final shipment to an end user. That is an untenable standard and certainly not required by the language of the freight handler classification. *See Webster's Third New International Dictionary* 493 (2002) (defining "continual" as "repeated at intervals with brief perhaps regular intermissions in time").

The freight handler classification accurately reflected the nature of LSI's business operations and the hazards posed to its workers. This was based on the superior court's well-supported findings of fact. LSI attempts to fit its business operations into the warehouse classification. But its arguments misapprehend the proper standard of review, are not supported by the evidence, and are premised on a fundamentally flawed reading of the classifications. This Court should affirm the superior court's conclusion that LSI was a freight handler based on its finding about LSI's business activities, which is supported by substantial evidence.

2. The “N.O.C. (Not Otherwise Classified)” Designation Does Not Support LSI’s Argument

As the superior court correctly concluded, the freight handler classification is the appropriate classification for LSI, and the “N.O.C.” (“not otherwise classified”) designation within that classification does not require otherwise. LSI summarily claims that the presence of the N.O.C. designation within the freight handler classification means that classification cannot be applied in this case because LSI should be covered by the warehouse classification instead. App. Br. 16-17. This Court should reject this argument because LSI was not operating a warehouse. Also, LSI’s argument misreads the N.O.C. designation.

The designation is used when there are “variations of the same general type of business” and “other related classifications” that may be more specific. WAC 296-17-31002. In those cases, the more specific classification should be assigned. *Id.*; WAC 296-17-31012. Here, WAC 296-17A-2002-13 is the general classification for freight handler services, while there are other related types of freight handling covered by a more specific classification. WAC 296-17A-2002-13. The N.O.C. designation does not support LSI’s argument where it seeks assignment to a *less specific* warehousing classification. The purpose of each classification is to produce fair insurance rates that reflect the hazardous nature of each

industry and ensure relief to injured workers. Assigning a business to a lower, less specific classification when that business's hazards match a higher, more specific classification would be contrary to the fundamental purpose of the classification system and the Industrial Insurance Act.

3. The “Multiple Enterprise Rule” Does Not Apply, but Even if It Did, That Rule Supports LSI’s Classification as a Freight Handler

The “multiple enterprise rule” does not apply here. LSI asserts that the Department incorrectly considered the “multiple enterprise rule” as a basis for the freight handler classification. App. Br. 17-19. But neither the Department nor the superior court based LSI’s classification on that rule. Reference to the multiple enterprise rule is a red herring.

Generally, each business is assigned only one basic risk classification that is calculated to reflect the average exposure to hazard for all of its workers. *See* WAC 296-17-31029; 100 C.J.S. *Workers’ Compensation* § 738 (2015) (“classification rules provide that each employer must be assigned only one basic classification whenever possible.”). The multiple enterprise rule is an exception to this general rule and permits multiple risk classifications only under very limited circumstances. It applies only when a business has both a primary and a secondary business, and when four narrow conditions are met. WAC 296-17-31017 (e.g., each of the multiple enterprises must be “physically

separated and distinct”). If a business is “unable to divide a worker’s hours between two or more classifications because the work simultaneously supports more than one basic classification,” then the business must report under “the highest rated classification that the work supports.” WAC 296-17-31017; *see also* WAC 296-17-31029.

LSI mistakenly claims the Department assigned the freight handler classification simply because it was the higher of two equally applicable classifications. And then it argues that was incorrect because it was operating one business only, a warehouse. But the superior court concluded LSI was properly classified as a freight handler based on its findings of fact that were supported by substantial evidence. Neither the superior court nor the Department considered LSI to be operating multiple enterprises. TR 46. The testimony presented by the Department, that LSI relies on for this argument, simply explained that *even if* LSI was simultaneously operating multiple enterprises, the conditions under WAC 296-17-31017 were not satisfied, and therefore the freight handling classification would be appropriate. TR 46 (Boyle testified that “in order to be able to report in both classifications the two different entities have to be separated by a permanent wall, [and] we did not find that to be the case at LSI.”). The multiple enterprise rule is not relevant and need not be considered by this Court in affirming the superior court.

