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

MICHAEL E. COAKER & MARILEE B. COAKER & the martial
community composed thereof,

Appellants,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE JAMES DIXON

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants Michael and Marilee Coaker successfully operated their roofing and construction company, Mike's Roofing Inc., for 25 years until 2015, when the Washington State Department of Labor and Industries ("the Department") levied a \$580,000 assessment against the corporation, forcing it to cease operations and ultimately file for bankruptcy. Under RCW 51.48.055(4), the officers of a corporation cannot be personally liable for an assessment "if all of the assets of the corporation . . . have been applied to its debts through bankruptcy." Ignoring the plain language of the statute, the Board of Industrial Insurance Appeals ("the Board") agreed with the Department and ruled that the Coakers must personally pay the assessment, reasoning that RCW 51.48.055(4) applies only where "the completion of the bankruptcy action . . . occur[s] prior to the Department's assessment of personal liability."

The plain language of RCW 51.48.055(4) requires only that the corporation's assets have been distributed to creditors *at the time* a corporate officer relies on the statute as a defense. The Board's interpretation of RCW 51.48.055(4) deprives corporate officers of the statutory protection from personal liability for an assessment against an insolvent company and conflicts with the very purpose of

the statutory defense and the corporate form in general because the Department can impose personal liability far faster than a corporation can complete bankruptcy.

The Board erred in assessing personal liability against the Coakers for another reason – the Coakers did not “willfully” refuse to pay any assessment, a prerequisite for personal liability under RCW 51.48.055(1). As the industrial appeals judge in this case found – whose findings the Board adopted in their entirety – the Coakers “did not deliberately fail to pay any assessment due, under report, or report incorrect risk classifications,” but instead consistently paid the amounts they believed were owed. The Board’s findings of willfulness rest entirely on the fact that Mike’s Roofing could not pay the assessment that became final in 2015, *after* it had ceased operations and run out of money.

This Court should reverse the Board, vacate the assessment of personal liability against the Coakers, and award the Coakers attorney’s fees under the Equal Access to Justice Act.

II. ASSIGNMENTS OF ERROR

1. The Board erred in entering its May 29, 2018, Decision and Order affirming personal liability against Michael Coaker,

Marilee Coaker, and their marital community property. (Certified Appeal Board Record (“CR”) 6-12, App. A)

2. The Board erred in entering Findings of Fact 4, 8, 9, 10, 12, and 13. (CR 10, App. A)

3. The Board erred in entering Conclusions of Law 2, 3, and 5. (CR 11, App. A)

4. The superior court erred in entering its January 30, 2019, Order Affirming Board of Industrial Appeals. (CP 59, App. B)

5. The superior court erred in entering its October 3, 2019, Order Affirming The Decision of The Board of Industrial Insurance Appeals. (CP 82-83, App. C)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1a. RCW 51.48.055(4) provides that a corporate “officer . . . *is not liable* [for assessments against a corporation] if all of the assets of the corporation . . . have been applied to its debts through bankruptcy.” (emphasis added) Did the Board err in interpreting RCW 51.48.055(4) as shielding a corporate officer from liability only if the corporation’s bankruptcy is complete before the Department imposes personal liability despite the present tense language of the statute evidencing the Legislature’s intent to require simply that a

corporation's assets have been distributed to creditors at the time the defense is asserted?

1b. Did the Board err in adopting an interpretation of RCW 51.48.055(4) based on the mistaken premise that an assessment is final on the day it is issued – and thus anything that happens after that date is irrelevant – when under RCW 51.48.140 assessments are not final until after all appeals have been exhausted?

2a. Mike's Roofing consistently reported the same number of hours worked by its employees to the Department and the Washington Employment Security Department ("ESD"). Did the Board erroneously find that there was a "discrepancy" between Mike's Roofing's filings with the Department and ESD that showed Mike's Roofing "reported far higher hours" to ESD and thus "the company was under-reporting employee hours"?

2b. The industrial appeals judge that presided over this case – whom the Board praised for detailing "the totality of the Coakers' behavior" and whose findings the Board adopted in their entirety – found the Coakers never "deliberately fail[ed] to pay any assessment due, under report[ed], or report[ed] incorrect risk classifications." Did the Board err in finding that the Coakers willfully failed to pay premiums when the undisputed evidence is that

they consistently paid the premiums they believed were owed and never deliberately failed to pay any premium?

IV. STATEMENT OF THE CASE

A. Mike and Marilee Coaker successfully ran Mike's Roofing for 25 years before a \$580,000 assessment imposed by the Department in 2012 forced the company out of business.

Michael and Marilee Coaker founded Mike's Roofing, Inc. in 1988. (CR 382-83) Started as a roofing company, Mike's Roofing evolved into a general construction company that performed residential, commercial, and public works projects. (CR 383-84, 386) As with many other companies, Mike's Roofing prospered in the years before the Great Recession and then struggled to find work between 2008 and 2012. (CR 388, 395-96)

At the times relevant to this appeal, Mr. Coaker was the President of Mike's Roofing; Ms. Coaker was the Vice President. (FF 6, CR 10) Both were responsible for the payment of industrial insurance premiums and associated reporting to the Department. (CR 100) Starting in 2007, Mike's Roofing used a third party, Checks on Call ("COC"), to manage its payroll and payment of industrial insurance premiums, as well as its payment of unemployment benefits to ESD. (CR 245, 502-07) During 2007, just before the

Great Recession, Mike's Roofing paid \$46,046.44 in industrial insurance premiums. (CR 630)

Mike's Roofing sent COC the number of hours work by its employees and their job classification. (CR 245-46, 503-04, 514) COC then used this information to automatically calculate unemployment and industrial insurance premiums. (CR 514)¹ COC's quarterly reports to the Department and ESD on behalf of Mike's Roofing consistently reported identical or nearly identical employee hours worked. (See CR 697-98, 702-03 (2009 quarter 3); CR 720-22 (2009 quarter 4); CR 731-33 (2010 quarter 1); CR 741-73 (2010 quarter 2); CR 751-53 (2010 quarter 3); CR 769-71 (2010 quarter 4); CR 779-81 (2011 quarter 1); CR 789-92 (2011 quarter 2);

¹ Industrial insurance premiums are determined by multiplying the number of hours an employer's employees worked in a given job classification by a rate determined by the Department based on the "degree of hazard" associated with the job. See RCW 51.16.035; WAC 296-17-31011. The premium is then adjusted upwards if the employer has had more than the expected amount of injuries and downwards if the employer has had less than the expected amount of injuries. See WAC 296-17-855.

CR 800-04 (2011 quarter 3); CR 830-35 (2011 quarter 4); CR 843-45 (2012 quarter 1); CR 853-56 (2012 quarter 2))²

Prior to 2012, the Department audited Mike's Roofing's payment of industrial insurance premiums three times. (CR 100, 413-14) The Department informed Mike's Roofing that each of these audits was random. (CR 419-20) Two of the audits found that Mike's Roofing had fully paid its premiums; the third found that Mike's Roofing had overpaid its premiums. (CR 413-14) The last of these audits was resolved in February 2012. (CR 415, 630-31)

Less than three months later, in May 2012, the Department audited Mike's Roofing a fourth time. (CR 412-13, 419-20) The specific period at issue spanned the third quarter of 2009 through the second quarter of 2012. (FF 2, CR 9-10) Mr. Coaker expressed frustration at being audited again and asked the Department to explain why his company was being audited so quickly after the last

² The hours worked by each employee are shown to the right of each employee's name in the quarterly reports COC submitted to ESD. (*See, e.g.*, CR 702) The only variation in the hours reported to the Department and ESD larger than a few hours occurred in the first quarter of 2011 where Mike's Roofing reported 1777 hours to ESD and 1697 to the Department, although Mike's Roofing reported the same amount of wages to each. (*See* CR 778-81) The discrepancy was likely the result of COC mistakenly reporting the hours for Mr. Coaker to the Department a second time rather than the hours of Robert Sutton, who worked 80 more hours than Mr. Coaker that quarter. (*See* CR 779)

audit concluded. (CR 259, 419-20) After the Department again told Mr. Coaker the audit was “random” – although it was not – Mr. Coaker refused to comply with the Department’s request for records as part of its audit. (CR 261, 419-20)³

