

NO. 66013-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

XENITH GROUP, INC.,

Respondent.

REPLY BRIEF

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I. INTRODUCTION

Xenith Group concedes that the Board decision is correct, if the independent contractor coverage analysis under RCW 51.08.070, .180, and .195 applies. Respondent's Brief 5, 15. However, Xenith argues this analysis does not apply, because "control" and "consent" "gatekeeper" employment relationship test is not met. Respondent's Brief 13, 18, 24.

Since the 1937 amendment, workers' compensation coverage includes "every person in this state [1] who is engaged in the employment of or [2] who is working under an independent contract, the essence of which is his or her personal labor for an employer." RCW 51.08.180. Long-standing precedent interprets this language to cover both common law employees and independent contractors who provide personal labor.

No reasonable view of the statutory language, let alone liberal construction of the industrial insurance act (Title 51 RCW), creates a "gatekeeper" test that would require employer "control" and employee "consent" for coverage, regardless of whether a person works under an independent contract for personal labor. Xenith's "gatekeeper" theory would cover only common law employees (subject to employer control) and exclude independent contractors (free of control). It would thus render meaningless the independent contractor coverage added in 1937. No authority supports this result.

II. ARGUMENT

A. No Authority Supports Xenith's "Gatekeeper" Theory that the *Novenson* "Control" and "Consent" Employment Relationship Test Overrides Independent Contractor Coverage

Xenith cites cases applying the *Novenson* "control" and "consent" employment relationship test as having "coexisted with the independent contractor case law and statutes for decades." Respondent's Brief 13, 15-18 (discussing case law following *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 588 P.2d 1174 (1979)). Xenith then jumps to a conclusion, without analysis or authority, that *Novenson* creates a "gatekeeper" test for coverage that overrides independent contractor coverage. Respondent's Brief 13, 18, 24.

Xenith's "gatekeeper" argument fails for many reasons but first because it is inconsistent with the definitions of "worker" and "employer" in RCW 51.08.070 and .180. These definitions are a starting point in deciding coverage. *E.g.*, *Norman v. Dep't of Labor & Indus.*, 10 Wn.2d 180, 183-184, 116 P.2d 360 (1941) (analyzing the definitions in deciding coverage). "Worker" includes those who are engaged in employment and those who are working under an independent contract for personal labor:

"Worker" means . . . every person in this state

[1] who is engaged in the employment of *or*

[2] who is working under an independent contract, the essence of which is his or her personal labor

for an employer under this title

RCW 51.08.180 (emphasis and numbers in brackets added). The term “or” is presumed to be a disjunctive conjunction used to connect alternatives. *See Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978). The statute thus creates the alternatives of “employment” and “independent contract” coverage, with neither overriding the other.

“Employer” consistently means any person or entity who engages “in any work covered” by the act “or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers.” RCW 51.08.070. No reasonable reading of these definitions supports Xenith’s “gatekeeper” theory that the independent contractor coverage does “not come into play unless and until the existence of a work relationship involving control by an employer and clear consent to employment by an individual has been demonstrated.” Respondent’s Brief 24. The plain statutory language precludes this interpretation. *See State v. Kintz*, 169 Wn.2d 537, 548, 238 P.3d 470 (2010) (“If language in a statute is subject to only one interpretation, then our inquiry ends.”).

Xenith’s “gatekeeper” theory is also irreconcilable with the long-standing precedent that applies independent contractor coverage as

alternative to employment relationship coverage. For example, the Supreme Court in *Norman* found independent contractor coverage without engaging in the “control” and “consent” employment relationship analysis. *See Norman*, 10 Wn.2d at 183-184. The Supreme Court in *White* held the personal labor independent contractor coverage test was not met in that case but cautioned that a person who does not qualify as a covered “independent contractor” may still qualify as an “employee.” *See White v. Dep’t of Labor & Indus.*, 48 Wn.2d 470, 477, 294 P.2d 650 (1956).

This Court has consistently followed the precedent and found independent contractor coverage without requiring a “control” and “consent” employment relationship. *See Dana’s Housekeeping, Inc. v. Dep’t of Labor & Indus.*, 76 Wn. App. 600, 607-609, 886 P.2d 1147 (1995); *Peter M. Black Real Estate Co. v. Dep’t of Labor & Indus.*, 70 Wn. App. 482, 488-490, 854 P.2d 46 (1993); *Jamison v. Dep’t of Labor & Indus.*, 65 Wn. App. 125, 130-133, 827 P.2d 1085 (1992); *Lloyd’s of Yakima Floor Ctr. v. Dep’t of Labor & Indus.*, 33 Wn. App. 745, 751-752, 662 P.2d 391 (1982). This Court in *Jamison* rejected as “irrelevant” an argument that timber fallers were not common law “employees,” because workers’ compensation coverage “includes both employees and those independent contractors working under a contract, ‘the essence of which is his or her personal labor for an employer.’” *Jamison*, 65 Wn. App. at 130.

When independent contractor coverage is at issue, the inquiry has always been “whether the essence of a particular independent contract is the personal labor of the independent contractors, within the purview of [Title 51 RCW].” *E.g., White*, 48 Wn.2d at 471. Xenith offers no good argument to distinguish this controlling precedent. It cannot.

Another flaw in Xenith’s “gatekeeper” theory is it would effectively eliminate independent contractor coverage. Before the 1937 amendment, the industrial insurance act covered only common law “employees” and excluded “independent contractors.” *Norman*, 10 Wn.2d at 183. This common law distinction was “based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996) (citations omitted). Thus, those who worked free of employer control were excluded as independent contractors. *E.g., Hubbard v. Dep’t of Labor & Indus.*, 198 Wash. 354, 358-360, 88 P.2d 423 (1939) (applying the pre-amendment “worker” definition). However, the Legislature rejected this exclusionary distinction in 1937 and 1939 by adding separate coverage for independent contractors who provide personal labor. *Norman*, 10 Wn.2d at 184; Laws of 1937, ch. 211, § 2 (RCW 51.08.180); Laws of 1939, ch. 41, § 2 (RCW 51.08.070).

