97398-9

No. 78796-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DELIVERY EXPRESS, INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Delivery Express, Inc. ("DEI") asks this Court to accept review of the Court of Appeals published decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Division I filed its published opinion in this case on June 10, 2019. It is set forth in the appendix at pages 1 through 19.

C. ISSUES PRESENTED FOR REVIEW

1. In a matter of first impression for this Court, does the proviso to RCW 51.08.180 exempt DEI owner/operators from the statute's definition of "worker" where those owners lease a "truck" within the meaning of the statute to DEI?

2. Under RCW 51.08.180 and this Court's *White* decision, is DEI exempt from providing industrial insurance to its owner/operators because they are not workers the essence of whose contract is "personal services" where they provide more than mere hand tools in the relationship?

3. Does RCW 51.12.020 exempt DEI owner/operators from IIA coverage as sole proprietors?

D. STATEMENT OF THE CASE

Division I's opinion correctly sets forth the facts herein, op. at 1-6, but several factual points are omitted or bear additional emphasis.

DEI has been a licensed motor carrier in Washington since 1997. CABR 304. Beginning in 2003, to build its fleet of available equipment,

DEI began contracting with owner/operators[1] to lease their vehicles – vehicles suitable for delivering various payloads – with drivers. *Id.* at 305-06, 315-47. The vehicles included semis, mid-sized trucks, pick-ups, vans and automobiles. *Id.* at 306. DEI would not contract with the owner/operators unless they had not brought vehicles with them because DEI owns no vehicles[2] and instead leased from these owner/operators all vehicles necessary to conduct its delivery business. *Id.* at 305-06, 315-47.[3] As Hamilton testified: "Since this was about building a fleet, we did not care who operated the delivery vehicles, just so long as they were qualified to drive." *Id*. at 306.

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[1] An owner/operator in the transportation industry is distinguished from a contract driver. *Penick v. Employment Sec. Dep't*, 82 Wn. App. 30, 35, 917 P.2d 136, 140, *review denied*, 130 Wn.2d 1004 (1996). The practice of using owner/operators allows more efficient distribution of transportation services, which would be hampered by each common carrier owning a fleet of vehicles and employing permanent drivers, particularly in a cargo/property delivery business where service demands fluctuate. *See generally*, Douglas C. Grawe, *Have Truck, While Drive: The Trucking Industry and the Use of Independent Owner-Operators Over Tim*e, 35 Transp. L.J. 115 (2008).

[2] David Hamilton testified before the Board of Industrial Insurance Appeals ("Board") that DEI had no vehicles of its own and leased any vehicles for its delivery business from owner/operators. AR 11/14/14:88. The Department of Labor & Industries ("Department") auditor initially testified that the vehicles were not necessary because the delivery persons could walk, take the bus, or ride a bicycle. On cross examination, however, she conceded that the vehicles were indispensable to DEI completing its services. AR 5/1/15:20-21. In fact, the Department's Field Audit Reference Manual (Exhibit 563) stated at page 104, "The independent contractors of necessity had to own or supply machinery in the form of a car, pick-up, or other motorized machine in order to accomplish their deliveries."

[3] The owner/operators are paid a percentage of the gross revenue from their operations with DEI. CABR 305-06, 315-47. They are responsible for all of their own operating costs, and are free to employ drivers to operate their vehicles. *Id.* These owner-operators are also free to lease their equipment to other carriers. *Id.*

The Department determined that during 2010-2011, the owner-operators with whom DEI contracted were "workers" as defined in RCW 51.08.180 for whom DEI failed to pay industrial insurance premiums. CP 8. It issued a notice and order to pay on September 19, 2012 for approximately $843,000 including interest and penalties. *Id*. The Board overturned some of the Department's assessments and penalties. *Id*. The Board concluded that some of DEI's owner/operators were exempt because they leased "box trucks"[4] to DEI, as opposed to other kinds of vehicles. CP 8, 36. However, the Board upheld the Department's notice and order because most of the owner/operators did not satisfy this Court's *White* test for exemption from coverage under RCW 51.08.180's definition of a "worker." CP 35-36.[5]

The trial court affirmed the Board's decision, CP 217-23, as did Division I in its published opinion.

[4] The Board did not define "box trucks" except to say that they are large. CP 35.

[5] Although DEI argued that the Department had failed to apply the distinct exemption from coverage for truck owner/operators contained in the proviso to RCW 51.08.180, the Board did not address the proviso in its decision. CP 32-49. The Board made passing reference to certain elements of the proviso, but failed to address or apply that part of the law. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[6]

(1) Division I Misinterpreted RCW 51.08.180

Whether a firm must provide industrial insurance for a contractor turns on whether that person is a "worker" as defined in the IIA. RCW 51.08.180. *See* Appendix. Under that statute, an employer can be exempted from paying premiums where the proviso to RCW 51.08.180 applies to a person or entity is the owner/operator of a truck, *or*, more generally, the person or entity is a contractor the essence of whose contract is not "personal services" because they bring more than ordinary hand tools to the job.[7] Under either facet of RCW 51.08.180, DEI was exempt from paying industrial insurance premiums for its owner/operators.

(a) Division I Misinterpreted the Proviso to RCW 51.08.180

RCW 51.08.180's proviso expressly excludes from its definition of "worker" those individuals who own and operate their own vehicle under a lease to a motor carrier. The proviso can be broken down into five

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[6] The standard of review here is *de novo* because the case involves statutory interpretation, a question of law, *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012); *State v. Wentz,* 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Moreover, under RCW 34.05.570(3)(d) the Board's conclusions of law, that are also reviewed *de novo*. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 895, 357 P.3d 59 (2015).

[7] On appeal for the first time, the Department conceded that the proviso's exclusion was distinct from *White*'s more general analysis. Br. of Resp't at 13-14.

separate factual elements: the (1) *owner* of a (2) *truck* must (3) *operate it* under a (4) *lease* to a (5) *motor carrier*. Owner/operators who satisfy all these elements are not "workers" covered by the Industrial Insurance Act, Title 51 RCW ("IIA"). *See Dep't of Labor and Indus. v. Mitchell Bros. Truck Lines, Inc.* 113 Wn. App. 700, 709-10, 54 P.3d 711 (2002) (owner-operators who entered into a lease-lease back arrangement with motor carrier nevertheless "owned" their trucks and were excluded from coverage under RCW 51.08.180).

Although DEI consistently argued below that the proviso to RCW 51.08.180 applied to its owner/operators, both the Department and the Board ignored the proviso entirely, focusing solely on this Court's decision in *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956). CP 32-48.[8]

DEI's contractors were the owners (element 1) and operators

[8] This disregard is explicit in the Board's refusal to interpret the word "truck," which would be necessary for the proviso to be properly applied. CP 36. Instead of applying the proviso, the Board's Industrial Appeals Judge concluded that only the *White* test for whether a person is an independent contractor was relevant:

> I do not need to and will not define a truck in this opinion. The analysis should turn on whether the equipment being analyzed is *ordinary equipment found in the general populace or specialized equipment no found in the general populace*. I believe this type of analysis allows the analysis of box trucks to follow the main stream of worker's compensation reasoning without diverting into a side argument about of the definition of trucks.

