NO. 45033-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent,

v.

LYON ENTERPRISES, INC.
d/b/a JAN-PRO CLEANING SYSTEMS,

Appellant.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO AMICUS CURIAE BRIEF OF NORTHWEST FRANCHISING, INC. D/B/A COVERALL OF WASHINGTON

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I. INTRODUCTION

The Industrial Insurance Act provides broad industrial insurance coverage for independent contractors who perform work under a contract when the essence of the *work* performed under that contract is personal labor. A franchisor, like any other entity that has work performed at its request under a contract, is an employer of the worker if the essence of the work was personal labor. The Industrial Insurance Act provides broad coverage for workers to reduce suffering and economic loss of persons hurt while working. The particular business model that employers may use for that personal labor can and does take many forms.

Northwest Franchising Inc., dba Coverall of Washington (Coverall) ignores those fundamental legal principles and argues that franchisors, because of their business model, are essentially per se excluded from providing coverage for the work performed by their franchisees. Without support, Coverall also asserts that the Department previously determined that franchisors were not subject to the Industrial Insurance Act. But the Department has not changed its interpretation that the Act requires coverage for a person who performs work under a contract when the essence of the work performed under that contract is personal labor, regardless of whether the employer chooses a franchise as its business model.

This Court should reject Coverall's arguments and affirm the superior court's decision.

II. ARGUMENT

A. Lyons Directed Its Franchisees To Perform Work Under Contracts With Lyons's Customers And Is Therefore Required To Provide Premiums For The Work Its Franchisees Performed

Lyons's franchisees performed "work" under their contracts with Lyons, and the essence of that work was their personal labor. Therefore, Lyons was the employer of its franchisees and is responsible to pay premiums for their work. RCW 51.08.180. Raising a specter of "devastating impact[s]" for coverage of franchisees, Coverall seeks to immunize franchisors from industrial insurance responsibilities. *See* Coverall Amicus at 14. But the type of business model that an entity chooses to organize itself under, such as a franchise, does not control as to whether a party is an employer. Even though its franchisee workers provided personal janitorial labor, Coverall argues the opposite, saying that the "essence" of Lyons's "relationship" with its franchisees was not personal labor. Coverall's arguments fail because the janitors provided personal labor for Lyons's customers at Lyons's direction.

1. The essence of the work performed by Lyons's janitors was their personal labor

Contrary to Coverall's argument (Coverall Amicus at 11), the key issue in this case is not the essence of Lyons's "relationship" with its franchisees but the essence of the *work* performed by the franchisees under their contract with Lyons. *See Dana's Housekeeping v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 607-08, 886 P.2d 1147 (1995). Under RCW 51.08.180, an independent contractor is a covered worker if the independent contract performs "work" under a contract and the essence of the work is "personal labor." Here, the "essence" of the work under the contract with Lyons was the janitors' personal labor, as the essence of a janitorial cleaning contract is the personal labor inherent in providing such services.

Dana's Housekeeping controls here. Coverall's argument that the essence of the relationship between Lyons and its franchisees was the franchise agreement itself suffers from the same defect as the employer's argument in *Dana's Housekeeping*, and, similarly, it should be rejected. *See Dana's Housekeeping*, 76 Wn. App. at 607-08. As *Dana's Housekeeping* explains, the "essence" with which a court is concerned with when deciding if industrial insurance coverage exists is "the essence of the *work* under the independent contract, not the characterization of the

parties' relationship." *See Dana's Housekeeping*, 76 Wn. App. at 607 (emphasis in original).

Dana's Housekeeping is not distinguishable. Coverall argues that *Dana's Housekeeping* is distinguishable because Lyons, unlike the *Dana's* employer, was paying fees "for the use of a service mark, a marketing plan, and numerous other services," rather than "sharing fees for housekeeping work." Coverall Amicus at 10. Coverall misreads *Dana's* in several ways. First, the decision in *Dana's Housekeeping* was not driven by the court's belief that the employer had not provided enough to the housekeepers by way of "services" to preclude coverage. *See Dana's Housekeeping*, 76 Wn. App. at 607-08. Rather, it was driven by the court's conclusion that the housekeepers performed work for the employer when they provided cleaning services to the employer's customers and that the essence of that work was the housekeepers' personal labor. *See Dana's Housekeeping*, 76 Wn. App. at 607-08. Here, as in *Dana's Housekeeping*, the franchisees performed work for Lyons when they provided cleaning services to Lyons's customers, and the essence of the work that the franchisees performed was their personal labor. *See id.*

Second, the franchisees in this case, like the housekeepers in *Dana's Housekeeping*, *did* agree to "share a fee" in return for "referrals." The franchisees purchase a franchise plan from Lyons, under which Lyons was responsible to provide the franchisees with a certain amount of work, with Lyons retaining a percentage of the money earned on each job. CP 1907, 1928, 1930. As the cases are indistinguishable, *Dana's Housekeeping* is controlling here. *See Dana's Housekeeping*, 76 Wn. App. at 607-08.

