

Henry Industries

INDEPENDENT CONTRACTORS

Delivery drivers

Delivery drivers for the firm were independent contractors but the firm exercised control over their work. Although the drivers were required to supply a vehicle for use in the deliveries, the primary object of the contract was not the use of the vehicle as contemplated in *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956). The drivers were covered workers under the Industrial Insurance Act. ...***In re Henry Industries*, BIIA Dec., 13 11525 (2014)** [Editor's Note: Affirmed, *Henry Industries, Inc. v. Dep't of Labor & Indus.*, 195 Wn. App. 593 (2016.)]

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

1 **IN RE: HENRY INDUSTRIES, INC.**) **DOCKET NO. 13 11525**
2 **FIRM NO. 092,575-00**) **DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Firm, Henry Industries, Inc., by
6 Stinson, Morrison, Hecker, LLP, per
7 Molly E. Walsh and Stephanie N. Scheck

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
Katy J. Dixon, Assistant

10 The firm, Henry Industries, Inc., filed an appeal with the Board of Industrial Insurance
11 Appeals on February 11, 2013, from an order of the Department of Labor and Industries dated
12 January 10, 2013. In this order, the Department modified its Notice and Order of Assessment
13 dated October 3, 2011, thereby assessing Henry Industries, Inc., \$51,579.57 for unpaid premiums,
14 penalties, and interest for calendar year 2010. The Department order is **AFFIRMED**.

15 **DECISION**

16 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
17 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
18 Order issued on September 26, 2013, in which the industrial appeals judge reversed and remanded
19 the Department order dated January 10, 2013. Our industrial appeals judge determined that Henry
20 Industries delivery drivers were independent contractors whose personal labor was not the essence
21 of the contract. The contested issue addressed in this order is whether drivers delivering packages
22 for one of Henry Industries' customers are workers under the Industrial Insurance Act (Act).

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 Henry Industries provides warehouse, logistic, and courier services in Washington State.
26 PharMerica is a long-term care pharmacy that sells pharmaceutical products and packages to
27 long-term healthcare facilities. PharMerica contracted with Henry Industries for the delivery of its
28 pharmaceutical products to healthcare facilities in Washington State. Henry Industries then
29 contracted with individuals to make the deliveries on assigned routes.

30 The controversy in this appeal is whether the 33 individuals performing the delivery services
31 during calendar year 2010 are covered workers under the Act. Henry Industries asserts that the
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1 individuals are not workers under the Act because (1) it has subcontractor relationships with the
2 individuals through written contracts; (2) the essence of the contract is not the personal labor of the
3 individuals; (3) Henry Industries does not exercise control over the work of the individuals; and (4)
4 the contract requires that the individuals provide a vehicle necessary to perform the contract.
5 Henry Industries argues that these facts exclude the individuals from the definition of worker under
6 the Act. The Department argues that the essence of the contract is the personal labor of the
7 individuals; the individuals are workers under the Act; and they are not exempt under the alternative
8 definition of worker found in RCW 51.08.195.

9 Our industrial appeals judge determined that the individuals were independent contractors
10 and exempt from coverage under the Act because they did not provide personal labor and the
11 essence of the contract was to provide a vehicle for delivery services for Henry Industries and its
12 customers. We have granted review because we disagree with the analysis set forth in the
13 Proposed Decision and Order. We find on the facts in this record that although the individuals are
14 independent contractors, the essence of the contract was personal labor and they are workers
15 within the meaning of the Act. Further, we find that Henry Industries failed to establish that the
16 individuals are exempt under the alternative definition of worker found in RCW 51.08.195.

17 Henry Industries and the 33 individuals entered into written contracts. The contract provides
18 that the individuals are subcontractors. The contract provides that each individual is required to
19 provide a vehicle and have necessary and appropriate insurance. An individual with a route was
20 free to hire someone else to do the work. The drivers obligated themselves to keep records, obey
21 all regulations, and to pay all taxes owed. The contract requires that the individual be fluent in
22 English and successfully complete drug, alcohol and background screening. The drug screening
23 includes random testing. The background check includes motor vehicle records and criminal
24 records. A negative report in the back ground check results in immediate termination. The
25 individual is to "faithfully and diligently devote his/her/its best efforts, skill and abilities to comply
26 with customer requirements and to faithfully enhance and promote the welfare and best interest" of
27 Henry Industries. Exhibits 2-33, § 3. i. The contract requires that the individual execute a
28 confidentiality agreement to ensure Henry Industries interests are protected.

