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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

BRIEF OF RESPONDENT RE: SWANSON HAY COMPANY

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I. INTRODUCTION

Swanson Hay Company, a motor carrier, attempts to avoid unemployment compensation taxes for its drivers who own and operate their own trucks ("owner-operators"), claiming they are independent contractors who should not be covered by the taxing provisions of the Employment Security Act. The Commissioner of the Employment Security Department properly ruled that Swanson's owner-operators are in its employment for purposes of the Act and that Swanson failed to prove the exception from the Act's coverage. The Commissioner's findings in this Administrative Procedure Act appeal are supported by substantial evidence, and the conclusions are free of legal error because this case is controlled by *Western Ports Transportation, Inc. v. Employment Security Department*, where the court ruled an owner-operator was in covered employment of a motor carrier for unemployment insurance purposes, and federal law did not preempt the Act. *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450-58, 41 P.3d 510 (2002). *Western Ports* has been the law in Washington for over 14 years, is consistent with many other states' decisions, and should not be overruled.

Swanson, however, raises policy arguments and a theory of federal preemption that depends on the false assumption that the tax will result in it having to hire only employees as drivers and to purchase expensive

equipment. This is empty rhetoric. As a matter of law, the Act obligates employers to pay unemployment taxes for employment covered by the Act, and the assessment or its basis does not affect worker classification for any other legal purpose. This tax obligation imposes only a minor cost increase and does not have the significant impact necessary to invoke federal preemption. The Court should affirm the Commissioner's order.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner correctly rule that Swanson failed to prove its owner-operators were free from its control or direction over the performance of services under RCW 50.04.140(1)(a), as construed in *Western Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 41 P.3d 510 (2002)? And, did Swanson fail to show *Western Ports* is wrong and harmful such that it should be overruled?

2. Did Swanson fail to prove its owner-operators were independently established businesses under RCW 50.04.140(1)(c) when they relied on Swanson's federal motor carrier authority to haul freight, they worked exclusively for Swanson, Swanson protected them from customer nonpayment, and all of the owner-operators entered into contracts with Swanson in their personal capacities?

III. STATEMENT OF THE CASE

Swanson is an interstate trucking company that transports general freight, lumber, drywall, and insulation, and buys and sells a lot of hay. Agency Record Swanson Hay Vol. 2 (ARSH2) 236 (Administrative Law Judge (ALJ) initial order, finding ¶ 4.9); ARSH2 268-82 (Commissioner's decision, incorporating the ALJ's findings and conclusions, subject to certain additions and modifications). The Department audited Swanson for the period 2009, 2010, and the first two quarters of 2011 to determine its compliance with the requirements of Title 50 RCW. ARSH2 268. As a result of the audit, the Department determined that 12 individuals Swanson classified as independent contractors were instead in employment under the Employment Security Act and, therefore, their wages should have been reported to the Department and subject to the unemployment tax. *Id.*

The Department issued Swanson a notice of assessment for contributions, penalties, and interest in the amount of $36,070.32. ARSH2 268; ARSH1 19. Swanson timely filed an administrative appeal of the assessment. ARSH1 2-3. Swanson did not dispute the assessment of taxes on the wages of four individuals included in the assessment, and the Department agreed to remove another person. ARSH2 278; ARSH2 234 (incorporated initial order, ¶ 3.6). This case, therefore, concerns the seven

remaining owner-operators. Swanson disputes the coverage of those owner-operators under the Act but has never challenged the calculation of taxes for those individuals, if they are determined to be properly covered. ARSH2 243 (incorporated initial order, ¶ 5.19); *see* Br. Appellant.

The owner-operators owned their tractor and/or trailers ("equipment") and provided their equipment and driving services to Swanson pursuant to contracts. ARSH2 235-36 (incorporated initial order, ¶ 4.8); *see* ARSH6 Ex. P, pp. 1-7 ("Contractor Service Operating Agreement").[1] None of the owner-operators at issue had independent operating authority during the audit period. ARSH2 236 (incorporated initial order, ¶ 4.12); ARSH4 6/9/14 Wiley test. 66. Instead, they drove using Swanson's motor carrier authority. ARSH2 236 (incorporated initial order, ¶ 4.12); ARSH4 6/9/14 Wiley test. 66.

None of the owner-operators hauled freight for his or her own customers or for any carrier other than Swanson during the pertinent period; instead, they "drove exclusively for Swanson Hay." ARSH2 237 (incorporated initial order, ¶ 4.22); ARSH4 6/9/14 Earl test. 157 ("Swanson is the only one I've ever been contracted to, and I'm now retired."); ARSH4 6/9/14 McGlothern test. 161 ("I have worked for Swanson Hay in one form or another since 1979, the biggest year of the

[1] Copies of the contract appear several times throughout the record. Throughout its brief, the Department cites to the most legible copy, which is attached as Appendix A.

time. I've leased to them, I think, three different times. This last time was pretty close to 20 years.").

Under the terms of the contracts, Swanson had "exclusive possession, use, and control of the equipment" and was responsible for its operation; federal regulations require motor carriers to have exclusive control over trucking equipment it leases. ARSH2 236 ¶ 4.13; ARSH6 Ex. P, p. 2 ¶ 2(A). Swanson required owner-operators to mark their equipment with Swanson's name, address, and operating authority identification number. ARSH2 236 (incorporated initial order, ¶ 4.14); ARSH6 Ex. P, p. 3 ¶ 3. Owner-operators were required to notify Swanson of accidents, provide photos of freight they hauled when requested by Swanson, and were responsible for damage to cargo. ARSH2 236-37 (incorporated initial order, ¶¶ 4.15, 4.16); ARSH6 Ex. P, pp. 2 ¶ 1(D) & (F), p. 3 ¶ 2(E), p. 5 ¶ 7. The owner-operators could choose their driving routes and were responsible for the costs of operating and maintaining the equipment and for driving violations such as speeding, but Swanson was responsible for overload violations. ARSH2 237 (incorporated initial order, ¶¶ 4.19, 4.20, 4.21); *see* ARSH6, *e.g.*, pp. 4-7 ¶ 6. Owner-operators needed to furnish certain reports and logs to Swanson. ARSH2 237-38 (incorporated initial order, ¶ 4.23); ARSH6 Ex. P, p. 1 ¶ 1(A).

The owner-operators could terminate their relationship with Swanson and drive for another trucking carrier. ARSH2 237 (incorporated initial order, ¶ 4.22). Owner-operators were not required to accept loads offered to them by Swanson. ARSH2 238 (incorporated initial order, ¶ 4.25); ARSH6 Ex. P, p. 3 ¶ 2(D). They could attempt to find their own loads on return trips but needed Swanson's permission to accept the load, as hauling a load under Swanson's authority without permission would be a breach of contract. ARSH2 238 (incorporated initial order, ¶ 4.26); *see, e.g.,* ARSH4 6/9/14 Swanson test. 123, 141.

Swanson paid the owner-operators for the services they provided. ARSH2 237 (incorporated initial order, ¶ 4.17); ARSH6 Ex. P, pp. 3-4 ¶¶ 4-5. Swanson set the fees it charged its customers for transporting freight, collected payment from its customers, and kept 12 percent of the payments, remitting the remaining 88 percent to the owner-operator, less deductions for costs such as fuel charged by the owner-operator to Swanson and costs of insurance purchased through Swanson. ARSH2 238 (incorporated initial order, ¶ 4.24); ARSH6 Ex. P, pp. 1-7. If a customer failed to pay Swanson, the owner-operator would still be paid, unless the

failure to pay was caused by the owner-operator. ARSH2 238 (incorporated initial order, ¶ 4.24); ARSH4 6/9/14, Swanson test. 132.[2]

Based on all these facts, the ALJ determined that the owner-operators were in Swanson's employment under RCW 50.04.100 because they performed personal services for wages for Swanson's benefit. ARSH2 239-40 (incorporated initial order, ¶¶ 5.4, 5.5).[3] Further, the ALJ ruled that the owner-operators were not excepted from coverage as independent contractors under RCW 50.04.140 because they were not free from Swanson's control or direction over the performance of services. ARSH2 241 (incorporated initial order, ¶ 5.11). Having ruled that Swanson failed the first element of the conjunctive independent contractor exception test in RCW 50.04.140(1), the ALJ did not address the second and third elements. ARSH2 241 (incorporated initial order, ¶ 5.13).

Swanson petitioned to the Commissioner of the Department for review, arguing only that its owner-operators met the independent

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[2] The contract between Swanson and owner-operators states: "CONTRACTOR shall invoice CARRIER and CARRIER shall compensate CONTRACTOR for the transportation of commodities as provided in Schedule A, attached hereto." ARSH6 Ex. P, p. 3 ¶ 4. Further, "Payment to the CONTRACTOR shall be made within fifteen days after submission of the necessary delivery documents and other paperwork, hereinafter referred to as 'Required Documents' concerning a trip in the service of the CARRIER." ARSH6 Ex. P, p. 4 ¶ 5(A). Provided that an owner-operator has transported the commodities and submitted the required documents, nothing in the contract relieves Swanson of its obligation to pay within 15 days. *See id.* Further, Swanson's owner testified concerning whether he pays owner-operators if a customer has not yet paid: "[T]hey get paid for it. . . . Whether we get paid for it or not. . . . That's in our contract, yes, or our agreement." ARSH4 6/9/14, Swanson test. 132.

[3] A copy of the Initial Order is attached as Appendix B.

contractor exception test under RCW 50.04.140(1) and that federally required controls should not be considered. ARSH2 252-60. The Commissioner upheld the ALJ's order, subject to additions and modifications. ARSH2 268-82.[4] The Commissioner ruled that the owner-operators were in Swanson's employment under RCW 50.04.100, and they were not free from control or direction under RCW 50.04.140(1)(a). ARSH2 269-75 (adding to the ALJ's findings with additional direction and control found by the Commissioner).

Even without considering control or direction required by federal leasing regulations, the Commissioner "still [found] that the owner-operators here have failed the first criterion under RCW 50.04.140(1) and (2) based on other *non-federally* mandated directions and controls exerted by Swanson Hay over the owner-operators' services, such as the requirements that the owner-operators supply auxiliary equipment and provide photographs of certain cargo as well as the [sic] Swanson Hay's right to divert shipment if an owner-operator's equipment was not in good operating condition." ARSH2 273-74.

The Commissioner also addressed the second and third elements of the independent contractor exception test in RCW 50.04.140(1). The Commissioner found that Swanson met the second element concerning

[4] A copy of the Decision of Commissioner is attached as Appendix C.

places of business. ARSH2 275-77. But Swanson failed to prove the third element concerning independently established businesses. ARSH2 277-79. The Commissioner relied heavily on the fact that none of the owner-operators had their own federal operating authority, without which they cannot independently engage in the interstate transportation of goods. ARSH2 279. Furthermore, the owner-operators worked only for Swanson during the audit period, Swanson protected them from risk of customer nonpayment, and the owner-operators all contracted with Swanson in their personal capacities instead of as business entities—and not all of the owner-operators had even registered as independent businesses with the State. ARHS2 279.

The Commissioner affirmed the assessment and remanded it to the Department for recalculation consistent with details in the Commissioner's ruling (i.e., removing contributions, penalties and interest associated with one driver consistent with the Department's stipulation). *See* ARSH2 280.

On judicial review, the superior court affirmed the Commissioner's decision. CP 82, 632-38.

IV. SCOPE AND STANDARD OF REVIEW

Judicial review of the decision of the Commissioner of the Employment Security Department is governed by the APA pursuant to RCW 34.05.510 and RCW 50.32.120. This Court sits in the same position

as the superior court and applies the APA standards directly to the agency decision and record. RCW 34.05.558; *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993). Swanson improperly assigns error only to the superior court's order. Br. Appellant 6. Given that this is APA judicial review, Swanson is required to assign error to the findings and conclusions of the agency's final order.[5]

The Commissioner's decision is considered prima facie correct, and the burden of demonstrating the invalidity of an agency action is on the party challenging the decision—here, Swanson. RCW 50.32.150; RCW 34.05.570(1)(a). The Court should grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those

[5] In certain places throughout its brief, Swanson also quotes from the superior court's letter ruling. But this Court does not review the superior court's decision, whose findings and conclusions are superfluous. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005). It reviews the Commissioner's final decision.

findings. RCW 34.05.558; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below and may not reweigh evidence or witness credibility. *Wm. Dickson Co.*, 81 Wn. App. at 411. Unchallenged factual findings are verities. *Tapper*, 122 Wn.2d at 407.

The Court then determines de novo whether the Commissioner correctly applied the law to those findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment tax law, the Court should afford substantial weight to the agency's interpretation of it. *Courtney*, 171 Wn. App. at 660.

V. ARGUMENT

Under the Employment Security Act, Title 50 RCW, all Washington employers must contribute to the unemployment compensation fund for the benefit of their employees. RCW 50.01.010; RCW 50.24.010. The Act is intended to "mitigate the negative effects of involuntary unemployment" by applying the "insurance principle of

sharing the risks, and by the systematic accumulation of funds during periods of employment." *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 36, 917 P.2d 136 (1996). "To accomplish this goal, courts must liberally construe the statute, viewing with caution any construction that would narrow coverage." *Id.* at 36; *Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992). Therefore, "exemptions from taxation statutes are strictly construed in favor of applying the tax, with the burden of proof on the party who seeks the exemption." *W. Ports*, 110 Wn. App. at 451.

Workers who perform services for wages for the benefit of an alleged employer are in employment under the Act, RCW 50.04.100, unless the employer can prove all elements of a narrow statutory exception from coverage, RCW 50.04.140. Swanson does not appeal the Commissioner's conclusion that its owner-operators were in its "employment" under the Act. And the Commissioner properly concluded that Swanson failed to meet the first and third elements of the three-part exception test. ARSH2 271-79. Last, the tax is not preempted.

A. Swanson Does Not Appeal the Determination That Owner-Operators Were in Employment Under RCW 50.04.100

To qualify as an employer under the Employment Security Act, an entity must have persons in "employment." RCW 50.04.080. The

definition of "employment" in the Employment Security Act is "exceedingly broad." *W. Ports*, 110 Wn. App. at 458. It is specifically broader than at common law or for other legal purposes and includes service in interstate commerce. RCW 50.04.100. "Employment" exists if the worker performs personal services for the alleged employer or for its benefit and receives wages for those services. *W. Ports*, 110 Wn. App. at 451; *Penick*, 82 Wn. App. at 40. Since "the transportation of goods necessarily requires the services of truck drivers, it is clear that the [carrier] directly used and benefited from the drivers' services." *Penick*, 82 Wn. App. at 40. This reasoning applies regardless of whether the drivers own their trucks. When a worker meets the criteria for being in employment, the burden shifts to the employer to prove the independent contractor exception. RCW 50.04.140, *Penick*, 82 Wn. App. at 42; *W. Ports*, 110 Wn. App. at 451.

