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Case # 73828-3-1

In The court of appeals of the state of Washington

Division I

Eric Rootvik Appellant

v

Washington state Department of Labor

Appellants Brief

2016 JUL 19 AM 8:30
COURT OF APPEALS DIV I
STATE OF WASHINGTON

The clerk of the court was kind enough to provide me with an outline of brief requirements. Unfortunately, I cannot organize myself in that way. I simply cannot do that. I have made two different attempts to obtain ADA accommodations from the Supreme court. A job I believe was actually the responsibility of the court of appeals. And on two occasion the supreme court denied me despite the factual documentation provide them. They are in error. The same documentation provided this court on Jun 10, 2016 in a sealed envelope.

Please do not confuse the narrative that follows with the ability to do what you ask in court rules. They are two very different things.

I am not stupid nor ignorant. In fact, the opposite. ADD, Dyslexia, PTSD are the culprits. And the subject of a motion to modify these requirements under the ADA is submitted with this brief.

Simply put I cannot seek and catalog information in the way you wish. I tried and thought I would be able to do it. My issues ebb and Wayne. But every time I sat down to do it over the space of weeks I stopped cold, locket, unable to move (metaphorically). The primary issue in this is probably the PTSD and short term memory. Unfortunately, I do not have the words to describe other than locked, froze, can't think.

It should be noted that I did not write the pleadings that have come prior to this. They were written for me. Unfortunately, both of us have ADD and it was like to jackhammers trying to kill each other.

For that reason, I ask that the court do what it can to understand my argument and know that I am not here to avoid a \$1000.

I am here because the department is abusing its authority.

I would also like to apologize to all that are forced to read this. I know it will be difficult.

This is an appeal of a superior court decision on review of an administrative decision and is appealed under RAP 2.3 (b)(1,2,3)(d)(1,2,3,4)

This case emanates from an infraction issued by the Department of labor for a violation of RCW 18.27.200(1)(a) where the department presented no evidence or logic as to how the shelving manufactured by Mr. Rootvik became fabricated into, becoming a part of the structure under the common law of fixtures. There evidence was solely based on the notion that any kind of product sold to a home owner requires a contractor's license. The department spent capias amounts of time misstating and misleading. Referring to Eric 'The Closet Guy' as Mr. Rootvik's installation business. Trying to "sell" an idea as opposed to proving anything. At time I felt the departments intent was to say with a wink and a nod "we can just ignore this guy and do what we want". Mr. Rootvik Manufactures closet systems and also sometimes installs.

And it appears to have worked.

The department even suggested that a consumer would be left without recourse if not registered as a contractor. Did he forget the court?

There is also an issue of constitutionality with RCW 18.27.310(2) which shifts the burden of proof to the defendant if it is alleged that I was unregistered. This is patently incompatible with our system of laws and sense of justice. How is it possible to prove a negative?

The Supreme court "State Of Washington, Respondent V. W.r., Jr., Appellant" said,

"Requiring a defendant to do more than raise a reasonable doubt is inconsistent with due-process principles," Justice Debra Stephens wrote for the majority, saying it raises "a very real possibility of wrongful convictions."

This puts the burden of proof back on the department where it should be.

Even though RCW 18.27.090(5) was re-written in 2007 The controlling case Would still be be. "126 Wn. App. 730, Dep't of Labor & Indus. v. Davison" (Exhibit I). In a conversation had with Mr. Norbat just two days ago he said as I thought that this case is still on point.

At the very least I was entitled to rely on Davison until the court says otherwise.

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Davison discuss the issue of fabricate into and said “what little fabrication was done, was done to the cabinets, not the structure”. They were referring to premanufactured cabinets. I sell closet shelving. That may include doors and drawers similar to a china hutch. But nowhere as involved as kitchen cabinets. The court also draws attention to ease of removal just as the ALJ does in this case as well as the fact that home owners periodically remodel and update.

If Davison is exempt so is Rootvik.

It should be noted that the ALJ repeatedly misstates the facts and Rootvik’s testimony. This was the subject of a motion to reconsider. See exhibit 2.

The ALJ at 6.12 of his final order states because the word install was removed. That was clear evidence of legislative intent, that such installations were not exempt. The problem of course is “In analyzing the arguments of the parties we must be guided by the cardinal rule that words in a statute are to be given their ordinary and usual meaning”. The ALJ is inserting meaning not included in the statute. His ideas do not comport with statutory construction.

At 6.11 the states that my shelving is hung from a rail and is removable which support the idea that nothing is fabricated into the structure becoming a fixture.

At 5.10 he points out that my shelving is manufactured away from the job site further identifying RCW 18.27.090(5) as the proper exemption.

To be honest I think the ALJ has confused RCW 18.27.090(8) an exemption for material suppliers with paragraph 5.

The major error the ALJ made was trying to insert meaning while ignoring the meaning of “not fabricated into and becoming a part of the structure under the common law of fixtures”. I think it is reasonable to assume the legislature envisioned that something might be done with finished goods like Rootvik’s other than just plopping them on the floor. Hens they drew the line at the point where something becomes a fixture to the real-estate. Surely if you remove shelving which can be attached to any wall, requiring only a little spackle to fill holes. Leaving a room or hall intact for any use. That is not a fixture. Therefore, exempt.