4. There Is No Authority for LSI's Self-Serving Allegation That the Department Acted Inconsistently

Disregarding that the APA does not apply, LSI incorrectly cites to RCW 34.05.570(3)(h) and alleges the Department acted inconsistently by supposedly assigning the warehouse classification, rather than the freight handler classification, to LSI's competitors. App. Br. 7, 16. This Court should reject that argument because the APA does not apply here. Even if it did apply, there is no authority for the proposition that LSI must be reclassified based on its supposed competition. *See Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 636-37, 949 P.2d 851 (1998) (a state agency may enforce its regulations despite a different application in a prior case). Risk classification is necessarily a fact-intensive endeavor, unique to each individual business. With over 1,000 possible classifications, this is why the Department is afforded such broad discretion and why this Court reviews for substantial evidence.

This Court should also reject LSI's argument because it is based entirely on self-serving and conclusory testimony from its president, which the superior court considered and rejected. The superior court, as a factfinder, can disbelieve a witness's self-serving testimony even if it is uncontroverted. *Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40,

361 P.3d 165 (2015). And the court does not reweigh credibility on appeal. *Ramos*, 191 Wn. App. at 40.

Substantial evidence supports the superior court’s finding that LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping. That finding, in turn, supports the conclusion that LSI was properly classified as a freight handler service. That classification most accurately reflects the precise nature of LSI’s business as well as the hazards posed to its workers. This Court should affirm.

D. LSI Is Not Entitled to Attorney Fees

There is no authority to award LSI attorney fees in this case. Washington State follows the “American rule” in awarding attorney fees, which provides that “a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery.” *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). LSI argues it should receive attorney fees under RCW 4.84.350, the Equal Access to Justice Act (EAJA). But the EAJA fee provision does not apply, here, where the “agency action [is] excluded from the judicial review portions of the APA.” *Cobra Roofing v. Dep’t of Labor & Indus.*, 157 Wn.2d 90, 101, 135 P.3d 913 (2006); *see* RCW 51.48.131 (APA judicial review applies only if a notice of assessment is on appeal).

Even if the APA did apply to this case, attorney fees are not justified under the EAJA. The EAJA, like any statute awarding attorney fees against the state, should be strictly construed since it constitutes a waiver of sovereign immunity and runs counter to the American rule. *See Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 936, 194 P.3d 988 (2008) (Madsen, J., concurring in part and dissenting in part). Such limited fees may be awarded only if LSI prevails, and then only if certain other conditions are met. RCW 4.84.350. The EAJA does not authorize attorney fees to a prevailing party if the agency's action was substantially justified, even if ultimately determined to be incorrect. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 202, 218-19, 104 P.3d 699 (2005). An action is substantially justified if it could satisfy a reasonable person. *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 721, 42 P.3d 456 (2002).

LSI should not receive attorney fees even if it prevails in this case. The Department has argued why the classification in this case was not only reasonable, but correct. The reasonableness is further evidenced by the fact that the Department's classification was affirmed by both the Board and the superior court. This Court should also affirm, but even if it does not, attorney fees are not justified.

VI. CONCLUSION

The superior court's finding about LSI's business operations was supported by substantial evidence. LSI unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts. Based on this finding, the superior court correctly concluded that LSI was properly classified as a freight handler rather than a warehouse. This Court should affirm.

RESPECTFULLY SUBMITTED this 23rd day of March, 2016.

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APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: LSI) DOCKET NOS. 13 22402 & 14 16119
2)
3 FIRM NOS. 923,816-00 & 209,894-00) PROPOSED DECISION AND ORDER
4

5 INDUSTRIAL APPEALS JUDGE: Anita A. Booker-Hay
6

7 APPEARANCES:
8

9 Firm, LSI, by
10 Cascade Financial Systems, per
11 Cal Krueger, Lay Representative
12

13 Department of Labor and Industries, by
14 Tom Boyle, Account Manager, and by
15 The Office of the Attorney General per
16 Charlotte Ennis Clark-Mahoney
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19 In Docket No. 13 22402, the firm, Labeling Services, Inc., filed an appeal with the Board of
20 Industrial Insurance Appeals on October 10, 2013, from an order of the Department of Labor and
21 Industries dated September 6, 2013. In this order, the Department affirmed the risk classifications
22 for Labeling Services, Inc. as Freight Handling (2002-13) and Clerical (4904-00) for the second
23 quarter of 2010 through the first quarter of 2013, based upon review of the workers' compensation
24 risk classifications assigned. The Department order is **AFFIRMED**.
25