The Department’s auditor then conducted an audit that “used only the roofing classification for all of Mike’s employees . . . because he had no records to make a determination that workers were working in a different classification.” (CR 250; *see also* CR 261)⁴ Roofing is among the most hazardous jobs and thus the Department assigned it one of the highest industrial insurance premium rates.⁵

Based on the assumption that all workers were performing roofing for every hour of every day, the auditor determined that Mike’s Roofing owed \$480,474.61 in additional premiums for the period covering the third quarter of 2009 through the second quarter

³ The audit was in fact triggered by a Washington Industrial Safety and Health Act inspection report that alleged there were workers performing roofing work at a Mike’s Roofing worksite that were not being reported by Mike’s Roofing. (CR 247)

⁴ The only exceptions were for Mr. Coaker’s elderly mother and the Coakers themselves who were exempt from mandatory coverage under RCW Title 51. (CR 250)

⁵ The Department’s most recent rates are available at <https://lni.wa.gov/insurance/rates-risk-classes/rates-for-workers-compensation/>. As of 2020, of 316 classifications, roofing has the tenth highest rate.

of 2012. (CR 250)⁶ After adding more than \$200,000 in penalties and interest, the Department sent Mike's Roofing a notice of assessment on November 14, 2012, ordering it to pay \$700,161.95. (CR 633-35) The Department then took more than a year to reconsider its decision before issuing a reduced assessment of \$579,586.87. (CR 9, 242)

Mike's Roofing appealed this assessment. (CR 242) Mr. Coaker had by now provided the Department records responsive to its audit however the Department refused to consider them. (CR 259) The Board of Industrial Insurance Appeals ("the Board") ultimately affirmed the assessment in an April 13, 2015, order. (CR 242-64)

The Board concluded that "Mike's did not comply with RCW 51.48.030 and RCW 51.48.040 for the third quarter of 2009 through the second quarter of 2012, by failing to keep adequate records of worker hours and by refusing to provide any records to the Department auditor in this case." (CR 262) The Board held the

⁶ The auditor's estimate charged Mike's Roofing as much as \$76,625 in premiums for an individual quarter, more than 150% of the premiums the Department's audit determined Mike's Roofing owed and paid for the *entire year* of 2007, when it was at the height of its success. (*Compare* CR 630, *with* CR 660)

Department was entitled to impose its assessment by “assign[ing] all worker hours in question to the highest rated classification to which the worker was exposed, in this case the roofing risk classification.” (CR 261) The Department did not find that Mike’s Roofing had violated RCW 51.48.020 by underreporting the number of hours worked by its employees.

Mike’s Roofing could not pay the \$579,586.87 assessment and stopped seeking new work after the Board affirmed the assessment. (CR 83, 436, 489) On November 9, 2015, Mike’s Roofing dissolved. (CR 670)

B. Despite finding the Coakers did not deliberately “fail to pay any assessment due, under report, or report incorrect risk classifications,” an industrial appeals judge affirmed the Department’s imposition of personal liability on the Coakers based on their conduct three years after the audit period.

On February 1, 2016, the Department issued a notice and order under RCW 51.48.055, imposing personal liability against the

Coakers for the assessment against Mike's Roofing. (CR 9, 271-73)⁷ The Coakers asked the Department to reconsider its decision (CR 325), but the Department refused and affirmed its order on June 16, 2016. (CR 274-75)⁸ The Coakers appealed the June 16th order to the Board. (CR 322) Mike's Roofing filed for Chapter 7 bankruptcy on March 9, 2017. (CR 267-69)

At a hearing before Industrial Insurance Judge Marnie Sheeran on September 21, 2017 (CR 360-609), the Coakers argued that during the audit period – 2009 to 2012 – they always paid the premiums they believed were owed, which were calculated by COC, and thus they did not willfully fail to pay any premiums. (CR 130-35) They also contested personal liability (CR 135-37), on the ground that “all of the assets of the corporation . . . have been applied to its debts through bankruptcy or receivership.” RCW 51.48.055(4).

⁷ RCW 51.48.055(1) provides that “[u]pon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, or other person having control or supervision of payment and/or reporting of industrial insurance, or who is charged with the responsibility for the filing of returns, is personally liable for any unpaid premiums and interest and penalties on those premiums if such officer or other person *willfully* fails to pay or to cause to be paid any premiums due.” (emphasis added) This statute is discussed in detail in § V.B.

⁸ The Department also attempted to impose liability for the Mike's Roofing's assessment against a trucking company run by Mr. Coaker's mother, as well as a company run by Mr. Coaker's nephew. (CR 499)

In her proposed decision and order Judge Sheeran found, consistent with Mr. Coaker's testimony, that "[b]etween July 2009 and June 2012, he did not deliberately fail to pay any assessment due, under report, or report incorrect risk classifications." (CR 83; *see also* CR 423-25, 480, 520-22 (Mr. and Mrs. Coaker's testimony that they never under-reported hours or failed to pay a premium they knew was due)) Judge Sheeran nonetheless found that the Coakers had "willfully" failed to pay premiums Mike's Roofing owed between 2009 and 2012 and affirmed the Department's assessment of personal liability. (CR 98)

Judge Sheeran relied on the Coakers' conduct in 2015, not their actions between 2009 and 2012, to find that they had willfully failed to pay premiums from 2009 to 2012. (CR 93-94) Judge Sheeran found "willfulness is demonstrated" because "[t]he Coakers chose to stop seeking any work and to instead close the company after the Board's order in April 2015," and because "[t]he Coakers refused to discuss a payment plan when contacted by the Department after the Board's order." (CR 93) Despite finding that "[i]n April 2015, the company had no or very little cash, because it was spent on legal fees" (CR 83), Judge Sheeran found "willfulness"

because “[t]he Coakers made no attempt to pay the assessment upon the issuance of the Board’s April 13, 2015 order.” (CR 93)

Judge Sheeran rejected the Coakers’ bankruptcy defense under RCW 51.48.055(4), reasoning that the statute requires that the bankruptcy be fully “resolved” before the defense can apply. (CR 96) While Judge Sheeran affirmed the assessment of personal liability against the Coakers for the unpaid assessments, accrued interest, and penalties for nonpayment, she directed the Department to recalculate the assessment by removing a record keeping penalty and warrant fees. (CR 96, 98)

C. The Board of Industrial Insurance affirmed the imposition of personal liability against the Coakers, finding the Department’s audit proved Mike’s Roofing was “under-reporting employee hours” and rejecting the Coaker’s reliance on the bankruptcy defense in RCW 51.48.055(4).

The Coakers timely sought review of Judge Sheeran’s decision before the Board. (CR 24-40) On November 14, 2017, less than a month after Judge Sheeran’s decision, the bankruptcy court issued an order closing Mike’s Roofing’s bankruptcy based on the bankruptcy trustee’s finding after “diligent inquiry” that “there is no property available for distribution.” (CR 72-73) The Coakers argued

to the Board that the now finalized bankruptcy of Mike's Roofing precluded personal liability under RCW 51.48.055(4). (CR 38-40)⁹

On May 19, 2018, the Board affirmed the assessment of personal liability against the Coakers. (CR 6-12) Except for a single finding that was updated to reflect that Mike's Roofing's bankruptcy was now complete, the Board adopted Judge Sheeran's findings and conclusions verbatim. (*Compare* CR 9-11, *with* CR 97-98)

In rejecting the Coakers' assertion that they had always paid the premiums they believed were owed, the Board found that the "uncontroverted facts demonstrate that the basis for the underlying assessment against Mike's Roofing was the company was under-reporting employee hours" as revealed by the Department auditor who "discover[ed] the discrepancy because of Employment Security filings that reported far higher hours." (CR 9) The Board reasoned that "[w]e cannot accept the Coakers' argument that as long as a company pays any premium, even though they are aware they are under-reporting the hours, they are in compliance with the law." (CR

⁹ The Coakers also argued that the imposition of personal liability was barred by the statute of limitations under RCW 51.16.190(2). The Coakers acknowledge that this argument is now precluded by this Court's recent decision in *Hopkins v. Washington State Dep't of Labor & Indus.*, 453 P.3d 755 (2019).

