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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38667-4-II

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

**RICHARD LEFFLER, ET UX ET AL
DBA CHOICES BUILDING & DEVELOPMENT,**

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The Superior Court adopted the Findings of Fact and Conclusions of Law of the Board of Industrial Insurance Appeals. Therefore, the Assignments of Error will refer directly to the Board of Industrial Insurance Appeals Findings of Fact and Conclusions of Law.

- 1. The Board of Industrial Insurance Appeals erred when they found that Mr. Hosford was not a partner of Appellant. Leffler during the period of 2004 and 2005. (Findings of Fact No. 4 & 7)**
- 2. The Board of Industrial Insurance Appeals erred when they found Appellant Leffler and Gregory Duncan were not partners. (Findings of Fact No. 5 & 6)**
- 3. The Board of Industrial Insurance Appeals erred when they found that Mr. Leffler was the sole proprietor of the construction company known as Choices Building & Development during the period of 2004 and 2005. (Finding of Fact No. 8)**
- 4. The Board of Industrial Insurance Appeals erred when they found that on November 3, 2005, Gregory S. Duncan was an employee of the Appellant and sustained an industrial injury during the course of his employment with the Appellant. At the time of the accident, the Appellant had not secured compensation as required by the Industrial Insurance Act. (Finding of Fact No. 10)**
- 5. The Board of Industrial Insurance Appeals erred when they found that Bridget Buntin (aka Bridge Button) was an employee and covered worker of the Appellant**

during the third quarter of 2005. (Finding of Fact No. 12)

6. The Board of Industrial Insurance Appeals erred when they found that Jason Robertson was working under independent contract, the essence of which was his personal labor, and he was a covered worker during the second and third quarters of 2004. (Finding of Fact No. 15)

7. The Board of Industrial Insurance Appeals erred when they found Nathan (last name unknown) performed duties as a framer and carpenter and that he was a covered employee of the Firm during the third and fourth quarters of 2005. (Finding of Fact No. 16)

8. The Board of Industrial Insurance Appeals erred when they found that Matt and Tim Hosford were both employees of the Firm and were covered workers while working on spec houses in 2005. (Finding of Fact No. 18)

9. The Board of Industrial Insurance Appeals erred when they found that the Department's assessment assigned estimated hours for Gregory S. Duncan based on payments made to him. However, this methodology duplicated the hours assessed for Gregory S. Duncan, Nathan (last name unknown), and Bridget Buntin. In addition, the assessment assigned 480 (Four hundred and eighty) hours in the real estate class (0510) for Gregory S. Duncan regarding the second and third quarter of 2005 and failed to indicate he undertook construction work during the second quarter of 2005. The Department's assessment should have assessed 480 (Four hundred and eighty) hours in class 7202 and no hours in class 0510 for the second quarter of 2005 concerning Mr. Duncan. (Finding of Fact No. 20)

12. The Board of Industrial Insurance Appeals erred

when he found that the Department should have assessed estimated premiums in class 0510 based on payments to Mr. Duncan during the third and fourth quarters of 2005 for the work performed by Mr. Duncan, Ms. Buntin, and Nathan (last name unknown). This categorization should utilize an average hourly wage calculation as provided by WAC 296-17-35201 (3). (Finding of Fact No. 21).

II. STATEMENT OF THE ISSUES

- 1. Did the Board of Industrial Insurance Appeals err when they concluded Appellant Leffler was the sole proprietor of Choices Building & Development? (Assignments of error 1 & 5)**

- 2. Did the Board of Industrial Insurance Appeals err when they concluded that Gregory S. Duncan, Matt Hosford, Tim Hosford, Bridget Buntin, Nathan (last name unknown) and Jason Robertson were employees of Choices Building & Development and covered workers under the Industrial insurance Act during 2004 and 2005? (Assignments of error 2,3,4,6,7,8,9 & 10)**

- 3. Did the Department correctly calculate and assess taxes, premiums, penalties and interest due and owing by the Appellant to the state fund for all four quarters of 2004 and 2005? (Assignment of error 11 and 12)**

III. STATEMENT OF THE CASE

A. Substantive Facts

1. History of Mr. Leffler's Business

Mr. Richard Leffler spent a lifetime involved in business arrangements without ever having a written agreement. He operated on mutual trust. Mr. Leffler is a 65 year old businessman who started his first real estate company in 1982 (RH&L Realty). Ten years later, he started his first construction company, Leffler Construction Company. (2/20/2007 Tr. 24, l. 35-44.) Shortly thereafter, Mr. Leffler formed a partnership with Marley Young, then the head engineer of Mason County, to perform development consulting. Leffler and Young did not have a written agreement. As Leffler states, "a written agreement wasn't necessary with men of integrity." (2/20/2007, Tr. 25.) When the construction company got too busy, Leffler gave Young the development business.

Leffler started and sold various other businesses in the following years. Although he kept his business license active, he was essentially semi-retired. "Everything was going wonderful. The wife and I were getting to play 200 to 250 rounds of golf a year. It was just a wonderful life." (2/20/2007 Tr. 28, l. 21-26.)

2. History of Leffler, Hosford, Duncan and Robertson Partnership.

Appellant Leffler's niece, April Grefstagn Robertson called him from California. Ms. Robertson asked Leffler to mentor her in real estate and he agreed. (2/20/2007, Tr. 29, l. 4-8).

