

FILED  
Court of Appeals  
Division II  
State of Washington  
4/21/2020 1:50 PM

NO. 53906-3-II

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

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MICHAEL AND MARILEE COAKER, and the marital community  
composed thereof,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT,  
DEPARTMENT OF LABOR AND INDUSTRIES**

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## I. INTRODUCTION

A person who flouts a final decision that compels them to pay state industrial insurance premiums has willfully failed to pay those premiums. To ensure that Washington State's industrial insurance fund is fully funded to protect workers, RCW 51.48.055 directs the Department to assess personal liability to a corporate officer of a defunct business if the officer willfully failed to pay the industrial insurance taxes that the company owed the Department. This statute furthers the Industrial Insurance Act's larger purpose of ensuring that industrial insurance taxes are available to cover the benefits the Department provides to injured workers.

Michael and Marilee Coaker, the owners of Mike's Roofing, Inc., dissolved the company in 2015, shortly after receiving a final decision that found that Mike's Roofing owed the Department \$580,000 in workers' compensation premiums, penalties, and interest. Mike's Roofing had failed to pay industrial insurance taxes and compounded this dereliction by failing to cooperate during the investigation. These are not disputed facts. Mike's Roofing, which the Coakers controlled, did not appeal the \$580,000 assessment—admitting its correctness. Instead, the Coakers decided not to pay even a portion of the amount and chose to wind down their business in order to evade paying.

Because they dissolved their business and because they controlled the decision not to pay the taxes, the Department issued a notice of assessment assigning the Coakers with personal liability. The narrow exception in RCW 51.48.055(4) does not apply here because Mike's Roofing did not finalize the bankruptcy until several months after the Department assessed the Coakers with personal liability for the company's debts. An employer or other person who appeals a notice of assessment of taxes must show that the assessment was incorrect as of the date the Department issued the assessment, and Mike's Roofing had not discharged its assets through bankruptcy until well after the Department issued the assessment. The Coakers's argument that the Legislature designed the bankruptcy provision to allow a corporate officer who has willfully failed to pay for premiums to escape liability once the Department has assessed personal liability would provide a loophole that undermines the important worker protection purposes of the Industrial Insurance Act.

The Board of Industrial Insurance Appeals (Board) and superior court properly upheld the Department's assessment of personal liability. This Court should affirm.

## **II. ISSUES**

- 1. Under RCW Title 51, the Board and the courts have only appellate authority over the Department's notices of assessment and so may review only the facts as of the**

**date of the Department's notice. At the time of the Department's notice, Mike's Roofing had neither begun nor finalized its bankruptcy. Did RCW 51.48.055(4)'s exemption apply?**

- 2. A final Board decision directed Mike's Roofing to pay the Department \$580,000. Not only did the Coakers pay none of the premiums, Mr. Coaker signaled to the Department that he would not pay them. Does substantial evidence support the Board's finding that the Coakers willfully failed to pay sums that they knew they owed the Department?**
- 3. Attorney fees are not payable under the Equal Access to Justice Act unless the State's position was not substantially justified. The Department's position is supported by the language of the statute and the only available legal authority. If the Coakers prevail, should they receive fees?**

### **III. STATEMENT OF FACTS**

#### **A. After the Department Obtained a Final Decision From the Board Requiring Mike's Roofing To Pay Premiums, Mike's Roofing Dissolved**

Mike's Roofing was a general contractor that performed roofing and other contracting work on residential and commercial property.

AR 383-84. Mike Coaker started the business in 1988 and incorporated in the 1990s. AR 382-83. At all times, Mr. Coaker owned at least fifty percent of the company. AR 444. When the company dissolved, Mr. Coaker and his wife, Marilee Coaker, each owned fifty percent of the business. AR 444, 481-82. From 2009 to 2012, and afterwards, both

Mr. and Ms. Coaker signed checks paying industrial insurance premiums.  
*See* AR 589.

In May 2012, the Department audited Mike's Roofing about the premiums it owed from 2009 to 2012. AR 412. Mike's Roofing failed to provide the Department with any records in response to the audit, so the Department estimated the premiums due and concluded that Mike's Roofing owed much more premiums than it had paid for that period. *See* AR 892-912. Mike's Roofing appealed this decision to the Board, and a Board judge issued a proposed decision and order that affirmed the Department's assessment. AR 892-912. Mike's Roofing did not petition for review from the proposed decision, so the Board adopted it as a final decision on April 2015. AR 663. Mike's Roofing did not appeal it.

Mr. Coaker filed articles of dissolution for Mike's Roofing, which became final on October 2015. AR 437; 670-71. He began winding down the business "sometime in early 2015." AR 436. Mr. Coaker asserted that he ended the business because of the Department's assessment. AR 436.

**B. Mike's Roofing Did Not Pay Any Portion of the Assessment To the Department After the Board Decision Affirming the Assessment Became Final**

After the Board decision affirming the Department's assessment became final, the Department assigned Jessica Rubin, a revenue agent, to collect the taxes Mike's Roofing owed the Department. AR 555. Rubin

contacted Mr. Coaker in May 2015, and asked him if he intended to appeal the Board's decision, and Mr. Coaker said he would not. AR 555. Mr. Coaker informed Rubin that he would close the business but said he did not know when this would occur. AR 556. Mr. Coaker said he had other things to do, said "good bye," and terminated the phone call. AR 556.

Rubin contacted Mr. Coaker again, and asked him if he was interested in a payment plan, which would give him more time to pay the assessment. AR 556. Mr. Coaker asked, "Do you think I am going to pay you?" AR 556. Rubin understood Mr. Coaker to mean that he did not intend to pay the assessment. AR 556. Rubin then filed a lien on Mike's Roofing's bank account and levied \$377.63. AR 557.

Because Mr. Coaker had specified that he would terminate his business and had suggested that he did not intend to ever pay the assessed amount, the Department issued an order revoking Mike Roofing's certificate of industrial insurance. AR 557-58. Revoking the certificate meant that Mike's Roofing could not lawfully employ any workers. AR 558. The Department personally served this order on Mike's Roofing's last known address, which was the Coakers's home. AR 559. The next day, Mr. Coaker came to Rubin's office at the Department and instructed her to never come to his house. AR 559. Rubin tried to discuss the amount that Mike's Roofing owed the Department, but Mr. Coaker did

not want to talk about it. AR 559-60. Mr. Coaker said that he would have his attorney contact the Department. AR 560. No challenge was filed to the revocation of the certificate.