26
27 In Docket No. 14 16119, the firm, LSI, filed an appeal with the Board of Industrial Insurance
28 Appeals on October 10, 2013, from an order of the Department of Labor and Industries dated
29 September 6, 2013. In this order, the Department determined the risk classifications for LSI as
30 Freight Handling (2002-13) and Clerical (4904-00) for the second quarter of 2011 through the first
31 quarter of 2013. The Department order is **AFFIRMED**.
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35 **PROCEDURAL AND EVIDENTIARY MATTERS**
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37 On May 29, 2014, the parties agreed to include the Jurisdictional History for both docket
38 numbers in the Board's record. Those histories establish the Board's jurisdiction in these appeals.
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40 These matters are consolidated. At the hearing on September 4, 2014, the parties stipulated
41 that Labeling Services Inc., and LSI are separate successor companies that performed the same
42 services from the same location. Both companies were previously classified as freight handlers but
43 filed amended quarterly reports asking the Department to change its classification to warehousing
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1 (2102-00). The Department declined to change the classification and the firm appealed the
2 determination.
3

4 ISSUES

- 5 1. In Docket No. 13 22402, did the Department order correctly determine
6 the risk classifications for Labeling Services, Inc. as Freight Handling
7 (2002-13) from the second quarter of 2010 through the first quarter of
8 2011?
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- 10 2. In Docket No. 14 16119, did the Department order correctly determine
11 risk classifications for LSI as Freight Handling (2002-13) for the second
12 quarter of 2011 through the first quarter of 2013?

13 In each docket number, the related Department order also classified specific Labeling and
14 LSI employees as Clerical (4904-00) for the quarters at issue. However, LSI did not contest the
15 clerical classifications in its quarterly reports asking the Department to change its classifications.
16 Instead the point of contention is whether the Department properly classified the businesses as
17 freight handlers rather than warehouses. Therefore, this decision addresses only the contested
18 issue.
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22 EVIDENCE PRESENTED

23 I have considered the testimony of:

- 24
- 25 a. Nic Klamke, Co-Owner and President of LSI, and
 - 26 b. Tom Boyle, Account Manager for the Department of Labor and Industries.
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29 I have also considered as evidence the following: admitted Exhibit Nos: 1, 2, and 11-16.
30 Exhibit Nos. 3-10 were rejected.
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32 DISCUSSION

33 Mr. Nic Klamke is the co-owner and President of LSI, formerly Labeling Services, Inc.
34 (Labeling) and has been in business since 1987. Mr. Klamke testified that although Labeling and
35 LSI are separate but successor businesses, they did not provide identical services. During the
36 second quarter of 2010 and the first quarter of 2011, Labeling operated one 178,000 square foot
37 warehouse facility and employed approximately 15 employees. Labeling primarily received canned
38 salmon from customers, labeled it, stored it about a year and then shipped it to multiple destinations
39 at the customer's request. Labeling later diversified its warehouse product and also stored such
40 items as bottled water, sugar, and bags of rice weighing between 10, 25 and 50 pounds.
41 Employees typically offloaded these items onto pallets in 2000 pound increments and used forklifts
42 or pallet jacks to move the items into the warehouse. Sometimes items stored were overflow
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1 products from another warehouse. Mr. Klamke testified that sometimes products would be stored
2 for a year or sometimes a product might come into the warehouse in July and ship in July. None of
3 the goods stored belonged to Labeling.
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5 Mr. Klamke testified that during the second quarter of 2011 through the first quarter of 2013,
6 LSI maintained a 117,000 square foot warehouse and employed ten people. LSI provided the
7 following services: overflow storage, labeling, re-packaging and re-palleting, shrink wrapping, and
8 shipping. The business also stored a variety of goods including rice, sugar, salmon oil and laminate
9 flooring. He testified employees offload products out of the container in which it came, stacked it
10 onto pallets and used a forklift or pallet jack to drive the merchandise through the warehouse for
11 storage. When a customer wants the product, LSI employees retrieve the product from storage,
12 place it on a conveyor, label the item, shrink wrap it, re-pallet and then ship the product.
13 Mr. Klamke testified that LSI might store the products for as little time as a day to three months or
14 longer. He also testified that products were shipped out in pieces and that not all parts contain the
15 same quantity. Mr. Klamke also indicated that goods are picked up by an entity that may not be the
16 owner and may be shipped to another location at the request of third and fourth parties. None of
17 the goods being shipped belonged to LSI. Mr. Klamke also testified that LSI employs administrative
18 staff and that these staff members also have receptionist duties, as well. He explained that these
19 staff members use radios to communicate information to other employees about which loading
20 docks to use and with incoming trucks.
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22 The Department asserts that both Labeling and LSI were freight handling businesses and
23 that the companies hired employees who were properly classified as clerical. Labeling and LSI do
24 not challenge the risk classification for its clerical staff. However, Labeling and LSI contend that
25 they were both warehouse businesses and were incorrectly classified as freight handling
26 businesses.
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28 **BURDEN OF PROOF**

