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Court of Appeals
Division I
State of Washington
NO. 73234-0-I

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

HENRY INDUSTRIES, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

KATY J. DIXON
Assistant Attorney General
WSBA No. 43469
Office Id. No. 91018
800 Fifth Avenue Suite 2000
Seattle, WA 98140
(206) 389-2770

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Appendix A: Board Decision and Order

Appendix B: RCW 51.08.195

I. INTRODUCTION

The Industrial Insurance Act is designed to reduce economic suffering caused by workplace injuries—to that end it embodies a legislative choice to have broad coverage for Washington workers. In 1936, the Legislature amended the Industrial Insurance Act to broaden its reach to provide workers' compensation coverage to contractors whose personal efforts are essential in performing work under a contract.

Henry Industries, Inc., hires independent contractors to provide transportation and delivery services, including the delivery of pharmaceutical supplies to long-term care facilities. The Board of Industrial Insurance Appeals found that these delivery drivers were covered workers. The fact that the drivers used personal vehicles to complete delivery routes does not change the essence of the work under the contract—which was to obtain the services of drivers, not simply to obtain the use of their cars. The drivers were required to exercise their discretion in transporting and securing sensitive materials, to represent Henry Industries professionally, and to exercise their skills in maintaining a 95 percent timeliness requirement for deliveries. These aspects of their labor, and more, show that they provided more than just a car.

This Court should affirm the Board's decision.

II. ISSUES

1. Does substantial evidence support finding that the essence of the contract was personal labor when the drivers were hired principally to provide delivery services that required judgment in working with sensitive materials, “courtesy and professionalism,” confidentiality, and a 95 percent timeliness mandate?
2. Does substantial evidence support that the drivers were not exempt from industrial insurance coverage under the multi-factor test in RCW 51.08.195 when Henry Industries had the burden of proof and cannot establish that the drivers filed taxes, properly registered with state agencies as a business, and maintained complete business records?
3. RCW 51.08.180 provides that any person working under a contract where the essence of their labor is personal is a covered worker. RCW 51.12.020 does not require sole proprietors to have industrial insurance coverage when working for themselves. Does RCW 51.08.180 govern here when the drivers were providing personal labor under a contract regardless of whether they were also registered as sole proprietors?

III. STATEMENT OF FACTS

A. **Henry Industries Is a Logistics Company That Enters Into Contracts With Drivers to Perform Transportation and Delivery Services**

1. **The Drivers Deliver Pharmaceuticals to Long-Term Care Facilities on Either a Set Schedule or on an On-Call Basis**

Henry Industries provides warehouse and logistics services.

BR Henry 8-9.¹ Henry Industries is headquartered in Kansas and has offices throughout the country, including operations in Seattle and

¹ The certified appeal board record is cited as “BR” followed by the appropriate page number. Citations to the testimony of a witness will be cited to as “BR” followed by the name of the witness and the page number of the applicable transcript.

Spokane and a warehouse in Redmond. BR Henry 9-10. Henry Industries' primary client in Washington is a company called PharMerica, which provides pharmaceutical supplies to long-term care facilities. BR Henry 10. Henry Industries has four warehouse employees in Washington; otherwise it enters into standard contracts, called cartage agreements, with drivers to perform deliveries. BR Henry 15.

Drivers enter into either a "route" contract or a "stat" contract. BR Henry 15-17. Route contracts are based on standard delivery needs and are generally performed six days a week. Route drivers making pharmaceutical deliveries arrive at PharMerica at a designated "release" time, enter a key code to enter a driver's room, check the manifest they received to make sure the serial numbers match the numbers on the deliverables, load the vehicles and start their routes. BR Parker 112-13. Stat drivers are called upon for individual jobs on an "on call" basis. BR Henry 17; BR Hawley 87.² Stat drivers are contacted by Henry Industries dispatchers when an order is ready to be picked up. The driver picks up the item, makes the delivery and then makes a proof of delivery call to the dispatcher to report the time of the delivery. BR Hawley 87.

As part of the job, the drivers must deliver the correct

² Henry Industries argues that the superior court incorrectly characterized the stat deliveries as "on call" deliveries (App. Br. 28), but both the cartage agreement and Hawley's testimony describe the deliveries as "on call." Ex. 2, "Schedule A."

pharmaceuticals to the correct long-term care facility, which requires handling sensitive materials in a “time critical” manner. BR Henry 20. Because the drivers are transporting controlled substances and narcotics, Henry Industries’ client PharMerica is subject to Drug Enforcement Agency standards, and so demands that all drivers pass background and drug tests before they can perform deliveries for PharMerica. BR Henry 22-23. Henry Industries passes along this screening requirement in its agreement with drivers and the drivers become contractually bound to Henry Industries to follow these rules. BR Henry 22; Ex. 2.

The drivers provide their own car, and pay maintenance and fuel costs. BR Henry 19. When a customer has an issue with a delivery, Henry Industries receives the complaint and investigates with the driver. BR Henry 45-46. Henry Industries requires drivers to keep their own books and register as business entities with the State of Washington, but it does not maintain any information regarding the drivers’ bookkeeping practices, and there is no standard process for checking that drivers register or maintain business licenses. BR Henry 48.

2. The Standard Driver Contract Establishes the Manner of Service

The standard driver contract states, by way of preamble, that the contractor “desires to perform services for customers of HICN.”³ The driver agrees to provide a vehicle for performing services and to drive the vehicle “in a manner that will provide maximum safety to the driver and the general public.” Ex. 2, §3b. The driver must be fluent in written and spoken English. Ex. 2, §3c.

The driver agrees to lease or purchase scanner devices for conducting pick-up and delivery services. Ex. 2, §3f. Under the agreement, the driver agrees to “prominently” wear an identification badge as required by Henry Industries’ customers, which may be purchased from Henry Industries. Ex. 2, §3g. The drivers generally wear uniforms and/or identification badges that designate them as independent contractors working for Henry Industries. BR Henry 40.

The driver agrees to maintain vehicle and occupational accident insurance, in specified amounts and provide evidence of insurance to Henry Industries. Ex. 2, §5. The driver agrees to keep information related to Henry Industries confidential. Ex. 2, §9. The driver agrees to secure all freight and to keep doors and windows locked at all times. Ex. 2, §3j.

³ HICN stands for “Henry Industries Courier Networks” and is a dba for Henry Industries, Inc. Ex. 2.

The driver agrees to a non-solicitation clause that prohibits the driver from working with any client of Henry Industries for the term of the agreement, and for 18 months following the termination of the agreement. Ex. 2, §10. Either party may terminate the agreement upon 14 days written notice, but the agreement also sets forth several grounds for immediate termination of the driver, including the driver's failure to secure or account for controlled substances, failure to complete delivery routes, and/or a breach of confidentiality or the non-solicitation provisions. Ex. 2, §12.

The contractor agrees to submit his or her delivery schedule to Henry Industries and its customer "including all stops and times, as frequently as requested by the customer" and to update the route as may be required. Ex. 2, §3h. Rejecting a route is grounds for immediate termination of the agreement. Ex. 2, "Schedule A." In order to be paid for services, the driver must turn in delivery receipts to Henry Industries' office. Ex. 2, "Schedule A."

Under the section entitled, "Manner of Performance of Service," the driver agrees to provide services "in a courteous, efficient, expeditious, reliable, safe and secure manner." Ex. 2, §3a. The driver agrees to conduct business "in a courteous and professional manner" and to "diligently devote his/her/its best efforts, skill and abilities to comply

with customer requirements and to faithfully enhance and promote the welfare and best interests” of Henry Industries. Ex. 2, §3i. The drivers agree to “perform all services in a timely, efficient and safe manner.” Ex. 2, “Schedule A.” The driver agrees to complete deliveries within the time frame requested by Henry Industries’ customer 95 percent of the time. Ex. 2, “Schedule A.”

3. The Drivers Testified That They Did Not Have Employees

Vince Martinez, operations manager at the Henry Industries Redmond warehouse, looks for drivers to complete available routes. BR Martinez 68. Martinez tells route drivers that they need to either complete a route themselves or arrange for a backup driver to complete the route. BR Martinez 68. If a stat driver could not complete a delivery, Martinez would “go on to the next person” until he found another contracted driver who was free to take the delivery, which sometimes required Martinez to call three or four of Henry Industries contracted drivers. BR Martinez 69. On occasion, Henry Industries’ clients would have concerns that delivery time frames were not being met, and Martinez would convey those concerns to the driver. BR Martinez 81.

Two drivers testified for Henry Industries: Charles Hawley and Keith Parker. BR Hawley 84-105; BR Parker 106-28. Hawley has been

driving for Henry Industries since November 2010 as an on-call “stat” courier. BR Hawley 85-87. Keith Parker has been driving for Henry Industries as a route driver since 2006. BR Parker 108-09. Neither had employees of their own nor drove for any other company while under contract in 2010. BR Hawley 92-93; BR Parker 110, 121.

B. The Board Found That the Essence of the Drivers’ Labor Under the Contract Was Personal and That They Did Not Meet the Test for Exemption, and the Superior Court Affirmed

After completing an investigation, a Department auditor found that Henry Industries owed premiums for work performed by 33 drivers operating under contract in 2010. BR Peterman 136. The Department concluded that Henry Industries owed \$51,579.57 in workers’ compensation taxes and penalties. Ex. 50. Henry Industries appealed the Department’s order to the Board. BR 48-111.

After Henry Industries appealed, the industrial appeals judge issued a proposed decision finding that the drivers did not provide personal labor to Henry Industries. BR 26-40. The Department filed a petition for review to the Board. BR 15-20. It is the three-member Board that issues a final Board decision, thus replacing the proposed decision. RCW 51.52.106.

The Board issued a decision and order in 2014 affirming the Department’s premium assessment. Looking to a number of factors about

the contract and the relationship between the parties, the Board found that drivers were working under independent contracts, the essence of which was their personal labor. The Board found that Henry Industries failed to establish that the drivers met any of the elements of RCW 51.08.195, and concluded that the drivers were workers as contemplated by RCW 51.08.180 and RCW 51.08.195. BR 8-9.⁴

The superior court affirmed, concluding that substantial evidence supported the Board's decision. CP 80.

IV. STANDARD OF REVIEW

A. The Superior Court and Appellate Court Reviews the Board's Decision Regarding Premium Assessments Under the Administrative Procedure Act

An employer seeking review of the Department's assessment of industrial insurance premiums must first appeal to the Board. RCW 51.48.131. An employer challenging the validity of the Department's assessment bears the burden of proof before the Board to show that the premiums were assessed incorrectly. RCW 51.48.131; RCW 51.52.050; *Scott R. Sonners, Inc. v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 355, 3 P.3d 756 (2000).