Rubin later learned that Mr. Coaker had applied for a new business with the Secretary of State. AR 560-61. This paperwork listed Mr. Coaker as the only member of the new company. AR 561. The Department issued an order charging the new business with successor liability for Mike's Roofing. *See* AR 498-99.<sup>1</sup> But Mr. Coaker asserted that he had listed himself as a member of the new company by accident, as a result of signing the wrong line of the document; he was merely trying to help his mother, Pat Coaker, start a new business, and he was not a member of the new business. AR 494-95. Mr. Coaker filed an amended application with the Secretary of State that did not list himself as a member of the company. AR 495. The Department rescinded the order charging the new business with successor liability. AR 499. Mr. Coaker later performed work for the new business for a year and half, until he had an injury. AR 500-01.

**C. The Department Assessed the Coakers with Personal Liability for the Unpaid Assessment**

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<sup>1</sup> Under RCW 51.16.200, the Department may charge a new business with liability for another employer's unpaid premiums, if the Department determines that the new business is the successor of the other employer.

On January 22, 2016, the Department sent the Coakers a letter warning them that the Department could find them personally liable for the unpaid premiums owed by Mike's Roofing. AR 567. The Department asked the Coakers to either pay the unpaid premiums or contact the Department by January 31, 2016. AR 567. The Coakers did not respond to the letter, so the Department issued a notice of assessment on February 1, 2017, that found them personally liable for the unpaid premiums, penalties, and interest. AR 567. On March 8, 2016, an attorney for the Coakers faxed a letter to the Department challenging the assessment of personal liability. AR 568. The Department affirmed the assessment of personal liability on June 16, 2016. AR 887-89.

The Coakers appealed the assessment of personal liability to the Board. AR 890. At the Board, Mr. Coaker testified that he did not believe the Department should have audited him in 2012 and that he disagreed with the 2012 audit's findings. AR 419-20. As for the time covered by the audit, he denied that he ever deliberately under-reported hours, misclassified staff, or underpaid premiums. AR 423-24. He testified that he understood the Board's decision on the 2012 audit to mean that Mike's Roofing owed the Department about \$500,000. AR 427. His understanding was that the Board's decision became final on April 13, 2015. AR 436.

Mr. Coaker testified that Mike's Roofing filed for bankruptcy in early 2017. AR 437. He confirmed that as of the date of the Board's hearing (September 2017), the bankruptcy process was not yet complete. AR 437.

Gloria Stucky testified that she performed payroll processing for Mike's Roofing. AR 503. She prepared reports and provided them to the Department of Labor and Industries and the Employment Security Department. AR 514. When generating these reports, she relied on information the Coakers provided. AR 514.

The Department expert who issued the personal liability order explained the basis for the finding that the Coakers were personally liable for Mike's Roofing's unpaid assessment. AR 588-89. The first element was whether Mike's Roofing had dissolved, and documents from the Secretary of State confirmed that it had dissolved. AR 588-89. The second element was whether the Coakers had the authority to pay industrial insurance premiums for Mike's Roofing. AR 589. The Department expert noted that the Coakers signed the checks and Mr. Coaker confirmed that any payments were made at his direction. AR 589.

The third element was whether the failure to pay was willful. AR 589. The witness concluded that the Coakers willfully failed to pay premiums to the Department based on records from the Department of

Revenue and Employment Security Department, which revealed that Mike's Roofing did not owe any outstanding balance to either agency as of 2015 or 2016. AR 563-65, 589-91. This information revealed that Mike's Roofing had paid the necessary amounts to those agencies, yet Mike's Roofing made no payments to the Department of Labor and Industries. AR 589-91. And the Department expert noted that Mr. Coaker had made statements both to the expert and to another Department employee that revealed that Mr. Coaker did not intend to pay the Department any premiums. AR 591.

The Department introduced records that showed the amount of taxable income that Mike's Roofing earned from January 2009 through September 2015. AR 914-1042. From January 2009 through December 2012, Mike's Roofing showed earnings most months, with significant variation from month to month. *See* AR 914-94. For example, Mike's Roofing had income of \$965,220.94 in December 2012 but reported no income in November 2012 and income of \$97,746.81 in October 2012. AR 990-94.

In 2013, Mike's Roofing reported no income for several months but reported income of \$109,019.09 for January, \$259,911.96 for February, \$123,686.59 for March, \$174,498.45 for August, \$122,729.73 for September, \$665,511.41 for November, and \$136,816.57 for

December. AR 995-1015. In 2014, Mike's Roofing reported no income except for the month of January (\$103,656.65). AR 1017-29. Mr. Coaker did not testify about why there was little income in 2014.

In 2015, Mike's Roofing reported income of \$13,184.86 for January, \$12,875.51 in February, \$47,618.50 in March, and \$18,716.16 in April, but no earnings after that, which fits with Mr. Coaker's testimony that he began winding up the business around April 2015. AR 436; 1030-1042.

**D. The Board Upheld the Department's Decision To Find the Coakers Personally Liable for Mike's Roofing's Unpaid Premiums and the Superior Court Affirmed**

The Board judge issued a proposed decision that upheld the Department's assessment of personal liability against the Coakers. *See* AR 80-101.<sup>2</sup> The judge issued the proposed decision on October 27, 2017. AR 98.

The Coakers petitioned for review with the Board in December 2017 and attached a declaration from their bankruptcy attorney dated November 23, 2017. AR 24-74. The declaration said that the Coakers' bankruptcy became final on November 14, 2017. AR 70. The petition

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<sup>2</sup> The judge required the Department to recalculate the amount of the offset because it included amounts other than premiums, interest, and penalties on the interest. AR 80-101. But the judge otherwise upheld the order. *See* AR 80-101.

argued that the Coakers were exempt under RCW 51.48.055(4) because of the bankruptcy. AR 38-40.

The Board granted review but reached the same result as the proposed decision. AR 6-12, 23. The Board declined to reopen the record to include the bankruptcy attorney's declaration, concluding that the newly offered evidence would not affect its decision because the Board interpreted RCW 51.48.055(4) to require the company to complete the bankruptcy before the Department issued the notice of assessment. AR 6-8. The Board cited one of its previous decisions, *In re Jaz Services, LLC*, No. 13 11377, 2015 WL 3551186 (Wash. Bd. Indus. Ins. App., April 9, 2015), for the conclusion that the bankruptcy had to be complete at the time of the Department's notice of assessment for RCW 51.48.055(4) to apply. AR 7. The Board also rejected the argument that the statute of limitations had run out and the argument that the Coakers' failure to pay taxes was not intentional. AR 8-9.

The Board made findings of fact that:

4. At least 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.

...