9) The Board emphasized Judge Sheeran’s discussion of willfulness, stating she “devoted a majority of her decision to discussing the totality of the Coakers’ behavior and finding that their failure to pay premiums was an intentional, conscious, and voluntary choice in arriving at a determination of personal liability under RCW 51.48.055(1).” (CR 9)

The Board likewise rejected the Coakers’ reliance on the bankruptcy defense under RCW 51.48.055(4). The Board reasoned that for the bankruptcy defense to apply, a company’s bankruptcy must be finalized “*prior* to the Department’s assessment of personal liability, as well as in conjunction with the termination, dissolution, or abandonment of a corporate or LLC business.” (CR 7 (emphasis added)) As did Judge Sheeran, the Board directed the Department to recalculate the assessment without the record-keeping penalty and warrant fees. (CR 11)

D. The trial court affirmed the Board’s imposition of personal liability on the Coakers, again rejecting their assertion that they paid all the premiums they believed were owed in the audit period and their reliance on RCW 51.48.055(4).

Pursuant to RCW 51.48.131 and RCW 34.05.570, the Coakers appealed the Board’s decision to Thurston County Superior Court Judge James Dixon (“the trial court”). (CP 1-2) The Coakers again

argued they had not willfully failed to pay any premiums and that they were immune from liability under RCW 51.48.055(4). (CP 23-28, 44-49) After an initial decision and several motions for reconsideration (CP 59-68), the trial court issued a final order on October 3, 2019, ruling that the Coakers were not protected by RCW 51.48.055(4) because it “provides protection for businesses that file for and complete bankruptcy proceedings prior to assessment of personal liability.” (CP 82-83) The trial court also concluded that “[s]ubstantial evidence exists in the record to support the findings of the Board that [the Coakers] willfully failed to pay industrial insurance premiums. The Board made 12 distinct findings, all of which are supported by substantial evidence in the record.” (CP 83)

The Coakers timely appealed. (CP 84-85)

V. ARGUMENT

A. **This Court reviews the Board’s decision under the Administrative Procedure Act, interpreting the law de novo and looking for substantial evidence to support the Board’s findings of fact.**

The Board both misconstrued the law in interpreting RCW 51.48.055 and misread the record in finding that the Coakers willfully failed to pay premiums. This Court should reverse the

Department's imposition of personal liability against the Coakers for either, or both, of these reasons.

Appeals to this Court from a notice of assessment "are governed by the provisions [of the Administrative Procedure Act ("APA")] relating to judicial review of administrative decisions contained in RCW 34.05.510 through 34.05.598." RCW 51.48.131; *see also* RCW 51.48.055(5). The APA requires relief from an agency order when the administrative agency erroneously interprets or applies the law, the order is not supported by substantial evidence, or the order is arbitrary or capricious. *See* RCW 34.05.570(3).

When reviewing an agency decision under the APA, this Court "review[s] the administrative record rather than the superior court's findings or conclusions." *Crosswhite v. Washington State Dep't of Soc. & Health Servs*, 197 Wn. App. 539, 548, ¶ 16, 389 P.3d 731 (2017). This Court "review[s] an agency's conclusions of law de novo, including whether the findings of fact support the conclusions of law." *Allen v. Dan & Bill's RV Park*, 6 Wn. App.2d 349, 365, ¶ 43, 428 P.3d 376 (2018), *rev. denied*, 194 Wn.2d 1010 (2019). And although this Court gives weight to an agency's interpretation of the law, this Court ultimately reviews an agency's interpretation and

application of the law de novo. *Crosswhite*, 197 Wn. App. at 549, ¶ 20.

As detailed below, the Board erroneously interpreted the law and based its findings on non-existent evidence that the Coakers underreported hours during the audit period. Each error is – standing alone – reason enough for reversal, but taken together they underscore the grave injustice of the Department’s decision to make the Coakers personally liable for the nearly \$600,000 assessment that bankrupted the company they spent 25 years building.

B. The Board’s interpretation of RCW 51.48.055(4) ignores the plain language of the statute and negates the bankruptcy defense meant to protect individuals from assessments that a business could not pay.

The Board’s interpretation of RCW 51.48.055(4) conflicts with basic rules of statutory construction. The Board’s interpretation not only ignores the plain language of the statute but leads to absurd results and effectively renders the bankruptcy defense meaningless. This Court should reverse the Board’s ruling that the Coakers are not protected by the bankruptcy defense in RCW 51.48.055(4).

“When interpreting a statute, the court first looks to its plain language.” *Pac. Cont’l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 382, ¶ 15, 273 P.3d 1009, *rev. denied*, 175 Wn.2d 1018 (2012).

“Statutes must be interpreted and construed so that all the language used is given effect.” *Spokane Cty. v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, ¶ 9, 430 P.3d 655 (2018) (quoted source omitted). “The goal of construing statutory language is to carry out the intent of the legislature” and thus courts “avoid strained, unlikely, or unrealistic interpretations.” *First Student, Inc. v. Dep’t of Revenue*, 194 Wn.2d 707, 711, ¶ 7, 451 P.3d 1094 (2019). Moreover, “[c]onstruction of a statute must be consistent with the statute’s underlying purposes.” *State v. Saint-Louis*, 188 Wn. App. 905, 916, ¶ 26, 355 P.3d 345 (2015), *aff’d sub nom. Dependency of D.L.B.*, 186 Wn.2d 103, 376 P.3d 1099 (2016).

Applying these principles, this Court should hold that the Board erred in interpreting RCW 51.48.055:

- 1. The Board’s interpretation conflicts with the plain language and purpose of RCW 51.48.055.**

RCW 51.48.055(1) allows the Department to impose personal liability on a corporate officer for an unpaid assessment “[u]pon termination, dissolution, or abandonment” of the corporation if the officer “willfully fails to pay or to cause to be paid any premiums due”:

Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, manager, or other person having control or supervision of payment and/or reporting of industrial insurance, or who is charged with the responsibility for the filing of returns, is personally liable for any unpaid premiums and interest and penalties on those premiums if such officer or other person willfully fails to pay or to cause to be paid any premiums due . . .

RCW 51.48.055(4) then provides that a corporate “officer, member, manager, or other person **is not** liable if all of the assets of the corporation or limited liability company have been applied to its debts through bankruptcy or receivership.” (emphasis added)

The Board ignored the plain language of RCW 51.48.055(4) in interpreting it as requiring “the completion of the bankruptcy action . . . *prior* to the Department’s assessment of personal liability.” (CR 8 (emphasis added)) By using the present tense of “to be” (“is not liable”) the Legislature made clear that the bankruptcy defense applies if – when asserted – all of the corporate assets have been applied to its debts in bankruptcy. As this Court has previously held, when the Legislature uses the word “is,” it intends the statute’s application will turn on the facts “at the time of the [relevant] hearing”:

Saint–Louis’s interpretation conflicts with the verb tense used in the text of subsection .180(1)(f). The statutory text, ‘if the parent *is* incarcerated,’ uses the present tense form of the verb “to be.” Applying ordinary English grammar, the present tense does not refer to parents who have already been incarcerated. . . . [T]he plain language of subsection .180(1)(f) shows that the legislature contemplated that RCW 13.34.180(1)(f) be applied to parents who are incarcerated *at the time of the termination hearing*.

Saint-Louis, 188 Wn. App. at 917, ¶ 28 (emphasis added and in original).

The Department erroneously argued below that the phrase “have been applied” in the statute reflects “past tense verbiage . . . relat[ing] exclusively to conduct in the past.” (CP 37; *see also* CR 8 (Board emphasizing the phrase “have been applied”)) But the phrase “have been applied” is not past tense – it is present perfect tense. *See* The Chicago Manual of Style 5.132, at 268 (17th ed. 2017)) (“The present-perfect tense is formed by using *have* or *has* with the principal verb’s past participle {have walked} {has walked}.”) (emphasis in original).¹⁰ “This tense ‘denotes an act, state, or condition that is *now completed or continues up to the present*.’”

¹⁰ In this case, the Legislature used the passive voice by adding the word “been” to the statute. *See* The Chicago Manual of Style 5.154, *supra*, at 274 (when the verb “be” is “joined with a past participle, the verb becomes passive.”).

Estate of Bunch v. McGraw Residential Ctr., 174 Wn.2d 425, 433-34, ¶ 14, 275 P.3d 1119 (2012) (quoting *The Chicago Manual of Style* 5.126, at 237 (16th ed. 2010)) (emphasis added). Thus, the phrase “have been applied” requires only that – at the time the officer asserts the defense – the corporation’s assets have been distributed to creditors through a bankruptcy or receivership action.

