

## **Dispatch Group**

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### **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*<sup>1</sup> 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.<sup>2</sup> 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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<sup>1</sup> *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956).

<sup>2</sup> 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.<sup>3</sup> 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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47 <sup>3</sup> WAC 263-12-115(2)(a).

1 burden is always on the employer in assessment appeals.<sup>4</sup> 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 <sup>4</sup> 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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10 /s/ \_\_\_\_\_  
11 DAVID E. THREEDY Chairperson  
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15 /s/ \_\_\_\_\_  
16 FRANK E. FENNERTY, JR. Member  
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