CP 36 (italics in original).

(element 3) of their vehicles, and their agreements were with DEI, a motor carrier (element 5). The vehicles here were leased by DEI (element 4). CABR 135-69.[9] The real issue here is the second element – was a "truck" leased?[10]

Division I correctly determined that the proviso constitutes a separate basis for exempting DEI from paying premiums, op. at 10,[11] but it then misinterpreted whether the vehicles at issue here were a "truck"

[9] In defiance of reality, the Board found as a matter of fact that the agreements at issue were not "leases," without defining that term or even mentioning the proviso. CP 41. It stated, for example, that there were other terms in the agreement such as warranties, compensation, payment and the like, as if these were suggestive of a non-lease arrangement. However, there was no legal definition of what a "lease" is. *Id.* That "finding" was not supported on this record. *See* Appellant's Br. at 19-25; Reply Br. at 8-14. Where DEI could not have performed its delivery business without the owner/operators' vehicles, and DEI had no delivery vehicles of its own, it is clear that the leasing of vehicles to execute its delivery business was vital. Division I did not address whether "leases" were present in its opinion.

[10] The Department has never defined either the term "truck" or the term "lease" as they are used in the proviso. The Department's two witnesses admitted that neither the IIA nor the Department's implementing regulations, define "truck" or "lease." CABR 925-27. The Department's litigation specialist, Eliezar Eidenbom, astonishingly admitted that each auditor and each litigation specialist (the staff members who evaluate audits on reconsideration) make up their own definitions. *Id*. He conceded there is no uniformity to the definition. *Id*.

[11] This point is confirmed by the proviso's legislative history. Among the legislative history materials on SB 4558 (1982) (*see* Appendix to DEI reply brief) is a January 27, 1982 staff memorandum from Ken Nichols, an attorney for the Senate Commerce & Labor Committee to Committee Chair, Senator J.T. Quigg regarding a possible amendment to the bill adding a reference to the "personal labor" aspect of RCW 51.08.180. Nichols noted that where the bill addressed truck owner/operators adding suggested "language regarding the lease of the truck not having as its essence the personal labor of the trucker would only be *redundant*." (emphasis added).

under the proviso's terminology.[12] The term "truck" is not defined in RCW 51.08.180. A "truck" is defined as "a wheeled vehicle for moving heavy articles: such as…a strong horse-drawn or automotive vehicle (such as a pickup) for hauling…". *Merriam-Webster's Collegiate Dictionary* 1343 (11th ed. 2014). Division I relied upon a colloquial understanding of the term from the dictionary definition, op. at 12,[13] but then largely ignored the statute's context. It referenced RCW 81.80.010(7)'s broad definition of a common carrier as someone who transported property "by motor vehicle for compensation," but it asserted that the Legislature was obliged to specifically adopt the legislative term "motor vehicle" from that definition if that's what it intended in RCW 51.08.180's proviso, if it intended to apply the term "truck" to all motor vehicles. Op. at 13. But

[12] With regard to terms in a statute, courts may look to dictionary definitions, including standard dictionaries for non-legal terms or legal dictionaries for legal terms. *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 443, 359 P.3d 753 (2015). But dictionary definitions do not control if a term of art is involved. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

[13] Indeed, the Department argued that statutory context indicates a "truck" is "a large automotive vehicle used to transport goods for commercial purposes." Br. of Resp't at 33. The Department stated that a "truck" should be understood by its common ordinary meaning, but then inserted the ambiguous term "large" and then baldly asserted that "pickups, SUVs, and passenger cars" do not meet the common meaning of "truck." *Id*. But such a colloquial understanding is itself flawed. SUVs and vans are often built on what the auto industry itself describes as a "truck frame." And common carriers like UPS, for example, use all manner of trucks, including "small trucks and vans." *E.E.O.C. v. United Parcel Serv., Inc.*, 306 F.3d 794, 796, *opinion amended on denial of reh'g*, 311 F.3d 1132 (9th Cir. 2002).

that approach to statutory interpretation defies the concept of "context" to a statute and would require the Legislature to literally define every word in an enactment to make its intent plain. That is contrary to the concept of "context" this Court has established.[14]

Statutory context of the proviso *is* relevant, as noted by this Court in *Campbell & Gwinn*, particularly where Washington motor vehicle laws also provide suitable definitions of "truck." *ATU Legislative Council of Wash. St. v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002) (Legislature is presumed to be aware of its own enactments). The motor vehicle laws, which often predate the proviso by decades, contain a specific definition of "truck" that expands the concept of a "truck" beyond Division I's narrow vision of traditional large transport vehicles. Division I simply refused to consider the fact that the Legislature in RCW 46.04.653 broadly defined a "truck" as, "every motor vehicle designed, used, or maintained primarily for the transportation of property." Op. at 12.[15] The Department has even adopted this definition in its regulations implementing the

[14] The Court doubled down on its erroneous interpretation of RCW 51.08.180's context when it asserted that reliance on the Legislature's own definition of a "truck" constitutes a "logical fallacy." Op. at 13.

[15] The same RCW chapter also defines "motor truck," as "any motor vehicle designed or used for the transportation of commodities, merchandise, produce, freight, or animals." RCW 46.04.310. This definition looks to the *function* for which the vehicle is used. There is little question that under these legislative definitions, the function of the vehicles DEI leased was commercial – transporting property or merchandise.

Washington Industrial Safety and Health Act. WAC 296-865-099. The same regulation distinguishes the term "truck" from the term "semitruck." *Id.* Thus, any motor vehicle designed, used or maintained *primarily for transporting property*, is a "truck," regardless of its size or configuration.

Additionally, Division I failed to note that the Attorney General broadly construed the term "truck" in the licensing/taxation setting. *See* AGO 1915-16 p.356 (automobile with trailer attached used to haul goods must be licensed as a truck); AGO 1927-28 p. 4 (car with box attachment must be licensed as a truck); AGO 1965-66 No. 119 (a self-propelled motor vehicle used by a farmer to transport fuel and oil to maintain farm equipment was a truck and not exempt from licensure as a farm implement).

Having these different definitions of transport vehicles at its disposal, the Legislature drafted RCW 51.08.180's proviso to say "truck." Although the Legislature could have limited the definition, it did not. *Nothing* in the legislative history of SB 4558 (appendix to DEI's reply br.) indicates that the Legislature intended to address any minimum size or configuration of a vehicle qualifying as a "truck" under the proviso. Rather, the Legislature's concern was about recognizing the industry practice of leasing vehicles to transport goods and have the vehicles' owners operate their own equipment, as opposed to having carrier

employees operate the equipment.

This Court must presume the Legislature meant exactly what it said – *any motor vehicle* that is used primarily to transport property is a "truck." The definition of a "truck" in the proviso to RCW 51.08.180 is a statutory interpretation question of first impression.[16] Division I's interpretation of the proviso to RCW 51.08.180 was erroneous in light of the statutory definitions of a "truck" and pertinent AGOs, particularly where any ambiguity in such a taxing statute is strictly construed against the Department as the taxing authority. *Sacred Heart Med. Ctr. v. Dep't of Revenue*, 88 Wn. App. 632, 636-37, 946 P.2d 409 (1997). Review is merited to give clarity to the proviso for Washington's delivery and trucking industries. RAP 13.4(b)(4).