The Board’s interpretation also conflicts with the obvious purpose of RCW 51.48.055(4) – to shield corporate officers and shareholders from liability for a corporation’s unpaid premiums when the corporation itself could not pay those premiums. The corporate form, by its very nature, shields individuals from personal liability for a business’s debt. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982) (“The purpose of a corporation is to limit liability.”). The legislative history of RCW 51.48.055 confirms that the Legislature intended to extend this bedrock principle of corporate law to industrial insurance premiums. *See* ESHB 3188, 58th Legislature, Final Bill Report at 2 (2004). (“Generally, corporate officers and other individuals are not personally liable for premiums owed by corporations or limited liability companies.”). The Board’s interpretation of RCW 51.48.055(4) is contrary to its statutory purpose, exposing officers

to sweeping liability by making it virtually impossible for officers to assert the statutory defense. (*See* § V.B.2)

The Board erroneously concluded that “the completion of the bankruptcy action . . . need[s] to occur prior to the Department’s assessment of personal liability” despite the fact that RCW 51.48.055(4) makes *no mention* of the Department’s notice assessing personal liability. (CR 8) The only mention of the notice of assessment in RCW 51.48.055 is in subsection (5), which provides that “[a]ny person having been issued a notice of assessment under this section is entitled to the appeal procedures under RCW 51.48.131.” The Legislature’s specific reference to the notice of assessment in subsection (5) confirms that had it intended for the bankruptcy defense to apply only *before* one had been issued, it would have specifically identified the “notice of assessment” as the watershed for application of RCW 51.45.055(4). *See Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 80, ¶ 68, 316 P.3d 1119 (“The legislature did not use the phrase ‘judicial proceeding’ in subsection (2)(e) defining ‘action involving public participation and petition’ as it did in subsections (2)(a) and (b). We presume that this omission was intentional.”), *rev. granted*, 180 Wn.2d 1009 (2014); *see also Dependency of D.L.B.*, 186 Wn.2d at 118, ¶ 36 (“the

legislature knew how to direct the termination court to consider a parent's prior incarceration, but chose not to do so in [this provision]).

The Board also erroneously held RCW 51.48.055(4) did not apply because "the completion of the bankruptcy action needed to occur . . . in conjunction with the termination, dissolution, or abandonment of a corporate or LLC business." (CR 8) Both the dissolution of Mike's Roofing and its bankruptcy were undisputedly the result of the Department's assessment. (CR 83, 436-38) Regardless, the Board's interpretation combines two distinct subsections – RCW 51.48.055(1) and RCW 51.48.055(4). RCW 51.48.055(4) has no language requiring the bankruptcy be "in conjunction with the termination, dissolution, or abandonment" of the corporation. The Board erred in adding language from one subsection of the statute to another. *Dillon*, 179 Wn. App. at 71, ¶ 45 (reversing the trial court's interpretation of the anti-SLAPP statute because it erroneously "combine[d] language from two separate subsections").

2. The Board’s interpretation renders RCW 51.48.055(4) meaningless and leads to absurd results.

The Board’s interpretation of RCW 51.48.055(4) to forever bar an officer from the benefit of the statute if the corporation’s bankruptcy is not complete before the Department issues a notice of assessment is absurd. A corporation such as Mike’s Roofing that cannot pay its debts has *no reason* to file for Chapter 7 Bankruptcy because a Chapter 7 “discharge cannot be granted to a corporation . . . but can only be granted to an individual.” Rombauer, 28 Wash. Prac., § 9.38 (September 2019 update) (citing 11 U.S.C.A. § 727(a)(1)); *see also* Alan Gutterman, Business Transactions Solutions § 304:50 (February 2020 update) (“The inability to obtain a discharge for the entity reduces the benefits of Chapter 7 for corporations.”).¹¹ It is for this reason that “entities seldom file under Chapter 7.” Steven Alberty, 3 Advising Small Businesses § 47:16 (2019); *see also* Federal Judicial Caseload Statistics 2018 Table F-2 (showing that in 2018 there were 467,027 individual Chapter 7 filings as opposed to 13,906 business Chapter 7 filings), available at

¹¹ Unlike Chapter 7 of the bankruptcy code, which focuses on liquidation of a debtor’s assets and discharging the debtor, Chapter 11 allows businesses to reorganize with the intent of remaining a going concern. *See* Rombauer, *supra*, 28 Wash. Prac., §§ 9.1, 9.97.

<https://www.uscourts.gov/statistics/table/f-2/federal-judicial-caseload-statistics/2018/03/31> (last visited February 14, 2020). Additionally, corporations cannot act pro se and thus must incur attorney’s fees – as well as trustee’s fees – to complete bankruptcy. *See Lloyd Enterprises, Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998) (“corporations . . . must be represented by an attorney”), *rev. denied*, 137 Wn.2d 1020 (1999).

The Coakers thus did what any reasonable corporate officer would do in dissolving Mike’s Roofing without also filing for bankruptcy. Washington law expressly allows a corporation to dissolve if it “is not able to pay its liabilities as they become due in the usual course of business, or the corporation’s assets are less than the sum of its total liabilities.” RCW 23B.14.010. Nevertheless, according to the Board, to gain the protection of RCW 51.48.055(4) corporate officers must compel the corporation to file a pointless bankruptcy and incur the attendant costs because the Department *might* impose personal liability in the future. A statutory interpretation requiring corporate officers to predict the Department’s future actions is absurd. *See Felt v. McCarthy*, 130 Wn.2d 203, 214, 922 P.2d 90 (1996) (Sanders, J., concurring)

(“clairvoyance about future governmental actions is beyond any mortal”).

Moreover, the Board’s interpretation makes it virtually impossible for corporate officers to avail themselves of RCW 51.48.055(4). Despite being a straightforward bankruptcy involving a debtor with no assets, Mike’s Roofing’s bankruptcy took 250 days to complete. (See CR 267-69 (bankruptcy filed March 9, 2017), 73 (bankruptcy closed November 14, 2017)) Most corporate bankruptcies will take longer. See Robert R. Bliss & George G. Kaufman, U.S. Corporate and Bank Insolvency Regimes: A Comparison and Evaluation, 2 Va. L. & Bus. Rev. 143, 169 (2007) (“In corporate bankruptcy there is no immediate resolution, and the average length of time the firm is in Chapter 7 or 11 may be long and variable.”).

Under the Board’s interpretation, the Coakers could have availed themselves of RCW 51.48.055(4) only if Mike’s Roofing filed for bankruptcy on May 27, 2015 (250 days before the Department issued its notice of personal liability). But that was only *two weeks*

after the assessment against Mike's Roofing became final.¹² (See CR 264) Under the Board's interpretation, if the bankruptcy proceedings had taken even two more weeks – as most will – it would have been *impossible* for the Coakers to avail themselves of RCW 51.48.055(4). This Court should reject the Board's interpretation that renders RCW 51.48.055(4) meaningless in almost all cases. *Dillon*, 179 Wn. App. at 80, ¶ 68 (“statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous”) (internal quotation and alterations omitted).

The Board's interpretation is especially absurd because corporate officers have *no* control over how quickly a bankruptcy court discharges the corporation. Officers may also have no control over the decision to file bankruptcy on behalf of the corporation. RCW 51.48.055 applies not only to the officers of a closely held corporation, but to any “corporate or limited liability company business.” RCW 51.48.055(1). Even where officers control whether

¹² The Department erroneously asserted below that the assessment against Mike's Roofing became final on the day the Board issued its decision affirming it, April 13, 2015 (CP 35), ignoring that under RCW 51.48.140 an assessment does not become final until the 30 days for filing an appeal have expired.

to file bankruptcy, they should be allowed to make a reasoned – not rushed – decision on how to proceed. The Department conceded as much below, acknowledging that a firm hit with a crippling assessment must make tough decisions about whether “to re-brand or . . . to terminate or abandon after discussion with financiers or accountants or any number of reasons why.” (1/25 RP 27)

Finally, under the Board’s interpretation the Department can nullify RCW 51.48.055(4) simply by issuing a notice of personal assessment – a boilerplate three-page document (CR 271-73) – *at any point* before the bankruptcy proceedings are concluded, no matter how early in the process the petition is filed or how swift the proceeding in bankruptcy court. The financial ruin caused by making individuals personally liable for a business’s assessment should not turn on whether the Department can issue a three-page notice before a bankruptcy court inventories a business’s assets and applies them to its debts. *Cf. Matter of Swanson*, 115 Wn.2d 21, 31, 804 P.2d 1 (1990) (rejecting proposed interpretation of civil commitment statute as absurd because it made the applicability of the statute “turn on the vagaries of scheduling”).

