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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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Department of Labor and Industries (“the Department”) ignores the fundamental flaws with the Board of Industrial Insurance Appeals’ (“the Board”) decision imposing personal liability on appellants Michael and Marilee Coaker for a \$580,000 assessment against their former company Mike’s Roofing. The Department not only advances an absurd interpretation of RCW 51.48.055, it refuses to defend the linchpin for the Board’s conclusion that the Coakers willfully failed to pay premiums – a non-existent “discrepancy” between the hours the Coakers reported to the Department and another state agency. The Department’s failure to address these flaws confirms that the Board must be reversed.

II. REPLY ARGUMENT

A. **The Department’s interpretation of RCW 51.48.055 ignores its plain language and writes the bankruptcy defense entirely out of the statute.**

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.” RCW 51.48.055(4) (emphasis added). The Department – like the Board – insists that for a corporate officer to benefit from RCW 51.48.055(4), the corporation’s bankruptcy must be “complete . . . before the

Department issued the notice of assessment.” (Resp. Br. 11) The Department’s interpretation conflicts with the statute’s plain language and leads to absurd results.

1. The Department ignores the language and purpose of RCW 51.48.055(4).

The Department now concedes – contrary to its argument below – that “RCW 51.48.055(4) is not written in the past tense,” but “has two clauses, one with a verb in the present tense (“*is not liable*”) and one with a verb in the present perfect tense (“*have been applied*”).” (Resp. Br. 21) The Department, however, argues “the present tense language” of the first clause of “subsection (4) relates to the corporate officer’s liability” under RCW 51.48.055(2) and not to the second clause of subsection (4). (*See* Resp. Br. 21)

The two clauses of RCW 51.48.055(4) combine to form a conditional sentence and thus must relate to each other. *See generally* The Chicago Manual of Style § 5.132, at 296-97 (17th ed. 2017). The Department cites no legal authority or rule of grammar to support its contention that the first clause of RCW 51.48.055(4) relates to language from a different subsection and not the second clause of the same sentence. The Department’s reading of the statute ignores that courts disfavor interpretations that “have words ‘leaping

across stretches of text, defying the laws of both gravity and grammar.” *Dep’t of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 450, 312 P.3d 676 (2013) (quoting *Flowers v. Carville*, 310 F.3d 1118, 1124 (9th Cir. 2002)).

The Department further ignores that the present perfect tense “denotes an act, state, or condition that is now completed or continues up to the present.” *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 434, ¶ 14, 275 P.3d 1119 (2012) (quoting *The Chicago Manual of Style* § 5.126, at 237 (16th ed. 2010)) (App. Br. 21-22). In other words, the present perfect tense describes a completed or continuing action from the perspective of *the present*. Thus, RCW 51.48.055(4) applies so long as the corporation’s assets “have been applied to its debts” when an officer – in the present – asserts the statute as a defense.

The Department erroneously argues that the reference to a “notice of assessment” in RCW 51.48.055(5) supports its interpretation. (Resp. Br. 22) But, as the Coakers explained (App. Br. 23), the fact that the Legislature used the term “notice of assessment” in RCW 51.48.055(5) but not in RCW 51.48.055(4) underscores that the Legislature could have – but did not – identify the notice of assessment as the watershed for application of RCW

51.48.055(4). The Department’s interpretation improperly adds language to the statute to say an “officer . . . is not liable if all of the assets of the corporation . . . have been applied to its debts through bankruptcy or receivership [before a notice of assessment is issued].”

The purpose of RCW 51.48.055 is not – as the Department argues – to “ensure[] that the Department can collect unpaid premiums even if the company that failed to pay the premiums has dissolved” by holding “the officers of a dissolved corporation personally liable.” (Resp. Br. 16 (citing *Hopkins v. Dep’t of Labor & Indus.*, 11 Wn. App.2d 349, 355-56, 453 P.3d 755 (2019))) As this Court observed in *Hopkins*, RCW 51.48.055 “allows the agency to hold certain people personally liable *under certain circumstances*.” 11 Wn. App.2d at 354, ¶ 18 (emphasis added). Specifically, the statute imposes liability on an officer if – and only if – an officer “willfully” fails to pay premiums. RCW 51.48.055(1). RCW 51.48.055 thus reflects the Legislature’s intent *not* to collect premiums from a corporate officer *unless* the officer “was culpable for the withholdings.” *Hopkins*, 11 Wn. App.2d at 357, ¶ 25.

