A Place for Rover, Inc.

INDEPENDENT CONTRACTORS

Online platforms

Service providers are not employees or independent contractors of a provider of an electronic (Internet) platform through which pet owners and pet services providers can interact and come to an agreement for services in which all services agreements are between pet owner and pet services provider and the platform provider is not involved in setting price, time, scope of service, or any other matter relating to the provider's and owner's agreement. **….*In re A Place for Rover, Inc.*, BIIA Dec., 19 11131 (2020)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 20-2-02332-6.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: A PLACE FOR ROVER INC DBA PLACE FOR ROVER A INC	)	**DOCKET NO. 19 11131**
FIRM NO. 216,887-00	)	**DECISION AND ORDER**

The Department of Labor & Industries issued a Notice and Order of Assessment that assessed A Place for Rover, Inc. industrial insurance taxes (premiums), penalties, and interest. This assessment included taxes, penalties, and interest attributable to pet service providers who used the Rover internet platform to obtain engagements with, and income from, pet owners. Rover argued the pet service providers were neither its employees nor its independent contractors. Our industrial appeals judge concluded that Rover's argument was supported by the facts and the law, reversed the Department order, and remanded the matter to the Department to recalculate the assessment after removing the taxes, penalties, and interest with regard to the pet services providers. The Department argues that the pet service providers are covered workers within the meaning of the Industrial Insurance Act, and that Rover is an employer of them. We agree with the analysis of our industrial appeals judge and **REVERSE AND REMAND** the January 11, 2019 order, to recalculate Notice and Order of Assessment No. 0678189, excluding the taxes, penalties, and interest attributed to the pet service providers.

DISCUSSION

The Proposed Decision and Order at pages 1 through 3 contains an excellent summary of relevant evidence. We include a discussion of specific documentary evidence below that supports our conclusions.

Testifying on behalf of Rover were Megan Teepe, the firm's Vice President and General Manager of international business, and Melissa Weiland (in rebuttal), the firm's deputy general counsel. Also called as witnesses by Rover were five pet service providers: Alison O' Rose Jackson, Giselle Lopresti, David Lester, Frances Galvon, and Pennie McCarty. The Department presented the testimony of Rodante Cruz, an Auditor 3, and Alix Campbell, a litigation specialist. Twenty nine exhibits were admitted (Exhibit 5 was later withdrawn). Exhibit 1 is a sample Rover independent contractor agreement that is of limited relevance because it did **not** pertain to the pet services providers, as acknowledged by the Department auditor. The document detailing the relationship between Rover and the pet service providers was the Terms of Service (TOS) agreement. There are two TOS in the record, Exhibits2 and 11 respectively, for 2018 and 2017 respectively. Because the audit period was limited to the four quarters of 2017, Exhibit 11 is the relevant document.

Sections 2-1 and 2-2 of the 2017 TOS state that the agreement is between "you" and Rover, Inc. Both describe Rover's services as a desktop web application, mobile applications, related tools, support, and services available to pet owners and pet service providers to enable them to find and communicate with each other. Rover is a "neutral venue," not a service provider; it merely brings the pet services providers and pet services customers together. It reiterates that Rover itself does not provide pet care services. The first sentence in Section 20 of the TOS states: "Nothing in this agreement will be construed as making either party the partner, joint venture, agent, legal representative, employer, contractor or employee of the other."

Exhibit 3 consists of the responses to a Department questionnaire by at least 45 pet services providers that by title assumes them to be independent contractors of Rover. When asked whether there was an agreement between themselves and Rover, only two of the pet services providers described the TOS as an independent contractor agreement while the same number wrote that there was no employment agreement. None of the five pet services providers who testified described an employment relationship with Rover. At most, Ms. Lopresti testified that Rover was her partner but not her boss.

