

Subcontracting Concepts

INDEPENDENT CONTRACTORS

Logistics Company

Where a firm's contract with the logistics company dictates that the firm is the primary provider of couriers for the logistics company, and it alone has discretion over the matters of the courier services, the courier drivers provide personal labor to the firm and are covered workers under the Industrial Insurance Act. ...***In re Subcontracting Concepts, BIIA Dec., 12 15210 (2014)*** [*Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 14-2-01221-4.*]

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

1 **IN RE: SUBCONTRACTING CONCEPTS) DOCKET NO. 12 15210**
2 **LLC)**
3 **FIRM NO. 166,698-00) DECISION AND ORDER**

4 **APPEARANCES:**

5 Firm, Subcontracting Concepts, Inc., LLC, by
6 AMS Law, P.C., per
7 Aaron K. Owada, and Sean Walsh

8 Department of Labor and Industries, by
9 Eliezar Eidenbom, Litigation Specialist, and
10 The Office of the Attorney General, per
11 Katy J. Dixon, Assistant

12 The firm, Subcontracting Concepts, LLC, (SCI) filed an appeal with the Board of Industrial
13 Insurance Appeals on April 27, 2012, from an order of the Department of Labor and Industries
14 dated April 5, 2012. In this order, the Department affirmed its December 23, 2008 Notice and Order
15 of Assessment No. 0477342 in which it assessed \$139,153.54 representing penalties and interest
16 for unpaid taxes; failure to keep records; and being unregistered, for the third and fourth quarters of
17 2006. The Department order is **AFFIRMED**.

18 **DECISION**

19 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
20 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
21 Order issued on December 23, 2013, in which the industrial appeals judge reversed and remanded
22 the Department order dated April 5, 2012. Subcontracting Concepts, LLC filed its response on
23 May 7, 2014. Contested issues addressed in this order include the assessment of \$139,153.54
24 representing penalties and interest for unpaid taxes; failure to keep records; as well as SCI being
25 an unregistered employer for the third and fourth quarters of 2006.

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

28 We disagree with the decision proposed by our industrial appeals judge. We grant review to
29 affirm the Department's April 5, 2012 order; finding that the independent contractors subject to the
30 Department audit were covered workers within the meaning of Title 51 RCW (the Act), because the
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1 essence of their contracts was for personal labor; and determining that Subcontracting Concepts
2 failed to establish that the identified workers qualified under exceptions set forth in RCW 51.08.195.

3 The controversies in this appeal include whether SCI is an employer under the Act; and if so,
4 whether the 87 Independent contractors subject to contracts with SCI and identified by the
5 Department audit were covered workers during the relevant period.

6 SCI presents itself as a settlement processing company, offering a variety of services to
7 independent contract couriers and logistic companies. Notwithstanding the independent contractor
8 agreements between SCI and the 87 identified couriers, the firm asserts that the couriers did not
9 provide a service for SCI, and that SCI never provided remuneration for work performed by the
10 couriers. SCI argues that it is not an employer as defined by RCW 51.08.070—for lack of either
11 direction or control over the couriers; that it is not an employee leasing entity as defined by
12 WAC 296-17-87306—being limited to providing administrative and referral services, only;¹ that the
13 couriers are excluded under RCW 51.12.020—most being sole proprietors; that the couriers meet
14 the exceptions or exclusions of worker as defined by RCW 51.08.180—essence of contract is not
15 personal labor; that the couriers meet the exceptions or exclusions of worker under
16 RCW 51.08.195—meeting all requirements set forth therein; and that the Department failed to
17 present any evidence contrary to that offered by SCI—realities of situations reflect that the couriers
18 contracted with logistic companies for delivery services and receipt of remuneration, and that SCI
19 only provided services to both logistic companies and the couriers.

