Burden of proof

The fact that the Department found that the employer knowingly misled the Department when it failed to report covered workers does not change the employer's burden of proof in an appeal before the Board; employers always bear the burden of proof in an appeal from a Notice and Order of Assessment (RCW 51.48.131). …*In re Dispatch Group, BIA Dec., 13 21330 (2015)*

Scroll down for order.
BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DISPATCH GROUP, INC. ) DOCKET NO. 13 21330
) ) DECISION AND ORDER
FIRM NO. 252,688-00

APPEARANCES:

Firm, Dispatch Group, Inc., by
Gryphon Law Group, P.S., per
Carmen R. Rowe and Katherine Beeler

Department of Labor and Industries, by
Kevin Guichon, Litigation Specialist, and by
The Office of the Attorney General, per
Maureen A. Mannix

The firm, Dispatch Group, Inc., (Dispatch) filed an appeal with the Board of Industrial Insurance Appeals on December 20, 2013, from an order of the Department of Labor and Industries dated December 10, 2013. In this order, the Department affirmed its order dated January 29, 2013, in which it assessed taxes against the firm totaling $95,746.63 for the first quarter of 2011 through the second quarter of 2012, including penalties and interest. The Department order is AFFIRMED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The firm filed a timely Petition for Review of a Proposed Decision and Order issued on April 24, 2015, in which the industrial appeals judge affirmed the Department order dated December 10, 2013. On June 15, 2015, the Department filed a response to the firm’s Petition for Review.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We agree with the industrial appeals judge that the Department order should be affirmed. We have granted review to clarify the burden of proof related to the Department’s finding that Dispatch knowingly mislead the Department when it failed to report its covered workers.

Mariya Khomlyak owned a company called Mariya’s Housecleaning. She contracted with individuals and companies to clean offices and residences. The Department audited her company and assessed taxes and penalties in 2011. It appears that Mariya’s Housecleaning closed down during that audit and set up Dispatch Group, Inc., dba Mariya’s Housecleaning. It also appears this company operated in the same way as the prior company.
Dispatch contracted with individuals and companies to clean offices and residences. They had written contracts, an example is Exhibit No. 2. Dispatch advertised for clients and then contacted the contractors to assign jobs. The contractors were not required to take the job but if they did they had to abide by the terms, including performing the cleaning on the days and hours set by Dispatch. They also had to abide by the rules of conduct set up by Dispatch. The customer paid Dispatch directly and the contractor submitted an invoice and was paid a percentage of the fee. Some of the contractors had other customers but most relied solely on the work referred to them by Dispatch.

The auditor for Mariya’s Housekeeping referred Dispatch to the Department to audit due to the similarities between the business practices between the two companies. It was assigned to Jessica Mixer, who audited the firm. Dispatch notified the Department it wanted to be represented by its bookkeeper, Maria Waligora. The parties met and Ms. Mixer was given several documents. The exhibits tell the entire story of the audit.

Ms. Mixer sent out independent contractor questionnaires and received about half in return. She also spoke to some of the contractors. Based on her review of the facts, statutes, and Department regulations she found that the contractors were covered workers. Because Dispatch did not have any time records, she estimated the taxes by taking the amount of money the contractors were paid and dividing it by the state wide average of work for janitorial service. She also assessed penalties for failure to maintain records, failure to register workers, and for knowingly misrepresenting based on the fact that the creation of Dispatch appeared to be an attempt to avoid taxes after the unfavorable assessment against Mariya’s Housekeeping.

We agree with the Proposed Decision and Order. Dispatch did not prove that its employees were exempt from coverage under the White test. The contract between Dispatch and contractors specifically forbids the contractor from having anyone else do the job unless Dispatch approves. There is no special equipment involved and the workers require no assistance.

