

Shanley, James (Northwestern Mutual Life Insurance Co.)

INDEPENDENT CONTRACTORS

Insurance agents

Where insurance sales agents working under independent contracts with a general agent can and do employ others to perform at least part of their contracts to sell insurance, their personal labor is not the essence of their independent contracts and they are not "workers" within the meaning of RCW 51.08.180. *Citing Massachusetts Life Insurance Co. v. Department of Labor & Indus.*, 51 Wn. App. 159 (1988). *Overruling In re Family Life Insurance Co.*, BIIA Dec., 63,147 (1984) ...*In re .James Shanley (Northwestern Mutual Life Insurance Co.)*, BIIA Dec., **87 0485 (1988)**

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: JAMES D. SHANLEY & WIFE,) DOCKET NO. 870485**
2 **dba, NORTHWESTERN MUTUAL)**
3 **LIFE INSURANCE COMPANY)**
4 **)**
5 **FIRM NO. 329,975) DECISION AND ORDER**
6 _____)

7 APPEARANCES:

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9 Firm, James D. Shanley & Wife, dba,
10 Northwestern Mutual Life Insurance Company, by
11 Carney, Stephenson, Badley, Smith, Mueller & Spellman, P.S., per
12 Janet L. Stauffer

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Dennis J. Beemer, Assistant
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18 This is an appeal filed by the firm with the Board of Industrial Insurance Appeals on February 9,
19 1987 from a Notice and Order of Assessment of Industrial Insurance Taxes of the Department of
20 Labor and Industries dated January 12, 1987 which assessed the firm, James D. Shanley and Wife,
21 for taxes due and owing to the State Fund in the amount of \$ 8,457.95, which accrued between July 1,
22 1984 through June 30, 1986. **REVERSED AND REMANDED.**
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25 **DECISION**