Under Xenith's "gatekeeper" theory, the act would cover only those who work subject to employer control (i.e., common law employees) and would thus exclude independent contractors, who are by definition "not controlled by the other nor subject to the other's right to control with respect to [their] physical conduct in the performance of the undertaking." *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (citing Restatement (Second) of Agency § 2(3)). Xenith's theory would thus render meaningless the independent contractor language added by the Legislature in 1937 and 1939, a result this Court must reject. *See Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (courts in interpreting statutes must "discern and implement" legislative intent and "give effect to all language, so as to render no portion meaningless or superfluous").

No authority supports Xenith's "gatekeeper" theory that a "control" and "consent" employment relationship must exist for coverage, "no matter who asks the question or why." Respondent's Brief 18. *Novenson* developed the "control" and "consent" employment relationship test in the employer immunity context, and courts have generally applied the test in deciding whether the *employment relationship* coverage exists. *See Novenson*, 91 Wn.2d at 553-555 (personal injury defendant claiming employment relationship for immunity must prove plaintiff's consent to such relationship). However, even for employment relationship coverage,

courts have rejected a rigid application of this test. For example, the Supreme Court in *Bolin* declined to follow the test in holding a juror was a county's "employee," because requiring "consent" would exclude involuntary jury duty and would not serve the purpose of *Novenson* or the act. *Bolin v. Kitsap County*, 114 Wn.2d 70, 72-74, 785 P.2d 805 (1990).

The *Bolin* Court distinguished *Novenson*, stating, "*Novenson* dealt with a question substantially different from that before the court in this case." *Bolin*, 114 Wn.2d at 73. *Novenson* "revolved around the nature of liability between an employer and a third party, the issue then before the court," and for "those purposes, the law requires the employee's consent, lest an employment relationship be implied without his consent to deprive him of his right to sue at common law." *Id.* at 73. However, due to judicial immunity protecting the county, requiring "consent" in *Bolin* "does not protect the claimant from involuntarily relinquishing his rights, but instead deprives him of his only means of redress." *Id.* at 73-74.

Bolin thus rejects Xenith's categorical approach to coverage. Xenith's "context is irrelevant" approach also runs afoul of the principle that "general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 445, 378 P.2d 684 (1963); *Anfinson v. FedEx*

Ground Package Sys., Inc., ___ Wn. App. ___, 244 P.3d 32, 40 (2010) (“employee” under minimum wage act is broader than common law “employee,” in part because while the common law “right to control” test was “to define an employer’s liability for injuries caused by his employee, the purpose of the [act] is to provide remedial protections to workers”).

Without analysis, Xenith presents a 2-3 page block quote from *Jackson v. Harvey*, 72 Wn. App. 507, 864 P.2d 975 (1994), as providing “an excellent overview of the historic underpinnings and evolution of the control-consent gatekeeper test.” Respondent’s Brief 15-17. However, *Jackson* does not support Xenith’s “gatekeeper” theory.

Jackson is a workers’ compensation claim rejection case, and this Court addressed “what legal test to apply in order to ascertain when an employment relationship exists for purposes of the Industrial Insurance Act, Title 51 RCW.” *Jackson*, 72 Wn. App. at 509. This Court then carefully stated its limited holding as follows: “*Without necessarily adopting a test encompassing the whole Act*, we hold that an employee must consent to employment by *an employer exempted from providing coverage under the Act.*” *Id.* at 509 (emphasis added).

In *Jackson*, general contractor Harvey asked carpenter Jackson to work with him on the Cotterills’ house, and Jackson believed Harvey was his employer. *Id.* at 509-510. This Court examined the definitions of

“worker” and “employer” to conclude Jackson “clearly” met the “worker” definition, while both “the Cotterills and Harvey arguably could meet” the “employer” definition. *Jackson*, 72 Wn. App. at 514. Harvey argued Jackson was the Cotterills’ employee and was as such exempt from coverage under former RCW 51.12.020(2), which exempted those who are “employed to do gardening, maintenance, repair, remodeling, or similar work in or about the private home of the employer.” *Id.*¹

In rejecting Harvey’s argument, this Court reviewed case law on the common law employment relationship and noted precedent that suggested “the two-prong [*Novenson*] test is tailored to determining when immunity exists.” *Id.* at 518 n.5. However, this Court found the “justification underlying the *Novenson* test applies equally” in *Jackson*, because an “employee who agrees to be employed by a homeowner for home renovation work gives up important statutory insurance benefits.” *Id.* at 518. This Court held “such an employee must consent to that employment relationship.” *Id.* This holding “best comports with” the liberal construction principle of Title 51 RCW. *Id.* at 519-520.

Jackson thus expressly declined to adopt an all-encompassing coverage test. *Jackson*, like *Novenson*, required “consent” to an

¹ The Legislature narrowed the scope of this exemption in 1997, and RCW 51.12.020(2) currently exempts any person “employed to do gardening, maintenance, or repair, in or about the private home of the employer.” Law of 1997 ch. 314, § 18.

employment relationship, when finding such relationship would cut off the worker's claimed right. In contrast, Xenith asserts absence of such relationship to avoid paying premiums and cut off its care providers' coverage. Neither *Novenson* nor *Jackson* supports Xenith's theory.

Xenith claims its care providers were employed by the clients they served and would thus be exempt from coverage as "domestic servants." Respondent's Brief 21 n.15. The domestic servant exclusion applies to a worker employed "in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment." RCW 51.12.020(1). Thus, if the clients were the care providers' employers, and if a care provider worked for a client who had less than two regular care providers working 40 hours or more per week, in the client's home, the care provider would be excluded as a "domestic servant." Xenith's argument thus presents a parallel with Harvey's argument in *Jackson* – worker was employed by an exempt employer.

However, the domestic servant exclusion is irrelevant in this case, because Xenith is the care providers' employer as defined in RCW 51.08.070 as shown above, and the exclusion does not apply to their work under their contracts with Xenith. This Court has interpreted the phrase "a private home" in the exclusion to hold the "exclusion does not apply to a commercial entity contracting with numerous housecleaners to clean many

different homes because the exclusion is limited to *a* private home.” *Dana’s*, 76 Wn. App. at 610. The exclusion does not apply to Xenith, because Xenith is a commercial entity contracting with numerous care providers to care for multiple clients. Xenith does not argue otherwise.

B. *Bennerstrom* Expressly Declined to Address Independent Contractor Coverage as Not Properly Raised and Does Not Support Xenith’s “Gatekeeper” Theory

Xenith relies heavily on this Court’s *Bennerstrom* decision as controlling the outcome of this case. Respondent’s Brief 4, 19-24. However, *Bennerstrom* does not support Xenith’s “gatekeeper” theory.