3. Because an assessment is not final until all appeals have been exhausted there is no reason to preclude consideration of a bankruptcy that is completed during the appellate process.

The Board's interpretation also conflicts with the principle that an "order or ruling is subject to revision at any time *before final judgment.*" *State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603 (1985) (emphasis added); *see also Snyder v. State*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978) ("The court's final say on the merits is subject to revision at any time before final judgment."). As support for its decision that RCW 51.48.055(4) does not apply where a bankruptcy "filing did not occur until *after* the Department issued the order that was subject to appeal" (CR 7 (emphasis in original)), the Board cited *In Re: Jaz Servs. LLC*, No. 13 11377, 2015 WL 3551186 (Wash. Bd. Ind. Ins. App. Apr. 9, 2015). *Jaz Services* reasoned that the Board could not change the Department's decision "based on material facts, the fact of bankruptcy, that exist now but that did not exist when the Department issued its personal liability assessment." 2015 WL 3551186, at *3.

The Board's decision in this case and in *Jaz Services* erroneously assume an assessment is final as soon as the Department issues it. But unlike a superior court judgment, an assessment is

considered final and enforceable only after *all* appeals have been exhausted. Under RCW 51.48.140, “the amount of the notice of assessment” “shall be deemed final” only *after* appellate options are exhausted:

If a notice of appeal is not served on the director and the board of industrial insurance appeals pursuant to RCW 51.48.131 within thirty days from the date of service of the notice of assessment, or if a final decision and order of the board of industrial insurance appeals in favor of the department is not appealed to superior court in the manner specified in RCW 34.05.510 through 34.05.598, or if a final decision of any court in favor of the department is not appealed within the time allowed by law, then the amount of the unappealed assessment, or such amount of the assessment as is found due by the final decision and order of the board of industrial insurance appeals or final decision of the court shall be deemed final . . .

(emphasis added) *See also* RCW 51.48.131 (“A notice of assessment becomes final thirty days from the date the notice of assessment was served upon the employer unless . . . an appeal is filed . . .”) Likewise, an assessment can only be entered on the judgment docket and enforced *after* all appeals have been exhausted. *See* RCW 51.48.140 (after the amount is “deemed final” the Department may file “a warrant in the amount of the notice of assessment” that may then “be entered in the judgment docket”).

Courts commonly rule based on facts that come into existence after an initial decision or proceeding but before entry of a final judgment. *See, e.g., Roger Lee Const. Co. v. Toikka*, 62 Wn. App. 87, 91, 813 P.2d 161 (1991) (reversing motion to dismiss because corporation paid its license fees “*after* trial but . . . before the entry of the findings and the decree”) (emphasis in original); *Marriage of Dickson*, 180 Wn. App. 1052, 2014 WL 1801733, at *1-2, 13 (2014) (“applaud[ing]” trial court’s “handing of a difficult dissolution,” including by “reopen[ing] the trial for presentation of additional evidence” after the FBI seized one party’s assets “after trial but before the trial court entered final orders”) (unpublished). Nothing precludes the Board from considering evidence submitted *before* the assessment became final.

C. There is no evidence the Coakers, who consistently paid the premiums they knew were owed and reported the same hours to the Department and ESD, willfully failed to pay premiums.

The Board committed two fundamental errors in finding that the Coakers willfully failed to pay premiums. First, the Board erroneously relied on a non-existent “discrepancy” between Mike’s Roofing’s reports to ESD and its reports to the Department, which the Board erroneously found showed Mike’s Roofing “reported far

higher hours” to ESD and thus “Mike’s Roofing . . . was under-reporting employee hours” to the Department. (CR 9) Second, the Board erroneously relied on the Coakers conduct in 2015 as evidence of their willful failure to pay premiums between 2009 and 2012. This Court should reverse the Board’s finding of willfulness because it is not supported by substantial evidence and is based on an erroneous interpretation of RCW 51.48.055(1).

“[W]illfully fails to pay or to cause to be paid’ means that the failure was the result of an intentional, conscious, and voluntary course of action.” RCW 51.48.055(1). The Board has previously interpreted “willful nonpayment” as “entail[ing] more than simple nonpayment.” *Shawn A. Campbell & Spouse DBA & E Acoustics LLC*, No. Docket No.13 12674, 2014 WL 1398630, at *8 (Wash. Bd. Ind. Ins. App. Mar. 27, 2014). Rather, the Board has held that “some element of knowledge is essential to a finding of willfulness.” *Campbel*, 2014 WL 1398630, at *4. This is consistent both with the common understanding of the term and its interpretation in other statutes that include a “willfulness” element. *See Pope v. Univ. of Washington*, 121 Wn.2d 479, 491, 852 P.2d 1055 (1993) (university did not act willfully under RCW 49.52.050(2) because there was no evidence it acted “with the intent to deprive employees of their

wages”), amended, 871 P.2d 590 (1994); *Crosswhite*, 197 Wn. App. at 552, ¶ 28 (“A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong.”) (quoting Black’s Law Dictionary 1834 (10th ed. 2014)).

The “evidence” relied upon below to support the Board’s finding that the Coakers acted willfully either does not exist, *i.e.*, the alleged underreporting, or does nothing to prove that the Coakers willfully failed to pay premiums, *i.e.*, their failure to pay the assessment that bankrupted Mike’s Roofing:

1. **Mike’s Roofing consistently reported the same hours to the Department and ESD, refuting the Board’s finding that a “discrepancy” proved Mike’s Roofing under-reported hours.**

The Board’s willfulness finding is based on a nonexistent “discrepancy” and a basic misunderstanding of why the Department imposed the underlying assessment against Mike’s Roofing. The Board found the “uncontroverted facts demonstrate that the basis for the underlying assessment against Mike’s Roofing was the company was under-reporting employee hours” as evidenced by a “discrepancy” between “[ESD] filings that reported far higher hours” and filings with the Department. (CR 9) But that is not true – the

Coakers consistently reported the same hours to ESD and the Department. (See § IV.A) Judge Sheeran correctly found that the Coakers never “deliberately fail[ed] to pay any assessment due, under report[ed], or report[ed] incorrect risk classifications.” (CR 83) This finding was based upon “uncontroverted” evidence before the Board.

The Department imposed the assessment against Mike’s Roofing under RCW 51.48.030 and RCW 51.48.040, on the ground that the company refused to cooperate in the Department’s audit, not because it under-reported hours. (CR 262) The Department never alleged, nor did the Board ever find, that Mike’s Roofing violated RCW 51.48.020 by underreporting the number of hours worked by its employees. (CR 242-62) Yet, the Board’s decision is founded on its erroneous belief that the Coakers were “aware they [were] under-reporting the hours.” (CR 9) Because the cornerstone of the Board’s decision is not supported by substantial evidence, it must be reversed.

2. The Board erroneously concluded the Coakers acted “willfully” because Mike’s Roofing could not pay the assessment.

The Board’s conclusion that the Coakers acted willfully is also based on its erroneous belief that the mere inability to pay an

assessment is evidence of “willfulness” under RCW 51.48.055. Because the Board erroneously interpreted and applied RCW 51.48.055 in finding the Coakers acted willfully, this Court reviews its ruling de novo. RCW 34.05.570(3)(d); *Crosswhite*, 197 Wn. App. at 549, ¶ 20.

