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

RICHARD LEFFLER et ux, dba CHOICES BUILDING &
DEVELOPMENT,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves an appeal from an industrial insurance premium, interest, and penalty assessment by the Department of Labor and Industries (Department). The primary issue is whether two people who worked for Choices Building and Development (Choices B&D) were “partners” with Richard Leffler in Choices B&D within the meaning of RCW 51.12.020(5) and therefore excluded from coverage under the Industrial Insurance Act.¹

The Board of Industrial Insurance Appeals (Board) found, as had the Department, that the two people were not Mr. Leffler’s partners, but instead were his employees for whom he was required to pay premiums under the Act. Under the provisions of the APA, this Court is now being asked to review that Board decision, which the superior court affirmed under the same substantial evidence review standard that

¹ The full text of all statutes cited in this brief is set forth in Appendix A.

applies in this Court. Because the administrative record demonstrates no error of law, and because the Board's findings are supported by substantial evidence, this Court should affirm the Board's decision.

II. ISSUES²

- 1. Does substantial evidence support the Board's findings of fact that no partnership formed between Mr. Leffler, Mr. Hosford, and Mr. Duncan?**
- 2. Do the Board's findings of fact support its conclusions of law that no partnership formed between Mr. Leffler, Mr. Hosford, and Mr. Duncan?**
- 3. Does substantial evidence support the Board's findings of fact and do those findings support the Board's conclusions of law affirming the Department's assessment of premiums for the**

² Mr. Leffler includes as the final clause of the final sentence of the "Conclusion" of his Brief of Appellant (App. Br.) a conclusory statement that "interest should be calculated only from the date of this Court's decision as the Department's initial calculations, by their own admission, were erroneous." App. Br. at 38. Mr. Leffler's statement is not supported by any authority or argument, nor did he make any supported argument on this proposition at either the Board or superior court. Whatever his rationale may be, he has waived argument on the point by his pleadings in this Court (RAP 10.3(a)(6)), in the superior court (RAP 2.5(a)), and at the Board (RCW 51.52.104).

work performed repairing Mr. Leffler's fire-damaged commercial property?

- 4. Should this Court order the Department to waive penalties where Mr. Leffler cites no authority requiring or authorizing such an order, and where the Board has already ordered the Department to recalculate penalties in light of the Board's unappealed findings that revise certain Department premiums calculations?**

III. STATEMENT OF THE CASE³

A. Facts

In 2003, Mr. Leffler lost his tenant for commercial property he owned, and he needed to get the property ready for new tenants. Tr. 2/20/07, at 29.⁴ His niece, April Robertson, also wanted his help in starting a real estate business; he agreed to help her, and they decided to locate that business in his

³ In this Statement of the Case, the Department generally will discuss only the facts and procedural background relevant to the primary issue in the case, i.e., whether Mr. Duncan, Mr. Hosford, and Mr. Leffler were partners. The Department will discuss the facts and procedural background relevant to the other issues *infra* in argument sections IV.C and IV.D.

⁴ The Clerk's Papers (CP) do not separately number the pages of the Certified Appeals Board Record (CABR). Transcripts in the CABR are cited to date of testimony and page number, while pleadings and orders in the CABR are cited to the Board-stamped page number in the lower right corner of the document.

building. Tr. 2/20/07, at 29. He also found other tenants. Tr. 2/20/07, at 29-30. Mr. Leffler started up a real estate company – Choices Real Estate (Choices RE) – and a construction company – Choices Building and Development (Choices B&D). Both businesses were registered with the Department of Licensing as sole proprietorships owned by Mr. Leffler. Tr. 2/7/07, at 87-88. Neither business opened up an industrial insurance account with the Department of Labor and Industries.

Robert Hosford began working for Choices B&D in 2004. Tr. 2/20/07, at 34-35. Greg Duncan began working for Choices RE in May 2005, and for Choices B&D about a month later. Tr. 2/20/07, at 44.

Choices B&D was building three “spec” homes on property Mr. Leffler owned. Tr. 3/13/07, at 7. By the time Mr. Hosford started, Choices B&D had already started one house. Tr. 2/20/07, at 35. After a fire at Mr. Leffler’s commercial property, Mr. Hosford also did the construction

work to repair the property. Tr. 2/20/07, at 38-39. Mr. Leffler brought Mr. Duncan into Choices B&D in June 2005 because Mr. Duncan told Mr. Leffler he had experience with the business end of home building. Tr. 2/2/0/07, at 44-45.

The central issue in this case is the nature of the business or employment relationship of Mr. Hosford, Mr. Duncan, and Mr. Leffler. There is no written agreement signed by the parties that defines the relationship. Mr. Hosford did not testify. Mr. Duncan testified that he was not a partner or part owner of Choices B&D, but instead was employed by Mr. Leffler as a construction manager and was paid \$20 per hour plus a promise of 20 percent of the profits from the sale of the buildings Choices B&D was building. Tr. 3/13/07, at 7-8. Mr. Duncan had the same arrangement as Mr. Hosford. Tr. 2/20/07, at 45.

While Mr. Leffler insisted that a partnership had been formed, he also described what was going on as a process of “due diligence.” Tr. 2/20/07, at 36, 46. “I didn’t want to get

involved with a partnership until I knew it was going to work”.

Tr. 2/20/07, at 97.

While working for Choices B&D, Greg Duncan fell off the top plate of a wall, broke his wrist, and ultimately filed a claim for benefits with the Department. Tr. 3/13/07, at 8, 11.

B. Department Assessments

After an audit, the Department assessed Mr. Richard Leffler industrial insurance premiums, penalties and interest for employment in calendar years 2004 and 2005. CABR Exhibits 1 & 2. Mr. Leffler appealed to the Board. CABR at 91.

Because Mr. Leffler had not arranged for industrial insurance coverage for any worker, the Department also issued a second penalty assessment, this one for all costs associated with Mr. Duncan’s claim. CABR at 95; RCW 51.48.010. Mr. Leffler protested, the Department affirmed the assessment, and Mr. Leffler appealed that decision to the Board. CABR at 95.

C. Board Proceedings

The Board consolidated the two appeals, CABR at 75. After conducting hearings, the Industrial Appeals Judge issued a Proposed Decision and Order that, among other things, affirmed the Department determinations that Mr. Duncan and Mr. Hosford were employees of Mr. Leffler. CABR at 40-58.⁵

In its analysis section, the proposed decision begins by summarizing the conflicting testimony in the case, first noting that as appellant Mr. Leffler bore the burden of proof at the Board. CABR at 42-46. The proposed decision notes that Mr. Duncan testified that he was a construction manager employed by Mr. Leffler, not a partner (CABR at 45 (citing Tr. 3/13/07, at 7)), and that Mr. Duncan filed a claim for benefits as an injured worker (CABR at 46).

Next, the proposed decision summarizes Washington's statute on partnerships, and then discusses some appellate court

⁵ A copy of the Proposed Decision and Order is provided in Appendix B to this Brief of Respondent.

precedents on partnership. CABR at 46-48. The proposed decision explains that under the case law a fact-finder's duty is to realistically determine the intention of the parties based on all of the facts, circumstances, actions and conduct of all of the parties. CABR at 46-48.

Turning back to the evidence, the proposed decision explains that while the absence of any written partnership agreement is not dispositive against Mr. Leffler, such absence works against his claim that a partnership agreement was ever reached with Mr. Duncan (who denied its existence) or Mr. Hosford (who did not testify). CABR at 48.

The proposed decision notes in this regard the equivocal testimony from Mr. Leffler himself to the effect that his discussions and arrangements with Mr. Duncan and Mr. Hosford were part of a "due diligence" process under which Mr. Leffler was only assessing during the relevant period whether to consummate a partnership arrangement. CABR at 48 (*see* Tr. 2/20/07, at 36, 46, 97). The proposed decision

describes these discussions as “informal and loosely defined negotiations” under which no partnership agreement was ever reached. CABR at 49.

The proposed decision characterizes the relations between Mr. Leffler and Mr. Duncan, and the responsibility vested in Mr. Duncan, as being less consistent with a partnership and more consistent with Mr. Duncan being project manager-employee whose personal labor was the essence of the contractual relationship with Mr. Leffler. CABR at 49. (“If Mr. Duncan was, indeed, a partner in this business, he would have been competent to sign such checks without Mr. Leffler’s permission.”) The proposed decision also notes that, while Mr. Hosford did not testify, evidence was similarly persuasive that providing personal labor was the essence of his relationship to Mr. Leffler. CABR at 49.

The proposed decision includes the following formal findings of fact:

4. In 2004, Mr. Leffler conferred with Robert Hosford concerning the purchase of Mr. Leffler's sole proprietorship of the construction company known as Choices Building & Development. No written agreement was executed and Mr. Hosford was not a partner of Mr. Leffler during the period of 2004 and 2005.

5. In June 2005, Mr. Leffler conferred with Gregory S. Duncan concerning the purchase of a 20 percent interest in the Choices Building and Development construction company. The primary purpose of the company was to construct spec homes on real estate owned by Mr. Leffler. No agreement was reached.

6. During the period of 2004 and 2005, Mr. Duncan was not a partner with Mr. Leffler concerning the construction business and did not have an ownership interest in the construction company known as Choices Building & Development.

7. During the period of 2004 and 2005, Mr. Hosford did not have an ownership interest in the construction company known as Choices Building & Development.

8. During the period of 2004 and 2005, Mr. Leffler was the sole proprietor of the construction company known as Choices Building & Development.

9. [As construction supervisor building a home for Ann and Robert Williams, Mr. Duncan] . . .

was authorized to complete checks pre-signed by Mr. Leffler and pay individuals from the proceeds for their labor. Mr. Duncan was not authorized to sign any checks on the company's bank account.

CABR at 54-55. Based on the evidence and these and other findings of fact, the proposed decision enters conclusions of law that Mr. Duncan and Mr. Hosford were employees of, not partners with, Mr. Leffler. CABR at 56-57.

Mr. Leffler petitioned the Board to review the Industrial Appeals Judge's proposed decision. CABR at 3-33. The Board then issued an Order Denying the Petition for Review and made the proposed decision the Decision and Order of the Board. CABR at 2.

D. Superior Court Proceedings

Mr. Leffler appealed the Board's decision to Thurston County Superior Court. CP at 3-4. Applying the same standard of review as applies in this Court, the Court affirmed the Board's decision. CP at 6-8. Mr. Leffler then appealed to this Court. CP at 9-13.

IV. ARGUMENT

A. Standard Of Review

The APA governs this Court's review of the Board's decision in this industrial insurance tax assessment case. RCW 51.48.131 (incorporating by reference RCW 34.05.510 through 34.05.598 for judicial review of Board decisions in assessment cases); *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 127, 827 P.2d 1085 (1992).

