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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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JOSE ARREDONDO d/b/a MAYRA PARTIDA

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR  
AND INDUSTRIES,

Respondent.

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Appeal from Superior Court of Thurston County  
08-2-00325-3

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**APPELLANT'S *CORRECTED* OPENING BRIEF**

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Aaron K. Owada, WSBA No. 13869  
Attorney for Appellant

AMS LAW, P.C.  
975 Carpenter Rd. NE., Ste. 201  
Lacey, WA 98516  
(360) 459-0751

**ORIGINAL**

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#### Statutes

RCW 51.52.112 5, 12, 13, 15

## **I. ASSIGNMENT OF ERROR**

The Appellant respectfully asserts that the Superior Court erred by dismissing an administrative review of a Board of Industrial Insurance Appeals involving an audit of alleged unpaid worker's compensation premiums on the basis that the amount alleged due and owing was not first paid to the State.

## **II. ISSUES**

Where an Employer, a single woman who was temporarily disabled with a high risk pregnancy, was not able to pay the Department of Labor & Industries \$37,514.29 that was alleged as unpaid industrial insurance premiums, did the Superior Court err by granting the Department's motion to dismiss her administrative review pursuant to RCW 51.52.112 by concluding that it would not be a financial hardship for Appellant to pay the \$20,000.00 as a condition of appeal?

### **III. PROCEDURAL BACKGROUND**

#### **A. Action before the Superior Court**

This case involves an appeal of an audit of the Firm, Jose M. Arredondo, et. ux., DBA Mayra S. Partida (“Partida”) by the Department of Labor & Industries for unpaid industrial insurance premiums for the 4<sup>th</sup> quarter of 2005, the 1<sup>st</sup> quarter of 2006 and the 2<sup>nd</sup> quarter of 2006. The Department alleges that the firm owed \$37,514.29 as of May 8, 2008.

The Department moved for dismissal of the firm’s appeal because the Employer did not pay the premium amount in order to maintain its appeal pursuant to RCW 51.52.112.

The Superior Court recognized that there was some merit to Appellant’s financial status and ordered Appellant to pay \$20,000.00 to the Department instead of \$37,514.29 in order to allow her appeal to continue. The Superior Court Order based its rationale by declaring, “This is based on the Declaration of Mayra Partida which demonstrates a basis to reduce the total

amount claimed by the Department.”<sup>1</sup> See Appendix A. (CP. 28)

Ms. Partida advised the Court that she was not able to pay \$20,000.00 to perfect her appeal. Consequently, her administrative appeal was dismissed without addressing the merits of her case.

**B. Underlying action before the Board of Industrial Insurance Appeals.**

The facts of the underlying appeal are as follows. Partida is a drywall firm that predominantly engages in the taping of drywall. The firm had three partners in the 4<sup>th</sup> quarter of 2005 and the 1<sup>st</sup> quarter of 2006. Mayra Partida owned 70% of the firm, Adam Carrazo and Jose Arredondo each owned 15% of the firm. It was undisputed that 90% of the work performed by Partida was residential, as compared to commercial construction. With a team of three, Partida, Carrazo and Arredondo, the work was divided between the three partners.

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<sup>1</sup> The Certified Appeal Board Record (CABR) is referenced in the Clerk’s Papers. References throughout this brief will be contained in the CABR.

That is, while one owner mixed the mud, the other team members performed the preparatory work at the home by covering screw locations.

By using a tool called a “bazooka”, Mr. Carrazo testified that it took about 3 seconds to cover a 10 foot wallboard as the bazooka automatically applied the “mud” and scraped up the excess mud. After applying the first layer, the team went to the next house to apply the first or second layer, while the first layer of the first house dried. The second application took about 3 ½ to 4 hours to sand and apply the second layer. They later returned to sand the second layer after letting it dry. This took about 1 ½ hours. Mr. Carrazo testified that by working 10 – 12 hours a day, six days a week, the team could cover six houses a week totaling 60,000 or more square feet of drywall.

Mr. Carrazo testified that many of the houses they worked at were part of a housing development. This made it easy to move from one house to another with minimal delay. Mr. Carrazo testified that if he only taped 65,000 square feet of

drywall each quarter, they could not stay in business.

In the 2<sup>nd</sup> quarter of 2006, the Firm hired three employees and reported \$3,586.01 for premiums in that quarter. The Firm did not report premium hours for the three owners, Partida, Carrazo and Arredondo for all three reporting periods.

Mr. Leslie testified that he is an accountant for Partida and that he provided square footage of work performed, check records and bank statements of Partida to the Department auditors. Neither the Department nor the Firm disputed the square footage reported to the Department in Exhibit 1.

