

NO. 45765-2-II

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

B&R SALES, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

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

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I. INTRODUCTION

This is a case arising under the Industrial Insurance Act, RCW Title 51. B&R Sales, Inc. (B&R) sells floor covering and countertops to customers, and it uses independent contractors to install its flooring products. Under the Industrial Insurance Act, an employer must pay premiums both for its employees and for any independent contractors it uses to perform work, if the essence of the work performed under the contract is personal labor.

The Board of Industrial Insurance Appeals (Board) and the superior court correctly affirmed the Department's determination that B&R is responsible to pay premiums for the work performed by the independent contractors it uses, because substantial evidence shows that the essence of the work that is performed under those contracts is personal labor. B&R hired the installers principally for their expertise and the physical labor to apply that expertise, they performed the work without assistance, and they had no employees. The courts recognize that installers are workers when they are hired for their expertise and if they complete the work using the standard tools of their trade.

This Court should reject B&R's arguments that substantial evidence does not support the finding that the installers were workers. This Court should also decline to consider B&R's arguments regarding

sole proprietors, partnerships, and limited liability corporations because it did not raise these arguments at the Board and because they lack merit.

II. ISSUES

1. Did the superior court correctly apply a substantial evidence standard of review where RCW 51.48.131 provides that appeals from the assessment of industrial insurance taxes are governed by the Administrative Procedure Act, which mandates a substantial evidence, not a de novo, standard?
2. Is there substantial evidence that the installers operating under contract with B&R were workers within the meaning of RCW 51.08.180 where they were hired principally for their expertise and physical labor, they performed the work without assistance, they had no employees, and they completed the work using the standard tools of their trade?
3. Did B&R waive its arguments about sole proprietors and other business entities under RCW 51.12.020, when RCW 34.05.554 and RCW 51.52.104 require a party to raise an issue at the Board in order to preserve that issue for review?
4. 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 certain business owners to have industrial insurance coverage for themselves. Does RCW 51.08.180 govern here when the installers were persons providing personal labor under a contract regardless of how they have organized themselves as a business?

III. STATEMENT OF THE CASE

- A. **B&R's Business Is Flooring and Countertops and It Uses Independent Contractors To Perform Installation of Flooring and Countertops**

B&R is a business based in Lacey, Washington that sells and installs floor covering and countertops.¹ BR Gunderson at 8. During 2008, B&R contracted with 17 independent contractors to install the materials that it sold to its residential and commercial clients. BR 3. The installers were required to sign a contract prepared by B&R if they wished to perform installation work for B&R. BR Gunderson at 69. In addition to using independent contractors to perform installation work, B&R also had one employee who performed installations. BR Gunderson at 79.

The installers were paid for their labor under a “price list” that is the same for all installers. BR Gunderson at 67. When installing flooring materials their pay was calculated based on the square footage of the installation, but when tearing out flooring materials they were paid an hourly wage. BR Gunderson at 67. The installers were directed to submit daily billing reflecting their work, and they were compensated by B&R on the Friday of the week following the week their work was completed. BR Gunderson at 36.

B&R provided the location for manufacturers to present training seminars on new products. BR Gunderson at 59-60. The installers were required to attend the manufacturer’s training seminars held at B&R when

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. Exhibits are referred to as “BR Ex”.

new products were introduced. BR Gunderson at 59-60. An installer was not allowed to install a product if he had not been to that training. BR Gunderson at 60.

B. B&R Hired the Installers For Their Expertise and Physical Labor

All flooring and countertop materials were provided by B&R and sold directly to its clients. BR Gunderson at 8. The salespeople determined the amount of product necessary based on the information provided by a B&R measurer after a site visit. BR Gunderson at 29, 64-67. The client was not advised that the installation work would be performed by anyone other than B&R. BR Gunderson at 69-70.

B&R hired the installers for their physical labor to install the flooring and countertops and their expertise in doing so. *See* BR Gunderson 13-16. Gary Gunderson, B&R's chairman of the board, testified that he hired installers for their knowledge and professionalism. BR Gunderson at 8, 13. Gunderson testified that the skills necessary for the job will depend on the type of floor material that needed to be installed, with carpet, ceramic tile, wood, and vinyl each requiring a unique skill set such that "it's a lot of expertise in all of those areas that we rely on the subcontractor for." BR Gunderson at 14-15. Installers Lonnie Huggins, Charles Soule and Jeffrey Saner testified that a person could not

do their job without significant personal experience and skill. BR Huggins at 6; BR Soule at 159; BR Saner at 101. Mr. Soule explained that his job requires an artistic sensibility, to visualize what the homeowner wanted and to implement that vision. BR Soule at 159. In addition, several of the installers testified to longstanding working relationships with B&R, ranging from 8 to over 20 years, with B&R providing full-time, or nearly full-time employment. BR Saner at 105; BR Zipperer at 128-29; BR Schultz at 142-43; BR Soule at 160; BR Huggins at 23-24; BR Fleury at 44.

On a project, the material was typically transported to the site by the installer. BR Gunderson at 28, 61, 82. However, if the material was too large to fit in the installer's vehicle, or if it needed to acclimate to the atmosphere in a particular house, B&R delivered it. BR Gunderson at 61, 82. Other miscellaneous materials such as glue, nails, and tack strips were either sold to the installers by B&R or purchased by the installers at other locations. BR Gunderson at 57.

The installers needed tools to complete their work, and they provided their own tools. BR Zipperer at 126-28; BR Schultz at 135. Tools included, among other things, various kinds of saws, rollers, trimmers, files, compressors, and nail guns. BR Saner at 88. The installers gave varying estimates of the value of their tools, ranging from

\$7,000 to \$20,000. BR Zipperer at 128; BR Saner at 88-89. The installers testified that the tools used were standard for their trade. BR Zipperer at 128; BR Schultz at 142.

Each day the installers would come to the B&R site, find out what job was scheduled for them, cut the material they needed for the day and transport it to the client's home. BR Gunderson at 28-29; BR Huggins at 14, 25. Sometimes the B&R scheduler, a former installer, would go out to see how the job was progressing. BR Gunderson at 32, 63. On occasion, there would be issues with the floor covering materials and employees of B&R would go out to the client's home to evaluate the materials before the installer would proceed with the work. BR Huggins at 14.

