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NO. 73234-0-I

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

HENRY INDUSTRIES, INC.,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Henry Industries, Inc. ("HII") brings this appeal requesting further review of an administrative ruling by the Board of Industrial Insurance Appeals ("Board" or "BIIA") under the Washington Industrial Insurance Act, RCW Title 51 ("the Act" or "WIIA"), which requires that all employers operating in Washington provide industrial insurance coverage for all their "workers," as that term is defined by the Act. The Department of Labor and Industries ("the Department") assessed insurance premiums, penalties, and interests against HII for allegedly violating the Act by failing to provide coverage for certain individuals. HII is a brokerage and logistics company that contracts with third parties to provide transportation and delivery services for its customers. The Department conducted an audit of HII's business in 2010, and identified 33 contract service delivery businesses that the Department claims are HII's covered workers.

Based on the record, these individuals do not meet the definition of "worker" under the prevailing test in *White v. Dep't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956) and, in some cases, are expressly exempt from coverage under the sole proprietor exception. The Department does not dispute that the individuals at issue are independent contractors, but argues that the essence of the contract under which these individuals

worked was for the contractors' personal labor, thereby making them covered workers under the Act. The Department takes this position despite State records and unequivocal language in its own Field Audit Reference Manual ("Manual") supporting the assertion that the contractors who are at issue in this case are not "workers" as that term is defined by the WIIA. In addition, the Department advances several arguments that are directly contradictory to positions it has taken previously when attempting to deny benefits under the Act to claimants. It is difficult to conceive how the Department could take a position more at odds with its own guidance and records.

The Board rested its conclusion on the fact that the Cartage Agreement, which governs the relationship between the contractor and HII, requires these individuals to submit to a background check and drug test. This *lone factor* is insufficient to establish that the individuals are covered workers and completely ignores substantial evidence to the contrary. Uncontroverted evidence presented by HII demonstrates that the Department made improper credibility assessments and misapplied the test for determining whether an individual meets the definition of "worker." In reviewing all the evidence in the record on appeal, this Court should find that prevailing law requires a reversal of the Board's decision because the essence of the Cartage Agreement is not personal labor of the contractor.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in finding that the "Substantial Evidence supports the Board's Findings of Fact Nos. 1 through 12 and 15."

2. The trial court erred in adopting the Board's Conclusions of Law Nos. 2 and 3 contained in the April 4, 2014, Decision and Order.

3. The trial court erred in making judgments about the credibility of witnesses who testified at the hearing before Administrative Law Judge Morgan.

4. The trial court erred by disregarding uncontroverted facts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. HII disputed the Board's Findings of Fact ("FOF") Nos. 5 through 12 and 15. Substantial evidence in the record does not support these findings. (Assignment of Error 1).

2. HII disputed the Board's Conclusions of Law ("COL") Nos. 2 and 3. The legal conclusions are errors of law. (Assignment of Error 2).

3. May a court that is acting in an appellate capacity make credibility determinations regarding the reliability of a witness? (Assignment of Error 3).

4. May a court unilaterally discount uncontroverted sworn testimony as unreliable? (Assignment of Error 4).

III. STATEMENT OF THE CASE

A. HENRY INDUSTRIES, INC.

HII provides warehouse and logistics services to its customers, including brokering transportation and delivery services for its customers. Certified Appeal Board Record ("CABR") Tr. 7/29/13 at 8:26, 10:13–17. In Washington, HII contracts with PharMerica, which makes its logistics and needs known through written contract, including products it needs delivered and when and where the delivery should take place. CABR 29, Judge Morgan's Proposed Decision and Order ("Proposed Order") at p. 4. While HII arranges for delivery and distribution of these products on behalf of PharMerica, it does not, itself, perform these services. CABR 29, Proposed Order at p. 4; CABR Tr. 7/29/13 at 13:2–9. Such services are contracted out to independent contractors, taxi companies, or delivery or trucking companies. CABR 29, Proposed Order at p. 4. The relationship between HII and the contractors is governed by a Cartage Agreement. CABR Tr. 7/29/13 at 15:19–22; *see generally* CABR Ex. 2-33, Cartage Agreement.

B. HENRY INDUSTRIES' RELATIONSHIP WITH ITS CONTRACTORS

HII uses two types of contractors—route and stat contractors. *Id.* at 15:23–16:7. Route contractors obtain routes by bidding on available contracts. *Id.* at 18:7–17. Once a contractor contracts for delivery routes, it is completely within his or her discretion and authority to determine how those services are completed, and HII provides no training or instruction as to how to complete the deliveries. CABR Ex. 2-33, Cartage Agreement ¶¶ 2, 3.c, Schedule A. The only limitation on the contractor's discretion, if any, is made by the end customer who receives the deliverables; in this case PharMerica. *See* CABR Tr. 7/29/13 at 22:17–23:11; CABR Ex. 2-33, Cartage Agreement ¶¶ 2, 3.c. In some circumstances, PharMerica may require that certain procedures be followed, and those will be communicated to the contractor. CABR Tr. 7/29/13 at 22:17–23:11. However, HII does not, itself, place any restrictions on the contractor's ability to determine how the contract should be performed and no directives are mandated by HII. *See* CABR Ex. 2-33, Cartage Agreement.

The Cartage Agreement specifically provides that the contractor is "solely" responsible for staffing each delivery and transportation job. *Id.* at ¶ 3.a. In doing so, it is undisputed that to complete the contracted delivery needs, the contractors, of necessity, supply their own motorized vehicles.

CABR 39, Proposed Order at p. 14; CABR 3, BIIA Decision and Order ("BIIA Decision") at p. 3. Contractors are also free to hire their own employees or assistants to do the contracted work, and witnesses for HII, Keith Parker and Charles Hawley, testified to the same, even if not all of them had exercised that option. CABR Ex. 2-33, Cartage Agreement ¶ 3.a.; CABR Tr. 7/29/13 at 115:11–18. To the extent contractors use employees, the Cartage Agreement requires that the contractors set their employees' hours and determine the time requirements of their own employees as necessary to complete the work. The contractors are also responsible for paying their employees (including setting pay rates) and supervising their work. CABR Tr. 7/29/13 at 115:22–116:1. HII has no authority or ability to hire, supervise, or pay the contractors' employees. Likewise, HII cannot adjust the amount it owes the contractor—the contractor is paid the contract price regardless of the amount of time it takes to complete a particular route. CABR Ex. 2-33, Cartage Agreement, Schedule A.

