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Western Home Transport v. Dept. of Labor Appellant's Reply Brief Dckt. 40462

IN THE SUPREME COURT OF THE STATE OF IDAHO

WESTERN HOME TRANSPORT, INC TRANSPORT, INC. Appellant/Employer. vs. IDAHO DEPARTMENT OF LABOR, Respondent.	)	SUPREME COURT # 40462 INDUSTRIAL COMMISSION #8108-T-2012 APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE INDUSTRIAL COMMISSION

OF THE STATE OF IDAHO

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A.

STATUS OF THE CASE

To assure highway safety and financial protection for the public, the United States government requires interstate cargo haulers to register and obtain a Department of Transportation authority number. Western Home Transport and its independent contractors share the common use of such a number held in Western's name. For the last five years, under the precedent of Giltner vs. Idaho Department of Commerce 145 Idaho 415, 179 P 3d 1071, (2008) this Court has held that, regardless of all other evidence of independence of operation, a truck owner-operator becomes an employee per se, if another's DOT authority is used.

By its appeal and Appellant's Opening Brief, Western urges this Court to reverse Giltner. In reply, the Idaho Department of Labor opposes this result with three arguments:

1. The principle of stare decisis does not permit this Court to overturn Giltner as controlling precedent.

2. There is substantial and competent evidence in the record to support the Industrial Commission's findings.

3. The Department should be awarded its costs and fees.

By this Reply Brief, Western Home reasserts that Giltner is wrongly decided and urges that the Department's arguments are not compelling.

B.
ARGUMENT

I.
STARE DECISIS IS A SUBJECTIVE STANDARD

In arguing that the legal principle of stare decisis did not allow this Court to revisit the

Giltner decision, the Department failed to consider the single most expansive case law dicta on the topic found within the Idaho Reports. In State v. Card, 121 Idaho 425, 825 P 2d 1081 (1992) the Idaho Supreme again considered the constitutionality of the abolution of the insanity defense in criminal cases in the face of a subsequent attack, after previously having ruled on the topic. In a specially concurring opinion, Justice McDevitt, over five pages of legal history examined, defined, critiqued and applied the principle. Upon the state of our law, he concluded:

> "As stare decisis evolved in Idaho, it is clear that this rule does not mandate unyielding acquiescence to prior decisions. Stare decisis is not a confining phenomenon but rather a principle of law." Smith v. State, 93 Idaho 795, 801, 473 P 2d 937, 943 (1970). The rule, to stand by decided cases, and to maintain former adjudications, contemplates more than blindly following some former adjudication, manifestly wrong. If it were to be applied strictly, no former decision would ever be overruled. Higer v. Hansen, 67 Idaho 45, 64, 170 P. 2d 411, 423 (1946) Accordingly, we recognize that this rule, "though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court . . ." Hertz v. Woodman, 218 U.S. 205, 212, 30 S. Ct. 621, 622, 54 L.Ed. 1001 (1910). Indeed, "when the application of this principle will not result in justice, it is evident that the doctrine is not properly applicable." Smith v. State, 93 Idaho 795, 801, 473 P.2d 937, 943 (1970). Sometimes a court must adhere to prior unsatisfactory rules to avoid the difficult and burdensome results occurring after a change after a long period of accommodation. Helvering v. Griffiths, 318 U.S. 371, 63 S. Ct. 636, 87 L.Ed. 843 (1943); Davis v. Department of Labor 317 U.S. 249, 63 S. Ct. 225, 87 L. ED. 246 (1942); Missouri v. Ross, 299 U.S. 72, 57 S. Ct. 60, 81 L. Ed. 46 (1936)
>
> While we must adhere to our previous decisions, stare decisis does require us to reexamine our prior precedents to determine whether they are still valid. The court has stated:
>
> This Court in the proper performance of its judicial function is required to examine its prior precedents. When precedent is examined in the light of modern reality and it is evident that the reason for the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function." Id at 121 Idaho 443-444

