IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RICHARD LEFFLER ET UX, DBA CHOICES BUILDING & DEVELOPMENT,	)	NO. 63900-5-I
Petitioner,	)	
v.	)	UNPUBLISHED OPINION
DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Respondent.	)	FILED: October 26, 2009

BECKER, J. — Richard Leffler appeals a decision of the Thurston County Superior Court, which upheld a Board of Industrial Insurance Appeals decision requiring Leffler to pay premiums, penalties, and interest as a result of his failure to pay workers compensation premiums for employees of his company, Choices Building & Development. Leffler argues that the assessments were incorrect because the workers were his partners or were employees of an independent contractor he hired to repair an office building. We affirm.

Greg Duncan was helping to build a house for Ann and Robert Williams in November 2005 when he fell and broke his wrist. In December 2005, he applied for workers compensation benefits with the Department of Labor and Industries. Choices Building & Development, the company hired by the Williams to build their house, had not paid any industrial insurance premiums.

The Department conducted an audit and in March 2006 ordered Richard Leffler to pay $61,385.83 for unpaid industrial insurance premiums, penalties, and interest for Choices' employees in 2004 and 2005. In July 2006, the Department ordered Leffler to pay $18,757.00 as a penalty for the adverse impact of Duncan's injuries on the State Industrial Insurance Fund. The amount of that penalty was the value of Duncan's injuries.

Leffler appealed the Department's assessments, and a hearing was held before an industrial appeals judge. Leffler claimed that Choices Building & Development was a partnership that built spec houses. He argued that he was not required to pay industrial insurance premiums for Bob Hosford and Greg Duncan because they were partners in the business. Leffler said he was the majority partner and banker, and Hosford and Duncan were minority partners and laborers. Leffler also challenged the Board's assessments related to work done on an office building he owned. Leffler argued that he was not required to pay industrial insurance premiums related to work on that building because he hired Hosford's company, H & H Construction, to repair the

building, and Hosford was an independent contractor.

Hosford did not testify at the hearing. Duncan, however, testified that he was a construction manager and laborer on the spec houses. According to Duncan, Leffler signed blank checks to pay for work on the spec houses. Duncan said he completed the checks in amounts sufficient to pay himself and the others he hired to help build the houses.

The Department conceded that it had miscalculated what Leffler owed for Duncan's work because those premiums were based upon the assumption that Duncan received the entire amount of the checks he cashed when in fact he paid himself and others with the money from the checks. But the industrial appeals judge rejected Leffler's assertion that Bob Hosford and Duncan were Leffler's partners and instead found that Leffler was the sole proprietor of Choices Building & Development. The judge found that the Department properly determined that several persons who worked on the spec houses and the office building were covered workers, but the Department had assigned some hours for employees under incorrect risk classifications (such as assessing premiums for hours spent roofing, when workers were actually framing).

Based upon the findings, the industrial appeals judge concluded that: Duncan and Bob Hosford were not Leffler's partners; Duncan was an employee and was a covered worker when he was injured in November 2005; the assessment of $18,757.00, which was based upon Duncan's injuries, was correct; but the $61,385.83

assessment for premiums, penalties, and interest was incorrect; and, therefore, the judge remanded the case to the Department with directions to recalculate the amount Leffler owed.

Leffler petitioned the Board of Industrial Appeals for review of the judge's proposed order and decision. The Board denied the petition, and the proposed order and decision became the Board's final order. Leffler appealed the order to the superior court, which affirmed most of the Board's decision:

> After considering the arguments of the parties and the administrative record, for the reasons stated in its letter opinion dated May 29, 2008, the court makes the following findings:
>
> 1. The Board's findings of fact are supported by substantial evidence and are affirmed.
> 2. The Board's conclusions of law, including its conclusion that Choices Building & Development was a sole proprietorship owned by Richard Leffler, are affirmed.
> 3. The Department's assessment of a two hundred percent (200%) penalty was excessive; that decision is not supported by substantial evidence and was arbitrary and capricious.
>
> It is hereby ordered, adjudged, and decreed that this case shall be remanded to the Department for recalculation of premiums and penalties consistent with the findings of the court.