29 In an appeal from a Department order affecting industrial insurance premiums, the burden of
30 proof rests upon the employer to prove that the Department order is incorrect.¹
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46 ¹ RCW 51.48.131; *R&G Probst v Department of Labor & Indus.*, 121 Wn. App. 288, 293 (2004). See also
47 RCW 51.52.050(2a) and WAC 263-12-115.

1 **FREIGHT HANDLING (2002-13)**

2 Washington Administrative Code 296-17A-2002 defines the classification of freight handling
3 as a business that engages in packing, handling, shipping, or repackaging merchandise or freight
4 such as lumber, logs, steel, pipe, grains, produce, machinery and vehicles, owned by another.
5 Included in that definition are: (1) the duties of freight handler employees (unloading, checking in,
6 weighing goods, sorting, repackaging, tiering and reloading goods for shipment); (2) machinery
7 used to perform the duties (pallet jacks, hand trucks, forklifts, boom trucks, mobile cranes or
8 overhead track cranes, and hand tools); and (3) the traditional location of freight handler
9 businesses, (railroad yards, airports, or warehouses not located on piers or areas adjoining piers).²

10 **WAREHOUSE (2102-00)**

11 The definition of warehouse is set out in WAC 296-17A-2102. In summary, a business
12 operates as a warehouse if it stores bulk, non perishable materials such as coffee, dry cement,
13 potatoes or rice, belonging to a customer, for "long periods of time." Included in that definition are:
14 (1) duties of the warehouse worker (moving merchandise within the facility and performing other
15 duties such as facility maintenance, record keeping, security, and routine maintenance);
16 (2) machinery used to perform the duties; (includes cleaning and record keeping supplies, forklifts,
17 pallet jacks, and shop vehicles); and (3) exclusions to the warehouse classification, not applicable
18 to this discussion.³

19 Mr. Boyle, an account manager, testified on behalf of the Department. As an account
20 manager, his primary duty is to classify businesses for workers' compensation purposes. He
21 accomplishes this task by reviewing master business applications that have been submitted to the
22 Department and confirming the information by communicating with the submitting agency to
23 determine correct risk classification.

24 On August 20, 2013, Mr. Boyle investigated the work site for LSI, formerly Labeling Services
25 Inc. (Labeling). During the investigation, Mr. Boyle toured the work site, observed LSI employees
26 working, and asked questions prompted by his observations. During the tour, Mr. Boyle testified
27 that he saw LSI employees driving forklifts around, loading goods and either stacking goods or
28 getting ready to load them onto a box trailer at the loading dock. He also observed equipment used
29 to break down bulk packages and a conveyor system that employees indicated had been
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46 ² WAC 296-17A-2002.

47 ³ WAC 296-17A-2102.