The department and the ALJ at 6.8 rely heavily on WAC 296-200A-016 (7) That refers definitions of specialty contractors.

There are two major problems with this. The first is for this to apply I must do all three things install, repair, and maintain. There was no evidence presented that I repair or maintain. The ALJ at 5.10 does refer to having a warranty but he misstates my testimony regarding repair. A warranty repair is not repair service per-se. It is an included part of the purchase designed to make the customer whole again. Since there is no evidence of all three it does not apply and even if it did it would conflict with a statutory exemption.

I think it is important to note that this WAC 296-200A-016 is evidence of department misconduct. In the proposed rules they described this new section as only guidance and would not alter enforcement activities or create an additional burden on the business. Last time I checked obtaining a contractor's license was expensive and posting a \$6000 or \$12000 was not easy. I have been told that addressing this is very complicated so I will go no further into it. But I would suggest that this is evidence of the department character and should be considered in evaluating their arguments. I do by the way have liability insurance which is far more important than a bond that will only pay a lawyer.

The department also failed to adequately address the issue of fabricating into and becoming a fixture under the common law of fixtures. In *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667-68, 538 P.2d 505 (1975). The court made the point that if you removed the alleged fixture a usable warehouse remained. Ultimately I think the court needs an actual instance to apply the three pronged test. Since there is nothing to analyze a determination that there is a fixture is impossible.

Rootvik did testify that his closet systems were based on the European system and designed for portability. In Europe people take their cabinets and shelving with them from house to house.

The department failed to establish they had jurisdiction over the alleged advertising. The charging document stated it occurred in Tumwater WA. The testimony of Terry Zinker was that she received an anonymous tip and then when searching on the internet. That is not Tumwater. A web page is not a postcard mailed to your home or a billboard you drive by. It is something that you must go looking for. It does not come to you. So a critical element of jurisdiction would be, did the advertising occur within the physical jurisdiction of Washington state. Terry Zinker testified that she had not bothered to find out the location of the server for each site.

I could find no case law on-point for this. Nearly all of it revolves around issues of passive and more interactive websites that the long arm statutes could attach to. The sites in question are passive and therefore do not trip the long arm statutes.

You're going to love this. The only case I could find was November 2010 case from the high court at the *Haig Dataco v Sportradar*.

“The Court ruled that the law should be applied to material hosted on the internet in the same way that it applies to satellite television, meaning that the jurisdiction covering infringing material is that of the country from where the material was broadcast.”

Simply put, Content is 'made available' in jurisdiction where server is located!

Common sense, don't you think.

At the risk of introducing new evidence when I shouldn't. there are web sites that can tell you were a websites server is. In all cases these sites are located out of state. The department never availed themselves of this information.

Judge Spector erred when she said two things. First, that rootvik violated the law under both the old and the new statute completely ignoring the president Davison set. Secondly she said that the ALJ had it right on all four counts. I don't know which four counts but one of them would have to be that installation was not allowed because of the clear legislative mandate.

She also crammed a 90-minute hearing into 30 minutes prior to her 9am hearing. I think this is because she had no intention of hearing me. In a previous case before her she came out screaming at me shifting the burden to me because I was a prose that did not write his own pleadings. She made it very clear that she had no time for prose litigants. This was Rootvik V SCRAP and opposing council will verify this.

I pray that the court will hear me. Hear the truth I speak and find in favor of Eric Rootvik.

Since this is not a game. A detailed decision would be most useful. To date, no one has made a fact driven decision.

Respectfully submitted

Eric Rootvik

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DIVISION II

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STATE OF WASHINGTON
BY g/p
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent,

v.

WILLIAM DAVISON DBA WOODPRO,
INC.,

Appellant.

No. 30816-9-II

PUBLISHED OPINION

QUINN-BRINTNALL, C.J. — William Davison dba Woodpro, Inc. (Woodpro) appeals the superior court’s reinstatement of an infraction issued by the Department of Labor and Industries (L&I) for its failure to register as a contractor. The trial court’s ruling reversed an earlier determination by an administrative law judge (ALJ) that Woodpro’s cabinet manufacture and installation activities are exempt from contractor registration under former RCW 18.27.090(5) (2001). That statute exempts from registration those who sell or install “finished products, materials, or articles . . . that are not actually fabricated into and do not become a permanent fixed part of a structure.” Woodpro contends that substantial evidence supported the ALJ’s finding that the cabinets were not permanently secured to the homeowner’s walls and that therefore Woodpro was exempt from contractor registration requirements for this job. We agree with Woodpro and reverse.

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FACTS

In October 2001, the Rowells¹ hired Woodpro² to manufacture and install custom cabinets in their kitchen and bathroom. The Rowells provided Woodpro with the measurements for the cabinets and approved Woodpro's written installation proposal.