2. By providing services to customers of Lyons, Lyons's franchisees performed work "for" Lyons

Lyons's franchisees provided services to customers of Lyons, and therefore performed work "for" Lyons. Making another argument that was considered and rejected by *Dana's Housekeeping*, Coverall also asserts that Lyons's franchisees did not provide services to Lyons, but merely provided services to Lyons's customers. Coverall Amicus at 10-12; *but see Dana's Housekeeping*, 76 Wn. App. at 608-09. However, as *Dana's Housekeeping* explains, where an independent contractor provides services to a customer of the employer, and the employer receives a benefit of some kind as a result of that work having been performed, that is sufficient to find that the independent contractor

performed work "for" the employer. *Dana's Housekeeping*, 76 Wn. App. at 608-09.

Here, all cleaning contracts that are performed under the Jan-Pro trademark are between Lyons and a customer. CP 1908. The franchisee performs the actual cleaning services, and Lyons receives at least 15 percent of the money earned on each contract. CP 1928-30. Thus, the franchisees perform the work *for* Lyons, even though the services are provided *to* a customer of Lyons's, because Lyons benefits from that work. *See Dana's Housekeeping*, 76 Wn. App. at 608-09.

3. Lyons is responsible for the work performed by its franchisees because its franchisees performed that work under contracts with Lyons and for Lyons' ultimate benefit

Lyons is responsible for the work performed by the franchisees because the janitors performed personal labor under the contract. Coverall makes the erroneous argument that although Lyons entered into franchise agreements with its franchisees, it did not thereby become responsible for the business operations of its franchisees, and, therefore, it should not be responsible for paying premiums for that work. Coverall Amicus at 11. Coverall asserts that a franchise agreement is simply an agreement that allows a franchisee to perform work using the service mark of the

franchisor, and that the business operations that a franchisee engages are its own. Coverall Amicus at 11-13.

However, Coverall's argument ignores the fact that Lyons did not simply sign franchise agreements with its franchisees and then have no further involvement in their business operations. Rather, all of the work performed by Lyons's franchisees was performed at Lyons's request, to customers of Lyons's, and the franchisees performed this work under their contracts with Lyons. The franchisees performed work under contracts with Lyons, and the essence of that work was the franchisees' personal labor.

4. The Industrial Insurance Act provides broad coverage to workers who perform work under contracts, subject only to narrow exemptions

The Industrial Insurance Act broadly covers most employment, subject to narrow exceptions. RCW 51.12.010. Coverall argues that the Department has the mistaken belief that "every worker in Washington" must be covered by the Industrial Insurance Act. Coverall Amicus at 12-13. The Department labors under no such misapprehension. The Industrial Insurance Act provides coverage for those who perform work under a contract when the essence of that work is personal labor, subject only to narrow and demanding exemptions. RCW 51.08.180; RCW 51.08.195. It follows from this that coverage does not exist where

the essence of the work performed under a contract is not personal labor, or where an exemption applies. However, as explained above, the essence of the work performed under Lyons's contracts with its franchisees was the franchisees personal labor, and no exemption applies. Therefore, Lyons is responsible for the janitor's work.

Sole proprietors are subject to coverage under the Industrial Insurance Act when, as here, they perform work under a contract with an employer and the essence of the work is their personal labor.

This Court should not consider Coverall's new argument that the janitors are excluded as sole proprietors. Coverall suggests that the exemption found in RCW 51.12.020 for sole proprietors and other independent businesses precludes Lyons's franchisees from coverage. Coverall Amicus at 13. This Court should not consider this argument as it is a new argument raised only by an amicus. *See* RAP 12.1(a); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). However, even if this Court decides to consider the argument, the argument should be rejected for two reasons.

First, RCW 51.12.020 exempts certain business owners from having to provide industrial insurance coverage for themselves. *See* RCW 51.12.020(5) (sole proprietors or partners); (8) (corporations); (13) (LLC). However, it does not address whether the individual is working for an employer providing personal labor under a contract.

Second, Coverall's argument is overbroad and would create a conflict between RCW 51.08.180 and RCW 51.12.020. RCW 51.08.180 provides that all persons providing work under a contract for an employer are covered workers if the essence of the work is personal labor, while RCW 51.12.020 exempts all sole proprietors and partners from coverage. The court must give both statutes effect. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000).

