Ryan, John

COVERAGE AND EXCLUSIONS

Course of trade, business or profession of employer (RCW 51.12.020(3))

Two laborers hired by a dentist to remodel railroad cars over a six-year period for the purpose of housing the dentist's ongoing dentistry practice were mandatorily covered workers and the remodeling effort was in the course of the dentist's profession in light of the duration of the employment relationship and the "ongoing," rather than prospective, nature of the business. **….*In re John Ryan*, BIIA Dec., 86 1153 (1987)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOHN B. RYAN, D.D.S./M.S.D.	**)**	**DOCKET NO. 86 1153**
	)	
FIRM NO. 330,513	**)**	**DECISION AND ORDER**

APPEARANCES:

John B. Ryan, D.D.S./M.S.D., by
Esposito, Tombari & George, P.S., per
John W. Campbell

Department of Labor and Industries, by
The Attorney General, per
Donald Verfurth, Assistant

This is an appeal filed by the employer/appellant on March 27, 1986 from an order of the Department of Labor and Industries dated February 26, 1986 which affirmed its Notice and Order of Assessment of Industrial Insurance Taxes No. 10047193, assessing premiums in the amount of $2,395.70 for the period of October 1, 1983 through September 30, 1985. The Department order is **AFFIRMED**.

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/appellant to a Proposed Decision and Order issued on June 1, 1987 in which the order of the Department dated February 26, 1986 was affirmed.

This matter was submitted based on stipulations of fact entered into by the employer and the Department. The issue on appeal is whether a dentist's employment of two laborers to remodel railroad cars for the purpose of officing his dental practice is mandatorily covered employment or is subject to exclusion pursuant to RCW 51.12.020(3).

Dr. John B. Ryan is a registered dental surgeon with a specialty in pediatric dentistry. He began practicing dentistry in 1968, and, after some additional graduate training, began practicing pediatric dentistry in 1972 in Spokane, Washington. In 1979, Dr. Ryan, a railroad buff, purchased a caboose and a Pullman car with the plan to use them as a dental office in the future. In 1982 he purchased a third car.

Dr. Ryan began restoring the cars with the part-time help of Richard Clark in June of 1979 and Bruce Ewing in November 1980. Dr. Ryan supervised his two workers whose work schedules varied, averaging two to three days a week. In the summer of 1982, work was reduced to an average of one day a week. Mr. Clark obtained full-time work elsewhere and eventually ceased the part-time employment with Dr. Ryan. Mr. Ewing continued until the project was completed at the end of August 1985.

The two part-time employees helped Dr. Ryan with such manual tasks as painting, sweeping, digging ditches, cleaning, pulling windows, renovating the cars, and installing wiring. During the construction period of 1979 to September 1985, the cars were not used as a dental office, but in June 1984 Dr. Ryan saw one patient in the railroad cars in order to begin the equipment layout, test lighting, and test the need for window treatment. The first dental chair was installed in June 1985. In September 1985, the three remaining chairs, x-ray equipment, and files were installed, and his old office was closed.

During the fourth quarter of 1983 through the third quarter of 1985, Mr. Ewing and Mr. Clark together worked a total of 2,485 hours.

Mr. Ewing was injured on three occasions while working for Dr. Ryan. He filed three claims with the Department -- Claim No. J-484188, Claim No. J-504817, and Claim No. J-559994. Dr. Ryan received notice of the acceptance of these claims for medical treatment, listing John B. Ryan, D.D.S. as the employer. None of these orders was appealed by Dr. Ryan.

The Industrial Appeals Judge affirmed the Department's assessment of premiums for these two part-time workers, reasoning that because Dr. Ryan did not appeal from the notices of the acceptance of the three claims listing him as the employer of Mr. Ewing, it was res judicata that Dr. Ryan was the "employer" for the purpose of Mr. Ewing's and Mr. Clark's coverage under the Industrial Insurance Act. The ultimate issue was never reached of whether the employment of these part-time manual laborers fell within the exclusionary provisions of RCW 51.12.020(3).

We are not persuaded that the facts stipulated to by the parties provide us with a sufficient basis for holding that, because Dr. Ryan failed to appeal the three notices of Mr. Ewing's claims showing Dr. Ryan as the employer, it is res judicata that Mr. Ewing and Mr. Clark are mandatorily covered workers under the Act. Clearly the three orders with respect to Mr. Ewing have no binding effect as to Mr. Clark, since he was not a party to the Department orders allowing Mr. Ewing's claims. Since the precise wording of these orders is unknown we cannot determine their precise res judicata

effect. There is no dispute that Dr. Ryan and Mr. Ewing enjoyed an employer-employee relationship. The dispute is whether such employment is mandatorily covered by the Industrial Insurance Act. The stipulated facts as presented in this record do not provide us with sufficient information to determine whether Dr. Ryan was truly apprised in these notices of acceptance of claims that the Department was requiring him to pay premiums and that Mr. Ewing's employment was within the mandatory coverage provisions. However, because of our resolution of the ultimate issue in favor of mandatory coverage, we need not resolve the res judicata issue.

