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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JOSE ARREDONDO et ux, d/b/a MAYRA PARTIDA,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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DIVISION II  
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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

In 2006 the Department of Labor and Industries (Department) audited the partnership doing business as Mayra S. Partida (“Partida” or “the firm”), to determine whether the firm had correctly paid Industrial Insurance premiums. The audit concluded that Partida had not reported all of the hours worked by its employees, leading to a substantial premium underpayment. Accordingly, the Department issued an order assessing approximately \$37,500 in premiums, penalties, and interest against Partida.

Partida unsuccessfully challenged the assessment, first to the Department and then to the Board of Industrial Insurance Appeals. The firm appealed the Board’s decision to superior court, but failed to pay the full assessment prior to initiating that action. Because RCW 51.52.112 requires such payment, the Department moved to dismiss Partida’s appeal.

In response, Partida argued that it should be excused from paying the assessment before appealing because requiring

it to do so would create an “undue hardship.” See RCW 51.52.112 (payment required “unless the court determines that there would be an undue hardship to the employer”). Partida predicated its argument on just two alleged facts: (1) that one of its six owners had health issues and little money, and (2) that the recession has reduced the firm’s profits. Other than that one owner’s declaration, however, Partida offered no evidence of any kind to support these assertions.

Nevertheless, the superior court accepted Partida’s undue hardship claim – but only to a point: it determined that paying the full \$37,500 assessment would constitute an undue hardship, and therefore permitted Partida to move forward with its appeal upon payment of \$20,000. It is this determination that Partida now appeals, arguing that it should have been excused from paying *any* portion of the assessment that the Board affirmed.

The superior court’s ruling on the extent of Partida’s alleged hardship was a discretionary one and, as such, is

reviewable only for an abuse of discretion. Even if true, the evidence offered by Partida regarding its financial situation does not establish an undue hardship, and certainly not a hardship warranting a waiver of the entire assessment. Because the superior court did not abuse its discretion when it allowed Partida to proceed with its appeal upon payment of slightly more than one-half of the amount due, this Court should affirm.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Pursuant to RCW 51.52.112, an employer wishing to appeal a Board decision regarding an Industrial Insurance premium assessment must first pay the full assessment unless doing so would create an “undue hardship.”<sup>1</sup> Based on unsubstantiated evidence that Partida was experiencing reduced income and that one of its six partners was having medical and financial difficulties, did the superior court abuse its discretion when it found an undue hardship and reduced the firm’s

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<sup>1</sup> The text of RCW 51.52.112 is attached hereto as Appendix A.

payment obligation from over \$37,500 to \$20,000, instead of eliminating the obligation entirely?

### **III. COUNTERSTATEMENT OF THE CASE**

Partida is a partnership comprising, at different times, three or six individuals. *See* BR 28.<sup>2</sup> Its primary business is drywalling, including hanging sheetrock and taping wallboard joints. BR 26-27.

Like all Washington businesses that are not self-insured,<sup>3</sup> Partida is required to pay workers' compensation premiums for work performed by covered employees. RCW 51.16.035, .060; *see also* RCW 51.08.180(1) (definition of "worker"). Premiums are based on the type and amount of work performed. However, no premiums are payable for work done

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<sup>2</sup> Citations to the Board of Industrial Insurance Appeals record are indicated by "BR" followed by the number stamped in the lower right-hand corner of the page, where such numbers appear. Citations to transcripts in the Board record will include the date of the testimony and the appropriate page and line numbers, while citations to exhibits will be indicated by "Ex." followed by the exhibit number.

<sup>3</sup> *See* RCW 51.14.010 (firms shall insure for workers' compensation purposes either through maintaining insurance with the Department-administered "state fund" or by qualifying as self-insurers).

by partners who have not affirmatively elected coverage under the Industrial Insurance Act. *See* RCW 51.12.020(5), .110.

For the fourth quarter of 2005, Partida claimed to have had no employees but reported performing work that far exceeded what could have been done by its owners alone. 9/28/07 Transcript, p.27, l.25 – p.32, l.12; *see also* Ex. 1, “Field Audit Report” (Exhibit 1).<sup>4</sup> Accordingly, the Department initiated an audit “for verification of the firm’s books and records, [to] look for any employment that may not be reported, and [to] review the business structure to see if [the Department was] missing something or there was underreporting.” 9/28/07 Transcript, p.32, ll.8-12.

On September 5, 2006, the Department issued a Notice and Order of Assessment of Industrial Insurance Taxes (“Assessment”) to Partida. BR 38-40.<sup>5</sup> The Assessment ordered the firm to pay taxes, penalties, and interest in the

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<sup>4</sup> A copy of the Field Audit Report is attached hereto as Appendix B.

<sup>5</sup> A copy of the Assessment is attached hereto as Appendix C.

amount of \$37,514.29, due to its failure to report worker hours and pay workers' compensation premiums for the fourth quarter of 2005 and the first two quarters of 2006. *Id.*; *see* RCW 51.48.120 (authorizing Department to issue notices of assessment); *see generally* RCW ch. 51.16 (recordkeeping and premium requirements).

Partida protested the Assessment, and on November 3, 2006, the Department affirmed it through an Order and Notice Reconsidering Notice and Order of Assessment of Industrial Insurance Taxes ("Affirming Order"). BR 42; *see* BR 34 (Finding of Fact 1); RCW 51.48.131.<sup>6</sup> Partida appealed the Affirming Order to the Board of Industrial Insurance Appeals. BR 46-49.

The primary issue Partida raised at the Board was whether the firm's partners could have accomplished all of the work that the firm attributed to them during the audit period.

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<sup>6</sup> A copy of the Affirming Order is attached hereto as Appendix D.

*See* BR 31-32. Because Partida did not provide adequate records during the audit, the Department had been forced to estimate the work that its employees had done. *See* BR Ex. 1, “Field Audit Report” (Exhibit 1); *see generally* RCW 51.48.030, .040.<sup>7</sup> The issue before the Board thus became whether the Department’s estimate was correct, with Partida arguing that it had paid appropriate premiums for the brief period of time that it admitted to having employees.<sup>8</sup>

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<sup>7</sup> Because it would be impossible to determine premiums absent records of work actually performed, the Industrial Insurance Act requires employers “to keep and preserve the records required by this title.” RCW 51.48.030. Failure to maintain such records subjects employers to statutory penalties; furthermore, “[a]ny employer who fails to keep and preserve the records adequate to determine taxes due shall be forever barred from questioning . . . the correctness of any assessment by the department based on any period for which such records have not been kept and preserved.” *Id.*; *see also* RCW 51.48.040 (imposing penalty on employers who refuse to permit inspection of employment records); *R&G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 294-95, 88 P.3d 413 (2004) (applying RCW 51.48.030, .040).

<sup>8</sup> The Department based its assessment on an industry standard of 65,000 square feet per person. Under this standard the Department presumes that an individual in the drywall industry is capable of installing and/or taping 65,000 square feet of drywall in a quarter (three-month period); any work over that amount is presumed to have been done by someone else. *See* BR 30-31.

The Board's Industrial Appeals Judge rejected Partida's arguments *in toto*, making the following pertinent Findings of Fact in his Proposed Decision and Order:

- In the firm's quarterly report to the Department . . . for the second quarter of 2006, the firm reported it had three employees . . . working with the three owners. The firm did not keep payroll or work records sufficient to determine the amount of work done by the three employees, or the pay received by them, during this quarter. Also, the amount of drywall construction work done by the firm during this quarter exceeds that which could be performed by the three owners. . . .
- The firm did not report having any employees performing drywall work during the fourth quarter of 2005 and the first quarter of 2006. The firm attributes all work performed by the firm for these quarters to the three owner-partners . . . . The amount of drywall construction work done by the firm during each of these quarters exceeds that would could be performed by those three persons.

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The fourth quarter of 2005 provides an example of the estimating process. During that quarter, Partida reported that it had installed or taped 663,604 square feet of sheetrock and claimed that all of this work had been done by its three owners. The industry standard of 65,000 square feet per person indicates that these three people could have completed only 195,000 square feet, or 29% of the work Partida reported having done. The Department therefore estimated that the other 468,604 square feet had been performed by employees for whom premiums should have been paid. *See* BR Ex. 1, "Field Audit Report" (Exhibit 1).

The firm had unreported employees assisting with the work during these quarters, for which no industrial insurance premiums were paid . . . .

- The records of the firm made available to the Department auditor during the audit were incomplete in that they failed to show the work done by each employee or that the employees had been paid for their work.

BR 34-35 (Findings of Fact 3, 4, 7).<sup>9</sup> The Proposed Decision and Order concluded that “[t]he order of the Department of Labor and Industries dated November 3, 2006, is correct and is affirmed.” BR 36 (Conclusion of Law 5).

Partida next filed a petition for review of the Proposed Decision and Order, asking the three-member Board to set aside its Industrial Appeals Judge’s decision and vacate the Affirming Order. *See* BR 3-10. On January 29, 2008, the Board denied Partida’s petition for review, thereby making the Proposed Decision and Order the Board’s final decision. BR 1; *see* RCW 51.52.106.

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<sup>9</sup> A copy of the Proposed Decision and Order is attached hereto as Appendix E.

In what amounted to its fourth challenge to the Assessment,<sup>10</sup> Partida appealed the Board's decision to the Thurston County Superior Court. CP 4-6. A condition precedent to pursuing such an appeal is payment of the disputed premiums, penalties and interest:

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. . . .

RCW 51.52.112.

Partida did not pay the taxes, penalties, and interest that the Department had assessed and the Board had affirmed before filing its superior court appeal. *See* CP 13-14. Accordingly, the Department moved to dismiss the action pursuant to RCW 51.52.112. CP 9-18. In response, Partida argued that it

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<sup>10</sup> Partida had previously (1) asked the Department to reconsider the Assessment, which resulted in the Affirming Order; (2) presented its case to the Board's Industrial Appeals Judge, which resulted in the Proposed Decision and Order affirming the Assessment; and (3) asked the Board to overturn the Proposed Decision and Order, which the Board declined to do.

should be relieved of its obligation to pay the assessment because requiring it to pay would create an “undue hardship.” *See* CP 21-27.

Partida offered two reasons why the superior court should find an undue hardship. First, Partida described health and financial problems that one of its owners, Mayra Partida, was experiencing. CP 24-25, 37-38. Second, the firm claimed that “the past year has been extremely slow because of the overall economic slow down . . . [which] has drastically reduced the amount of work that the firm has been able to perform.” CP 24. According to Partida, this reduction in work had led to a corresponding reduction in income, making it impossible to pay any of the assessment at all. *See* CP 24-25, 37-38.