Woodpro installed the cabinets by screwing each cabinet into the wall with four screws. Davison testified that Woodpro uses this technique in order to facilitate easy removal of cabinets.³ In fact, at one point, Woodpro had to remove and reconfigure some of the Rowells' cabinets. But Davison acknowledged that, in contrast with European practice, American homeowners do not typically take cabinets with them when they move. Woodpro installed plywood "sub top" and "self edge" trim on the base cabinets, but the Rowells installed tiles on top of these cabinets. The Woodpro employee who performed the installation estimated that each cabinet took 10 to 20 minutes to install and that the project took 15 to 20 hours to complete.

The Rowells testified that they would likely live in the house for the rest of their lives.

Woodpro completed the job in November 2001. Dissatisfied with Woodpro's work, the Rowells filed a complaint with L&I. L&I investigated, and on January 17, 2002, issued Woodpro an infraction for installing the cabinets when it was not registered as a contractor as required by chapter 18.27 RCW.

¹ The Rowells are not parties to this appeal.

² William Davison is the president of Woodpro, Inc. His wife, Judith Davison, acts as the secretary and treasurer.

³ Davison testified that installation with easy removal in mind is "the standard in the industry," in part because of the frequency of kitchen remodels. Administrative Record (AR) at 74. In addition, Davison opined that a future owner of the Rowells' home would remodel one of the bathrooms because an open area under the sinks was designed for "handicap access." AR at 69.

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Woodpro appealed the infraction, claiming that it was exempt from the licensing requirement under former RCW 18.27.090(5) because it prefabricated the cabinets and did not permanently affix them to the home. An administrative hearing was held on June 7, 2002. The ALJ determined that the cabinets “were not secured to the wall permanently,” Administrative Record (AR) at 101, and reversed the notice of infraction, concluding that Woodpro was acting as a contractor but that the installation of the cabinets fell under the statutory exemption.

L&I appealed to the Thurston County Superior Court, which reversed the ALJ’s decision and reinstated the infraction.

Woodpro appealed. After Woodpro filed a notice of appeal, it came to this court’s attention that under RCW 18.27.310(4), the superior court’s decision was subject only to discretionary review under RAP 2.3. We ordered additional briefing from the parties on whether discretionary review was appropriate.

For the reasons stated below, we grant Woodpro’s request for discretionary review and reverse.

ANALYSIS

RULES GOVERNING DISCRETIONARY REVIEW

Woodpro argues that discretionary review is appropriate and we agree.

RCW 18.27.310(4) provides that “[a]n appeal from the administrative law judge’s determination or order shall be to the superior court. *The decision of the superior court is subject only to discretionary review pursuant to Rule 2.3 of the Rules of Appellate Procedure.*”

(Emphasis added.) RAP 2.3(b) provides:

[D]iscretionary review may be accepted only in the following circumstances:

.....

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(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

Woodpro initially argues that, although courts retain ultimate authority to interpret a statute,⁴ the trial court's failure to give the requisite deference to the agency's and, in particular, the ALJ's interpretation of an ambiguous statute so far departed from the accepted and usual course of judicial proceedings as to call for our review.⁵ But, as L&I correctly notes, an ALJ's construction of the statute does not necessarily indicate the *agency's* interpretation and, therefore, the superior court need not defer to the ALJ's decision. The trial court did not depart from the accepted and usual course of judicial proceedings when it reviewed a single ALJ's interpretation of a statute.

Nevertheless, review is appropriate here. RAP 2.3(b)(1) permits review where "[t]he superior court has committed an obvious error which would render further proceedings useless."

The trial court's Conclusion of Law No. 6 states, "The common laws of fixtures is applicable in this case."⁶ Clerk's Papers at 33. But in *Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 815-16, 496 P.2d 978 (1972), we held that the law of fixtures is inapplicable to circumstances such as those in this case. There, the defendant argued that the plaintiff, a cabinet supplier, should not be able to obtain a lien on the materials it supplied if the court did not

⁴ *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983).

⁵ See, e.g., *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992).

⁶ Under the common law of fixtures, chattel becomes a fixture if: (1) it is actually annexed to the realty; (2) its use or purpose is applied to or integrated with the use of the realty it is attached to; and (3) the annexing party intended a permanent addition to the freehold. *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667-68, 538 P.2d 505 (1975).

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consider the plaintiff a contractor under the act. *Harbor Millwork*, 6 Wn. App. at 809. We disagreed:

As was stated in *Finley-Gordon Carpet Co. v. Bay Shore Homes, Inc.*, 247 Cal. App. 2d 131, 55 Cal. Rptr. 378 (1966), *there is neither compelling reason nor authority to indicate why the law of fixtures should be incorporated into the legislature's design for registering contractors. . . .* The contractor's law has a different purpose from the lien law. The purpose of the contractor's registration act is to prevent victimizing of the public by unreliable, fraudulent and incompetent contractors. The lien law protects persons who furnish labor and materials to the exclusion of mortgages not shown of record before the inception of the lien. . . . *Interpretations of one statute supply no talisman for interpreting the other.*

Harbor Millwork, 6 Wn. App. at 815-16 (emphasis added, citations omitted). Although *Harbor Millwork's* statement regarding the law of fixtures does not prohibit consideration of fixture law in a contractor registration act context, here the trial court's conclusion that fixture law controlled its decision was error.