C. The Department Found that the Installers Were Providing Personal Labor to B&R, and Therefore the Workers Were Covered by the Industrial Insurance Act

The Department audited B&R for the year 2008 and assessed industrial insurance premiums for the 17 installers who operated under contracts with B&R. Sharon Palko, auditor for the Department, determined all of the installers were providing personal labor. BR Palko at 24. Thus, they were covered by the Industrial Insurance Act, which requires an employer to pay premiums for their work. RCW 51.14.010; RCW 51.08.180; BR Palko at 27. Ms. Palko indicated that she did not consider whether a subcontractor is registered as a corporation or has

taken on any other business form, because it was the individual owners who were performing the installation work for B&R and they did not use any employees or subcontractors of their own to perform any of the work under the contract. BR Palko at 23.

In October 2009, the audit resulted in a notice and order of assessment against B&R, finding that they owed \$58,940.98 in premiums, and additional penalties and interest for a total amount due of \$87,752.23. BR 218. B&R requested reconsideration of the audit findings. BR Billings at 124.

Jerold Billings, Litigation Specialist with the Department, conducted the reconsideration. BR Billings at 124. He received additional information from B&R, reviewed their website and spoke with representatives of the company. BR Billings at 124, 126, 146-148. Mr. Billings testified that he looks at the nature of the business entity, but if the owner of a corporation is providing personal labor, then it is still personal labor irrespective of the business entity formation. BR Billings at 128. Mr. Billings affirmed the auditor's finding that all 17 installers were providing personal labor. BR Billings at 127. The Department issued a notice and order reconsidering notice and order of assessment of industrial insurance taxes, affirming the earlier assessment. BR 220.

D. The Board Found That the Essence of the Installers' Labor under the Contract Was Personal

B&R appealed the audit to the Board, and hearings were held. BR 173. Gary Gunderson, retired chairman of the Board at B&R, testified on behalf of B&R. Several of the installers also testified: Jeff Saner (Saner's Installation), Rick Zipperer (Cascade Tile), Mike Schultz (Michael Schultz Enterprises), Chuck Soule (Tile with Soule), Mark Huyck (Mark's Flooring), Lonnie Huggins (LT Carpet Works, LLC), and Gene Fleury (GTF installation).

At a break in proceedings, the parties stipulated that the installers who had been confirmed to testify but who not yet testified would testify in a substantially similar manner as Gene Fleury. BR 7. Those installers included Dallen Bounds (Dal-Lyn's Sales & Services), Todd DeCosta (DeCosta's Installation), James Flint (Northwest Custom Carpets), Jay Hanks (Basic Flooring), Scott Woodland (Woodland Carpet) and Anthony Alan Turcotte (Double T. Flooring, Inc.). BR 7. As neither the Department nor B&R had confirmed any witness to testify on behalf of David Fleury (Custom Counters & More), Dave Lanning (Drapery Installations by Dave) or Richard Schnebly (RS Floors), the parties' stipulation did not extend to those installers. BR 8.

Auditor Sharon Palko and Litigation Specialist Jerold Billings testified for the Department regarding the audit and reconsideration, and the information the Department relied upon in issuing the assessment. BR Palko at 5-74; BR Billings at 172-177. In addition, Maureen O'Connell, a public records designee for the Department of Revenue, testified for the Department regarding the status of several of the installers' DOR accounts. BR O'Connell at 84-121. Ms. O'Connell testified that David Fleury had no account with DOR in 2008. BR O'Connell at 89. LT Carpets, LLC registered with DOR at the end of 2008. BR O'Connell at 93. She also noted that Todd DeCosta, James Flint and Richard Schnebly had accounts with DOR, but did not report income in 2008. BR O'Connell at 87, 94, 95.

An industrial appeals judge issued a proposed decision and order. BR 139-169. The proposed decision and order noted that the Legislature had changed the definition of worker in RCW 51.08.180 in the middle of 2008 by taking out the exceptions to coverage contained in former RCW 51.08.180(2), and incorporating them (with limited modifications) into a new statute, RCW 51.08.181. BR 151, 152. That change became effective June 12, 2008. BR 151. The industrial appeals judge excluded the installers associated with LT Carpet Works, LLC, Double T Flooring, Inc., and Absolute Pro Floors from inclusion in the assessment after June

12, 2008 on the basis that legal entities such as partnerships, corporations and limited liability companies could not meet the definition of a “worker” under the new version of RCW 51.08.180, but could meet the definition under former RCW 51.08.180(2). BR 152. The industrial appeals judge otherwise affirmed the assessment. BR 165-67. Both parties filed petitions for review.

The Board granted the petitions for review, and issued a decision and order that upheld the majority of the assessments made by the Department. BR 2-16. The Board, like the industrial appeals judge, analyzed the assessment under both sets of laws that existed in 2008. The Board applied the former RCW 51.08.180(2) for the period prior to June 12, 2008. BR 9-11. For the period after June 12, 2008, the Board applied the amended RCW 51.08.180 and the new statute governing registered contractors, RCW 51.08.181. BR 11, 12.

The Board found that the essence of the work performed by all seventeen of the subcontractors was personal labor. BR 13 (Finding of Fact No. 5). The Board disagreed with the industrial appeals judge’s finding that legal entities could not be workers after the effective date of the statutory amendments. BR 8, 9. The Board noted that while the Department used legal entity names in assessing premiums, that the assessment was based on the work performed by individuals. BR 8, 9.

As such, the Board found that the Department correctly assessed premiums for work done by Lonnie Huggins (working as Absolute Pro Floors and LT Carpet Works, LLC), Jack Huggins (Absolute Fro Floors) and Thomas Roberts (LT Carpet Works, LLC). BR 9.

The Board concluded that two subcontractors, Michael Schultz and Charles Soule, were not covered workers before June 12, 2008, but that they were covered workers after June 12, 2008. The Board concluded that the other fifteen installers were covered workers during all of 2008. BR 14.²

E. The Superior Court Decided That Substantial Evidence Supported The Board's Finding Regarding Personal Labor

B&R filed an appeal to Thurston County Superior Court. The superior court reviewed the certified appeal board record, pleadings, and briefings filed by the parties, and heard oral argument on October 3, 2013. On December 4, 2013, the superior court issued a letter opinion. CP 366-

² The reason that the Board concluded that Michael Schultz and Charles Soule were covered workers during the second half of 2008, but were not covered during the first half of that year, is that the amended RCW 51.08.181 imposes some additional requirements to qualify for an exemption than were imposed by former RCW 51.08.180(2). The Board concluded that Michael Schultz and Charles Soule met all of the requirements for an exemption under former RCW 51.08.180(2) but did not meet all the requirements of RCW 51.08.181 and thus ceased to be exempt from coverage after the new statute became effective on June 12, 2008. BR 11. The Board concluded that the remaining installers did not qualify for an exemption under either former RCW 51.08.180(2) or RCW 51.08.181 and thus were covered workers during all of 2008. BR 13, 14. B&R has not assigned error to the Board's finding that none of the installers are exempt from coverage under either the multi-factor test contained in former RCW 51.08.180(2) or the test contained in RCW 51.08.181.

