

No. 74125-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LSI LOGISTIC SERVICE SOLUTIONS LLC, a Washington limited
liability company, LABELING SERVICES, INC, an inactive
Washington corporation,

Appellants

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAR 25 PM 4:34

APPELLANTS' REPLY BRIEF

Attorneys for Appellant
Matt Adamson, WSBA #31731
JAMESON BABBITT STITES & LOMBARD, P.L.L.C.
801 Second Avenue, Suite 1000
Seattle, Washington 98104-4001
Telephone: 206 292 1994
Facsimile No.: 206 292 1995

APPELLANTS' REPLY BRIEF- i

TABLE OF CONTENTS

A. Standard of Review..... 1

B. The Department and the Board Ignored the Key
Requirements of the Governing Regulations2

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Cornu-Labat v. Hosp. Dist. No. 2 of Grant County,
177 Wn.2d 221, 229, 298 P.3d 741, 745 (2013)..... 1

Other Authorities

WAC 296-17A-2002-13 5

WAC 296-17A-2102 2

WAC 296-17A-2102-00 4

WAC 296-17A-2102-11 4

A. Standard of Review

Labeling and LSI concede that the APA does not apply. However, the standard of review is the same. The only live testimony in these proceedings occurred before the Industrial Appeals Judge, Anita Booker Hay, on September 4, 2015. Judge Hay entered a “Proposed Decision and Order” that includes Findings of Fact and Conclusions of Law. (CP 26 – 32). The Board of Industrial Insurance Appeals entered corrected Finding of Fact and Conclusions of Law. (CP 33-35).

The Superior Court affirmed after hearing oral argument from counsel. The trial judge did not hear any live testimony. After oral argument, the trial court merely “adopt[ed] the findings of fact and conclusions of law of the Board.” (CP 44; also compare CR 44-45 with CP 34-35)

When a trial court simply reviews written testimony, the Court of Appeals provides no deference to its “findings.” See *Cornu-Labat v. Hosp. Dist. No. 2 of Grant County*, 177 Wn.2d 221, 229, 298 P.3d 741, 745 (2013) (“An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits”). Thus, no deference can be given to the trial court’s findings of fact, and this Court sits in the

same position as the trial court. The standard of review is therefore whether substantial evidence supports Judge Hay's findings (CP 26 – 32) as corrected by the Board (CP 33-35), and the proper interpretation of the applicable regulations distinguishing between warehouses and freight handlers.

B. The Department and the Board Ignored the Key Requirements of the Governing Regulations

The Department of Labor and Industries (the "Department") continues to take the position that any warehouse that receives a shipment of goods, unloads them, inspects them, uses a forklift to move them to storage, and later ships them to back to the customer or to a third party, is a "freight handler." Let's inspect each of these activities in the context of the regulations.

First, the storage of goods could not make a business a freight handler. Just the opposite is true. Storage is the defining characteristic of a warehouse. See WAC 296-17A-2102.

Second, the fact that the goods arrive via shipment cannot convert a warehouse to a freight handler. (Resp. p. 23) Regardless of whether goods are shipped to the warehouse, or brought in by truck without paying a shipping carrier, the job description of, and risk to, the warehouse employees is the same.

APPELLANTS' REPLY BRIEF- 2

Goods must be transported to the warehouse somehow. These are warehouses at issue, and not self-storage facilities. Arguing that receiving goods via shipment makes one a freight handler and not a warehouse is contrary to modern reality.

Third, the fact that the warehouse employees inspect goods, and then use forklifts and pallet jacks to unload goods and move them to storage cannot convert a warehouse to a freight handler. This is work that is done in any warehouse, and use of forklifts and pallet jacks are specifically mentioned in the regulation for warehouses. See *id.* Again, the distinction is between warehouses and freight handlers, and not warehouses and self-storage facilities.

Fourth, the fact that warehouse employees would remove goods from storage and load them for shipping cannot convert a warehouse to a freight handler. How else would goods ever leave a warehouse? Of course warehouse employees pull goods from storage and load them onto a truck. This activity cannot convert them to a freight handler.

Fifth, when goods are removed from storage for shipping, the location of the shipping destination cannot plausibly be relevant. The Department testified that warehouses store goods and ship

them back to their owner, while a freight handler stores goods and ships the goods to someone else. (R. p. 43 ll. 14-20) The Department now relies on a special note in WAC 296-17A-2102-00 arguing that warehouses do not store goods that are “intended for sale to wholesaler or retailer.” (Resp. at p. 24)

However, the address on the shipping label cannot plausibly distinguish between a warehouse and a freight handler. Nor could the address on the label increase the risk of injury to employees. The goods are pulled from storage, moved through the warehouse, and loaded for shipment – and that work is the same regardless of whether the end destination is the owner or a retailer.

