

W.A. Schmittler, Inc.

ASSESSMENTS

Newspaper carrier (RCW 51.12.020(10))

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Newspaper carrier (RCW 51.12.020(10))

COVERAGE AND EXCLUSIONS

Newspaper carrier (RCW 51.12.020(10))

The newspaper carrier exemption RCW 51.12.020(10) does not apply to carriers who enter businesses for delivery of newspapers to be resold to that business's own customers. **...In re W.A. Schmittler, Inc., BIA Dec., 11 23864 (2012)** [*Editor's Note:* The Board's decision was appealed to Kitsap County Superior Court No. 12-2-02754-6. Also see the 2013 amendment to RCW 51.12.020(10), which adds delivery to businesses as an exemption and effectively overrules the Board's decision in *W. A. Schmittler.*]

Scroll down for order.

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

1 **IN RE: W. A. SCHMITTLER, INC.) DOCKET NO. 11 23864**
2 **FIRM NO. 199,023-00) DECISION AND ORDER**
3 _____)

4 APPEARANCES:

5 Firm, W. A. Schmittler, Inc., by
6 Davis Wright Tremaine, per
7 Michael J. Killeen and Nigel P. Avilez

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 James M. Hawk

11 The firm, W. A. Schmittler, Inc., filed an appeal with the Board of Industrial Insurance
12 Appeals on December 21, 2011, from an Order and Notice Reconsidering Notice and Order of
13 Assessment No. 0519018, dated November 22, 2011. In this order, the Department of Labor and
14 Industries affirmed its August 30, 2010 Notice and Order of Assessment No. 0519018. The
15 Department order is **AFFIRMED**.

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

17 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board
18 for review and decision. The firm filed a timely Petition for Review to a Proposed Decision
19 and Order issued on August 17, 2012, in which the industrial appeals judge affirmed the
20 Department order dated November 22, 2011. We note that appeals to the Board are governed by
21 Chapter 51.52 RCW, not the Administrative Procedure Act at Chapter 34.05 RCW, as indicated by
22 the firm in its petition. On October 31, 2012, the Department filed its Reply to the Petition for
23 Review. All contested issues are addressed in this order.

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

26 We agree with the result reached by our industrial appeals judge in this appeal, but have
27 granted review to elaborate on the news carrier exception to the Washington Industrial Insurance
28 Act. This case turns largely on the statutory interpretation of this exception.

29 Washington law provides that, "Services performed by a newspaper carrier selling
30 or distributing newspapers **on the street or from house to house**" [emphasis added] is
31 an employment that is excluded from the mandatory coverage of the Industrial Insurance
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1 Act." RCW 51.12.020(10). The appellant, W. A. Schmittler, Inc., is a firm that contracts with
2 individuals to deliver newspapers. The firm requires its carriers to sign a "carrier contract" that
3 indicates that the carrier is an independent contractor, not an employee. While some of its carriers
4 have routes that include only house-to-house delivery, carriers Dale Klokker, Lidice Klokker, and
5 Cynthia Smith enter businesses to deliver newspapers to a proprietor for resale. The Department
6 of Labor and Industries assessed premiums against the company for these carriers, reasoning that
7 if injured, they would be covered by industrial insurance. The Department also assessed small
8 penalties against the firm for failure to register as an employer and failure to keep records.

9 The primary thrust of Schmittler's Petition for Review is that the Industrial Insurance Act by
10 virtue of the news carrier exception does not cover any of its newspaper carriers, even those who
11 enter businesses for delivery of newspapers to be resold. The petition also asserts that the
12 Department does not dispute that the relationship between the firm and its carriers is one of an
13 independent contractor. We disagree on both counts and sustain the Department's assessment for
14 the carriers who make newspaper deliveries indoors to businesses for resale.

15 We first consider Schmittler's argument that its news carriers are exempt from industrial
16 insurance coverage due to the news carrier exception. The firm argues that the services performed
17 by the carriers who enter businesses to deliver the newspapers "fall squarely within the newspaper
18 carrier exemption." The language of the exception indicates that it applies to newspaper delivery
19 services performed "on the street or from house to house." To make its claim that carriers who
20 enter businesses to make deliveries fall squarely within the exception, the firm either disregards or
21 interprets so broadly the phrase "on the street" in the exception, that it effectively excises it from the
22 statute. One of the first principles of statutory construction is that "statutes must not be construed in
23 a manner that renders any portion thereof meaningless or superfluous." *Cockle v. Labor & Indus.*,
24 142 Wn.2d 801, 809 (2001).