Mr. Leffler bore the burden of proof before the Board to show that the assessments were incorrect. *Black Real Estate Co. v. Dep't of Labor & Indus.*, 70 Wn. App. 482, 486-87, 854 P.2d 46 (1993). Under the APA, this Court reviews the Board's decision on the same basis as the superior court to determine whether the Board's factual findings are supported by substantial evidence and its conclusions of law are correct. RCW 34.05.570(3)(d) and (e); *see Hamel v. Empl. Sec. Dep't*, 93 Wn. App. 140, 144-45, 966 P.2d 1282 (1998).

On issues of law, this Court may substitute its judgment for that of the agency, but the Court accords substantial weight to the interpretation of statutes and rules by the implementing agency (here, interpretations of the Industrial Insurance Act by both the Department and Board). *Id.*; *Ackley-Bell v. Dep't of Labor & Indus.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (Board and Department interpretations considered).⁶ Also, because the Act is to be liberally construed to provide coverage, its exceptions are narrowly construed. *See, e.g., Ochoa v. Dep't of Labor & Indus.*, 143 Wn.2d 422, 425-26, 20 P.3d 939 (2001) (narrowly construing RCW 51.12.020(7)'s jockey exclusion from mandatory coverage); *University of Washington v. Marengo*, 122 Wn. App. 798, 804 (2004) (narrowly

⁶ Mr. Leffler contends that the determination of “partner” status under RCW 51.12.010(5) is outside the expertise of the Board (and presumably Department) and therefore is not entitled to deference. App. Br. at 27. The case that Mr. Leffler cites does not directly support his contention that Department and Board interpretations of coverage language in the Industrial Insurance Act are not entitled to deference. In any event, this case does not involve a dispute about law but instead involves an attempt by Mr. Leffler to re-try the facts in the appellate courts.

construing “parking area” exception to RCW 51.08.013’s course of employment inclusive language).

On mixed questions of law and fact, the Court determines the law independently and then applies it to the facts as the agency has found them, to the extent that, as here, the findings are supported by substantial evidence. *Hamel*, 93 Wn. App. at 145. Evidence is substantial if “sufficient to persuade a fair-minded, rational person of the truth of the matter.” *R & G Probst v. Dep’t of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). In determining whether substantial evidence exists, the Court must take the “record in the light most favorable to the party who prevailed [before the fact-finding tribunal],” here, the Department, and must not “rebalance the competing [evidence] and inferences.” *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

B. The Board’s Determination That There Was No Partnership Should Be Affirmed

RCW 51.12.020(5) excludes from the coverage of the Industrial Insurance Act, “sole proprietors and partners.” The primary issue in this case is whether “Choices Building and Development” (Choices B&D) was a partnership co-owned by Richard Leffler, Bob Hosford, and Greg Duncan, or instead was a sole proprietorship owned by Mr. Leffler, with Mr. Hosford and Mr. Duncan being mere employees providing personal labor to Mr. Leffler. *See* former RCW 51.08.180 (2004).⁷

Mr. Leffler does not question the proposition that if Mr. Duncan and Mr. Hosford were, as the Board found, Mr. Leffler’s employees in 2004 and 2005, then he is required to pay industrial insurance premiums, interest and penalties for that employment. RCW 51.16.060; 51.48.210. Nor does Mr. Leffler question that because Mr. Leffler did not obtain

⁷ In 2008, the legislature amended RCW 51.08.180, moving what had been subsection 2 to RCW 51.08.181 and changing its four-part test to a seven-part test mirroring the requirements of RCW 51.08.195. *See* Laws of 2008 ch. 208, §§ 3, 5. Because these amendments came after the audit period, this brief refers to the version of the statute in effect at the time.

industrial insurance coverage for anyone, if Mr. Duncan was his employee, not a partner, at the time of his injury, that makes Mr. Leffler liable for all claim costs of Mr. Duncan. RCW 51.48.010.⁸

1. Partnership Formation Is A Question Of Fact

Mr. Leffler argues that this Court may substitute its judgment for that of the Board of Industrial Insurance Appeals in determining whether there was a partnership formed. *See* App. Br. at 27. The Department disagrees.

Although Mr. Leffler contends the Board erroneously interpreted or applied the law of partnership, he points to nothing in the record that would lead to that conclusion other

⁸ Mr. Leffler's Brief of Appellant seems to suggest that if this Court were to determine as a matter of law that Mr. Duncan and Mr. Hosford were partners excluded from coverage, then this Court could also hold those "partners" jointly liable with Mr. Leffler for whatever taxes, interest and penalties are ultimately held due for other workers for Choices. *Compare* App. Br. at 37 (vaguely suggesting this); *with* CABR at 33 (Mr. Leffler's petition to the Board in which he expressly requested such relief). The courts, like the Board, however, have no subject matter jurisdiction to address matters not addressed in the Department order on appeal. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-64, 879 P.2d 326 (1994). The Department orders on appeal here addressed the liability of only Mr. Leffler for premiums, interest, and penalties, so his liability, and his liability alone, is all that can be addressed on appeal.

than his disagreement with the Board's decision that no partnership had been formed. The Board's decision correctly states the law of partnership formation and even cites some of the same case law Mr. Leffler cites. CABR at 47-48. Under the Uniform Partnership Act, a partnership forms whenever two or more persons associate to carry on as co-owners a business for profit, whether they intend for a partnership to be formed or not. RCW 25.05.055.

All relevant evidence should be considered, and "where it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established." *In re Estate of Thorton*, 81 Wn.2d 72, 79, 499 P.2d 864 (1972).

In Washington, where there is contradictory evidence about whether a partnership was formed, the issue is a question of fact. *Malnar v. Carlson*, 128 Wn.2d 521, 534, 535-536, 910

P.2d 455 (1996); *Ocean View Land, Inc. v. Wineberg*, 65 Wn.2d 952, 952-53, 400 P.2d 319 (1965); *see also Goeres v. Ortquist*, 34 Wn. App. 19, 22, 658 P.2d 1277 (1983) (joint venture is also fact question). Therefore, this Court should limit its review to determining whether substantial evidence supports the Board's decision.

2. Substantial Evidence Supports The Board's Findings Of Fact

As the Department explains *infra* Part III.C, the Board's proposed decision includes extensive discussion of the evidence supporting the findings of fact and conclusions of law that no partnership agreement was reached. First, there was nothing in writing, and Mr. Leffler and Mr. Duncan gave conflicting testimony about the nature of the parties' relationships. CABR at 45-48. Second, Mr. Leffler's own testimony was at times internally inconsistent. CABR at 48. He insisted that a partnership had been formed, but also testified that he did not want to form one until he was sure it would work. *Id.*

In addition to these facts discussed in the proposed decision, the partnership property – the real estate and the bank account – was all in Mr. Leffler’s name, and the businesses were registered with the state as sole proprietorships. Tr. 2/20/07, at 35, 87-88; CABR Exhibit 10.

The Department does not dispute that the administrative record contains evidence sufficient for the Board to have concluded that a partnership had been formed. But the record also contains evidence supporting the Board’s findings that no partnership was formed. It is not unusual to have conflicting evidence that a fact-finder must finally resolve. This is why there are triers of fact and why the standard of review of such factual determinations is so deferential. The industrial appeals judge needed to evaluate the credibility of the witnesses and weigh the evidence to determine the facts. The industrial appeals judge did so, as is evident from his discussion of the evidence concerning the formation of a partnership. CABR at 48-50; *see* discussion *infra* Part III.C.

Mr. Leffler cites numerous appellate court decisions addressing what constitutes partnership (including, inappropriately, an unpublished decision). App. Br. at 27-34. Not one of the decisions he cites lends any support to his argument in this case that he is entitled to judgment as a matter of law. Because the Board's decision is supported by substantial evidence, this Court should affirm the Board's decision that no partnership had been formed.

3. The Law Does Not Presume Mr. Hosford Or Mr. Duncan To Be Partners

Mr. Leffler argues that because Mr. Hosford and Mr. Duncan were to share in the profits when the homes Choices B&D was building were sold, under the law they must be presumed to be partners. App. Br. at 27-29. A person who receives a share of the profits of a business is presumed to be a partner unless the profits were received in payment of wages or other compensation to an employee. RCW 25.05.055(3)(c)(ii).

RCW 25.05.055(3)(c)(ii) applies here to rebut any

presumption of partnership from a promise to receive a share of the profits. Mr. Hosford and Mr. Duncan both performed labor for Choices B&D and both were paid for doing so. Mr. Duncan testified that his pay was \$20 per hour plus 20 percent of the profits. Because both men exchanged labor for consideration and so would qualify as employees under former RCW 51.08.180(2004), they cannot be presumed to be partners just because their compensation included a share of the profits.

C. Mr. Leffler Is Responsible For Premiums For Work Performed On His Commercial Property

Mr. Leffler apparently has two alternative theories to try to evade responsibility for premiums on the work performed on the fire-damaged building he owned. First, he asserts conclusorily and without any evidentiary support that Mr. Hosford was an exempt contractor under RCW 51.08.195 and/or former RCW 51.08.180(2) (2004). App. Br. at 34. Second, invoking case law under a long-since-revised statutory scheme, he asserts that the work was excluded because the

project was not a “business for profit” project. App. Br. at 34-

35. Neither argument has any merit.

The Board’s proposed decision rejects Mr. Leffler’s first theory under analysis that includes the following:

Mr. Leffler contends he was billed by Mr. Hosford’s business, H & H Construction, and that Mr. Hosford was an independent contractor. Exhibit Nos. 14 and 15 are tax statements forwarded for purposes of internal revenue obligations. However, the essence of Mr. Hosford’s assignment was his personal labor and the exemption contained in RCW 51.08.195 is not applicable.

CABR at 50.

Mr. Leffler testified that during the repair project he would get money from his insurance company, deposit the money into Choices B&D’s bank account, and Mr. Hosford would draw the same pay he got every week. Tr. 2/20/07, at 39. Thus, the arrangement regarding Mr. Hosford’s labor (and for the other laborers on the project) for the fire repair work was no different than for the work on the three “spec” houses. Consequently, the Board did not err in treating it no differently.

Moreover, despite the use of the name “H & H Construction”, Mr. Hosford did not testify, and neither Mr. Leffler nor anyone else presented evidence from which the Board could have concluded that “H & H Construction” was a legitimate independent business, registered as a construction contractor as required by law, and eligible for exclusion under either the 6-part test of RCW 51.08.195 or the 4-part test of former RCW 51.08.180(2) (2004).