Appeals beyond the Board are governed by the Administrative Procedure Act. RCW 51.48.131; *Probst v. Dep't of Labor & Indus.*,

⁴ The Board's decision is in Appendix A.

155 Wn. App. 908, 915, 230 P.3d 271 (2010). Under the Administrative Procedures Act, Henry Industries bears the burden of proof to prove the Board decision incorrect. RCW 34.05.570(1)(a).

Both the superior court and appellate court review the assessment based on the record before the Board. *Probst*, 155 Wn. App. at 915.⁵ Correctly following the Administrative Procedures Act, the superior court applied the correct standard of review, which is substantial evidence, not a preponderance of the evidence, as Henry Industries claims. *Contra* App. Br. 23. RCW 51.52.115 does not apply, instead RCW 51.48.131, which mandates use of the Administrative Procedures Act, does. *ETCO, Inc. v. Dep't of Labor & Indus.*, 66 Wn. App. 302, 305-06, 831 P.2d 1133 (1992).⁶

B. Substantial Evidence Review Applies

The Board's findings of fact are reviewed for substantial evidence, defined as evidence sufficient to persuade a fair-minded, rational person of the declared premise. *See* RCW 34.05.570(3)(e); *Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 704, 54 P.3d 711

⁵ It is the Board's decision that is reviewed. Under RCW 51.52.104, proposed decisions and orders are not the decisions and orders of the Board. *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). Henry Industries' claim that the Board "reversed" the findings of the industrial appeals judge is without merit. App. Br. 9. It is the findings of the Board and the Board alone that are subject to review here.

⁶ The two decisions cited by Henry Industries in support of its claim that preponderance of the evidence applied both concern worker benefits, not tax assessments. App. Br. 11 (citing *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 253, 177 P.3d 180 (2008); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 189 P.3d 178 (2008)).

(2002). The reviewing court views the evidence in the light most favorable to the Department, as it is the party who prevailed in the highest administrative forum that exercised fact-finding authority (here, the Board). *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 418, 216 P.3d 451 (2009).

The superior court's analysis is irrelevant to this Court, as it is the findings and conclusions of the Board that are subject to review. *See Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. at 704. Henry Industries claims that the superior court committed reversible error by ignoring or discounting certain evidence, and making improper credibility determinations. App. Br. 11. But credibility determinations are questions reserved for the fact finder, the Board, and are not subject to appellate review. *See Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 910, 138 P.3d 177 (2006).

While the Board's legal conclusions are reviewed de novo, an appellate court gives substantial weight to the agency's interpretation when the subject area falls within the agency's area of expertise. *Mitchell Bros.*, 113 Wn. App. at 704. In reviewing a mixed question of law and fact, the court determines the law independently of the agency determination and then applies the law to the facts as found by the agency. *Peter M. Black Real Estate Co., v. Dep't of Labor & Indus.*, 70 Wn. App.

482, 487, 854 P.2d 46 (1993).

C. The Question of Whether the Drivers Were Workers Is a Mixed Question of Law and Fact

This case concerns whether the 33 drivers were “workers” under RCW 51.08.180. This question is a mixed question of law and fact. *B & R Sales, Inc. v. Dep’t of Labor & Indus.*, 186 Wn. App. 367, 376, 344 P.3d 741 (2015). Whether the services were personal is a question of fact. *Dana’s Housekeeping, Inc. v. Dep’t of Labor & Indus.*, 76 Wn. App. 600, 608, 886 P.2d 1147 (1995). Here, the Board found that the drivers were working under independent contracts, the essence of which was their personal labor. BR 8. This finding should be reviewed for substantial evidence. *Id.* “The fact finder can consider the contract, the work to be done, the situation of the parties, and other attendant circumstances.” *Dana’s Housekeeping, Inc.*, 76 Wn. App. at 608. The conclusion of whether, under these facts, the contractors are workers should be reviewed de novo. *B & R Sales, Inc.*, 186 Wn. App. at 376. Without analysis, the court in *Silliman v. Argus Servs., Inc.*, 105 Wn. App. 232, 236, 19 P.3d 428 (2001), characterized the question of whether work performed constitutes “personal labor” as a question of law. It is correct that the legal conclusion of whether the individuals are workers is a question of law, as analyzed in *B & R Sales*. 186 Wn. App. at 376. But determining whether

the “essence” of something involves “personal labor” necessarily involves looking at the attendant circumstances and agreeing or rejecting the testimony presented by such circumstances—all endeavors traditionally done by a fact finder. *See Dana’s Housekeeping, Inc.*, 76 Wn. App. at 607. Therefore, this Court should decline to follow *Silliman* and instead determine that the question of whether something is personal labor is a question of fact as determined by *Dana’s Housekeeping*.

V. ARGUMENT

The fundamental purpose of the Industrial Insurance Act is to reduce economic suffering caused by industrial injuries and have broad coverage to effectuate that goal. RCW 51.04.010; RCW 51.12.010. Under the Act, determining whether employment is covered is dictated by the actual nature of the work performed, and not by the labels that the parties attach to their relationship. *See Jamison v. Dep’t of Labor & Indus.*, 65 Wn. App. 125, 132, 827 P.2d 1085 (1992). To that end, the Legislature purposefully expanded the definition of covered worker in the Act beyond the common law definition of employee in order to “bring under its protection independent contractors whose personal efforts constitute the main essential in accomplishing the objects of the employment, and this, regardless of who employed or contracted for the work.” *Norman v. Dep’t of Labor & Indus.*, 10 Wn.2d 180, 184, 116 P.2d 360 (1941).

The more a statute facilitates full collection of premiums, the better it serves the accident fund from which compensation is paid, thus ensuring that workers are protected. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 426, 873 P.2d 583 (1994). In addition, collecting premiums serves the Industrial Insurance Act's goal "to allocate the cost of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer." *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009). This is particularly important here given that courier drivers have the twelfth most dangerous occupation in Washington in terms of reported injuries.⁷

The Department's position is clear—when the essence of work under the contract is personal labor, the contractor is covered, contrary to Henry Industries' claims that the Department has somehow taken an inconsistent position about this. App. Br. 2; BR 3-4. Such coverage ensures that workers are protected against the economic and physical harm caused by industrial injuries. RCW 51.12.010; RCW 51.04.010.

A. Henry Industries' Delivery Drivers Are Workers Under RCW 51.08.180 Because Substantial Evidence Shows That the Essence of Their Work Under the Contract Is Personal Labor

Looking at the contract and the work performed under the contract provides substantial evidence that the essence of the work performed

⁷ <http://www.lni.wa.gov/IPUB/417-258-000.pdf> (last visited Nov. 13, 2015).

under the contract was personal labor. Henry Industries is wrong that the only evidence of personal labor is a “lone factor” of the background and drug checks, or that the Board relied on those elements alone in finding that the drivers were providing personal labor. App. Br. 2. Although this evidence contributes to the substantial evidence present here, it is not the only evidence as demonstrated below. Henry Industries admits that the work provided was transportation and delivery of goods. App. Br. 13. Such work is personal labor and is covered by the Industrial Insurance Act.

1. Whether an Independent Contractor Is Covered by the Industrial Insurance Act Depends on Whether the Essence of the Work Was Personal Labor

The Board correctly concluded that the drivers were “workers” under RCW 51.08.180. A “worker” is defined to include both employees and “every person in this state . . . who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title” RCW 51.08.180.⁸ The *Norman* Court emphasized that whether an independent contractor is covered by the Act depends on

⁸ Henry Industries asserts that for purposes of determining industrial insurance coverage, individuals are divided into two categories: “workers” who are covered under the Industrial Insurance Act and “employees” who are exempt from coverage unless they otherwise opt into coverage. App. Br. at 12. This is incorrect. A “worker” may be an employee or an independent contractor if the respective tests for either categorization are met. *Xenith v. Dep’t of Labor & Indus.*, 167 Wn. App. 389, 269 P.3d 414, amended by 349 P.3d 858 (2012).

whether “the essence of the work being performed . . . was personal labor.” *Norman*, 10 Wn.2d at 184.

The Washington Supreme Court in *White* articulated three instances where the essence of work under a contract may not be for personal labor. An independent contractor is not a covered worker who:

(a) must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract; [or]

(b) obviously could not perform the contract without assistance; or

(c) of necessity or choice employs others to do all or part of the work he has contracted to perform.

White v. Dep’t of Labor & Indus., 48 Wn.2d 470, 474, 294 P.2d 650 (1956).

In *White*, William and Lucinda May White owned a donkey engine, a steam powered logging engine unique to the task at hand. The Whites orally contracted with a mill owner to move their “donkey engine onto the tract in question and to yard out and cold deck the logs.” *White*, 48 Wn.2d at 475. The Whites could not perform the contract without the donkey engine. *Id.* Indeed, Lucinda May White testified that they were approached to do the work because “we had equipment.” *Id.* The Whites hired one worker, Lydey, to assist them in their work, and they received increased compensation from the mill owner to reflect the wage paid to

Lydey. *White*, 48 Wn.2d at 475. The Court found that the essence of the contract between the Whites and the mill owner was not for the personal labor of the Whites, pointing in part to the expensive machinery and also to the employment of Lydey. *Id.* at 476-77.

Since *White*, the three elements articulated in that case have been applied to a number of other cases involving the assessment of industrial insurance premiums. *See, e.g., Jamison*, 65 Wn. App. at 130-32; *Lloyd's of Yakima Floor Center v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 748, 662 P.2d 391 (2001); *B & R Sales, Inc.*, 186 Wn. App. at 376-80. In analyzing the *White* factors, courts “consider the contract, the work to be done, the situation of the parties, and other attendant circumstances.” *B & R Sales, Inc.*, 186 Wn. App. at 377. They “focus on the realities of the situation rather than the technical requirements of the test.” *Id.* In determining the essence of a work relationship, the “essence” with which RCW 51.08.180 is concerned is the “essence of the *work* under the independent contract, not the characterization of the parties’ relationship.” *Dana's*, 76 Wn. App. at 607. Here only the first and third prongs are disputed. App. Br. 14. (arguing that the drivers meet the first and third prongs, only). Neither factor is demonstrated here when looking to the contract, the work, the situation of the parties, and the circumstances of the work.

2. Under the First Prong of *White*, the Object of the Contract Was the Services of the Drivers, Not the Car

The Board's finding that the essence of the work under the contract was personal labor is supported by substantial evidence. The agreement the drivers signed is a contract for services provided to Henry Industries and in practice the evidence shows that the primary object of the contract was the timely and competent services of the drivers, not the vehicle.

