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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 34566-1-III

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

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

Appellants,

v.

STATE OF WASHNGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

BRIEF OF APPELLANT
SWANSON HAY COMPANY

McNEICE WHEELER, PLLC
RYAN MCNEICE, WSBA # 36814
BECKI WHEELER, WSBA # 36676
Attorneys for Appellant Swanson Hay Company
11404 E. Sprague Ave
Spokane Valley, WA 99202
Telephone: (509) 928-4141
Facsimile: (509) 928-9166

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1. INTRODUCTION:

This case is about a family owned trucking business, Swanson Hay Company, challenging a large state agency, Employment Security Department ("ESD"). On the surface, the main issue is whether ESD correctly categorized seven owner-operators as employees when Swanson Hay hired them as independent contractors. However, at the heart of the issue, this case is about ESD's overreach, their improper application of the law, and the ramifications their improper application will have on the entire trucking industry throughout Washington State.

2. ASSIGNMENTS OF ERROR:

A. Assignments of Error

i. The trial court erred in entering its order on June 23, 2016 as to Swanson Hay, when it upheld the administrative court's ruling.

B. Issues Pertaining to Assignments of Error:

i. Under RCW 50.04.140(1), the independent-contractor exception applies if workers are free from the carrier's

direction or control, perform the services outside of the carrier's place of business, and are engaged in an independently established business. The evidence showed that (a) Swanson Hay, the carrier in this case, does not control the method and detail by which owner-operators perform transportation services; (b) owner-operators perform their truck-driving services outside all places of Swanson Hay's business; and (c) owner-operators satisfy all factors the court has traditionally examined as indicia of an independently established business. Did the Commissioner err in finding that the owner-operators are not exempt independent contractors? (Assignment of Error Number 1).

3. STATEMENT OF THE CASE:

A. Independent Contractors in the Trucking Industry

Trucking is a critical part of the economy, both on a state and national level. ARS7, Ex. AA at 2.[1] The majority of trucking businesses are small businesses with nearly 96% operating fewer

[1] The Administrative Record for Swanson Hay is cited herein as "ARS" followed by the volume number.

than 20 trucks. ARS7, Ex. AA at 2. The trucking industry itself fluctuates in demand and the utilization of owner operators is vital to handling these fluctuations. The use of independent owner-operators is a common and widespread practice within the trucking industry. ARS7, Ex. Z at 2. Independent, owner-operators are the backbone of the trucking industry throughout Washington and the United States. The vast majority of interstate truckload transportation businesses in Washington, rely on the use of contractual relationships with owner-operators. ARS7, Ex. AA at 3. Contracting with independent contractors provides trucking businesses with a number of benefits; namely, they keep down costs and provide flexibility by allowing the companies to address the need to move cargo without having to purchase trucks that can cost more than $150,000. ARS7, Ex. AA at 3.

B. Swanson Hay Company

Swanson Hay is a family owned and operated trucking business that has been in good standing in the State of Washington since 1965. ARS7, Ex. Z at 1. Swanson Hay is an interstate motor

carrier duly licensed by the U.S. Department of Transportation and the Federal Motor Carrier Safety Administration ("FMCSA"). Further, it is a common contract carrier and a bonded hay dealer. ARS7, Ex Z at 1-2. Swanson Hay is based in Spokane, WA and operates throughout the 11 western states and British Columbia. ARS7, Ex. Z at 2. Swanson Hay utilizes owner-operators because it enables Swanson Hay to be flexible in the market and save money by avoiding having to purchase highly expensive equipment. ARS7, Ex. AA at 3. All owner-operators leased to Swanson Hay own their own vehicles and Swanson Hay provides no financing for the owner-operators equipment. ARS7, Ex. BB at 18-22. Owner-operators remain responsible for, but not limited to, truck repair and maintenance, insurance, license fees, trip expenses, and fuel costs. ARS7, Ex. BB at 18-22. Pursuant to both federal and state regulations, the respective owner-operator trucks carry the Swanson Hay insignia and are operated under Swanson Hay's Interstate Commerce Commission ("ICC") authority. ARS7, Ex. BB at 18-22.