After Ms. Robertson secured her real estate license, she was anxious to move into an office and start her business.

Around the same time that Ms. Robertson secured her real estate license, Leffler met Bob Hosford. Hosford owned his own construction business, H&H Construction. (2/20/2007, Tr. 37, l. 37-42). Leffler was impressed with Hosford's workmanship and he began to formulate the idea of a business that combined the elements of construction and real estate:

A. ...basically with the same kind of name, but separate entities. Then once they prove themselves, we can join them under a franchise later... If they are a contractor and real estate agent, then they can professionally represent their product to the public..." (2/20/2007, Tr. 33, l. 30-49).

So Leffler arranged a meeting with Hosford, Ms. Robertson, and himself to discuss a partnership.

A. ...and I told Bob and I told April, if you guys want to run these companies, fine. I will back you financially, but if you guys ever have employees, you have to handle that. I want nothing to do with employees, that is up to you.

But if you want to grow these companies separately and then join them later and buy me out, you

are both, I will give you both a 5 percent interest to start, *so that you are owners of the company, and you are legitimately and legally my partner.* (emphasis added).

(2/20/2007, Tr. 34, l. 37 through p. 35, l. 1.)

Ms. Robertson recounted a similar meeting:

A. ...the initial discussions with Rick Leffler, Bob Hosford and myself on our verbal agreement was to start out with a small percentage of ownership in the company. And as we grew the revenue -- or grew the profits in the company and became profitable, the ownership would grow. And eventually it would get to a point where Mr. Hosford would completely own the business without having to invest his own money to buy the business. So his time and effort and gaining the profitability in the business was his way of earning his ownership.

(2/20/2007 Tr. 71, l.23 to 39.)

Notes of a May 6, 2004 meeting wherein Hosford, Leffler, and Robertson discussed their plans for the company are contained at Ex. # 7, and include the following:

- For 6 months work (December to May 2004), April and Bob to receive 5% (five) ownership of Choices Real Estate and Choices Construction, respectively,
- At end of the year (2004), April & Bob to receive another 5% (five) each for Choices Real Estate and

Choices Construction, respectively, totaling 10% ownership each,

- Starting in 2006, upon profitability, ownership to increase another 10% (ten) totaling 20% (twenty) ownership each of both companies. At this time, April & Bob begin process of buying out Rick's 60% (sixty) ownership,
- Information to be included in LLC Articles.

Ms. Robertson then came up with the name "Choices Building and Development". It was agreed that Ms. Robertson would run and eventually own Choices Real Estate Company and Mr. Hosford would run and eventually own the construction company, Choices Building and Development. (2/20/2007, Tr. 35, l. 8-28.)

Hosford's first project was a construction site already in progress, the Oakland Bay project. Leffler had started building an Oakland Bay house and asked Hosford to take over running the project so Hosford could show Leffler that he knew "how to run a company and create profits." In addition to the ownership interest, Leffler allowed Hosford to take weekly draws against future profits so that Hosford could pay bills.(2/20/2007, Tr. 35, l. 37-49).

Based upon these terms, Hosford began working the Oakland Bay project. (2/20/2007, Tr. 36, l. 28-36.)

In 2004, a fire destroyed a portion of the office complex Leffler owned, including the portion which housed the real estate office located at 2337 Olympic Highway, Shelton, Washington. The damages were covered by insurance. Hosford and Leffler agreed that Hosford would perform the repairs of the building under his own company, H&H Construction Company and not as part of the partnership with Appellant Leffler. (2/20/2007, Tr. 38, l. 14-21). It was further agreed, that once H&H Construction finished reconstructing the office, Hosford would be back with Choices doing the homes, spec homes for profit.” (2/20/2007, Tr. 38, l. 23-28).

As a practical matter, Hosford found that he was able to continue monitoring the Oakland Bay project while rebuilding the office. Hosford’s son, Matt Hosford, assisted with the rebuilding of the office. H&H Construction was, after all, “Hosford and Hosford” Construction (Bob & Matt Hosford; Father & Son). (2/20/2007, Tr. 73, l. 37 to 42).

April Robertson’s husband, Jason, also pitched in to help get his wife’s real estate office back up and running as soon as possible. Jason worked alongside Matt and Tim Hosford and assisted with a little over 90 hours of sheet rocking. Leffler paid \$850.00 (eight hundred and fifty) for Robertson’s assistance on the office. (2/20/2007, Tr. 18-23). Appellant Leffler never personally hired Matt Hosford as an employee of

Choices Building & Development. Leffler believed Matt Hosford worked for H&H Construction for the purposes of rebuilding Leffler's fire-damaged office building. (2/20/2007, Tr. 47, l. 30 to p. 48, l. 17).

As Appellant Leffler received the fire insurance proceeds that were tagged for construction costs, he deposited them into the Choices' checking account. Hosford then took his weekly draws from the account for the work he and his son were performing. Hosford decided what the amounts were every week. Leffler never knew what the specific amounts would be, but trusted Hosford to do the right thing. (2/20.2007, Tr. 39, l. 44 to p. 40, l. 1).

At the end of 2004, Leffler's accountant issued Hosford a 1099 Miscellaneous form reflecting that Bob Hosford and his company, H&H Construction, had been paid \$56,549.79 (fifty-six thousand five hundred-forty nine dollars and seventy-nine cents) in miscellaneous compensation, reflecting his compensation as business owner of H&H Construction. (2/20/2007, Tr. 37, l. 3-19; p. 40, l. 40 to p. 41, l. 5., Ex.# 14).