Moreover, the parties agree that there is little guiding authority on contractor registration requirements and both urge us to waive the rules of appellate procedure to "serve the ends of justice." RAP 1.2(c). We liberally interpret the Rules of Appellate Procedure and may alter any of its provisions when necessary to promote justice and to consider cases and issues on their merits. RAP 1.2(c). We therefore hold that discretionary review is appropriate in this case.

CONTRACTOR REGISTRATION EXEMPTION

Did the superior court err in reversing the ALJ's reversal of the infraction? We hold that it did.

In reviewing an administrative action, we sit in the same position as the trial court and apply the Administrative Procedure Act standards directly to the agency's administrative record. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Ind.*, 112 Wn. App. 291, 296, 49 P.3d 135

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(2002) (citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)), *review denied*, 149 Wn.2d 1003 (2003). Like the trial court, we review questions of law de novo but accord substantial weight to the agency's interpretation of the statutes it administers. *Superior Asphalt*, 112 Wn. App. at 296 (citing *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)). We review findings of fact for substantial evidence in light of the whole record. Former RCW 34.05.570(3)(e) (1995). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). On mixed questions of law and fact, we independently determine the law, then apply it to the facts as found by the agency. *Hamel v. Employment Sec. Dep't*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036 (1999).

Chapter 18.27 RCW, which requires a contractor to obtain a license to engage in building enterprises, "was designed to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors, many of whom operated a transient business from the relative safety of neighboring states." *Harbor Millwork*, 6 Wn. App. at 811. RCW 18.27.010(1) defines a contractor as

any person, firm, or corporation who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith or who installs or repairs roofing or siding; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided herein.

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RCW 18.27.010(1). Unless exempted, a contractor must register in order to do business in Washington State. RCW 18.27.200(1)(a). The statutory exemptions to the registration requirement include that asserted by Woodpro, former RCW 18.27.090(5), which provides, “The registration provisions of this chapter do not apply to . . . [t]he sale or installation of any finished products, materials, or articles . . . that are *not actually fabricated into* and *do not become a permanent fixed part of a structure.*” (Emphasis added.) See *Harbor Millwork*, 6 Wn. App. at 812-13.

In *Harbor Millwork*, we addressed whether the company’s activities under its contract with a homeowner required registration, thus barring it from suing that homeowner to recover the balance due under the contract. The company had agreed to furnish doors, doorjamb, valances, handrails, and custom-made cabinets for the construction of the defendant Achttien’s new home. The company fabricated the items at its plant and delivered them to the construction site. The homeowner and his carpenter-foreman, who were acting as primary contractors for the project, installed the doors, doorjamb, valances, and handrails, and they assisted in installing the kitchen cabinets. But the company’s employees installed the remainder of the cabinets. *Harbor Millwork*, 6 Wn. App. at 809.

We noted that “in the majority of instances the primary means of attaching the cabinets to the walls was by use of screws. . . . [C]abinets were also nailed into place. In other instances, as in the kitchen, the cabinets were bolted into sockets and held in place by lag screws.” *Harbor Millwork*, 6 Wn. App. at 814. We also noted that:

In interpreting the requirements of the exemption set forth in RCW 18.27.090(5), it is clear that “fabricate into” means something other than mere attachment. The supplier who actually installs finished products is required to perform a certain amount of fabrication to make the product operational or functional. Nevertheless, he is exempt from registration as a contractor unless the

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finished product is actually “fabricated into” and becomes a “permanent fixed part of a structure.” There is no easy formula by which it can be determined that something has or has not become “fabricated into” and a “permanent fixed part of a structure.”⁷ Accordingly, *each case must be decided on its own facts.*

Harbor Millwork, 6 Wn. App. at 814-15 (emphasis added). And we concluded under the facts of that case that “[t]here is substantial evidence to support a finding of fact that the items of cabinet work installed by Harbor Millwork would be exempted by [RCW 18.27.090(5)].” *Harbor Millwork*, 6 Wn. App. at 815 (emphasis added).⁸

In a later case, *Craftmaster Restaurant Supply Co. v. Cavallini*, 11 Wn. App. 500, 523 P.2d 962 (1974), Division Three of this court held that there was substantial evidence to support a trial court’s finding that certain items were not fabricated into, nor did they become a permanent part of, a restaurant. 11 Wn. App. at 503. But the facts distinguish *Craftmaster* because it involved a leased restaurant facility in which the items’ ease of removal was especially important. 11 Wn. App. at 503.

Here, the ALJ found that Woodpro

installed the cabinets . . . in the . . . kitchen and bathrooms . . . according to [its] usual practice by screwing each cabinet, using four screws, into the wall. In doing so, the cabinets were not secured to the wall permanently; they were attached by screws which allowed removal or adjustment of the cabinets.

⁷ Both *Harbor Millwork* and *Craftmaster Restaurant Supply Co. v. Cavallini*, 11 Wn. App. 500, 523 P.2d 962 (1974), the only other pertinent case interpreting the RCW 18.27.090(5) exception, do not treat the two terms separately, but essentially examine whether items “[became] permanent” and were “fabricated into” a structure. In other words, the cases do not separately analyze the two phrases.