Even if a car is a necessary part of a contract, the contractor may still be covered under the Industrial Insurance Act. "[I]f the contracting party's primary object is to obtain the personal labor of a skilled contractor, the contractor is a 'worker' under RCW 51.08.180 even if the contractor must use specialized equipment in the course of his or her performance of the personal labor." *B & R Sales, Inc.*, 186 Wn. App. at 377-78. The Department disputes that a car is specialized equipment—but even *arguendo* it is, it does not preclude coverage where the primary object is to obtain the contractor's labor.

Henry Industries agrees with the Department that the primary object of the contracts was the transportation and delivery of goods. App. Br. 13. As transporting and delivering are two types of services, Henry Industries concedes that the drivers entered into personal service contracts to deliver goods. Yet Henry Industries argues that the drivers are

not providing personal labor because drivers could not feasibly complete their routes without a car. App. Br. 18. Henry Industries denies that it is looking only at the “mere use of [a] vehicle[.]” App. Br. 17. But yet it argues that the “vehicles provided by the contractors are absolutely necessary to completion of the contract” and it equates that to the “expensive equipment” in *White* to argue that this excludes coverage. App. Br. 18. Despite its protestations, Henry Industries’ argument boils down to an argument that because a car is required that this is the primary object of the contract. App. Br. 17-18. But the presence of a car does not change the fact that the physical act of driving is labor, nor does it change that Henry Industries required its drivers to handle sensitive material and deliver the products in a timely, professional and secure fashion—aspects of the personal labor provided directly to Henry Industries, and so this argument fails. Henry Industries then attempts to reconstitute its argument by saying it does not care who drives the car, so therefore the primary object is the car not the driver. App. Br. 19. But the myriad contractual requirements that attach to the driver show that Henry Industries is anything but indifferent as to *who* performs work under the contract. Moreover, the ability of a contractor to hire others does not, standing alone, preclude industrial insurance coverage. *See* Part V.A.3. It is the actual work performed that is examined, and here such examination shows

it was personal labor.

a. The Mere Use of a Personal Vehicle Does Not Determine the Essence of a Contract

The essence of a contract turns on the nature of the work performed, and Henry Industries agrees that the primary object of this contract was the transportation and delivery of goods. App. Br. 13. While the drivers needed a car to perform the contract, this alone does not determine the essence of the work. *See Lloyd's*, 33 Wn. App. at 751-52.

Under *White*, when the object of the contract is the equipment, then the contract is not about personal labor. But *White* and subsequent cases hold that a worker can use equipment to accomplish the work. 48 Wn.2d at 477; *B & R Sales, Inc.*, 186 Wn. App. at 370; *Jamison*, 65 Wn. App. at 131. In other words, the presence of equipment does not preclude coverage where personal labor is also provided. *Jamison*, 65 Wn. App. at 131. The Board's finding is consistent with *Lloyd's of Yakima*, where a company sold floor covering for installation and used independent contractors to install its product. *Lloyd's*, 33 Wn. App. at 747. The agreement between Lloyd's and the installers "was their personal labor" despite the fact that the installers used a van to transport their materials. *Id.* at 751. Contrary to Henry Industries' arguments, the court in *Lloyd's of Yakima* did not say that the truck was merely ancillary to the contract; the

court said that the machinery was not the *primary* object of the agreement. *Id.* Likewise, the Board here concluded that despite the necessary use of a vehicle, the essence of the contract was personal labor. Br. 8.

The court's holding in *Lloyd's of Yakima* was recently reaffirmed in *B & R Sales, Inc.*, 186 Wn. App. at 377-78, another case involving flooring installers who used *customized* vans to transport supplies. Under *B & R*, the necessary use of expensive equipment does not preclude coverage if the object of the contract is to obtain the personal services of the contractor. *B & R Sales*, 186 Wn. App. at 377-78.⁹

While Henry Industries requires drivers to provide a vehicle and use it in performing services under the contract, Henry Industries does not require any special type of vehicle or any specialized equipment in addition to the vehicle. This is not like the “donkey engine” in *White* where the “donkey engine” was the primary object of the contract and the labor was only secondary. *White*, 48 Wn.2d at 475, *discussed in B & R Sales, Inc.*, 186 Wn.2d at 378; *see also Jamison*, 65 Wn. App. at 131 (use of “Cat tractor” to perform work under the contract did not mean contractor was not worker). The only equipment necessary to make the deliveries was a standard automobile, something owned by the vast

⁹ Henry Industries seems to believe that because cars may be expensive, this defeats coverage. App. Br. at 18. But this argument was rejected in *B & R Sales, Inc.*, 186 Wn. App. at 370.

majority of people in this country. This is hardly “specialized” equipment. Rather, it is the normal equipment used to accomplish a job as permitted by *White*. But even if it is viewed as “specialized” under *B & R Sales*, its presence is not determinative because the object of the contract remains the personal services of the drivers.

The drivers testified that they use their regular cars to make deliveries, in addition to using their cars for their own personal use. BR Hawley 95; BR Parker 123. A Henry Industries’ job posting for contract driver positions advertised that the recommended vehicle was “anything reliable with good gas mileage.” BR Henry 42. If the car were the primary object of the agreement, one would expect the contract to concern itself with the car’s size, make, model, load capacity or mileage, but there are no requirements of that sort. CEO Brett Henry testified that he does not know what kind of car the contractors use. BR Henry 36.

The *essence* of the contract was the work performed by the driver. A vehicle without a driver would be of little use in completing the work demanded under the contract. Henry Industries did not contract for the car, but rather for the services of the driver. Moreover, in today’s working world, cars are ubiquitous and many professions require that employees operate a vehicle as part of their normal job duties. If needing to use a car meant that a contractor was automatically exempt from workers’

compensation coverage, the Industrial Insurance Act's broad mandate to reach all employees and contractors whose personal labor is the essence of the contract would be thwarted in a way never intended by the *White* Court or the Legislature.

b. The Department's Manual Emphasizes That Generally Supplying a Vehicle Does Not Exempt an Individual From Coverage

The Department's field audit reference manual advises auditors, when determining an employer's liability for industrial insurance premiums, to carefully evaluate and document the purpose of the contract and the importance of any equipment provided under the contract.¹⁰ While Henry Industries makes much of the fact that the Department's reference manual states that the use of a vehicle will, under some situations, make a delivery driver exempt from mandatory coverage, Henry Industries misreads the manual and omits important provisions in its analysis. App. Br. 15. The manual advises that the "auditor must evaluate and document the purpose of the contract and the importance of any equipment supplied. *Generally, supplying a vehicle doesn't exempt an*

¹⁰ This document is an internal guidance document used in training auditors, not a publically available document. Henry Industries has not shown that it relied upon the manual or cited any authority for why the manual should be treated as a legal authority. Indeed, Henry Industries states that it does not dispute that the manual is not a legal document, but nevertheless indicates that the manual should be treated as evidence of the Department's "intent." App. Br. 15. The Department auditor was clear that his determination in this case turned on the elements of employer control evidenced in the contract. It is this sworn testimony, not a generic training document, that explains the Department's intention in issuing a premium assessment against Henry Industries.

individual from coverage.” Ex. 34 (emphasis added). Indeed, the reference manual cites the *Lloyd’s* decision as an instance where the use of a van did not take the contractors out of the operation of the Industrial Insurance Act. The manual also emphasizes that “if the contracting firm controls the individual, the equipment doesn’t exempt the individual, regardless.” The auditor testified that he determined that the contracts were for personal labor, despite the use of vehicle, because of the elements of direction and control reflected in the cartage agreement. BR Peterman 159. This conclusion is legally correct and consistent with the Department’s own internal guidance documents.

c. The Drivers Convey Sensitive Pharmaceutical Products to Specific Locations

That the work performed is personal labor is shown by the work performed by the drivers. The drivers handle controlled substances, requiring specific screening protocols, including passing drug tests and yearly background checks. *See* Ex. 2; BR Henry 22-23. The drivers must pick up drugs from PharMerica and make sure they identify the correct location to take the drugs to, matching up the serial numbers on the manifest and on the product and making their way to their destination efficiently. *See* BR Parker 112-13. This requires discretion and judgment. Indeed, the contract requires confidentiality. Ex. 2 §9.

The drivers must identify themselves as Henry Industries subcontractors through an identification badge and many also wear uniforms. Ex. 2, §3g; BR Henry 40. In representing Henry Industries, they devote their best efforts “to faithfully enhance and promote the welfare and best interests” of Henry Industries. Ex. 2, §3i. They have to be “courteous and professional” with Henry Industries’ customers and the public. *See* Ex. 2, §3i. Henry Industries is contracting for the loyalty, demeanor, and professionalism of the driver. These are attributes of personal labor specific to Henry Industries.

Henry Industries also contracts for the skills of the driver, as driving is a form of personal labor. If an independent contractor has skills of importance to the employer, this supports the conclusion that the essence of the work under the contract is personal labor. *Lloyd’s of Yakima*, 33 Wn. App. at. 751. Here, drivers must handle sensitive material and deliver the products in a timely, professional and secure fashion.¹¹ By contract, the drivers must also be on time 95 percent of the time to make their deliveries. Ex. 2 “Schedule A.” This requires skills in navigating the areas on their routes with maximum efficiency and safety. If there were

¹¹ Of course, if the Court does not believe that the drivers provided skilled labor, that does not mean that the drivers are not covered. Indeed, RCW 51.08.180 covers all independent contractors when the essence of the work under the contract is personal labor. It would be a strange rule of law that only laborers who are denominated skilled are covered under the Industrial Insurance Act. Here, the labor provided is the actual work of the delivery services whether characterized as skilled or unskilled.

concerns about delivery times by the client, Henry Industries staff will speak to the driver. BR Martinez 81. This shows that Henry Industries is contracting for timeliness in the labor provided and ability to safely accomplish such results. Drivers must provide constant updates as to whether the deliveries are accomplished. BR Hawley 95. This shows that Henry Industries is keenly interested in the accomplishment of the delivery. The drivers also agree to submit their route to Henry Industries, and update the route as needed. Ex. 2, §3h. This shows Henry Industries values the route taken and the impact on the delivery in order to meet its customer's needs.

The testimony of Parker and Hawley establishes that they performed their delivery work as the contract required them to do, by diligently devoting their best efforts “to faithfully enhance and promote the welfare and best interests” of Henry Industries. Ex. 2, §3i. To do so required daily interaction with Henry Industries staff.