Unlike route contractors, stat contractors do not have regular service contracts, but are called on an as-needed basis. *See* CABR Tr. 7/29/13 at 15:23–17:7. A stat contractor's function is to provide urgent delivery services in emergency situations at the direction of the customer. *Id.* However, this does not require stat contractors to be available 24 hours

per day, or even to be available at all. *Id.* at 16:8–14. Stat contractors are contacted by dispatchers for HII and are free to decline deliveries as they wish, in which case, the dispatcher will contact another stat contractor until one is available and willing to perform the delivery. *Id.*

The Cartage Agreement requires that the contractors comply with all state laws regarding business registration and licensing, paying all applicable federal, state, and local taxes, and maintaining all appropriate insurance required by law. *Id.* at 88:2–7. Because HII does not employ the route or stat contractors, it does not keep records of these matters. Contractors for HII testified that they have registered UBI numbers with the State of Washington and employee identification number for tax purposes. *Id.* at 86:24–26, 101:22–102:2. The contractors also testified that they run their own businesses as sole proprietors. *Id.* at 84:20–23; 86:22–23.

C. DEPARTMENT FIELD AUDIT AND PROCEDURAL HISTORY

In 2011, the Department conducted an audit of HII's business for the 2010 calendar year (Field Audit No. 0546153) (the "Audit"), and determined that HII did not report and pay industrial insurance tax on 33 individuals. The Department alleges that these 33 individuals are covered workers under the Act. In October 2011, the Department issued a Notice

and Order of Assessment of Industrial Insurance Tax stating that HII owes \$57,044.93 plus applicable interest in unpaid taxes and penalties. Upon HII's request for reconsideration, the Department modified its assessment to \$51,579.57. HII appealed the modified assessment. An evidentiary hearing was held before Industrial Appeals Judge Morgan, wherein HII submitted into evidence the Cartage Agreements of all 33 individuals identified in the Audit and produced two contractors—Mr. Parker and Mr. Hawley—as witnesses. Judge Morgan found that the individuals at issue were "independent contractors whose *personal labor was not the essence of their contracts*," and, therefore, not covered under the Act. CABR 40, Proposed Order at p. 15. Judge Morgan further ordered that all premiums and penalties assessed against HII be removed. *Id.* In reaching these conclusions, Judge Morgan made a number of findings of fact, including:

- The independent contractors "of necessity had to own or supply machinery in the form of a car, pick-up, or other motorized vehicle" to complete the deliveries (Judge Morgan's Finding of Fact No. 3);
- "HII did not direct or supervise the independent contractors during the course of the delivery of the PharMerica packages" (Fact No. 4);
- "By necessity or choice, the independent contractors could opt to employ others to perform all or part of the contract . . . without notice to or agreement by HII" (Fact No. 5);

- The independent contractors did not provide personal labor (Fact No. 6). CABR 39-40, Proposed Order at p. 14-15.

Judge Morgan also made certain legal conclusions, including that the contractors were independent contractors whose personal labor was not the essence of their contracts (legal conclusion No. 2) and that the assessment against HII should be removed (legal conclusion No. 3). CABR 40, Proposed Order at p. 15. The Department appealed factual findings no. 4 and 6 and legal conclusions no. 2 and 3. CABR 16. Notably, the Department did not appeal or take issue with factual findings 3 or 5. *Id.*

The Board (2-1) reversed Judge Morgan's decision, finding that the contract was for personal labor and the assessment was to be reinstated against HII. This decision was based solely on the fact that contractors are required to submit to drug and background tests. The Board ignored material evidence regarding the relationship between HII and the contractors and the freedom allowed to contractors under the Cartage Agreement.

IV. ARGUMENT

A. APPELLATE REVIEW IS *DE NOVO*, AND THE COURT SHOULD REVERSE THE DECISION FINDING THAT THE BOARD AND SUPERIOR COURT MISAPPLIED PREVAILING LAW.

Appellate review of matters of statutory construction is *de novo*. *Long v. Dep't of Labor & Indus.*, 174 Wn. App. 197, 202–03, 299 P.3d 657, 660 (2013), *as amended on reconsideration* (May 29, 2013) (citing *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 912, 83 P.3d 1012 (2004)). More particularly, an appellate court's review of a decision by the BIIA is *de novo*. *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353–54, 962 P.2d 844, 847 (1998) ("Judicial appeal of a decision by the Board of Industrial Insurance Appeals is *de novo* . . . based solely on the evidence and testimony presented to the Board."). The Court of Appeals' focus on review is evaluating "whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusions of law flow from the findings." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402, 406 (1996), *as amended on denial of reconsideration* (May 8, 1996). As the party challenging the Board's findings and conclusions, HII bears the burden of proof to show that the Board and, by extension the Superior Court, erred in its determination. *Id.* at 127; RCW 51.52.115.

The Superior Court erred in its review of the Board's decision by providing undue deference to the Board. It is well settled that "the superior court may substitute its own findings and decision" for those made by the Board if it finds "from a fair preponderance of credible evidence, that the BIIA's findings and decision are incorrect." *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 253, 177 P.3d 180, 184 (2008); *see also Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 315–16, 189 P.3d 178, 186 (2008) (the court "may disregard the BIIA's findings and conclusions if, even though there is substantial evidence to support them, it believes that other substantial evidence is more persuasive"). The Superior Court is bound by the Board's findings only if "the court 'finds itself unable to make a determination on the facts because the evidence is evenly balanced.'" *Young*, 81 Wn. App. at 123.