Bennerstrom held the claimant, who cared for his mother at their home, was not an employee of DSHS and expressly declined to address whether he was a covered independent contractor. *Bennerstrom v. Dep’t of Labor & Indus.*, 120 Wn. App. 853, 866-867, 86 P.3d 826, *review denied*, 152 Wn.2d 1031 (2004). Xenith claims *Bennerstrom* did not address the independent contractor issue, because the “facts did not permit the legal inquiries to get past the consent-control gatekeeper.” Respondent’s Brief 24. However, this Court gave a different explanation.

The claimant in *Bennerstrom* made a passing statement: “Whether considered a DSHS employee or an independent contractor, [he] worked as an in-home care provider and is eligible for benefits.” *Bennerstrom*, 120 Wn. App. at 866 n.25. This Court held it “need not consider” this

vague reference to independent contractor coverage, because the claimant gave “no citation to authority, persuasive argument, or analysis to support this contention.” *Bennerstrom*, 120 Wn. App. at 866-867 (citing *State v. Johnson*, 119 Wn.2d 167, 170-171, 829 P.2d 1082 (1992) (issues not properly raised are not before the court)). This Court reiterated this point later in the opinion: “And, as noted above, Bennerstrom fails to persuasively brief his contention that he is an independent contractor.” *Bennerstrom*, 120 Wn. App. at 871.

Bennerstrom does not hold or suggest that the “control” and “consent” employment relationship test trumps the independent contractor coverage. Xenith’s reliance on *Bennerstrom* is thus misplaced.²

Further, in trying to analogize this case to *Bennerstrom*, Xenith overlooks several distinctions. For example, the claimant there contracted with DSHS (government agency) to care for his mother receiving public care, and he received paychecks from DSHS, which retained no portion of

² The claimant in *Bennerstrom* tried to raise the independent contractor issue for the first time in his petition for review to the Supreme Court. Joint Answer to Petition for Review, *Bennerstrom*, 152 Wn.2d 1031 (2004) (review denied). A copy of the joint answer by DSHS and the Department in *Bennerstrom* is attached as Appendix A. In the answer, the state argued the claimant waived the independent contractor issue (App. A 6-7) and otherwise did not meet the personal labor independent contractor coverage test (App. A 8 n.2). The state also pointed out that while the case was pending, the Legislature appropriated fund for collective bargaining agreement related to compensation between the state and care providers who contract with DSHS (such as the claimant in *Bennerstrom*), and the state viewed this 2004 act as reflecting intent to fund compensation, including workers’ benefits, for care providers contracting with DSHS. App. A 10; Laws of 2004, ch. 278, §§ 1-7. A copy of the act is attached as Appendix B.

his pay. *Bennerstrom*, 120 Wn. App. at 856-857. In contrast, the care providers here contracted with Xenith (commercial entity) to care for various clients and received paychecks from Xenith, which derived hourly profit from their labor. Thus, the personal labor “for an employer” test for independent contractor coverage is arguably not met in *Bennerstrom*, whereas it is met here as shown in the Department’s opening brief. *See Dana’s*, 76 Wn. App. at 608 (personal labor is “for an employer” when it benefits the employer). In fact, *Bennerstrom* pointed out this government versus business distinction in rejecting as “unpersuasive” the claimant’s attempt “to equate DSHS” to the housekeeping business in *Dana’s* that sent housecleaners to client homes. *Bennerstrom*, 120 Wn. App. at 871.

In addition, Xenith overlooks the difference in significance between the contract term in *Bennerstrom* that the claimant was “not employee of DSHS” and the equivalent term in Xenith’s contracts with its care providers. The contract term in *Bennerstrom* was relevant on the issue of whether the claimant consented to an employment relationship with DSHS for employment relationship coverage. *See Bennerstrom*, 120 Wn. App. at 859-860. However, the “not an employee of Xenith” term is irrelevant here, where separate independent contractor coverage exists, and the coverage does not turn on “consent” to an employment relationship. When statutorily defined coverage exists, parties may not

defeat it by contract. RCW 51.04.060 (agreement by worker and employer to waive rights and duties under the act is void).

Xenith points out, without explaining relevance, the testimony of the Department investigator Wilcox during cross-examination about her understanding of the “control” and “consent” test and *Bennerstrom*. Respondent’s Brief 13 n.11, 22. However, the Department’s “deliberative processes were irrelevant,” where, as here, the Board conducted a de novo evidentiary hearing, and this Court reviews the Board decision. *McDonald v. Dep’t of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001). Even if Wilcox’s understanding of law had any relevance, she testified she examined RCW 51.08.180 and .195 to find independent contractor coverage. Wilcox 138. In any event, a correct order “will not be reversed merely because the trial court gave the wrong reason for its rendition.” *In re Jones*, 152 Wn.2d 1, 10 n.2, 93 P.3d 147 (2004).

Xenith claims the only post-2004 case the Board cited in distinguishing *Bennerstrom* was its own prior decision, *In re Dale Sanders Trucking Co.*, BIIA Dec., 07 11358 (2008) (2008 WL 5598541) (significant decision). Respondent’s Brief 23. Even if this is true, Xenith does not explain how the Board’s citation to *Sanders* supports its “gatekeeper” theory. It does not. Further, the Board cited *Sanders* not to

distinguish *Bennerstrom* but to explain its “policy reason” for coverage, in “addition to the statutory framework requiring coverage.” BR 5-6.

Sanders addressed the coverage exclusion of a worker’s “activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.” RCW 51.08.180. This exclusion did not apply in *Sanders*, where the facts showed the workers did not own the trucks they drove, although they signed a mandatory lease agreement with their trucking firm, under which the firm retained a portion of the workers’ income as a lease payment on the trucks, and the workers leased back the trucks to the firm. *Sanders*, 2008 WL 5598541, at *1-6. The Board in this case cited *Sanders*, stating that when a “worker is forced to sign a contract, which attempts to waive their right to industrial insurance benefits as a condition of contracting with a firm, this Board has weighed in favor of finding an employer-employee relationship.” BR 6.

The Board’s statement is consistent with RCW 51.04.060, which prohibits contractual avoidance or waiver of the duties or rights under the act. The Board’s citation to *Sanders* reflects the analogy, where the trucking firm, like Xenith, sought to avoid paying workers’ compensation premiums by way of contracting. *See Sanders*, 2008 WL 598541, at *5.