(b) Division I's Interpretation of This Court's *White* Decision Is Erroneous as to the Definition of a "Worker"

In addition to the proviso's explicit carrier exception to the definition of worker in RCW 51.08.180, the statute also notes that a contractor is a covered "worker" only if the essence of the contract is that

[16] First impression statutory interpretation questions are often the subject of review by this Court either under RAP 4.2(a)(4) or RAP 13.4(b)(4). *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (first interpretation of 1981 tort reform legislation); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city's response to a Public Records Act request was sufficient to trigger the PRA's statute of limitations); *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (interpretation of statute addressing repayment of industrial insurance benefits).

contractor's personal labor. RCW 51.08.180. Division I's interpretation of RCW 51.08.180 is at odds with this Court's interpretation of that statute in *White*, a decision that has stood for 63 years, meriting review. RAP 13.4(b)(1).

When this Court construes a statute, as the *White* court construed RCW 51.08.180, such construction "becomes as much a part of the legislation as if it were originally written into it." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 137, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077 (1998). And the Court of Appeals is not free to disregard this Court's resultant treatment of the statute. *In re Marriage of Larson and Calhoun,* 178 Wn. App. 133, 143, 313 P.3d 1228, *review denied*, 180 Wn.2d 1011 (2013) ("We are not free to ignore binding Washington Supreme Court precedent and we err when we disregard it."). *White*'s interpretation of RCW 51.08.180 is part of the statute.

But Division I ignored *White* by altering its elements in a fashion it was not free to do. Following its decision in *Henry Industries v. Dep't of Labor & Industries,* 195 Wn. App. 593, 381 P.3d 172 (2016), Division I concluded that the essence of the agreements between the owner-operators leased trucks was personal labor, not DEI's ability to use the owner-operators' vehicles for deliveries. Op. at 6-10. *Henry Industries* was

wrongly decided and this Court should grant review here to so hold.[17]

In addressing the "essence" of the contract as a contractor's "personal labor," the *White* court established three disjunctive factual tests for determining this "essence," and thereby determining if an individual is truly an independent contractor:[18]

> The requirement that the contract of any independent contractor…must be one 'the essence of which is his personal labor' clearly indicates that it was not intended to cover an independent contractor (a) who must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract, …(b) who obviously could not perform the contract without assistance, or (c) who of necessity or choice employs others to do all or part of the work he has contracted to perform….

48 Wn.2d at 474 (emphasis added). Any of these three tests, if met, excludes the contractor from the statutory definition of "worker." *Id.*

Most relevant here, the *White* court concluded that when a

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[17] Division I in *Henry Industries* did not address RCW 51.08.180's proviso because Henry Industries was not a motor carrier, as was DEI here. It was a pharmaceutical wholesaler. That case is factually distinguishable from this case because the company *was* focused on drivers. It was delivering controlled substances and needed to be certain that the drivers were not only competent, but reliable. 195 Wn. App. at 598-99.

[18] In *White*, a sawmill hired individual loggers to fell nearby timber. *Id.* at 474-75. It contracted with a local couple, the Whites, to process the logs. *Id.* at 475. The sawmill hired the Whites because they owned an engine that could be used to process the logs. That engine, known as a "donkey engine," was a single-cylinder steam engine that could pull large loads around a logging site without the use of donkeys or other animal power. David Wilma, *John Dolbeer Invents the Donkey Engine and Revolutionizes Logging in August 1881*, http://www.historylink.org/File/5331 (March 1, 2003). During the logging work, Lucinda White was injured and filed a claim for personal injuries under IIA. The Department rejected the claim, concluding that Lucinda was an independent contractor not covered under the definition of worker in RCW 51.08.180. This Court affirmed the Department's conclusion.

contractor *of necessity must provide machinery or equipment* (as opposed to ordinary hand tools) to do the job, the *essence* of the contract is not personal labor, and the contractor is not a "worker" covered by the IIA. *Id.* The Court distinguished between "equipment" and "hand tools." *Id*. at 474. The Court further distinguished between "expensive machinery" and "hand tools." *Id*. at 477.

Below, the Board deleted this Court's phrase "machinery or equipment" from the first *White* test and substituting its own rule that "ordinary hand tools" meant "equipment outside the access of the general population." CP 35. That phrase does not appear anywhere in *White,* nor can it be implied from this Court's decision. The Board dismissed the vehicles DEI owner/operators brought to the relationship, taking the unsupported position that a vehicle is not "expensive machinery" unless it is a box truck. CP 36.

The arbitrary and shifting nature of the Board's analysis is clear when the analysis below is contrasted with its own previous administrative decisions, *In Re: Yellow Book Sales*, 2011 WL 1903472 (2011).[19] In *Yellow Book,* a telephone book distribution company contracted with individual automobile owners to deliver the books. *Id*. at 1. The

[19] *Yellow Book* is a significant Board decision. RCW 51.52.160. It is persuasive authority and is entitled to deference. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

Department concluded that the essence of these contracts was the personal labor of the contractors, and assessed industrial insurance taxes. The Board reversed, finding:

> The independent contractors of necessity had to own or supply machinery in the form of a car, pick-up, or other motorized machine in order to accomplish their deliveries.

Id. at *2. The language "of necessity" and "supply machinery" is straight from *White*, and the Board concluded that automobiles qualified as "machinery" under *White*, and not "hand tools."[20]

To compound the confusion surrounding the *White* test, Division I in *Henry Industries* claimed that the first *White* test is only met if the equipment the independent contractor brings to the business relationship is "special," as opposed to "ordinary," equating such vehicles with "hand tools." 195 Wn. App. at 608. It then concluded that cars are "ordinary." *Id.* at 608-09. The *White* decision says nothing about whether the relevant "equipment or machinery" that the contractor brings to the relationship must be "specialized," as the *Henry Industries* court ruled.

Division I's opinion here only makes matters worse. The court

[20] Obviously, the Board in *Yellow Book* found that automobiles qualified as the "machinery" contemplated in *White,* but it changed the test in this case. In doing so without explanation, the Board failed in its duty to apply the law consistently. *Seattle Area Plumbers v. Wash. State Apprenticeship and Training Council*, 131 Wn. App. 862, 879, 129 P.3d 838 (2006) ("Agencies may not treat similar situations in different ways"). This only lend credence to DEI's contention that this Court should definitively apply its precedent in *White*.

correctly articulates this Court's holding in *White* as to hand tools, op. at 7, but then adopts the analysis of the *Henry Industries* court that what this Court meant in *White* is that the essence of a contract is a worker's personal labor for purposes of RCW 51.08.180 only if the worker brought "specialized equipment" to the relationship, a term *nowhere* defined by Division I in *Henry Industries* or in the opinion here. *Id*.[21]

The court further concluded, as a factual matter, that the essence of DEI's agreements with its owner/operators was their personal labor. Op. at 7-10. But this is belied by the critical fact that *DEI owned no vehicles* to perform the requisite delivery services. Plainly, a delivery company without a means to deliver commercial materials is a misnomer, at best. As noted *supra*, DEI was contracting for a deliver fleet, not drivers.