The Department’s interpretation of the special note is also incorrect. The special note in WAC 296-17A-2102-00 is simply distinguishing between warehouses and businesses that buy grocery products and sell them to retailers or wholesalers. See WAC 296-17A-2102-11. Labeling and LSI did not buy and sell the product they stored. The special note cannot plausibly mean that a warehouse is only a warehouse if the “coffee,” “potatoes,” and “rice” etc. are stored by their owner for later return to that same owner. WAC 296-17A-2102-00. Again, the address on the shipping label cannot distinguish between a warehouse and a freight handler.

APPELLANTS’ REPLY BRIEF- 4

In sum, arrival via shipment, unloading, inspecting, and moving to storage, and subsequent loading and shipping to a third party cannot convert a warehouse to a freight handler. Rather, the distinguishing factor between a warehouse and a freight handler is the length of storage and whether there is a “continual movement” of goods from the originator, through the freight handler and to the end destination. In fact, that is just what the regulation says.

WAC 296-17A-2002-13 specifically identifies this as the distinguishing feature, stating: “Establishments engaged as freight handlers have the hazard of the continual movement of goods, in contrast to warehousing operations in classification 2102-00 that usually store goods for long periods of time.” It goes on to say that “freight handling services providers do not operate warehouses and storage facilities as a general rule.”

The fact that the regulation distinguishes between warehouses and storage facilities on the one hand, and freight handlers on the other, shows an understanding that there are other similarities between the two. Those similarities are receipt of goods via shipment, unloading, and shipment of goods to third parties. It is because of these similarities that the regulation includes the distinction between a business that exists for the purposes of

APPELLANTS’ REPLY BRIEF- 5

storage and one that is just a cog in the shipment of freight. One that has the hazard of continual movement of goods, and one that does not. Any other interpretation – i.e. relying on shipping, unloading, movement within a warehouse - merely turns successful and busy warehouses into freight handlers. But the success of a warehouse does not mean it is no longer a warehouse.

The Department spent at most “an hour and a half to two hours” visiting the business. (R. p. 42 l. 19) The Department entered no evidence regarding the storage of the goods by LSI or Labeling. The Board made no findings on these key distinguishing characteristics, and was wholly unconcerned with the inconsistent treatment of Labeling/LSI and its competitors.

The undisputed evidence showed that from the second quarter of 2010 through the first quarter of 2011, Labeling operated in a 178,000 square foot warehouse facility and employed approximately 15 employees, including clerical staff. Labeling mostly received canned salmon from Alaska, labeled it, stored it for about a year, and then shipped it out when requested by the customer. The product was not owned by Labeling. (R. p. 17, ll 9 – 15; p. 20 ll. 8 – 26; p. 21 ll. 1 - 11)

APPELLANTS’ REPLY BRIEF- 6

Starting in about the second quarter of 2011, LSI, as successor to Labeling, moved to a 117,000 square foot warehouse facility. LSI diversified into additional products as the salmon business ended. LSI stored bottled water and beverage containers, as well as rice, sugar, salmon oil, laminate flooring, and other commodities. (R. p. 18 ll. 9 – 21; 21 l. 18 – p. 22 l. 24) The goods are stored from about a month to two or three years, with an average storage time of about six months. (R. p. 15 ll. 1-3) LSI did not prepare goods to be re-loaded and immediately shipped out. (R. p. 36 l. 14 – p. 37 l. 4)

The Department and the Board made no findings as to the length of time that goods are stored by Labeling or LSI. Although their role was to distinguish between a warehouse, which is defined by the storage of goods, and a freight handler, which is defined by the “continual movement of goods,” the Department and the Board ignored those distinguishing factors and instead focused on work that occurs at both warehouses and freight handlers - loading, unloading, use of pallet jacks and forklifts, and shipping. That was error.

The Department’s decision is also, unsurprisingly, inconsistent with its treatment of LSI’s competitors, which are

APPELLANTS’ REPLY BRIEF- 7

classified as warehouses despite being the same business as LSI. (R. pp. 11 - 13). The fact that the Department applies the warehouse designation to Labeling's and LSI's competitors is further evidence that warehouses receive goods via shipment, unload and inspect them, load them onto pallets, and store them. That is just what Labeling and LSI did during the relevant time periods (and continues to do).

