Hardy and Associates DBA Vanguard Cleaning Systems

INDEPENDENT CONTRACTORS

Franchisees

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Hiring subordinates

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HARDY AND ASSOCIATES D/B/A VANGUARD CLEANING SYS.	)	**DOCKET NO. 17 19828**
FIRM NO. 077,765-00	)	**DECISION AND ORDER**

Hardy and Associates DBA Vanguard Cleaning Systems of Washington (Hardy) operates a business that franchises a cleaning system to LLCs in the State of Washington. Some of the LLCs hired employees to perform all or part of the janitorial work for which they contract, and some owners of the LLCs did not, instead performing the janitorial work themselves. Hardy did not pay industrial insurance premiums for any of the owners of the LLCs, regardless of whether they hired anyone to help them perform the janitorial work. The Department of Labor and Industries determined that the LLCs who did not hire employees were workers under the Industrial Insurance Act and required Hardy to pay workers compensation premiums for them. Hardy argues that none of the owners of the LLCs are "workers" as the term is defined in the Industrial Insurance Act and therefore all of the owners are exempt from coverage. Our industrial appeals judge determined that the owners are workers under the Act, but because 22 of the owners testified to hiring subordinates, they became exempt from coverage under *White v. Department of Labor & Industries.*[1] While we agree with our industrial appeals judge that the owners of LLCs may be considered workers under the Act, we also find that not all of the 22 owners who testified provided sufficient evidence to show that they hired subordinates as contemplated by *White.* A preponderance of the evidence supports that 3 of the 22 of the testifying owners hired employees and became exempt from coverage under *White*. The Department order is **REVERSED** and **REMANDED** to the Department to remove three LLCs and recalculate the unpaid taxes, interest, and penalties based on the remaining LLCs.

DISCUSSION

Vanguard Cleaning Systems is a national trademark brand specializing in commercial janitorial services. Hardy and Associates is a franchisee of Vanguard. However, Hardy does not itself perform any janitorial services. Instead, Hardy sublicenses the trademarked Vanguard Cleaning System to smaller LLCs. Hardy does not enter into franchise contracts with individuals. Under the franchise contract, Hardy is responsible for providing the LLCs with commercial janitorial accounts. Hardy also makes optional training and support services available. The LLCs are responsible for performing the janitorial services themselves. The contract with Hardy requires each LLC to employ at least one

[1] 48 Wn.2d 470 (1956).

employee to perform janitorial work. Hardy does not involve itself with the hiring or firing of employees of the LLC and does not require documentation that the minimum employee requirement has been satisfied. Hardy's revenue consists of the fees and royalties it collects from the commercial customers before forwarding the remaining money to the appropriate LLC.

In 2016, the Department conducted an audit of Hardy after receiving a phone call from the owner of an LLC inquiring about elective workers' compensation coverage. The audit initially determined that Hardy had 114 workers for whom it had not paid workers compensation premiums for the year 2015 but that number was reduced to 107 after Hardy filed a protest. Hardy has appealed the Department's determination that the remaining 107 franchisees are subject to coverage under the Act.

This appeal is factually similar to *Department of Labor and Industries v. Lyons Enterprises Inc.*[2] In *Lyons*, the employer was, like Hardy, a company that licensed a janitorial system to small businesses in the State of Washington. Lyons, like Hardy, did not perform any janitorial services itself and instead made money by licensing the name and trade secrets of Jan Pro, a nationwide commercial janitorial service. The litigation in *Lyons* focused on whether the franchisees could be considered employees under RCW 51.08.180 and, if so, whether they could be exempted from coverage under RCW 51.08.195.

After finding that the Industrial Insurance Act applied to franchisees, the *Lyons* court looked to RCW 51.08.180 to determine that independent contractors were included in the definition of a "worker" so long as the essence of the contract was for his or her personal labor. Having found that the essence of the franchise contracts in *Lyons* was for personal labor, the court then looked to see if any of the three recognized exceptions outlined in *White* applied such that the businesses were exempted from coverage. The court ultimately found that those franchisees who actually "employed subordinates" were exempt from coverage and the case was remanded to the Board to determine which franchisees employed subordinates. However, when Lyons was remanded to the Board to answer that question, the Department and Lyons elected to resolve it by settlement and the question remained unanswered.

In *Lyons* and *White* the terms "employ" and "hire" are used relatively interchangeably. But the words do have subtle differences. "Employ" can mean to hire someone or to simply make use of

[2] 185 Wn.2d 721 (2016).

their services, whereas "hire" is defined specifically as employing someone for wages.[3] In *Lyons* the supreme court found that "Lyons' franchisees who do not **hire subordinates** meet the IIA's definition of "worker."[4] Shortly after the *Lyons* decision came out, the court of appeals further clarified the distinction in *Henry Industries, Inc. v. Department of Labor & Industries*. The court pointed to the testimony of an employee who said that he used others to handle his route when he was unavailable, but that same driver also testified that he did not employ others.[5] The court went on to say that the employer would have to show that the drivers delegated a "significant portion of their duties" to others to meet the third test under *White*.