Additionally, the essence of the agreements was not "personal services" because DEI's agreements contemplated that its owner/operators were to provide *vehicles* and that owner/operators could hire others to operate the equipment. In 2000, DEI adopted its earliest version of its

[21] Because *White's* construction of RCW 51.08.180, and the proviso to RCW 51.08.180 as to owner/operators involve *distinct analyses*, as Division I conceded here, to give each part of RCW 51.08.180 meaning, the *proviso* must extend to any motor vehicles in addition to the type of "expensive machinery" which would clearly fall within *White.* Alternatively, *White* must be construed to apply to vehicles which are not trucks but which are, by themselves, "expensive machinery." To hold otherwise would violate the principle that "[c]ourts should not construe statutes to render any language superfluous." *State v. Riles,* 135 Wn.2d 326, 340, 957 P.2d 655 (1998); *In re Det. of Kistenmacher,* 163 Wn.2d 166, 180, 178 P.3d 949, 956 (2008). The proviso dates from 1982 so it was clearly intended to address something not covered by *White*, a 1956 decision.

contractor agreement. CP 315-21. Section 1 stated that "For the duration of this Agreement [Contractor promised] *to furnish and to operate the above-described motor vehicles* for use in Carrier's transportation Service." CABR 315 (emphasis added). This language remained unchanged in the three modifications of this contract that DEI adopted between 2000 and 2011. CABR 322-49.

Moreover, all four versions of the agreement used by DEI between 2000 and 2011 contain identical provisions regarding operation of the leased equipment by individuals other than the owner/operators. Paragraphs 4(d), 4(f), 4(g) and 8(a) of each of the four agreements contemplated that the owner/operators could hire drivers for their vehicles. The final version of the agreement even added paragraph 4(i) which specifically directed how the drivers hired by DEI owner/operators were employees for whom the owner/operators were responsible as to taxes, liability, and supervision. CABR 338.

The language in the four versions of the agreement made it clear that DEI did not care who operated the leased equipment, just as long as the drivers were duly qualified to do so, unlike the situation in *Henry Industries*. The essence of these four versions of the lease agreement was *the equipment*. Division I's opinion glosses over this critical point.

Simply put, the interpretation of RCW 51.08.180 in this Court's

White decision is at odds with the interpretation of that statute by Division I in *Henry Industries* and in this case. Under the *White* formulation, if a person or entity brought more than hand tools, i.e. expensive equipment, to the relationship, the essence of the contract was not that contractor's personal services, and the contractor was not a covered RCW 51.08.180 "worker." Division I has transformed that requirement to "specialized equipment," a limitation not required by the statutory language or contemplated by this Court in *White*. Division I further ignored the fact that services provided by DEI's owner/operators were hardly "personal" where others could perform them. Review is merited. RAP 13.4(b)(1).

(2) Division I's Interpretation of the Sole Proprietor Exclusion in RCW 51.12.020 Is Contrary to This Court's *Fankhauser* Decision

In enacting RCW 51.12.020 (*see* Appendix), the Legislature unambiguously precluded the IIA's application to sole proprietors. "In a clear and unambiguous language, the legislature has described the only exemption from the mandatory coverage. Sole proprietors and partners are exempted." *Jepson v. Dep't of Labor & Indus*., 89 Wn.2d 394, 408, 573 P.2d 10 (1977);[22] *Dep't of Labor and Indus. v. Fankhauser,* 121 Wn.2d 304, 849 P.2d 1209 (1993).

[22] The version of RCW 51.12.020 then in effect contained sole proprietor exclusion. It did not exclude corporate officers. The Court concluded that RCW 51.08.180 covered corporate officers because RCW 51.12.020 did not exclude them from coverage.

In *Fankhauser,* this Court held that individuals suffering a continuous injury (asbestos related diseases) contracted through exposure while a "worker" were eligible for benefits even though they manifested the disease later, while they were sole proprietors who had not elected coverage. *Fankhauser* concluded that while RCW 51.12.020(5) excluded the claimants from mandatory coverage, the last covered employment (before the claimants became sole proprietors) did afford coverage under the IIA. *Fankhauser* supports the conclusion that sole proprietors are not covered under the IIA.

Despite this Court's unambiguous decisions in *Jepson/Fankhauser*, the *Henry Industries* court said it was trying to "harmonize" RCW 51.08.180 (which defines "worker" for purposes of coverage), RCW 51.08.195 (which is the six part safe-harbor test for excluding coverage even for an individual otherwise deemed a "worker" under RCW 51.08.180) and the coverage exclusions in RCW 51.12.020. *Henry Industries,* 195 Wn. App. at 623-24. That court didn't "harmonize" anything. It simply decided not to apply RCW 51.12.020 to owner/operators.

The Board here declined to apply the unambiguous provisions of RCW 51.12.020 and found DEI's owner/operators, who were sole proprietors or corporate officers, to be covered workers. CP 41-42. In

doing so, the Board not only contravened *Jepson*/*Fankhauser*, it contravened its own precedent.[23]

Division I here merely adopted the *Henry Industries* court's alleged "harmonization" of RCW 51.08.180 and RCW 51.12.020. Op. at 17-18. In so doing, it erred. In "harmonizing these separately enacted statutory provisions, the *Henry Industries* court gutted the exclusions in RCW 51.12.020 by ignoring two basic rules of statutory construction: give effect to the entire statutory framework, *Campbell & Gwinn*, 146 Wn.2d at 11 and determine the Legislature's intent "from the statute's plain language." *Id. Henry Industries* erroneously concluded that an individual who did business as a sole proprietor still had to satisfy the exemption requirements in RCW 51.08.195, or that person would still be deemed a "worker" covered under the IIA. The court's logic rendered RCW 51.12.020 meaningless. Any facts that satisfy RCW 51.08.195's six-part test would obviate the need for RCW 51.12.020's exclusions. Such construction cuts against the rule of statutory construction requiring the

[23] The Board's Significant Decision, *In Re: Doug Pittmon, et ux., DBA Bud Ishida & Associates, Div. III*, 1989 WL 164546 (1989), recognized that RCW 51.12.020 is the Legislature's pronouncement that individuals who own their own businesses as sole proprietors are beyond IIA's reach. *Id.* at *5. In recognizing that RCW 51.12.020(5) excludes sole proprietors from coverage, the Board observed that "the Legislature contemplated that individuals who are engaged in a business for themselves, hold themselves out to the public as independent business people, or otherwise *act and/or operate as independent entrepreneurs*, should be excluded from the mandatory coverage of the Act." *Id.* (emphasis added).

courts to give effect to each provision of the law.

Where the owner/operators with whom DEI contracted: (a) had profit and loss risk and reward from their businesses; (b) held Washington state business licenses; (c) held WUTC motor carrier licenses; (d) paid state business and occupation taxes; (e) reported income on IRS Form 1040, Schedule C (self- employment income) and (f) were free to do business with DEI's competitors, it is clear that they are exempt "sole proprietors."