1 nonoperational since about 2011. Before leaving LSI, he "did ask about the goods that were there,
2 how they arrived, who owned the goods that were in the facility, where they were going once they –
3 you know, as the truck was being loaded, where it was going." ⁴ Mr. Boyle testified that, after the
4 site visit, "We concluded that the risk classification for freight handling was correct."⁵
5
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7 Mr. Boyle testified that Labeling and LSI were more like freight handling companies because
8 they received products from a manufacturer and distributed that product to a retailer or a
9 wholesaler.⁶ He indicated that businesses are classified as warehousing if the warehouse stores
10 goods for a customer, usually for long periods of time, and the customer ultimately retrieves the
11 goods or arranges to have those goods shipped. Mr. Boyle also testified that "the freight handling
12 classification is used for those businesses that are basically a middle entity between manufacturer
13 and end destination".⁷ He believed that both Labeling and LSI labeled and repackaged products,
14 acts that are not normally performed by companies classified as warehouses. Mr. Boyle also
15 believed that both companies engaged in multiple enterprises since both simultaneously engaged
16 in storing overstock for a retailer, a warehouse function, while also distributing products from a
17 manufacturer to another party, a freight handler function. Mr. Boyle testified that an entity that
18 engages in multiple enterprises follows the multiple enterprises rule.
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25 So the multiple enterprise rule, and in this case the two enterprises being
26 freight handling and warehousing, that rule states that in order to be able to
27 report in both classifications the two different entities have to be separated by a
28 permanent wall, which we did not find that to be the case at LSI; we found one
29 big warehouse.⁸ If there are two enterprises within the same facility that
30 doesn't have a permanent wall, we use the highest classification for the whole
31 business.⁹
32

33 Having carefully considered the evidence presented, I am persuaded by the testimony of
34 Mr. Boyle that Labeling and LSI were both properly classified as freight handling companies. By
35 stipulation, the parties agreed that Labeling and LSI were separate successor companies that
36 performed the same services from the same location, a warehouse. Although the definitions for the
37 risk classification of warehouse and freight handling share some similarities, the distinguishing
38 characteristics appear to be the packaging and movement of the goods. Freight handling
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43 ⁴ 9/4/2014 Tr. at 43.

44 ⁵ 9/4/2014 Tr. at 42.

45 ⁶ 9/4/2014 Tr. at 44.

46 ⁷ 9/4/2014 Tr. at 44.

47 ⁸ 9/4/2014 Tr. at 46.

⁹ 9/4/2014 Tr. at 46.

1 companies pack and ship goods while warehouse companies do not. Further, a business can have
2 two different classifications if the businesses are kept physically separate and distinct. ¹⁰ During the
3 second quarter of 2010 and the first quarter of 2011, Labeling Services, Inc. operated its business
4 out of a warehouse and labeled, stored and shipped products for customers. Its employees loaded
5 items onto pallets using forklifts or pallet jacks and moved the products to storage in the warehouse
6 where they stayed until they were labeled, repackaged and shipped. The products were not usually
7 stored for long periods of time and sometimes shipped less than a month after receipt by Labeling
8 Services Inc. was a freight handler. During the second quarter of 2011 through the first quarter of
9 2013, LSI operated a business that provided the same services as Labeling Services, Inc. Like
10 Labeling, LSI's business was more characteristic of freight handling than warehouse operations.
11 LSI was in the business of storing, packaging, repackaging and shipping products to other entities.
12 LSI's employees regularly unloaded goods, repackaged and reloaded goods for shipment and used
13 equipment like forklifts and pallet jacks. LSI was a freight handler whose business was located at a
14 warehouse.
15

16 Simply locating the businesses in a physical warehouse was insufficient to make the
17 businesses eligible for classification as warehouses. Labeling and LSI could possibly have
18 qualified for more than one classification as a business with multiple enterprises by erecting a wall
19 at the warehouse and separating the warehousing functions from the freight handling functions.
20 However, neither business erected or maintained a physical barrier to keep the businesses
21 separate and distinct. Therefore, the highest classification, freight handling, was assigned to the
22 whole business. The Department orders dated September 6, 2013, are affirmed.
23

24 FINDINGS OF FACT

- 25 1. On May 29, 2014, an industrial appeals judge certified that the parties
26 agreed to include the Jurisdictional History in the Board record solely for
27 jurisdictional purposes.
- 28 2. Labeling Services, Inc. and LSI are separate successor companies that
29 share the same physical location and provide the same services.
- 30 3. The Department investigated LSI, formerly Labeling Services, Inc., on
31 August 20, 2013 to determine risk classifications of the businesses
32 during the second quarter of 2010 through the first quarter of 2011 and
33 the second quarter of 2011 through the first quarter of 2013,
34 respectively.

