INDEPENDENT CONTRACTORS

Insurance agents

The statutory provisions which include as "workers" independent contractors whose personal labor is the essence of the contract were not designed to embrace only "spurious" independent contractors. (RCW 51.08.070, RCW 51.08.180). …In re Family Life Insurance Co., BIIA Dec., 63,147 (1984) [dissent] [Editor's Note: Overruled, In re James Shanley (Northwestern Mutual Life Insurance Co.), BIIA Dec., 87 0485 (1988).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FAMILY LIFE INSURANCE COMPANY ) DOCKET NO. 63,147
FIRM NO. 217,366 ) DECISION AND ORDER

APPEARANCES:

Employer, Family Life Insurance Company, by
Ryan, Swanson, Hendel and Cleveland, per
David H. Oswald and Jerry H. Kindinger

Department of Labor and Industries, by
The Attorney General, per
Anthony B. Canorro and William A. Garling, Jr., Assistants

This is an appeal filed by the employer on October 11, 1982, from an order of the
Department of Labor and Industries issued August 11, 1982, which ordered the employer to pay the
additional premium ($6,735.58) as set forth in the Department's letter dated March 4, 1982, and
further ordered the employer to continue to pay premiums on behalf of all workers subsequent to
the audit. AFFIRMED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
Order issued on September 22, 1983, in which the order of the Department dated August 11, 1982,
was sustained.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
no prejudicial error was committed and said rulings are hereby affirmed.

Reduced to its essence, the substantive issue presented by this appeal is whether the sales
agents of Family Life Insurance Company are "workers" within the meaning and contemplation of
RCW 51.08.180, so as to require Family Life Insurance to pay premiums for their industrial
insurance coverage.

Following an audit completed on January 8, 1982, the Department determined that the sales
agents of Family Life were in fact "workers", and that Family Life owed the Department the sum of
$6,735.58 in unpaid industrial insurance premiums, covering its sales agents for the inclusive
period from October 1, 1979 through September 30, 1981 (eight quarters).

Family Life maintains that the independent contract provision within RCW 51.08.180 was
intended by the legislature to embrace only spurious independent contracts, not those having time-
honored traditional bases. Under the time-honored test (right of control), it contends it exercises little, if any, control over its sales agents. Family Life takes the position that the Department for the first time in the thirty-five years that Family Life has been doing business in Washington, that its agents are "workers" under the statute. It maintains that the Department's position is inconsistent with, and contrary to, other state law (RCW 48.01.030, RCW 50.04.230, WAC 458-20-164 and WAC 458-20-105). Family Life further argues that the Department's position is inconsistent with federal taxation law, citing 26 U.S.C., Section 3306(c)(14).

Frank R. Okoren is an auditor employed by the Department in its Seattle service location. Sometime after October 16, 1979, Mr. Okoren received a written field audit assignment stating that "subject firm (Family Life Insurance Company) was audited in July, 1976, and assessed hours for the insurance agents. However, the firm is still not reporting those agents."

Mr. Okoren testified that his audit consisted essentially of applying Procedure Manual Number 7 (Exhibit 2) to the contents of Family Life's Servicing Agent Agreement (Exhibit 1). Exhibit 1 is a blank standard form that Family Life uses in contracting with each of its sales agents. Exhibit No. 2 is a directive or memorandum, internal to the Department's auditors, which was issued on February 23, 1973 by Mr. Vernon Castle. It is intended to be followed by the Department's auditors in determining whether salesmen and insurance agents are in fact employees (workers). Mr. Okoren determined that Family Life's agents were workers under Class 63-3 and computed the eight-quarter arrearages of the employer.

It should be noted that the appeal of the employer does not contest the accuracy of computation of the industrial insurance premiums involved; its appeal solely challenges the determination that its sales agents are its employees (workers).

The pertinent portion of the definition of "employer", found in RCW 51.08.070, has remained unchanged since its amendment in 1977. That portion reads as follows:

"Employer' means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers." (Emphasis supplied)

As pertinent here, that portion of the definition of "worker", found in RCW 51.08.180, has similarly remained unchanged since its 1977 amendment. That portion reads as follows:
"Worker' means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of, or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment." (Emphasis added)

The "personal labor-independent contract" portion of the foregoing definitions had its inception in a 1927 amendment to the definition of "employer", found in Laws 1927, Chapter 310, Section 2. That definition read as follows:

"Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extra-hazardous work or who contracts with another to engage in extra-hazardous work".