Yet again, Division I's decisions in *Henry Industries* and here are in stark contrast to this Court's interpretation of RCW 51.12.020 in *Jepson/Fankhauser*. Review is merited. RAP 13.4(b)(1).

F. CONCLUSION

Division I's published opinion misinterprets the proviso in RCW 51.08.180, and is contrary to this Court's opinions in *White* and *Fankhauser.* Review is merited. RAP 13.4(b).

This Court should reverse Division I's opinion and the Board's decision. The Department's assessment against DEI should be dismissed, and DEI should be awarded its costs and attorney fees.[24]

[24] This Court's rules allow a prevailing party an award of attorney fees if applicable law grants them. RAP 18.1(a). DEI is entitled to attorney fees under RCW 4.84.350(1). DEI has sought, and should obtain, significant relief from this Court. It has been wrongfully assessed IIA taxes.

DATED this 8th day of July, 2019.

Respectfully submitted,

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APPENDIX

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DELIVERY EXPRESS, INC., a Washington corporation, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 78796-9-I DIVISION ONE PUBLISHED OPINION FILED: June 10, 2019

ANDRUS, J. — Delivery Express, Inc. (DEI) challenges the Board of Industrial Insurance Appeals' (Board) decision that DEI is obligated to pay Industrial Insurance Act[1] (IIA) premiums for some of its drivers. Because substantial evidence supports the Board's finding that the essence of the drivers' independent contracts with DEI was their personal labor, DEI failed to establish the drivers were exempt under the leased-truck exemption of RCW 51.08.180, and the drivers' status as sole proprietors does not exclude them from coverage under RCW 51.12.020, we affirm.

FACTS

DEI provides same-day, next-day, and next-week Seattle delivery service,

[1] Title 51 RCW.

including courier, freight, logistics and freight forwarding. It advertises 24-hour on-call courier services anywhere in Western Washington. When initially founded in November 1996, DEI obtained a Washington Utilities & Transportation Commission (WUTC) intrastate common carrier permit, purchased vehicles, and hired drivers for whom it paid workers' compensation premiums. In 2000, its founder, David Hamilton, decided to expand DEI's business by contracting with drivers who provided their own vehicles. DEI started using an independent contractor agreement, under which it "leased" the vehicle and driver and, in return, paid the driver a commission for each completed delivery. DEI contracted with drivers of 24-foot box trucks, passenger cars, and "everything in between."

Under the terms of the agreements, the drivers were deemed independent contractors providing transportation services to DEI customers. Each driver was required to furnish and operate a vehicle, pay the cost of operating and maintaining the vehicle, and refrain from competing with DEI for any customer whose freight the driver transported under a bill of lading issued by DEI. The agreements identified the vehicle the driver intended to use but did not mandate any size, make, or model.

DEI uses a dispatcher "app" to notify drivers of available work. Some drivers have specific routes they drive on a daily basis. Most, however, are "on demand," meaning once they download DEI's app onto their handheld device, they can log in and wait for a delivery assignment. The on-demand drivers can accept or reject any specific delivery, although there is scant evidence they ever rejected a job. The cargo delivered ranged from small items—such as escrow documents

and other paperwork, blood samples or medical specimens, T-shirts, and computer hardware—to larger items—such as lumber, raw materials, and non-inventory stock for grocery and department stores.

In February 2010, the Department of Labor & Industries notified DEI it intended to conduct an audit for the calendar year 2009 to determine DEI's compliance with workers' compensation laws. By October of that year, the Department notified DEI that the firm's independent contractor drivers were covered workers under the IIA. The Department concluded the drivers did not meet any exemption under either RCW 51.08.180[2] or 51.08.195.[3] It notified DEI that effective July 1, 2010,[4] DEI needed to report all driver hours under a risk classification for "parcel delivery."

Hamilton spoke with the Department auditor, Gina Bautista, by phone and disagreed with her conclusions. One finding in particular seemed to stick out to Hamilton—namely, that the drivers rendered the same services as DEI did. Rather than appeal the decision, DEI decided to change its business model and become a "freight broker," rather than a common carrier. On April 20, 2011, DEI ceased operating as a common carrier when it obtained a freight broker license from the WUTC and the United States Department of Transportation.

When DEI changed its business model, it asked its drivers to obtain a motor carrier license from the WUTC and required them to execute new agreements,

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[2] RCW 51.08.180 defines "worker" as including independent contractors when "the essence of [the contract] is his or her personal labor."

[3] RCW 51.08.195 excludes independent contractors who meet a six-factor test set out in the statute.

[4] Because this was an educational audit, DEI only owed IIA premiums prospectively.

called broker-carrier agreements. This agreement made no mention of "leasing" any vehicles. Instead, it identified DEI as the "broker" and the independent contractor as the "motor carrier." Under the broker-carrier agreement, the drivers agreed to "provide motor vehicle equipment with drivers to provide small package/parcel pick up and delivery service to [DEI's] shippers and consignees." As under the former contractor agreement, the drivers were paid a commission of each invoice DEI issued to its customers. The covenant not to compete with DEI also remained the same.

Hamilton believed that by converting DEI's business model from common carrier to freight broker, he was bringing the company into compliance with the Department's audit because DEI and the drivers would no longer be in the same line of business. DEI did not pay any IIA premiums for the drivers after it was notified of the 2009 audit results.

In February 2011, the Department notified DEI it would conduct a second audit for the calendar year 2010. The Department later modified the audit period to include only the last two quarters of 2010 and all of 2011. Once again, the Department determined the drivers were covered workers.

On September 19, 2012, the Department notified DEI that, as a result of the audit, it was assessing $841,639 in workers' compensation premiums, penalties, and interest. The Department imposed a penalty of $127,500 for failing to maintain adequate records under RCW 51.48.030 and a penalty of $50,000 for "knowingly and intentionally evad[ing] paying workmen's compensation insurance."

DEI sought reconsideration of the Department's order of assessment. After receiving and reviewing additional documents from DEI, the Department denied reconsideration on January 17, 2014. DEI then appealed the Department's assessment order to the Board. The Board granted the appeal and referred the matter to an Industrial Appeals Judge (IAJ) for an evidentiary hearing.

The IAJ conducted the hearing beginning in the autumn of 2014 and concluding in the summer of 2015, and, in June 2016, issued a proposed decision and order affirming in part and reversing in part the Department's assessment order. The IAJ found that the majority of drivers were not exempt under RCW 51.08.180 or 51.08.195 but found three drivers qualified for an exemption. It reversed the misrepresentation penalty and affirmed the penalty for failing to maintain adequate records. Because the Department's premium calculation included three drivers whom the IAJ determined should be excluded, the IAJ remanded the matter to the Department for a recalculation of the premiums DEI owed.

In September 2016, both parties asked the Board to review the IAJ's proposed decision and order. On November 3, 2016, the Board adopted the IAJ's decision and order as its own.

