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Court of Appeals
Division III
State of Washington

NO. 323820

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ARMAND V. DeFELICE,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

ROBERT W. FERGUSON
Attorney General

LEAH HARRIS, WSBA # 40815
Assistant Attorney General
Attorneys for Respondent
OID #91020
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

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I. INTRODUCTION

The Employment Security Department audited the payroll and tax records of Appellant Dr. Armand DeFelice's ("Dr. Armand") sole proprietorship dental practice and determined that two dental associates, Dr. Armand's daughter, Dr. Loretta DeFelice ("Dr. Loretta"), and daughter-in-law, Dr. Louise Christine DeFelice Guthrie ("Dr. Louise"), were in employment for unemployment insurance tax purposes.[1] The Department assessed back taxes, penalties, and interest on the wages paid to the two associates. Dr. Armand argued that the associates, Drs. Loretta and Louise, were partners in the practice and, thus, the payments to them were not taxable wages but their share of the business profits.

The Commissioner of the Department properly determined that Dr. Armand failed to satisfy his burden to establish that a partnership had been formed between him and the two associates and correctly concluded that the services the associates provided were "employment" under the Employment Security Act. Dr. Armand improperly asks this Court to reevaluate the weight of the evidence on appeal. Because substantial evidence supports the Commissioner's findings, and there are no errors of law, the Court should affirm the Commissioner's decision.

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[1] Because the dentists share a common last name, this brief refers to the doctors by their first names.

II. COUNTERTATEMENT OF THE ISSUES

1. "A partnership is formed by agreement to place money, effects, labor and skill, or some or all of them, in a lawful business and to divide the profits and bear the losses in certain proportions." *Bengston v. Shain*, 42 Wn.2d 404, 409, 255 P.2d 892 (1953). Did the Commissioner properly conclude Dr. Armand failed to establish that a partnership had been formed when: (1) the Association Agreements with Dr. Loretta and Dr. Louise, which Dr. Armand failed to prove had been revoked, explicitly stated they were not partners; (2) Drs. Loretta and Louise took home 40 percent of their production regardless of whether their patients paid their bills; (3) Dr. Armand only took home what was left over after all overhead expenses of the business were paid; (4) Dr. Armand's business was registered as a sole proprietorship with the Employment Security Department and Department of Revenue; and (5) the business never filed a Form 1065 partnership return with the IRS?

2. The Employment Security Act defines "employment" as "personal service, of whatever nature . . . performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied." RCW 50.04.100. Did the Commissioner properly conclude that Drs. Loretta and Louise were in the "employment" of Dr. Armand for unemployment insurance tax purposes when the associates performed

dental services for the benefit of Dr. Armand's business, received remuneration for those services, and Drs. Loretta and Louise entered into agreements that called for them to "carry on the practice of dentistry and other procedures agreed upon by [Dr. Armand] and Associate"?

3. Once the Department establishes the services provided amount to "employment" under RCW 50.04.100¶, the burden shifts to the employer to establish that the workers are exempt under RCW 50.04.140. Did Dr. Armand waive any argument that the services provided by Drs. Loretta and Louise were excepted from coverage under RCW 50.04.140 by failing to raise the argument before the trier of fact and by failing to assign error to all of the relevant findings and conclusions on appeal?

4. Should the Court deny Dr. Armand attorney fees where the Employment Security Act does not provide for them, this is not an equitable proceeding, and, in any event, the Court should affirm the Commissioner's decision?

III. COUNTERSTATEMENT OF THE CASE

Dr. Armand began a dental practice in 1966. Administrative Record (AR) 115, 230, 292 (Finding of Fact (FF) 1). The business was a sole proprietorship, and Dr. Armand was the owner. AR 105, 115, 125. On February 1, 1990, Dr. Armand, as owner of the dental practice, entered into an "Association Agreement" with his daughter, Dr. Loretta. AR 239-

43, 292 (FF 1). The Association Agreement stated, "The Owner [Dr. Armand] hereby agrees to have Associate associate with him for the purpose of practicing dentistry on Owner's patients." AR 241, 292 (FF 1). It provided that the Agreement "shall continue until terminated in a manner set forth in paragraphs 7 and 8." AR 241, 292 (FF 2). Paragraphs 7 and 8 provided for 30 days termination notice by either party or in the event of "illness or other causes." AR 243, 292-93 (FF 2). The Agreement further provided, "It is specifically agreed that the doctors are not partners and neither shall be liable or responsible for the acts of the other doctor, except to the extent specifically provided for herein." AR 241, 293 (FF 3).

