

Ray Araya (Emerald Coast Painting)

ASSESSMENTS

Penalties

Penalties assessed for misrepresentation and failure to keep records are not penalties on premiums as set forth in RCW 51.48.055.***In re Ray Araya (Emerald Coast Painting), BIIA Dec., 11 12356 (2014)*** [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 14-2-11166-5.*]

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

1 **IN RE: ROY R. ARAYA ET UX DBA) DOCKET NO. 11 12356**
2 **EMERALD COAST PAINTING, LLC)**
3 **FIRM NO. 040,323-00) DECISION AND ORDER**

4 **APPEARANCES:**

5 Roy R. Araya, Corporate Officer for the Firm,
6 Emerald Coast Painting, LLC, by
7 Sayre Law Offices, PLLC, per
8 Steven M. Sayre

9 Department of Labor and Industries, by
10 Jerry Billings, Litigation Specialist,
11 None

12 Department of Labor and Industries, by
13 The Office of the Attorney General, per
14 Scott T. Middleton, Assistant

15 The corporate officer, Roy R. Araya, of the firm Emerald Coast Painting, LLC, filed an appeal
16 with the Board of Industrial Insurance Appeals on March 3, 2011, from a Notice and Order of
17 Assessment of the Department of Labor and Industries dated February 2, 2011. In this order, the
18 Department affirmed the provisions of an October 1, 2010 Notice and Order of Assessment of
19 Corporate Officer Liability No. 0521080, for unpaid taxes, interest, and penalties previously
20 assessed against Emerald Coast Painting, LLC, in the amount of \$375,862.68. The Department
21 order is **REVERSED AND REMANDED**.

PRELIMINARY MATTERS

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
24 Order issued on October 14, 2013, in which the industrial appeals judge reversed and remanded
25 the Department order dated February 2, 2011. The corporate officer, Roy R. Araya, filed a Reply to
26 the Department's Petition for Review on January 10, 2014. The contested issue addressed in this
27 order is whether the Department correctly assessed corporate officer personal liability under
28 RCW 51.48.055, for industrial insurance premiums, interest, and penalties unpaid by Emerald
29 Coast Painting, LLC, for the fourth quarter of 2004, through the fourth quarter of 2006, against
30 Mr. Araya.
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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
2 no prejudicial error was committed. The rulings are affirmed.

3 **DECISION**

4 We granted review because we disagree with the conclusion reached by our industrial
5 insurance appeals judge in the Proposed Decision and Order that Mr. Araya does not have
6 corporate officer personal liability under RCW 51.48.055 for any of the outstanding assessment
7 against Emerald Coast Painting, LLC. We conclude that Mr. Araya has corporate officer personal
8 liability for the premiums, interest, and penalties on those premiums, but that the personal liability
9 does not extend to the other penalties assessed. We have granted review to reverse and remand
10 the Department Notice and Order of Assessment of Corporate Officer Liability No. 0521080, with
11 direction to reissue the Notice and Order of Assessment of Corporate Officer Liability consistent
12 with this decision.

13 **FACTS**

14 The Proposed Decision and Order summarized the issues and evidence presented in this
15 appeal. We highlight some of the key facts.

16 Roy R. Araya and Van Brink ran Emerald Coast Painting, LLC, an exterior and interior
17 painting business, from 2001 to 2010. The business was organized as a Limited Liability Company
18 (LLC) with no written operating agreement or by laws. Mr. Araya used the title Chief Operating
19 Officer (COO) and Mr. Brink used the title Chief Financial Officer (CFO). They were the only two
20 members of the LLC. The record established that Mr. Araya largely dealt with the field work –
21 bidding on jobs, interacting with subcontractors and so forth, while Mr. Brink largely dealt with the
22 financial and business aspects of the job, corporate filings to various state agencies, and
23 maintaining the bank accounts.

24 Mr. Araya denied having anything to do with the financial aspects of the business. However,
25 he carried a checkbook in the field; paid subcontractors via check; and made purchases for the
26 business. He drove a company vehicle; paid the insurance for it; and paid other business expenses
27 directly.