The policy of the Washington Industrial Insurance Act is to "embrace all employments which are within the legislative jurisdiction of the state." RCW 51.12.010. The statute further declares that this title "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."

RCW 51.12.020(3) states:

> "The following are the only employments which shall not be included within the mandatory coverage of this title: ... (3) a person whose employment is not in the course of the trade, business or profession of his or her employer and is not in or about the private home of the employer." [Emphasis added]

RCW 51.12.020(3) has not been specifically interpreted since coverage under the Act was broadened by the 1971 amendments, effective January 1, 1972, which extended mandatory coverage to virtually all employments within this state except those excluded in RCW 51.12.020. Thus, we do not consider such pre-amendment case law as Carsten v. Department of Labor and Industries, 172 Wash. 51 (1933); Dalmasso v. Department of Labor and Industries, 181 Wash. 294 (1935); Jannak v. Department of Labor and Industries, 181 Wash. 396 (1935); Craine v. Department of Labor and Industries, 19 Wn.2d 75 (1943); or Nyland v. Department of Labor and Industries, 41 Wn.2d 511 (1952) to be authoritative or conclusive to this inquiry, since the Legislature has evidenced a general broadening of coverage and a trend away from the direction of those cases. Further evidence of this trend toward broadening of coverage is the 1977 amendment which included law enforcement officers and firefighters employed on or after October 1, 1977, within the coverage of the Industrial Insurance Act.

We must look behind the purpose of the exclusions contained in RCW 51.12.020 to determine whether the employment relationship between Dr. Ryan and Mr. Ewing and Mr. Clark was intended to be covered by the Act. We note at the outset that this was an employer-employee relationship under

the definition of "worker" contained in RCW 51.08.180 and the definition of "employer" contained in RCW 51.08.070. Since this employment relationship admittedly existed, the argument for coverage starts in a stronger position because the compensation legislation presumptively applies unless a good reason for exclusion can be shown. 1C A. Larson Workmens' Compensation Law (1987) § 51.22.

Larson provides us with some insight into the purpose behind various exemptions which have the "non-business" character of the employer's activity in common. As pointed out by Larson, the courts have consistently held that compensation acts do not apply to employments where a householder hires someone to fix the roof, mow the lawn, clean house, or remodel the kitchen. Despite the fact that such workers are employees who could suffer an accident during the course of such employment, they are not within the letter or spirit of compensation legislation for the reason that to impose workers' compensation liability on householders would be impossible to administer, given the whole host of casual short-duration "employment" relations attendant to the average household. The Washington Industrial Insurance Act incorporates this exclusion from coverage in RCW 51.12.020(2).

The second purpose of the "non-business" aspect of the coverage exemption discussed by Larson comes into play in defining the boundaries of the "regular" business of an employer who is admittedly in business. In most states, a particular employment is within the Act if it is part of the employer's regular business. Larson, § 51.21. The Washington legislature has incorporated this provision in RCW 51.12.020(3). As previously pointed out, there are no Washington cases construing RCW 51.32.020(3). The numerous out-of-state cases cited by Larson construing this phrase have mostly involved ancillary activities such as remodeling, repair, construction, and cleaning. These activities have generally been construed as "in the course of the business" since they are an expectable, routine and inherent part of carrying on the enterprise. Larson § 51.23. Likewise we conclude that the remodeling of rail cars to house Dr. Ryan's dental practice was an inherent part of his dental business.

The employer appellant, relying on Lackey v. Industrial Commission of Colorado, 249 P.2d 662 (1926), which applies the exemption where the work being done was for a prospective business, argues that the work done on the railroad cars was for Dr. Ryan's prospective business and was not merely for the maintenance of an existing business structure. However, Dr. Ryan's dentistry business was not prospective -- he was operating as a dental business and incorporated as such during the entire period. The work done on the cars previous to the total movement of his business into them

was intended for the furtherance and enhancement of the corporation's ongoing business. We believe that Lackey is clearly distinguishable from Dr. Ryan's situation.