The cartage agreement signed by all drivers is replete with elements that are specific to a driver, from how the drivers are screened, to how they are paid, to the manner in which they can be terminated, to their rights after the contract ends. For the purpose of determining the essence of these contracts, it is irrelevant whether these requirements originate from Henry Industries or from Henry Industries customer,

PharMerica. Henry Industries adopted and built them into its agreement with the drivers. BR Henry 13.

Henry Industries points to *Silliman* to argue that labor is not personal if the contract contemplates a specific labor, but not a specific laborer. App's Br. 21 (citing *Silliman*, 105 Wn. App. at 232, 238). This is incorrect in two fundamental ways. First, the ability to hire someone else is not determinative under the *White* test. See Part V.A.3. What is looked at is the work performed by the contractor. *Norman*, 10 Wn.2d at 184. Here, as discussed extensively throughout this brief, the work performed calls for discretion, judgment, confidentiality, loyalty, and the ability to deliver products in a timely and secure manner.

Second, it would be difficult to contemplate screening requirements that are more specific to a laborer than random drug screening and yearly background checks. Because Henry Industries is contracting with individuals to deliver controlled substances, the standards imposed upon Henry Industries client PharMerica by the Drug Enforcement Agency are passed down to Henry Industries, and through them to those performing delivery services. BR Henry 22-23. Either Henry Industries knows who is performing deliveries, and that person is not a drug user, or Henry Industries is in breach of contract with PharMerica.

From a business perspective, it makes sense that Henry Industries would want its drivers to have passed background checks and be subject to drug screening and quality control measures, given the sensitive nature of the pharmaceutical goods the drivers are transporting. While Henry Industries argues that these requirements attach to the driver, who the contract permits to be someone other than the contractor, App. Br. 22, that is a distinction without a difference, because here all 33 drivers were also the signatories to the contract, *and* that they were doing the actual work under the contract, which is what the courts examine. *Norman*, 10 Wn.2d at 184. As discussed in Part V.A.3, the ability to contract with another does not defeat industrial insurance coverage. To the extent the Department had information that the contracting party provided others to perform the actual driving service for Henry Industries, the Department excluded those parties from the assessment. BR Peterman 153.

d. Henry Industries' Long Time Relationships With the Drivers Shows That Their Labor Was Personal

The realities of the situation show that the work was personal labor. The drivers who testified were in long-term working relationships with Henry Industries. Hawley and Parker had both worked for Henry Industries for years and both worked exclusively for Henry Industries during the audit period. BR Hawley 92-93; BR Parker 110.

Hawley testified that after each delivery he makes a call to Henry Industries to confirm the signer's signature and time. BR Hawley 87. He gets direction from a Henry Industries dispatcher about where to pick up the product to be delivered. BR Hawley 89. If Hawley was running late, he would alert the dispatcher and they would call the client to notify them of a delay. BR Hawley 95. Hawley testified that he met with a representative from Henry Industries before he signed the cartage agreement and that he accepted the payment terms without negotiation. BR Hawley 100. He never hired an employee or subcontracted out work. BR Hawley 102.

Parker testified that he drove a set route four times a week and the stops were determined by Henry Industries' customer, PharMerica. BR Parker 117. Parker testified that he submits daily manifests to Henry Industries that determine how much he is paid, based on stops and mileage, which was a pretty regular amount every other week. BR Parker 126-28.

The longstanding and exclusive working relationship Hawley and Parker had with Henry Industries shows that the company was not indifferent to who performed the delivery services. This situation is a far cry from the scenario in *White*, where the Whites were approached about the logging contract because they owned one piece of specialized logging

equipment. *White*, 48 Wn.2d at 475.

3. Under the Third Prong of *White*, Henry Industries Must Show That Its Delivery Drivers Actually Employed Other Workers to Perform Some of the Work Under the Contract, Not Simply That the Contract Allowed Them to Do So

Henry Industries presented no evidence that any of the 33 drivers included in the assessment hired employees to make their deliveries for them, and so there is no basis to exempt them under this prong of the *White* test. While *White* does exempt independent contractors who of necessity or choice employ others to do all or part of the contracted work, this is limited to scenarios like the one in that case, where the Whites hired Lydey to work for them. *White*, 48 Wn.2d at 475. Here, in contrast, Henry Industries relies on the fact that the contract permits a driver to hire or contract with other Henry Industries' drivers to perform services, but this alone does not remove the contracted drivers from coverage under the Industrial Insurance Act. Both drivers who testified said that they never had employees, and Henry Industries presented no evidence that any driver included in the assessment *actually* employed anyone else to drive for him. BR Hawley 93; BR Parker 121. Rather, the evidence shows Henry Industries used other contracted drivers for coverage if they could not complete a route. BR Martinez 68-69.

In *White*, the Court concluded that the disputed individuals were

not covered workers because they actually *did* employ others to perform work under the contract, not merely because they were permitted to do so. *White*, 48 Wn.2d at 474 (finding exempt a contractor who “of necessity or choice *employs others* to do all or part of the work he [or she] has contracted to perform.” (emphasis added)). Henry Industries wrongly asserts that the mere ability to hire someone precludes industrial insurance coverage. *See* App. Br. 24. Under the third prong of *White*, the fact that the independent contractor *could have* assigned the work to another person without violating the contract does not defeat coverage. *White*, 48 Wn.2d at 474.

Indeed, the *White* Court expressly disavowed language that the Court used in two of its earlier decisions suggesting that the mere contractual ability to use another to perform work was enough. *See White*, 48 Wn.2d at 472-73. The *White* court emphasized that these decisions were “too broad” and the Industrial Insurance Act does not cover only those “extremely rare cases” where the employer wants only the services of the contractor:

We are now convinced that the language in the *Crall* and *Cook* cases is too broad, and that the legislature in 1937, in adopting the section of the workmen’s compensation act with which we are now concerned, had something more in mind than the protection in those extremely rare cases in which the party for whom the work is done requires the personal services of the independent contractor and is

unwilling that any part of the work be done by someone else.

Id. at 473-74.

Likewise, in *Tacoma Yellow Cab v. Dep't of Labor & Indus.*, the court affirmed the finding that the essence of a taxi company's contracts with cabdrivers was personal labor, despite the fact that the leases allowed drivers to hire qualified employees, because the "realities of the situation," showed they contributed nothing to the contract but their personal labor. 31 Wn. App. 117, 123-25, 639 P.2d 843 (1982).

Furthermore, neither *Massachusetts Mutual Life Insurance Co. v. Dep't of Labor & Indus.*, 51 Wn. App. 159, 752 P.2d 381 (1988), nor *Silliman* stand for the proposition that the hypothetical ability to use another worker to accomplish work under a contract is sufficient to preclude an independent contractor from receiving the protection of the Industrial Insurance Act, as Henry Industries argues. *Contra* App. Br. 21-22. In each of those cases, an independent contractor actually used others to perform their work, so it was not merely a contractual possibility, as here. *Silliman*, 105 Wn. App. at 237; *Massachusetts Mutual*, 51 Wn. App. at 161 ("General agents may and do delegate their duties to others."). The Board has also recognized this distinction. *In re Laird Chiropractic P.S.*, No. 13 16317, 2014 WL 6230656, *4 (Bd. Ind. Ins. Appeals Sept. 11,

2014) (interpreting *Massachusetts Mutual* to hold that it cannot be enough that “the parties might contemplate that the work may be performed by others. There must also be evidence that others were hired to do some of the work.”).¹²

Henry Industries may be willing to permit its drivers to employ others, but there was no evidence that any driver included in the assessment exercised this contractual right. Henry Industries argues that it should be enough that its CEO testified that drivers will “oftentimes” use employees or contractors. App. Br. 20, 22-23; BR Henry 32. It argues that it is error to disregard the CEO testimony because it asserts it was unrefuted. App. Br. 23. This is incorrect in three ways. First, the Board as fact-finder is entitled to not believe a witness on credibility grounds, even if it is unrefuted. *Ramos v. Dep’t of Labor & Indus.*, No. 32675-6-III, 2015 WL 6689584, at *2 (Wash. Ct. App. Oct. 6, 2015). The appellate court does not review that determination. *Id.* Second, Henry has the burden of proof, and the Board correctly concluded that the general nature of this testimony was inadequate to establish that any of the 33 specific drivers included in the assessment had employees. BR 5; RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a). Third, the testimony was not unrefuted. On the contrary, the Department auditor testified that he considered the

¹² The Board’s interpretation of the Industrial Insurance Act is entitled to “great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

White test, and removed two individuals from the premium assessment because they had employees of their own and so “were providing more than personal labor by providing the labor of others.” BR Peterman 153. In contrast, the auditor concluded, and the Board agreed, that the other 33 drivers did not provide the labor of others and were providing only their personal labor to perform work under the contract, and Henry Industries provided the Board with no evidence to the contrary.

Sharing work with co-workers or other contractors also does not remove an individual from mandatory industrial insurance coverage. *Peter M. Black Real Estate Co.*, 70 Wn. App. at 489-90 (co-workers joining together to work does not implicate third prong of *White* test). Contrary to Henry Industries’ assertions, Parker did not testify that he had employees or even subcontractors that worked for him. *Contra* App. Br. 24. Parker testified that he would sometimes get other drivers who had contracts with Henry Industries to cover his route for him, stating “all you do is talk to the other drivers who have contracts with Henry Industries and ask if they want to have one of your days.” BR Parker 124. This work sharing is not enough to remove Parker from the operation of the Industrial Insurance Act.

The fact that an independent contractor has some incidental use of other labor to perform some tasks is not “in itself dispositive” of the issue

of whether the independent contractor is covered by the Industrial Insurance Act. *See Jamison*, 65 Wn. App. at 133 (evidence that treefallers may have had part time employees helping them with contract not enough to preclude coverage under realities of the situation that showed personal labor); *Tacoma Yellow Cab*, 31 Wn. App. at 123-24 (concluding that taxi cab lessee drivers were covered workers, even though they could and did allow others to drive the taxi cab, because the essence of their contract with the leasing company was their personal labor as drivers). This is because a court's analysis as to whether the essence of a contract is personal labor is ultimately grounded in "the realities of the situation" rather than the technical requirements that the independent contractor could not or did not hire anyone to perform work under the contract." *Jamison*, 65 Wn. App. at 132 (quoting *Tacoma Yellow Cab*, 31 Wn. App. at 124).

Here there was no more than some incidental sharing of job responsibilities by Parker, but the reality is that personal labor was provided to Henry Industries. It would certainly be contrary to the broad remedial purposes of the Industrial Insurance Act to construe occasional job sharing as sufficient to defeat coverage under the Act. RCW 51.04.010; RCW 51.12.010. Henry Industries argues that *White* does not require *employment*, as long as a contractor "uses others in some

capacity.” App. Br. 24. But this is contrary to both the actual language of the *White* case, which speaks of contractors who employ others, and the facts of the case, where the Whites hired an actual employee, paid him wages and negotiated a higher contract rate so they could compensate him. *White*, 48 Wn.2d at 475. *White* does not stand for the proposition that just “using others” is enough to defeat coverage.