Under the Agreement, each doctor would be "responsible for determining the amount of charges for his own services rendered. All charges shall be billed under the name of Owner and all remittances shall be deposited into the Owner's account." AR 242, 293 (FF 4). Dr. Armand testified that this billing practice never changed. AR 135-37. The Agreement also provided that the Owner would provide the necessary facilities and equipment and pay the rent and all expenses. AR 242, 293 (FF 9). Dr. Armand testified that he continued to bear all of the costs of the dental practice. AR 142-43. Dr. Loretta was to receive 35 percent of the fees she produced. AR 249, 293 (FF 3). At some point prior to 2010,

the percentage of fees Dr. Loretta received increased to 40 percent. AR 129, 155, 294 (FF 13).

On January 2, 2004, Dr. Armand entered into an "Association Agreement" with his daughter-in-law, Dr. Louise. AR 246-49, 293 (FF 5). The substance of the Agreement was the same as Dr. Loretta's Agreement in all material respects. AR 239-43, 246-49, 293 (FF 5-9). Per the agreement, Dr. Louise also initially received 35 percent of the fees she produced. AR 249, 293 (FF 7). As with Dr. Loretta, at some point prior to 2010, the percentage of fees Dr. Louise received increased to 40 percent. AR 129, 155, 294 (FF 13).

In 2012, the Department audited Dr. Armand's business. AR 103. The business had not been paying unemployment insurance taxes for Dr. Loretta and Dr. Louise, so the Department sought to determine whether they were in an employment relationship with Dr. Armand under the Employment Security Act and whether back taxes, penalties, and interest were owed. The auditor reviewed, among other things, Form W-2s and W-3s, 1099s and 1096s, quarterly and annual reports, profit and loss statements for 2010, 2011, and 2012, check registers, general ledger accounts, and the Association Agreements. AR 104, 294 (FF 10). At all times material to the audit, the dental practice had been registered with the Employment Security Department and Department of Revenue as a sole

proprietorship, and Dr. Armand had listed the business on his income tax returns as a sole proprietorship.[2] AR 105, 115, 125, 294 (FF 14, 15). The payments Dr. Armand made to Dr. Loretta and Dr. Louise had been reported as miscellaneous income on IRS Form 1099s. AR 117, 161, 169, 294 (FF 11).

Based on her review of the business records, the auditor concluded that the services Dr. Loretta and Dr. Louise provided amounted to employment under the Act and, thus, the amounts paid to them were wages for which unemployment insurances taxes should have been paid. AR 294 (FF 12). The Department issued Dr. Armand a Notice of Assessment assessing taxes, penalties, and interest in the amount of $1,896.37 for the wages paid to the doctors for the first quarters of 2010, 2011, and 2012.[3] AR 127, 221-22, 294 (FF 18). Dr. Armand appealed the assessment, and an administrative law judge (ALJ) convened an administrative hearing. AR 204-05, 224-25.

At the hearing, Dr. Armand asserted that the Association Agreements had been orally modified over time and that he, his daughter,

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[2] The practice formed a professional limited liability company (PLLC) after the audit on January 1, 2013. AR 133.

[3] The payments made in the first quarters of those years met the taxable wage base for each doctor, so wages paid in subsequent quarters were not taxed. AR 127; *see also* RCW 50.04.010 and http://www.esd.wa.gov/uitax/taxreportsandrates/fileandpaytaxes/taxable-wage-base.php.

and his daughter-in-law had been operating as a partnership.[4] AR 170, 294 (FF 13). He therefore claimed that the payments to Dr. Loretta and Dr. Louise were not wages for unemployment tax purposes. However, he offered no evidence that the Association Agreements had been terminated pursuant to their termination clauses. The business never changed its registration with the Employment Security Department or the Department of Revenue from a sole proprietorship to a partnership. AR 125. Business income was never reported on a Form 1065 partnership return; income and expenses were always reported on Dr. Armand's individual income tax returns as a sole proprietorship, and he then issued Form 1099s to Dr. Loretta and Dr. Louise. AR 115, 161-62, 169, 294 (FF 11, 14). At all pertinent times, Dr. Loretta and Dr. Louise were always paid 40 percent of what they produced. Dr. Armand only took home what was left after he paid all of the overhead expenses. AR 130, 294 (FF 13). Sometimes, this was very little. AR 130.