20 Resolution of this matter turns on the two contracts presented for consideration.
21 Exhibit No.7 is the Assignment Agreement between US Dispatch Corporation (a logistic company),
22 and SCI. Although dated October 1, 2003, testimony established that this contract represents the
23 standard agreement between the two entities during the relevant audit period. The contract
24 established SCI as in the business of brokering expedited courier and messenger services, and of
25 managing transportation resources for courier services. The management services provided by
26 SCI include, but are not limited to, "brokering of motorized and manpower services as well as
27 review, verification and payment of transportation invoices received from outside transport
28 vendors." Exhibit No. 7 at 1. In consideration of providing management services, US Dispatch

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30 ¹ The employee leasing entity and sole proprietor issues were not adequately litigated and will not be discussed further.
31 Similarly, insofar as we are finding that the Department's assessments are correct, the fines and penalties flow from
32 that determination. That portion of the order under appeal has not been adequately challenged, so there will be no
further discussion.

1 agreed to use SCI as its primary provider of brokered transportation services and vehicles, as well
2 as the independent contractors to provide such services. In addition, "SCI shall have the discretion
3 to provide the type, nature and quality of management and technical resources, including the use of
4 independent contractors and any vehicle necessary to fulfill its obligations." Exhibit No. 7 at 1.

5 The SCI/US Dispatch contract allows SCI to invoice the logistic company on a weekly basis
6 for the cost incurred in providing management resource services based on gross revenues
7 generated by the US Dispatch. Additional fees are charged for all disbursements made on behalf
8 of US Dispatch. "The "invoicing shall provide for a cost plus \$2.00 per week per independent
9 contractor management fee." Exhibit No. 7 at 1. We note the cost is not defined with any
10 specificity but appears to be that amount based on gross revenues, as described earlier.

11 The contract continues: "The vehicles, personnel or independent contractors utilized by SCI
12 and provided to the Company shall not be deemed or considered to be owned by, employed by, or
13 the agents of the Company . . ." Exhibit No. 7 at 2. That provision provides a clear understanding
14 that the couriers are associated with SCI rather than the logistic company.

15 Although the contract identified SCI as a broker, the language of the contract dictates that
16 SCI is the primary provider of couriers (personnel) for the logistic company, and it alone has
17 discretion over the nature of the courier services provided. The contract also sets forth the
18 payment requirements from US Dispatch to SCI in an amount based on gross revenues. This
19 provision is inconsistent with testimony suggesting that the only source of income for SCI was the
20 administration fee of the average \$2.00 per settlement check in addition to some minor additional
21 charges to the couriers' accounts for specific bookkeeping type services.

22 Ultimately, the SCI/US Dispatch contract establishes SCI as much more than a simple
23 settlement services company. Rather, SCI is in the business of providing its couriers (personal
24 labor) to logistic companies.

25 Exhibit No. 6 is an Independent Contractor Owner/Operator Agreement submitted as
26 representing all such contracts between SCI and the various couriers during the relevant audit
27 period. That document establishes in great detail the parties' relationship by defining specific rights
28 and responsibilities in performance of the contract. This contract identifies SCI as being "engaged
29 in the business of brokering courier and messenger delivery services for its customers and
30 furnishing certain administrative services in connection therewith." Exhibit No. 6 at 4. The courier
31 is required to have a vehicle with certain specifications; maintain that vehicle; make that vehicle
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1 available to SCI; and use that vehicle in connection with the services the Independent
2 Contractor (IC) furnishes to SCI and its customers. The IC is required to provide immediate written
3 notice to SCI and its customers when a vehicle is replaced. "Independent Contractor will be issued
4 an identification card containing the name and/or logo of SCI and/or of the customer of SCI for
5 whom the Independent Contractor is performing services. . . ." Exhibit No. 6 at 4. Specific clothing
6 may be required or requested by SCI and/or its customers. In lieu of rendering services directly,
7 the courier may employ drivers in connection with the execution of delivery assignments accepted
8 by the courier so long as the individual meets the qualifications set forth in the contract.