25 "On the street" and "from house to house" are the words that the Legislature chose to
26 describe the newspaper selling and distribution that would be exempt from industrial insurance
27 coverage. The firm argues that the phrase "on the street" includes "distributing newspapers to
28 locations **alongside** the street," including businesses that have their doors on sidewalks or on a
29 street. Effectively, this would be all businesses with a physical location. Such an interpretation of
30 the exception would render the inclusion of the words "on the street" superfluous to the exception
31 and meaningless.

1 Schmittler further argues that the case of *Ochoa v. Department of Labor and Indus.*, 143
2 Wn.2d 422 (2001), relied on by our industrial appeals judge, is not applicable to the question before
3 us. *Ochoa* involved one of the other exceptions enumerated in RCW 51.12.020, the one for
4 jockeys, which appears in subsection (7). *Ochoa* established that, notwithstanding the exception
5 from coverage, a jockey could be covered by industrial insurance if at the time of injury, he or she
6 was not participating in or preparing horses for races. Mr. Ochoa was hurt while exercising a horse,
7 and was held to have been covered. The *Ochoa* case is relevant because the coverage
8 determination in an injury case is essentially the same determination in an assessment case, that
9 is, firms are assessed premiums based on the Department's responsibility to cover the injuries of
10 the firm's employees.

11 It has long been established that all doubts as to the meaning of the Act are resolved in
12 favor of the injured employee. *Ochoa* at 426. Therefore, exceptions are narrowly construed. *UW,*
13 *Harborview Med. Ctr. v. Marengo*, 122 Wn. App. 798 (2004).

14 We believe that our interpretation of the exception draws the line where the Legislature
15 intended it to be drawn. Newspaper carriers who deliver papers from house to house or sell them
16 on the street were meant by the Legislature to be exempt from industrial insurance coverage.
17 However, carriers who enter businesses for delivery of newspapers to be resold to that business'
18 own customers should not be exempt. If they were, workers who deliver newspapers indoors would
19 be without coverage, while workers who deliver all manner of other products indoors, even
20 magazines, would have coverage. This would be a distinction based entirely on the type of product
21 being carried into the store. We cannot discern any reason that the Legislature would have
22 intended such a distinction.

23 The firm's petition also claims that the Department did not dispute that the employer and its
24 carriers have an independent contractor relationship. Actually, the Department auditor who testified
25 at hearing determined that none of the workers qualified for the independent contractor exemption.
26 It has long been established that two parties' contract for services does not mean that there is no
27 employer-employee relationship for workers compensation purposes. There have been many
28 cases over the years that have found an employment relationship despite the parties having
29 characterized their arrangement as contractual. *Dana's Housekeeping, Inc. v. Department of Labor*
30 *& Indus.*, 76 Wn. App. 600 (1995); *review denied*, 127 Wn.2d 1007 (1995). The proper question is
31 whether the essence of the work performed, in this case, the delivery of newspapers, is the
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1 personal labor of each of the workers. RCW 51.08.180. *Xenith Group, Inc., v. Department of Labor*
2 *& Indus.*, 167 Wn. App. 389 (2012). The evidence showed that the carriers personally delivered the
3 newspapers to the customers on their routes. Each of them did all of their own delivery, except
4 when a day was taken off and a substitute covered the route. We believe that there is no question
5 that personal labor is the essence of the work being performed by these carriers.

6 The last avenue by which the firm might be relieved of assessment for these three workers
7 is under RCW 51.08.195, which sets forth six requirements for persons to qualify themselves as
8 independent contractors for industrial insurance purposes. However, the firm made virtually no
9 attempt to show that the workers had met all six requirements of RCW 51.08.195. Particularly,
10 there was no showing that the carriers had filed a schedule of expenses with the Internal Revenue
11 Service, had established an account with the Washington Department of Revenue, or had
12 maintained a separate set of books or records. Further, the carrier contract states that the "carrier
13 will deliver said newspapers with his/her own equipment according to methods prescribed by
14 dealer." This undercuts any claim that the carriers are free from control or direction over their
15 performance of the service, as required by RCW 51.08.195(1).