Partida’s “undue hardship” contention was supported by a declaration from Ms. Partida alone. Absent were any financial or other records to support the firm’s claim of reduced income. *Cf.* BR 32 (Industrial Appeals Judge noting that

“[i]nterestingly too, the firm did not offer any financial records in evidence in this appeal”). Likewise absent was any information regarding assets or income of the other five owners of the firm.<sup>11</sup> Instead, in response to the Department’s motion to dismiss, Ms. Partida asserted that she was “the owner” of Partida and claimed that the entire alleged net income of the firm (\$4,000 per month) was barely enough for her personal expenses. CP 24-25, 37-38. As with the firm’s finances, however, Ms. Partida submitted no documentation of any kind to support her statements regarding her income and expenses.

Nevertheless, the superior court granted Partida’s request and found an “undue hardship” that warranted a deviation from the mandate of RCW 51.52.112. Declining to waive the entire assessment, however, the court conditionally dismissed

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<sup>11</sup> Before the Board, Ms. Partida testified that Partida had six partners after the period for which it was audited. *See* BR 28, 8/1/07 Transcript, p.52, ll.7-13 (three owners during audit period, with Ms. Partida owning 70%), p.53, ll.13-21 (three additional individuals became owners after audit period); *see also id.* p.20, l.4 – p.23, l.14 (Adam Carrazco, partner in Partida, explaining ownership structure during 2005 and 2006).

Partida's appeal subject to payment of \$20,000 of the \$37,514.29 assessment:

[T]he Department's Motion to Dismiss is granted. However, the Plaintiff has until October 10, 2008 upon which to provide \$20,000.00 to the Department . . . in a manner which is acceptable to the State. In which case, the Plaintiff will be allowed to pursue her appeal. This is based on the Declaration of Mayra Partida which demonstrates a basis to reduce the total amount claimed by the Department.

CP 28.<sup>12</sup>

Partida chose not to pay the reduced amount, thus making the Court's September 5, 2008 order a dismissal order as of October 11, 2008.<sup>13</sup> The firm now appeals the superior court's order to this Court, arguing that it should be required to pay nothing at all prior to challenging the Board's decision which affirmed the Department's Assessment for premiums that

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<sup>12</sup> A copy of the superior court's order is attached hereto as Appendix F.

<sup>13</sup> There is nothing in the record showing that October 10, 2008 came and went without the firm's payment of \$20,000, but it is indisputable that (1) October 10, 2008 has passed, and (2) the firm has not paid anything. *See also* ACB 6 ("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 . . .").

were due in 2005 and 2006. CP 29-30; Appellant's Corrected Opening Brief (ACB) 18.

#### **IV. ARGUMENT**

##### **A. The Standard Of Review Is Abuse of Discretion**

Partida's appeal of the Board's decision to superior court is governed by the Administrative Procedures Act, RCW ch. 34.05. *See* RCW 51.48.131. However, the firm's request that the superior court excuse it from paying the amount otherwise required by RCW 51.52.112 was not considered by either the Department or the Board. The issue before this court is thus whether the superior court's decision to reduce the amount required to be paid, rather than waive it entirely (or require payment in full), was correct.

The Industrial Insurance Act does not establish a standard of review for an "undue hardship" determination under RCW 51.52.112, and Partida does not suggest one. Research reveals no other Washington statute or case that might provide guidance for reviewing a superior court's determination on

whether an “undue hardship” exists that would reduce or eliminate a statutory precondition to pursuing an appeal.<sup>14</sup> It is therefore appropriate to turn to analogous situations to determine the applicable standard of review. *Cf. Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988) (applying standard of review for “analogous” denial of building permit application to denial of subdivision application); *Geo Exchange Systems, LLC v. Cam*, 115 Wn. App. 625, 628-629, 65 P.3d 11 (2003) (applying standard of review for “analogous” trial by affidavit to summary proceeding under RCW 60.04.081).

RCW 51.52.112 requires payment of “[a]ll taxes, penalties, and interest” prior to appealing an assessment to superior court, “unless the court determines that there would be an undue hardship to the employer.” *Id.* Partida’s request to be relieved of its statutory payment obligation is best analogized,

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<sup>14</sup> As discussed *infra* Part IV.C, the federal tax cases that Partida cites are distinguishable and, in any event, do not suggest that the superior court erred.

for standard of review purposes, to a request to proceed *in forma pauperis*, a proceeding that allows indigent litigants access to the courts. *E.g.*, *Bullock v. Roberts*, 84 Wn.2d 101, 104-105, 524 P.2d 385 (1974);<sup>15</sup> *cf.* ACB 12 (“Statement of the Case”), 13, 17-18 (all suggesting that Partida will not be able to pursue its appeal if it is required to pay any portion of the Assessment).

Washington courts have considered *in forma pauperis* requests to waive filing fees and bond posting requirements,

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<sup>15</sup> Most cases involving applications to proceed *in forma pauperis* involve the constitutional right of access to the courts accorded to criminal defendants and certain civil litigants, primarily in the family law context. *E.g.*, *Whitney v. Buckner*, 107 Wn.2d 861, 734 P.2d 485 (1987) (denial of *in forma pauperis* status to incarcerated plaintiffs in dissolution and child support modification proceedings violated due process as it “denied petitioners any meaningful access to the courts . . . in the absence of sufficient justification . . .” *Id.* at 866-867.).

Partida’s appeal to superior court was a challenge by a business to a civil assessment for workers’ compensation premiums. As such, the firm does not have a constitutional right to proceed *in forma pauperis*. *See, e.g.*, *In re Grove*, 127 Wn.2d 221, 240, 897 P.2d 1252 (1995) (holding that in civil cases in which only property or financial interests are at stake, there is no constitutional right to waiver of fees and payment of costs); *cf. Rowland v. California Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 203, 113 S. Ct. 716, 722, 121 L. Ed.2d 656, 667 (1993) (poverty is a human condition, and for this and other reasons, law extends *in forma pauperis* relief only to natural persons).

*Bowman v. Waldt*, 9 Wn. App. 562, 513 P.2d 559 (1973), and to waive all fees associated with a civil action, *Neal v. Wallace*, 15 Wn. App. 506, 550 P.2d 539 (1976). See generally *O'Connor v. Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969) (discussing history of *in forma pauperis* doctrine). In all of these cases appellate courts have applied the **abuse of discretion** standard of review. *Bowman*, 9 Wn. App. at 570; *Neal*, 15 Wn. App. at 508 (citing *O'Connor*); see also *Bullock*, 84 Wn.2d at 103-104 (mandamus will lie to compel superior court judge to “exercise judicial discretion” and rule on petitions to proceed *in forma pauperis*). Abuse of discretion is therefore the appropriate standard to apply in the present appeal.

The test under for abuse of discretion is well-established: a superior court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The superior court here did not abuse its discretion – in fact, it accorded Partida the benefit of the

doubt when it reduced the firm's payment obligation by nearly half based only on the declaration of Ms. Partida. Its decision should therefore be affirmed.

**B. The Superior Court Did Not Abuse Its Discretion When It Substantially Reduced The Firm's Payment Obligation But Declined To Eliminate It Entirely**

The *in forma pauperis* doctrine is also the best analogy to Partida's "undue hardship" claim. Washington courts use a four-part test to determine whether a party may be relieved of the expenses of litigation:

To allow waiver of fees in a civil action, at a minimum, the affidavit accompanying the motion must show '(1) . . . actual, not theoretical, indigency; (2) that but for such waiver a litigant would be unable to maintain the action; (3) that there are no alternative means available for procuring the fees; and (4) that plaintiff's claim is 'brought in good faith and with probable merit.'

*Neal*, 15 Wn. App. at 508-509 (citation omitted); *cf. Housing Authority of King County v. Saylor*, 87 Wn.2d 732, 743-744, 557 P.2d 321 (1977) (denying motion to proceed *in forma*

*pauperis* in appeal to Supreme Court based on “factors of indigency, good faith, and meritorious claim”).

In support of its claim of undue hardship, the firm submitted a declaration from Mayra Partida that described her personal health and financial issues and allegedly-declining firm profits. *See* CP 37-39. Taking the statements in the declaration at face value, the firm has perhaps shown that *one* of its partners is indigent. This singular declaration does not satisfy the requirements of the first three prongs of *Neal*, because it does not show indigency of the partnership and does not show that there are no alternative means available to obtain the assessment.

Ms. Partida’s Board testimony was that the firm actually has *six* partners – three people who were partners during the audit period, and three employees who were converted into partners after the audit was completed. *See* BR 28, 8/1/07 Transcript, p.52, ll.7-13 (three owners during audit period, with Ms. Partida owning 70%), p.53, ll.13-21 (three additional

individuals became owners after audit period); *see also id.* p.20, 1.4 – p.23, 1.14 (Adam Carrazco, partner in Partida, explaining ownership structure during 2005 and 2006 and identifying six partners after audit period). Neither the Board nor the superior court record contains any indication of a subsequent change in ownership.<sup>16</sup>

Under Washington law, partners are jointly and severally liable “for all obligations of the partnership.” RCW 25.05.125(1). While the three partners that the firm added after the audit period may not be personally liable for the assessment, *see* RCW 25.05.125(2), Ms. Partida and two other partners are. Because each of these three people is responsible for the entire assessment, each has an equal interest in pursuing Partida’s appeal – and each is equally responsible for paying the assessment as a condition of continuing this litigation.

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<sup>16</sup> Ms. Partida’s declaration suggests that she is the only owner of Partida. *See* CP 37. If necessary, the Department will move to supplement the record to show that this is not true.

The record contains no declaration or other information regarding these other partners, and Ms. Partida's declaration does not mention them. For this reason alone,<sup>17</sup> the superior court would have been well within its discretion to find that no undue hardship existed warranting *any* reduction in the assessment that RCW 51.51.112 required Partida to pay before continuing its appeals. When the court instead found a hardship and agreed to reduce the firm's obligation by nearly half, it certainly did not abuse that discretion.<sup>18</sup>

Little need be said about the fourth *Neal* factor, which requires a litigant seeking a waiver of litigation expenses to show that its claim is "brought in good faith and with probable merit." *Neal*, 15 Wn. App. at 509. The original Assessment directed Partida to pay \$37,514.29 in premiums, penalties, and

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<sup>17</sup> As noted *supra* Part III, also absent were any financial or other records to support either the firm's claim of reduced income or Ms. Partida's claim of financial hardship.

<sup>18</sup> Even if this Court's review of the "undue hardship" determination were under the substantial evidence standard, the complete absence of evidence regarding Ms. Partida's partners and their finances would preclude reversal of the superior court's ruling.

interest for the tax years 2005 and 2006. BR 38-40. At the firm's request, the Department reconsidered the Assessment and then affirmed it. BR 42. The Board's Industrial Appeals Judge reached the same result, making numerous and detailed findings of fact in support of his decision. BR 25-36. The Board itself then denied Partida's petition for review of the Industrial Appeals Judge's decision. BR 1.