In discussing the Board’s citation to *Sanders*, Xenith points out that liberal construction does not reduce workers’ burden of proving their

right to benefits. Respondent's Brief 23. Liberal construction "does not apply to questions of fact but to matters concerning the construction of the statute." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949) (citations omitted). However, this is a premium assessment case, where the burden of proof is on the employer. RCW 51.48.131. Further, the Board made findings based on mostly undisputed facts and properly applied the liberal construction rule in interpreting the terms "worker" and "employer" in finding coverage here. BR 3-5.

Xenith claims its owner Petersen was "new to private enterprise" and followed *Bennerstrom*. Respondent's Brief 3. However, not knowing the law does not excuse nonpayment of required premiums. As shown above, long-standing precedent interprets independent contractor coverage as alternative to employment relationship coverage, and it is a "universal maxim that ignorance of the law excuses no one." *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (rejecting claimant's argument for equitable relief from claim-filing deadline).

Without reference to the record, Xenith claims Petersen "worked with an attorney and an accounting firm which, in turn, had received input from L&I on the business." Respondent's Brief 3. Xenith also claims the Department and the Board are taking "positions contrary to the ones they espoused in *Bennerstrom*." Respondent's Brief 24. But there is no

inconsistency between the Department's position in *Bennerstrom* on employment relationship coverage and the position here on independent contractor coverage. Xenith's suggestion that the Department gave it any "input" inconsistent with the Department's current position has no support in the record and should thus be rejected. *See Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 619, 937 P.2d 1158 (1997) ("We will not consider allegations of fact without support in the record."). Further, when "the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied." *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

In sum, no authority, including *Bennerstrom*, supports Xenith's "gatekeeper" theory. This Court should thus reject the theory.

C. Xenith Concedes the Correctness of the Board's Independent Contractor Coverage Analysis, and Xenith's Assignments of Error Contrary to the Concession Are Waived and Lack Merit

Focusing solely on its "gatekeeper" theory, which fails as shown above, Xenith otherwise concedes the correctness of the Board decision, conceding that conclusions of law 3 and 4 are "correct if one engages in RCW 51.08.180 and RCW 51.08.195 analysis." Respondent's Brief 5.

Xenith thus concedes its "care providers were independent contractors, the essence of which was their personal labor" under RCW 51.08.070 and .180. Certified Appeal Board Record (BR) 8 (conclusion of

law 3). Xenith also concedes it “failed to establish that it was entitled to the exemption to mandatory coverage embodied in RCW 51.08.195.” BR 8 (conclusion of law 4). As explained in the Department’s opening brief and above, the correctness of this independent contractor coverage analysis is dispositive and should result in the affirmance of the Board decision upholding the Department’s premium assessment in this case

However, Xenith inconsistently assigns error to findings of fact 5, 6, and 7 that pertain to the independent contractor coverage analysis. Respondent’s Brief 4-5 (assignments of error 2-4). Xenith offers no authority or analysis related to these assignments of error in the issue statement or body of the argument. These assignments of error are thus “waived.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citation omitted); RAP 10.3(a)(6).³

In any event, Xenith’s assignments of error lack merit. For example, finding of fact 5 states that the “essence of the contract between Xenith and the care providers was to provide personal labor to the developmentally disabled.” BR 7. Xenith challenges this finding, claiming only that the essence of the contract “was to alert [the care providers] of opportunities for employment.” Respondent’s Brief 4.

³ In particular, findings of fact 6 and 7 pertain to the coverage exception under RCW 51.08.195, and Xenith further concedes that all six elements in this statute “had to be shown” for the exception and that Xenith “did not prove each care giver met all the factors of RCW 51.08.195.” Respondent’s Brief 15.

However, the independent contractor coverage turns on the “realities of the situation,” not “the characterization of the parties’ relationship.” *Dana’s*, 76 Wn. App. at 607-608 (rejecting a housekeeping business’s argument that the essence of its contracts with housecleaners was “an agreement to accept referrals and share a fee”). Regardless of how Xenith characterizes its role as a “middleman,” the undisputed realities were that it gained about \$5 per each hour of its care providers’ personal labor. England 14; Petersen 80, 92; FF 6. This evidence is sufficient for the Board to find that the essence of Xenith’s contracts with the care providers was their personal labor.⁴

Xenith incorrectly claims its care provider England submitted her timesheets to DSHS as well as to Xenith. Respondent’s Brief 10, 22. England testified she sent her timesheets to Xenith, which then sent the timesheets to DSHS. England 14, 11, 18-19. Petersen consistently testified Xenith collected the care providers’ monthly hours and submitted them to DSHS. Petersen 79. Xenith’s suggestion that the care providers sent their timesheets directly to DSHS has no support in the record and should thus be rejected. *See Voicelink Data Servs*, 86 Wn. App. at 619.

⁴ Throughout its brief, Xenith uses some loaded terms, such as “self-employed,” “self-employment,” “client/employer,” “middleman,” and “just a middleman,” as “unrebutted testimony.” Respondent’s Brief 8, 11, 21-22. These are characterizations, not unrebutted facts, and the independent contractor coverage does not turn on “the characterization of the parties’ relationship.” *Dana’s*, 76 Wn. App. at 607.

Finding of fact 6 pertains to the record keeping requirement for the coverage exception under subsection (6) of RCW 51.08.195, and Xenith claims, without reference to the record, there is “evidence that at least six” of its care providers were keeping separate records. Respondent’s Brief 5. England testified that she kept her own records, such as her timesheets, DSHS case manager contact information, and DSHS care assessment, and testified also that she discussed with “roughly five” other care providers and understood they were also keeping their records. England 18, 49.

However, as explained in the Department’s opening brief, subsection (6) requires record keeping that reflects all items of income and expenses of the contractors’ businesses as a whole, not just their dealings with Xenith, and Xenith had to show such record keeping took place as of the effective date of their contracts. BR 5; *Lee’s Drywall Co. v. Dep’t of Labor & Indus.*, 141 Wn. App. 859, 870-871, 173 P.3d 934 (2007) (interpreting almost identical language in RCW 51.12.070). As the Board correctly pointed out, there is no evidence England or any other care providers were maintaining a separate record of all items of business income and expenses on the effective date of their contracts. FF 6.