What it means to "employ others" is also defined in *Peter M. Black Real Estate Co., Inc. v. Department of Labor and Industries*. Black Real Estate argued that because some of its listing agents paid people to come in and fix up listings or shared commissions with other agents who showed the listings, those listing agents were no longer workers because they had employed others. Division Two disagreed. The court found "Nor are Black's agents employing others to perform their work when they agree to assist each other and share the commission."[6]

The Proposed Decision and Order in this case found that if the owner of an LLC testified that he or she used a helper at any point during 2015, this was sufficient to find that the owner had employed a subordinate under *White* and therefore was exempt from coverage. In other words, any owner of an LLC who had someone help them at any point in 2015 lost coverage under the Act as a worker. We disagree with such a broad interpretation of *Lyons* and *White*.

We start with the proposition that the Industrial Insurance Act is to be liberally construed with an express purpose of reducing the suffering and economic loss associated with industrial injuries.[7] In order to achieve its stated purpose, the courts have found that the Industrial Insurance Act requires all doubts to be resolved in favor of coverage.[8] In order to reconcile this presumption of coverage with the exemptions articulated in *Lyons*, *White,* and *Henry*, we find that "hiring subordinates" has greater formality and structure than simply asking a friend or family member to cover for the franchisee or enlisting the aid of someone on an occasional basis that does not delegate a "significant portion of the franchisee's duties." It is a bargained for exchange for remuneration, with the work

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[3] Webster's II New Riverside University Dictionary 583 (1994).
[4] *Dep't of Labor & Indus. v. Lyons Enterprises Inc*., 185 Wn.2d 721, 734, (2016) (Emphasis added).
[5] *Henry Ind. Inc. v. Dep't of Labor & Indus*., 195 Wn. App. 593 (2016).
[6] *Peter M. Black Real Estate Co., Inc. v. Dep't of Labor & Indus*., 70 Wn. App. 482, 490 (1993).
[7] RCW 51.12.010.
[8] *Dep't of Labor and Indus. v. Lyons*, 185 Wn.2d 721 (2016); *Doty v. Town of South Prairie*, 155 Wn.2d 527 (2005).

inducing the remuneration and the remuneration inducing the work. But the very fact that a franchisee paid the helper does not necessarily remove that franchisee from coverage as the court held in *Black*.

Three of the franchisees have demonstrated that they have, in turn, become employers by employing others. Chris Jones of Chris Cleaning LLC testified that he had hired many workers and that he paid workers' compensation premiums for those workers. Il Chang of Jay Services, LLC testified that he had hired workers and paid workers' compensation premiums for some of them. Although, through the testimony it became clear that Mr. Chang did not do the paperwork for his LLC and was unsure about the names of the people he employed or what premiums were paid on their behalf, because his wife handled that part of the business. Still, his testimony convinces us that he is an employer. Violeta Badon of Lasave LLC testified that she had hired workers and paid workers' compensation premiums for those workers as well as providing them with 1099s for that pay.

The testimony of the remainder of the owners of LLCs during the period of the audit proved to be insufficient to remove those owners from coverage. The testimony produced by the owners of the various LLCs was oftentimes vague as to the details of the type of help they received and the circumstances surrounding that help. While we are concerned about the lack of detail elicited from many of the testifying LLC owners and the lack of documentation provided to support that testimony, we specifically find that the owners who testified to only having family members or friends help them on an occasional basis, without anything more, did not provide sufficient evidence to show that they had employed a subordinate to help with all or part of the work as required by *White*.

We also note that it is concerning that of the 22 LLC owners that testified, there was testimony that at least 15 of them were limited in English proficiency, with several needing interpreters for that testimony. All of the contracts were in English and the testimony makes it quite clear that many of the LLC owners did not understand all of the nuances of the contracts they were signing. It is concerning that many of the LLC owners who came to testify had a vague understanding that the issue under consideration was whether they had used helpers, but likely no understanding of how a determination that they were employers would affect their LLC in the future.

Accordingly, we find the testimony of the following people to be insufficient to establish that they were exempted from coverage during the period of 2015: Benjamin Parilla of BP&L LLC; Aaron Kennedy of Aaron's Cleaning Service, LLC; Aurelio Barreto of Five Star General Cleaning Services; Phalla Lean of Clean Bright Janitorial Service; Aracely Avelino of Avelino's Cleaning, LLC; Librado Ruelas of CZV Cleaning, LLC; Jose Alberto Alfaro of Northwest Cleaning, LLC; Consuela Jimenez

Hernandez of Leonard's LLC; Ofelia Rosas Ramos of Ramirez Rosas Cleaning, LLC; Rosa Becerra of ARA Janitorial, LLC; Isabel Maldonado of Canas Cleaning Services, LLC; Maria Macedo of Macedo Cleaning Servics, LLC; Julio Tomas of JR Janitorial; Deyanira Villasenor of Dey's Cleaning; Arthur Valdez of Valdez Cleaning; Maria Pineda Reyes of Mary's Cleaning, LLC; Petra Pineda Reyes of Aby's Janitorial, LLC; Annabelle Encita of Annabelle's Cleaning, LLC; and Nesseri Capati Deza of Deza's Cleaning Service, LLC. This matter is remanded to the Department of Labor and Industries to remove the remaining three LLCs from coverage as workers for Hardy and recalculate the unpaid premiums, penalties, and interest accordingly.