71. On January 28, 2014, the superior court issued a judgment that affirmed the Board's decision and order. CP 381-84. The superior court concluded that the Board's findings were supported by substantial evidence and that its legal conclusions were not reversible error. CP 382. B&R appeals from the judgment of the Superior Court. CP 385-92.

IV. SUMMARY OF THE ARGUMENT

The Board properly concluded that the essence of the installers' work under contracts with B&R was their personal labor. Under RCW 51.08.180, an individual is a "worker" if he or she either is an employee of an employer or is working under an independent contract, "the essence of which is his or her personal labor." The essence of an independent contractor's work is his or her personal labor unless the independent contractor (1) must own or supply machinery or equipment as distinguished from usual hand tools, (2) obviously could not perform the contract without assistance, or (3) employs others to perform work under the contract, by either necessity or choice. *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 474, 294 P.2d 650 (1956); *see also Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 607, 886 P.2d 1147 (1995).

Here, the undisputed evidence shows that the installers did not employ others to perform any of the work under any of the contracts with

B&R. Although B&R argues that the installers supplied tools and equipment such that the essence of their work under the contract is not personal labor, *Lloyd's of Yakima Floor Center. v. Department of Labor & Industries*, 33 Wn. App. 745, 751, 662 P.2d 391 (1982), rejected an almost identical argument in a case involving indistinguishable facts.

Furthermore, substantial evidence supports that the installers were engaged by B&R principally because of their expertise in installing flooring. Many of the installers had a significant history working for B&R. B&R's chairman stated that he relied upon the installer's professional experience. Several of the installers testified that their work required years of practice to perfect their technique. The realities of the situation show that the essence of the work under the contract was the personal labor of the installer. B&R has offered no compelling basis to exempt the installers from mandatory industrial insurance coverage.

B&R argues that because the installers had established various business formations, they were exempt from coverage, but this argument is overbroad and should be rejected. First, with respect to arguments raised under RCW 51.12.020, B&R did not raise this argument at the Board and under RCW 34.05.554 and RCW 51.52.104 has not preserved the issue for review.

Second, the general definition of worker in RCW 51.08.180 determines whether independent contractors are covered under the Industrial Insurance Act, and the test is whether the essence of the work under the contract is their personal labor. If the mere fact of forming a sole proprietorship, partnership, LLC, or corporation were sufficient to remove an individual from coverage, the Industrial Insurance Act's presumption of inclusion would be thwarted, an absurd conclusion.

Because the installers working under contract with B&R were covered workers and not otherwise exempt, this Court should uphold the superior court's determination that the Board's findings were supported by substantial evidence and correct as a matter of law.

V. STANDARD OF REVIEW

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; *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:

Further appeals taken from a final decision of the board under this section are governed by the provisions relating to judicial review of administrative decisions contained in RCW 34.05.510 through 34.05.598.

RCW 51.48.131; *see also Probst v. Dep't of Labor & Indus.*, 155 Wn. App. 908, 915, 230 P.3d 271 (2010).

An appellate court sits in the same position as the superior court and reviews the assessment based on the record before the Board. *Probst*, 155 Wn. App. at 915. 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 (2002). 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.

VI. ARGUMENT

The Industrial Insurance Act's sweeping purpose is stated in RCW 51.12.010:

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state. This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss

arising from injuries and/or death occurring in the course of employment.

To this purpose, the Industrial Insurance Act is to be liberally applied to provide certain expedient relief to those coming within its provisions. *Lloyd's*, 33 Wn. App at 745. The Industrial Insurance Act is remedial, and “a liberal construction is not only appropriate but mandatory.” *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981). Any ambiguity must be resolved “in favor of compensation for the injured worker.” *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 142, 177 P.3d 692 (2008) (citation omitted).

In order to make it possible to provide certain and expedient relief to injured workers, the Industrial Insurance Act requires every employer to secure workers compensation by insuring with the state (through premiums) or self-insuring. RCW 51.14.010; *Lloyd's*, 33 Wn. App. at 748; *Xenith v. Dep't of Labor & Indus.*, 167 Wn. App 389, 396, 269 P.3d 414 (2012).

A. The Superior Court Correctly Followed RCW 51.48.131 in Applying a Substantial Evidence Standard to the Findings of the Board

The trial court applied the correct standard of review. Superior court (and appellate) appeals from Department orders assessing premiums for unpaid workers compensation taxes are governed by RCW 51.48.131,

which incorporates by reference the provisions relating to judicial review of administrative decisions contained in the Administrative Procedure Act (APA). RCW 34.05.570(3)(e), a statute within that portion of the APA, provides for substantial evidence review:

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.

The substantial evidence standard, like the arbitrary and capricious standard, is “highly deferential” to the agency fact finder. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 418, 216 P.3d 451 (2009). 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). *Id.*

B&R incorrectly argues that the superior court should have reviewed the Board’s findings de novo, using a preponderance standard, rather than reviewing them only to determine if substantial evidence supports them. *See* App’s Br. at 21-23. The two cases B&R cites in support for this assertion, *Allison v. Department of Labor & Industries*, 66 Wn.2d 263, 266, 401 P.2d 982 (1965), and *Ruse v. Department of Labor*

& Industries, 138 Wn.2d 1, 977 P.2d 570 (1999), both concern worker benefits, not the assessment of industrial insurance premiums, and are therefore inapposite here.

As the court noted in *ETCO, Inc. v. Department of Labor & Industries*, 66 Wn. App. 302, 305-06, 831 P.2d 1133 (1992), in appeals involving orders assessing premiums, RCW 51.48.131 governs over the more general provisions of RCW 51.52.110, which pertain to worker benefits and other appeals of Department orders. *See also* RCW 51.52.115 (providing for de novo review). This is because, under well-established rules of statutory construction, RCW 51.48.131 is both more specific and was adopted later than RCW 51.52.110. *See ETCO*, 66 Wn. App. at 306. B&R fails to cite to any case governed by RCW 51.48.131 in support of its contention that the superior court should have conducted a de novo review; however, only cases governed by that statute are relevant to the question of what standard applied here. *See App's Br.* at 21-23.

The superior court's judgment and order applied the correct standard in finding that the Board's findings of fact were supported by substantial evidence and that the Board's conclusions of law were correct as a matter of law and were in accordance with the APA. CP 381-84.