The superior court's letter opinion is not a part of the record on appeal. Neither Leffler nor the Board, however, has assigned error to the decision that the 200 percent penalty was arbitrary and capricious.

Leffler contends that the Board's findings of fact are not supported by substantial evidence and the Board erroneously interpreted the law when it found that he was the

sole proprietor of Choices and that Bob Hosford and Duncan were not partners.

Judicial review of a final notice of assessment by the Board is governed by the Administrative Procedure Act, RCW 34.05.510 through .598. RCW 51.48.131; Maplewood Estate, Inc. v. Dept. of Labor and Industries, 104 Wn. App. 299, 304, 17 P.3d 621 (2000). The employer has the burden to prove that the taxes and penalties were incorrect. RCW 34.05.570(1)(a). A court may grant relief from the Board's order only under circumstances set forth in RCW 34.05.570(3)(a) through (i). For example, the court may grant relief if it determines that the Board erroneously interpreted or applied the law or if the order is not supported by substantial evidence. RCW 34.05.570(3)(d) and (e).

Evidence is substantial if, considering the entire administrative record, there is a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. Maplewood, 104 Wn. App. at 304. This court sits in the same position as the trial court in reviewing a Board order and applies the standards of review set forth in the APA to the administrative record that was before the Board. See Superior Asphalt and Concrete Co. v. Dept. of Labor and Industries, 112 Wn. App. 291, 296, 49 P.3d 135 (2002) (applying APA to decision by administrative law judge in Office of Administrative Hearings).

If the court sets aside or modifies actions within the Board's discretion, the court may not “itself undertake to exercise the discretion that the legislature has placed in the

agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay." RCW 34.05.574.

Employers and workers may not exempt themselves from the burdens or waive the benefits of the Industrial Insurance Act. RCW 51.04.060. Coverage is mandatory for all workers except those in certain employments or entities, including partnerships, that are specifically excluded from the mandatory coverage of the Act. RCW 51.08.180 (a worker is a person employed by an employer); RCW 51.08.181 (registered contractor and electrician exclusions); RCW 51.08.195 (alternative exceptions to definitions of workers and employers); RCW 51.12.020 (exclusions for partners and sole proprietors, and for certain employments, such as domestic servants, gardeners, and persons hired to do repair work in a private home).

In general, a partnership is formed when two or more persons agree to conduct a business and share profits and ownership control: "Except as otherwise provided in subsection (2) of this section,[1] the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." RCW 25.05.055(1); Curley Elec., Inc. v. Bills, 130 Wn. App. 114, 118, 121 P.3d 106 (2005). Nevertheless, the parties' intentions, as shown by the surrounding facts and circumstances and the actions and conduct of the parties, are relevant to the determination whether a partnership existed. Malnar v. Carlson, 128

[1] Subsection 2 of RCW 25.05.055 is not relevant to this appeal.

Wn.2d 521, 535, 910 P.2d 455 (1996). A person who receives a share of the profits of a business is presumed to be a partner unless he received the profit share in payment of a debt, of rent, of interest on a loan, or—critical here—in payment for "services as an independent contractor or of wages or other compensation to an employee." RCW 25.05.055(3)(c)(ii). The burden of proving a partnership is on the party alleging a partnership. Curley, 130 Wn. App. at 120-21.

Leffler argues that the record contains substantial evidence that Hosford and Duncan were his partners. The Department concedes there is evidence in the record that would support such a finding. But the evidence was conflicting, and substantial evidence supports the Board's finding that the parties did not have a partnership and, therefore, Leffler was required to pay premiums for Hosford and Duncan.

Leffler cites RCW 25.05.055 and, as proof that Hosford and Duncan were his partners, asserts that they received a share of the profits. But Leffler ignores the portion of the statute indicating that a person will not be presumed to be a partner, despite receiving of a share of the profits of the business, if the profit share is payment for wages.

Leffler's own testimony showed that he controlled the business and that Hosford and Duncan received a share of the profits as payment for their labor. For example, when addressing the work on the office building, Leffler testified that he signed blank checks from Choice's bank account and Hosford filled in the amount on the blank

checks when he wanted to be paid for his work. When Leffler was asked whether construction loans were in his name, or the company's, he responded: "It is all the same. I am a sole proprietor, so it doesn't matter." Leffler's testimony also indicated that although he anticipated Duncan and Hosford becoming his partners, they had to show him that they knew what they were doing and could operate the business profitably before he would formalize a partnership agreement.

