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., BIIA 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.]***

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

**DECISION**

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

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

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

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

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

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

"On the street" and "from house to house" are the words that the Legislature chose to
describe the newspaper selling and distribution that would be exempt from industrial insurance
coverage. The firm argues that the phrase "on the street" includes "distributing newspapers to
locations alongside the street," including businesses that have their doors on sidewalks or on a
street. Effectively, this would be all businesses with a physical location. Such an interpretation of
the exception would render the inclusion of the words "on the street" superfluous to the exception
and meaningless.
Schmittler further argues that the case of *Ochoa v. Department of Labor and Indus.*, 143 Wn.2d 422 (2001), relied on by our industrial appeals judge, is not applicable to the question before us. *Ochoa* involved one of the other exceptions enumerated in RCW 51.12.020, the one for jockeys, which appears in subsection (7). *Ochoa* established that, notwithstanding the exception from coverage, a jockey could be covered by industrial insurance if at the time of injury, he or she was not participating in or preparing horses for races. Mr. Ochoa was hurt while exercising a horse, and was held to have been covered. The *Ochoa* case is relevant because the coverage determination in an injury case is essentially the same determination in an assessment case, that is, firms are assessed premiums based on the Department's responsibility to cover the injuries of the firm's employees.

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

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

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

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

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

FINDINGS OF FACT

1. On February 16, 2012, and on August 6, 2012, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On November 22, 2011, the Department of Labor and Industries issued an Order and Notice Reconsidering Notice and Order of Assessment, in which it affirmed its Notice and Order of Assessment of Industrial Insurance Taxes No. 0519018. In that Notice and Order dated August 30, 2010, the Department assessed W. A. Schmittler Inc., industrial insurance taxes in the amount of $7,117.61, for the last two quarters of 2007, all of 2008 and 2009, and the first two quarters of 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
keep records, was engaged in the business of newspaper delivery, and had workers providing their personal labor.

4. For the last two quarters of 2007, all of 2008 and 2009, and the first two quarters of 2010, W. A. Schmittler Inc., was engaged in the business of newspaper distribution and had workers who provided their personal labor in furtherance thereof. During this time, Schmittler contracted with Dale Klokker, Lidice Klokker, and Cynthia Smith, hereafter "the carriers," to deliver newspapers for the firm.

5. The essence of the contract between Schmittler and the carriers was that they would provide their own personal labor in the delivery of newspapers to customers at their homes and their businesses.

6. The carriers each signed a contract indicating that they were not employees of W. A. Schmittler, Inc., and that no taxes, including industrial insurance premiums, would be withheld from their checks. The carriers were required to sign the contract as a condition of their being allowed to deliver newspapers for the firm.

7. The carriers provided their personal labor in furtherance of the completion of their duties. An employer-employee relationship existed between the firm and the carriers during the period at issue.

8. As part of their required duties, the carriers entered business establishments to sell and/or distribute newspapers for resale by the business, as well as selling and distributing from house to house, and on the street.

9. The firm required the carriers to deliver newspapers according to methods that the firm prescribed.

10. During the audit period, the carriers filed no schedule of expenses with the Internal Revenue Service, established no account with the state Department of Revenue, and maintained no separate set of books or records.

11. During the audit period, W. A. Schmittler Inc., failed to keep and/or preserve records adequate to determine industrial insurance taxes due.

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.
3. The carriers were engaged in services that precluded their exemption from coverage under RCW 51.12.020(10).

4. The firm was not entitled to the exemption from mandatory coverage embodied in RCW 51.08.195, as to the carriers herein.

5. The Department's November 22, 2011 Order and Notice Reconsidering Notice and Order of Assessment, affirming its Notice and Order of Assessment of Industrial Insurance Taxes No. 0519018, is correct and is affirmed.


BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY     Chairperson

/s/
FRANK E. FENNERTY, JR.    Member