3. History of Greg S. Duncan's involvement in partnership.

Hosford and Leffler considered associating another person into the business, with a different skill set. Specifically,

on March 21, 2005, Hosford and Leffler had a meeting with Larry Clark, an electrician. (2/20/2007, Tr. 43, l. 35-42). Discussions were held to revamp the Development partnership to include Mr. Clark. Bob Hosford himself took notes. (See Ex. #17). Ownership interests would be redistributed to increase Hosford's share to 20% (twenty), decrease Leffler's share to 70% (seventy), and add Mr. Clark with a 10% (ten) starter share. (2/20.2007, Tr. 42, l. 21-35, and Ex. #17). Draws would be increased to \$20.00 (twenty)/hour up to \$1,000.00 (one thousand) each week. Mr. Clark declined the offer and did not join the partnership. However, after this meeting, Hosford took draws at \$20.00 (twenty)/hour up to \$1,000.00 (one thousand)/week in accordance with the agreement. (2/20/2007, Tr. 43, l. 21-26).

Then in June 2005, Leffler and Hosford discussed offering a partnership to Greg Duncan. Duncan had been employed as a sales agent for Choices Real Estate in April and May, 2005 and paid a 40% (forty) commission. Leffler knew Mr. Duncan had a real estate license, construction experience, and specialized knowledge on how to complete the documentation needed to obtain a speculative construction loan. (2/20/2007, Tr. 44, l. 14-28, p. 45, l. 1-10). After an initial debate in which Hosford protested Duncan's equal share, it was finally agreed that Duncan and Hosford would each own a 20%

(twenty) interest in the Development company and Leffler would own the remaining 60% (sixty). (2/20/2007, Tr. 45, l. 39 to p.. 46, l. 1).

Additionally, all three partners could take draws of \$20.00 (twenty)/hour up to \$1,000.00 (one thousand)/week. (2/20/2007, Tr. 83, l. 19-24). The draws were calculated against the cost of producing the house and, therefore, would reduce profit, i.e. the more draws, the less profit. (2/20/2007, Tr. 84, l. 3-17). Duncan confirmed that he received \$20.00 (twenty)/hour plus 20% (twenty)of the profits. (3/13/2007, Tr. 7, l. 5-12, p. 8, l. 21-25).

Ms. Robertson recalls that Duncan and Hosford received regular draws against future profits, which was nearly identical to her own arrangement with Choices Real Estate. (2/7/2007, Tr. 80, l. 32-49; p. 89, l. 41-43, p. 90, l. 1-5). Copies of canceled checks representing a sample of the draws are contained at Ex. #16 (sixteen).

Duncan and Hosford were responsible for keeping track of expenditures and draws in project reports. (2/20/2007, Tr. 83, l. 23-24). The agreement was not reduced to writing because in Leffler's opinion, "it wasn't necessary." (2/20/2007, Tr. 46, l. 8-10). Immediately thereafter, Duncan became another managing partner like Hosford. "...him and Bob ran

the whole show.” (2/20/2007, Tr. 47, l. 26). Leffler was merely “the banker.” (2/7/2007, Tr. 87, l. 12).

April Robertson also remembers when Greg Duncan was “brought on board.” According to Robertson, Duncan was told from the beginning, “you’re here to earn your ownership and be an owner of this company. And you know, you and Bob get this to a profitability and I will eventually no longer be any part of this at all, it will just be the two of you.” (2/20/2007, Tr. 77, l. 12-19). Robertson testified that Duncan’s share was “supposed to be the same as Bob Hosford.” She emphasized that this agreement originally caused Hosford to be disgruntled as he felt Duncan had not yet earned entitlement to an equal share. (2/7,2007 Tr. 77, l. 25-31).

At the time he accepted the partnership offer with Choices Building and Development, Duncan knew that he would be getting no health care coverage. (3/13/2007, Tr. 24, l. 25-27). Duncan also knew that there would be no withholdings from his checks unless he did that himself because he was responsible for paying himself in the form of draws. (3/13/2007, Tr. 24, l. 11-23).

Furthermore, he had no supervisor. There was no one to verify the accuracy of his work hours. (3/13/2007, Tr. 52, l. 15-21).

Q. So, you could be out golfing and nobody would know. Isn't that correct?

A. I s'pose.

Q. Well, if you are an owner there wouldn't be any problem there if you went golfing, wouldn't that be correct?

A. I didn't golf.

...

A. I do golf, but I only -- up to that point, I think I had played golf one time.

Q. ... Wasn't it true that you told Labor and Industries that one of the things you missed was not golfing?

A. Yes, I love golf. I just haven't had time to play.

Q. So, apparently you had only played once then.

A. That's my recollection, yes.

(3/13/2007, Tr. 52, l. 23 to p. 53, l. 1).

Duncan had authority to hire and fire, complete blank checks, and pay employees from check proceeds. All employees were paid cash. (3/13/2007, Tr. 9, l. 17-35). No taxes were withheld from any checks.