6. Michael Coaker was President and Marilee Coaker was Vice President of Mike's Roofing and each had responsibility for ensuring that industrial insurance premiums were reported and paid when due between the third quarter of 2009 and when Mike's Roofing ceased operations in 2015.
7. Michael and Marilee Coaker were exempt from mandatory coverage under Title 51 during the relevant time periods.
8. Mike's Roofing ceased operations in April 2015 and dissolved as a corporation on November 9, 2015. The choice to cease operations was a conscious, intentional, and voluntary choice by Mr. and Mrs. Coaker.
9. Between July 1, 2009, and April 2015, Mike's Roofing had in its possession and control sufficient funds that could have been used to pay the amount owed to the Department in full.
10. Michael Coaker and Marilee Coaker had actual knowledge of the debt owed to the Department and made an intentional, conscious, and voluntary choice to pay other obligations with the firm's funds, and not pay the amount due to the Department for the assessment against Mike's Roofing.
11. Michael Coaker and Marilee Coaker had the option to set up a payment plan for the assessment owed to the Department, but refused.
12. Michael Coaker and Marilee Coaker's failure to pay the assessment owed against Mike's Roofing was willful.
13. The completion of Mike's Roofing's Chapter 7 bankruptcy action did not occur prior to the Department's assessment of personal liability, nor in conjunction with the dissolution of the corporation.

AR 10.

The Coakers appealed the Board's decision to superior court. CP 1-12. The court affirmed the Board's decision, determining that substantial evidence supported the Board's findings and that it did not commit an error of law. CP 86-87.

The Coakers appeal. CP 84-87.

#### **IV. STANDARD OF REVIEW**

The Department has original jurisdiction in industrial insurance matters. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). When the Department issues a personal liability order against individuals for a corporation's unpaid workers' compensation premiums, penalties, and interest, the individual can appeal to the Board. RCW 51.48.055(5); RCW 51.48.131. Although the Board engages in de novo review, its authority is appellate only and it cannot expand the issues ruled on by the Department. RCW 51.52.100; *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 490, 288 P.3d 630 (2012). The Coakers bear the burden to show that the notice of assessment charging them personal liability is incorrect. *See* RCW 51.48.131; RCW 51.52.050; *Scott R. Sonners, Inc. v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 355, 3 P.3d 756 (2000).

The Administrative Procedure Act governs appeals beyond the Board. RCW 51.48.131; RCW 34.05.570(3)(d); *Probst v. Dep't of Labor*

*& Indus.*, 155 Wn. App. 908, 915, 230 P.3d 271 (2010). Both the superior court and appellate court review the assessment based on the record before the Board. *Probst*, 155 Wn. App. at 915.

Under the APA, the Coakers bear the burden to prove the Board decision is incorrect. RCW 34.05.570(1)(a). This Court reviews the Board’s findings to determine whether substantial evidence supports them. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004). Evidence is “substantial” when it is enough to persuade a fair-minded person of the truth of a declared premise. *Id.* Under substantial evidence review, appellate courts do not reweigh the evidence. *Id.* Instead, courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *Kittitas Cty. v. Kittitas Cty. Conservation*, 176 Wn. App. 38, 48, 308 P.3d 745 (2013).

The court reviews the Board’s legal conclusions de novo, giving substantial weight to the agency’s interpretation when the subject falls within the agency’s area of expertise. *Dep’t of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 704, 54 P.3d 711 (2002).

## V. ARGUMENT

While acting as officers of Mike’s Roofing, the Coakers willfully failed to pay the Department any of the premiums that the Board directed Mike’s Roofing to pay. RCW 51.48.055 authorizes the Department to

charge the officers of a company with personal liability for unpaid premiums after a business dissolves if the officers willfully failed to pay the premiums while the company was active. The Board and superior court properly determined that the exemption in RCW 51.48.055(4) does not apply because Mike's Roofing had not finalized the bankruptcy process (or even begun it, for that matter) at the time of the Department's assessment. And contrary to the Coakers' arguments, substantial evidence supports the Board's finding that they willfully failed to pay premiums to the Department that they knew Mike's Roofing had to pay.

This Court should affirm.

**A. RCW 51.48.055(4) Does Not Apply Here Because Mike's Roofing Did Not Declare Bankruptcy Until After the Department Issued the Notice of Assessment**

A corporation must complete the bankruptcy process before the Department issues a notice of assessment for the exemption in RCW 51.48.055(4) to shield a corporate officer from liability. Any other reading would undermine the purpose of RCW 51.48.055, which is to allow the department to collect premiums from defunct corporations when the corporation's officers willfully failed to pay premiums. And this reading reflects the bedrock principle in the Industrial Insurance Act that it is the party's status as of the date of a Department order—here, the notice

of assessment to the Coakers—that is relevant when determining whether the Department’s order is correct; later changes are irrelevant.

**1. The purpose of RCW 51.48.055 is to ensure that employers cannot escape their responsibility to pay premiums to the Department by dissolving their companies**

The Industrial Insurance Act requires employers “to report and pay workers’ compensation premiums for all covered workers.” *Dep’t of Labor & Indus. v. Lyons Enters. Inc.*, 185 Wn.2d 721, 725-26, 374 P.3d 1097 (2016); RCW 51.08.180; RCW 51.16.060. The Act’s fundamental purpose is to reduce economic suffering caused by industrial injuries and have broad coverage to advance that goal. RCW 51.04.010; RCW 51.12.010. The more a statute facilitates full collection of premiums, the better it serves the accident fund from which the Department pays injured workers—ensuring the fund may protect workers. *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 426, 873 P.2d 583 (1994).

RCW 51.48.055 authorizes the Department to find the officers of a dissolved corporation personally liable for the company’s unpaid debts. As the court observed in *Hopkins*, this statute ensures that the Department can collect unpaid premiums even if the company that failed to pay the premiums has dissolved. *Hopkins v. Dep’t of Labor & Indus.*, 11 Wn.

App. 2d. 349, 355-56, 453 P.3d 755 (2019); *see Littlejohn*, 74 Wn. App. at 426. The Department relies on premiums from employers to pay for the benefits it provides to workers who suffer on the job injuries. *Hopkins*, 11 Wn. App. 2d at 355; *WR Enterprises, Inc. v. Dep't of Labor & Indus.*, 147 Wn.2d 213, 216-17, 53 P.3d 504 (2002). Preventing the Department from collecting premiums that the defunct business owed to it undermines this purpose.

And as *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009), emphasizes, a core purpose of the Industrial Insurance Act is to allocate the cost of injuries to employers, since this provides employers with an incentive to provide their workers with safe workplaces. This goal would be undermined by a rule of law that allows a company's governing officers to willfully fail to pay the Department premiums and then escape responsibility for those amounts by dissolving the company, as that would mean that neither the employer nor the officers pay the premiums that they owed the Department. RCW 51.48.055 closes this gap in coverage by allowing the Department to assign personal liability to the officers for those unpaid premiums.

RCW 51.48.055(4) provides a limited exemption for corporate officers who would otherwise be subject to a notice of assessment. The Department cannot charge the officer with an assessment if all company

assets have been applied to its debts through bankruptcy or receivership. But subsection (4) does not apply here because Mike’s Roofing had not finalized the bankruptcy until after the Department issued its notice of assessment to the Coakers.

