Peter Black Real Estate Co.

INDEPENDENT CONTRACTORS

Real estate agents

Where real estate agents working under independent contracts with a real estate company do not supply any special equipment necessary to perform the job, and it is not their duties to others, the essence of their contracts is their personal labor. The fact that agents occasionally contract with third parties to perform some services necessary to facilitate a sale does not constitute a delegation of their duties under their contracts. Under the negative three-pronged test set forth in *White v. Department of Labor & Indus*, 48 Wn.2d 470 (1956) they are "workers" within the meaning of RCW 51.08.180. ***….In re Peter Black Real Estate Co.*, BIIA Dec., 88 1191 (1989)** [*Editor's Note*: *Affirmed, Black Real Estate v. Labor & Indus.,* 70 Wn. App. 482 (1993).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PETER M. BLACK REAL ESTATE CO., INC.	)	**DOCKET NOS. 88 1191 & 88 1192**
	)	
FIRM NO. 517202	)	**DECISION AND ORDER**

APPEARANCES:

Firm, Peter M. Black Real Estate Co., Inc., by
Platt, Irwin, Colley, Oliver, Miller & Wood, per
Stephen E. Oliver

Department of Labor and Industries, by
The Attorney General, per
Linda M. Gallagher, Assistant

The appeal assigned Docket No. 881191 was filed by the employer, Peter M. Black Real Estate Co., Inc. on March 24, 1988 from an order of the Department of Labor and Industries dated February 24, 1988. The order affirmed Notice and Order of Assessment of Industrial Insurance Taxes No. 57972, issued by the Department on January 27, 1988. The Notice and Order assessed industrial insurance taxes for the period April 1, 1987 through September 30, 1987 in the amount of $ 775.12.

The appeal assigned Docket No. 881192 was filed by the employer, Peter M. Black Real Estate Co., Inc., on March 24, 1988 from an order of the Department dated March 14, 1988. The order affirmed Notice and Order of Assessment of Industrial Insurance Taxes No. 57971, issued by the Department on January 27, 1988. The Notice and Order assessed industrial insurance taxes for the period January 1, 1985 through March 31, 1987 in the amount of $ 2,700.09. The Department orders are **REVERSED IN PART**.

ISSUES

1. Whether the six individuals who acted as real estate agents pursuant to Peter M. Black's brokerage license during various portions of the relevant periods are workers within the meaning of RCW 51.08.180.
2. Whether Peter M. Black, the president and sole director and shareholder of Peter M. Black Real Estate Co., Inc., is included within the mandatory coverage provisions of the Industrial Insurance Act;

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 in response to a Proposed Decision and Order issued on September 9, 1988 in which the orders of the Department were 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.

Although the evidence presented by the parties is well set forth in the Proposed Decision and Order, we believe our own recitation of the evidence is important to the disposition of this appeal.

Status of Real Estate Agents:

Peter M. Black Real Estate Co., Inc. is a Washington corporation engaged in the business of real estate sales and brokerage. The corporation's designated broker is Peter M. Black. Although the company was incorporated on March 9, 1979, it did not engage in any work or business until September of 1979.

During the period relevant to these appeals, i.e., January 1, 1985 through September 30, 1987, six licensed real estate sales agents worked with the Peter M. Black Real Estate Co., Inc. pursuant to written and oral agreements. Written contracts signed by five of those sales agents were received into evidence in this matter as Exhibit Nos. 10-14; with the exception of the agreement signed by Ms. Marguerite A. Glover (Exhibit No. 13), the agreements are identical. According to those agreements, the sales agents are deemed to be independent contractors, and not servants, employees, or partners of the broker.

Peter M. Black Real Estate Co., Inc. provides office space for its sales agents, including the use of an office computer. As the designated broker, Mr. Black attempts to insure that the sales agents comply with all relevant laws. However, no supervision is provided concerning the manner in which the sales agents perform their duties. The sales agents work no specific hours, and are not required to be in the office a specific number of hours per day or week. No regular sales or staff meetings are conducted, and no sales training is provided to the sales agents. The agents are not paid a salary or wage, and with the exception of Ms. Glover, are compensated strictly on a commission basis.

Ms. Glover, whose contract differs from those of the other sales agents only with regard to the payment of expenses and compensation, receives a portion of the commissions earned by other sales agents in exchange for her paying certain expenses incurred by Peter M. Black Real Estate Co., Inc. As stated, Ms. Glover's contract is otherwise identical to those signed by the other sales agents. Under those agreements, the sales agents agree to work diligently and with their best efforts to sell, lease, or rent any and all real estate listed with the broker, and to solicit additional listings and customers. Further, only those expenses "which must, be reason of necessity, be paid from the commission," are shared by Peter M. Black Real Estate Co., Inc.

