

74125-0

74125-0

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.

2016 DEC 20 PM 1:01
COURT OF APPEALS
DIVISION I
NO. 74125-0

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants LSI LOGISTIC SERVICE SOLUTIONS LLC, (“LSI”), and LABELING SERVICES, INC, (“Labeling”) request that this Court reverse the decision by the Department of Labor and Industries (the “Department”) and the Board of Industrial Insurance Appeals (the “Board”). The Department and the Board incorrectly classified appellants’ businesses as “freight handlers” with the hazard of continual movement of freight.

Appellants are not freight handlers under the applicable regulation, and substantial evidence does not support that conclusion. Appellants Labeling and LSI operate a warehouse storing goods owned by others. They are not freight handlers involved in the continuous movement of goods from manufacturer to end-user, and the Department and Board erred in so finding. This Court must reverse.

II. ASSIGNMENTS OF ERROR

1. The Board erred in entering Findings of Fact 4, 5, and 6 in its Decision and Order dated December 17, 2014 (“Board’s Order”). A copy of the Board’s Order is attached as **Appendix A**.

2. The Board erred in entering Conclusions of Law 2, 3, and 4 in the Board’s Order.

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3. The trial court erred in adopting and affirming the Board's Order.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Department and the Board err in concluding that Labeling and LSI operated as freight handlers handling the continual movement of freight, rather than a warehouse that stores goods owned by others?

2. Does substantial evidence support the Board's Findings of Fact 4, 5, and 6 finding that Labeling and LSI were freight handlers engaged in unloading, inspecting, labeling, repackaging, and reloading goods for shipping?

3. Are Labeling and LSI entitled to an award of fees and costs under RCW 4.84.350?

IV. STATEMENT OF THE CASE

1. Appellant LSI is a Washington limited liability company. Its principal place of business is located at 20021 89th Avenue S., Kent, WA 98031.

2. Appellant Labeling is an inactive Washington corporation. When active, its principal place of business was located at 6838 S. 234th Street, Kent WA 98032.

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3. Respondent Department of Labor and Industries (the “Department”) is an agency of the State of Washington.

4. This is an appeal of the December 17, 2014 Decision and Order by the Board of Industrial Insurance Appeals for the State of Washington, which Decision and Order was affirmed by the trial court on September 1, 2015. The appeal arises out of the Department’s classification of Labeling and LSI as “freight handlers”, rather than general warehouse, for the periods from the second quarter of 2010 through the first quarter of 2013.

5. 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).¹

¹ The “R” citations herein refer to the transcript of the September 4, 2014 hearing before ALJ Anita Booker-Hay. The King County Superior Court Clerk’s office stated that the Certified Appeal Board Record (Trial Court Sub. No. 7), which includes the transcript, would be transmitted to this Court as an original document and not as a numbered part of the clerk’s papers.

6. Starting in about the second quarter of 2011, LSI, as successor to Labeling, moved to a 117,000 square feet 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)

7. These commodities arrive on pallets, or sometimes as “floor loaded” where it is loaded from the container onto a pallet. (R. p. 22 ll. 11 – 24) The pallets are moved through the warehouse using pallet jacks and forklifts, (R. p. 22 ll. 22-24). Occasionally LSI needs to load goods onto a pallet or re-pallet goods for shipment. (R. p. 35 ll. 21-22; p. 36 ll. 11-13). All of the products are owned by the customers or by a customer of a customer. (R. p. 23 ll. 10-11; p. 32) 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)

8. In sum, LSI operates a warehouse. (R. p. 15 ll. 6-7) The warehouse handles storage of goods such as flooring materials, empty beverage containers, rice, sugar, salmon oil, and similar items. The goods are owned by others, stored at LSI’s

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warehouse, and eventually shipped out. The primary business is the receipt of such goods in a container, movement by fork lift or pallet jack to a storage location in the warehouse, and then movement in the same manner to a shipping truck when ordered to do so by the customer. The goods received belong to 30-35 different customers, arrive at different times, and are stored for different periods of times depending on the customer and the type of goods. Goods come and go because it is a large warehouse, with 30-35 customers, with goods arriving at different times and leaving at different times. But the goods themselves are not in “continual movement” on their way to an end user.