Mr. Leffler’s second theory for excluding work on the repair project, i.e., that the work was not being done “in a business for profit,” is likewise without merit. The three cases he cites, *Locken v. Dep’t of Labor & Indus.*, 58 Wn.2d 534, 364 P.2d 232 (1961), *Craine v Dep’t of Labor & Indus.*, 19 Wn.2d 75, 141 P.2d 129 (1943), and *Carston v. Dep’t of Labor & Indus.*, 172 Wash. 51, 19 P.2d 133 (1933), all come from an era before the 1971 Legislature expanded the scope of the Industrial Insurance Act to mandate coverage for all employments except those specifically excluded.

RCW 51.12.010; Laws of 1971, Ex. Sess., ch. 289, § 2.

Mr. Leffler points to no current exclusion from coverage that would apply, and there is none. *See* RCW 51.12.020.⁹

D. This Court Should Not Direct The Department To Waive The Penalties Assessed

Mr. Leffler seeks waiver of any penalties for his failure to report or pay premiums for the work of the admitted employees Mr. Duncan and Mr. Hosford hired but failed to report. App. Br. at 35-38. He blames Mr. Duncan and Mr. Hosford, claiming ignorance and lack of willfulness in his personal failure to see to it that Choices B&D secured industrial insurance coverage for and paid premiums on those employees.

Mr. Leffler cites no court decision, statute or court rule that would require or even authorize this Court to grant his request for waiver of any of his penalty obligations.

⁹ Moreover, even if the pre-1971 line of cases were applicable, Mr. Leffler's hair-splitting between his Choices' short-term business project of repairing a fire-damaged commercial building and its long-term business scheme of building spec homes is parallel to the argument rejected in *Locken*, 58 Wn.2d 534 at 536 ("Melvin Locken's land clearing operation to be under the work[ers'] compensation act must be a business, but not necessarily his only business.")

Mr. Leffler's waiver request should be rejected for this lack of supporting authority. RAP 10.3(a)(6); *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (party's failure to cite authority shows party has looked and found no support).

The Department anticipates that Mr. Leffler may try to broaden his penalty-waiver request in his Reply Brief. While that would be inappropriate under RAP 10.3(c), in an abundance of caution, the Department will address other penalty-waiver questions that Mr. Leffler might try to raise.

The Department assessed four different types of penalties. First, it assessed late penalties and interest pursuant to RCW 51.48.210. Second, it assessed a penalty of \$500 pursuant to RCW 51.48.030 for Mr. Leffler's failure to keep proper records. CABR Exhibit 1; Tr. 3/13/07, at 65. Third, it assessed a \$27,759.97 penalty pursuant to RCW 51.48.010 for Mr. Leffler's failure to secure the payment of compensation. CABR Exhibit 1; Tr. 3/13/07, at 66. And fourth, by a separate assessment order also issued pursuant to RCW 51.48.010 it

assessed Mr. Leffler for the cost of Mr. Duncan's industrial insurance benefits. CABR Exhibit 2.

The Board's order required the Department to recalculate the first three penalties. CABR at 57. Whether this Court affirms the Board's decision or grants Mr. Leffler further relief on the premiums assessed, it would be inappropriate for this court to order the Department to waive penalties as requested. The legislature has given the Department the responsibility to assess penalties, the Board has already ordered the penalties to be recalculated, and the APA provides that the reviewing court should "not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action" RCW 34.05.574(1).

As for the claim cost penalty, RCW 51.48.010 provides for a penalty of between 50percent and 100 percent of the cost of a claim. Mr. Leffler presented no evidence challenging the amount of the assessment; his challenge in relation to the claim

cost penalty has always been limited to whether Mr. Duncan was a worker covered by the Industrial Insurance Act. Because substantial evidence supports the Board's decision that Mr. Duncan was an employee of Choices B&D and not a partner or co-owner, this Court should affirm the Board's decision.

V. CONCLUSION

For the reasons stated, this Court should affirm the Judgment of the superior court and the Decision and Order of the Board of Industrial Insurance Appeals.

RESPECTFULLY SUBMITTED this 15th day of April, 2009.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 15th day of April, 2009, at Tumwater,

WA.

Jerei Bargasus
JEREI BARGABUS
Legal Assistant

APPENDIX A

RCW 25.05.055
Formation of partnership.

(1) Except as otherwise provided in subsection (2) of this section, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(2) An association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter.

(3) In determining whether a partnership is formed, the following rules apply:

(a) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property;

(b) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived; and

(c) 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:

(i) Of a debt by installments or otherwise;

(ii) For services as an independent contractor or of wages or other compensation to an employee;

(iii) Of rent;

(iv) Of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;

(v) Of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

(vi) For the sale of the goodwill of a business or other property by installments or otherwise.

[1998 c 103 § 202.]

RCW 34.05.510

Relationship between this chapter and other judicial review authority.

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law.

[1988 c 288 § 501.]

RCW 34.05.570
Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

Notes:

Findings – Short title – Intent – 1995 c 403: See note following RCW 34.05.328.

Part headings not law – Severability – 1995 c 403: See RCW 43.05.903 and 43.05.904.

Effective date – 1989 c 175: See note following RCW 34.05.010.

RCW 34.05.574**Type of relief.**

(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

(2) The sole remedy available to a person who is wrongfully denied licensure based upon a failure to pass an examination administered by a state agency, or under its auspices, is the right to retake the examination free of the defect or defects the court may have found in the examination or the examination procedure.

(3) The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law.

(4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.

[1989 c 175 § 28; 1988 c 288 § 517.]

Notes:

Effective date – 1989 c 175: See note following RCW 34.05.010.

RCW 34.05.598
Frivolous petitions.

The provisions of RCW 4.84.185 relating to civil actions that are frivolous and advanced without reasonable cause apply to petitions for judicial review under this chapter.

[1988 c 288 § 607.]

RCW 51.08.013**"Acting in the course of employment."**

(1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(2) "Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; (ii) promoted and encouraged employee use of one or more alternative commute modes; or (iii) otherwise participated in the provision of the alternative commute mode.

(b) An employee's participation in social activities, recreational or athletic activities, events, or competitions, and parties or picnics, whether or not the employer pays some or all of the costs thereof, unless: (i) The participation is during the employee's working hours, not including paid leave; (ii) the employee was paid monetary compensation by the employer to participate; or (iii) the employee was ordered or directed by the employer to participate or reasonably believed the employee was ordered or directed to participate.

(3) "Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service; or (c) a nonmotorized means of commuting such as bicycling or walking.

[1997 c 250 § 10; 1995 c 179 § 1; 1993 c 138 § 1; 1979 c 111 § 15; 1977 ex.s. c 350 § 8; 1961 c 107 § 3.]

Notes:

Severability – 1979 c 111: See note following RCW 46.74.010.

RCW 51.08.180
"Worker" — Exceptions.

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

[2008 c 102 § 3; 1991 c 246 § 3; 1987 c 175 § 3; 1983 c 97 § 1; 1982 c 80 § 1; 1981 c 128 § 2; 1977 ex.s. c 350 § 15; 1961 c 23 § 51.08.180. Prior: 1957 c 70 § 20; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1937 c 211 § 2; RRS § 7674-1.]

Notes:

Conflict with federal requirements – Severability – 2008 c 102: See notes following RCW 51.08.070.

Effective date – Conflict with federal requirements – 1991 c 246: See notes following RCW 51.08.195.

Former RCW 51.08.180 (Laws 1991 Ch 246, sec. 3)

- (1) "Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as a separate alternative, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.
- (2) For the purposes of this title, any person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not a worker when:
 - (a) Contracting to perform work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;
 - (b) The person, firm, or corporation has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;
 - (c) The person, firm, or corporation maintains a separate set of books or records that reflect all items of income and expenses of the business; and
 - (d) The work which the person, firm, or corporation has contracted to perform is:
 - (i) The work of a contractor as defined in RCW 18.27.010; or
 - (ii) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW.
- (3) Any person, firm, or corporation registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW including those performing work for any contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is a worker when the contractor supervises or controls the means by which the result is accomplished or the manner in which the work is performed.
- (4) For the purposes of this title, any person participating as a driver or back-up driver in commuter ride sharing, as defined in RCW 46.74.010(1), is not a worker while driving a ride-sharing vehicle on behalf of the owner or lessee of the vehicle.

RCW 51.08.195

"Employer" and "worker" — Additional exception.

As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and

(2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the 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

(3) The 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 the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

(4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the 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

(5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the 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

(6) On the effective date of the contract of service, the 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.

[2008 c 102 § 4; 1991 c 246 § 1.]

Notes:

Conflict with federal requirements – Severability – 2008 c 102: See notes following RCW 51.08.070.

Effective date – 1991 c 246: "This act shall take effect January 1, 1992." [1991 c 246 § 10.]

Conflict with federal requirements – 1991 c 246: "If any part of this act is found to be in conflict with federal requirements which are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is hereby declared to be inoperative solely to the extent of the conflict, and such finding or determination shall not affect the operation of the remainder of this act. The rules under this act shall meet federal requirements which are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state." [1991 c 246 § 9.]

RCW 51.12.010

Employments included — Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

[1972 ex.s. c 43 § 6; 1971 ex.s. c 289 § 2; 1961 c 23 § 51.12.010. Prior: 1959 c 55 § 1; 1955 c 74 § 2; prior: (i) 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part. (ii) 1923 c 128 § 1, part; RRS § 7674a, part.]

RCW 51.12.020**Employments excluded. (Effective until July 1, 2009.)**

The following are the only employments which shall not be included within the mandatory coverage of this title:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

(2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer. For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.

(3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.

(4) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(5) Sole proprietors or partners.

(6) Any child under eighteen years of age employed by his or her parent or parents in agricultural activities on the family farm.

(7) Jockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW.

(8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.

(b) Alternatively, a corporation that is not a "public company" as defined in *RCW 23B.01.400(21) may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or may exempt any number of officers if all the exempted officers are related by blood within the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.

(c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(d) A corporation may elect to cover officers who are exempted by this subsection in the manner provided by RCW 51.12.110.

(9) Services rendered by a musician or entertainer under a contract with a purchaser of the services, for a specific engagement or engagements when such musician or entertainer performs no other duties for the purchaser and is not regularly and continuously employed by the purchaser. A purchaser does not include the leader of a group or recognized entity who employs other than on a casual basis musicians or entertainers.

(10) Services performed by a newspaper carrier selling or distributing newspapers on the street or from house to house.

(11) Services performed by an insurance agent, insurance broker, or insurance solicitor, as defined in RCW **48.17.010, ***48.17.020, and ***48.17.030, respectively.

(12) Services performed by a booth renter as defined in ****RCW 18.16.020. However, a person exempted under this subsection may elect coverage under RCW 51.32.030.

