

NAO Enterprises

ASSESSMENTS

Estimated premiums

Any assessment of premiums based upon an estimate of hours worked, as permitted by RCW 51.16.155, must be based upon a reasonable estimate which has some basis in fact. ...*In re NAO Enterprises*, BIIA Dec., 89 1832 (1990)

Failure to maintain records

The provisions of RCW 51.48.030 and .040, which require an employer to keep and preserve adequate books and records of employment and make them available for inspection by the Department, do not require a corporation which engaged in no business activity and had no employees to maintain such records. ...*In re NAO Enterprises*, BIIA Dec., 89 1832 (1990)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: NAO ENTERPRISES) DOCKET NO. 89 1832
2)
3 FIRM NO. 547,114-00-9) DECISION AND ORDER
4 _____)

5 APPEARANCES:
6

7 Employer, NAO Enterprises, Inc., by
8 William T. Smith, President, Pro Se
9

10 Department of Labor and Industries, by
11 The Attorney General, per
12 Ron LaVigne, Assistant and Shawn Ruth, Paralegal
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14 This is an appeal filed by the firm, NAO Enterprises, on May 1, 1989 from a Notice and Order of
15 Assessment of the Department of Labor and Industries dated March 30, 1989, which was received by
16 the firm on April 13, 1989. The Notice and Order of Assessment affirmed Notice and Order of
17 Assessment of Industrial Insurance Taxes No. 66878 dated December 21, 1988 which assessed
18 taxes due and owing the state fund in the amount of \$35,892.36 for the period July 1, 1986 through
19 June 30, 1988. **REVERSED AND REMANDED.**
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23 **DECISION**
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25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order
27 issued on January 25, 1990 in which the Notice and Order of Assessment dated March 30, 1989 was
28 affirmed.
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30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
31 prejudicial error was committed and said rulings are hereby affirmed.
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33 The Proposed Decision and Order affirmed the Notice of Assessment on the basis of RCW
34 51.48.030 and .040. RCW 51.48.030 provides:
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36 Any employer who fails to keep and preserve the records adequate to
37 determine taxes due shall be forever barred from questioning, in an appeal
38 before the board of industrial insurance appeals or the courts, the
39 correctness of any assessment by the department based on any period for
40 which such records have not been kept and preserved.
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42 RCW 51.48.040 provides:
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44 The books, records and payrolls of the employer pertinent to the
45 administration of this title shall always be open to inspection by the
46 department or its traveling auditor, agent or assistant, for the purpose of
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1 ascertaining the correctness of the payroll, the persons employed, and
2 such other information as may be necessary for the department and its
3 management under this title.

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5 . . . Any employer who fails to allow adequate inspection in accordance
6 with the requirements of this section ... is forever barred from questioning
7 in any proceeding in front of the board of industrial insurance appeals or
8 any court, the correctness of any assessment by the department based on
9 any period for which such records have not been produced for inspection.

10 Relying on these statutory provisions, and on RCW 51.16.155, the Department's auditor estimated
11 that the corporation owed \$35,892.36 in premiums. Our Industrial Appeals Judge determined that
12 William Smith, the president of the corporation, was precluded from challenging the amount of the
13 assessment.
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16 We find it hard to imagine that the legislature intended RCW 51.48.030 and .040 to apply to a
17 case such as this. Essentially what we have here is little more than a paper corporation which Mr.
18 Smith formed in 1984, with the hope that he would receive state grants to build daycare centers and
19 other commercial property. However, during most of its existence, NAO Enterprises engaged in no
20 activities which would cause it to be responsible for industrial insurance premiums.
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23 During the period of July 1, 1986 through December 31, 1987, the first six quarters of the audit
24 period, NAO Enterprises had no employees. Certainly, if the corporation was not an employer during
25 that period, it would have no obligation under RCW 51.48.030 to keep records and would have no
26 obligation under RCW 51.48.040 to allow inspection of non-existent records by the Department. We
27 cannot believe that the legislature intended, by enacting the above-referenced provisions, to require
28 corporations with no employees to maintain records of employment. Thus, Mr. Smith, as president of
29 NAO Enterprises, was clearly entitled to challenge the assessment of premiums for the period July 1,
30 1986 through December 31, 1987, as his testimony establishes the corporation had no employees
31 during that period.
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33 The first business activities of any sort engaged in by NAO Enterprises occurred during the
34 period of January 1, 1988 through June 30, 1988. During that period, Mr. Smith: " ... sided two or
35 three houses, and one of those houses when I first started out I had an employee for about a week
36 and he got mad and left." 10/5/89 Tr. at 11. Accordingly, for that period, Mr. Smith was under an
37 obligation to keep records and provide those records on demand for inspection by the Department of
38 Labor and Industries. Although Mr. Smith did not provide for inspection, or, in fact, keep the kind of
39 records normally required of a business enterprise, he did offer to show the Department's auditor his
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1 girlfriend's checkbooks which were the only records that he had. In view of the quite minimal business
2 activities of NAO Enterprises, the proffered checkbooks must be said to have constituted reasonable
3 business records. The offer to allow the auditor to review the girlfriend's checkbooks constituted
4 compliance with the provisions of RCW 51.48.030 and RCW 51.48.040 and entitles Mr. Smith to
5 challenge the correctness of the Department's assessment for premiums for the period beginning in
6 January of 1988.
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10 Testimony of the Department's auditor, Kimberly Wade, reveals that the Department's
11 assessment of premiums was based upon an estimated audit payroll report. Based upon the fact that
12 NAO Enterprises was a nonprofit corporation with four corporate officers, the Department assumed
13 that four people were engaged full-time in the building business during the entire two-year period
14 covered by the audit. There is no reasonable basis for this assumption. The corporate records reveal
15 that the officers in 1986 were St. Nicholas, Allen O'Dare, Bill Smith II, Bill Smith I and Bill Smith III.
16 Subsequently, St. Nicholas and Allen O'Dare were dropped as officers, and Roberta Peterson and
17 Robert Hill were added. While we are not familiar with Allen O'Dare, we are acquainted with St.
18 Nicholas, and we also know from the record that the Bill Smiths referred to are father, grandfather, and
19 son. At least for the initial period of the audit, it would appear that part of the hours used in estimating
20 premiums were based upon the supposed labor of an officer who was at most nine years old.
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27 Any assessment of premiums based upon an estimate under the provisions of RCW 51.16.155
28 must, of course, be based upon a reasonable estimate that has some basis in fact. It is quite clear
29 that the only reasonable conclusion to be drawn from the record before us is that work was performed
30 for the corporation by William T. Smith, aided briefly by one employee. This work consisted of siding
31 two or three houses during the period of January through June of 1988. The employee, Rod
32 Chandler, worked on only one of these jobs and at most for the period of six days. Any estimate of the
33 hours worked and the premiums due, in order to be reasonable, must be based upon the actual
34 business activities engaged in by the corporation.
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39 As there were no business activities engaged in by the corporation prior to January 1, 1988,
40 there is no basis on which to assess any premiums for the period of July 1, 1986 through December
41 31, 1987. For the last portion of the audit period, January 1, 1988 through June 30, 1988, there is a
42 basis for assessing premiums as NAO Enterprises engaged in business activities during that period
43 and had an employee for a brief period of time. Any premiums assessed for that period must be
44 based upon a reasonable estimate of the hours worked by that employee and Mr. Smith.
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1 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
2 and a careful review of the entire record before us, we have determined that the Department's Notice
3 and Order of Assessment dated March 30, 1989 is incorrect, and must be reversed. The matter will
4 be remanded to the Department with directions to remove any premiums assessed for the period of
5 July 1, 1986 through December 31, 1987 and for a redetermination of the assessment for the period of
6 January 1, 1988 through June 30, 1988.
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10 Proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1 are hereby adopted as
11 this Board's final Finding and Conclusion. In addition, the Board enters the following Findings and
12 Conclusions:
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14 **FINDINGS OF FACT**