Rover provides an internet platform. The online platform matches pet owners with qualified providers of pet services, such as sitting, walking, and grooming. Pet services are between individual pet owners and individual pet sitters, walkers, and groomers. In Rover's case, the payment method is as follows: the customer deposits the agreed upon payment with Rover. Rover holds the full payment until 48 hours after the end date/time of the service purchased. Assuming the service goes forward as contracted for and without any problems, Rover will pay the contracted fee, minus its cut—usually 20 percent—to the service provider. Because Rover does not exert any other control over the customer or the pet service provider, the fee payment arrangement is the activity that the Department has decided makes the pet services providers into "workers" and "employees" of Rover within the meaning of RCW 51.08.180 and .185, thus making Rover the "employer" of the pet service providers within the meaning of RCW 51.08.070.

RCW 51.08.180 defines a "worker" as:

> (E)very 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, or as an exception to the definition

> of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 . . . .
>
> RCW 51.08.070 defines an "employer" as:
>
> "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. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195.

Notwithstanding the provisions of the TOS that the pet service providers are not employees or independent contractors of Rover, we must still determine whether it is still the employer of the pet service providers within the meaning of RCW 51.08.070 or whether they are independent contractors, because the essence of the contract is personal labor.

The analysis of whether Rover is an "employer" within the meaning of the Act begins with *Novenson v. Spokane Culvert & Fabricating Co.*[1] in which our supreme court set forth a two-prong test for determining whether an employer-employee relationship exists. It exists when (1) the employer has the right to control the servant's conduct in the performance of his duties and (2) the employer and the servant consent to the relationship.[2] These are questions of fact that are decided on a case-by-case basis.[3]

In *Xenith Group, Inc. v. Department of Labor and Industries*,[4] Division I of the Court of Appeals refused to apply the test discussed in *Novenson* and *Bennerstrom*. Xenith Group was a home care referral agency. The home care providers affiliated with Xenith all signed paperwork that stated that they were not an employee of Xenith but also that "clearly stated" that they were independent contractors, not employees. The company president admitted at hearing that these providers were independent contractors of Xenith. The court concluded that under these circumstances, the test in *Bennerstrom* and *Novenson* was not relevant because some independent contractors were "workers" as defined by RCW 51.08.180, and if they were the type of independent contractor that was defined as a worker under that statute, then Xenith was an employer as defined by RCW 51.08.070.

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[1] 91 Wn.2d 550, 553 (1979).
[2] See, also, *Robinson v. Dep't of Labor & Indus,* 181 Wn. App. 415 (2014); *Bennerstrom v. Dep't of Labor& Indus.*, 120 Wn. App. 853 (2004).
[3] *Smick v. Burnup & Sims*, 35 Wn. App. 276, 279 (1983)
[4] 167 Wn. App. 389 (2012).

Under *Xenith* it is not necessary to use the two-prong test when the existence of either an employee/employer relationship or an independent contract is admitted. In that case, the issues were limited to whether the specific kind of independent contract stated in RCW 51.08.180 ("[a]n independent contract, the essence of which is his or her personal labor for an employer..") applied and if so, is the statutory exception to the definitions of "worker" and "employer" found in RCW 51.08.195 applicable.

However, in this case, it is *Xenith* that is distinguishable. The TOS between Rover and the pet service providers does not include a provision stating that the pet services providers are either Rover's employers or have an independent contractor relationship with it. Mr. Cruz, the Department's auditor on this account, testified that the TOS was not an independent contractor agreement with the pet service providers. Rover did not admit to the existence of such a relationship with the pet care providers. The weight of the evidence does not support the existence of such a relationship. Thus, we must determine whether the parties intended to enter into a form of employment relationship or contractor/independent contractor relationship.

As noted by our industrial appeals judge in the Proposed Decision and Order, Rover had virtually no control over either the customer or the pet service provider other than the right to hold the job payment for a specific time and then subtract the fee for its services to both parties, and also to suspend or terminate its relationship with them if they do not meet ethical or behavioral standards that are essentially common to all business relationships. Rover does not control what, when, who, or how the pet service contracts are performed. It does not warrant the qualifications of the care providers. The terms of service are quite clear about the limited role Rover has beyond bringing the owners and care providers together and providing some ancillary resources that they can use if they choose.

