

Dispatch Group

ASSESSMENTS

Burden of proof

The fact that the Department found that the employer knowingly misled the Department when it failed to report covered workers does not change the employer's burden of proof in an appeal before the Board; employers always bear the burden of proof in an appeal from a Notice and Order of Assessment (RCW 51.48.131). ...*In re Dispatch Group, BIA Dec., 13 21330 (2015)*

Scroll down for order.

1 Dispatch contracted with individuals and companies to clean offices and residences. They
2 had written contracts, an example is Exhibit No. 2. Dispatch advertised for clients and then
3 contacted the contractors to assign jobs. The contractors were not required to take the job but if
4 they did they had to abide by the terms, including performing the cleaning on the days and hours
5 set by Dispatch. They also had to abide by the rules of conduct set up by Dispatch. The customer
6 paid Dispatch directly and the contractor submitted an invoice and was paid a percentage of the
7 fee. Some of the contractors had other customers but most relied solely on the work referred to
8 them by Dispatch.
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10 The auditor for Mariya's Housekeeping referred Dispatch to the Department to audit due to
11 the similarities between the business practices between the two companies. It was assigned to
12 Jessica Mixer, who audited the firm. Dispatch notified the Department it wanted to be represented
13 by its bookkeeper, Maria Waligora. The parties met and Ms. Mixer was given several documents.
14 The exhibits tell the entire story of the audit.
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16 Ms. Mixer sent out independent contractor questionnaires and received about half in return.
17 She also spoke to some of the contractors. Based on her review of the facts, statutes, and
18 Department regulations she found that the contractors were covered workers. Because Dispatch
19 did not have any time records, she estimated the taxes by taking the amount of money the
20 contractors were paid and dividing it by the state wide average of work for janitorial service. She
21 also assessed penalties for failure to maintain records, failure to register workers, and for knowingly
22 misrepresenting based on the fact that the creation of Dispatch appeared to be an attempt to avoid
23 taxes after the unfavorable assessment against Mariya's Housekeeping.
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25 We agree with the Proposed Decision and Order. Dispatch did not prove that its employees
26 were exempt from coverage under the *White*¹ test. The contract between Dispatch and contractors
27 specifically forbids the contractor from having anyone else do the job unless Dispatch approves.
28 There is no special equipment involved and the workers require no assistance.
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30 Dispatch also failed to establish exemptions under the statutory exceptions.² The Proposed
31 Decision and Order goes into great detail with each exception and we have little to add. The only
32 thing we really know is that most of the contractors had UBI numbers. The workers are required to
33 meet all six requirements to qualify under the statutory exemptions and most did not meet even one
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46 ¹ *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956).

47 ² RCW 51.08.180.

1 requirement. The evidence demonstrates that Dispatch controlled the clients, days and hours that
2 the offices and residences were cleaned, and how they were cleaned. Some of the contractors told
3 the Department that they bought their cleaning products from Dispatch and that they were trained
4 by Dispatch. Exhibit No. 1 shows that Dispatch held itself out as a cleaning company not a
5 dispatcher and it advertised for workers to be employed as cleaners not independent contractors.
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9 There is no evidence that any of the contractors paid any state taxes to the Department of
10 Revenue, Employment Security or Labor and Industries. Mariya Khomlyak testified that she and
11 her son, a part-owner of the company, cleaned offices and businesses and that they guaranteed
12 the work of the contractors. This would mean that the contractors were not engaged in an
13 established business independent of Dispatch. It is the same for all the exceptions.
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16 Having decided that the contractors were covered workers the penalties for failure to register
17 covered workers should be upheld. The penalty for failure to keep records is also justified because
18 the company did not keep any records that the Department could use on which to base an
19 assessment or to determine wages.
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22 Dispatch asserts that because the Department based its misrepresentation penalties on
23 RCW 51.48.020, the Department had the burden of proof based on clear, cogent, and convincing
24 evidence.³ The industrial appeals judge agreed but found that the company knowingly
25 misrepresented that it had no covered workers because (1) Dispatch was established almost
26 immediately after the assessment against Mariya's Housekeeping; and, (2) the business model for
27 Dispatch was exactly the same as Mariya's Housekeeping, including the same income for the first
28 quarter. We agree with the substantive part of the industrial appeals judge's proposed decision but
29 disagree that the Department had the burden of proof.
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34 WAC 263-12-115(2)(a) specifically states that the Department has the burden in an appeal
35 from a Department order "that alleges fraud or willful misrepresentation." This rule applies only for
36 appeals from orders issued under RCW 51.32.240(5). In the order in this appeal, the Department
37 doesn't allege willful misrepresentation. There is merely a notation that a penalty is for "misrep" on
38 the Department order. Even without the notation on the order, the burden does not shift. The
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³ WAC 263-12-115(2)(a).