Following the hearing, the ALJ weighed the evidence and issued an order affirming the assessment. AR 292-99. She concluded that Dr. Armand had not established that the dentists had, over time, formed a partnership, and that services performed by Dr. Loretta and Dr. Louise

[4] Although the auditor met with Dr. Armand, his bookkeeper, and one of the dental associates during the course of the audit, no one ever told the auditor that the Association Agreements had been revoked and that the business was a partnership. AR 125.

during the audit period were personal services performed for wages for Dr. Armand. AR 295-96 (Conclusions of Law (CL) 1-8). They therefore were in employment as defined by RCW 50.04.100 . AR 296 (CL 8). She further found that the work performed by the dentists did not meet any of the exceptions to employment under RCW 50.04.140. AR 296-99 (CL 9-14).

Dr. Armand petitioned the Commissioner of the Department for review of the ALJ's decision, and the Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the ALJ's order. AR 319-20.[5] Dr. Armand then sought judicial review in the Spokane County Superior Court, which affirmed the Commissioner's decision. CP 53-60. This appeal followed.

IV. SCOPE AND STANDARD OF REVIEW

Dr. Armand seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of the Commissioner's decision is governed by the Washington Administrative Procedure Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The Court of Appeals sits in the same position as the superior court and applies the APA standards directly to the administrative

[5] The Commissioner only made minor corrections to the ALJ's order: replacing "Dr. DeFelice" with "Dr. Armand" in Finding of Fact 1, and replacing "Dr. Loretta" with "Dr. Louise" in Finding of Fact 7. AR 319.

record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). The Court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). Here, the Commissioner adopted all of the ALJ's findings and conclusions (with some minor corrections). AR 319-20.

The Court's review is limited to the agency record. RCW 34.05.558. The Commissioner's decision is considered prima facie correct, and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; RCW 34.05.570(1)(a). The court should grant relief "only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

A. Review of Factual Findings

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. An agency's findings of fact must be upheld if supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). "Substantial evidence is evidence of a 'sufficient quantity . . . to persuade a fair-minded person of the truth and correctness'" of the finding.

Campbell v. Emp't Sec. Dep't, __ Wn.2d __, 326 P.3d 713, 715-16 (2014) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004)). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should "view the evidence and the reasonable inferences in the light most favorable to the party that prevailed" at the administrative proceeding below. *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004). The court cannot substitute its judgment on the credibility of the witnesses or the weight to be given to conflicting evidence. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Unchallenged findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

B. Review of Conclusions of Law

Questions of law are subject to de novo review. *Affordable Cabs, Inc.*, 124 Wn. App.at 367. However, where an agency has expertise in a particular area, the court should accord substantial weight to the agency's decision. *Wm. Dickson Co.*, 81 Wn. App. at 407; *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

C. Mixed Questions of Law and Fact

When there is a mixed question of law and fact, the court must make a three-step analysis. *Tapper*, 122 Wn.2d at 403. First, the court determines which factual findings below are supported by substantial evidence. *Id.* Second, the court makes a de novo determination of the correct law, and third, it applies the law to the facts. *Id.* As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

D. Arbitrary and Capricious

Dr. Armand briefly argues that the Commissioner's decision is arbitrary and capricious. Appellant's Br. at 20. An agency's decision is arbitrary and capricious only if it is "willfully unreasonable, without consideration and in disregard of facts or circumstances." *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002). "If the decision is the result of honest and due consideration, it is not arbitrary and capricious even if reasonable minds could disagree with the result." *Stephens v. Emp't Sec. Dep't*, 123 Wn. App. 894, 905, 98 P.3d 1284 (2004).

V. ARGUMENT

The Court should affirm the Commissioner's decision because substantial evidence supports the factual findings and the legal conclusions are free from error. The Commissioner properly concluded that Dr. Armand did not establish that he, Dr. Loretta, and Dr. Louise had formed a partnership, and that Dr. Loretta and Dr. Louise were in "employment" under RCW 50.04.100. Moreover, Dr. Armand did not satisfy his burden to establish that the associates met the exceptions to employment under RCW 50.04.140 because he failed to raise the issue below or fully address it in his opening brief. In any event, when viewing the evidence in the light most favorable to the Department, the Commissioner properly concluded that the exceptions were not met.

