Maxwell, Mary

INDEPENDENT CONTRACTORS

Home health care attendant

Where home health care attendants assist a totally incapacitated individual, personal labor is the essence of the independent contract, and the home health care attendant is a worker within the meaning of RCW 51.08.180(1). *Citing Massachusetts Mutual Life v. Department of Labor & Indus*., 51 Wn. App. 159 (1988). Home health care attendants' service represented personal labor, even though based on skill and expertise, since personal labor is not restricted to manual labor. **….*In re Mary Maxwell*, BIIA Dec., 90 0855 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 91-2-18181-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY BLISS MAXWELL	**)**	**DOCKET NO. 90 0855**
	)	
CLAIM NO. 569,095-00	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Mary Bliss Maxwell, by
Ann Scearce, Legal Guardian

Department of Labor and Industries, by
The Attorney General, per
Venita M. Lang, Assistant, and Yvonne K. Dickson, Legal Examiner

This is an appeal filed by the employer, Mary Bliss Maxwell, on February 20, 1990 from a Notice and Order of Assessment of industrial insurance taxes No. 79212 issued by the Department of Labor and Industries on January 22, 1990. The Department's Notice and Order assessed industrial insurance premiums and penalties in the amount of $7,200.34 for the period July 1, 1987 through June 30, 1989. **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 Department of Labor and Industries to a Proposed Decision and Order issued on December 3, 1990 in which the order of the Department dated January 22, 1990 was reversed and remanded to the Department for the issuance of an order assessing no industrial insurance premiums due for the period in question.

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

The issue in this appeal is whether a number of home health care attendants employed by Ms. Maxwell were "workers" within the meaning of RCW 51.08.180(1). Ms. Maxwell is physically and mentally incapacitated. She suffers from a variety of conditions, including amyotrophic lateral sclerosis, diabetes, and cardiac conditions. Ms. Maxwell is totally dependent upon others for her care. She requires 24 hour monitoring by a health care attendant. If she were a hospital in-patient, she would be in an intensive care unit. Ann Scearce is a neighbor of Ms. Maxwell's. As Ms. Maxwell gradually became more incapacitated, Ms. Scearce agreed to become Ms. Maxwell's legal guardian. In that capacity she has contracted with a number of licensed health care providers to care for Ms. Maxwell. Ms. Scearce has hired registered nurses, licensed practical nurses, and certified nurses'

aides to provide these services. Care is provided in either 8 or 12 hour shifts and during that period the attendants monitor equipment, including the respirator, oxygen purifier, and gastrointestinal feeding equipment.

It was Ms. Scearce's intention to enter into independent contracts with each of these individuals. Initially Ms. Scearce entered into verbal contracts, however, in January of 1989, at the urging of Ms. Maxwell's accountant, formal written contracts were executed. Furthermore, commencing in July 1989, Ms. Scearce required each of these individuals to have a state business license.

RCW 51.08.180 defines worker as:

> . . . Every person in this state who is engaged in the employment of an employer under this title, whether by manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in 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. . . .

Ms. Maxwell asserts that home health care attendants do not fall within this definition. Ms. Scearce testified that the individuals were told that they were not employees and that they were responsible to make their own tax deductions. She filed a form 1099 with the Internal Revenue Service to report their respective incomes.

We have no doubt that these individuals are independent contractors. Having determined that the individuals are independent contractors, it is therefore necessary to determine whether "the essence" of their independent contracts was their "personal labor". In reaching this decision we note the analytical framework set forth by the Court of Appeals in Massachusetts Mutual Life v. Dep't of Labor & Indus., 51 Wn.App. 159, 163-164 (1988), where the court stated that there are:

> . . . . three independent contracting situations which the Legislature intended to exclude from the expanded definition of workman. Excluded from the Act's coverage was the independent contractor (1) who of necessity owned or supplied machinery or equipment (as distinguished from usual hand tools) to perform the contract, or (2) who obviously could not perform the contract without assistance, or (3) who of necessity or of choice employed others to do all or part of the work he has contracted to perform.

The testimony indicates that the health care providers: (1) did not supply machinery or equipment; (2) they were capable of performing the contract without assistance; and (3) they did not employ others to

do all or part of the work that they contracted to perform. Despite these facts, our Industrial Appeals Judge determined that the health care providers did not meet the statutory definition of "workers" because the essence of their contracts was not their personal labor, but was their "skill and expertise."

We cannot agree with this analysis, as it appears to equate "personal labor" with "manual labor", nor is the statute so restrictive. Labor is "personal" whether "by way of manual labor or otherwise." RCW 51.08.180(1). In prior Board decisions we have found independent contractors to be workers despite the fact that they did not perform "manual" labor. See In re Traditions Unlimited, Inc., BIIA Dec., 87 0600 (1989), where we determined that outside sales people were workers, and In re Peter M. Black Real Estate Co. Inc., BIIA Dec., 88 1191 (1989), where we determined that real estate agents were workers. In both of these cases we found that the essence of the individuals' work was their personal labor, despite the fact that manual labor was not involved. The workers in the aforementioned cases relied upon their own individual skill and expertise just as did the health care providers who provided services for Ms. Maxwell. We note that in Peter M. Black Real Estate Co. Inc. we specifically noted that "If the independent contractor has special or superior abilities of critical importance to the employer, this tends to suggest that the essence of the contract is personal labor". Thus, the rationale set forth by our Industrial Appeals Judge does not support the conclusion he reached.