Nor does the Board’s decision in *Yellow Book Sales and Distribution Company*, No. 10 11146, 2011 WL 1903472 (Bd. Indus. Ins. Appeals Mar. 30, 2011), stand for the proposition that just having the option to use others to do the work is enough to remove a contractor from the operation of the Industrial Insurance Act. As the Board noted, the facts in that case were substantially different. BR 5. Because of the short time frame for delivering a large volume of phone books, it was clear that the contract at issue there could not be performed by someone without assistance, and so the work under the contract was precluded by the second prong of the *White* test. BR 5. Crucial also to the Board was the extremely limited contact between the firm and the drivers in that case, as opposed to the screening and monitoring exercised by Henry Industries personnel. BR 5.

It was Henry Industries’ burden to show that the drivers employed others, and it failed to do so. RCW 51.43.131; RCW 51.52.050; RCW

34.05.570(1)(a). Under the substantial evidence standard, the lack of evidence showing that the drivers employed others supports the Board's findings.

4. The Board Weighed the Evidence and Its Decision Should Not Be Second Guessed

The Board weighed the evidence here and decided that the *essence* of the contract was personal labor. Looking to decide the essence of something requires a fact finder to weigh the evidence and to judge credibility. Henry Industries invites this Court to weigh the evidence in its favor, but in reviewing factual determinations the court cannot do that, as inferences are construed in the Department's favor. *Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. at 704. As such, this Court should affirm.

B. All 33 Drivers Fail at Least One Part of the Six Factor Test Laid Out in RCW 51.08.195 and Therefore Are Not Exempt From Industrial Insurance Coverage

Substantial evidence supports the Board's findings that Henry Industries is not exempt under RCW 51.08.195 because it does not meet all six of the elements required to take advantage of the exemption under that statute. RCW 51.08.195 creates an exception to the rule that independent contractors providing personal labor are covered workers, if the contractors are operating an independent business. *See Dep't of Labor & Indus. v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 536, 347 P.3d 464

(2015), *review granted*, 183 Wn.2d 1017 (2015) (“Because the franchisees are not independently established businesses, the statutory exception is inapplicable.”). Appendix B includes the complete text of RCW 51.08.195.

As the party with the burden of proof, Henry Industries had to show that all 33 disputed drivers satisfied each part of the test in RCW 51.08.195; RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a). At hearing, Henry Industries presented the testimony of only two of the 33 drivers included in the assessment: Charles Hawley and Keith Parker. Because Henry Industries bore the burden of proof at the Board and because it presented no exclusion evidence under RCW 51.08.195 with respect to the other 31 drivers, those drivers fail the test as a matter of law. RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a).

With respect to the two drivers who did testify, neither met each of the requirements of RCW 51.08.195 and so neither is exempt. Under subsection (1), drivers must be free from direction or control. The drivers here were not free from Henry Industries’ direction and control so fail the test under RCW 51.08.195(1). The drivers interacted daily with Henry Industries’ staff, and were subject to myriad contractual requirements in the performance of their duties. Ex. 2; BR Hawley 87; BR Parker 112-113.

Moreover, and contrary to Henry Industries claims, the drivers do

meet several of the examples of control described in the Department reference manual. Ex. 34; *contra* App. Br. 27. With respect to the first example, a set schedule, the route driver has to submit a delivery schedule to Henry Industries that includes all stops and times, and to update the route as required. Ex. 2, §3h. With respect to the ability to fire example, drivers can be immediately terminated for failure to comply with the contract's many terms. Ex. 2, §12. With respect to the requirement to report tardiness example, the drivers also agree to complete deliveries within the time frame requested by Henry Industries' customer 95 percent of the time. Ex. 2, "Schedule A." The control factors listed in the Department manual are illustrative, not determinative, and the realities of the situation are that Henry Industries both contractually and in fact exercised the type of control described in the manual.

Because the principal place of business for the drivers is their car, and drivers are responsible for the costs of the car, the Department concedes that the drivers probably meet the requirements of subsection 2 of RCW 51.08.195. But because each and every element of the test must be met for the exemption to apply, meeting only one of the six elements is not dispositive.

In addition to failing to show that the drivers were not subject to direction and control, Henry Industries failed to prove the third, fourth,

fifth, and sixth elements of the exclusion test. Under subsection 3, Henry Industries needed to show that its contractors hold themselves out as separate businesses, independently established in a trade, occupation, profession, or business, or that they are eligible for a federal business tax deduction. RCW 51.08.195(3). Far from being an independent business, Hawley testified that during the audit period and since, he has not worked for any other client besides Henry Industries. BR Hawley 93. Because his testimony establishes that Hawley did not have an independent business and does not establish that he has a principal place of business that would be eligible for a business deduction for federal income tax purposes, Hawley fails RCW 51.08.195(3). BR Hawley 84-105.

Under subsection (4) Henry Industries needed to show that the drivers were responsible for filing a schedule of expenses with the internal revenue service, both contractually and in fact. RCW 51.08.195(4). While the contract contains a general clause requiring drivers to file federal taxes and prepare reports, there is no specific provision relating to the filing of a schedule of expenses with the IRS. Ex. 2, §6. Hawley and Parker testified that they itemized mileage on their tax returns, but didn't state that they filed a schedule of expenses for their business. BR Hawley 88; Parker BR 114. Henry Industries' assertion that the testimony in the record is "suggestive" that drivers are filing federal taxes for their business is not

adequate to meet their burden with respect to this element. App. Br. 34; RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a).

Under subsection (5), Henry Industries needed to prove that the drivers had a UBI number. RCW 51.08.195(5). Parker testified that during the audit period he did not have a business license or a UBI number, and so he fails RCW 51.08.195(5). BR Parker 109. Hawley testified he did have a UBI number, but did not testify as to what it was, or specify whether he had a UBI number during the audit period. BR Hawley 86. Henry Industries admits that it is not aware if all have UBI numbers. App. Br. 34. Ignoring that it admits that it was not aware if all had UBI numbers, Henry Industries argues the Board should have weighed Hawley's general testimony more than the lack of records, but the Board's decisions about weight are not now revisited. App. Br. 34. Henry Industries also argues that the Board erred by ignoring that "UBI numbers are public records." App. Br. 34. But the Board and this Court's review of the record is limited to the evidence provided to the Board, not public records available outside the record. *Probst*, 155 Wn. App. at 915. It was not the Department's burden to put on such evidence, it was Henry Industries. RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a).

Finally, with respect to subsection (6), exempt workers are required to prove that as of the date of contract, they are maintaining a

separate set of books or records that reflect all items of income and expenses. Here, neither Hawley nor Parker testified in any detail regarding the books and records they maintain, so Henry Industries has not met its burden of proof with respect to RCW 51.08.195(6); RCW 51.43.131; RCW 51.52.050; RCW 34.05.570(1)(a).

Henry Industries has failed to establish that its non-testifying drivers are exempt under RCW 51.08.195 and substantial evidence supports that the workers who did testify are not excluded. Henry Industries admits it cannot meet all parts of the six part test and argues it lacks access to its drivers' records, needed to prove the exemption. App. Br 35. Note Henry Industries does not explain why it could not have contractually mandated access to such records as other businesses do. Henry Industries' tactic of arguing that the fact that they cannot establish that the drivers meet the fourth, fifth, and sixth elements of the test is evidence that they *do* in fact meet the test is a strained tautology that should be rejected. Interpreting a similar test in RCW 51.12.070, which imposes prime contractor liability for work performed by subcontractors, the court rejected the prime contractor's argument that it could not establish the elements of the test because it did not have the authority to examine the contractor's books and records or enter their premises to determine if they have a principal place of business. *Lee's Drywall v.*

Dep't of Labor and Indus., 141 Wn. App. 859, 869, 173 P.3d 934 (2007).

The court emphasized that it was the Legislature's choice to require contractor's to prove every element of the test. *Id.* As the party with the burden of proof, Henry Industries likewise cannot avoid premium liability by stating that it does not, and cannot, know if its drivers meet the elements of the statute.

C. RCW 51.08.180 Applies to Qualified Independent Contractors Regardless of Whether They Are Sole Proprietors

The Board found that, during the audit period, Henry Industries entered into contracts with 33 drivers to deliver pharmaceutical products and that the essence of the drivers' work was personal labor. Henry Industries' claims that RCW 51.12.020's exclusion for sole proprietors preempts the Legislature's extension of industrial insurance coverage to independent contractors through RCW 51.08.070 and RCW 51.08.180 regardless of whether the drivers worked under independent contracts with Henry Industries with the essence of their work under that contract being personal labor. Henry Industries' argument must be rejected because it would lead to the absurd result of the Legislature's extension of coverage to independent contractors being completely meaningless, as all independent contractors who work on a self-employed basis will necessarily either be sole proprietors or be otherwise exempt as officers

of the business they create. The court does not construe a statute or statutory scheme to render portions meaningless. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

Henry Industries' argument would lead to the absurd result of RCW 51.08.070 and RCW 51.08.180 extending coverage to independent contractors when the essence of the work they perform under a contract is personal labor, only to have RCW 51.12.020 take coverage away from such people under all circumstances. This is true because *any* person who is engaged in activity for profit on a self-employed basis, including one who provides work as an independent contractor, will be a "sole proprietor" under the law unless another type of business entity, such as a corporation or LLC, is created. *See Dolby v. Worthy*, 141 Wn. App. 813, 816, 173 P.3d 946 (2007). This means that all independent contractors will have a business model subject to the exclusions in RCW 51.12.020 as that statute contains exemptions for sole proprietors, officers of corporations, and officers of LLCs. *See* RCW 51.12.020(5), (8), (13). Therefore, if RCW 51.12.020(5) were read to exempt all independent contractors from coverage if they are sole proprietors, this would render the Legislature's extension of coverage to independent contractors through RCW 51.08.070 and RCW 51.08.180 meaningless, as an independent contractor will always be a sole proprietor, and thus

exempt under RCW 51.12.020(5) or, if an LLC or corporation was formed, an officer of it (and thus exempt under RCW 51.12.020(8) or (13)). It is implausible that the Legislature intended for its coverage of independent contractors in RCW 51.08.070 and RCW 51.08.180 to not actually result in any independent contractors being covered under the Act, but that would be the inevitable conclusion of applying the sole proprietor exemption to independent contractors, as Henry Industries argues. App. Br. 37.