V. ARGUMENT

A. STANDARD OF REVIEW

An Appellate Court interprets agency regulations as if they were statutes. See *Children's Hosp. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999). Courts review the Board's interpretation of the statute or regulation de novo. See *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

An Appellate Court reviews the agency's interpretation under an error of law standard, which allows an appellate court to substitute its own interpretation of the statute or regulation for the

Board's interpretation. See *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). Appellate Courts give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise. *Id.* Accordingly, Courts will uphold an agency's interpretation of a regulation if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996).

The APA governs judicial review of the Board's decision in an industrial insurance assessment case. See RCW 51.48.131. "On appeal from the superior court, we sit in the same position as the superior court and review the agency's order based on the administrative record rather than the superior court's decision. An employer challenging the validity of the agency action assessing industrial insurance premiums bears the burden of showing that the premiums were assessed incorrectly." *B&R Sales, Inc. v. Dep't of Labor & Indus.*, 186 Wn. App. 367, 374-375, 344 P.3d 741, 745-746 (2015); see also *Xenith Grp., Inc. v. Dep't of Labor & Indus.*, 167 Wn. App. 389, 393, 349 P.3d 858, 859 (2012); RCW 34.05.570.

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RCW 34.05.570(3) sets out the grounds for invalidating an administrative order. Two grounds are applicable here: (1) the agency's order is not supported by substantial evidence, RCW 34.05.570(3)(e); and (2) the agency erroneously interpreted or applied the law, 34.05.570(3)(d).

The Court should not give deference to an agency interpretation when the agency has applied the same regulations in a different manner to comparable businesses competing for the same customers. The undisputed evidence below showed that the Department's interpretation as applied to Labeling and LSI is inconsistent with how the Department treats Labeling's and LSI's competitors who conduct the same types of operations. (R. pp. 11 - 13).

"Agencies may not treat similar situations in different ways. *Vergeyle v. Employment Sec. Dep't*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981), *overruled on other grounds in Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 276, 737 P.2d 1262 (1987). Further, RCW 34.05.570(3)(h) requires the Council to rule with consistency unless a rational basis for an inconsistency is demonstrated by an explanation of the facts and its reasoning." *Appren. Comm. v. Training Council*, 131 Wn. App. 862, 879, 129

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P.3d 838, 847 (2006); *see also Stericycle of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 93, 359 P.3d 894, 903, (2015) (“Agencies should not treat similar situations differently and should strive for equal treatment.”)

B. LABELING AND LSI OPERATE A WAREHOUSE

WAC 296-17A-2102 provides that risk classification 2102-00 Warehouses “Applies to establishments operating as warehouses for general merchandise. This merchandise belongs to a customer and is usually stored for long periods of time. Products typically involved are bulk, nonperishable materials which might include, but not be limited to: Coffee; Dry Cement; Potatoes; Rice.”

WAC 296-17A-2102 describes the business of LSI and Labeling, which is a warehouse business (R. p. 15 ll. 6-7) 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)

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)

These commodities arrive on pallets, or sometimes as “floor loaded” where it is loaded from the contained onto a pallet. (R. p. 22 ll. 11 – 24) The pallets are moved through the warehouse using pallet jacks and forklifts, (R. p. 22 ll. 22-24). Occasionally LSI needs to load goods onto a pallet or re-pallet goods for shipment. (R. p. 35 ll. 21-22; p. 36 ll. 11-13). All of the products are owned by the customers, or by a customer of a customer. (R. p. 23 ll. 10-11; p. 32) The goods are stored from about a month to a 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)

LSI and Labeling operate a warehouse, and store goods from a month up to two or three years, with an average time of six months. (R. p. 15 ll. 1-3) Other competitors of LSI and Labeling in

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the same line of business have been classified as Warehouses. (R. pp. 11 - 13) The Board was unconcerned with the fact that the Department was treating competitors differently.

Labeling and LSI operated a warehouse during the applicable time periods, and, just like with their competitors, the Department was required to use this classification for those entities. The Department did not do so and the Board erred in finding that the Department was correct. The Board erroneously applied risk classification in WAC 296-17A-2002-13 for "Freight handler services, N.O.C."