29 The definition of worker is set out in RCW 51.08.180. The term "worker" includes not only
30 employees, as that term is commonly understood, but also a person "who is working under an
31 independent contract, the essence of which is his or her personal labor for an employer under this
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1 title . . ." RCW 51.08.070 defines an employer as a person or entity, engaging in any work in this
2 state covered by the provisions of this title, "who contracts with one or more workers, the essence
3 of which is the personal labor of such worker or workers." This statutory construct creates a
4 presumption in favor of mandatory coverage. As a general rule, all employments are covered
5 under the Act unless there are specific exceptions or exemptions from coverage. Further,
6 RCW 51.08.180 and RCW 51.08.070 exclude a person from the definition of a worker or employer
7 who meets the six part test set forth in RCW 51.08.195(1) through (6).

8 The Washington Supreme Court has provided a test for determining whether an independent
9 contractor is a worker with the meaning of RCW 51.08.180. Under this test, an independent
10 contractor is exempt from coverage under the Act when the contractor: (1) must of necessity own or
11 supply machinery or equipment as distinguish from the usual hand tools to perform the contract; or
12 (2) obviously could not perform the contract without assistance; or (3) who of necessity or choice
13 employs others to do all or part of the work contracted to perform. *White v. Department of Labor &*
14 *Indus.*, 48 Wn.2d 470, 474 (1956). We will address each of the three tests set out in *White*.

15 When viewed in its entirety, the contract between Henry Industries and each individual calls
16 for personal labor. While the contract requires the individual to provide a car for use in the delivery
17 of the drugs, the requirement of the car, although an important part of the contract, is not the
18 primary object of the contract. The contract is specific with respect to selecting the individual. The
19 individual must be fluent in English and must complete drug, alcohol and background screening.
20 The drug screening occurs randomly when required by Henry Industries' clients and performed at
21 Henry Industries' request. The background screening is conducted initially and then annually as
22 authorized by Henry Industries. A negative report in any test results in termination. Additionally,
23 under the contract the individual is required to promote the best interest of Henry Industries.

24 The record establishes that the individuals who contracted with Henry Industries to deliver
25 the pharmaceuticals are engaged in a long-term relationship with PharMerica where they would
26 pick up the pharmaceuticals and the various long-term care facilities where they would deliver
27 them. The drivers would enter the PharMerica building to obtain the pharmaceuticals and would
28 make the delivery inside the health care facilities. This would require contact by the delivery drivers
29 with the "customers" on each end of the process. The agreements that Henry Industries had with
30 the individual drivers are open-ended. The testimony of two drivers, Charles Hawley and Keith
31 Parker, indicate that the individual drivers worked for many years for Henry Industries. At the time
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1 of his testimony Mr. Hawley had worked for Henry Industries for approximately 2-1/2 years.
2 Mr. Parker began work in 2006 and worked through the audit year of 2010. The relationship
3 between Henry Industries and the individual drivers and the long-term care facilities reflects a
4 long-term personal relationship. This relationship forms an important element of the relationship
5 between Henry Industries and the drivers and is reflected in the requirements the driver must meet
6 in order to work for Henry Industries. The selection process used by Henry Industries as well as its
7 monitoring of the actions of the individuals demonstrates that Henry Industries is hiring the
8 individual based on the individual's personal attributes and will terminate the individual if their
9 personal behavior and performance fails to meet the requirements set by Henry Industries in the
10 contract. Henry Industries exercised control over the individuals under the contract.

11 While the contract is specific regarding the qualifications and conduct of the individual, the
12 contract is silent on the requirements of the vehicle to be supplied by the individual. The vehicle's
13 size, its ability to carry loads, or any other specification about the vehicle is absent from the
14 contract. Specific to the contract is the requirement that the vehicle used must be able to be locked
15 to provide security for the items carried under the contract. The primary object of the contract is not
16 for the use of any machinery or equipment as contemplated in *White*, the contract is for the
17 personal labor of the individual. Not any person with a car can meet the requirements of the
18 contract. However, once the individual meets the requirements of the contract, any standard car is
19 acceptable for use under the contract so long as it is properly licensed and insured and has locks
20 on the doors. The mere fact that the individual used a vehicle which the individual supplied in the
21 course of performing work does not change the fact that the essence of the contract is personal
22 labor.