Not until after he was injured did Duncan ever state that he did not consider himself to be an owner of Choices Building and Development. Contrary to the testimony of Leffler and Ms. Robertson, Duncan stated at the hearing that in order for Duncan to be an "equity owner in the company, it would cost [him] \$50,000 to buy in -- to be an official partner of the company." (3/13/2007, Tr. 12, l. 19-23). Neither Mr. Clark nor Mr. Gonzales, who had been asked to join before Duncan was mentioned a \$50,000.00 (fifty thousand) buy in when they were

asked to join. Nor do any of the notes from the meeting with Duncan document a \$50,000.00 (fifty thousand) buy in. In fact, there is absolutely no evidence, documentary, witness or circumstantial, prior to Duncan's injury that he was not a partner.

Duncan had unrestricted authority to act on behalf of the company. He negotiated the bids for the home building projects, and as the Williams contract showed, bound the company to the contract by signing as staff, construction manager, and general officer for the company. (3/13/2007, Tr. 26, l. 5-49). (See also Ex. #6.)

All parties also agree Duncan also had freedom to hire. (2/7/2007, Tr. 83, l. 37 to 43). Duncan testified that the only two people he recalled hiring to work on the home building projects were his girlfriend, Bridget, and a man named Nathan. (3/13/2007, Tr. 22, l. 49 to p. 23, l. 5). Robertson specifically recalls that Duncan hired his girlfriend, Bridget Buntin, and Duncan paid Buntin directly in the same way that Hosford hired his sons, Matt and Tim Hosford, and paid them directly. (2/7/2007, Tr. 84, l. 18 to p. 85, l. 3). This occurred because Duncan had unrestricted access to blank checks signed by Leffler. The check did not have any named payee or specified amount Duncan had authorization to complete the blank checks as necessary to conduct business. Additionally, Duncan was

exclusively in charge of negotiating pay scales for his employees. (3/13/2007, Tr. 30, l. 21 to p. 31, l. 7).

Unfortunately, on November 3, 2005, Greg Duncan fell off the roof of one of the homes that Choices constructing. The home had been purchased by Robert and Ann Williams. Duncan suffered a fracture that required metal pin fixation. After the fall, Duncan told Leffler that "he was sleeping... 23 (twenty-three) hours a day... for a solid week afterward because he was all doped up." (2/20/2007, Tr. 52, l. 19-26). Yet despite Duncan's inability to work after the accident, Duncan still took his weekly draws against future profit consistent with the partnership agreement. See Ex. #16, this included the following draws: November 11, 2005, \$450.00, (four hundred-fifty) November 18, 2005, \$1,200.00; (one thousand-two hundred) November 25, 2005, \$1,300.00 (one thousand three-hundred). Duncan alleges that these checks were not just for him, "but also to pay other employees that were out working on the job." But Duncan was the named payee on the checks. (3/13/2007, Tr. 36, l. 31-39).

Duncan produced no records to specify who he paid, and for what work, with respect to these draws. Additionally, Duncan used these paychecks as proof of his earnings so that the Department of Labor and Industries could calculate his time loss at \$20.00 (twenty)/hour, 50 (fifty) hours a week, even

though he told the doctors he had not worked after the fall, and had told Labor and Industries that he stopped working in mid-November. (3/13/2007, Tr. 38, l. 47 to p. 41, l. 9). At the hearing, Duncan admitted he lied to Labor and Industries by stating, "I was mistaken." (3/13/2007, Tr. 41, l. 11). Duncan also admits that when he initially sought medical treatment he did lie to his doctors that he was hurt on the job. Rather, he stated that he had fallen off of a friend's house. (3/13/2007, Tr. 33, l. 7-15). At his doctor's appointment, November 8, 2005, five days after he fell, Duncan did not state he had L & I coverage, and instead stated he did not have any health insurance. (See Ex. #20).

Duncan and Leffler had a discussion about how Duncan's medical bills would be paid. According to Leffler, Duncan knew that he had no health insurance and knew he was not covered by L & I, but Leffler offered to have the business pay his medical bills since they were all partners, and then the business would seek reimbursement from Duncan's share of the profits in the future. (2/20/2007, Tr. 66, l. 30-49).

Duncan tells a different story. Duncan states he did not file an L & I claim right after his fall because Leffler told him not to. Duncan states Leffler promised to pay for the medical, but then changed his mind and so after that, Duncan filed. (3/13/2007, Tr. 13, l. 41-52).

On November 21, 2005, without consulting with Leffler, Duncan ordered forms from an on-line company to assist in forming a corporation. (See Ex. #18). Duncan identified the directors of the corporation (Choices Building & Development, Inc.) to be Robert Hosford, Gregory Duncan and Richard Leffler. (See Ex. #18. See also, 2/20/2007, Tr. 62, l. 3 to Tr. 64, l. 1). Duncan states that Leffler asked him to do this, but Leffler denies this. In support of his testimony, Leffler points out that he had to contact the bank and trace the check to find out what the payment was about. He didn't recognize the payer, when Leffler found out, he canceled the transaction. (See 3/13/2007, Tr. 46, l. 23-31, and compare 2/20/2007, Tr. 62, l. 44 to Tr. 63, l. 6, and Tr. 91, l. 19-37).

At some point in late November, early December 2005, it came to Leffler's attention that due to Hosford's and Duncan's frequent draws and failure to keep good records, the company was left without sufficient funds to pay for housing materials. In other words, the two partners had depleted the Choices bank account. (2/20/2007, Tr. 55, l. 28 to 47). According to Leffler, Choices Development was in "dire financial trouble." (2/20/2007, Tr. 55, l. 51. Leffler then informed Duncan that he was terminating the partnership. Duncan responded by stating he was going to file an L & I claim. In other words, the filing of the L&I claim first arose only after Duncan was informed

that Leffler wanted out of the partnership. (2/20/2007, Tr. 67, l. 37-51).