DEI filed a petition for judicial review in King County Superior Court, which affirmed in substantial part the Board's decision. DEI appeals, arguing that the drivers are exempt from IIA coverage for all or a portion of the audit period under

two separate provisions of RCW 51.08.180, or alternatively, as sole proprietors under RCW 51.12.020.[5]

ANALYSIS

The Administrative Procedure Act, chapter 34.05 RCW, governs this court's review of the Board's IIA premium assessments.[6] RCW 34.05.570(3) provides that this court may grant relief from an agency order if the agency has erroneously interpreted or applied the law, or the order is not supported by substantial evidence. We thus review the Board's factual findings for substantial evidence[7] and view the evidence in the light most favorable to the Department, the party who prevailed before the Board.[8] The Board's conclusions of law are reviewed de novo, giving substantial weight to the agency's interpretation.[9]

A. RCW 51.08.180

DEI contends the Board erred in finding that the drivers are "workers" under two separate provisions of RCW 51.08.180. This statute extends IIA coverage to:

> every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, . . . PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

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[5] DEI does not appeal the Board's determination that the drivers do not qualify under the statutory exemption for independent contractors in RCW 51.08.195.

[6] RCW 51.48.131; see also Dep't of Labor & Indus. v. Lyons Enters., Inc., 185 Wn.2d 721, 731, 374 P.3d 1097 (2016).

[7] Lyons, 185 Wn.2d at 731.

[8] Henry Indus., Inc. v. Dep't of Labor & Indus., 195 Wn. App. 593, 600, 381 P.3d 172 (2016).

[9] Lyons, 185 Wn.2d at 732.

The Board found that personal labor for delivering items was the essence of the contract between DEI and most of its drivers, and that these drivers were "workers" covered by the IIA. The Board also found the drivers did not lease their vehicles to DEI, making the leased-truck exemption inapplicable.

DEI challenges the factual basis for the Board's "essence of the contract" finding and the Board's failure to define the word "truck" under the leased-truck exemption.

1. "Essence of the Contract"—the *White* Test

To determine whether the essence of a contract is personal labor, this court looks "to the contract, the work to be done, the situation of the parties, and other attendant circumstances."[10] The court focuses on the realities of the situation.[11] Whether a particular individual is a "worker" under this provision of RCW 51.08.180 is a mixed question of law and fact.[12]

In White v. Department of Labor & Industries,[13] the Supreme Court held that personal labor is not the essence of a contract with an independent contractor (1) when the independent contractor owns or supplies machinery or equipment (as distinguished from the usual hand tools) to perform the contract; (2) when the independent contractor cannot perform the contract without assistance; and

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[10] Id. at 735 (quoting Lloyd's of Yakima Floor Cen. v. Dep't of Labor & Indus., 33 Wn. App. 745, 749, 662 P.2d 391 (1982)).

[11] Id. at 735-36 (internal quotation marks omitted).

[12] Henry, 195 Wn. App. at 602.

[13] 48 Wn.2d 470, 294 P.2d 650 (1956).

(3) when the independent contractor either chooses to or must employ others to do all or part of the work he or she has contracted to perform.[14]

This court held in Henry Industries, Inc. v. Department of Labor & Industries,[15] a factually analogous case, that a courier service company's independent contracting drivers were workers under RCW 51.08.180 because vehicles they used to deliver packages were not specialized equipment needed to perform the contracted work.[16] As in Henry, there is substantial evidence supporting the Board's finding that the drivers' personal labor is the essence of the agreements between DEI and the drivers. The primary object is not the machinery the drivers own; it is the service of driving packages from point A to point B.

First, paragraph 1 of the contractor agreement and paragraph 4 of the broker-carrier agreement identify the purpose of the agreements as providing delivery or transportation services. The drivers testified that their full time "job" was delivering packages for DEI, that DEI required them to log in on a regular basis, that they logged in early in the morning and remained available the entire day, that they drove eight hours a day, Monday through Friday, for DEI, and that they never hired anyone or asked anyone to help with the deliveries, or asked anyone to log in on their behalf when they were not available. This evidence supports a finding that the work DEI needed was the labor of driving from one location to another to pick up and drop off packages.

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[14] Id. at 474.

[15] 195 Wn. App. 593, 381 P.3d 172 (2016).

[16] Id. at 609. This court concluded there was "no persuasive argument that the vehicles the drivers are required to provide constitute special equipment, as opposed to ordinary equipment, to perform the courier services under the agreements." Id. at 608.

Second, neither the contractor agreements nor the broker-carrier agreements specified that the drivers had to provide any particular type of vehicle. The majority of drivers used small passenger cars, such as Toyota Yaris, Corolla, Scion and Prius, Subaru Legacy, Honda Fit, Ford Focus, Chevrolet Cavalier, Kia Rio, Nissan Maxima, Hyundai Elantra, and Nissan Versa. As the court in Henry noted, these types of vehicles are not the "'necessary machinery or equipment' which, under White, would take this agreement outside the operation of the IIA."[17]

Third, the contractor agreements imposed appearance and conduct requirements on the drivers. For example, the agreement required the drivers to "conduct themselves courteously (both on the road and while with customers) and in a professional manner." They were required to be "neatly attired" and to wear "clean and wrinkle free" uniforms. Hair had to be "clean, neat and conservatively styled," and any mustaches or beards had to be "neatly trimmed." These appearance and behavior provisions are evidence that DEI placed more emphasis on how the drivers interacted with its customers than it did on the equipment the drivers used.

Finally, both the contractor agreements and the broker-carrier agreements contain non-compete clauses that limit the drivers' ability to solicit business from DEI customers, both during the term of the agreement and for 6 to 12 months thereafter. Such a clause is another strong indication that DEI entered into a contract with the driver for his or her personal skills at delivering packages in an efficient manner, rather than simply leasing a vehicle to effectuate deliveries.

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[17] Id. at 611 (quoting Lloyd's, 33 Wn. App. at 751).

This evidence provides substantial support for the Board's finding that the drivers' personal labor was the essence of their contracts with DEI.

2. Leased-Truck Exemption

Next, DEI contends the Board erred in refusing to define the word "truck" as used in the leased-truck exemption of RCW 51.08.180. It also argues the leased-truck provision is unconstitutionally vague. We reject both arguments.

a. Meaning of "Operating a Truck"

The IAJ noted, in its discussion of the White test, that DEI "pressed for a definition of a truck." The IAJ wrote, "I do not need to and will not define a truck in this opinion," because the definition was unnecessary to determine whether the vehicles were specialized equipment under White. Neither the IAJ nor the Board specifically addressed the term as used in the leased-truck exemption. We agree with DEI that the Board's decision did not address the leased-truck exemption and focused solely on the "essence of the contract" portion of RCW 51.08.180. Nevertheless, we disagree with DEI that any of the passenger cars used by its courier drivers are "trucks" under this clause.[18]

To trigger the leased-truck exemption, DEI had to prove (1) the drivers' activities were "attendant to operating a truck," (2) which the drivers owned, and (3) which the drivers leased to a common carrier.[19] We must determine, according

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[18] Statutory interpretation is a question of law, reviewed de novo. Id. at 622; see also Green v. Dep't of Soc. & Health Servs., 163 Wn. App. 494, 508, 260 P.3d 254 (2011) ("Under RCW 34.05.570(3)(d), the APA's 'error of law' standard, we may substitute our interpretation of the law for the agency's.").