The Department and the Board ignored these facts, and ignored the key factor – storage vs. continual movement – in distinguishing between a warehouse and a freight handler. Rather, the Department and the Board relied instead on the finding that LSI “repackaged and reloaded goods.” (CP 34, FOF No. 4; R. p. 43 ll. 21-22).¹

There was not substantial evidence that LSI “repackaged, and reloaded goods for shipping.” (CP 34, FOF 4) The Department's Response contends that the “primary business [of Labeling and LSI] was to receive shipments of merchandise owned by others, run it through a production line, repackage it, and then ship it to multiple destinations.” (Resp. at p. 15). This is not

¹ To the extent the Department was relying on the “labeling” of goods, LSI stopped labeling goods in 2011. (R. p. 18 l. 5) And putting labels on goods is not the role of a freight handler.

supported by the record. And it contradicts the very next sentence of the response, which is apparently the citation for the previous sentence.

As indicated at the top of page 16 of the response, the actual testimony was that “we would label it, store it, and then ship it out as required.” (R. p. 17) There is a huge difference between (1) receiving goods, repackaging them, and shipping them out, and (2) receiving goods, storing them, and then shipping them out. It is, in fact, the distinction between a warehouse and a freight handler – storage for a “long period of time” vs. continual movement of goods.

The Department also contends that Finding of Fact No. 4 is supported by testimony at pages 33, 36-37 of the transcript. (Resp. p. 5-6) That is also not accurate. Mr. Klamke testified on page 36 that “we never reload, unless there was a problem. I mean, I suppose there might be a time, once or twice, that we had something that came to us that wasn’t ours and we unloaded it, and we’d reload it back because it was in error.” (R p. 36) The undisputed evidence was that the goods are unloaded and moved to storage in the warehouse.

The Department also relies on the “production line” used only by Labeling (and not LSI) for the canned salmon. (Resp. pp.

APPELLANTS’ REPLY BRIEF- 9

17-18). But having a production line with a labeling machine that labels goods before moving them to storage is not a freight handler.

The Department also attacks Labeling and LSI for “misconstruing the evidence” about the average storage time. This is an odd attack considering that the distinguishing feature between a warehouse and a freight handler is the storage of goods, and the Department never made any effort to determine the whether Labeling or LSI stored goods for a long period of time or not. The attack is also a misunderstanding of “average.” Of course, if the average storage time is six months, there will be some goods that are stored longer, and some shorter. The undisputed testimony was that goods are typically stored from one month to two or three years, with an average of six months. (R. p. 15 ll 1-3)

CONCLUSION

Labeling and LSI operated warehouses for the relevant time periods. The Department, the Board, and the trial court relied upon the erroneous findings that Labeling and LSI “repackaged and reloaded goods for shipping.” No evidence supports that finding. And they ignored the distinguishing characteristics between a warehouse and a freight handler in the regulations. This Court must reverse and enter a conclusion that Labeling and LSI were

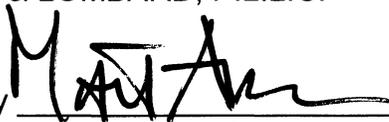
APPELLANTS’ REPLY BRIEF- 10

warehouses because the evidence showed they store goods for a long period of time, and are not a cog in the continual movement of freight.

Alternatively, this Court must remand for a new evidentiary hearing and ruling that treats competitors equally and is based on the proper interpretation of the regulation - one that gives dispositive weight to the distinguishing characteristics between warehouses and freight handlers (storage for long periods vs. continual movement of goods as a cog in the movement of freight), rather than one that focuses on their similarities (shipping, unloading, inspecting, and movement within the warehouse).

DATED this 25th day of April, 2016.

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By 
Matt Adamson, WSBA #31731
Attorneys for Appellants

APPELLANTS' REPLY BRIEF- 11

CERTIFICATE OF SERVICE

Laura Kondo states and declares:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, PLLC, over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On April 25, 2016, I served the foregoing (1) Appellants' Reply Brief on:

Attorneys for Respondent
DEPARTMENT OF LABOR AND
INDUSTRIES
Robert W. Ferguson
Attorney General
Thomas V. Vogliano
Assistant Attorney General,
WSBA 44977
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
T: 260-464-7740

VIA US Mail

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

DATED at Seattle, Washington, this 25th day of April, 2016.