Mr. Leslie testified that under the drywall rule, only the square footage is reported because premium is based on square footage and not hours. Moreover, he further testified that no premiums were reported for the three owners under the owner exemption.

The Department provided the testimony of Linda Williams, litigation specialist, Terri Zenker, drywall specialist for the Department, Kristen Phalen, field auditor, and Mark

Shaffer, president and owner of Mark's Drywall, Inc. None of the Department's witnesses had personally seen any of the work performed by Partida during the audit period, nor had they even been to the jobsites after the work was performed.

Except for Mr. Shaffer, none of the Department's witnesses had ever engaged or performed any of the tasks associated with taping drywall.

The Department relied on a 65,000 foot guideline for owners and concluded that an owner could not tape more than 65,000 feet of drywall per quarter. Because the amount of drywall taped by the owners exceeded 65,000 feet, the Department concluded that the work had to have been performed by other individuals and not just the three owners.

The Department agreed that the 65,000 foot guideline has not been adopted in statute or promulgated into any WAC provision under the Administrative Procedure Act's rulemaking process. Nevertheless, the state imposes the burden of proof to prove that the Department's assessment is incorrect. Without

any personal knowledge of the actual methods used by the firm to tape the houses, the Department has reached the conclusion that the amount of taping performed was not accurate and assessed an audit with no other evidence. In this application, the firm respectfully asserts application of the collection and audit statutes are unconstitutional as applied.

**C. Facts surrounding Ms. Partida's financial status.**

As set forth in her Declaration, dated September 3, 2008, Ms. Partida is the owner and President of the firm. See Appendix B. (CP. 37-39).

As of the hearing before the Superior Court, Ms. Partida was a 25 year old single woman, and at that time was soon to be a mother as she was scheduled for surgery on September 12, 2008, for a C-section. For the last five months she had been directed by her physician to be bed ridden as she had been diagnosed with a high risk pregnancy. This prevented her from being active with her company.

The past year has been extremely slow for the firm because of the overall economic slowdown. This drastically

reduced the amount of work that the firm was able to perform.

Because of the slow economic times, there were many days where they had no work to perform. In comparison, several years ago they had six days of work per week to perform. In September 2008, it was typical for the firm to barely have two days of work per week, if that.

At the time of the Motion before the Superior Court, Ms. Partida had no assets or income to pay the amount claimed by the State. The amount of work her company was making was barely sufficient to pay their business expenses.

Over the past year, the firm company grossed between \$10,000 and \$12,000.00 each month. From that gross amount, Appellant is required to pay for tool equipment rental, gas, supplies, taxes, and other things necessary for her company to perform work as a drywall company. After these expenses are paid, the firm nets approximately \$4,000 each month for her personal living expenses. As she has a car loan and house loan to pay, there is very little left for her to pay any money to the state.

Moreover, Appellant does not have any savings or property available to pay the premiums, nor does she have any established line of credit available from any banking institution.

Because of the slow economy, the Superior Court respectfully erred by not concluding that it would be an undue

hardship for Petitioner to pay the amount the State claims is due and owing for worker's compensation premiums in order for her to perfect her appeal in the Superior Court.

#### **IV. STATEMENT OF THE CASE**

The Superior Court erred by not finding that it would constitute an undue hardship for Appellant, a single mother with a temporary disability, to pay \$20,000.00 to the Department of Labor & Industries in order to allow her administrative appeal to be reviewed by a court of original jurisdiction.

#### **V. ARGUMENT**

**A. RCW 51.52.112 allows the court to waive payment of taxes, penalties or interest of alleged unpaid industrial insurance premiums if there is an undue hardship to the Employer.**

The facts in this appeal are not in dispute. The only Declaration provided to the Court regarding Ms. Partida's financial situation is contained in her Declaration set forth in Appendix B. RCW 51.52.112 declares:

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest *unless the court determines that there would be an*

*undue hardship to the employer.* In the event an employer prevails in a court action, the employer shall be allowed interest on all taxes, penalties, and interest paid by the employer but determined by a final order of the court to not be due, from the date such taxes, penalties, and interest were paid. Interest shall be at the rate allowed by law as prejudgment interest.

(Emphasis added).

There is no dispute that Ms. Partida did not pay the full amount of the audit she challenges at the time of her appeal to the Superior Court challenging the administrative decision of the Board of Industrial Insurance Appeals. Ms. Partida did not have the funds to pay the amount claimed by the State, nor did she have \$20,000.00, the amount required by the Superior Court to allow her appeal to be considered on the merits.