The letter opinion by the superior court judge does not apply an incorrect standard of review. B&R argues that Judge Wickham's

December 4, 2013 letter opinion applied a standard of review that was unclear. App's Br at 22. Generally, memorandum or letter decisions are not final, appealable orders, but an expression of the opinion of the court used to give direction to counsel in the preparation of a final order. *Ullom v. City of Renton*, 5 Wn.2d 319, 321, 105 P.2d 69 (1940). The superior court's judgment unambiguously and correctly applied the substantial evidence standard of review. CP 381-84.

In any event, Judge Wickham's letter also correctly reflects that, under the APA, review of the challenged assessment was 1) based solely on the record before the Board, 2) de novo with respect to the Board's legal conclusions and 3) reviewed under the substantial evidence standard. CP 366-71. Both the superior court's letter opinion and its subsequent judgment and order conform to the requirements of RCW 51.48.131 and applied the appropriate standard of review, and B&R fails to provide any meritorious argument to the contrary.

B. The Installers Are Workers Under RCW 51.08.180 Because The Essence of Their Work Under The Contracts Is Their Personal Labor

1. The Industrial Insurance Act Covers Independent Contractors Who Provide Personal Labor

The installers involved here were covered under the Industrial Insurance Act because they provided personal labor under their contracts.

For purposes of the Industrial Insurance Act, the term “employer” includes “any person, body of persons, corporate or otherwise . . . who contracts with one or more workers, the essence of which is the personal labor of such worker or workers.” RCW 51.08.070. A “worker” is similarly 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. In expanding the definition of covered worker beyond the common law definition of employee, the Legislature intended to “broaden the Industrial Insurance Act, and 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).

In determining whether the essence of work under a contract is personal labor, courts examine “the contract itself, the work to be performed, the parties’ situation and other relevant circumstances.” *Malang v. Dep’t of Labor & Indus.*, 139 Wn. App. 677, 688, 162 P.3d 450 (2007). 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.

The Washington Supreme Court in *White* articulated three instances where the essence of 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;

(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, 48 Wn.2d at 474.

In *White*, Mr. and Mrs. White owned a donkey engine, a steam powered logging engine. 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, Mrs. White testified that they were approached to do the work because "we had equipment." *Id.* The Whites hired one worker, Mr. Lydey, to assist them in their work, and they received increased compensation from the mill owner to reflect the wage paid to Mr. Lydey. *Id.* 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:

(1) because the Whites had of necessity to furnish expensive machinery and equipment, i.e., the donkey engine (as distinguished from the usual hand tools), to be able to perform the contract; (2) because after the modification of the contract the contracting parties knew that the independent contractors, the Whites, could not personally perform all the labor required by the contract; and (3) because after the modification of the contract the Whites did employ Lydey to do part of the work they had contracted to perform.

Id. at 476-477. 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 v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 130-32, 827 P.2d 1085 (1992).

The court's opinion in *Lloyd's* is particularly helpful in understanding why the installers in this case were covered workers, because it concerns independent contractors engaged in the same trade as those working for B&R: floor installation. *Lloyd's*, 33 Wn. App. at 747. *Lloyd's* of Yakima Floor Center sold floor covering for installation in residences and commercial establishments. *Lloyd's*, 33 Wn. App. at 747. Just like B&R, *Lloyd's* either sold the flooring product by itself or sold a package that included installation. *See id.* After examining the nature of the contracted work and the tools involved, the court in *Lloyd's* concluded

that “the essence of the contract, the ‘gist or substance, the vital *sine qua non*, the very heart and soul’ of the agreement between Lloyd’s and the installers was their personal labor.” *Id.* at 751; *see also In re Rubensteins Contract Carpet, LLC*, No. 06 13753, 2007 WL 4986257 (Wash. Bd. of Indus. Ins. Appeals November 7, 2007) (finding that floor and wall covering installers were covered workers who were hired principally for their expertise, not their equipment, such that the skill of the installer was the primary object of their agreement).

Here, the parties do not dispute that the installers included in the assessment are independent contractors, not employees. Because labor is the primary object of the agreement between the installers and B&R, the installers are covered workers and B&R is responsible to pay premiums for their labor.

2. The Primary Object of the Agreement Between B&R and the Installers Was the Skill of the Installers, Not the Installer’s Tools

The installers are workers because the primary object of the agreement between B&R and the installers was the installer’s expertise. In providing the labor of this expertise, the installers may use the tools of the trade to perform their work and still be covered workers. *See Lloyd’s*, 33 Wn. App. at 751. B&R argues that because the installers must supply equipment to perform under the contact, they are not covered workers.

App's Br at 30-31. A similar argument was considered and rejected in *Lloyd's*. *Lloyd's*, 33 Wn. App. at 751. Substantial evidence supports a finding that B&R's installers were engaged in similar work, using similar tools such that the holding in *Lloyd's*, that the essence of the contracts was personal labor, applies to B&R's installers as well.

In *Lloyd's*, the court emphasized that since the installers used the usual tools of the trade, they did not use the sort of machinery or equipment that, under *White*, would take the contractors outside the protection of the Industrial Insurance Act. *Lloyd's*, 33 Wn. App. at 751. In *Lloyd's*, the installers furnished tools worth approximately \$3,000 and a truck for transporting materials. *Id.* The B&R installers testified that their tools ranged in value from \$7,000 to \$20,000. BR Zipperer at 128; BR Saner at 88-89. As the Board noted in its decision and order, it is reasonable to conclude that the price of tools has gone up, due in part to inflation and related to technical changes in the way tools operate, since *Lloyd's* was decided in 1982. BR 4. This slight increase in value does not change the basic focus of the analysis, which is whether it was the tools or the installer's personal labor that constituted the "heart and soul" of the agreement. *Lloyd's*, 33 Wn. App. at 751. The evidence establishes that while the installers needed to use the usual tools of their trade to complete their work, the primary object of their contracts with B&R was the

installer's physical labor and their professional expertise. The evidence shows that the tools used by the installers were simply the usual tools of the trade. BR Zipperer at 128; BR Schultz at 142.

The usual tools of the trade may be used by workers, the fact that they may be specialized tools for a particular industry does not matter, after all, it is the tools of the given "trade" that are looked at. *See Lloyd's*, 33 Wn. App. at 751. B&R argues that the tools used by the installers are "professional installation tools" that can only be purchased from specialized stores and could not be purchased from Home Depot or other "consumer" stores, and that this takes their work out of the protection of the Industrial Insurance Act under *White*. App's Br. at 30-31. However, as *Lloyd's* shows, the relevant question is whether the tools were common to the trade practiced by the workers in that case, not whether the general public commonly uses those tools. *Lloyd's*, 33 Wn. App. at 751.