C. LABELING AND LSI ARE NOT FREIGHT HANDLERS

The risk classification for Freight handler services only applies to:

establishments engaged in packing, handling, shipping, or repackaging merchandise or freight which is owned by others and is not covered by another classification. General cargo is usually in boxes, cartons, crates, bales or bags. Other cargo includes but is not limited to lumber, logs, steel, pipe, grains, produce, machinery, and vehicles. ... 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. In addition, freight handling services providers do not operate warehouses and storage facilities as a general rule." WAC 296-17A-2002-13 (emphasis added)

Substantial evidence does not support the Department's findings that LSI and Labeling are freight handlers, and the Department applied an erroneous, and inconsistent, interpretation of the regulations.

Freight handling involves the "continual movement of goods" on their way to an end-user. Freight handlers are, unsurprisingly, handling "freight" on its way to its end destination. Thus, they "have the hazard of the continual movement of goods." WAC 296-17A-2002-13. This applies to goods moved in "freight" and not goods that need to be moved around a warehouse for storage purposes.

In interpreting the regulation, the word "freight" should be given its plain meaning, or ordinary dictionary definition. *N. Cent. Wash. Respiratory Care Servs., Inc. v. Dep't of Revenue*, 165 Wn. App. 616, 624, 268 P.3d 972, 976 (2011) ("To determine the plain meaning of an undefined term, we may look to the dictionary"). Webster's defines "freight" as "goods that are carried by ships, trains, trucks, or airplanes" and "the system by which goods are carried from one place to another."

There was not substantial evidence that Labeling and LSI engage in any part of the "system by which goods are carried from

one place to another.” Rather, goods arrive at LSI and Labeling’s warehouse for the purpose of storage, with an average storage period of six months.

The fact that Labeling and LSI package goods onto pallets for storage in their warehouse, and occasionally have to repackage goods, does not make them freight handlers just because the WAC for freight handlers mentions “packing” and “repackaging” of “freight.” The emphasis for freight handlers is, first and foremost, the handling of “freight.” This gives rise to the “hazard of continual movement of goods,” coming from the manufacturer, packed, or repackaged, and then shipped out...i.e. continual movement in “freight” as opposed to storage. The fact that warehouse employees also sometimes package goods for storage purposes, and ship the goods when asked by the customer, does not make them freight handlers.

Substantial evidence also does even not support Finding of Fact No. 4, that Labeling and LSI unloaded, inspected labeled “repackaged, and reloaded goods for shipping.” The Department visited the business for, at most, an “hour and a half to two hours.” (R p. 42 | 19). The Department provided no evidence that Labeling and LSI were “repackaging and reloading” goods as a freight

handler. At most, the Department witnessed goods being stacked for storage and being made ready to be loaded on a box trailer. (R. p. 42 ll. 8-12) This is not proof of “freight handling.”

The Department effectively concluded that the difference between a business that is a warehouse and a business that is a freight handler can be determined by answering the question: “how busy is the warehouse?” A warehouse, by necessity, unloads goods and stores them, and then re-loads them for shipment at some future time. Thus, if the warehouse is large and busy, there is a “continual movement of goods” from the receiving trucks to the storage areas, and of other goods from the storage areas to the shipping trucks, as well as movement of goods within the warehouse. But a busy warehouse is still a warehouse. It does not become a freight handler simply because it is busier than other warehouses.

A freight handler is, in contrast, “engaged in packing, handling, shipping, or repackaging merchandise or freight which is owned by others and is not covered by another classification.” WAC 296-17A-2002-13. There is a “continual movement of goods.” *Id.* This continual movement must be read in context of “freight” handling, meaning continual movement of the goods to the next

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party. Noticeably absent from the description of freight handlers, is any storage of merchandise. In fact, the WAC specifies that freight handlers do not store goods. See WAC 296-17A-2002-13 (“freight handling services providers do not operate warehouses and storage facilities as a general rule”).

It appears that the Department employee who made the initial classification, determined, incorrectly so, that because in his opinion the goods are not stored for a “long time,” (R. p. 44 ll. 12 – 22) and because Labeling and LSI load goods onto pallets, and occasionally re-pallet goods, (R. p. 35 ll. 21-22; p. 36 ll. 11-13; R. p. 43 ll. 14-24) that this makes them freight handlers. The employee is incorrect. That is not what the WAC says.