A. The Employment Security Act's Definition of "Employment" is "Exceedingly Broad"

Under the Employment Security Act, all Washington employers must contribute to the unemployment compensation fund for the benefit of their employees. RCW 50.01.010, RCW 50.24.010. The purpose of the Act is to mitigate the negative effects of involuntary unemployment and protect the workers unemployed through no fault of their own. RCW 50.01.010; *Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 36, 917 P.2d 136 (1996). The Legislature found it could achieve this goal "only by

application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment." RCW 50.01.010. "The mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage" of the Act. *Shoreline Community Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938 (1992). Accordingly, the party claiming an exemption from taxation bears the burden of proof. *Schuffenhauer v. Dep't of Emp't Sec.*, 86 Wn.2d 233, 239, 543 P.2d 343 (1975).

The Employment Security Act's definition of employment is "exceedingly broad." *W. Ports*, 110 Wn. App. at 458. The Act defines "employment" more broadly than the common law master-servant relationship. RCW 50.04.100. If the services Dr. Loretta and Dr. Louise provided amounted to "employment" under the Act, then Dr. Armand, like all other employers in Washington, had a statutory obligation to contribute to the unemployment compensation fund, unless he can prove an exception. RCW 50.24.010; RCW 50.04.100, .140.

B. Dr. Armand Failed to Establish That He, Dr. Loretta, and Dr. Louise Had Formed a Partnership

Dr. Armand claimed but failed to establish that Drs. Loretta and Louise were not in employment because they were partners in the business. "'Employment' . . . means personal service, of whatever nature .

. . performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied." RCW ¶50.04.100.

In contrast, a partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055." RCW 25.05.005(6). "A partnership is formed by agreement to place money, effects, labor and skill, or some or all of them, in a lawful business and to divide the profits and bear the losses in certain proportions." *Bengston v. Shain*, 42 Wn.2d 404, 409, 255 P.2d 892 (1953). "The mere sharing of the net proceeds of a business venture with an employee, without more, does not of itself convert the relationship between the parties concerned into a partnership." *Id.* A person will not be presumed to be a partner, despite receiving a share of the profits of the business, if the profit share is payment for wages. RCW 25.05.055(3)(c)(ii). The existence of a partnership depends on the intention of the parties, which must be ascertained from the facts, circumstances, and conduct of the parties. *Id.*; *Eder v. Reddick*, 46 Wn.2d 41, 49, 278 P.2d 361 (1955).

"The burden of proving a partnership is upon the party asserting its existence." *Curley Elec., Inc., v. Bills*, 130 Wn. App. 114, 120-21, 121 P.3d 106 (2005). "[T]he fact that parties to a business arrangement call it

a partnership does not make it so in the absence of additional evidence." *State v. Bartley*, 18 Wn.2d 477, 481, 139 P.2d 638 (1943).

Substantial evidence supports the Commissioner's finding that Dr. Loretta and Dr. Louise were not partners in the business. When Drs. Loretta and Louise became associates, the agreements they signed specifically stated they were not partners. AR 241, 247, 293 (FF 3, 6), 296 (CL 6). The Association Agreements also stated the relationship "shall continue until terminated in a manner set forth in paragraphs 7 and 8" (which provided for 30 days termination notice by either party or in the event of "illness or other causes"). AR 241, 243, 292-93 (FF 2). There is no evidence the agreements were ever terminated pursuant to paragraphs 7 and/or 8. Dr. Armand argues that the Association Agreements had been orally modified or revoked over time. AR 170; Appellant's Br. at 5, 9. However, substantial evidence—and indeed, the weight of the evidence—revealed that Drs. Loretta and Louise continued to operate as associates rather than partners of the business.

For example, until the business converted to a professional limited liability company in 2013, it had always been registered with the Employment Security Department and Department of Revenue as a sole

proprietorship, not a partnership. AR 105, 115, 125, 294 (FF 15).[6] It never filed any notification with the sate regarding a change in status.[7] The business also never filed tax returns evidencing a partnership, such as an IRS Form 1065. AR 162, 294 (FF 14). Rather, Dr. Armand reported the business income and expenses on his individual tax returns as a sole proprietorship. AR 115, 161, 294 (FF 14). And the payments made to Dr. Loretta and Dr. Louise were reported as miscellaneous income on Form 1099s. AR 117, 161, 169, 294 (FF 11). As the Commissioner stated, "[t]his is absolutely inconsistent with [Dr. Armand's] claim the business was a partnership tax entity during the time[] period at issue." AR 296 (CL 7).