C. Procedural History

This action began when ESD issued an Order and Notice of Assessment on November 8, 2011. The Order and Notice of Assessment assessed Swanson Hay's contributions, penalties, and interest in the amount of $36,070.32. Swanson Hay filed a timely appeal of the Order and Notice of Assessment. On June 9, 2014, the parties proceeded to an evidentiary hearing before the Office of Administrative Hearings ("OAH") on the issue of whether, pursuant to RCW 50.04.100, the owner-operators in dispute were employees of Swanson Hay, and, if so, whether their services were exempted from coverage under RCW 50.04.100. Subsequently, on August 14, 2014, the OAH issued a Tax Case Initial Order, holding that, pursuant to RCW 50.04.100, the disputed owner-operators were employees of Swanson Hay. Further, the OAH held that the owner-operator's services were not exempt from coverage under RCW 50.04.140. Swanson Hay petitioned for review by the ESD Commissioner's Review Office (CRO). The CRO likewise affirmed the Initial Order. Swanson Hay timely sought review in the Spokane County Superior Court.

D. The Trial Court's Decision

The Honorable Harold Clarke III, heard Swanson Hay's appeal under Case Number: 2015-02-03704-2, in conjunction with that of Hatfield Enterprizes and System Transport After considering the record, and hearing arguments, the court ruled in favor of ESD. However, the court held that but for *W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 41 P.3d 510 (2002), ("*Western Ports*"), the Court would have concluded that the owner-operators were independent contractors exempt from coverage under RCW 50.04.140(1), ultimately reversing the CRO's decision. CP 18.

4. SUMMARY OF THE ARGUMENT

The trial court erred in upholding the CRO's determination that the owner-operators did not satisfy the independent-contractor exemption under RCW 50.04.140(1). In order for owner-operators to be exempt they must be (1) free from the carrier's control and direction, (2) the services must be performed outside all of the carrier's places of business, and (3) the owner-operators must be

engaged in an independently established business. RCW 50.04.140(1). The court should not consider federally mandated controls when applying the statutory test for exemption under RCW 50.04.140(1)(a). Considering federally mandated controls in this analysis, goes against federal legislative intent and has negative policy implications for the trucking industry in Washington. Other jurisdictions have held that owner operators fit the independent contractor exemption.

Swanson Hay's Independent Contractor Agreement ("ICA") is written to comply with federal regulations. However, aspects of Swanson Hay's ICA have been improperly categorized as elements of control and general contractual rights should not be considered aspects of control.

Therefore, Swanson Hay has satisfied the control and direction requirement under RCW 50.04.140(1)(a). The CRO ruled that Swanson Hay proved the owner-operators operated outside of all the places of Swanson Hay's business and therefore satisfied RCW 50.04.140(1)(b). ESD did not appeal that decision.

Furthermore, the owner-operators satisfy all of the traditional factors of an independently established business under RCW 50.04.140(1)(c). The CRO determined that since the owner-operators did not have their own operating authority (also known as a MC#) the owner-operators were not an independently established business. There is no authority for including a MC# in the traditional factors and therefore, MC#s should not be considered. Swanson Hay has proven the owner-operators satisfy all three prongs under RCW 50.04.140(1).

5. ARGUMENT

A. This Court should not consider federally mandated controls in applying the RCW 50.04.140(1) exemption test.

The two leading Washington cases interpreting the independent contractor employment statutes in regards to owner-operators are *Penick v. Employment* Sec. Dep't, 82 Wn. App. 30, 39, 917 P.2d 136 (1996), a Division II case, and *W. Ports Transp., Inc,*

v. Employment Sec. Dep't of State of Wash., 110 Wn. App. 440, 41 P.3d 510 (2002)[2], a Division I case.

The Court in *Penick* dealt with the issue of contract-drivers and not owner-operators. *Penick*, 82 Wn. App. at 34, 917 P.2d at 136. The court found the contract drivers did not fall within the RCW 50.04.140(1) exemption because the carrier owned the equipment used by the contract-driver and also paid for items such as fuel, maintenance, repairs, and licensure. *Penick*, 82 Wn. App. at 34, 917 P.2d at 136. However, at the administrative level, *Penick* involved two different groups of drivers: those who owned their trucks (owner/operators) and those who did not (contract drivers). *W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 453, 41 P.3d 510, 517 (2002). The Commissioner in *Penick* found the owner-operators to be exempt and ESD did not appeal that decision. *W. Ports Transp., Inc.*, 110 Wn. App. at 453, 41 P.3d at 517. This failure to appeal strongly

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[2] It is important to note that *Western Ports* predates *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002) and the Court was unable to benefit from the logic of the Washington State Supreme Court in regards to the definition of control.

suggests ESD conceded the commissioner's determination that the owner-operators satisfied the RCW 50.04.140(1) exemption test. Similar to the carrier in *Penick*, Swanson Hay utilizes traditional owner-operators that own and maintain their own equipment at their own risk.