Any other expenses incurred by the sales agent are the responsibility of the sales agent. According to the testimony presented, the sales agent must furnish his or her own automobile, business supplies, and any other equipment the agent desires to use, such as a camera or video camera recorder. Further, a sales agent will occasionally contract with a third party, such as a surveyor, pest inspector, or contractor, whose services are necessary to facilitate a sales transaction. On occasion, the sales agent has become personally liable for such expenses when the transaction did not culminate in a sale.

The Department does not contend that the sales agents are employees of Peter M. Black Real Estate Co., Inc., and it is quite apparent, that due to the absence of any direct control over the manner in which the sales agents perform their duties, the agents are not employees of the company. Although we are urged to find that the sales agents are partners or joint venturers with Peter M. Black Real Estate Co., Inc., we agree with our Industrial Appeals Judge that this is not the case. Although each sales agent has the power to veto the hiring of a new sales agent, no sales agent has a full right of control or management of the business. Ms. Glover is the only sales agent who is contractually obligated to pay any of the expenses incurred by Peter M. Black Real Estate Co., Inc. She is not at risk or liable for any losses incurred by the firm, and she has no right of management or control in the business. We are satisfied that these sales agents are neither partners nor joint venturers. See, State v. Bartley, 18 Wn.2d 477, 139 P.2d 638 (1943).

It is therefore clear that we must characterize the sales agents as independent contractors. If this case had arisen prior to 1937 our discussion would be concluded, because prior to that year independent contractors were not within the scope of the Industrial Insurance Act, nor were the people with whom they had contracted required to pay industrial insurance premiums.

In 1937, however, the Legislature expanded the definition of workman (now "worker") to include within the terms of the Act independent contractors whose personal labor constituted the essence of the contract. Laws of 1937, ch. 211, § 2, p. 1030. The relevant statute, RCW 51.08.180, now reads, in part,:

> `worker' means every person in the 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 corollary to this definition of "worker" is the definition of "employer" as contained in RCW 51.08.070. That statute reads, in part:

> `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 added).

It is readily apparent that in modifying the definition of "worker" the Legislature was intending to expand the coverage of the Act to not only extend the protections of the Act to a greater number of individuals, but to also require the Department to assess industrial insurance premiums on the hours of work performed by such individuals. The 1937 amendment was, as stated by our Supreme Court in White v. Department of Labor and Industries, 48 Wn.2d 470 (1956):

> . . . intended to protect workmen (and to make contracting parties for whom the work is done responsible for industrial insurance premiums) in those situations where the work could be done on a regular employer-employee basis but where, because of the time, place, manner of performance, and basis of payment, it could be urged that the workman was an independent contractor rather than an employee. Prior to the 1937 enactment, the independent contractor, when injured, was not entitled to the protection of the Workman's Compensation Act, and the party with whom he had contracted was excused from paying premiums. It was felt to be desirable, and rightly so, to eliminate the technical issue of whether the workman was an employee or an independent contractor by giving him protection in either situation.

48 Wn.2d at 474.

Although the 1937 amendment expanded the definition of "worker", the expansion was not complete. As stated by the court in Haller v. Department of Labor and Industries, 13 Wn.2d 164, 167 (1942) the amendment evidenced a legislative intention "to extend industrial insurance protection to some, but not all, independent contractors . . . ." (Emphasis added). The White court, too, recognized that even with the 1937 amendment there would remain independent contractors who would not be subject to the mandatory coverage of the Act. It noted that while a person might be an independent contractor not covered under the Act, that did not prevent him or her from having the protection of the Act if he or she desired to qualify as a working employer, gave necessary notice to

the director, and paid the necessary premiums. 48 Wn.2d 477-478; See RCW 51.12.115 and RCW 51.32.030.

Our analysis of whether these salespeople are independent contractors whose personal labor is the essence of the contract should be tempered by the Legislature's declaration of policy as contained at RCW 51.12.010. This declaration provides that:

> There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of this state.

RCW 51.12.020 goes on to provide a list of the only employments which are not subject to mandatory coverage.

Yet, while there is a presumption in favor of mandatory coverage, the Legislature did not intend to include all independent contractors within the mandatory coverage of the Act. RCW 51.12.020 excludes a number of employments from mandatory coverage, including "sole proprietors." RCW 51.12.020(5). Thus the Legislature contemplated that individuals who are engaged in a business for themselves, hold themselves out to the public as independent business people, or otherwise act and/or operate as independent entrepreneurs, should be excluded from the mandatory coverage of the Act. In a sense, the statutory framework creates a continuum, with independent contractors, who are covered pursuant to RCW 51.08.180, on one end and sole proprietors, who are excluded pursuant to RCW 51.12.020(5), on the other.

