

Dale Sanders Trucking

COVERAGE AND EXCLUSIONS

Interstate truckers – Owner-operators

Drivers who sign a lease-back agreement but do not have a significant economic interest in the truck covered under the agreement are not exempt from coverage as owner-operators who lease their truck to a common carrier under RCW 51.08.180.

Distinguishing Department of Labor & Indus. v. Mitchell Brothers Truck Line, Inc., 113 Wn. App. 700 (2002). ...***In re Dale Sanders Trucking Co.*, BIA Dec., 07 11358 (2008)**

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: DALE SANDERS TRUCKING CO) DOCKET NO. 07 11358**
2 **FIRM NO. 457,792-02) DECISION AND ORDER**
3 _____)

4 APPEARANCES:

5 Firm, Dale Sanders Trucking Co., by
6 Reinisch Mackenzie, P.C., per
7 Steven R. Reinisch

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 Courtlan P. Erickson, Assistant

11 The firm, Dale Sanders Trucking Co., filed an appeal with the Board of Industrial Insurance
12 Appeals on February 7, 2007, from an Order and Notice Reconsidering Notice and Order of
13 Assessment of the Department of Labor and Industries dated February 5, 2007. In this order, the
14 Department affirmed Notice and Order of Assessment No. 0420677, dated August 14, 2006, in
15 which it assessed the firm industrial insurance premiums, interest, and penalties due and owing the
16 State Fund for the 1st through 4th quarters of 2005, including penalty for failure to keep records, for
17 a total assessment of \$113,508.69. The Department order is **AFFIRMED**.

18 style="text-align:center">**DECISION**

19 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
21 Order issued on May 22, 2008, in which the industrial appeals judge reversed and remanded the
22 order of the Department dated February 5, 2007.

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

25 We have granted review because we disagree with the proposed decision to reverse the
26 Department order of February 5, 2007. Although we agree with our industrial appeals judge that
27 the firm failed to establish that its drivers were independent contractors as provided by
28 RCW 51.08.180, RCW 51.08.195, and under the requirements of *White v. Department of Labor &*
29 *Indus.*, 48 Wn.2d 470 (1956), we do not agree that the drivers were owner-operators engaged in
30 interstate trucking and, therefore, exempt from coverage. For reasons to be discussed below, we
31 believe the Department was correct to assess the firm premiums for hours attributed to work
32 performed by the firm's truck drivers.

10/22/08

1 Dale Sanders is the owner of Dale Sanders Trucking Co., which has been in business since
2 2000 as an interstate trucking operation. In the relevant year, 2005, Dale Sanders Trucking Co.
3 operated 12 tractors and 17 trailers. During 2005, the firm used various drivers to operate its
4 equipment, and considered the drivers independent contractors. The following drivers operated
5 equipment during all or a portion of 2005: Bryan Schultz, Jerrold Webb, Hubert Hancock, John
6 Kruse, Maris Liepins, Bernard Russell, Frank Colter, Michael Randall, Michael Valentine, Curtis
7 Glace, Jack Denison, Ronald Campbell, Edward MaVey, Rory Miller, Phillip Hoselton, Arthur
8 Gardner, and Stan Jeffery.

9 Mr. Sanders testified on behalf of the firm. He stated that all the drivers signed an
10 agreement (Exhibit 1) and Contractor Lease and Operating Agreement (Exhibit 2). The
11 agreements provided that each driver was an independent contractor. The firm retained a portion
12 of the driver's income as a lease payment on the trucks, which they drove and leased back to the
13 firm. Mr. Sanders asserts that the agreements are the same as used by another trucking company,
14 Mitchell Brothers Trucking. The court of appeals upheld that firm's agreements as establishing the
15 drivers as owner-operators of their trucks and, therefore, exempt from coverage. *Department of*
16 *Labor & Indus. v. Mitchell Brothers Truck Line, Inc.*, 113 Wash. App. 700 (2002). The term of the
17 Dale Sanders Trucking contracts was 36 or 48 months. At the end of the term, the driver could
18 purchase the truck. No driver has reached the end of the lease period, nor has any driver
19 purchased a truck under the agreement. All drivers operating equipment for the firm operated
20 under the agreement, unlike the circumstances in *Mitchell*, where many drivers were also employed
21 by the firm as employees.