- 15 2. During the period July 1, 1986 through December 31, 1987, NAO
16 Enterprises engaged in no business activities, had no employees, and
17 was not an employer. Therefore, for that period, NAO Enterprises was
18 under no obligation to keep and preserve records to determine taxes due
19 to the Department of Labor and Industries.
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- 21 3. During the period January 1, 1988 through June 30, 1988, NAO
22 Enterprises performed certain business activities consisting of siding two
23 or three houses, which work was performed by the president of the
24 corporation, William T. Smith, and by one employee, Rod Chandler, who
25 worked for five or six days on one of the jobs.
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- 27 4. The only officer of NAO Enterprises to ever perform any work or any
28 business function for the corporation was William T. Smith, and these
29 activities were only performed during the period January 1, 1988 through
30 June 30, 1988.
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- 32 5. For the period January 1, 1988 through June 30, 1988, NAO Enterprises
33 maintained and preserved records sufficient to determine premiums due
34 under the Industrial Insurance Act in the form of checkbook registers for
35 the account of Roberta S. Peterson, an officer of the corporation.
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- 37 6. On June 8, 1988, the Department auditor, Kimberly Wade, had an
38 opportunity to inspect the records of NAO Enterprises consisting of the
39 checkbook registers of Roberta Peterson, when she went to the home of
40 William T. Smith to perform an audit.

41 **CONCLUSIONS OF LAW**

- 42 2. NAO Enterprises has complied with the provisions of RCW 51.48.030 and
43 .040 in keeping adequate records and offering those records for inspection
44 by the Department of Labor and Industries' auditor.
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- 46 3. During the period of July 1, 1986 through December 31, 1987, NAO
47 Enterprises had no employees and engaged in no business activities

1 which would subject the corporation to the provisions of the Industrial
2 Insurance Act.

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4 4. During the period of January 1, 1988 through June 30, 1988, NAO
5 Enterprises engaged in business activities and Mr. Smith and Mr.
6 Chandler performed work which subjected the corporation to the
7 provisions of the Industrial Insurance Act for the payment of premiums.
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9 5. The Notice and Order of Assessment of Industrial Insurance Taxes dated
10 March 30, 1989 which affirmed a Notice and Order of Assessment No.
11 66878 dated December 21, 1988 and assessed taxes against NAO
12 Enterprises in the amount of \$35,892.36 which accrued for the period July
13 1, 1986 through June 30, 1988, is incorrect, and is reversed and this
14 matter remanded to the Department with directions to remove any
15 premiums assessed for the period of July 1, 1986 through December 31,
16 1987 and to reassess premiums for the period of January 1, 1988 through
17 June 30, 1988, based upon the hours of work performed by Mr. Smith and
18 Mr. Chandler for NAO Enterprises during that period.

19 It is so ORDERED.

20 Dated this 26th day of July, 1990.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

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25 /s/ _____
26 SARA T. HARMON Chairperson

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29 /s/ _____
30 FRANK E. FENNERTY, JR. Member

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33 /s/ _____
34 PHILLIP T. BORK Member