Our courts have not delineated a clear cut test for determining whether personal labor is the essence of an independent contract. In Haller, supra, which was only the second case decided under the 1937 amendment, the court stated that the determination must:

> depend upon the provisions of the contract, the nature of the work to be performed, the situation of the parties, and other attendant circumstances.

13 Wn.2d at 167.

The above quoted framework for analyzing whether personal labor is the essence of the contract has been reiterated by the courts on several occasions. Massachusetts Mutual Life Insurance Co. v. Department of Labor and Industries, 51 Wn. App. 159, 163 (1988); Lloyd's of Yakima Floor Center v. Department of Labor and Industries, 33 Wn. App. 745, 749 (1982); Cook v. Department of Labor and Industries, 46 Wn.2d 475, 476 (1955).

Early cases dealing with the "personal labor" inclusion characterized the inquiry in terms such as whether the independent contractor's "personal efforts constitute the main essential in accomplishing the objects of the employment", Norman v. Department of Labor and Industries, 10 Wn.2d 180, 184 (1941), or whether the labor to be performed was "the vital sine qua non, the very heart and soul" of the contract. Haller, at 168. Where others could have performed the work under a contract to haul logs it was said that "labor that can be done by others is not personal as the word is used in the statute." Crall v. Department of Labor and Industries, 45 Wn.2d 497, 499 (1954).

It was not until the Supreme Court's decision in White, supra, that a somewhat more workable test was developed to explain the results reached up to that time. In White the court analyzed the factual situations in its prior cases of Norman, Haller, Crall and Cook and concluded that the 1937 amendment:

> was not intended to cover an independent contractor (a) who must of necessity own or supply machinery or equipment (as distinquished from the usual hand tools) to perform the contract (the Crall and Cook cases, supra), or (b) who obviously could not perform the contract without assistance (the Haller and Cook cases, supra), or (c) who of necessity or choice employs others to do all or part of the work he has contracted to perform (the Haller and Crall cases, supra).

(Emphasis added)[1]

A recent case involved the question of whether personal labor was the essence of the contract between an insurance company and its various insurance agents. Massachusetts Mutual Life Insurance Co., supra. In Massachusetts Life it was noted that the insurance company had never disapproved a career agent's contract, that general agents and sales agents may and do delegate their duties to others (e.g. telephone solicitation) and that agents may represent up to 50 insurance companies at a time. Relying solely on the fact that the agents may and do delegate their duties to others, the court held that the insurance agents were not "workers" for purposes of the Act.

By specifying instances in which personal labor is not the essence of the independent contract, the White case provides a framework for resolving a number of cases involving similar facts. Yet the

[1] The court in White cautioned, in dicta, that the mere fact a person might own and use machinery and equipment in his or her work does not make him or her an independent contractor. If, in the operation of a truck, tractor or other equipment the person "is subject to the direction and control of the employer' the person is an employee, even though the amount paid for the use of the equipment may be much more than would be paid for the person's services as an operator of the equipment. 48 Wn.2d at 477.

White test is incomplete. It does not further delineate the circumstances under which personal labor is the essence of an independent contract.

In reviewing the factual scenarios presented by the court cases as well as the applicable statutes, there are a number of factors in addition to the White criteria which seem to be important to the determination of whether personal labor is the essence of the contract. These include:

(1) Right of Control. Does the employer exercise control over the time, place or manner of performance of the contract? Although technically the "right of control" test is for determining whether the individual is an employee as distinguished from an independent contractor, it nevertheless continues to have a great bearing on whether the essence of the contract is personal labor. The more control exercised by the employer in the day-to-day performance of the contract, the more likely that personal labor is deemed the essence of the contract (See, e.g., Lloyd's);

(2) Spurious Independent Contracts. Although not cited as a reason in the case law, independent contracts established only as a guise or subterfuge to avoid industrial insurance premiums should not be condoned. See RCW 51.04.060;

(3) Special Abilities of the Independent Contractor. If the independent contractor has special or superior abilities of critical importance to the employer, this tends to suggest that the essence of the contract is personal labor (See, e.g., Lloyd's and Norman.) On the other hand, if who performs the contract is a "matter of indifference" to the employer, this suggests the contrary (Haller, 13 Wn.2d at 164);

(4) Exclusivity of Contract. If the independent contractor is not limited in his ability to concurrently contract with others there is a likelihood that the courts will conclude that the essence of the contract is not personal labor. (See, e.g., Crall; Massachusetts Life);

(5) Indicia of Independent Business. Although personal labor of the independent contractor may be involved, the circumstances may suggest that he or she is simply engaged in an independent business or occupation. See, e.g., Camp v. Department of Labor and Industries, 55 Wn.2d 839 (1960); RCW 51.12.020(5).