There is no evidence that the care providers consented to an employment arrangement that the Terms of Service explicitly states—in its first and last provisions—does not exist. The pet care providers who testified during the hearing did not indicate that they consented to such any form of employment arrangement. Nor did the vast majority of the pet service providers who answered the Department's questionnaire indicate consent to such an arrangement. Thus, neither prong of the two-prong test support any form of employment relationship between Rover and the pet service providers.

Our analysis does not end there, however. The Department asserts that the primary question is whether the essence of the contract is the personal labor of the pet service providers. To determine whether personal service is the essence of the contract, the analysis often begins with the court's decision in *White v. Department of Labor & Industries.*[5] In *White* the court identified a three-pronged test that asks whether the independent contractor (1) owns or supplies his own machinery or equipment; (2) obviously could not perform the contract without assistance; or (3) employs others to do all or part of the work he has contracted to do. This analysis has limited relevance here, however, because the contract for services is between the pet service provider and the pet owner. The analysis applies to those who are providing work or services under an independent contract for a putative employer as defined by RCW Title 51. Here, the pet service providers are not working or providing their services for Rover under a contract with Rover. The providers provide work under an agreement with the pet owners and provide the work for the pet owners. Rover is not involved in setting price, time, scope of service, or any other matter relating to the provider's and owner's agreement. The essence of the contract between Rover and the pet service provider is the use of Rover's online platform in exchange for a fee, not the personal labor of the pet service provider. The application of *White* analysis is not relevant to characterization of the relationship between Rover and the pet service providers and does not require we find that Rover is an employer or that pet service providers are workers under RCW Title 51.

To the extent that the Department's notice and order of assessment includes taxes, premiums, and interest attributable to the pet service providers, it must be reversed and the taxes, penalties, and interest recalculated with them.

DECISION

On January 11, 2019, the Department of Labor & Industries (Department) issued an order affirming Notice and Order of Assessment No. 0678189, that assessed additional industrial insurance taxes (premiums), penalties, and interest in the amount of $215,139.32 for all four quarters of 2017 against A Place for Rover, Inc. (Rover) to which statutory late penalties and interest was added, for a new total of $219,947.75. Rover appeals, seeking reversal only as to that portion of the assessment related to the pet services providers, arguing the pet service providers were neither its employees nor its independent contractors. Because Rover's argument is supported by the facts and the law, the order of the Department is reversed and remanded to the Department to recalculate the

[5] *White v Dep't of Labor & Indus.,* 48 Wn.2d 470 (1956).

assessment after removing the assessment of taxes and penalties and interest with regard to the pet services providers.

FINDINGS OF FACT

1. On April 25, 2019, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. A Place for Rover, Inc. does business in the State of Washington. It provides an electronic (Internet) platform where pet owners and pet services providers can post their profiles, pet owners can list the services they want for their pets, pet services providers can list the services they provide, their rates for those services, and their availability to provide services to the pet owners.

3. A Place for Rover, Inc. provides an electronic (Internet) platform through which pet owners and pet services providers can interact and come to an agreement for services. All services agreements are between pet owner and pet services provider. A Place for Rover, Inc. is not involved in setting price, time, scope of service, or any other matter relating to the provider's and owner's agreement.

4. A Place for Rover, Inc., the pet owners, and the pet services providers enter into an agreement before the Rover electronic platform can be used wherein A Place for Rover, Inc., the pet owners, and the pet services providers agree A Place for Rover, Inc., does not provide pet services, does not employ pet services providers, and that the pet services providers are neither employees or independent contractors of A Place for Rover, Inc.

5. The Department issued a Notice and Order of Assessment of Industrial Insurances Taxes against A Place for Rover, Inc., on October 5, 2018, for the first through the fourth quarters of 2017, in the amount of $215,139.32 in premiums, penalties, and interest. The Department affirmed that notice and order in its order dated January 11, 2019, and added statutory late penalties and interest, for a new total of $219,947.75.

6. The personal labor provided by the pet services providers was for the pet owners, not for A Place for Rover, Inc.

7. A Place for Rover, Inc., does not provide pet services to pet owners.

8. A Place for Rover, Inc., did not owe any industrial insurance taxes for the pet services providers for the first through fourth quarters of 2017, nor any penalties or interest for those time periods with regard to pet services provided to pet owners by pet services providers.