In appealing to superior court, Partida thus seeks to show not only that the original Assessment was wrong, but that three subsequent reviews over the following three years were also wrong. Furthermore, because its appeal is governed by the Administrative Procedures Act, Partida would need to show that the Board's findings of fact were not even supported by substantial evidence. *See, e.g., Lee's Drywall Co., Inc. v. Dep't of Labor & Indus.*, 141 Wn. App. 859, 864, 173 P.3d 934 (2007). At this point it can safely be said that Partida's appeal lacks "probable merit." Because the superior court could properly have dismissed Partida's appeal for failing to pay any

part of the assessment that RCW 51.52.112 requires, it did not abuse its discretion when it reduced the assessment but not by as much as Partida might have liked.

**C. The Federal Tax Cases That The Firm Cites Support The Superior Court's Decision**

Partida cites to two federal tax cases that contain the word “hardship” to support its claim that the superior court erred by reducing the firm’s obligation under RCW 51.52.112 by approximately one-half instead of eliminating it entirely. *See* ACB 14-16. As a threshold matter, these cases – which have little if any bearing on the meaning of “hardship” or “undue hardship” in Washington – do not allow the firm to escape its complete failure to (1) present evidence that the other five partners lack financial ability to pay the \$20,000, or (2) show that there is any merit to its latest appeal. *See* discussion *supra* Part IV.B. Moreover, assuming for argument that these federal cases are relevant, they are entirely consistent with the superior court’s decision.

*Flora v. United States*, 362 U.S. 145, 80 S. Ct. 630 (1960), involved a tax refund suit that the federal District Court had dismissed because the taxpayer had not paid the “entire assessment” prior to filing suit. *Id.* at 146. The Supreme Court held that the Internal Revenue Code required payment of the “full assessment” as a jurisdictional prerequisite to bringing suit in court, and therefore affirmed the lower court’s dismissal. *Id.* at 155, 175-177.

Partida argues that this Court should look to the *Flora* Court’s discussion of the word “hardship” to assist in interpreting RCW 51.52.112. *Flora*, however, has nothing to do with the firm’s appeal. First, the word “hardship” appears nowhere in the federal tax statutes at issue in *Flora*. See 28 U.S.C. § 1346(a)(1); Revenue Act of 1924, § 900, 43 Stat. 336 (1924). Even today the word is not used anywhere in the Internal Revenue Code with respect to taxpayer appeals. Because the meaning of the word “hardship” was not before the *Flora* Court, the Court did not address it.

Second, to the extent the word “hardship” appears in *Flora* at all, it is exclusively in the context of the overall system of federal tax appeals that Congress created. As the *Flora* Court explained, one part of this system was the federal Board of Tax Appeals,<sup>19</sup> which was established to ameliorate what some in Congress described as the “hardship” of requiring taxpayers to pay taxes before pursuing any appeal from their assessments. See *Flora*, 362 U.S. at 158-163 (quoting extensively from legislative history of Board of Tax Appeals). But “hardship” was not the only word Congress used to describe the problems some taxpayers might encounter if required to pay their full assessments before appealing.<sup>20</sup> Because Congress used the word “hardship” in a colloquial

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<sup>19</sup> The Board of Tax Appeals was re-named as the Tax Court of the United States in 1942. See *Comm’r of Internal Rev. v. Heininger*, 320 U.S. 467, 470 n.2, 64 S. Ct. 249 (1943).

<sup>20</sup> Other language Congress used to support creation of the Board of Tax Appeals included “financial hardship and sacrifice,” *Flora*, 362 U.S. at 159; “the long, troublesome processes which exist,” *id.* at 163 n.24; “impossible to pay in advance,” *id.*; and “the idea that a man must first pay his money and then sue to get it back is an anomaly in the law,” *id.*

sense – and appears not to have used the phrase “undue hardship” at all – *Flora* provides no guidance to the meaning of RCW 51.52.112. The case is thus of no use in determining whether the superior court here abused its discretion.

Third, “hardship” – the word that appears in *Flora* and in the legislative history of the Board of Tax Appeals – and “undue hardship” – the phrase that appears in RCW 51.52.112 – are different concepts. By using the word “undue,” Washington’s legislature recognized that requiring prepayment of assessments might cause *some* “hardship,” but mandated that this requirement be waived only upon a showing of hardship that was “undue.” *Cf. Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (“[w]e may assume that any accommodation would entail some hardship on the Company, but . . . ‘(u)ndue hardship is something greater than hardship . . . .’”) (citation omitted); *In re Berscheid*, 309 B.R. 5, 11 (2002) (phrase “undue hardship” in Bankruptcy Code

“means more than just mere hardship; instead, the hardship must be exceptional”).<sup>21</sup>

Fourth, to the extent the federal system discussed and approved in *Flora* is similar to Washington’s Industrial Insurance premium appeal scheme, the “hardships” associated with administrative appeals are addressed identically. Congress created the Board of Tax Appeals so that taxpayers could dispute assessments without prepaying the amounts alleged to be due. This is the “hardship” that is discussed in *Flora* – the expense of pursuing the *first* appeal. The Board of Industrial Insurance Appeals serves precisely this function: by requiring

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<sup>21</sup> See also *In re Densmore*, 8 B.R. 308, 309 n.1 (Bankr. Ga. 1979) (“[s]ome burden and hardship may be expected by the statute [18 U.S.C. § 523(a)(8), addressing discharge in bankruptcy of educational loans in situations of “undue hardship”]; it is the ‘undue’, the unreasonable, unconscionable hardship which the debtor is not expected and required to bear”).

Notably, the “undue hardship” exemption for student loan discharge “requires the bankruptcy judge to *exercise discretion* in determining whether payment of the debt will cause undue hardship on the debtor and his dependents . . . .” 2 *Collier Bankruptcy Manual* ¶ 523.13[2] at 67 (3<sup>rd</sup> ed. revised 2008) (emphasis added). This supports the Department’s argument above, *supra* Part IV.A, that the applicable standard of review is abuse of discretion.

no prepayment, the Board provides employers such as Partida an opportunity to prove that a Department assessment is wrong without first paying that assessment. At the administrative level, the systems are identical in this regard.

A taxpayer in the federal system who is dissatisfied with the outcome of an administrative appeal may proceed to federal District Court, but *must* prepay the assessment at that point – there is absolutely no hardship exception for the second appeal. As the *Flora* Court explained, one purpose of Board of Tax Appeals was “to furnish a forum where full payment of the assessment would not be a condition precedent to suit. The result is a system in which there is one tribunal [the Board of Tax Appeals] for prepayment litigation and another [the courts] for post-payment litigation.” *Flora*, 362 U.S. at 164.

Washington employers who do not prevail at the Board can likewise appeal to superior court and are generally required to prepay their assessments at that point – unless they can show “undue hardship.” This is a *more* generous standard than the

federal system provides, and it is precisely this exception that Partida now pursues. The firm can hardly argue that RCW 51.52.112 does not satisfy the “hardship” discussed in *Flora* where the state statute is more lenient than its federal counterpart.

In sum, *Flora* is a federal case involving the federal income tax system. The statutes it construes do not use the word “hardship,” and the legislative history of those statutes uses the word only informally and only with respect to a taxpayer’s first appeal from an assessment. Nowhere in *Flora* appears the phrase “undue hardship,” which differs significantly from the word “hardship” and is the statutory language here at issue. And if Partida’s appeal *did* arise in the federal system, the firm would be entitled to no relief at all from the prepayment requirement, a result the firm presumably does not seek despite its reliance on federal law. For all of these reasons *Flora* does not shed light on any of the issues that Partida’s appeal raises.

*St. Paul Cathedral School v. United States*, 2008 WL 5121928 (E.D. Wash. 2008) is an unpublished federal district court decision interpreting federal regulations promulgated by the Internal Revenue Service, and as such is of even less use in resolving the issues that Partida raises under Washington's Industrial Insurance system. Furthermore, the case involves a suit by a taxpayer to obtain a refund of penalties *already paid*. See *St. Paul Cathedral* at \*1.<sup>22</sup> It thus arises from facts that are the exact opposite of those here present and is entirely irrelevant to Partida's claim that it should be required to pay nothing before pursuing its appeal from the Board's decision.

*St. Paul Cathedral* is distinguishable for another fundamental reason. At issue in the case was a statute that allowed for a refund of penalties if the taxpayer could show that its failure to pay taxes was "due to reasonable cause and not due to willful neglect." *Id.* at \*3, quoting 26 U.S.C. § 6651(a)(1).

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<sup>22</sup> The case also concerns penalties alone; the taxpayer did not argue that the taxes themselves were improperly assessed. *St. Paul Cathedral* at \*1.

The Internal Revenue Service had promulgated regulations interpreting the “reasonable cause” standard, under which “a taxpayer must show that it exercised ordinary business care. Second, the taxpayer may excuse its failure to pay by showing either: (1) the taxpayer was unable to pay the tax; or (2) the taxpayer would suffer an undue hardship by paying the tax on the due date.” *St. Paul Cathedral*, at \*3, citing 26 C.F.R. § 301.6651-1(c)(1).

In discussing “undue hardship,” the *St. Paul Cathedral* court explained that case law and federal regulations “all suggest that the touchstone here is the reasonableness of the taxpayer’s decision not to pay *at the time the tax was due.*” 2008 WL 5121928 at \*6 (emphasis added). In other words, the question under federal law governing the refund of penalties is whether there was an “undue hardship” when the taxes were due. Partida has never argued that such a hardship existed in 2005 and 2006 when its workers’ compensation premiums were

due – indeed, it argues that its financial difficulties only arose during the “past year.” *See* CP 37-38.<sup>23</sup>

Federal interpretations of the “undue hardship” exception in 26 C.F.R. § 301.6651-1(c)(1) are consistent with the superior court’s ruling in this case. As explained in *St. Paul Cathedral*:

‘Evidence of financial trouble, without more, is not enough’ to establish undue hardship.’ . . . 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.’ . . . However, financial difficulties as substantial as ‘the potential ruin of a corporation’ may constitute reasonable cause.

*St. Paul Cathedral* at \*6 (citations omitted).

*St. Paul Cathedral* explains that under some circumstances financial difficulties might amount to “undue hardship” excusing the payment of federal taxes. The bar is a high one, however, and the limited and unsubstantiated evidence that Partida has offered fails to clear it. *See, e.g., Pacific Wallboard & Plaster Corp. v. United States*, 319 F.

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<sup>23</sup> *See also* CP 38 (9/3/08 declaration referring to “past year” as being “extremely slow,” resulting in “drastically reduced” work).