After a 1937 amendment (Laws, 1937 Chapter 211, Section 2), the definition of "worker" (workman) was essentially the same as it is now. It reads as follows:

"The term workman within the contemplation of this Act means every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his personal labor for any employer coming under this Act, whether by way of manual labor or otherwise in the course of his employment."

We note that certain independent licensed contractors were removed from the "personal labor-independent contract" portion of the definitions of worker and employer by the 1981 amendment (Laws 1981, Chapter 128, Sections 1 and 2) to RCW 51.08.070 (defining employer) and RCW 51.08.180 (defining worker). Contrary to the urging of Family Life, we have been unable to conclude that the legislature intended, in adopting the "personal labor-independent contract" definition of "worker" and "employer," to embrace only spurious independent contractors. We believe the legislative intent was to include all "personal labor-independent contracts".

We have been able to find no Washington cases interpreting the "personal labor contract" portion of the definition of worker, or of employer, as applied to insurance sales agents.

In Chapter VIII (Sections 43.00 through 56.35) of his The Law of Workmen's Compensation, Professor Arthur Larson exhaustively discusses "Employment Status". At Section 43.54, Professor Larson indicates a trend toward subordinating the concept of "control" to that of the "nature of work"
in determining employment status. He cites *Gordon v. New York Life Insurance Company*, 300 N.Y. 652, 90 N.E. 2d 898 (1950), reversing *Gordon v. New York Life Insurance Company*, 275 App. Div. 135, 89 N.Y.S. 2d 83 (1949). He notes that in *Gordon*, every fact relating to control was overwhelmingly on the side of independent contractorship. By written contract, the insurance salesperson was free to exercise her own discretion and judgment with respect to the persons from whom she would solicit applications and with respect to the time, place and manner of solicitation. Her payment was by commission, not by time. She paid her own expenses and used her own car. She was not required to make any report of her activities or to attend any meetings, although meetings were held at which she could attend if she wished. She had no office space. The company, after her initial training period, did not in fact exercise any control over her work, beyond limiting her to a certain territory and forbidding her to sell competing insurance. For good measure, the written contract said explicitly that she should not be an employee but an independent contractor. The Compensation Board held her to be an employee; the appellate division reversed by a 3-2 decision; and the court of appeals restored the award by a 4-3 decision, saying that it was for the Board to choose between conflicting inferences. Professor Larson points out that in *Gordon* there were no facts whatever showing actual right or exercise of control. The closest thing to it was evidence that the company "suggest[d]" that salesmen work eight hours a day--but the very word "suggest" implies the absence of control, especially when the contract and the conduct of the parties show that no control over the time of work existed. How, then, can such a decision be explained? The only explanation is that the "control" test was not to be the fulcrum for determining statutory coverage. In its place is the court's unexpressed conviction that the company was getting its basic business accomplished through this employee. The employee was not in an independent business as a general insurance broker might be. She was in continuous service, rather than on a single project. She was not in the kind of business where she might be expected to provide her own protection against injury. In short, she met every "nature of the work" test, and not a single "control" test; and the court without accounting for the result in these terms does in fact reach a most appropriate result in applying liberal construction theories.

We note that in *Gordon*, discussed above, the decision was reached without the enabling power of a "personal service-independent contractor" definition of employer and worker, such as we have in this state.
Professor Larson comments that to bring theory and practice together, New York ought either to copy the Wisconsin statute (which he sets forth in Section 43.52.) or announce judicially the emergence of the new (nature of the work) test of employment.

Professor Larson also cites Davis v. Home Insurance Company, 291 So. 2d 455 (La. App. 1974). There, the claimant worked under a written contract with the insurance company which required a minimum of commissions if he was to receive renewal commissions. The contract purported to exclude representation of other companies, although the latter requirement was not strictly enforced. He was expected to render liaison services between the company and the policy holders, and was included in a group hospitalization plan. Social security deductions were withheld from his commission payments. On the other hand, the contract stipulated that he was an independent contractor. The claimant was held to be an employee.

Looking at Exhibit 1, we are persuaded that the insurance sales agents of Family Life were in fact "workers", within the definition of RCW 51.08.180, when measured against Professor Larson’s "nature of the work" test (Sections 43.50 through 43.52), as well as the yardstick of Exhibit 2.

The proposed findings of fact, conclusions of law and order are hereby stricken and replaced by those that follow.