Here, the lower court either ignored or disregarded evidence on matters that the Department did not dispute or otherwise controvert. For instance, the evidence in the record is that the contractors were permitted to and did use third parties—be it the contractor's employees, subcontractors, or otherwise—to complete the contracted work. The Department presented no evidence to the contrary. The Superior Court also made improper credibility assessments regarding witnesses who testified before Administrative Law Judge Morgan, but whom the Superior

Court did not have the benefit of hearing testify. In short, the Superior Court gave undue deference to the Board's decision that deference was neither warranted nor required, and the lower court's ruling affirming the Board's decision should be reversed.

B. THE SUPERIOR COURT'S CONCLUSION THAT CONTRACTORS ARE COVERED WORKERS IS REVERSIBLE ERROR.

For purposes of determining coverage under the Act, individuals are divided into two categories: "workers" who are covered under the Act and "employers" who are exempt from coverage (unless they otherwise opt into coverage). RCW 51.08.180; *Cook v. Ocean Gold Seafoods, Inc.*, 2007 WL 4190410, *1 (W.D. Wash. Nov. 21, 2007) (*rev'd on other grounds*). The statute is broadly written to include independent contractors whose personal labor is the essences of the contract. *Id.* (defining "worker" to include "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"). There is no dispute in this case that the individuals covered in the 2010 Audit are independent contractors. Indeed, both the Department and the Board expressly recognized that the individuals are independent contractors. *See* CABR 2, BIIA's Decision at p. 2 ("We find on the facts in this record that although the individuals are independent contractors"); CABR 16, Department's Petition for

Review, BIIA Docket No. 13 11525 at p. 4 ("The parties do not dispute that the courier drivers are independent contractors, not employees."). Thus, the question before the Court is whether the essence of their contracts is to provide personal labor to HII. The answer to this question is plainly "no." For those 33 individuals at issue in this case, the essence of their contracts was the transportation and delivery of goods. Their personal labor was not essential to the contract. Thus, they are necessarily employers under the Act, and HII is not liable to pay any taxes or provide any insurance benefits on behalf of those contractors.

1. The Contractors are Exempt Under *White*.

In determining whether an independent contractor is a worker or employer, Washington courts first evaluate whether the essence of the contract is personal labor. *Cook*, 2007 WL 4190410, *2. If so, the court examines whether there is an exception to finding that the independent contractor is a worker under RCW 51.08.195. *Id.* ("RCW 51.08.195 creates an exception to the rule that independent contractors for personal labor are "workers," . . ."). Regarding the first prong of the test, Washington courts have identified three discrete situations where the work does not constitute personal service (referred to hereinafter as the "*White* test"):

- (1) If the contractor must, out of necessity, own or supply machinery or equipment (as distinguished from the usual hand tools);
- (2) If the contractor could not perform the contract without assistance; or
- (3) If the contractor, by necessity or choice, employs others to do all or part of the work he or she has contracted to perform.

White, 48 Wn.2d at 470; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 688, 162 P.3d 450 (2007); *Silliman v. Argus Svcs., Inc.*, 105 Wn. App. 237, 19 P.3d 428 (2001) (where a contractor provides machinery or equipment or employs others to carry out the contract, this negates a finding that an independent contract is one for personal service). Keeping in line with this test, the Department's own Reference Manual expressly recognizes that these situations remove a contract from the "personal labor" category. CABR Ex. 34, Reference Manual at 000391. If the answer to any one of these questions is affirmative, then the contractor is exempt from coverage under the Act. *Id.* ("[A]n independent contractor is exempt from coverage if *any* of the following circumstances exist in their relationship with the employer.") (emphasis added). In this case, the independent contractors undoubtedly meet the first and third prongs of the *White* test.

a. White Test, Part 1: Provision of Equipment

In *White*, the Supreme Court of Washington affirmed that where a contractor furnishes machinery and equipment, the contract is not for personal labor. *Id.* at 472–74, 476 (citing *Crall v. Dep't of Labor & Indus.*, 45 Wn.2d 497, 275 P.2d 903 (1954) and *Cook v. Dep't of Labor & Indus.*, 46 Wn.2d 475, 282 P.2d 265 (1955)).¹ Following this guidance, the Department Reference Manual states that a contractor is exempt under *White*:

[I]f the contract is for the delivery of goods, the vehicle would be crucial to the contract and if the individual supplies the vehicles they would probably be exempt.

CABR Ex. 34, Reference Manual at 000392. The Department now argues that the Manual is not a legal document and, therefore, should be disregarded by the Court. HII does not dispute that the Manual is not a legal document, but this Manual clearly evidences the Department's intent to exclude from coverage those individuals working under a contract for the delivery of goods where the supplied vehicle is critical to carrying out the terms of such contract. This Manual is used by the Department in training field auditors to accurately evaluate whether an individual is

¹ *Crall* and *Cook* both premised their holdings that the contract was not personal labor partially on the fact that the contract could not be performed unless the independent contractor furnished expensive machinery or equipment. *White*, 48 Wn.2d at 472–74. The Supreme Court affirmed these holdings in *White. Id.* at 476 (finding that *Crall* and *Cook* were correctly decided).

covered under the Act. It is disingenuous for the Department to disregard its own guidance and training tool by dismissing it as a non-legal document simply because it is inconvenient and harmful to its position. If the Court is to give any deference to the Department's interpretation of the WIIA, the Court should give deference to those interpretations made during neutral times over arguments advanced once litigation has ensued.

Providing deference to the Department's interpretation of the WIIA as it is stated in the Manual, it is clear that the individuals at issue here are exempt from mandatory coverage. In this case, the services contracted for under the Cartage Agreement are precisely for the delivery of goods. Brett Henry, CEO for HII, testified that "99 percent of what that driver is doing is out on the road providing a delivery service" that is made "across the state" (CABR Tr. 7/29/13 at 34:24–25, 36:25), and the Department admitted in its Petition for Review to the Board that the contractors are "engaged in the business of performing *local*² transportation, package pick up and package *delivery services*." CABR 16, Department Petition for Review, IV.A at p. 4 (emphasis added). Moreover, there is no dispute that the Cartage Agreement requires that the contractors provide their own tools and equipment necessary to complete the work, including vehicles

² Although the Department states that the transportation is local, deliveries are actually made statewide. See CABR Tr. 7/29/13 at 36:25–37:1.