Dr. Armand asserts that IRS Forms 1065 need not be filed by small partnerships and that, therefore, this fact could not be considered. Appellant's Br. at 16-17. Dr. Armand cites only to IRS Rev. Proc. 84-35, 1984-1CB for his claim that small partnerships need not report partnership

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[6] Dr. Armand appears to misapprehend the meaning of Finding of Fact 16 ("Neither Dr. Loretta nor Dr. Louise had any current Employment Security Department Accounts in effect during the audit period."). AR at 294; *see* Appellant's Br. at 17. The fact that Drs. Loretta and Louise did not have accounts with the Department (and were not listed on Dr. Armand's account) suggests they were not partners.

[7] Any business registered with the Department must report changes in owners, partners, members, etc. at the same time the quarterly tax and wage report is due. WAC 192-310-010(2)(a); AR 126-27. Businesses registered with the Department of Revenue must apply for and obtain a new registrations and licenses document whenever one or more partners is added, where the general partnership continues as a business organization, and the change in the composition of the partners is equal to or greater than 50 percent. WAC 458-20-101(11)(a)(iii).

income to the IRS. Appellant's Br. at 16-17. On the contrary, section 6031 of the Internal Revenue Code requires *every* partnership to file a return for each taxable year. I.R.C. § 6031(a). The return must provide the names of all the partners and their distributive share of partnership income. *Id.* Partnerships that file to timely file a complete partnership return are subject to a penalty under section 6698, unless the failure is due to reasonable cause. *See generally* I.R.C. § 6698. The IRS has published guidance establishing that partnerships with 10 or fewer partners will be deemed to have met the reasonable cause test, and thus will not be subject to the penalty under section 6698, if the partnership establishes that all partners have fully reported their shares of the income, deductions, and credits of the partnership on their timely filed income tax returns. Rev. Proc. 84-35 § 3.01, 1984-1 C.B. 509. Thus only the penalty, not the filing requirement, is waived for small partnerships that make the requisite reasonable cause showing.

But even if Dr. Armand were correct, the fact that the business never filed any tax returns identifying the business as a partnership and only filed returns identifying the business as a sole partnership is but one piece of evidence the Commissioner considered, and the Commissioner was entitled to give it appropriate weight. *See Minder v. Gurley*, 37

Wn.2d 123, 130, 222 P.2d 185 (1950) ("It is well settled that no one fact or circumstance will be taken as the conclusive test.").

Additionally, despite Dr. Armand's arguments to the contrary, Drs. Loretta and Louise did not share in the profits and losses of the business. *Bengston v. Shain*, 42 Wn.2d at 409. "Profit" means the excess of revenues over expenditures in a business transaction. BLACK'S LAW DICTIONARY 1329 (9th ed. 2009). During the audit period (2010-2012), Drs. Loretta and Louise were each paid 40 percent of their gross production, i.e., 40 percent of the fees billed to patients for the work each doctor performed. AR 130, 294 (FF 13). The doctors received 40 percent of their gross production regardless of whether the patients ultimately paid their bills. AR 137-39. After paying Dr. Loretta and Dr. Louise and paying for other overhead expenses, Dr. Armand paid himself only whatever was left each month. AR 130, 294 (FF 13). Sometimes, this was very little.[8] AR 130. Dr. Armand testified that he bore all of the costs of the dental practice. AR 142-43. Accordingly, only Dr. Armand shared in the profits of the business enterprise—i.e., the money that was made after all the costs and expenses were paid. And Drs. Loretta and Louise did not share in the losses—they always took home 40 percent of their

[8] In his brief, Dr. Armand asserts, without any citation to the record, that he "received the same profit percentage applicable to his production as Dr. Loretta and Dr. Louise." Appellant's Br. at 13. His sworn testimony contradicts this assertion. AR 130, 142.

production, regardless of how profitable the business was after all expenses were paid. This further demonstrates that they were commissioned employees, and their share of their production was payment of wages, which does not establish a partnership. RCW 25.05.055(3)(c)(ii) ("A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment. . . of wages or other compensation to an employee."); *Bengston*, 42 Wn.2d at 409 ("The mere sharing of the net proceeds of a business venture with an employee, without more, does not of itself convert the relationship between the parties concerned into a partnership.")