The Coakers could not have “willfully,” *i.e.*, intentionally and consciously, failed to pay premiums they did not *know* were due. RCW 51.48.055(1) (“willfully fails to pay or to cause to be paid’ means that the failure was the result of an intentional, conscious, and voluntary course of action.”); § V.C.1. As Judge Sheeran found, there is no evidence the Coakers “*deliberately* fail[ed] to pay any assessment due.” (CR 83 (emphasis added)) Rather, the only evidence is that the Coakers – consistent with three prior audits finding they owed no additional premiums – always paid what they thought was owed, as calculated by their third-party payroll manager. (CR 413-14, 423-25, 506-08, 520-22; *see also* § IV.A)

The Board’s findings make clear that it found the Coakers acted willfully not because they failed to pay premiums they knew were due between 2009 and 2012, but because Mike’s Roofing could not pay an assessment based entirely on “estimated” premiums that became final in 2015, *after* it had ceased operations and run out of

money. The Board found the Coakers acted willfully because “as of *April 13, 2015*, there was no bona fide dispute between Mike’s Roofing and the Department concerning whether Mike’s Roofing owed a substantial amount of money in unpaid premiums, interest, and penalties.” (FF 4, CR 10 (emphasis added))¹³ The Board then blamed the Coakers for not “set[ting] up a payment plan for the assessment” and for their “conscious, intentional, and voluntary choice” to “cease[] operations in *April 2015*.” (FF 8, 11, CR 10 (emphasis added))

There was nothing “voluntary” about the Coakers’ decision to cease Mike’s Roofing’s operations. Mike’s Roofing undisputedly could not pay the assessment, even with a payment plan, because as Judge Sheeran found, “[i]n April 2015, the company had no or very little cash.” (CR 83; *see also* CR 87 (finding that the Department “levied the bank accounts for Mike’s Roofing and obtained a total of \$377.63 on June 10, 2015.”)) Accordingly, the Coakers’ only reasonable course was to dissolve Mike’s Roofing. (*See* CR 436, 489 (Mr. Coaker’s testimony that the decision to shut down Mike’s

¹³ The Board, like the Department, erroneously treated the assessment against Mike’s Roofing as final on the day the Board affirmed it, ignoring that under RCW 51.48.140 an assessment is not final until “the time allowed by law” for an appeal has expired.

Roofing was a “no-brainer” because “[w]e couldn’t afford [to] pay the assessment and knew we were going to lose the ability to perform work.”)) The Board’s conception of “willfulness” puts corporate officers in an impossible catch-22: come up with non-existent funds to pay an assessment or have your failure to pay used as evidence of “willfulness.”

The Board’s imposition of personal liability on the Coakers simply because Mike’s Roofing could not pay the assessment also conflicts with fundamental principles of corporate law. A court cannot disregard the corporate form based on the “mere fact” a corporation is unable to pay its debts because doing so “would undermine the very foundation of the entity concept.” *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 644, 618 P.2d 1017 (1980); see also *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 547, ¶ 32, 269 P.3d 1038, 1048 (2011) (“A corporate entity should not be disregarded solely because it cannot meet its obligations.”). Yet, that is precisely what the Board did here.

Campbel addressed similar facts and held that an officer did not willfully refuse to pay premiums because he “paid what he believed the company owed at the time,” despite the fact that “a Department audit established, after the company ceased operation,

that additional premiums were owed.” 2014 WL 1398630, at *8. The Board reasoned that the officer could not have acted willfully without “some level of knowledge that the company owed more premiums than he was paying” and that “[k]nowledge of the [later] resolution of the dispute regarding the amount owed cannot be imputed back to [the officer] during the time when the company was still in business.” 2014 WL 1398630, at *8.

Here, as in *Campbel*, the Coakers paid the premiums they believed were owed during the audit period and the assessment imposing additional premiums did not become final until *after* Mike’s Roofing was out of business. Yet, the Board found the Coakers “had actual knowledge of the debt owed” based on “the assessment against Mike’s Roofing.” (FF 10, CR 10) The Board thus did precisely what it correctly reasoned it could not do in *Campel* – find officers willfully failed to pay premiums even though they had no idea those premiums were due.

This case is also like *Campel* because there is no evidence the company “had the funds to pay the additional premiums assessed by the Department and [the officer] chose to divert the money to other uses.” 2014 WL 1398630, at *8. The Board’s contrary finding that the Coakers “made an intentional, conscious, and voluntary choice to

pay other obligations” is premised on its finding that Mike’s Roofing had “sufficient funds” to pay the Department additional premiums “[b]etween *July 1, 2009, and April 2015.*” (FF 99-10, CR 10 (emphasis added)) But there were *no additional premiums to pay* between July 2009 and April 2015 because the Board’s assessment was not final until May 13, 2015. *See Dep’t of Labor & Indus. v. City of Kennewick*, 99 Wn.2d 225, 227, 661 P.2d 133 (1983) (affirming trial court’s refusal to enter warrant under RCW 51.48.140 because the trial court never entered a final order in favor of Department); *see also* § V.B.3. The Board nowhere found that Mike’s Roofing had sufficient funds to pay the assessment *after* it became final in May 2015.

The Board also mistakenly relied on the Coakers’ decision not to appeal the assessment against Mike’s Roofing to superior court as evidence of willfulness. (*See* FF 2, CR 10 (“Mike’s Roofing did not appeal the Board’s order.”); *see also* CR 93 (Judge Sheeran’s finding that “willfulness is demonstrated” because the assessment against Mike’s Roofing “was not appealed”)) The Board nowhere explained how an officer’s decision *not* to fight an assessment based on premiums that became due years earlier is evidence that officer “willfully” failed to pay those premiums. The Board’s reasoning

perversely forces corporate officers to exhaust all appeals lest their failure to do so be considered evidence they “willfully” failed to pay premiums.

The Coakers should not be punished for their imminently reasonable decision to cut their losses and dissolve Mike’s Roofing rather than continue fighting a costly and likely futile legal battle against the Department that had already exhausted Mike’s Roofing’s resources. (*See* CR 83) When the Coakers made that decision they had no way of knowing the Department would come after them personally for the assessment. It offends fundamental notions of justice to hold against the Coakers their decision to throw in the towel when there was no reason to keep fighting. *See Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001) (holding that application of collateral estoppel works an injustice when there is not “sufficient motivation for a full and vigorous litigation of the issue”).

The Board erroneously interpreted and applied RCW 51.48.055 by finding “willfulness” based on Mike’s Roofing’s inability to pay a \$580,000 assessment and the Coakers’ decision to dissolve Mike’s Roofing and attempt to move on with their lives. This Court should reverse.

D. This Court should award the Coakers their attorney's fees under the Equal Access to Justice Act.

The Equal Access to Justice Act, RCW 4.84.340-360, states that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” RCW 4.84.350(1). A “[q]ualified party’ means . . . an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed.” RCW 4.84.340(5). “A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.” RCW 4.84.350(1).

The Coakers satisfy each of the requirements for an award of attorney’s fees under the Equal Access to Justice Act. The Coakers have a net worth less than one million and upon prevailing they will have obtained far more than “some benefit” – they will have spared themselves the financial ruin that befell their company. Nor was the Department’s attempt to impose personal liability on the Coakers “substantially justified.” The Coakers’ loss of the company they spent

25 years building was more than enough punishment for their failure to cooperate with an audit. But that was not enough for the Department, which then insisted that the Coakers personally bear liability for the assessment against Mike's Roofing based on an interpretation of RCW 51.48.055 contrary to its plain language and purpose. (§§ V.B) The Department also encouraged the Board to hold the Coakers personally liable for a \$580,000 assessment simply because Mike's Roofing could not pay the assessment. (§ V.C.2) This Court should award the Coakers their attorney's fees.

VI. CONCLUSION

This Court should reverse the Board, vacate the assessment of personal liability against the Coakers, and award the Coakers their attorney's fees.

Dated this 20th day of February, 2020.

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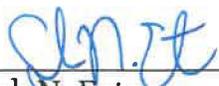
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 20, 2020, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Catharine Morisset Fisher & Phillips LLP 1201 3rd Ave Ste 2750 Seattle WA 98101 cmorisset@fisherphillips.com jmatautia@fisherphillips.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Steve Vinyard Office of the Attorney General PO Box 40121 Olympia, WA 98504-0121 steve.vinyard@atg.wa.gov liolyce@atg.wa.gov	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 20th day of February, 2020.