16 To conclude, the employer has failed to show that the workers for which the Department has
17 assessed premiums fall within the news carrier exception, that they are independent contractors or
18 that they meet the requirements of RCW 51.08.195. Therefore, the assessment is correct, and
19 should be affirmed.

20 **FINDINGS OF FACT**

- 21 1. On February 16, 2012, and on August 6, 2012, an industrial appeals
22 judge certified that the parties agreed to include the Amended
23 Jurisdictional History in the Board record solely for jurisdictional
24 purposes.
- 25 2. On November 22, 2011, the Department of Labor and Industries issued
26 an Order and Notice Reconsidering Notice and Order of Assessment, in
27 which it affirmed its Notice and Order of Assessment of Industrial
28 Insurance Taxes No. 0519018. In that Notice and Order dated
29 August 30, 2010, the Department assessed W. A. Schmittler Inc.,
30 industrial insurance taxes in the amount of \$7,117.61, for the last two
31 quarters of 2007, all of 2008 and 2009, and the first two quarters of
32 2010.
3. Prior to August 30, 2010, the Department conducted an audit of W. A.
Schmittler, Inc. As a result of that audit, the Department concluded that
W. A. Schmittler, Inc., was an unregistered employer that had failed to

1 keep records, was engaged in the business of newspaper delivery, and
2 had workers providing their personal labor.

- 3 4. For the last two quarters of 2007, all of 2008 and 2009, and the first two
4 quarters of 2010, W. A. Schmittler Inc., was engaged in the business of
5 newspaper distribution and had workers who provided their personal
6 labor in furtherance thereof. During this time, Schmittler contracted with
7 Dale Klokker, Lidice Klokker, and Cynthia Smith, hereafter "the carriers,"
8 to deliver newspapers for the firm.
- 9 5. The essence of the contract between Schmittler and the carriers was
10 that they would provide their own personal labor in the delivery of
11 newspapers to customers at their homes and their businesses.
- 12 6. The carriers each signed a contract indicating that they were not
13 employees of W. A. Schmittler, Inc., and that no taxes, including
14 industrial insurance premiums, would be withheld from their checks.
15 The carriers were required to sign the contract as a condition of their
16 being allowed to deliver newspapers for the firm.
- 17 7. The carriers provided their personal labor in furtherance of the
18 completion of their duties. An employer-employee relationship existed
19 between the firm and the carriers during the period at issue.
- 20 8. As part of their required duties, the carriers entered business
21 establishments to sell and/or distribute newspapers for resale by the
22 business, as well as selling and distributing from house to house, and on
23 the street.
- 24 9. The firm required the carriers to deliver newspapers according to
25 methods that the firm prescribed.
- 26 10. During the audit period, the carriers filed no schedule of expenses with
27 the Internal Revenue Service, established no account with the state
28 Department of Revenue, and maintained no separate set of books or
29 records.
- 30 11. During the audit period, W. A. Schmittler Inc., failed to keep and/or
31 preserve records adequate to determine industrial insurance taxes due.
- 32 12. During the audit period, W. A. Schmittler Inc., was not registered with
the Department of Labor and Industries.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. For the last two quarters of 2007, all of 2008 and 2009, and the first two quarters of 2010, an employer-employee relationship existed between W.A. Schmittler Inc., and the carriers, as contemplated by Chapter 51.08 RCW and Chapter 51.12 RCW.

- 1 3. The carriers were engaged in services that precluded their exemption
2 from coverage under RCW 51.12.020(10).
3 4. The firm was not entitled to the exemption from mandatory coverage
4 embodied in RCW 51.08.195, as to the carriers herein.
5 5. The Department's November 22, 2011 Order and Notice Reconsidering
6 Notice and Order of Assessment, affirming its Notice and Order of
7 Assessment of Industrial Insurance Taxes No. 0519018, is correct and
8 is affirmed.

9 DATED: November 20, 2012.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11 /s/ _____
12 DAVID E. THREEEDY Chairperson

13 /s/ _____
14 FRANK E. FENNERTY, JR. Member