28 During the audit period, fourth quarter of 2004, through fourth quarter of 2006, Emerald
29 Coast Painting, LLC, filed "no payroll" reports, in essence telling the Department that they had no
30 employees. The LLC treated all of the painters as subcontractors, and they paid their office
31 manager as a subcontractor. In an audit, the Department found Emerald Coast Painting, LLC, had
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1 covered workers, and assessed premiums for workers' compensation taxes. The firm had been
2 audited for a previous period, assessed for the same issues, but did not change their practices.
3 Because of this, in 2008 when the assessment related to the fourth quarter of 2004, through the
4 fourth quarter of 2006, was issued the Department also added a significant misrepresentation
5 penalty, along with a penalty for failure to keep records.

6 In 2008 Mr. Araya hired Tami Church to work as an office manager for Emerald Coast
7 Painting, LLC. Ms. Church made payments on behalf of the firm to vendors, subcontractors, and
8 the Department. Ms. Church explained in her testimony that she had the responsibility to make
9 sure the LLC was in compliance with L&I, and that she spoke with people at the Department many
10 times. Emerald Coast Painting, LLC's business practice was that Mr. Araya and Mr. Brink would
11 "pre-sign" a stack of checks, and Ms. Church would make actual payments at their direction.

12 In late 2008 when Mr. Brink was out of the country, the Department issued a levy against
13 Emerald Coast Painting, LLC's bank account. Mr. Araya, concerned that checks to the
14 subcontractors would fail to clear and be dishonored, negotiated with the Department and got the
15 levy reversed. He met and spoke with Department employees to discuss Emerald Coast Painting,
16 LLC's L&I account.

17 In 2009 following the assessment, Mr. Araya and Mr. Brink signed a payment plan with the
18 Department. Emerald Coast Painting, LLC made payments to the Department with checks bearing
19 Mr. Araya's signature. Mr. Araya asserted that he did not direct those payment be made, and the
20 check merely bore his signature because he had pre-signed those checks.

21 Also in 2009 the members of Emerald Coast Painting, LLC, had a falling out. By early 2010,
22 the business was defunct. In their respective testimony, Mr. Araya and Mr. Brink told conflicting
23 stories as to which of them was at fault and being dishonest. Mr. Araya conceded in his testimony
24 that he knew there was a significant debt owed to L&I by the LLC when he left the business.

25 **ANALYSIS**

26 We agree with our industrial appeals judge that the issue in this appeal is whether Mr. Araya
27 had the control, supervision, responsibility, or duty to act for the corporation as a prerequisite to
28 attaching personal liability.

29 RCW 51.48.055, the statute at issue provides in relevant part as follows:

- 30 (1) Upon termination, dissolution, or abandonment of a corporate or
31 limited liability company business, any officer, member, manager, or
32 other person having control or supervision of payment and/or reporting

1 of industrial insurance, or who is charged with the responsibility for the
2 filing of returns, is personally liable for any unpaid premiums and interest
3 and penalties on those premiums if such officer or other person willfully
4 fails to pay or to cause to be paid any premiums due the department
under chapter 51.16 RCW.

5 For purposes of this subsection "willfully fails to pay or to cause to be
6 paid" means that the failure was the result of an intentional, conscious,
and voluntary course of action.

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

11 As the appealing party, Mr. Araya had the burden to show that the Department's order was
12 incorrect and that he was not personally liable for the assessed premiums under RCW 51.48.055.
13 RCW 51.52.050. We note that the amount of the tax assessment, penalties, and interest were not
14 at issue in this case. We also agree with our industrial appeals judge that there was insufficient
15 evidence to establish that Mr. Araya's wife had any role in the corporation or any liability for
16 industrial insurance taxes assessed against Emerald Coast Painting, LLC. It is also uncontested
17 that Mr. Araya had personal knowledge of the outstanding industrial insurance tax, interest, and
18 penalty assessment against Emerald Coast Painting, LLC.

19 In his appeal, Mr. Araya contended corporate officer personal liability should not attach to
20 him because he and Mr. Brink divided the business duties associated with operating Emerald Coast
21 Painting, LLC, and the duties regarding industrial insurance taxes were typically performed by
22 Mr. Brink. It is undisputed that Mr. Brink signed the payroll tax returns filed with the Department,
23 and had the most contact with the Department. We believe that the assignment of duties and
24 responsibilities between LLC members is not what controls in this situation. Rather, the statute
25 points to the corporate officers' control or supervision of payment and/or reporting of industrial
26 insurance, or who is charged with the responsibility for the filing of returns.