Here, the Commissioner properly concluded that the work performed by Swanson's owner-operators constitutes "employment" as it is broadly defined under the Employment Security Act. ARSH2 270. Swanson does not assign error to this conclusion and makes no argument about it. Br. Appellant 6-7, 11-12. Thus, Swanson could avoid liability for unemployment insurance taxes only if it could establish the owner-operators were independent contractors under RCW 50.04.140. It did not.

B. Swanson Failed to Meet Its Burden of Proving That Its Owner-Operators are Excepted From Coverage Under the Narrow Test of RCW 50.04.140(1)

RCW 50.04.140 is an exception to a tax imposed for the protection of unemployed workers. Therefore, courts "will scrutinize much more closely" the facts alleged by the party seeking the exception. *Fors Farms, Inc. v. Emp't Sec. Dep't*, 75 Wn.2d 383, 391, 450 P.2d 973 (1969). Swanson failed to carry its burden of proving exception from coverage.

The question under RCW 50.04.140 is not whether owner-operators are independent contractors "under federal motor carrier law or common law. Instead, the question is whether [they] meet all [of the] prongs of the exemption test contained in the act, regardless of common law definitions." *W. Ports*, 110 Wn. App. at 459. This is because RCW 50.04.100 explicitly provides coverage for services performed by persons who, under other laws, may be treated as independent contractors ("Employment" is "unlimited by the relationship of master and servant as known to the common law or any other legal relationship." RCW 50.04.100.

There are two methods to establish an independent contractor exception under RCW 50.04.140. Swanson only sought to establish the elements of subsection (1). Br. Appellant 11-13. Under subsection (1), services performed by an individual for remuneration shall be employment

"unless and until it is shown to the satisfaction of the commissioner" all of the following three elements:

> (a) 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*
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; *and*
>
> (c) 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 50.04.140(1) (emphasis added); *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 369, 101 P.3d 440 (2004) (employer must prove all three parts in order for its workers to be exempt).

The Commissioner properly concluded that Swanson failed to prove exception under 50.04.140(1)(a) and (1)(c). ARSH2 271-79.

1. Swanson failed to prove its owner-operators were free from Swanson's control or direction over their performance of services under RCW 50.04.140(1)(a)

To satisfy the first element of the exception test, Swanson needed to prove its drivers are free from control or direction during the performance of services, "both under the contract of service and in fact." RCW 50.04.140(1)(a). "The crucial issue is not whether the employing

unit actually controls, but whether it *has the right to control* the methods and details of the worker's performance." *W. Ports*, 110 Wn. App. at 452 (emphasis added). Swanson failed to prove such freedom.

a. Washington employment security cases set forth the relevant test for control or direction and hold that federal regulations may be considered

Within the trucking business, the employing unit's control over work assignments is evidence of control or direction. *Penick*, 82 Wn. App. at 43. Further, the right to terminate a worker for substandard work is "incompatible with freedom from control over the performance of services." *Id.* (citing *Schuffenhauer v. Emp't Sec. Dep't*, 86 Wn.2d 233, 237, 543 P.2d 343 (1975)). The courts have found that even truck drivers who choose their own routes and work hours are not free from control if the company has the right to terminate them for unsatisfactory performance, determines job assignments, and requires drivers to check in daily and clean their trucks. *Penick*, 82 Wn. App at 43. Similarly, a truck driver who worked under an "independent contractor agreement" and owned his own trucks was not free from control or direction where the trucking firm required the driver to submit monthly vehicle reports, participate in the company drug testing program, purchase insurance through the trucking company, and seek approval prior to carrying passengers. *W. Ports*, 110 Wn. App. at 455.

While Swanson acknowledges that the court's holding in *Penick v. Employment Security Department* was about company drivers, not owner-operators, it suggests the Court can consider the Commissioner's *administrative* decision regarding owner-operators in that case. *See Penick*, 82 Wn. App. at 41-44; Br. Appellant 14-15. It is wrong. Under RCW 50.32.095, the Commissioner may designate certain Commissioners' decisions as precedent, which serve as persuasive authority for this Court. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). A decision that is not designated as precedential by the Commissioner is of no value. *W. Ports*, 110 Wn. App. at 459. The Commissioner's decision in *Penick* was not precedential and is thus of no value to the Court. More importantly, *Western Ports* later definitively held owner-operators are in covered employment under the Act. This is the controlling precedent.[6]

Swanson argues that in evaluating the extent of its control or direction over owner-operators, the Department may not consider the controls that are required by federal regulations that govern the use of leased trucks in interstate commerce. Br. Appellant 16-20; *See, e.g.*, 49 C.F.R. § 376.12. But the Court of Appeals has held that the trier of fact

[6] Similarly, what an *ALJ* held in a different case in 2013 is of no consequence. *See* Br. Appellant 21 (referencing the *Fastway Transport* decision by "Judge Courtney E. Beebe in Eastern Washington").

can properly consider such federally mandated controls in applying the statutory exception test. *W. Ports*, 110 Wn. App. at 453-54 (evaluating "controls over the leased trucks-with-drivers" in addition to those controls exerted by the carrier itself over the owner-operators' truck-driving and freight-hauling services). As the *Western Ports* court noted, the same degree of control is required regardless of whether the employer designates its drivers as employees or independent contractors. *Id.* at 454. The court thoughtfully explained:

> It would make little sense for the Legislature to have specifically included service in interstate commerce as "employment" only to automatically exempt such service under RCW 50.04.140 based on federal regulations that require a high degree of control over commercial drivers operating motor vehicles in interstate commerce—and, as discussed below, that same degree of control is required regardless of whether such drivers are designated as employees or independent contractors.

Id. at 454. Swanson's argument contradicts the opinion.

Indeed, the more highly regulated an industry is, the less likely workers performing personal services for a putative employer in that industry will be free from that employer's control or direction, and thus the more likely they are to be employees. Swanson essentially argues for the opposite interpretation: any time there are many requirements by a third party, like the government—or by logical extension, a customer or insurer—the *less* likely the worker is to be an employee because those

controls cannot be considered. This makes little sense and would defeat the purposes of the Act by creating the potential to carve out workers in many industries from unemployment insurance coverage, at least as to this element of the independent contractor statute.

b. The Commissioner properly applied the law concerning freedom from control or direction to the facts of this case

Here, as the Commissioner found, "Swanson Hay exerted extensive controls over the methods and details of how the driving services were to be performed by the owner-operators." ARSH2 272. The Commissioner incorporated rulings by the ALJ, including that:

> Swanson Hay had exclusive possession, use, and control over the leased equipment. Swanson Hay required the owner-operators to mark their equipment with Swanson Hay's name, address, and operating authority identification number. Swanson Hay required the owner-operators to provide photos of the freight they hauled if Swanson Hay requested them to do so. The owner-operators were responsible for any damage to the freight they hauled. Swanson Hay required the owner-operators to file a variety of reports, including hours of service reports, physical examination certificates, accident reports, daily logs, daily vehicle condition reports, scale tickets, toll receipts, delivery receipts, maintenance reports and records, and other documents and data required by regulations. Swanson Hay established and collected all fees for freight hauled and paid the owner-operators from those proceeds. The owner-operators were required to operate strictly under Swanson Hay's operating authority. . . . Here, Swanson Hay had the right to exercise direction and control over the owner-operators as to methods and details of providing driving services to a substantial and significant degree.

ARSH2 241 ¶ 5.11; ARSH2 272 (Commissioner's order, incorporating initial order). Each of these indicia of control can be considered under *Western Ports*. Substantial evidence supports the determination, as the ruling is based on the contract of service. ARSH6 Ex. P, pp. 1-7.

Some, but not all, of the contract provisions are federal requirements. But *Western Ports* permits consideration of federally required factors. 110 Wn. App. at 453-54. Even if the federal lease requirements could not be considered, the Commissioner relied on multiple controls exerted by Swanson beyond those required by federal law. The Commissioner "still [found] that the owner-operators here have failed the first criterion under RCW 50.04.140(1) and (2) based on other *non-federally* mandated directions and controls exerted by Swanson Hay over the owner-operators' services," ARSH2 273-74, such as:

> Swanson Hay required the owner-operators to supply auxiliary equipment including chains, tarps, tie-downs at their own expense in order to handle the cargo transported and achieve delivery of the commodities. *See* [ARSH6 Ex. P], p. 3, ¶ 1D. Additionally, Swanson Hay required the owner-operators to provide photographs of any load deemed to be a risk for cargo claims or any cargo damaged in transit. *See* [ARSH6 Ex. P], p. 3, ¶ 1F. Finally, if an owner-operator's equipment was not in good operating condition, Swanson Hay retained the right to transfer the shipment from such equipment and accomplish the transportation of the shipment according to its best judgment. *See* [ARSH6 Ex. P], p. 3, ¶ 1C.

ARSH2 272.

The Commissioner properly ruled that these elements show Swanson was interested not only in the end result of transporting freight to the destination, but also in how the owner-operators performed the transportation services. *Id.* (citing *Jerome v. Emp't Sec. Dep't*, 69 Wn. App. 810, 817, 850 P.2d 1345 (1993)). For example, requiring the auxiliary equipment evidences control because owner-operators were told which equipment to provide. And concerning photographs of loads, while federal regulations may require carriers to maintain insurance protection, there is no requirement in those regulations for drivers to "provide [their] own photographic equipment" or photograph loads for insurance purposes. This is a control imposed by Swanson upon the owner-operators for Swanson's purposes. Thus, while Swanson's argument that the Court should not consider federally mandated controls is incorrect under Washington case law, it is also immaterial in this case because of these additional controls.

Swanson also argues that *Western Ports* does not *require* controls in federal regulations to be considered but merely says they *could* be considered. Br. Appellant 15 n.3. This effectively admits that the Commissioner did not err in considering federally mandated controls, because *Western Ports* permits it. Hence, in assessing whether Swanson

had the right to control the owner-operators, the Commissioner properly considered, among other factors, that "[u]nder the terms of the contracts, Swanson Hay had 'exclusive possession, use and control of the equipment' and was responsible for its operation." ARSH2 236 (incorporated initial order, ¶ 4.13); ARSH6 Ex. P, p. 2 ¶ 2(A).

To be sure, some provisions of Swanson's contract signal some measure of owner-operators' freedom. *See, e.g.,* Br. Appellant 23-24. For example, Swanson points out that owner-operators are free to "control the methods and means of loads and routes," to "turn down loads," and to "locate their own loads." Br. Appellant 23 (citing to the *entire* contract for each without pointing to specific contract provisions). But there is no support in the record for its claim that the owner-operators in fact "regularly find their own loads / freight by using Internet Truck Stop 'www.truckstop.com'." Br. Appellant 23. Even if there were, Swanson's focus on these factors asks the Court to reweigh the evidence and come to a different conclusion than that found by the Commissioner, which is not this Court's role.

The Commissioner did just as Swanson urged and considered "all facts related to the work situation . . . when determining" whether the owner operators were independent contractors under the Act. Br.

Appellant 15. And when doing so, the Commissioner properly found the owner-operators to be covered workers. ARSH2 273-74.

c. *Western Ports* is good law and should be applied, not overruled

Swanson asserts various reasons why this Court should depart from *Western Ports*, but none of the arguments has merit.

Swanson's argument that *Western Ports* is inconsistent with *other jurisdictions'* decisions is unavailing for two reasons. *See* Br. Appellant 19-21. First, the very old decisions it cites involved either common law definitions of "employment" and "independent contractor" or different statutory definitions altogether. *Nat'l Trailer Convoy, Inc. v. Emp't Sec. Agency of Idaho*, 360 P.2d 994, 997 (Idaho 1961) ("For purposes of the Employment Security Law, Idaho applies the common law test."); *Meredith Publ'g Co. v. Iowa Emp't Sec. Comm'n*, 6 N.W.2d 6, 13 (Iowa 1942) ("It is true, that most states . . . have made [unemployment compensation] coverage . . . broader in this respect than the federal law. But Iowa has not seen fit to do so. It has so worded this particular section of the statute to conform . . . to the common law conception of employer-employee-independent contractor relationship."); *Hassebroch v. Weaver Const. Co.*, 67 N.W.2d 549, 553 (Iowa 1954) (worker's compensation case; Act did not define "independent contractor;" and court thus applied

definitions from RESTATEMENT OF AGENCY); *Hilldrup Transfer & Storage of New Smyrna Beach, Inc. v. Dep't of Labor and Emp't Sec.*, 447 So. 2d 414, 416-17 (Fla. Dist. Ct. App. 1984) (relying on RESTATEMENT (SECOND) OF AGENCY (1958)). Accordingly, the Commissioner properly found these rulings unpersuasive. ARSH2 274.

Second, *Western Ports* has been controlling precedent for over 14 years. Stare decisis compels respect for and adherence to this prior decision; it should be reversed only if it is shown to be incorrect and harmful. *State v. Ray*, 130 Wn.2d 673, 677-78, 926 P.2d 904 (1996). Stare decisis fosters parties' reliance on judicial decisions, *id.*, and "assures that the same rules will apply to each citizen's case and that those rules may be known and relied upon." *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 423, 150 P.3d 545 (2007). "[W]ithout the stabilizing effect of stare decisis, 'law could become subject to . . . the whims of current holders of judicial office.'" *Id.* (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Here, Swanson disagrees with the law, but it has not shown that the law is wrong or harmful. On the other hand, overruling *Western Ports* would harm *other* carriers and drivers who have relied on and complied with *Western Ports*'s holding and paid their fair share of taxes, instead rewarding carriers who failed to follow this precedent with an unfair competitive advantage.

Importantly, the Legislature has declined to modify the employment coverage provisions of the Act since the *Western Ports* decision in 2002, which indicates legislative acquiescence in that decision. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-47, 217 P.3d 1172 (2009). In fact, the Legislature has specifically exempted owner-operators from coverage under the Industrial Insurance Act since 1982. RCW 51.08.180; Laws of 1982, ch. 80, § 1. It has never provided for such an exemption under the Employment Security Act.

Moreover, the *Western Ports* decision is not an outlier. *See, e.g., Claim of Short*, 649 N.Y.S.2d 955 (N.Y. App. Div. 1996); *C.R. England, Inc. v. Dep't of Emp't Sec.*, 7 N.E. 3d 864, 876-77 (Ill. App. Ct. 2014); *SZL, Inc. v. Indus. Claim Appeals Office*, 254 P.3d 1180, 1183-84 (Colo. Ct. App. 2011). The *Western Ports* court acknowledged that courts "in various states having unemployment statutes similar to Washington's have found owner/drivers to be covered employees for purposes of unemployment compensation" under similar facts. *Id.* at 460-61. At most, Swanson shows that different states have applied their own laws differently, not that *Western Ports* is incorrect.

Swanson also incorrectly argues that *Western Ports*'s holding that federally-mandated controls may be considered under our state unemployment law conflicts with federal legislative intent. *See* Br.