Laura Kondo, Assistant to Matt Adamson

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR 25 PM 4:34

No. 74125-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LSI LOGISTIC SERVICE SOLUTIONS LLC, a Washington limited
liability company, LABELING SERVICES, INC, an inactive
Washington corporation,

Appellants

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 APR 25 PM 4:34

APPELLANTS' REPLY BRIEF

Attorneys for Appellant
Matt Adamson, WSBA #31731
JAMESON BABBITT STITES & LOMBARD, P.L.L.C.
801 Second Avenue, Suite 1000
Seattle, Washington 98104-4001
Telephone: 206 292 1994
Facsimile No.: 206 292 1995

APPELLANTS' REPLY BRIEF- i

TABLE OF CONTENTS

A. Standard of Review..... 1

B. The Department and the Board Ignored the Key
Requirements of the Governing Regulations..... 2

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Cornu-Labat v. Hosp. Dist. No. 2 of Grant County,
177 Wn.2d 221, 229, 298 P.3d 741, 745 (2013)..... 1

Other Authorities

WAC 296-17A-2002-13 5

WAC 296-17A-2102 2

WAC 296-17A-2102-00 4

WAC 296-17A-2102-11 4

A. Standard of Review

Labeling and LSI concede that the APA does not apply. However, the standard of review is the same. The only live testimony in these proceedings occurred before the Industrial Appeals Judge, Anita Booker Hay, on September 4, 2015. Judge Hay entered a “Proposed Decision and Order” that includes Findings of Fact and Conclusions of Law. (CP 26 – 32). The Board of Industrial Insurance Appeals entered corrected Finding of Fact and Conclusions of Law. (CP 33-35).

The Superior Court affirmed after hearing oral argument from counsel. The trial judge did not hear any live testimony. After oral argument, the trial court merely “adopt[ed] the findings of fact and conclusions of law of the Board.” (CP 44; also compare CR 44-45 with CP 34-35)

When a trial court simply reviews written testimony, the Court of Appeals provides no deference to its “findings.” See *Cornu-Labat v. Hosp. Dist. No. 2 of Grant County*, 177 Wn.2d 221, 229, 298 P.3d 741, 745 (2013) (“An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits”). Thus, no deference can be given to the trial court’s findings of fact, and this Court sits in the

same position as the trial court. The standard of review is therefore whether substantial evidence supports Judge Hay's findings (CP 26 – 32) as corrected by the Board (CP 33-35), and the proper interpretation of the applicable regulations distinguishing between warehouses and freight handlers.

B. The Department and the Board Ignored the Key Requirements of the Governing Regulations

The Department of Labor and Industries (the "Department") continues to take the position that any warehouse that receives a shipment of goods, unloads them, inspects them, uses a forklift to move them to storage, and later ships them to back to the customer or to a third party, is a "freight handler." Let's inspect each of these activities in the context of the regulations.

First, the storage of goods could not make a business a freight handler. Just the opposite is true. Storage is the defining characteristic of a warehouse. See WAC 296-17A-2102.

Second, the fact that the goods arrive via shipment cannot convert a warehouse to a freight handler. (Resp. p. 23) Regardless of whether goods are shipped to the warehouse, or brought in by truck without paying a shipping carrier, the job description of, and risk to, the warehouse employees is the same.

Goods must be transported to the warehouse somehow. These are warehouses at issue, and not self-storage facilities. Arguing that receiving goods via shipment makes one a freight handler and not a warehouse is contrary to modern reality.

Third, the fact that the warehouse employees inspect goods, and then use forklifts and pallet jacks to unload goods and move them to storage cannot convert a warehouse to a freight handler. This is work that is done in any warehouse, and use of forklifts and pallet jacks are specifically mentioned in the regulation for warehouses. See *id.* Again, the distinction is between warehouses and freight handlers, and not warehouses and self-storage facilities.

Fourth, the fact that warehouse employees would remove goods from storage and load them for shipping cannot convert a warehouse to a freight handler. How else would goods ever leave a warehouse? Of course warehouse employees pull goods from storage and load them onto a truck. This activity cannot convert them to a freight handler.

Fifth, when goods are removed from storage for shipping, the location of the shipping destination cannot plausibly be relevant. The Department testified that warehouses store goods and ship

them back to their owner, while a freight handler stores goods and ships the goods to someone else. (R. p. 43 ll. 14-20) The Department now relies on a special note in WAC 296-17A-2102-00 arguing that warehouses do not store goods that are “intended for sale to wholesaler or retailer.” (Resp. at p. 24)

However, the address on the shipping label cannot plausibly distinguish between a warehouse and a freight handler. Nor could the address on the label increase the risk of injury to employees. The goods are pulled from storage, moved through the warehouse, and loaded for shipment – and that work is the same regardless of whether the end destination is the owner or a retailer.