Notably, Justice McDevit, while retaining his own conviction that the law was unconstitutional, set aside his prior dissent, adopted the Court's majority view as proper precedent where there were no compelling and cogent reasons which necessitated a departure from prior rulings. He did so because "litigants need to be assured that the law will remain substantially the same day to day." Id at 444

Far from being a lock-box which must remain unopened forever, as both this Court and Justice McDevitt have noted, prior opinions should be revisited and retested under modern conditions periodically. In fact, with all due respect to the common law tradition, reversal of precedent "is a question entirely within the discretion of the court." Hertz v. Woodman, supra

II.

THE GILTNER PRECEDENT IS MANIFESTLY WRONG, UNWISE, UNJUST AND RIPE FOR REVERSAL

The Department of Labor, from pages 7 through 14 of its Reply Brief urges the proposition that the rule of stare decisis typically requires that controlling precedent be followed, whenever this Court has established well-reasoned, worthy and just rules of law. The Appellant is comfortable with this test, even though it is ultimately subjective as noted above. However, this Court has also established parameters by which it may measure holdings which were ill-conceived or subsequently have fallen afoul of societal change or sharper recent perspective. The typical framework for overruling an earlier holding in Idaho is:

1. Is the decision manifestly wrong?
2. Has the holding, over time, proven unjust or unwise?
3. Will reversal vindicate plain, obvious principles of law and remedy a

continued injustice? State v. Humphries, 134 Idaho 657, 8 P 3d 652(2000)

This Court is not, and should not be, hesitant to reverse itself when a holding has proven flawed, as measured by any or all of these tests.

The holding of the majority in Giltner, especially with the contrarian perspective which was instantly supplied by a detailed dissent, is relatively easily found to be of the "suspect" category.

As noted in Western's Opening Brief, the rule that the use of another's DOT authority compels a finding of employment was simply pronounced in Giltner with no citation of prior Idaho case holdings, no adopted out-of-state case law and not even an explanation of a line of reasoning. See Giltner 145 Idaho at 420, where the Court simply says:

> "Here, the reclassified drivers were not "engaged in an independently established trade, occupation, profession, or business." All of the reclassified drivers operated under Giltner's DOT authority. They had no authority to operate without this; they were solely dependent on Giltner's DIT authority to haul goods in interstate commerce. Therefore, as a matter of law, they could not be engaged in an independently established trade, occupation, profession or business. They were necessarily Giltner's employees for purposes of Idaho's Employment Security Law. Thus we affirm the decision of the Commission."

Of course, this lack of antecedents or logical development does not necessarily invalidate an adopted position, if the position is right, just and wise. However, the "DOT authority equals employment per se" rule is none of those. It fails on at least two significant grounds:

A. THE PER SE RULE IS INTERNALLY INCONSISTENT WITH THE LONGSTANDING IDAHO HOLDING THAT REQUIREMENTS COMPELLED BY GOVERNMENT REGULATIONS CAN NOT BE USED TO DETERMINE COVERED EMPLOYMENT

As long ago as 1961, this Court advised the Department of Employment that a finding of an employer-employee relationship could not be achieved or invented by citing features or facts by which the superior required the agent to comply with state or federal legal requirements. National Trailer Convoy, Inc. v. Employment Security Agency of Idaho, 83 Idaho 247, 360 P 2d 994 (1961)

This holding was reaffirmed in Giltner:

> 'Therefore, the Commission erred in finding that Giltner's adherence to federal rules and regulations was evidence of control over the reclassified drivers. Such evidence cannot be used when analyzing the control prong of Idaho Code Section 72-1316. Furthermore, there was insufficient evidence otherwise demonstrating control. " Id at 420, (from the paragraph of the opinion immediately preceding the other Giltner quoted above announcing the per se rule)

Yet Giltner ignores the fact that sharing a DOT authority is just another form of regulatory compliance.