Appellant 16-18. It notes that federal regulations require carriers to "assume complete responsibility for the operation of the equipment," and that they shall have exclusive possession, control, and use of the equipment." Br. Appellant 17 (quoting 49 C.F.R. § 376.12(c)(1)). The regulation further provides:

> Nothing in the provision required by *paragraph (1)(c)* of this section is intended to affect whether the lessor . . . is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship *may exist* when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

49 C.F.R. § 376.12(c)(4) (emphasis added). As the Commissioner properly noted, the scope of this qualifying provision "only reaches to 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular; and it does not extend to include other federal safety regulations, such as those contained in 49 C.F.R. Part 395 or Part 396." ARSH2 273. It says nothing about the numerous other federal lease requirements and safety regulations governing the relationship between motor carriers and owner-operators, which are included in Swanson's contract. Swanson points to no other "legislative intent" with which the *Western Ports* decision supposedly conflicts.

Moreover, the Interstate Commerce Commission has stated that it "take[s] no position on the issue of independence of lessors." 8 I.C.C.2d

669, 671 (1992). Indeed, 49 C.F.R. § 376.12(c)(4) was added upon a request from the Interstate Truckload Carriers Conference "to give notice to the courts and worker's compensation or other administrative tribunals that [the] 'control regulation' . . . should not be a factor in determining whether a lessor is an independent contractor or an employee and . . . should be given no weight in any agency relationship determination." 8 I.C.C.2d at 670. In response, the ICC adopted 49 C.F.R. § 376.12(c)(4), making clear that the control regulation, 49 C.F.R. § 376.12(c)(1), should not be deemed "prima facie evidence of an employer-employee relationship," and seeking to "reinforce [its] view of the neutral effect of the control regulation." *Id.*

If the ICC intended to *preclude* consideration of federal lease requirements when making employment determinations under state law, then it would have said so in response to the Interstate Truckload Carriers Conference explicit request to do so. But neither the regulation nor the ICC's related guidance say anything about *barring consideration* of the control regulation, let alone the numerous other federal leasing requirements, under the state law inquiry. Rather, the ICC is "explicitly agnostic on the issue of the carrier-driver relationship." *Remington v. J.B. Hunt Transport, Inc.*, 2016 WL 4975194 at *5 (D. Mass 2016). *Western*

Ports does not conflict with 49 C.F.R. § 376.12(c)(4) or federal legislative intent.

d. Swanson's policy arguments are misplaced because control or direction under the Act does not preclude independence under other laws

Swanson's policy arguments against applying the unemployment tax to wages paid to owner-operators rest on the false assumption that this will "effectively eliminate[] the use of independent contractors" because it will "force carriers to provide trucking services only though employees, which would limit companies' operational flexibility." Br. Appellant 18-19. But the Department seeks to enforce the Employment Security Act only, whose definition of covered employment includes persons who, under other laws, are independent contractors. *W. Ports*, 110 Wn. App. at 458. The type of "employment" covered by the Act is explicitly broader than the common law relationship "or any other legal relationship." RCW 50.04.100. As *Western Ports* explained:

> An individual may be both an independent contractor for some purposes, and engaged in 'employment' [under the Act]. . . . In fact, although courts use the term independent contractor in unemployment law, as if one is either an employee and, therefore, entitled to benefits or an independent contractor and, therefore, not entitled to benefits, these terms should not be confused with the common law definitions of master and servant or independent contractor. . . . Thus, the question is not whether [an owner-operator] may be an independent contractor under federal motor carrier law or under

> common law. Instead, the question is whether he meets all three prongs of the exemption test contained in the act, regardless of common law definitions.

W. Ports, 110 Wn. App. at 458-59. The tax assessment does not ban carriers' use of owner-operators. Swanson can treat owner-operators as independent contractors for other legal purposes. The only relationship the Department purports to define is "'the employment intended to be covered by the act for the purpose of the act and none other.'" *Id.* at 458 (quoting *Compensation & Placement v. Hunt*, 22 Wn.2d 897, 899, 158 P.2d 98 (1945)).

Other courts have rejected motor carriers' claims that similar laws would require them to change their business models and reclassify their drivers for other purposes. The Seventh Circuit rejected a carrier's "bare assertion" that complying with the Illinois Wage Payment and Collection Act would require it to classify its drivers as employees for all purposes. *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1056 (7th Cir. 2016). The Colorado Court of Appeals concluded that "it is legally permissible for an individual to be an employee for unemployment tax liability purposes at the same time the individual is considered to be an independent contractor for other purposes under other laws." *SZL, Inc.*, 254 P.3d at 1186. And the Illinois Appellate Court disagreed that applying Illinois' Unemployment Insurance Act to an interstate carrier would "prohibit motor carriers and

drivers from establishing independent contractor relationships outside the context of the Act." *C.R. England, Inc.*, 7 N.E.3d at 880.

Like the laws at issue in those cases, the Employment Security Act does not require Swanson to choose one business model over another. "Conspicuously absent from [Swanson's] parade of horrors is any citation of authority showing that it would be required to comply" with other laws or reclassify its drivers for other purposes. *Costello*, 810 F.3d at 1056; Br. Appellant 18-19. The Court should reject Swanson's bare assertion to the contrary.

e. The common law test for control does not apply

This is a statutory case. Therefore, Swanson's suggestion that *Western Ports'* test for control conflicts with that of *Kamla v. Space Needle Corporation*, 147 Wn.2d 114, 52 P.3d 472 (2002), is off-base. Br. Appellant 14 n.2. *Kamla* addressed whether an employer retained the right to direct a contractor's work so as to bring the employer within the "retained control" exception to the general rule of non-liability for injuries of a contractor. *Id.* at 119. It is not an unemployment case and did not discuss Title 50 RCW. Unlike under common law, the exceptions to coverage under the Employment Security Act must be narrowly construed. *Penick*, 82 Wn. App. at 36; *W. Ports*, 110 Wn. App. at 451.

Even if the *Kamla* test applied here, Swanson exerted more control than just general contractual rights. As the Commissioner found, Swanson had exclusive possession, use, and control over the trucks; required owner-operators to mark their equipment with Swanson's identifiers; to photograph loads; to file numerous and frequent reports, "including hours of service reports, physical examination certificates, accident reports, daily logs, daily vehicle condition reports, scale tickets, toll receipts, delivery receipts, maintenance reports and records, and other documents and data required by regulations;" and more. ARSH2 272 (Commissioner's Decision, incorporating initial order's conclusion ¶ 5.11, ARSH2 241). Further, Swanson required owner-operators to comply with all applicable motor carrier safety regulations and state laws relating to operation of the equipment. ARSH6 Ex. P, p. 3 ¶ 2(E). And, the contract provides: "CONTRACTOR agrees to deliver the load safely, carefully and on time, and to comply with all specifications or requirements which are set forth in any agreement, contract, bill of lading or other document relating to such transportation as may be executed by CARRIER and CARRIER's customer." ARSH6 Ex. P, p. 3 ¶ 2(D). These provisions gave Swanson the right to control the methods and details of performance.

The Court should affirm the ruling that Swanson failed to prove freedom from control or direction under RCW 50.04.140(1)(a).

2. Swanson failed to prove that the owner-operators were engaged in independently established businesses under RCW 50.04.140(1)(c)

The Commissioner properly ruled that Swanson failed to prove its owner-operators were "customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." RCW 50.04.140(1)(c); ARSH2 277-79. This element requires 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." *Jerome v. Emp't Sec. Dep't*, 69 Wn. App. 810, 815, 850 P.2d 1345 (1993). As another court explained, "[t]he purpose of this requirement is to assure that workers whose income is almost wholly dependent upon continued employment by a single employer are protected from the vagaries of involuntary unemployment, regardless of their status as employees or independent contractors under the common law." *SZL, Inc.*, 254 P.3d at 1183 (interpreting nearly identical language in Colorado's employment security act, favorably citing *Western Ports*).

a. Without their own motor carrier authority, the owner-operators could not continue in business if their relationship with Swanson ended

Courts have described several factors that may indicate whether an independent business exists. *Penick*, 82 Wn. App. at 44. The factors

include whether the worker: (1) has a separate office or place of business outside of the home; (2) has investment in the business; (3) provides equipment and supplies needed for the job; (4) whether the alleged employer fails to provide protection from risk of injury or nonpayment; (5) whether the worker works for others and has individual business cards; (6) is registered as an independent business with the State; and, (7) is able to continue in business even if the relationship with the alleged employer is terminated. *Id.* (citing *Jerome*, 69 Wn. App. at 815). This last factor—the ability to continue in business even if the relationship with the carrier ends—is the most important factor under longstanding law. *See All-State Constr. Co. v. Gordon*, 70 Wn.2d 657, 666, 425 P.2d 16 (1967) ("Most important for unemployment compensation are those factors—investment, good will, an independent clientele, and the like—which enable the worker to continue in business if he loses a particular customer, and which thus prevent that loss from rendering him unemployed.") (quoting Willcox, *The Coverage of Unemployment Compensation Laws*, 8 Vand. L. Rev. 245, 265 (1955)).

Truck ownership alone is not enough to demonstrate the existence of an independent business that will survive termination of the contractual relationship. If the owners do not have separate motor carrier authority from the Federal Motor Carrier Safety Administration, and if they "were

terminated by [the carrier], in all likelihood they would be out of work until they could make similar arrangements with another carrier." *Stafford Trucking, Inc. v. Dep't of Indus., Labor & Human Rel.*, 306 N.W.2d 79, 84 (Wis. Ct. App. 1981) (finding owner-operators to be in non-exempt employment of the carrier for purposes of state unemployment law).

Having one's own motor carrier authority is not a mere paperwork formality. It is essential to the viability of an independent business in the trucking industry and the ability to continue in the business of hauling freight, and the Commissioner need not be blind to this. If the contractual relationship ends with Swanson, the owner-operators will lose the ability to haul freight, which would render them unemployed. *See All-State Constr. Co.*, 70 Wn.2d at 666. Although the owner-operators can then go work for another carrier under that carrier's authority, Br. Appellant 33, this is no different than any at-will employee's ability to find a new job. During the period while they are unemployed and searching for a new carrier to lease with, the owner-operators should be covered by unemployment benefits as other workers would be, thereby minimizing the suffering and economic hardship of involuntary unemployment. *See* RCW 50.01.010.

None of Swanson's owner-operators had independent motor carrier authority during the audit period. ARSH2 236 (incorporated initial order, ¶

4.12); ARSH4 6/9/14 Wiley test. 66. The Department, ALJ, and Commissioner acknowledged that an owner-operator could be independent by having his or her own motor carrier authority. ARSH4 6/9/14 Wiley test. 66. The Department even agreed to remove from the assessment one driver who had motor carrier authority and brokered loads with Swanson. ARSH2 278 (Commissioner's order, removing Trenor Elwell dba Triple J Trucking); *see* ARSH2 238 (incorporated initial order, ¶ 4.27, noting Swanson's broker arrangements were *different* than those with the other owner-operators, and thus did not include the same control or direction as in the contracts). It is thus not the case that the Department's interpretation will always result in owner-operators failing the statutory independent contractor exception test, as Swanson seems to claim. *See* Br. Appellant 18.

And, far from working for Swanson and multiple other companies, as one would expect of an independent contractor in business for him or herself, *see Jerome,* 69 Wn. App. at 815-16, the owner-operators "drove exclusively for Swanson Hay." ARSH2 237 (incorporated initial order, ¶ 4.22). One owner-operator testified, "Swanson is the only one I've ever been contracted to, and I'm now retired." ARSH4 6/9/14 Earl test. 157. And another testified, "I have worked for Swanson Hay in one form or another since 1979, the biggest year of the time. I've leased to them, I

think, three different times. This last time was pretty close to 20 years." ARSH4 6/9/14 McGlothern test. 161. An owner-operator can hardly be said to carry on an independent business if he or she was wholly dependent on Swanson for income for 20 years or for an entire career.

Swanson argues that *Penick* and *Western Ports* did not consider motor carrier authority in analyzing whether the owner-operator was an independent contractor, and this somehow demonstrates that considering this factor is improper. Br. Appellant 36-37. As noted above, the *Penick* decision only addressed company drivers, not owner-operators. *Penick*, 82 Wn. App. at 41-44. Thus the court would have had no reason to consider operating authority. And in *Western Ports*, the court did not analyze the third element of RCW 50.04.140(1). Having found control or direction under RCW 50.04.140(1)(a), the court did not address the other elements. *W. Ports*, 110 Wn. App. at 459.

b. The Commissioner also properly determined that Swanson did not show other indicia of the owner-operators' independence

In any event, Swanson failed to show the owner-operators were independent even under what it calls the "traditional" factors applicable to RCW 50.04.140(1)(c), including: (1) whether the supposed independent contractors worked for others while working for the putative employer; (2) whether they were subject to risks of loss from customer nonpayment; and

(3) whether they were registered as an independent business with the State. *Penick*, 82 Wn. App. at 44.

First, Swanson did not offer any evidence showing that its owner-operators worked for other carriers while working for Swanson. ARSH2 279. To the extent Swanson may argue it, independence is not shown by the owner-operators' ability to find additional loads on return trips. This is because they needed Swanson's permission to accept the loads, as they would be hauled under Swanson's authority, and Swanson had exclusive possession, use, and control of the equipment. ARSH2 238 (incorporated initial order, ¶ 4.26 ("If an owner-operator hauled a load without Swanson Hay's permission, Swanson Hay would likely consider that conduct to be a breach of contract.")); ARSH2 236 (incorporated initial order, ¶ 4.13).

Second, as the Commissioner found, Swanson protected the owner-operators from risk of customer nonpayment: "If a customer failed to pay, Swanson Hay would still pay the owner-operators unless the failure to pay was caused by the conduct of the owner-operator." ARST2 238 (incorporated initial order, ¶ 4.24); ARST2 279. Swanson argues this was a mere courtesy and not a contractual obligation, but it fails to explain why that matters. Br. Appellant 35. Even if it did matter, the contract states: "CONTRACTOR shall invoice CARRIER and CARRIER shall compensate CONTRACTOR for the transportation of commodities as

provided in Schedule A, attached hereto." ARSH6 Ex. P, p. 3 ¶ 4. And, "Payment to the CONTRACTOR shall be made within fifteen days after submission of the necessary delivery documents and other paperwork, hereinafter referred to as 'Required Documents' concerning a trip in the service of the CARRIER." ARSH6 Ex. P, p. 4 ¶ 5. Provided that an owner-operator has transported the commodities and submitted the required documents, nothing in the contract relieves Swanson of its obligation to pay within 15 days. *See id.* Further, Steven Swanson himself testified concerning whether he pays owner-operators if a customer has not yet paid: "[T]hey get paid for it. . . . Whether we get paid for it or not. . . . *That's in our contract*, yes, or our agreement." ARSH4 6/9/14, Swanson test. 132 (emphasis added). Substantial evidence supports the Commissioner's finding that Swanson protects owner-operators from the risk of nonpayment.

Third, only five of the seven owner-operators had registered businesses in Washington during the audit period. ARSH2 277; ARSH6-7, Exs. BB, DD, EE, FF, GG, II. And for those five, Swanson contracted with the individual drivers and not their business entities. ARSH2 277; ARSH6-7, Exs. BB, DD, EE, FF, GG, II. As the Commissioner found, this shows that Swanson "was interested in the services performed by the owner-operators personally, not the services that could have been

performed by other drivers working for the owner-operators' businesses." ARSH2 277.