The Commissioner properly weighed all of the evidence and found that Dr. Armand had not carried his burden in establishing that a partnership existed during the audit period. *Curley Elec., Inc.*, 130 Wn. App. at 120-21. Dr. Armand emphasizes his own self-serving testimony and merely asks the Court to reweigh the conflicting evidence, which it may not do on appeal. *Davis*, 94 Wn.2d at 124. The Commissioner, therefore, correctly concluded that the services performed by Dr. Loretta and Dr. Louise were in covered employment, and that Dr. Armand owed unemployment insurance premiums, penalties, and interest on their wages. The Court should affirm.

C. Dr. Loretta and Dr. Louise Performed Personal Services for Wages for Dr. Armand

Rather than being partners with Dr. Armand, Drs. Loretta and Louise performed "personal service[s] . . . for wages or under any contract calling for the performance of personal services." RCW 50.04.100. This is covered employment under the Act. "To determine if a work situation satisfies the definition of 'employment,' RCW 50.04.100, the Commissioner must determine (1) if the worker performs personal services for the alleged employer and (2) if the employer pays wages for those services."[9] *Penick*, 82 Wn. App. at 39. The test to determine whether a worker performed personal services is whether the services performed were clearly for the alleged employer or for its benefit. *Affordable Cabs, Inc.*, 124 Wn. App. at 368.

In *Penick*, the court found that truck drivers performed personal services for a sole proprietorship engaged in the interstate transportation of goods. *Penick*, 82 Wn. App. 34, 40. As the transportation of goods necessarily requires the services of truck drivers, it was clear that the business directly used and benefited from the drivers' services. *Id.* at 40.

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[9] "Wages" means "remuneration paid by one employer during any calendar year to an individual in its employment . . . ." RCW 50.04.320(1). An "employer" includes any individual or type of organization having any person in employment. RCW 50.04.080. "Remuneration" includes "all compensation paid for personal services . . . ," subject to exceptions that do not apply here. RCW 50.04.320(4).

Here, Dr. Armand's business is a dental practice. It necessarily requires dental procedure services, which Dr. Loretta and Dr. Louise are licensed to perform, and which they did perform. Thus, like the sole proprietorship trucking business in *Penick*, it is clear that Dr. Armand's business directly used and benefited from the other dentists' services.

Additionally, Drs. Loretta and Louise received "wages" because they received remuneration for their performance of personal services. In *Penick*, the court found the drivers were paid wages because the business collected payment from the customers then paid the drivers on a biweekly basis. *Penick*, 82 Wn. App. at 41. There was no evidence of separate accounts; the funds belonged to the business until they were disbursed to the drivers. *Id.* Similarly here, all patients' payments were deposited into a single business account under Dr. Armand's name, out of which Dr. Loretta and Dr. Louise were paid. AR 135-37, 242, 293 (FF 4, 7). The funds thus belonged to the business until they were disbursed to the dentists. Accordingly, the Commissioner did not err in determining the dentists received wages. AR 296 (CL 8).

The dentists also performed personal services under a contract calling for the performance of personal services. RCW 50.04.100. Both Drs. Loretta and Louise entered into Association Agreements "for the purpose of practicing dentistry on patients of Owner" and that called for

them to "carry on the practice of dentistry and other procedures agreed upon by Owner and Associate." AR 241, 247, 292 (FF 1), 293 (FF 5). Although Dr. Armand asserted the agreements had been orally revoked over time, the weight of the evidence showed that the dentists still operated their practice per the terms of the agreements, the only exception being the percent of production the two associates took home (which increased from 35 to 40 percent).[10] Accordingly, the Commissioner properly determined Drs. Loretta and Louise were in employment under RCW 50.04.100 because they performed personal services under a contract calling for the performance of personal services.

A worker is in "employment" if the worker provides "personal service[s] . . . for wages *or* under any contract calling for the performance of personal services." RCW 50.04. Either or both meanings are met here, as the dentists' services were performed for wages and were performed pursuant to a contract for personal services. Dr. Armand thus could avoid liability for unemployment insurance premiums only if he could establish

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[10] Dr. Armand stresses that the auditor did not ask anyone in the dental practice whether the agreements she had been provided were still valid. Appellant's Br. at 9-10, 15. Dr. Armand provided the agreements to the auditor, however, and did not indicate that they had been revoked. AR 171 ("She asked for them, so I dug them up out of my space from a long time ago and then I gave her copies of them.") At any rate, the Commissioner makes his own findings and conclusions about the validity of any timely appealed tax assessment. RCW 34.05.461(3); AR 118. Dr. Armand was entitled to attempt to establish at the de novo evidentiary hearing that the agreements had been revoked, so whether the auditor asked if they had been revoked is of no consequence. RCW 34.05.452; WAC 192-04-110.

the doctors were independent contractors under RCW 50.04.140. As described below, he failed to do this.