Western requires in its independent contractor agreement that a driver should maintain a compliant logbook, take required physicals, meet insurance requirements and comply with all other Federal mandates. The DOT authority rule emanates from the same source and results in the same collaboration. The interstate highway truck is required to have the long haul registration and Western provides it. Driver reports and tax computations are governmentally required from the road and Western receives them and passes them through. However, these regulatory tentacles do not give Western any more unique control over the independent trucker. The controls arise from regulator demands. Having Western as an umbrella licensee and clearing house does not change the duty or day work of the trucker as to either the motoring public or

government agents. The joint use of DOT authority is logical, convenient for both the private and public sectors and nothing more or less than compliance with governmental regulation. The Court in Giltner is inconsistent when it charges the Department not to use such regulatory impacts in finding employment, but then does so itself by adopting the per-se rule.

B. IT IS UNWISE, UNJUST AND MANIFESTLY WRONG TO DESTROY THE SHARED USE OF A DOT AUTHORITY FOR INDEPENDENT TRUCKERS

This Appellant attempted to give the Department testimony to show a practical and accurate image of how the business life of an unsophisticated, but truly independent tractor-owner could be facilitated by a shared system which alleviated compliance paperwork burdens and yet facilitated a continuation of open road freedoms for the small operator. Government regulation precludes any interstate hauling without anticipating, studying and responding to a multiplicity of jurisdictional rules. Is centralizing that compliance inherently wrong? If, as was shown to be the case with the Western self-employed truckers, the small operators were fully competent to file their own income tax forms as self employed and pay their own social security and labor-related fees, of what public purpose is it to call them "employees," simply because Western made certain that pre-trip permits were secured and post-trip road taxes were allocated?

The Giltner rule sounds the deathknell of the independent trucker for no morally good or socially necessary reason, unwisely and unjustly.

III.

THE COMMISSION'S FINDINGS ARE INSIGHTFUL AND SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE AS TO THE NON-GILTNER ISSUES AND ILLUSTRATE THE OVERREACHING OF THE DEPARTMENT TO FIND COVERED

EMPLOYMENT

The Appellant is not unfriendly to the principal finding of fact and law made by the Industrial Commission:

> "(These) Drivers are Free from Control of Western Home Transport, Inc., Both under Contract of Service and in Fact." Decision and Order, p 4 R-26

These findings are explained and recorded well in the Commission's Decision and Order. Of critical focus before this Court is the issue of compliance with government regulations. Yet, the Commission gave Western Home full credit for establishing regulatory oversight, without creating an employment relationship:

> " Western Home has an interest in ensuring that its drivers comply with all applicable federal regulations. Western Home also has an interest in ensuring that drivers made deliveries on time to specified customers. This kind of control would go to control over the results and, as the Idaho Supreme Court explained in Excell I, control over the results is not the same as control over the manner, method or mode by which a task is performed. 'Merely exerting control over the results of the work does not suggest an employment relationship." 141 Idaho 688, at 695, 116 P 3d 18, at 25 (2005) (citing Beale, 131 Idaho at 42, 951 P 2d at 1269). Further, the Idaho Supreme Court has ruled that adhering to federal law governing interstate trucking is not evidence to show an entity's control over a driver. Hernandez v. Triple Eli Transport, Inc., 145 Idaho 37, 175 P. 3d 199 (2007).
> The provisions of the contract in this case go to enforcement of applicable state and federal regulations and ensure the outcome of the work for which the drivers are retained. The contract does not include provisions that would extend the control of Western Home over "the details of the work, the manner, method, or mode of doing it, the means by which it is to be accomplished, or, specifically, the details, manner, means, or method of doing the work, as contrasted with the result thereof." The routes over which a driver travels are dictated by permits issued by state authorities. The hours a driver works and sleeps are also mandated by federal statute. The costs for insurance and other expenses described in the contract do not control the manner, method, or mode of picking up the cargo and hauling it to the appointed destination, the work for which the owner/

> operators are retained. The weight of the evidence establishes that Western Home does not exert any control over the details, manner, or method the owner/operators use in performing their work beyond the terms described in the contract. Therefore, the owner/operators Western Home uses are free from the control of Western Home, both under the terms of the contract and in fact. Employer has satisfied the provisions of Idaho Code Section 72-1316(4)(a)." Decision and Order, p 6-7, R 27-28.