Supp. 1187, 1189 (D. Or. 2004), *aff'd*, 2005 WL 3113470 (2005) (undue hardship based on financial difficulties requires “extraordinary circumstances”). In fact, the *St. Paul Cathedral* court itself managed to find only a single reported case – *East Wind Industries v. United States*, 196 F.3d 499 (3<sup>rd</sup> Cir. 1999), an appeal arising in New Jersey – in which a taxpayer was excused from paying penalties under the “undue hardship” exception. *See St. Paul Cathedral* at \*6.<sup>24</sup>

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<sup>24</sup> *East Wind Industries* involved facts far removed from the present appeal. The taxpayers in that appeal had contractors with the Defense Department and encountered financial difficulties when they stopped paying “illegal bribes” to government employees. Specifically, once these payments stopped, “(1) the Taxpayers were not paid monies due and owing to them for work which was successfully performed and for goods delivered to and accepted by the Defense Agencies; (2) payments were intentionally and substantially delayed; (3) inventory was wrongfully rejected and (4) orders were required to be reworked according to the ‘trumped up’ false specifications of the government inspectors.” *East Wind Indus. v. United States*, 196 F.3d 499, 502 (3<sup>rd</sup> Cir. 1999).

Finding that the taxpayers had shown an undue hardship for failing to pay taxes when due, the Court of Appeals described a situation quite different from that which Ms. Partida presents:

The Taxpayers make a persuasive argument in support of their position that they have established that payment of the taxes when due would have resulted in undue hardship. This position is supported by the following facts: (1) Mr. and Mrs. D'Antonio incurred substantial personal debts

Other federal cases illustrate the difficulty taxpayers encounter when trying to prove “undue hardship” as a reason for failing to pay taxes. In *StaffIT, Inc. v. United States*, 482 F.3d 792 (5<sup>th</sup> Cir. 2007), for example, the Court of Appeals rejected a claim of undue hardship that was based on an assertion that other debts and obligations needed to be paid prior to federal taxes:

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by obtaining loans and a mortgage on their residence in order to provide additional cash for the taxpayers to stay in business; (2) the personal funds were used to pay essential creditors and a small number of employees retained to re-work the inventory; (3) rent was not paid; (4) without the reduced staff, the Taxpayers would have to had shut down their operation; (5) the Taxpayers needed to stay in business so that they could collect on their claims against the government and obtain the funds needed to pay the IRS and other creditors. The evidence shows that if the Taxpayers had paid their employment taxes when due, they would have had insufficient funds to pay the reduced work force and essential creditors to enable them to remain a going concern. Moreover, the only markets for the \$750,000 of inventory in the Taxpayer's warehouse were the Defense Agencies. The Taxpayers have clearly shown that they were at the mercy of the Defense Agencies as to whether they would have sufficient cash flow to operate the business. Under these facts and circumstances, we find that the Taxpayers have established that undue hardship would have resulted if they had paid their employment taxes on time.

*East Wind Indus.*, 196 F.3d at 509-510.

Despite all its financial troubles in late 2001 and early 2002, S.I. continued to pay virtually all its creditors, its employees, its contractors, its officer-stockholders, and its operating expenses in preference to its payroll tax obligations. S.I. relegated its obligations to the government to those owed to its other creditors and even those owed to its own officer-shareholders. The logical consequence of S.I.'s actions is the imposition of tax penalties. To conclude otherwise would be to sanction S.I.'s unilateral, self-execution of a government loan.

*Id.* at 801-802.<sup>25</sup>

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<sup>25</sup> *StaffIT* is part of a line of federal cases rejecting the contention that the government should be forced to become an “unwilling partner” in a business that diverts funds that might have been used to pay taxes to other creditors. See, e.g., *Diamond Plating Co. v. United States*, 390 F.3d 1035 (7<sup>th</sup> Cir. 2004):

We also note that some of the delinquent taxes were trust fund taxes. Rather than remitting these taxes to the government on a quarterly basis after withholding them from employee wages, Diamond Plating used the funds for operating expenses. Because this practice makes the government “an unwilling partner in a floundering business,” *Collins v. United States*, 848 F.2d 740, 741-42 (6<sup>th</sup> Cir.1988), companies withholding trust fund taxes must provide strong justification to avoid penalties. Diamond Plating has failed to provide such a justification. Indeed, the undisputed evidence shows that the company's officers favored all other creditors and themselves over the government, which severely undermines Diamond Plating's arguments about financial distress.

*Diamond Plating*, 390 F.3d at 1039; see also *Fran Corp v. United States*, 164 F.3d 814, 820 (2<sup>nd</sup> Cir. 1999) (“[p]erhaps most important is Fran's

The need to pay other obligations first is the reason that Partida now advances to avoid paying its workers compensation premiums that were due in 2005 and 2006. *See* CP 38 (Ms. Partida's net income from business is based on firm's gross income less "tool equipment rental, gas, supplies, taxes, and other things necessary for my company to perform work as drywallers"; personal expenses including car and home loans also take priority over the Assessment). No federal court has found an under hardship under similar circumstances,<sup>26</sup> and the

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failure to provide any evidence to show that it placed its obligations to the IRS before those to any and all creditors not directly related to the two projects" in which firm was engaged while not paying taxes).

<sup>26</sup> *See, e.g., Matter of Carlson*, 126 F.3d 915 (7th Cir. 1997), in which the Court rejected a claim that a son's illness and the associated costs constituted an undue hardship:

In regard to financial hardship, the Carlsons presented no evidence that their son's medical bills caused catastrophic financial distress - no documentation was presented of cash flow problems, necessary living expenses, or problems with other creditors. They appear, actually, to have paid all their other household and business bills (the only creditors listed on their bankruptcy petition were the IRS, the Illinois Department of Revenue, and the mortgagee, and when asked at trial if he paid household expenses during the years in question, Mr. Carlson responded "Sure, sure, of course.").

superior court here did not abuse its discretion in deciding to waive only half of the payment required under RCW 51.52.112.

Finally, as noted above, Partida provided no documentation whatsoever of its alleged financial difficulties – a failure of proof that the Board noted. *See* BR 32. Federal courts have looked askance at claims of undue hardship that are supported by only the unsubstantiated claims of the debtor. *E.g., Carlson, supra* n.25; *Lykes v. Comm’r of Internal Rev.*, T.C. Memo. 2004-159, 2004 WL 1551273 at \*4 (U.S. Tax Ct. 2004) (“[t]he Court further notes that petitioner did not provide Appeals Officer Reagan or this Court with any financial records that might have supported petitioner's claim of undue hardship. We may infer that petitioner had no records that would have supported his claim”).

The Department does not dispute that it may have been difficult for Partida’s to pay its assessment at the time it filed its the superior court appeal, although it should be noted that the

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*Id.* at 923.

appeal was filed more than two years after the first quarter of the Assessment and 17 months after the Assessment itself. Regardless, the financial difficulties of a single member of a six-partner firm, supported by nothing other than a brief declaration, do not establish an undue hardship that would warrant a further reduction in the prepayment that RCW 51.52.112 requires. The superior court did not abuse its discretion when it accepted Partida's arguments, found a hardship, and decreased by almost 50% the payment required for the firm to continue with its series of appeals.

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**V. CONCLUSION**

For the foregoing reasons, the superior court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of May, 2009.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink that reads "Michael Hall". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

MICHAEL HALL  
Assistant Attorney General  
WSBA No. 19871  
PO Box 40121  
Olympia, WA 98504-0121  
(360) 586-7723

**RCW 51.52.112**

**Court appeal — Payment of taxes, penalties, and interest required.**

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.

[1986 c 9 § 19.]

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# FIELD AUDIT REPORT

26-Sep-06

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**DBA Name:** MAYRA S PARTIDA  
**Legal Name:** MAYRA S PARTIDA  
**Account ID:** 093,671-01  
**UBI Number:** 602 543 144

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## AUDIT INFORMATION

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**Auditor:** Kristen Phalen

**Date Assigned:** 5/26/2006

**Date Submitted for Approval:** 9/25/2006

**Audit Assignment Code:** AA10 - Data Queries, Under Reporting

**Likelihood:** 15.00      **Severity:** 0.5      **Ranking Score:** 7.5

**Referral Comments:** Please audit for unreported square footage: This employer changed from a sole to a 3-way part. The firm Taped a total of 569,181 sq. ft in the 05/4 quarter and reported 0 footage. Dividing this 3 ways is severely outside the industry guide for 3 persons to perform. Attention should be given to the number of hours and footage each owner is claiming they are performing.

**Tracking Codes:** DRYW - Drywall

**ADU Comments:** Please audit for unreported square footage: This employer changed from a sole to a 3-way part. The firm Taped a total of 569,181 sq. ft in the 05/4 quarter and reported 0 footage. Dividing this 3 ways is severely outside the industry guide for 3 persons to perform. Attention should be given to the number of hours and footage each owner is claiming they are performing.

**Supervisor Comments:**

**Auditor Comments:** Account open fourth quarter 2005.

**Audit Period:** 10/1/2005    6/30/2006

**Audit Level:** Field Audit

**No Change Audit:** NO

**Net adj to Hours:** 995,386

**Net adj to premiums:** \$30,048.70

**Urgent Claim Investigation:** NO

**Jnreg Employer Current Qtr:**

**Prime Contractor Liability:** NO

**Penalty Worksheet Completed:** YES

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## Audit Summary

**Referred By:** Data Queries

**Allegations:** Please audit for unreported square footage: This employer changed from a sole to a 3-way part. The firm Taped a total of 569,181 sq. ft in the 05/4 quarter and reported 0 footage. Dividing this 3 ways is severely outside the industry guide for 3 persons to perform. Attention should be given to the number of hours and footage each owner is claiming they are performing.

**Findings:** Firm was underreporting drywall square footage.

**Corrections Made:** Picked up the square footage that was over the Washington State Standard of 65,000 ft per quarter per owner.

**Penalties:** A \$100.00 penalty for failure to provide employee footage records was assessed. Firm was cooperative.

## Audit Details

**Detailed Findings:** Reviewed books and records and firm had good records for who they did drywall work for. The firm has three partners Jose Arredondo, Adam Carraco, and Mayra Partida. These partners appear to meet the guidelines of a true partnership and share in the equal management of the business.

In the quarter ending December 2005 the firm reported the following taping jobs:

Dynamic 390,480

Pyramid 136,816

Universal 136,308

Total 663,604

The firm states the 3 owners did all this work themselves.

In the quarter ending March 2006 the firm reported the following taping jobs:

Dynamic 133,488

TriCounty 47,462

Universal 386,351

Total 567,301

Dynamic Hanging 14,304

The firm states the 3 owners did all this work themselves.