[19] RCW 51.08.180; see also B&R Sales, Inc. v. Dep't of Labor & Indus., 186 Wn. App. 367, 375, 344 P.3d 741 (2015) (employer has burden of showing IIA premiums assessed incorrectly). DEI concedes this provision would only apply to the period during which it held a common carrier permit and became inapplicable once DEI began doing business as a freight broker in April 2011.

to established principles of statutory interpretation, whether "operating a truck" extends to delivering small packages via a passenger vehicle.

The purpose of statutory interpretation is to determine and give effect to the intent of the legislature.[20] Phrases in a statute are given their plain and ordinary meaning absent a contrary statutory definition.[21] We may refer to dictionaries to ascertain the common meaning of statutory language.[22] We must also consider the statute as a whole and harmonize its provisions by reading them in context with related provisions.[23] We presume the legislature does not intend absurd results, and we will reject any reading of a phrase that produces an absurd result.[24] Only if more than one interpretation of the plain language is reasonable, do we find a statute ambiguous and engage in statutory construction and consider the statute's legislative history.[25] Finally, a guiding principle of interpreting IIA provisions is to liberally construe the remedial statute "to achieve its purpose of providing compensation to all covered employees injured in their employment," with all doubts resolved in favor of coverage of the worker.[26]

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concedes this provision would only apply to the period during which it held a common carrier permit and became inapplicable once DEI began doing business as a freight broker in April 2011.

[20] State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

[21] State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008).

[22] Budget Rent A Car Corp. v. Dep't of Licensing, 144 Wn.2d 889, 899, 31 P.3d 1174 (2001).

[23] Henry, 195 Wn. App. at 622.

[24] Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007).

[25] Evans, 177 Wn.2d at 192-93; Cherry v. Mun. of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991).

[26] Lyons, 185 Wn.2d at 734 (quoting Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)).

DEI urges this court to adopt a broad definition of "truck" as that term is defined in our licensing statutes. Under RCW 46.04.653, "truck" means "every motor vehicle designed, used, or maintained primarily for the transportation of property." DEI contends the vehicles its drivers used, although not designed to transport property, were nevertheless primarily used for that purpose and thus should be deemed "trucks" under RCW 51.08.180. We reject this argument because it ignores the ordinary meaning of truck, it takes the word "truck" out of the context in which the legislature used it, it is based on a logical fallacy, and it would lead to an absurd result.

First, the dictionary definition of "truck" is either "an automotive vehicle built for the transportation of goods on its own chassis," or "a motorized vehicle equipped with a swivel for hauling a trailer."[27] Under the ordinary definition, if the vehicle has a chassis designed to transport property or has a swivel to pull a trailer to transport property, it is a truck within the meaning of RCW 51.08.180. The passenger cars, SUVs, and minivans driven by DEI's couriers clearly fall outside this definition of truck, whereas box trucks and pickup trucks would fit within it.

Second, the leased-truck exemption must be read in the context in which it occurs. RCW 51.08.180 refers to "trucks" leased to "common carriers." A "common carrier" is any person who undertakes to transport property for the general public "by motor vehicle for compensation."[28] A "motor vehicle" is defined as "any truck, trailer, semitrailer, tractor, . . . or any self-propelled or motor-driven

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[27] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2454 (2002).

[28] RCW 81.80.010(1).

vehicle used upon any public highway of this state for the purpose of transporting property, but not including baggage . . . ."[29] If the legislature had intended RCW 51.08.180's leased-truck exemption to encompass all motor vehicles, it could have simply said so. By singling out trucks for the IIA exemption, the legislature must have intended to narrow its application to a particular subset of motor vehicles that common carriers use to move freight.[30] Applying the dictionary definition is consistent with this legislative intent. It is also consistent with the well-established principle that the IIA is liberally construed to protect more workers.

Third, DEI's argument is based on the logical fallacy that because all trucks are motor vehicles that can be used to transport property, and passenger cars are motor vehicles that can be used to transport property, then all passenger cars must be trucks. This argument is a classic non sequitur, known as the fallacy of the undistributed middle:[31]

> All trucks [Z] can be used to transport property [B]
> A passenger car [Y] can be used to transport property [B]
> Therefore, all passenger cars [Y] are trucks [Z][32]

The result is a logical fallacy.[33]

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[29] RCW 81.80.010(7) (emphasis added).

[30] See Filmore LLLP v. Unit Owners Ass'n of Centre Pointe Condo., 183 Wn. App. 328, 344, 333 P.3d 498 (2014) (undefined common statutory terms are given their common meaning unless there is strong evidence the legislature intended something else).

[31] See generally Stephen M. Rice, Indispensable Logic: Using the Logical Fallacy of the Undistributed Middle as a Litigation Tool, 43 Akron L. Rev. 79, 89-101 (2010).

[32] See Allied Erecting & Dismantling, Co. v. USX Corp., 249 F.3d 191, 202 n.1 (3d Cir. 2001).

[33] Aylett v. Sec'y of Hous. & Urban Dev., 54 F.3d 1560, 1569 & n.5 (10th Cir. 1995); see also Spencer v. Texas, 385 U.S. 554, 578-79 & n.9, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (Warren, C.J., dissenting and concurring).

Finally, DEI's argument that we should define a "truck" as any motor vehicle that could be used to transport any type of property would lead to an absurd result. Under this approach, any small passenger car or even a motorcycle would qualify. Common sense must inform our analysis,[34] and common sense tells us no ordinary person would consider a motorcycle, a Toyota Yaris, or a Chevy Malibu to be a truck.

We hold that RCW 51.08.180's leased-truck exemption applies only to a motor vehicle built to transport goods on its own chassis or to a motor vehicle equipped with a swivel for hauling a trailer to transport goods.

Using this definition, none of the drivers the Board deemed "workers" under the IIA, with the exception of two, drove trucks to deliver packages for DEI. Two individuals, Matin Syed and Randall Utterback, testified they drove pickup trucks to make deliveries for DEI. Syed drove a 2000 Ford Ranger, a vehicle with a pickup bed, which he used in 2009 and 2010. Utterback drove a Chevy pickup truck with a canopy for DEI business in 2010. The Board included Syed and Utterback in the list of drivers for whom DEI owes IIA premiums for the last two quarters of 2010, and excluded these same drivers from the list for 2011 under RCW 51.08.195. Thus, the only time period for which the leased-truck exemption could be relevant for Syed and Utterback is the last two quarters of 2010.

But neither Syed's nor Utterback's contractor agreement during 2010 is in the record. DEI offered Exhibit 284, a contractor agreement between Syed and DEI, and Exhibit 321, a contractor agreement between Utterback and DEI. But the

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[34] State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008).