**2. RCW 51.48.055(4) applies only if the party completed the bankruptcy process before the Department issued its notice of assessment**

The plain language of RCW 51.48.055 and RCW 51.48.131, read in the context of the Department’s original jurisdiction in industrial insurance cases, resolves this matter.

**a. RCW 51.48.050 and RCW 51.48.131 show that the relevant date is the date of the notice of assessment**

When RCW 51.48.055 is read as a whole, and along with related provisions and with general principles underlying the Industrial Insurance Act, the only reasonable interpretation of the statute is that the subsection applies only when the corporate officer claiming the exemption completed the bankruptcy process before the Department issued the notice of assessment. Any other reading would render RCW 51.48.055 toothless, undermining RCW 51.48.055’s fundamental objectives.

The ultimate goal in interpreting a statute is to determine and carry out the Legislature’s intent. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015). “The meaning of words in a statute is not gleaned

from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quotation marks and citations omitted). When more than one statute is relevant to deciding an issue, the court reads “statutes together to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.” *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 792, 357 P.3d 1040 (2015) (quotation marks and citations omitted).

Reading RCW 51.48.055 subsections (1), (2), and (4) together shows that the defense provided in subsection (4) applies only if the bankruptcy process is complete before the Department issues its notice of assessment. The statute provides:

*(1) 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 the department under chapter 51.16 RCW.*

For purposes of this subsection “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.

(2) The officer, member, manager, or other person *is liable* only for premiums that *became due* during the period he or she had the control, supervision, responsibility, or duty to act for the corporation described in subsection (1) of this section, plus interest and penalties on those premiums.

...

(4) The 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.

RCW 51.48.055 (emphasis added).

Under subsection (1), it is the corporation’s dissolution (or abandonment or termination) that triggers the corporate officer having liability for the corporation’s unpaid premiums, penalties, and interest. Subsection (2) clarifies that the officer is liable for premiums that “became due” at a time that the officer had control over the payment of premiums. So read together, subsections (1) and (2), the “dissolution” of the company makes the officer “liable” for unpaid premiums that “became due” during a period of control.

Subsection (4) then provides that, even if the company has dissolved, the officer is not liable for the unpaid premiums that “became due” if all of the corporation’s assets *have been applied to the company’s*

*debts* through bankruptcy or receivership. So if all of the company's debts have been discharged through bankruptcy when the Department issues a notice of assessment charging the officer with personal liability, the notice of assessment would be wrong: the officer "is not liable" for the unpaid premiums because all the assets "have been applied" to the company's debts. RCW 51.48.055(4). But if, as here, the company has not declared bankruptcy when the Department issues its assessment, let alone completed the bankruptcy process, then the officer is liable for the unpaid premiums, penalties, and interest because it would not be true that all of the company's assets "have been applied" to its debts. *Id.*

That subsection (4) is written in the present tense supports the Department, not the Coakers. The Coakers correctly point out that RCW 51.28.055(4) is not written in the past tense. AB 21-22. The subsection 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*"). But it does not follow that subsection (4) can be invoked to render an assessment retroactively incorrect. Rather, the present tense language in subsection (4) relates to the corporate officer's liability to an order charging the officer for unpaid premiums that "became due" during the officer's control. So the officer "is not liable" related to a notice of

assessment charging them with personal liability if all of the company's assets "have been applied" to its debts at that time. RCW 51.48.055(4).

More support for this conclusion comes from RCW 51.48.055(5). RCW 51.48.055(5) provides that the Department assesses personal liability against an officer by issuing a "notice of assessment." RCW 51.48.055(5) also provides that individuals have the right to appeal such notices of assessment under RCW 51.48.131.

The Legislature's adoption of the appeal process in RCW 51.48.131 confirms that the inquiry on appeal concerns the facts as they existed on the date that the Department issued its notice of assessment. RCW 51.48.131 provides that an appeal "shall set forth with particularity the reason for the employer's<sup>3</sup> appeal and the amounts, if any, that the employer admits are due." If the Board grants the appeal, then "[t]he burden of proof rests upon the employer in an appeal to prove that the taxes and penalties *assessed upon the employer in the notice of assessment are incorrect.*" RCW 51.48.131 (emphasis added). Thus, both the notice of appeal, and the evidence presented at hearing, must address the specific amount assessed by the Department in a specific notice of assessment. This interpretation tracks RCW 51.48.120, which governs

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<sup>3</sup> RCW 51.48.131 also governs the process used when an employer appeals a notice of assessment.

notices of assessment against an employer who fails to pay premiums that are due and provides that the notice of assessment shall “certify[] the amount due.”

The Legislature thus contemplated that appeals from notices of assessment in personal liability cases would involve a challenge to a specific notice of assessment, which the Department issued on a specific date, demanding a specific sum of money from that individual. Since the amount that an employer owes the Department in industrial insurance premiums can change over time for a variety of factors, the only way to show that a notice of assessment is incorrect is to show that it was an incorrect assessment of that person’s liability when the Department issued it. If an employer could challenge a notice of assessment based on changes in the employer’s status that took place after the Department issued the notice, then there could never be an end to litigation, because it would always be possible that some new event would change the amount the employer owes the Department. And it would encourage firms to strategically wait to file bankruptcy.

When RCW 51.48.055 is read in this context, it follows that a person who appeals a notice of assessment charging the person with personal liability must show that the assessment of personal liability was incorrect on the date the Department issued the notice of assessment. And

RCW 51.48.055(4) only makes an assessment of personal liability incorrect on the date the Department issued it if the business had completed the bankruptcy process as of the date of the Department's notice of assessment.

**b. The personal-liability statute is part of the Department's original jurisdiction to administer the Act, allowing the Board to review only the correctness of the Department's notice of assessment at the time it is issued**

The personal-liability statute also needs to be construed as part of the Industrial Insurance Act as a whole, with the legal effect of orders issued by the Department, and the role of the Department and Board, established by decades of case law. A notice of assessment is simply another type of Department order. And the case law has long established that in a challenge to an order issued by the Department, in various contexts, the relevant date is the date of the order, not a later date. *Turner v. Dep't of Labor & Indus.*, 41 Wn.2d 739, 742, 251 P.2d 883 (1953) (evidence that disability occurred after the closing date in pension claim is not relevant); *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952) ("Because of the appellate nature of the proceeding before the board, the aggravation for which compensation is awarded must be that which is shown before the supervisor, and it can only be that which has occurred when he hears the claim."); *Roberts v. Dep't of Labor &*

*Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1955) (had to show permanent partial disability as of date of order).