Other factors in case law further support the Commissioner's conclusion that the owner-operators were not in independently established businesses. For example, independence can potentially be shown if workers solicited, advertised, or otherwise held themselves out as a separate business to the public. *Penick*, 82 Wn. App. at 44. Swanson presented no such evidence that owner-operators did this. Nor did Swanson present testimony or evidence that the owner-operators had their own books, records, customer lists, or other indicia of independent businesses. *See id.*

Substantial evidence supports the Commissioner's determination that Swanson did not prove that the owner-operators were engaged in independent businesses, and this determination is free of legal error. RCW 50.04.140(1)(c); ARSH2 279. By focusing on *certain* indicia of independence, Br. Appellant 32-38, Swanson invites this Court to reweigh the evidence, which it may not do on appeal. The Court should affirm.

C. The Tax Assessment is Not Preempted

Like System-TWT and Hatfield, Swanson appears to suggest that the Federal Aviation Administration Authorization Act (FAAAA) preempts application of the Employment Security Act's insurance

provisions to the trucking industry. Br. Appellant 16-17. But Washington's governing precedent has already rejected that argument. *W. Ports,* 110 Wn. App. at 450-58 (federal transportation law, including the FAAAA, does not preempt the Employment Security Act).

The FAAAA's preemption provision provides that a "State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c) (emphasis added). A party who asserts a state law is preempted by the FAAAA must establish that the state law in question has a *significant* relationship to the prices, routes, or services of the trucking industry, *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008), and that the law concerns a carrier's "transportation of property." *Dan's City Used Cars, Inc., v. Pelkey*, __ U.S. __, 133 S. Ct. 1769, 1778-79, 185 L. Ed. 2d 909 (2013).

Swanson failed to make the needed showing for preemption. Indeed, other than its bare assertion that having to pay unemployment insurance premiums for its owner-operators will "eliminate[]" the use of owner-operators in the trucking industry, Swanson has made no argument that the Employment Security Act will significantly affect the prices,

routes, or services it offers its customers, or that the Act concerns the "transportation of property." *See* Br. Appellant 16-19.

These principles are addressed in greater length in Section V.C of the Department's brief in System-TWT Transport, which is consolidated with this case. The Court should reject the appellants' arguments that the Employment Security Act is preempted by the FAAAA.

VI. CONCLUSION

Swanson failed to prove that its owner-operators are excepted from coverage under the Employment Security Act. In keeping with the Act's mandate that employers contribute to a fund to compensate individuals who are in their "employment" but become unemployed through no fault of their own, Swanson is liable for unpaid contributions, penalties, and interest as ordered by the Commissioner. This Court should affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 8th day of February, 2017.

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PROOF OF SERVICE

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Spokane Valley, WA 99214-0758

Email: ryan@mcneicelaw.com
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8 day of February 2017 at Olympia, Washington.

DIANNE S. ERWIN, Legal Assistant

CONTRACTOR SERVICE OPERATING AGREEMENT.

THIS AGREEMENT, made and entered into this day, by and between SWANSON Hay Company Inc., 5010 N. Florida, Spokane, WA Federal I.D. #91-1666441 hereinafter referred as CARRIER and.

Name Address

City State ZIP

Federal Id. # Hereinafter referred to as CONTRACTOR

WITNESSETH

Whereas, CARRIER is engaged in the business of transporting property for hire by motor vehicle in interstate commerce, subject to the rules and regulations of interstate commerce commission and other government authorities: and

Whereas, CONTRACTOR is engaged in a business venture similar to that in which CARRIER is engaged, and owns or controls certain commercial motor vehicle equipment, and has advised CARRIER of its desire to make such equipment and described services available to carrier in connection with CARRIERS business as a licensed for-hire motor carrier: and

Whereas, CARRIER desires to subcontract for CONTRACTOR'S services and equipment in its business;

Now therefore, in consideration of the premises and mutual covenants and conditions contained herein, the parties agree as follows:

I. EQUIPMENT AND LABOR.

A. CONTRACTOR hereby agrees to furnish to CARRIER the equipment described in schedule a attached hereto, together with drivers and all other necessary labor required to transport, load and unload property as may be offered by CARRIER for transportation by CONTRACTOR. Any and all drivers of commercial motor vehicles supplied by CONTRACTOR are required to be properly licensed to operate such equipment and shall be otherwise qualified as required by regulations of the United States Department of Transportation including, but not limited to 49 C.F.R. 383, 391 and 392. CONTRACTOR shall require that such driver or drivers shall cooperate with CARRIER in achieving compliance with such laws and regulations as have been described, and to such end shall promptly cause to be filed with CARRIER any and all hours of service reports, physical examination certificates, accident reports and other reports, documents and data required by those identified applicable laws and regulations CONTRACTOR further agrees to assure that any and all such drivers furnished by CONTRACTOR to operate the equipment shall operate such equipment within the hours of service limits provided by 49 c.f.r. 395. and any and all comparable state regulations which may be applicable. CONTRACTOR shall indemnify and hold CARRIER harmless with respect to an fines or other levies assessed against CARRIER by reason of the failure of any driver furnished by CONTRACTOR to comply with any of the described regulations site herein.

B. All equipment furnished by CONTRACTOR shall be fully operable and in good operation condition so as to be capable of performing the services agreed to by CONTRACTOR. Such equipment, including all accessories, shall meet or exceed the requirements of c.f.r. 393 and shall be maintained in such condition by the CONTRACTOR, at his sole expense, during the term of this agreement, and in conformity with 49 c.f.r. 396 CONTRACTOR acknowledges that the phrase "fully operable and in good

operating condition" requires **CONTRACTOR** to pay for and provide all maintenance and operating costs necessary for **CONTRACTOR** to perform pursuant to this Agreement including, but not limited to, driver's wages, salaries of all **CONTRACTOR** management an employees, all operating expenses, detention and accessorial services, fuel, oils, greases, tires, parts, supplies, tolls and ferry charges, equipment use fees and federal use taxes **CARRIER** will also provide all fuel tax bonds, however **CONTRACTOR** will ultimately be responsible for all State and Provincial road and fuel taxes which are in excess of those taxes previously paid by **CONTRACTOR** at the time of fuel purchases. Any and all base plates, licenses, or permits required by law to be issued in the name of **CARRIER** will be supplied by **CONTRACTOR**; however, **CONTRACTOR** shall retain the unused portions of such base plates, licenses, or permits upon the termination of this Agreement.

C. 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 transpiration according to the **CARRIER'S** best judgment. Any and all costs and expenses incident to the rehandling of such shipments as are herein described shall be the responsibility of **CONTRACTOR.**

D. **CONTRACTOR** shall supply, at it 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. **CONTRACTOR** will furnish all auxiliary equipment necessary to handle cargo transported. In the event any property of CARRIER, such as trailer equipment, is pulled by **CONTRACTOR'S** equipment, and damage to such **CARRIER** equipment is caused by an act or omission on the part of **CONTRACTOR**, its employees, agents or hired workers, the costs and expenses associated with such damage and the repair costs for such damage are the responsibility of **CONTRACTOR.**

E. **CONTRACTOR** is not required to rent or purchase any products, equipment or service from carrier as a condition of this agreement.

F. **CONTRACTOR** shall provide **CARRIER** with no less than two and no more than four photographs of any load deemed by **CONTRACTOR** to be a risk for cargo claims or cargo damaged in transit. **CONTRACTOR** is responsible for providing his own photographic equipment, but shall be compensated by **CARRIER** at the rate of fifty cents ($.50) for each such photograph provided to **CARRIER** pursuant to this subparagraph.

2. <u>CONTROL</u>

A. 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.

B. For purposes of complying with the regulations cited in Paragraph 2A, transfer of possession of the equipment described herein shall occur upon the execution of this Agreement. Possession shall be surrendered by **CARRIER** to **CONTRACTOR** coincidental with the termination or expiration of this Agreement or without the necessity of the issuance of any receipt therefor.

C. **CONTRACTOR** shall be solely responsible for the direction and control of its employees, agents and servants, including the selection, hiring, supervision, compensation, termination, establishment of hours, specification of working condition and adjustment of grievances as to all such employees, agents or servants of **CONTRACTOR. CONTRACTOR** will also be responsible for all labor expenses associated with its employees, agents or servants, including but not limited to unemployment and workers

compensation insurance, FICA or other similar taxes, insurance or benefits to which such persons are entitled, and income tax withholding with respect to the compensation of **CONTRACTOR** and of such persons. **CONTRACTOR** shall make all payroll tax deduction and other deductions and all payments thereof with respect to compensation paid to contractor ad to such persons. In the event **CARRIER** is assessed any amount, whether in the form of a tax, penalty or interest, because of contractor's failure to comply with this subparagraph, **CONTRACTOR** will reimburse or otherwise hold **CARRIER** harmless from any and all such assessments **CONTRACTOR** agrees to provide to **CARRIER**, at **CARRIER'S** request, proof of **CONTRACTOR'S** compliance with and all parts or elements of this subparagraph.

D. **CONTRACTOR** is not obligated to accept for transportation every or any load or shipment of property offered by **CARRIER** to **CONTRACTOR**. In the event **CONTRACTOR** accepts for transportation and other necessary services a load or shipment offered by **CARRIER**, **CONTRACTOR** agrees to deliver the load safely, carefully and on time, and to comply with all specifications or requirements which are set forth in any agreement, contract, bill of lading or other document relating to such transportation as may be executed by **CARRIER** and **CARRIER'S** customer. For all such shipments or loads offered by **CARRIER** for transportation and accepted for transportation by **CONTRACTOR**, **CONTRACTOR** is obligated to provide complete transportation service, including, as may be necessary, the loading and unloading of equipment and transportation from origin to destination, but the manner and means thereof, and the selection of routes shall be within the sole descretion of the **CONTRACTOR**. It is the intent of this paragraph to reaffirm that, while contractor shall be required to meet all obligations assumed thereunder, **CONTRACTOR** is expected to exercise the descretion and judgment of an independent **CONTRACTOR** in determining such methods and means employed.

E. **CONTRACTOR** is required to comply with all applicable motor carrier safety regulations including, but not Limited to 49 C.F.R.-390-397, and any applicable comparable state regulations relating to contractor's operation of the equipment in accordance with this agreement. Failure of contractor to report any accident or violation of such cited regulation will be considered a breach of this agreement.

3 IDENTIFICATION

A. **CARRIER** is obligated by 49 C.F.R. 390-397, 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.

4. COMPENSATION

A. **CONTRACTOR** shall invoice **CARRIER** and **CARRIER** shall compensate **CONTRACTOR** for the transportation of commodities as provided in Schedule A, attached hereto.

B. Upon submission of the paperwork required in Section 6 hereof, a copy of the weekly settlement will be given **CONTRACTOR** for each load hauled, showing rate and all accessorial charges, including detention. This document will show all monies due contractor with regard to each indicated load. **CONTRACTOR** has the explicit right to examine **CARRIER'S** tariffs and other source documents relating to each weekly settlement, upon proper request.

C. Gross revenues, as used herein, means the gross amount of cash actually collected by **CARRIER**, less any sums paid by **CARRIER** as a commission or brokerage to any broker or other person who is paid to procure said business, and less any inspection fees and all interline fees paid to other carriers for hauls in territory not covered by **CARRIER'S** permits.

D. Compensation due contractor from **CARRIER** may be reduced to account for (set off against) moneys advanced at the request of or on behalf of the **CONTRACTOR**, including service charges and interest thereon ;charges for state and Provincial road and fuel taxes, which are in excess of those taxes previously paid by **CONTRACTOR** at the time of fuel purchases; charges for loss, injury or damage to cargo, person or property, without regard to fault, which are in excess of those taxes previously paid by **CONTRACTOR** at the time of fuel purchases; charges for loss, injury or damage to cargo, person or property, without regard to fault, to the extent permitted under Paragraphs 8b and 8c, together with interest thereon; costs, expenses and or liabilities for loss, injury or damage to cargo, person or property, incurred by **CARRIER** as a result of negligent, reckless, willful, wanton or intentional acts or omissions of **CONTRACTOR**, his agents or employees, together with interest thereon; any sums owed to the Internal Revenue Service for the Federal Highway Use Tax on the vehicle listed in this Agreement, if the **CONTRACTOR** has not furnished proof of payment of said taxes; such sums as may be necessary to reimburse carrier for **CONTRACTOR** failure to complete a scheduled movement; and charges as otherwise specified in this Agreement, together with interest thereon. In the event of such reduction or set-off, and as required by 49 C.F.R. 1057.12(h) , **CARRIER** will supply **CONTRACTOR** with written documentation of the basis for such reduction of set- off

5. <u>SETTLEMENTS</u>

A. Payment to the **CONTRACTOR** shall be made within fifteen days after submission of the necessary delivery documents and other paperwork, hereinafter referred to as "Required Documents," concerning a trip in the service of the **CARRIER**. The Required Documents are Limited to log books required by the Department of Transportation and those documents necessary for the **CARRIER** to secure payment from the shipper. The latter include bills of lading, shipping manifests, signed delivery receipts, equipment detention reports, certified weight tickets and purchased permits. Payment to the **CONTRACTOR** shall not be contingent upon the submission of a bill of lading to which no exceptions have been taken. In addition to the above-designated items, **CONTRACTOR** must deliver to the **CARRIER**, in complete and correct condition, shipping order, vehicle maintenance reports accident report, fuel tickets and other evidence of proper performance or delivery as may be required by the commission or the Department of Transportation. Failure to do so shall constitute a breach of the Agreement.

B. In any case in which **CONTRACTOR**, his agents or employees have secured an advance of any kind from the **CARRIER**, or if **CARRIER** has been charged for or has made payment for loss, injury or damage to cargo, person or property, without regard to fault, to the extent permitted under Paragraphs 8b and 8c; or if **CARRIER** has incurred costs, expenses and/or liabilities for loss, injury or damage to cargo, personal property, a result of negligent, reckless, willful or, wanton or intentional acts or omissions of **CONTRACTOR**, his agents or employees; or if **CONTRACTOR** has failed to furnish proof of payment to the internal revenue service of the federal highway use tax on the vehicles listed in this agreement; or if **CONTRACTOR** has failed to complete a scheduled movement; or either is due and owing from **CONTRACTOR** to carrier Andy other charge or expense under this Agreements, **CARRIER** shall be authorized to deduct the amount of such advances (including service charges), charges, payments or other amounts due to the **CARRIER** from **CONTRACTOR**, together with interest thereon, from any settlement or combination of settlements, at **CARRIER'S** option when settling with the **CONTRACTOR**.

C. In addition to all other items herein specified, **CARRIER** may deduct from contractors compensation, at the time of settlement all costs incurred by **CARRIER** for the benefit of **CONTRACTOR** for the following items: fuel, oil, repairs, tires, fines, lubricants, garaging, tolls road or fuel taxes or any levies or assessments based upon the operation of the vehicle.

