Rainbow International

COVERAGE AND EXCLUSIONS

Waiver of benefits (RCW 51.04.060)

RCW 51.04.060 invalidates a contractual agreement to the extent that it purports to exclude a worker from coverage who would otherwise be covered by the Industrial Insurance Act. It is inappropriate, however, to rely on RCW 51.04.060 to make the threshold determination whether the employment relationship is within the coverage of the Act. **….*In re Rainbow International*, BIIA Dec., 88 2664 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Route managers

Where every aspect of the route manager's job is controlled by the employer and the employer supplies the work as well as the equipment, the fact that the route managers hire helpers and do not believe they are employees does not make them independent contractors. A right to control the work performed and an absolute right to terminate the relationship without liability are inconsistent with the concept of an independent contract and establish an employer-employee relationship. **….*In re Rainbow International*, BIIA Dec., 88 2664 (1990)** [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 90-2-00248-6.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RAINBOW INTERNATIONAL/ MICHAEL MORALES & WIFE	)	**DOCKET NO. 88 2664**
FIRM NO. 457,192	)	**DECISION AND ORDER**

APPEARANCES:

Firm, Michael Morales & Wife,
dba Rainbow International, by
Seth (Kelly) Fulcher, Jr.

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

This is an appeal filed by the firm, Michael Morales & Wife, dba Rainbow International, on June 27, 1988 from an order of the Department of Labor and Industries dated May 24, 1988 which assessed industrial insurance taxes for the period January 1, 1986 through December 31, 1987 in the amount of $12,239.49. **REVERSED AND REMANDED**.

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 firm to a Proposed Decision and Order issued on May 23, 1989 in which the order of the Department dated May 24, 1988 was reversed and remanded with instructions to recompute the taxes due and owing to the state fund under the provisions of WAC 296-17-350(4) and with instructions that the total assessment was not to exceed $12,239.49.

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.

The question presented by this appeal is whether certain individuals who clean and dye carpets under a business agreement with Rainbow International are covered workers under our Industrial Insurance Act. Michael Morales owns a franchise known as Rainbow Carpet Dyeing and Cleaning. The actual carpet cleaning or dyeing services are provided by persons designated as route managers. These route managers sign an agreement with Mr. Morales, indicating that they are "contractors". This appeal focuses on the nature of the relationship between Mr. Morales and the route managers.

Our Industrial Appeals Judge determined that the route managers were independent contractors, found that the essence of the contract was their personal labor, and concluded that they were covered workers under our Industrial Insurance Act. While we agree with the result reached by the Proposed Decision and Order, we disagree with the analysis used by the Industrial Appeals Judge. The level of control which Mr. Morales exercised over the route managers' day-to-day performance is inconsistent with a determination that the route managers were independent contractors. Furthermore, because the route managers frequently hired helpers, we cannot conclude that they were independent contractors, the essence of whose contract was their personal labor. See, White v. Dep't of Labor & Indus., 48 Wn.2d 470, 294 P.2d 650 (1956); Mass. Mutual Life v. Dep't of Labor & Indus., 51 Wn. App. 159, 752 P.2d 381 (1988). However, under all the facts of this case, in particular the level of control Mr. Morales exercised over the method and manner of the route managers' performance of their duties on his behalf, we must conclude that the route managers were employees of Mr. Morales.

Initially we note that the Industrial Appeals Judge relied on the provisions of RCW 51.04.060. RCW 51.04.060 states:

> No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

The Industrial Appeals Judge concluded that because of the provisions of RCW 51.04.060, the contract between the route managers and Mr. Morales did not control the nature of the relationship between them. We disagree. The contract between the parties obviously controls their relationship. However, it does not necessarily determine whether a route manager is a covered worker within the meaning of the Industrial Insurance Act. RCW 51.04.060 applies to invalidate a contractual agreement, to the extent that agreement purports to exclude from coverage a worker who would otherwise be covered by the Industrial Insurance Act. It is inappropriate, however, to rely on RCW 51.04.060 to make the threshold determination of whether a relationship is within the coverage of the Industrial Insurance Act. For that initial determination we must refer to the provisions of RCW 51.08.180, 51.08.185, 51.08.070, 51.08.013, and Ch. 51.12 RCW.

