



**Messenger Courier
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the Americas**

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October 20, 2006

VIA HAND DELIVERY

Hon. Ronald M. George, Chief Justice
and the Associate Justices
Supreme Court of the State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *JKH Enterprises, Inc. v. Department of Industrial Relations*
Case No. H-028762
Petition for Review

Dear Chief Justice George and Associate Justices:

The Messenger Courier Association of the Americas (“Applicant” or “MCAA”) respectfully urges the Court to grant the Petition for Review of *JKH Enterprises, Inc.* (“JKH” or “Petitioner”) in a case with far-reaching consequences for the messenger courier industry. This letter is submitted pursuant to Rule 28(g) of the California Rules of Court.

I. THE APPLICANT’S INTEREST.

The MCAA is a nonprofit industry association of, by, and for the messenger courier industry. Since 1987, the MCAA has worked to promote and maintain the common interests of those engaged in the messenger courier industry throughout the United States and abroad.

Courier companies have for over 100 years historically utilized independent contractors to make deliveries to customers, a tradition followed throughout the United States. Such a business model provides for the speedy and reliable delivery of items to thousands of businesses around the country. It is estimated that approximately 71% percent of messenger courier companies in the United States currently utilize independent contractors. These include both smaller corporations and the largest and best known national overnight delivery services.



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Hon. Ronald M. George, Chief Justice
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Supreme Court of the State of California
October 20, 2006
Page 2

Couriers are a vital part of the domestic transportation sector supply chain. A wide variety of industries rely on couriers for same-day and expedited delivery of time-sensitive products, ranging from medical companies that test blood for rapid diagnosis, to law firms with important documents, to companies that need parts and products to conduct daily business. Use of independent contractors allows for the efficient use of resources on an as-needed basis. In fact, the courier industry has long employed an “independent contractor,” or independent owner-operator driver, business model to supplement the courier firms employee resources.

The robust nature of the same-day and expedited delivery service provided by courier firms requires a great deal of staffing flexibility in order to meet delivery needs in a timely and efficient manner. Because the courier industry is the only way to deliver documents and goods in less than 24 hours and according to the customer’s schedule, staffing needs vary based on that schedule, which is a different volume and frequency, dependent on time of day, day of the week and month of the year. Relying strictly upon dedicated employee operations rather than independent owner-operator drivers or combined employee and owner operator business models would make it impossible to efficiently meet demand on high volume days, and expensive to maintain on low-volume days. This model is cost-efficient for owners, but more importantly for customers, because the cost of deliveries would greatly increase if all drivers were to be employees. The independent owner-operator model is integral to maintaining the flexibility necessary to maintain the courier industry, which fills a unique space that no other delivery service provides: on-demand, business to business, same day and expedited deliveries.

In addition to being beneficial for courier services and the businesses that use them, owner-operator drivers benefit from the independent owner-operator model. This business model allows more Americans the freedom to own their own business while also providing flexible scheduling which appeals to young families, families with two working parents, retirees, and independent people who do not want a typical 9-5 workday. Elimination of independent contractors with the concomitant decrease in efficiency of courier services, as would result from the instant case, would cause many such services to go out of business and would have an adverse impact on the primarily small businesses that utilize courier services. Hence, the Applicant has a substantial interest in this matter.

II. WHY THE COURT SHOULD GRANT REVIEW.



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Supreme Court of the State of California
October 20, 2006
Page 3

In a case initially handed down by the Department of Industrial Relations (DIR), JKH's couriers were inexplicably found to be employees. The Hearing Officer's decision, affirmed by the trial court and the Court of Appeal, was based solely on one factor – that their duties are an integral part of JKH's operations, and totally ignored the other factors set forth by the Supreme Court in *S. G. Borello and Son Co., Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 (“*Borello*”). Moreover, the Court of Appeal found that one of the fourteen JKH drivers in question was, in fact, an independent contractor but was silent on why this was so. This leaves the industry with not only an apparently new standard for classifying its drivers but no guidance on how a company can legitimately utilize independent contractors in California.

In addition, the Court of Appeal failed to apply the independent judgment standard of review despite the fact that the case involved a fundamental right of Petitioner. Therefore, the Petition for Review should be granted.

A. The Decision Of The DIR Hearing Officer Was Excessively Narrow And Failed To Consider The Factors Mandated By The Court In Borello.