In the quarter ending June 2006 the firm reported the following taping jobs:

Dynamic 358,184

Universal 93,422

Total 451,606

The firm reported employees did 116,429 of the taping and the owners did 335,117.

The firm did not have good employee records. I reviewed check records but it was not clear who they were paying and few employee records were provided. It is highly unlikely these three owners taped 663,604 square feet in the fourth quarter of 2005 by themselves when the Washington State standard for each owner is only 65,000 square feet. Since I was provided limited records for employees, I used Washington State Standard of 65,000 feet for each owner and assessed the excess to employee hours. I did this for each quarter I audited. The accountant, John Leslie, believed the owners had not been reporting employee hours correctly, but also believed that the owners were taping more than 65,000 feet a quarter.

The firm has recently added three new partners to the firm as of 7/18/06 that are not in my audit period. I explained to the firm's accountant, John Leslie, they might not meet the test of a true partner if they are not sharing in the management of the firm and were just put on as owners to avoid workers' compensation.

I assessed a \$100 penalty for failure to keep employee records in the fourth quarter 2005 and the first quarter 2006. From the hours worked and talking to the accountant they must have had some employees they did not report. I assume they were paid cash or out of another check

book since there was no payment from the check register I was provided.

The accountant will definitely take this to reconsideration. His biggest concern is the drywall rates and the limit of the 65,000 sq feet per person per quarter.

**Results:**

**Criteria:**

**Reporting Errors Found:**

**Requested records:**

Employer Record	Description	Provided
Check Register		Yes
Department of Revenue Reports		Yes
Employment Security Reports		Yes
L&I Reports/Worksheets		Yes
Other employer records	Drywall Reports	Yes

**Accuracy of Employer Records:**

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**FIRM INFORMATION**

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**Employer address and phone numbers:**

**DBA Name:** MAYRA S PARTIDA  
**Mailing Address:** 10408 NE 76TH ST  
VANCOUVER, WA 98662-  
**Phone Number:** (503)997-4722

**Employer bank:**

**Name:** U S BANK **No account #**

**Branch:** Hazel Dell

**Ownership:**

**Entity:** Partnership

Owner Name	Title	SSN	Owner Effect Date	Owner Ending Date	
PARTIDA, MAYRA S	PTR	540-08-3243	09/01/05		70
CARRAZCO, ADAM M	PTR	573-75-0648	09/01/05		15
ARREDONDO, JOSE M	PTR	541-43-5340	09/01/05		15

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**CLASSIFICATION ANALYSIS**

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**Complete description of firm's operations:**

Firm is a drywall contractor and does minimal hanging.

**Assigned classifications:**

Classifications And Subcodes	Active Quarter	Inactive Quarter
0550-00	10/1/2005	
0551-00	10/1/2005	

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**CENTRAL OFFICE SYSTEM CORRECTIONS**

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**POST AUDIT CONFERENCE:**

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**Post Audit Conference Held:** Yes

**Name:** Mayra Partida

**Title:** Owner

**Conference Date:** 8/23/2006

**Comments:** Left messafe of assessment.

# Spreadsheet Entry Report

MAYRA S PARTIDA

Date Printed: Tuesday, September 26, 2006

Audit Period: 10/1/2005 - 6/30/2006

Acct No: 093-671-0

Sorted by Name

	Excel	Class	PB			
-Period Type				Qty Sq Ft	Qty Sq Ft	Qty Sq Ft
-Period End Date				12/31/2005	3/31/2006	6/30/2006
-Source						
ade						
emp	055100	468604	386605	256606		

**Detail of Reportable Hours**

Printed: September 26, 2006

MAYRA S PARTIDA

Acct No: 093,671-01

Audit Period: 10/1/2005 to 6/30/2006

Employee Name	Hours Entered	Dollars Entered	Hourly Wage	Reportable Hours
<b>Year/Quarter: 2005/4      Class: 0551-00</b>				
emp	468,604.00	\$0.00	\$0.00	468,604.00
<b>Totals for :</b>	<b>Year/Quarter: 2005/4</b>	<b>Class: 0551-00</b>		<b>468,604</b>
<b>Year/Quarter: 2006/1      Class: 0551-00</b>				
emp	386,605.00	\$0.00	\$0.00	386,605.00
<b>Totals for :</b>	<b>Year/Quarter: 2006/1</b>	<b>Class: 0551-00</b>		<b>386,605</b>
<b>Year/Quarter: 2006/2      Class: 0551-00</b>				
emp	256,606.00	\$0.00	\$0.00	256,606.00
<b>Totals for :</b>	<b>Year/Quarter: 2006/2</b>	<b>Class: 0551-00</b>		<b>256,606</b>

**Audited Payroll Report    Audit**

Printed: September 26, 2006

MAYRA S PARTIDA

Acct No: 093,671-01

Audit Period: 10/1/2005 to 6/30/2006

Quarter	Class	Reported Hours/Units	Audited Hours/Units	Adj to Hours/Unit	Rates Amount	Reported Premium	Audited Premium	Adj to Premium
<b><u>2005 Q4</u></b>								
	055000	0	0	0	0.0525	\$0.00	\$0.00	\$0.00
	055100	0	468604	468604	0.0295	\$0.00	\$13,823.82	\$13,823.82
<b>Total for Qtr:</b>		0	468604	468604		\$0.00	\$13,823.82	\$13,823.82
<b><u>2006 Q1</u></b>								
	055000	0	0	0	0.0545	\$0.00	\$0.00	\$0.00
	055100	0	386605	386605	0.0308	\$0.00	\$11,907.43	\$11,907.43
<b>Total for Qtr:</b>		0	386605	386605		\$0.00	\$11,907.43	\$11,907.43
<b><u>2006 Q2</u></b>								
	055000	0	0	0	0.0545	\$0.00	\$0.00	\$0.00
	055100	116429	256606	140177	0.0308	\$3,586.01	\$7,903.47	\$4,317.45
<b>Total for Qtr:</b>		116429	256606	140177		\$3,586.01	\$7,903.47	\$4,317.45
<b>Grand Total :</b>		116429	1111815	995386		\$3,586.01	\$33,634.72	\$30,048.70

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Note: These figures do not include penalties, interest or payments made on your account.

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93,671-01

NOTICE AND ORDER OF ASSESSMENT

Department of Labor and Industries  
COLLECTIONS  
Olympia, Washington 98504-4170

) Notice and Order of  
) Assessment of Industrial  
) Insurance Taxes

IN THE MATTER OF THE ASSESSMENT OF  
INDUSTRIAL INSURANCE TAXES AGAINST:

) FIELD AUDIT

) No. 0422081

)  
) JOSE M ARREDONDO AND SPOUSE,  
) ADAM M CARRAZCO AND SPOUSE,  
) MAYRA S PARTIDA AND SPOUSE,  
) AND THE MARITAL COMMUNITY COMPOSED THEREOF,  
) A PARTNERSHIP,  
) DBA MAYRA S PARTIDA  
) 10408 NE 76TH ST  
) VANCOUVER WA 98662

)  
) An Employer, Account ID 093,671-01  
) Unified Business Identifier (UBI) 602543144 )

THE DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE  
OF WASHINGTON:  
TO:

JOSE M ARREDONDO AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

ADAM M CARRAZCO AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

MAYRA S PARTIDA AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

IT IS ORDERED by the Director, pursuant to RCW 51.48.120, that taxes due and owing by you to the STATE FUND are hereby determined to be the sum of Thirty Seven Thousand, Five Hundred Fourteen and 29/100 Dollars, (\$37,514.29), and that said taxes are hereby assessed per Field Audit.

Period (Qtr)	Premium Due Per Employer Report	Penalties & Interest Due Per Employer Report	Premium Due Per Audit	Penalties & Interest Due to Date	Payments	Balance Due
UNAVAIL			\$ 0.00	\$ 100.00 PEN 0.00 INT	\$ 0.00	\$ 100.00
062	3,586.01	0.00 PEN 0.00 INT	7,903.46	431.74 PEN 86.34 INT	3,586.01	4,835.53
061	0.00	0.00 PEN 0.00 INT	11,907.43	2,381.48 PEN 595.35 INT	0.00	14,884.26

093,671-01 0746046

APPENDIX C  
Page 1 of 3

**NOTICE AND ORDER OF ASSESSMENT**  
**Department of Labor and Industries**

No. 0422081

An Employer, Account ID 093,671-01  
 UBI: 602543144

Period (Qtr)	Premium Due Per Employer Report	Penalties & Interest Due Per Employer Report	Premium Due Per Audit	Penalties & Interest Due to Date	Payments	Balance Due
054	\$ 0.00	0.00 PEN \$ 0.00 INT	13,823.82 \$	2,764.76 PEN \$ 1,105.92 INT	0.00 \$	17,694.50
						\$ 37,514.29

Additional penalties may be owing. In addition, delinquent taxes shall bear interest at the rate of one percent of the delinquent amount per month or fraction thereof from and after the due date until payment, increases, and penalties are received by the department (RCW 51.48.210).

You are hereby notified that this NOTICE AND ORDER OF ASSESSMENT is a demand for payment and the Director may issue a Notice and Order to Withhold and Deliver to satisfy this NOTICE AND ORDER OF ASSESSMENT, provided that, in any proceeding under Title 11 of the United States Code, the Department will observe the terms of 11 USC Sec. 362.

Request for reconsideration of this order must be made in writing to the Department of Labor and Industries in VANCOUVER within thirty (30) days. A further appealable order will follow such a request.

You are further notified that any appeal of this NOTICE AND ORDER OF ASSESSMENT must be made within thirty days of the date of service by filing an appeal with the Board of Industrial Insurance Appeals, PO Box 42401, Olympia WA 98504-2401, and sending a copy of said appeal to the Director of the Department of Labor and Industries, by mail or personal delivery, pursuant to RCW 51.48.131.

If said APPEAL is not made this NOTICE AND ORDER OF ASSESSMENT shall be deemed FINAL and the Director without further notice may file a WARRANT with the Superior Court Clerk for the unpaid balance of the above assessed amount, plus costs, which will become a LIEN upon the title to and interest in all real and personal property of the employer, the same as a JUDGMENT.