D. Dr. Armand Waived Any Argument That the Services Dr. Loretta and Dr. Louise Provided Were Excepted From Coverage Under RCW 50.04.140, and, In Any Event, He Cannot Establish the Coverage Exceptions

Once the Department establishes that the services provided amount to "employment," the burden shifts to the employer to establish that the workers are exempt. *Penick*, 82 Wn. App. at 42; *W. Ports*, 110 Wn. App. at 451; RCW 50.04.140. Dr. Armand did not argue below and does not argue now on appeal that Drs. Loretta and Louise were excepted from statutory coverage under RCW 50.04.140 (commonly referred to as the "independent contractor exemption," *see The Language Connection, LLC v. Emp't Sec. Dep't*, 149 Wn. App. 575, 580, 205 P.3d 924 (2009)). He has only argued that Drs. Loretta and Louise were partners, not that they were independent contractors. A party waives an issue by not raising it before the trier of fact. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 915 P.2d 1140 (1996).

1. The dentists were not free from direction and control.

RCW 50.04.140 provides two methods to establish exception from employment. Each method has its own subsection, and each subsection contains multiple elements, *all* of which must be met in order to satisfy an

exception. RCW 50.04.140(1), (2).[11] The first element under each test is the same: that the individual performing services for remuneration "has

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[11] Under subsection (1), services performed by an individual for remuneration shall be employment "unless and until it is shown to the satisfaction of the commissioner" each and every one of the following three elements:

> (a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; *and*
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; *and*
>
> (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service.

RCW 50.04.140(1) (emphasis added).

Alternatively, in order to establish an exception, an employer can prove all six elements under subsection (2). Under subsection (2), services performed by an individual for remuneration shall be employment "unless and until it is shown to the satisfaction of the commissioner" each and every one of the following six elements:

> (a) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact; *and*
>
> (b) Such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed; *and*
>
> (c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; *and*
>
> (d) On the effective date of the contract of service, such individual is responsible for filing at the next applicable filing period, both under the

been and will continue to be free from control or direction over the performance of such service, both under his or her contract of service and in fact." RCW 50.04.140(1)(a), (2)(a). The focus of this inquiry is on the right to control the worker's performance, not whether the employer actually exerts control. *W. Ports*, 110 Wn. App. at 452. This is the only element to which Dr. Armand assigns error, and the findings and conclusions related to it are found in Conclusion of Law 11. Appellant's Br. at 3 (Assignment of Error 3), 19-20; AR 297-98. However, Dr. Armand only challenges Conclusion of Law 11 as it relates to his argument that Drs. Loretta and Louise were partners; he makes no claim that they were independent contractors or that they satisfied all of the elements of either one of the coverage exception tests. He does not even

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contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; *and*

(e) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, such individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; *and*

(f) On the effective date of the contract of service, such individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

RCW 50.04.140(2) (emphasis added).

challenge the specific findings in that conclusion: that Dr. Armand had the right to control the billing of patients, how much to charge for procedures, the collection of money, the scheduling of patients, and, more generally, what occurred on the premises of his practice. AR at 298 (CL 11). Since these findings are now verities, he cannot establish he did not have the right to control various aspects of the dentists' performance. *Tapper*, 122 Wn.2d at 407.

2. Dr. Armand cannot satisfy the remaining exceptions to employment.

Dr. Armand does not assign error to the remaining findings and conclusions pertaining to the remaining elements.[12] *See* Appellant's Br. at 3, 19-20. Accordingly, the relevant findings are verities on appeal, and Dr. Armand has waived any argument that Drs. Loretta and Louise were exempt independent contractors. *Tapper*, 122 Wn.2d at 407.