1 burden is always on the employer in assessment appeals.⁴ The statute states that, "The burden of
2 proof rests upon the employer in an appeal to prove that the taxes and **penalties** assessed upon
3 the employer in the notice of assessment are incorrect." (Emphasis added) In this case the
4 Department assessed a penalty against Dispatch for intentionally misrepresenting employee hours
5 and according to the plain language of the statute the burden is on Dispatch to prove otherwise.
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9 We also note that in her pleading dated May 15, 2015, Dispatch's attorney filed both a
10 Petition for Review and a request for an extension to file its Petition for Review to supplement the
11 record. In a single pleading a party can request either an extension of time to file a Petition for
12 Review **or** a Petition for Review; not both. Therefore, we have accepted the May 15, 2015 pleading
13 as a Petition for Review and treated it as such.
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16 FINDINGS OF FACT

- 17 1. On April 17, 2014, an industrial appeals judge certified that the parties
18 agreed to include the Jurisdictional History in the Board record solely for
19 jurisdictional purposes.
- 20 2. The firm, Dispatch Group, Inc., (Dispatch) is a janitorial business with
21 cleaning services provided by individuals referred to as contractors.
- 22 3. During the first quarter of 2011 through the second quarter of 2012, the
23 following individuals performed janitorial services for the clients of
24 Dispatch in exchange for remuneration: Anatoliy Pugach, Anatoliy
25 Yurchuk, Ganna Panayiotou, Anyuta Deineka, Elvira Ortiz Alvarez,
26 Gallina Gud, Georgina Armas, Nicolae Gruar, Svetlana Kruglova,
27 Lyudmyla Yurchuk, Svetlana & Mykola Melnyk, Mariya Ymoshenko,
28 Mariya Voloshchuk, Mariya Tsaruk, Nedezhda (Nadiya) Demets,
29 Nadezhda Kapraleva, Nadiya Kuzmych, Nataliya Kuzmych, Nikolay &
30 Tamara Yurchuk, Oksana Drebut, Oleksandr Bondarenko, Olena
31 Tarasov, Olga Deineka, Olga Levinta, Olha Priakhina, Petro
32 Yukhymchuk, Seghel Lesan, Svetlana Golovetskaya, Svetlana
33 Roshchik, Svetlana Nikolayenko, Vera Georgiyevn Tokhvre, Vita Henish,
34 Vita Mashtalyar, Elena Yan, and V&V Janitorial Services ("the
35 custodians").
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- 38 4. Dispatch advertised for cleaning jobs and employees and indicated,
39 through advertisement, that it offered ongoing training for its employees.
40 Dispatch negotiated the price of cleaning services and served as an
41 interpreter for contractors whose native language was Russian or
42 Ukrainian. Dispatch also required each worker to enter into a written
43 agreement prior to engaging in cleaning for a business that
44 (1) compelled contractors to collect money from customers and remit
45 those funds to Dispatch along with invoices for services rendered and
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47 ⁴ RCW 51.48.131.