(13) Members of a limited liability company, if either:

(a) Management of the company is vested in its members, and the members for whom exemption is sought would qualify for exemption under subsection (5) of this section were the company a sole proprietorship or partnership; or

(b) Management of the company is vested in one or more managers, and the members for whom the exemption is sought are managers who would qualify for exemption under subsection (8) of this section were the company a corporation.

[1999 c 68 § 1; 1997 c 314 § 18. Prior: 1991 c 324 § 18; 1991 c 246 § 4; 1987 c 316 § 2; 1983 c 252 § 1; 1982 c 63 § 15; 1981 c 128 § 3; 1979 c 128 § 1; 1977 ex.s. c 323 § 7; 1973 c 124 § 1; 1972 ex.s. c 43 § 7; 1971 ex.s. c 289 § 3; 1961 c 23 § 51.12.020; prior: 1955 c 74 § 3; prior: 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part.]

Notes:

Reviser's note: *(1) RCW 23B.01.400 was amended by 2000 c 168 § 1, changing subsection (21) to subsection (22); and was subsequently amended by 2002 c 297 § 9, changing subsection (22) to subsection (24).

** (2) RCW 48.17.010 was amended by 2007 c 117 § 1, deleting the definition of "agent," effective July 1, 2009.

*** (3) RCW 48.17.020 and 48.17.030 were repealed by 2007 c 117 § 39, effective July 1, 2009.

**** (4) RCW 18.16.020 was amended by 2002 c 111 § 2, deleting the definition of "booth renter."

Severability – 1991 c 324: See RCW 18.16.910.

Effective date – Conflict with federal requirements – 1991 c 246: See notes following RCW 51.08.195.

Effective dates – Implementation – 1982 c 63: See note following RCW 51.32.095.

Severability – Effective date – 1977 ex.s. c 323: See notes following RCW 51.04.040.

RCW 51.12.020

Employments excluded. (Effective July 1, 2009.)

The following are the only employments which shall not be included within the mandatory coverage of this title:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.

(2) Any person employed to do gardening, maintenance, or repair, in or about the private home of the employer. For the purposes of this subsection, "maintenance" means the work of keeping in proper condition, "repair" means to restore to sound condition after damage, and "private home" means a person's place of residence.

(3) A person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.

(4) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(5) Sole proprietors or partners.

(6) Any child under eighteen years of age employed by his or her parent or parents in agricultural activities on the family farm.

(7) Jockeys while participating in or preparing horses for race meets licensed by the Washington horse racing commission pursuant to chapter 67.16 RCW.

(8)(a) Except as otherwise provided in (b) of this subsection, any bona fide officer of a corporation voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation, who at all times during the period involved is also a bona fide director, and who is also a shareholder of the corporation. Only such officers who exercise substantial control in the daily management of the corporation and whose primary responsibilities do not include the performance of manual labor are included within this subsection.

(b) Alternatively, a corporation that is not a "public company" as defined in RCW 23B.01.400(24) may exempt eight or fewer bona fide officers, who are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation and who exercise substantial control in the daily management of the corporation, from coverage under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation, or may exempt any number of officers if all the exempted officers are related by blood within the third degree or marriage. If a corporation that is not a "public company" elects to be covered under subsection (8)(a) of this section, the corporation's election must be made on a form prescribed by the department and under such reasonable rules as the department may adopt.

(c) Determinations respecting the status of persons performing services for a corporation shall be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance shall control over form, and mandatory coverage under this title shall extend to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(d) A corporation may elect to cover officers who are exempted by this subsection in the manner provided by RCW 51.12.110.

(9) Services rendered by a musician or entertainer under a contract with a purchaser of the services, for a specific engagement or engagements when such musician or entertainer performs no other duties for the purchaser and is not regularly and continuously employed by the purchaser. A purchaser does not include the leader of a group or recognized entity who employs other than on a casual basis musicians or entertainers.

(10) Services performed by a newspaper carrier selling or distributing newspapers on the street or from house to house.

(11) Services performed by an insurance producer, as defined in RCW 48.17.010(5).

(12) Services performed by a booth renter. However, a person exempted under this subsection may elect coverage under RCW 51.32.030.

(13) Members of a limited liability company, if either:

(a) Management of the company is vested in its members, and the members for whom exemption is sought would qualify for exemption under subsection (5) of this section were the company a sole proprietorship or partnership; or

(b) Management of the company is vested in one or more managers, and the members for whom the exemption is sought are managers who would qualify for exemption under subsection (8) of this section were the company a corporation.

[2008 c 217 § 98; 1999 c 68 § 1; 1997 c 314 § 18. Prior: 1991 c 324 § 18; 1991 c 246 § 4; 1987 c 316 § 2; 1983 c 252 § 1; 1982 c 63 § 15; 1981 c 128 § 3; 1979 c 128 § 1; 1977 ex.s. c 323 § 7; 1973 c 124 § 1; 1972 ex.s. c 43 § 7; 1971 ex.s. c 289 § 3; 1961 c 23 § 51.12.020; prior: 1955 c 74 § 3; prior: 1947 c 281 § 1, part; 1943 c 210 § 1, part; 1939 c 41 § 1, part; 1937 c 211 § 1, part; 1927 c 310 § 1, part; 1921 c 182 § 1, part; 1919 c 131 § 1, part; 1911 c 74 § 2, part; Rem. Supp. 1947 § 7674, part.]

Notes:

Severability – Effective date – 2008 c 217: See notes following RCW 48.03.020.

Severability – 1991 c 324: See RCW 18.16.910.

Effective date – Conflict with federal requirements – 1991 c 246: See notes following RCW 51.08.195.

Effective dates – Implementation – 1982 c 63: See note following RCW 51.32.095.

Severability – Effective date – 1977 ex.s. c 323: See notes following RCW 51.04.040.

RCW 51.16.060
Quarterly report of payrolls.

Every employer not qualifying as a self-insurer, shall insure with the state and shall, on or before the last day of January, April, July and October of each year thereafter, furnish the department with a true and accurate payroll for the period in which workers were employed by it during the preceding calendar quarter, the total amount paid to such workers during such preceding calendar quarter, and a segregation of employment in the different classes established pursuant to this title, and shall pay its premium thereon to the appropriate fund. Premiums for a calendar quarter, whether reported or not, shall become due and delinquent on the day immediately following the last day of the month following the calendar quarter. The sufficiency of such statement shall be subject to the approval of the director: PROVIDED, That the director may in his or her discretion and for the effective administration of this title require an employer in individual instances to furnish a supplementary report containing the name of each individual worker, his or her hours worked, his or her rate of pay and the class or classes in which such work was performed: PROVIDED FURTHER, That in the event an employer shall furnish the department with four consecutive quarterly reports wherein each such quarterly report indicates that no premium is due the department may close the account: PROVIDED FURTHER, That the department may promulgate rules and regulations in accordance with chapter 34.05 RCW to establish other reporting periods and payment due dates in lieu of reports and payments following each calendar quarter, and may also establish terms and conditions for payment of premiums and assessments based on estimated payrolls, with such payments being subject to approval as to sufficiency of the estimated payroll by the department, and also subject to appropriate periodic adjustments made by the department based on actual payroll: AND PROVIDED FURTHER, That a temporary help company which provides workers on a temporary basis to its customers shall be considered the employer for purposes of reporting and paying premiums and assessments under this title according to the appropriate rate classifications as determined by the department: PROVIDED, That the employer shall be liable for paying premiums and assessments, should the temporary help company fail to pay the premiums and assessments under this title.

[1985 c 315 § 1; 1981 c 260 § 13. Prior: 1977 ex.s. c 350 § 26; 1977 ex.s. c 323 § 11; 1973 1st ex.s. c 32 § 1; 1971 ex.s. c 289 § 76; 1965 ex.s. c 80 § 1; 1961 c 23 § 51.16.060; prior: 1959 c 308 § 14; 1957 c 70 § 47; prior: 1947 c 247 § 1, part; Rem. Supp. 1947 § 7676c, part.]

Notes:

Severability – Effective date – 1977 ex.s. c 323: See notes following RCW 51.04.040.

Effective dates – Severability – 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

RCW 51.48.010

Employer's liability for penalties, injury or disease occurring before payment of compensation secured.

Every employer shall be liable for the penalties described in this title and may also be liable if an injury or occupational disease has been sustained by a worker prior to the time he or she has secured the payment of such compensation to a penalty in a sum not less than fifty percent nor more than one hundred percent of the cost for such injury or occupational disease. Any employer who has failed to secure payment of compensation for his or her workers covered under this title may also be liable to a maximum penalty in a sum of five hundred dollars or in a sum double the amount of premiums incurred prior to securing payment of compensation under this title, whichever is greater, for the benefit of the medical aid fund.

[1985 c 347 § 2; 1982 c 63 § 20; 1977 ex.s. c 350 § 69; 1971 ex.s. c 289 § 61; 1961 c 23 § 51.48.010. Prior: 1947 c 247 § 1(4d), part; Rem. Supp. 1947 § 7676d, part.]

Notes:

Effective dates – Implementation – 1982 c 63: See note following RCW 51.32.095.

Effective dates – Severability – 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

RCW 51.48.030

Failure to keep records and make reports.

Every employer who fails to keep and preserve the records required by this title or fails to make the reports provided in this title shall be subject to a penalty determined by the director but not to exceed two hundred fifty dollars or two hundred percent of the quarterly tax for each such offense, whichever is greater. Any employer who fails to keep and preserve the records adequate to determine taxes due shall be forever barred from questioning, in an appeal before the board of industrial insurance appeals or the courts, the correctness of any assessment by the department based on any period for which such records have not been kept and preserved.

[1986 c 9 § 8; 1985 c 347 § 4; 1982 c 63 § 21; 1971 ex.s. c 289 § 64; 1961 c 23 § 51.48.030. Prior: 1947 c 247 § 1(4d), part; Rem. Supp. 1947 § 7676d, part.]

Notes:

Effective dates – Implementation – 1982 c 63: See note following RCW 51.32.095.

Effective dates – Severability – 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

RCW 51.48.131**Notice of assessment for default in payments by employer — Appeal.**

A notice of assessment becomes final thirty days from the date the notice of assessment was served upon the employer unless: (1) A written request for reconsideration is filed with the department of labor and industries, or (2) an appeal is filed with the board of industrial insurance appeals and sent to the director of labor and industries by mail or delivered in person. The appeal shall not be denied solely on the basis that it was not filed with both the board and the director if it was filed with either the board or the director. The appeal shall set forth with particularity the reason for the employer's appeal and the amounts, if any, that the employer admits are due.

The department, within thirty days after receiving a notice of appeal, may modify, reverse, or change any notice of assessment, or may hold any such notice of assessment in abeyance pending further investigation, and the board shall thereupon deny the appeal, without prejudice to the employer's right to appeal from any subsequent determinative notice of assessment issued by the department.