27 We have previously considered the question of corporate officer personal liability under
28 RCW 51.48.055, in *In re Regan Bafaro et ux*, Dckt. No. 12 20238 (August 15, 2013). In the *Bafaro*
29 case, the record did not support a conclusion that Mr. Bafaro exercised financial responsibility with
30 regards to industrial insurance. However, here Mr. Araya did exercise financial responsibility on
31 behalf of Emerald Coast Painting, LLC, in many ways. The record shows Mr. Araya carried a
32 checkbook in the field; made decisions as to which bills would be paid; made direct payments to

1 various subcontractors by company check; made purchases for the business; drove a company
2 vehicle; paid the vehicle insurance; and paid other business expenses directly.

3 The record also shows Mr. Araya met and spoke with Department employees to discuss
4 Emerald Coast Painting, LLC's L&I account, and successfully sought reversal of a levy against
5 Emerald Coast Painting, LLC's bank account. Notably, Mr. Araya was concerned that the bank
6 levy, which would direct funds to the outstanding Department assessment, would take funds from
7 subcontractors, evidencing responsibility and decision making for payment of bills other than
8 industrial insurance taxes. We find this evidence of willful failure to pay outstanding industrial
9 insurance taxes.

10 Finally, the record shows Mr. Araya was a signatory in 2009 on a Department payment plan,
11 and that payments were made to the Department with checks bearing Mr. Araya's signature.
12 Mr. Araya would like us to agree that because he pre-signed a stack of checks he was not directly
13 responsible for the payments, however, we conclude that by signing the checks and delegating the
14 actual payment to a staff person, he was exercising the requisite control or supervision of payment
15 of industrial insurance referenced in RCW 51.48.055.

16 We conclude the record supports a conclusion that, as a managing member of a two-person,
17 closely held LLC, with bank signature authority, a history of bill paying, actual knowledge of the tax
18 assessment and liability, and having signed the payment agreement, Mr. Araya was a responsible
19 corporate officer who willfully failed to pay or cause to be paid the premiums due to the Department
20 under RCW 51.48.055.

21 Having determined that Mr. Araya has personal liability under RCW 51.48.055, we turn now
22 to analysis of the assessment. In its Notice and Order of Assessment of Corporate Officer Liability
23 (NOA) No. 0521080 dated October 1, 2010, the Department assessed Mr. Araya with personal
24 liability for premiums, penalties, and interest previously assessed to Emerald Coast Painting, LLC.
25 The NOA set forth premiums of \$143,356.45; penalties of \$28,809.28; and interest of \$76,553.09,
26 for the period from the fourth quarter of 2004, through the fourth quarter of 2006. In addition, the
27 NOA provided for additional penalties of \$10,000, for failure to keep records, and \$286,700, for
28 misrepresentation.

29 A plain reading of RCW 51.48.055(1), the statutes establishing corporate officer liability,
30 provides that liability extends to "unpaid premiums and interest and penalties on those premiums."
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1 The statutory authority for the Department's assessment of penalties is found at RCW 51.48.020 for
2 misrepresentation, and at RCW 51.48.030 for failure to keep records.

3 Here, the premiums, penalties, and interest actually assessed on the premiums total
4 \$248,718.82. We believe that the penalties assessed for misrepresentation and failure to keep
5 records are not penalties on the premiums as set forth in RCW 51.48.055. Accordingly, we
6 conclude that the penalties for misrepresentation and for failure to keep records are not recoverable
7 by the Department against a corporate officer personally under the statute. Had the Legislature
8 intended to extend corporate officer personal liability for penalties due to misrepresentation and for
9 failure to keep records, the statute could have explicitly provided for recovery of those penalties.

10 We conclude that Mr. Araya is personally liable under RCW 51.48.055 for industrial
11 insurance premiums, interest, and penalties on those premiums. We reverse and remand the NOA
12 under appeal, with direction to the Department to recalculate the assessment without the penalties
13 assessed for misrepresentation and for failure to keep records.

