F & R Cliff (Cliff's Dairy Cow Hoof Trimming)

ASSESSMENTS

Existence of partnership

Where individuals became partners upon completion of training period, industrial insurance taxes were payable for an individual who never completed the payments necessary to establish partnership. ***….In re F & R Cliff (Cliff's Dairy Cow Hoof Trimming)*, BIIA Dec., 93 2648 (1994)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: F & R CLIFF dba CLIFF'S DAIRY COW HOOF TRIMMING	)	**DOCKET NO. 93 2648**
FIRM NO. 838,712-00	)	**DECISION AND ORDER**

APPEARANCES:

Firm, F & R Cliff dba Cliff's Dairy Cow Hoof Trimming, by
Peters & Fowler, P.S., per
Kevan T. Montoya, Attorney

Department of Labor and Industries
Office of the Attorney General, per
Robert G. Young, Assistant

This is an appeal filed by the firm, F & R Cliff dba Cliff's Dairy Cow Hoof Trimming, on June 15, 1993, from a Notice and Order of Assessment issued by the Department of Labor and Industries on May 21, 1993, which assessed taxes due and owing the State Fund for the period from the third quarter of 1990 through the fourth quarter of 1992 for a total of $18,110.37. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on March 14, 1994, in which the Notice and Order of Assessment issued by the Department on May 21, 1993 was reversed and remanded to the Department with directions to recalculate taxes due and owing after deducting hours for Mike Collins and all trimmers for those periods when they were partners in the firm and recalculating penalties and interest taking the new calculation of overdue taxes into account, and thereupon take such action as 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.

The Department seeks reinstatement of an assessment of industrial insurance premiums for dairy cow hoof trimmers working under the business name Cliff's Dairy Cow Hoof Trimming. The assessed employer, Frank Cliff, asserts that the trimmers were partners, sharing expenses and profits equally. The industrial appeals judge found four of the named workers to be partners after having completed a training period. We agree with three of the four determinations.

The Department, in its Petition for Review, asks that this Board establish a definitive list of objective criteria for the identification of a partnership. We find such criteria readily identifiable in the existing principles of partnership law as embodied in RCW 25.04.010 and in the cases decided by the appellate courts of this state.

Washington has adopted the Uniform Partnership Act, RCW 25.04.010, et seq. RCW 25.040.070 is entitled "Rules for determining the existence of a partnership" and provides, in part, that sharing in the profits of the business is prima facie evidence of partnership outside certain excepted cases. One exception is payments made as wages to an employee. The statute is unhelpful in further distinguishing between payments to partners versus payments as wages to an employee. There is, however, ample case law establishing the requisites of a partnership.

The existence of a partnership depends on the intentions of the parties, and may be implied from the facts and circumstances. A partnership will be deemed established when it appears from all the circumstances that the parties have entered into a business relationship combining their property, labor, skill or experience for the purposes of a joint or common venture wherein the profits are shared. Thornton Estate, 18 Wash. 2d 72 (1972) See also, Cusick v. Phillippi, 42 Wash. App. 147, reconsideration denied (1985). Consent to the formation of a partnership must be unanimous among the alleged partners. Ferguson v. Jeanes, 27 Wash. App. 558 (1980). See also, Kintz v. Read, 28 Wash. App. 731 (1981). Kintz also establishes that the burden of proving the existence of a partnership rests with the party asserting the relationship. The necessary proof is more stringent between parties than with respect to third parties.

The Department asks that for industrial insurance purposes we impose additional criteria for the establishment of a partnership, namely the existence of a written partnership agreement and proof of compliance with state and IRS tax reporting guidelines for partnerships. We decline to do so. The status of partnerships under current industrial insurance law is analogous to the status of independent contractors before the passage of RCW 51.08.195. That statute imposed licensing and tax filing criteria for determining independent contractor exemptions to industrial insurance coverage. Before the enactment of the statute, general principles of agency and employment law governed the inquiry into independent contractor status. Compliance with licensing and tax filing requirements were factors to consider, but noncompliance was not necessarily fatal to attaining independent contractor status. That is exactly the case with partnership status at this time. Absent a statutory mandate that overrides the general principles of partnership law in this state, we must apply those principles. The fact that

parties have breached tax or licensing requirements does not prevent the parties from being partners for the purpose of assessing industrial insurance premiums.

A brief review of the factual background is necessary to the resolution of this appeal. Frank Cliff was an experienced dairy farmer and hoof trimmer when he decided to go into the hoof trimming business in the Yakima Valley. He had run his own business in Idaho and retained his accountant there. He assumed he could operate under Washington law in the same manner as he had in Idaho.