In *Western Ports*, the court ruled that the services the owner-operator performed for the carrier constituted employment and the owner-operator did not fall within the RCW 50.04.140(1) exemption. *W. Ports Transp., Inc.*, 110 Wn. App. at 445, 41 P.3d at 513. It was determined that ESD, "can consider federally mandated controls in applying the state test for exemption".[3] *W. Ports Transp., Inc.*, 110 Wn.App. at 453, 41 P.3d at 517. Additionally, the court agreed with the *Penick* court that all facts related to the work situation must be considered when determining whether an independent contractor is an employee. *W. Ports Transp., Inc.*, 110

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[3] The court only held that federally mandated direction and control could be considered, not must be considered. The court had the opportunity to require that federally mandated direction and control be considered. However, the Court specifically choose not to. *W. Ports Transp., Inc. v. Employment Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 453, 41 P.3d 510, 517 (2002).

Wn.App. at 451, 41 P.3d at 516. However, this court should not consider federally mandated controls. By considering federally mandated controls the Court's decision would go against federal intent, negatively affect the trucking industry in Washington, and would differ from other jurisdictional rulings in similar situations.

i. Western Ports Goes Against Federal Legislative Intent

The court in *Western Ports* improperly overlooked federal legislative history and policy by allowing the consideration of federally mandated direction and control. *W. Ports Transp., Inc.*, 110 Wn. App. at 453, 41 P.3d at 517. When Congress wrote the Federal Aviation Administration Authorization Act (FAAAA) of 1994 it expressly preempted state and local laws by borrowing language from the Airline Deregulation Act (ADA) of 1978. Congress stated that a, "State...may not enact or enforce a law...related to a price, route or service of any motor carrier...with respect to the transportation of property." *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368, 128 S. Ct. 989, 993, 169 L.Ed. 2d 933 (2008), quoting 49 U.S.C. § 14501(c)(1). Congress

was fully aware of the Supreme Court's broad interpretation of the ADA when they copied the language. *Rowe,* 552 U.S., at 364, 370, 128 S. Ct. at 994, 169 L. Ed. 2d 933. Congress' goal was to help ensure transportation rates, routes, and services and stimulate efficiency, innovation, and low prices. *Rowe*, 522 U.S. at 371, 128 S. Ct. at 995, 169 L. Ed. 2d 933. In order to achieve such a goal, certain aspects of the trucking industry needed to be federally regulated.

Federal regulations require the carrier to "assume complete responsibility" for the operation of the leased equipment and to maintain "exclusive possession, control, and use of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1). The federal government provided that ***nothing*** in the above resolution "***is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier***." 49 C.F.R. § 376.12(c)(4) (emphasis added).

By applying *Western Ports*, the CRO in this case improperly limited the scope of 49 C.F.R. § 376.12(c)(4) by making a

distinction between 49 U.S.C. § 14102 and 49 C.F.R. Part 376, and federal safety regulations.[4] By making these distinctions, the CRO is saying that because Swanson Hay followed federal safety regulations they are exerting control. ARS2A, at 273. According to this logic, the only way the owner-operators can be independent contractors is if Swanson Hay intentionally breaks federal safety regulations. Thus, Swanson Hay will be unable to obtain the necessary certification to continue their interstate commerce business.

ii. Western Ports has negative policy implications for the trucking industry in Washington

Extending the holding in *Western Ports* would fundamentally change the business models of the trucking industry throughout Washington State because ESD will have effectively eliminated the use of independent contractors. Independent contractors are a cornerstone of the trucking industry. ARS7, Ex.

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[4] Examples of these federal regulations are those contained in 49 C.F.R. Part 395 and Part 396.

AA at 4. Relying on *Western Ports* would force carriers to provide trucking services only through employees, which would limit companies' operational flexibility. AR7, Ex. AA at 4. It would also create a substantial financial burden on trucking companies as they would have to hire more employees, purchase trucks that cost upwards of $150,000, as well as trailers that can cost anywhere between $25-$45,000. ARS7, Ex. AA at 5. Currently, the independent contractors provide all of this equipment at no extra cost to the company. ARS7, Ex. BB 18-23.

iii. Other jurisdictions have held that owner-operators fit the independent contractor exemption.