9 The contract disavows any employer/employee relationship between the courier SCI, or its
10 customers; sets forth courier responsibilities for payment of various federal and state taxes;
11 required that the courier obtain and keep in force occupational accident or workers' compensation
12 insurance; and other liabilities insurance protecting SCI and its customers. "All . . . insurance shall
13 be in such amounts, with carriers and in such form as acceptable to SCI." Exhibit No. 6 at 5.

14 "For each completed delivery, the Independent Contractor shall be paid a fee based on the
15 schedule of rates negotiated and agreed to by SCI and the Independent Contractor." Exhibit No. 6
16 at 7. On delivery, the courier is required to furnish SCI with all data and paperwork required by SCI
17 and/or its customers. The courier is to then provide a correct and complete invoice to SCI. SCI will
18 pay the IC within 15 days following receipt of the invoice.

19 "SCI has represented to its clients' [*sic*] and to their customers, that an established standard
20 of service that is fully competitive with that offered by their competitors, will be provided." Exhibit
21 No. 6 at 7. The IC acknowledged this standard of service, which includes providing delivery
22 services that meet the requirements of SCI clients.

23 The contract does allow a courier to accept or reject an assignment from SCI or its
24 customers, and allows a courier to accept an assignment from any other carrier. The couriers,
25 when possible, must arrange for coverage when not available for their route. Excessive
26 non-availability may result in the route being placed up for bid. On termination of the contract, and
27 for a period of 12 months, the courier is prohibited from soliciting business from an SCI customer.

28 With the preface that the burden is on SCI to prove that the Department's taxes and penalty
29 assessment are incorrect (see, RCW 51.48.131), we begin our analysis by determining SCI's and
30 the couriers' statuses within the Title 51 RCW statutory scheme.

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2 In Washington,

3 "Employer" means any person, body of persons, corporate or otherwise, and the legal
4 representatives of a deceased employer, all while engaged in this state in any work
5 covered by the provisions of this title, by way of trade or business, or **who contracts**
6 **with one or more workers, the essence of which is the personal labor of such**
7 **worker or workers.** Or as an exception to the definition of employer, persons or
8 entities are not employers when they contract or agree to remunerate the services
9 performed by an individual who meets the tests set forth in subsections (1) through (6)
of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work
performed that requires registration under chapter 18.27 RCW or licensing under
chapter 19.28 RCW.

10 RCW 51.08.070 "Employer" — Exception (emphasis added).

11 "Worker" means every person in this state who is engaged in the employment of an
12 employer under this title, whether by way of manual labor or otherwise in the course of
13 his or her employment; **also every person in this state who is engaged in the**
14 **employment of or who is working under an independent contract, the essence**
15 **of which is his or her personal labor for an employer under this title,** whether by
16 way of manual labor or otherwise, in the course of his or her employment, or as an
17 exception to the definition of worker, a person is not a worker if he or she meets the
18 tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests
19 set forth in RCW 51.08.181 for work performed that requires registration under
chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a
person is not a worker for the purpose of this title, with respect to his or her activities
attendant to operating a truck which he or she owns, and which is leased to a
common or contract carrier.

20 RCW 51.08.180: "Workers" - Exceptions. (Emphasis added).

21 There is no dispute that SCI is engaged in work covered under the Act. Similarly, there is no
22 dispute that the couriers are working under an independent contract as evidenced by Exhibit 6.
23 There is a disagreement as to whether the essence of that contract is the worker's personal labor
24 for an employer and/or whether the couriers fall within the exceptions of RCW 51.08.195.

25 The leading case addressing the coverage exemptions for independent contractors is
26 *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956). The *White* court set forth a
27 three-part test to determine whether an independent contractor is exempt from coverage. The
28 contractor (1) must of necessity own or supply machinery or equipment as distinguished from the
29 usual hand tools to perform the contract; or (2) obviously could not perform the contract without
30 assistance; or (3) who of necessity or choice employs others to do all or part of the work contracted
31 to perform. *White* at 474. Only one of the three criteria must be satisfied.