The 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. The department shall promptly transmit its original record, or a legible copy thereof, produced by mechanical, photographic, or electronic means, in such matter to the board. RCW 51.52.080 through 51.52.106 govern appeals under this section. Further appeals taken from a final decision of the board under this section are governed by the provisions relating to judicial review of administrative decisions contained in RCW 34.05.510 through 34.05.598, and the department has the same right of review from the board's decisions as do employers.

[1989 c 175 § 120; 1987 c 316 § 3; 1985 c 315 § 7.]

Notes:

Effective date -- 1989 c 175: See note following RCW 34.05.010.

RCW 51.48.210
Delinquent taxes.

If payment of any tax due is not received by the department by the due date, there shall be assessed a penalty of five percent of the amount of the tax for the first month or part thereof of delinquency; there shall be assessed a total penalty of ten percent of the amount of the tax for the second month or part thereof of delinquency; and there shall be assessed a total penalty of twenty percent of the amount of the tax for the third month or part thereof of delinquency. No penalty so added may be less than ten dollars. If a warrant is issued by the department for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than five dollars nor greater than one hundred dollars. In addition, delinquent taxes shall bear interest at the rate of one percent of the delinquent amount per month or fraction thereof from and after the due date until payment, increases, and penalties are received by the department.

[1987 c 111 § 8; 1986 c 9 § 18.]

Notes:

Conflict with federal requirements – Severability – Effective date – 1987 c 111: See notes following RCW 50.12.220.

RCW 51.52.104

Industrial appeals judge — Recommended decision and order — Petition for review — Finality of order.

After all evidence has been presented at hearings conducted by an industrial appeals judge, who shall be an active or judicial member of the Washington state bar association, the industrial appeals judge shall enter a proposed or recommended decision and order which shall be in writing and shall contain findings and conclusions as to each contested issue of fact and law, as well as the order based thereon. The industrial appeals judge shall file the signed original of the proposed decision and order with the board, and copies thereof shall be mailed by the board to each party to the appeal and to each party's attorney or representative of record. Within twenty days, or such further time as the board may allow on written application of a party, filed within said twenty days from the date of communication of the proposed decision and order to the parties or their attorneys or representatives of record, any party may file with the board a written petition for review of the same. Filing of a petition for review is perfected by mailing or personally delivering the petition to the board's offices in Olympia. Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.

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. If an order adopting the proposed decision and order is not formally signed by the board on the day following the date the petition for review of the proposed decision and order is due, said proposed decision and order shall be deemed adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.

[2003 c 224 § 2; 1985 c 314 § 1; 1982 c 109 § 5; 1971 ex.s. c 289 § 22; 1963 c 148 § 6.]

Notes:

Effective dates – Severability – 1971 ex.s. c 289: See RCW 51.98.060 and 51.98.070.

APPENDIX B

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

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.biaa.wa.gov
(360) 753-6824

In re: **RICHARD H LEFFLER ET UX DBA
CHOICES BUILDING &
DEVELOPMENT**

Docket No. 06 14467 06 18471

Firm No. 460,256-02

**ORDER DENYING PETITION
FOR REVIEW**

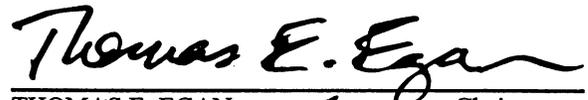
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **WARD J. RATHBONE** on **July 16, 2007**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Employer on **August 6, 2007**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: August 23, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: RICHARD H. LEFFLER, ET UX DBA) DOCKET NOS. 06 14467 & 06 18471
2 CHOICES BUILDING & DEVELOPMENT)
3 FIRM NO. 460,256-02) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Ward J. Rathbone

5 APPEARANCES:

6
7 Firm, Richard H. Leffler et ux DBA Choices Building & Development, by
8 Hanemann Bateman & Jones, per
9 Jack W. Hanemann

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 James S. Johnson, Assistant

13 Docket No. 06 14467: The Firm, Richard H. Leffler et ux DBA Choices Building &
14 Development, filed an appeal with the Board of Industrial Insurance Appeals on April 26, 2006,
15 regarding Notice and Order of Assessment No. 0411902 issued on March 7, 2006, which assessed
16 taxes, penalties, and interest due and owing to the State Fund in the amount of \$61,385.83 for all
17 four quarters of 2004 and 2005. The Department order is **REVERSED AND REMANDED**.

18 Docket Number 06 18471: The Firm, Richard H. Leffler et ux DBA Choices Building &
19 Development, filed an appeal with the Board of Industrial Insurance Appeals on September 7, 2006,
20 from an order of the Department of Labor and Industries dated August 22, 2006. In this order, the
21 Department affirmed Notice and Order of Assessment No. 0420017 dated July 31, 2006, that
22 indicated the Director had determined an accident, resulting in injuries to a worker, occurred prior to
23 the Firm securing compensation as required by RCW 51.48.010, and noted the Director has the
24 authority to assess penalties for the cost of the injury/injuries sustained by Gregory Scott Duncan
25 (Claim No. Y-655570; DOI 11/03/05) and the order determined that the cost of this claim or the
26 reserve value for this claim is \$18,757. In addition, the order indicated the Director determined that
27 the cost of the claim has had an adverse impact to the State Fund and that the Firm failed to secure
28 payment of industrial insurance compensation prior to the date of the injury. Based on such
29 findings, the order confirmed the Director had determined the Firm shall be assessed a penalty of
30 \$18,757. The Department order is **AFFIRMED**.

31
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AGO L&I DIVISION
SEATTLE

1 Both parties eventually filed respective briefs that have been carefully reviewed and
2 considered in the issuance of this consolidated Proposed Decision and Order. Counsel for the
3 Department acknowledged,

4 [T]he evidence . . . established that the Department's premium
5 calculation needs to be corrected.

6

7 [T]he Department asks that the Board affirm Choices Building and
8 Development was the employer of the individuals discussed above,
9 reverse the order on appeal in Docket No. 06-14467, and remand to
10 recalculate the assessment consistent with the discussion above. The
11 Board should affirm the assessment in Docket No. 06 18471.

12 Department's Post-Hearing Brief at 1 & 6.

13 **ISSUES**

- 14 1. Did an industrial injury occur on November 3, 2005 to a covered worker,
15 Gregory Scott Duncan, prior to the Firm (Choices Building &
16 Development) securing compensation as required by RCW 51.48.010
17 and, if so, did the Director have the authority to assess penalties for the
18 cost of the injury/injuries sustained by Mr. Duncan in the amount of
19 \$18,757 for the cost of the claim or the reserve value of the claim?
- 20 2. Did the Department correctly calculate and assess taxes, penalties, and
21 interest due and owing by the Firm to the State Fund in the amount of
22 \$61,385.83 for all four quarters of 2004 and 2005 in Notice and Order of
23 Assessment No. 0411902?

24 **EVIDENCE**

25 Richard H. Leffler was 65 years of age at the time of his testimony. In 1982, he received his
26 broker's license, formed a sole proprietorship known as RH&L Realty Company, and started a
27 construction company in 1992 known as Leffler Construction Company. In addition, he initiated a
28 development consulting company with a friend, Marley Young, but subsequently transferred his
29 interest to Mr. Young. In 2000, Mr. Leffler sold his interest in a company known as Triple A
30 Professional Rental Management.

31 Mr. Leffler operated RH&L Realty Company and his construction company during the period
32 2000 to 2003, but denied being involved in any business activities. He asserted,

I had no employees. Those guys that ran my companies knew I wanted
nothing to do with employees ever. Ever. I didn't need them in my life.
Don't want them. No employees, that was absolute paramount. I don't
get involved if there are employees . . . of course, my companies had
employees over the years, but I had nothing to do with the structure of
reporting the employees.

1 April Robertson, f/k/a Grefagn, is the niece of Mr. Leffler and moved to Shelton, Washington
2 from California in 2003. Her objective was to manage/operate a real estate business as a broker.
3 It was her wish to be mentored by Mr. Leffler who was experienced in local real estate matters.
4 She quickly obtained her real estate license and immediately became immersed in numerous real
5 estate projects. She would frequently confer with her uncle and received a small percentage of
6 ownership in the real estate company. Her ownership interest was structured to increase in relation
7 to growth in profits until she had complete ownership.

8 In 2004, Mr. Leffler conferred with Ms. Robertson and Robert Hosford. He advised them
9 that,

10 [I]f you guys want to run these companies, fine. I will back you
11 financially, but if you guys ever have employees, you have to handle
12 that. I want nothing to do with employees that is up to you.

13 But if you want to grow these companies separately and then join them
14 later and buy me out . . . I will give you both a 5 percent interest to start.
15 So that you are owners of the company, and you are legitimately and
16 legally my partner.

17 2/20/07 Tr. at 34-35.

18 The financial arrangement was structured to provide draws for these individuals against
19 future business profits. However, there was no written agreement with Mr. Hosford since Mr. Leffler
20 did not "want to get involved in a full blown partnership with people I don't know anything about."
21 2/20/07 Tr. at 36. Nevertheless, Mr. Leffler signed several blank checks and authorized
22 Mr. Hosford to complete the requisite information on each check. During 2004, Mr. Hosford
23 received \$56,549 and a Form 1099 was prepared to reflect the distribution of those funds. In
24 addition, Mr. Hosford established a company known as H & H Construction with his son and
25 repaired property owned by Mr. Leffler that had previously been damaged by fire.

26 Mr. Leffler contends that Gregory S. Duncan was included as a partner/owner in Choices
27 Building & Development (a construction company) in June 2005 with a 20 percent interest.
28 Mr. Hosford purportedly retained a 20 percent interest and Mr. Leffler owned a controlling interest of
29 60 percent "because we were still in the due diligence process. We are still in the, me discovering
30 whether they can do it or not." 2/20/07 Tr. at 46. The primary purpose of this arrangement was to
31 construct spec homes on real estate owned by Mr. Leffler. However, a formal partnership
32 agreement was neither prepared nor signed by any of these individuals.

Jack Bartz is a certified financial planner and an IRS enrolled agent who provides financial
planning, investment advising, and tax preparation. In 2005, he was contacted by Mr. Leffler to

1 review the summary of several time sheets involving numerous individuals who were building
2 houses for him. Based on these documents, he was directed to prepare an accounting of
3 construction costs. However, he was not retained to prepare tax returns for the business or any
4 Form 1099s. Mr. Bartz conferred with Robert Hosford and Gregory Duncan and concluded these
5 individuals did not have an ownership interest in the business.

