# **SAFETY AND HEALTH**

#### Employer (RCW 49.17.020(3))

The failure of the employer to contract with a licensed contractor does not establish responsibility for safety violations, the test for responsibility under the statue is whether personal labor is the essence of the contract. *Citing White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956). *....In re Kenneth & Viola Whitmire*, BIIA Dec., 95 W338 (1996)

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# BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

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IN RE: KENNETH L. WHITMIRE AND VIOLA WHITMIRE **DOCKET NO. 95 W338** 

CITATION & NOTICE NO. 115218778

**DECISION AND ORDER** 

APPEARANCES:

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Employer, Kenneth L. Whitmire and Viola Whitmire, by Lofland and Associates, per Gary E. Lofland

Department of Labor and Industries, by The Office of the Attorney General, per M. Catherine Walsh, Assistant

The employer, Kenneth L. Whitmire and Viola Whitmire, filed an appeal with the Board of Industrial Insurance Appeals on September 12, 1995, from a Corrective Notice of Redetermination of the Department of Labor and Industries dated August 22, 1995. The Corrective Notice of Redetermination assessed penalties of \$4,380 for alleged violations of the Washington Industrial Safety and Health Act. **VACATED.** 

### **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 June 25, 1996, in which the Corrective Notice of Redetermination of the Department dated August 22, 1995, was affirmed as modified.

36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that 37 38 no prejudicial error was committed and the rulings are affirmed. The primary issue on appeal is not 39 40 whether there were safety violations during a tree topping and pruning operation, but whether 41 42 Mr. and Mrs. Whitmire were employers of four individuals performing that work within the meaning 43 44 of the Washington Industrial Safety and Health Act (WISHA). The Whitmires contend that they 45 46 were not employers since they accepted the bid of James Turner and Keith Turner as independent 47

contractors to top and prune trees in front of the Whitmires' apartments. The Department argues that the Whitmires were employers of the Turners and were responsible for WISHA safety violations since neither James or Keith Turner was a registered contractor under state law and since the Turners essentially provided personal labor. We agree with the Whitmires' contention, and we will briefly summarize the evidence in the record leading to this conclusion.

On May 11, 1995, a Department safety compliance officer observed a tree topping operation and traffic diversion in front of some apartments owned by the Whitmires in Yakima. The officer noted a number of safety violations including the failure to wear hard hats, and the lack of a harness in a bucket lift truck. See photo Ex. Nos. 1-8. The individuals present were James Turner, Keith Turner, Dusty Stark, and Archie King. Mr. Harris, the apartment manager for the Whitmires, arrived by car after the officer began speaking to the workers. Mr. Harris told the officer that the workers were not his employees, but that they had been hired by Mr. Turner. Mr. Harris then telephoned Mr. Whitmire who came to the job site. Mr. Whitmire initially was upset at the termination of the work but he eventually agreed to obtain safety equipment.

At the hearing, Mr. Whitmire explained that he needed to have trees topped and pruned that grew in front of apartments that he owns in Yakima. He solicited and received bids from a few contractors, including that of James Turner, who had done odd jobs for him in the past. James Turner confirmed that he was an experienced logger. His bid was lowest, and Mr. Whitmire awarded the contract to him. James Turner and his brother, Keith Turner, agreed with Mr. Whitmire to top trees for a flat fee of \$2,000. They were to rent a truck and other equipment. James Turner acknowledged that neither he nor his brother were registered contractors. James Turner, Keith Turner and Kenneth Whitmire entered into a written, hold harmless agreement for the purpose of protecting Kenneth Whitmire from liability for damage to equipment and injuries to workers that the Turners might hire for the tree topping and pruning operation. Ex. No. 11.

To begin our analysis, under WISHA the Whitmires cannot be responsible for safety violations if they were not employers under that act. RCW 49.17.020(3) states, "The term 'employer' means any person, firm, . . . or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons . . .." Subsection 4 has a parallel definition of employee under the act.