CONCLUSIONS OF LAW

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

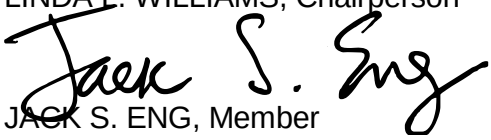
2. A Place for Rover, Inc., is not an employer of pet services providers and the pet service providers are not workers of A Place for Rover, Inc., within the meaning of RCW 51.08.070 and RCW 51.08.180, respectively.

3. The January 11, 2019, Department of Labor and Industries order affirming its notice and order of assessment dated October 5, 2018, is reversed and remanded to the Department to recalculate the assessment after removing the assessment of taxes, penalties, and interest with regard to the pet services providers and take all further actions consistent with the facts and the law.

Dated: October 23, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson



JACK S. ENG, Member

DISSENT

The majority suggests that the Legislature amend the definitions of worker and employer if it intends for the definition to apply to people using internet platforms to contract for work. The definition in RCW 51.08.180, however, is so all-encompassing already as to make it clear that the intention of the Legislature is that the default is in favor of workers' compensation coverage, and it is impossible to list every permutation of potential employments.

As the court stated in *Xenith*, "To effect the sweeping purpose of the state's workers' compensation scheme, the legislature modified this common law for purposes of workers' compensation by specifically and broadly defining the terms "worker" and "employer.""[6] In *Xenith* the court of appeals determined that healthcare workers that contracted with a referral service to find employment were covered workers for the purposes of workers compensation. The facts here are not that dissimilar.

[6] *Xenith Group, Inc. v. Dep't. Of Labor & Indus*., 167 Wn. App. 389 (2012).

Pet owners in need of a pet sitter or dog walker go on Rover's website to find a person to fulfill that need. They are actively looking for a worker to provide these services. Rover provides those workers through their website. The pet sitters must sign a contract with Rover in order to be allowed to place their offer of services on Rover's website. The pet sitters agree to certain standards in order to be hired to pet sit. They agree to use GPS on their walks with the pet. They agree to use certain veterinarians if the pet is injured. The pet sitters sometimes wear clothing with the Rover logo, or provide cards to the pet owners with the Rover logo. The pet owners must pay the fee for service up front to Rover, and the pet sitters are only paid for their labor after it is completed. The pet sitters are required to submit to a background check prior to utilizing the Rover website to find work. Rover requires the pet sitter and pet owner to contract through the Rover website, not allowing them to make separate arrangements outside of Rover. If the service providers do not meet a certain standard, then they are removed from the Rover platform and are no longer able to get work through Rover. At the end of the year, Rover provides the pet sitters who earned over the $600 minimum, with a 1099 form for tax purposes. **All** of Rover's income comes from the labor of these service providers.

The definition of a worker under the Industrial Insurance Act (IIA) in Washington is deliberately all-encompassing. "The IIA is meant to provide broad workers compensation coverage. *See* RCW 51.12.010 ('it is the purpose of this title to embrace all employments') (emphasis added). In keeping with that goal, RCW 51.08.180 defines a worker as:"[7] "**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…"[8] (Emphasis added). The *Xenith* court goes on to say that the "very purpose behind the legislature's broad definitions of "employer" and "worker"—to provide workers' compensation coverage to certain individuals not meeting the common law definition of an employee."[9]

[7] *Dep't of Labor & Indus. v. Lyons Enterprises, Inc.*, 186 Wn. App. 518 (2015).
[8] RCW 51.08.180.
[9] Xenith

Rover does not refer to the contracts between it and its service providers as independent contractor contracts, but that is what they are. Although they are entitled "Terms of Service" agreements, they are contracts, the essence of which is to provide the pet sitters' personal labor to the customers because without that personal labor, Rover would not have any income. The majority states that these "Terms of Service" agreements specifically show that the service providers did not consent to an employment arrangement, but that is not required. In *Xenith* the court was faced with the same argument, that first the court was required to determine if an employment relationship existed. The court found that was not necessary stating: "Xenith's proposed threshold test would frustrate the very purpose behind the legislature's broad definitions of "employer" and "worker"—to provide workers' compensation coverage to certain individuals not meeting the common law definition of an employee. As we have previously recognized, analyzing whether an individual works under an independent contract, the essence of which is that individual's personal labor, involves a different analysis than whether the individual is an employee."[10]