Accordingly, RCW 51.48.055 is – as the Coakers argued – consistent with “the ‘bedrock principle’ that corporate officers are generally not personally liable for the debts of a corporation.” (*See*

Resp. Br. 31 (quoting App. Br. 22)) That neither a bankrupt corporation nor its officers might pay a premium does nothing to undermine the Coaker’s interpretation. (See Resp. Br. 16-17) “[T]he desirability of efficient revenue collection does not justify reading into the statute a mechanism for collection that the Legislature has not authorized.” *Littlejohn Const. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 426, 873 P.2d 583 (1994) (cited at Resp. Br. 16).

2. The Coakers’ interpretation allows for the orderly collection of premiums, while the Department’s leads to absurd results.

The Department’s interpretation would require a corporation to file for bankruptcy *before* an assessment against it is even final, while the Coakers’ provides a corporation a reasonable – but not unlimited – amount of time to protect its officers by filing for bankruptcy. The Coakers’ interpretation, unlike the Department’s, also avoids burdening bankruptcy courts with pointless petitions.

a. The Department’s interpretation requires corporations to file for bankruptcy before an assessment is final.

The Department correctly states that the dissolution of a corporation is the point at which a corporate officer may “hav[e] liability for the corporation’s unpaid premiums.” (Resp. Br. 20) *See also Hopkins*, 11 Wn. App.2d at 355, ¶ 21 (officer “could not be held

personally liable until [the corporation] dissolved”). Accordingly, under the Department’s interpretation of RCW 51.48.055(4), for the Coakers to ensure they could not be personally liable for the assessment against Mike’s Roofing, Mike’s Roofing needed to complete bankruptcy before it dissolved on October 22, 2015.¹ Mike’s Roofing’s bankruptcy took eight months to complete, meaning that if it did not file for bankruptcy in February of 2015 – *before the assessment against it was final* – the Department could impose liability on the Coakers as soon as Mike’s Roofing dissolved.

An interpretation that requires a corporation to file for bankruptcy based on an assessment that is still subject to change is absurd. Under the Department’s reading, even if a corporation has appealed an assessment, it must still file for bankruptcy if it wants to protect its officers. But filing for bankruptcy will almost certainly be the corporation’s death knell. *See* Steven Alberty, 3 Advising Small Businesses § 47:22 (2019) (“In most cases there is no possibility that the debtor’s business will continue after a Chapter 7 proceeding”). The Department’s interpretation thus absurdly forces a corporation

¹ The Department correctly points out that Mike’s Roofing dissolved in October 2015 based on the date of its articles of dissolution. (*See* App. Br. 10; Resp. Br. 4; *see also* RCW 23B.14.030)

that wants to protect its officers to file for bankruptcy – thereby ensuring its own destruction – even if it has an appeal pending that, if successful, would allow the corporation to continue its business.

b. The Coakers’ interpretation allows the collection of premiums from officers except in limited circumstances.

The Coakers are not proposing a “loophole” that allows officers to escape liability “long after the Department issued its notice of assessment.” (Resp. Br. 28) Under the Coakers’ interpretation, a corporation’s assets must have been applied to its debts before the assessment against its officers becomes final. (*See* § II.A.3) The Coakers’ interpretation thus allows a corporation a reasonable – but not indefinite – amount of time to protect its officers.

Likewise, a corporation and its officers cannot “escape their responsibility to pay premiums” by dissolving the corporation. (Resp. Br. 16) Officers that dissolve a corporation without paying premiums for the purpose of protecting assets would engage in a “willful” failure to pay supporting officer liability. And if a corporation had sufficient assets to pay premiums – but did not – those assets would not be protected in bankruptcy if its officers relied on RCW 51.48.055(4). Filing for bankruptcy would also allow a

creditor or trustee to recover corporate assets via a preference or adversarial proceeding. *See* 11 U.S.C. § 547; Fed. R. Bankr. P. 7001.