**ORDER AND NOTICE  
RECONSIDERING NOTICE AND ORDER OF ASSESSMENT**

Department of Labor and Industries  
Olympia, Washington 98504-4170

) Order and Notice  
) Reconsidering Notice and  
) Order of Assessment of  
) Industrial Insurance Taxes

IN THE MATTER OF THE ASSESSMENT OF  
INDUSTRIAL INSURANCE TAXES AGAINST:

) No. 0422081

JOSE M ARREDONDO AND SPOUSE,  
ADAM M CARRAZCO AND SPOUSE,  
MAYRA S PARTIDA AND SPOUSE,  
AND THE MARITAL COMMUNITY COMPOSED THEREOF,  
A PARTNERSHIP,  
DBA MAYRA S PARTIDA  
10408 NE 76TH ST  
VANCOUVER WA 98662

An Employer, Account ID 093,671-01  
Unified Business Identifier (UBI): 602543144

The Director of the Department of Labor and Industries of the State of  
Washington to:

JOSE M ARREDONDO AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

ADAM M CARRAZCO AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

MAYRA S PARTIDA AND SPOUSE,  
10408 NE 76TH ST  
VANCOUVER WA 98662

J LESLIE COMPANY INC.  
C/O JOHN LESLIE  
PO BOX 61605  
VANCOUVER WA 98666

Pursuant to RCW 51.48.131, it is the department's decision that Notice  
and Order of Assessment of Industrial Insurance Taxes No.0422081,  
ISSUED September 5, 2006, AND SERVED ON September 8, 2006, is

**AFFIRMED**

You are hereby notified that this ORDER AND NOTICE RECONSIDERING  
NOTICE AND ORDER OF ASSESSMENT is a demand for payment and the  
Director may issue a Notice to Withhold and Deliver to satisfy  
this ORDER AND NOTICE RECONSIDERING NOTICE AND ORDER OF ASSESSMENT;  
provided that, in any proceeding under Title 11 of the United States  
Code, the Department will observe the terms of 11 USC Sec. 362.

**ORDER AND NOTICE  
RECONSIDERING NOTICE AND ORDER OF ASSESSMENT  
Department of Labor and Industries**

**No. 0422081**

**An Employer, Account ID 093,671-01  
UBI: 602543144**

**You are further notified that any appeal of this ORDER must be made within thirty days of the date of service by filing an appeal with the the Board of Industrial Insurance Appeals, PO Box 42401, Olympia, WA 98504-2401, and sending a copy of said appeal to the Director of the Department of Labor and Industries, by mail or personal delivery, pursuant to RCW 51.48.131.**

**If said APPEAL is not made this ORDER shall be deemed FINAL and the Director without further notice may file a WARRANT with the Clerk of County for the unpaid balance of the above assessed amount, plus costs, which will become a LIEN upon the title to all real and personal property of the employer, the same as a JUDGMENT.**

**Dated this 3rd day of November 2006  
For the Director of the  
DEPARTMENT OF LABOR AND INDUSTRIES**



**By: MAUREEN STRAND  
Revenue Officer  
Phone: (360) 896-2325  
DEPT OF LABOR AND INDUSTRIES  
312 SE STONEMILL DR, STE 120  
VANCOUVER WA 98684-6982**

**STATUTORY REFERENCES ATTACHED**

**APPENDIX D  
Page 2 of 2**

**Page: 2**

**NOTICE AND ORDER OF ASSESSMENT**  
**Department of Labor and Industries**

No. 0422081

An Employer, Account ID 093,671-01  
UBI: 602543144

Dated this 5th day of September 2006  
For the Director of the  
**DEPARTMENT OF LABOR AND INDUSTRIES**

  
By: MAUREEN STRAND  
Revenue Officer  
Phone: (360) 896-2325  
DEPT OF LABOR AND INDUSTRIES  
312 SE STONEMILL DR, STE 120  
VANCOUVER WA 98684-6982

STATUTORY REFERENCES ATTACHED  
093,671-01 0746046

APPENDIX C  
Page 3 of 3

Page: 3

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: JOSE M. ARREDONDO ET UX DBA ) DOCKET NO. 06 21028  
2 MAYRA S. PARTIDA )  
3 FIRM NO. 093,671-01 ) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Richard J. Mackey

5 APPEARANCES:

6  
7 Firm, Jose M. Arredondo, et ux, DBA Mayra S. Partida, by  
8 AMS Law, P.C., per  
9 Aaron K. Owada

10 Department of Labor and Industries, by  
11 The Office of the Attorney General, per  
12 Courtlan Erickson, Assistant

13 The firm, Mayra S. Partida, filed an appeal with the Board of Industrial Insurance Appeals on  
14 November 17, 2006, from an order of the Department of Labor and Industries dated November 3,  
15 2006. In this order, the Department affirmed Notice and Order of Assessment No. 0422081, issued  
16 by the Department on September 5, 2006, which assessed the firm industrial insurance premiums,  
17 interest, and penalties for the period of the fourth quarter 2005 through the second quarter 2006,  
18 plus penalty for records unavailable, for a total assessment of \$37,514.29. The Department order  
19 is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 The deposition of Mark Shaffer, taken August 6, 2007, is published. Exhibit Nos. 1 and 2 to  
22 the deposition are designated Exhibit Nos. 2 and 3, respectively. The objection made on page 13  
23 to the offer of Exhibit No. 2 is sustained, and Exhibit No. 2 is rejected in evidence. The objections  
24 made on page 29 to the offer of Exhibit No. 3 are overruled, and Exhibit No. 3 is admitted in  
25 evidence. All other objections are overruled and motions denied.

26 The deposition of Kristen Phalen, taken August 27, 2007, is published. No objections or  
27 motions were made.

28 The deposition of Terri Zenker, taken August 28, 2007, is published. Exhibit No. 1 to the  
29 deposition is designated Exhibit No. 4, and is rejected in evidence. All other objections not mooted  
30 by rephrasing of the question are overruled and motions denied.

31  
32

1 **ISSUES**

2 Whether the Department has correctly assessed the firm industrial  
3 insurance premiums, interest, and penalties, for the fourth quarter 2005  
4 through the second quarter 2006.

5 **EVIDENCE PRESENTED**

6 Adam Carrazo, who states he is a 15 percent owner of the appellant firm, was called as a  
7 witness by the firm. Mr. Carrazo states that during the audit period of fourth quarter 2005 to second  
8 quarter 2006, the firm was mostly engaged in taping (rather than hanging) drywall, and that 90  
9 percent of their work was residential (rather than commercial) jobs, and the majority of these were  
10 two-level homes each comprising 9,000 to 10,000 square feet of wallboard. He states that at the  
11 start of the audit period they had a three-person crew. Mr. Carrazo described how the firm's team  
12 of three worked as a team preparing mud, covering screw locations in the wallboard, taping the  
13 wallboard joints using a 5-foot long tool called a bazooka that applies tape to the wallboard joints  
14 while automatically delivering mud over the tape, and cleaning up excess mud. Mr. Carrazo  
15 testified that using the bazooka, it takes only three seconds to cover a 10-foot wallboard joint from  
16 ceiling to floor. Mr. Carrazo testified it takes three to four hours for the team to finish the first  
17 application on a typical house, and they then move onto another house (in a housing development,  
18 or up to 10 to 15 travel minutes apart), where they repeat the process. Mr. Carrazo states they  
19 later return to the first house, after the mud has dried, to sand the surface and apply another layer  
20 of mud. This second application takes 3½ to 4 hours. Later they returned a third time to each  
21 house, for about 1½ hours, to sand the now dry second application. Mr. Carrazo testified that by  
22 working 10 to 12 hours a day, six days a week, the three owner/crew members complete six  
23 houses a week, totaling 60,000 or more square feet of work.

24 Mr. Carrazo testified that some weeks they did a little more work, and some weeks a little  
25 less, making it possible for the firm to complete the square footage claimed in the audit report and  
26 at Exhibit No. 1. He states that if he personally averaged only 65,000 square feet per quarter his  
27 company would not stay in business.

28 Mr. Carrazo testified that during the fourth quarter 2005 and the first quarter 2006, only the  
29 three partners in the firm were working for the company. In the second quarter 2006, the firm hired  
30 three employees (Anastacio Moline, Jose, and Jorge), and it is for these workers that the company  
31 reported premiums of \$3,586.01 in that quarter. Mr. Carrazo states that in July 2006, these three  
32 joined the firm as partners. He states the six partners then continued to work six days a week, with  
the hours per day depending on the work available.

1 John J. Leslie, a self-employed accountant, was called as a witness by the firm. Mr. Leslie  
2 states most of his clients are small businesses, and many are in the construction business,  
3 including four who engage in the drywall industry. The firm in this appeal has been one of his  
4 clients for four years. Mr. Leslie states he prepares quarterly reports to the Department of Labor  
5 and Industries for workers' compensation purposes, and that during the audit period in this appeal  
6 that was the only report he prepared for the firm here. Mr. Leslie states that workers' compensation  
7 premiums in the drywall industry are computed from the square footage of drywall that is installed  
8 (hung) or taped. In this case he prepared the quarterly reports from records of work done (the  
9 square footage) by the firm. Mr. Leslie testified that these records were made available to him by  
10 Mayra S. Partida's company, but that the information is readily available because suppliers and  
11 contractors at all levels report the data by address where the construction is performed. Mr. Leslie  
12 also testified that check records and bank statements Mayra Partida brought in were provided to  
13 the Department's auditor.

14 Mr. Leslie states square footage information is reported to the Department even if only  
15 owners perform the work; however, where the work is done only by owners, no premiums are  
16 calculated unless the owners have specifically elected coverage. Mr. Leslie states the owners of  
17 Ms. Partida's company did not elect industrial insurance coverage. Accordingly, no premiums were  
18 reported for the fourth quarter 2005 or the first quarter 2006, nor was any report of owner work  
19 made. However, Mr. Leslie testified, the firm paid industrial insurance premiums in the second  
20 quarter of 2006 (as shown on the audit report at Exhibit No. 1) when the firm had employees.

21 Mr. Leslie testified he agreed with the accuracy of the footage relied upon by the  
22 Department's auditor; however, he does not agree with the assessment made (the outcome)  
23 because he does not agree with the guideline of 65,000 square feet per owner exemption.  
24 Mr. Leslie understands that the 65,000 square feet constitutes a guideline of the Department that is  
25 not promulgated by either a statute or administrative code regulation.

26 Tracey G. Evans, who is an owner of Dynamic Drywall, was called as a witness by the firm.  
27 Dynamic Drywall is a full service drywall firm, and Mr. Evans has personally done taping work.  
28 Mr. Evans states his company has previously hired subcontractors and, during the period fourth  
29 quarter 2005 and the first and second quarters 2006, Mayra Partida's firm was one of those  
30 subcontractors hired to do taping work. Mr. Evans has heard of the 65,000 square foot guideline  
31 used by the Department, and he testified that as an owner he could tape that much or more during  
32 a quarter and still perform his administrative duties as owner of his company. Mr. Evans testified

1 that when he was working alone he could tape two or three simple houses in a tract development  
2 per week all by himself. He states two houses was average, and if he wanted to work seven days a  
3 week he could do more. Mr. Evans testified that in between coats of taping he would meet clients  
4 and do estimates and bids. He states he did that for at least five or six years, and that if he had  
5 been limited to 65,000 square feet per quarter taping he could not have stayed in business.  
6 Mr. Evans testified that if he had two other persons working with him he could do ten houses in a  
7 week. He acknowledges that working on custom houses takes more time. Mr. Evans states he is  
8 on the drywall advisory committee in Olympia, and that he considers the 65,000 square foot  
9 guideline ludicrous.

