

Cheri's Pet Grooming

ASSESSMENTS

Effect of failure to allow inspection of records (RCW 51.48.040)

EVIDENCE

Effect of failure to allow inspection of records (RCW 51.48.040)

Where an employer failed to provide records to Department on Fifth Amendment grounds, it is precluded from presenting evidence at the Board that the assessment was incorrect. *Citing Annest v. Annest* 49 Wn.2d 62 (1956). ...***In re Cheri's Pet Grooming*, BIIA Dec., 89 5939 (1991)**

Scroll down for order.

1 The industrial appeals judge noted that the Board does not have the authority to determine the
2 constitutionality of the law that it administers, and also noted that the firm had failed to submit any
3 evidence to show that the assessment was incorrect. The industrial appeals judge therefore affirmed
4 the Department order.
5

6
7 While we reach the same conclusion as our industrial appeals judge, i.e., that the Department
8 order assessing industrial insurance taxes should be affirmed, we do so for somewhat different
9 reasons. We believe the final sentence of RCW 51.48.040 is dispositive of this matter. That sentence
10 provides that:
11

12
13 Any employer who fails to allow adequate inspection in accordance with
14 the requirements of this section is subject to having its certificate of
15 coverage revoked by order of the Department and is forever barred from
16 questioning in any proceeding in front of the board of industrial insurance
17 appeals or any court, the correctness of any assessment by the
18 department based on any period for which such records have not been
19 produced for inspection.
20

21 The employer now finds itself in a "Catch-22" position. Because the employer denied the
22 Department the opportunity to inspect its records and asserted the Fifth Amendment privilege against
23 self-incrimination, the employer is now barred from offering evidence to defeat the assessment. The
24 employer apparently believes it should be able to cloak itself in the protection afforded by the Fifth
25 Amendment and still proceed to offer certain evidence to defeat the assessment. That is not the law
26 of this state. In *Annest v. Annest*, 49 Wn.2d 62 (1956), the Washington Supreme Court stated that:
27

28
29 A witness who declines to answer a proper question upon the ground that
30 it would tend to incriminate him, has not told the whole truth, which his
31 oath as a witness requires. He will not be permitted to testify to part of the
32 truth only. When a party claims the privilege of not answering a proper
33 question, the court may dismiss his action or strike his testimony.
34

35
36 Annest v. Annest, at 64. See Self-Incrimination--Civil Action, Annot., 4 A.L.R.3d 545 (1965).
37

38 In the matter before us it is apparent that the employer had a choice. The employer could have
39 provided the requested documentary evidence and contested the assessment, or the employer could
40 choose to exercise the Fifth Amendment privilege against self-incrimination. But the employer cannot
41 have it both ways. To allow the employer to claim the privilege against self-incrimination and then
42 testify and present only that evidence which the employer finds agreeable, would, in the words of the
43 *Annest* court, allow the employer to testify to only part of the truth. It appears to us that the
44 Legislature's adoption of the language in RCW 51.48.040 which bars the employer from contesting the
45
46
47

1 assessment before this Board is in agreement with the case law in this state as set forth in Annest.
2 Since the employer has failed to meet the requirement under the statute to provide the necessary
3 documentary records to the Department, the employer is precluded from offering any evidence before
4 this Board regarding the assessment.
5
6

7 **FINDINGS OF FACT**

- 8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
1. On November 20, 1989 the Department of Labor and Industries issued a Notice and Order of Assessment assessing industrial insurance taxes against Cheri's Pet Grooming for the period July 1, 1987 through June 30, 1989 in the amount of \$5,071.08. On December 20, 1989 the firm submitted a notice of appeal to the Board of Industrial Insurance Appeals from the November 20, 1989 Notice and Order of Assessment. On January 19, 1990 the Board issued an order granting the appeal, assigned it Docket No. 89 5939 and directed that further proceedings be held on the issues raised in the appeal.
 2. The Department issued a subpoena duces tecum on June 19, 1989, requesting that Cheri's Pet Grooming produce certain business documents and records for the audit period of July 1, 1987 through June 30, 1989. The subpoena was personally served on June 25, 1989. Cheri's Pet Grooming refused to provide any books, records or payroll to the Department of Labor and Industries for the period of July 1, 1987 through June 30, 1989, asserting a Fifth Amendment right against self-incrimination.
 3. As a result of the firm's failure to provide the requested information, the Department conducted an estimated audit, and assessed industrial insurance taxes in the amount of \$5,071.08.

30 **CONCLUSIONS OF LAW**

- 31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
 2. Under RCW 51.48.040 the firm was required to submit its books, records and payroll to the Department for inspection. Because the firm refused to provide the requested information, the Department properly estimated premiums due under RCW 51.16.155. In addition, because the firm refused to provide the requested information, it is barred pursuant to RCW 51.48.040 from challenging the correctness of the assessment of industrial insurance taxes for the period of July 1, 1987 through June 30, 1989 before the Board of Industrial Insurance Appeals.

1 3. The November 20, 1989 Notice and Order of Assessment No. 77397
2 assessing industrial insurance taxes due and owing in the amount of
3 \$5,071.08 for the period July 1, 1987 through June 30, 1989 is correct and
4 is hereby affirmed.
5

6 It is so ORDERED.

7 Dated this 10th day of June, 1991.
8

9 BOARD OF INDUSTRIAL INSURANCE APPEALS
10

11
12 /s/
13 _____
14 SARA T. HARMON Chairperson
15

16
17 /s/
18 _____
19 FRANK E. FENNERTY, JR. Member
20

21
22 /s/
23 _____
24 PHILLIP T. BORK Member
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47