Stracener, Beth

INDEPENDENT CONTRACTORS

Entertainers

A performance lease that required a dancer to pay a certain amount to a club that required performance during specified shifts to create revenue for the club was a contract, the essence of which was clearly personal labor. The dancer was a covered worker when performing under the contract. ***….In re Beth Stracener,* BIIA Dec., 05 14952 (2006)**
[*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 06-2-11854-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BETH A. STRACENER	)	**DOCKET NO. 05 14952**
	)	
CLAIM NO. Y-894348	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Beth A. Stracener, Pro Se

Employer, LLC Foxes II, by
Law Office of Larry N. Johnson, PLLC, per
Larry N. Johnson

Department of Labor and Industries, by
The Office of the Attorney General, per
David I. Matlick, Assistant

The employer, LLC Foxes II, filed an appeal with the Board of Industrial Insurance Appeals on May 16, 2005, from an order of the Department of Labor and Industries dated March 18, 2005. In this order, the Department affirmed orders dated December 13, 2004 and June 25, 2004, in which the Department allowed the claim. The Department order is **AFFIRMED**.

PRELIMINARY MATTERS

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 March 29, 2006, in which the industrial appeals judge affirmed the order of the Department dated March 18, 2005.

The employer argues that several exhibits offered were rejected in error. They pertain to Department actions on other claims that the employer believes are inconsistent with the Department adjudication in this claim. We agree with our industrial appeals judge that they are not relevant and should remain rejected. Actions that the Department takes in other claims pertain to each of those claims, and have no bearing to the adjudication of this claim. It is not the Board's role to ensure that the Department is consistent, even if it were to know the facts of each individual claim. Each case must be decided on its own merits. Relative to other evidentiary matters, we have reviewed the rulings in the record of proceedings and find that no prejudicial error was committed. The rulings are affirmed.

The other issues presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

DECISION

This comes before us on the employer's Petition for Review from our industrial appeals judge's determination that the claimant was a worker as contemplated by the Industrial Insurance Act. The Department decided that this claim should be allowed. Ms. Stracener is a nightclub dancer. She performed at a club called Foxes, and was also expected to make agreements with customers for private dances on Foxes' premises. The employer argues that the claimant is a lessee of its club "space" and is a sole proprietor, not an employee or even an independent contractor, and is therefore excluded from coverage under RCW 51.12.020(5). Alternatively, it argues that Ms. Stracener is excluded from coverage pursuant to RCW 51.12.020(9), as an entertainer under a contract with a purchaser of the services for a specific engagement not regularly or continuously employed by the purchaser.

In a stipulation of the parties, the parties indicated that each performer, including the claimant, agrees to pay for "space" at the club and dance or perform other services for the general public during the shift she works and "produce the maximum gross sales possible from the premises during the term of this lease for the benefit of both owner and performer; and assure regular maximum operation of entertainment at the premises for the benefit of both owner and performer . . .", among other provisions in the agreement. Exhibit No. 1. Our industrial appeals judge found that the claimant was an independent contractor, the essence of whose services were personal labor. The "Performance Lease" states that the lessee will pay a certain amount to the club, but will perform during the allotted shifts to create as much revenue as possible. Exhibit No. 1. She was to pay $15 an hour or $90 a shift, (six hours) simply to use the stage, but obviously it was to Foxes' benefit. This was a contract, but the essence of the contract was clearly for Ms. Stracener's personal labor.

Beth Stracener was a waitress at Foxes beginning in April 2004. She became interested in performing as a dancer and an arrangement was reached. She discontinued her serving work and signed a "Performance Lease," (Exhibit No. 12), which, as stated above, provided that she would pay for the space she occupied to dance at the premises and would provide entertainment at the club for the entire time she was using the stage. She was injured while performing on stage. In its

Petition for Review, the employer argues that Ms. Stracener's activities were not personal labor. However, in attempting to submit more reasons as to why Ms. Stracener was not engaged in her own personal labor, the employer actually makes the case that Ms. Stracener was engaged in personal labor; for instance, soliciting customers, and so on (Petition for Review, at 15). Such activity outlined in the employer's Petition for Review does not require anything but personal effort. Ms. Stracener supplied no equipment or tools other than her clothes or costume. She required no assistance, and did not employ others to either do, or enable her to do, her work. The contract stated that she could not delegate or reassign her duties. The provisions regarding Ms. Stracener's obligation to maximize her efforts to perform during her allotted shifts and make as much money as possible for that time were all to Foxes' benefit as well as her own. The case that is most relevant is the case cited in the Proposed Decision and Order, *Department of Labor & Indus. v. Tacoma Yellow Cab*, 31 Wn. App 117 (1982). In that case, cabbies leased the vehicles, paying the cab company as lessors, but retaining the fares—similar to the arrangement here in which Ms. Stracener paid the club for its venue and kept all the fees she generated from the patrons. In each case, the essence of the labor, by cabby or dancer, was personal. The court said that it was necessary to look at the substance, not the form, of the arrangement, and that the lease arrangement evaded the real issue—that personal labor was the essence of the contract. This was the true purpose involved, even though the cab drivers were able to use the cab that they drove for any legal purpose. The court stated that:

> [W]e are reminded not to observe symbolic or meaningless acts. Rather, we are urged, in reviewing statutes which confer benefits, to 'look at the realities of the situation.' (Citations omitted.) The realities are simply that the *essence* of the independent lease contract is to provide a method to place taxis and drivers on the city streets of Tacoma to carry passengers . . ..