(see CABR Ex. 2-33, Cartage Agreement ¶ 3.b, e.), nor any dispute that the contractors actually do provide their own vehicles. See CABR 18, Petition for Review, IV.A.1. at p. 5. Under *White* and the guidance provided in the Department's Manual, it is clear that the contractors are exempt under the Act because the use of vehicles is critical to completing the delivery services.

With regard to this element of the *White* test, the Superior Court erred in finding that the contractors do not meet the "specialized equipment" exemption. In reaching this conclusion, the lower court contrasted the use and prolificness of specialized equipment at the time *Crall* and *Cook* were decided to present day, concluding that it is an artificial standard in present day to decide "that because cars are expensive that persons who use their cars in their job must therefore be independent contractors who aren't essentially providing personal labor." RP 2/20/15 at 39:11–23, 41:23–42:2. The lower court apparently misunderstood (or ignored) HII's argument, which was not that the mere use of vehicles by any independent contractor removes the individual from coverage under the Act, but rather, that because the use of a vehicle is the primary object of the contract, which involves the transportation and delivery of goods, removes the contractors from coverage in this instance. Likewise, the primary object of the contract at issue in *Crall* was to haul logs, which

required the use of expensive machinery. *White*, 48 Wn.2d at 473. In examining *Crall*, the *White* court noted that "the contract could not be performed without the use of expensive machinery or equipment," and relied upon that to hold that providing such machinery creates an automatic exemption from the Act. When looking to *Cook*, the *White* court similarly noted that a tractor and truck were necessary to complete the primary object of the contract, which was to haul timber, and affirmed that the contract in *Cook* was not for personal labor because the contract could not be performed without expensive equipment. *Id.* In other words, under *White*, where expensive equipment is necessary to achieve the object of the contract, then the contract is not personal.

In this case, the vehicles provided by the contractors are absolutely necessary to the completion of the contract. Mr. Henry testified at the evidentiary hearing that the contractors make deliveries across the state and may "well exceed 100,000 miles per year" to complete their contracted deliveries. CABR Tr. 7/29/13 at 36:25–37:1. Thus, even if the delivery involved only a small package, the contractor could not comply with the terms of the contract and provide timely delivery of the package without the use of a vehicle. With the amount of mileage the contractors are required to travel to complete their deliveries, a vehicle is absolutely necessary and critical to fulfilling the contract duties, and is precisely the

situation for which the *White* court created the machinery exemption. *Lloyds of Yakima v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 662 P.2d 391 (1982), upon which the Department erroneously relies is distinguishable. *Lloyds* involved carpet installers who had special skills essential to perform the contracted services. The court found that the workers were covered under the Act because the carpet installation was the primary purpose of the job and the need for trucks was only ancillary. In contrast, in this case, delivery of goods is a primary object and the use of vehicles is *essential*, not ancillary, to accomplishing the goal.

When comparing the present day example of HII's contractors to those individuals in *Crall* and *Cook*, the lower court observed that the theory applied in the precedential cases was that "sometimes you are basically hiring the equipment and you don't really care who operates the equipment as long as they can do a decent job." RP 2/20/15 at 39:20–23. This is precisely the case with HII—the company does not care who completes the deliveries on behalf of its customers, as long as somebody with adequate equipment to make the deliveries does so. CABR Tr. 7/29/13 at 32:3–5 ("The individual providing that service is not important. It's merely that the service be provided and the pharmaceuticals be delivered.").

b. White Test, Part 3: Right to Employ Others

Under *White*, a contractor who by necessity or choice employs others to do all or part of the contracted work is exempt under the WIIA. *White*, 48 Wn.2d at 474. In this case, delegation of contract duties to others is expressly permitted under the Cartage Agreement (*see* CABR Ex. 2-33, Cartage Agreement ¶ 3.a., c.). Mr. Henry testified that "oftentimes these drivers use employees or subcontractors to provide the labor needed." CABR Tr. 7/29/13 at 32:8–10. Additionally, witnesses at the hearing testified that they are permitted under the contract to hire others to perform the work for them, and Mr. Parker specifically testified that while he does not have any employees, he uses others to complete his routes when he is unavailable. *Id.* at 115:19–21.

Washington courts have recognized that whether the essence of an independent contract is personal labor is ultimately determined by "look[ing] to the realities of the situation rather than the technical requirements of the test." *Peter M. Black Real Estate Co., Inc. v. Dep't of Labor & Indus.*, 70 Wn. App. 482, 488, 854 P.2d 46 (1993); *Fiedler Indus. v. Dep't of Labor & Indus.*, 2000 WL 16899, *3 (Wash. App. Jan. 7, 2000) ("Ultimately, whether the essence of an independent contract is personal labor is a factual determination to be made according to

realities that include the nature of the contract, the work to be done, and situation of the parties, and other attendant circumstances."). Under the realities test, the critical inquiry is whether the agreement *allows* contractors the option to use others to perform the work, rather than whether contractors exercise that option. *See Mass. Mut. Life Ins. Co. v. Dep't of Labor & Indus.*, 51 Wn. App. 159, 164–65, 752 P.2d 381 (1988) (where an employer knows that others *may* be employed to do the work or where the agreement contemplates such delegation, the contract is not for personal labor). Moreover, where a contract contemplates a specific type of labor rather than a specific *laborer*, it is *not* personal labor within the meaning of the statute. *Silliman*, 105 Wn. App. At 232, 238 (because the contract did not contemplate a specific laborer, the contractor was not providing personal labor and was not a worker within the meaning of the statute).