22 Mr. Sanders testified that the drivers were able to accept loads or driving assignments from
23 other firms; he was not aware, however, that any driver had done so. Other indicia of ownership
24 claimed by the firm included the ability to take the trucks to their homes or any place they wanted to
25 park them, ability to decline assignments or loads brokered to them by Sanders Trucking, ability to
26 choose their own routes when transporting loads, although they were only paid for the shortest
27 distance, freedom to take time off without asking permission, freedom from periodic performance
28 evaluation by Sanders Trucking, freedom from supervision by Sanders Trucking in the performance
29 of their work, and the ability to hire someone to assist them, including to assist in driving.
30 Mr. Sanders testified that the persons who entered into these agreements were not provided paid
31 vacations, or benefits such as health insurance, sick leave, or disability insurance, and were not
32 guaranteed hours of work. Mr. Sanders states that drivers, at their own expense, purchased

1 equipment or technology to assist them in running their own businesses as independent
2 contractors.

3 The firm credited the drivers 91 cents per mile and settled with the drivers every two weeks.
4 31 cents of the 91 cents per mile was paid to the driver, the remaining amount was recorded in a
5 non-escrow account. The firm deducted any amounts it paid for repairs, maintenance, fuel, and
6 license fees. The remaining amounts would be a credit against the purchase of the truck. The
7 drivers received their pay without deductions or withholdings for taxes. The firm also carried
8 insurance against loss of the trucks, and contrary to the terms of the agreement, did not require the
9 drivers to take out insurance. Drivers were reimbursed for expenses incurred for emergency
10 repairs on the road. In the event the driver purchased the truck at the end of a term, the insurance
11 costs would be deducted from the reserve account.

12 Mr. Sanders acknowledged that the drivers who signed the agreements (Ex. Nos. 1 & 2)
13 were not required to provide any tools or equipment; however, he states it was necessary that they
14 be licensed to drive a truck (CDL). Mr. Sanders is aware that none of the drivers who worked for
15 him in 2005 hired other drivers to assist them, and he acknowledges that performing the work did
16 not require, by its nature, that the drivers hire someone else to help them.

17 Mr. Sanders testified that at the expiration of the lease terms the drivers had the option to
18 purchase their trucks for the residual value. Mr. Sanders acknowledges that the agreements with
19 the drivers saved the firm certain costs, but also states he intended that the leasing arrangement
20 would offer the lease operators the opportunity to become owners of the trucks.

21 Stanley Jeffery, who has been driving commercial trucks since 1994 and has known
22 Mr. Sanders since the latter part of 1999, was called as a witness by the firm. Mr. Jeffery considers
23 himself to have been an independent trucker in 2005 driving for Sanders Trucking and
24 acknowledges that he signed agreements with Sanders Trucking. He understands that at the end
25 of a contract period and completing purchase of a truck he was driving, he would own the rig.

26 Mr. Jeffery considers the truck he is driving to be his own truck. In his truck, Mr. Jeffery has
27 installed his own stereo, TV, VCR, DVD player, satellite radio, and refrigerator. Mr. Jeffery testified
28 that he has the option to choose not to work some days, and has done so. He believes he could
29 use his truck for purposes other than income production, such as volunteer hauling. Mr. Jeffery
30 also believes that he has the option to contact a broker directly for loads rather than going through
31 Sanders Trucking; however, he has not done this. Mr. Jeffery states that Sanders Trucking keeps
32 him busy.

1 Mr. Jeffery has driven various trucks on lease contract with Mr. Sanders, never reaching the
2 end of a lease agreement before he upgraded to what he believed was a better truck. He has
3 never purchased one of the trucks because he did not want to do so. Mr. Jeffery understands that
4 Mr. Sanders owns the truck, until Mr. Jeffery decides to purchase it. Mr. Jeffery believes he is in
5 business for himself, and sees benefit in the tax deductions, including a home-office space
6 deduction, although he does not take depreciation deductions on the truck. He does not have a
7 UBI number for his trucking business, nor is he registered with the Department of Revenue.
8 Mr. Jeffery uses a bookkeeping service. He keeps his driver logs by computer. Mr. Jeffery states
9 the only time he talks to Mr. Sanders is when he needs something repaired. He considers himself
10 free from control by Sanders Trucking. Until sometime near in time to his testimony, Mr. Jeffery did
11 not understand that he was leasing the truck back to the firm. Nor did he understand that he could
12 allow someone else to drive his truck.