6. <u>RISKS AND RESPONSIBILITIES</u>

A. **CONTRACTOR** shall be responsible for the payment of any and all fines, expenses or cost incurred by contractor by reason of **CONTRACTOR'S** contractor's violation of, or failure to adhere to, any federal, state or other law, rule or regulation of any agency or department having jurisdiction to impose such fines, expenses or costs, and any damages, costs or expense, including fines resulting from overweight or

oversized trailer; provided, however, that where trailer are pensuaded or sealed, or the load is containerized, or when the trailer or lading is otherwise outside **CONTRACTOR'S** control, **CARRIER** shall be ultimately responsible for any such fines, and shall reimburse the **CONTRACTOR** therefor, unless the violation results from the acts or omissions of **CONTRACTOR**.

7. INSURANCE AND CARGO AND PROPERTY DAMAGE

a. It is specifically understood and agreed that **CARRIER** shall have no liability for any damage or loss that may occur to equipment of the **CONTRACTOR** used in the performance of this agreement. Said equipment shall be insured at **CONTRACTOR'S** expense with respect to it's use in the **CARRIER'S** service.

B. 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

C. When **CONTRACTOR'S** tractor is used to pull a trailer or semi-trailer owned by **CARRIER**, **CONTRACTOR** shall be liable to **CARRIER**, without regard to fault or the absence thereof, for any loss or damage to trailer or semi-trailer (including, but not limited to, loss or damage to refrigeration units, tires and other trailer equipment accessories) which is not covered by insurance, and for any deductible under such insurance, up to a maximum of $1,000.00.

D the **CONTRACTOR** shall be liable for the entire loss, injury, or damage to cargo and to third persons or property resulting from negligee, reckless, willful, wanton or intentional acts of contractor contractor, its agents or employees, without regard to whether such loss, injury, or damage is covered by **CARRIER'S** liability, property damage or cargo damage insurance referred to above.

E. **CONTRACTOR**, at its own expense, shall maintain continuos insurance coverage against public liability and property damage claims arising from use of the equipment by contractor when bobtailing and when pulling **CARRIER'S** trailer at items and at places during which there is no performance of a trip in behalf of the **CARRIER**, and **CARRIER** shall be named as an additional insured under any such policy. In addition to the above, if **CONTRACTOR** and its employees are not participants in a state-sponsored or state-approved workman's compensation program, then the **CONTRACTOR** is required to maintain a policy of accident insurance with limits equal to or in excess of those limits of the group accident insurance policy made available to **CONTRACTOR** by **CARRIER**. copies of all insurance policies shall be delivered to **CARRIER**, and the policy shall provide that the coverage in favor the **CARRIER** shall not be revoked, canceled or amended without giving the **CARRIER** ten days written notice thereof.

F. At the time of execution of this agreement, **CONTRACTOR** shall make initial elections, on schedule B attached hereto, with respect to the purchase of accident insurance and/or collision insurance through the **CARRIER**. The prices of such insurance available through the **CARRIER** shall also be indicated on schedule B copies of all insurance policies purchased through the **CARRIER** will be provided to **CONTRACTOR** upon request.

G. In the event **CONTRACTOR** becomes liable to **CARRIER** as a result of loss, injury or damage to persons, property or cargo as provided for in this agreement, **CARRIER** will make available to **CONTRACTOR** a written explanation and itemization before any deductions for cargo or property damages are made from any reserve fund, settlement, or other compensation owed to **CONTRACTOR**.

9 REPORTS REQUIRED OF CONTRACTOR

A. 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. **CONTRACTOR** shall at all times

comply with the rules and regulations as set forth by such 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 theperformance 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 regulations of such agencies.

5. On a current basis, all maintenance report and records as required by regulation. Failure to comply with the provisions of this paragraph will result in a special handling charge not to exceed $25.00 in each specific case.

12. GOVERNING PROVISIONS

A. This agreement constitutes the entire agreement and understanding between the parties and shall not be modified, altered, changed or amended in any respect unless in writing, signed by both parties.

B. This agreement has been executed in the State of Washington and shall be deemed to have been drawn on accordance with the laws of the state of Washington. In the event of any disagreement or litigation arising under this agreement, such disagreement or litigation shall be decided in accordance with the laws of the State of Washington.

C. This agreement may not be transferred or assigned without express written permission of CARRIER.

D. Any notice required to be given to either party under this agreement may be accomplished by sending the same by certified mail return receipt requested, to SWANSON Hay Company,5010 N. Florida, Spokane, WA 99217.
In the case of the CONTRACTOR. Such notice shall be deemed received at 12:01 a.m. on the fourth day after the date of mailing.

E. This agreement shall become effective on the date of its execution and shall, subject to the provisions for renewal or termination elsewhere contained herein, remain in effect for a period of one year.

F. If any action is brought hereunder or relating hereto, the prevailing party shall recover its actual and reasonable attorney fees.

G. If any provision of this agreement shall be declared invalid or inoperative by any competent judicial or administrative body, such provision shall be suspended form operation during the period of invalidity or an amended provision will be substituted. The remaining provisions of this agreement, other than those which have been invalidated or are inoperative, shall not be affected thereby.

EXECUTED IN TRIPLICATE at Spokane, WA this _____ day of January, 2012.

BY:_____	BY:_____
TITLE_____	TITLE:_____
CARRIER	CONTRACTOR

SCHEDULE A

Equipment that is furnished by the CONTRACTOR hereunder is described as follows

TRACTORS

Unit #	Make & Year	Serial #	No. axles

TRAILERS

Unit #	Make & Year	Serial #	No. axles

Payment to be made hereunder is:
88% of the gross revenue of the loads hauled, this payment schedule
To remain in effect for a period of one year.

Also, Swanson Hay Co., Inc., and the company providing insurance, will not
Be held responsible, in any way, for any passengers that the CONTRACTOR
May wish to transport with him.

When the Contractor, and all parties connected with the contractor, are using
Swanson Hay Co., Inc. facilities, they are there, at their own risk, and will not
Hold Swanson Hay Co., Inc., Carl Swanson, or company providing
Insurance, responsible in any way, in case of injury or accident.

X_____ X_____

CARRIER CONTRACTOR

DATE:_____

RECEIVED

AUG 15 2014

LI TAX & WAGE
LEGAL APPEALS UNIT

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

In The Matter Of: **SWANSON HAY COMPANY,** **Employer/Petitioner**	**OAH Docket No. 01-2012-21705T** **(082014-00680)** **TAX CASE:** **FINDINGS OF FACT,** **CONCLUSIONS OF LAW,** **AND** **INITIAL ORDER**

I. ISSUES PRESENTED

1.1 Were the relevant individuals correctly characterized by the Employment Security Department as employees for the purposes of unemployment insurance taxation?

1.2 If so, did the remuneration the Swanson Hay Company paid to those individuals constitute wages for the purposes of unemployment insurance taxation?

1.3 If so, what is the correct computation of contributions, penalties, and interest, if any, owed by the Swanson Hay Company to the Employment Security Department?

II. ORDER SUMMARY

2.1 The following individuals were correctly characterized by the Employment Security Department as employees for the purposes of unemployment insurance taxation: Michael Earl, Michael McGlothern, Darryl Schernitzki, Derwood Burchett, John Rohrenbach, Mark Evans, and Terry Pederson.

2.2 The remuneration the Swanson Hay Company paid to the above-named individuals, as well as to James Reinstra, Austin Clark, Danny Markley, and Eddy Wilcox, constituted wages for the purposes of unemployment insurance taxation.

2.3 The correct computation of contributions, penalties, and interest owed by the Swanson Hay Company to the Employment Security Department is $36,070.32, less any contributions, penalties, and interest attributed to the remuneration paid to Trenor P. Elwell.

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III. HEARING

3.1 **Hearing Date:** June 9, 2014

3.2 **Administrative Law Judge:** Terry A. Schuh

3.3 **Employer/Petitioner:** Swanson Hay Company

3.3.1 **Representative:** Ryan R. McNeice and Beckie Wheeler, McNeice Wheeler PLLC, Attorneys at Law

3.3.2 **Witnesses:**

3.3.2.1 Steven Swanson, President, Swanson Hay Company

3.3.2.2 Michael Earl, former owner-operator

3.3.2.3 Michael McGlothern, owner-operator

3.3.2.4 Darryl Schernitzki, owner-operator

3.4 **Agency:** Employment Security Department

3.4.1 **Representative:** Lionel Greaves, IV, Assistant Attorney General

3.4.2 **Witness:** Una Wiley, Deputy Director, Employment Security Dept.

3.4.3 **Observer:** Christina Yoon, Rule 9 Intern

3.5 **Exhibits:** Exhibits 1 through 4 (offered by the Employment Security Department) and Exhibits A through II (offered by the Swanson Hay Company) were admitted into the record.

3.6 **Stipulation:** On June 9, 2012, the parties filed a document entitled Stipulation which was discussed and clarified on the record at the evidentiary hearing and, if not formally incorporated into record at that time is now incorporated into the record by this reference. Swanson Hay Company stipulated that it does not dispute the taxes, penalties, and interest assessed by the Employment Security Department as to James Reinstra, Austin Clark, Danny Markley, and Eddy Wilcox for all periods under appeal. The Employment Security Department stipulated that it intends to remove Trenor P. Elwell from the assessment for all periods under appeal.

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3.7 **Court Reporter:** Tia B. Reidt, I. C., from Naegeli Reporting, appeared as court reporter. The Office of Administrative Hearings did not order a transcript.

IV. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1 On November 8, 2011, the Employment Security Department ("the Department") issued and served an Order and Notice of Assessment to Swanson Hay Co., Inc. ("Swanson Hay") assessing taxes, penalties, and interest for all four quarters of 2009 and of 2010 and the first two quarters of 2011 in the amount of $36,070.32. Ex. 2, pp. 3-4.

4.2 On November 21, 2011, Swanson Hay filed its appeal. Ex. 3.

At issue are the owner-operators who leased and drove equipment

4.3 Predicate to the Order and Notice of Assessment was the audit conducted by Stacy Morris. Ex. 1.

4.4 The audit covered all four quarters of 2009, all four quarters of 2010, and the first two quarters of 2011. Ex. 1, p. 1.

4.5 Ms. Morris reclassified as employees 12 individuals that Swanson Hay characterized as independent contractors. Ex. 1, p. 1.

4.6 These 12 individuals were: Derwood Burchett, Austin Clark, Michael Earl, Trenor P. Elwell, Mark Evans, Danny Markley, Michael McGlothern, Terry Pederson, James Reinstra, John Rohrenbach, Darryl Schernitzki, and Eddy Wilcox. Ex. 1, pp. 65-67.

4.7 The Department subsequently removed Trenor P. Elwell from the assessment. *See* ¶ 3.5 above. Swanson Hay subsequently withdrew its dispute as to James Reinstra, Austin Clark, Danny Markley, and Eddy Wilcox. *Id.* Accordingly, the individuals whose classification is disputed for the purposes of this appeal remain: Derwood Burchett, Michael Earl, Mark Evans, Michael McGlothern, Terry Pederson, John Rohrenbach, and Darryl Schernitzki (collectively, "owner-operators").

4.8 The owner-operators owned their tractor-trailers ("equipment") and provided their equipment and driving services to Swanson Hay under the terms

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of a lease contract. Testimony of Swanson; *see* Exs. Z, BB, DD, EE, FF, GG, HH, and II.

4.9 Swanson Hay transports general freight, lumber, drywall, and insulation, and buys and sells a lot of hay. Testimony of Swanson. Swanson Hay was "engaged in the business of transporting property for hire by motor vehicle in interstate commerce, subject to the rules and regulations of [the] interstate commerce commission and other government authorities." Ex. 4. p. 1.

4.10 The owner-operators signed contracts with Swanson Hay. Testimony of Swanson; *see* Exs. BB, DD, EE, FF, GG, HH, and II; Testimony of Earl. The contracts characterized the owner-operators as independent contractors. Testimony of Swanson; *see* Exs. BB, DD, EE, FF, GG, HH, and II.

Characteristics of the owner-operators

4.11 None of the owner-operators had active UBI numbers in 2009, 2010, or the first two quarters of 2011 (collectively, "the audit period"). Testimony of Wiley. None of them were registered with the Department of Revenue. Testimony of Wiley.

4.12 None of the owner-operators had independent operating authority during the audit period. Testimony of Wiley; Testimony of Earl; Testimony of McGlothern. Very few such equipment owners have their own operating authority. Testimony of Swanson They drive for entities that have operating authority. Testimony of Swanson; Testimony of Earl; Testimony of McGlothern; Testimony of Schernitzki..

4.13 Under the terms of the contracts, Swanson Hay had "exclusive possession, use and control of the equipment" and was responsible for its operation. Testimony of Wiley; *see, e.g.*, Ex. BB, p. 40, ¶ 2A. Swanson Hay submits to federal oversight of its trucking operation. Testimony of Swanson. Federal requirements dictate that Swanson Hay must have exclusive control over the equipment it leases. Testimony of Swanson. The owner-operators were required to "run" under the authority of the entity they leased to. Testimony of McGlothern.

4.14 Swanson Hay required the owner-operators to mark their equipment with Swanson Hay's name, address, and operating authority identification number. *See, e.g.*, Ex. 4, p. 4, ¶ 3A.

4.15 Swanson Hay required owner-operators to notify Swanson Hay of any accident. Testimony of Wiley.

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4.16 The owner-operators were required to provide photos of the freight they hauled when requested to do so by Swanson Hay. Testimony of Wiley; *see, e.g.*, Ex. 4, p. 3. Owner-operators were responsible for any damage to the cargo they hauled. Testimony of Swanson.

4.17 Swanson Hay provided the owner-operators with medical and dental coverage. Testimony of Wiley. This was evidence of an employer-employee relationship, as opposed to an independent contractor relationship, because it would otherwise constitute insurance fraud. Testimony of Wiley.

4.18 Swanson Hay paid the owner-operators for the services the owner-operators provided. Testimony of Wiley; Testimony of McGlothern. The services the owner-operators provided were transporting cargo for Swanson Hay for remuneration. Testimony of Wiley. They were paid by the mile, not by the load. Testimony of Swanson. They were also paid for extra services. Testimony of Swanson.

4.19 The owner-operators could select the route they traveled to haul the assigned freight. Testimony of Wiley; *see, e.g.* Ex. BB, p. 41, ¶ 2D; Testimony of Earl. They controlled the methods, means, and routes. Testimony of Swanson.

4.20 The owner-operators were responsible for all costs of operating and maintaining the equipment. Testimony of Wiley; Testimony of McGlothern; Testimony of Schemitzki. They owned and had title to their equipment. Testimony of Swanson; Testimony of Earl; Testimony of McGlothern; Testimony of Schemitzki. The owner-operators financed their equipment independent of Swanson Hay. Testimony of Swanson; Testimony of Earl; Testimony of McGlothern. Owner-operators were responsible for the storage of their equipment but Swanson Hay allowed the owner-operators to store their equipment at Swanson Hay if they wished to do so. Testimony of Swanson. Approximately half of the owner-operators did so. Testimony of Swanson.