It should be noted that all contractors who have not otherwise organized themselves as another type business entity would be sole proprietors, since all that is required to create a sole proprietorship is for an individual to decide to engage in a for-profit business. *See Dolby v. Worthy*, 141 Wn. App. 813, 173 P.3d 946 (2007) ("A sole proprietorship is the simplest form of doing business because no legal entity is created"). Under Coverall's apparent interpretation of the statutes, no independent contractor would ever be covered because all are sole proprietors by default if they have not registered as another type of business; a result not

contemplated by the Legislature as it would render RCW 51.08.180 meaningless.

To give effect to both statutes, RCW 51.08.180's broad definition of "worker" should be read to embrace all work performed under a contract, the essence of which is personal labor, regardless of whether the person who is performing that manual labor happens to own a sole proprietorship business. However, a sole proprietor who does not perform personal labor for an employer under a contract, and who is in business for him or herself, would be excluded under RCW 51.12.020. Such a reading gives effect to both statutes without producing the absurd result Coverall apparently seeks here. Furthermore, such a result would be contrary to the fundamental purpose of the Industrial Insurance Act, which is to provide broad coverage when one performs personal labor under a contract, regardless of the label the parties attach to their relationship. *See* RCW 51.12.020; *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 132, 827 P.2d 1085 (1992).

B. This Court Should Not Consider Coverall's Argument That The Department Advised Coverall That Its Franchisees Were Exempt From Coverage Under The Industrial Insurance Act, But, Even If This Court Considers The Argument, It Fails

This Court should decline to consider Coverall's various arguments that are based on facts and legal issues peculiar to Coverall.

Coverall, attaching documents it obtained through a request under the Public Records Act, argues that the Department's past treatment of Coverall establishes that the Department previously held the view that franchisees are per se exempt from coverage. Coverall Amicus at 4-8. This Court should not consider this argument, as it is a legal argument raised only by an amicus. *See* RAP 12.1(a); *Long*, 60 Wn.2d at 154.

Furthermore, Coverall's argument necessarily depends on its offer of new evidence, in the form of appendices attached to its brief that are not part of the current record. Under RCW 51.52.115, a court, in reviewing a decision of the Board of Industrial Insurance Appeals (Board), only considers the evidence that is contained in the Board's record. The only exception to this is that a party may offer new evidence to a superior court judge if the evidence relates to an irregularity of the proceedings that were used by the *Board* if there is no evidence of those irregularities in the Board's record. RCW 51.52.115. That narrow exception does not apply here, as Coverall is offering new evidence regarding the Department's past practices, not evidence regarding the procedures that were used by the Board while the Board was hearing Lyons's appeal from the Department's audit. Also, when it applies, RCW 51.52.115 authorizes a superior court to hear new evidence under oath, but it does not allow an appellate court

to consider new materials that are attached as an appendix to an amicus brief. *See also* RAP 9.1(a).

In any event, even if this Court considers Coverall's novel legal argument and its newly offered evidence, Coverall's argument fails, as Coverall has not proven that the Department had ever taken the legal position that franchisees are per se exempt from coverage. Coverall effectively equates the lack of a prior case regarding whether or not a franchisor is responsible for premiums as establishing that the Department has fundamentally altered its interpretation of RCW 51.08.180 as it relates to franchisors and franchisees. However, that conclusion does not follow from that premise. Whether an alleged employer is responsible for work performed by another person depends on a large number of factual and legal issues, and one cannot reasonably infer a change in the Department's interpretation of a statute based on a lack of published, or even unpublished, cases regarding a given issue.

Coverall offers new evidence that indicates that the Department conducted an audit of Coverall in 1991, and that the Department's understanding at that time was that Coverall sold "janitorial supplies and franchises" but did not "do the services themselves." Coverall Amicus, Appendix (App.) One at 5. The materials also show that the Department assessed Coverall for unpaid premiums associated with its salesman who

provided training to the "franchise people." Coverall Amicus, App. One at 5. However, the materials offered by Coverall do not show that the Department advised Coverall that it was not—and would never be—responsible for paying premiums for a franchisee under any circumstances.

Furthermore, even assuming that the materials support the inference that the Department did not find Coverall to be responsible for the work performed by its franchisees at the time of its 1991 audit, the materials do not establish what particular information the Department relied upon in reaching that conclusion. The new evidence offered by Coverall is inadequate to support any assumption regarding what the Department's legal interpretation of the Industrial Insurance Act—as it relates to franchisors and franchisees—was at that time. Indeed, the incompleteness of this information underscores one reason why appellate courts should not consider new arguments raised only by an amicus: the record often is, as it is here, insufficient to support any reasoned argument regarding the newly raised issues.