In any event, the Commissioner properly concluded that the doctors did not satisfy all the exceptions, especially when all the evidence and reasonable inferences are viewed most favorably to the Department. The second element of both tests requires that the service in question be

[12] The Commissioner's findings on the various elements of the coverage exemption statute, RCW 50.04.140, are found in conclusions of law 11-14. CR 298-99. "When findings of fact of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below." *Tapper*, 122 Wn.2d at 406.

performed outside the usual course of business for which such service is performed or that it be performed outside of all places of business of the enterprise. RCW 50.04.140(1)(b), (2)(b). Subsection (2)(b) also allows the purported employer to establish the exception if the worker is responsible, under the contract and in fact, for the costs of the principle place of business. RCW 50.04.140(2)(b). Here, Drs. Loretta and Louise performed dental work—the essential part of Dr. Armand's business—at Dr. Armand's place of business. AR 162, 289 (CL 12). And, as discussed above, Dr. Armand bore the costs of the business, not Drs. Loretta and Louise. Accordingly, the Commissioner properly concluded Dr. Armand did not prove the second exception test.

The third exception element requires that the worker "is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service." RCW 50.04.140(1)(c), (2)(c). Subsection (2)(c) also can be met if the individual has a principle place of business for the work that is eligible for a federal income tax business deduction. RCW 50.04.140(2)(c). The evidence shows Drs. Loretta and Louise did not maintain independent businesses or offices. AR 163, 299 (CL 14). They were not separately registered with the Employment Security Department or Department of Revenue, and they did not have their own business

identification numbers. AR 163. No evidence was offered to show they had separate business places eligible for tax deductions. This element was not met.

The fourth and fifth elements of subsection (2) require the worker to have established an account with the Department of Revenue and other relevant state agencies for the payment of required taxes, to have received a unified business identifier number, and to maintain separate books reflecting business income and expenses. RCW 50.04.140(2)(e), (f). Dr. Louise testified that she had not registered with the Employment Security Department or Department of Revenue, and she did not have a business number. AR 163. There is no evidence in the record Drs. Loretta or Louise maintained business records that were different from Dr. Armand's. These elements were not met. The Commissioner properly concluded Drs. Loretta and Louise were in "employment" under the Act, and the services they performed did not meet either the exception tests. The Court should affirm.

E. Dr. Armand is Not Entitled to Attorney Fees

Dr. Armand's brief states his attorney's intention to seek attorney fees and costs "in accordance with the provision RCW 50.32.160" if Dr. Armand is successful on appeal. Appellant's Br. at 24. Even if he is successful on appeal, he is not entitled to fees.

Attorney fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity. *Crane Towing, Inc. v. Gorton*, 89 Wn.2d 161, 570 P.2d 428 (1977). Dr. Armand cites RCW 50.32.160 for the authority to seek attorney fees. That provision of the Employment Security Act, however, is unavailing. It provides:

> It shall be unlawful for any attorney engaged in any appeal to the courts *on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits* to charge or receive any fee therein in excess of a reasonable fee . . . , and if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving *an individual's application for initial determination, claim for waiting period credit, or claim for benefits*. In other respects, the practice in civil cases shall apply.

RCW 50.32.160 (italics added). It is clear that the statutory attorney fee provision in the Employment Security Act allows for the award of attorney fees only to the *unemployment benefits claimant* who is successful on appeal. Even if RCW 50.32.160 applied, Dr. Armand would not be entitled to fees because he has failed to meet his burden of proving that the Commissioner's decision was erroneous.

Dr. Armand may argue in reply that the Court has equitable power to grant attorney fees. However, "[t]his is not an equitable proceeding. It is a proceeding to review an administrative determination, conducted under the provisions of the administrative procedure act . . . . Unless a party can show that he is entitled to attorney fees under the law which gives the right of review (here, RCW 50.32), there is not authority in the court to award such fees pursuant to equitable or other doctrines." *Pennsylvania Life Ins. Co. v. Emp't Sec. Dep't*, 97 Wn.2d 412, 417, 645 P.2d 693 (1982). The Court should deny any request for fees.

VI. CONCLUSION

Dr. Armand's appeal amounts to an invitation to reweigh the evidence, which the Court should decline. For the foregoing reasons, the Department respectfully requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 8th day of August, 2014.

ROBERT W. FERGUSON
Attorney General

LEAH HARRIS,
WSBA # 40815
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Judy St. John, certify that I served a copy of Department's Response Brief on all parties or their counsel of record on the date below as follows:

U.S. Mail Prepaid to:

James J. Workland
Workland & Witherspoon, PLLC
601 W. Main Avenue, Suite 714
Spokane, WA 99201

Electronically Filed with:

Renee S. Townsley, Clerk of the Court
Washington State Court of Appeals, Division III

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

DATED this 8th day of August 2014 , at Seattle, WA.

Judy St. John, Legal Assistant