At Duncan's next doctor's appointment on December 2, 2005, he told his doctor that he had been laid off and wanted to file a Labor and Industries claim. (3/13/2007, Tr. 41, l. 13 to 29). The claim was then filed. (Ex. #19)

On December 5, 2005, Leffler sent a letter wherein he invited Duncan and Hosford to make offers to buy out his partnership share. Leffler never suggested that he was selling the entire business only his share. He proposed different scenarios, including an option in the event only Hosford was interested in completing the buyout. (Ex. #22). In testimony, Duncan denied ever receiving Ex. #22.

In response, on December 5, 2005, Duncan sent an e-mail proposing a buyout of the company to Leffler. (3/13/2007, Tr. 41, l. 39-45) (See also Ex. #21). Duncan's "offer" of December 5, 2005 was unacceptable to Leffler. On December 6, 2005, Leffler confirmed Duncan's and Hosford's interest in buying out his share, but asked for them to submit a formal offer. (See Ex. #13.) When this did not occur, Leffler sent a letter dated December 19, 2005 to Hosford and Duncan, terminating the partnership and listing the terms of dissolution (returning keys, records, and tools, etc.). (See Ex. #12).

In early 2006, Leffler's accountant prepared and forwarded 1099 miscellaneous income tax forms to Duncan in the amount of \$31,125.36 (thirty-one thousand, one-hundred-twenty-five dollars and thirty-six cents) and to Hosford (and H&H Construction) in the amount of \$65,866.81 (sixty-five thousand eight hundred-sixty-six dollars and eighty-one cents). (See Ex. #15). No objection was made to using a 1099 Miscellaneous Income form.

Several witnesses, who had no interest in the proceedings, all testified that they understood a partnership existed. Ann Williams is a customer who hired Choices to build her home. Her home is the house from which Greg Duncan fell. After speaking with Greg Duncan, Ms. Williams had no doubts that Duncan, Hosford and Leffler were partners.

Q. What was -- did you have a conversation with Greg Duncan about what his relationship with -- or his capacity may be a better term -- in Choices was?

A. He was going to a construction supervisor and he -- Mr. Leffler and Mr. Hosford were going into building these houses as partners. I don't know how much of a partnership, how much was what, and then they would all share in the profits. Rick would finance it, they would build and then he would -- and then they would build the house and share in the profits.

Q. Did Mr. Duncan tell you this?

A. Yes.

Q. Okay. And did you have -- did he tell you on more than one occasion or just one occasion?

A. Well, I'd have to say we talked about it on more than one occasion.

(2/7/2007, Tr. 52, l. 5-34).

Ms. Williams' testimony was substantially similar with respect to her conversations with Bob Hosford and his representations that he was partner to Leffler and Duncan.

Q. And did you have any conversations with Robert Hosford about his relationship or his capacity in Choices?

A. Yes.

Q. And what did he personally inform you?

A. Again, he was doing a lot of the labor. He was the actual -- he was doing the actual building, the framing. And again, he was a -- the three of them were partners, and they were all going to share in the profits.

(2/7/2007, Tr. 52, l. 35-49).

She described each of the three partners as having distinctly different roles in the company. Leffler handled the finance, Duncan was the construction supervisor, and Hosford performed a portion of the construction. Neither Mr. Hosford nor Mr. Duncan ever stated they were employees of Choices Development. (2/7/2007, tr. 54, l. 47 to p. 55, l.5).

Mrs. Williams' husband, Robert, concurred. During the course of his conversations with Bob Hosford and Greg Duncan, both held themselves out to be partners with Richard Leffler.

Q. ...During the course of those frequent conversations you had with Mr. Duncan, did he personally communicate to you what his relationship was with Choices Development?

A. He said that he was a partner with Rick; he and Bob were partners with Rick and that they would split the profits after the house was completed.

Q. And the Bob you're referring to is Bob Hosford?

A. Bob Hosford, yes.

(2/7/2007, Tr. 59, l. 17 to l. 31).

Q. Did you have any conversations directly with Robert Hosford about his relationship or his capacity in Choices?

A. Yes, we did. He also indicated that he was a partner after there was some -- there was some time there involved where he was thinking about being a partner and not thinking about being a partner and then he decided he was going to be a partner with his; that he also would take part of the profits at the end of the house.

(2/7/2007, Tr. 59, l. 52 to Tr. 60, l. 13).

Reuben Gonzales is the owner of Extreme Roofing and maintained a business license for all time periods relevant hereto. Some time in the Spring of 2005, Leffler invited Gonzales to meet with himself, Duncan and Hosford to discuss whether Gonzales wanted to "get into [Leffler's] building development with these two or three of them." (2/7/2007, Tr. 62, l. 23-27). The meeting was held at Choices Realty. Mr. Gonzales testified:

A. Well, basically Rick was very adamant on the phone about not having any employees and he wanted me to become a partner in the company. He wanted me to meet with his other two partners so that we could all get a feel for one another.

(2/7/2007, Tr. 63, l. 7-13).

