

KEW Construction

COVERAGE AND EXCLUSIONS

Partners (RCW 51.12.020(5))

EMPLOYER-EMPLOYEE (RCW 51.08.070; RCW 51.08.180)

Partners (RCW 51.12.020(5))

In determining whether limited partners are excluded from mandatory coverage pursuant to RCW 51.12.020(5) the Board considers the intent of the parties, as evidenced by their agreement, their acts and conduct, and all the facts and circumstances of the case. Where there was no sharing of profits and losses, the working relationship between the individuals was in reality that of employer and employees, and the sole purpose of the partnership agreement was to evade the benefits and burdens of the Industrial Insurance Act in contravention of RCW 51.04.060, the limited partners were held to be "workers" subject to mandatory coverage under the Act. ...***In re KEW Construction, BIIA Dec., 87 0152 (1988)*** [*Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No.88-2-02759-2.*]

Scroll down for order.

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

1 **IN RE: K E W CONSTRUCTION**) **DOCKET NO. 87 0152**
2)
3 **FIRM NO. 385539**) **DECISION AND ORDER**
4 _____

5 APPEARANCES:

6
7 Employer, K E W Construction, by
8 Campbell, Dille, Barnett, McCarthy & Adams, per
9 Craig S. Adams and Bryce H. Dille

10
11 Department of Labor and Industries, by
12 The Attorney General, per
13 Jack S. Eng, Elliott Furst, and Deborah J. Lazaldi, Assistants

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15 This is an appeal filed by the employer, K E W Construction, on January 16, 1987 from an
16 Order and Notice Reconsidering Notice and Order of Assessment of the Department of Labor and
17 Industries dated December 22, 1986, which affirmed a September 12, 1986 Notice and Order of
18 Assessment of Industrial Insurance Taxes in the amount of \$ 32,345.63 for the periods of April 1, 1984
19 through September 30, 1985 and April 1, 1986 through June 30, 1986. **AFFIRMED.**

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22) **DECISION**

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24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order
26 issued on April 8, 1988 in which the order of the Department dated December 22, 1986 which adhered
27 to the provisions of the Notice and Order of Assessment dated September 12, 1986 was affirmed.

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

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32 The Department assessed premiums against K E W Construction for periods relevant in this
33 appeal for hours worked by 26 individuals whom K E W Construction contends were limited partners
34 and thereby excluded from mandatory coverage by the provisions of RCW 51.12.020(5). The
35 Proposed Decision and Order, for the most part, accurately describes the evidence and reaches the
36 correct decision in affirming the Department's order. We have, however, granted review in order to
37 resolve inconsistencies in the Findings of Fact and Conclusions of Law; correct certain
38 characterizations of the evidence; describe additional evidence; and state our own reasons for
39 affirming the Department's order.

