AEX Corp.

ASSESSMENTS

Estimated premiums

In an assessment appeal, the Board found that the employer failed to establish equitable estoppel where a Department audit included a determination that employer's premiums would be assessed on the basis that the employer paid employees on a commission basis, the employer failed to show justifiable reliance. **….*In re AEX Corp.*, BIIA Dec., 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6.]

Failure to maintain records

Where a firm failed to maintain adequate records but could present only an educated guess regarding the number of hours worked by cab drivers and paid the drivers at the rate of 45 percent of fare-generated fees, the firm failed to establish that it paid the drivers on any basis other than commission. **….*In re AEX Corp.*, BIIA Dec., 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6.]

BOARD

Equitable powers

To establish equitable estoppel, an employer, in an assessment appeal, must prove each element. Where a Department audit included a determination that employer's premiums would be assessed on the basis that the employer paid employees on a commission basis, the employer failed to show justifiable reliance. **….*In re AEX Corp.*, BIIA Dec., 90 5314 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 93-2-00171-6. The Board has refined its interpretation of applying equity under stare decisis to explain that cases with similar facts are precedent and need not involve nearly identical facts in order to allow the Board to reach an equitable decision. In so doing the Board is not creating an equitable remedy, but following precedent. *In re Lyle Applegate*, BIIA Dec., 18 16730 (2019).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AEX CORPORATION	**)**	**DOCKET NO. 90 5314**
	)	
FIRM NO. 286,904-00-8	**)**	**DECISION AND ORDER**

APPEARANCES:

Firm-Petitioner, AEX Corporation, by
George I. Diana, Attorney

Department of Labor and Industries, by
Office of the Attorney General, per
Penny L. Allen, Assistant

This is an appeal filed by the employer, AEX Corporation, on October 19, 1990 from an Order and Notice Reconsidering Notice and Order of Assessment dated August 22, 1990. The Order and Notice dated August 22, 1990 affirmed a prior Notice and Order of Assessment of Industrial Insurance Taxes dated June 8, 1990, No. 82453, assessing taxes due and owing the state fund, which accrued between January 1, 1988 and December 31, 1989, in the amount of $38,898.57. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer and the Department of Labor and Industries to a Proposed Decision and Order issued on June 30, 1992 in which the order of the Department dated August 22, 1990 was reversed and the matter remanded to the Department to redetermine and reassess taxes due and owing the state fund for the period January 1, 1988 through December 31, 1989, after consideration of In re Royal Towing, Inc., Dckt. Nos. 90 1067 and 90 1069 (January 17, 1992), and to take such further action as may be indicated by the law and the facts.

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

DECISION

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

We disagree with our industrial appeals judge in the conclusions reached, however. As stated, this is an appeal from an assessment for industrial insurance premiums of the company which operates "Yellow Cabs" in Spokane, Washington, for the period January 1, 1988 through December 31, 1989.

The employer challenges the assessment in several aspects. Some of the issues presented are within the Board's jurisdiction, but some are not. The employer, after a 1986 premium audit, was advised that the Department took the position that employees of the cab company were paid on a commission basis, not a piece work basis, and premiums assessed would be founded upon that determination. The employer appealed that determination, but abandoned the appeal.

The employer continued to pay premiums on the piece work basis, not on commission basis, and the subsequent audit, the subject of the instant appeal, revealed the underpayment. The employer urges the Board to find that it acted in good faith and that the doctrine of equitable estoppel should apply. The argument is that the firm lost the ability to collect the portion of the higher premium rate from the employees which otherwise would have been collected but for the delay of the Department conducting its audit. An audit, by definition, is retrospective. The audit in question was performed less than six months after the assessment period had ended on December 31, 1989. We find that is not an unreasonable delay.

The Board has no jurisdiction in equity and cannot grant equitable relief except in those situations where we follow established and precedential case law. In re Seth E. Jackson, BIIA Dec., 61,088 (1982). In the event the Court of Appeals or the Supreme Court has decided a case having the same facts as those of an appeal we are considering and where those courts have afforded equitable relief, the Board may anticipate what the ruling by the courts would be in our appeal and grant the same relief. Even before we consider what the appellate courts would do with the present appeal, the employer herein must first establish the necessary elements of the doctrine. For example, there must be an admission, statement, or act by one party which is inconsistent with the claim of the other party; there must be an act by the other party based upon the admission, statement, or act; and there must be the danger of injury or damage to that other party should the first party be allowed to contradict or deny the admission, statement, or act. Harbor Air Service, Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977); McDaniels v. Carlson, 108 Wn.2d 299, 738 P.2d 254 (1987).