10 Mayra S. Partida, an owner of the firm-appellant here, was called as a witness by the firm.  
11 Ms. Partida states her drywall firm has been in existence since 2005, and that it mainly does taping.  
12 Ms. Partida testified that during the audit period of fourth quarter 2005 through second quarter  
13 2006, she was 70 percent owner of the firm, and that her partners, Adam Carrazco and Jose  
14 Arrendondo, each owned 15 percent. She testified that during the fourth quarter 2005 and the first  
15 quarter 2006 the firm had no employees, and that during the second quarter 2006, the firm had  
16 three employees in addition to the three owners. Ms. Partida states the employees in that quarter,  
17 Jorge, Jose, and Anastacio, later became partners. Ms. Partida testified the firm correctly reported  
18 the number of square feet of drywall done by the company. She states the homes on which they  
19 worked during the audit period were mostly tract homes, although once in a while they did custom  
20 homes. Ms. Partida estimates that a custom home takes one to four hours longer than a tract  
21 home, depending on what needs to be done.

22 Ms. Partida testified that Mr. Leslie did the end of year taxes for the firm, and prepared the  
23 quarterly reports as well as the supplemental report done in the second quarter 2006, when the firm  
24 had employees. All the other business records were taken care of by Ms. Partida herself for the  
25 partnership. Ms. Partida testified she had a record of the average hours worked per week by each  
26 partner, but not actual time records, and that the check register provided to Ms. Phalen shows who  
27 checks are written to, and that she kept a record of gross pay to workers and the partners, with  
28 sums withheld and the purpose of the withholding, for each check to them during the audit period.  
29 During the first two quarters there were no employees, so the checks then were to the partners and  
30 suppliers. Ms. Phalen states she made her checkbooks available to the auditor to fully examine.

31 Linda Williams, who is employed by the Department of Labor and Industries as a litigation  
32 specialist, was called as a witness by the Department. Ms. Williams described her duties at the

1 Department. Ms. Williams testified she informed Mr. Leslie the 65,000 square foot guideline had  
2 been set for owners because the Department felt that is all owners can do because they have other  
3 duties. She also stated that as part of a reconsideration process in this case, she found no reason  
4 to modify the original assessment. Ms. Williams acknowledges she has no independent evidence  
5 indicating the three partners in the firm could not tape the square footage they reported.  
6 Ms. Williams agrees that the 65,000 square foot guideline has never been set forth as a  
7 Washington Administrative Code regulation. She states the Department has used guidelines in  
8 other industries, such as logging.

9 Terri Zenker, who is employed by the Department of Labor and Industries, was called as a  
10 witness by the Department. Ms. Zenker has worked in various positions in employer services with  
11 the Department for almost 30 years, and has been involved with drywall issues since January 1997  
12 when the reporting was changed from an hourly basis to square footage, and she was the sole  
13 underwriter at the Department for that industry monitoring and reviewing documents in drywall  
14 industry reports. She points out that, pursuant to WAC 296-17-35203(6)(A), drywall reports are  
15 based on the square footage of material purchased for a project, and pursuant to subsection B of  
16 the same regulation, where the work has been performed by both owners and employees, the work  
17 done by owners can be deducted but must be reported in a firm's quarterly reports. Ms. Zenker  
18 acknowledges, on the other hand, that work performed on a construction site by exempt owners  
19 without the help of any workers is non-reportable to the Department.

20 Ms. Zenker testified that the Department has guidelines for use by auditors doing drywall  
21 audits. She calls the guidelines a reality check for analysis of data. These include conversion  
22 factors used in calculations, which are all based off the figure of 125 square feet per hour, or 1,000  
23 square feet in an 8-hour day, and 520 hours in a quarter. She explained that this leads to a 65,000  
24 square foot guideline, in use by the Department since 1997, in analyzing a firm's account to  
25 determine if it should be sent to audit.

26 Ms. Zenker testified that she has been reviewing reports relating to Mayra S. Partida since  
27 2005 and, as the footage performed exceeded the 65,000 guideline, she concluded it was done by  
28 more than just the three partners. For that reason the account was sent to the Department's field  
29 audit unit for verification. Ms. Zenker states the audit result (Exhibit No. 1), applies the 65,000  
30 square foot guideline.

31 Ms. Zenker acknowledges she is designated the drywall specialist for the Department, but  
32 she has not done a study to determine how fast or how long it takes for a taper to tape in the

1 drywall industry. She also acknowledges she was not involved in the studies that developed the  
2 125 square foot figure the Department has adopted as a guideline, and she is not aware of any  
3 public hearings related to the adoption of the 65,000 square foot guideline. Insofar as Ms. Zenker  
4 knows, the type of documents the auditor requested from the Mayra S. Partida firm were provided  
5 to the auditor.

6 Kirsten Phalen, who has been employed by the Department of Labor and Industries for a  
7 little over three years as a field auditor, was called as a witness by the Department. She states the  
8 goal of an audit is to ensure the firm is reporting correctly. Ms. Phalen conducted an audit of  
9 Mayra S. Partida's business that covered the period fourth quarter 2005 to the second quarter 2006  
10 because it appeared the owner's reporting was outside the Department's industry standard of  
11 65,000 square feet per person. Ms. Phalen described how a 65,000 square foot industry standard  
12 was developed from a determination that one person can hang four small (4x8) sheets, or 125  
13 square feet, an hour. Ms. Phalen understands it is part of her job to limit each owner of the firm to  
14 65,000 square feet per quarter, and that any remaining square footage of work performed must  
15 have been done by employees of the firm because owners can only have 65,000 square feet per  
16 quarter. From her audit, Ms. Phalen understands that Jose Arredondo, Adam Carrozco, and Mayra  
17 Partida were partners who owned the firm she audited.

18 Ms. Phalen has never met Mayra Partida. The only representative of the firm that met with  
19 Ms. Phalen as she conducted the audit was the firm's accountant, John Leslie. Mr. Leslie had the  
20 drywall reports, and Ms. Phalen noted the firm had done some drywall hanging in March 2006.  
21 Ms. Phalen understands that hanging is more expensive than taping, so she took that square  
22 footage from the 65,000 allowance. Based on the reports provided by Mr. Leslie, Ms. Phalen  
23 determined the square footage for the owners of the firm. Ms. Phalen states she asked for a  
24 breakdown of the square footage each person hung, and was not able to obtain that information for  
25 the months of March and June 2006, and also was unable to determine from the firm's check  
26 register that people were paid in the quarter ending June 2006. She states the dollars did not  
27 match the workers' hours. Ms. Phalen concluded the owners had over-reported their work because  
28 they had reported more than 65,000 square feet per person, and she determined anything over that  
29 amount was employee hours which she assessed at the taping rate for the quarters audited. The  
30 premiums Ms. Phalen assessed amounted to \$30,048.70. Also, because she could not get good  
31 records of who did what hanging in March and June 2006, and she states firms are required to  
32 keep track of that, Ms. Phalen assessed a \$100 penalty.

1 Mark Shaffer, who is the president and owner of Mark's Drywall, Inc., in Lacey, Washington,  
2 was called as a witness by the Department. Mr. Shaffer has about 31 years experience in the  
3 drywall industry, including 18 years personally installing the material. Mr. Shaffer states his firm  
4 does drywall installation, and about 85 percent of that is work done in homes of all sizes and  
5 complexity. His firm currently has 25 employees, and 14 of those do the taping, finishing, and  
6 texturing phase of the work. Mr. Shaffer's employees generally work 40 to 45 hours a week.  
7 Mr. Shaffer described the process of installation and taping, finishing, and texturing, and described  
8 the tools used in taping, finishing, and texturing, including the tool called a bazooka.

9 Based on his experience, and upon worker production data from his own firm that he states  
10 is competitive with others in the industry (Exhibit No. 3), Mr. Shaffer testified that a team of three  
11 people could not tape 500,000 square feet in a quarter—or, it would be a stretch to accomplish  
12 such work—even if the work were mostly easier jobs.

13 Mr. Shaffer testified that in 1993 the Department pulled people together from the wallboard  
14 industry into a committee and did several studies to determine a way to assess premiums in the  
15 industry. Mr. Shaffer was part of the committee. He states they determined that the square footage  
16 of wallboard is a reasonable approach, and that the industry has accepted 125 square feet per hour  
17 as a reasonable standard of work. Mr. Shaffer testified the 65,000 square feet per quarter is  
18 derived from that.

19 **DECISION**

20 As the appellant here, the firm has the burden of proof to establish by a preponderance of  
21 the evidence that the assessment made by the Department is incorrect.

22 The period audited by the Department encompasses three quarters, from the fourth quarter  
23 2005 through the second quarter 2006. There is no dispute over the square footage of work done  
24 by the firm during these quarters (Exhibit No. 1); rather, the focal point of the dispute is over how  
25 much work was done by the three partners. The amount of drywall material installed (hung) or  
26 finished (taped and caulked), measured in square feet, is the basis for reporting in the drywall  
27 industry. WAC 296-17-31021(2); WAC 296-17-35203(6)(a). The firm asserts that the work it  
28 attributed to the three partners in each quarterly report to the Department is accurate in all respects,  
29 and the records required by law were made available to the Department auditor. The Department  
30 contends the three owner-partners could not have personally performed the work claimed by them,  
31 that the firm must have had unreported employees in the fourth quarter 2005 and first quarter 2006,  
32 that more work must have been done by employees in the second quarter 2006, that it is

1 reasonable for the Department to credit the owners with no more than 65,000 square feet each, per  
2 quarter, and that the records of payments made by the firm to employees were not adequate.  
3 While the firm has made a prima facie case with the evidence it presented, I find that the firm has  
4 not carried its burden by a preponderance of the evidence, with respect to any of the quarters  
5 audited, for the reasons addressed below.