Here, each of HII's contractors operates under the Cartage Agreement which focuses only on the work to be done, not a particular laborer. *See* CABR Ex. 2-33, Cartage Agreement ¶ 3.a. (the contractor "will be solely responsible for determining, providing, and assigning a *sufficient number of workers*" implying an indifference as to who performs the labor). Because the Cartage Agreement clearly and unequivocally provides that the work to be performed can be delegated, it is not personal

labor. *See Mass. Mut. Life Ins. Co.*, 51 Wn. App. at 164–65 (the essence of an employment contract was not personal labor because the insurance company agents could and did delegate significant portions of their duties to others). Accordingly, it cannot be concluded that the Cartage Agreement is a contract for personal service. In reaching the opposite conclusion, however, the Board focused substantially on the fact that contractors are required to undergo a background check and drug test before undertaking any deliveries on behalf of PharMerica. The Board ignored that these checks are required by PharMerica, not Henry Industries. CABR Tr. 7/29/13 at 23:4–11. More notably, the salient point, which the Board conveniently chose to ignore, is that PharMerica, and therefore the Cartage Agreement, simply requires that *whoever* is performing services under the contract undergo a background check and drug test, thereby showing that the Cartage Agreement is not personal to the contractor. CABR Ex. 2-33, Cartage Agreement ¶ 3.c.5–6.

The Superior Court disregarded evidence from Mr. Henry that contractors relied on others to do deliveries, stating that it was the "only evidence on this topic," and that "it is clear he does not directly supervise [the contractors]. So he has no idea. So he is not a good source." RP 2/20/15 at 36:12–16. The Superior Court reached this conclusion even though no conflicting evidence was presented by the Department at any

time during the entirety of these proceedings. Notably, the Superior Court's standard for reviewing the Board's decision was preponderance of the evidence. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 253, 177 P.3d 180, 184 (2008). This requires merely that HII establish that the evidence is more probably true than not. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). Because there was no contradictory evidence presented, there is no valid basis for the Superior Court to discount this evidence or implicitly find that it is probably not true. The Ninth Circuit has instructed that:

It is unreasonable to discredit the sworn testimony of a witness for the sole reason that there is no contemporaneous documentary evidence to support it,

which is precisely what the lower court did in reviewing the Board's decision. *Vera-Villegas v. I.N.S.*, 330 F.3d 1222, 1234 (9th Cir. 2003). Moreover, given that the Superior Court judge was not present to assess the credibility of the witnesses, she should not make credibility judgments on review, but should evaluate only whether, in light of all evidence presented, and in this case only HII presented evidence, it is more probably true than not. Because there was no contradictory evidence, the lower court's dismissal of this evidence was in error.

The Superior Court judge also disregarded the evidence from Mr. Parker that he uses others to complete his routes when he is unavailable.

CABR Tr. 7/29/13 at 115:19–21. In particular, the lower court found because Mr. Parker did not actually hire employees, there was no indication to the court that any of the contractors at issue actually employed others, either of necessity or of choice and, therefore, the inquiry was over. RP 2/20/15 at 36:17–25. The court wholly ignored the fact that even if Mr. Parker did not employ others, he did use subcontractors from time to time. By requiring the contractor at issue to actually *employ* others, as opposed to subcontract with others, the lower court misreads the *White* test. *White* does not require *employment*; as long as the contractor uses others in some capacity, whether that be through employment, subcontracting, or otherwise, to complete the contract work, it is sufficient to meet the third prong of *White*. In this case, delegation of contract duties to others is expressly permitted under the Cartage Agreement, and this was confirmed through testimony of the witnesses. CABR Ex. 2-33, Cartage Agreement ¶ 3.a., c. (stating that the contractor may use "a sufficient number of workers" defined as "Contractor Workers" to complete the contract duties); CABR Tr. 7/29/13 at 115:15–18. Whether any contractor ever exercised that option, and it was established through testimony that at least some did, is irrelevant to the analysis.

Finally, the lower court erred by dismissing *Yellow Book Sales & Distribution Co., Inc.*, Dkt. No. 10 11146 (Mar. 30, 2011), as inapposite to this case. *Yellow Book* involved independent contractors who delivered telephone books to residential addresses once per year. In that case, the Board found that the individuals were not covered under *White* because: (1) the independent contractors "of necessity had to own or supply machinery in the form of a car, pick-up, or other motorized machine in order to accomplish their deliveries;" (2) the contractors were free to choose their delivery routes; and (3) the contractors could opt to employ other people to do all or part of the contracted work, and some of the contractors completed the work on their own while others used employees or subcontractors to perform the work. *Id.* at 2. The Superior Court reasoned that the case did not apply to the present situation because some of the workers in *Yellow Book* were not known to the employer, whereas in the present case, all contractors are known to HII, a finding which is not supported by the record on appeal. RP 2/20/15 at 42:12–19. Whether or not the individuals performing the work are known to the company is irrelevant under *White*. What is important is whether the contractor has the option to use others to do some or all of the contracted work, which is the case with HII.

The evidence in the record supports the assertion that the independent contractors were not providing personal labor and, therefore, are not subject to mandatory coverage under the Act. As a result, the Superior Court erred in affirming the Board's Findings of Fact 5 (that the individuals worked under contracts, the essence of which was their personal labor) and 12 (that the workers are subject to mandatory insurance coverage) and the Board's Conclusion of Law 2 (that the contractors are "workers" under the Act).

2. The Contractors are Exempt Under the Multifactor Test.

Even if the Court finds that the Cartage Agreement calls for personal labor of the independent contractors, they may still be excepted from coverage under RCW 51.08.195. Because HII establishes below that the independent contractors meet each prong of the six-part test set forth in that section, they are exempt from "worker" status, and the Superior Court's finding that the contractors did not meet this exception was in error.

1. *The individual is free from control or direction, both under the contract and in fact.*
(Related to the Board's Finding of Fact No. 6)

The decisive factor in this part of the test is whether HII has the right to control the means and manner of the work, not merely the end

result. *Camp v. Dep't. of Labor & Indus.*, Docket No. 38,035 (1973). The Department's Reference Manual provides the following examples of control:

- (1) The employer requires the individual to work a certain shift or be available full-time;
- (2) The individual cannot quit without incurring liability for breach of contract;
- (3) The employer can fire the individual;
- (4) The individual is paid by the hour instead of by the day or job;
- (5) The employer furnishes necessary equipment;
- (6) The individual is required to notify the employer when they will be late or absent;
- (7) The employer provides training to the individual.

CABR Ex. 34, Reference Manual at 00393.