6 Judith A. Kittinger is a consultant in the business of Kittinger & Associates with a specialty in
7 ~~insurance and computers. In June 2006, she was assigned by Mr. Leffler to audit invoices~~
8 pertaining to several construction sites and to review time sheets received from the state of
9 Washington regarding job costs. She contended these time sheets indicated the labor provided by
10 Mr. Hosford, Mr. Duncan, and other individuals concerning construction of certain houses. In
11 addition, Mr. Leffler provided information relating to business accounts and copies of checks. She
12 prepared a document reflecting the information contained in the time sheets, including dates, work
13 performed, hours of work, etc., that also described withdrawals by Mr. Hosford and Mr. Duncan.

14 Ann Williams presently resides in a custom home constructed by Choices Building &
15 Development with modifications as requested by her and her husband, Robert Williams. She
16 explained that Mr. Leffler financed the project, Mr. Duncan was the construction supervisor, and
17 Mr. Hosford performed a portion of the construction. It was her understanding these three
18 individuals were partners and would share in any profits. Based on this information, change orders
19 were conveyed to Mr. Duncan who negotiated the costs of modifications.

20 Mr. Williams recalled that Mr. Duncan was introduced as the partner of Mr. Leffler and
21 Mr. Hosford. Mr. Duncan managed all further construction matters including change orders,
22 financial arrangements, and the construction contract. Mr. and Mrs. Williams purchased the real
23 estate directly from Mr. Leffler and obtained a construction loan to finance the construction of the
24 spec house.

25 Two other custom-built homes were to be constructed with a construction loan in Mr. Leffler's
26 personal name rather than the name of Choices Building & Development. Mr. Leffler conceded he
27 didn't "know the bank might have put it in the construction's [sic] company's name. It is all the
28 same. I am a sole proprietor, so it doesn't matter." 2/20/07 Tr. at 72.

29 Reuben Gonzales is the owner of Extreme Roofing and confirmed he had a meeting with
30 Mr. Leffler, Mr. Hosford, and Mr. Duncan concerning a possible building development. Mr. Leffler
31 advised Mr. Gonzales that he preferred a partnership, did not want any employees in his business,
32

1 and offered a small percentage of the profits. During their discussions, Mr. Duncan and
2 Mr. Hosford indicated they were a partnership with Mr. Leffler.

3 April Robertson confirmed that she understood Mr. Hosford was managing the construction
4 aspect of her uncle's business. She was present during discussions between Mr. Leffler and
5 Mr. Duncan concerning their relationship regarding the construction business. She confirmed the
6 arrangement was similar to that of Mr. Hosford and the two would eventually own and operate the
7 business without any ownership interest of Mr. Leffler. Mr. Duncan would retain possession of
8 checks signed by Mr. Leffler without any named payee or specified amount. Mr. Duncan was
9 authorized to complete the information on the check and provide distribution of funds as necessary.

10 Tony Morris was 39 years old at the time of his testimony and is purchasing property from
11 Mr. Leffler. During the past 12 years, Mr. Morris has occasionally provided manual labor for
12 Mr. Leffler, including minor construction work at Oakland Bay property, as partial satisfaction of his
13 house payment obligations. Accordingly, Mr. Morris did not consider himself as an employee of
14 Mr. Leffler or his company.

15 William French has known Mr. Leffler for approximately eighteen years and worked for him
16 during 2005 for a flat fee of \$400. Specifically, Mr. French pressure washed and painted
17 Mr. Leffler's CAT and prepared it for an auction. Mr. French was assisted by his brother who
18 worked on the engine.

19 Jason Robertson is the spouse of April Robertson, has known Mr. Leffler for approximately
20 four years, and provided sheet rocking labor at the business building that was damaged by fire. He
21 worked more than 90 hours and received \$850 in 2005. He was assisted by Matt Hosford and Bob
22 Hosford.

23 Gregory S. Duncan is currently employed by Group Seven Real Estate Services as an
24 agent. He contended he was employed as a sales agent by Mr. Leffler's real estate company,
25 Choices Real Estate, in April 2005 and was paid a 40 percent commission. In June 2005, he
26 started work for the construction company, Choices Building & Development, and provided
27 feasibility estimates for the construction of "spec houses." Thereafter, Mr. Leffler requested
28 Mr. Duncan to act as a construction manager, was paid \$20 per hour, and "would receive a
29 percentage of the profits on the jobs I consulted on." 3/13/07 Tr. at 7. Mr. Duncan was authorized
30 to complete checks previously signed by Mr. Leffler, hire individuals, and pay them from the check
31 proceeds.

32

1 On November 3, 2005, Mr. Duncan was working at the Williams' construction site, fell off the
2 top plate of the wall, and broke his wrist. In November 2005, he stopped working for the
3 construction company because Mr. Leffler was ceasing operations. In addition, Mr. Duncan was
4 terminated from the real estate company. On December 2, 2005, Mr. Duncan signed an
5 Application for Benefits with the Department of Labor and Industries regarding his fall.

6 Bobbie Hatton is an employee of the Department of Labor and Industries and has been an
7 ~~auditor for one year. She was assigned to audit Choices Building & Development and contacted~~
8 Mr. Leffler who provided information regarding business operations including time cards and
9 various checks issued by the company. She determined there were workers for the business that
10 should have reported their hours and, therefore, prepared an Audit Payroll Report. In addition to
11 premiums for the covered workers, the Department's computer system calculated late penalties and
12 interest regarding failure to maintain time records, as well as an unregistered penalty of \$27,700.59.

13 **DECISION**

14 As the appealing party in this consolidated matter, Mr. Leffler has the burden of proof to
15 submit a preponderance of the evidence regarding the Department orders being contested. He
16 contends several individuals are excluded from coverage under the Industrial Insurance Act, and
17 thus his business is not required to pay any industrial insurance premiums.

18 The Act is to be "liberally construed" and the express legislative intent of the Act is to
19 "embrace all employments." Accordingly, mandatory coverage applies unless an individual is within
20 one of the specific exceptions to coverage contained in RCW 51.12.020. However, the question of
21 coverage is not resolved by a simple analysis of whether an employer/employee relationship exists.
22 *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550 (1979). The intent of the Act is to
23 mitigate the consequences of injuries in the workplace and to extend coverage, unless explicit
24 exceptions or exclusion can be established. Pursuant to RCW 51.12.020, certain enumerated
25 employments are excluded from coverage and the statute specifies that:

26 The following are the only employments which shall not be included within mandatory
27 coverage of this title:

- 28 (5) Sole proprietors or partners.
- 29 (13) Members of a limited liability company, if either:
 - 30 (a) Management of the company is vested in its members, and
 - 31 the members for who exemption is sought would qualify for
 - 32 exemption under subsection (5) of this section were the
 - company a sole proprietorship or partnership;

1 Washington has adopted the Revised Uniform Partnership Act. (RCW 25.05). Case law
2 declares that the existence of a partnership depends upon the intentions of the parties and may be
3 implied from the facts and circumstances of a business relationship. A partnership will be
4 considered as established if the parties have combined their property, labor, skill, and/or
5 experience for the purposes of a joint or common purpose of sharing profits. *Thornton Estate*,
6 81 Wn.2d 72 (1972). Consent to the formation of a partnership must be unanimous among the
7 purported partners. *Ferguson v. Jeanes*, 27 Wn. App. 558 (1980). In addition, the burden of
8 proving the existence of a partnership is upon the party who asserts the relationship. *Kintz v. Read*,
9 28 Wn. App. 731 (1981).

10 Mr. Leffler's testimony and demeanor evince an individual who admittedly did not want to
11 incur any imposition of premiums pertaining to individuals involved in his business projects. His
12 testimony concerning these business ventures and the arrangement with purported partners, either
13 general or limited, creates the superficial appearance of a form of partnership that is entitled to
14 exemption from mandatory coverage under the terms of RCW 51.12.020(5). In *State v. Bartley*,
15 18 Wn.2d 477, 481-482 (1943), the Washington Supreme Court ruled that:

16 In determining, in a given case, whether a partnership exists, there may
17 be disclosed by the evidence many elements pointing one way or the
18 other, no one of which may be said to be conclusive. The fact that the
19 parties to a business arrangement may call it a partnership does not
20 make it such. Many times form must give way to substance. There is
21 no fixed rule by which it may be determined whether, in a particular
22 case, there is a partnership relation. It all depends upon the intention of
the parties, and such intent must be ascertained from the agreement of
the parties, their acts and conduct, and all the facts and circumstances
of the case.

23 In *Bartley*, a limited partnership agreement listing the initial four alleged limited partners was
24 filed with the Secretary of State, pursuant to Title 25 RCW. However, the court did not limit its
25 decision to a mere consideration of the appearance of formal compliance with the partnership
26 statute in ascertaining the realities of the parties' relationship. Although there were several factors
27 indicating a partnership relationship, other factors, were "of such cogency as to overcome the
28 others and bring us to the conclusion that the arrangement throughout between Bartley and the
29 other parties to the agreements created the relationship of employer and employees." *Bartley*
30 at 482).

31 As stated in *Purdy & Whitfield v. Department of Labor & Indus.*, 12 Wn.2d 131, 140 (1942),

32 There is no arbitrary rule by which it may be determined whether a
partnership relation existed in a given instance or not. The existence of

1 a partnership depends upon the intention of the parties. That intention
2 must be ascertained from all of the facts and circumstances and the
actions and conduct of the parties.

3 Therefore, in order to determine whether an individual is a "worker" entitled to coverage by
4 industrial insurance, it is necessary to examine the essence of the working relationship and not
5 permit the form of an oral or written agreement to pre-empt reality. *Labor & Industries v. Tacoma*
6 *Yellow Cab*, 31 Wn. App. 117, 124 (1982).

7 RCW 51.04.060 provides that:

8 No employer or worker shall exempt himself or herself from the burden
9 or waive the benefits of this title by any contract, agreement, rule or
10 regulation, and any such contract, agreement, rule or regulation shall be
pro tanto void.

11 Although the absence of a written agreement entered into by Mr. Leffler and others is not
12 necessarily decisive, the arrangement is certainly subject to question concerning the consequences
13 of the relationship of these individuals.

14 Based on all the circumstances of this case, the preponderance of evidence establishes that
15 the primary, if not sole, purpose of setting up this purported partnership agreement was to evade
16 the burdens and benefits of the Industrial Insurance Act, in contravention of RCW 51.04.060. In the
17 final analysis of the evidence, Mr. Leffler's actions were clearly designed to circumvent the
18 imposition of any premiums for the labor performed in constructing the spec homes.

19 On December 19, 2005, Mr. Leffler forwarded a letter to Mr. Duncan and Mr. Hosford,
20 unilaterally designating the document as "legal notice . . . that our partnership agreement is officially
21 terminated as of this 19th day of December 2005." Exhibit No. 12. In correspondence to Bob
22 Hosford, dated January 3, 2006, Mr. Leffler refers to a previous facsimile transmission, presumably
23 from Mr. Hosford. Mr. Leffler responded that,

24 It was a very strange note mentioning some sort of employment you had
25 with Choices Building and Development. You were never an employee
26 of Choices Building and Development. You and I were involved in a
27 joint venture agreement in which you were supposed to run a business
that produced profits.