4.21 Owner-operators were responsible for driving violations such as speeding but Swanson Hay was responsible for overload violations. Testimony of Swanson.

4.22 The owner-operators drove exclusively for Swanson Hay. Testimony of Wiley; Testimony of Earl. But they could terminate their relationship with Swanson Hay and then drive for another trucking company. Testimony of Swanson; Testimony of Earl.

4.23 Swanson Hay required the owner-operators to file "all hours of service reports, physical examination certificates, accident reports and other reports, documents and data required by those identified applicable laws and

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regulations." Ex. BB, p. 39, ¶ 1A; Testimony of Wiley. Swanson Hay required owner-operators to provide daily logs, daily vehicle condition report, scale tickets, toll receipts, delivery receipts, any documents and data regulations required Swanson Hay to maintain, and all maintenance reports and records. *See, e.g.*, Ex. 4, p. 7.

4.24 Swanson Hay established the fees for the freight transported by the owner-operators. Testimony of Wiley; Testimony of Schernitzki. Swanson Hay billed the customers, kept 12% of the receipt, and provided the remaining 88% to the owner-operators less deductions for costs such as fuel charged by the owner-operator to Swanson Hay and insurance purchased through Swanson Hay. Testimony of Swanson; Testimony of Schernitzki. If a customer failed to pay, Swanson Hay would still pay the owner-operators unless the failure to pay was caused by the conduct of the owner-operator. Testimony of Swanson. Swanson Hay did not prepay owner-operators. Testimony of Swanson.

4.25 Swanson Hay offered loads to owner-operators and the owner-operators were not required to accept a load. Testimony of Swanson; Testimony of Earl; Testimony of McGlothern; Testimony of Schernitzki.

4.26 Owner-operators could find their own loads on return trips but the owner-operators had to get Swanson Hay's permission to accept the load. Testimony of Swanson; Testimony of Earl; Testimony of McGlothern. If an owner-operator hauled a load without Swanson Hay's permission, Swanson Hay would likely consider that conduct to be a breach of contract. Testimony of Swanson. It would also violate federal regulations. Testimony of Swanson. Swanson Hay did the billing for any extra loads the owner-operators hauled. Testimony of Swanson.

4.27 Occasionally, Swanson Hay would broker a load for a driver with his/her own authority but that was a relationship different from the one Swanson Hay had with the owner-operators. Testimony of Swanson.

<u>The assessment</u>

4.28 The Department reviewed Swanson Hay's check register and the 1099's Swanson Hay issued to identify and calculate unreported wages from contract labor. Testimony of Wiley.

4.29 Swanson Hay paid Trenor P. Elwell $748.00 during the third quarter of 2010. That is the only remuneration Swanson Hay paid to Mr. Elwell during the audit period.

4.30 The remuneration Swanson Hay paid to the owner-operators was

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payment for both equipment rental and driver services There is no evidence in the record regarding how much of the remuneration Swanson Hay attributed to equipment rental and how much to driver services. There is no evidence in the record that Swanson Hay and the owner-operators ever made, much less calculated, that distinction.

4.31 The Department determined that Swanson Hay owed for the audit period $36,070.32 in additional taxes, penalties, and interest. Exs. 1 and 2.

V. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I make the following Conclusions of Law:

Jurisdiction

5.1 I have jurisdiction over the parties and subject matter herein under Title 50 RCW and under Chapters 34.05 and 34.12 RCW.

The remuneration paid for driving services constituted wages and employment

5.2 Of initial importance is whether the payments made to the owner-operators for driving services constituted wages. "Wages" means remuneration paid. RCW 50.04.320(1) and (2). "'Remuneration' means all compensation paid for personal services . . .." RCW 50.04.320(4)(a).

5.3 Here, Swanson Hay paid compensation to the owner-operators in part for providing driving services. Thus, those payments constituted wages.

5.4 Personal services performed for wages constitutes employment. RCW 50.04.100. However, to constitute employment, such personal services must be performed for the employer or the employer's benefit. *Penick v. Employment Sec Dep't*, 83 Wn.App. 30, 40, 917 P.2d 136 (1999); *see also, Daily Herald v. Employment Security*, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979). In instances where a court found employment, the service that was provided directly benefitted the employer's business, such as drivers driving cabs owned by the employer (*Affordable Cabs, Inc. v. Employment Sec. Dep't*, 124 Wn.App. 361), droppers delivering the employer's newspapers to carriers for delivery to customers (*Daily Herald, supra*), and truck drivers delivering freight the employer had contracted to deliver (*Penick, supra*). Here, Swanson Hay paid the owner-operators under the terms of the lease for both equipment rental and driving services for each transport of freight. Swanson Hay received 12% of the receipts paid by customers for transportation of freight. Accordingly, Swanson Hay benefitted directly from the services provided by the owner-operators. Therefore,

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I hold that the personal services performed by the owner-operators herein for the wages paid by Swanson Hay constituted employment as contemplated by RCW 50.04.100.

5.5 Accordingly, the owner-operators were employees whose wages subjected Swanson Hay to unemployment insurance taxation unless the owner-operators' services qualified as an exception to employment.

<u>The owner-operators' services do not satisfy the exceptions tests under RCW 50.04.140</u>

5.6 RCW 50.04.140 provides the two applicable exception tests, one in three elements and the other in six elements. If Swanson Hay satisfies either of those tests, then the wages paid to the owner-operators are exceptions from taxation for unemployment insurance. The exception must be strictly construed against its application. *In re All-State Constr. Co v. Gordon*, 70 Wn.2d 657, 665, 425 P.2d 16 (1967); *W. Ports Transp., Inc. v Emp. Sec Dep't*, 110 Wn.App. 440, 451 (2002). The burden of proof is on the party asserting the exception. *In re All-State Constr. Co., Inc. v. Gordon*, 70 Wn.2d 657, 665, 425 P.2d 16 (1967); *Penick v. Empl. Sec. Dep't*, 82 Wn.App. 30, 42, 917 P.2d 136 (1999).

5.7 Swanson Hay need only satisfy one of the two tests. However, each test is conjunctive, meaning that Swanson Hay must satisfy all of the elements of either the first test or the second.

5.8 The first element is the same for each of the two tests. That first element is: "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." RCW 50.04.140(1)(a) and (2)(a).

5.9 Critical is not actual control, but, rather, the right to control. *Western Ports Transp., Inc v. Emp. Sec. Dep't*, 110 Wn.App 440, 452 (2002); *Jerome v. Empl. Sec. Dep't*, 69 Wn.App. 810, 817, 850 P.2d 1345 (1993).

5.10 One court found the employer to exercise direction and control where the employer required the individual to: display the employer's name on his truck; purchase insurance from the employer; submit to drug and alcohol testing; obtain the employer's permission to carry passengers; notify the employer of accidents, inspections, and citations; keep the truck clean and in repair; call dispatch for assignments; file daily logs; and be subject to termination for violating any employer policy. *Western Ports*, 110 Wn.App. at 454. Another court found the employer to exercise direction and control where the employer owned the cab driven by the individual, provided the means by which the individual acquired customers, and set the fares. *Affordable Cabs, Inc. v. Employment Sec. Dep't*,

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124 Wn.App. 361, 371 (2004). Another court found the employer to exercise direction and control where the employer trained the individuals, reviewed their performance, and controlled their assignments. *Jerome*, 69 Wn.App. at 817.

5.11 Here, Swanson Hay had exclusive possession, use, and control over the leased equipment. Swanson Hay required the owner-operators to mark their equipment with Swanson Hay's name, address, and operating authority identification number. Swanson Hay required the owner-operators to provide photos of the freight they hauled if Swanson Hay requested them to do so. The owner-operators were responsible for any damage to the freight they hauled. Swanson Hay required the owner-operators to file a variety of reports, including hours of service reports, physical examination certificates, accident reports, daily logs, daily vehicle condition reports, scale tickets, toll receipts, delivery receipts, maintenance reports and records, and any other documents and data required by regulations. Swanson Hay established and collected all fees for freight hauled and paid the owner-operators from those proceeds. The owner-operators were required to operate strictly under Swanson Hay's operating authority. On the other hand, the owner-operators controlled the methods, means, and routes for delivering freight. Moreover, the owner-operators were not required to accept loads offered to them by Swanson Hay. On the other hand, the owner-operators needed Swanson Hay's express permission to haul loads other than those assigned by Swanson Hay. In fact, if and when an owner-operator discovered a load they might haul, Swanson Hay then completed the fee arrangements. At least some of the requirements summarized in this paragraph were dictated by federal regulations. Therefore, Swanson Hay argued, in effect, that such instances reflected the federal government exercising direction and control rather than Swanson Hay. I disagree. There are indeed instances of the federal government exercising direction and control, but it is direction and control over Swanson Hay, not over the owner-operators. Swanson Hay essentially argued that, where it exercised direction and control because it was required by law to do so, that direction and control should be distinguished from when it exercised direction and control at its own discretion. But there is no authority for that distinction. Quite the contrary, the court in *Western Ports* specifically held that federally mandated direction and control could be considered when determining the tests in RCW 50.04.140. *Western Ports*, 110 Wn.App. at 453-454. Here, Swanson Hay had the right to exercise direction and control over the owner-operators as to methods and details of providing driving services to a substantial and significant degree.

5.12 Swanson Hay observed that the owner-operators were responsible for the costs of operating the equipment and had a substantial investment represented by the ownership of that equipment. However, these facts speak to elements other than the element of direction and control. Accordingly, they are not persuasive as to the element of direction and control.

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5.13 Thus, Swanson Hay has failed to meet its burden to establish the first element in each of the two conjunctive tests. Accordingly, I need not address the remaining elements in either of the tests. Therefore, Swanson Hay has failed to establish that the wages paid to the owner-operators should be exceptions from unemployment insurance taxation.

5.14 Thus, the owner-operators' services do not satisfy the exceptions test under RCW 50.04.140.

The assessment should be affirmed

5.15 The assessment was based on remuneration that included both equipment rental and driving services. As discussed above, the driving services constituted employment and the remuneration paid for driving services constituted wages taxable for the purposes of unemployment insurance. The equipment rental was not employment, was not wages, and was not taxable. However, no evidence was presented by the Department or Swanson Hay regarding how much of the remuneration paid by Swanson Hay should be attributed to equipment rental and how much to driving services. Furthermore, although Swanson Hay argued diligently that the remuneration paid to the owner-operators should qualify as an exception from taxation under RCW 50.04.140, Swanson Hay presented no argument challenging the accuracy or efficacy of the assessment.

5.16 Nearly a year ago, Swanson Hay moved this tribunal to dismiss the assessment as void. Swanson Hay argued that the Department exceeded its jurisdiction because the Department inflated the assessment by knowingly including equipment rental, which is not subject to taxation. I denied the motion to dismiss. The reasoning I employed then, in pertinent part, applies here as well and is incorporated below.

5.17 Title 50 RCW "shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. The foregoing is legislatively mandated. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.*, 120 Wn.2d 394, 406, 842 P.2d 930 (1992).

5.18 "If an employer fails to provide necessary payroll or other wage information during an audit, the department may use RCW 50.12.080 to determine payroll and wage information based on information otherwise available to the department. This may include information from labor market and economic analysis, information provided to other state or local agencies, and the *best information otherwise available to the department.*" WAC 192-340-020

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(emphasis added).

5.19 RCW 50.12.080 provides the Department authority to issue an arbitrary report when an employer fails to provide a report. However, the foregoing regulation applies RCW 50.12.080 to audits when an employer fails to provide necessary payroll or wage information. RCW 50.12.080 directs the Department to proceed "upon the basis of such knowledge as may be available" to "arbitrarily" conclude and that this arbitrary conclusion is "deemed to be prima facie correct". Swanson Hay neither offered nor suggested any information that it possesses or that the Department possesses or should possess with which to separate non-taxable remuneration from taxable remuneration. Here, the Department reviewed the relevant 1099 forms and Swanson Hay's check register, none of which distinguished remuneration paid for equipment rental from remuneration paid for driving services. Swanson Hay is evidently unable to provide better information than already provided to the Department. One might argue that the Department cannot assess taxes unless the Department can somehow overcome this dearth of information. However, I am not persuaded that a putative employer should escape tax liability because the putative employer is unable to accurately provide wage information despite being the entity in the best position to do so. Nor is the Department obliged to guess or to seek estimates from the putative employer. Here, the Department identified by means of Swanson Hay's records remuneration paid to the individuals in question, knowing that this remuneration package included remuneration that was not properly subject to taxation herein. I am persuaded by the authority referenced above that the Department was entitled to rely upon the information it had from Swanson Hay – however incomplete – to calculate its assessments. Swanson Hay has always had the opportunity to provide evidence to re-calibrate the assessments and retained that privilege for the evidentiary hearing held. Swanson Hay did not provide any such evidence. Therefore, I accept the assessment as unchallenged by Swanson Hay apart from the argument regarding classification addressed above.

5.20 Nevertheless, in the stipulation discussed earlier above, the Department agreed to remove from the assessment wages attributed to Trenor P. Elwell. This will reduce the assessment marginally and as to one quarter only. Despite the stipulation, neither party presented an assessment recalculated without the wages attributed to Trenor P. Elwell. Therefore, the originally issued assessment for $36,070.32 should be AFFIRMED in that it correctly holds Swanson Hay liable for unemployment tax contributions, interest, and penalties for 2009, 2010, and the first two quarters of 2011 but nevertheless it should be REMANDED to the Department for recalculation so as to be reduced by the amount of taxes, penalties, and interests attributed to the remuneration Swanson Hay paid to Trenor P. Elwell.

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INITIAL ORDER

IT IS HEREBY ORDERED THAT:

The Order and Notice of Assessment issued under RCW 50.24.070 is ordered **AFFIRMED** in part and **REMANDED** in part.

The Order and Notice of Assessment is **AFFIRMED** in that it correctly holds the Employer-Petitioner liable for unemployment tax contributions, interest, and penalties for 2009, 2010, and the first two quarters of 2011.

However, the Order and Notice of Assessment must be reduced for the third quarter of 2010 by the amount of tax, penalty, and interest flowing from the remuneration attributed to Trenor P. Elwell. Therefore, this matter is **REMANDED** to the Employment Security Department for recalculation of the assessment for the third quarter of 2010, and therefore recalculation of the amount for the period of 2009, 2010, and the first two quarters of 2011, consistent with the terms of this Initial Order.

Signed and Issued at Olympia, Washington, on the date of mailing.

Terry A. Schuh
Senior Administrative Law Judge
Office of Administrative Hearings

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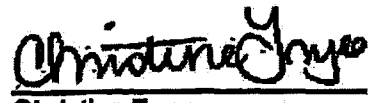
Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses, postage prepaid, on the 14th day of August, 2014, at Olympia, Washington.