Other jurisdictions have ruled in favor of an independent contractor characterization with the same or similar fact pattern in this case.[5] The Idaho Supreme Court ruled, "requirements that truck and driver meet Interstate Commerce Commission's standards, and

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[5] *National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho*, 83 Idaho 247, 360 P.2d 994 (1961); *Hassebroch v. Weaver Const. Co.*, 246 Iowa 622, 67 N.W.2d 549 (1954); *Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. State, Dept. of Labor and Employment Sec., Div. of Empl.*,447 So.2d 414 (1984).

existence of the road patrols, point toward compliance with governmental regulations, and are not indicia of an employer-employee relationship. The driver's control of his route, of garaging and upkeep of his truck, his privilege of refusing a haul, all indicate the status of independent contractor." *National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho*, 83 Idaho 247, 360 P.2d 994 (1961). (introduced as evidence was a 1954 decision of the *National Labor Relations Board (99 N.L.R.B. 1019)* finding the owner's operating trucks for the plaintiff corporation were independent contractors within the meaning of the *National Labor Relations Act, 29 U.S.C.A. § 151 et seq.*). [6] Similarly, the Iowa Supreme Court has held, "every contract for work reserves to the employer a degree of control, at least to enable him to see it is done according to the contract. Such limited control does not necessarily indicate a master-servant relationship." *Meredith Pub. Co. v. Iowa Employment Sec. Commission,* 232 Iowa 666, 674, 6 N.W.2d 6, 10, 11 (1942). While

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[6] Idaho has also rejected using federal regulation to determine employee status. See, e.g. *Hernandez v. Triple Ell Transp., Inc.,* 145 Idaho 37, 175 P.3d 199 (2007).

the above cases are not precedential, they are persuasive and since the Washington State Supreme Court has not ruled on this issue, this Court should take these ruling into consideration.

Furthermore, there is a lack of uniformity in the analysis of this issue within the lower courts of Washington. Our firm prevailed in 2013, on the same or similar facts in front of Judge Courtney E. Beebe in Eastern Washington in the matter of *Fastway Transport, Inc., Docket No. 04-2013-08158.* These contradictory results between the west side and east side of Washington Administrative Law Judges, as well as Appeals Court Division I (*Western Ports*) and Division II (*Penick*) contradictions in Washington State, makes for a classic Washington State Supreme Court case on this clearly political issue.

B. The Owner-Operators are Independent Contractors under RCW 50.04.140(1)

The services provided by the owner-operators in question satisfy all three prongs of the Independent Contractor Exemption. Therefore, the owner-operators are excluded from coverage under

RCW 50.04.100.[7] The CRO agreed that Swanson Hay established the second element of the statutory test. ARS2A at 227. ESD concedes that determination by not seeking review. The CRO concluded Swanson Hay exercised direction and control over the owner-operators and that the owner-operators were not an independently established business. ARS2A. However, the trial court disagreed with the CRO.[8]

i. The Owner-Operators are free from Swanson Hay's direction and control

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[7] The prongs under RCW 50.04.140(1) are as follows: (1) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; and (2) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside all of the places of business of the enterprise for which such service is performed; and (3) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service. RCW 50.05.140(1) The employer must prove all three statutory requirements in order to be exempt from coverage. *Miller v. Employment Sec. Dep't*, 2 Wn. App. 503, 505, 476 P.2d 138 (1970).

[8] "Given this manner of weighing the various factors, this Court would hold the carriers are controlling the end result of the work, not the performance of the work, and the decision of the Commissioner should be reversed. However, this Court believes it is constrained to follow the holding in Western Ports, where on facts very similar to those at hand, the court held the owner-operator to be an employee for the purposes of the Unemployment Compensation Act. Accordingly, the appeals are denied." CP 18.

The first prong of the exemption test requires the owner-operators to be free from direction and control in the performance of their work. RCW 50.04.140(1)(a). The totality of the facts and circumstances shows that the owner-operators were free from the direction and control of Swanson Hay. A review of Swanson Hay's ICA and supporting exhibits in the record illustrates that the owner-operators satisfy the first prong as follows, (1) The owner-operators contractually are in complete control of methods and means of loads and routes. ARS7, Ex. BB 18-23. (2) The owner-operators can contractually turn down loads. ARS7, Ex. BB 18-23. (3) The owner-operators can contractually locate their own loads. ARS7, Ex. BB 18-23. (4) The owner-operators regularly find their own loads / freight by using Internet Truck Stop "www.truckstop.com". The freedom and convenience of finding their own loads / freight allows the owner-operators the freedom to create their own schedule by choosing the timing of the operation and convenient routes for delivery. ARS7, Ex. BB 18-23. (5) The owner-operators choose the area of the country in which they want, or do not want loads / freight.

ARS7, Ex. BB 18-23. (6) The owner-operators must supply all equipment, including but not limited to, trucks, trailers, and any auxiliary equipment necessary. ARS7, Ex. BB 18-23. (7) The owner-operators are responsible for storage and costs of storage of their own equipment. ARS7, Ex. BB 18-23.