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4. Employees of LSI, formerly Labeling Services Inc., unloaded, repackaged, and reloaded goods for shipping using pallet jacks and forklifts. Labeling Services, Inc. employees provided the same services as LSI and used the same equipment. Both businesses were located at a warehouse.
 5. During the second quarter of 2010 through the first quarter of 2011, the proper risk classification for Labeling Services, Inc. was Freight Handling (2002-13), pursuant to WAC 296-17A-2102.
 6. During the second quarter of 2011 through the first quarter of 2013, the proper risk classification for LSI was Freight Handling (2002-13) pursuant to WAC 296-17A-2102.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.
2. The Department correctly classified the employees of LSI, successor entity of and formerly known as Labeling Services, Inc., for the second quarter of 2011 through the first quarter of 2013, as required by RCW 51.16.035.
3. In the appeal filed under Docket No. 13 22402, the Department order dated September 6, 2013, is correct and is affirmed.
4. In the appeal filed under Docket No. 14 16119, the Department order dated September 6, 2013, is correct and is affirmed.

DATED: October 28, 2014

Anita A. Booker-Hay

ANITA A. BOOKER-HAY
Industrial Appeals Judge
Board of Industrial Insurance Appeals

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: LABELING SERVICES, INC.,) DOCKET NOS. 13 22402 & 14 16119
and LSI)
4 FIRM NOS. 923,816-00 & 209,894-00) DECISION AND ORDER
5

6 APPEARANCES:

7
8 Firms, Labeling Services, Inc., LSI, and
9 Cascade Financial Systems, per
10 Cal Krueger, Lay Representative
11

12 Department of Labor and Industries, by
13 Thomas Boyle, Account Manager, and by
14 The Office of the Attorney General, per
15 Charlotte Ennis Clark-Mahoney
16

17 In Docket No. 13 22402, the firm, Labeling Services, Inc., filed an appeal with the Board of
18 Industrial Insurance Appeals on October 10, 2013, from an order of the Department of Labor and
19 Industries dated September 6, 2013. In this order, the Department affirmed the risk classifications
20 for Labeling Services, Inc., as Freight Handling (2002-13) and Clerical (4904-00) for the second
21 quarter of 2010, through the first quarter of 2013. The Department order is **AFFIRMED**.
22
23

24 In Docket No. 14 16119, the firm, LSI, filed an appeal with the Board of Industrial Insurance
25 Appeals on October 10, 2013, from an order of the Department of Labor and Industries dated
26 September 6, 2013. In this order, the Department affirmed the risk classifications for LSI as Freight
27 Handling (2002-13) and Clerical (4904-00) for the second quarter of 2011, through the first quarter
28 of 2013. The Department order is **AFFIRMED**.
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32 **DECISION**

33 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
34 review and decision. The firms filed a timely Petition for Review of a Proposed Decision and Order
35 issued on October 29, 2014, in which the industrial appeals judge affirmed the Department orders
36 dated September 6, 2013.
37
38

39 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
40 no prejudicial error was committed. The rulings are affirmed.
41

42 We agree with our industrial insurance appeals judge that the Department correctly assigned
43 Labeling Services, Inc., and its successor firm, LSI, the risk classification for freight handling in the
44 September 6, 2013 Department orders. We have granted review to clarify and correct the Findings
45

1 of Fact and Conclusions of Law. We note that LSI is the successor company to Labeling Services,
2 Inc. We have added the fact that the business performed inspection and labeling of goods, and
3 because LSI moved to a smaller warehouse during the period at issue, we do not believe it is
4 accurate to state that the businesses operated from the same location. We have added a
5 Conclusion of Law that addresses the Department's classification of employees of Labeling Service
6 Inc., for the second quarter of 2010, through the first quarter of 2011.
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10 FINDINGS OF FACT