Finding of fact 7 pertains to the “free from control or direction” requirement for the coverage exception under subsection (1) of RCW 51.08.195, and the finding states, “Xenith chose not to control the care

providers' physical conduct in the performance of their duties, even when misconduct occurred." BR 7. Xenith claims this finding reflects the Board's "complete departure from the undisputed evidence of the hiring and firing power held by the clients and respecting choices." Respondent's Brief 5. However, Xenith had a duty to conduct background checks on its care providers and report any suspected abuse or neglect by them. Petersen 68, 97, 99, 113. Petersen testified that when one of the care providers had sex with a client, Xenith had no authority to fire the provider, although it reported the incident to DSHS. Petersen 97. In light of this evidence, the Board found Xenith had "some element of control" although it chose not to exercise it. BR 6, 7. This finding reflects the Board's view of the evidence, not "a complete departure" from it.

Xenith also assigns error to findings of fact 3, 4, and 6 and conclusions of law 2 and 3, on the sole basis that these findings and conclusions addressed a time frame beyond January 31, 2007, when Xenith ceased doing business. Respondent's Brief 4-5. But Xenith never made this argument at the Board or superior court below, although the Department's appealed assessment order addressed the same time frame. BR 49-50 (assessment order), 52-54 (Xenith's notice of appeal). A notice of appeal to the Board "shall set forth with particularity the reason for the employer's appeal." RCW 51.48.131. "Issues not raised before the

agency may not be raised on appeal,” except in certain limited circumstances not implicated here. RCW 34.05.554. Further, Xenith makes no analysis related to these assignments of error. Xenith thus waived this time frame argument. *See Cowiche Canyon*, 118 Wn.2d at 809; RAP 10.3(a)(6); RCW 34.05.554; RCW 51.48.131.

In any event, workers’ compensation premiums are calculated per each calendar quarter. *See* RCW 51.16.060. Xenith does not explain why the assessment period (from the fourth quarter of 2005 through the first quarter of 2007) extends beyond January 31, 2007. The Department investigator Wilcox testified that the assessed hours represented the hours Xenith provided. Wilcox 143. There is no evidence the Department assessed premiums beyond January 31, 2007. *See* RCW 51.48.131 (employer has the burden to prove the taxes and penalties assessed are incorrect). Nor does Xenith dispute or challenge the amount of the assessed premiums. Thus, Xenith’s time frame argument lacks merit.

In sum, Xenith concedes the correctness of the Board’s independent contractor coverage analysis, and Xenith’s contrary assignments of error are waived and lack merit.

D. Xenith is Not Entitled to Attorney Fees or Costs

Without citing authority, Xenith requests attorney fees and costs. Respondent’s Brief 25. “Argument and citation to authority are required

under [RAP 18.1(b)] to advise [the court] of the appropriate grounds for an award of attorney fees as costs.” *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) (denying attorney fees request as not supported by argument and citation to authority). In any event, Xenith is not entitled to attorney fees or costs, because, as shown above, it does not prevail in this appeal.⁵

III. CONCLUSION

For the reasons stated above and in the Department’s opening brief, the Department asks this Court to reverse the superior court judgment and affirm the Board decision in this case.

RESPECTFULLY SUBMITTED this 26th day of January, 2011.

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⁵ Under the equal access to justice act (applicable in a judicial review of agency action under the APA, applicable in this premium assessment case under RCW 51.48.131), a “prevailing party” is entitled to attorney fees, “unless the agency action was substantially justified or . . . circumstances make an award unjust.” RCW 4.84.350(1); *Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 227, 173 P.3d 885 (2007).

Appendix A

NO. 75421-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN BENNERSTROM,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON; and DEPARTMENT OF SOCIAL AND HEALTH
SERVICES OF THE STATE OF WASHINGTON,

Respondents.

JOINT ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Department of Labor and Industries (DLI) and the Department of Social and Health Services (DSHS) submit this joint answer to John Bennerstrom's petition for discretionary review. Mr. Bennerstrom was denied workers' compensation benefits because he could not demonstrate that he worked for an employer who is required to provide benefits under the Industrial Insurance Act. Mr. Bennerstrom appears to have abandoned all the legal claims that were argued and ruled upon below. He now asserts for the first time that he is entitled to workers' compensation benefits as an independent contractor under the analysis in *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 886 P.2d 1147 (1995) and RCW 51.08.180.

Mr. Bennerstrom has not satisfied any of strict standards in RAP 13.4(b) to merit review by this state's highest court. Contrary to Mr. Bennerstrom's assertions, the decision below is in harmony with *Dana's Housekeeping*, and presents no issue of substantial public interest meriting further review.

II. COUNTERSTATEMENT OF THE ISSUE

Does Mr. Bennerstrom's petition for review satisfy the criteria in RAP 13.4(b) when he raises a new issue for the first time in his petition

and when he shows no conflict with a previous appellate decision and presents no issue of significant public interest?

III. STATEMENT OF THE CASE

Mr. Bennerstrom began living with and caring for his mother in the family home after his father died in 1968. BR Bennerstrom 134.¹ Mr. Bennerstrom cared for his mother until he was injured in 1999. BR Bennerstrom 104-05, 114. Mrs. Bennerstrom had owned the family home until she transferred it to her son before she applied for the Community Options Program Entry System (COPES) in 1995. BR Bennerstrom 128, 114.

COPES is a Medicaid program that pays for personal care and household services to permit individuals to remain in their homes rather than being cared for in a nursing home. BR Moss 6. In order to qualify for COPES, an individual must need assistance with the tasks of daily living and be of low income. BR Moss 7-8.

Under this program, the person receiving care (here Mrs. Bennerstrom) is responsible for overseeing her own care to the maximum extent of her abilities and desires. RCW 74.39A.095(4); RCW

¹ "BR" refers to the Certified Appeal Board Record. The complete record is not consecutively numbered. Witness testimony is referenced by "BR" followed by the witness name and page number. "AB" refers to the Brief of Appellant.

74.39A.007(1). The COPES recipient has responsibility for their own care, including "the decision to employ and dismiss a personal aide." RCW 74.39.050(2)(f). Mrs. Bennerstrom delegated her decision-making authority to Mr. Bennerstrom by giving her son power of attorney over financial and medical decisions. BR Bennerstrom 100, 142.