The owner-operators are free from Swanson Hay's control and direction because Swanson Hays' ICA is written to comply with federal regulations, aspects of Swanson Hays' ICA have been improperly categorized as elements of control and direction, and general contractual rights should not be considered elements of control and direction.

1. Swanson Hay's Independent Contractor Agreement is written to comply with federal regulations.

49 U.S.C. § 14102(a) provides for federal regulation of a carrier's lease of motor vehicle equipment and regulations. Further, 49 C.F.R. § 376.11 et seq. provides the specific terms and conditions regarding when a carrier may perform authorized transportation with equipment it does not own. The Federal Motor Carrier Safety

Administration (FMCSA) will terminate Swanson Hay's Motor Carrier Number (MC#) and shut down its trucking operations if these federally mandated controls over the owner-operators are not properly implemented and contracted for in Swanson Hay's ICA. ARS7, Ex BB 8-22. As such, Swanson Hay's ICA satisfied the federal regulations regarding the carrier's exclusive possession, use, and control of the equipment,[9] the identification of the equipment,[10]

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[9] "49 C.F.R. 1057.12(C) requires the CARRIER to state in this agreement that it shall have exclusive possession, use, and control of the equipment and shall be responsible for the operation of the equipment during the term of this agreement, at such time as the equipment is operated in the service of CARRIER. For all other purposes, the equipment shall be possessed by and the responsibility of CONTRACTOR. No provision of this agreement shall be so interpreted as to require CARRIER to employ any driver, either as its own employee, or as an employee of CONTRACTOR in order to keep in use the equipment furnished thereunder." ARS7, Ex. BB at 19.

[10] 49 C.F.R 390-397 requires the CARRIER "to identify the equipment described herein as being operated under the name of CARRIER. In order to effect compliance with such regulation, each of the tractors described in Schedule A shall display on each door the name and address of the CARRIER and the name and address of the CONTRACTOR, as well as the identification number of the operating authority under which the equipment is operated. Such identification shall be in a form acceptable to state and federal regulatory agencies, and shall be placed upon the equipment at the expense of CONTRACTOR. At expiration or termination of this Agreement, the identification of CARRIER shall be obliterated or removed by CONTRACTOR and CONTRACTOR shall provide proof of such obliteration or removal." ARS7, Ex. BB at 20.

policies regarding liability of property damage,[11] and the rules and regulations of the interstate commerce summation, department of transportation and state agencies.[12]

The CRO incorrectly analyzed these federally mandated regulations as aspects of Swanson Hay's direction and control over the owner-operators. However, the federal government mandates the lease requirements and Swanson Hay has no other choice but to

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[11] Pursuant to 49 C.F.R. 1043 and 49 U.S.C. 10927, "CARRIER shall maintain a policy of public liability and property damage insurance and a policy of cargo damage insurance; provided, however that CONTRACTOR shall be liable to CARRIER without regard to fault or the absence thereof, for any loss, injury or damage to cargo, or to their person's or their property not covered under said policies, and for any deductible under such policies, up to a maximum of $1,000.00" ARS7, Ex. BB at 22.

[12] "In order that CARRIER may comply with the rules and regulations of the interstate commerce summation, department of transportation (including, but not limited to 49 C.F.R. 395, 396) and the various state regulatory agencies having jurisdiction over their operations, CONTRACT shall at all time comply with the rules and regulations as set forth by agencies and furnish CARRIER with the following documents and information: (1) On a daily basis, the original of the daily log of each driver whom the CONTRACTOR employs in the performance of this agreement. (2) On a daily basis, the original of the driver's daily vehicle condition report for vehicles used in the performance of this agreement. (3) The original or true copies of all scale tickets, toll receipts, delivery receipts for each load transported. (4) Such other documents or data which must be maintained by CARRIER or filed by CARRIER pursuant to complying with the regulation of such agencies. (5) On a current basis, all maintenance reports and records as required by regulation. Failure to comply with provisions of this paragraph will result in a special handling charge not to exceed $25.00 in each specific case." AR7, Ex. BB at 22.

include these provisions in their ICA if they want to follow federal regulations and keep their MC#. Furthermore, "both carriers and owner-operators are subject to, and must comply with the federal regulations; neither party is free to negotiate any of the required terms." ARS7, Ex. AA at 3. Therefore, by analyzing RCW 50.04.140(1) this way, the CRO is requiring Swanson Hay to violate federal regulations.