Focusing on the party's status as of the date of the Department's assessment of personal liability reflects the bedrock principle that the Department is the only entity with original jurisdiction over industrial insurance issues, while the Board and the courts have appellate authority only. *See Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 220-21, 292 P.2d 865 (1956); *Karniss*, 39 Wn.2d at 901. If the Department issues an order and a party's status later changes after that order was issued, the Department has necessarily adjudicated the person's status only as of the date of its order, not as of the date of the later event. *E.g. Roberts*, 46 Wn.2d at 425. So if the Board or a court were to adjudicate the case based on a change in status that took place after the Department issued its notice of assessment, then they would effectively be exercising original jurisdiction over an issue that the Department never addressed. And they lack the authority to do that. *See Brakus*, 48 Wn.2d. at 220-21; *Karniss*, 39 Wn.2d at 901-02.

- c. **The Board—whose decisions are entitled to great deference—has previously decided that it may only review Department decisions at the date of the notice of assessment in personal liability cases**

The Board, whose interpretations of the Industrial Insurance Act are not binding but are entitled to great deference, *Weyerhauser v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991), agreed with the Department that RCW 51.48.055(4) applies only when the employer completed the bankruptcy process as of the date of the Department's notice of assessment. Along with reaching that conclusion here, the Board reached that conclusion in *Jaz Services*, 2015 WL 3551186 at \*3.<sup>4</sup> And as *Jaz Services* correctly notes, because the Board only has appellate authority over decisions of the Department, the Board must decide the correctness of a notice of assessment based on the party's status at the time of the notice of assessment, not based on a subsequent change in status. *Jaz Services*, 2015 WL 3551186 at \*3.

That the Board and the courts can consider new evidence when deciding whether a Department order is correct does not mean that they can adjudicate issues that the Department did not consider when it issued its order. The Coakers argue that the courts not uncommonly consider evidence that surfaced after a court proceeding had begun and claim that

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<sup>4</sup> While the Board did not designate *Jaz Services* a significant decision, the Court of Appeals may consider Board decisions as persuasive authority when deciding questions of law, no matter if the decision has been designated significant. *See, e.g., Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012) (citing *In re David Killian*, No. 06 17478, 2007 WL 4986270 (Wash. Bd. Indus. Ins. App. Nov. 20, 2007), and *In re Bobbie Thomas*, Nos. 04 17345 & 04 17536, 2006 WL 2989442 (Wash. Bd. Indus. Ins. App. May 17, 2006)).

that means that the Board and the courts should interpret RCW 51.48.055(4) to apply even if the company declared bankruptcy after the Department issued its order. AB 32. But while it is true that a party can sometimes offer newly discovered evidence, the newly discovered evidence must still relate to the parties' status as of the date of the Department's order, or else the newly discovered evidence is irrelevant. *See, e.g., Roberts*, 46 Wn.2d at 425.

For example, if a worker appeals a closing order issued by the Department, then the worker cannot present evidence that the worker's condition became aggravated after the claim was closed because that would be a change in status that took place *after* the Department issued its order, which the closing order did not address. *See id.* But the worker could present the testimony of a doctor who examined a worker after the Department issued its order, if the doctor testified that the worker's condition at the time of the closing order was likely the same as the worker's condition at the time of the new examination. *See id.* This is because the evidence—whether old or new—must relate to the worker's status as of the date of the Department's order.

Here, the new evidence that the Coakers wished to offer—that Mike's Roofing completed the bankruptcy process after the Department issued its order—related to a change in status that took place after the

Department issued its notice of assessment, which the Department's order did not address. If Mike's Roofing had completed the bankruptcy process before the Department issued its assessment, but the Coakers uncovered evidence of this fact *after* the Department issued the assessment, the evidence would be relevant, because it would show that the bankruptcy process was complete before the Department issued its assessment. But that is not what they did here: they sought to offer evidence about something that happened after the Department issued the assessment, and this evidence did not relate back to their status as of the date of the assessment. The Board therefore properly excluded it.

**3. Reading RCW 51.48.055(4) to apply only when the employer had completed the bankruptcy process as of the date of the Department's order is necessary to prevent RCW 51.48.055 from becoming useless**

The Coakers ask for an extremely broad reading of the exemption. Not only is this unreasonable reading contrary to the plain language of the statute, reading RCW 51.48.055(4) in the Coakers' way renders it virtually useless as a mechanism to collect premiums from defunct employers. If the corporate officer can file for bankruptcy on the company's behalf long after the Department issued its notice of assessment, and if doing so causes the Department's notice of assessment to become retroactively incorrect, then the exception in subsection (4) swallows the rule. Because

there is no deadline for a corporation to file for bankruptcy, the corporation's controlling officers can unilaterally terminate their own liability at any time under that reading of the statute. On the other hand, requiring the corporation to complete the bankruptcy process before the Department issues its order means that the officers cannot unilaterally immunize themselves from liability at any time, which means RCW 51.48.055 remains effective as a tool to collect premiums.

And requiring the employer to have completed the bankruptcy process before the Department issues its notice of assessment also helps ensure that the bankruptcy process itself is a meaningful one. If the corporation has to complete the bankruptcy process before the Department issues its order, this gives the corporation (and its officers) an incentive to file for bankruptcy right after discovering that the company cannot pay its obligations. And the earlier a company files for bankruptcy, the more likely it is that it will still have assets that can be distributed to creditors through the bankruptcy process. On the other hand, if the company declares bankruptcy long after it has dissolved as a corporation, it likely has already liquidated most or all of its assets, so, when it finally does declare bankruptcy, there will likely be nothing to distribute to creditors.

RCW 51.48.055(4)'s language—"[t]he 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”—shows that the Legislature contemplated that the bankruptcy process would cause the corporation’s assets to be applied to its debts. If the corporation still has assets when it declares bankruptcy, then this is more likely to occur. But if the corporation has unloaded its assets and then declares bankruptcy years later, then the Legislature’s purpose in enacting subsection (4) is not served, because the bankruptcy process may not help any of the corporation’s creditors obtain any portion of the amounts they were owed.<sup>5</sup> So requiring the corporation to complete the bankruptcy process before the Department issues its order for its officers to use the defense under subsection (4) both furthers the purposes of RCW 51.48.055 as a whole (by ensuring that the statute is still meaningful as a collection tool) and of subsection (4) itself (by ensuring that the bankruptcy process provides a meaningful benefit to the corporation’s creditors).

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<sup>5</sup> A bankruptcy trustee has tools available to try to undo transactions that occurred before the corporation filed for bankruptcy, but those tools have time limitations. *See, e.g.*, 11 U.S.C. § 547(b) (trustee may void a preferential transfer of property to a creditor done 90 days prior to filing for bankruptcy, or up to a year before filing for bankruptcy in the case of an insider). Creditors can also seek avoidance of fraudulent transfers of property by the corporation but must initiate a suit within four years of the fraudulent transaction. RCW 19.40.041; RCW 19.40.091. The earlier the bankruptcy is filed after the company stops doing business, the more likely it is that the trustee can provide meaningful relief to the creditors and that the creditors can protect their rights.