Christine Frye
Delivery Specialist

NOTICE OF FURTHER APPEAL RIGHTS

This Tax Initial Order is final unless a Petition for Review is filed, in writing, with the Agency Records Center of the Employment Security Department at PO Box 9046, MS-6000, Olympia, Washington 98507-9046, and postmarked on or before **September 15,2014**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review. A Petition for Review need not be filed on an official form, but such form may be obtained from an Unemployment Insurance Office of the Employment Security Department.

Do not file your Petition for Review by facsimile (fax).

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CERTIFICATE OF SERVICE
I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on August 14, 2015

Representative, Commissioner's Review Office
Employment Security Department

TAX

BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON

Review No. 2014-2826

In re:	Docket No. 01-2012-21705T
SWANSON HAY COMPANY Tax ID No. 826663-00-5	**DECISION OF COMMISSIONER**

This is an unemployment insurance tax dispute between the Employment Security Department ("Department") and the interested employer, Swanson Hay Company, Inc. ("Swanson Hay"). The Department conducted an audit of Swanson Hay for the period of 2009, 2010, and the first two calendar quarters of 2011. As a result of the audit, 12 individuals hired by Swanson Hay during the period at issue were reclassified as employees of Swanson Hay and, therefore, their wages should have been reported to the Department and subject to unemployment insurance tax. The Department issued an Order and Notice of Assessment on November 8, 2011, assessing Swanson Hay contributions, penalties, and interest in the amount of $36,070.32. *See* Exhibit 2, p. 3. Swanson Hay filed a timely appeal from the Order and Notice of Assessment. *See* Exhibit 3. Subsequently, Swanson Hay stipulated that it would not dispute the contributions, penalties, and interest assessed by the Department with regard to James Reinstra, Austin Clark, Danuy Markley, and Eddy Wilcox; and the Department stipulated that it would remove Trenor Elwell from the assessment. *See* adopted ¶ 3.6 in Tax Case Initial Order. Consequently, what remain at issue are the contributions, penalties, and interest with regard to the following seven owner-operators: Derwood Burchett, Mike Earl, Mark Evans, Mike McGlothern, Terry Pederson, John Rohrenback, and Darry Schernitzki.

The parties filed extensive motions before the Office of Administrative Hearings ("OAH") prior to the evidentiary hearing held on June 9, 2014. Specifically, Swanson Hay filed the following four motions: Motion for Summary Judgment on Federal Preemption, Amended Motion to Dismiss Void Assessments, Motion to Compel, and Consolidated Motions in Limine.[1] The OAH denied Swanson Hay's first three motions in their entirety, but granted in part and denied in part Swanson Hay's motions in limine. On the other hand, the Department filed a Cross-Motion for Partial Summary Judgment and a Motion to Exclude Witnesses and Strike Exhibits. The OAH denied the Department's summary judgment motion in its entirety, but granted in part and denied in part the Department's motion to exclude witnesses and strike exhibits. Thereafter, the parties proceeded to the evidentiary hearing on the remaining issues of whether the owner-operators in dispute were in "employment" of Swanson Hay pursuant to RCW 50.04.100 and, if so, whether their services were exempted from coverage pursuant to RCW 50.04.140. After the evidentiary hearing, the OAH issued a Tax Case Initial Order on August 14, 2014, holding that the disputed owner-operators were in "employment" of Swanson Hay pursuant to RCW 50.04.100 and that their services were not exempted from coverage pursuant to RCW 50.04.140. On September 9, 2014, Swanson Hay timely petitioned the Commissioner for review of the Tax Case Initial Order. On October 1, 2014, the Commissioner's Review Office received a reply filed by the Department. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record (including the audio recording of the various hearings) and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we adopt the OAH's findings of fact and conclusions of law in the Tax Case Initial Order, subject to the following additions and modifications. We replace "Danny Markley" with "Danuy Markley" in adopted ¶ 2.2, ¶ 3.6, and ¶ 4.6 in the Tax Case Initial Order. Moreover, because the parties do not challenge the rulings by the OAH on their respective pre-hearing motions, we will further adopt the OAH's findings and conclusions in its various orders disposing of those pre-hearing motions. Having done so, we hereby enter the following.

Employment

Swanson Hay is liable for contributions, penalties, and interest as set forth in the Order and Notice of Assessment if, during the period at issue, the owner-operators are in "employment" of

[1] Swanson Hay's four motions were filed with and heard by the OAH in conjunction with two other matters: In re Hatfield Enterprizes, Inc., OAH Docket No. 01-2012-21704T and In re MacMillan-Piper, Inc., OAH Docket No. 01-2012-21703T.

Swanson Hay as defined in RCW 50.04.100. *See* RCW 50.04.080; RCW 50.24.010. If the owner-operators' employment is not established, Swanson Hay is not liable for the assessed items. If employment is established, Swanson Hay is liable unless the services in question are exempted from coverage.

We consider the issue of whether an individual is in employment subject to this overarching principle: The purpose of the Employment Security Act (or "Act"), Title 50 RCW, is to mitigate the negative effects of involuntary unemployment. This goal can be achieved only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment. To accomplish this goal, the Act is to be liberally construed to the end that unemployment benefits are paid to those who are entitled to them. *See* RCW 50.01.010; Warmington v. Emp't Sec. Dep't, 12 Wn. App. 364, 368, 529 P.2d 1142 (1974). This principle has been applied so as to generally find the existence of an employment relationship. *See, e.g.*, In re All-State Constr. Co., 70 Wn.2d 657, 665, 425 P.2d 16 (1967); Penick v. Emp't Sec. Dep't, 82 Wn. App. 30, 36, 917 P.2d 136, *review denied*, 130 Wn.2d 1004, 925 P.2d 989 (1996).

"Employment," subject only to the other provisions of the Act, means personal service of whatever nature, unlimited by the relationship of master and servant as known to the common law or any other legal relationship, including service in interstate commerce, performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied. RCW 50.04.100. To determine whether a work situation satisfies the definition of "employment" in RCW 50.04.100, we must determine (1) whether the worker performs personal services for the alleged employer; and (2) whether the employer pays wages for those services. *See* Skrivanich v. Davis, 29 Wn.2d 150, 157, 186 P.2d 364 (1947). The test for personal service is whether the services in question were clearly for the entity sought to be taxed or for its benefit. *See* Daily Herald Co. v. Emp't Sec. Dep't, 91 Wn.2d 559, 564, 588 P.2d 1157 (1979). In applying this test, we look for a clear and direct connection between the personal services provided and the benefit received by the entity sought to be taxed. *See* Cascade Nursing Serv., Ltd. v. Emp't Sec. Dep't, 71 Wn. App. 23, 31, 856 P.2d 421 (1993).

In this case, Swanson Hay was engaged in the business of transporting goods in interstate commerce; and the owner-operators performed truck-driving services for Swanson Hay. As such, the owner-operators' personal services directly benefited Swanson Hay's business. Moreover, it is beyond dispute that Swanson Hay paid wages for the services provided by the owner-operators.

See adopted ¶ 5.3 in Tax Case Initial Order; *see also* Exhibit 4, p. 4, ¶ 4 (Compensation). Consequently, the administrative law judge correctly concluded that the seven owner-operators were in employment of Swanson Hay pursuant to RCW 50.04.100. *See* adopted ¶¶ 5.2 through 5.5 in Tax Case Initial Order; *see also* Penick, 82 Wn. App. at 40 (as transportation of goods necessarily required services of truck drivers, it was clear that the carrier directly used and benefited from the drivers' services).

Independent Contractor Exemption

The services performed by the seven owner-operators are taxable to Swanson Hay unless they can be excluded pursuant to some other provisions of Title 50 RCW. *See* Skrivanich, 29 Wn.2d at 157. The provisions of the Act that exclude certain services from the definition of employment are found at RCW 50.04.140 through RCW 50.04.240, RCW 50.04.255, RCW 50.04.270, and RCW 50.04.275. The burden of proof rests upon the party alleging the exemption. *See* All-State Constr., 70 Wn.2d at 665. Just as RCW 50.04.100 is to be liberally construed to the end that benefits be paid to claimants who are entitled to them, the provisions of Title 50 RCW that exclude certain services from the definition of employment are strictly construed in favor of coverage. *See, e.g.,* In re Fors Farms, Inc., 75 Wn.2d 383, 387, 450 P.2d 973 (1969); All-State Constr., 70 Wn.2d at 665. Because the Act is intended for the benefit of a group that society seeks to aid, any exemption available through the application of these tests must be scrutinized even more closely than an exemption to a tax levied purely for revenue-raising purposes. *See* Schuffenhauer v. Emp't Sec. Dep't, 86 Wn.2d 233, 239, 543 P.2d 343 (1975).

In this case, the only exception that concerns us is found at RCW 50.04.140(1) and (2). The truck-driving services performed by the seven owner-operators are excepted from employment only if all of the requirements of either section are met. *See* All-State Constr., 70 Wn.2d at 663. Here, the agreements between Swanson Hay and the owner-operators referred to the owner-operators as contractors. *See, e.g.,* Exhibit 4. This contractual language, however, is not dispositive of the issue of whether the services at issue were rendered in employment for purposes of the Act. Instead, we consider all the facts related to the work situation. Penick, 82 Wn. App. at 39.

RCW 50.04.140(1) and (2) provide two alternative tests in determining whether an individual hired by an alleged employer to perform personal services is an "independent contractor" for the purpose of unemployment insurance tax. The first three criteria in each test are

essentially identical in all aspects that are relevant to this case. The employer is required to prove that an individual meets all of the criteria in one of the tests in order to qualify that individual for this exemption. Therefore, if an individual fails to meet any single criterion, he or she will not be considered an "independent contractor" and the employer is liable for contributions based on wages paid to the individual pursuant to RCW 50.24.010.

A. Direction and Control.

The first criterion under RCW 50.04.140(1)(a) and (2)(a) is freedom from control or direction. The key issue here is not whether the alleged employer actually controls; rather, the issue is whether the alleged employer has the right to control the *methods and details* of the performance, as opposed to the *end result* of the work. Existence of this right is decisive of the issue as to whether an individual is an employee or independent contractor. *See* Jerome v. Emp't Sec. Dep't, 69 Wn. App. 810, 816, 850 P.2d 1345 (1993).

Here, the contracts between Swanson Hay and the owner-operators specifically provided that the owner-operators had the sole discretion regarding the manner, means, and routes so as to provide complete transportation services, *see* Exhibit 4, p. 4, ¶ 2D; yet, Swanson Hay exerted extensive controls over the methods and details of how the driving services were to be performed by the owner-operators. For example, besides the directions and controls described in adopted ¶ 5.11 in the Tax Case Initial Order, Swanson Hay required the owner-operators to supply auxiliary equipment including chains, tarps, tie-downs at their own expense in order to handle the cargo transported and achieve delivery of the commodities. *See* Exhibit 4, p. 3, ¶ 1D. Additionally, Swanson Hay required the owner-operators to provide photographs of any load deemed to be a risk for cargo claims or any cargo damaged in transit. *See* Exhibit 4, p. 3, ¶ 1F. Finally, if an owner-operator's equipment was not in good operating condition, Swanson Hay retained the right to transfer the shipment from such equipment and accomplish the transportation of the shipment according to its best judgment. *See* Exhibit 4, p. 3, ¶ 1C. These requirements imposed by Swanson Hay are generally inconsistent with freeing the owner-operators from its control and direction; in other words, Swanson Hay was not just interested in the *end result* of the transportation services performed by the owner-operators, but it also concerned itself as to "*how*" the transportation services were to be performed by the owner-operators. *See* Jerome, 69 Wn. App. at 817 (a putative employer's ability to control was evidenced by the fact that it could enforce the control by unilaterally deciding not to give referrals to any food demonstrator).

In sum, we concur with the administrative law judge that the seven owner-operators have not met the first criterion – freedom from control or direction – under RCW 50.04.140(1)(a) and (2)(a). *See* adopted ¶¶ 5.8 through 5.12 in Tax Case Initial Order. Moreover, for reasons set forth below, we also concur in the administrative law judge's conclusion that, based on the holding in W. Ports Transp., Inc. v. Emp't Sec. Dep't, 110 Wn. App. 440, 453-54, 41 P.3d 510 (2002), federally mandated direction and control could be considered in applying the statutory exemption test under RCW 50.04.140. *See* adopted ¶ 5.11 in Tax Case Initial Order.

In its Petition for Review, Swanson Hay argues in favor of jettisoning the W. Ports' holding with regard to the federally mandated direction and control, by relying on "federal legislative history and policy" as embodied in 49 C.F.R. § 376.12(c)(4), which provides:

> Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.

We do not find this argument to be persuasive. First, the court in W. Ports was keenly aware of 49 C.F.R. § 376.12(c)(4) when it held that the federally mandated controls could be considered in applying the statutory exemption. *See* W. Ports, 110 Wn. App. at 453-55. Second, the scope of 49 C.F.R. § 376.12(c)(4) only reaches to 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular; and it does not extend to include other federal safety regulations, such as those contained in 49 C.F.R. Part 395 or Part 396. For example, 49 C.F.R. § 395.8(a) specifies that every motor carrier shall require its drivers to record their duty status for each 24 hour period; and 49 C.F.R. § 396.11(a)(1) specifies that every motor carrier shall require its drivers to file written report at the completion of each day's work on each vehicle operated. Swanson Hay clearly made such provisions in its contracts with the owner-operators, *see* Exhibit 4, p. 6, ¶ 9A; yet nothing in the so-called "federal legislative history or policy" cautions us not to consider these federally mandated requirements when deciding a state law question as to whether an owner-operator is an employee or an independent contractor. Regardless, even if we were not to consider the federally mandated directions and controls, we will still find that the owner-operators here have failed the first criterion under RCW 50.04.140(1) and (2) based on other *non-federally* mandated directions and controls exerted by Swanson Hay over the owner-operators' services, such as the requirements that the owner-operators supply auxiliary equipment and

provide photographs of certain cargo as well as the Swanson Hay's right to divert shipment if an owner-operator's equipment was not in good operating condition.

Swanson Hay asks us to consider several out-of-state cases (i.e. cases from Idaho, Iowa, Florida; and a case from National Labor Relations Board) for the propositions that federally mandated requirements should not be considered as indicia of an employer-employee relationship and that owner-operators were deemed independent contractors for other purposes unrelated to unemployment insurance tax. Swanson Hay's reliance on these out-of-state cases is unavailing, especially when an appellate decision (i.e. W. Ports) in this state has already addressed similar issues for the purpose of unemployment insurance tax.

Next, Swanson Hay brings to our attention RCW 51.08.180, a provision in the Washington Industrial Insurance Act that exempts owner-operators working for a common carrier from the industrial insurance coverage.[2] However, the Employment Security Act does not contain a similar statutory provision exempting owner-operators from the unemployment insurance coverage.[3]

Finally, Swanson Hay points to an OAH's decision in In re Fastway Transport, Inc., Docket No. 04-2013-08158, in which the administrative law judge apparently found an independent contractor relationship existed between a common carrier and its owner-operators "on the same or similar facts." We have not reviewed the merits of that decision and cannot say whether or not it was correctly decided. Regardless, a lower tribunal's initial decision in an unrelated matter will in no way bind this tribunal as the final agency decision-maker in this matter.