One additional issue needs to be resolved before it can be determined that these individuals are mandatorily covered under the provisions of the Industrial Insurance Act. RCW 51.12.020(5) provides that partnerships and sole proprietors are excluded from mandatory coverage. Absent specific testimony on the subject, we cannot find that independent contractors who provide, in essence, only their personal labor are sole proprietors. Only one individual who performed health care services for Ms. Maxwell testified. Mary Jagielo stated that she did consider herself an independent contractor and did pay her own taxes. She further indicated, however, that she had not taken the legal steps necessary to establish a business during the audit period. Ms. Jagielo testified that she did obtain a state business license on July 1, 1989, which is immediately subsequent to the audit period. (This is in conformity with Ms. Searce's testimony that she required all of the health care providers to have state business licenses effective July 1, 1989.) Based upon her testimony, we would be inclined to find that she was excluded from mandatory coverage beginning July 1, 1989; however, this does not retroactively affect her status as a worker during the July 1, 1987 - June 30, 1989 audit period. We therefore find that the assessment was correct and the Department order must be affirmed.

We hereby adopt Finding of Fact No. 1 and Conclusion of Law No. 1 from the Proposed Decision and Order. We hereby make the following additional Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

2. During the period July 1, 1987 through June 30, 1989, Ann Scearce, legal guardian for Mary Bliss Maxwell, contracted with 11 health care providers to provide home health care services for Mary Bliss Maxwell's medical needs on a 24- hour basis. During said period Ms. Maxwell was entirely dependent and incapable of any activity.

3. During the period July 1, 1987 through June 30, 1989, the 11 health care providers were not required to provide any of their own equipment to provide these services.

4. For the period July 1, 1987 through June 30, 1989, it was not necessary for the health care providers to hire other employees or delegate any of their duties, and they did not in fact do so. There is no evidence that any of the health care providers paid their own industrial insurance premiums, had office locations, or business licenses, during the audit period.

5. For the period July 1, 1987 through June 30, 1989, the health care providers provided their personal labor in monitoring the physically disabling conditions of Mary Bliss Maxwell.

CONCLUSIONS OF LAW

2. Teresa Hickerson, Karen Terry, Janis Sanford, Mary Jane Schulmeister, Mary Anne Jackson, Pam Bartlett, Ann Wiser, Mary Russell, Corina Estola, Mary Nelson, John Gilchrist, and Mary Jagielo were independent contractors providing health care services for Mary Bliss Maxwell from July 1, 1987 through June 30, 1989. Personal service was the essence of their contracts within the meaning of RCW 51.08.180.

3. The Notice and Order of Assessment of industrial insurance taxes No. 79212 issued by the Department of Labor and Industries on January 22, 1990, which assessed industrial insurance premiums and penalties in the amount of $7,200.34 for the period July 1, 1987 through June 30, 1989 is correct and is affirmed.

It is so ORDERED.
Dated this 19th day of July, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/_____
S. FREDERICK FELLER Chairperson
/s/_____
FRANK E. FENNERTY, JR. Member
/s/_____
PHILLIP T. BORK Member

SPECIAL CONCURRING STATEMENT

I have joined in the foregoing decision, because I too believe that these home health care providers for Ms. Maxwell were working under independent contracts the essence of which was their personal labor, and thus they were "workers" subject to mandatory industrial insurance coverage during the July 1, 1987--June 30, 1989 audit period here under review. Thus, the Department's Notice and Order of Assessment dated January 22, 1990 must be affirmed.

Whether mandatory coverage status remained in effect on and after July 1, 1989, in light of these individuals' written contracts, and their required business licensing effective that date, is a different story. However, that is not an issue which can be decided by this Board in the instant appeal.

It is also worthy of note to the appealing party in this case that the 1991 Legislature passed further legislation bearing upon this issue. A separate alternative has been provided to the definition of "worker" under RCW 51.08.180, i.e., a person subject to mandatory coverage if working under an independent contract "the essence of which is his or her personal labor for an employer." By a new section added to chapter 51.08 RCW, it is provided that "services performed by an individual for remuneration shall not constitute employment subject to this title", i.e., the individual is not a "worker," if he or she meets the six-part test "set forth in subsections (1) through (6) of section (1) of this act." In my view, persons meeting this six-part test are individual entrepreneurs or sole proprietors and thus not included within mandatory coverage. See Engrossed Substitute senate Bill 5837, Secs. 1, 2 and 3, 1991 Regular Session. Again, while this new legislation has no application to the case now before us, it is very important to current and future determinations as to whether an individual is an employee, an independent contractor, and/or a sole proprietor.

Dated this 19th day of July, 1991.

/s/_____
PHILLIP T. BORK Member