The employee took the testimony that the goods are stored from between a month and to two to three years and concluded that “I believe a month would not be considered a long time.” (R. p. 44 l 21) This testimony stems from the fact that WAC 296-17A-2002 differentiates between freight handlers who “have the hazard of continual movement of goods, in contrast to warehousing operations in classification 2102-00 that usually store goods for long periods of time.” Although the WAC says “usually,” and although the undisputed evidence showed an average storage of

six months, (R. p. 15 ll. 1-3), the Department employee chose “one month” as the measuring stick. Presumably this was to try and get around the fact that freight handlers do not store goods. However, the average storage time for LSI and Labeling is six months, and even storage for one month is not “continual movement of goods” applicable to freight handlers.

The fact that the Department relied on an erroneous fact – “one month” of storage time vs. an average of six months – shows that the Department erred and that substantial evidence does not support its conclusion. Substantial evidence does not support the conclusion that Labeling and LSI only stored goods for “one month.”

The Department employee who made this initial decision also apparently believes that a warehouse is only a warehouse if the owner of the goods personally brings them into the warehouse and puts them on the shelf and then either later retrieves the goods, or arranges for shipping. (R. p. 43 ll. 14-20). This interpretation, that warehouse employees do not move goods with forklifts, or package goods for storage purposes, or load them onto trucks when the owner of the goods wants them shipped, is not consistent with reality. No warehouse (and no insurance company

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of a warehouse) would authorize the customer to enter the warehouse and operate a forklift to move their goods to the storage shelves, or to load the goods onto trucks, or to package them onto pallets for storage purposes. It is also not consistent with WAC 296-17A-2102 which specifically says that warehouse employees use forklifts, pallet jacks, etc.

The Department's interpretation is also not consistent with how the Department treats Labeling's and LSI's competitors who conduct the same types of operations. (R. pp. 11 - 13). The fact that the Department applies the warehouse designation to Labeling's and LSI's competitors is substantial evidence of the fact that a warehouse does in fact do the very things that Labeling and LSI do. At a minimum, the Court should remand for a determination as to why the competitors are treated more favorably than Labeling and LSI. See *Appren. Comm. v. Training Council*, 131 Wn. App. 862, 879, 129 P.3d 838, 847 (2006) (agencies must apply rules consistently).

Finally, the Department's interpretation also does not account for the fact that the freight handler designation only applies if the business is "not covered by another classification." WAC 296-17A-2002-13. Because the warehouse classification applies to

Labeling and LSI, the Department may not use the freight handler classification.

D. LABELING AND LSI DO NOT HAVE TWO BUSINESSES

Though not part of the Board's ruling, the Department employee also seemed to believe that LSI and Labeling engaged in both warehousing and freight handling, and that in such circumstances, the Department always selects the "higher" classification. (R. p. 46) Again, this was incorrect. There is no WAC provision supporting such a conclusion. The Department is apparently relying on the old version of WAC 296-017-31017, which is essentially a "Q&A" and does not support their argument.

In the 2011 and 2012 editions, WAC 296-017-31017 provides hypothetical questions and answers, and states that the multiple classifications rule only applies if "[t]he employer is operating a secondary business which includes operations that we do not consider a normal part of that employer's principal business in Washington." See **Appendix B**. Thus, if there are two business enterprises, the Department may impose multiple classifications if five criteria are met. If any one of those five criteria are not met, "then the operations of the secondary business will be reported in

the highest rated classification that applies to the employer.” WAC § 296-17-31017.

The Department employee appears to have interpreted this rule, in this case, to mean that if a business is doing any work that might be included in a higher classification, and the five criteria are not met, then the business must be classified at the highest risk level. But that is not a plausible interpretation of WAC § 296-17-31017. The rule does not even apply unless there is a principal and a secondary type of business, and the secondary business is not part of the normal operations of the principal business. That is not the case here.

Labeling and LSI did not have multiple businesses. Labeling and LSI operate one business - a warehouse for general merchandise. The fact that warehousing and freight handling can each involve packing goods does not make a warehousing operation into a freight handler, and does not mean there are two businesses. Rather, warehouses package goods and then store them, while freight handlers package goods in order to ship them and thus they have the “hazard of continual movement of goods.” LSI and Labeling do not have that hazard. Without multiple businesses, there is no basis for defaulting to a secondary business

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with the higher risk classification. Put another way, there is no basis for applying freight handler classification simply because warehousing also sometimes involves packing goods. And as indicated above, WAC 296-17A-2002-13 for freight handlers only applies when no other classification applies.