2. Aspects of Swanson Hay's ICA have been improperly categorized as elements of direction and control.

The CRO created a list of items it believed demonstrated control and direction. ARS2A at 272. Some of these items did not affect the core of the work provided, including certain previsions of Swanson Hay's ICA.[13] These ICA provisions that affect Swanson Hay include the requirement that the owner-operators supply

[13] The trial court held that "the appropriate test as to the issue of control and direction would be to measure those points of control that affect the core of the work being provided" and "such things as keeping the equipment clean, maintaining correct signage or cooperating in the event of a loss are ancillary to the actual work of hauling." CP 18.

auxiliary equipment,[14] provide photographs of certain cargo for insurance purposes,[15] and that Swanson Hay may transfer shipment from unsatisfactory equipment.[16] ARS2A, AR at 273-274.

Swanson Hay's requirement that the owner-operators supply auxiliary equipment is indicia that the owner-operators are engaged in an independently established business. The CRO improperly characterized this requirement as an "element of control". This requirement falls under RCW 50.04.140(1)(c) (the owner-operators

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[14] "CONTRACTOR shall supply, at its expense, auxiliary equipment such as, but not limited to, chains, tarps, tie-downs and similar equipment, in such quantity and of such type or quality as is necessary to achieve delivery of the commodities to be transported in or upon the equipment described herein by contractor." ARS7, Ex. BB at 19.

[15] "Pursuant to 49 C.F.R. 1043 and 49 U.S.C. 10927 CARRIER shall maintain a policy of public liability and property damage insurance and a policy of cargo damage insurance; provided, however that CONTRACTOR shall be liable to CARRIER, without regard to fault or the absence thereof, for any loss, injury or damage to cargo, or to their person's or their property not covered under said policies, and for any deductible under such policies, up to a maximum of $1,000.00." ARS7, Ex. BB at 22.

[16] "In the event that the equipment described herein is not in the condition required by Paragraph 1B or is otherwise deemed inadequate for the performance of CONTRACTOR's obligations under this Agreement, CARRIER may transfer any shipment from such equipment and accomplish transpiriation according to the CARRIER's best judgement. Any and all costs and expenses incident to the rehandling of such shipments as herein described shall be the responsibility of CONTRACTOR.

have an independently established business). Indication of an independently established business occurs when a "worker provides equipment and supplies needed for the job". *Jerome v. Employment Sec. Sep't Wn. App.* 810, 815, 850 P.2d 1345 (1993).[17] Therefore, this aspect of Swanson Hay's ICA was improperly categorized as an element of control and direction.

Further, Swanson Hay requires owner-operators to provide photographs of certain cargo to protect against product loss. The CRO argued that since Swanson Hay requires owner-operators to provide photographs of certain cargo, it is an element of Swanson Hay's direction and control over the owner-operators. The purpose of these photographs is to prove loss or damage of cargo and is not an attempt to control the contractor. It is a federal regulation that carriers maintain insurance to protect against cargo damage or loss. 49 C.F.R. 1043; 49 U.S.C. 10927.

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[17] These factors will be discussed in greater detail in the context of deciding whether the owner-operators had an independently established business later in this brief.

Furthermore, Swanson Hay reserves the right to divert a shipment if the owner-operator's equipment cannot produce the end result. The alleged employer has the right to control the methods and details of the performance of the work, as opposed to the end result of the work. *Jerome* Wn.App. at 816, 850 P.2d 1345 (1993). The CRO compared the provision of the ICA, which allowed Swanson the ability to transfer shipment from faulty equipment, with *Jerome*. However, *Jerome* is factually distinguishable from the case at hand. Swanson Hay simply retains the right to proactively transfer the shipment if the equipment cannot deliver the goods. Meanwhile, the owner-operators can choose the methods and means of how they deliver the goods.[18] This is a perfect example of Swanson Hay being concerned about the end result (the delivery of goods) while allowing the owner-operators to determine how the services were performed. Even though Swanson Hay retained the right to divert

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[18] In *Jerome*, the employer retroactively decided to not give referrals to food demonstrators after she trained them on how to prepare food, demonstrate the product, and dress themselves, and then checked their performance and reviewed all reports. *Jerome v. State, Employment Sec. Dep't*, 69 Wn. App. 810, 816-17, 850 P.2d 1345, 1348 (1993).

shipment if the owner-operators equipment could not produce the end result, this is not a showing of control and direction.