Indeed, this is precisely why RCW 51.48.055(4) requires that all of a corporation's assets be applied to its debts in bankruptcy or receivership – to confirm through a judicial proceeding that the corporation has no assets and that its officers have not wrongfully diverted assets to themselves. *See* House Commerce & Labor Committee Hearing on ESHB 3059, February 3, 2004 (Director of the Department's testimony that the bill was intended to “prevent[] an officer from taking all the money out of a company, closing it down, and avoiding its legitimate obligations.”).² That purpose was served here – Mike's Roofing's bankruptcy trustee confirmed after “diligent inquiry” “there is no property available for distribution.” (CR 72-73) The fact that neither the Department nor the trustee alleged wrongdoing by the Coakers confirms none occurred and that the Department's draconian interpretation of RCW 51.48.055(4) is unnecessary to prevent officers from “diverting [a corporation's] assets elsewhere.” (Resp. Br. 47)

² ESHB 3059 was incorporated into ESHB 3188, the bill that eventually passed and became RCW 51.48.055. The audio for the hearing is available at <https://www.tvw.org/watch/?eventID=2004021377>, and the relevant testimony begins at 1:21:07.

The Department’s argument that corporate officers will abuse the statutory defense to “unilaterally terminate their own liability” (Resp. Br. 29) also mistakenly assumes a level of control over the corporation that many – if not most – corporate officers do not have. Corporate officers cannot compel a corporation to file bankruptcy at a whim and their personal liability should not turn on lengthy legal proceedings over which they have no control. (*See* App. Br. 28-29)³ Indeed, the Department itself concedes it “might be challenging for a corporate officer to obtain the benefit of subsection.” (Resp. Br. 34)

c. The Department’s interpretation does not facilitate the bankruptcy process.

Where – as here – a corporation has no assets there is no reason for the corporation to file for bankruptcy except to prevent the personal liability of its officers. (*See* App. Br. 25-29) The corporation has nothing to gain because – unlike an individual – it cannot receive a discharge of its debts and its creditors gain nothing because the corporation has no assets to distribute. The Department

³ As Mr. Coaker explained, Chapter 7 bankruptcies without assets “don’t get . . . get pushed through real quick” because “there’s . . . not a lot of money for [trustees] to make.” (CR 438) *See also* 11 U.S.C. §§ 326(a), 330(a)(7) (trustees paid a percentage of “all moneys disbursed”). As just two examples of Chapter 7 bankruptcies that have been pending for **years** *see Bankruptcy of MacLeod*, W.D. Wash. Bkrptcy. Case no. 14-17526-MLB, and *Bankruptcy of Adams*, W.D. Wash. Bkrptcy. Case no. 14-15003.

twists this argument, asserting the Coakers argued it is *always* pointless for a corporation to file for bankruptcy. (See Resp. Br. 33) To the contrary, the Coakers argued it was pointless for “[a] corporation such as Mike’s Roofing *that cannot pay its debts*” to file for bankruptcy. (App. Br. 25 (emphasis added))

Because a defunct corporation has no way of predicting whether the Department will impose personal liability on its officers, under the Department’s interpretation it must file for bankruptcy simply because the Department *might* impose personal liability. Bankruptcy courts will thus be forced to process petitions that are meaningless – they do not result in the distribution of assets because the corporation has none and they do not protect officers because the Department never intended to impose personal liability.

Rather than forcing corporations to preemptively file for bankruptcy, corporations should be allowed a reasonable period of time to pursue bankruptcy once the Department actually imposes personal liability on its officers. If officers are not subjected to personal liability, then simply dissolving the corporation – as the Coakers did – will avoid the costs of bankruptcy, leaving *more* assets to pay creditors, including the Department. The Coaker’s actions – not the Department’s – thus better promote the “full collection of

premiums.” (Resp. Br. 16) *See Dep’t of Labor & Indus. v. Briseno*, 12 Wn. App.2d 406, 418, ¶ 39, 457 P.3d 1250 (2020) (rejecting Department’s interpretation that “would not advance the valid safety concerns it has articulated on appeal”). Moreover, because the Department cannot impose personal liability until a corporation dissolves, the Department’s reading encourages corporations to delay dissolution to buy time to complete bankruptcy proceedings, contrary to *Hopkins*, which refused to interpret RCW 51.48.055 in a manner that incentivized firms “to avoid dissolution or abandonment of the corporate form.” 11 Wn. App.2d at 356, ¶ 24.