The Department’s interpretation of the special note is also incorrect. The special note in WAC 296-17A-2102-00 is simply distinguishing between warehouses and businesses that buy grocery products and sell them to retailers or wholesalers. See WAC 296-17A-2102-11. Labeling and LSI did not buy and sell the product they stored. The special note cannot plausibly mean that a warehouse is only a warehouse if the “coffee,” “potatoes,” and “rice” etc. are stored by their owner for later return to that same owner. WAC 296-17A-2102-00. Again, the address on the shipping label cannot distinguish between a warehouse and a freight handler.

APPELLANTS’ REPLY BRIEF- 4

In sum, arrival via shipment, unloading, inspecting, and moving to storage, and subsequent loading and shipping to a third party cannot convert a warehouse to a freight handler. Rather, the distinguishing factor between a warehouse and a freight handler is the length of storage and whether there is a “continual movement” of goods from the originator, through the freight handler and to the end destination. In fact, that is just what the regulation says.

WAC 296-17A-2002-13 specifically identifies this as the distinguishing feature, stating: “Establishments engaged as freight handlers have the hazard of the continual movement of goods, in contrast to warehousing operations in classification 2102-00 that usually store goods for long periods of time.” It goes on to say that “freight handling services providers do not operate warehouses and storage facilities as a general rule.”

The fact that the regulation distinguishes between warehouses and storage facilities on the one hand, and freight handlers on the other, shows an understanding that there are other similarities between the two. Those similarities are receipt of goods via shipment, unloading, and shipment of goods to third parties. It is because of these similarities that the regulation includes the distinction between a business that exists for the purposes of

storage and one that is just a cog in the shipment of freight. One that has the hazard of continual movement of goods, and one that does not. Any other interpretation – i.e. relying on shipping, unloading, movement within a warehouse - merely turns successful and busy warehouses into freight handlers. But the success of a warehouse does not mean it is no longer a warehouse.

The Department spent at most “an hour and a half to two hours” visiting the business. (R. p. 42 l. 19) The Department entered no evidence regarding the storage of the goods by LSI or Labeling. The Board made no findings on these key distinguishing characteristics, and was wholly unconcerned with the inconsistent treatment of Labeling/LSI and its competitors.

The undisputed evidence showed that from the second quarter of 2010 through the first quarter of 2011, Labeling operated in a 178,000 square foot warehouse facility and employed approximately 15 employees, including clerical staff. Labeling mostly received canned salmon from Alaska, labeled it, stored it for about a year, and then shipped it out when requested by the customer. The product was not owned by Labeling. (R. p. 17, ll 9 – 15; p. 20 ll. 8 – 26; p. 21 ll. 1 - 11)

APPELLANTS’ REPLY BRIEF- 6

Starting in about the second quarter of 2011, LSI, as successor to Labeling, moved to a 117,000 square foot warehouse facility. LSI diversified into additional products as the salmon business ended. LSI stored bottled water and beverage containers, as well as rice, sugar, salmon oil, laminate flooring, and other commodities. (R. p. 18 ll. 9 – 21; 21 l. 18 – p. 22 l. 24) The goods are stored from about a month to two or three years, with an average storage time of about six months. (R. p. 15 ll. 1-3) LSI did not prepare goods to be re-loaded and immediately shipped out. (R. p. 36 l. 14 – p. 37 l. 4)

The Department and the Board made no findings as to the length of time that goods are stored by Labeling or LSI. Although their role was to distinguish between a warehouse, which is defined by the storage of goods, and a freight handler, which is defined by the “continual movement of goods,” the Department and the Board ignored those distinguishing factors and instead focused on work that occurs at both warehouses and freight handlers - loading, unloading, use of pallet jacks and forklifts, and shipping. That was error.

The Department’s decision is also, unsurprisingly, inconsistent with its treatment of LSI’s competitors, which are

APPELLANTS’ REPLY BRIEF- 7

classified as warehouses despite being the same business as LSI. (R. pp. 11 - 13). The fact that the Department applies the warehouse designation to Labeling's and LSI's competitors is further evidence that warehouses receive goods via shipment, unload and inspect them, load them onto pallets, and store them. That is just what Labeling and LSI did during the relevant time periods (and continues to do).