**FINDINGS OF FACT**

1. On January 8, 1982, the Department of Labor and Industries completed an audit of Family Life Insurance Company for the inclusive period from October 1, 1979 through September 30, 1981. As a result of that audit, the Department asserted that Family Life Insurance Company owed the Department additional premiums in the sum of $6,735.58 for industrial insurance coverage, for its insurance sales agent who had not been reported as employees during that audit period. On March 4, 1982, the Department by letter issued a demand to Family Life for the payment thereof. On March 12, 1982, the Department received a letter of protest from the employer. On May 17, 1982, the employer filed with the Department a letter requesting reconsideration. On August 11, 1982, the Department issued an order demanding that the employer pay the additional premium as set forth in the Department's letter of March 4, 1982, and further ordered the employer to continue to pay premiums on behalf of all workers subsequent to the audit. On October 11, 1982, the Board of Industrial Insurance Appeals received from the employer a notice of appeal from that order dated August 11, 1982. On October 28, 1982, this Board issued its order granting the appeal subject to proof of timeliness, assigned it Docket No. 63,147, and directed that proceedings be held on the issue raised therein.
2. The envelope containing the employer's notice of appeal, received by this Board on October 11, 1982, was properly addressed to this Board with adequate postage prepaid, and bore a postmark showing that it had been deposited in the mails on October 8, 1982, within sixty days of the issuance of the Department's order dated August 11, 1982.

3. During the inclusive period from October 1, 1979 through September 30, 1981, Family Life was engaged in business within the State of Washington processing insurance applications, underwriting risks, administering insurance policies, collecting premiums, and paying claims.

4. During the inclusive period from October 1, 1979 through September 30, 1981, sales agents under independent contract with Family Life solicited and secured applicants for that company's insurance policies.

5. During the inclusive period from October 1, 1979 through September 30, 1981, those insurance sales agents were working for Family Life, each under an independent contract, the essence of which was his or her personal labor in the course of his or her employment with Family Life.

6. During the inclusive period from October 1, 1979 through September 30, 1981, none of the insurance sales agents under contract with Family Life Insurance Company were reported by the latter to the Department as employees or workers. During that period, no premiums were paid by Family Life to the Department for industrial insurance coverage for any of those insurance sales agents. Family Life Insurance Company owes to the Department the sum of $6,735.58 as additional premiums for industrial insurance coverage for its insurance sales agents during that inclusive period.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions are entered:

1. The notice of appeal, received by the Board of Industrial Insurance Appeals from Family Life Insurance Company on October 11, 1982, appealing from an order issued by the Department of Labor and Industries on August 11, 1982, was timely filed within the meaning and contemplation of RCW 51.52.060. This Board has jurisdiction of the parties and the subject matter of this appeal.

2. During the inclusive period from October 1, 1979 through September 30, 1981, Family Life contracted with insurance sales agents, all of whom were "workers" employed by Family Life Insurance Company, within the meaning and the contemplation of RCW 51.08.180.

3. During the inclusive period from October 1, 1979 through September 30, 1981, within the meaning and contemplation of RCW 51.08.070, Family Life Insurance Company was engaged in business in this state and in the course of its business entered contracts with insurance sales agents
as workers, the essence of the contracts being the personal labor of such workers.

4. The order issued by the Department of Labor and Industries on August 11, 1982, which ordered Family Life Insurance Company to pay to the Department as additional premiums the sum of $6,735.58 as set forth in the Department's letter dated March 4, 1982, and which further ordered Family Life to continue to pay premiums on behalf of all workers subsequent to the audit, is correct, and should be affirmed.

It is so ORDERED.

Dated this 23rd day of April, 1984.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L. HALL Chairman

/s/
FRANK E. FENNERTY, JR. Member

DISSENETING OPINION

I dissent from the Board majority's decision. I do not believe that independent insurance agents appointed by an insurance company to solicit insurance applications in the manner and under the circumstances exemplified by this case are "workers" subject to mandatory workers' compensation coverage within the meaning and historical legislative intent of RCW 51.08.180.

As support for this position, I would be hard-pressed to write an opinion which would improve upon the arguments already made a part of this record by Family Life Insurance Company's counsel, in the form of the Memorandum of Facts and Law submitted at the hearing on June 8, 1983, and the Company's Supplemental Brief submitted on July 1, 1983. I quote what I consider to be the most pertinent portions of those documents:

"It is the Company's position that, as a matter of fact and law, its agents are independent contractors whose efforts are not rendered for an employer, but rather themselves. Washington case law is of little help in this case, except to demonstrate by absence of authority the correctness of the Company's position. No Washington court has ever before held that independent insurance agents, licensed and regulated by the state and paid solely by commissions, are included within the RCW 51.08.180 definition of worker."
Washington cases which have dealt with the intent and scope of the subject statute have done so only on a very general basis. The common law test of whether an individual is an employee or independent contractor is used. Clausen vs. Dept. of Labor & Industries, 15 Wn. 2d 62, 129 P.2d 777 (1942). That is a legal test applied to the facts of each case and turns principally upon whether the alleged employee is subject to direction and control as to the methods and details of doing work. Risher vs. Dept. of Labor & Industries, 55 Wn. 2d 830. 350 P.2d 645 (1960). Where the requisite right to direct and control is present, an employer-employee relationship is deemed to exist.