1 (2) authorized Dispatch to pay the contractor or to withhold payment
2 under certain conditions. The essence of the contract between Dispatch
3 and the contractors was personal labor.
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- 5 5. The custodians were not free from direction or control over the
6 performance of services rendered, either under the contract of services
7 or in fact.
- 8 6. The custodians did not provide service outside of the usual course of
9 business for which the service was performed, or perform service
10 outside of the place of business of the enterprise for which service was
11 performed. Nor were the custodians under contract or responsible for
12 the costs of the principal place of business from which the service was
13 performed.
- 14 7. The custodians neither customarily engaged in an independently
15 established trade, occupation, profession, or business, of the same
16 nature as that involved in the contract of service, nor did the custodians
17 have a principal place of business for the business being conducted that
18 was eligible for a business deduction for the custodians' federal income
19 tax purposes.
- 20 8. On the effective date of the contract of service, the custodians were
21 responsible for filing at the next applicable filing period, both under the
22 contract of service and in fact, a schedule of expenses with the Internal
23 Revenue Service for the type of business the individual was conducting.
- 24 9. On the effective date of the contract of service, or within a reasonable
25 period after the effective date of the contract, 20 of the 35 custodians
26 had established an account with the Department of Revenue and other
27 state agencies for payment of all state taxes normally paid by employers
28 and businesses and had registered for and received a unified business
29 identifier number from the State of Washington.
- 30 10. On the effective date of the contract of service, the custodians
31 maintained separate sets of books or records that reflected all items of
32 income and expenses of the business that the individual custodian was
33 conducting.
- 34 11. Dispatch paid no industrial insurance taxes based on the work
35 performed by custodians for the first quarter of 2011 through the second
36 quarter of 2012.
- 37 12. During the first quarter of 2011 through the second quarter of 2012,
38 Dispatch operated a janitorial business in which it negotiated contracts
39 for cleaning with home and business owners, purchased cleaning
40 supplies for contractors engaged in contracts, the essence of which was
41 personal labor, and trained its contractors.
- 42 13. During the first quarter of 2011 through the second quarter of 2012,
43 Dispatch failed to keep adequate records to allow for a determination of
44 industrial insurance premiums.
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3 14. As a part of its audit, the Department estimated premiums totalling
4 \$49,440.55, and assessed a \$5,000 penalty based on Dispatch's failure
5 to keep adequate records for the first quarter of 2011 through the second
6 quarter of 2012.
- 7 15. During the first quarter of 2011 through the second quarter of 2012,
8 Dispatch made knowing misrepresentations about premiums owed for
9 covered workers. Mariya Khomlyak, an owner of Dispatch had been
10 audited for a previous business, Mariya's Housecleaning, and knew or
11 should have known about Labor and Industries' reporting and record
12 keeping requirements.
- 13 16. Because of its audit of Dispatch for the first quarter of 2011 through the
14 second quarter of 2012, the Department found that Dispatch made
15 knowing misrepresentations about premiums owed for covered workers
16 and was subject to a \$10,000 penalty.
- 17 17. Because of its audit of Dispatch for the first quarter of 2011 through the
18 second quarter of 2012, the Department found that Dispatch was an
19 unregistered employer subject to a maximum penalty of \$33,025.68,
20 double the premiums it owed, but was assessed a reduced penalty of
21 \$15,000.
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23 **CONCLUSIONS OF LAW**
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- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
26 and subject matter in this appeal.
- 27 2. Dispatch's contractors were covered workers under RCW 51.08.180 and
28 *White v. Department Labor & Indus.*, 48 Wn.2d 470 (1956).
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- 30 3. Dispatch's workers were not exempt from coverage because the workers
31 did not meet all six of the criteria set out in RCW 51.08.195.
- 32 4. The premiums that the Department estimated to be \$49,440.55 due for the
33 first quarter of 2011 through the second quarter of 2012, are proper.
- 34 5. Dispatch's failure to maintain sufficient employment records per the
35 requirements of Title 51 RCW and the Washington Administrative Code
36 subjected the firm to penalties contemplated by RCW 51.48.030.
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- 38 6. Dispatch's failure to maintain sufficient employment records bar it from
39 questioning the correctness of any Department assessment for the
40 relevant periods under RCW 51.48.030.
- 41 7. Dispatch has the burden of proof to show that it did not knowingly
42 misrepresent its employment information concerning covered workers
43 pursuant to RCW 51.48.131.
- 44 8. Dispatch knowingly misrepresented its employment information about
45 covered workers and became subject to the penalty contemplated by
46 RCW 51.48.020.
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1 9. The Department order dated December 10, 2013, is correct and is
2 affirmed.
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4 Dated: July 9, 2015.
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6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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9
10 /s/ _____
11 DAVID E. THREEDY Chairperson
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15 /s/ _____
16 FRANK E. FENNERTY, JR. Member
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20 /s/ _____
21 JACK S. ENG Member
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