Moreover, to the extent the Department was relying on this rule, its order is inconsistent with its application (or lack thereof) of the rule to the competitors of Labeling and LSI who operate similar businesses with the same clients and are assessed as warehouses.. Reversal is therefore required by RCW 34.05.570(3)(h).

E. LABELING AND LSI SHOULD BE AWARDED FEES AND COSTS

RCW 4.84.350 provides that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.”

The agency action here is not “substantially justified.” “Substantially justified has been held to mean justified in substance or in the main -- in other words, justified to a degree that could satisfy a reasonable person.” *Alpine Lakes v. Natural Resources*,

102 Wn. App. 1, 19, 979 P.2d 929, 938 (1999); *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891, 904 (2007). The determination that a business that stores goods for an average of six months is not a warehouse is not substantially justified. Substantial evidence does not support the finding and conclusion that Labeling and LSI were part of a system for the “continual movement” of goods from the manufacturer to an end user. And it is not substantially justified to apply more favorable treatment to Appellants’ competitors.

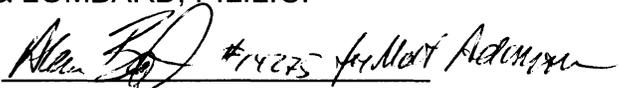
LSI and Labeling should be awarded their fees and costs incurred before the trial court and on this appeal. RCW 4.84.350.

CONCLUSION

The Department and the Board erred in imposing the riskier freight handler classification on Labeling and LSI for the applicable periods. Labeling and LSI operate a warehouse, storing goods from a month to three years, with an average storage period of about six months. That is a warehouse. They do not have the “hazard” of continual movement of goods that comes with offloading, packing, re-loading freight for shipment. The Department and the Board must be reversed.

DATED this 20th day of January, 2016.

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

By  #14275 for Matt Adamson
Matt Adamson, WSBA #31731
Attorneys for Appellants

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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 January 20, 2016, I served the foregoing (1) Appellants' Opening Brief on:

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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 20th day of January, 2016.



Laura Kondo, Assistant to Matt Adamson

2016 JUN 20 11:01
STATE OF WASHINGTON
CLERK OF SUPERIOR COURT

Appendix A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: LABELING SERVICES, INC.,) DOCKET NOS. 13 22402 & 14 16119
and LSI)
4 FIRM NOS. 923,816-00 & 209,894-00) DECISION AND ORDER

5
6 APPEARANCES:

7
8 Firms, Labeling Services, Inc., LSI, and
9 Cascade Financial Systems, per
10 Cal Krueger, Lay Representative

11
12 Department of Labor and Industries, by
13 Thomas Boyle, Account Manager, and by
14 The Office of the Attorney General, per
15 Charlotte Ennis Clark-Mahoney
16

17
18 In Docket No. 13 22402, the firm, Labeling Services, Inc., filed an appeal with the Board of
19 Industrial Insurance Appeals on October 10, 2013, from an order of the Department of Labor and
20 Industries dated September 6, 2013. In this order, the Department affirmed the risk classifications
21 for Labeling Services, Inc., as Freight Handling (2002-13) and Clerical (4904-00) for the second
22 quarter of 2010, through the first quarter of 2013. The Department order is **AFFIRMED**.
23

24
25 In Docket No. 14 16119, the firm, LSI, filed an appeal with the Board of Industrial Insurance
26 Appeals on October 10, 2013, from an order of the Department of Labor and Industries dated
27 September 6, 2013. In this order, the Department affirmed the risk classifications for LSI as Freight
28 Handling (2002-13) and Clerical (4904-00) for the second quarter of 2011, through the first quarter
29 of 2013. The Department order is **AFFIRMED**.
30
31

32 **DECISION**

33
34 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
35 review and decision. The firms filed a timely Petition for Review of a Proposed Decision and Order
36 issued on October 29, 2014, in which the industrial appeals judge affirmed the Department orders
37 dated September 6, 2013.
38