13 Contrasting the testimony of the firm's witnesses was the testimony of two drivers called by
14 the Department. One of the drivers was Mr. Cookson. He states that when hired by Dale Sanders
15 Trucking, he completed a lot of paperwork. Mr. Cookson did not recall signing agreements similar
16 to Exhibits 1 and 2. He testified that there was not a discussion of leasing a truck or buying a truck
17 from Mr. Sanders. Mr. Cookson considered himself an employee of Dale Sanders Trucking
18 because they could tell him what to do. He did not believe he was free to turn down loads.
19 Mr. Cookson did not have an account with the Department of Revenue or the State of Washington,
20 and did not have a UBI number with the state. He took no maintenance or other expense, or
21 depreciation deduction, on his taxes for the truck. The truck he drove belonged to Dale Sanders,
22 and it was never Mr. Cookson's truck except in the sense that it was the truck he drove.
23 Mr. Cookson states he did not insure the truck, never hired or paid another driver to drive it, and
24 was not able to use it for personal business such as hauling loads for someone else. Mr. Sanders
25 paid for the fuel. Mr. Cookson testified he did not lease the truck, and made no lease payments.

26 Mr. Cookson installed a microwave in the truck, but made no other modifications.
27 Mr. Cookson states Dale Sanders was responsible for other maintenance, and this was done at the
28 trucking company shop.

29 Another driver who testified was Mr. Webb. Mr. Webb was injured while driving for the firm
30 and filed a claim for industrial insurance benefits. It was his claim that prompted the Department to
31 audit the firm. He met Mr. Sanders in September 2004, after answering an ad that said "drivers
32 wanted." Mr. Webb signed some papers, and initialed others, in the process of signing up to go to

1 work. Mr. Webb testified that he does not remember signing a contract that looks like Ex. Nos. 1
2 and 2. On cross-examination, Mr. Webb acknowledged copies of his signature on the agreement
3 documents, dated September 12, 2004, at Exhibit No. 7, except for the signature on the last page
4 of that document, and also acknowledged his signature on his time loss notification document at
5 Exhibit No. 8. Mr. Webb testified that he drove for Sanders Trucking for a year and a month before
6 he was hurt. He states that since then he has been drawing compensation and trying to recover.

7 Mr. Webb considered himself to be an employee of Sanders Trucking, and not self-employed
8 or in business for himself. His intention, in driving for Dale Sanders Trucking, was not to be self-
9 employed. He also states that Mr. Sanders owned the truck he drove. Further, Mr. Webb states,
10 he does not remember anybody ever mentioning lease payments, nor was he ever told that he had
11 the option to purchase the truck at any time. Mr. Webb states he would not purchase the truck; he
12 took the job because he was broke and needed to go to work. He just wanted a job driving by the
13 mile. Mr. Webb testified he was not required to make payments on the truck, and does not
14 remember that he was ever aware he was considered to be paid 91 cents per mile, with the amount
15 over 31 cents a mile going into an account for expenses. He does not recall getting any money
16 back as a credit from an account when he stopped driving for Sanders Trucking. Mr. Webb states
17 he did get a bonus of \$50 each month if he delivered all loads on time and there were no problems.

18 Mr. Webb testified that he never reported anything on the truck for his own taxes. Mr. Webb
19 does not have a place of business that is eligible for a business tax deduction. The only records he
20 kept while working for Sanders Trucking are his log books. Mr. Webb has no account with the
21 Department of Revenue and no Uniform Business Identifier (UBI) number related to his work with
22 Sanders Trucking.

23 Mr. Webb states he could not sell the truck he drove, nor could he hire other drivers to drive
24 the truck. Mr. Webb states he does not know what is meant by personal use of the truck. He did
25 take it home at times, but could not use it to haul a load for a different firm. Mr. Webb was free to
26 choose the route he wanted to drive, but believes every driver does that. Mr. Webb never declined
27 a load from Sanders Trucking, and does not know if he could have done so, but acknowledges that
28 on one occasion he asked for a different load. Mr. Webb tried to check in with Sanders Trucking
29 every day, and occasionally contacted brokers at their instruction. When driving, Mr. Webb brought
30 wrenches, pliers, and a pry-bar for light maintenance on the truck, such as adjusting brakes.

31 Mr. Webb testified he drove Truck No. 13 until about the last month he was with Dale
32 Sanders Trucking, then asked for another truck that would have more room inside the cab.

1 Thereafter, he drove Truck No. 15, a cab-over truck. Mr. Webb testified that in changing trucks he
2 did not sign a new contract.