1 The record in this appeal establishes that the essence of the contracts between SCI and the
2 independent contractor/couriers is for personal labor. This determination is bolstered by the
3 representative contract between SCI and US Dispatch, as well as the SCI/Independent Contractor
4 agreement. Neither contract anticipates the hiring of a vehicle, with the operator being an ancillary
5 component. Nor does either contract anticipate the use of unusual machinery or equipment. In
6 fact, the vehicle requirements are rather minimal (a lockable weather-protected area adequate for
7 transporting/storing cargo), and certainly not unusual. Rather, it is the courier operating an
8 unspecified minimally equipped vehicle that is the object of the contracts. *White* test element (1) is
9 not met. Nor are elements (2) and (3). The courier function requires only one person per vehicle;
10 or, at least, the evidence does not prove otherwise. In addition, there is no support that any of the
11 87 individuals identified during the audit employed others to fulfill the contract.

12 The analysis now turns to whether the independent contractors, while providing personal
13 labor, fall within the statutory exceptions of RCW 51.08.195, which provides as follows:

14 As an exception to the definition of "employer" under RCW 51.08.070 and the
15 definition of "worker" under RCW 51.08.180, services performed by an individual
16 for remuneration shall not constitute employment subject to this title if it is shown
that:

17 (1) The individual has been and will continue to be free from control or
18 direction over the performance of the service, both under the contract of service
and in fact; and

19 (2) The service is either outside the usual course of business for which the
20 service is performed, or the service is performed outside all of the places of
21 business of the enterprise for which the service is performed, or the individual is
22 responsible, both under the contract and in fact, for the costs of the principal
place of business from which the service is performed; and

23 (3) The individual is customarily engaged in an independently established
24 trade, occupation, profession, or business, of the same nature as that involved in
25 the contract of service, or the individual has a principal place of business for the
26 business the individual is conducting that is eligible for a business deduction for
federal income tax purposes; and

27 (4) On the effective date of the contract of service, the individual is
28 responsible for filing at the next applicable filing period, both under the contract of
service and in fact, a schedule of expenses with the internal revenue service for
the type of business the individual is conducting; and

29 (5) On the effective date of the contract of service, or within a reasonable
30 period after the effective date of the contract, the individual has established an
31 account with the department of revenue, and other state agencies as required by
the particular case, for the business the individual is conducting for the payment

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1 of all state taxes normally paid by employers and businesses and has registered
2 for and received a unified business identifier number from the state of
Washington; and

3 (6) On the effective date of the contract of service, the individual is
4 maintaining a separate set of books or records that reflect all items of income
5 and expenses of the business which the individual is conducting.

6 RCW 51.08.195 - "Employer" and "worker" — Additional exception.

7 We note the firm's assertion that the couriers do not provide personal labor to SCI for
8 remuneration, a status requirement set forth in the preamble to RCW 51.08.195. As such, SCI is
9 not an employer under the plain language of the statute. However, the contracts establish
10 otherwise. The SCI/US Dispatch contract requires US Dispatch to use couriers provided by SCI.
11 Consideration is established as a portion of gross revenues realized by US Dispatch. Settlement
12 payments flow from US Dispatch through SCI and (for an additional processing fee) to the couriers
13 performing the work. Although there may not be any direct labor for SCI, the couriers' personal
14 labor is performed for the firm's benefit, allowing SCI to fulfill its contractual obligation to the logistic
15 company, US Dispatch. In Washington, personal labor includes both direct labor and labor
16 performed for the firm's benefit. *Dana's Housekeeping v. Department of Labor & Indus.*, 76 Wn.
17 App. 600, 608 (1995). We find that the remuneration requirement of RCW 51.08.195 has been
18 satisfied.