⁸ But because there was some dispute and the trial court’s findings of fact were inadequate, we remanded to the trial court to determine whether the various items fell under the exemption. *Harbor Millwork*, 6 Wn. App. at 815.

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AR at 101.⁹ L&I argues that this finding is not supported by substantial evidence and that insofar as it makes a legal determination, it is incorrect.

At the administrative hearing, the Woodpro employee who actually installed the cabinets testified that each cabinet took 10 to 20 minutes to install and that it took a total of 15 to 20 hours to complete the project. In addition to screwing the cabinets into place, Woodpro installed the plywood tops of the base cabinets and installed “self edge” trim around the area where the homeowner intended to install the tile countertops. Davison, Woodpro’s president, testified that the American (as opposed to European) practice is for cabinets to remain in place even when a homeowner moves. And Mr. Rowell testified that he bought the home to live in and that he and his wife intended to stay there for the rest of their lives. On the other hand, Davison, Woodpro’s president, emphasized that bathroom and kitchen remodels were common and that each cabinet would take “two minutes” to remove. AR at 68.

Each case must be decided on its own facts. *Harbor Millwork*, 6 Wn. App. at 815-16. Although this is a case where reasonable minds may well disagree, our review of the record before the ALJ reveals substantial evidence supporting the ALJ’s finding that these cabinets were not installed permanently and that they were installed with removal and future remodels in mind. And even though the cabinet installation was time consuming, much of this time involved

⁹ Moreover, Conclusion of Law No. 4.2 states in pertinent part:

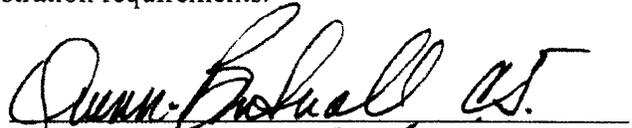
Attachment by screwing the cabinet to the wall was to allow for easy removal and/or adjustment of an installed cabinet rather than fixing the cabinets permanently to the wall. This case is distinguished from a situation where an object is delivered in various parts and is constructed into the structure in such a way that the object becomes permanently attached to the structure.

AR at 103.

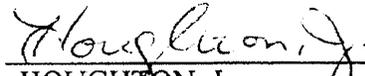
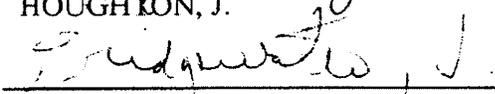
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altering the cabinets, not the home. This is consistent with Davison’s testimony and the ALJ’s finding that the cabinets Woodpro designed were for easy removal. Even though these particular homeowners intended to use these cabinets for their lifetime, substantial evidence supports the ALJ’s finding that the cabinets were not installed permanently.

We reverse the trial court’s erroneous application of fixture law and reinstate the ALJ’s ruling exempting Woodpro from contractor registration requirements.


QUINN-BRINTNALL, C.J.

We concur:


HOUGHTON, J.

BRIDGEWATER, J.

July 21, 2014

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The Honorable ALJ Charles H Van Gorder
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Re: Motion for Reconsideration of Administrative Law Judge's decision denying Appellant relief requested—infraction #NCZIK00895. The ALJ decision that Appellant requests reconsideration is attached hereto –listed behind Exhibit A of this documents.

To Honorable ALJ Charles H Van Gorder

The following is submitted in brief format and includes facts in support of Appellant's Motion for Reconsideration. The foundation for the instant request is formed of plain error. Incorporated herein by reference is the following brief in support of the instant request to reconsider the denial of relief for Appellant Rootvik and grant movant relief but ruling Appellant Rootvik's work falls under exemption of contractor's registration requirements.

Sincerely,

Eric Rootvik

Date

I. GROUNDS

1. The ruling is plain error because the ruling does not include the addition acts enumerated and required in order for Appellant to be required to registers.
2. The word install and its variations no longer apply to RCW 18.27.090(5), as such, in order to sustain Appellant's violation proper compliance requires additional facts exist that support specific acts that are fixed by statute or expanded by WAC's; those facts do not exist, therefore, the ruling upholding the violation is plain error.

II. FACTS

The origin of the custom closet industry as we know it today would be California Closets. They asked the question, "How can we provide high quality closet shelving with infinite design choices without the high cost of typical kitchen cabinetry?"

Their solution was to take an installation process used for decades in Europe that allows for a quick, simple installation and removal of cabinetry by homeowners and apply it closet cabinetry. In Europe, it is customary to take ones cabinetry from a home to a new home. Nevertheless, the facts of this [these] particular item(s), which form the facts and foundation of the instant violation, are not permanent fixture; therefore, Appellant is exempt for registering—as a contractor—as a matter of law.

The system created was a much-simplified frame work to keep cost down while still providing a stunning high-end look. Everything is made and finished in the shop to fit the space intended. No fabrication is ever preformed on site during installation. It assembles just as a bookcase would and hangs like a picture frame—

these are removable non-fixed items. This clear fact is elementary, obvious, and controlling in the determination that Appellant is exempt.