39
40 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
41 no prejudicial error was committed. The rulings are affirmed.
42

43
44 We agree with our industrial insurance appeals judge that the Department correctly assigned
45 Labeling Services, Inc., and its successor firm, LSI, the risk classification for freight handling in the
September 6, 2013 Department orders. We have granted review to clarify and correct the Findings

1 of Fact and Conclusions of Law. We note that LSI is the successor company to Labeling Services,
2 Inc. We have added the fact that the business performed inspection and labeling of goods, and
3 because LSI moved to a smaller warehouse during the period at issue, we do not believe it is
4 accurate to state that the businesses operated from the same location. We have added a
5 Conclusion of Law that addresses the Department's classification of employees of Labeling Service
6 Inc., for the second quarter of 2010, through the first quarter of 2011.
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10 FINDINGS OF FACT

- 11 1. On May 29, 2014, an industrial appeals judge certified that the parties
12 agreed to include the Jurisdictional Histories, as amended, in the Board
13 record solely for jurisdictional purposes.
- 14 2. Labeling Services, Inc. and LSI are separate companies that provide the
15 same services. LSI is the successor company to Labeling Services, Inc.
- 16 3. The Department investigated Labeling Services Inc., and its successor
17 company, LSI, on August 20, 2013, to determine risk classifications of
18 the businesses during the second quarter of 2010, through the first
19 quarter of 2011, and the second quarter of 2011, through the first quarter
20 of 2013, respectively.
- 21 4. Employees of Labeling Services Inc., and its successor company, LSI,
22 unloaded, inspected, labeled, repackaged, and reloaded goods for
23 shipping using pallet jacks and forklifts. Labeling Services, Inc.'s
24 employees provided the same services as LSI and used the same
25 equipment. Both businesses were located in a warehouse.
- 26 5. During the second quarter of 2010, through the first quarter of 2011, the
27 proper risk classification for Labeling Services, Inc., was Freight
28 Handling (2002-13), as provided by WAC 296-17A-2102.
- 29 6. During the second quarter of 2011, through the first quarter of 2013, the
30 proper risk classification for LSI was Freight Handling (2002-13) as
31 provided by WAC 296-17A-2102.

32 CONCLUSIONS OF LAW

- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the
34 parties and subject matter in these appeals.
- 35 2. The Department correctly classified the employees of Labeling Services,
36 Inc., for the second quarter of 2010, through the first quarter of 2011, as
37 required by RCW 51.16.035.
- 38 3. The Department correctly classified the employees of LSI, successor
39 entity of Labeling Services, Inc., for the second quarter of 2011, through
40 the first quarter of 2013, as required by RCW 51.16.035.
- 41 4. In the appeal filed under Docket No. 13 22402, the Department order
42 dated September 6, 2013, is correct and is affirmed.

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5. In the appeal filed under Docket No. 14 16119, the Department order dated September 6, 2013, is correct and is affirmed.

Dated: December 17, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS



DAVID E. THREEDY Chairperson



FRANK E. FENNERTY, JR. Member

Appendix B

WAC § 296-17-31017

This file includes all rules adopted and filed through the 15-14 Washington State Register dated July 15, 2015

Washington Administrative Code > TITLE 296. LABOR AND INDUSTRIES, DEPARTMENT OF > CHAPTER 17. GENERAL REPORTING RULES, AUDIT AND RECORDKEEPING, RATES AND RATING SYSTEM FOR WASHINGTON WORKERS' COMPENSATION INSURANCE

WAC 296-17-31017. Multiple classifications.

(1) **Can I have more than one basic classification assigned to my account?** Yes, sometimes we will give you more than one basic classification because:

- * The basic classification that describes your business specifies certain duties that must be reported separately.
- * You have employees performing work described in the general exclusions, WAC 296-17-31018(4).
- * You are a contractor with workers performing more than one phase of construction, as described in WAC 296-17-31013.
- * You operate a farm that raises more than one type of crop or animal, as described in WAC 296-17-31014.

We also may assign more than one basic classification when a single classification does not describe all of your business operations because you have multiple enterprises.

A multiple enterprise is when you:

- * Operate a secondary business with operations we do not normally consider related to your other business operations; or
- * Have multiple retail stores.