In any event, the evidence does not establish that these are unique devices that are not available to the general public. Indeed, there was no testimony that these specialized stores do not sell to regular consumers. Indeed, Mr. Zipperer testified that he got some of his tools at Home Depot. BR Zipperer at 127. Finally, the litigation specialist testified that he found the same tools online and available for purchase at Home Depot. BR Billings at 133-135. B&R has not met its burden of establishing that the

tools used by the installers were anything other than the usual tools of their trade.

Similarly, the fact that the installers provided vehicles for transporting materials also does not change the essence of the work done under the contracts. The installers in *Lloyd's* also provided a van for transporting materials, but the court opined that it did “not believe that a truck used to transport floor covering materials to a jobsite is the type of necessary machinery or equipment which, under *White*, would take this agreement outside the operation of the act.” *Lloyd's*, 33 Wn. App. at 751. The testimony at hearing was that B&R’s installers used their vehicles to transport the installer, his tools, and the materials to the customer’s residence when the quantity was not too large to fit into the vehicle. BR Gunderson at 61. If the quantity was too large for the vehicle, or if the product had to cure, then B&R transported the materials. BR Gunderson at 61, 82.

There is no indication that the vehicles used by the B&R installers were sufficiently different in type, purpose or value from the trucks used by the installers in *Lloyd's* to distinguish the cases. While the court in *Lloyd's* did not describe the vehicles with precision to indicate, for example, if they had any modifications, the *Lloyd's* court contrasted the trucks used to transport supplies in that case with the equipment that was

found to be central to the completion of the work in other cases, such as the small crane that was used to remove logs in *Dieckman v. Department of Labor & Industries*, 49 Wn.2d 378, 379, 301 P.2d 763 (1956), and the log truck used to transport timber in *Crall v. Department of Labor & Industries*, 45 Wn.2d 497, 499, 275 P.2d 903 (1954). See *Lloyd's*, 33 Wn. App. at 752 (discussing cases).

Thus, the slight modifications made by some of the installers to their vehicles for added convenience, such as shelving or false floors, did not transform the basic nature of their contract with B&R: the essence of the contracts was the installation of flooring, not the provision of vans that carried the flooring materials. See BR Saner at 89; BR Huggins at 12. While both a vehicle for transporting supplies and the usual tools of the trade were important to the completion of their work under the contract, the essence of those contracts remained their personal labor as skilled installers.

In any event, substantial evidence supports a finding that it was in fact the installers' personal skills and physical labor, rather than tools or a truck, that were the principal focus of the contract. As cited by B&R in its briefing, B&R Chairman Gunderson testified that he had to use installers because "We don't have that capacity. We sell the product and we rely on professional subcontractors to install the product." BR Gunderson at 14;

App's Br at 11. When asked "Can anyone do your job?" installer Jeffery Saner replied "No . . . because it takes a lot of experience to do my trade, especially Formica countertop work and a lot of vinyl work is very difficult to do. No, not just anyone can do that." BR Saner at 101. When asked what it took to do his job professionally, Charles Soule replied that it took tools, experience and "I think probably there's an artistic ability that's required in being able to visualize what the homeowner is expecting and to try to create that vision." BR Soule at 159. When asked "Is there an art or skill required to do the carpet laying?" installer Lonnie Huggins answered:

Absolutely . . . Seams, doing the seams takes, you know, specialty or special tools and lots of years of learning how to do it. There is an art to the job. It's not something that you can bring somebody on the job for a week and expect them to pick up on it. It's something you got to take time, see a lot of things done. There is still things that we come across that, you know, is not particularly the same as, you know, the last job. Every job is a little different. So, there is, you know, there is a lot to learn in the business.

BR Huggins at 6.

If an independent contractor has special skills of critical importance to the employer, this supports the conclusion that the essence of the work under the contract is personal labor. *See Lloyd's*, 33 Wash. App. at 751 ("Lloyd's utilized the installers because of their superior ability"). On the other hand, if who performs the contract is a "matter of

indifference” to the employer, this may suggest that the contract is for something other than personal labor. *See Haller v. Dep’t of Labor & Indus.*, 13 Wn.2d 164, 164, 124 P.2d 559 (1942). There is substantial evidence here that the B&R installers, like the installers in *Lloyd’s*, were hired for their expertise. It was not a matter of indifference to B&R who installed their product: Mr. Gunderson testified that he depended on professional installers. BR Gunderson at 14. Mr. Huggins’s, Mr. Soule’s and Mr. Saner’s testimony establishes that even with all the requisite tools, a person could not do their job without significant personal experience and skill. BR Huggins at 6; BR Soule at 159; BR Saner at 101. The essence of the installers’ work was their professional expertise; gleaned from years of experience and the physical labor they provided using that expertise, not the tools they used to complete the work.

In addition, several of the installers testified to longstanding working relationships with B&R. Mr. Saner testified that B&R kept him busy full time, that he had been there “22, 23 years straight,” and that he had no need to work with any other company. BR Saner at 105. Mr. Zipperer had worked for B&R since 1998 and estimated that work for B&R constituted 95 percent of his income in 2008. BR Zipperer at 128-129. Mr. Schultz estimated that work for B&R constituted 80 percent of his income in 2008. BR Schultz at 142-43. Mr. Soule had worked for

B&R for ten to twelve years. BR Soule at 160. Mr. Huggins testified that he only worked for B&R in 2008. BR Huggins at 23. Mr. Fleury also testified that his company only worked for B&R in 2008. BR Fleury at 44. The longstanding and exclusive, or nearly exclusive, working relationship between B&R and its installers reflects that B&R was anything but indifferent to who installed its product. This is a far cry from the scenario in *White*, where the Whites were approached about the logging contract because they owned a piece of specialized equipment. *White*, 48 Wn.2d at 475. Like the installers in *Lloyd's*, B&R contracted with its installers because they were experts with which the company had longstanding professional relationships.

The other bases that B&R offers to distinguish *Lloyd's* also fail. Here, as in *Lloyd's*, the heart and soul of the installers contracts was their personal labor. The presence of an indemnification clause, a slight difference in the type or value of the tools employed, or minor modifications to a van do not meaningfully distinguish the cases. As in *Lloyd's*, the “the essence of the contract, the ‘gist or substance, the vital *sine qua non*’” of the agreement between B&R and the installers was the installers’ personal labor. *Lloyd's*, 33 Wn. App at 751.