The closet hangs on the wall by one thin steel hanging rail like one would use for a heavy-duty picture or mirror-hanging device. This simple shelving system hangs from the wall at one single point using this hanging rail. The rail utilizes easily removed drywall screws only. It mounts in seconds and can be removed in seconds leaving only small holes that are easily filled and painted—like one would leave when removing a hanging mirror or picture frame—or a spice shelf.

Needless to say, today's economy calls for every mode available to stretch the homeowner's dollar. These removable closets fits consumer market objective to the tea.

This manner the closet hangs—the system—allows a homeowner to take their custom shelving (closets) from room to room or move to a new home easily. If modifications are necessary in the new space the homeowner can simply order a few new finished parts to make it work.

After closet parts are built to fit the location they may be installed at customer's option. The installation process goes as follows:

On the walls, that closet shelving will be hung a level line is draw at 80". Then studs are located for anchoring the hang rail. Place the hang rail against wall and secure it with drywall screws into the studs. Attach hanger hardware to vertical panels and hang panels on the hanging rail. Were fixed shelves are located insert expanding pins in vertical 5mm holes. Slide fixed shelves with connecting cams over expanding pins and then turn cams with a screwdriver locking cams and pins together and wedging pins into the holes they are in. repeat as necessary according to design. Install adjustable shelves were needed.

III. EVIDENCE RELIED UPON

1. Exhibit A (attached hereto and incorporated herein by reference) is Washington State Register (WSR)'s permanent and proposed rules, which establish the intent, purpose and spirit of applicable sections.

IV. ARGUMENT

IV 1. The ruling is plain error because the ruling does not include the additional acts enumerated and required in order for Appellant to register as a contractor.

In the ruling (Section 5.5) the Administrative Law Judge (ALJ) adds words to Appellant's testimony by way of stated Appellant charged for labor and materials. Issues of cost for labor was never discussed. Nor, was the reference to repairs, though none were performed, there was never any reference to costs of repairs. The extent of any repair was in referenced in hypothetical. If any Warranty work were needed Appellant would step up and repair. Testimony at the hearing touched on the range of cost for closet shelving. None of the ALJ or AG questions made any distinctions. There was never a per installation statements by Appellant. In addition, though, the word install no longer applies, at a different points, Appellant testified that he did not always install, which said installation was non-fixture items.

Section 5.7: The last four sentences from Appellant's web site are referenced where Appellant stated that nothing was incorrect in advertising the placement/installation of the non-fixed closet "as opposed to his work history". In addition, it was established and stood as fact via no one objected to Appellant's testimony that that someone else wrote the ad and his ADD/Dyslexia often causes him to confuse reading or miss things because of ADD / Dyslexia. In other words, establishing that the link was created with others from business college class that he took from school and solely addressed his work history. In addition approval of the page referenced in section 5.9 does not change the fact it just showing Appellant's work history.

In section 5.10, the ALJ adds language to Appellant's testimony by blanket statement that Appellant "Mr. Rootvik designs, builds and installs custom closet

systems himself". When asked if there was a warranty, Appellant stated yes, but the term was not defined and means the implied warranty of merchantability.

Though, warranty work if needed is part of the original sale; it is not a separate contract to maintain or repair. Appellant does not warrant the materials but the manufacture does; same with many sales men, the manufacture warrants materials.

The ALJ asked if a customer reconfigured his closet and needed more shelves, which a customer could get more shelves. This has no application to fixed items.

VI 2. Further language stated in Exhibit A shows language is not designed to change registration requirements, which stands to show the applicable case law still stands showing Appellant's work is exempts from registration.

The proposed rules for WAC 296-200a-016 as shown in the WSR 08-16-091 of L&I's proposed and permeant rule of August 4, 2008. (See, Exhibit A, evidence relied upon) Stated here in relevant part, WSR 08-13-078

PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

The proposed new section WAC 296-200A-016 provides definitions for "specialty contractor" for the purpose of contractor registration. The department uses these definitions to classify businesses into the "building trades or crafts" governed by the statute described above. The definitions also outline the scope of work each specialty may perform. The department is publishing the proposed definitions only to help contractors identify their proper classification and scope of work, **but will not alter agency interpretation of the classifications.** They will not alter the type of business a firm does or how they do that business, **nor will they alter the agency's compliance activities.** As such, they impose no additional costs on any business.

(Emphasis added)

See highlighted relevant section of Exhibit A page 5, which establish the changes are not meant to affect registration criteria.

In section 6.9, the ALJ states the department must issue an infraction under 18.27.200 because the WAC says so. In fact, the ALJ correctly quotes “what violations of chapter 18.27 can result in a notice of infraction” WAC 296-200A-300 (3).

Under RCW 18.27.200, the department must issue a notice of infraction to a contractor for: (a) Advertising, offering to work, submitting a bid, or performing any contracting work without being registered or when the contractor's registration is suspended or revoked

However, RCW 18.27.200 does not state an infraction must issue.

(Emphasis added)

RCW 18.27.200 Violation — Infraction.