Our Industrial Appeals Judge determined that because the route managers were substantially autonomous in performing their work, they were independent contractors, rather than employees. She then determined that although the route managers were independent contractors, the essence of their

contract was personal service, and therefore they were covered workers under our Industrial Insurance Act. RCW 51.08.180.

While we agree that the route managers are mandatorily covered workers, we do not believe that they are independent contractors. Because of the level of control exercised by Mr. Morales over the performance of the route managers' duties, and because of other factors detailed below, we find that an employer-employee relationship exists between Mr. Morales and the route managers. The fact that the route managers hired helpers does not mean they were not themselves Mr. Morales' employees. The route managers had the authority to hire helpers to assist them in their duties of cleaning and dyeing carpets for Mr. Morales. Mr. Morales was aware of the practice and did nothing to discourage it. The helpers were paid out of the route managers' commissions. Thus Mr. Morales, like many employers, essentially delegated to his route managers the task of hiring subordinates to assist them. That fact alone does not preclude a finding that the route managers themselves were Mr. Morales' employees.[1]

The test for determining whether an employer-employee relationship or a principal-independent contractor relationship exists has developed through case law. In Clausen v. Dep't of Labor & Indus., 15 Wn.2d 62, 129 P.2d 777 (1942), the court stated that:

> . . . an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of the employer, except as to the product or result of his work.

Clausen, at 71.

The court in Clausen went on to state that:

> No one of the factors hereinbefore mentioned is conclusive in determining the nature of the relationship. However, in Burchett v. Department of Labor & Industries, 146 Wash. 85, 261 Pac. 802, 263 Pac. 746, we quoted with approval from 14 R.C.L. 72, a statement to the effect that no single fact is so conclusive in showing that the relationship is not that of an independent contractor as that the employer has the unrestricted right to terminate the particular service whenever he chooses, without regard to the final result of the work itself. As we stated in Hubbard v. Department of Labor & Industries, supra, [198 Wash. 354 (1939)] the power of the

---

1 The issue of whether Mr. Morales is responsible for premiums on the worker hours of the helpers is not addressed by the Notice and Order of Assessment on appeal and was not litigated by the parties. Therefore, that issue is beyond the scope of our review.

> employer to terminate the employment at any time is incompatible with the free control of the work usually enjoyed by an independent contractor.

Clausen, at 73.

In Hubbard v. Dep't of Labor & Indus., 198 Wash. 354, 88 P.2d 423 (1939), the court stated:

> The ultimate test by which it is determined whether the relation is that of employer and employee or that of principal and independent contractor is to inquire whether or not the employer retained the right, or had the right under the contract, to control the manner of doing the work and the means by which the result was to be accomplished. [citations omitted] These cases all hold that the chief, and most decisive, factor in determining whether the relationship is that of employer and employee or that of principal and independent contractor is the right of control over the work or thing to be done.

Hubbard, at 358-359.

While it appears that the primary test to be used in determining the existence of the employer-employee relationship, as opposed to a principal-independent contractor relationship, is the right to control the method and manner of the work under the contract, the courts have recognized a second step to the analysis under our Industrial Insurance Act. In Novenson v. Spokane Culvert, 91 Wn.2d 550, 588 P.2d 1174 (1979), the worker had entered into an agreement with a temporary job service for placement with other employers. The job service sent the worker to Spokane Culvert for temporary duty. The worker was injured while working at Spokane Culvert. Spokane Culvert sought immunity from civil liability for the worker's injuries, asserting an employer-employee relationship with the worker. The trial court granted summary judgment in favor of Spokane Culvert, finding as a matter of law that the worker was an employee of Spokane Culvert.

The Supreme Court held that the facts were unclear as to whether the worker, Mr. Novenson, had agreed to the employer-employee relationship with Spokane Culvert. The court held that absent a mutual agreement between the parties, the relationship could not exist. The case was remanded to determine the issue regarding consent to the relationship.

In Novenson, the court stated that: "The right of control is not the single determinative factor in Washington. A mutual agreement must exist between the employee and employer to establish an employee- employer relationship." Novenson, at 553. Thus the analysis under our Industrial Insurance Act requires a determination of whether "(1) the employer has the right to control the

servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." Novenson, at 553.