3 As stated at the onset, Dale Sanders Trucking asserts that the drivers were exempt under
4 RCW 51.08.180(1) and the holding in *Department of Labor & Indus. v. Mitchell Brothers Truck Line,*
5 *Inc.*, 113 Wash. App. 700 (2002). We conclude that there are significant differences in the
6 circumstances established in *Mitchell Brothers* and the circumstances involved with Dale Sanders
7 Trucking. These differences require a different result. In *Mitchell Brothers*, the court concluded that
8 the drivers enjoyed rights comparable to ownership. Although the signed agreement may have
9 been similar, the significant difference in the way in which Dale Sanders Trucking administered its
10 business leads to a different result.

11 We begin our analysis keeping in mind two important tenets of industrial insurance. First,
12 the firm, as the appealing party, has the burden of proving that the Department was incorrect in
13 finding the drivers covered under industrial insurance. Second, there are statutory provisions that
14 favor coverage. RCW 51.12.010 states, "This title shall be liberally construed for the purpose of
15 reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring
16 in the course of employment." The Industrial Insurance Act provides for mandatory coverage
17 unless specifically excluded by a provision of the Act. Any exclusion shall be strictly construed in
18 favor of finding coverage. Accordingly, the provisions of the title are to be liberally construed in the
19 worker's favor. RCW 51.12.010; *McIndoe v. Dep't. of Labor & Indus.*, 144 Wn.2d 252, 256-57,
20 26 P.3d 903 (2001). It follows that the Act should be liberally construed in favor of finding coverage
21 for workers unless they are otherwise exempt from mandatory coverage.

22 In concluding that the drivers were not exempt from coverage, we believe it is significant that
23 the drivers for Dale Sanders Trucking did not have a choice in signing the agreements. If they
24 wanted to work for Dale Sanders Trucking, they had to sign the agreements. Mitchell Brothers
25 drivers had a choice; the firm hired many of its drivers as employees. For Dale Sanders, none of
26 the drivers were employees. Mitchell Brothers started the lease-back program as a mechanism to
27 attract more drivers. Dale Sanders did not establish the same basis for the lease-back; rather it
28 appears that the firm's program was established for the financial benefits of not paying workers
29 compensation premiums. None of the drivers who testified suggested that they signed the contract
30 because they wanted to purchase the trucks; two of the three who testified did not even know about
31 the purchase option. They did not realize that they were considered to be paid more than their take
32 home, with the rest being credited to an account. Nor were they aware of any insurance-related or

1 loss-related financial responsibility they had. A number of drivers for Mitchell Brothers purchased
2 their trucks at the end of the lease period, none of Dale Sanders' drivers did.

3 In *Mitchell Brothers*, the court concluded that the drivers had a substantial economic interest
4 in the trucks. They operated the trucks for their own financial gain. They paid the operating
5 expenses and were responsible for damage or loss. They deducted depreciation on their taxes; the
6 Dale Sanders drivers did not. Because Mitchell Brothers' drivers bore the risks of ownership as well
7 as its benefits, the court concluded that they were owner-operators, exempt from coverage.

8 Dale Sanders drivers did not pay for insurance. In contradiction to the provisions of the
9 agreement, the firm secured and paid the insurance on the trucks. In addition, the non-escrow
10 reserve account does not establish that the drivers were responsible for maintenance, fuel, or
11 license fees. The only point at which they would face any economic impact of those expenses
12 would be when they exercised the option to buy a rig at the end of the lease term. They did not
13 have to make a monthly lease payment, unlike the drivers for Mitchell Brothers. The drivers did not
14 have a significant economic interest in the trucks such as contemplated by the court in *Mitchell*
15 *Brothers*.

16 The realities of the administration of the contract with this firm reveal a substantially different
17 relationship between Dale Sanders Trucking and its drivers from the relationship considered in
18 *Mitchell Brothers*. The firm did not abide by the contract provisions; the drivers did not enjoy a
19 significant economic interest in the trucks; and the drivers did not enter into the contract with the
20 intent of purchasing the trucks. The drivers were not treated as owners by the firm and did not
21 regard themselves as such. We conclude that the firm's drivers were not owners of the trucks they
22 drove for Dale Sanders Trucking and RCW 51.08.180(1) does not exempt them from coverage.
23 The Department's assessment must be affirmed.

24 **FINDINGS OF FACT**

- 25 1. On August 14, 2006, the Department of Labor and Industries issued
26 Notice and Order of Assessment No. 0420677, in which it determined
27 industrial insurance taxes, premiums, and interest, including a penalty
28 for records not kept, were due and owing the State Fund by the firm for
29 the first through fourth quarters of 2005, for a total assessment of
\$113,508.69. On September 12, 2006, the firm filed a Protest and
Request for Reconsideration of the Department order.