3. General contractual rights should not be considered elements of direction or control

The definition of control the CRO used is contrary to the definition set forth by the Washington State Supreme Court. The CRO points to general contractual rights as elements of direction and control. However, the Washington State Supreme Court held that, "general contractual rights as the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work, do not mean that the general contractor controls the method of the contractor's work". *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (quoting *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 445-56, 711 P.2d 1090 (1985)). The court explained:

> "[t]he employer must have retained at least some degree of control over the manner in which the wor[k] is done. It is not enough that he has merely a general right to order the

> work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods or work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Kamla, 147 Wn.2d at 119, 52 P.3d 472 (quoting Rest. (2d) TORTS § 414 cmt. c (1965)). Therefore, general contract rights should not be considered when analyzing aspects of direction or control for the purposes of RCW 50.04.140(1)(a).

ii. The owner-operators are engaged in an independently established businesses.

The CRO improperly determined that Swanson Hay did not establish that the owner-operators were an independently established business. ARS2A, at 280. Owner-operators are independently established in their occupation of driving trucks. *All-*

State Const. Co. v. Gordon, 70 Wn. 2d 657, 425 P.2d 16 (1967). Evidence of an "enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of that relationship" is required to satisfy RCW 50.05.140(1)(c). *Jerome*, 69 Wn. App. at 815, 850 P.2d at 1345, quoting *Schuffenhauer v. Department of Empl. Sec.*, 86 Wn.2d 233, 238, 543 P.2d 348 (1975). ICA's are not dispositive of whether a worker is a "covered employee" with ESD. However, Swanson Hay's owner-operators have been independently established in their own right in the trucking industry. Beyond the ICA language itself, the facts and circumstances of the relationship between Swanson Hay and their owner-operators should be deemed exempt under the Act. Additionally, the ICA specifically allows for termination of the ICA by either party without cause. This allows owner-operators the freedom to choose more lucrative or advantageous agreements with other carriers as the owner-operators see fit or as opportunities arise within the industry. ARS7, Ex. BB. 18-23. The owner-operators satisfy all traditional factors the court

has used as indicia as an independently established business. There is no authority for including possession of a MC# in the traditional test. Even with the MC# being analyzed the owner-operators would still be considered to be engaging in independently established businesses. Therefore, the owner-operators satisfy RCW 50.04.140(1)(c). ESD is treating the possession of a MC# as the sole deciding factor, however, even if the MC# is added to the traditional test, that should be weighed equally with all other factors.

1. The owner-operators satisfy all factors the court has traditionally examined as indicia of an independently established business.

The CRO argued that Swanson Hay provided its' owner-operators protections from risk of injury or non-payment, and that the owner-operators do not work for others.[19] ARS2A, AR at 279.

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[19] These are two factors of the seven that are indicative of an independently established business. *Jerome*, 69 Wn. App. at 815. Swanson Hay has satisfied all other factors. As established earlier, the owner-operators do not work inside of one of Swanson Hay's offices. ARS7. Ex. BB 18-23. Instead they work from the trucks they own, which certainly constitutes as a separate place of business outside of the home. ARS7, Ex. BB 18-23. There is no doubt the owner-operators invest large amounts of money into their business, upwards of $150,000

The CRO asserted that Swanson Hay provided protection from the threat of nonpayment by the customers in the ICA. ARS2A, AR at 279. However, there is no such provision listed under the ICA. AR7, Ex. BB. 18-23. The owner of Swanson Hay testified that he is willing to provide payment to his independent contractors as scheduled even if the customer is a little late on paying Swanson Hay. ARS4, 6/9/2014 trans at 132. However, this is not a contractual obligation and is little more than an accommodating personal business practice. Therefore, Swanson Hay does contractually obligate itself to provide protection from injury or non-payment. Thus, the CRO improperly concluded that the owner-operators did not satisfy the *Jerome* test. Furthermore, the CRO contends that the owner-operators could not work for others because the owner-

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on trucks and $25-45,000 on trailers. ARS7, Ex. AA at 5. Nor is there any dispute over the fact that the owner-operators are required to provide all equipment and supplies needed for the job. Not only are they required to supply the truck and trailer itself, they are also required to supply an auxiliary equipment necessary to the job. ARS7, Ex. BB 18-46. The majority of the owner-operators have their businesses registered with the State of Washington, and those that do not are still operating an independent business as a sole proprietor. ARS7, Ex. EE 1. The termination of the relationship between Swanson Hay and the owner-operators has no bearing on the owner-operator's ability to take their equipment and haul for another company. ARS1B at 95-96.

operators did not have their own MC#s. However, the trial court determined that the CRO failed to cite to any authority that supported making an MC# an additional or paramount factor. CP 18.