Swanson Hay lists nine factors for us to consider so as to decide whether the owner-operators were free from its control and direction. *See* Swanson Hay's Petition for Review at 2-3. Because factor Nos. 1 through 4 relate to the third criterion under RCW 50.04.140(1)(c), we will consider them in the context of deciding whether the owner-operators had independently established businesses. Having considered factor Nos. 5 through 9 as well as other factors

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[2] As of 2008, Washington is one of the 14 states that deem an owner-operator to be an independent contractor for the purpose of workers' compensation through a relatively simple statutory definition; the other 13 states are Alabama, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Oregon, Tennessee, Texas, and Wyoming. *See* Gregory M. Feary, Independent Contractor Employment Classification: A Survey of State and Federal Laws in the Motor Carrier Industry, 35 Transp. L.J. 139, 141-42 (2008).

[3] As of January 2008, 14 states have enacted statutory exemptions for owner-operators within their unemployment insurance law; and Washington is *not* one of the 14 states. Instead, Washington is one of the 17 states that subscribe to an ABC test, a three-prong test that deems an owner-operator to be an employee unless the motor carrier can show all three prongs are met. *Id.* at 150-51.

described above, we conclude that the seven owner-operators have not satisfied the first criterion – freedom from control or direction – under RCW 50.04.140(1)(a) and (2)(a).

B. Outside Usual Course of Business or Outside All Places of Business.

The second criterion under RCW 50.04.14)(1)(b) is that the service in question either be performed outside the usual course of business for which such service is performed, or that it be performed outside all places of business of the enterprise for which such service is performed. Regarding the first alternative, Swanson Hay's usual course of business was to transport goods in interstate commerce, and the owner-operators provided driving services to Swanson Hay. As such, the owner-operators' services were performed within, not outside, the usual course of Swanson Hay's business. Accordingly, Swanson Hay fails the first alternative under RCW 50.04.140(1)(b).

Regarding the second alternative under RCW 50.04.140(1)(b), the critical inquiry in this case is whether the trucks owned by the owner-operators but leased to Swanson Hay constitute the places of Swanson Hay's business. W. Ports did not address this issue as the court there disposed of the case on the first criterion of the independent contractor test under RCW 50.04.140(1)(a). *See* W. Ports, 110 Wn. App. at 459. Although the court in Penick held that the trucks were the carrier's places of business, it relied on the fact that the carrier owned the trucks used by the contract drivers. *See* Penick, 82 Wn. App. at 43. Thus, Penick is factually distinguishable because Swanson Hay did not own the trucks at issue here but, instead, leased the trucks owned by the owner-operators. Other appellate decisions seem to suggest that premises leased by a putative employer or otherwise specified by a putative employer for work purposes, could constitute such employer's place of business. *See, e.g.,* Schuffenhauer, 86 Wn.2d at 237 (clam digging on land leased by employer not outside all places of business); Miller v. Emp't Sec. Dep't, 3 Wn. App. 503, 506, 476 P.2d 138 (1970) (timber harvesting on land leased by employer performed at place of business of employer); Affordable Cabs, Inc. v. Emp't Sec. Dep't, 124 Wn. App. 361, 371, 101 P.3d 440 (2004) (taxi driver drove to locations specified by the employer; while these places were not owned by the employer, they were places where the driver was "engaged in work"); however, these appellate decisions did not deal with the type of leasing practices prevalent in interstate trucking industry and, hence, their applicability to the case at bar is rather limited.

Here, we are dealing with a unique contractual relationship between common carriers and owner-operators that effectuates the lease of equipment (i.e. trucks) along with driving services; and such contractual relationship is subject to extensive federal safety regulations designed for the

protection of the public and applying to both motor carriers as well as owner-operators. *See, generally,* Federal Motor Carrier Safety Administration ("FMCSA") Regulations, 49 C.F.R. Parts 300 – 399. In order to clarify the role of federal leasing regulations and their impact on independent contractor status, the Interstate Commerce Commission (the predecessor agency to FMCSA) promulgated 49 C.F.R. § 376.12(c)(4). As discussed above, 49 C.F.R. § 376.12(c)(4) cautions us that an independent contractor relationship may still exist between a motor carrier and an owner-operator, notwithstanding the fact that the motor carrier must comply with 49 U.S.C. § 14102 and 49 C.F.R. Part 376 in general, and 49 C.F.R. § 376.12(c)(1) in particular. 49 C.F.R. § 376.12(c)(1) specifically provides that:

> The lease shall provide that the authorized carrier lessee shall have *exclusive possession, control, and use of the equipment* for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume *complete responsibility for the operation of the equipment* for the duration of the lease. (Emphasis added.)

Consequently, pursuant to 49 C.F.R. § 376.12(c)(4), a carrier's "exclusive possession, control, and use of the equipment" and a carrier's "complete responsibility for the operation of the equipment" do not completely negate the possibility of finding an independent relationship between a carrier and an owner-operator.

Consistent with the spirit of 49 C.F.R. § 376.12(c)(4) and in light of the lack of appellate decisions on the issue, we conclude that a mere leasing arrangement where a carrier (i.e. the lessee) assumes possession of and responsibility for the equipment (i.e. truck) owned by an owner-operator (i.e. lessor) does not in and of itself convert the equipment into the carrier's place of business. To conclude otherwise will effectively preclude a carrier from ever being able to satisfy the second alternative under RCW 50.04.140(1)(b). With that being said, a carrier, however, may still fail the second alternative – outside all places of business – under RCW 50.04.14)(1)(b), if its owner-operators are to engage themselves in other places of the carrier's business, such as the carrier's office or repair shop, in addition to simply driving the trucks leased to the carrier.

In this case, Swanson Hay leased the trucks owned by the seven owner-operators; and, as required by 49 C.F.R. § 376.12(c)(1), the contracts between Swanson Hay and the owner-operators provided that Swanson Hay "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." *See* Exhibit 4, p. 3, ¶ 2A. As discussed above, the sheer fact that Swanson Hay leased the trucks

with driving services does not automatically transform the trucks (leased to Swanson Hay but owned by the owner-operators) into the places of Swanson Hay's business pursuant to 49 C.F.R. § 376.12(c)(4). Moreover, the record does not show that the owner-operators actively engaged themselves in other places of Swanson Hay's business, such as the office or repair shop. Accordingly, we are satisfied that the truck-driving services performed by the owner-operators were performed outside all places of Swanson Hay's business and, thus, Swanson Hay has satisfied the second alternative under RCW 50.04.140(1)(b).

C. Independently Established Business.

Of the seven disputed owner-operators, Swanson Hay introduced into record business registrations for six of them: (1) Derwood Burchett d/b/a Derwood Burchett, *see* Exhibit BB, p. 1; (2) Mike Earl d/b/a Mike Earl Trucking, *see* Exhibit DD, p. 4; (3) Mark Evans d/b/a Mark Evans Trucking LLC, *see* Exhibit GG, p. 1; (4) Mike McGlothern d/b/a McGlothern Trucking Inc., *see* Exhibit EE, p. 1; (5) John Rohrenback d/b/a Rohrenback Trucking, *see* Exhibit FF, p. 1; and (6) Darry Schernitzki d/b/a Darryl Schernitzki Hauling, *see* Exhibit II, p. 1. There is no indication in the record that one owner-operator, Terry Pederson, registered a business in this state; and another owner-operator, Derwood Burchett, did not open its sole proprietorship until September 2012, over a year after the audit period at issue. *See* Exhibit BB, pp. 2-4. Significantly, although Mark Evans and John Rohrenback registered their respective businesses in the form of a limited liability company and a corporation, Swanson Hay did not contract with their respective businesses but, instead, it contracted with Mark Evans and John Rohrenback in their individual capacities. *See* Exhibit GG, pp. 2-22; Exhibit EE, pp. 11-31. This fact alone shows that Swanson Hay was interested in the services performed by the owner-operators personally, not the services that could have been performed by other drivers working for the owner-operators' businesses.

Furthermore, if a business intends to operate as an authorized for-hire motor carrier that transports regulated commodities in interstate commerce in exchange for a fee or other compensation, such business must obtain an interstate operating authority (MC number) through the FMCSA. A business may need to obtain multiple operating authorities to support its planned business operations. *See* Get Authority to Operate (MC Number), Fed. Motor Carrier Safety Admin., http://www.fmcsa.dot.gov/registration/get-mc-number-authority-operate (last visited August 7, 2015). The types of operating authorities include the authority for motor carrier of property (except household goods), the authority for motor carrier of household goods, the

authority for broker of property (except household goods), and the authority for broker of household goods. *See* Types of Operating Authority, Fed. Motor Carrier Safety Admin., http://www.fmcsa.dot.gov/ registration/types-operating-authority (last visited August 7, 2015). Exhibit CC at page 9 is an example of the operating authority obtained by Trenor Elwell d/b/a Triple J Trucking, for whom the Department has agreed to withdraw its assessment. *See* adopted ¶ 3.6 in Tax Case Initial Order.

Here, Swanson Hay had its operating authority to operate as a for-hire motor carrier transporting goods in interstate commerce, while none of the seven owner-operators had their own operating authorities. Instead, the owner-operators contracted with Swanson Hay so that they may operate their equipment (i.e. trucks) under the operating authority of Swanson Hay. Because of this arrangement, Swanson Hay retained the right to decline any load an owner-operator may wish to transport under Swanson Hay's operating authority. *See* adopted ¶ 4.26 in Tax Case Initial Order.

The third criterion under RCW 50.04.140(1)(c) requires a showing that an 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 with the alleged employer. Proof of independently established business requires evidence of an enterprise created and existing separate and apart from the relationship with the alleged employer, an enterprise that will survive the termination of that relationship. The courts have traditionally examined the following factors as indicia of an independently established business: (1) the worker has a separate office or place of business outside of his or her home; (2) the worker has an investment in the business; (3) the worker provides equipment and supplies needed for the job; (4) the alleged employer fails to provide protection from risk of injury or non-payment; (5) the worker works for others and has individual business cards; (6) the worker is registered as an independent business with the state; and (7) the worker is able to continue in business even if the relationship with the alleged employer is terminated. *See* Penick, 82 Wn. App. at 44.

As discussed above, one of the unique characteristics about the trucking industry is the federal requirement that an owner-operator obtain an operating authority (MC number) in order to engage in the business of transporting goods in interstate commerce; otherwise, the owner-operator must operate under another carrier's operating authority. In other words, when it comes to the trucking industry, whether an owner-operator has his or her own operating authority is an

additional paramount factor for the purpose of proving independently established business under the third criterion of RCW 50.04.140(1)(c). If an owner-operator wishes to sell his or her services, invoice for the services, collect for the services, and maintain safety records as required by federal regulations, all the while continuing to operate his or her truck, maintain the truck, and manage the load, then he or she has the option to obtain the operating authority. And if an owner-operator does not wish to take upon the administrative burdens of running a business, he or she still has the option of leasing onto an authorized motor carrier with operating authority. *See* Douglas C. Grawe, Have Truck, Will Drive: The Trucking Industry and The Use of Independent Owner-Operators Over Time, 35 Transp. L.J. 115, 133 (2008). However, if an owner-operator chooses the latter option, certain legal consequences may flow from that choice, one of which is that such owner-operator may be deemed an employee of the carrier for the purpose of unemployment insurance tax under the appropriate circumstances.

In this case, some of the traditional factors certainly weigh in favor of finding independently established business. For example, some, but not all, of the seven owner-operators had registered businesses in Washington; the owner-operators provided equipment (i.e. trucks) and other supplies needed for the transportation of goods; the owner-operators made substantial investment in their businesses by purchasing the trucks or trailers; and their places of business were their trucks, which were outside of their homes. However, other traditional factors weigh against finding independently established business. For example, Swanson Hay, the putative employer here, provided protection from the risk of non-payment by the customers, *see* adopted ¶ 4.24 in Tax Case Initial Order; and the owner-operators did not work for other carriers while working for Swanson Hay. Regardless of how the traditional factors may play out one way or the other, we must assign paramount weight to one additional factor when it comes to the trucking industry, namely, whether an owner-operator has his or her own operating authority so as to be able to independently engage in interstate transportation of goods. In this case, it is beyond dispute that the seven owner-operators did not have their own operating authorities and, therefore, they could not engage in interstate transportation of goods independent of another carrier with such operating authority. Because this additional factor weighs heavily against finding independently established business and further because at least two traditional factors are also not in favor of finding independently established business, we are satisfied that the seven owner-operators have not met the third criterion of the exemption test under RCW 50.04.140(1)(c).

Conclusion

In summary, Swanson Hay has not carried its burden to prove the seven owner-operators are independent contractors because these owner-operators have not met at least one of the criteria under RCW 50.04.140(1) and (2). All seven of the disputed owner-operators are in "employment" of Swanson Hay pursuant to RCW 50.04.100 and are not exempted under either RCW 50.04.140(1) or (2), or any other provisions of law. Swanson Hay is liable to pay the amount assessed in the November 8, 2011, Order and Notice of Assessment with regard to Derwood Burchett, Mike Earl, Mark Evans, Mike McGlothern, Terry Pederson, John Rohrenback, and Darry Schernitzki. Pursuant to the parties' stipulations, *see* adopted ¶ 3.6 in Tax Case Initial Order, Swanson Hay is further liable to pay the amount assessed with regard to James Reinstra, Austin Clark, Danuy Markley, and Eddy Wilcox; but it is not liable to pay the amount assessed with regard to Trenor Elwell.

Now, therefore,

IT IS HEREBY ORDERED that the August 14, 2014, Tax Case Initial Order issued by the Office of Administrative Hearings is **AFFIRMED.** Swanson Hay is not liable for the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 regarding Trenor Elwell, but is liable for the contributions, penalties, and interest assessed pursuant to RCW 50.24.010 regarding the remaining individuals (i.e. Derwood Burchett, Mike Earl, Mark Evans, Mike McGlothern, Terry Pederson, James Reinstra, John Rohrenback, Darry Schernitzki, Austin Clark, Danuy Markley, and Eddy Wilcox) during the period of 2009, 2010, and the first two calendar quarters of 2011. The case is **REMANDED** to the Department to re-calculate the total amount of contributions, penalties, and interest in accordance with the foregoing.

Dated at Olympia, Washington, August 14, 2015.*

S. Alexander Liu
Deputy Chief Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a Petition for Reconsideration. No matter will be reconsidered unless it clearly appears from the face of the Petition for Reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty (20) days from the date the Petition for Reconsideration is filed. A Petition for Reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, WA 98507-9555, and to all other parties of record and their representatives. The filing of a Petition for Reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL REVIEW

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the Superior Court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such appeal is filed, the attached decision/order will become final. If you choose to file a judicial appeal, you must both:

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

Serve a copy of your judicial appeal by mail or personal service within the thirty (30) day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park Drive, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the thirtieth (30th) day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal your serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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