Dispatch also failed to establish exemptions under the statutory exceptions. The Proposed Decision and Order goes into great detail with each exception and we have little to add. The only thing we really know is that most of the contractors had UBI numbers. The workers are required to meet all six requirements to qualify under the statutory exemptions and most did not meet even one

1 White v. Department of Labor & Indus., 48 Wn.2d 470 (1956).
2 RCW 51.08.180.
requirement. The evidence demonstrates that Dispatch controlled the clients, days and hours that the offices and residences were cleaned, and how they were cleaned. Some of the contractors told the Department that they bought their cleaning products from Dispatch and that they were trained by Dispatch. Exhibit No. 1 shows that Dispatch held itself out as a cleaning company not a dispatcher and it advertised for workers to be employed as cleaners not independent contractors.

There is no evidence that any of the contractors paid any state taxes to the Department of Revenue, Employment Security or Labor and Industries. Mariya Khomlyak testified that she and her son, a part-owner of the company, cleaned offices and businesses and that they guaranteed the work of the contractors. This would mean that the contractors were not engaged in an established business independent of Dispatch. It is the same for all the exceptions.

Having decided that the contractors were covered workers the penalties for failure to register covered workers should be upheld. The penalty for failure to keep records is also justified because the company did not keep any records that the Department could use on which to base an assessment or to determine wages.

Dispatch asserts that because the Department based its misrepresentation penalties on RCW 51.48.020, the Department had the burden of proof based on clear, cogent, and convincing evidence. The industrial appeals judge agreed but found that the company knowingly misrepresented that it had no covered workers because (1) Dispatch was established almost immediately after the assessment against Mariya’s Housekeeping; and, (2) the business model for Dispatch was exactly the same as Mariya’s Housekeeping, including the same income for the first quarter. We agree with the substantive part of the industrial appeals judge’s proposed decision but disagree that the Department had the burden of proof.

WAC 263-12-115(2)(a) specifically states that the Department has the burden in an appeal from a Department order “that alleges fraud or willful misrepresentation.” This rule applies only for appeals from orders issued under RCW 51.32.240(5). In the order in this appeal, the Department doesn’t allege willful misrepresentation. There is merely a notation that a penalty is for “misrep” on the Department order. Even without the notation on the order, the burden does not shift. The

---

3 WAC 263-12-115(2)(a).
burden is always on the employer in assessment appeals.\textsuperscript{4} The statute states that, "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." (Emphasis added) In this case the Department assessed a penalty against Dispatch for intentionally misrepresenting employee hours and according to the plain language of the statute the burden is on Dispatch to prove otherwise.

We also note that in her pleading dated May 15, 2015, Dispatch's attorney filed both a Petition for Review and a request for an extension to file its Petition for Review to supplement the record. In a single pleading a party can request either an extension of time to file a Petition for Review or a Petition for Review; not both. Therefore, we have accepted the May 15, 2015 pleading as a Petition for Review and treated it as such.

\textbf{FINDINGS OF FACT}

1. On April 17, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. The firm, Dispatch Group, Inc., (Dispatch) is a janitorial business with cleaning services provided by individuals referred to as contractors.

3. During the first quarter of 2011 through the second quarter of 2012, the following individuals performed janitorial services for the clients of Dispatch in exchange for remuneration: Anatoliy Pugach, Anatoliy Yurchuk, Ganna Panayiotou, Anyuta Deineka, Elvira Ortiz Alvarez, Gallina Gud, Georgina Armas, Nicolae Gruar, Svetlana Kruglova, Lyudmyla Yurchuck, Svetlana & Mykola Melnyk, Mariya Ymoshenko, Mariya Voloshchuk, Mariya Tsaruk, Nadezhda (Nadiya) Demets, Nadezhda Kaprakova, Nadiya Kuzmych, Nataliya Kuzmych, Nikolay & Tamara Yurchuk, Oksana Drebut, Oleksandr Bondarenko, Olena Tarasov, Olga Deineka, Olga Levinta, Olha Priakhina, Petro Yukhymchuk, Seghel Lesan, Svetlana Golovetskaya, Svetlana Roshchik, Svetlana Nikolayenko, Vera Georgiyevna Tokhvre, Vita Henish, Vita Mashtalyar, Elena Yan, and V&V Janitorial Services ("the custodians").