The Department also erroneously assumes that corporations will have more assets to distribute if they file for bankruptcy immediately “after discovering that the company cannot pay its obligations.” (Resp. Br. 29) But for many corporations – such as Mike’s Roofing – the only “obligation” they cannot pay will be the Department’s assessment and they will exhaust the last of their resources fighting that assessment. (*See* CR 83) Accordingly, even if those corporations filed for bankruptcy *the same day* an assessment becomes final, they would not have any assets to pay creditors. The Department entirely ignores this fact in blaming the

Coakers for not filing for bankruptcy on Mike's Roofing behalf when the assessment became final in April of 2015. (See Resp. Br. 33)

Finally, there is nothing laudable in forcing corporations to file Chapter 7 bankruptcy the moment they become distressed. Businesses can often obtain financing or work out other arrangements to stave off bankruptcy. See *Alberty, supra*, § 47:1 (a distressed business can “attempt to negotiate a workout agreement with its creditors”). The Department conceded that companies should be given time to have “discussion[s] with financiers.” (1/25 RP 27) By forcing corporations to immediately file for bankruptcy, the Department denies creditors – including itself – the opportunity to be paid by struggling businesses that could avoid bankruptcy.

3. There is no reason to preclude consideration of a bankruptcy that is completed before an assessment becomes final.

The Department wrongly asserts that the Coaker's interpretation renders assessments “retroactively incorrect.” (Resp. Br. 21, 28) A notice of assessment is only final *after* the time for pursuing an appeal has expired and thus cannot be “retroactively” overruled until that time. (See App. Br. 30-32) The Department nowhere acknowledges 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).

Rather than address this fundamental principle, the Department – citing cases involving the aggravation of a worker’s injury – argues that judicial officers are powerless to consider evidence of bankruptcy post-dating an assessment because “the relevant date is the date of the order, not a later date.” (Resp. Br. 24-27) But the Industrial Insurance Act requires that a claim for aggravation of an injury be presented as a new claim. *See* RCW 51.32.160; WAC 296-14-400. Thus, not surprisingly, the cases cited by the Department rejected as irrelevant evidence of aggravation when appealing an original injury claim and vice versa.⁴

This case involves an assessment of personal liability against an employer’s officers, not a claim for aggravation, and thus is governed by RCW 51.48.131, which confirms that a notice of assessment is not final if – as here – “an appeal is filed with the board

⁴ *See Turner v. Dep’t of Labor & Indus.*, 41 Wn.2d 739, 741-44, 251 P.2d 883 (1953) (refusing to consider “evidence of conditions developing after the date of the supervisor’s order” because “[t]he question of aggravation is not now before us”); *Karniss v. Dep’t of Labor & Indus.*, 39 Wn.2d 898, 901, 239 P.2d 555 (1952) (refusing to consider “evidence of aggravation prior to the last order . . . from which no appeal is taken”); *Roberts v. Dep’t of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1955) (rejecting evidence of symptoms arising after benefit award).

of industrial insurance appeals.” *See also* RCW 51.48.140 (assessment “shall be deemed final” after appeals are exhausted). RCW 51.48.131’s requirement that a party explain “with particularity the reason for [its] appeal” in its notice of appeal does not – as the Department argues – mean that all evidence post-dating an assessment is irrelevant. (Resp. Br. 22) To the contrary, the Department’s own regulations recognize that future circumstances might be relevant and thus provides that “[a]ny party may amend his or her notice of appeal on such terms as the industrial appeals judge may prescribe” WAC 263-12-080.

The Department also mistakenly asserts that a ruling granting the Coakers the benefit of RCW 51.48.055(4) would be tantamount to “exercising original jurisdiction over an issue that the Department never addressed.” (Resp. Br. 25; *see also* Resp. Br. 26 (asserting “the Department did not consider” the issue)) But the Department **did** address this issue. The Department’s revenue agent testified that she “check[ed] with [the] L&I bankruptcy unit” to determine that “[t]he corporation did not file bankruptcy” before issuing the notice of assessment against the Coakers. (CR 566)

Moreover, having “original jurisdiction” means only that the Department has the first word, not the last word. *See ORIGINAL*

JURISDICTION, Black’s Law Dictionary (11th ed. 2019) (“A court’s power to hear and decide a matter before any other court can review the matter.”). Where – as here – an assessment is “*properly appealed*” “[t]he Board and the courts do have authority under the Act to reconsider decisions.” *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 172, 937 P.2d 565 (1997) (emphasis in original). This authority includes – as the Department concedes – the ability to “consider new evidence.” (Resp. Br. 26) It would be absurd to argue otherwise because “[a]lthough RCW 51.52.050(2)(a) permits an ‘appeal to the board,’ an ‘appeal’ from a department order is in fact the first proceeding at which any evidence is taken.” *Dep’t of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 206, ¶ 51, 378 P.3d 139 (2016).