- 11 1. On May 29, 2014, an industrial appeals judge certified that the parties
12 agreed to include the Jurisdictional Histories, as amended, in the Board
13 record solely for jurisdictional purposes.
- 14 2. Labeling Services, Inc. and LSI are separate companies that provide the
15 same services. LSI is the successor company to Labeling Services, Inc.
- 16 3. The Department investigated Labeling Services Inc., and its successor
17 company, LSI, on August 20, 2013, to determine risk classifications of
18 the businesses during the second quarter of 2010, through the first
19 quarter of 2011, and the second quarter of 2011, through the first quarter
20 of 2013, respectively.
- 21 4. Employees of Labeling Services Inc., and its successor company, LSI,
22 unloaded, inspected, labeled, repackaged, and reloaded goods for
23 shipping using pallet jacks and forklifts. Labeling Services, Inc.'s
24 employees provided the same services as LSI and used the same
25 equipment. Both businesses were located in a warehouse.
- 26 5. During the second quarter of 2010, through the first quarter of 2011, the
27 proper risk classification for Labeling Services, Inc., was Freight
28 Handling (2002-13), as provided by WAC 296-17A-2102.
- 29 6. During the second quarter of 2011, through the first quarter of 2013, the
30 proper risk classification for LSI was Freight Handling (2002-13) as
31 provided by WAC 296-17A-2102.

32 CONCLUSIONS OF LAW

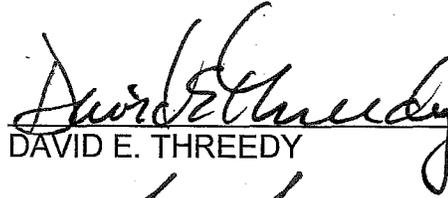
- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the
34 parties and subject matter in these appeals.
- 35 2. The Department correctly classified the employees of Labeling Services,
36 Inc., for the second quarter of 2010, through the first quarter of 2011, as
37 required by RCW 51.16.035.
- 38 3. The Department correctly classified the employees of LSI, successor
39 entity of Labeling Services, Inc., for the second quarter of 2011, through
40 the first quarter of 2013, as required by RCW 51.16.035.
- 41 4. In the appeal filed under Docket No. 13 22402, the Department order
42 dated September 6, 2013, is correct and is affirmed.

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5. In the appeal filed under Docket No. 14 16119, the Department order dated September 6, 2013, is correct and is affirmed.

Dated: December 17, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY

Chairperson



FRANK E. FENNERTY, JR.

Member

APPENDIX B

FILED
KING COUNTY, WASHINGTON

SEP 01 2015

SUPERIOR COURT CLERK
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DEPUTY

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

LSI LOGISTIC SERVICE SOLUTIONS
LLC, a Washington limited liability
Company, LABELING SERVICES INC,
an inactive Washington corporation,

Petitioner,

V.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

NO. 15-2-00933-8 KNT

[REDACTED] FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
JUDGMENT

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|---|---|
| 1. Judgment Creditor: | State of Washington Department of Labor and Industries |
| 2. Judgment Debtor: | Labeling Services, Inc. and successor company LSI Logistics |
| 3. Principal Amount of Judgment: | \$0 |
| 4. Interest to Date of Judgment: | \$0 |
| 5. Statutory Attorney Fees: | \$200.00 |
| 6. Costs: | \$0 |
| 7. Other Recovery Amounts: | \$0 |
| 8. Principal Judgment Amount shall bear interest at 0% per annum. | |

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor: Charlotte Ennis Clark-Mahoney
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

11. Representative for Judgment Debtor: Matt Adamson
Jameson Babbitt Stites & Lombard P.L.L.C.
Attorneys at Law
801 Second Avenue #1000
Seattle, WA 98104

This matter came on regularly before the Honorable Veronica Galvan in open court on September 1, 2015. Appellant, Labeling Services, Inc., LSI was represented by Matt Adamson; Attorney at Law the Respondent, Department of Labor and Industries (Department), appeared by counsel, Robert W. Ferguson, Attorney General, per Charlotte Ennis Clark-Mahoney, Assistant. The Court reviewed the records and files herein, including the Certified Appeal Board Record and pleadings submitted by counsel, and heard argument.