3. The Fact That Corporations and LLCs Are Not Capable of Performing Labor Without the Aid of a Human Being Does Not Mean That One May Contract

**With a Corporation or an LLC and Be Per Se Exempt
From Coverage Under the Industrial Insurance Act**

The installers here did not need others to aid them in performing work under the contract and as such they were covered workers. Under the second prong of the *White* test, independent contractors are excluded from mandatory coverage if they “obviously could not perform the contract without assistance.” *White*, 48 Wn.2d at 474. B&R incorrectly argues that it was error to conclude that the installers who were members of LLCs or corporate officers were covered workers, because a corporation or LLC necessarily requires assistance from an actual person to perform labor. *See App’s Br.* at 38. This argument lacks merit and finds no support under *White*.

The second prong of the *White* test contemplates situations where people assist other people in performing work under a contract. *See White*, 48 Wn.2d at 474. In *White*, the sawmill owner approached the Whites to inquire if they knew anyone who could perform falling and bucking work as part of their contract, as the mill had recently discharged an employee doing that work. *White*, 48 Wn.2d at 475. The Whites told the mill owner they knew a man named Mr. Lydey who could do that work, and the mill owner agreed to pay the Whites an additional sum to cover Mr. Lydey’s wages. *Id.* The contract between the mill owner and

the Whites was then modified to allow the Whites to receive assistance from Mr. Lydey. *White*, 48 Wn.2d at 477. Because the modified contract required the assistance of another worker apart from the Whites, the essence of it was not the Whites personal labor. *Id.* at 476. Nowhere did *White* suggest, however, that the fact that a corporation necessarily receives assistance from a human whenever the corporation undertakes a contract to perform labor would mean that there would be no coverage under the Industrial Insurance Act. *See White*, 48 Wn.2d at 577.

Similarly, in *Cook v. Department of Labor & Industries*, 46 Wn.2d 475, 476, 282 P.2d 265 (1955), a case B&R cites in support of the proposition that the installers who had formed a corporation or an LLC are excluded under the second prong of the *White* test, the Court found that a contract for timber cutting and hauling was not principally for personal labor because it would have required more than one person to load the truck, and because in practice the plaintiff's wife would assist him with the daily loading of the truck. *Id.*; *see also Haller*, 13 Wn.2d at 168 (“One workman unaided cannot clean out a well. The job requires at least two”).

In contrast to the facts of *White* and *Cook*, the Board noted that the installers working for B&R could, and routinely did, complete their work without the assistance of any employees or helpers. BR 9. Of the seventeen installers included in the assessment, one was operating as an

LLC: LT Carpet Works, LLC and one was operating as a corporation: Double T Flooring, Inc. BR 7. B&R was assessed premiums for work done by Lonnie Huggins and Thomas Roberts, the members of LT Carpet Works, LLC and for the work done by Anthony Alan Turcotte, of Double T Flooring, Inc. The Board's decision and order notes that in assessing premiums the Department used legal entity names, but "also clearly identified which individuals' work was considered and the assessment was based on those individuals' labor" BR 8. The Board found that Lonnie Huggins, Thomas Roberts, and Anthony Alan Turcotte were covered workers for the calendar year 2008. BR 14.

B&R's arguments about "fictitious entities" do not change the fact that the installers performed personal labor. B&R writes, "the Firm must have known the fictitious entity with which they were contracting would obviously not perform the contract without the assistance of agents." App's Br. at 38. Applying this argument to the facts of the instant case, B&R asserts, for example, that Anthony Alan Turcotte is not a covered worker because he was the agent of Double T Flooring, Inc., and the corporate entity of Double T Flooring, Inc., could not have installed flooring without the assistance of Anthony Alan Turcotte. Because Anthony Alan Turcotte had to help Double T Flooring, Inc., install floors, both Anthony Alan Turcotte and Double T Flooring, Inc., are excluded

from mandatory coverage because the corporate entity could not perform the contract without assistance. This argument strains the legal fiction of corporate personhood beyond its logical breaking point. This is not a situation akin to that entertained by the *White* and *Cook* courts, where actual people were helping actual other people perform work under the contract. *White*, 48 Wn.2d at 477; *Cook*, 46 Wn.2d at 476. B&R's installers did not have employees and did not testify that anyone helped them with their installation work. See BR Saner at 95, 105; BR Zipperer at 130; BR Schultz at 141.

Furthermore, notwithstanding the fact that one of the installers formed a corporation and another formed an LLC, B&R entered into contracts with the installers – including the ones who had organized as an LLC and a corporation – to perform personal labor. Under RCW 51.08.180, any “person” who performs work under a contract is a covered worker if the essence of the work is personal labor. It is undisputed that the persons who formed a corporation and an LLC, respectively, are nonetheless “persons” who “performed work” under “contracts.” Therefore, they are workers under the Industrial Insurance Act.

4. The Installers Are Not Exempted From Coverage Because, While They Were Contractually Permitted To Hire Others, They Did Not Actually Hire Others To Do So

Contrary to B&R's arguments, the third prong of the *White* test does not exclude the installers because they did not hire others to perform any work. B&R argues that the installers are excluded under the third prong of the *White* test because B&R's contracts with the installers permitted them to employ others. App's Br. at 39. However, that fact does not make them exempt under *White*, as, under *White*, an employer must show that the independent contractor actually employed others to perform work under the contract, not merely that the independent contractor had the contractual ability to do so. *White*, 48 Wn.2d at 477 ("after the modification of the contract the Whites did employ Lydey to do part of the work they had contracted to perform"). The Court concluded that the Whites were not covered workers because the Whites had actually hired a worker to perform work under the contract, not merely because they were permitted to do so under the terms of the contract. *White*, 48 Wn.2d at 475. Indeed, the *White* Court expressly noted that it disavowed any language in the Court's previous decisions that suggested that the contractual ability to use others to perform work was enough to take an independent contractor out of the coverage of the Industrial Insurance Act even if the independent contractor did not actually assign that work to anybody else. *White*, 48 Wn.2d at 473-474.

Notably, the court in *Jamison* stated that even in a case where the contractors not only could – but perhaps did – allow others to perform work under the lease agreement, this was not dispositive as to whether the timber fallers at issue in that case were supplying personal labor. *Jamison*, 65 Wn. App. at 133. *Jamison* explains that this is because the dispositive question is whether the labor constituted the essence of the contract, a question answered by the “realities of the situation” and not by technicalities. *Jamison*, 65 Wn. App. at 132; see also *Tacoma Yellow Cab v. Dep’t of Labor & Indus.*, 31 Wn. App. 117, 639 P.2d 843 (1982).