2. The possession of a MC# is not part of the traditional test of an independently established business.

The CRO held that possession of a MC# was an additional paramount factor for the purpose of proving an independently established business. ARS2A, AR at 278-279. However, the trial court properly ruled the CRO's decision in this regard was erroneous in interpreting and applying the law, and should be reversed. CP 18. Furthermore, the *Pennick* court never mentioned operating authority as they went through the factored test. *Penick v. Employment Sec. Dep't*, 82 Wn. App. 30, 39, 917 P.2d 136 (1996). In fact, the court provided examples of factors that would show an independently established business and the possession of an operating authority or MC# was not mentioned. *Penick,* 82 Wn. App. at 44, 917 P.2d at 136. This fixation is an example of both the ESD and the CRO

attempting to add operating authority to the traditional test when the court in *Pennick* and *Western Ports* chose not to. *Penick Sec. Dt,* 82 Wn. App. 30, 39, 917 P.2d 136 (1996); *Western Ports Transportation v. Emp't Sec. Dep't*, 110 Wn. App. 440, 41 P.3d 5150 (2002).

3. If the possession of a MC# is added to the traditional test, that factor should be weighed equally with all other factors.

Operating authority should not be added to the traditional test, however fit is added, it should be weighed equally against all other factors. Factored tests are utilized to address multiple aspects of a case and allow the court to look at all of the facts and circumstances. The CRO and ESD improperly weighed the possession of a MC# as the sole factor. In application, the CRO and ESD made possession of a MC# a threshold requirement by holding it higher than any other factor. ESD's only witness, Una Wiley, testified that none of the other factors traditionally used by the court mattered if the owner-operators do not have a MC#. ARS4, 6/9/2014

trans. at 101-102.[20] If operating authority is added to the traditional test, it should be considered equally with all the other factors. If operating authority is considered equally with the other factors, Swanson Hay would satisfy the majority of the factors shown, establishes itself as an independently established business.

6. CONCLUSION:

For the foregoing reasons, this Court should reverse the Trial Court's order, find the owner-operators are independent contractors under RCW 50.04.140(1), and remand the case to ESD to dismiss

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[20] Q. I believe Mr. Greaves had indicated beyond the MC number, does ESD put equal weight to other facts and circumstances, whether that be IC - Independent Contractor Agreement, titles and ownership of the respective equipment, bank partnership, their business license, and whether they have a promissory note indicating that they financed it with an independent financial institution. ***You indicated to Mr. Greaves' question that you do take all of those things, I just mentioned into question. However, when I asked you those same questions, you said, if they check the box for each of those but not - but dont have an MC number, you're not taking the other factors into account.*** Are you taking those other factors into account or are you not?

THE WITNESS: **If they do not have a motor carrier** - they don't have driving authority?

MR. McNEICE: Correct

THE WITNESS: ***Then those other factors would not matter***. CR 4, 6/9/2014 trans at 101-102 (emphasis added). This testimony shows ESD's overreach in completely changing and, in fact, removing the factored test all together by only focusing on the MC#s.

the assessments against Swanson Hay, and award Swanson hay its reasonable attorneys' fees incurred on appeal.

DATED this 14th day of November, 2016.

Respectfully submitted,

Ryan McNeice, WSBA # 36814
Becki Wheeler, WSBA # 36676
McNeice Wheeler, PLLC
11404 E. Sprague Ave
Spokane Valley, WA 99202
(509) 928-4141

Attorneys for Appellant
Swanson Hay Company

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the Brief of Appellants Swanson Hay Company in Court of Appeals Division III Case No. 345661-I-III (consolidated with 34567-0-III and 34568-8-III) to the following parties:

Eric Daniel Peterson
Leah E. Harris
Assistant Attorneys General
Licensing and Administrative Law Division
800 5th Ave Ste 2000 MS TB-14
Seattle WA, 98104-3188
ericpl@atg.wa.gov; leahh1@atg.wa.gov

Aaron Riensche
Ogden Murphy Wallace PLLC
901 5th Ave, Suite
Seattle, WA 98164-2008
ariensche@omwla.com

Philip A. Talmadge
Thomas M. Fitzpatrick
2775 Harbor Ave SW
Third Floor, Suite C
Seattle, WA 98126-2138
phil@tal-fitzlaw.com; tom@tal-fitzlaw.com

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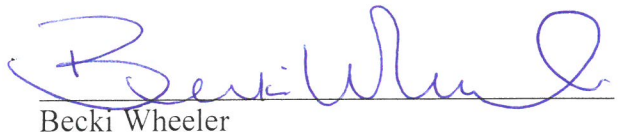
Court of Appeals, Division III
Clerk's Office

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

DATED this 14th day of November, 2016.



Becki Wheeler