The Commission next applied the statutory independence criteria of Idaho Code 72-1316(4)(b), as augmented by the 15 point criteria of IDAPA 09.01.35.112.04, to determine whether Western's contractors could be engaged in an "independently established trade." Two of the fifteen factors were given little weight, one deemed neutral, and one, driver's hours, said to be controlled by federal regulation. Of the remaining eleven criteria evaluated directly, the Commission concluded that seven of those illustrated an independent professional relationship. R-29-35

This caused the Commission to concede that "there is significant evidence to suggest that the owner/operators in this case are independent contractors," even under the statutory terms and with the regulatory checklist. Decision and Order, p 14 R 35 However, this state of facts was rejected solely "as a matter of law for Western drivers", since "they operate under the Employer's DOT authority, the 'owner/operators are employees, not independent contractors, per Giltner". Id at R 35

Thus, in effect, there is only one factual finding which is relevant here: A DOT authority was in common use by Western and its contractors on interstate trips. We concede that.

Did that factor destroy the independence of operation of the drivers? Not according to the findings of the Commission. Did the Department carefully investigate this question of an

independent trade and accurately find facts upon which to deliberate objectively and base its own ruling? Absolutely not!

As was shown in Appellant's Opening Brief, the Department's field investigator spoke to NO drivers, misunderstood key facts and reached at least 14 unsupported, speculative and incorrect conclusions in finding "employment" status, for thirteen drivers, eleven of whom had no contact with the Department in any form whatsoever.

Thus, the Department's contention that the Commissions findings are factually supported is both wrong and right:

1. The facts, found by the Commission properly deem these drivers independent.

2. The Commission accurately found that Western Home's DOT authority was used by these drivers.

3. The Commission DID NOT find a record which justified the finding of covered employment on any basis whatsoever, except this Court's mandate in Giltner.

IV.

THE DEPARTMENT'S EFFORTS TO DISTINGUISH PRIOR IDAHO CASE HOLDINGS ARE INSUFFICIENT: THIS COURT HAS FOUND A LACK OF EMPLOYMENT IN NEARLY IDENTICAL CIRCUMSTANCES

At the top of page 13 of the Department's Brief, in a single paragraph, the Respondent offers arguments which seek to factually distinguish two relevant Idaho cases which Western urged were insightful as to both facts and law.

Since the drivers in Hammond v. Department of Employment , 94 Idaho 66, 480 P 2d 912 (1971) did not drive under another's DOT authority, it is discredited offers the Department.

Since National Trailer Convoy, Inc. v. Employment Security Agency of Idaho, 83 Idaho 247, 360 P 2d 994 (1961) in which operators did use an umbrella DOT authority was decided before the common law standard was codified it must be ignored, suggests the Respondent. Both of such points miss the point. One is incorrect.

It appears to the Appellant that Respondent is simply wrong when it says that "the drivers in Hammond did not drive under the putative employer's MC/DOT authority" Brief p 13

The precise facts recited in the opinion of the Hammond Court are these:

> "Hammond has an Idaho PUC permit but no ICC permit. All shipments handled by Coulter and Frei are under the authority of Allied's ICC and Idaho PUC permits. Both drivers are subject to ICC rules and regulations regarding maximum driving hours, trip reports, and equipment safety checks. Both are licensed by Allied and must meet physical and other requirements established by Allied and the ICC. Transportation rates are set by Allied subject to ICC approval and the drivers are paid on a per-shipment basis. Allied sends the money to Hammond who pays over to the drivers their share and retains an amount as rental for the use of his vans.
> Id at 94 Idaho 67

The only fair interpretation of this text is that neither driver had a DOT authority himself. Both drivers used the DOT authority of Allied, which paid them, passing funds through Hammond. If a per se Giltner-rule had existed under the then and now-same statutory criteria, neither driver could have been held to be an independent contractor by either the Industrial Accident Board and the Idaho Supreme Court! Yet that is the holding made by both as to Idaho-based interstate moving truck drivers over forty years ago under the current statutory criteria.