14 **FINDINGS OF FACT**

- 15 1. On May 23, 2011, an industrial appeals judge certified that the parties
16 agreed to include the Jurisdictional History in the Board's record solely for
17 jurisdictional purposes.
- 18 2. In the fourth quarters of 2004, all four quarters of 2005, and all four
19 quarters of 2006, Emerald Coast Painting, LLC, was a limited liability
20 corporation, doing interior and exterior painting in the state of Washington.
21 During that time, Emerald Coast Painting, LLC, had an industrial
22 insurance account with the Department of Labor and Industries and filed
23 "no payroll" reports. Emerald Coast Painting, LLC, was no longer
24 operating and was terminated, dissolved, or abandoned by March 1, 2010.
- 25 3. On April 2, 2008, the Department issued a Notice and Order of
26 Assessment of Industrial Insurance Taxes No. 0460600, against Emerald
27 Coast Painting, LLC, in the amount of \$503,586.80 for unpaid premiums,
28 penalties, and interest owed on the corporation's industrial insurance
29 account for the period covering the fourth quarter of 2004, through the
30 fourth quarter of 2006. The order included a penalty of \$286,700 for
31 misrepresentation by the corporation of the number of employees on its
32 payroll. The April 2, 2008 order was never appealed and became final.
4. On October 1, 2010, the Department issued Notice and Order of
Assessment of Corporate Officer Liability No. 0521080 in which it
determined that Mr. Araya and his spouse were personally liable as
provided by RCW 51.48.055 for taxes unpaid by Emerald Coast Painting,
LLC, from the fourth quarter of 2004, through the fourth quarter of 2006.
The total assessment was in the amount of \$375,862.68 (after a

1 \$169,556.14 payment was made). After Mr. Araya protested the
2 October 1, 2010 order, the Department affirmed the order in its
3 February 2, 2011 Order and Notice Reconsidering Notice and Order of
4 Assessment of Industrial Insurance Taxes No. 0521080.

- 5 5. The assessment was composed of premiums in the amount of
6 \$143,356.45, penalties on the premiums in the amount of \$28,809.28, and
7 interest on the premiums in the amount of \$76,553.09. Additional
8 penalties were assessed for failure to keep records in the amount of
9 \$10,000, and for misrepresentation in the amount of \$286,700.
- 10 6. Roy R. Araya and Van Brink were the only members of Emerald Coast
11 Painting, LLC. Mr. Araya was Emerald Coast Painting, LLC's chief
12 operating officer. Mr. Brink was Emerald Coast Painting, LLC's chief
13 financial officer.
- 14 7. Roy R. Araya was an officer of Emerald Coast Painting, LLC, and in that
15 capacity had control, supervision, and responsibility for payment and/or
16 reporting of Emerald Coast Painting, LLC's industrial insurance premiums
17 with the Department of Labor and Industries.
- 18 8. Mr. Araya's spouse had no role in the corporation.

CONCLUSIONS OF LAW

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
20 and subject matter in these appeals.
- 21 2. The nonpayment of Emerald Coast Painting, LLC's industrial insurance
22 premiums, interest, and penalties due to the Department for the fourth
23 quarter of 2004, all four quarters of 2005, and all four quarters of 2006,
24 was under the control, supervision, responsibility, and duty to act for
25 Emerald Coast Painting, LLC, of Roy R. Araya, and was willful, as that
26 term is defined by RCW 51.48.055.
- 27 3. Roy R. Araya, along with his marital community, is personally liable for the
28 unpaid industrial insurance premiums, interest and penalties of Emerald
29 Coast Painting, LLC, for the fourth quarter of 2004, all four quarters of
30 2005, and all four quarters of 2006, within the meaning of RCW 51.48.055.
- 31 4. Roy R. Araya, along with his marital community, is not personally liable for
32 the additional penalties assessed for failure to keep records and
misrepresentation, within the meaning of RCW 51.48.055.

1 5. The Order and Notice Reconsidering Notice and Order of Assessment of
2 Industrial Insurance Taxes No. 0521080, dated February 2, 2011, is
3 reversed and is remanded to the Department with direction to issue a
4 further order consistent with the law and the facts.

5 Dated: March 24, 2014.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7 /s/
8 DAVID E. THREEEDY Chairperson

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10
11 /s/
12 FRANK E. FENNERTY, JR. Member