When all four of the following conditions apply, we will add a basic classification(s) for a multiple enterprise:

- * You maintain accurate payroll records that clearly distinguish the work performed for each business.
- * Each business is physically separated and distinct.
- * Each business can operate independently of any others. If one business closes, any others are able to continue on their own.
- * The classifications are permitted to be assigned together by classification descriptions and general reporting rules.

If any of these conditions do not apply, we will assign your firm the classification(s) that identifies:

- * Your principal business (this is the business that has the greatest number of hours); and
- * Any secondary business operations that are higher rated than your principal business.

Note: Whenever you have more than one classification assigned to your account, you must keep accurate records of the hours (or alternative reporting units) worked by each employee in each classification. Using percentages, averages, or estimates is **not** permitted. If you do not have original time card or time book entries to support how you are reporting, all worker hours in question will be assigned to the highest rated classification to which the worker was exposed. An explanation of necessary payroll records can be found under WAC 296-17-35201.

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- (2) **My business is assigned a basic classification and a standard exception classification. I have an employee who works in both classifications. Can I divide this employee's hours (or alternative units) between the two classifications on my quarterly report?**

Normally you cannot report employees in a standard exception classification if they also perform duties covered by a basic classification. If any of their work is covered by a basic classification, then all of their hours (or alternative reporting units) must be reported in the basic classification.

The only time you are permitted to divide a worker's hours between a standard exception classification and a basic classification is when the basic classification is assigned to you because it is a general exclusion under WAC 296-17-31018(4).

- (3) **Can I divide an employee's hours between two standard exception classifications on my quarterly report?**

No, you cannot divide employees' hours between two standard exception classifications. You must report all of their hours in the highest rated standard exception classification applicable to their work.

- (4) **I have more than one basic classification assigned to my business and I have employees who work in more than one of these classifications. Can I divide their hours between these basic classifications on my quarterly report?**

Yes, you may divide an employee's hours between basic classifications when:

- * The classification descriptions allow a division of hours; and
- * You maintain records on each employee and the department can determine from those records the hours worked in each classification.

If the classification descriptions do not allow a division of hours, or if you do not maintain adequate records, you must report the workers' hours in the highest rated risk classification applicable to your business, unless your records show that a worker did not work in that classification.

For the following examples, suppose an employer has the classifications and rates shown below:

| Risk Class | Description | Rates* |
|------------|----------------------------------|--------------|
| 0507 05 | Roofing work | \$ 7.37/hour |
| 0510 00 | Wood frame building construction | \$ 4.71/hour |
| 0513 00 | Interior finish carpentry | \$ 2.01/hour |

Example 1: If the employer does not keep records of which classifications an employee worked in, all of the employee's hours must be reported in classification 0507.

Example 2: If the employer's records show the employee worked only in classifications 0510 and 0513, but no time records were kept, all of the employee's hours must be reported in classification 0510.

Example 3: If the employer's records show the hours the employee worked in classification 0510 and the hours the employee worked in 0513, the employer may report the employee's hours in both classifications.

* The rates above do not reflect actual rates and are only intended for the purpose of this example.

- (5) **I have employees with duties that support more than one basic classification, but it is not possible to distinguish their hours between classifications. How do I report these workers' hours?**

Sometimes employers are unable to divide a worker's hours between two or more classifications because the work simultaneously supports more than one basic classification. When this occurs, you must report the work in the highest rated classification that the work supports.

Example 1: You operate both a motel with classification 4905, and a restaurant with classification 3905. You have a laundry facility that cleans the linens for both the restaurant and for the motel and you choose not to distinguish schedules for washing the linens separately. If you do not maintain work or payroll records, you must report your employees in the higher premium rate classification.

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If classification 3905 is higher than classification 4905, you need to report the laundry operations in classification 3905.

If classification 4905 is higher than classification 3905, you need to report the laundry operations in classification 4905.

Example 2: You have a floor covering store and also offers installation services to your customers. Your store operations are under classification 6309 and your employees performing the installation service are under classification 0502.

Since delivery is included in both your classifications, when your workers deliver floor covering to one of your own job sites, their drive time must be reported in whichever of your classifications is higher premium rated.