As to National, it is true that it was decided under the common law test which predated the codification of Idaho Code Section 72-1316 in 1963. Western noted that in presenting the precedent. Appellant's Opening Brief p 12.

This case is pertinent for two reasons:

1. The common law test is, was and should be essentially the same as the current code in purpose and practice. The Legislature did not report intending anything different. (See 1963 Idaho Session Laws, Chapter 318, pg 875 wherein the Title of the Act does not specify any intent to expand or modify the traditional common law definitions in use of the time. Instead, the text of the act simply strikes a reference to the usual common law rules and replaces it with the modern "independently established trade, business or profession" language still in use.)

2. The National Trailer operation based also in Boise is identical in business model to that of Western's for the delivery of oversized manufactured homes across state lines using independent-driver, private party trucks under written contract.

The 1961 Idaho Supreme Court passed on the opportunity to develop a pro se rule then. It did not find covered employment under identical facts. That Court also was quite adamant that any requirements and standards imposed for compliance with governmental regulations "ARE NOT INDICIA OF AN EMPLOYER-EMPLOYEE RELATIONSHIP." National, supra, 83 Idaho at 252 (emphasis added) Thus, that earlier Court created the rule which this Court later cited with favor, in the paragraph of the Giltner opinion immediately preceding its inconsistent per se rule announcement.

Contrary to the Department's suggestion, this case is relevant, if not controlling, as a longstanding view that the Western business model works lawfully. It is also contrary to any finding that Giltner can continue to exist as a useful rule of law.

V.

THE DEPARTMENT'S CLAIM OF OTHER STATE PRECEDENT IS WEAK: NO STATE EXCEPT IDAHO REPORTS A GILTNER-TYPE RULE

At page 23 of the Appellant's Opening Brief, Western discusses and distinguishes from the instant facts the only case cited by the Industrial Commission in its Decision and Order for the proposition that other states have adopted a Giltner- type rule: Merick Trucking Inc, v. Missouri Dept of Labor Relations, 933 S.W. 2d 938 (1996) R-31. We noted and criticized that a single sentence of that regional, intermediate appellate court's opinion made a passing reference to the centralized utilization of an ICC license. Id at 942.

While the Department attempted to breathe life back into this connection at pages 11-12 of its Reply Brief, it must discount both the gross factual disparities and confront the reality that no-other Missouri court in the seventeen years since the Merick opinion was issued has cited it as authority for a Giltner-type conclusion.

Likewise the Department has stretched holdings and ignored facts in Oregon, Washington, New York, and especially Missouri.

It cites Bryne Trucking Inc. v. Employment Division, 32 Or. App 229, 574 P 2d 664, affid. 284 or 443, 587 P 2d 473 (1978) for the proposition that Oregon would hold Western accountable "under facts similar to those in this case." Reply Brief p. 11

Not only did the Oregon Supreme Court find that a "subterfuge" was used to make it appear that the drivers owned the company's trucks and observe that 'difficult questions" would have been posed had the operators actually been owners, but neither the Court of Appeals nor the Supreme Court, upon review, make any comment about or attach any significance to the fact that

all drivers used Bryne's common carrier authority in both interstate and intrastate commerce! Id at 574 P2d 665 and 587 P2d 472. There is no per se employment rule in Oregon!