Mr. Cliff started to train other people to trim cow hooves. Recalling the months of poverty he endured while paying tuition to learn cow hoof trimming at an established school, Mr. Cliff determined to lend money to his trainees while they perfected the craft. He loaned money to them based on the cows trimmed during "training." He "loaned" each trainee $1.00 per cow trimmed, for a total of between $1200 and $1600 per trainee. On completion of training, each trainee became a partner in the business. None of the partnerships were ever reduced to a written contract. None of the partnerships ever had a business license. Bookkeeping consisted of the records of Mr. Cliff's personal checking account. He issued 1099 Forms to the other partners at the end of each tax year. His accountant in Idaho filed self-employed/sole proprietor returns for Frank Cliff, Mark Cliff, and Larry Lakins.

Frank Cliff owned two cow chutes, wood and metal devices for restraining the cows during the trimming process. He also owned the clippers used in the operation. He intended to form a partnership for the operation of each chute. To each partnership he provided a chute, clippers and blades, the business name and administrative services, such as setting the schedule, fielding phone calls, banking and distributing the proceeds of the jobs. Each trimmer provided physical labor and a means of transporting the chute, as discussed below.

Mark Cliff and Larry Lakins formed the balance of one partnership at the time of hearing. Mark Daniels and Joe Weiss allegedly formed the balance of the second through 1992. At various times during the audit period, Mark Cliff and Mark Daniels were together and several other "partners" came and went. There were also three gentlemen who became disenchanted with hoof trimming as a vocation during the training period and left without becoming partners. According to Frank Cliff, these individuals were required to repay the loans he made to them during the training period.

The working two thirds of each chute partnership provided a vehicle with which to haul the chute. They paid gas, insurance licensing, maintenance and repairs on the vehicle in equal shares. They were supposed to pay two thirds of the cost of chute repairs and blade replacements, but often

Frank Cliff did not charge for blades. Mark Daniels and Joe Weiss often paid for their own blade replacements because they worked west of the Cascades and it was inconvenient to go to Yakima for repairs.

Mark Cliff was fully trained before going to work with his father, so had no training period. He had title to the van that he and Larry Lakins used. Larry Lakins underwent about three months of training, and repaid the training loan to Mr. Cliff. Both Mark Cliff and Larry Lakins assert that they were partners with Frank Cliff and that the verbal agreement was for a three-way split of all proceeds and expenses. They equated the costs of maintaining the van with Cliff's cost in maintaining the chute and felt things worked out evenly all around.

Mark Daniels intended to be a partner, but never repaid his training loan. When he needed assistance working the jobs on the west side of the state, he recalls that he asked Frank Cliff's permission to recruit a new person, namely Joe Weiss. He felt that Frank Cliff had the ultimate decision over who worked under the name of the business. He agreed that expenses and proceeds were evenly divided and that his intention was to be a partner.

Joe Weiss never thought he was a partner. He thought he was operating a business as a sole proprietor or independent contractor, leasing a chute from Frank Cliff. This impression was furthered when Frank sent a copy of Exhibit 1 to be signed. That document purports to lease a chute from a business owned by Frank and Roberta Cliff to the chute operators. It contains a non-competition agreement and sets forth in writing the same distribution of proceeds and allocation of expenses as the unwritten agreement had earlier provided. Daniels and Weiss never signed the agreement. They stopped working for the Cliffs after Weiss raised questions about business licensing and asserted that the distribution of money was unfair.

The industrial appeals judge determined that the Department correctly assessed hours at the statutory minimum wage for individuals who were in training. This is the correct outcome if the trainees were employees who only became partners at the conclusion of training. One could infer that the trainees were partners at the outset and were using their labor and repayment of training loans as a means of buying into the partnership. However, the testimony of Frank Cliff is very clear: these men were not partners until they were competent to work on their own. He may well have loaned them money. He may well have to account to the Wage and Hour Division of the Department if he underpaid them. For our purposes, his testimony subjects him to liability for premiums for the training

period. We are satisfied that the training periods identified in the Proposed Decision and Order are as accurate as the record allows.

With respect to the Mark Cliff/Larry Lakins chute, these men clearly intended and followed through on a partnership arrangement with Frank Cliff. There are licensing omissions and other tax implications of the arrangement, but as far as worker's compensation premiums are concerned, these men were partners from January 1, 1992, and exempt from coverage under RCW 51.12.020.

With respect to Mark Daniel, he believed he was a partner and apparently had no complaints about that circumstance until he became associated with Mr. Weiss. He admitted however, that his belief in his status as a partner persisted until he spoke with Peggy Noll at the Department during the conduct of the audit. He testified at hearing under subpoena and after having attempted to discharge a personal debt to Frank Cliff in bankruptcy. Whatever afterthoughts Mr. Daniel may have had about that relationship after the fact, Mr. Daniel has conceded that he was a partner with Frank Cliff. Frank Cliff's attempt to have Daniel and Weiss sign a lease may have revoked that partnership if signed, but the document was never endorsed and the original relationship remained in force until terminated some time after the audit period.