For compensation, Gonzales was offered a small percentage of the profit, as well as payment for his labor. (2/7/2007, Tr. 65, l. 11 to 21). Gonzales also met with Duncan and Hosford, who held themselves out to be partners. "They were partners; there was the three of them" (2/7/2007, Tr. 63, l. 35-36).

Tony Morris is a Choices Building & Development customer who would occasionally exchange labor in lieu of house payments owed to Leffler. Mr. Morris considered Hosford to be "the guy that was running the company..." (2/20/2007, Tr. 11, l. 3-6).

Judith Kittinger is a self-employed consultant in the fields of insurance and computers, who audited the construction accounts. (2/7/2007, Tr. 14, l. 49 to p. 15, l. 1). She also reviewed bank records and canceled checks reflecting the draws that Hosford and Duncan took as payment for services rendered. A review of Duncan's records indicated that his average draw totaled \$48.11 (forty-eight dollars and eleven cents)/hour. (2/7/2007, Tr. 22, l. 43-45). Hosford's average

draw was \$25.49 (twenty-five dollars and forty-nine cents)/hour. (2/7/2007, Tr. 24, l. 43-44). Based upon company notes, she discerned that Duncan was supposed to draw at \$20.00 (twenty)/hour. (2/7/2007, Tr. 22, l. 47 through p. 23, l. 19). Hosford was supposed to draw at \$15.00 (fifteen)/hour the first year and \$20.00 (twenty)/hour the second year.

Kittinger confirmed that Bob Hosford registered a contractor's license and was doing business as H&H Construction. Kittinger's review of records left her with the distinct impression that, particularly with respect to the work Hosford performed on the fire-damaged 2337 Olympic Highway building, Hosford was working under his contractor's license as H&H Construction and separately invoiced Leffler for the work performed. Kittinger contacted several state agencies who confirmed that Robert Hosford was owner of H&H Construction. (2/7/2007, Tr. 32, l. 35-45).

Kittinger further testified, based upon her prior experience as a tax preparer, that employees receive W-2's, and independent contractors receive 1099's. (2/7/2007, Tr. 34, l. 39, to p. 35, l. 9). Finally, Kittinger found no reliable documentation to inventory the time allegedly worked by Tim Hosford, Tim Griese, April Robertson, Bill French, Bridget Buntin, Nathan, Lonnie, Jason Robertson, or Tony. (2/7/2007,

Tr. 40, l. 49 to Tr. 42, l. 35). With respect to Matt Hosford, Kittinger states:

A. There was nothing in the books that indicated that a check was written to Matt Hosford. My assumption was that in consideration to his understanding of Mr. Leffler, he was paying his son himself.

Q. Bob Hosford?

A. Bob Hosford was paying his son.

(2/7/2007, Tr. 45, l. 7-17).

B. Procedural Facts

This is an appeal by the purported employer of a decision by the Board of Industrial Insurance Appeals (“BIIA”) that the business, Choices Building and Development (hereafter “Choices”), hired employees which it failed to report. The Department of Labor and Industries assessed taxes, penalties and interest to the alleged employer, all of which are disputed. The case presents itself as one appeal to two (2) separate Orders. One Department Order was partially reversed by the BIIA with directions to the Department to recalculate using the proper number of hours, risk classifications, and eliminating a number of the alleged employees; but not all. (See Findings of Fact, Nos. 3, 13, 14, 17, 19, 20, 21 and 22. Tr. 55 & 56). The second Department Order dealt with Mr. Duncan, who was injured while working on November 3, 2005. The business claimed Mr. Duncan was a partner and not a covered employee.

Bob Hosford employees. They should be found to be partners. Jason Robertson should be found not to be an employee for reasons set forth below. Additionally, Choices requests this Court to waive penalties, interest and all assessments with respect to work performed at the fire-damaged office complex located at 2337 Olympic Highway, Shelton, Washington.

Choices does concede that Hosford and Duncan had the authority as partners to hire employees without Leffler's knowledge. Therefore, Bridget Buntin, Nathan, Tim and Matt Hosford would be considered employees of Choices.

IV. ARGUMENT

A. Standard of Review

The Petitioner asserts that the Board of Industrial Appeals (BIAA) has erroneously interpreted the law and that the decision is not supported by substantial evidence when the entire record is reviewed. RCW 34.05.570(3)(d)4(e)

The appropriate relief is for this court to set aside the decision by the BIAA that a partnership did not exist among Mr. Leffler, Mr. Duncan and Mr. Hosford and remand the matter to the agency with instructions to recalculate the partnership's tax liability without Mr. Duncan and Mr. Hosford being considered employees. RCW 34.05.574

When reviewing an agency decision for error of law the court is entitled to substitute its decision for that of the agency. University of Washington v. Jacobs 68 WA. 44, 842 P.2d 971 (1992). Further, in areas such as partnership law and the formation of partnerships; which are outside the agency's expertise the BIAA is not entitled to deference in its interpretation. Cascade Court Limited Partnership v. Noble 105 WA. 563, 20 P.3d 997 (2001)

B. Bob Hosford and Greg Duncan were partners within the meaning of RCW 51.12.020(5), and not covered workers.

Washington has adopted the Revised Uniform Partnership Act. (See RCW Chapter 25.05, inclusive.) Pursuant to RCW 25.05.0555, whenever two or more persons "carry on as co-owners a business for profit," a partnership is formed, "*whether or not the persons intend to form a partnership.*" (emphasis added). Any agreement to form a partnership (including amendments thereto) does not have to be in writing and can be oral or merely implied. RCW 25.05.005.