The Department and the Board ignored these facts, and ignored the key factor – storage vs. continual movement – in distinguishing between a warehouse and a freight handler. Rather, the Department and the Board relied instead on the finding that LSI “repackaged and reloaded goods.” (CP 34, FOF No. 4; R. p. 43 ll. 21-22).¹

There was not substantial evidence that LSI “repackaged, and reloaded goods for shipping.” (CP 34, FOF 4) The Department's Response contends that the “primary business [of Labeling and LSI] was to receive shipments of merchandise owned by others, run it through a production line, repackage it, and then ship it to multiple destinations.” (Resp. at p. 15). This is not

¹ To the extent the Department was relying on the “labeling” of goods, LSI stopped labeling goods in 2011. (R. p. 18 l. 5) And putting labels on goods is not the role of a freight handler.

supported by the record. And it contradicts the very next sentence of the response, which is apparently the citation for the previous sentence.

As indicated at the top of page 16 of the response, the actual testimony was that “we would label it, store it, and then ship it out as required.” (R. p. 17) There is a huge difference between (1) receiving goods, repackaging them, and shipping them out, and (2) receiving goods, storing them, and then shipping them out. It is, in fact, the distinction between a warehouse and a freight handler – storage for a “long period of time” vs. continual movement of goods.

The Department also contends that Finding of Fact No. 4 is supported by testimony at pages 33, 36-37 of the transcript. (Resp. p. 5-6) That is also not accurate. Mr. Klamke testified on page 36 that “we never reload, unless there was a problem. I mean, I suppose there might be a time, once or twice, that we had something that came to us that wasn’t ours and we unloaded it, and we’d reload it back because it was in error.” (R p. 36) The undisputed evidence was that the goods are unloaded and moved to storage in the warehouse.

The Department also relies on the “production line” used only by Labeling (and not LSI) for the canned salmon. (Resp. pp.

APPELLANTS’ REPLY BRIEF- 9

17-18). But having a production line with a labeling machine that labels goods before moving them to storage is not a freight handler.

The Department also attacks Labeling and LSI for “misconstruing the evidence” about the average storage time. This is an odd attack considering that the distinguishing feature between a warehouse and a freight handler is the storage of goods, and the Department never made any effort to determine the whether Labeling or LSI stored goods for a long period of time or not. The attack is also a misunderstanding of “average.” Of course, if the average storage time is six months, there will be some goods that are stored longer, and some shorter. The undisputed testimony was that goods are typically stored from one month to two or three years, with an average of six months. (R. p. 15 ll 1-3)

CONCLUSION

Labeling and LSI operated warehouses for the relevant time periods. The Department, the Board, and the trial court relied upon the erroneous findings that Labeling and LSI “repackaged and reloaded goods for shipping.” No evidence supports that finding. And they ignored the distinguishing characteristics between a warehouse and a freight handler in the regulations. This Court must reverse and enter a conclusion that Labeling and LSI were

warehouses because the evidence showed they store goods for a long period of time, and are not a cog in the continual movement of freight.

Alternatively, this Court must remand for a new evidentiary hearing and ruling that treats competitors equally and is based on the proper interpretation of the regulation - one that gives dispositive weight to the distinguishing characteristics between warehouses and freight handlers (storage for long periods vs. continual movement of goods as a cog in the movement of freight), rather than one that focuses on their similarities (shipping, unloading, inspecting, and movement within the warehouse).

DATED this 25th day of April, 2016.

JAMESON BABBITT STITES
& LOMBARD, P.L.L.C.

By 
Matt Adamson, WSBA #31731
Attorneys for Appellants

CERTIFICATE OF SERVICE

Laura Kondo states and declares:

1. I am a legal assistant with the law firm of Jameson Babbitt Stites & Lombard, PLLC, over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On April 25, 2016, I served the foregoing (1) Appellants' Reply Brief on:

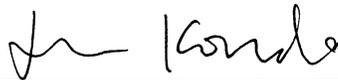
Attorneys for Respondent
DEPARTMENT OF LABOR AND
INDUSTRIES

Robert W. Ferguson
Attorney General
Thomas V. Vogliano
Assistant Attorney General,
WSBA 44977
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
T: 260-464-7740

VIA US Mail

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

DATED at Seattle, Washington, this 25th day of April, 2016.



Laura Kondo, Assistant to Matt Adamson

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR 25 PM 4:34