Tacoma Yellow Cab, at 124.

This is on point with the case before us. The entertainment service was for the benefit of the employer and its establishment. Foxes advertises itself as a place that provides adult entertainment, and that is how it makes its revenue. Furthermore, in its Petition for Review, the employer states that the entertainers contribute more than personal labor, because the performer must approach a customer, develop dance routines, maintain a certain appearance, and otherwise use her individual efforts. This is nothing if not personal labor. The assertions belie the argument, not support it. Here, as in *Tacoma Yellow Cab*, the purpose of the "independent lease" is to provide a method to make adult entertainment available to the customers of the club.

As noted above, the employer also argues that the claimant's work was excluded under RCW 51.12.020(9), which provides that among the exclusions from mandatory coverage are:

> Services rendered by a musician or entertainer under a contract with a purchaser of the services, for a specific engagement or engagements when such musician or entertainer performs no other duties for the purchaser and is not regularly and continuously employed by the purchaser.

This contention is incorrect. The dancers at Foxes, including the claimant, do perform regularly and continuously for the same employer. This does not involve one specific or even a specific series of engagements; the contract contemplates an ongoing relationship, unlike that with a band or other entertainer who performs at a certain site and then moves on. Furthermore, the customer is the client of the club first and foremost, and comes there to be entertained. The claimant was there to provide just that kind of service on an ongoing basis for the customers of Foxes, not just for her own benefit, but for the benefit of Foxes' business. More than just an engagement, or even a limited series of engagements was contemplated.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, the Department's Response to Petition for Review, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On June 21, 2004, the Department of Labor and Industries received an application for benefits from the claimant, Beth A. Stracener, in which she alleged that an industrial injury occurred on June 8, 2004, during the course of her employment with Foxes. On June 25, 2004, the Department issued an order in which it allowed the claim. On June 30, 2004, the Department received the employer's protest to the June 25, 2004 order, and it was held in abeyance. On December 13, 2004, the Department issued an order in which it affirmed its June 25, 2004 order. On February 14, 2005, the Department received the employer's protest to the December 13, 2004 order, and it was held in abeyance. On March 18, 2005, the Department issued an order in which it affirmed its June 25, 2004 and December 13, 2004 orders. On May 16, 2005, the Board received the employer's Notice of Appeal from the March 18, 2005 order, and it was assigned Docket No. 05 14952.

2. On June 7, 2004, Foxes and Beth A. Stracener entered into a contract, a Performance Lease, which contemplated that the claimant dance at Foxes with payments being made to Foxes on a per shift basis for use of the space she occupied to dance. She was to arrange her shifts with the other dancers, maximize her efforts to provide entertainment for the shifts she worked both on stage to provide dances for individual customers to the benefit of Foxes as well as her own and the customers'. Foxes is an establishment which holds itself out as a provider of adult entertainment.

3. The essence of the Performance Lease was that Beth A. Stracener would provide personal labor, in the form of adult entertainment dancing and solicitation of customers for dances, for Foxes. The only "equipment" provided by Ms. Stracener was her clothing or costume.

4. Ms. Stracener's work as a dancer did not involve services for a specific engagement or engagements, and an ongoing relationship was contemplated.

5. On June 8, 2004, Ms. Stracener injured her right knee while dancing at Foxes.

CONCLUSIONS OF LAW

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

2. At the time of her June 8, 2004 right knee injury, Beth A. Stracener was a worker in the employment of Foxes, within the meaning of RCW 51.08.180, because the essence of the independent contract she entered into with Foxes was personal labor.

3. Ms. Stracener was not excluded from mandatory coverage under the Industrial Insurance Act as a sole proprietor within the meaning of RCW 51.12.020(5).

4. Ms. Stracener was not excluded from mandatory coverage under the Industrial Insurance Act as a musician or entertainer under a contract with a purchaser of the services for a specific engagement or engagements who is not regularly and continuously employed by the purchaser within the meaning of RCW 51.12.020(9).

5. The March 18, 2005 order of the Department of Labor and Industries is correct and is affirmed.

It is so **ORDERED**.

Dated this 29th day of August, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member