The relationship between HII and its contractors does not meet any of these control factors: (1) HII does not require that the individuals work a particular time or shift. Rather, the contractors bid on specific routes and, in doing so, effectively choose what shifts they want to work. CABR Tr. 7/29/13 at 108:19–25, 112:1–4. To the extent deliveries on those routes must be completed at a particular time, PharMerica sets those requirements, and in any event, the contractor knows that information at the time of contracting. Thus, the contractors can use that information in

choosing a route to decide for themselves when they want to work. Further, they are not personally required to complete the routes, so they can essentially never work if they choose to do so. *See* CABR Tr. 7/29/13 at 115:15–18; CABR Ex. 2-33, Cartage Agreement ¶ 3. Regarding stat contractors, they are not required to be on call or available, and the lower court erred in finding that these individuals were "on-call." RP 2/20/15 at 44:13–17. Those individuals are not only free to turn down stat opportunities, and indeed some have, but are not even required to answer the phone when a dispatcher from HII calls. CABR Tr. 7/29/13 at 89:21–90:2. In terms of being "on call," stat contractors are nothing more than names on a list of potentially available individuals that HII can call in case of an emergency. (2) The contractor can terminate the agreement at any time for any reason upon 14 days' notice without incurring liability. The contractor may also terminate the agreement immediately upon a material default by HII. CABR Ex. 2-33, Cartage Agreement ¶ 12. (3) HII cannot fire the contractors, but may only terminate the agreement upon 14 days' notice or immediately for limited reasons identified in the Cartage Agreement related to a breach by the contractor. *Id.* (4) The contractors are paid a contract price as negotiated by the contractor and set forth in Schedule A of the Cartage Agreement. These rates are typically structured as a flat per route, per day, or per mileage rate. *Id.* at Schedule A. (5) HII

does not provide any equipment to the contractors. They must provide all equipment necessary to complete the delivery routes. *See* CABR Tr. 7/29/13 at 19:12–23, 20:21–23; CABR Ex. 2-33, Cartage Agreement ¶ 2–3. (6) While some contractors provide a courtesy notice of absence, this is not required by HII. CABR Tr. 7/29/13 90:3–91:1. Regarding late deliveries, PharMerica may require that notice be provided if the pick up or delivery will be late, but this is not required by HII. (7) HII does not provide training of any kind to its independent contractors. CABR Tr. 7/29/13 at 21:24–26.

HII has no right to control its contractors. The "control" factors the Department, Board, and lower court have all focused on are the delivery parameters set by HII's customer, PharMerica, which parameters are known to the contractors at the outset. In other words, before the contractor decides to negotiate with HII, it can evaluate the routes, delivery times, etc. and determine at the forefront whether it wants to accept responsibility for those routes. Subject to those customer-driven requirements, the contractors are free to determine how to meet their delivery schedule.

2. The service is outside the usual course of business for which the service is performed, or is performed outside all places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed.
(Related to the Board's Finding of Fact No. 7)

HII is a warehousing and distribution service that brokers the transportation and delivery of bulk freight. It does not perform any delivery or transportation services. Rather, HII engages independent contractors to perform those services, which are a distinct and independent service not within the usual course of HII's business.

Most of the work is performed outside of HII's place of business. HII maintains a warehouse in Redmond, Washington for the storage piece of its business. CABR Tr. 7/29/13 at 10:18–11:2. These warehouses were used for storing electronic parts for certain companies, but had no relation to the PharMerica contract, which was serviced out of Spokane and Kent. *See* CABR Tr. 7/29/13 at 11:25–12:4, 12:22–25, 33:16–18, 65:20–66:8. Because all route deliveries were tied to the PharMerica account, route contractors never went to HII's warehouses in Washington, nor had any reason to. *Id.* at 33:22–25. Rather, route drivers picked up deliverables directly from PharMerica and delivered the goods to various other facilities around the state. *Id.* at 66:9–67:3. To the extent a contractor picks up product from HII's place of business, this is due to the customer

specifically requesting that course of conduct. *See* CABR Ex. 2-33, Cartage Agreement ¶ 2.a., Schedule A.

In affirming this factual finding, the Superior Court observed that the contractors "didn't work for anybody else or in any other location." RP 2/20/15 at 50:13–15. Whether the contractor worked for other businesses or at other locations is irrelevant; the critical inquiry is whether the contractors performed work that is outside HII's usual course of business, which they did. For these reasons, the Superior Court's decision affirming Finding of Fact no. 7 is inaccurate.

3. *The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes.*
(Related to the Board's Finding of Fact No. 8)

As indicated above, HII is engaged in the business of brokering the transportation and delivery of bulk freight; it is not itself a delivery company. The contractors, on the other hand, are courier companies, and they are engaged under the Cartage Agreement to provide delivery and transportation services. In affirming this factual finding, the Superior Court focused exclusively on the alleged control exerted by HII over the contractors. RP 2/20/15 at 50:13–15. As previously established, HII does not exercise control over its contractors. Regardless, control is a wholly

separate element, which is not indicative of being engaged in similar businesses.

4. On the effective contract date, the individual is responsible, both under the contract and in fact, for filing a schedule of expenses with the Internal Revenue Service.
(Related to the Board's Finding of Fact No. 9)

The Cartage Agreement expressly requires that the:

Contractor shall, at its sole cost and expense, be solely responsible for making all payments and preparing all reports concerning its business, income, or employees required by any Social Security or income tax act, unemployment act, Workers' Compensation act, business or license tax act, or other similar revenue or regulatory act, whether federal, state, or local.

CABR Ex. 2-33, Cartage Agreement ¶ 6. As a result, by signing the Cartage Agreement, each of the 33 disputed individuals expressly agreed to be responsible for filing a schedule of expenses with the State and/or Federal internal revenue service. HII is unaware whether its contractors have satisfied this filing requirement because they do not have access to such information (again, demonstrating the lack of control). For purposes of this test, however, it is irrelevant whether the independent contractors actually file the expense schedules, so long as they are contractually obligated to assume that responsibility. CABR Ex. 34, Reference Manual at 000396 ("Part four merely requires that the individual be responsible for filing an expense schedule with the IRS. It is not required that the

individual *actually* file an expense schedule with the IRS to meet the test.") (Emphasis added). Regardless, at least one contractor testified that he has an employer identification number (EIN) for tax purposes, which is suggestive that the contractors do comply with this requirement. Because all that is required by the Department to meet this test is a contractual obligation³ to accept responsibility for this filing requirement, the Superior Court erred in disregarding the contractual evidence supported by the Cartage Agreement, which demonstrates that the contractor is required to accept this responsibility, as well as the testimonial evidence provided by the contractor.