Finally, even assuming for the sake of argument that the Department's interpretation of the law changed at some point after 1991. Coverall's argument that the Department is precluded from adjusting its view of the law until and unless it adopts a new rule is incorrect. Coverall

Amicus at 7-8. Contrary to its contention, *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009), does not stand for the proposition that a state agency may not change its interpretation of a statute until it adopts a rule that reflects its changed views. In *Dot*, the Supreme Court did not approve of the agency's change in legal interpretation because it did not agree with the agency's most recent interpretation of the relevant statute. *See id.* The Court thought the statute needed to be amended in order for it to mean what the agency believed it meant. *Id. Dot Foods* did not hold that an agency may not ever adjust its understanding of the meaning of a statute under any circumstances absent a statutory amendment. *See id.*

Here, the Department's position does not rely on this Court deferring to its interpretation of an ambiguous statute. RCW 51.08.180, which governs when an employer is responsible for the work performed by an independent contractor, unambiguously provides that such coverage exists when the essence of the contract is personal labor. Nothing in the statute suggests that a per se exemption applies to franchisors who use franchisees to perform work. Rather, the test in such a case is whether the essence of the work performed under that contract is personal labor, and RCW 51.08.180 cannot be read otherwise.

Coverall also argues that the Department made a "demonstrably false" statement in its brief that Lyons's had, "without citation to the record," argued that the Department had changed its interpretation of the Industrial Insurance Act as it relates to franchisors. *See* Coverall Amicus at 5-6 (citing Resp't's Br. at 30). First, it should be noted that the Department did not state on page 30 of its brief that Lyons had made an argument "without citation to the record." Resp't's Br. at 30. The Department stated that "Lyons also warns of dire consequences for other franchisors if it is found to be a covered employer, and asserts—without support in the record—that the Department has historically recognized that franchisors should not be covered under the Industrial Insurance Act."

The Department's statement is correct. The record does not support the conclusion that the Department had historically taken the view that franchisors are per se exempt from coverage and later altered its interpretation of the statute. Coverall argues that the Department's statement in its brief was false because Lyons provided evidence that it was not found liable for premiums for its franchisors in the 2005 audit. Coverall Amicus at 5-6. However, the Department's statement that the record did not show that it had changed its legal interpretation of the statute is not contradicted by the existence of the 2005 audit report. *See* CP 875-79.

First, the 2005 audit report does not contain the words "franchise," "franchisor," or "franchisee": it speaks only in terms of "subcontractors" who performed work for Lyons. CP 875-79. Second, the 2005 audit found that Lyons was responsible for two of the subcontractors, but not for the rest, because two of the subcontractors did not meet the six-part exemption found in RCW 51.08.195. CP 875-79. The record does not establish whether those two subcontractors were "franchisees" or another type of independent contractor. In any event, the 2005 audit report does not indicate that at one point the Department held the legal view that franchisors were never responsible for the work performed by their franchisees.

Further support for the fact that the Department has not radically altered its interpretation of the law as it relates to franchises comes from the testimony of Jerold Billings, who asserted that no such change had occurred. CP 2256. Coverall suggests that the testimony of Mr. Billings should be disregarded because Mr. Billings had been instructed that he had to testify to that, whether it was accurate or not. Coverall Amicus at 6. As this argument was also not raised by any party, this Court should decline to consider it. *See* RAP 12.1(a); *Long*, 60 Wn.2d at 154. But, in the event the Court considers it, the argument fails for several reasons.

First, the materials that Coverall provides to support this new argument are not contained in the record, and, therefore, cannot properly be considered by this Court. *See* RCW 51.52.115. Second, even if this new evidence is considered, it shows only that the Department's auditors were advised that they should testify as to what they understand the Department's policies to be, not as to whether they personally supported those policies. *See* Coverall Amicus, App. Two at 3. Coverall's suggestion that Mr. Billings was instructed to falsely testify that there was no change in the Department's policies is baseless and does not merit consideration by this Court.

Mr. Billings also testified that the Department looks to see if the essence of the work performed under the contract is personal labor. *See* CP 224-56. This interpretation does not depend on the type of business model an employer uses: rather, it depends on the type of work performed. This approach is not only consistent with Department policy, it also carries out a key mandate of the Industrial Insurance Act, which is ensuring that workers are covered when they perform personal labor under a contract.

III. CONCLUSION

The Court should reject Coverall's call for a per se exclusion for franchises for industrial insurance coverage. Such a rule finds no support

in the statute and is inconsistent with the long-standing policy in this state to broadly provide industrial insurance in order to reduce economic loss and suffering, and provide sure and certain relief to those injured performing work. RCW 51.04.010; RCW 51.12.010. The Department requests that this Court reject the arguments in the amicus curiae brief of Coverall and that it affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 24 day of June, 2014.

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DECLARATION OF MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor and Industries' Answer to Amicus Curiae Brief of Northwest Franchising, Inc. d/b/a Coverall of Washington and this Declaration of Mailing to all parties on record as follows:

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