

## **AEX Corp.**

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### **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.]

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1 We disagree with our industrial appeals judge in the conclusions reached, however. As stated,  
2 this is an appeal from an assessment for industrial insurance premiums of the company which  
3 operates "Yellow Cabs" in Spokane, Washington, for the period January 1, 1988 through December  
4 31, 1989.  
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7 The employer challenges the assessment in several aspects. Some of the issues presented  
8 are within the Board's jurisdiction, but some are not. The employer, after a 1986 premium audit, was  
9 advised that the Department took the position that employees of the cab company were paid on a  
10 commission basis, not a piece work basis, and premiums assessed would be founded upon that  
11 determination. The employer appealed that determination, but abandoned the appeal.  
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14 The employer continued to pay premiums on the piece work basis, not on commission basis,  
15 and the subsequent audit, the subject of the instant appeal, revealed the underpayment. The  
16 employer urges the Board to find that it acted in good faith and that the doctrine of equitable estoppel  
17 should apply. The argument is that the firm lost the ability to collect the portion of the higher premium  
18 rate from the employees which otherwise would have been collected but for the delay of the  
19 Department conducting its audit. An audit, by definition, is retrospective. The audit in question was  
20 performed less than six months after the assessment period had ended on December 31, 1989. We  
21 find that is not an unreasonable delay.  
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24 The Board has no jurisdiction in equity and cannot grant equitable relief except in those  
25 situations where we follow established and precedential case law. In re Seth E. Jackson, BIIA Dec.,  
26 61,088 (1982). In the event the Court of Appeals or the Supreme Court has decided a case having  
27 the same facts as those of an appeal we are considering and where those courts have afforded  
28 equitable relief, the Board may anticipate what the ruling by the courts would be in our appeal and  
29 grant the same relief. Even before we consider what the appellate courts would do with the present  
30 appeal, the employer herein must first establish the necessary elements of the doctrine. For example,  
31 there must be an admission, statement, or act by one party which is inconsistent with the claim of the  
32 other party; there must be an act by the other party based upon the admission, statement, or act; and  
33 there must be the danger of injury or damage to that other party should the first party be allowed to  
34 contradict or deny the admission, statement, or act. Harbor Air Service, Inc. v. Board of Tax Appeals,  
35 88 Wn.2d 359, 560 P.2d 1145 (1977); McDaniels v. Carlson, 108 Wn.2d 299, 738 P.2d 254 (1987).  
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1 We agree completely with our industrial appeals judge in the determination that there is not a  
2 justifiable reliance on an action or statement by the Department that it would no longer use the  
3 commission basis rule. Therefore, equitable estoppel is not available to the employer, even if we  
4 decided that we had the jurisdiction to grant the relief requested.  
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7 The employer argues that the wrong rate was applied, that the piece work rule should be  
8 applied rather than the commission rule. The testimony clearly indicates cab drivers are paid 45% of  
9 the fares generated. The evidence shows the reason for such a payment is to cover the considerable  
10 amount of non-productive or "on call" time when the cab drivers sit and wait for a dispatcher to send  
11 them to a fare. There is some testimony that individual cab drivers can increase their productive time  
12 by establishing a clientele. Presumably that clientele will request the specific cab driver, thus  
13 increasing his or her production. As a basis for arguing that a cab driver is a piece worker we believe  
14 this to be fallacious reasoning. Individual cab drivers still must wait to be dispatched to the fare and  
15 are still paid the 45% of the productive time. Unlike piece work where a worker can theoretically  
16 increase the hourly pay by increasing productivity a driver can only drive one vehicle for a certain  
17 number of hours per day. There is a practical limit to how much one driver can produce. It is not  
18 shown, therefore, how there would be a net gain in either production or payment to the individual  
19 driver.  
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22 The Washington Administrative Code defines commission personnel.  
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25 Commission personnel are persons whose compensation is based upon a  
26 percentage of the amount charged for the commodity or service rendered.  
27 Commission personnel are to be reported for premium purposes at a  
28 minimum of assumed worker hours of not less than . . . 40 worker hours  
29 per week for full-time employment: Provided, that the assumed eight  
30 worker hours daily for part-time employment will apply only if the  
31 employer's books and records are maintained so as to show separately  
32 such person's actual record of employment. WAC 296-17-350(4).  
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38 The commission personnel rule is applicable if full-time cab drivers are paid on a percentage of  
39 the fare generated.  
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41 The industrial appeals judge came to the conclusion that the drivers were not commissioned  
42 personnel. He based his conclusion on his interpretation of In re Royal Towing, Inc., Dckt. Nos. 90  
43 1067 and 90 1069 (January 17, 1992). Royal Towing is not a significant decision, is not readily  
44 available to parties who may appear before the Board, does not have true precedential value, and is  
45 specifically stated not to be a final decision of the Board within RCW 51.52.110. Further, we do not  
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1 believe the case is "on point" with the instant appeal. In Royal Towing all actual hours of the part-time  
2 employees were carefully maintained for other governmental agencies. In the case on appeal,  
3 because adequate records were not kept, the best the firm could do was make an educated estimation  
4 of hours worked by the drivers. We, therefore, do not agree with the industrial appeals judge in his  
5 determination that the drivers are other than commissioned personnel. They are employees paid by  
6 commission at a rate of 45% of fare generated fees. There is an additional reason for holding against  
7 the employer on this argument, however.