Therefore, being fully informed, the Court adopts the findings of fact as follows:

FINDINGS OF FACT

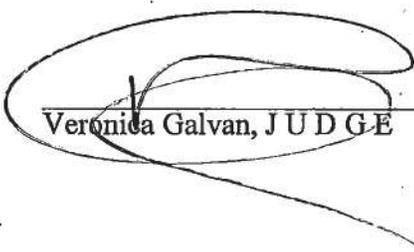
1. Labeling Services LSI filed an appeal to a department order to the Board of Industrial Insurance Appeals. Hearings were held September 4, 2014. The full Board affirmed the Proposed Decision and Order of the industrial appeals judge, and the firm timely filed an appeal to the superior court of King County.
2. This court affirms the Board of Industrial Insurance Appeals and adopts the findings of facts and conclusions of law of the Board as follows: On May 29, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional Histories, as amended, in the Board record solely for jurisdictional purposes.
3. Labeling Services, Inc. and LSI are separate companies that provide the same services. LSI is the successor company to Labeling Services, Inc.
4. The Department investigated Labeling Services Inc., and its successor company, LSI, on August 20, 2013, to determine risk classifications of the businesses during the second quarter of 2010, through the first quarter of 2011, and the second quarter of 2011, through the first quarter of 2013, respectively.
5. Employees of Labeling Services Inc., and its successor company, LSI, unloaded, inspected, labeled, repackaged, and reloaded goods for shipping using pallet jacks and forklifts. Labeling Services, Inc.'s employees provided the same services as LSI and used the same equipment. Both businesses were located in a warehouse.

- 1 6. During the second quarter of 2010, through the first quarter of 2011, the proper
2 risk classification for Labeling Services, Inc., was Freight Handling (2002-'13), as
3 provided by WAC 296-17A-2102.
4 7. During the second quarter of 2011, through the first quarter of 2013, the proper
5 risk classification for LSI was Freight Handling (2002-13) as provided by WAC
6 296-17A-2102.

7 **CONCLUSIONS OF LAW**

- 8 1. The Superior Court has jurisdiction over the parties and subject matter in these
9 appeals.
10 2. The Department correctly classified the employees of Labeling Services, Inc., for
11 the second quarter of 2010, through the first quarter of 2011, as required by RCW
12 51.16.035.
13 3. The Department correctly classified the employees of LSI, successor entity of
14 Labeling Services, Inc., for the second quarter of 2011, through the first quarter of
15 2013, as required by RCW 51.16.035.
16 4. In the appeal filed under Docket No. 13 22402, the Department order dated
17 September 6, 2013, is correct and is affirmed.
18 5. The Board of Industrial Insurance Appeals, correctly affirmed the Departments
19 Order affirming the risk class for Labeling Services, Inc. and LSI.

20 DATED this 15 day of September, 2015.

21 
22 Veronica Galvan, J U D G E

23 Presented by:
24 ROBERT W. FERGUSON
25 Attorney General

26 CHARLOTTE ENNIS CLARK-MAHONEY
Assistant Attorney General
WSBA No. 13096
Counsel for Respondent
Copy received,

1 approved as to form and
2 notice of presentation waived:

3
4 _____
5 Matt Adamson
6 WSBA No. 31731
7 Jameson Babbitt Stites & Lombard P.L.L.C.
8 Attorneys at Law for Appellant
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**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

LSI LOGISTIC SERVICE
SOLUTIONS, et al.,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

NO. 74125-0

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Respondent's Brief and Appendices A and B, and this Certificate of Service in the below described manner.

Via E-Filing to:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101

//

//

Via First Class United States Mail, Postage Prepaid to:

Matt Adamson
Jameson Babbitt Stites & Lombard, PLLC
801 Second Avenue, Suite 1000
Seattle, WA 98104
Attorneys for Appellant

DATED this 23rd day of March, 2016.



LYNN ALEXANDER
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740