4. Dispatch advertised for cleaning jobs and employees and indicated, through advertisement, that it offered ongoing training for its employees. Dispatch negotiated the price of cleaning services and served as an interpreter for contractors whose native language was Russian or Ukrainian. Dispatch also required each worker to enter into a written agreement prior to engaging in cleaning for a business that (1) compelled contractors to collect money from customers and remit those funds to Dispatch along with invoices for services rendered and

\textsuperscript{4} RCW 51.48.131.
(2) authorized Dispatch to pay the contractor or to withhold payment under certain conditions. The essence of the contract between Dispatch and the contractors was personal labor.

5. The custodians were not free from direction or control over the performance of services rendered, either under the contract of services or in fact.

6. The custodians did not provide service outside of the usual course of business for which the service was performed, or perform service outside of the place of business of the enterprise for which service was performed. Nor were the custodians under contract or responsible for the costs of the principal place of business from which the service was performed.

7. The custodians neither customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, nor did the custodians have a principal place of business for the business being conducted that was eligible for a business deduction for the custodians' federal income tax purposes.

8. On the effective date of the contract of service, the custodians were 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 was conducting.

9. On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, 20 of the 35 custodians had established an account with the Department of Revenue and other state agencies for payment of all state taxes normally paid by employers and businesses and had registered for and received a unified business identifier number from the State of Washington.

10. On the effective date of the contract of service, the custodians maintained separate sets of books or records that reflected all items of income and expenses of the business that the individual custodian was conducting.

11. Dispatch paid no industrial insurance taxes based on the work performed by custodians for the first quarter of 2011 through the second quarter of 2012.

12. During the first quarter of 2011 through the second quarter of 2012, Dispatch operated a janitorial business in which it negotiated contracts for cleaning with home and business owners, purchased cleaning supplies for contractors engaged in contracts, the essence of which was personal labor, and trained its contractors.

13. During the first quarter of 2011 through the second quarter of 2012, Dispatch failed to keep adequate records to allow for a determination of industrial insurance premiums.
14. As a part of its audit, the Department estimated premiums totalling $49,440.55, and assessed a $5,000 penalty based on Dispatch's failure to keep adequate records for the first quarter of 2011 through the second quarter of 2012.

15. During the first quarter of 2011 through the second quarter of 2012, Dispatch made knowing misrepresentations about premiums owed for covered workers. Mariya Khomlyak, an owner of Dispatch had been audited for a previous business, Mariya's Housecleaning, and knew or should have known about Labor and Industries' reporting and record keeping requirements.

16. Because of its audit of Dispatch for the first quarter of 2011 through the second quarter of 2012, the Department found that Dispatch made knowing misrepresentations about premiums owed for covered workers and was subject to a $10,000 penalty.

17. Because of its audit of Dispatch for the first quarter of 2011 through the second quarter of 2012, the Department found that Dispatch was an unregistered employer subject to a maximum penalty of $33,025.68, double the premiums it owed, but was assessed a reduced penalty of $15,000.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. Dispatch's contractors were covered workers under RCW 51.08.180 and White v. Department Labor & Indus., 48 Wn.2d 470 (1956).

3. Dispatch’s workers were not exempt from coverage because the workers did not meet all six of the criteria set out in RCW 51.08.195.

4. The premiums that the Department estimated to be $49,440.55 due for the first quarter of 2011 through the second quarter of 2012, are proper.

5. Dispatch's failure to maintain sufficient employment records per the requirements of Title 51 RCW and the Washington Administrative Code subjected the firm to penalties contemplated by RCW 51.48.030.

6. Dispatch’s failure to maintain sufficient employment records bar it from questioning the correctness of any Department assessment for the relevant periods under RCW 51.48.030.

7. Dispatch has the burden of proof to show that it did not knowingly misrepresent its employment information concerning covered workers pursuant to RCW 51.48.131.

8. Dispatch knowingly misrepresented its employment information about covered workers and became subject to the penalty contemplated by RCW 51.48.020.
9. The Department order dated December 10, 2013, is correct and is affirmed.

Dated: July 9, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY      Chairperson

/s/
FRANK E. FENNERTY, JR.  Member

/s/
JACK S. ENG            Member