5. *On the effective contract date or within a reasonable period thereafter, the individual has established an account with the department of revenue and other state agencies as required by the particular case, for the individual's business for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier (UBI) number.*
(Related to the Board's Finding of Fact No. 10)

Like part four, this element of the test "requires merely that the individual establish an account, but does not require that they report business income." CABR Ex. 34, Reference Manual at 000397. The Cartage Agreement provides that the contractor is solely responsible for handling all tax-related issues on behalf of its business and employees, and

³ The Department's statement that a contractual obligation meets this test is consistent with part 1 of the six-part test regarding control. To actually ensure that the contractor meets this element would be to impose control over the contractor.

HII does not handle these matters on their behalf. *See* CABR Ex. 2-33, Cartage Agreement ¶¶ 4.b., 6. It issues 1099s annually to each of its contractors, but it has no other involvement in the contractors' tax matters. Except for information provided by the Department as a result of this audit, HII is unaware whether its contractors have actually established an account with the Washington Department of Revenue or other state agencies for purposes of paying all state taxes. It is also unaware whether its contractors have registered for and received a UBI number. Testimony presented at the hearing demonstrates that the contractors have registered UBI numbers. In affirming the Board's Finding No. 10, the Superior Court apparently discounted this evidence. Not only was there no sensible reason for discounting this evidence, *Vera-Villegas v. I.N.S.*, 330 F.3d 1222, 1234 (9th Cir. 2003) (it is unreasonable to discredit sworn testimony simply because documentary evidence was not provided), this ignores that UBI numbers are public records available on the State Department of Revenue website, and can be easily verified by anyone. As a result, it was error for the lower court to disregard this evidence, particularly in light of the fact that the Department provided no evidence to refute this testimony, and the Court is not required to accept the Board's conclusion.

6. On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.
(Related to Finding of Fact No. 11)

The Cartage Agreement provides that the contractor is solely responsible for preparing and maintaining all books and/or reports regarding its business income and expenses. See CABR Ex. 2-33, Cartage Agreement ¶ 6. HII is unaware whether its contractors actually maintain their own books or records reflecting all items of income and expenses. HII does not have access to such information, demonstrating that it does not exercise control over the contractors. Again, however, testimony presented to Judge Morgan demonstrates that the contractors do maintain books reflecting their income and expenses.

The fact that HII does not maintain evidence regarding factors 4, 5, and 6 as it relates to these contractors actually provides additional evidence to support its "right of control" argument, *supra*. These contractors are operating their own businesses, responsible by contract to maintain their own books, pay taxes, hire or contract with other workers to fulfill the requirements of the contract, etc. HII simply does not exercise any control over how these contractors operate their businesses. All of these facts support a finding that these independent contractors are exempt under the multifactor test.

C. THE SUPERIOR COURT ERRED IN AFFIRMING THE BOARD'S DECISION THAT THE CONTRACTORS ARE COVERED WORKERS.

As set forth above, the contractors are not covered workers under the Act because they do not provide personal labor and are further exempt under the multifactor test as well. Another basis for exclusion for certain contractors at issue is based on their status as sole proprietors. The Superior Court, however, erred in determining that sole proprietors are not exempt from coverage under the Act. RCW 51.12.020 (referred to hereinafter as the "excluded employments provision") unambiguously states that the employments listed therein, including sole proprietors, "shall not be included within the mandatory coverage" of the Act. RCW 51.12.020(5). The Superior Court's ruling that this does not create an exception to RCW 51.08.180 (referred to hereinafter as the "mandatory coverage provision") is contrary to the only two cases that discuss this particular statute, and to commonly accepted canons of statutory construction.

In *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), the Washington Supreme Court had occasion to address how this exception is construed in the context of the mandatory coverage provision. *Id.* at 309. *Fankhauser* involved two self-employed individuals who filed claims under the Act after being diagnosed with asbestos-related

diseases. *Id.* The Department argued that because the claimants were self-employed and did not elect coverage under the Act, "the plain language of the Act unambiguously excludes claimants from workers' compensation coverage." *Id.* On the issue, the Washington Supreme Court held that:

sole proprietors or partners are expressly excluded from mandatory coverage and are not required to participate in Washington's workers' compensation system.

Id. In reaching this decision, the Court did not undertake an independent analysis to determine whether the claimants were "workers" under the Act as defined by the mandatory coverage provision, which is what the Department urges and Superior Court agreed is necessary before determining whether the exceptions under the excluded employments provision apply. Rather, the *Fankhauser* court effectively ruled that unless the sole proprietor affirmatively elects coverage under the Act, he is automatically excluded under the sole proprietor exception.

Following the Washington Supreme Court's clear and unambiguous precedent, this Court has also held that sole proprietors are automatically excluded from mandatory coverage. In *Dosanjh v. Bhatti*, 85 Wn. App. 796, 934 P.2d 1210 (1997), the Washington Court of Appeals instructed that "[n]either are [sole proprietors] considered 'workers' nor 'employees' automatically covered under the statute." *Id.* at 775. The Court of Appeals repeated the Supreme Court's suggestion that absent an

affirmative election by sole proprietors to be covered under the Act, no coverage would be provided. *Id.*