6 In the second quarter 2006 the work of the firm (mostly taping of wallboard in newly  
7 constructed homes) was done by the three owner-partners (Mayra S. Partida, Jose M. Arredondo,  
8 and Adam Carrazo) who were also assisted by three employees (Anastacio Moline, Jose, and  
9 Jorge). The firm was required by law to keep records adequate to determine taxes due  
10 (RCW 51.48.030), including records of work done by, and payments to, employees. Ms. Partida  
11 says she kept those records; however, she did not meet with the Department's auditor. Rather,  
12 Ms. Partida merely provided some financial records to Mr. Leslie (who had personal knowledge  
13 only of the quarterly reports he prepared for the firm), who passed Ms. Partida's financial records to  
14 Ms. Phalen, the Department auditor. Unfortunately for the firm, Ms. Phalen could not determine  
15 from them what the employees had been paid. Interestingly too, the firm did not offer any financial  
16 records in evidence in this appeal. Rather, it relies only upon Ms. Partida's somewhat self-serving  
17 testimony that required records were provided. I am persuaded that Ms. Phalen did not receive  
18 financial records of payments to employees in the second quarter 2006 adequate to determine what  
19 they had been paid or what work they had done.

20 As Ms. Phalen had no other records beside the quarterly reports, she made an estimate of  
21 work done by employees and owners of the firm in the second quarter 2006. In doing so, the  
22 auditor relied upon guidance from the Department indicating that a firm owner can do about 65,000  
23 square feet of drywall work in a quarter. The evidence of record establishes that guideline resulted  
24 from studies conducted during the 1990s in which the drywall industry participated. The record also  
25 establishes that where that quantity of work is performed in a 40-45 hour work week, the work is  
26 competitive in the industry. The Board has held that "[a]ny assessment of premiums based upon  
27 an estimate . . . must, of course, be based upon a reasonable estimate that has some basis in fact."  
28 *In re NAO Enterprises*, BIIA Dec., 89 1832 (1990). On the record here, I find the Department's  
29 reliance upon 65,000 square feet as the quantum of work to be attributed to each owner in the  
30 second quarter 2006 to be both reasonable and based upon sufficient fact that it should be  
31 accepted in this particular case. That estimate having been shown to be reasonable, the firm is  
32

1 barred from further contesting it where, as here, the need for the estimate arose from an  
2 inadequacy of business records at the time of the audit (RCW 51.48.030).

3 In the fourth quarter 2005 and the first quarter 2006, the firm asserts it had no employees,  
4 and all work was performed by the three partner-owners. However, the volume of work the firm  
5 claims to have done exceeds that done in the second quarter 2006 when the firm had six workers  
6 (three owners and three employees). In contrast, the Department has offered the testimony of  
7 Mr. Shaffer, a clearly disinterested business owner with over three decades of experience in the  
8 drywall industry, that the work claimed in these quarters exceeds that which could have been  
9 performed by the three owners. While the firm, too, has presented the testimony of another drywall  
10 business owner (Mr. Evans), he has a business relationship with the firm-appellants here which  
11 makes him somewhat less than disinterested. I also find Mr. Shaffer's record of the work done by  
12 his own employees (Exhibit No. 3), which he states is competitive in the industry, to be particularly  
13 persuasive, even in light of the fewer hours worked by his employees than those claimed by the  
14 owners in this appeal. I am persuaded by the testimony of Mr. Shaffer that the volume of drywall  
15 work reported as done by the three owners of the firm-appellant for the fourth quarter 2005 and the  
16 first quarter 2006 exceeds what could reasonably be done by those three persons working alone,  
17 even if they worked the long hours they claim. Since there is no dispute over the total work  
18 completed by the firm, I am compelled to agree with Ms. Phalen, the Department auditor, that the  
19 firm must have had other employees during these two quarters, for whom work has not been  
20 reported nor premiums paid.

21 Since the firm had employees in those first two quarters of the audit period, and provided no  
22 financial records to support their work and paid no premiums for them, the Department had the right  
23 to estimate the work done. The analysis here follows that above, for the second quarter 2006. The  
24 Department relied upon a 65,000 square foot guideline for each owner, which on the evidence here  
25 I find reasonable, and has correctly assessed premiums, interest, and taxes for the remaining work,  
26 which it is reasonable to conclude was performed by an unknown number of employees of the firm.

27 The penalty of \$100 assessed by the auditor for records unavailable (records not kept) is  
28 appropriate within the meaning of RCW 51.48.030.

29 The interest and penalties assessed by the Department for the delinquent taxes are  
30 appropriate within the meaning of RCW 51.48.210.

31 For the reasons addressed above, the Department order dated November 3, 2006, must be  
32 affirmed.

## FINDINGS OF FACT

1. On September 5, 2006, the Department of Labor and Industries issued Notice and Order of Assessment No. 0422081, that assesses the firm industrial insurance premiums, interest, and penalties, plus a penalty for records unavailable, due and owing the State Fund for the period fourth quarter 2005 through second quarter 2006, in the total amount of \$37,514.29.

On September 20, 2006, the firm filed with the Department a Protest and Request for Reconsideration of the September 5, 2006 order.

On November 3, 2006, the Department issued an order that affirms Notice and Order of Assessment No. 0422081, dated September 5, 2006.

On November 17, 2006, the firm filed with the Board of Industrial Insurance Appeals a Notice of Appeal of Order and Notice No. 0422081, dated November 3, 2006. On December 27, 2006, the Board issued an Order Granting Appeal, under Docket No. 06 21028, and directed that further proceedings be held.
2. During the period fourth quarter 2005 through second quarter 2006, the firm doing business as Mayra S. Partida engaged in drywall construction work. During this period, Ms. Partida owned 70 percent of the firm, and her two partners, Jose M. Arredondo and Adam Carrazo, each owned 15 percent of the firm. The firm principally did taping and caulking of drywall in newly constructed homes.
3. In the firm's quarterly report to the Department of Labor and Industries for the second quarter 2006, the firm reported it had three employees (Anastacio Moline, Jose, and Jorge) working with the three owners. The firm did not keep payroll or work records sufficient to determine the amount of work done by the three employees, or the pay received by them, during this quarter. Also, the amount of drywall construction work done by the firm during this quarter exceeds that which could be performed by the three owners. As a result, it is necessary for the Department to estimate the work done by the employees and owners from available records and using reasonable guidelines of the Department.
4. The firm did not report having any employees performing drywall work during the fourth quarter 2005 and the first quarter 2006. The firm attributes all work performed by the firm for these quarters to the three owner-partners, Mayra Partida, Jose Arredondo, and Adam Carrazo. The amount of drywall construction work done by the firm during each of these two quarters exceeds that which could be performed by those three persons. The firm had unreported employees assisting with the work during these quarters, for which no industrial insurance premiums

1 were paid to the Department. As a result, it is necessary for the  
2 Department to estimate the work done by the owners and employees  
3 from available records and using reasonable guidelines of the  
4 Department.

- 5 5. Under the circumstances of this case, the Department reasonably  
6 estimated that each owner of the firm-appellant personally finished  
7 65,000 square feet of drywall during each quarter of the three-quarter  
8 audit period, and that all remaining square footage finished by the firm  
9 was done by employees.
- 10 6. The premiums assessed the firm by the Department for industrial  
11 insurance for the period fourth quarter 2005 through second quarter  
12 2006, are reasonable.
- 13 7. The records of the firm made available to the Department auditor during  
14 the audit were incomplete in that they failed to show the work done by  
15 each employee or that the employees had been paid for their work.
- 16 8. The penalties for delinquent taxes, and interest on those taxes,  
17 assessed the firm by the Department for the period fourth quarter 2005  
18 through second quarter 2006 are appropriate.
- 19 9. The \$100 penalty assessed the firm for records unavailable (records not  
20 kept) during the audit period is appropriate.

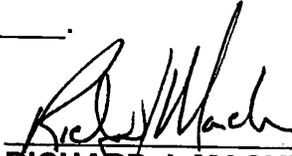
#### 21 CONCLUSIONS OF LAW

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
23 parties to and subject matter of this appeal.
- 24 2. During the fourth quarter 2005, and the first and the second quarter  
25 2006, the firm had employees performing drywall work within the  
26 meaning of RCW 51.08.180 and RCW 51.08.185.
- 27 3. In fourth quarter 2005, and the first and the second quarter 2006, the  
28 firm did not keep records adequate to determine taxes due, within the  
29 meaning of RCW 51.48.030. Accordingly, as provided by that same  
30 statute, the penalty of \$100 assessed for failure to keep records is  
31 appropriate, and the firm is barred from questioning any assessment by  
32 the Department based on any period for which records have not been  
kept and preserved.
4. The penalties and interest assessed by the audit for the delinquent  
taxes (premiums) is appropriate within the meaning of RCW 51.48.210.

1 5. The order of the Department of Labor and Industries dated November 3,  
2 2006, is correct and is affirmed.

3 It is so **ORDERED**.

4 DATED: NOV 29 2007

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7 **RICHARD J. MACKEY**  
8 Industrial Appeals Judge  
9 Board of Industrial Insurance Appeals  
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SEP 05 2008  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

1 **IN THE SUPERIOR COURT OF WASHINGTON**  
2 **IN AND FOR THURSTON COUNTY**

3 **STATE OF WASHINGTON,**  
4 *Jose Arredondo et. ux* **Plaintiff,**  
5 **vs.**  
6 *Department of Labor & Industries*  
7 **Defendant.**

NO. 08-2-00325-3

**ORDER**

8 IT IS HEREBY ORDERED that *the Department's Motion to Dismiss*  
9 *is granted. However, the Plaintiff has until October 10, 2008*  
10 *upon which to provide \$20,000.00 to the Department*  
11 *by October 10, 2008 in a manner which is acceptable*  
12 *to the state. In which case, the Plaintiff will be*  
13 *allowed to pursue her appeal. This is based on*  
14 *the Declaration of Mayra Partida which demonstrates a*  
15 *basis to reduce the total amount claimed by the*  
16 *Department.*

RECEIVED  
2008 SEP -5 AM 11:27  
ATTORNEY GENERAL'S OFFICE  
L&I DIVISION OLYMPIA

17  
18 DATED this 5<sup>th</sup> day of Sept, 2008.

19  
20 *Chris Poweroy*  
21 JUDGE

22 PRESENTED BY:  
23 EDWARD G. HOLM  
24 Prosecuting Attorney  
*Edward G. Holm*

Approved as to form:

25 Deputy Prosecuting Attorney, WSBA # 13869

26 *Constance T. Erickson*  
Attorney for Defendant, WSBA # 38246

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

<p>JOSE ARREDONDO,</p> <p style="text-align: right;">Appellant,</p> <p style="text-align: center;">v.</p> <p>WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,</p> <p style="text-align: right;">Respondent.</p>
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DECLARATION OF MAILING

09 MAY 27 AM 10:39  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 DEPUTY  
 COURT OF APPEALS  
 DIVISION II

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Aaron Owada  
AMS Law  
975 Carpenter Road NE, Suite 201  
Lacey, WA 98516

DATED this 26<sup>th</sup> day of May, 2009.

  
 SHELLIE O'NEAL  
 Legal Assistant