19 Only two individuals subject to the 2006 audit testified in this matter. Their mere assertions
20 as to meeting any specific criteria set forth in RCW 51.08.195 are simply insufficient and not
21 persuasive. We do, however, disagree with the Department's position that Michael Weekly, having
22 kept his business records in a backpack, necessarily disqualifies his exception under
23 subsection (3). Although the six provisions are inclusive in that all must be met, subsection (3) has
24 alternative criteria. Most certainly, a backpack is not a principle place of business eligible for a
25 federal income tax deduction. However, in a broad sense the couriers are engaged in an
26 independently established trade, occupation, profession, or business; thereby fulfilling the
27 subsection (3) requirement. Similarly, we are not persuaded by the Department's argument that
28 Mr. Weekly's failure to pay 2006 taxes to the Washington Department of Revenue necessarily
29 disqualifies him under subsection (5). He simply needs an account through which he is to pay
30 business taxes, not that actual payment of those taxes.

31 The Department's concern as to Michael Foster's use of his home computer for business
32 purposes, thereby not qualifying for a federal income tax deduction, suffers the same flaw as that of

1 Mr. Weekly. Mr. Foster, being a courier, is engaged in an independently established trade;
2 occupation; profession; or business—the need of a tax-deductible office is of no further
3 consequence under subsection (3).

4 With respect to Mr. Weekly, Mr. Foster, and the other 85 couriers subject to the Department
5 audit, we address each of the RCW 51.08.195 criteria,

- 6 (1) The contracts between SCI and its couriers establish a great amount of control
7 in the performance of their obligations. This provision is not satisfied.
- 8 (2) The courier services are performed for the benefit of SCI, but outside SCI's
9 places of business. This provision is satisfied.
- 10 (3) The couriers are engaged in an independently established trade, occupation,
11 profession, or business. This provision is satisfied.
- 12 (4) Although the Independent Contractor agreement requires that the couriers file
13 all required reports and returns, and pay all Federal, State, and local taxes,
14 there is no specific provision requiring the 87 couriers, on the effective dates of
15 their respective contracts, to file the specified schedule of expenses with the
16 Internal Revenue Service for the type of business the individual is conducting.
17 This provision is not satisfied.
- 18 (5) There is insufficient proof, if any, that the 87 couriers had established accounts
19 with the Department of Revenue and other state agencies as required during
20 the relevant period. This provision is not satisfied.
- 21 (6) There is insufficient proof, if any, that the 87 couriers on the effective dates of
22 their respective contracts maintained a separate set of books or records to
23 reflect all items of income and expenses of their businesses. This provision is
24 not satisfied.

25 Based on the record presented we find that SCI is an employer in the courier business; and its
26 couriers for which there are Independent Contractor agreements are deemed covered workers
27 under the Act because they fail to meet each of the six requirements set forth in RCW 51.08.195.
28 Our decision is consistent with the recently issued Decision and Order in *In re Henry Industries*,
29 Dckt. No. 13 11525 (April 4, 2014).

FINDINGS OF FACT

- 30 1. On July 11, 2012, an industrial appeals judge certified that the parties agreed
31 to include the Jurisdictional History in the Board record solely for
32 jurisdictional purposes.
2. On December 23, 2008, the Department of Labor and Industries issued a
Notice and Order of Assessment of Industrial Insurance Taxes to
Subcontracting Concepts, LLC, in which it assessed the sum of \$21,750 for
records not kept; \$500 for being unregistered; \$47,916.92 for the fourth

1 quarter of 2006; and \$68,968.62 for the third quarter of 2006. The total
2 assessment was \$139,135.54.