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

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

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

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31 Legislative classification is not prohibited. It must only be reasonable, not arbitrary.  
32 Washington State School Director's Association v. Dep't of Labor & Indus., supra. State v. Persinger,  
33 62 Wn.2d 362, 382 P.2d 497 (1963). The burden of the employer in the instant case is to show the  
34 classification is arbitrary. "Where there is room for two opinions, action is not arbitrary and capricious  
35 when exercised honestly and upon due consideration. . . ." Buell v. Bremerton, 80 Wn.2d 518, 526,  
36 495 P.2d 1358 (1972); DuPont-Fort Lewis School Dist. 7 v. Bruno, 79 Wn.2d 736, 489 P.2d 171  
37 (1971).

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42 The testimony indicates that the Department has established its classification state-wide for  
43 cab driving work and specific premiums for each employer are determined by the experience rating.  
44 At present AEX Corporation has a very good experience rating. There is no evidence which indicates  
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1 the Department has been arbitrary and capricious in establishing the classification nor that the  
2 promulgation of the classification is contrary to law.  
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4 The employer also seeks to show that the Department miscalculated the number of hours and  
5 the premium based thereon and alleges that it does not owe as much as the Department indicates.  
6 The Department did not use actual hours because actual hours were never made available. There  
7 has been a subsequent extrapolation by the employer in an attempt to prove the probable actual  
8 hours. We do not believe that is sufficient to overcome the use of the commission rule. WAC 296-17-  
9 350(4).  
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11 The employer concedes that the Board probably lacks jurisdiction over the issues identified  
12 below. However, some evidence was presented on these so that they may be raised in Superior  
13 Court. We do not believe there is a requirement to exhaust administrative remedies prior to taking  
14 such issues to the Superior Court. The issues which we do not resolve are: whether the Industrial  
15 Insurance Act and the regulations adopted in conformance therewith discriminate against the  
16 employer; whether they are contrary to public policies; and, whether they are in violation of the United  
17 States Constitution in a number of specific instances. None of these issues are justiciable before the  
18 Board, but may be raised before a court of general jurisdiction. Bare v. Gorton, 84 Wn.2d 380, 526  
19 P.2d 379 (1974).  
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22 After consideration of the Proposed Decision and Order and the Petitions for Review filed  
23 thereto, and a careful review of the entire record before us, we make the following:  
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### 26 **FINDINGS OF FACT**