The rulings in the *Fankhauser* and *Bhatti* cases are unambiguous, and their reasoning and ultimate holding comport with prevailing rules of statutory construction. The starting point of interpreting a statute is always the plain language of the statute. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009). In this case, the statutory language says that sole proprietors are exempt; it does not say that sole proprietors are exempt only when they are not otherwise providing personal labor to an employer. RCW 51.12.020. Additionally, where two provisions of a statute are in conflict with one another, as the Department argues is the case here, the more specific provision—the sole proprietor exception—controls over the more general provision—the general "worker" definition. *Leson v. State*, 72 Wn. App. 558, 564, 864 P.2d 384, 386 (1993).⁴ The Department argues, and the Superior Court erroneously agreed, that the statute should be read to embrace all work performed under a contract, the essence of which is personal labor, regardless of whether the person is a sole proprietor. CP 54, Department's

⁴ In *Dosanjh v. Bhatti*, 85 Wn. App. 769, 934 P.2d 1210 (1997), the court applied this rule of construction finding that the business owner who operated under contract with another employer was exempt from coverage under the Act. *Id.* at 775. In reaching this conclusion, the court did not analyze the plaintiff's status as a "worker." Rather, it recognized that certain exceptions, including the sole proprietor exception, removed the individual from coverage.

Trial Brief, p. 23. Indeed, in its ruling, the Superior Court articulated that the exemption does not address whether the person in question is working for an employer providing personal labor under a contract. RP 2/20/15 at 53:13–16. It argues that this is the only way to give effect to both provisions. This reasoning is illogical. If this were the case, there would be no reason for the exception because the exception would apply only if the labor is not personal, in which case the general rule would not apply, rendering the exception null. Instead, the Court should find that if the exception is met, and here it is met by anyone who was registered as a sole proprietor during the audit period, then the Act does not apply. In short, there are only two options with regard to sole proprietors: either the rule is met, and the exception is applied, rendering the contractor exempt; or the rule is not met, and the exception is void. Under either scenario, the general rule (the application of the Act), does not apply.

The Superior Court's ruling that this exception did not apply to exclude those contractors who were registered as sole proprietors during the audit period is contrary to prevailing precedent and runs afoul of recognized canons of statutory construction. As a result, the lower court erred in reaching its decision, and its decision should be reversed. Moreover, the Department's position that RCW 51.12.020(5) does not create an automatic exception to the mandatory coverage of the Act is

completely disingenuous based upon its own statements and past legal position. Indeed, in *Fankhauser*, the Department took the position that "the plain language of the Act unambiguously excludes the claimants from workers' compensation coverage" because they were self-employed sole proprietors who did not elect optional coverage. *Fankhauser*, 121 Wn.2d 304, 309. This position is also consistent with the Department's Reference Manual, which is used to teach and guide auditors on how to apply the Act. The Manual plainly recognizes that all employments listed in RCW 51.12.020 are exempt from mandatory coverage. CABR Ex. 34, Reference Manual at 000391 ("The excluded employments in RCW 51.12.020 are exempt from mandatory coverage regardless of whether the individual supplies only their personal labor."); *see also* CABR Ex. 41, Education Sheet at p. 10 (bates stamp 000247) ("Sole proprietors are not mandatorily covered by industrial insurance."). Here again, the Department argues that the Manual is not a legal document and, therefore, should be disregarded. Because courts grant deference to the Department's interpretations of the WIIA, and the Manual clearly evidences the Department's interpretation that RCW 51.12.020 excludes self-employments, including sole proprietors, it should not be permitted to disregard that guidance simply because it is now inconvenient for the Department. Essentially, the Board and Department want to have their

cake and eat it too in the form of collecting taxes from employers, but not paying it out to sole proprietors when claims are filed. Rather than give deference to the Board's decision now, when litigation has ensued, such deference should be paid to those decisions that are made by the Board and Department during neutral, nonlitigious times.

The Department's own documents demonstrate that at least 20 of the 33 individuals identified in the audit are or have been at one time registered with the Washington State Department of Revenue as sole proprietors. CABR Ex. 44, State Business Records Database Detail. Of those 20 individuals, 12—over one-third of the disputed individuals—currently have active accounts open with the Department of Revenue and did so in 2010, the audit period. *Id.* At no point in the administrative proceedings did the Department provide any argument or evidence to overcome this undisputed fact, instead choosing to wholly ignore it. Department guidance is clear that sole proprietors are exempt from coverage under the Act, and the undisputed database detail records undoubtedly establish that at least 12 of the disputed individuals are and were sole proprietors during the audit period. Likewise, the review Board also failed to consider this argument, focusing only on whether the individuals meet the *White* test or any of its exceptions. The Department may argue that while coverage is not mandatorily covered, a sole

proprietor can elect coverage through the contractor's business. And, in fact, the Cartage Agreement, which each of the 33 disputed individuals signed, provides that the "Contractor agrees to maintain Occupational/Accidental insurance coverage or workers compensation coverage on Contractor and any individuals working for Contractor as employees or independent contractors." CABR Ex. 2-33, Cartage Agreement ¶ 5.b.

Because there is no dispute that at least 12 of the 33 individuals included in the audit are sole proprietors and, therefore, expressly excluded from coverage under the Act, HII cannot be liable for taxes owed on behalf of those individuals. Further, those individuals and the remaining 21 contractors are excluded from coverage regardless of their status as a sole proprietor because, as has been established, their contracts with HII are not for personal labor.

V. CONCLUSION

The evidence in the record establishes that the contractors are not workers under the Act because the essence of their contract is not personal labor. The Department's documents and guidance support this conclusion. The contractors are exempt under exceptions recognized by Washington courts because they provide expensive machinery that is necessary to complete the object of the contract and they have the option to use others

in completing the contracted work. Further, HII established that these contractors are exempt under the multifactor test. Even if the Court finds that the contracts are for personal labor and that the multifactor test has not been met, the tax assessment should at least be reduced by one-third to account for those contractors who are registered with the State as sole proprietors and are, therefore, exempt from the Act.

DATED this 17th day of September, 2015.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and not a party to the within cause.

2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101.

3. On the 17th day of September, 2015, I caused true copies of the following documents:

BRIEF OF APPELLANT HENRY INDUSTRIES, INC.

to be served via e-mail and by U.S. mail on counsel for the Department at the following address:

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

Executed this 17th day of September, 2015, at Seattle, WA.

Valerie Macan

Valerie Macan