Similarly, the argument that *White* has limited relevance because the contract is between the pet owner and service provider rather than between the pet owner and Rover is not supported by the facts. If Rover were, as it argues, merely providing a platform on which pet owners could find pet sitters, then it would just charge a flat fee to access the website. But Rover makes its money based on the actual labor of the service providers. The more services rendered, the more money Rover makes. The pet owners don't pay the service providers, they pay Rover for services rendered. Additionally, the service providers are at the mercy of Rover if they do not provide good service to the individual pet owners. The individual owner can choose not to use a pet sitter again if they don't like their service. Rover, however, can keep that service provider from providing service to any of the pet owners on its platform if the pet sitter displeases just one of the dog owners that contracts with that individual service provider. The service providers are, therefore, working under a contract, the essence of which is their personal labor so they meet the definition of worker under RCW 51.08.180.

The Legislature set up an additional means under which a person can be excluded from coverage even if they meet the definition of worker. RCW 51.08.195 sets out 6 conjunctive elements to determine when coverage should be excluded. "[U]nder this test, a contractor for labor who fulfills all six requirements does not become a "worker." But an independent contractor who does not satisfy

[10] Xenith.

any one of these factors is a "worker," and the payment he or she receives in remuneration for services is the "wages."[11] As stated in *Xenith* the service providers for Rover have to meet all six elements to be excluded. They do not meet any of them. They do not have their own businesses for pet sitting or accounts with the Department of Revenue for pet sitting. They are not allowed to become service providers on other platforms that offer the same services as Rover. The only element that is arguable in the instant case is whether or not the pet sitters are free from direction or control in performance of their duties in contract or in fact. But the Rover service providers do not meet this exception either. The service providers have to meet the expectations of the individual pet owners with which they contract which can include specific timelines or duties. If they do not perform up to the pet owners' requirements the service providers can be terminated from Rover.

The service providers for Rover are working under an independent contract, the essence of which is their personal labor. Rover makes **all** of its income from the personal labor of the service providers. Since the very first time a law was written to require payment of taxes, the people to which those laws apply have been trying to find ways to meet exceptions in order **not** to pay those taxes. The Washington IIA definition of "workers" and "employers" was written broadly, and those that uphold the Act were instructed to apply it liberally in favor of coverage so that workers would be assured the swift and certain relief promised under the IIA. Rover service providers provide a service that could easily lead to injury as it is a well-known fact that dogs and cats sometimes bite, scratch, and jump on people. In fact, a report of injury is what led to the audit of Rover that led to this appeal.

The Legislature has already written the law broadly enough to encompass almost every worker in Washington to ensure the greatest possible coverage for injured workers under the IIA. Under the current law the Rover service providers qualify as workers and deserve the same protections guaranteed to other workers under the IIA. Rover should not be able to abdicate its duty to protect the workers that create its income simply by calling its Independent Contractor contracts "Terms of Service." I would affirm the Department's order, therefore, I dissent.

Dated: October 23, 2020.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

[11] *Malang v. Dep't of Labor & Indus*., 139 Wn. App. 677, 689 (2007),

Addendum to Decision and Order
In re A Place for Rover Inc. DBA Place for Rover A Inc
Docket No. 19 11131
Firm No. 216,887-00

Appearances

Firm, A Place for Rover, Inc. DBA Place For Rover A, Inc., by Davis Wright Tremaine, LLP, per Michael J. Killeen, and Kristina Markosova

Department of Labor and Industries, by Office of the Attorney General, per Maureen 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 April 8, 2020, in which the industrial appeals judge reversed and remanded the Department order dated January 11, 2019. On May 26, 2020, Rover filed an Objection to Department's Petition for Review. On June 22, 2020, Rover filed a Response to the Department's 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.