IAJ excluded Syed's agreement because DEI did not produce it during the Department's audit. And the IAJ rejected Utterback's agreement after the hearing. We thus have no agreement to examine to determine if it constituted a truck lease. Furthermore, Utterback testified he never leased his truck to DEI. And even if Syed's agreement had been admitted, it lists a 2005 Honda as Syed's "equipment," not a 2000 Ford Ranger.[35] Thus, based on this record, DEI failed to establish that Syed or Utterback met the leased-truck exemption during the last two quarters of 2010.

b. Constitutionality of Leased-Truck Exemption

DEI contends the leased-truck exemption is unconstitutionally vague. We disagree. Whether a statute is constitutional is a question of law, reviewed de novo.[36] Statutes are presumed constitutional.[37] Under the due process clause of the Fourteenth Amendment of the United States Constitution, RCW 51.08.180 is unconstitutionally vague if DEI demonstrates that the statute "does not provide ascertainable standards . . . to protect against arbitrary enforcement."[38] But due to the inherently vague nature of language, courts do not require "impossible standards of specificity."[39] Constitutional vagueness is "not mere uncertainty."[40]

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[35] In addition, exhibits that were admitted for Syed—his Washington State vehicle registration and his certificate of liability insurance—both show a 2006 Mitsubishi Lancer, a passenger car.

[36] State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

[37] State v. Jacobson, 92 Wn. App. 958, 967, 965 P.2d 1140 (1998).

[38] Watson, 160 Wn.2d at 6 (quoting State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)).

[39] City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

[40] Id.

A statute is unconstitutionally vague only "if persons of common intelligence must necessarily guess at its meaning and differ as to its application."[41]

DEI argues that it was subject to arbitrary enforcement by the Department because its auditors defined the term "truck" differently. The record does not bear this out. When DEI asked Bautista how she defined the word truck, she testified she searched the Federal Motor Carrier Safety Administration's online software program to see if any of DEI's drivers were listed as owning a truck. Bautista also attempted to contact individual drivers to ask them if they drove trucks to deliver packages. Finally, she searched the Washington State Department of Motor Vehicle Licensing website to determine if any drivers had vehicle registrations for any trucks.

Eliezar Eidenbom, the Department litigation specialist who handled DEI's requested reconsideration of the 2010-2011 audit, used what he called "a common definition of truck," which he defined as a motor vehicle designed to carry cargo. Eidenbom concluded that vans, SUVs, and minivans were not "trucks" because they were designed to carry passengers, not to carry loads. Eidenbom considered a pickup truck to fall within the statutory exemption and would also consider a cargo van to do so, if the van was designed for carrying freight and heavy loads and had its passenger seats removed to allow for loading property.

Both Bautisa and Eidenbom applied a definition consistent with this court's statutory interpretation. We can find nothing arbitrary about the approach they

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[41] City of Seattle v. Webster, 115 Wn.2d 635, 643, 802 P.2d 1333 (1990).

took. Nor can we conclude that a person of ordinary intelligence must guess whether a vehicle is a truck.

DEI relies on Grant County v. Bohne,[42] to argue that RCW 51.08.180's leased-truck exemption is unconstitutionally vague. We find that case distinguishable. In Bohne, the Court considered whether a zoning ordinance, which provided that "[n]o buildings [may] be moved in on any lot in this district," was unconstitutionally vague.[43] Grant County claimed the Bohnes violated the ordinance by placing a mobile home on their lot. The Court held the ordinance was unconstitutionally vague because persons of average intellect would expect a prohibition against mobile homes to specifically refer to mobile homes.[44] But this case before us is dissimilar; people have an understanding of what a truck is. There is no guesswork needed to ascertain the meaning of this word.[45] Unlike the "building" versus "mobile home" distinction in Bohne, the average person would not think that a two-door or four-door passenger vehicle is a "truck." The leased-truck exemption is not unconstitutionally vague.

B. RCW 51.12.020

Finally, DEI claims the Board erred in concluding that drivers who ran a courier business as sole proprietors were not statutorily excluded from the IIA

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[42] 89 Wn.2d 953, 577 P.2d 138 (1978).

[43] Id. at 956.

[44] Id.

[45] See Town of Clyde Hill v. Roisen, 111 Wn.2d 912, 919, 767 P.2d 1375 (1989) (distinguishing Bohne, concluding people do have a basis in common practice and understanding for knowing what a "fence" is).

under RCW 51.12.020. This argument was rejected in Henry, and we see no basis for revisiting the issue here.

RCW 51.12.020(5) provides that sole proprietors are not included within the IIA's mandatory coverage. In Henry, the company argued that this statutory provision categorically exempted it from paying IIA premiums for drivers if those drivers operated their own businesses as sole proprietors.[46] This court held that because neither RCW 51.08.180 nor RCW 51.08.195 referenced RCW 51.12.020's exclusions,

> the most reasonable way to harmonize interpretation of these three statutes is to conclude that the legislature intended to include within the scope of "worker" those sole proprietors who met RCW 51.08.180's requirements and who were not excluded by RCW 51.08.195. Thus, even though a person may choose to set up his or her business as a sole proprietorship, that alone does not exclude that person from IIA coverage as a "worker." No other interpretation of these statutes makes sense.[47]

DEI's interpretation of RCW 51.12.020 is inconsistent with Henry. The DEI drivers who set up businesses as sole proprietors are not automatically excluded from IIA coverage by virtue of RCW 51.12.020.

CONCLUSION

We affirm the Board's finding that, during the audit period, the drivers identified in Findings of Fact No. 3 and No. 4 of the Board's order are "workers" under RCW 51.08.180. The record supports the Board's finding that the essence of their contracts with DEI was their personal labor. DEI failed to establish that any of these drivers, with the exception of two, operated trucks and failed to establish

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[46] 195 Wn. App. at 621.

[47] Id. at 623-24.

that these two drivers leased their vehicles to DEI. Thus, the leased-truck exemption is not applicable. Finally, RCW 51.12.020's "sole proprietor" exclusion does not alleviate DEI's liability for worker compensation premiums for drivers who are "workers" under RCW 51.08.180.

We affirm.

Andrus, J.

WE CONCUR:

Chun, J.

Schindler, J.

RCW 51.08.180:

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 … PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

RCW 51.12.020:

The following are the only employments which shall not be included within the mandatory coverage of this title:

. . .

(5) Sole proprietors or partners.

. . .

(8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.

(b) Alternatively, a corporation that is not a "public company" as defined in RCW 23B.01.400 may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or

may exempt any number of officers if all the exempted officers are related by blood within the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.

(c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(d) A corporation may elect to cover officers who are exempted by this subsection in the manner provided by RCW 51.12.110.

. . .

(13) Members of a limited liability company, if either:

(a) Management of the company is vested in its members, and the members for whom exemption is sought would qualify for exemption under subsection (5) of this section were the company a sole proprietorship or partnership; or

(b) Management of the company is vested in one or more managers, and the members for whom the exemption is sought are managers who would qualify for exemption under subsection (8) of this section were the company a corporation.

. . .

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 78796-9-I to the following parties:

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Original E-filed with:
Court of Appeals, Division I
Clerk's Office

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

DATED: July 8, 2019, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

July 08, 2019 - 11:05 AM

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