- 3 3. During the third and fourth quarters of 2006, the essence of the work
4 performed by the Independent Contractor/couriers was personal labor, as
5 dictated by the Subcontracting Concepts, LLC/Independent Contractor
6 agreements, and reflected in the actual performance of those contracts. As
7 such, Subcontracting Concepts, LLC, was an employer as anticipated by
8 RCW 51.08.070, with respect to the personal labor of those courier drivers
9 identified during the Department audit.
- 10 4. The contracts between SCI and its couriers establish a great amount of
11 control in the performance of their obligations. RCW 51.08.195(1) is not
12 satisfied.
- 13 5. Although the Independent Contractor agreement requires that the couriers
14 file all required reports and returns, and pay all Federal, State, and local
15 taxes, there is no specific provision requiring the 87 couriers, as of the
16 effective dates of their respective contracts, to file the specified schedule of
17 expenses with the Internal Revenue Service for the type of business the
18 individual is conducting. RCW 51.08.195(4) is not satisfied.
- 19 6. SCI failed to show that the 87 couriers had established accounts with the
20 Department of Revenue and other state agencies as required during the
21 relevant period. RCW 51.08.195(5) is not satisfied.
- 22 7. SCI failed to show that the 87 couriers on the effective dates of their
23 respective contracts maintained a separate set of books or records to reflect
24 all items of income and expenses of their businesses. RCW 51.08.195(6) is
25 not satisfied.

26 **CONCLUSIONS OF LAW**

- 27 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
28 and subject matter in this appeal.
- 29 2. During the period that included the third and fourth quarters of 2006, the
30 couriers were covered workers of Subcontracting Concepts, LLC, within the
31 meaning of RCW 51.08.180 and RCW 51.08.195.
- 32 3. The Department order dated April 5, 2012, is correct and is affirmed.

DATED: May 23, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEEDY Chairperson

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

1
2 **DISSENT**

3 I dissent. The majority relies on the substance of the contracts that represent agreements
4 between Subcontracting Concepts, Inc. (SCI), and the logistic companies; and SCI and the
5 independent contractors subject to the Department's audit. Based on the record presented, I am
6 convinced that SCI is not an employer as defined by the RCW 51.08.070; the independent
7 contractors are not workers as defined by the RCW 51.08.180; that the essence of any contract
8 was not for personal labor; and that SCI has met its burden to establish that the 87 courier/drivers
9 are not subject to premium assessments for the audit period.

10 The record reflects that for the relevant audit period SCI was in the business of providing
11 client services to logistic companies and independent contractors (courier/drivers), the most
12 significant of which was to process settlement payments from the logistics companies to the
13 courier/drivers. It charged a per check (floating) fee for this service. SCI also provided a number of
14 other services, collecting additional fees should a client opt to participate in the offered occupational
15 accident program. It charged additional fees for administrative services: direct deposit, child
16 support garnishments, and tax levies. SCI provided minimal assistance with respect to tax
17 documents.

18 At most, and when considering realities of the various relationships as established through
19 testimony, SCI appears to be a bookkeeping-type firm providing an array of services to its clients. It
20 acts as a clearing-house of sorts to connect logistic companies with couriers/drivers, but has no role
21 in contract negotiations between the logistic companies and the individual drivers and no role in the
22 day-to-day business of either. The courier/drivers (delivering packages) are not in the course of the
23 trade, business, or profession of SCI (providing settlement and other services for the logistic
24 industry). For those reasons, even assuming an employer/employee relationship, they would be
25 excluded under RCW 51.12.020 (3).

26 Ultimately, the actual conduct of the parties² establishes that for the relevant period, SCI was
27 not in the courier business and did not agree to remunerate drivers for the performance of their
28 individual duties while fulfilling their separate contracts with logistic companies. Although SCI
29 provided a variety of services for their client drivers and logistic companies, there is simply
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31 ² The Board should consider the "realities of the situation," as instructed by *Department of Labor and Indus., v. Tacoma*
32 *Yellow Cab Co.*, 31 Wn. App. 117, 124 (1982).

1 insufficient evidence to establish an employer/employee relationship between SCI and the drivers
2 subject to this audit.