Mr. Bennerstrom and his mother jointly decided that Mr. Bennerstrom would continue to be the sole care provider after Mrs. Bennerstrom became eligible for COPES. BR Bennerstrom 134. Mr. Bennerstrom was informed that he was not a DSHS employee and he agreed to this arrangement in a written contract. Ex. 1, 16; BR Hungate 59-60; BR Bennerstrom 132-33.

Bennerstrom, who did not want outsiders taking care of his mother, elected to provide all personal care for her. BR Sarafian 80. Mr. Bennerstrom assisted his mother with tasks as personal hygiene, dressing, bathing, meal preparation, feeding, toileting, shopping, bill paying, laundry, and housework. Ex. 10, 11, 22; BR Sarafian 68.

Mr. Bennerstrom had minimal contact with government workers charged with monitoring the COPES program. Mr. Bennerstrom submitted vouchers for payment, which DSHS as a third party payor, sent to him rather than Mrs. Bennerstrom because of federal law. BR Cherry

44-45. Mrs. Bennerstrom and her son were responsible for providing supervision and assessing the quality of the work that was performed. RCW 74.39.050; BR Sarafian 100; BR McDermott 33-34, BR Bennerstrom 139-41. Although the case manager and oversight nurses could make recommendations, Mr. Bennerstrom had decision-making authority. He was very independent and rejected virtually every caregiving recommendation that was made to him. BR Sarafian 98-101; BR Hungate 53-57; BR McDermott 29-34. Government workers responsible for monitoring the COPES program had no ability to ability to override Mr. Bennerstrom's decisions or impose discipline when he disregarded their advice. BR Sarafian 100-01; BR Hungate 57; McDermott 32-33.

Mr. Bennerstrom alleged below that he was entitled to industrial insurance benefits on two grounds. First, he claimed that he provided skilled medical care for his mother and was therefore not a domestic servant. AB 4; BR 39. Second, Mr. Bennerstrom asserted that he and DSHS had an employer-employee relationship which entitled him to benefits. AB 5, BR 41.

The Board of Industrial Insurance Appeals ruled against Mr. Bennerstrom on both issues. BR 1-4. The Board found that Bennerstrom was employed by his mother in a private home, and thus was excluded

from coverage as a domestic servant under RCW 51.12.020(1). BR 3. The Board also decided that DSHS was not Mr. Bennerstrom's employer. BR 2-3. The superior court affirmed the Board's decision on summary judgment following review of the record. CP 9.

The Court of Appeals, Division I, likewise affirmed the Board. *Bennerstrom v. Dep't of Labor & Indus. and Dep't of Soc. & Health Serv.*, 120 Wn. App. 853, 86 P.3d 826 (2004). The Court of Appeals determined that no employer-employee relationship existed because Mr. Bennerstrom had not satisfied either prong of the two-part test, consent and control, necessary to prove an employment relationship under *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). The Court of Appeals also determined that Mr. Bennerstrom's mix of personal care and household duties made him a domestic servant since his duties were indistinguishable from those in a factually similar case, *Everist v. Dep't of Labor & Indus.*, 57 Wn. App. 483, 789 P.2d 760 (1990).

IV. ARGUMENT

A. Mr. Bennerstrom cannot demonstrate a conflict with other appellate cases by raising new arguments in his petition.

Mr. Bennerstrom asserts that the decision below conflicts with *Dana's Housekeeping*, which addressed the question of workers'

compensation coverage for independent contractors. PFR 2, 7. Mr. Bennerstrom shows no conflict with *Dana's Housekeeping*. The issue of whether Mr. Bennerstrom could receive workers' compensation benefits as an independent contractor under the limited circumstances in RCW 51.08.180 was not raised below. Mr. Bennerstrom waived the independent contractor argument when he did not raise this issue before the Board and he waived this issue again by failing to raise it at the superior court level. See RCW 51.52.070; RCW 51.52.104; *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 345, 725 P.2d 463 (1986) (neither Board nor the superior court has jurisdiction to rule on issues that were not specifically raised in the petition for review).

Although *Dana's Housekeeping*, 76 Wn. App. at 607, identifies a three-part test necessary to determine an independent contractor's eligibility for workers' compensation, Mr. Bennerstrom did not allege before the Board, the superior court, or the Court of Appeals that he satisfied any of the statutory criteria in RCW 51.08.180. This is a fact specific issue and would need a record developed at the Board, with findings of fact, in order for either the superior court or appellate courts to consider the issue.

Mr. Bennerstrom stated only in passing in his briefing to the Court of Appeals that he was entitled to workers' compensation benefits as an independent contractor. *See* AB 18. *Dana's Housekeeping* was discussed in Mr. Bennerstrom's opening brief in the context of the domestic servant exclusion and Mr. Bennerstrom did not even cite RCW 51.08.180. AB 18. Certainly, he did not assign error on this ground, nor raise it as an issue. AB 2-5. The Court of Appeals properly declined to consider Mr. Bennerstrom's passing reference to the independent contractor issue on the basis that Mr. Bennerstrom provided no citation to authority, persuasive argument, or analysis to support this contention. 86 P.3d at 833.

Even assuming that the independent contractor issue is properly presented to this Court, the decision below does not conflict with the ruling in *Dana's Housekeeping* because the cases are readily distinguishable on the facts. Unlike *Dana's Housekeeping*, which involved a commercial enterprise, here Mrs. Bennerstrom was a recipient of the benefits of a public assistance program where the beneficiary of the

labor was not DSHS, but Mrs. Bennerstrom.²

Mr. Bennerstrom also cites *Dana's Housekeeping* to argue that the Court of Appeals improperly applied the domestic servant exclusion in RCW 51.12.020(1) to exclude DSHS. PFR 10. *See also* PFR 14. This was not the decision of the Court of Appeals, nor did DLI or DSHS argue that the domestic servant exclusion applied to DSHS. *See* DSHS Respondent's Brief, at 1-2; DLI's Respondent's Brief, at 1.