Id. Where it is not present, the relationship is that of an independent contractor.

The sole purpose of the Legislature in 1937 by adding the phrase pertaining to independent contracts was to eliminate bogus employment contracts in which some employers had hired their work outside by independent contractors in order to avoid premium payments under the Act. See, Lloyd's of Yakima vs. Dept. of Labor & Industries, 33 Wash. App. 745 (1982); Norman vs. Dept. of Labor & Industries, 10 Wn. 2d 180, 184 (1941). The Legislature did not intend to bring bona fide independent contracts reflecting a real traditional relationship within the Act. This was confirmed in White vs. Dept. of Labor & Industries, 48 Wn. 2d 470, 294 P.2d 650 (1956), where it said that the provision was to apply:

in those situations where the work could be done on a regular employer-employee basis, but where because of the time, place, manner, performance and basis of payment it could be urged that the worker was an independent contractor rather than an employee.

Thus, the independent contract provision of RCW 51.08.180 was intended to embrace only spurious independent contractors, not real ones. That is not the situation where traditional insurance agents are entrepreneurial and independent and where such agents hold that status because they want it and have always cherished it.

This case is not a situation where Family Life seeks to transform, for flimsy legal purposes, an employee into a bogus independent contractor. The independent insurance agents appointed by Family Life pose the classic case of a profession that does not lend itself to control as to the methods and details of his work. Once an agent develops a certain proficiency, it is only natural that he alone manage the details of his work. These agents are professionals in their field and as such are expected to act with their own judgment, discretion and initiative in conducting their activities.
Independent agents appointed by Family Life are entrepreneurs, and they have the entrepreneurial spirit. Their earnings depend on how they organize their time, how they get interviews, how many calls they choose to make, when and where they make such calls and how effective they are in their way of selling insurance.

The Insurance Code distinguishes between employees of companies, who need not be licensed as agents although they may assist agents in soliciting, negotiating, and effectuating insurance, and agents, who must be licensed. An individual who may so assist an agent on behalf of an insurer is defined as a person "employed on salary by an insurer" (see RCW 48.17.040). That person is an employee. On the other hand, an agent must be licensed under the provisions of RCW 48.17.010, and that term is defined as a person appointed by an insurer to solicit applications for insurance in its behalf. Obviously, then, the insurance code draws a distinction between the salaried employee, who is, in fact, an employee, and the licensed agent, who is a commissioned, independent contractor and not an employee.

Agents here do not perform "personal labor for an employer." Under both federal and state laws, agents are deemed to engage in business for themselves and to hold their services out to the public. Absent the right to exercise immediate control and supervision, which right Family Life does not have over agents, it cannot be said the efforts of said agents are for anyone but themselves.

And, further:

These salespersons are not employees but independent contractors. The written contract which each has with the Company expressly so provides. Exhibit 1 to Hearing. All practical indicia of the relationship strongly confirms the independent contractor status. That evidence was presented through the testimony of Messrs. Paul Johnson and Mel Caudell and is itemized in pages 10-13 of Family Life's Memorandum of Facts and Law. This evidence was uncontroverted by the Department. Further, Mel Caudell testified that the salespersons take pride in having their own business and they would not consent to employee status. Without such consent by one alleged to be an employee, our Supreme Court has said no employment status can exist.

We hold that, in cases involving the issue of whether under Washington's workmens' compensation laws there is an employer-employee relation, such a relation cannot exist without the consent of the workman." Fisher v. Seattle, 62 Wn. 2d 800, 806 (1963).

Under the facts here presented, absent proof of an employee status, the Company cannot be otherwise found liable for industrial insurance premiums under RCW 51.08.180 because the essence of salespersons' labor is not performed for the Company." (Emphasis added)
Based on the foregoing, I dissent from the Board's majority decision. I would reverse the Department's order of August 11, 1982, and direct that no mandatory industrial insurance coverage be imposed on these independent insurance agents.

Dated this 23rd day of April, 1984

/s/
PHILLIP T. BORK  Member