Sarah N. Eaton

Index to Appendix to Brief of Appellants

- App. A: Certified Appeal Board Record, pg. 6-12
Washington Board of Industrial Insurance Appeals
Docket No. 16-17318
- App. B: Order Affirming Board of Industrial Appeals (CP 59)
Thurston County Superior Court Cause No. 18-2-02991-34
- App. C: Order Affirming the Decision of the Board of Industrial
Insurance Appeals (CP 82-83)
Thurston County Superior Court Cause No. 18-2-02991-34

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: MICHAEL E. COAKER &**)
2 **MARILEE B. COAKER & THE MARITAL**)
3 **COMMUNITY COMPOSED THEREOF**)
4)
5 **FIRM NO. 543,252-01**) **DOCKET NO. 16 17318**
6) **DECISION AND ORDER**

7 On April 13, 2015, in a previous appeal assigned Docket No. 14 12482, we affirmed the
8 Department's assessment of premiums, interest, and penalties against Mike's Roofing, Inc. Mike's
9 Roofing filed Articles of Dissolution with the Washington Secretary of State on November 9, 2015.
10 The Department subsequently determined that Michael and Marilee Coaker were, as corporate
11 officers, personally responsible for the unpaid taxes, penalties, and interest owed by Mike's Roofing
12 when it dissolved, as well as a record-keeping penalty, warrant fees and penalties, and premiums for
13 the second and third quarters of 2015. The Coakers appealed, contending they were not personally
14 liable because the non-payment was not willful. Our industrial appeals judge found the nonpayment
15 was willful, and therefore, the Coakers and their marital property were responsible for payments of
16 the unpaid taxes, penalties, and interest for the time period at issue. The judge also ruled the
17 Department may not assess personal liability for the record-keeping violation penalties or the warrant
18 fees assessed Mike's Roofing. The Coakers seek review of the personal liability determination and
19 also ask the decision be set aside based on newly discovered evidence. We reject the offer of newly
20 discovered evidence and uphold the Proposed Decision and Order's determination of personal
21 liability as well as the direction to the Department to limit the scope of the assessment. The
22 Department's Order and Notice Reconsidering Notice and Order of Assessment of Workers'
23 Compensation Taxes dated June 16, 2016, is **REVERSED AND REMANDED** to issue an order
24 assessing corporate officer personal liability against Michael Coaker, Marilee Coaker, and the marital
25 community property thereof for only the unpaid taxes, penalties on the unpaid taxes, and interest
26 (continuing to accrue) for Mike's Roofing's unpaid assessment, less any amounts previously paid.

DISCUSSION

27 The Coakers attached a declaration from a bankruptcy attorney and electronic notifications
28 representing a November 14, 2017 U.S. Bankruptcy Court order as "newly discovered evidence."
29 The order was issued **16** days after counsel for the Coakers received the Proposed Decision and
30 Order. Civil Rule 60 provides methods of relief from a judgment or order premised on a "reasonable
31 time" but not more than **one year** after the judgment, order, or proceeding was entered.¹ CR 60(b)(3)

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¹ CR 60(b) final paragraph following (11).

1 permits relief from an order based on "Newly discovered evidence which by due diligence could not
2 have been discovered in time to move for a new trial under rule 59(b)." For reasons explained below,
3 we deny relief under CR 60.
4

5 We will only consider newly discovered evidence attached to a Petition for Review that could
6 not have been presented at the original hearing with the exercise of reasonable diligence.² To justify
7 vacating a judgment on the ground of newly discovered evidence, the moving party must establish
8 that the evidence:
9

- 10 (1) Would probably change the result if a new trial were granted,
- 11 (2) Was discovered since trial,
- 12 (3) Could not have been discovered before the trial by the exercise of due
13 diligence,
- 14 (4) Is material,
- 15 (5) Is not merely cumulative or impeaching.³
16

17 The information contained in the Petition for Review is not material. In *in re Jaz Services*⁴ we
18 addressed RCW 51.48.055(4)—the bankruptcy defense to the assessment of personal liability and
19 the plain reading of the statute. The statute provides that an officer, member, manager, or other
20 person is not liable for any unpaid premiums and interest and penalties on those premiums if "all of
21 the assets of the corporation . . . have been applied to its debts through bankruptcy or receivership."⁵
22

23 In *Jaz Services* we received an appeal from an Order and Notice Reconsidering Notice and
24 Order of Assessment of Workers' Compensation Taxes. The Department assessed personal liability
25 against Michael and Patricia Daniels for taxes, penalties, and interest that had accrued and were
26 unpaid by Jaz Services, LLC. The industrial appeals judge granted the Daniels' summary judgment
27 motion to dismiss based on RCW 51.48.055(4). We disagreed that the matter was proper for
28 summary judgment and remanded the appeal for further proceedings. In doing so we rejected
29 reliance on the bankruptcy defense allowed in RCW 51.48.055(4) because the Daniels' Chapter 7
30 filing did not occur until **after** the Department issued the order that was subject to appeal.
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44 ² *In re Eileen Cleary*, BIIA Dec., 92 1119 (1993), accord, *Boyd v. City of Olympia*, 1 Wn. App 2d 17, 33-34 (October 24,
45 2017).

46 ³ *Jones v. City of Seattle*, 179 Wn. 2d 322, 360 (2013), as corrected (Feb.5, 2014) (internal citations omitted).

47 ⁴ BIIA Dec. 13 11377 (2015).

⁵ RCW 51.48.055(4).

1 The application of a corporation's assets to its debts through bankruptcy or receivership must
2 occur **before** the company dissolves. RCW 51.48.055 states:
3

4 (1) **Upon termination, dissolution, or abandonment** of a corporate or limited liability
5 company business . . . [a former officer who may otherwise be personally liable for the
6 company's non-payment of industrial insurance taxes] (4) is not liable if all of the
7 assets of the corporation or limited liability company **have been applied** to its debts
8 through bankruptcy or receivership.
9

10 (Emphasis added.)

11 In order for the provision of the bankruptcy defense to apply, the completion of the bankruptcy
12 action (application of assets to liabilities) needed to occur prior to the Department's assessment of
13 personal liability, as well as in conjunction with the termination, dissolution, or abandonment of a
14 corporate or LLC business. That fact pattern is not present in this appeal. The CR 60(b)(3) relief
15 sought by the Coakers by way of application of RCW 51.48.055(4) is denied.
16
17

18 The parties briefed the legal issue of the interplay between RCW 51.48.055 and
19 RCW 51.16.190, the provision limiting Department collection actions and the assessment of personal
20 liability for officers, and the industrial appeals judge specifically addressed the issue in the Proposed
21 Decision and Order. The Coakers contend the statute of limitations for collection actions against a
22 firm is the same as in a personal liability action. They rely on RCW 51.16.190(2) to establish the
23 trigger for the commencement of the three-year period to be the date premiums become due. This
24 is a reliance on the Supreme Court decision of *Dolman v. Department of Labor & Indus.*⁶
25
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28

29 We acknowledged this issue as a procedural matter in *In re Shawn A. Campbell & Spouse*⁷
30 in which we directed our industrial appeals judge, on remand, to determine "whether the Department
31 asserted personal liability against Mr. Campbell and Spouse within the three-year statute of
32 limitations set forth in RCW 51.16.190(2) and made applicable by RCW 51.48.055(7)."⁸ The issue
33 was reconciled following a hearing on the merits. Premiums become "due" at the time personal
34 liability is triggered, under the 2004 statute—RCW 51.48.055—upon the termination, dissolution, or
35 abandonment of the corporation or LLC. A Notice and Order of Assessment of Corporate Officer
36 Liability then must be issued within the three-year period.
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45 ⁶ 105 Wn.2d 560 (1986).

46 ⁷ *In re Shawn A. Campbell & Spouse dba E&E Acoustics LLC*, Dckt. No. 13 12674 (March 27, 2014) (Order Vacating
47 Proposed Decision and Order and Remanding the Appeal for Further Proceedings).

⁸ *Campbell* at 11.

1 In this appeal Mike's Roofing filed for administrative dissolution on November 9, 2015. The
2 Department issued a timely order of personal assessment against Mike and Marilee Coaker on
3 February 1, 2016.
4

5 Our industrial appeals judge devoted a majority of her decision to discussing the totality of the
6 Coakers' behavior and finding that their failure to pay premiums was an intentional, conscious, and
7 voluntary choice in arriving at a determination of personal liability under RCW 51.48.055(1). The
8 Coakers advance several arguments in their Petition for Review. First is the premise that as long as
9 a firm pays any amount of premium at the time it is due, willfulness has not been established. We
10 disagree. The uncontroverted facts demonstrate that the basis for the underlying assessment against
11 Mike's Roofing was the company was under-reporting employee hours. The Department auditor was
12 able to discover the discrepancy because of Employment Security filings that reported far higher
13 hours. We cannot accept the Coakers' argument that as long as a company pays any premium, even
14 though they are aware they are under-reporting the hours, they are in compliance with the law.
15

16 Further, there is nothing in the record of this appeal to support Mr. Coaker had a bona fide
17 dispute over the amount of premiums owed. He steadfastly declined to provide any information or
18 records to convince the Department their audit findings were in error.
19