Mr. Bennerstrom mixes two separate issues together. The Court of Appeals affirmed the Board's decision that Mr. Bennerstrom was not an employee of DSHS. It was on this basis that DSHS was not required to provide workers' compensation benefits, not under the domestic servant

² Three distinct requirements must be met in order for a worker to qualify for workers' compensation benefits as an independent contractor. *Dana's Housekeeping*, 76 Wn. App. at 607. First, the worker must be working under an independent contract. Second, the essence of the contract must be personal labor. Third, the labor must be performed for a covered employer under this title. *Id.* at 607. In *Dana's Housekeeping* the issue was the third prong of the test and the alleged employer argued that its 140 housekeepers performed work for the benefit of the homeowners rather than for Dana's. 76 Wn. App. at 608. The court disagreed with this characterization of who received the benefit, since Dana's received up to 48 percent of the housecleaning fee paid by the homeowners, and also controlled much of the work performed. *Id.* at 608-09. Unlike the situation in *Dana's Housekeeping*, DSHS did not retain a portion of Mr. Bennerstrom's pay as profit. DSHS and the federal government expended funds because Mrs. Bennerstrom qualified for a public assistance program. Mr. Bennerstrom did not care for his mother at state expense to benefit DSHS. He provided care to benefit his mother. Under the COPES program, the Bennerstroms decided what state funded services they wished to use and decided who would perform the work and how and when the care giving tasks would be performed. Hence, the third prong of the independent contractor test has not been satisfied because Mr. Bennerstrom's labor benefited his mother, not DSHS.

exclusion. As a separate matter, the Board found that, although DSHS was not the employer of Mr. Bennerstrom, Mrs. Bennerstrom was his employer. BR 3. The Court of Appeals affirmed the Board's decision that the domestic servant exclusion separately excluded Mr. Bennerstrom from coverage. The Board found that Mr. Bennerstrom's duties as Mrs. Bennerstrom's employee were subject to the domestic servant exclusion. BR 3. RCW 51.12.020(1) excludes any individual "employed as a domestic servant in a private home."³ Contrary to Mr. Bennerstrom's arguments at PFR 11, there was a private individual that benefited from the domestic servant exclusion, namely Mrs. Bennerstrom. Here, Mr. Bennerstrom undertook the personal care of his mother. This is the sort of noncommercial activities that family members undertake. The Legislature excludes such work from coverage under the domestic servant exclusion in RCW 51.12.020(1) so as not to put an economic and administrative burden on private individuals, such as Mr. Bennerstrom's elderly mother.

The scope of the decision below was properly limited to determining that Mr. Bennerstrom was ineligible for workers' compensation benefits because he was not an employee of DSHS and that

³ Mr. Bennerstrom seeks to limit RCW 51.12.020(1) to homeowners. But this is not the language of the statute, which contemplates an individual "employed as a domestic servant in a private home." RCW 51.12.020(1). At PFR 10-12, Mr. Bennerstrom incorrectly characterizes *Dana's Housekeeping* and *Everist* as limiting application of the statute to homeowners. Such an issue was not addressed in either case.

Mr. Bennerstrom was ineligible for workers' compensation benefits as an employee of his mother because his duties were those of a domestic servant. Hence, no conflict exists between the ruling below and the ruling in *Dana's Housekeeping* because they address different issues.

B. The instant case presents no issue of substantial public interest meriting review by this Court.

The issues raised by Mr. Bennerstrom do not present issues of substantial public interest. Under COPES, DSHS administers a public assistance program to ensure that needy, disabled members of Washington's population receive proper care when they lack resources to do this on their own. This public assistance system does not establish an employment relationship that requires payment of workers' compensation benefits. As acknowledged by Mr. Bennerstrom at PFR 2, the Legislature elected to fund workers' compensation benefits for COPES and other home care workers under contract with DSHS prospectively. Laws of 2004, ch. 278, §§ 1-7. This legislation is effective for all injuries on or after July 1, 2004. Therefore, any decision of the Supreme Court is largely moot because of the changed legislative scheme. The fact that the Legislature changed the scheme reflects that it was the Legislature's choice whether to provide the benefits.

A decision by this Court has the potential to affect Mr. Bennerstrom's eligibility for workers' compensation benefits but is unlikely to affect anyone else who does not have a pending lawsuit. The facts presented in Mr. Bennerstrom case are unique to workers providing home care services under contract with DSHS through COPES or similar programs. Mr. Bennerstrom mistakenly asserts that DSHS somehow improperly contracted out of providing workers' compensation benefits under RCW 51.04.060. PFR 13. As a factual matter, contracts are relevant to show the parties did not consent to an employer-employee relationship and do not violate RCW 51.04.060.⁴ Mr. Bennerstrom's case was a given determination under the unique circumstances of his case.

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⁴ See *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P.2d 777 (1942) (holding that a contract, whether express or implied, is an important factor when determining if employer-employee relationship exists); *Wash. State Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 710, 54 P.3d 711 (2002) (holding that contract is not void under RCW 51.04.060 if the worker is not eligible for workers' compensation and has no benefit to waive even if the arrangement created by the contract has the incidental effect of creating an exception to coverage under the Industrial Insurance Act); *Lindbloom v. Dep't of Labor & Indus.*, 199 Wash. 487, 489-90, 91 P.2d 1001 (1939) (holding that a contract for services establishing the absence of an employer-employee relationship did not improperly waive industrial insurance benefits).

This case does not present an issue of substantial public interest
and review is not warranted.

RESPECTFULLY SUBMITTED this 23rd day of June, 2004.

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Appendix B

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1777

Chapter 278, Laws of 2004

58th Legislature
2004 Regular Session

HOME CARE WORKERS--COLLECTIVE BARGAINING

EFFECTIVE DATE: 4/1/04

Passed by the House March 10, 2004
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 10, 2004
Yeas 47 Nays 0

BRAD OWEN

President of the Senate

Approved April 1, 2004.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 1777** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

April 1, 2004 - 12:34 p.m.

**Secretary of State
State of Washington**

ENGROSSED HOUSE BILL 1777

AS AMENDED BY THE SENATE

Passed Legislature - 2004 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By Representatives Morrell, DeBolt, Cody, Benson, Sullivan, Woods, Pettigrew, McDonald, Wallace, Priest, Simpson, Roach, Grant, Hinkle, Santos, Jarrett, Hunt, Blake, Dunshee, Conway, Kirby, Hankins, Clibborn, Linville, Kagi, Kessler, Kenney, Schual-Berke, Darneille, Rockefeller, Wood, Lovick, Campbell, McDermott and Hudgins

Read first time 02/10/2003. Referred to Committee on Appropriations.