28 Exhibit No. 11.

29 Mr. Leffler's adamant assertion of a partnership agreement is subject to critical evaluation of
30 his testimony and documentary evidence. Initially, he described the discussions as part of a "due
31 diligence process" rather than a final agreement. Exhibit No. 17 indicates the proposed division of
32 future profits from construction projects with an implication of the extent of ownership. This

1 document was drafted by Mr. Hosford during a meeting of March 21, 2005. In addition,
2 Ms. Robertson prepared notes regarding discussions between Mr. Hosford, Mr. Duncan, and
3 Mr. Leffler pertaining to the proposed percentage of ownership business interests. (Exhibit
4 Nos. 7, 8, & 9). However, the evidence fails to substantiate that these discussions were anything
5 but informal and loosely defined negotiations for the gradual purchase of the company. Quite
6 simply, a finalized, enforceable, binding partnership agreement was never effectuated between all
7 the parties.

8 Although a written document is not mandatory, there must be a mutual consent of all the
9 parties. Mr. Duncan's activities reveal an individual who was performing personal labor at the time
10 of his injury and operating as a project manager. Admittedly, his authority was extensive and he
11 possessed the power to execute binding construction contracts with the right to agree to change
12 orders. Nevertheless, such authorization is not necessarily limited to general or limited partners,
13 but is consistent with delegated management duties.

14 Extensive evidence was introduced concerning Mr. Duncan's ability to complete checks
15 signed by Mr. Leffler. These activities were undertaken in accordance with Mr. Leffler's instructions
16 and permission. If Mr. Duncan was, indeed, a partner in this business, he would have been
17 competent to sign such checks without Mr. Leffler's permission. The evidence establishes that
18 Mr. Duncan was processing these checks at the direction of Mr. Leffler in order to pay numerous
19 workers their wages in cash without creating documentary proof of payments that were subject to
20 taxation.

21 Although Mr. Hosford participated in discussions concerning the creation of a joint venture,
22 he never accepted the responsibilities of either a general or limited partner. The evidence discloses
23 Mr. Leffler's wish to sell the business or transfer his interest, but the general proposals were never
24 accepted as a binding contract. Mr. Hosford did not testify in this proceeding, but there is no
25 persuasive evidence that he had any substantial economic interest in the company other than as a
26 source of income. The preponderance of evidence indicates that the essence of his activities was
27 his personal labor.

28 In order to determine whether an individual is a "worker" entitled to coverage by industrial
29 insurance, it is necessary to assess the essence of the working relationship and not allow the form
30 of a written agreement or the notes of conversations to prevail over reality. *Department of Labor &*
31 *Indus. v. Tacoma Yellow Cab*, 31 Wn. App. 117, 124 (1982). Based on the evidence and credibility
32

1 of all the witnesses in this matter, the conclusion is that Mr. Hosford and Mr. Duncan were, in
2 reality, workers for the Firm rather than limited or general partners.

3 The arrangement was apparently crafted by Mr. Leffler in order to avoid direct payment of
4 wages to workers and premiums for workers' compensation coverage. Alternatively, Mr. Leffler
5 asserts two other reasons for challenging the assessment of premiums:

- 6 (1) Certain individuals were independent contractors and the essence of
7 ~~their contracts with Choices Building & Development was not their~~
8 personal labor; and
- 9 (2) Some of the individuals were registered contractors, excluded from
10 coverage by RCW 51.08.180.

11 In 2004, Mr. Hosford performed services concerning repairs to the Olympic Highway
12 Building. In that capacity, he was not acting as either a general or a limited partner of Choices.
13 Mr. Leffler contends he was billed by Mr. Hosford's business, H & H Construction, and that
14 Mr. Hosford was an independent contractor. Exhibit Nos. 14 and 15 are tax statements forwarded
15 to Mr. Hosford by Mr. Leffler for the years 2004 and 2005, and document "miscellaneous income"
16 for purposes of internal revenue obligations. However, the essence of Mr. Hosford's assignment
17 was his personal labor and the exemption contemplated in RCW 51.08.195 is not applicable.

18 The Department's assessment included several other individuals who were not considered
19 partners or independent contractors. For example, Bridget Buntin (aka Bridge Button) was
20 Mr. Duncan's personal friend who was hired by him to perform construction labor on the spec
21 homes, including foundation work and digging ditches. She performed these assignments during
22 the third quarter of 2005 and was directly paid by Mr. Duncan with cash derived from the checks
23 pre-signed by Mr. Leffler. Clearly, she was a covered worker during this period and the Department
24 properly assessed premiums.

25 Tony Morris testified that he was purchasing property from Mr. Leffler and had periodically
26 performed personal manual labor for him for approximately eleven years. These activities were to
27 defray delinquent payments relating to the property he was purchasing from Mr. Leffler. Although
28 he acknowledged the possibility of performing this labor between July and September 2004, he
29 denied any such activities in 2005 and submitted that "it probably been two or three years since I
30 was doing anything for him." 2/20/07 Tr. at 10. Based on his unchallenged testimony, the
31 preponderance of evidence indicates that Mr. Morris was neither an employee nor a covered
32 worker during the audit period of 2004 and 2005.

1 William French's activities were limited to washing and painting equipment belonging to
2 Mr. Leffler in the summer of 2005 in order to present it for auction. Mr. French did not provide any
3 personal labor for the construction of the spec houses and received approximately \$400 as a flat
4 fee for his services. In addition, he received reimbursement of \$50 for rental of cleaning equipment
5 and apparently shared a portion of his fee with his brother who assisted him. Based on his
6 unchallenged testimony, Mr. French was neither an employee nor a covered worker concerning
7 these activities.

8 Jason Robertson performed sheet rocking services concerning a building owned by
9 Mr. Leffler in 2004. He worked for approximately 94½ hours and received \$850 in 2005 for his
10 efforts. Accordingly, any assessment for 2005 was erroneous and should be expunged. Mr. Leffler
11 contends he was merely aiding a future relative who had never previously engaged in sheet rocking
12 assignments. Neither of these propositions is persuasive and Mr. Robertson's activities in 2004
13 were properly assessed for the second and third quarters of 2004.

14 Nathan (last name unknown) was hired by Mr. Duncan to perform the duties of a framer and
15 carpenter on the spec houses during the third and fourth quarters of 2005. Apparently, he was paid
16 cash with the funds received after Mr. Duncan completed and deposited checks pre-signed by
17 Mr. Leffler. There is simply no persuasive evidence that he should not be considered as a covered
18 worker for purposes of assessment of premiums. Rather, he appears to be a classic example of an
19 employee who is paid "under the table" in order to avoid income tax responsibilities in exchange for
20 not seeking workers' compensation coverage.

21 Tim Griese did not testify and did not perform any manual labor on the construction of the
22 spec houses. There is no reason to conclude that he was an employee of the Firm and Mr. Leffler
23 indicated that he only wished to assist him in a manner comparable to Mr. Morris. Although the
24 evidence is scarce concerning his activities, there is no reason to disregard Mr. Leffler's testimony
25 in this instance. Accordingly, any assessment for the period of 2004 and 2005 is incorrect.

26 Matt Hosford and Tim Hosford were hired by Bob Hosford who was the field superintendent
27 on the construction project and apparently possessed the authority to hire his adult children. Both
28 individuals worked on the spec homes in 2005 and should have been covered workers during that
29 time. Accordingly, their hours for 2005 were properly assessed.

30 April Robertson's activities were limited to the real estate business. Her testimony reflects a
31 person who was determined to succeed in this undertaking and achieved her goals. She arrived in
32 Washington in December 2003 and obtained her real estate license within three months. She

1 contended that she "revamped" the real estate business that was previously known as RH&L Real
2 Estate during the first quarter of 2004. 2/7/07 Tr. at 87. Although she asserts a partnership
3 arrangement had been established, she acknowledged that her uncle was listed as the sole owner
4 when the name of the business was changed to Choices Real Estate.

5 Ms. Robertson considered herself as a partner with her uncle and her actions are consistent
6 with that perspective. Unlike the discussions with Mr. Hosford and/or Mr. Duncan, Mr. Leffler
7 proceeded with a financial arrangement consistent with her statements that precipitated her move
8 to Washington. She assumed responsibility for the operation of the real estate business and
9 utilized her share of the profits of the company to acquire the purchase of her uncle's company in
10 March 2006 as a real estate broker. The difference between her situation and that of Mr. Duncan
11 and Mr. Hosford is the discussions with Mr. Leffler actually resulted in the consummation of a
12 partnership agreement. Based on her persuasive testimony, she was a partner for purposes of
13 workers' compensation coverage during the audit period of 2004 and 2005. Accordingly, any
14 assessment concerning her participation as a partner during that time was incorrect.

15 The evidence establishes that hours were assessed in a risk classification designated as
16 0507 for roofing when the company subcontracted the roofing projects. Accordingly, the
17 Department is directed to reclassify hours assigned to class 0507 into class 0510. In addition, the
18 Department's assessment assigned estimated hours for Greg Duncan based on payments to him.
19 However, this process duplicated the hours assessed for Greg Duncan, Nathan, and Bridget
20 Buntin.

21 Therefore, the Department acknowledges that it is appropriate to assess 480 hours in class
22 7202 and no hours in class 0510 for the second quarter of 2005 concerning Mr. Duncan.
23 Furthermore, the Department concedes that it is appropriate to assess estimated premiums in class
24 0510 based on payments to Mr. Duncan during the third and fourth quarter of 2005 for the work
25 performed by Mr. Duncan, Ms. Buntin, and Nathan (last name unknown). This categorization
26 should use an average hourly wage calculation as provided by WAC 296-17-35201(3). Inasmuch
27 as the penalties and interest were based on the premium calculations, the Department is directed to
28 recalculate the penalties and interest after establishing the premiums as delineated.

29 In conclusion, the assessment in Docket No. 06 18471 is affirmed. However, the
30 Department order in Docket No. 06 14467 is incorrect and is reversed. The matter is remanded to
31 the Department with directions to recalculate the assessment in accordance with this decision and
32 the Findings of Fact and Conclusions of Law hereinafter stated.

FINDINGS OF FACT

- 1
2 1. Docket No. 06 14467: On March 7, 2006, the Department issued Notice
3 and Order of Assessment No. 0411902 to Richard H. Leffler et ux DBA
4 Choices Building & Development, assessing taxes, penalties, and
5 interest due and owing to the State Fund in the sum of \$61,385.83 for all
6 four quarters of 2004 and 2005.