20 **DECISION**

21 In Docket No. 16 17318, the firm, Michael E. Coaker & Marilee B. Coaker, filed an appeal with
22 the Board of Industrial Insurance Appeals on July 13, 2016, from an order of the Department of Labor
23 and Industries dated June 16, 2016. In this order, the Department determined that Michael and
24 Marilee Coaker were, as corporate officers, personally responsible for the unpaid taxes, penalties,
25 and interest owed by Mike's Roofing when it dissolved, as well as the record keeping penalty, warrant
26 fees and penalties, and premiums for the second and third quarters of 2015. This order is incorrect
27 and is reversed and remanded to recalculate the amount assessed in the absence of a
28 record-keeping penalty, warrant fees and penalties, and premiums for the second and third quarters
29 of 2015.
30

31 **FINDINGS OF FACT**

- 32 1. On August 23, 2016, an industrial appeals judge certified that the parties
33 agreed to include the Jurisdictional History in the Board record solely for
34 jurisdictional purposes.
35
- 36 2. On January 31, 2014, the Department ultimately assessed premiums,
37 interest, and penalties against Mike's Roofing, Inc., for the third and fourth
38 quarters of 2009; first through fourth quarters of 2010 and 2011; and first
39 quarters of 2015.
40

1 and second quarters of 2012. Mike's Roofing appealed the assessment,
2 which ended with a Board Order Adopting Proposed Decision and Order
3 issued on April 13, 2015. Mike's Roofing did not appeal the Board's order.
4

- 5 3. On June 16, 2016, the Department issued an Order and Notice
6 Reconsidering a Notice and Order of Assessment of Corporate Officer
7 (personal) liability that affirmed the Notice and Order of Assessment of
8 Corporate Officer Liability against Michael and Marilee Coaker,
9 personally, and their marital property for the unpaid premiums, penalties,
10 and interest accruing since the issuance of the assessment against Mike's
11 Roofing, as well as warrant fees and interest for 2015 and record keeping
12 violation penalties.
- 13 4. At least as of April 13, 2015, there was no bona fide dispute between
14 Mike's Roofing and the Department concerning whether Mike's Roofing
15 owed a substantial amount of money in unpaid premiums, interest, and
16 penalties.
- 17 5. Michael and Marilee Coaker each owned 50 percent of Mike's Roofing
18 prior to July 1, 2009, and through dissolution of the company in 2015.
- 19 6. Michael Coaker was President and Marilee Coaker was Vice President of
20 Mike's Roofing and each had responsibility for ensuring that industrial
21 insurance premiums were reported and paid when due between the third
22 quarter of 2009 and when Mike's Roofing ceased operations in 2015.
- 23 7. Michael and Marilee Coaker were exempt from mandatory coverage
24 under Title 51 during the relevant time periods.
- 25 8. Mike's Roofing ceased operations in April 2015 and dissolved as a
26 corporation on November 9, 2015. The choice to cease operations was
27 a conscious, intentional, and voluntary choice by Mr. and Mrs. Coaker.
- 28 9. Between July 1, 2009, and April 2015, Mike's Roofing had in its
29 possession and control sufficient funds that could have been used to pay
30 the amount owed to the Department in full.
- 31 10. Michael Coaker and Marilee Coaker had actual knowledge of the debt
32 owed to the Department and made an intentional, conscious, and
33 voluntary choice to pay other obligations with the firm's funds, and not pay
34 the amount due to the Department for the assessment against Mike's
35 Roofing.
- 36 11. Michael Coaker and Marilee Coaker had the option to set up a payment
37 plan for the assessment owed to the Department, but refused.
- 38 12. Michael Coaker and Marilee Coaker's failure to pay the assessment owed
39 against Mike's Roofing was willful.
- 40 13. The completion of Mike's Roofing's Chapter 7 bankruptcy action did not
41 occur prior to the Department's assessment of personal liability, nor in
42 conjunction with the dissolution of the corporation.
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14. The Department's assessment of corporate officer (personal) liability for Mike's Roofing's record-keeping violation penalties and for warrant fees for 2015 was not permissible per RCW 51.48.055.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. Michael Coaker and Marliee Coaker willfully failed to pay or cause to be paid premiums owed to the Department for the third and fourth quarters of 2009; first through fourth quarters of 2010 and 2011; and first and second quarters of 2012, within the meaning of RCW 51.48.055.
3. Michael Coaker and Marliee Coaker, along with their marital community property, are personally liable for unpaid taxes, interest, and penalties for the premiums owed by Mike's Roofing for the third and fourth quarters of 2009; first through fourth quarters of 2010 and 2011; and first and second quarters of 2012, within the meaning of RCW 51.48.055.
4. Michael Coaker and Marliee Coaker, along with their marital community property, are not personally liable for the record-keeping violation penalties for Mike's Roofing or the warrant fees issued for 2015 pursuant to RCW 51.48.055.
5. The Department's Order and Notice Reconsidering Notice and Order of Assessment of Workers' Compensation Taxes dated June 16, 2016, is reversed and this matter is remanded to the Department to assess corporate officer personal liability against Michael Coaker, Marilee Coaker, and the marital community property thereof for only the unpaid taxes, penalties on the unpaid taxes, and interest (continuing to accrue) for Mike's Roofing's unpaid assessment, less any amounts previously paid.

Dated: March 29, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson



FRANK E. FENNERTY, JR., Member



JACK S. ENG, Member

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Addendum to Decision and Order
In re Michael E. Coaker & Marilee B. Coaker & the Marital Community Composed Thereof
Docket No. 16 17318
Firm No. 543,252-01

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Appearances

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18

Firm, Michael E. Coaker & Marilee B. Coaker, by Holmes Weddle & Barcott PC, per Ann M. Silvernale

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Department of Labor and Industries, by Dana Diederich, Litigation Specialist, and Office of the Attorney General, per Cody Costello

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Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on October 27, 2017, in which the industrial appeals judge reversed and remanded the Department order dated June 16, 2016. The Department filed a response to the petition for review.

Evidentiary Rulings

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

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

MICHAEL E. COAKER & MARILEE B.
COAKER & THE MARITAL
COMMUNITY COMPOSED THEREOF,
Plaintiff/Petitioner,

vs.

WASHINGTON STATE DEPARTMENT
OF LABOR,
Defendant/Respondent.

No. 18-2-02991-34

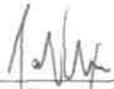
ORDER AFFIRMING BOARD OF INDUSTRIAL
APPEALS

Clerk's Action Required

This matter having come before this Court on the 25th day of January, 2019, on Petitioners administrative appeal from a Decision and Order of the Board of Industrial Insurance Appeals dated May 31, 2018; Petitioners appearing through their attorney, Thomas Vogliano; Respondent appearing through Assistant Attorney General Cody Costello; the Court having reviewed the record and file herein, having considered arguments of counsel, and in all things being fully advised, it is now, hereby,

ORDERED that the Board of Industrial Insurance Appeals Decision and Order is AFFRIMED.

Dated: 30 day of January, 2019



Judge James Dixon

Order

THURSTON COUNTY SUPERIOR COURT
2000 Lakeridge Dr. S.W., Bldg 2
Olympia, WA 98502
(360) 786-5560

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STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

MICHAEL E. COAKER, et al.

NO. 18-2-02991-34

Petitioners,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

ORDER AFFIRMING
THE DECISION OF THE BOARD OF
INDUSTRIAL INSURANCE
APPEALS

Respondent.

A. This matter came before the Court on plaintiffs Michael E. Coaker, Marilee B. Coaker and their comprised Marital Community ("Coakers") appeal of the Board of Industrial Insurance Appeals ("Board") May 29, 2018 Order (Case No. 16-17318) ("Order") upholding the Department of Labor & Industries' ("the Department's") February 1, 2016 assessment of personal liability against the Coakers. This Court considered the parties' briefs, the administrative record, and heard arguments of the parties on January 25, 2019.

B. The parties appeared before the Court on March, 8, 2019, per a stipulated motion for reconsideration, and the Court issued an oral ruling clarifying the basis for its preliminary written order of February 1, 2019 affirming the Board's Order.

C. The parties also appeared before the Court on October 4, 2019 hearing on the Department's Notice for Presentation of a final written order affirming the Board's order, to

SMITH GOODFRIEND, PS

February 20, 2020 - 2:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53906-3
Appellate Court Case Title: Michael Coaker, et al, Apps v. Dept. of Labor and Industries, Resp
Superior Court Case Number: 18-2-02991-8

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