1 AN ACT Relating to implementing the collective bargaining agreement
2 between the home care quality authority and individual home care
3 providers; creating a new section; making appropriations; and declaring
4 an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) The legislature finds that the voters of
7 the state expressed their support for home-based long-term care
8 services through their approval of Initiative Measure No. 775 in 2001.
9 With passage of the initiative, the state has been directed to increase
10 the quality of state-funded long-term care services provided to elderly
11 and disabled persons in their own homes through recruitment and
12 training of in-home individual providers, referral of qualified
13 individual providers to seniors and persons with disabilities seeking
14 a provider, and stabilization of the individual provider work force.
15 The legislature further finds that the quality of care our elders and
16 people with disabilities receive is highly dependent upon the quality
17 and stability of the individual provider work force, and that the
18 demand for the services of these providers will increase as our
19 population ages.

1 (2) The legislature intends to stabilize the state-funded
2 individual provider work force by providing funding to implement the
3 collective bargaining agreement between the home care quality authority
4 and the exclusive bargaining representative of individual providers.
5 The agreement reflects the value and importance of the work done by
6 individual providers to support the needs of elders and people with
7 disabilities in Washington state.

8 NEW SECTION. **Sec. 2.** The sum of one hundred forty-five thousand
9 dollars, or as much thereof as may be necessary, is appropriated from
10 the general fund--state for the fiscal year ending June 30, 2005, and
11 the sum of one hundred forty-five thousand dollars, or as much thereof
12 as may be necessary, is appropriated from the general fund--federal for
13 the biennium ending June 30, 2005, to the children and family services
14 program of the department of social and health services. The
15 appropriations in this section shall be used solely to implement the
16 compensation-related provisions of the collective bargaining agreement
17 between the home care quality authority and the exclusive bargaining
18 representative of the individual providers of home care services. The
19 appropriations in this section shall be reduced by any amounts
20 appropriated by the 2004 legislature for this purpose in separate
21 legislation enacted prior to June 30, 2004.

22 NEW SECTION. **Sec. 3.** The sum of eight million ninety-six thousand
23 dollars, or as much thereof as may be necessary, is appropriated from
24 the general fund--state for the fiscal year ending June 30, 2005, and
25 the sum of seven million five hundred thirty-one thousand dollars, or
26 as much thereof as may be necessary, is appropriated from the general
27 fund--federal for the biennium ending June 30, 2005, to the
28 developmental disabilities program of the department of social and
29 health services. The appropriations in this section shall be used
30 solely to implement the compensation-related provisions of the
31 collective bargaining agreement between the home care quality authority
32 and the exclusive bargaining representative of the individual providers
33 of home care services. The appropriations in this section shall be
34 reduced by any amounts appropriated by the 2004 legislature for this
35 purpose in separate legislation enacted prior to June 30, 2004.

1 NEW SECTION. **Sec. 4.** The sum of fourteen million two hundred
2 seventy-nine thousand dollars, or as much thereof as may be necessary,
3 is appropriated from the general fund--state for the fiscal year ending
4 June 30, 2005, and the sum of fourteen million one hundred seventy-one
5 thousand dollars, or as much thereof as may be necessary, is
6 appropriated from the general fund--federal for the biennium ending
7 June 30, 2005, to the aging and adult services program of the
8 department of social and health services. The appropriations in this
9 section shall be used solely to implement the compensation-related
10 provisions of the collective bargaining agreement between the home care
11 quality authority and the exclusive bargaining representative of the
12 individual providers of home care services. The appropriations in this
13 section shall be reduced by any amounts appropriated by the 2004
14 legislature for this purpose in separate legislation enacted prior to
15 June 30, 2004.

16 NEW SECTION. **Sec. 5.** The sum of ninety-four thousand dollars, or
17 as much thereof as may be necessary, is appropriated from the general
18 fund--state for the fiscal year ending June 30, 2004, and the sum of
19 one million two hundred seventy-six thousand dollars, or as much
20 thereof as may be necessary, is appropriated from the general fund--
21 state for the fiscal year ending June 30, 2005, to the home care
22 quality authority. The appropriations in this section shall be used
23 solely for administrative and employer relations costs associated with
24 implementing the terms of the collective bargaining agreement between
25 the home care quality authority and the exclusive bargaining
26 representative of the individual providers of home care services. The
27 home care quality authority shall transfer funds from this
28 appropriation to the department of social and health services and to
29 the office of financial management as necessary to achieve the terms of
30 the agreement. The appropriations in this section shall be reduced by
31 any amounts appropriated by the 2004 legislature for this purpose in
32 separate legislation enacted prior to June 30, 2004.

33 NEW SECTION. **Sec. 6.** The sum of thirteen thousand dollars, or as
34 much thereof as may be necessary, is appropriated from the general
35 fund--state for the fiscal year ending June 30, 2004, and the sum of
36 fifty-two thousand dollars, or as much thereof as may be necessary, is

1 appropriated from the general fund--state for the fiscal year ending
2 June 30, 2005, to the office of financial management. The
3 appropriations in this section shall be used solely for administrative
4 and employer relations costs associated with implementing Substitute
5 House Bill No. 2933 (home care worker collective bargaining). The
6 appropriations in this section shall be reduced by any amounts
7 appropriated by the 2004 legislature for this purpose in separate
8 legislation enacted prior to June 30, 2004.

9 NEW SECTION. **Sec. 7.** This act is necessary for the immediate
10 preservation of the public peace, health, or safety, or support of the
11 state government and its existing public institutions, and takes effect
12 immediately.

Passed by the House March 10, 2004.

Passed by the Senate March 10, 2004.

Approved by the Governor April 1, 2004.

Filed in Office of Secretary of State April 1, 2004.

NO. 66013-6-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant,

v.

XENITH GROUP INC.,

Respondent.

NO. 66013-6-I

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on January 26, 2011, she caused to be served the Department's Reply Brief and Declaration of Mailing in the below-described manner:

Via ABC Legal Messenger to the following:

ORIGINAL & COPY TO: Richard D. Johnson,
Court Administrator/Clerk
Court of Appeals Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

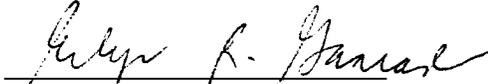
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COPY TO:

Joan Morgan
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801 Second Ave., Suite 1110
Seattle, WA 98104-1576

DATED this 26th day of January, 2011.


ERLYN R. GAMAD
Legal Assistant