7 The Notice and Order of Assessment was received by the Firm on
8 March 9, 2006. However, Mr. Leffler had previously directed the
9 Department on February 23, 2006, to forward "all further
10 correspondence of any sort" to him in care of his attorney's office. On
11 April 12, 2006, Notice and Order of Assessment No. 0411902 was
12 received by Mr. Leffler's attorney.

13 On April 12, 2006, a Protest and Request for Reconsideration was filed
14 with the Department on behalf of the Firm regarding Notice and Order of
15 Assessment No. 0411902, dated March 7, 2006. The Department
16 forwarded the Protest and Request for Reconsideration to the Board of
17 Industrial Insurance Appeals as a direct appeal. On April 26, 2006, the
18 Board received the Protest and Request for Reconsideration forwarded
19 from the Department as a direct appeal. On May 18, 2006, the Board
20 issued an order granting the appeal, subject to proof of timeliness,
21 assigned it Docket No. 06 14467, and directed that further proceedings
22 be conducted on the merits.

23 Docket No. 06 18471: On July 31, 2006, the Department issued Notice
24 and Order of Assessment No. 0420017 to Richard H. Leffler et ux DBA
25 Choices Building & Development, indicating that the Director had
26 determined that an accident, resulting in injuries to a worker, occurred
27 prior to the Firm securing compensation as required by RCW 51.48.010,
28 noted the Director has the authority to assess penalties for the costs of
29 the injury/injuries sustained by Gregory Scott Duncan (Claim
30 No. Y-655570; DOI 11/03/05), confirmed that the cost of this claim or
31 reserve value for this claim had been determined as \$18,757, verified
32 that the Director had determined the cost of the above referenced claim
had an adverse impact to the State Fund and that the Firm failed to
secure payment of industrial insurance compensation prior to the date of
injury and, based on the above findings, the Director determined that the
Firm be assessed a penalty of \$18,757.

On August 15, 2006, a Protest and Request for Reconsideration was
filed with the Department on behalf of the Firm regarding Notice and
Order of Assessment No. 0420017 dated July 31, 2006, which was
received on August 8, 2006. On August 22, 2006, the Department
issued an order affirming Notice and Order of Assessment No. 0420017
issued on July 31, 2006.

On September 7, 2006, a Notice of Appeal was filed with the Board
regarding the Department order dated August 22, 2006. On
September 25, 2006, the Board issued an order granting the appeal,

1 assigned Docket No. 06 18471, and directed that further proceedings be
2 conducted on the merits.

3 2. Richard H. Leffler is currently the owner of Choices Building &
4 Development. In 1982, he received his broker's license and formed a
5 sole proprietorship known as RH&L Realty Company. In 1992, he
6 established a construction company known as Leffler Construction
7 Company. He operated RH&L Realty Company and his construction
8 company during the period of 2000 to 2003.

9 ~~3. In 2004, Mr. Leffler entered into a partnership with his niece, April~~
10 ~~Robertson f/k/a Greftagn. The agreement provided her with a small~~
11 ~~percentage ownership interest in the real estate company and was~~
12 ~~structured to increase in ownership interest until she had acquired~~
13 ~~complete ownership. She assumed responsibility for the operation of~~
14 ~~the real estate business and utilized her share of the profits of the~~
15 ~~company to acquire Mr. Leffler's ownership interest by March 2006~~
16 ~~when she became a real estate broker. During the period of 2004 and~~
17 ~~2005, she was a partner in the company, was not an employee of the~~
18 ~~company, and was not a covered worker.~~

19 4. In 2004, Mr. Leffler conferred with Robert Hosford concerning the
20 purchase of Mr. Leffler's sole proprietorship of the construction company
21 known as Choices Building & Development. No written agreement was
22 executed and Mr. Hosford was not a partner of Mr. Leffler during the
23 period of 2004 and 2005.

24 5. In June 2005, Mr. Leffler conferred with Gregory S. Duncan concerning
25 the purchase of a 20 percent interest in the Choices Building &
26 Development construction company. The primary purpose of the
27 company was to construct spec homes on real estate owned by
28 Mr. Leffler. No agreement was reached.

29 6. During the period of 2004 and 2005, Mr. Duncan was not a partner with
30 Mr. Leffler concerning the construction business and did not have an
31 ownership interest in the construction company known as Choices
32 Building & Development.

33 7. During the period of 2004 and 2005, Mr. Hosford did not have an
34 ownership interest in the construction company known as Choices
35 Building & Development.

36 8. During the period of 2004 and 2005, Mr. Leffler was the sole proprietor
37 of the construction company known as Choices Building &
38 Development.

39 9. Ann and Robert Williams purchased real estate directly from Mr. Leffler
40 and obtained a construction loan to finance the construction of a house
41 to be built by Choices Building & Development. Mr. Leffler helped
42 finance the project and Mr. Duncan acted as the construction
43 supervisor. In that capacity, he was authorized to accept change
44 orders, negotiate costs of modifications, and execute the construction
45 contract. In addition, he was authorized to complete checks pre-signed

1 by Mr. Leffler and pay individuals from the proceeds for their labor.
2 Mr. Duncan was not authorized to sign any checks on the company's
3 bank account.

4 10. On November 3, 2005, Gregory S. Duncan was an employee of the Firm
5 and sustained an industrial injury during the course of his employment
6 with the Firm. At the time of the accident, resulting in injuries to
7 Mr. Duncan, the Firm had not secured compensation as required by the
8 Industrial Insurance Act.

9 ~~11. Two other custom homes were to be constructed on property owned by~~
10 ~~Mr. Leffler and with a construction loan in his personal name rather than~~
11 ~~the name of Choices Building & Development.~~

12 12. Bridget Buntin (aka Bridge Button) was hired by Mr. Duncan to provide
13 construction labor on the spec homes, including foundation work and
14 digging ditches. She performed these services during the third quarter
15 of 2005 and was paid directly by Mr. Duncan with cash from funds
16 received by him by depositing checks pre-signed by Mr. Leffler. During
17 the third quarter of 2005, she was an employee and covered worker of
18 the Firm.

19 13. Tony Morris is purchasing property from Mr. Leffler and, during the past
20 eleven or twelve years, has occasionally provided manual labor for him,
21 including minor construction work, as partial satisfaction of monthly
22 house payment obligations. During the period of 2004 and 2005,
23 Mr. Morris was not an employee of Mr. Leffler and was not a covered
24 worker.

25 14. In 2005, Mr. Leffler paid William French a flat fee of \$400 to pressure
26 wash and paint equipment for the purpose of selling it at an auction. In
27 addition, Mr. French received reimbursement of \$50 for renting
28 equipment to perform these tasks. He was assisted by his brother who
29 worked on the engine of the equipment. During the period of 2004 and
30 2005, Mr. French did not provide any personal labor for the construction
31 of the spec houses, was not an employee of Mr. Leffler, and was not a
32 covered worker.

15. In 2004, Jason Robertson performed sheet rocking services concerning
a building owned by Mr. Leffler. He worked for approximately 94½
hours and received \$850 in 2005 for his services. During the second
and third quarters of 2004, he was working under an independent
contract, the essence of which was his personal labor, and he was a
covered worker.

16. Nathan (last name unknown) performed the duties of a framer and
carpenter on the spec homes during the third and fourth quarters of
2005. He was an employee of the Firm during that period and was a
covered worker.

17. Tim Griese did not perform any manual labor on the construction of the
spec houses during the period of 2004 and 2005, and was not a covered
worker during that period.

- 1 18. Matt Hosford and Tim Hosford worked on the spec houses in 2005 and
2 provided personal labor regarding the project. Accordingly, they were
3 both employees of the Firm during that period and were covered
4 workers.
5
6 19. The Department assessed hours in a risk classification designated as
7 0507 for roofing although the company had subcontracted the roofing
8 projects. The risk classification should have been assigned to
9 class 0510.
10
11 ~~20. The Department's assessment assigned estimated hours for Gregory S.~~
12 ~~Duncan based on payments made to him. However, this methodology~~
13 ~~duplicated the hours assessed for Gregory S. Duncan, Nathan (last~~
14 ~~name unknown), and Bridget Buntin. In addition, the assessment~~
15 ~~assigned 480 hours in the real estate class for Gregory S. Duncan~~
16 ~~regarding the second and third quarter of 2005 and failed to indicate he~~
17 ~~undertook construction work during the second quarter of 2005. The~~
18 ~~Department's assessment should have assessed 480 hours in~~
19 ~~class 7202 and no hours in class 0510 for the second quarter of 2005~~
20 ~~concerning Mr. Duncan.~~
21
22 21. The Department should have assessed estimated premiums in class
23 0510 based on payments to Mr. Duncan during the third and fourth
24 quarters of 2005 for the work performed by Mr. Duncan, Ms. Buntin, and
25 Nathan (last name unknown). This categorization should utilize an
26 average hourly wage calculation as provided by WAC 296-17-35201(3).
27
28 22. The penalties and interest assessed by the Department were based on
29 incorrect premium calculations.

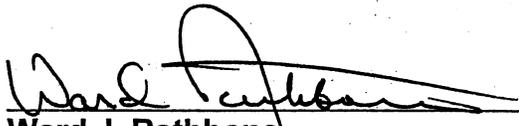
CONCLUSIONS OF LAW

- 30 1. The Board of Industrial Insurance Appeals has jurisdiction over the
31 parties to and subject matter of these appeals.
32
33 2. For the purposes of assessment of industrial insurance premiums, a
34 general partnership or limited partnership was not effectively created
35 between Richard H. Leffler et ux DBA Choices Building & Development
36 and Gregory S. Duncan or Robert Hosford for the years of 2004 and
37 2005. Therefore, both Mr. Duncan and Mr. Hosford were workers within
38 the meaning of RCW 51.08.180 and were not excluded from mandatory
39 coverage by RCW 51.12.020(5).
40
41 3. On November 3, 2005, Mr. Duncan was an employee of the Firm and
42 was a covered worker at the time of the accident that occurred prior to
43 the Firm securing compensation as required by RCW 51.48.010.
44
45 4. Notice and Order of Assessment No. 0420017, issued by the
46 Department on July 31, 2006, is correct and is affirmed.

1 5. Notice and Order of Assessment No. 0411902, issued by the
2 Department on March 7, 2006, is incorrect and is reversed. The matter
3 is remanded to the Department with directions to recalculate taxes due
4 and owing in accordance with the above Findings of Fact, recalculate
5 penalties and interest taking the new calculation of overdue premiums
6 and the facts.

6 It is so ORDERED.

7 DATED: JUL 16 2007

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10 
11 **Ward J. Rathbone**
12 Industrial Appeals Judge
13 Board of Industrial Insurance Appeals
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