With these established criteria, we now turn to the facts of the present case. Michael Morales holds an exclusive franchise known as Rainbow Carpet Dyeing and Cleaning Co. of east King County. Mr. Morales entered into a number of subcontractor agreements with individuals to perform services as route managers. The route managers would clean and dye carpets. Several of the route managers would employ "helpers" to assist in the work. The agreements have been admitted as Exhibit No. 6. The contract lacks any specific information regarding the right of control by Mr. Morales over the acts of the route managers. It also is silent regarding the termination of the contract. However, it does include a non-competition clause which prohibits competition for three years and which requires the route manager during the term of the agreement to pay Mr. Morales 40% of the gross receipts earned by the route manager from any similar business.

Each route manager is interviewed by Mr. Morales, and then, if hired, engages in a two to three week training program. Either Mr. Morales or another experienced route manager supervises and trains the new route manager in the use of the equipment and technique of Rainbow Carpet Cleaning. Mr. Morales supplies the carpet cleaning and dyeing equipment on a lease basis to the route managers. He also supplies the various cleaning products. The route managers pay $20.00 per week for the lease of the equipment and purchase the supplies directly from Mr. Morales. Mr. Morales maintains an advertisement in the yellow pages. He schedules and books the various jobs for the route managers. Portions of the scheduling books for the route managers have been admitted as Exhibit No. 7. These indicate that each route manager was scheduled for only one job for a particular block of time. Thus, Exhibit No. 7 indicates that each route manager was assigned work in a manner which was consistent with the requirement that the route manager perform the labor involved.

Mr. Morales billed and collected the monies on commercial accounts, while on residential accounts the managers collected the money and turned the invoices and the collections over to Mr. Morales each day. The route manager's work was subject to review by Mr. Morales. He received the calls from dissatisfied customers who called on him to correct unsatisfactory work. When this occurred he would deal directly with the customer and the route manager in an attempt to resolve the problem.

We believe that the facts of this case indicate that the route managers are not independent contractors. Every aspect of their work is controlled by Mr. Morales. He controls where they go, when

they go, what they do, and how they do it. He supplies the work as well as the equipment to do the work. He employs these route managers in the furtherance of his own business.

The contract requires that if the route manager performs any similar work for other individuals, the route manager must compensate Mr. Morales for that work. This is not indicative of an independent contractor relationship. Additionally, there is no definition of the scope of the work to be performed under the contract. Mr. Morales stated that the ending of the arrangement was usually mutual, a recognition that the agreement did not bind either party to any specific performance under the contract. Thus the route manager worked at the discretion of Mr. Morales. As the court stated in Clausen, an absolute right to terminate the relationship without liability is not consistent with the concept of an independent contract. We believe the agreement is simply an employment agreement, terminable at will by either party. Because Mr. Morales controlled the method and manner of the work performed by the route managers, the "right of control" test has been met.

The "consent" test set forth in Novenson has also been met. Although various route managers testified that they did not view themselves as employees, but rather as independent contractors under the agreement, we will not elevate form over substance. There is no question that the route managers have consented to a business relationship with Mr. Morales. There is clearly a mutual agreement. The question is whether this consensual agreement amounts to an employer-employee relationship or some other relationship. The conduct of the parties and all of the surrounding facts of the relationship are important in determining the existence of a contract of employment. Wilkie v. Dep't of Labor & Indus., 53 Wn.2d 371, 334 P.2d 181 (1959).

On the facts of this case, the route managers' testimony that they did not believe they were employees is insufficient to change the nature of the business arrangement. In actuality the route managers have consented to Mr. Morales' detailed control over the method and manner in which they perform their work on his behalf. They cannot remove themselves from the mandatory provisions of the Industrial Insurance Act by merely denying the existence of the employer-employee relationship. Because the route managers are mandatorily covered workers under the Industrial Insurance Act, the provisions of the agreement between them and Mr. Morales which purport to exclude them from coverage are void pursuant to RCW 51.04.060.