Example 3: You are a construction contractor and pay your workers for driving to and from the construction sites. Some of these workers work in more than one construction classification. You can keep records of when they work in each classification and report their hours at the job site accordingly, but all of their drive time on a given day must be reported in the highest rated construction classification they worked in the same day.

(6) How can I find the rates for the classifications assigned to my account? Each of your classifications has a new rate assigned to it yearly. Your rates are on your annual rate notice and your quarterly report, or you may obtain your rates by contacting your account manager.

History

Statutory Authority: RCW 51.04.020 and 51.16.035. WSR 14-12-052, § 296-17-31017, filed 5/30/14, effective 6/30/14; WSR 13-11-128, § 296-17-31017, filed 5/21/13, effective 7/1/13; WSR 10-10-108, § 296-17-31017, filed 5/4/10, effective 7/1/10. Statutory Authority: RCW 51.16.035. WSR 98-18-042, § 296-17-31017, filed 8/28/98, effective 10/1/98.

Annotations

Notes

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Workers' Compensation Insurance

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Washington Administrative Code > TITLE 296. LABOR AND INDUSTRIES, DEPARTMENT OF > CHAPTER 17. GENERAL REPORTING RULES, AUDIT AND RECORDKEEPING, RATES AND RATING SYSTEM FOR WASHINGTON WORKERS' COMPENSATION INSURANCE

WAC 296-17-31017. Multiple classifications.

- (1) **Can I have more than one basic classification assigned to my account?** Yes, we will assign other classifications to your business when the assignment of another basic classification is required or permitted by the description(s) of the employer's other classification(s).

Whenever you have more than one classification assigned to your account, you must keep detailed records of the actual time spent by each employee in each classification. An explanation of payroll records you must keep can be found under WAC 296-17-35201. Use of percentages, averages or estimates is not permitted. If you do not have original time card or time book entries to support your reporting, all worker hours in question will be assigned to the highest rated classification applicable to your business operations.

- (2) **Are there other circumstances when I can have more than one basic classification assigned to my account?** Yes, under certain circumstances we will assign more than one basic classification to your account. These circumstances include:

* The employer is operating a secondary business which includes operations that we do not consider a normal part of that employer's principal business in Washington, or

* The employer has multiple retail store locations.

In these instances we will assign additional basic classifications *only if all of the following conditions are met:*

* The employer maintains separate payroll records for each business,

* Different employees work in each business,

* Each business is separated by structural partitions if they share a common business location,

* Each business can exist independently of the other, and

* The classification language of the principal business does not prohibit the assignment of the secondary classification.

If all of the above *five* conditions are not met, then the operations of the secondary business will be reported in the highest rated classification that applies to the employer.

- (3) **What do you mean by the term "principal business?"** The principal business is represented by the basic classification assigned to an employer which produces the greatest amount of exposure. The principal business does not include standard exception or general exclusion classifications or operations.

- (4) **If my business is assigned a basic classification and a standard exception classification and I have an employee who works in both classifications, can I divide their exposure (hours) between the two classifications on my quarterly report?**

No, you cannot divide an employee's exposure (*work hours*) between a basic classification and standard exception classification. An explanation of "standard exception classification" is discussed in the next section (WAC 296-17-31018(2)). If an employee performs work covered by a basic classification and a standard exception classification, all of their exposure (*hours*) must be reported in the basic classification applicable to your business. You

cannot report the exposure (*hours*) of any employee in a standard exception classification if they perform duties covered by a basic classification assigned to your business. Refer to WAC 296-17-31018 for a list and explanation of the "*exception classifications*."

(5) I have more than one standard exception classification assigned to my business. One of my employees works in more than one of the standard exception classifications. Can I divide their exposure (hours) between two or more standard exception classifications on my quarterly report?

No, you cannot divide an employee's work hours between two standard exception classifications. You must report all exposure (*work hours*) in the highest rated standard exception classification applicable to the work being performed.

History

Statutory Authority: RCW 51.16.035 and 51.04.020, 10-10-108, § 296-17-31017, filed 5/4/10, effective 7/1/10.

Statutory Authority: RCW 51.16.035, 98-18-042, § 296-17-31017, filed 8/28/98, effective 10/1/98.

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In these instances we will assign additional basic classifications *only if all of the following conditions are met:*

- * The employer maintains separate payroll records for each business,
- * Different employees work in each business,
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