A Stop Order was issued by the Department of Industrial Relations against JKH ordering it to stop using any employee labor until it had secured workers' compensation insurance. The Company contested the Stop Order, and, after a short hearing was held, the DIR Hearing Officer stated:

I'm going to take a brief recess and review all this information. But you know, we have found couriers with the exact same type of situation as employees in the past, and I don't know that we'll find any different today.

JA 141:9-13.

The Hearing Officer wasted little time reviewing the evidence and forming her conclusion.” Indeed, on the same day as the hearing, the DIR issued its findings and Order upholding the Stop Order. JA 76-62. The Hearing Officer's findings were restricted to the following:

Although some of the factors in this case can be indicative of the workers being independent contractors, the overriding factor is that the persons performing the work are not engaged



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October 20, 2006
Page 4

in occupations or businesses distinct from that of Appellant. Rather, their work is the basis for Appellant's business. . . . Therefore, the finding is that these workers are in fact employees of Appellant.

JA 71:11-20.

Obviously, this decision was hurriedly written and not well reasoned. The DIR made only one finding in support of its conclusion that these individuals were not independent contractors but were employees of JKH. A decision that has such a far-reaching effect for an entire industry should not be left standing based on such a paucity of findings.

The court in *Borello* held that the right to control test is the most significant factor in evaluating independent contractor status. However, it did not hold that said test or any other test be applied in isolation. Rather, the *Borello* court directed that numerous other factors should be considered in determining employee status. These include: whether the person at issue is engaged in an occupation or business that is different from that of the principal; whether the work is part of the regular business of the principal; who supplies the tools and place for the person doing the work; the individual's investment in equipment and materials required to perform the job; the particular skill required; whether the work is usually done under the direction of the principal or by a specialist acting on his or her own; the opportunity for the worker to obtain a profit or incur loss; the time for which the services will be rendered; the permanence of the working relationship; how the job will be paid for; whether the parties involved believe that there is an employer-employee relationship. *Borello* at 351, 355.

The Hearing Officer in the instant case did not take these various factors into account. Instead, the Officer dwelt on one "overriding factor" -- that the persons performing the work were not engaged in an occupation or business distinct from that of the Petitioner. *Borello* did not set forth that particular factor as the "overriding" one in determining a worker's status. Rather, it held that arrangements must be analyzed on their facts and the determining circumstances may be different from case to case. *Borello*, 48 Cal.3d at 354.

The Court of Appeal erroneously followed the Hearing Officer's analysis by basing its decision of employee status on the single finding that the workers' functions constituted the integral part of JKH's courier service business. It misapplied *Borello*, by deeming that finding to be sufficient to constitute employee status and ignoring consideration of the other



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Supreme Court of the State of California
October 20, 2006
Page 5

factors set forth in *Borello*. As a matter of law, this was an erroneous conclusion, and warrants the granting of the Petition for Review.

B. The Court of Appeals Utilized The Wrong Standard Of Review.

Moreover, the Appeals Court erred by failing to apply the independent judgment standard of review, as the case clearly involved JKH's fundamental vested rights. If JKH did not immediately commence treating the workers as employees and obtain workers' compensation insurance for them, it would be prohibited from using these individuals in its operations thereby forcing it to cease operations. There can be nothing more drastic for a company to be ordered to do than shut down its entire operations. If this is not deemed to be the altering of a fundamental right so as to warrant the application of the independent judgment standard of review, there is virtually nothing that could come within that umbrella.

C. Failure To Grant The Petition For Review Will Have A Devastating Impact On The Messenger Courier Industry.

The Messenger Courier Association of the Americas is a nationwide organization. The overwhelming number of its members are small businesses that properly treat messenger couriers as independent contractors. If this case is allowed to stand, it will have a devastating impact on its membership. Many of the entities will be forced to cease operating with a substantial detrimental effect not only on the companies and the workers associated with them, but on the businesses that rely on their services.

The Association submits that the decision of the Hearing Officer, affirmed by the courts, will have a devastating effect on its membership if the Court does not grant the Petition for Review. Surely, such substantial impact should not be based on a decision that wrongfully considered only one factor—whether the workers were an integral part of the principal's operation, and which failed to consider the myriad other factors favorable to independent contractor status of which the Court in *Borello* mandated consideration.

III. CONCLUSION

For all of these reasons, the Messenger Courier Association of the Americas respectfully requests that the Court grant the Petition for Review filed by JKH Enterprises, Inc.



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Supreme Court of the State of California
October 20, 2006
Page 6

Very truly yours,

LITTLER MENDELSON, P.C.

By _____
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RGH/WFT/rac