The Department also cites Western Parts Transportation, Inc v. Employment Security Department, 10 Wash App 440 41 P 3d 510 (2002) as a collection of similar facts upon which employment was found. Division One of the Washington Court of Appeals did indeed find that a truck driver could be found to be an "independent contractor" for federal tax law purposes, yet also an "employee" for unemployment coverage. The drivers operated under the trucking firm's state and U.S. Department of Transportation authorities. A dispute arose over an intrastate haul, the contract was terminated and the drivers applied for unemployment benefits. None of these facts are common to our case. Most significantly, an administrative hearing was had, and a determination was made upon the applicable statutory and administrative criteria and the Court sustained the ruling as supported by substantial evidence. Neither party asserted and neither regulators nor judges found that the single use of DOT authority to be determinative or even worthy of comment. There is no per se employment rule in Washington State!

The third case offered by the Department as factually similar was Claim of Short, 233 A.D. 2d 676, 649 N.Y.S. 2d 955 (1996). In a one page decision, a regional intermediate appellate court sustained an administrative board's finding of covered employment made upon substantial evidence. No reference in these facts is made to DOT authority and the driving seems to have been intrastate only. The significant point: There is no per-se employment rule in New York!

Finally, the Department suggests that the Court "See also" K&D Auto Body, Inc. v. Division of Employment Security, 171 S.W. 3d 100 (2005). Reply Brief, p 11. This is a

potentially significant case because it arises out of the same jurisdiction as Merick Trucking, supra, the only case cited by the Commission as possible support for a per se rule. Decided nineteen years after Merick, the K&D opinion should show the current state of Missouri law and especially indicate whether Giltner has recent support in the Midwest. In fact, both cases were decided by the Missouri Court of Appeals Western District.

K&D was a tow truck company operating both within and without Missouri and licensed "throughout the United States", presumably and necessarily by a DOT authority number. Id at 103. Compliance by both the company and drivers with Federal DOT rules is discussed in the text. Id at 104. The Labor and Industrial Relations Commission heard conflicting evidence of both independence and control, applied various statutory tests, considered relevant case law, pondered a twenty point IRS list of factors and made a decision based upon the record. The Court, at great length, reviewed all twenty federal revenue ruling criteria and added two more from United States Supreme Court holdings. Ultimately, weighing and balancing, analyzing and reasoning, the Western District bench affirmed the Commission. This process as undertaken and the result reached by the Missouri Court of Appeals is telling and compelling.

In Missouri, as should be the case in Idaho, there is no per se employment rule. Instead, review and balancing of facts is done. Thus, the attempts of the Department to cite four jurisdictions to butness Giltner is weak at best. The Commission's reliance on Missouri and Merick is likewise misplaced.

The better-reasoned, commonly-used approach would seem to be to determine covered employment based on the presentation of evidence as measured against statutory criteria, even if a single DOT authority is used. This is done in North Carolina, New York, Wisconsin, Oregon,

Washington and even Missouri. It should be done in Idaho. No jurisdiction, except Idaho uses DOT authority as the only criteria, as far as briefing by both the Appellant and the Respondent have found.

VI.

DOT AUTHORITY IS SIMPLY ANOTHER INCIDENCE OF "GOVERNMENTAL REGULATORY COMPLIANCE" AND SHOULD NOT "PER SE" DETERMINE COVERED EMPLOYMENT

So what is different about DOT Authority? This Court does not allow the Department of Employment to butness a finding of "covered employment" by using contractual or operational features of relationship which are mandated by statute or regulation. As noted above, this has been the rule since 1961, when the opinion in Nation Trailer Convoy v. Employment Security Agency of Idaho, supra, was issued.

Obviously, Justice Burdick writing for the majority in Giltner, supra, placed the interstate haul license in an entirely different category than other such regulatory requirements. But the opinion does not explain why. It is true that the DOT license is the lynch pin which binds all of the truck operations together. Holding that permit, Western can contract for loads, obtain trip permissions, call the drivers, assign the loads, collect the taxes and file regulatory paperwork. It becomes the DOT's remote agent to assure safety checks and insurance coverage by the drivers for their trucks. Without it, the operation as structured cannot continue, we concede. Yet, that does not control the truckers. The DOT authority, after all is merely one more imposed regulatory compliance. If Western's license was cancelled tomorrow, each driver could seek his own interstate permit. Western could restructure. The drivers would still drive.