The Coakers argue that the Legislature’s purpose in including subsection (4) in RCW 51.48.055 was to extend the “bedrock principle” that corporate officers are generally not personally liable for the debts of a corporation. AB 22. But this does not make sense: if the Legislature intended for corporate officers to have no liability for the corporation’s unpaid premiums, it would not have bothered to enact RCW 51.48.055 in the first place. It also makes no sense that the Legislature would create a loophole that effectively guts the extension of personal liability.

The Coakers cite a portion of the bill report to try to bolster their argument, but the portion of the report they cite was describing the then-current state of the law *before* the enactment of RCW 51.48.055. *See* AB 22. In the portion of the bill report that summarizes the bill’s changes to the law, the report states that corporate officers are liable when the corporation dissolves and the officers willfully failed to pay premiums. *See* Engrossed Substitute House Bill 3188, Final Bill Report 3 (2004). The Legislature intended to change the status quo by enacting RCW 51.48.055 to revoke corporate immunity, not to maintain the status quo by keeping it intact.

The Coakers also argue that the Department and Board’s interpretation of RCW 51.48.055(4) renders that subsection meaningless and leads to an absurd result, but the Coakers’ argument leads to

RCW 51.48.055 itself becoming meaningless and absurd. AB 25-29. It is implausible that the Legislature would impose personal liability on corporate officers but create an exemption to that undermines the statute. The Coakers' argument fails for four reasons.

First, the Coakers believe that RCW 51.48.055 is a debt relief statute that operates to give corporate officers freedom from their willful nonpayment if the company they controlled files for bankruptcy after the notice of assessment. AB 25. But the reference to bankruptcy references the status quo of the defunct company's situation as a shield at the time of the notice of assessment and there is no intent from the Legislature to use it as a sword to relieve a company's officers from their willful acts after the notice of assessment.

Second it grossly overstates the case to assert that a company has no reason to file for chapter 7 bankruptcy other than doing so to trigger RCW 51.48.055(4)'s exemption. Indeed, the very data the Coakers cite shows that while more individuals than corporations file for bankruptcy, almost 14,000 corporations filed for chapter 7 bankruptcy in 2018 alone. *See* AB 25. It is unlikely that all of those corporations did so to try to obtain the benefits of RCW 51.48.055(4) for their corporate officers. And to put the data in perspective, there are many more people in Washington State than there are corporations, so it is no surprise that there would be

many more individuals than corporations who have declared bankruptcy in a given year.

Third, if it was pointless for a corporation to ever file for bankruptcy, it would not make sense for the Legislature to include subsection (4) within RCW 51.48.055 just to encourage corporations to file otherwise meaningless bankruptcies. Rather, it is more plausible that the Legislature included subsection (4) in that statute to encourage defunct corporations to file bankruptcy promptly upon learning that they cannot pay their debts, in order to help ensure that their creditors receive at least some portion of what they are owed from the corporation's remaining assets. And this purpose is furthered by encouraging the filing of early, not late, bankruptcies.

Finally, the Department's interpretation of RCW 51.48.055(4) does not make the subsection meaningless, as it does not make it impossible for a corporation to declare bankruptcy in time for the corporate officer to obtain the benefit of that subsection. In the case of the Coakers themselves, they could have had Mike's Roofing complete the bankruptcy in time to avoid personal liability if they had filed for bankruptcy upon learning that it was impossible for them to pay Mike's Roofing's debts, including the assessment. And in any event, under the Board and Department's reading of the statute, there will almost certainly be cases in

which a company declares bankruptcy, and completes that process, before the Department issues an assessment of personal liability. When that happens, the statute will make the corporate officers exempt from personal liability. That it might be challenging for a corporate officer to obtain the benefit of subsection (4) to excuse the officer from willfully failing to pay taxes (which the Department needs to take care of injured workers), does not make the subsection meaningless.

**B. Substantial Evidence Supports the Board’s Finding That the Coakers Willfully Failed To Pay Premiums That They Knew Mike’s Roofing Owed the Department**

The Board’s findings have ample support in the record and establish that the Coakers are subject to personal liability as a result of willfully failing to pay premiums that they knew Mike’s Roofing owed to the Department in their capacity as officers of that corporation. The Board and superior court properly upheld the Department’s assessment of personal liability and this Court should affirm.

- 1. Under RCW 51.48.055(1), the Coakers are personally liable because Mike’s Roofing dissolved, the Coakers were officers who had the authority to pay premiums on behalf of Mike’s Roofing, and the Coakers willfully failed to pay those premiums**

RCW 51.48.055(1) provides the test to establish personal liability.

Under that subsection, a corporate officer is personally liable for the unpaid premiums of a corporation if:

- The corporation has been terminated, dissolved, or abandoned;
- A corporate officer had control or supervision over payment or reporting of industrial insurance, or is charged with filing returns; and
- The corporate officer willfully refused to make payments.

Here, it is undisputed that Mike's Roofing dissolved and that the Coakers had control or supervision over paying premiums to the Department. The Coakers also do not deny that they did not pay any additional premiums to the Department on behalf of Mike's Roofing after the Board issued the April 2015 decision. They deny only that their failure to pay those premiums to the Department was willful. *See* AB 32-41. But substantial evidence supports the Board's finding that the Coakers willfully failed to pay premiums that they knew Mike's Roofing owed the Department.

RCW 51.48.055(1) clarifies that a willful failure to pay premiums means that "the failure was the result of an intentional, conscious, and voluntary course of action." So it is unnecessary to show that the Coakers attempted to defraud the Department or that they acted out of malice or out of a capricious desire to violate the law: all that is necessary is that they knew that they had to make payments to the Department on Mike's Roofing's behalf but made a voluntary decision to *not* make those payments. And the evidence here supports a finding that they did so.

The Coakers incorrectly assert that the Board's April 2015 decision, which upheld the Department's notice of assessment based on the 2012 audit, did not become final until May 2015. AB 37. Based on this incorrect assertion, they argue that the Board failed to make a finding that they were able to pay the assessment as of the date they believe it became final. AB 37-38. But the April 2015 Board decision was final on the date that it was issued because the Coakers did not have the right to appeal it since they did not petition for review from the proposed decision and order. RCW 51.48.055; RCW 51.48.131; RCW 51.52.104. Appeals from notices of assessments—including those issued under RCW 51.48.055—are governed by RCW 51.48.131, which in turn says that RCW 51.52.080 through RCW 51.52.106 apply to appeals before the Board.