There is also no dispute that Ms. Partida is a single woman who was 25 years old at the time, and had been ordered to be bedridden by her physician because she had a high risk pregnancy, and that she was further scheduled to have a C-section on September 12, 2008.

Based on the economic slowdown, Ms. Partida's Declaration to the Court was very clear: she simply had no funds to pay the \$37,514.29 claimed by the State, nor did she have any funds to pay the \$20,000.00 amount ordered by the Superior Court.

The undersigned counsel has found no Washington cases

that provide interpretation or guidance regarding the term “undue hardship” as set forth in RCW 51.52.112. However, although not directly on point, federal case law in income tax matters is helpful. For example, when Congress created the Board of Tax Appeals, it clearly acknowledged that a right to appeal after taxes are paid as legal remedy for contested tax assessments is an incomplete remedy. The US Supreme Court in *Walter W. Flora v. United States of America*, 362 U.S. 145, 80 S. Ct. 630, 4 L.Ed2d 623 (1960) provided the legislative history of the creation of the Board of Tax Appeals by Congress in 1924. The Supreme Court provided the following legislative history:

The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits..., or estate taxes. Although a taxpayer, may, after payment of his tax bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may

have, since its receipt, either been wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.’

RCW 51.52.112 allows a tax payer to recover overpayments of taxes, after payments have been paid. However, Congress and the US Supreme Court have recognized that such a recovery in of itself can create a financial hardship to a taxpayer. Hence, the right to recovery is an insufficient remedy.

There are several federal cases that discuss the concept of “financial hardship”. These cases arise in the context of employers not properly withholding federal income taxes that are obligated to the IRS. Generally speaking, the federal courts recognize that a financial hardship can arise, but it is more than a “mere inconvenience” to the taxpayer.

For example, the US Court, Eastern District of Washington, held in *St. Paul Cathedral v. U.S.*, Slip Copy, 2008 WL 5121928 when it granted Summary Judgment for the Defendant that:

The term “undue hardship” means more than an

inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.<sup>26</sup> C.F.R. § 1.6161-1(b). “Evidence of financial trouble, without more, is not enough” to establish undue hardship. *Synergy Staffing, Inc. v. United States*, 323 F.3d 1157, 1160 (9th Cir.2003).<sup>FN6</sup> A taxpayer seeking refund of penalties must “come forward with evidence of what funds it *did* have on hand each time a payroll tax was due,” and “produce evidence of how it spent those funds in lieu of paying its taxes.” *Id.*

In our present case, the Superior Court correctly concluded that Ms. Partida’s Declaration provided the basis to conclude that payment of the full payment challenged of \$37,514.29 would create a financial hardship to the Appellant. This is because Appellant was able to successfully demonstrate that her ability to work was reduced because she was under doctor’s orders to be bedridden for a high risk pregnancy for five months; that there was a slow down in the economy; and, that the amount of revenue was barely sufficient to cover Appellant’s expenses. Ms. Partida demonstrated in objective terms that the number of days her company had worked reduced

from six days per week, to barely two days of jobs per week. Moreover, Appellant as a single mother did not have any assets to pay \$20,000.00 as a condition to allowing her appeal to be heard by the Superior Court.

Where the Department of Labor & Industries has not established any guidelines to determine what constitutes an “undue hardship”, guidance from federal tax cases demonstrates that a mere inconvenience is not sufficient. Here, Ms. Partida challenges the underlying industrial insurance taxes that she claims were incorrectly assessed. Her medical condition and slow economy clearly set forth in objective terms that she could not earn enough to challenge the State’s assessment that she owed \$37,514.29 for work the government claimed was conducted by unknown workers. That is, the basis for the government’s case was that her company did more work than a guideline, and therefore they must have had workers perform some of the work.

The Employer in its appeal to the Superior Court challenges the constitutionality of the underlying statute as it improperly shifts the burden of proof onto the employer and is therefore unconstitutional in its application.<sup>2</sup> However, the

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<sup>2</sup> Appellant was precluded from raising her constitutional challenges before the Board of Industrial Insurance Appeals because the Board is an administrative agency that lacks authority to address constitutional issues.

merits of the underlying appeal, including her constitutional challenges, cannot go forward unless Ms. Partida is financially capable of paying the premiums she challenges.

## VI. CONCLUSION

Based on the above, the Trial Court's Decision dismissing the administrative review because Ms. Partida could not pay \$20,000.00 should be reversed, and the Superior Court should be directed to review this case on the merits.

DATED this 20<sup>th</sup> day of February, 2009.

AMS LAW, P.C.



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Aaron K. Owada  
WSBA No. 13869  
Attorney for Appellant