If the Giltner rule is to stand and be understood, this Court must explain how there can be two different categories of governmental regulations - some which can be used to find employer control and some, as it has consistently held, which may not. The Appellant respectfully suggests that the rule long ago announced in National, supra, that covered employment can not be predicated upon governmental control factors is worth preserving. No other state has apparently created two such categories of regulation with a resultant per se process. Instead, as do Washington, Oregon, Missouri and others, we should look toward contracts, facts and actual practices in determining whether any occupation, job or profession is or can be conducted independently! For independence to be presumed away in all trucker circumstances is unfair and makes the DOT authority into something that it is not.

VII.

SIGNIFICANTLY, THE DEPARTMENT MAKES NO ARGUMENT THAT PUBLIC INTEREST WILL BE HARMED IF GILTNER IS REJECTED

Two public policies are involved in the resolution of this case. As to "covered employment," protecting against the possibility that a terminated worker, unable to promptly find new work, the Appellant appreciates that the Court liberally construes the Idaho Employment Security Law to effectuate the purposes of stability for workers. However, these drivers, who own their own trucks, regard themselves as proudly self employed and possess all necessary open road tools, insurances, licenses and in some cases even already possess an individual a DOT authority to haul interstate. For them, the threat of unemployability is largely illusory. They deal with it as does any self-employed person in a sole proprietorship. If displaced, they can immediately contact shippers directly or associate with another truck broker who arranges hauls.

The independent trucker is never without means to make an independent living. Per this record, no Western Home contractor has ever made an unemployment claim, nor would the Appellant ever expect one to do so. The Department does not argue the existence of any threat to the integrity of the unemployment statute requiring sweeping applications here or plead for destitute, abandoned working-men in this case. In fact if Giltner is again upheld, Western may well be compelled to terminate these contracts. Other similarly situated shippers and drivers will be affected as well. The Department, in this instance, is actually working contrary to labor's best interest.

The second public policy at play herein is framed by the United States Department of Transportation rules and National Traffic Safety statutes designed to protect the driving public on interstate roads by assuring that long-haul truckers are inspected, insured, responsible and rested as they transit. Here again, the Department makes no argument that a group using Western's single DOT authority raises public threats or policy problems. Nor can it make such an argument! It is evident from this record, that Western's interaction with drivers and centralized regulatory filings on behalf of the independent operators support and strengthen, not weaken, faithful compliance to federal law. Relieved of regulatory woes, the trucker can concentrate on safe driving. To the extent Giltner impairs these relations, it actually threatens public policy, state and federal.

C.

THE DEPARTMENT SHOULD NOT BE AWARDED ATTORNEY'S FEES AND COSTS

From the outset, as measured by Justice Jones' dissent, the Giltner precedent has been subject to debate and discount. On these facts, even the Industrial Commission couched the

ruling from which has Western appealed by describing it "as unreasonable as it may be, particularly to the Employer in this case." Decision and Order, p 14, R 35

Thus, this appeal is both factually grounded and legally appropriate, rendering the Department's request for fees and costs as without merit.

D.

CONCLUSION

If "compliance with governmental regulations are not indicia of an employer-employee relationship" as this Court ruled, it should now either conform the Giltner ruling to that holding or explain it how it is necessary for the benefit of both the Department and its constituents to keep it. For each and all of the above stated reasons and precedents, this Court should overrule the precedent in Giltner, holding instead that DOT authority is merely another badge of compliance with government regulation, not per se evidence of covered employment.

DATED This ____ day of July, 2013.

Respectfully Submitted:

_____
David H. Leroy, Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 2013, I caused a true and correct copy of the foregoing Appellant's Reply Brief to be sent by hand delivery to the following:

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_____
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