We also agree with the Industrial Appeals Judge's determination that the Department's reliance on WAC 296-17-350(6) in assessing the industrial insurance taxes was misplaced. We agree that the industrial insurance taxes must be recomputed pursuant to WAC 296-17-350(4). Our review of the

provisions of WAC 296-17-350(4) and (6) convinces us that the Department's basis for choosing subsection (6), which pertains to piece workers, is incorrect. The Department should have calculated the premiums due by reference to WAC 296-17-350(4), which pertains to commissioned personnel. Elizabeth Wells, the Department auditor, apparently chose the provisions of WAC 296-17-350(6), the piece worker provision, because the workers were performing manual labor. However, subsection (4), the provision pertaining to commissioned personnel, reads: "Commission personnel are persons whose compensation is based upon a percentage of the amount charged for the commodity or service rendered." (Emphasis added) The determining factor in applying subsection (4) is the basis of the particular worker's compensation, not the type of labor performed. Subsection (4), on its face, applies to individuals performing personal service. The Industrial Appeals Judge was correct in reversing the order and requiring the Department to use the correct provisions of WAC 296-17-350(4) in determining the taxes due.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order's conclusion that the route managers are workers subject to the mandatory coverage of the Industrial Insurance Act is correct. We also agree with the Proposed Decision and Order's determination that the proper assessment of the route managers must be made pursuant to WAC 296-17-350(4) on the basis that they are commission workers.

FINDINGS OF FACT

1. On May 24, 1988 the Department of Labor and Industries issued Notice and Order of Assessment of Industrial Insurance Taxes No. 61666 to Michael Morales and Wife dba Rainbow International (Rainbow), assessing taxes due and owing to the state fund for the period January 1, 1986 through December 31, 1987 in the amount of $12,239.49 and demanded payment in that amount. On June 27, 1988 the firm filed a notice of appeal with the Board of Industrial Insurance Appeals by letter placed in the U.S. mail on June 23, 1988. On July 27, 1988 the Board issued an order granting the appeal subject to proof of timeliness, assigned Docket No. 88 2664 to the appeal and directed that hearings be held on the issues raised by the appeal.

2. For the period January 1, 1986 through December 31, 1987 Rainbow correctly paid state industrial insurance premiums on its office personnel, including its telephone solicitors, a secretary and a bookkeeper.

3. In the period from January 1, 1986 through December 31, 1987 Rainbow entered into a mutual agreement with several individuals to perform carpet cleaning and carpet dyeing. These individuals held the title of route

managers. Rainbow trained the managers, paying a trainee $25.00 per day for a period from one to three weeks. Managers were required to attend weekly training meetings.

Each route manager provided a van. Through advertising, Rainbow provided customers for the managers. Rainbow scheduled jobs for the managers to serve particular customers.

Rainbow (1) leased cleaning and dyeing equipment to the managers; (2) sold managers their supplies; and (3) provided a warehouse for storage of materials and for occasional cleaning and dyeing of carpets outside customers' homes. The managers were encouraged to put the Rainbow name on their vans and to wear shirts bearing Rainbow identification.

Rainbow had a maximum of eight route managers during a quarter. About 50% of the managers had one helper; no manager paid industrial insurance premiums for his helper or for himself.

Rainbow negotiated most of the prices for work done by the managers. Each route manager was paid by commission which ranged from 40 to 60% of the amount charged for their service. Managers carried a pager by which they could be reached by the company during their work day and on two evenings during the week.

4. Rainbow controlled the method and manner of the route managers' performance of their carpet cleaning and dyeing duties in furtherance of Rainbow's business. The route managers consented to this control and to the business relationship with Rainbow.

CONCLUSIONS OF LAW

1. The notice of appeal filed by Rainbow on June 27, 1988 was timely in regard to the order of the Department of Labor and Industries dated May 24, 1988. RCW 51.48.131.

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

3. During the period January 1, 1986 through December 31, 1987 Rainbow entered into employment contracts with route managers in the course of its business. Rainbow was an employer within the meaning of RCW 51.08.070 and the route managers were mandatorily covered workers within the meaning of RCW 51.08.180.

4. Premiums for worker hours for route managers for the period January 1, 1986 through December 31, 1987 should be computed according to WAC 296-17-350(4), since the route managers are commission personnel.

5. The Notice and Order of Assessment of Industrial Insurance Taxes No. 61666 issued by the Department on May 24, 1988 which assessed taxes due and owing to the state fund which accrued between January 1, 1986 through December 31, 1987 in the amount of $12,239.49 is incorrect and should be reversed and the matter remanded to the Department with

instructions to recompute the taxes due and owing to the state fund for the worker hours of Rainbow's route managers under the provisions of WAC 296-17- 350(4) rather than WAC 296-17-350(6).

It is so ORDERED.

Dated this 3rd day of January, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member