23 In *Lloyd's of Yakima Floor Center v. Department of Labor & Indus.*, 33 Wn. App. 745 (1982),
24 the floor center hired floor and carpet installers to install carpet sold by the center. The installers
25 were required to supply their own tools and equipment, plus a van or vehicle able to transport the
26 carpet and flooring materials to customer locations. The court found that the essence of the
27 agreements between the floor center and the installers was for their personal labor. The van or
28 motor vehicle for transportation was not specialized equipment contemplated by *White*. *Lloyd's* at
29 751. We find on the facts in this record that the individuals hired by Henry industries fail to meet the
30 exclusion from coverage under the first *White* test.

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1 Henry Industries has also failed to prove that the individuals met either of the remaining two
2 tests set forth in *White*. There is no evidence delivering totes of pharmaceuticals required the work
3 of helpers. The individuals are not excluded under the second *White* test.

4 The testimony of the two drivers who worked for Henry Industries in 2010, fails to establish
5 that the drivers employed others to perform the labor under the contract. Charles Hawley stated
6 that he never hired anybody to do the work for Henry Industries. Keith Parker's testimony on this
7 issue is not clear whether he hired others to perform the delivery services. Mr. Parker testified that
8 he was required to make sure the delivery gets done and that if he is not available he finds
9 someone to handle the route. But Mr. Parker also testified on cross examination that he has never
10 had any employees. We are not persuaded by Mr. Parker's testimony that he in fact hired others to
11 perform the work required by the contract. The individuals are not excluded as workers under the
12 third *White* test.

13 The dissent argues that a recent Board decision *In re Yellow Book Sales & Distribution*
14 *Company, Inc.*, Dckt. No. 10 11146 (March 30, 2011) on similar facts reaches a different conclusion
15 and should be followed. The dissent notes that our decision in *Yellow Book* determined that
16 delivery drivers in that decision were independent contractors and the essence of the contract was
17 not personal service and therefore they were not covered workers.

18 In *Yellow Book*, we adopted the Proposed Decision and Order issued by our industrial
19 appeals judge. In doing so we adopted the Findings of Fact and Conclusions of Law contained in
20 the Proposed Decision and Order. *In re Yellow Book Sales & Distribution Company, Inc.*, Dckt. No.
21 10 11146 (Proposed Decision and Order, December 17, 2010). The facts set out in the *Yellow*
22 *Book* Proposed Decision and Order that provided the basis for our Decision and Order in *Yellow*
23 *Book* are substantially different from the facts of this appeal.

24 In *Yellow Book*, the firm contracted once a year with distributors to deliver phone books to
25 residential addresses. These deliveries were in rural settings as well as in urban settings. The
26 delivery was done on designated routes and was to be completed in a three-day period for each
27 route. The delivery was a one-time event and the delivery person had no contact with the
28 occupants of the residence and the firm did not care who actually delivered the books. In *Yellow*
29 *Book*, the essence of the contract was not any individual's personal labor. It was clear on the facts
30 that given the number of books to be delivered and the short time frame the contract required for
31 the delivery, the same individual with the contract would have extreme difficulty delivering the books
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1 without the help of others and elevates the contract to more than just the personal labor of the
2 delivery person. Additionally, the firm owner specifically stated that the firm did not care who made
3 the actual delivery. This is in sharp contrast to the screening and control exerted by Henry
4 Industries over the hiring and monitoring of the drivers delivering the pharmaceuticals. The facts in
5 *Yellow Book* are substantially different facts than presented in this appeal and result in a different
6 decision.

7 RCW 51.08.195 provides an alternate definition of employer and worker and creates an
8 exception from mandatory coverage under the Act. The statute excludes certain individuals from
9 coverage if all six of the specified elements are met. RCW 51.08.195 provides:

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

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

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

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

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

27 (5) On the effective date of the contract of service, or within a
28 reasonable period after the effective date of the contract, the individual
29 has established an account with the department of revenue, and other
30 state agencies as required by the particular case, for the business the
31 individual is conducting for the payment of all state taxes normally paid
32 by employers and businesses and has registered for and received a
unified business identifier number from the state of Washington; and

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

4 Henry Industries must prove all 6 elements of RCW 51.08.195 to establish that its drivers are
5 exempt from mandatory coverage. Our industrial appeals judge, having found that the individuals
6 were excluded as workers under the *White* test, did not address the application of RCW 51.08.195.
7 We have reviewed the record and find that Henry Industries has failed to present evidence to
8 establish that any of the individuals met all the requirements set out in RCW 51.08.195.