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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order
29 issued on February 19, 1988 in which the order of the Department dated January 12, 1987 was
30 reversed and remanded to the Department with instructions to assess \$ 8,305.98 against James D.
31 Shanley and Wife for taxes which have accrued between July 1, 1984 through June 30, 1986.
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34 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
35 prejudicial error was committed and said rulings are hereby affirmed.
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38 The three issues presented by this appeal are accurately set forth in the Proposed Decision
39 and Order. We agree with the Proposed Decision and Order that the Department was correct in
40 assessing additional premiums for the employer's salaried clerical personnel under the provisions of
41 WAC 296-17-350(5) in the amount of \$ 446.29. We agree with the Proposed Decision and Order that
42 the Department was incorrect regarding the additional premiums assessed with respect to Mr. Howard
43 Stetson, in the sum of \$ 151.97. The third issue raised by this appeal cannot be disposed of quite so
44 succinctly, as it concerns the characterization of the relationship between certain insurance agents
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1 and the appealing firm. The Department determined, and the Proposed Decision and Order affirmed,
2 that these agents are workers within the meaning of RCW 51.08.180. We have granted review on this
3 issue due to the recent decision of the Court of Appeals, Division I, in Massachusetts Mutual Life
4 Insurance Company v. Department of Labor and Industries, 51 Wn. App. 159 (1988) which alters the
5 legal basis upon which the Proposed Decision and Order relied.
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9 The chief area of dispute between the Department and the firm in this case is the interpretation
10 of RCW 51.08.180. That statute extends the definition of a worker to a person who is ". . . working
11 under an independent contract, the essence of which is his or her personal labor" The Department
12 of Labor and Industries determined that the individual insurance agents were workers because the
13 essence of their contract with the firm was their own personal labor in the promotion and selling of
14 insurance.
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18 The firm has emphasized in its presentation of evidence the independent and highly
19 individualized nature of the tasks performed by insurance sales agents in promoting their insurance
20 products. In a previous decision by this Board involving not only insurance agents but also facts that
21 are very close to the present case, the Board majority agreed with the Department in determining that
22 the essence of the contractual relationship between the insurance company and its insurance agents
23 was the personal labor of the agents. In re Family Life Insurance Company, BIIA Dec. 63,147 (1984).
24 In the Massachusetts Life Insurance case referred to above, the court of appeals, working with facts
25 also very close to the present case, determined that insurance agents are true independent
26 contractors and that their personal labor is not the essence of their employment agreement with the
27 insurance company.
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31 James Shanley is a general agent for Northwestern Life Insurance Company who has eighteen
32 sales agents working under contract with him. There is no dispute by the Department as to Mr.
33 Shanley's description of the relationship between Mr. Shanley and these eighteen insurance sales
34 agents. Each agent is required to provide his or her own fidelity bond and is allowed to sell other
35 forms of noncompeting insurance based upon the needs of prospective purchasers. The insurance
36 agents are required to pay their own office expenses and office staff except for a brief two-year period
37 in which the firm shares in the start-up costs for new agents. The agents also set their own hours and
38 methods of soliciting clients. In some cases the individual insurance agents employ office staff for the
39 purpose of soliciting clients and customers by telephone and other means. In summary, the consistent
40 factual theme running through this case as well as our earlier decision in Family Life and the court of
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1 appeals decision in Massachusetts Life Insurance is the highly unstructured relationship between a
2 sales agent and the general agent, in order to allow the greatest latitude to the sales agent in
3 conducting his or her own sales endeavors.
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6 The court of appeals in Massachusetts Life Insurance relied heavily on the leading Washington
7 State Supreme Court decision in this area, White v. the Department of Labor and Industries, 48 Wn.
8 2d 470 (1957). In discussing which kinds of independent contracts would be considered covered
9 under the Industrial Insurance Act (RCW 51.08.180) the court of appeals in Massachusetts Life
10 Insurance stated that there were:
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13 three independent contracting situations which the Legislature intended to
14 exclude from the expanded definition of workman. Excluded from the
15 Act's coverage was the independent contractor (1) who of necessity
16 owned or supplied machinery or equipment (as distinguished from the
17 usual hand tools) to perform the contract, or (2) who obviously could not
18 perform the contract without assistance, or (3) who of necessity or choice
19 employed others to do all or part of the work he has contracted to perform.
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21 Massachusetts Life Insurance, at 163-164; See also White, at 474.
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23 This three pronged test is often quoted and applied to determine whether an independent
24 contractor is a worker within the meaning of RCW 51.08.180. However, for a clear understanding of
25 the White decision, it is essential to look behind this test at the rationale for the court's opinion.
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27 The White court concluded that, in expanding the definition of "worker" in 1937 to include
28 independent contractors, the Legislature
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30 intended to protect workmen (and to make contracting parties for whom
31 the work is done responsible for industrial insurance premiums) in those
32 situations where the work could be done on a regular employer-employee
33 basis but where, because of the time, place, manner of performance, and
34 basis of payment, it could be urged that the workman was an independent
35 contractor rather than an employee.... It was felt to be desirable, and
36 rightly so, to eliminate the technical issue of whether the workman was an
37 employee or an independent contractor by giving him protection in either
38 situation.
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40 White, at 474. This very same language was relied on by the court of appeals in Massachusetts
41 Life Insurance, at 163.
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43 Thus, while the court of appeals in Massachusetts Life Insurance focused especially on the
44 third criterion of White, the inquiry involved more than a simple application of the White "test" to the
45 facts of that particular case. As the court stated in Lloyd's of Yakima v. Department of Labor and
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1 Industries, 33 Wash. App. 745, 749 (1982), in order to determine whether an independent
2 contractor is a worker within the meaning of RCW 51.08.180, one must look to "the contract, the
3 work to be done, the situation of the parties, and other attendant circumstances." See also
4 Massachusetts Life Insurance, at 163.
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7 In reviewing the facts of this case, it is apparent that the eighteen sales agents are employers
8 in their own right. They can and do hire others to perform certain of their functions. Indeed, there
9 are many aspects of the insurance business which the individual insurance agent does not perform
10 him or herself. While the solicitation of new business contacts by telephone or other means may be
11 the most obvious example of delegation of the contractual duties by the sales agent, there are, no
12 doubt, others. It seems clear that the purpose of any office staff hired by the individual agent is to
13 allow the agent the greatest latitude and flexibility in rendering advice to prospective clients and
14 freedom from tasks not requiring his or her specific authority or supervision. The full extent to which
15 an agent's office staff assists in the selling of insurance was not fully developed in the record. We
16 will not speculate here as to what other tasks the secretaries and other persons employed by an
17 individual agent may perform in the promotion of an agent's individual sales practice. Suffice it to
18 say that it appears that individual agents can and do employ others to perform at least part of the
19 contract to sell insurance.
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22 Thus, in light of the third criterion of White as well as the rationale of that decision, it is
23 apparent that the sales agents here, like the sales agents in Massachusetts Life Insurance, are not
24 workers within the meaning of RCW 51.08.180. The Department's assessment of premiums for
25 these agents must therefore be reversed.
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28 At the time of the Board majority's decision in Family Life there were no Washington cases
29 interpreting the "personal labor" provision of RCW 51.08.180 as it applied to insurance agents. We
30 expressly overrule our decision in Family Life to the extent it expresses an analysis of the
31 independent contractor relationship different from that set forth herein.
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34 **FINDINGS OF FACT**