The industrial appeals judge, in his Proposed Decision and Order, concluded that because the Turners were not registered contractors the working relationship they had with the Whitmires could not have the status of a legal owner-contractor relationship. Rather the lack of registration by the Turners, and Mr. Whitmire's knowledge of their lack of registration, meant the Turners must have been ordinary employees and Mr. Whitmire the employer responsible for the job site.

We have found no requirement under WISHA that individual contractors will automatically be considered employees if they are not registered as contractors under Chapter 18.27 RCW concerning the registration of contractors with the state.

Notably, RCW 18.27.020 makes it a misdemeanor for any *contractor* to bid or work without being registered. It does not make it a crime to hire and use a contractor who is not registered. Furthermore, we do not have the authority to make such a broad extension of existing statutes and case law to hold that individuals who contract with unregistered contractors are automatically responsible for the safety violations of the contractors. It is not appropriate for the Board to extend its jurisdiction without a clear mandate from the legislature or the court. Thus, under WISHA the Whitmires are not the employers of the Turners and the workers hired by the Turners, merely because the Turners were not registered contractors under Chapter 18.27 RCW.

Pursuant to RCW 49.17.020(3), the Whitmires could be found to be employers if the essence of their contract with the Turners was personal labor. The state Supreme Court

interpreted similar language under the Industrial Insurance Act in *White v. Department of Labor* & *Indus.,* 48 Wn.2d 470 (1956). At page 474, the court explained that personal labor is not the essence of the contract when the independent contractor must necessarily supply machinery or equipment more than hand tools, obviously cannot perform the contract without assistance, or who out of necessity or choice employs others to perform all or part of the work. Here, the Turners agreed to supply and be responsible for all equipment and they, in fact, rented a bucket lift truck for the operation. James and Keith Turner also employed two other individuals. Therefore, the essence of the contract between the Whitmires and the Turners was not personal labor. The Whitmires cannot be responsible under WISHA for the safety violations of the Turners.

Furthermore, the Whitmires were not general contractors who would be liable under WISHA for the safety violations of subcontractors. See *Stute v. P.B.M.C.*, 114 Wn.2d 788 (1990), and *In re RC Construction*, BIIA Dec., 87 W039 (1989). A general contractor may be found liable at a multiple-employer construction site where the general contractor has control and is responsible for general supervision and safety of all workers at the site. *Stute*, at 463. This was certainly not the case in this tree topping and pruning operation that had only one contractor, James and Keith Turner, conducting and controlling the operation at the site. In addition, the apartment manager, Mr. Harris, was apparently not present at the site until after the officer spoke to the Turners. Mr. Harris was not shown to have exercised any actual control of the tree topping and pruning other than generally observing and seeing that cars were not parked below the trees. Finally, the mere fact that Mr. Whitmire purchased safety equipment after the operation was stopped by the compliance officer does not show prior control of the general confusion at the time the safety violations occurred. This is evidence only of the general confusion at the time of who was responsible. Mr. Whitmire was yielding to the directions of the safety inspector.

In conclusion, Kenneth L. Whitmire and Viola Whitmire were not employers of the four individuals conducting the tree topping and pruning operation within the meaning of the Washington Industrial Safety and Health Act. Corrective Notice of Redetermination 115218778 issued to Kenneth L. Whitmire and Viola Whitmire is vacated.