(1) It is a violation of this chapter and an infraction for any contractor to:

(a) Advertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter;

(b) Advertise, offer to do work, submit a bid, or perform any work as a contractor when the contractor's registration is suspended or revoked;

(c) Transfer a valid registration to an unregistered contractor or allow an unregistered contractor to work under a registration issued to another contractor;

(d) If the contractor is a contractor as defined in RCW 18.106.010, violate RCW 18.106.320; or

(e) Subcontract to, or use, an unregistered contractor.

(2) Each day that a contractor works without being registered as required by this chapter, works while the contractor's registration is suspended or revoked, or works under a registration issued to another contractor is a separate infraction. Each worksite at which a contractor works without being registered as required by this chapter, works while the contractor's registration is suspended or revoked, or works under a registration issued to another contractor is a separate infraction.

[2007 c 436 § 9; 2002 c 82 § 6; 1997 c 314 § 14; 1993 c 454 § 7; 1983 1st ex.s. c 2 § 1.]

In section 6.10, the ALJ poses the question “If Mr. Rootvik’s work in installing custom closet systems comes within the definition of “contractor”...”. The question is if Appellant advertised some work requiring a contractor’s license. Moreover, while Appellant did admit to some installation, Appellant did not state he installed everything. Moreover, there is no offer to install. The extent of discussion is about Appellant’s background and skill. Appellant testified he sold both installed and parts. . Selling or installing parts do not require a license.

It was established the closet installation required only a screwdriver and a few screws. In 6.12 the ALJ miss quotes an older statute, and adds language from the new one.

In section 6.13, the ALJ jumps to the conclusion that I advertised to do work requiring a license, but the record is void of facts and acts required to show Appellant is not exempt. (enfaces added)

IV 3. Under the particular facts of this case and Washington judicial determinations Appellant Rootvik is exempt from contractor registration violations pursuant to RCW 18.27.090(5).

No facts stand showing the additional acts needed to remove Appellant from exemption statute of RCW 18.27.090 (5). The AG’s office attempted to create the illusion Appellant’s reference to his work history was work that he was offering to preform, yet, Appellant disputed this inference and no facts were submitted showing otherwise. Selling non-fixed closet (California style closets) were offered in the ad. The explanation of work history in the “ABOUT ME” link of the ad showed and stated Appellant’s work history, which ties to his knowledge, his skill and competence in selling the item offered in the ad, which was the California style closets, which (this stands undisputed) are not fabricated into the structure or fixtures as statutorily or factually defined. ,

It appears the hypothetical offer to warranty something he sold, if needed, is the only references to an additional act offered, which the act of warranty repair is insufficient under the plain language of the statute and the WAC to require Appellant to register. There are two other acts needed to remove Appellant from exemption status and those acts were not established because they do not exist.

No facts were offered, discussed or presented showing Appellant offered to do any work beyond the California style non-fixture closets. The mere act of engaging in warranty work if required in addition to installing (screwing in the rail with a screw driver) in order to hand the non-fixed closet is insufficient to determine Appellant is not exempt.

The word install or installation is removed from the relevant statutory language therefore, it does not apply to the statute. The ruling inserts the application of installation and repairing is sufficient to remove Appellant from exemption status. This is incorrect.

It was established the charging officer held Appellant installed therefore, he is required to register as a contractor. The state acted improperly in charging and no facts were brought forth to show otherwise.

The exemption of RCW 18.27.090 (5) rests on limited facts and no facts were brought forth showing Appellant was not exempt.

The registration provisions of this chapter do not apply to, because the facts place Appellant exempt; quoted in relevant part,

RCW 18.27.090

Exemptions.

(5) The sale of any finished products, materials, or articles of merchandise that are not fabricated into and do not become a part of a structure under the common law of fixtures;

[2013 c 23 § 13; 2007 c 436 § 6; 2003 c 399 § 401; 2001 c 159 § 7; 1997 c 314 § 8; 1987 c 313 § 1; 1983 c 4 § 1; 1980 c 68 § 2; 1974

ex.s. c 25 § 2. Prior: 1973 1st ex.s. c 161 § 1; 1973 1st ex.s. c 153 § 6; 1967 c 126 § 3; 1965 ex.s. c 170 § 50; 1963 c 77 § 9.]

Id.

1B. To hold case law no longer applies ignores intent, purpose and spirit of the new rules and acts to remove notice, therefore, denying Appellant due process given the property interest held by Appellant in this matter.

Because the new statutory and WAC language was not intended to change registration or compliance criteria to hold the case law no longer applies violates principles of due process because it removes notice of the consequences of one's acts; namely, Appellants. Therefore, to hold Appellant (or the public in general) cannot rely on the following case law any longer violates due process simply because it removes notice of the consequences of one's acts.