We agree completely with our industrial appeals judge in the determination that there is not a justifiable reliance on an action or statement by the Department that it would no longer use the commission basis rule. Therefore, equitable estoppel is not available to the employer, even if we decided that we had the jurisdiction to grant the relief requested.

The employer argues that the wrong rate was applied, that the piece work rule should be applied rather than the commission rule. The testimony clearly indicates cab drivers are paid 45% of the fares generated. The evidence shows the reason for such a payment is to cover the considerable amount of non-productive or "on call" time when the cab drivers sit and wait for a dispatcher to send them to a fare. There is some testimony that individual cab drivers can increase their productive time by establishing a clientele. Presumably that clientele will request the specific cab driver, thus increasing his or her production. As a basis for arguing that a cab driver is a piece worker we believe this to be fallacious reasoning. Individual cab drivers still must wait to be dispatched to the fare and are still paid the 45% of the productive time. Unlike piece work where a worker can theoretically increase the hourly pay by increasing productivity a driver can only drive one vehicle for a certain number of hours per day. There is a practical limit to how much one driver can produce. It is not shown, therefore, how there would be a net gain in either production or payment to the individual driver.

The Washington Administrative Code defines commission personnel.

> Commission personnel are persons whose compensation is based upon a percentage of the amount charged for the commodity or service rendered. Commission personnel are to be reported for premium purposes at a minimum of assumed worker hours of not less than . . . 40 worker hours per week for full-time employment: Provided, that the assumed eight worker hours daily for part-time employment will apply only if the employer's books and records are maintained so as to show separately such person's actual record of employment. WAC 296-17-350(4).

The commission personnel rule is applicable if full-time cab drivers are paid on a percentage of the fare generated.

The industrial appeals judge came to the conclusion that the drivers were not commissioned personnel. He based his conclusion on his interpretation of In re Royal Towing, Inc., Dckt. Nos. 90 1067 and 90 1069 (January 17, 1992). Royal Towing is not a significant decision, is not readily available to parties who may appear before the Board, does not have true precedential value, and is specifically stated not to be a final decision of the Board within RCW 51.52.110. Further, we do not

believe the case is "on point" with the instant appeal. In Royal Towing all actual hours of the part-time employees were carefully maintained for other governmental agencies. In the case on appeal, because adequate records were not kept, the best the firm could do was make an educated estimation of hours worked by the drivers. We, therefore, do not agree with the industrial appeals judge in his determination that the drivers are other than commissioned personnel. They are employees paid by commission at a rate of 45% of fare generated fees. There is an additional reason for holding against the employer on this argument, however.

The Legislature has imposed a considerable penalty for the failure of an employer to keep those records required to determine taxes due. Such employer is forever barred from questioning the correctness of the Department's assessment in an appeal before the Board relating to the period of assessment and during which the records were not kept. RCW 51.48.030. While this statutory direction makes further discussion arguably moot, we choose to address those other issues over which we have jurisdiction.

The employer also argues that an incorrect premium rate has been imposed upon it by the Department as the rate does not reflect the actual risk associated with cab driver work.

The Department has been directed and empowered by the Legislature to classify all occupations or industries based upon risk of injury to workers associated therewith, to fix rates of premiums, and to collect the premiums owed. RCW 51.16.035; Washington State School Director's Association v. Dep't of Labor & Indus., 82 Wn.2d 367, 510 P.2d 818 (1973). The burden of proof in an appeal to prove taxes imposed are incorrect is upon the employer. RCW 51.48.131.

Legislative classification is not prohibited. It must only be reasonable, not arbitrary. Washington State School Director's Association v. Dep't of Labor & Indus., supra. State v. Persinger, 62 Wn.2d 362, 382 P.2d 497 (1963). The burden of the employer in the instant case is to show the classification is arbitrary. "Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration. . . ." Buell v. Bremerton, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972); DuPont-Fort Lewis School Dist. 7 v. Bruno, 79 Wn.2d 736, 489 P.2d 171 (1971).