Here, there was no evidence that any installer actually employed anyone else to install flooring for him during the audit period. See BR Saner at 95, 105; BR Zipperer at 130; BR Schultz at 141. As such, substantial evidence supports a finding that the installers did not, by necessity or choice, employ others to perform work under the contract, even if they were contractually authorized to do so. The installers are not excluded from mandatory coverage under the third prong of the *White* test.

C. The Installers Are Not Excluded From Industrial Insurance Coverage, Even If They Are Sole Proprietors or Partners in a Business Entity, Because They Are Workers for B&R Rather Than Individuals Acting as Their Own Employers

1. B&R Did Not Raise Its Argument About RCW 51.12.020 At the Board and It May Not Now Raise It

B&R, attempting to raise a new argument not made at the Board, contends that because the installers with whom they contracted were engaged in various kinds of business associations, including partnerships and sole proprietorships, they are excluded from mandatory coverage under RCW 51.12.020. App's Br. at 39-42. However, because B&R failed to raise this argument at the Board, it is precluded from doing so here. *See Leuluai v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 176 Wn.2d 1018 (2013); *Edelman v. State*, 160 Wn. App. 294, 310, 248 P.3d 581 (2011).

For judicial review cases under the Administrative Procedures Act, a party must raise issues at the agency level; new issues can be raised on appeal only if they fall expressly within the statutory exceptions of RCW 34.05.554. *US West Communications, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). RCW 34.05.554 allows new issues during the review of an order if (1) the person did not know, and was under no duty to discover, facts giving rise to the issue, or (2) the person was not notified of the administrative proceeding. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P.3d 812 (2005).

Similarly, under RCW 51.52.104, a party waives an issue by not raising it in his or her petition for review of the Board's decision. *See* RCW 51.52.104 ("petition for review shall set forth in detail the grounds

therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.”); *Leuluaialii*, 169 Wn. App. at 684; *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992).

B&R filed a pre-hearing brief, a reply brief, and a petition for review at the Board. BR 394-407; BR 125-130; BR 86-109. None of those filings argue that the installers are exempt under RCW 51.12.020. B&R first makes this argument in its opening trial brief in superior court. CP 49. The Department argued that B&R had waived this argument in its supplemental trial brief. CP 365-66. B&R was engaged in all aspects of their appeal at the Board, and was represented by counsel throughout. Yet B&R’s pre-hearing brief, reply brief, and its petition for review at the Board fail to mention RCW 51.12.020. Although the superior court did not specifically rule on the waiver argument, the argument was clearly waived, and this court may affirm the superior court’s decision on any basis supported by the record. *See State v. Bunner*, 86 Wn. App. 158, 161, 936 P.2d 419 (1997). By failing to raise this issue at the agency level in its petition for review, B&R has waived this argument.

2. RCW 51.12.020 Does Not Apply Because the Installers Performed Labor for an Employer and Did Not Act as Their Own Employers

Even assuming that B&R has not waived this argument, there is nothing in RCW 51.12.020 that precludes coverage for the installers here, since the installers performed labor for an employer (B&R) and did not simply act as their own employers. RCW 51.08.180 provides the definition of a “worker” under the Industrial Insurance Act. Under RCW 51.08.180, a worker includes *any person* working under a contract if the essence of that contract is their personal labor, unless all of the criteria for an exemption under RCW 51.08.181 are met. The installers are persons, they were working under contract with B&R, and the essence of their work under those contracts was their personal labor.

Therefore, unless these installers meet each element of the test for exemption laid out in former RCW 51.08.180(2) or RCW 51.08.181, they are covered workers. The Board concluded that only Michael Schultz and Charles Soule met the test for exemption, and that they only met it for the period of 2008 prior to the statutory amendments. BR 14. B&R has not assigned error to this finding, or argued in its brief that the installers do in fact meet the requirements of former RCW 51.08.180(2) or RCW 51.08.181. Thus, it is a verity on appeal that, with the exception of Mr. Schultz and Mr. Soule, none of the installers meet those exemptions. RAP 10.3(a)(4)-(6); *State v. Ross*, 141 Wn.2d 304, 311, 4 P.3d 130 (2000);

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Nonetheless, B&R claims that RCW 51.12.020 exempts sole proprietors, partners, bona fide officers of corporations and managing members of LLCs even when a person is performing work for another employer and the essence of the contract is the personal labor of the individuals doing the work. App's Br. 39-41. B&R's argument fails.

First, RCW 51.12.020 exempts certain business owners from having to provide industrial insurance coverage for themselves. *See* RCW 51.12.020(5) (sole proprietors and partners); (8) (corporations), (13) (LLC). It does not address whether the individual is working for an employer providing personal labor under a contract.

Second, with respect to excluded corporate officers, RCW 51.12.020(8)(b) excludes voluntarily elected or appointed officers, but only if they exercise substantial control over the corporation and *their primary responsibilities do not include the performance of manual labor*. Here, the record plainly shows that the installers performed manual labor as one of their primary job duties. Anthony Alan Turcotte is the only individual associated with the one corporation included in the assessment, Double T Flooring, Inc. and he did not testify. BR 7. Because he did not testify, and there is no basis for concluding that his primary job duties did

not include manual labor, so B&R has not established that Mr. Turcotte met all the requirements of this exemption.

Third, with regard to limited liability companies, RCW 51.12.020(13) provides a limited exemption for members of limited liability companies, with certain conditions, depending upon whether management is vested in its members or in one or more managers. Here, no evidence establishes that Lonnie Huggins of LT Carpets Works, the only LLC included in the assessment, meets the exemption, as there is no evidence as to whether control was vested in the members or in managers. *See* BR Huggins at 19. The record is inadequate to establish that RCW 51.12.020(13) applies to the members of LT Carpet Works, LLC.

Fourth, with respect to sole proprietors and partnerships, B&R's argument is untenably overbroad and would create an unnecessary conflict between RCW 51.08.180 and RCW 51.12.020. RCW 51.08.180 provides that all persons providing work under a contract for an employer are covered workers if the essence of the work is personal labor, while RCW 51.12.020 exempts all sole proprietors and partners from coverage. Under accepted principles of statutory construction, "apparently conflicting statutes must be reconciled to give effect to each of them." *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000).