(6) Work can be Performed Within an Employer/Employee Relationship. If the work could be done on a regular employer/employee basis but the parties have chosen to structure the relationship as an independent contract, then it is more likely that the essence of the contract is personal labor and that the independent contractor is a "worker". See, White.

(7) Nature of the Work. If the "employer" is getting its basic work done through the services of the independent contractor, then that person is more likely to be considered a "worker". Department of Labor and Industries v. Tacoma Yellos Cab Company, 31 Wn. App. 117, rev. denied,

97 Wn.2d 1015 (1982). The flip side of this test is set forth in RCW 51.12.020(3) which excludes from coverage "a person whose employment is not in the course of the trade, business, or profession of his or her employer . . .."

(8) Furtherance of the Independent Contractor's Interests as Opposed to the "Employer's" Interests. RCW 51.08.180 includes independent contractors within the coverage of the Act if the essence of the contract is personal labor and if the contractor is acting in the course of employment. The latter term is defined in RCW 51.08.013 as "the worker acting at his or her employer's direction or in the furtherance of his or her employer's business . . . ." If the independent contractor is furthering his or her own business interests rather than those of an employer, then the independent contractor should not come within the statutory definition of "worker".

However, even though these additional criteria appear to be important to a determination of whether an independent contractor is a "worker", the most recent pronouncement from the Court of Appeals still relies almost exclusively on the negative White test. See, Massachusetts Life. In Massachusetts Life, the Court of Appeals noted that the insurance agents involved there "may and do" delegate duties to others and, just on that basis, excluded them from coverage.

In the final analysis, the courts have frequently listed a number of factors, but have consistently turned to the three-pronged negative test of White for the resolution of the question of whether an independent contractor is a "worker." In the absence of clear guidance from the courts, we do not feel it is appropriate for us to expand the White test beyond the parameters which have been set by case law, particularly in light of the statutory preference for mandatory coverage.

Evaluating this case under the three guidelines articulated in White for exclusion of independent contractors, there is no question but that the sales agents are covered workers. Although sales agents do supply some of their own equipment, such as an automobile or a VCR, these more closely resemble "tools of the trade", as distinguished from those situations in which the essence of the contract is the machinery or equipment itself. See, Lloyd's, at 751. Further, Peter M. Black Real Estate Co., Inc. and the sales agents do not contemplate that the labor of obtaining and selling property listings will be done by others, in whole or in part. Although agents will occasionally contract with third parties for the performance of services necessary or desirable to facilitate a sales transaction, we do not view this as tantamount to delegating their duties under their contracts. While the sales agents who work with Peter M. Black Real Estate Co., Inc. can and frequently do share the effort and commission involving a particular sales transaction, a sales agent may not delegate any of the duties involved in obtaining and selling property listings to any person who is not also a sales

agent with Peter M. Black Real Estate Co., Inc. Under such facts, we can only conclude that the sales agents work under an independent contract, the essence of which is the sales agent's personal labor; the agents are therefore workers within the meaning of RCW 51.08.180.

Status of Peter M. Black:

Peter M. Black Real Estate Co., Inc. was incorporated on March 9, 1979. Since that time, Mr. Peter Black has remained its sole shareholder and director. According to the uncontroverted evidence in this case, the firm did not conduct or engage in any business until approximately September of 1979. Under these facts, we can only conclude that Mr. Black is excluded from the mandatory coverage provisions of the Act.

As pointed out by our Industrial Appeals Judge, executive officers of corporations were first excluded from mandatory coverage under RCW 51.12.020 effective June 7, 1979. However, that statute also provided that "[a]ny officer who is considered by the department to be covered on and after June 30, 1977, shall continue to be covered until such time as the officer voluntarily elects to withdraw from coverage...." Laws of 1979, ch. 128, § 1, p. 489. (That portion of the statute was deleted by the Legislature in 1987; Laws of 1987, ch. 316, § 2, p. 1123). It is stipulated that Mr. Black never voluntarily elected to withdraw from coverage.

However, before an entity becomes subject to the provisions of our Industrial Insurance Act, it must be "engaged in this state in any work covered by the provisions' of the Act. RCW 51.08.070.