Here the facts are clear, non-fixed closets, which are far less complex in all ways than cabinets—which were held as exempt given the particular facts—show Appellant is exempt. As the Court held in *Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 496 P.2d 978(1972), which is cited as controlling in *Dep't of Labor & Indus. v. Davison* 126 Wn. App. 730, quoted in relevant part,

"The common laws of fixtures is applicable in this case."«6»Clerk's Papers at 33. But in *Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 815-16, 496 P.2d 978 (1972), we held that the law of fixtures is inapplicable to circumstances such as those in this case. There, the defendant argued that the plaintiff, a cabinet supplier, should not be able to obtain a lien on the materials it supplied if the court did not consider the plaintiff a contractor under the act. *Harbor Millwork*, 6 Wn. App. at 809. We disagreed:

As was stated in *Finley-Gordon Carpet Co. v. Bay Shore Homes, Inc.*, 247 Cal. App. 2d 131, 55 Cal. Rptr. 378 (1966), there is neither compelling reason nor authority to indicate why the law of fixtures should be incorporated into the legislature's design for registering contractors

The contractor's law has a different purpose from the lien law. The purpose of the contractor's registration act is to prevent victimizing of

the public by unreliable, fraudulent and incompetent contractors. The lien law protects persons who furnish labor and materials to the exclusion of mortgages not shown of record before the inception of the lien. . . . Interpretations of one statute supply no talisman for interpreting the other . Harbor Millwork , 6 Wn. App. at 815 -16 (emphasis added, citations omitted). Although Harbor Millwork 's statement regarding the law of fixtures does not prohibit consideration of fixture law in a contractor registration act context, here the trial court's conclusion that fixture law controlled its decision was

Id. at 737

It was plain error for the ALJ to overrule the court's holdings as the ALJ did here by ruling the violation against Appellant was valid. It is proper for the ALJ to reconsider its ruling and set aside its ruling in light of the due process violations stated here. Dismissal of this violation is proper.

"In reviewing an administrative action, we sit in the same position as the trial court and apply the Administrative Procedure Act standards directly to the agency's administrative record." Cf. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Ind.*, 112 Wn. App. 291, 296, 49 P.3d 135 (2002) (citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)), review denied, 149 Wn.2d 1003 (2003).

As the Court held, in *Dep't of Labor & Indus. v. Davison*, quoted in relevant part,

Chapter 18.27 RCW, which requires a contractor to obtain a license to engage in building enterprises, 'was designed to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors, many of whom operated a transient business from the relative safety of neighboring states.'

RCW 18.27.010(1) defines a contractor as any person, firm, or corporation who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real

estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith or who installs or repairs roofing or siding; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided herein.

Id. 126 Wn. App. 730 –at 737-738

The facts are clear. Not only are the closets designed specifically to be removed with ease, it is not fix; making it a fixture would eliminate it's unique nature in the market, plus increase cost. As the Court held, in *Dep't of Labor & Indus. v. Davison*, quoted in relevant part,

RCW 18.27.010 (1). Unless exempted, a contractor must register in order to do business in Washington State. RCW 18.27.200 (1)(a). The statutory exemptions to the registration requirement include that asserted by Woodpro, former RCW 18.27.090 (5), which provides, "The registration provisions of this chapter do not apply to . . . [t]he sale or installation of any finished products, materials, or articles . . . that are not actually fabricated into and do not become a permanent fixed part of a structure ." (Emphasis added.) See *Harbor Millwork* , 6 Wn. App. at 812 -13.

Id. 126 Wn. App. 730 at 738

Controlling, in the instant legal review, is *Each case must be decided on its own facts.* Supra.

One could summarize by quoting *Dep't of Labor & Indus. v. Davison*, quoted in relevant part,

Although this is a case where reasonable minds may well disagree, our review of the record before the ALJ reveals substantial evidence supporting the ALJ's finding that these cabinets were not installed permanently and that they were installed with removal and future remodels in mind. And even though the cabinet installation was time consuming, much of this time involved altering the cabinets, not the home. This is consistent with Davison's testimony and the ALJ's finding that the cabinets Woodpro designed were for easy removal.

Even though these particular homeowners intended to use these cabinets for their lifetime, substantial evidence supports the ALJ's finding that the cabinets were not installed permanently.

Id. 126 Wn. App. 730 at 747.

CONCLUSION

It is proper given the notice element involved; namely, to hold the case law no longer applies clearly violates fundamental principles of due process because it voids out notice to the public (Appellant) of the consequences of one's acts. To make such a ruling is improper. The ALJ cannot properly ignore standing case law, especially when it is clear the intent of the new statutes and WAC was not designed to change existing registration principles albeit by way of enforcement or registration.

Moreover, the act of placing a rail in a wall with a screw driver, selling non-fixed closets and offering to repair the non-fixed closest if that ever occurred when tied to the normal assumption of a manufacture warranty and not affiliated by testimony or facts with any type of a warranty by Appellant (i.e. no contract or notice was offered of warranty by Appellant) allows Appellant to be exempt from registration.

Over all the ruling stands as plain error. Given the intent, purpose and spirit of the relevant WAC's and statute in conjunction with case law to hold Appellant is not exempt violates due process.

Respectfully submitted,

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Date

Case # 73828-3-1

In The court of appeals of the state of Washington
Division 1

Eric Rootvik Appellant

V

Washington state Department of Labor

Affidavit of service

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

By prior arrangement with the department I did serve the department via e-mail with a true and correct copy of appellants brief and motion to deviate from standard briefing format on 7-19-2016

**Eric
Rootvik**

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