DECISION

In Docket No. 17 19828, the firm, Hardy & Associates DBA Vanguard Cleaning Systems of Washington filed an appeal with the Board of Industrial Insurance Appeals on August 23, 2017, from an order of the Department of Labor and Industries dated July 26, 2017. In this order, the Department assessed a total of $383,689.70 in unpaid taxes, interest, and penalties for the year 2015. This order is incorrect and is reversed and remanded to the Department to recalculate the taxes, interest, and penalties based on the remaining covered workers.

FINDINGS OF FACT

1. On February 26, 2018, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Vanguard Cleaning Systems is a national trademark brand specializing in commercial janitorial services. Hardy and Associates is a franchisee of Vanguard, however, Hardy does not itself perform any janitorial services. Hardy sublicenses the trademarked Vanguard Cleaning System only to LLCs, not individuals. Under the franchise contract, Hardy is responsible for providing the LLCs with commercial cleaning accounts, however, the LLCs are responsible for performing the janitorial services themselves. The franchise contract with Hardy contains a clause that requires each LLC to hire at least one employee to perform the janitorial work. Hardy does not involve itself with the hiring or firing of employees of the LLC and does not require documentation that the minimum employee requirement has been satisfied. Hardy's revenue consists of the fees and royalties it collects from the commercial customers before forwarding the remaining money to the appropriate LLC.

3. The LLCs provide janitorial services to various businesses throughout Western Washington. These services include vacuuming, mopping, dusting, cleaning bathrooms, and taking out garbage and recycling. Such services constitute personal labor.

4. The following LLCs hired subordinates during the calendar year of 2015 to perform all or some of the work under the commercial cleaning accounts secured by Hardy: Chris Jones of Chris Cleaning, LLC; Il Chang of Jay's Services, LLC; Violeta Badon of LaSave, LLC;

5. Hardy failed to provide sufficient records for the Department to calculate the actual hours worked by the covered workers. The Department correctly estimated the hours worked under WAC 296-17- 35201.

6. With the exception of the workers listed in Finding of Fact No. 4, the Department correctly calculated the unpaid premiums, penalties, and interest due in the Order and Notice Reconsidering Notice and Order of Assessment of Workers' Compensation Taxes No. 0646061.

CONCLUSIONS OF LAW

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

2. Owners of LLCs who did not hire subordinates to perform all or part of the work under the commercial cleaning contracts are covered workers for whom Hardy is required to pay industrial insurance premiums. RCW 51.08.180; *Department of Labor and Indus. v. Lyons Enterprises Inc.* 185 Wn.2d 721 (2016); *White v. Department of Labor & Indus.*, 48 Wn.2d 470 (1956).

3. The following LLCs hired subordinates to help perform all or some of their commercial cleaning contracts, making them exempt from coverage under the Industrial Insurance Act: Chris Jones of Chris Cleaning, LLC; Il Chang of Jay's Services, LLC; Violeta Badon of LaSave, LLC;

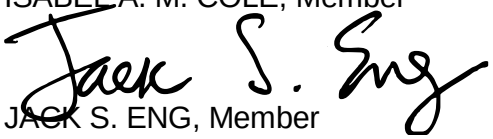
4. The Department's Order and Notice Reconsidering Notice and Order of Assessment of Workers' Compensation Taxes No. 0646061 is incorrect and is reversed and remanded to the Department to remove the owners of the LLCs identified in Finding of Fact No. 4 and Conclusion of Law No. 3 and recalculate the unpaid premiums, interest, and penalties due.

Dated: January 8, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

ISABEL A. M. COLE, Member



JACK S. ENG, Member

Addendum to Decision and Order
In re Hardy and Associates DBA Vanguard Cleaning SYS.
Docket No. 17 19828
Firm No. 077,765-00

Appearances

Firm, Hardy & Associates DBA Vanguard Cleaning Systems of WA, by Miller Nash Graham & Dunn, per Douglas C. Berry

Department of Labor and Industries, by Office of the Attorney General, per Maureen A. Mannix

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on July 8, 2019, in which the industrial appeals judge reversed and remanded the Department order dated July 26, 2017. The firm, Hardy & Associates, filed a response to the petition for review.

Evidentiary Rulings

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