3 I also question the Department's audit procedure and/or process. Apparently, the
4 Department sent out questionnaires to at least the 87 courier/drivers to determine their relationship
5 with SCI. Based on the very few returned responses, the Department determined that all 87 drivers
6 did not meet the requirements of RCW 51.08.180 and RCW 51.08.195. The Department did not
7 adequately identify, if there was even an attempt to do so, any statistical theory to support the
8 extrapolation of information from a few responding drivers and apply it to all 87. But the majority
9 does not appear willing to recognize the reverse: allow the testimony of a few to represent the
10 many. Rather, the firm is charged with the burden of refuting assessments for each of the 87
11 courier/drivers who had performed services in 2006 (seven years prior to the Board's hearings);
12 assessments that were issued through mere speculation. Locating all 87 independent contractors
13 and requiring each to testify at the Board is an unreasonable burden when considering the
14 Department's casual ability to issue broad-brush assessments without sufficient facts to support the
15 same.

16 Once again, I am in opposition to the majority's decision as it pertains to independent
17 contractors and the use of vehicles in the performance of the respective contracts for
18 delivery services. My most recent dissent was to the decision in *In re Henry Industries, Inc.*, Dckt.
19 No. 13 11525 (April 4, 2014). *Henry Industries* contracted with drivers for the sole purpose of
20 delivering pharmaceuticals. Those contracts could not be satisfied without the use of specialized
21 equipment—an automobile. In other words, there would be no contract if the independent
22 contractor did not have a vehicle.

23 The *Henry Industries* decision was somewhat problematic when considering the Board's
24 earlier decision in *In re Yellow Book Sales & Distribution Company, Inc.*, Dckt. No. 10 11146
25 (March 30, 2011). In that case, the Board correctly determined that the independent contractors
26 delivering telephone books "of necessity had to own or supply machinery in the form of a car,
27 pickup, or other motorized machine in order to accomplish their delivery." I find no distinction
28 between the delivery of pharmaceuticals and the delivery of telephone books, when the facts
29 establish that both require the use of a motorized vehicle.

30 Turning to Subcontracting Concepts, LLC, I find no distinction between the delivery of
31 telephone books (*Yellow Book Sales*) and the delivery of packages for logistic companies. Each
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1 requires a motorized vehicle, the absence of which would result in the inability to fulfill the
2 contractual obligations. My reasoning is consistent with the court's discussion in *Department of*
3 *Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117 (1982): "[I]n order to avoid the
4 categorization of 'workman' (or more recently as 'worker'), the person whose labor is being utilized
5 must of necessity supply to the work effort some machinery or equipment." *Tacoma Yellow Cab* at
6 125.³

7 I certainly recognize that the Subcontracting Concepts facts are bit confusing, when
8 considering the various contracts between Subcontracting Concepts and the logistic companies;
9 and its independent contractor agreements with the courier/drivers. Nonetheless, each contract,
10 with specificity, identifies the use of a vehicle in the performance, thereof. Without the vehicle,
11 there can be no contract.

12 I understand that the majority distinguishes *Yellow Book* based on the once-per-year
13 contract for telephone deliveries to both rural and urban settings, and the lack of actual control
14 exerted over the distributor or its drivers. First, the once-per-year delivery distinction falls short.
15 When considering the requirement of a motorized vehicle, a delivery is a delivery. The frequency is
16 of no consequence. Second, because the contract necessarily requires machinery or equipment
17 (for example, a motorized vehicle), thus exempting the drivers from coverage under the Act, there is
18 no need to address or otherwise consider, the extent of control over those independent contractors.

19 The Board should eliminate the confusion caused by seemingly inconsistent rulings and
20 apply its *Yellow Book Sales* reasoning to the case-at-hand. In doing so, the record would establish
21 that the independent contractors are not covered workers under the Act, as the essence of the
22 contract was not personal labor, consistent with *White v. Department of Labor & Indus.*, 48 Wn.2d
23 470 (1956), as cited by the majority. The Department's order should be reversed.

24 Dated: May 23, 2014.

25
26 BOARD OF INDUSTRIAL INSURANCE APPEALS
27

28 /s/ _____
29 JACK S. ENG Member
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31 ³ Note that *Tacoma Yellow Cab* was decided in favor of coverage for reasons not applicable to this matter.
32