Properly read, RCW 51.12.020(5), (8), and (13) exempt sole proprietors and officers of corporations or LLCs from coverage in their capacity as the *employee* of the sole proprietorship, corporation, or LLC that is their nominal employer, but those subsections of RCW 51.12.020 do not prevent coverage if an independent contractor (who happens to have formed one of those types of businesses) performs work under a contract with another person or firm and the essence of the work under the contract is personal labor.¹³

¹³ Henry Industries points to Exhibit 44 “State Business Records Database Detail” for proof that 12 individuals included in the assessment had open accounts with the Washington State Department of Revenue during 2010 and should be exempt under RCW 51.12.020 on that basis. But the database entry for Charles Hawley indicates that he had a sole proprietorship business called “Food Talk” that was opened in 1990. It isn’t at all clear from the record that this sole proprietorship has anything to do with the work he was doing for Henry Industries, or that this is even the same Charles Hawley. Hawley’s testimony was that he had a sole proprietorship named “Stan’s Currier Service.” Exhibit 44 does not reflect whether Stan’s Currier Service had an open Department of Revenue account in 2010. This example illustrates how illogical it would

In other words, RCW 51.12.020 clarifies that a sole proprietor does not become covered under the Industrial Insurance Act *simply* by virtue of being the owner of a sole proprietorship. RCW 51.12.020 does not preclude a sole proprietor from being covered as an independent contractor. This reading does not render the exclusion in RCW 51.12.020 null, as Henry Industries argues, because many sole proprietors either do not provide personal labor to others under an independent contract (such as a sole proprietor who operates a store and who sells goods to customers but does not provide personal labor to either those customers or anybody else), or do provide some sort of labor but the essence of the work under the contract is not personal labor (such as a sole proprietor who provides services but the essence of the work under the contract involves the use of specialized equipment, like the “donkey engine” used by the Whites in the *White* case). *White*, 48 Wn.2d at 475; *contra* App. Br 39. Sole proprietors who provide work to others under contracts or who provide work that has an essence other than personal labor would be exempt from mandatory coverage under RCW 51.12.020(5). App. Br. 39. Such sole proprietors could still elect to be covered by the Industrial Insurance Act, but they would need to pay premiums to receive that coverage.

be to exclude from industrial insurance coverage anyone “registered” as a sole proprietor, as Henry Industries argues, since this would apparently require the Department to preclude coverage for Charles Hawley on the basis that in 2010 he was registered for a business that had nothing to do with making courier deliveries. App. Br. 39.

This reading of the statute gives meaning to all statutory provisions as required by basic statutory construction principles. *See Filo Foods, LLC v. City of Sea Tac*, 183 Wn.2d 770, 357 P.3d 1040, 1041 (2015) (court reads “statutes together to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.”) (citations omitted). Under the harmonious statutory scheme, Henry Industries’ drivers, even if sole proprietors, are covered under the Industrial Insurance Act, because they perform work under contract with Henry Industries and the essence of that work is personal labor.¹⁴

Neither of the cases Henry Industries cites supports its claim that RCW 51.12.020 automatically bars an independent contractor whose personal labor is the essence of the contract. While the *Fankhauser* case has broad language suggesting that sole proprietors and partners are not covered by the Industrial Insurance Act, that decision does not reasonably support the conclusion that contractors who operate as sole proprietors are never covered because nowhere did the *Fankhauser* opinion discuss or analyze the issue of whether RCW 51.12.020 prevents independent

¹⁴ The Department’s manual contains an incorrect statement of the law with respect to RCW 51.12.020: “The excluded employments in RCW 51.12.020 are exempt from mandatory coverage regardless of whether the individual supplies only their personal labor.” Ex. 34 at 391. As extensively discussed above, if sole proprietors provide personal labor under a contract they are covered, but if they employ themselves in endeavors that do not involve personal labor under a contract, they are not covered. Henry Industries provides no authority that an agency’s incorrect statement of the law in a manual not used by the public should in anyway inform on the court’s opinion.

contractors from being covered *simply* because they happen to own a sole proprietorship, even when the essence of the work they perform under a contract is personal labor. *See Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 309, 849 P.2d 1209 (1993). The workers in *Fankhauser* sought coverage based on the fact that they developed occupational diseases that were caused in part by work performed as the employee of an employer and in part by work they performed as sole proprietors. *See id.* at 309-10. The workers did not argue that they were independent contractors, and the Court had no occasion to, and did not, address whether RCW 51.12.020(5) excluded such workers from coverage. *See id.* at 310-14. Rather, the Court concluded that the workers were covered because the occupational disease was caused in part by work for an employer that was indisputably covered by the Industrial Insurance Act. *Id.* at 311-14. Since the Court did not discuss the issue of whether independent contractors who provide work under the contract, the essence of which is personal labor, are covered workers even if they happen to be sole proprietors, the decision does not aid Henry Industries here.

The facts and legal issues presented by *Dosanjh v. Bhatti*, 85 Wn. App. 769, 934 P.2d 1210 (1997), bear even less resemblance to the facts and issues presented in this case, as the question before the Court in *Dosanjh* involved lease back trucks, an issue not present here.

It is a fundamental purpose of Industrial Insurance Act to embrace all covered employment, and for the issue of whether employment is covered to be dictated by the actual nature of the work performed. *See* RCW 51.12.020; *Jamison*, 65 Wn. App. at 132. Henry Industries' attempt to read RCW 51.12.020 in isolation as a per se exemption for anyone registered as a sole proprietor runs afoul of the Legislature's intent to have broad coverage under the Industrial Insurance Act and undermines the collection of those funds held in trust to compensate injured workers. It is simply not the case, as Henry Industries baselessly argues, that the Department wants to collect taxes from employers while refusing to pay out claims to workers when they are injured. App. Br. 41. Quite to the contrary, the Department assesses premiums precisely so that it can afford to compensate workers when they are injured in the course of their employment, and if Charles Hawley or Keith Parker or any of the other 31 drivers included in the assessment were injured when making deliveries for Henry Industries they would be entitled to file a claim for medical and wage replacement benefits.

Holding Henry Industries responsible for the payment of its drivers' industrial insurance premiums serves the accident fund, ensuring protection for injured workers, and helping allocate the costs of workplace injuries to the industries that produce them, thus motivating employers to

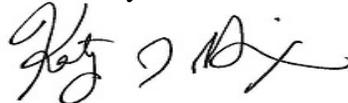
make workplaces safer. *Buse Timber & Sales, Inc.*, 166 Wn.2d at 19.

VI. CONCLUSION

Henry Industries uses independent contractors to transport and deliver pharmaceutical supplies. The essence of the work done by the independent contractors is personal labor—it requires discretion, judgment, skill, and timeliness. Henry Industries concedes it cannot know if its drivers meet the multi-factor statutory test for exemption under RCW 51.08.195. RCW 51.12.020 only precludes a self-employed person to have mandatory coverage for themselves, and does not automatically disqualify contractors who work for employers from coverage. Ruling for the Department on all theories will promote the basic goals of the Industrial Insurance Act to provide broad coverage for persons who perform personal labor for an employer under a contract. This Court should affirm the decision of the superior court and Board.

RESPECTFULLY SUBMITTED this 18th day of November, 2015.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Katy J. Dixon", written in a cursive style.

KATY J. DIXON
Assistant Attorney General
WSBA No. 43469

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: HENRY INDUSTRIES, INC.) DOCKET NO. 13 11525
2 FIRM NO. 092,575-00) DECISION AND ORDER

3 APPEARANCES:

4
5 Firm, Henry Industries, Inc., by
6 Stinson, Morrison, Hecker, LLP, per
7 Molly E. Walsh and Stephanie N. Scheck

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
Katy J. Dixon, Assistant

10 The firm, Henry Industries, Inc., filed an appeal with the Board of Industrial Insurance
11 Appeals on February 11, 2013, from an order of the Department of Labor and Industries dated
12 January 10, 2013. In this order, the Department modified its Notice and Order of Assessment
13 dated October 3, 2011, thereby assessing Henry Industries, Inc., \$51,579.57 for unpaid premiums,
14 penalties, and interest for calendar year 2010. The Department order is **AFFIRMED**.

15 **DECISION**

16 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
17 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
18 Order issued on September 26, 2013, in which the industrial appeals judge reversed and remanded
19 the Department order dated January 10, 2013. Our industrial appeals judge determined that Henry
20 Industries delivery drivers were independent contractors whose personal labor was not the essence
21 of the contract. The contested issue addressed in this order is whether drivers delivering packages
22 for one of Henry Industries' customers are workers under the Industrial Insurance Act (Act).

23 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
24 no prejudicial error was committed. The rulings are affirmed.

25 Henry Industries provides warehouse, logistic, and courier services in Washington State.
26 PharMerica is a long-term care pharmacy that sells pharmaceutical products and packages to
27 long-term healthcare facilities. PharMerica contracted with Henry Industries for the delivery of its
28 pharmaceutical products to healthcare facilities in Washington State. Henry Industries then
29 contracted with individuals to make the deliveries on assigned routes.

30 The controversy in this appeal is whether the 33 individuals performing the delivery services
31 during calendar year 2010 are covered workers under the Act. Henry Industries asserts that the
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1 individuals are not workers under the Act because (1) it has subcontractor relationships with the
2 individuals through written contracts; (2) the essence of the contract is not the personal labor of the
3 individuals; (3) Henry Industries does not exercise control over the work of the individuals; and (4)
4 the contract requires that the individuals provide a vehicle necessary to perform the contract.
5 Henry Industries argues that these facts exclude the individuals from the definition of worker under
6 the Act. The Department argues that the essence of the contract is the personal labor of the
7 individuals; the individuals are workers under the Act; and they are not exempt under the alternative
8 definition of worker found in RCW 51.08.195.

9 Our industrial appeals judge determined that the individuals were independent contractors
10 and exempt from coverage under the Act because they did not provide personal labor and the
11 essence of the contract was to provide a vehicle for delivery services for Henry Industries and its
12 customers. We have granted review because we disagree with the analysis set forth in the
13 Proposed Decision and Order. We find on the facts in this record that although the individuals are
14 independent contractors, the essence of the contract was personal labor and they are workers
15 within the meaning of the Act. Further, we find that Henry Industries failed to establish that the
16 individuals are exempt under the alternative definition of worker found in RCW 51.08.195.