A partnership is *presumed* if the person receives a share of the profits of a business..." (RCW 25.05.55(3)(c)) (emphasis added). Discussions to convert a partnership to an LLC or corporation does not terminate a partnership.

The present case falls squarely within these statutory definitions of partnership. First, the partnership is presumed because both Duncan and Hosford were receiving a share of the profits in the form of draws. Second, a partnership can be created orally or even implied. Third, the fact that there were discussions and steps taken to convert the partnership to a LLC does not terminate the partnership and in fact supports the Appellants position that Hosford and Duncan were owners of the business.

A key question for this court to ask and apply to the facts of this case is whether the parties conduct show an intent to combine efforts and resources for the purpose of procuring jointly shared profits?

For example, in *In re Thornton's Estate*, 81 Wash.2d 72(1972), the Court found that a woman established a prima facie case of implied partnership because she jointly contributed her labor to the cattle and farming enterprise, she shared in the decision making concerning the enterprise; and, necessarily, she benefited jointly from the profits.

The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence

of the partnership *may be implied* from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.

In re Thornton's Estate, 81 Wash. 2d at 79, citations omitted, *emphasis added*.

If the actions are more consistent with a partnership than an employee/employer relationship, then a partnership will be deemed established.

In this regard, the courts also examine whether the parties had a joint right of control of the company affairs. *Honarkhah v. Nelson*, 121 Wash. App. 1002 (2004) (holding that where there was no intention to share profits, there is no partnership), *Cusick v. Phillippi*, 42 Wn. App. 147, 154 (1989), *Malnar v. Carlson*, 128 Wn. 2nd 521, 525 (1996), and *Nicolson v. Kilbury*, 83 Wash. 196, 202 (1915).

The court has also considered whether the parties were working towards the same goals, understandings and interests,

and whether their conduct is consistent with a partnership or partnership principles. *Kintz v. Read*, 28 Wash. App. 731 (1981). In summary, the key inquiry is whether their conduct was more consistent with a partnership and partnership principles, or an employer/employee or master and servant relationship.

When one applies these principles to the following uncontested facts in this case it supports the existence of a partnership:

First. Choices Building and Development was a for-profit business operating to construct spec homes.

This is undisputed and needs no further discussion.

Secondly. Duncan and Hosford received a share of the profits.

The draws that Hosford and Duncan took at \$15 or \$20/hour, were against future profits. Additionally, it is undisputed that Hosford and Duncan would be receiving a 20% share of the profits. Profit sharing is the heart of the definition of a partnership. See *Malnar v. Carlson*, 128 Wn.2d 521 (1996), cited in *Honarkhah v. Nelson*, 121 Wash. App. 1002 (2004), unpublished opinion.

Third. Duncan and Hosford were equity owners of the company.

If Hosford and Duncan considered themselves mere employees and not equity partners, then why did their December 5, 2005 e-mail offer only to buy out Leffler's share of the company, and not the company in its entirety? The terms of their offer presume that between the two of them, they already own 40% of the company. And as such, they admit in this document that they are minority partners of Choices Building and Development. (See Ex. #21.)

Also, Leffler acknowledged their equity interest in the tools by asking Hosford and Duncan to reimburse him for his 60% share of the tools.

Fourth. The parties followed dissolution protocol consistent with a partnership.

Any partner who wishes to dissociate from a partnership need only give notice to the other partners of his express will to withdraw as a partner. RCW 25.05.225. Thereafter, unless the partnership is dissolved or wound up, the remaining partners may purchase the dissociated partner's remaining interest for a buyout price. RCW 25.05.250.

Once Leffler indicated his intent to terminate the partnership, Hosford and Duncan submitted a proposal to buy out Leffler's share. This is consistent with an intent to buy out a dissociating partner.

Fifth. The parties had joint right to control company affairs.

Hosford and Duncan had unlimited control over the hiring of employees, the manner in which business was conducted, the completion of checks on the company account, and the construction of the homes.

Sixth. The parties united in a common goal for the purpose of sharing profits.

The common goal was the building of homes for shared profits.

Seventh. The parties combined their labor, skill and experience for the purpose of procuring joint profits.

As detailed by homeowner, Ann Williams, each partner had a unique role in the business. Leffler was the "bank." Duncan was the construction supervisor, and Hosford was the builder. Their combined effort was for the goal of earning profits that would be distributed in their respective shares.

Eighth. The parties represented themselves to the public as partners.

Homeowner, Ann Williams, and her husband Robert, testified that Hosford and Duncan identified themselves as partners in the business. Additionally, Duncan signed the contract for the Williams house identifying himself as an officer

of the company. It would appear that the only time Duncan identified himself as anything other than partner was when it was to his benefit for the purposes of filing a Labor and Industries claim.

In summary, the conduct of the parties is completely consistent with the intent to be partners. Once being a partner was no longer to Duncan's benefit (the company was not profitable and he was not entitled to L&I benefits), then he disclaimed the ownership interest and attempted to declare himself an employee. However, all of his actions while working at Choices show his intention to be considered a partner in the company.