30 On February 5, 2007, the Department issued Order and Notice
31 Reconsidering Notice and Order of Assessment No. 0420677, in which it
32 affirmed the order dated August 14, 2006.

1 On February 7, 2007, the firm filed with the Board of Industrial Insurance
2 Appeals a Notice of Appeal of the February 5, 2007 Order and Notice
3 Reconsidering Notice and Order of Assessment No. 0420677. On
4 March 2, 2007, the Board granted Docket No. 07 11358.

- 5 2. During calendar year 2005, Dale Sanders Trucking had up to 12 trucks.
6 It required 17 drivers to sign agreements by which the drivers leased the
7 trucks back to Sanders Trucking, a common carrier, and operated the
8 trucks. The drivers each signed agreements by which they each leased
9 a truck for a fixed term and monthly payments, and had an option to buy
10 the truck for the residual value of the vehicle at the conclusion of the
11 lease term. The drivers received a twice monthly settlement of 31 cents
12 per mile; an amount equal to the additional revenue from operation of
13 the truck (about 60 cents per mile) was credited to an account
14 maintained by Dale Sanders Trucking. Dale Sanders Trucking paid for
15 fuel, license fees, maintenance, insurance, and repairs on the trucks. In
16 the event of damage to a truck, the driver was responsible for cost of the
17 deductible on the insurance policy. In the event of loss of cargo, the
18 driver paid the loss, although this amount might be advanced by Dale
19 Sanders Trucking. At the completion of a lease term, if the driver
20 exercised the option to purchase the truck, the costs of fuel, licenses,
21 maintenance, insurance, and repairs of the truck would be deducted
22 from the account, and the balance applied toward the residual value of
23 the vehicle.
- 24 3. Drivers were paid mileage for the shortest route distance, but were free
25 to take other routes. The 17 drivers bore the costs of food and lodging,
26 could choose not to accept a load, and were permitted to install personal
27 items such as radios, televisions, refrigerators, and microwaves in the
28 cab of their trucks. Unless a vehicle was unavailable due to
29 maintenance or repair, the drivers drove only their own leased vehicle.
30 They could park their trucks at locations of their choosing, and could use
31 their trucks for purposes other than business, and could carry loads
32 obtained from sources other than Dale Sanders Trucking. The drivers
primarily carried interstate loads along the Interstate 5 corridor between
Washington and locations in California.
4. Dale Sanders Trucking did not withhold federal income taxes or social
security payments from the 31 cents per mile paid in the twice monthly
settlements, nor did Dale Sanders Trucking make any workers'
compensation premium payments for the drivers. The drivers were
given a 1099-form reflecting payments made to them in 2005. They
were responsible for their own federal income taxes. The 17 drivers did
not all take advantage of federal tax deductions available to them.
There is no evidence that any of these registered with any department of
the State of Washington as an independent contractor, or that any had a
Uniform Business Identifier number with the State. The drivers did not
make monthly lease payments to the firm.

- 1 5. None of the drivers exercised an option to purchase a truck at the end of
2 the lease term. Of the three drivers to testify, none of the drivers drove
3 for the firm because they wanted to purchase their truck. The firm did
4 not give drivers the option of driving as an employee of the firm. The
5 firm did not abide by all provisions of the signed agreements (Exhibits 1
6 & 2).
- 6 6. The firm did not keep accurate records of the hours the drivers worked.
7 Records of the compensation the drivers received were provided by the
8 firm. The Department estimated hours by dividing the compensation
9 divided by the state's minimum wage. Using this formula the firm was
properly assessed \$113,508.69 for premiums, penalties (including
penalty for failure to keep records), and interest as of August 14, 2006.

10 **CONCLUSIONS OF LAW**

- 11 1. The Board of Industrial Insurance Appeals has jurisdiction over the
parties to and the subject matter of this appeal.
- 12 2. The 17 drivers, determined by the Department of Labor and Industries to
13 be employees of Dale Sanders Trucking Co. during 2005, were not
14 owners of trucks leased to a common carrier, and were workers or
15 employees of Dale Sanders Trucking Co., within the meaning of
RCW 51.08.180.
- 16 3. The Order and Notice Reconsidering Notice and Order of Assessment
17 No. 0420677, issued by the Department of Labor and Industries on
February 5, 2007, is correct, and is affirmed.

18 It is **ORDERED**.

19 Dated: October 22, 2008.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22
23
24 /s/ _____
THOMAS E. EGAN Chairperson

25
26
27 /s/ _____
FRANK E. FENNERTY, JR. Member