17 Henry Industries and the 33 individuals entered into written contracts. The contract provides
18 that the individuals are subcontractors. The contract provides that each individual is required to
19 provide a vehicle and have necessary and appropriate insurance. An individual with a route was
20 free to hire someone else to do the work. The drivers obligated themselves to keep records, obey
21 all regulations, and to pay all taxes owed. The contract requires that the individual be fluent in
22 English and successfully complete drug, alcohol and background screening. The drug screening
23 includes random testing. The background check includes motor vehicle records and criminal
24 records. A negative report in the back ground check results in immediate termination. The
25 individual is to "faithfully and diligently devote his/her/its best efforts, skill and abilities to comply
26 with customer requirements and to faithfully enhance and promote the welfare and best interest" of
27 Henry Industries. Exhibits 2-33, § 3. i. The contract requires that the individual execute a
28 confidentiality agreement to ensure Henry Industries interests are protected.

29 The definition of worker is set out in RCW 51.08.180. The term "worker" includes not only
30 employees, as that term is commonly understood, but also a person "who is working under an
31 independent contract, the essence of which is his or her personal labor for an employer under this
32

1 title . . ." RCW 51.08.070 defines an employer as a person or entity, engaging in any work in this
2 state covered by the provisions of this title, "who contracts with one or more workers, the essence
3 of which is the personal labor of such worker or workers." This statutory construct creates a
4 presumption in favor of mandatory coverage. As a general rule, all employments are covered
5 under the Act unless there are specific exceptions or exemptions from coverage. Further,
6 RCW 51.08.180 and RCW 51.08.070 exclude a person from the definition of a worker or employer
7 who meets the six part test set forth in RCW 5.08.195(1) through (6).

8 The Washington Supreme Court has provided a test for determining whether an independent
9 contractor is a worker with the meaning of RCW 51.08.180. Under this test, an independent
10 contractor is exempt from coverage under the Act when the contractor: (1) must of necessity own or
11 supply machinery or equipment as distinguish from the usual hand tools to perform the contract; or
12 (2) obviously could not perform the contract without assistance; or (3) who of necessity or choice
13 employs others to do all or part of the work contracted to perform. *White v. Department of Labor &*
14 *Indus.*, 48 Wn.2d 470, 474 (1956). We will address each of the three tests set out in *White*.

15 When viewed in its entirety, the contract between Henry Industries and each individual calls
16 for personal labor. While the contract requires the individual to provide a car for use in the delivery
17 of the drugs, the requirement of the car, although an important part of the contract, is not the
18 primary object of the contract. The contract is specific with respect to selecting the individual. The
19 individual must be fluent in English and must complete drug, alcohol and background screening.
20 The drug screening occurs randomly when required by Henry Industries' clients and performed at
21 Henry Industries' request. The background screening is conducted initially and then annually as
22 authorized by Henry Industries. A negative report in any test results in termination. Additionally,
23 under the contract the individual is required to promote the best interest of Henry Industries.

24 The record establishes that the individuals who contracted with Henry Industries to deliver
25 the pharmaceuticals are engaged in a long-term relationship with PharMerica where they would
26 pick up the pharmaceuticals and the various long-term care facilities where they would deliver
27 them. The drivers would enter the PharMerica building to obtain the pharmaceuticals and would
28 make the delivery inside the health care facilities. This would require contact by the delivery drivers
29 with the "customers" on each end of the process. The agreements that Henry Industries had with
30 the individual drivers are open-ended. The testimony of two drivers, Charles Hawley and Keith
31 Parker, indicate that the individual drivers worked for many years for Henry Industries. At the time
32

1 of his testimony Mr. Hawley had worked for Henry Industries for approximately 2-1/2 years.
2 Mr. Parker began work in 2006 and worked through the audit year of 2010. The relationship
3 between Henry Industries and the individual drivers and the long-term care facilities reflects a
4 long-term personal relationship. This relationship forms an important element of the relationship
5 between Henry Industries and the drivers and is reflected in the requirements the driver must meet
6 in order to work for Henry Industries. The selection process used by Henry Industries as well as its
7 monitoring of the actions of the individuals demonstrates that Henry Industries is hiring the
8 individual based on the individual's personal attributes and will terminate the individual if their
9 personal behavior and performance fails to meet the requirements set by Henry Industries in the
10 contract. Henry Industries exercised control over the individuals under the contract.

11 While the contract is specific regarding the qualifications and conduct of the individual, the
12 contract is silent on the requirements of the vehicle to be supplied by the individual. The vehicle's
13 size, its ability to carry loads, or any other specification about the vehicle is absent from the
14 contract. Specific to the contract is the requirement that the vehicle used must be able to be locked
15 to provide security for the items carried under the contract. The primary object of the contract is not
16 for the use of any machinery or equipment as contemplated in *White*, the contract is for the
17 personal labor of the individual. Not any person with a car can meet the requirements of the
18 contract. However, once the individual meets the requirements of the contract, any standard car is
19 acceptable for use under the contract so long as it is properly licensed and insured and has locks
20 on the doors. The mere fact that the individual used a vehicle which the individual supplied in the
21 course of performing work does not change the fact that the essence of the contract is personal
22 labor.

23 In *Lloyd's of Yakima Floor Center v. Department of Labor & Indus.*, 33 Wn. App. 745 (1982),
24 the floor center hired floor and carpet installers to install carpet sold by the center. The installers
25 were required to supply their own tools and equipment, plus a van or vehicle able to transport the
26 carpet and flooring materials to customer locations. The court found that the essence of the
27 agreements between the floor center and the installers was for their personal labor. The van or
28 motor vehicle for transportation was not specialized equipment contemplated by *White*. *Lloyd's* at
29 751. We find on the facts in this record that the individuals hired by Henry industries fail to meet the
30 exclusion from coverage under the first *White* test.

1 Henry Industries has also failed to prove that the individuals met either of the remaining two
2 tests set forth in *White*. There is no evidence delivering totes of pharmaceuticals required the work
3 of helpers. The individuals are not excluded under the second *White* test.

4 The testimony of the two drivers who worked for Henry Industries in 2010, fails to establish
5 that the drivers employed others to perform the labor under the contract. Charles Hawley stated
6 that he never hired anybody to do the work for Henry Industries. Keith Parker's testimony on this
7 issue is not clear whether he hired others to perform the delivery services. Mr. Parker testified that
8 he was required to make sure the delivery gets done and that if he is not available he finds
9 someone to handle the route. But Mr. Parker also testified on cross examination that he has never
10 had any employees. We are not persuaded by Mr. Parker's testimony that he in fact hired others to
11 perform the work required by the contract. The individuals are not excluded as workers under the
12 third *White* test.

13 The dissent argues that a recent Board decision *In re Yellow Book Sales & Distribution*
14 *Company, Inc.*, Dckt. No. 10 11146 (March 30, 2011) on similar facts reaches a different conclusion
and should be followed. The dissent notes that our decision in *Yellow Book* determined that
16 delivery drivers in that decision were independent contractors and the essence of the contract was
17 not personal service and therefore they were not covered workers.

18 In *Yellow Book*, we adopted the Proposed Decision and Order issued by our industrial
19 appeals judge. In doing so we adopted the Findings of Fact and Conclusions of Law contained in
20 the Proposed Decision and Order. *In re Yellow Book Sales & Distribution Company, Inc.*, Dckt. No.
21 10 11146 (Proposed Decision and Order, December 17, 2010). The facts set out in the *Yellow*
22 *Book* Proposed Decision and Order that provided the basis for our Decision and Order in *Yellow*
23 *Book* are substantially different from the facts of this appeal.

24 In *Yellow Book*, the firm contracted once a year with distributors to deliver phone books to
25 residential addresses. These deliveries were in rural settings as well as in urban settings. The
26 delivery was done on designated routes and was to be completed in a three-day period for each
27 route. The delivery was a one-time event and the delivery person had no contact with the
28 occupants of the residence and the firm did not care who actually delivered the books. In *Yellow*
29 *Book*, the essence of the contract was not any individual's personal labor. It was clear on the facts
30 that given the number of books to be delivered and the short time frame the contract required for
31 the delivery, the same individual with the contract would have extreme difficulty delivering the books

1 without the help of others and elevates the contract to more than just the personal labor of the
2 delivery person. Additionally, the firm owner specifically stated that the firm did not care who made
3 the actual delivery. This is in sharp contrast to the screening and control exerted by Henry
4 Industries over the hiring and monitoring of the drivers delivering the pharmaceuticals. The facts in
5 *Yellow Book* are substantially different facts than presented in this appeal and result in a different
6 decision.

7 RCW 51.08.195 provides an alternate definition of employer and worker and creates an
8 exception from mandatory coverage under the Act. The statute excludes certain individuals from
9 coverage if all six of the specified elements are met. RCW 51.08.195 provides:

10 As an exception to the definition of "employer" under RCW 51.08.070 and the
11 definition of "worker" under RCW 51.08.180, services performed by an individual for
remuneration shall not constitute employment subject to this title if it is shown that:

12 (1) The individual has been and will continue to be free from control or
13 direction over the performance of the service, both under the contract of
14 service and in fact; and

15 (2) The service is either outside the usual course of business for which
16 the service is performed, or the service is performed outside all of the
17 places of business of the enterprise for which the service is performed,
18 or the individual is responsible, both under the contract and in fact, for
the costs of the principal place of business from which the service is
performed; and

19 (3) The individual is customarily engaged in an independently
20 established trade, occupation, profession, or business, of the same
21 nature as that involved in the contract of service, or the individual has a
22 principal place of business for the business the individual is conducting
that is eligible for a business deduction for federal income tax purposes;
and

23 (4) On the effective date of the contract of service, the individual is
24 responsible for filing at the next applicable filing period, both under the
25 contract of service and in fact, a schedule of expenses with the internal
26 revenue service for the type of business the individual is conducting;
and

27 (5) On the effective date of the contract of service, or within a
28 reasonable period after the effective date of the contract, the individual
29 has established an account with the department of revenue, and other
30 state agencies as required by the particular case, for the business the
31 individual is conducting for the payment of all state taxes normally paid
32 by employers and businesses and has registered for and received a
unified business identifier number from the state of Washington; and

1 (6) On the effective date of the contract of service, the individual is
2 maintaining a separate set of books or records that reflect all items of
3 income and expenses of the business which the individual is conducting.

4 Henry Industries must prove all 6 elements of RCW 51.08.195 to establish that its drivers are
5 exempt from mandatory coverage. Our industrial appeals judge, having found that the individuals
6 were excluded as workers under the *White* test, did not address the application of RCW 51.08.195.
7 We have reviewed the record and find that Henry Industries has failed to present evidence to
8 establish that any of the individuals met all the requirements set out in RCW 51.08.195.