RCW 51.52.104 states:

In the event no petition for review is filed as provided herein by any party, the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, *and no appeal may be taken therefrom to the courts.*

The Board issued the April 2015 decision adopting the proposed decision and order because no party petitioned for review from the proposed decision. AR 663. So the April 2015 decision was not appealable and it became final on the date it was issued.

**2. Substantial evidence supports the Board’s finding that the Coakers could pay premiums to the Department as a result of a final and binding Board decision, but they made a conscious decision to not pay the Department**

There is ample support in the record for the Board’s finding that the Coakers willfully failed to pay premiums. Indeed, several things supporting this finding are undisputed. The undisputed evidence establishes that the Coakers knew that a 2015 Board decision required them to pay the Department about a “half a million dollars” in industrial insurance premiums based on a 2012 audit. AR 427. The undisputed evidence also establishes that the Coakers knew this decision became final and binding in April 2015. AR 436. Yet the Coakers never paid the Department any portion of the money that the final Board decision directed them to pay. *See* AR 563-64, 589-91.

Under substantial evidence review, this Court does not reweigh the evidence, nor revisit credibility determinations. *Port of Seattle*, 151 Wn.2d at 588. Rather, it reviews the evidence solely to determine whether a reasonable person could find, as the Board did, that the failure to pay was willful. *Id*; *see also Aviation West Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 429, 980 P.2d 701 (1999) (explaining that the possibility of drawing different conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial

evidence). And in doing so, the Court views the evidence in the light most favorable to the Department and makes all reasonable inferences from that evidence in the light most favorable to the Department. *Kittitas County*, 176 Wn. App. at 48; *Orca Logistics, Inc. v. Dep't of Labor & Indus.*, 152 Wn. App. 457, 462-63, 216 P.3d 412 (2009).

The evidence supports the Board's finding that the Coakers willfully failed to pay the Department its premiums in two ways. First, there is substantial evidence that Mike's Roofing had the financial capacity to pay the premiums the Board found that it owed the Department. *See* AR 914-1042. The Department introduced records showing that Mike's Roofing had gross earnings of over a million dollars in both 2012 and 2013. AR 976-1015. While Mike's Roofing's earnings were more modest in 2014, they were not negligible at over a hundred thousand dollars, nor were the earnings in the first three months of 2015 negligible. AR 1017, 1030-35. And while the amounts the company earned from month to month varied, Mike's Roofing also had substantial earnings from 2009 to 2011. AR 914-975.

Though Mr. Coaker testified that Mike's Roofing had no cash reserves as of April 2015 (AR 489), the Board was not required to uncritically accept this self-serving statement as true, particularly given the substantial earnings Mike's Roofing had earned in the years before.

*See Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, 361 P.3d 165 (2015) (a fact-finder may disbelieve a witness's self-serving testimony, even if there is no directly contrary evidence). And the Coakers offered little or no business records explaining why the company would have no money as of April 2015. The Coakers did not testify to any sudden or unexpected expenses that they encountered around this time frame that would explain why Mike's Roofing would have no funds. And the alleged lack of funds cannot be attributed to the 2015 Board decision directing them to pay additional premiums because Mike's Roofing never paid any portion of that amount to the Department. Additionally, the record shows that Mike's Roofing paid amounts it owed to other state agencies in 2015 (the Department of Revenue and the Employment Security Department), but it did not pay the Department. AR 589-91.

Given the evidence of substantial business income over a period of several years coupled with a lack of documentation proving that the company's expenses depleted that income, a reasonable trier of fact could conclude, as the Board did here, that Mike's Roofing could pay the Department the premiums it owed but that the Coakers chose to not make those payments on Mike's Roofing's behalf. AR 914-1042. And while a trier of fact could also have conceivably made a different finding, that is irrelevant under substantial evidence review: the issue is whether a

reasonable person could make the findings that the Board made, not whether other evidence might have supported a different finding. *See Aviation West*, 138 Wn.2d at 429.

Second, aside from the evidence about Mike's Roofing's profits, there is also evidence that Mr. Coaker personally made statements to Department employees that support the inference that he had made a conscious decision to not pay the Department the premiums that the Board had ordered Mike's Roofing to pay. AR 556, 559-60, 585-86. The Department's collection agent testified that when she tried to discuss a payment plan with Mr. Coaker, Mr. Coaker responded, "Do you think I am going to pay you?" which she understood to mean that he did not intend to pay the Department. AR 556.

The record also shows that the Department made other attempts to discuss a payment plan with Mr. Coaker but that Mr. Coaker rebuffed these efforts, refusing to even discuss the issue. AR 556, 559-60. And during a meeting with the Department employee who issued the order under appeal, Mr. Coaker made statements that the employee understood to mean that he did not intend to pay the Department any more money. AR 585-86. Mr. Coaker did not deny making any of these statements to the Department, nor did he offer an alternative explanation as to why he made them. Given this evidence, a reasonable trier of fact could conclude,

as the Board did, that Mr. Coaker had made a conscious decision not to pay the additional premiums to the Department that the Board had ordered. AR 10-11.

In arguing that the Board's findings are not supported by substantial evidence, the Coakers essentially ignore the evidence that supports the Board's findings and instead focus on evidence that they believe shows that they did not willfully fail to pay premiums to the Department. *See* AB 29-41. But this argument turns the standard of review on its head: the issue is whether there is any evidence supporting the Board's findings, not whether other evidence might have supported different findings. *See Port of Seattle*, 151 Wn.2d at 588; *Aviation West*, 138 Wn.2d at 429. And as *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998), explains, when a party is arguing that findings are unsupported by substantial evidence, it is "insufficient" to "merely" provide "a recitation of the facts in the light most favorable" to that party. That is what the Coakers did here, and their arguments therefore fail. Substantial evidence supports the Board's findings and this Court should uphold them. *See Port of Seattle*, 151 Wn.2d at 588.

And, rather than address whether the Board's findings of fact are supported by substantial evidence, the Coakers devote much of their attention to comments that the Board judge made in the narrative portion

of the proposed decision and order and that the Board made in the narrative portion of its decision and order. *See* AB 34-36. But first, this Court reviews the Board's decision and order, not the proposed decision and order. *See Johnson v. Dep't of Health*, 133 Wn. App. 403, 411, 136 P.3d 760 (2006); *Stratton v. Dep't of Labor & Indus.*, 1 Wn. App. 77, 79-80, 459 P.2d 651 (1969). And second, the proper focus is on the Board's formal findings of fact, not stray comments in the narrative portion of the decision. *See Port of Seattle*, 151 Wn.2d at 588.