When examining the actions of the parties in a particular business relationship, it is not significant if the partnership property is held in the name of only one of the partners, for even in such a scenario, a partnership may be found. See Thornton, 81 Wash. 2d 72 (1972). See Williams' contract, which only Duncan signed. What is important is that Duncan also had full access to the bank account via the checks that Leffler made available to him. Duncan had unrestricted ability to use the funds for company business. The fact that he himself could not sign the checks is of no significance as he could use them however he wished and did not require Leffler's instruction or approval in that regard.

All the objective factors and subjective intent prior to Duncan's fall point to a partnership.

C. None of the individuals who worked on the fire-damaged office complex were covered workers while working in that capacity.

Bob Hosford: For the time period which Bob Hosford worked on the fire-damaged office complex owned by Rick Leffler, Bob Hosford was an independent contractor as defined by RCW 51.08.195 and/or a registered or licensed contractor working in his capacity as a contractor under RCW 51.08.180(2) and not a covered worker.

Everyone else, eg., Matt Hosford, Tim Hosford, Jason Robertson: As stated above, construction on the office complex was performed by H&H Construction under Bob Hosford in the capacity of independent contractor. As such, everyone he hired was hired in the capacity of subcontractor or employee of H&H Construction, not as an employee of Choices or Richard Leffler.

Just as importantly, Leffler and Choices were not in business for profit for the purpose of repairing the office building. Leffler hired H and H Construction to repair the fire damaged building. The checks were made payable to H and H Construction. " 'Business' as used in the Workmen's Compensation Act means an activity having a gain or profit motive, rather than being merely incident to some aspect of

living as such.” *Locken v. Department of Labor and Industries*, 58 Wash. 2d 534, 364 P. 2d 232 (1961). Leffler hired Hosford as H&H Construction to repair the fire-damaged building.

“In order to be an ‘employer coming under this Act,’ one must be engaged, as a regular business, in the type of extrahazardous work involved.” *Craine v. Department of Labor and Industries*, 19 Wash. 2d 75 (1943). In hiring contractors to repair his office complex, Leffler acted as an owner, not a developer. See *Carston v. Dep’t of Labor & Indus.*, 172 Wash. 51 (1933), wherein the court held that a carpenter employed by an ordinary householder to make repairs or improvements on his property is not a workman in contemplation of the Industrial Insurance Act, cited in *Craine, supra*. Choices was in the business of building spec homes, not repairing fire-damaged commercial buildings. Thus, Choices was not an employer under the meaning of the Workers Compensation Act for the work performed on the office building. All the premium assessments by Labor and Industries to Choices for 2004 for Robert Hosford should be reversed.

D. Penalties should be waived for the remaining unreported covered workers.

Matt and Tim Hosford, Bridget Buntin, and Nathan appear to be employees hired by Bob Hosford or Greg Duncan to work on the various Choices Building and Development

home building projects. Unfortunately, because of the inept record keeping of Greg Duncan and Robert Hosford, there is no reliable documentation to inventory the time allegedly worked by any of these individuals.

Leffler did not fail to report these workers for the purpose of avoiding his responsibilities under the Workmen's Compensation Act. Hosford or Duncan apparently hired employees and left Leffler out of the daily management responsibilities. Leffler never expressed an intent to evade the worker's compensation system. He simply expected for Duncan and Hosford to manage their partnership interests. Leffler had made it clear to his partners that the management of any employees was their responsibility. Neither Duncan nor Hosford reported the workers to the Department of Labor and Industries, nor did they communicate the information to Leffler for reporting.

Duncan is not a credible witness. He was "mistaken" in his income that he reported to L&I for the purpose of recovering time loss. He was caught golfing, when according to his records he was taking draws for work. He told L&I he really missed golfing as a result of his injuries, and then testified at the hearing he had only golfed once. Finally, he lied to his doctors.

Specifically, the critical problem with Duncan's version of events is that his conversation with Leffler about the medical bills did not occur for some time (at least one week) after the fall. Thus, Duncan cannot explain why he did not tell the doctors that he had been injured at work. The only explanation is that Duncan knew that he was not covered by L&I because he was a partner.

Choices understands that taxes will be owed for the four employees that Duncan and Hosford hired to work on the home building projects. As partners Hosford and Duncan had the authority to hire employees to work for the partnership. However, there was no intent by Leffler to evade the system. Leffler is requesting that this Court hold that Duncan and Hosford to be partners. See RCW 25.05.125, stating once the partnership is established, "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law."

The shared liability is no different for a person who by words or conduct merely purports to be a partner or consents to being represented by another as a partner, in a partnership or with one or more persons not partners. If partnership liability occurs as a result of the purported partners actions, then the liability rests with the purported partner as if he were a partner. RCW 25.05.135.

V. CONCLUSION

This appeal principally involves application of the facts most of which are uncontroverted, to the law of partnerships. The Appellant asks this court to reverse the Board of Industrial Insurance Appeals decision. Appellant requests this Court hold that Duncan and hosford were partners with Mr. Leffler; that no penalties can be assessed as there was no willfulness or intent to evade by Leffler and that interest should be calculated only from the date of entry of this Court's decision as the Department's initial calculations, by their own admission, were erroneous.

Dated this 26 day of Feb, 2009.

JACK W. HANEMANN, INC. P.S.

By: 
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Attorney for Appellant

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CERIFICATE OF SERVICE

I certify that I served copies of this document on all parties and counsel of record on the date below by U.S. Mail as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.



FRANK PARASCONDOLA, Paralegal

DATE: February 26, 2009
PLACE: Olympia, WA 98506