9 The two individuals with contracts in 2010 that presented testimony, Mr. Hawley and
10 Mr. Parker provided very little information regarding their activities relevant to the six elements of
11 RCW 51.08.195. Mr. Haley testified that he has a Unified Business Identifier (UBI) number, but he
12 failed to provide it. He stated he has no account with the Department of Labor and Industries. He
13 stated that he has an Employer Identification number (EIN), but he failed to provide it. He stated
14 that he has not worked for other employers than Henry Industries. He has never hired others to do
15 the work under the contract. We are not persuaded that Mr. Hawley has an EIN or a UBI number.
16 If he does, the persuasive evidence would be the numbers and not Mr. Hawley's bald assertion that
17 they exist. But even if we were persuaded that Mr. Hawley had both an EIN and a UBI number
18 without substantially more information this fact is insufficient to establish any of the requirements of
19 RCW 51.08.195. Mr. Hawley is not excluded from coverage under the alternative definition of
20 worker under RCW 51.08.195.

21 Mr. Parker, the second individual with a contract in 2010 that testified, stated that he did not
22 have a UBI number or business license in 2010. He was not registered with the Department of
23 Revenue and did not have an account with the Department of Labor and Industries. He also stated
24 that he did not provide services to any other entity in 2010, only Henry Industries. This evidence
25 fails to establish any of the requirements of RCW 51.08:195. Mr. Parker is not excluded from
26 coverage under the alternative definition of worker under RCW 51.08.195. We agree with the
27 Department of Labor and Industries that the 33 individuals holding contracts with Henry Industries
28 in the first, second, third and fourth quarters of 2010 were workers under the Act.

29 Henry Industries failed to make reports as required and is therefore subject to the penalty
30 provisions of RCW 51.48.030. When reports are not filed as required, the Department has the
31 authority to estimate the amount of unpaid premiums. RCW 51.16.155. The estimate must have
32 some reasonable basis in fact. *In re NAO Enterprises*, BIIA Dec., 89 1832 (1990).

1 The Department knew how much each driver had been paid through tax records compiled by
2 Henry Industries. The amount a driver was paid, divided by the state average wage for the type of
3 work performed, gives a reasonable estimate of the hours worked. Hours worked multiplied by the
4 premium rate produces a reasonable estimate of the unpaid premiums. This is the method the
5 Department used for the audit period, calendar year 2010. The Department's estimate had a
6 reasonable basis in fact and conforms to the requirements of *NAO Enterprises*.

7 In addition to unpaid premiums, Henry Industries was assessed fines, penalties, and interest
8 for failing to keep records, make quarterly reports, and to pay premiums when due. The fines,
9 penalties, and interest assessed by the Department are reasonable.

10 The Department order dated January 10, 2013, is correct and is affirmed:

11 **FINDINGS OF FACT**

- 12 1. On April 8, 2013, an industrial appeals judge certified that the parties
13 agreed to include the Jurisdictional History in the Board record solely for
14 jurisdictional purposes.
- 15 2. Henry Industries, Inc., provides warehouse, logistic, and courier services
16 in Washington State.
- 17 3. During the first, second, third and fourth quarters of 2010, Henry
18 Industries, Inc., contracted with PharMerica to deliver pharmaceutical
19 products to locations specified by PharMerica.
- 20 4. During the first, second, third and fourth quarters of 2010, Henry
21 Industries, Inc., contracted with 33 individuals to deliver pharmaceutical
22 products to locations specified by PharMerica.
- 23 5. During the first, second, third and fourth quarters of 2010 the individuals
24 were working under independent contracts, the essence of which was
25 their personal labor.
- 26 6. During the first, second, third and fourth quarters of 2010 the individuals
27 employed by Henry Industries under independent contracts were not
28 free from the firm's control or direction over the performances of their
29 services.
- 30 7. The firm, Henry Industries, Inc., failed to establish that during the first,
31 second, third and fourth quarters of 2010 the individuals employed by
32 Henry Industries under independent contracts provided service outside
the usual course of the firm's business, or performed services outside all
of the places of business of the firm's enterprise, and were responsible
for the cost of the principal place of business for which the service was
performed.

- 1 8. The firm, Henry Industries, Inc., failed to establish that during the first,
2 second, third, and fourth quarters of 2010 the individuals employed by
3 the firm under independent contracts were customarily engaged in
4 independently established trade, occupation, profession or business, of
5 the same nature as that involved in the contract of service.
- 6 9. The firm, Henry Industries, Inc., failed to establish that during the first,
7 second, third, and fourth quarters of 2010, the individuals employed by
8 the firm under independent contracts were responsible for filing at the
9 next applicable filing period, both under the contract of service and in
10 fact, a schedule of expenses with the internal Revenue Service for the
11 type of business the individual was conducting.
- 12 10. The firm, Henry Industries, Inc., failed to establish that during the first,
13 second, third, and fourth quarters of 2010, the individuals employed by
14 the firm under independent contracts had established accounts with the
15 Department of Revenue, and other state agencies as required by the
16 particular case, for the business the individual was conducting for the
17 payment of all state taxes normally paid by employers and businesses,
18 and had registered for and received a uniform business identifier
19 number from the state of Washington.
- 20 11. The firm, Henry Industries, Inc., failed to establish that during the first,
21 second, third, and fourth quarters of 2010, the individuals employed by
22 the firm under independent contracts were maintaining a separate set of
23 books or records that reflected all items of income and expenses of the
24 business, which the individual was conducting.
- 25 12. The 33 individuals working for Henry Industries, Inc., during the first,
26 second, third and fourth quarters of 2010 were workers and subject to
27 mandatory coverage under the Industrial Insurance Act.
- 28 13. During the first, second, third and fourth quarters of 2010 Henry
29 Industries, Inc. failed to maintain records of the 33 individual workers.
- 30 14. Henry Industries, Inc., failed to produce records of the 33 individuals
31 work when requested by the Department of Labor and Industries.
- 32 15. The penalties assessed by the Department are reasonable.

CONCLUSIONS OF LAW

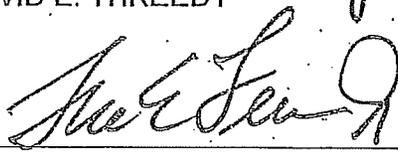
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. The 33 individuals working for Henry Industries, Inc., in the first, second, third and fourth quarters of 2010 were workers as contemplated by RCW 51.08.180 and RCW 51.08.195.

1 3. The Department order dated January 10, 2013, is correct and is
2 affirmed.

3 Dated: April 4, 2014.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

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6 
7 DAVID E. THREEDY Chairperson

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9 
10 FRANK E. FENNERTY, JR. Member

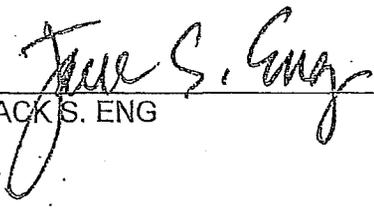
11
12 **DISSENT**

13
14 Because the majority concludes that the delivery drivers under an independent contract with
15 Henry Industries are workers under the Industrial Insurance Act and reaches this conclusion by
16 disregarding the obvious nature of the contract, I must dissent. The contract between Henry
17 Industries and the delivery drivers requires the use of equipment without which the contract cannot
18 be performed. The essence of the contract is the delivery of the pharmaceuticals which clearly
19 requires the use of specialized equipment, an automobile. While an automobile may be used in the
20 course of employment and may not always satisfy the requirement of specialized equipment under
21 the *White* test, here the requirement of the car clearly does. In a recent Board decision *In re Yellow*
22 *Book Sales & Distribution Company, Inc.*, Dckt. No. 10 11146 (March 30, 2011), the Board
23 addressed a similar issue. In the *Yellow Book* appeal, the contract called for the delivery of phone
24 books to individual residences. The Board adopted the findings of the Proposed Decision and
25 Order and issued a Decision and Order. The findings of the Board included a finding that the
26 independent contractor who agreed to delivery of the telephone books "of necessity had to own or
27 supply machinery in the form of a car, pickup or other motorized machine in order to accomplish
28 their delivery." The Board's finding in the *Yellow Book* appeal was correct and should be followed
29 in this appeal. The delivery drivers under contract with Henry Industries "of necessity had to own or
30 supply machinery in the form of a car in order to accomplish their delivery." On this record, I would
31 find that the drivers were independent contractors; the essence of the contract was not personal
32

1 labor; and the independent workers are not covered workers under the Industrial Insurance Act. I
2 agree with the industrial appeals judge and would reverse the Department's Notice and Order.

3 Dated: April 4, 2014.

4
5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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7 
8 JACK S. ENG Member

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CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

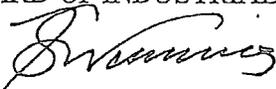
HENRY INDUSTRIES, INC. 3801 JEWELL WICHITA, KS 67213	EM1
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MOLLY E. WALSH, ATTY STINSON LEONARD STREET LLP 1201 WALNUT ST #2900 KANSAS CITY, MO 64106-2150	EA1
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STEPHANIE N. SCHECK, ATTY STINSON LEONARD STREET LLP 1625 N WATERFRONT PARKWAY #300 WICHITA, KS 67206-6620	EA2
---	-----

KATY J DIXON, AAG OFFICE OF THE ATTORNEY GENERAL PO BOX 40121 OLYMPIA, WA 98504-0121	AG1
---	-----

Dated at Olympia, Washington 4/4/2014
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 

J. SCOTT TIMMONS
Executive Secretary

APPENDIX B

APPENDIX B

RCW 51.08.195

"Employer" and "worker" — Additional exception.

As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

[2008 c 102 § 4; 1991 c 246 § 1.]

NO. 73234-0-I

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

HENRY INDUSTRIES, INC.,
Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served true and correct copies of the Brief of Respondent Department of Labor and Industries with Appendixes A and B, and this Declaration of Service, to all parties on record as follows:

Via E-Filing to:

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

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Via Email and First Class U.S. Mail, Postage Prepaid, to:

Stephanie N. Scheck
Stinson Leonard Street LLP
1625 North Waterfront Pkwy, Suite 200
Wichita, KS 67206
Email: stephanie.scheck@stinson.com
Appellant's Attorney, Pro Hac Vice

Molly E. Walsh
Stinson Leonard Street LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Email: molly.walsh@stinson.com
Appellant's Attorney, Pro Hac Vice

Michael J. Killeen
Mimi Gentry
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Email: mikekilleen@dwt.com
Email: mimigentry@dwt.com
Appellant's Attorney

DATED this 18th day of November, 2015 at Seattle, WA.


LYNN ALEXANDER
Legal Assistant
Attorney General's Office
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Phone: (206) 464-5343