In analyzing whether Dr. Ryan's remodeling venture on the railroad cars was in the course of his profession of dentistry, we note that the remodeling activity was not a casual short-duration employment, but, while part-time, continued for over six years. Furthermore, the remodeling venture was solely for income production within his profession as a dentist. The conversion of the railroad cars was specifically designed to produce income as a professional dentist and was not merely incidental to some other aspect of Dr. Ryan's life, such as the personal pursuit of a hobby. In the event that Dr. Ryan had been remodeling these railroad cars as a mere hobby, with no intent that they house and enhance his dentistry business, then we believe that the employment of Mr. Ewing and Mr. Clark would have been exempted under RCW 51.12.020(3). However, such is not the case.

Given the legislative mandate contained in RCW 51.12.010 to construe this title liberally for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment, and given the discussion of non-business exemption statutes contained in Larson, we believe that the employment relationship between Dr. Ryan and Mr. Ewing and Mr. Clark was not excluded from coverage by RCW 51.12.020(3) in that Mr. Ewing and Mr. Clark were employed in the course of Dr. Ryan's professional business. The Department therefore correctly assessed premiums for the hours Mr. Ewing and Mr. Clark worked for Dr. Ryan. The Department order of February 26, 1986 is correct and will be affirmed.

The Board hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On January 23, 1986 the Department of Labor and Industries issued a notice and order of assessment of industrial insurance taxes to John B. Ryan, D.D.S./M.S.D., Insurance Tax No. 10047193, assessing $2,395.70 which accrued as a result of an audit covering the period of October 1, 1983 through September 30, 1985. On February 14, 1986 Dr. Ryan protested and requested reconsideration. On February 26, 1986 the Department entered an order affirming its notice and order of assessment of industrial insurance taxes. On March 24, 1986 the Department received Dr. Ryan's notice of appeal which was forwarded to this Board on March 27, 1986, and on April 15, 1986 the Board entered an order granting the appeal, assigning it Docket No. 86 1153 and directing that further proceedings be held in the matter.

2. Dr. John B. Ryan is a registered dental surgeon with a specialty in pediatric dentistry. He began practicing dentistry in 1968 and, after additional graduate training, began a specialty practice in pediatric dentistry in 1972 in Spokane, Washington.

3. In 1979 Dr. Ryan, who is a railroad buff, purchased a caboose and a Pullman car with the plan to use them as a dental office in the future. In 1982 he purchased a third car.

4. Dr. Ryan began restoring and remodeling the railroad cars with the part-time help of Richard Clark in June of 1979. Bruce Ewing began helping part-time in November 1980. Dr. Ryan supervised these two workers; work schedules varied, averaging two to three days a week. In the summer of 1982 work was reduced to an average of one day a week. When Mr. Clark obtained full-time work elsewhere he eventually ceased the part-time employment with Dr. Ryan. Mr. Ewing continued his employment on the project until the project was completed at the end of August, 1985.

5. The duties of Mr. Clark and Mr. Ewing were to help Dr. Ryan remodel the railroad cars by painting, sweeping, digging ditches, cleaning, pulling windows, installing wiring, and welding.

6. During the construction period of 1979 to September 1985, the cars were not used as a dental office. In June 1984 Dr. Ryan did see one patient in the railroad cars in order to begin the equipment layout, test the lighting, and test the need for window treatment. The first dental chair was installed in June 1985, and in September 1985 the three remaining chairs, the x-ray equipment, and the files were installed and his old office closed.

7. During the fourth quarter of 1983 through the third quarter of 1985, Mr. Ewing and Mr. Clark together worked a total of 2,485 hours.

8. On September 29, 1984, and November 10, 1984, and March 20, 1985, Bruce Ewing filed claims with the Department of Labor and Industries for industrial injuries, listing Dr. Ryan as his employer. Dr. Ryan received notices of acceptances of these claims listing him as Mr. Ewing's employer. Dr. Ryan did not appeal these notices.

9. Mr. Ewing's and Mr. Clark's employment was in the course of Dr. Ryan's dental profession in that they were remodeling the railroad cars in furtherance of Dr. Ryan's dental business.

CONCLUSIONS OF LAW

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

2. Mr. Ewing's and Mr. Clark's employment by Dr. Ryan was not excluded from mandatory coverage by the Industrial Insurance Act pursuant to RCW 51.12.020(3).

3. The February 26, 1986 order of the Department of Labor and Industries affirming the January 23, 1986 Notice and Order of Assessment of Industrial Insurance Taxes No. 10047193, assessing premiums in the amount of $2,395.70 for the period of October 1, 1983 through September 30, 1985, is correct and should be affirmed.

It is so ORDERED.

Dated this 9th day of December, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member