For example, the Coakers suggest that the Board found that they lacked the financial capacity to pay the Department but that it still found that their failure to pay was willful. AB 36-41. But the Board's finding was that the Coakers *did have* the financial capacity to pay, not that they did not. AR 10. In incorrectly claiming that the Board found that they lacked the financial ability to pay the Department, the Coakers cite a portion of the proposed decision and order where the judge was summarizing the testimony of Mr. Coaker. *See* AB 37 (citing AR 83). The proposed decision and order's formal findings of fact found that this was not true, and the portion of the proposed decision and order that explains the judge's reasoning in entering a decision similarly shows that the judge believed that Mike's Roofing had the financial ability to pay. AR 93-95, 97. And in any event, the Board's finding of fact was that the Coakers had

the capacity to pay the assessed premiums, and substantial evidence supports this finding. AR 10.

Similarly, the Coakers claim that the Board found that they did not intentionally fail to pay premiums to the Department, or use improper classifications, or under-report their workers' hours, but this is again based on a portion of the proposed decision and order that summarizes Mr. Coaker's testimony, not a finding of fact of either the proposed decision and order or the decision and order. AB 36 (citing AR 83). Furthermore, that portion of the proposed decision and order was summarizing Mr. Coaker's testimony on whether he intentionally underpaid premiums *from 2009 to 2012*—the period covered by the Department's 2012 audit—not whether he intentionally failed to pay the Department the money that the Board's 2015 decision ordered him to pay. *See* AR 83. That the judge summarized this testimony does not establish that the judge believed it, let alone that the Board adopted it as true.

Moreover, both the proposed decision and the actual decision and order of the Board made a formal finding of fact that there was not a genuine dispute about whether the Coakers owed additional premiums *as of April 2015*, the date that the Board's decision became final and binding. AR 10, 97. Even assuming the Coakers acted in good faith from 2009 to 2012 in making the premium payments that they believed were

appropriate at the time, they could not claim good faith as of April 2015: at that point, no matter if they agreed with the Board's final decision, they were legally obligated to follow it. And substantial evidence shows that they willfully decided to not do so.

**C. The Coakers Have No Right To Attorney Fees Because the Department's Action Was Substantially Justified**

The Coakers should not prevail so they should not receive attorney fees under the Equal Access to Justice Act (EAJA). AB 42-43. But, even if they prevail, they should not receive fees because the Department's personal liability order was substantially justified. And awarding fees now would be premature as there has been no finding that the Coakers are qualified parties or that circumstances would not make an award unjust. *See Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 598, 360 P.3d 875 (2015). The Coakers assert in their brief in conclusory fashion that they are qualified parties based on their alleged net worth, but they have offered no evidence that this is true. AB 42. And the arguments of counsel are not evidence. *See Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Nor does the EAJA allow an award of reasonable attorney fees to a prevailing party if the agency's action was substantially justified. RCW 4.84.350(1). The EAJA was intended to "ensure citizens a better

opportunity to defend themselves from *inappropriate* state agency actions.” *Raven v. Dep’t of Soc. & Health Servs.*, 177 Wn.2d 804, 833, 306 P.3d 920 (2013) (quoting *Costanich v. Dep’t of Soc. & Health Servs.*, 164 Wn.2d 925, 929, 194 P.3d 988 (2008)).

Although the Act does not define “substantially justified,” case law has established that the State must show that the agency action had a reasonable basis in law and in fact. *Plum Creek Timber Co. v. Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595, 993 P.2d 287 (2000) (“[Substantially justified means justified . . . to a degree that could satisfy a reasonable person.”). The agency’s decision need not be correct—only reasonable. *Id.*

In *Department of Labor & Industries v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 347 P.3d 464 (2015), *aff’d*, 185 Wn.2d 721 (2016), the Department and the company disagreed over whether franchisees performing janitorial work were covered workers under the Industrial Insurance Act. *Id.* at 530. The Court of Appeals ultimately agreed with the company on a significant issue (that the company did not have to pay premiums for franchisees who employed others) but declined to award attorney fees to the company because the Department’s tax assessment against the company was substantially justified. *Lyons*, 186 Wn. App. at 530, 542. The court noted that “[a]n agency action may be manifestly

unjust and still satisfy a reasonable person” and that while the Department’s position was ultimately determined to be incorrect by a reviewing court, the position was not untenable. *Lyons*, at 542. This was especially true because the existing law on the subject matter was complex and somewhat confused. *Id.*

The Department has substantially prevailed in every forum in which this case has been litigated. And even if the Coakers prevail, the Department acted reasonably when it issued the personal liability order. There is no existing case law interpreting RCW 51.48.055(4), and the only persuasive authority on point—the Board’s decision in *In re Jaz Services*—supports the Department, not the Coakers. *Jaz Services*, 2015 WL 3551186 at \*3. While the Court need not follow the *Jaz Services* decision, it was reasonable for the Department to rely on it, particularly with no contrary authority.

And the Department has supported its position here based on the language of RCW 51.48.055, the public policy considerations underlying it, and the record. The Department’s interpretation of these statutes gives effect to the Legislature’s intent to pursue personal liability for a former officer’s willful nonpayment when a corporation dissolves, thus furthering the purpose of Title 51 to keep the workers’ compensation fund solvent. And the Department explains why an overly broad reading of

RCW 51.48.055(4) would undermine that goal and thwart the collection of premiums from businesses that have dissolved and whose controlling officers willfully failed to pay premiums.

The Coakers also suggest that the Department must pay fees because the Department knew that Mike's Roofing could not pay its premiums yet it assessed personal liability against the Coakers anyway. AB 43. Nothing supports this claim. The Department's position throughout this case has been that Mike's Roofing had the funds available to pay premiums but that the Coakers willfully chose not to pay any additional premiums to the Department after the Board decision became final in April 2015. And the Department has explained why it believes that substantial evidence supports this finding. Even if the Coakers prevail, the Department's actions were substantially justified.

## **VI. CONCLUSION**

Personal liability is a collection tool provided by the Legislature to the Department to ensure that corporate officers of financially troubled companies do not evade their tax burden by diverting their assets elsewhere. RCW 51.48.055(4) does not apply here, because Mike's Roofing had not filed for bankruptcy when the Department issued its notice of assessment to the Coakers. Interpreting subsection (4) to apply retroactively renders RCW 51.48.055 toothless, contrary to the intent of

the Legislature. And substantial evidence shows that the Coakers knew they owed the Department additional premiums and that Mike's Roofing could pay the premiums, but the Coakers willfully decided to not pay, and instead dissolved the company to escape that debt. The Board and the superior court properly upheld the Department's assessment of personal liability and this Court should affirm.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April, 2020.

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NO. 53906-3-II

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

MICHAEL E. COAKER et al,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR  
AND INDUSTRIES,

Respondent.

DECLARATION OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Brief of Respondent, Department of Labor and Industries and this Declaration of Service in the below described manner:

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**April 21, 2020 - 1:50 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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