35 The Board adopts proposed Findings of Fact 1, 2, and 4 and Proposed Conclusions of Law 1, 2
36 and 3 as the Board's final Findings of Fact and Conclusions of Law and incorporates the same herein
37 by reference. The Board also makes the following Findings of Fact and Conclusions of Law.
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- 40 3. James D. Shanley and Wife employed a clerical staff of fourteen during
41 the inclusive period from July 1, 1984 through June 30, 1986. Some of
42 these persons were hourly employees and some were salaried. Shanley
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1 correctly reported his hourly employees to the Department of Labor and
2 Industries. Shanley reported his salaried employees' hours as 140 hours
3 per month. The Shanley firm did not maintain complete and accurate
4 records, supported by original time cards or timebook entries for these
5 salaried employees and therefore was required to report assumed hours
6 based upon 160 worker hours for each month in which the employee was
7 on salary pursuant to WAC 296-17- 350(5). The firm therefore owes the
8 Department \$ 446.29 as additional premiums for industrial insurance
9 coverage for salaried clerical workers during the inclusive period from July
10 1, 1984 through June 30, 1986.

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- 12 5. During the period from July 1, 1984 through June 30, 1986 James D.
13 Shanley and Wife, as general insurance agent for Northwestern Mutual
14 Life Insurance Company, contracted with eighteen insurance agents under
15 a full-time special or soliciting agent's contract to solicit and secure
16 applicants for Northwestern Mutual Life Insurance Company insurance
17 policies and annuity contracts.
- 18 6. During the period from July 1, 1984 through June 30, 1986, each of the
19 eighteen insurance sales agents was required to provide his or her own
20 fidelity bond and was allowed to sell other forms of noncompeting
21 insurance based upon the needs of prospective purchasers. The
22 insurance agents were required to pay their own office expenses and
23 office staff except for a brief two-year period in which the firm shared in the
24 start-up costs for new agents. The agents also set their own hours and
25 methods of soliciting clients. In some cases the individual insurance
26 agents employed office staff for the purpose of soliciting clients and
27 customers by telephone and other means.
- 28 7. During the period from July 1, 1984 through June 30, 1986 the contract
29 between James D. Shanley and his wife, as general agent for
30 Northwestern Mutual Life Insurance Company and, the eighteen insurance
31 sales agents was an independent contract, the essence of which was not
32 the personal labor of the eighteen insurance sales agents.

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34 **CONCLUSIONS OF LAW**

- 35 4. During the period July 1, 1984 through June 30, 1986, the eighteen
36 insurance sales agents on contract with James D. Shanley and Wife, as
37 general insurance agent for Northwestern Mutual Life Insurance
38 Company, were not workers within the meaning of RCW 51.08.180.
- 39 5. The Notice and Order of Assessment of Industrial Insurance Taxes issued
40 by the Department of Labor and Industries on January 12, 1987 which
41 assessed \$ 8,457.95 against James D. Shanley and Wife for taxes which
42 accrued between July 1, 1984 through June 30, 1986, is incorrect and is
43 hereby reversed and remanded to the Department with instructions to
44 issue a new Notice and Order of Assessment of Industrial Insurance
45 Taxes assessing \$ 446.29 against James D. Shanley and his wife, as
46 general agents for Northwestern Mutual Life Insurance Company for
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