The Department, like the Board, mistakenly relies on *In Re: Jaz Servs. LLC*, No. 13 11377, 2015 WL 3551186 (Wash. Bd. Ind. Ins. App. Apr. 9, 2015), where the Board refused to allow corporate officers to rely on RCW 51.48.055(4) “because the[] Chapter 7 filing did not occur until after the Department issued its orders that are the subject of this appeal.” 2015 WL 3551186, at *3. But the corporation in *Jaz Services* – like Mike’s Roofing – had no assets to distribute to creditors and thus had no reason to file for bankruptcy until the Department imposed personal liability on its officers. *See* 2015 WL

3551186, at *3 (“the court closed the bankruptcy case with an indication there were no assets to distribute”). *Jaz Services* thus punished the officers for not filing a pointless bankruptcy. Moreover, the officers in *Jaz Services* – like the Coakers – asked the Department to reconsider its assessment imposing personal liability, a request that if granted would have obviated the need to burden the bankruptcy court with a petition from an asset-less corporation.

The Coakers’ interpretation of RCW 51.48.055(4) does not mean “there could never be an end to litigation.” (Resp. Br. 23) It only allows officers to submit evidence that a corporation’s assets have been applied to its debts *before* an assessment is final.

B. The Department ignores the fundamental flaws underlying the Board’s conclusion that the Coakers willfully failed to pay premiums.

The Department never addresses the erroneous foundation for the Board’s conclusion that the Coakers willfully failed to pay premiums – the Board’s finding there was a “discrepancy” between Mike’s Roofing’s reports to the Employment Security Department and its reports to the Department that showed “the company was under-reporting employee hours.” (CR 9) Similarly, the Department ignores that the Board’s finding regarding Mike’s Roofing’s financial

ability to pay additional premiums was limited to the six years *before* it ceased operations in April 2015.

1. The Board’s willfulness conclusion is founded on a non-existent “discrepancy” in the hours the Coakers reported to the Department.

The Board unequivocally found the Coakers willfully failed to pay premiums because they were “under-reporting employee hours”:

The Coakers [argue] . . . that as long as a firm pays any amount of premium at the time it is due, willfulness has not been established. The uncontroverted facts demonstrate that the basis for the underlying assessment against Mike’s Roofing was the company was under-reporting employee hours. The Department auditor was able to discover the discrepancy because of Employment Security filings that reported far higher hours. We 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 Department *nowhere* defends this finding, thereby conceding it is erroneous. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (“The State does not respond and thus, concedes this point.”); *see also* App. Br. 34-35.

Rather than defend the Board’s finding of a “discrepancy,” the Department asks this Court to ignore it as a “stray comment.” (Resp. Br. 42) But the Board rejected the Coakers’ defense that they always paid the premiums they believed were owed – and thus could not

have willfully failed to pay any – because the purported discrepancy proved “they [were] aware they [were] under-reporting the hours.” (CR 9) The Board’s finding thus was not a “stray comment,” but the “articulation of the basis for the ruling” that is *required* by the Administrative Procedure Act. *See Low Income Hous. Inst. v. City of Lakewood*, 119 Wn. App. 110, 119, 77 P.3d 653 (2003).

The Department also erroneously attempts to minimize the findings of Industrial Appeals Judge Sheeran, who presided over the evidentiary hearing. (Resp. Br. 42) Although this Court reviews the Board’s decision, not Judge Sheeran’s, the Board adopted her findings verbatim while praising her for detailing “the totality of the Coakers’ behavior.” (CR 9) The Department contends that Judge Sheeran was only “summarizing” testimony when she found the Coakers never “deliberately fail[ed] to pay any assessment due, under report[ed], or report[ed] incorrect risk classifications.” (CR 83) But Judge Sheeran’s summary of the evidence underlying her decision is no less a part of her decision than the “facts” section of any appellate decision and the fact she did not denote all of her decision “formal” findings of fact is irrelevant (Resp. Br. 43), because it is “the prerogative of an appellate court to . . . determin[e] what

facts have actually been found below.” *Tapper v. State Employment Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

2. The Coakers could not have willfully failed to pay premiums they did not know were due, nor could they have willfully failed to pay premiums they had no ability to pay.