It should be noted that all contractors who have not otherwise organized themselves in another type business entity would be sole proprietors, since all that is required to create a sole proprietorship is for an individual to decide to engage in a for-profit business. *See Dolby v. Worthy*, 141 Wn. App 813, 173 P.3d 946 (2007) (“A sole proprietorship is the simplest form of doing business because no legal entity is created”). Under B&R’s theory, no contractor would ever be covered; a result not contemplated by the Legislature. To give effect to both statutes, RCW 51.08.180’s broad definition of “worker” should be read to embrace all work performed under a contract, the essence of which is personal labor, regardless of whether the person who is performing that manual labor happens to own a sole proprietorship business. However, a sole proprietor who does not perform personal labor for an employer under a contract, and who is in business for him or herself would be excluded under RCW 51.12.020. Such a reading gives effect to both statutes without producing the absurd result BR&R seeks here: a ruling that every sole proprietor or partner is excluded from industrial insurance coverage, regardless of whether the reality of the situation is that the “sole proprietor” is simply a person who performs manual labor for an employer under a contract. Such a result would be contrary to the fundamental purpose of Industrial Insurance Act, which is to embrace all covered employment, and for the

issue of whether employment is covered to be dictated by the reality of the situation and the nature of the work performed, and not by the labels that the parties attach to their relationship. *See* RCW 51.12.020; *Jamison*, 65 Wn. App. at 132.

As *Tacoma Yellow Cab* explains, in determining whether individuals are covered under the Act, courts must look to the “realities of the situation,” not to “symbolic or meaningless acts.” *Tacoma Yellow Cab*, 31 Wn. App. at 124. Similarly, in *Dana’s Housekeeping*, a case involving housecleaners working under contract, the court instructs that the proper focus in determining whether individuals are covered workers under RCW 51.08.180 is “the essence of the work and for whom the work is performed.” *Dana’s*, 76 Wn. App. at 607. The court in *Dana’s* notes that personal labor for an employer includes both direct labor and labor for an employer’s benefit. *Id.* The fact that, in that case, homeowners were the end recipients of the contractors’ services did not change the reality that the work was done for the employer’s benefit. *Id.* Similarly, B&R benefited by having experienced installers who could be dispatched to install their products in customers’ homes. *See* BR Gunderson at 13-14. B&R attempts to use RCW 51.12.020 as cover to obscure the basic nature of the working relationship between B&R and its installers: a contractual relationship for personal labor, for B&R’s benefit; the essence of that

work is unaffected by each installer's particular choice of business formation.

The courts have rejected similar attempts to mask the realities of business relationships in order to avoid mandatory coverage. For example, in *Xenith Group, Inc. v. Department of Labor & Industries*, 167 Wn. App. 389, 400, 269 P.3d 414 (2012), the court notes that the very purpose behind the Legislature's broad definitions of "employer" and "worker" in the Industrial Insurance Act is to provide workers' compensation coverage to certain individuals not meeting the common law definition of an employee.

In that case, Xenith contracted with the Department of Social and Health Services (DSHS) to provide home care services to disabled adults. *Xenith*, 167 Wn. App. at 391-92. Xenith contended that the home care providers operating under contract were not covered workers because Xenith did not exercise the requisite control over the home care workers, and because the home care workers did not consent to be employees. *Xenith*, 167 Wn. App. at 397. Xenith argued that both those elements had to be met before the definitions provided in RCW 51.08.180 could be applied. *Xenith*, 167 Wn. App. at 397.

But the court rejected Xenith's attempt to conflate common law and statutory definitions of "employee" given the Legislature's clear

intention to include certain independent contractors as covered workers. *Xenith*, 167 Wn. App. at 400. The court instructed that in circumstances where independent contractors are working under a contract, the essence of the work is their personal labor, the Board must consider the multi-part test in RCW 51.08.195 to determine whether the contractors are exempt from coverage. *Xenith*, 167 Wn. App. at 400.³ *Xenith*'s proposed threshold test, the court noted, would frustrate the very purpose behind the Act's broad definition worker and employer: to ensure workers compensation coverage for individuals who are providing personal labor but do not meet the common law definition of employee. *Xenith*, 167 Wn. App. at 400-401.

Similarly, B&R attempts to use RCW 51.12.020 as a threshold test to preclude coverage for an independent contractor who performs personal labor for an employer under a contract, and its attempt to do so should be rejected. B&R's interpretation makes no sense given that independent contractors who provide personal labor are covered under RCW 51.08.180 and necessarily they operate their own businesses because they are not employees. If B&R's interpretation of RCW 51.12.020 were correct, the

³ In that case, because home care workers are not required to be registered as contractors, RCW 51.08.195 applied, not RCW 51.08.181 which concerns contractors required to be licensed under chapter 18.27 RCW and chapter 19.28 RCW. B&R and its contractors were required to be licensed under chapter 18.27 RCW. BR 9; *see also* WAC 296-200A-016 (22) (including in the definition of specialty contractor, for registration purposes, those engaged in installing, repairing or replacing floor covering materials)

mere fact of establishing a sole proprietorship, partnership, LLC or corporation would automatically remove an individual from workers' compensation coverage, making unnecessary any inquiry into the nature of their contract or the conditions of their employment.

The statute itself cautions against such a conclusion, stating:

For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

RCW 51.12.020(8)(c). Under accepted principles of statutory construction, RCW 51.08.180 and RCW 51.12.020 should be read together to find that individuals working under a contract for their personal labor are covered unless they satisfy either of the statutory tests for exemption in RCW 51.08.181 (registered contractor) or RCW 51.08.195 (all other employment). Only those engaged in true self-employment, and not under a contract of service, are exempt under RCW 51.12.020. B&R has not met its burden to show that the installers included in the assessment are exempt. In fact, evidence supports that the installers were engaged by B&R for their professional expertise, that they had longstanding working relationships with B&R and that the essence of their contracts was their personal labor. Because B&R does not argue that

they are otherwise exempt, substantial evidence supports that they are covered workers under RCW 51.08.180.

VII. CONCLUSION

B&R uses independent contractors to install flooring materials. The essence of the work done by the independent contractors is plainly personal labor, and B&R has failed to demonstrate otherwise. Furthermore, B&R's various arguments that would disqualify workers from coverage simply because they have formed a corporation, a limited liability company, a partnership, a sole proprietorship, or some other business entity fails, as they ignore the reality of the situation and would frustrate one of the basic goals of the Industrial Insurance Act, which is to provide broad coverage for persons who perform personal labor for an employer under a contract. Therefore, this Court should affirm the January 28, 2014 decision of the superior court.

RESPECTFULLY SUBMITTED this 6th day of June, 2014.

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NO. 45765-2-II

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

B & R SALES, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

**CERTIFICATE OF
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on June 6, 2014, she caused to be served the Brief of Respondent, Department of Labor and Industries and this Certificate of Service in the below-described manner.

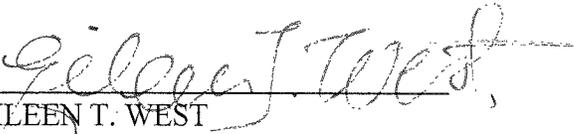
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