9 The two individuals with contracts in 2010 that presented testimony, Mr. Hawley and
10 Mr. Parker provided very little information regarding their activities relevant to the six elements of
11 RCW 51.08.195. Mr. Haley testified that he has a Unified Business Identifier (UBI) number, but he
12 failed to provide it. He stated he has no account with the Department of Labor and Industries. He
13 stated that he has an Employer Identification number (EIN), but he failed to provide it. He stated
14 that he has not worked for other employers than Henry Industries. He has never hired others to do
15 the work under the contract. We are not persuaded that Mr. Hawley has an EIN or a UBI number.
16 If he does, the persuasive evidence would be the numbers and not Mr. Hawley's bald assertion that
17 they exist. But even if we were persuaded that Mr. Hawley had both and EIN and a UBI number
18 without substantially more information this fact is insufficient to establish any of the requirements of
19 RCW 51.08.195. Mr. Hawley is not excluded from coverage under the alternative definition of
20 worker under RCW 51.08.195.

21 Mr. Parker, the second individual with a contract in 2010 that testified, stated that he did not
22 have a UBI number or business license in 2010. He was not registered with the Department of
23 Revenue and did not have an account with the Department of Labor and Industries. He also stated
24 that he did not provide services to any other entity in 2010, only Henry Industries. This evidence
25 fails to establish any of the requirements of RCW 51.08.195. Mr. Parker is not excluded from
26 coverage under the alternative definition of worker under RCW 51.08.195. We agree with the
27 Department of Labor and Industries that the 33 individuals holding contracts with Henry Industries
28 in the first, second, third and fourth quarters of 2010 were workers under the Act.

29 Henry Industries failed to make reports as required and is therefore subject to the penalty
30 provisions of RCW 51.48.030. When reports are not filed as required, the Department has the
31 authority to estimate the amount of unpaid premiums. RCW 51.16.155. The estimate must have
32 some reasonable basis in fact. *In re NAO Enterprises*, BIIA Dec., 89 1832 (1990).

1 The Department knew how much each driver had been paid through tax records compiled by
2 Henry Industries. The amount a driver was paid, divided by the state average wage for the type of
3 work performed, gives a reasonable estimate of the hours worked. Hours worked multiplied by the
4 premium rate produces a reasonable estimate of the unpaid premiums. This is the method the
5 Department used for the audit period, calendar year 2010. The Department's estimate had a
6 reasonable basis in fact and conforms to the requirements of *NAO Enterprises*.

7 In addition to unpaid premiums, Henry Industries was assessed fines, penalties, and interest
8 for failing to keep records, make quarterly reports, and to pay premiums when due. The fines,
9 penalties, and interest assessed by the Department are reasonable.

10 The Department order dated January 10, 2013, is correct and is affirmed.

11 **FINDINGS OF FACT**

- 12 1. On April 8, 2013, an industrial appeals judge certified that the parties
13 agreed to include the Jurisdictional History in the Board record solely for
14 jurisdictional purposes.
- 15 2. Henry Industries, Inc., provides warehouse, logistic, and courier services
16 in Washington State.
- 17 3. During the first, second, third and fourth quarters of 2010, Henry
18 Industries, Inc., contracted with PharMerica to deliver pharmaceutical
19 products to locations specified by PharMerica.
- 20 4. During the first, second, third and fourth quarters of 2010, Henry
21 Industries, Inc., contracted with 33 individuals to deliver pharmaceutical
22 products to locations specified by PharMerica.
- 23 5. During the first, second, third and fourth quarters of 2010 the individuals
24 were working under independent contracts, the essence of which was
25 their personal labor.
- 26 6. During the first, second, third and fourth quarters of 2010 the individuals
27 employed by Henry Industries under independent contracts were not
28 free from the firm's control or direction over the performances of their
29 services.
- 30 7. The firm, Henry Industries, Inc., failed to establish that during the first,
31 second, third and fourth quarters of 2010 the individuals employed by
32 Henry Industries under independent contracts provided service outside
the usual course of the firm's business, or performed services outside all
of the places of business of the firm's enterprise, and were responsible
for the cost of the principal place of business for which the service was
performed.