The Department – like the Board – confuses the facts needed to establish that the Coakers willfully failed to pay the premiums due from Mike’s Roofing. The Department needed to establish *both* that (1) Mike’s Roofing had the ability to pay the premiums, and (2) the Coakers knew additional premiums were due and yet chose not to pay them. (*See App. Br. 33-34, 39-40*) The Board never found that these elements existed *at the same time* – it found only that Mike’s Roofing had the ability to pay additional premiums *before* the Coakers knew additional premiums were due.

Specifically, the Board found that the Coakers knew they owed additional premiums “as of April 13, 2015.” (FF 4, CR 10) It then found that “Mike’s Roofing had . . . sufficient funds that could have been used to pay the amount owed to the Department,” but limited that finding to the period “[b]etween July 1, 2009, and April 2015.”

(FF 9, CR 10 (emphasis added))⁵ As Judge Sheeran explained, this finding – which the Board copied from her findings – reflected the undisputed fact that “[i]n April 2015, [Mike’s Roofing] had no or very little cash.” (CR 83) In other words, by the time the Coakers knew additional premiums were due, Mike’s Roofing could no longer pay them. Because the Coakers never knew additional premiums were due at a time when Mike’s Roofing had the ability to pay those premiums, they could not have – as the Department asserts – “made a conscious decision to not pay the Department.” (Resp. Br. 40)

The Department does not dispute that the ability to pay an assessment is necessary to find willfulness, but instead asserts the Board rejected Mr. Coaker’s “self-serving” testimony that “Mike’s Roofing had no cash reserves as of April 2015” (Resp. Br. 38) and found Mike’s Roofing could have paid the \$580,000 assessment “as of April 2015.” (Resp. Br. 39) But the Board *did* accept Mr. Coaker’s

⁵ Although the Department is correct its assessment against Mike’s Roofing became final when the Board issued its April 13, 2015, order adopting the unappealed proposed decision and order (Resp. Br. 36), both the Board and the Department treated the April 13 decision as appealable. (See FF 2, CR 10 (noting “Mike’s Roofing did not appeal” the April 13 order); CR 555 (Department asked Mr. Coaker “on May 6, 2015 . . . if he [was] going to appeal the Board decision”)) In any event, a one-month difference in finality is immaterial given Mike’s Roofing could not have paid the nearly \$600,000 assessment in either April or May of 2015.

testimony – that is why it limited its finding that Mike’s Roofing had sufficient funds to pay premiums to the six years *before* April 2015. (FF 9, CR 10) The Coakers thus are not, as the Department asserts (Resp. Br. 41), asking this Court to ignore evidence favorable to the Department, but explaining why the Board’s own findings do not support its decision. *See Allen v. Dan & Bill’s RV Park*, 6 Wn. App.2d 349, 365, ¶ 42, 428 P.3d 376 (2018) (reversing agency decision unsupported by findings), *rev. denied*, 194 Wn.2d 1010 (2019).

The Department erroneously argues the Coakers acted willfully because they “chose not to pay any additional premiums to the Department after the Board decision became final in April 2015.” (Resp. Br. 48) In doing so, the Department repeats its mistake from *Shawn A. Campbel & Spouse DBA & E Acoustics LLC*, No.13 12674, 2014 WL 1398630 (Wash. Bd. Ind. Ins. App. Mar. 27, 2014). There – as here – the Department imposed personal liability because it “assess[ed] additional premiums against the company . . . after it had ceased operation” and rejected the officer’s defense he “paid what he believed was owed” while the company was operating. 2014 WL 1398630, at *1. The Board reversed because “[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.