The testimony indicates that the Department has established its classification state-wide for cab driving work and specific premiums for each employer are determined by the experience rating. At present AEX Corporation has a very good experience rating. There is no evidence which indicates

the Department has been arbitrary and capricious in establishing the classification nor that the promulgation of the classification is contrary to law.

The employer also seeks to show that the Department miscalculated the number of hours and the premium based thereon and alleges that it does not owe as much as the Department indicates. The Department did not use actual hours because actual hours were never made available. There has been a subsequent extrapolation by the employer in an attempt to prove the probable actual hours. We do not believe that is sufficient to overcome the use of the commission rule. WAC 296-17-350(4).

The employer concedes that the Board probably lacks jurisdiction over the issues identified below. However, some evidence was presented on these so that they may be raised in Superior Court. We do not believe there is a requirement to exhaust administrative remedies prior to taking such issues to the Superior Court. The issues which we do not resolve are: whether the Industrial Insurance Act and the regulations adopted in conformance therewith discriminate against the employer; whether they are contrary to public policies; and, whether they are in violation of the United States Constitution in a number of specific instances. None of these issues are justiciable before the Board, but may be raised before a court of general jurisdiction. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

After consideration of the Proposed Decision and Order and the Petitions for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On June 8, 1990, the Department of Labor and Industries issued a Notice and Order of Assessment of Industrial Insurance Taxes, No. 82453, assessing taxes due and owing to the state fund, pursuant to RCW 51.48.120, which accrued between January 1, 1988 and December 31, 1989, in the amount of $38,898.57.

   On June 28, 1990, the Notice and Order of Assessment, No. 82453, dated June 8, 1990, was received by the firm. On July 27, 1990, the firm mailed a protest and request for reconsideration, correctly addressed and postage prepaid, to the Department. On July 30, 1990, the protest and request for reconsideration was received by the Department.

   On August 22, 1990, the Department issued an Order and Notice affirming the prior Notice and Order of Assessment, No. 82453, dated June 8, 1990.

   On September 18, 1990, the Order and Notice dated August 22, 1990, was received by the firm. On October 15, 1990, the firm mailed a notice of appeal, correctly addressed and postage prepaid. On October 19, 1990,

the notice of appeal from the Order and Notice dated August 22, 1990 was received by the Board of Industrial Insurance Appeals. On November 7, 1990, the Board granted the appeal, subject to determination of timeliness, assigned Docket No. 90 5314, and directed that proceedings be scheduled.

2. Between January 1, 1988 and December 31, 1989, the firm operated a taxicab business located in Spokane, Washington. Drivers were paid on a commission basis, 45% of gross fares collected, or minimum wage, whichever was greater.

3. Drivers worked defined shifts during which approximately three to five hours were involved in the actual transport of passengers, and the remainder of the time the driver was "on call", usually parked at various taxi stations within the city. While parked and "on call", the driver was free to utilize the time as he or she pleased so long as the driver remained available for immediate dispatch and transport of passengers.

4. The firm was aware that the Department position was that computation of premiums for such drivers was required to be as commission personnel, WAC 296-17-350(4), because of a prior audit which had been completed during 1986. The employer had no reason to believe the Department would change its position in such regard.

5. There was no prejudice to the firm resulting from the time necessary to complete the audit procedure and assess taxes due in this instance, and the alleged inability at the present time of the firm to recoup the employee portion of the premium from prior employees. The audit was timely accomplished.

6. The firm did not keep accurate or adequate records of the hours worked by its cab drivers during the period under appeal.

7. The Department's determination of classification of cab drivers and the experience rating and premiums established has not been shown to be arbitrary and capricious.

8. The firm has raised certain constitutional issues in this appeal.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal, except the constitutional issues over which it does not have jurisdiction.

2. Application of WAC 296-17-350(4), Commission Personnel, to this employer for the purpose of determining and assessing industrial insurance premiums for taxi drivers was correct.

3. No equitable relief from premiums imposed may be granted by the Board in this appeal.

4. The Order and Notice dated August 22, 1990, which affirmed a prior Notice and Order of Assessment of Industrial Insurance Taxes, No. 82453, dated June 8, 1990, assessing taxes due and owing the state fund, pursuant to RCW 51.48.120, which accrued between January 1, 1988 and December 31, 1989, in the amount of $38,898.57, is correct and is affirmed.

It is so **ORDERED**.

Dated this 9th day of December, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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