Other evidence besides Leffler's testimony indicated that Hosford and Duncan were not Leffler's partners. The real estate that Choices developed and the company's bank account were in Leffler's name only. Choices was registered with the State as a sole proprietorship. A financial planner hired to review time sheets for work done on the spec houses testified that although there were discussions about the possibility of a partnership, no partnership was formed. An auditor hired to review Leffler's banking records testified that Leffler allowed Hosford to take an hourly wage, indicating not only that Hosford was paid for his labor, but that Leffler decided how much Hosford was to be paid hourly. A person Leffler approached about becoming a partner of the business testified that Leffler offered him a percentage of the profits, but he also would have been paid for his labor.

Substantial evidence supported the Board's findings that Hosford and Duncan were not partners. The Board, therefore, correctly concluded that they were covered employees and that Leffler owed industrial insurance premiums related to their work on

the spec houses.

Leffler next argues that the assessments relating to work on his office building should be reversed. Leffler contends that he hired Hosford's company, H & H Construction, to repair the office building, and Hosford was an independent, registered, and/or licensed contractor who is not considered a worker under the Industrial Insurance Act. Leffler asserts that Hosford's sons, Matt and Tim, and Jason Robertson, who also worked on the office building, were Bob Hosford's employees. But Leffler did not meet his burden to prove that Bob Hosford was a contractor who is not considered a worker under the statutes. See RCW 51.08.195 (six part test for excepting independent contractors from the general definition of workers under Industrial Insurance Act); former RCW 51.08.180(2) (2007) (four part test for excepting registered or licensed contractors from general definition of workers).

Leffler also argues that the assessments related to work on the office building should be reversed because the work to repair the building was not his business and, therefore, the Department should not have considered him the employer of those who worked on the building. To be considered an employer for industrial insurance purposes, however, Leffler was not required to be engaged only in the business of repairing commercial buildings. See RCW 51.08.070 (definition of "employer" includes one who contracts with worker or workers and essence of contract is personal labor).

The Board's findings that the workers were Choices' employees who were

entitled to coverage were supported by substantial evidence, and the evidence supported the Board's conclusion that Leffler owed premiums, penalties, and interest as a result. Leffler, therefore, did not meet his burden to show that the premiums, penalties, and interest should not have been assessed.

Leffler concedes that he should have paid premiums relating to work done by Matt and Tim Hosford, Bridget Buntin, and Nathan on the spec houses because Hosford and Duncan, as partners, had authority to hire laborers. But he asks this court to order the Department to waive the penalties related to those workers because he did not intentionally fail to pay premiums for the employees. Leffler contends that his partners, Hosford and Duncan, were responsible for employees, but they did not keep adequate records or report the workers to the State.

Leffler's argument is not persuasive. The Board correctly concluded that Hosford and Duncan were not partners and that Hosford was not an independent contractor. The Board, therefore, properly assessed premiums for Hosford, Duncan, and the persons they hired to work on the spec houses and the office building. Statutes authorize penalties when an employer fails to register and pay premiums for workers. RCW 51.48.010 (allowing penalties for incurring an obligation to pay industrial insurance premiums before securing payment of compensation); RCW 51.48.030 (allowing penalties if an employer fails to keep records and make reports required under the industrial insurance statutes). Moreover, substantial evidence

supported the Board's finding that Leffler wanted to avoid the burdens imposed upon employers under the Industrial Insurance Act: "Mr. Leffler's testimony and demeanor evince an individual who admittedly did not want to incur any imposition of premiums pertaining to individuals involved in his business projects." Furthermore, at oral argument Leffler was unable to cite any authority for this court to order the Department to waive the penalties and interest. We, therefore, deny his request.

The decision of the superior court is affirmed, and the case is remanded to the Department to recalculate the premiums, penalties, and interest consistent with the superior court's decision.

Becker, J.

WE CONCUR:

Ellington, J.

Cox, J.