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- 28 1. On June 8, 1990, the Department of Labor and Industries issued a Notice  
29 and Order of Assessment of Industrial Insurance Taxes, No. 82453,  
30 assessing taxes due and owing to the state fund, pursuant to RCW  
31 51.48.120, which accrued between January 1, 1988 and December 31,  
32 1989, in the amount of \$38,898.57.  
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34 On June 28, 1990, the Notice and Order of Assessment, No. 82453, dated  
35 June 8, 1990, was received by the firm. On July 27, 1990, the firm mailed  
36 a protest and request for reconsideration, correctly addressed and  
37 postage prepaid, to the Department. On July 30, 1990, the protest and  
38 request for reconsideration was received by the Department.  
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40 On August 22, 1990, the Department issued an Order and Notice affirming  
41 the prior Notice and Order of Assessment, No. 82453, dated June 8, 1990.  
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43 On September 18, 1990, the Order and Notice dated August 22, 1990,  
44 was received by the firm. On October 15, 1990, the firm mailed a notice of  
45 appeal, correctly addressed and postage prepaid. On October 19, 1990,  
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1 the notice of appeal from the Order and Notice dated August 22, 1990 was  
2 received by the Board of Industrial Insurance Appeals. On November 7,  
3 1990, the Board granted the appeal, subject to determination of timeliness,  
4 assigned Docket No. 90 5314, and directed that proceedings be  
5 scheduled.

- 6  
7 2. Between January 1, 1988 and December 31, 1989, the firm operated a  
8 taxicab business located in Spokane, Washington. Drivers were paid on a  
9 commission basis, 45% of gross fares collected, or minimum wage,  
10 whichever was greater.
- 11 3. Drivers worked defined shifts during which approximately three to five  
12 hours were involved in the actual transport of passengers, and the  
13 remainder of the time the driver was "on call", usually parked at various  
14 taxi stations within the city. While parked and "on call", the driver was free  
15 to utilize the time as he or she pleased so long as the driver remained  
16 available for immediate dispatch and transport of passengers.
- 17 4. The firm was aware that the Department position was that computation of  
18 premiums for such drivers was required to be as commission personnel,  
19 WAC 296-17-350(4), because of a prior audit which had been completed  
20 during 1986. The employer had no reason to believe the Department  
21 would change its position in such regard.
- 22 5. There was no prejudice to the firm resulting from the time necessary to  
23 complete the audit procedure and assess taxes due in this instance, and  
24 the alleged inability at the present time of the firm to recoup the employee  
25 portion of the premium from prior employees. The audit was timely  
26 accomplished.
- 27 6. The firm did not keep accurate or adequate records of the hours worked  
28 by its cab drivers during the period under appeal.
- 29 7. The Department's determination of classification of cab drivers and the  
30 experience rating and premiums established has not been shown to be  
31 arbitrary and capricious.
- 32 8. The firm has raised certain constitutional issues in this appeal.

#### 33 **CONCLUSIONS OF LAW**

- 34 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
35 to and the subject matter of this appeal, except the constitutional issues  
36 over which it does not have jurisdiction.
- 37 2. Application of WAC 296-17-350(4), Commission Personnel, to this  
38 employer for the purpose of determining and assessing industrial  
39 insurance premiums for taxi drivers was correct.
- 40 3. No equitable relief from premiums imposed may be granted by the Board  
41 in this appeal.

1 4. The Order and Notice dated August 22, 1990, which affirmed a prior  
2 Notice and Order of Assessment of Industrial Insurance Taxes, No.  
3 82453, dated June 8, 1990, assessing taxes due and owing the state fund,  
4 pursuant to RCW 51.48.120, which accrued between January 1, 1988 and  
5 December 31, 1989, in the amount of \$38,898.57, is correct and is  
6 affirmed.  
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8 It is so **ORDERED**.

9 Dated this 9<sup>th</sup> day of December, 1992.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

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13 /s/ \_\_\_\_\_  
14 S. FREDERICK FELLER Chairperson

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17 /s/ \_\_\_\_\_  
18 FRANK E. FENNERTY, JR. Member  
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