Joe Weiss was nobody's partner. He never believed himself to be one. Frank Cliff had to prove the existence of the partnership and failed to do so. See Ferguson v. Jeanes and Kintz v. Read, supra. At most he was an employee of the partnership between Frank Cliff and Mark Daniels, making any assessment appropriate against both partners.

The remaining individuals identified as employees in the Proposed Decision and Order must be considered employees of Frank Cliff, as he paid them, and there is no record as to whom he was in partnership with while training them.

FINDINGS OF FACT

1. On May 21, 1993, the Department issued to F & R Cliff dba Cliff's Dairy Cow Hoof Trimming (hereinafter F & R Cliff) a Notice and Order of Assessment assessing taxes due and owing the State Fund for the period from the third quarter of 1990 through the fourth quarter of 1992 for a total of $18,110.37. On June 15, 1993, the firm filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the May 21, 1993, Notice and Order. On July 12, 1993, the Board issued an Order Granting the Appeal, assigned it Docket 93 2648 and directed that hearings be held on the merits of the appeal.

2. Between the third quarter of 1990 and the fourth quarter of 1992, F & R Cliff was engaged in the business of trimming dairy cow hooves.

3. For certain periods between the third quarter of 1990 and the fourth quarter of 1992, the business operations of F & R Cliff were conducted as follows: Frank Cliff owned and maintained hoof trimming chutes and supplied trimming shears and blades. Frank Cliff also scheduled all jobs and paid all telephone charges. Mark Cliff, Larry Lakins, Mike Daniels, Jeff Miner, and Joe Weiss provided labor, travel expenses, vehicle license fees, vehicle maintenance, and vehicle insurance to the firm. Mark Cliff contributed a vehicle to pull the chute. Two trimmers worked each job and proceeds were split evenly between the two trimmers and Frank Cliff. Frank Cliff did not supervise jobs, had no power to hire or fire trimmers and scheduled jobs according to the trimmers' instructions. For periods during which this business relationship existed, the above named individuals, with the exception of Joe Weiss, agreed to be, and were, partners in the firm.

4. Mike Collins provided veterinary services to Frank Cliff for his dog, and was not an employee of the firm.

5. From September 1991 through May 1992, Mark Cliff was not engaged in hoof trimming as a partner in or employee of F & R Cliff.

6. For certain periods between the third quarter of 1990 through the fourth quarter of 1992, Howard Holland, Larry Lakins, Mike Daniels, Joe Weiss, Scott Cooley, Don Erickson, and Dale Forest trimmed hooves as trainees for F & R Cliff. When they were working as trainees, these individuals were under the supervision of Frank Cliff and could have been discharged by Frank Cliff. During their training periods, these individuals did not share equally in the proceeds of the business. During their training periods, these individuals were employees of the firm. Joe Weiss remained an employee of the firm for the entire period that he worked for F & R Cliff after being trained.

7. All money paid by F & R Cliff to Howard Holland, Scott Cooley, Don Erickson, and Dale Forest was paid for work performed by them while in training.

8. Money paid to Larry Lakins for jobs performed prior to January 1, 1992, was for work performed by him while in training. Money paid to Larry Lakins for jobs performed from January 1, 1992 forward was paid in his capacity as a partner.

9. Money paid to Mike Daniels for jobs performed prior to May 1, 1991, was paid for work performed while in training. Money paid to Mike Daniels for jobs performed from May 1, 1991, forward was paid to him in his capacity as a partner.

10. All money paid to Joe Weiss during his association with F & R Cliff was for work as an employee.

11. F & R Cliff maintained no records documenting actual hours worked by its trainee trimmers or by employee, Joe Weiss.

12. Interest and penalty provisions in the Department Notice and Order of Assessment issued on May 21, 1993, are based on an erroneous calculation of hours and taxes due.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and the parties in this appeal.

2. Between the third quarter 1990 and the fourth quarter 1992, hoof trimmers in training with F & R Cliff were employees of the firm and industrial insurance premiums should have been paid for the hours they worked. At all times that he worked during the audit period Joe Weiss was an employee and industrial insurance premiums should have been paid for the hours he worked.

3. Between the third quarter 1990 and the fourth quarter 1992, hoof trimmers who were partners in the firm were exempt from industrial insurance taxation.

4. The penalty and interest provisions of the May21, 1993, Notice and Order of Assessment are based on an incorrect assessment of industrial insurance taxes and are therefore incorrect.

5. The Notice and Order of Assessment dated May 21, 1993, which assessed taxes due and owing the State Fund for the period from the third quarter 1990 through the fourth quarter 1992 for a total of $18,110.37, is incorrect and is reversed and remanded to the Department with directions to recalculate taxes due and owing after deducting hours for Mike Collins and for all partners for those periods when they were partners in the firm, and recalculating penalties and interest taking the new calculation of overdue taxes into account, and thereupon take such action as indicated by the law and the facts.

It is so ORDERED.

Dated this 8th day of August, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

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

/s/ _____
ROBERT L. McCALLISTER Member