## **FINDINGS OF FACT**

- 1. On June 5, 1995, the Department of Labor and Industries issued Citation and Notice 115218778 to Kenneth L. Whitmire and Viola Whitmire for alleged violations of the Washington Industrial Safety and Health Act that allegedly occurred on May 11, 1995, in Yakima, Washington. The Whitmires appealed the citation on June 22, 1995, and the Department issued a Notice Reassuming Jurisdiction on July 10, 1995. On August 22, 1995, the Department issued a Corrective Notice of Redetermination to the Whitmires that assessed penalties of \$4,380. The Whitmires appealed to the Board of Industrial Insurance Appeals on September 12, 1995.
- 2. Prior to May 3, 1995, Kenneth L. Whitmire solicited bids to have trees topped and pruned on property near apartments owned by Kenneth L. Whitmire and Viola Whitmire in Yakima, Washington. On about May 3, 1995, Kenneth L. Whitmire accepted the bid of James Turner and Keith Turner. Kenneth L. Whitmire, James Turner, and Keith Turner entered into a contract to top and prune the trees for a flat fee of \$2,000. James Turner and Keith Turner agreed to supply the equipment and labor for the tree topping and pruning.
- 3. On May 11, 1995, James Turner and Keith Turner began topping and pruning the trees near the apartments of Kenneth L. Whitmire and Viola Whitmire in Yakima, Washington. James Turner and Keith Turner provided hand tools, chain saws, trucks and a bucket lift truck. They also hired two additional workers, Dusty Stark and Archie King.
- 4. As of May 11, 1995, neither James Turner nor Keith Turner had registered as contractors with the state of Washington.

### CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this appeal.
- 2. On May 11, 1995, Kenneth L. Whitmire and Viola Whitmire were not employers of James Turner, Keith Turner, Dusty Stark, or Archie King during the tree topping and pruning operation in Yakima, Washington within the meaning of the Washington Industrial Safety and Health Act.

that occurred on May 11, 1995, during the tree topping and pruning and related activities of James Turner, Keith Turner, Dusty Stark, and Archie King. 4. Corrective Notice of Redetermination 115218778 issued by the Department of Labor and Industries to Kenneth L. Whitmire and Viola Whitmire is incorrect and is vacated. It is so **ORDERED**. Dated this 29th day of October, 1996. BOARD OF INDUSTRIAL INSURANCE APPEALS /s/ S. FREDERICK FELLER Chairperson /s/ JUDITH E. SCHURKE Member DISSENT I disagree with the majority opinion that allows serious safety violations in the workplace to go without consequence. I would affirm the citation and adopt the penalty analysis in the Proposed Decision and Order. Mr. Whitmire should be found responsible for the safety violations that occurred on May 11, 1995, at his apartments since he had true control of the workplace and was, in effect, the general contractor. In Stute v. P.B.M.C., Inc., 114 Wn.2d 454 (1990), the Washington State Supreme Court explained that the Washington Industrial Safety and Health Act (WISHA) created a nondelegable duty on general contractors to provide a safe place to work for employees of subcontractors. At page 464, the court held that, "the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate 

Kenneth L. Whitmire and Viola Whitmire are not responsible for any

safety violations under the Washington Industrial Safety and Health Act

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supervisory authority constitutes sufficient control over the workplace." In this appeal, Mr. Whitmire had his apartment manager at the workplace to ensure that the tree topping was done properly. He also had a nominally independent subcontractor present to conduct the tree topping operation and to direct traffic. In addition, as the majority noted, once the operation was stopped by the compliance officer, Mr. Whitmire purchased the safety equipment needed to continue the work. A reasonable mind can infer from this action that the "contract" between Mr. Whitmire and the Turners was not enforceable. If in fact the Turners were the responsible party for the operation, the Whitmires could have sued to enforce the contract. Instead, they acted like any general contractor would when an employee or subcontractor needed the necessary equipment to safely perform a job, they went out and purchased it.

Under these facts, I would find that Mr. Whitmire controlled the workplace either as an employer or general contractor so that he should be held responsible for safety violations that put his employee and the employees of his subcontractor at risk. To hold otherwise encourages employers who control the workplace to hire unregistered and uninsured subcontractors and insulate themselves from responsibility for safety.

To summarize, I would not allow Mr. Whitmire to avoid his responsibility under WISHA for dangerous conditions which occurred at his workplace on May 11, 1995. I would hold him responsible as a general contractor and I would adopt the penalty analysis of the industrial appeals judge in his Proposed Decision and Order.

Dated this 29th day of October, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/\_\_\_\_\_ FRANK E. FENNERTY, JR.

Member