- 1 8. The firm, Henry Industries, Inc., failed to establish that during the first,
2 second, third, and fourth quarters of 2010, the individuals employed by
3 the firm under independent contracts were customarily engaged in
4 independently established trade, occupation, profession or business, of
5 the same nature as that involved in the contract of service.
- 6 9. The firm, Henry Industries, Inc., failed to establish that during the first,
7 second, third, and fourth quarters of 2010, the individuals employed by
8 the firm under independent contracts were responsible for filing at the
9 next applicable filing period, both under the contract of service and in
10 fact, a schedule of expenses with the internal Revenue Service for the
11 type of business the individual was conducting.
- 12 10. The firm, Henry Industries, Inc., failed to establish that during the first,
13 second, third, and fourth quarters of 2010, the individuals employed by
14 the firm under independent contracts had established accounts with the
15 Department of Revenue, and other state agencies as required by the
16 particular case; for the business the individual was conducting for the
17 payment of all state taxes normally paid by employers and businesses;
18 and had registered for and received a uniform business identifier
19 number from the state of Washington.
- 20 11. The firm, Henry Industries, Inc., failed to establish that during the first,
21 second, third, and fourth quarters of 2010, the individuals employed by
22 the firm under independent contracts were maintaining a separate set of
23 books or records that reflected all items of income and expenses of the
24 business, which the individual was conducting.
- 25 12. The 33 individuals working for Henry Industries, Inc., during the first,
26 second, third and fourth quarters of 2010 were workers and subject to
27 mandatory coverage under the Industrial Insurance Act.
- 28 13. During the first, second, third and fourth quarters of 2010 Henry
29 Industries, Inc., failed to maintain records of the 33 individual workers.
- 30 14. Henry Industries, Inc., failed to produce records of the 33 individuals
31 work when requested by the Department of Labor and Industries.
- 32 15. The penalties assessed by the Department are reasonable.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. The 33 individuals working for Henry Industries, Inc., in the first, second, third and fourth quarters of 2010, were workers as contemplated by RCW 51.08.180 and RCW 51.08.195.

1 3. The Department order dated January 10, 2013, is correct and is
2 affirmed.

3 Dated: April 4, 2014.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

5
6 /s/ _____
7 DAVID E. THREEEDY Chairperson

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

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12 **DISSENT**

13 Because the majority concludes that the delivery drivers under an independent contract with
14 Henry Industries are workers under the Industrial Insurance Act and reaches this conclusion by
15 disregarding the obvious nature of the contract, I must dissent. The contract between Henry
16 Industries and the delivery drivers requires the use of equipment without which the contract cannot
17 be performed. The essence of the contract is the delivery of the pharmaceuticals which clearly
18 requires the use of specialized equipment, an automobile. While an automobile may be used in the
19 course of employment and may not always satisfy the requirement of specialized equipment under
20 the *White* test, here the requirement of the car clearly does. In a recent Board decision *In re Yellow*
21 *Book Sales & Distribution Company, Inc.*, Dckt. No. 10 11146 (March 30, 2011), the Board
22 addressed a similar issue. In the *Yellow Book* appeal, the contract called for the delivery of phone
23 books to individual residences. The Board adopted the findings of the Proposed Decision and
24 Order and issued a Decision and Order. The findings of the Board included a finding that the
25 independent contractor who agreed to delivery of the telephone books "of necessity had to own or
26 supply machinery in the form of a car, pickup or other motorized machine in order to accomplish
27 their delivery." The Board's finding in the *Yellow Book* appeal was correct and should be followed
28 in this appeal. The delivery drivers under contract with Henry Industries "of necessity had to own or
29 supply machinery in the form of a car in order to accomplish their delivery." On this record, I would
30 find that the drivers were independent contractors; the essence of the contract was not personal
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1 labor; and the independent workers are not covered workers under the Industrial Insurance Act. I
2 agree with the industrial appeals judge and would reverse the Department's Notice and Order.

3 Dated: April 4, 2014.

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5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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7 /s/ _____
8 JACK S. ENG Member

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