Because Mike’s Roofing could not pay the assessment when it became final, here – as in *Campbel* – it is irrelevant that “there was not a genuine dispute about whether the Coakers *owed* additional premiums as of April 2015.” (Resp. Br. 43 (emphasis added); *see also* Resp. Br. 37 (“the Coakers knew this decision became final and binding in April 2015.”)) The Coakers have always acknowledged that, as of April 2015, Mike’s Roofing owed additional premiums. But they have also consistently asserted that Mike’s Roofing could not pay those premiums and that its mere inability to pay could not establish “willfulness.” (See App. Br. 35-41; CP 27; CR 35)

Having failed to recognize the limited scope of the Board’s findings, the Department erroneously defends a non-existent finding that Mike’s Roofing could have paid the Department’s assessment when it became final in April 2015 despite having ceased operations. (See Resp. Br. 38-40) But the Board did not make that finding for a reason – substantial evidence does not support it. The Department’s insistence that Mike’s Roofing had \$580,000 it could have used to pay the assessment in April 2015 and that the Coakers made a “conscious decision” to direct those funds elsewhere is meritless.

For example, the Department asserts the Coakers failed to “explain[] why the company would have no money as of April 2015” and “did not testify to any sudden or unexpected expenses . . . around this time.” (Resp. Br. 39) But the Coakers explained – and Judge Sheeran found – that they began winding up Mike’s Roofing because they could not pay the assessment, spending the last of its resources on fighting the assessment. (CR 83, 489) Mike’s Roofing’s lack of funds in April 2015 thus can be directly “attributed to the 2015 Board decision” (Resp. Br. 39) and the Coakers were not attempting to “evade paying” or “escape the debt” (Resp. Br. 1, 48), but recognizing the harsh economic reality imposed on them by Department.

The Department also points to Mike’s Roofing’s historical revenues – which it erroneously calls “profits” – as evidence it “had the financial capacity to pay the premiums the Board found it owed” in April 2015. (Resp. Br. 38, 40) But whether Mike’s Roofing could have paid additional premiums prior to April 2015 is irrelevant because there were no additional premiums to pay *until April 2015*. See RCW 51.48.055(2) (an officer “is liable *only* for premiums that *became due during the period* he or she” had responsibility for the payment of premiums) (emphasis added). The Coakers thus did absolutely nothing wrong in paying “amounts . . . owed to other state

agencies” during the first quarter of 2015 (Resp. Br. 8-9, 39) because the assessment was not yet final. *Campbel*, 2014 WL 1398630, at *8 (nonpayment of premiums before assessment was final was not willful because “a bona fide dispute regarding what was owed” existed until the officer’s appeal was “finally resolved”).

The Department also relies on Judge Sheeran’s “reasoning” – having just argued the Board’s reasoning was only a “stray comment” – to assert “that Mike’s Roofing had the financial ability to pay.” (Resp. Br. 42 (citing CR 93-95, 97)) Despite finding that Mike’s Roofing had no cash in April 2015, Judge Sheeran found that it could have paid the assessment because it could have “prepare[d] to pay for the assessment” as soon as it was “issued in November 2012.” (CR 95) Nothing required the Coakers to spend years saving to pay for an assessment that might never become final. Rather, they were “legally entitled” to “dispute[] the [assessment] on behalf of the company.” *Campbel*, 2014 WL 1398630, at *8.

The Department also cites Mr. Coaker’s statements to the Department after the assessment was final as evidence “he had made a conscious decision to not pay the Department.” (Resp. Br. 40) Mr. Coaker’s statement that he did not “intend” to pay the assessment reflects only that Mike’s Roofing *had no money to pay it* and his

understandable frustration over having lost the business he spent 25 years building. The Department's attempt to use Mr. Coaker's statements as evidence of willfulness underscores that the Board imposed personal liability on the Coakers for a \$580,000 assessment simply because Mike's Roofing could not pay it. (*See* App. Br. 38)

The Coakers could not have willfully failed to pay premiums they did not know where due, nor willfully failed to pay premiums they had no ability to pay. The Board's decision must be reversed.

C. The Coakers are entitled to their attorney's fees under the Equal Access to Justice Act.

The Coakers are entitled to their attorney's fees under the Equal Access to Justice Act. The Department's order was not "substantially justified" (Resp. Br. 44-48), but rests on an absurd interpretation (*see* § II.A) and a Board decision it now disavows. (*See* § II.B.1) The Coakers will submit a financial declaration under RAP 18.1(c), mooting the Department's concern "there has been no finding that the Coakers are qualified parties." (Resp. Br. 44)

III. CONCLUSION

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

Dated this 22nd day of June, 2020.

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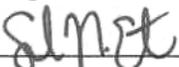
DECLARATION OF SERVICE

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

That on June 22, 2020, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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