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41 By way of an executed document entitled "Agreement of Limited Partnership of K.E.W.
42 Construction Limited Partnership" (Exhibit No. 1) Ken Ellison is described as a general partner forming
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1 the agreement initially with four other individuals described as limited partners. This 36-page
2 document and its appendices describe Mr. Ellison as the only capital contributor and as maintaining 75
3 percent interest in the purported partnership. The other four individuals included in the initial
4 agreement contributed no capital and each was to maintain a one percent interest. The agreement
5 states that the "primary purpose and general character of the business of the Partnership is to be a
6 general contractor and have all the powers of a general contractor." The agreement generally grants
7 Mr. Ellison broad and extensive powers of control over the business operation. The agreement further
8 allocates all "income, gain, expense and loss" "among the Partners in accordance with their respective
9 Percentage Interests in the Partnership."
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11
12 Mr. Ellison and the initial four purported limited partners, as well as 22 other individuals on
13 various subsequent dates, signed identical two-page documents, each entitled "Limited Partner
14 Agreement". These agreements stated that each purported limited partner would own one percent for
15 his respective share of the limited partnership; set forth an hourly wage; and elected whether or not
16 the "partnership" would pay for workers' compensation coverage, social security taxes and income tax
17 withholding.
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20 The Department takes the position that the exclusion from coverage contained in RCW
21 51.12.020(5) applies only to general partners, not to limited partners.¹ Thus the Department
22 determined that the 26 purported limited partners were mandatorily covered because they were
23 limited, not general, partners.
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26 We need not reach the issue of whether the exclusion of "partners" contained at RCW
27 51.12.020(5) refers only to general partners, because we conclude that the individuals in question
28 were neither limited nor general partners, but rather workers entitled to the mandatory coverage of the
29 Act. In reaching this conclusion we rely, in part, upon the express legislative intent to "embrace all
30 employments" coupled with the requirement that the Act be "liberally construed." RCW 51.12.010.
31 Thus, mandatory coverage applies unless an individual comes within one of the specific exceptions to
32 coverage listed in RCW 51.12.020.
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35 We are mindful that the situation between Mr. Ellison and the purported individual limited
36 partners described thus far facially gives rise to the appearance of a partnership, entitled to exclusion
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45 ¹That position has been recently embodied in WAC 296-17-349(2) (WSR 88-06-048), which became effective on
46 April 1, 1988 and is therefore inapplicable to the time periods in question here.
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1 from mandatory coverage under the terms of RCW 51.12.020(5). However, we will not elevate form
2 over substance.
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4 In determining, in a given case, whether a partnership exists, there may be
5 disclosed by the evidence many elements pointing one way or the other,
6 no one of which may be said to be conclusive. The fact that the parties to
7 a business arrangement may call it a partnership does not make it such.
8 Many times form must give way to substance. There is no fixed rule by
9 which it may be determined whether, in a particular case, there is a
10 partnership relation. It all depends upon the intention of the parties, and
11 such intent must be ascertained from the agreement of the parties, their
12 acts and conduct, and all the facts and circumstances of the case.
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14 State v. Bartley, 18 Wn.2d 477, 481-482 (1943). In the instant appeal, as in Bartley, a limited
15 partnership agreement listing the initial four purported limited partners was filed with the Secretary of
16 State, pursuant to Title 25 RCW. Yet the court in Bartley looked beyond the appearance of formal
17 compliance with the partnership statute to ascertain the realities of the parties' relationship. We do the
18 same here.
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21 In reviewing all relevant factors, we note that each of the separately signed two-page
22 documents entitled "Limited Partner Agreement" sets a distinct hourly rate of compensation to be paid
23 each individual for the hours worked each month for K E W Construction. Second, despite the fact
24 that the "Agreement of Limited Partnership of K E W Construction Limited Partnership" calls for
25 allocation of income, gain, expense and loss among the purported partners in accordance with their
26 respective percentage interests, the Schedule K-1 (Form 1065) documents filed with the Internal
27 Revenue Service report only guaranteed payments and net earnings from self-employment for each
28 individual and do not report any profit or loss sharing whatsoever. (Exhibit No. 32). We further note
29 that each of the Limited Partner Agreements allowed each individual to choose between Pierce
30 County Medical insurance, "State Industrial", or no insurance, with the proviso that K E W Construction
31 would pay for the Pierce County coverage in toto, but would only pay an equivalent amount for "state
32 industrial", with the "limited partner" making up the difference.
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40 Additionally, Mr. Ellison testified that the company was responsible for the work performed on
41 various contracts. The purported partners all received their assignments from a single other purported
42 partner, Mr. William Willoughby. This same Mr. Willoughby was the sole person responsible for
43 ascertaining whether work was accomplished properly and would direct the others to correct
44 improperly performed work when necessary. Such circumstances clearly suggest that the other
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1 individuals were laborers under the direct control and supervision of William Willoughby on behalf of
2 K E W Construction.
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4 "There is no arbitrary rule by which it may be determined whether a partnership relation existed
5 in a given instance or not. The existence of a partnership depends upon the intention of the parties.
6 That intention must be ascertained from all of the facts and circumstances and the actions and
7 conduct of the parties." Purdy & Whitfield v. Dept. Labor & Indus., 12 Wn.2d 131, 140 (1942). To
8 determine whether an individual is a "worker" entitled to coverage by industrial insurance, we should
9 look to the essence of the working relationship and not allow the form of a written agreement to prevail
10 over reality. Labor & Indus. v. Tacoma Yellow Cab, 31 Wn. App. 117, 124 (1982) review denied 97
11 Wn.2d 1015. We must conclude from the evidence in the present case that the purported 26
12 individual limited partners were, in reality, workers for K E W Construction rather than limited partners.
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14 RCW 51.04.060 provides as follows: "No employer or worker shall exempt himself or herself
15 from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and
16 any such contract, agreement, rule or regulation shall be pro tanto void." While we express no opinion
17 as to the validity of the written agreements entered into by Mr. Ellison and the other 26 purported
18 limited partners for other purposes, such as social security and income tax liability, we hold that under
19 the circumstances of this case, the written agreements entered into are void insofar as they purport to
20 exclude the 26 individual workers from mandatory coverage under our industrial insurance laws. For,
21 based on all the circumstances of this case, it appears that the sole purpose of setting up this
22 purported Limited Partnership was to evade the burdens and benefits of the industrial insurance act, in
23 contravention of RCW 51.04.060.
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25 We note that the employer seemed to suggest two other reasons for challenging the
26 assessment of premiums -- 1. that some of the individuals were independent contractors and that the
27 essence of their contracts with K E W Construction was not their personal labor; and 2. that some of
28 the individuals were registered contractors, excluded from coverage by RCW 51.08.180.
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30 Neither of these areas was fully explored in the record. In his testimony, Kenneth Ellison (the
31 purported general partner) did indicate that Karl English, Larry Peterson, Mike McIntire, M. R. McGill
32 and Mike Fife were all registered contractors, all worked for others in addition to K E W Construction,
33 and all provided more than their personal labor, i.e., machinery such as bulldozers or backhoes.
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35 Robert E. Lail, Sr. (the auditor) stated that the only registered contractor he was aware of was
36 Mike Fife and that some adjustment of the 953 hours assessed for his labor might be appropriate.
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1 However, he noted that Mr. Ellison did not wish to discuss this issue until the limited partnership issue
2 was resolved.
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4 Based on this scant evidence, we cannot conclude that any of these individuals were excluded
5 from coverage either as an independent contractor or as a registered contractor pursuant to RCW
6 51.08.180. Furthermore, since we conclude that K E W Construction "supervise[d] or control[led] the
7 means by which the result [was] accomplished or the manner in which the work [was] performed," it
8 follows that all individuals were "workers", regardless of whether they were registered contractors
9 under Ch. 18.27 or 19.28 RCW. See RCW 51.08.180(3).
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11 We thus affirm the Department order of December 22, 1986 and, in so doing, adopt proposed
12 Finding of Fact No. 1. In addition, we make the following Findings of Fact and Conclusions of Law.
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14 **FINDINGS OF FACT**