It is therefore quite apparent that the mere act of incorporating an entity is not sufficient to make that entity an employer under our Act. The entity, corporate or otherwise, must first be engaged in this state in work covered by the provisions of the Act. It is uncontroverted that Peter M. Black Real Estate Co., Inc. first engaged in any work in this state in September of 1979. Therefore, the entity was not an employer in this state prior to June 7, 1979. Since Peter M. Black Real Estate Co., Inc., was not an employer in this state within the meaning of RCW 51.02.070 between June 30, 1977 and the effective date of the 1979 amendment, June 7, 1979, it follows that Mr. Black was not required to specifically withdraw from coverage under the above-quoted proviso of the 1979 legislation. Thus, pursuant to RCW51.12.020 as amended in 1979, Peter M. Black, as an officer, director, and shareholder of the corporation is excluded from mandatory coverage under the Act. Because Mr. Black did not voluntarily elect to be covered under the Act, it was error for the Department to assess premiums or him.

After consideration of the Proposed Decision and Order, the Employer's Petition for Review filed thereto, and a careful review of the entire record before us, we hereby enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On January 27, 1988 the Department of Labor and Industries issued a Notice and Order of Assessment No. 57971 to Peter M. Black Real Estate Co., Inc. assessing taxes due and owing the State Fund in the amount of $2,700.09 for the period from January 1, 1985 through March 31, 1987 (Docket No. 88 1192) and also Notice and Order of Assessment No. 57972 assessing taxes due and owing the State Fund in the amount of $775.12 for the period from April 1, 1987 through September 30, 1987 (Docket No. 88 1191).

   On February 24, 1988 the firm, Peter M. Black Real Estate Co., Inc., protested both notices and orders of assessment. On February 24, 1988 and March 14, 1988 the Department issued orders affirming Notice and Order of Assessment Nos. 57971 and 57972.

   On March 24, 1988 the firm filed notices of appeal with the Board of Industrial Insurance Appeals from the orders dated February 24, 1988 and March 14, 1988. On April 15, 1988 the Board issued orders granting the appeals, assigning Docket Nos. 88 1191 and 88 1192 to the appeals and directing that hearings be held on the issues raised by the appeals.

2. On March 9, 1979, Peter M. Black Real Estate Co., Inc. was incorporated. Since that date, Mr. Peter M. Black has been the sole shareholder, president, and a member of the corporation's board of directors. Peter M. Black Real Estate Co., Inc. did not engage in any work or business in this state or elsewhere until September of 1979.

3. From January 1, 1985 through September 30, 1987, the sales agents of Peter M. Black Real Estate Co., Inc. were not required to work any specific hours, work any period of time in the office or attend any meetings. Agents supplied their own automobiles, cameras and other business supplies. The company provided office space, some furniture, a computer and legal advice. No real estate agent was authorized to hire other persons to list or sell property on his or her behalf. No real estate agent had the right to manage or control Peter M. Black Real Estate Co., Inc. or was liable for its losses, if any.

4. During the period from January 1, 1985 through September 30, 1987, the real estate sales agents were working under an independent contract with Peter M. Black Real Estate Co., Inc., the essence of which was the agents' personal labor.

5. Peter M. Black did not elect to be voluntarily covered under the Industrial Insurance Act.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. During the period from January 1, 1985 through September 30, 1987, the real estate sales agents associated with Peter M. Black Real Estate Co., Inc. were workers within the meaning of RCW 51.08.180.

3. During the period from January 1, 1985 through September 30, 1987, Peter M. Black was excluded from the mandatory coverage of the Industrial Insurance Act pursuant to RCW 51.12.020 as amended in 1979.

4. The order of the Department of Labor and Industries dated February 24, 1988, which affirmed Notice and Order of Assessment No. 57972 issued on January 27, 1988, which assessed industrial insurance taxes due and owing to the state fund in the amount of $775.12 for the period from April 1, 1987 through September 30, 1987, and the order of the Department of Labor and Industries dated March 14, 1988, which affirmed Notice and Order of Assessment No. 57971 issued on January 27, 1988, which assessed industrial insurance taxes in the amount of $2,700.09 for the period from January 1, 1985 through March 31, 1987, are incorrect and should be reversed, and this matter remanded to the Department with direction to delete the assessment based upon coverage of Peter M. Black, and to issue a revised Notice and Order of Assessment of Industrial Insurance Taxes for the period from January 1, 1985 through September 30, 1987 for coverage of the real estate sales agents associated with Peter M. Black Real Estate Co., Inc.

It is so ORDERED.

Dated this 23rd day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member