- 15 2. On May 31, 1984 a Certificate of Limited Partnership of K E W
16 Construction Limited Partnership was filed with the Secretary of State,
17 State of Washington. The certificate listed Ken Ellison as the general
18 partner and sole contributor of capital, in the amount of \$ 10,000.00.
19 Listed as limited partners were Elmo Willoughby, Jim Willoughby, Mark
20 Willoughby and William Willoughby. Mr. Ellison maintained 75% interest,
21 while each of the other four maintained a 1% interest. K E W Construction
22 was established as a general contracting business. The agreement
23 between Mr. Ellison and the Willoughbys granted Mr. Ellison broad control
24 over the business operations and stated that all income, gain, expense
25 and loss would be allocated among these five individuals according to
26 their respective percentage interests.
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- 28 3. At various times subsequent to this initial agreement, 22 more individuals
29 signed limited partnership agreements with Mr. Ellison. Each such
30 agreement set forth an hourly wage; elected whether K E W Construction
31 would pay for workers' compensation coverage, social security taxes and
32 income tax withholding; and established a one percent interest in K E W
33 Construction.
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- 35 4. Profits and losses were not in fact shared between Mr. Ellison and the 4
36 Willoughbys or the other 22 individuals. All of these individuals were paid
37 hourly wages, pursuant to their individual agreements with K E W
38 Construction.
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- 40 5. Mr. William Willoughby assigned the other 25 individuals to various
41 construction jobs and was responsible for assuring that the work was done
42 properly, instructing the others to correct faulty work when necessary.
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- 44 6. Industrial insurance premiums were not fully paid by K E W Construction
45 on behalf of these 26 individuals for the periods April 1, 1984 through
46 September 30, 1985 and April 1, 1986 through June 30, 1986.
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1 7. The total unpaid industrial insurance premiums for the periods of April 1,
2 1984 through September 30, 1985 and April 1, 1986 through June 30,
3 1986 amounted to \$ 32,345.63.

4 **CONCLUSIONS OF LAW**

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6 1. The Board of Industrial Insurance Appeals has jurisdiction of the subject
7 matter and the parties to this appeal.
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9 2. For the purposes of assessment of industrial insurance premiums, a
10 limited partnership was not effectively created between Kenneth E. Ellison
11 and any of the 26 individuals working for K E W Construction from April 1,
12 1984 through September 30, 1985 and April 1, 1986 through June 30,
13 1986. Those 26 individuals were workers within the meaning of RCW
14 51.08.180 and were not excluded from mandatory coverage by RCW
15 51.12.020(5).
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17 3. The documents entitled "Limited Partner Agreement" are pro tanto void
18 within the meaning of RCW 51.04.060.
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20 4. The Department properly assessed K E W Construction for hours worked
21 by the 26 individuals during the period April 1, 1984 through September
22 30, 1985 and April 1, 1986 through June 30, 1986.
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24 5. The order of the Department of Labor and Industries dated December 22,
25 1986 which adhered to the provisions of the Notice and Order of
26 Assessment dated September 12, 1986 and assessed industrial insurance
27 premiums in the amount of \$ 32,345.63 for the periods of April 1, 1984
through September 30, 1985 and April 1, 1986 and June 30, 1986 is
correct and is affirmed.

28 It is so ORDERED.

29 Dated this 18th day of November, 1988.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

31
32 /s/ _____
33 SARA T. HARMON Chairperson

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

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38 /s/ _____
39 PHILLIP T. BORK Member