Equitable powers

Because RCW 51.12.070(5) is only one of the criteria to be met by a contractor seeking exemption from responsibility of a subcontractor's premiums, the satisfaction of subsection (5) does not allow for the application of "equitable estoppel" to dispose of the obligation to meet other criteria for the prime contractor exception under RCW 51.12.070. ....In re GT Drywall, BIIA Dec., 10 11537 (2011) [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 11-2-00562-7.]

Prime contractor liability (RCW 51.12.070)

When the Department has assessed premiums against the prime contractor for work done by a subcontractor, reliance by the prime contractor on the Department of Labor and Industries' website that the subcontractor is in "good standing" is not synonymous with "compliance" with all of the requirements of RCW 51.12.070.

When a prime contractor is liable for the premiums assessed for the work of a subcontractor, the prime contractor discount rate cannot be applied to the work performed by the subcontractor. ....In re GT Drywall, BIIA Dec., 10 11537 (2011) [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 11-2-00562-7.]

ASCENDANT

Equitable powers

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IN RE:   GT DRYWALL INC  ) DOCKET NO. 10 11537
FIRM NO. 950,029-01  ) DECISION AND ORDER

APPEARANCES:

Firm, GT Drywall, Inc., by
AMS Law, P.C., per
Aaron K. Owada

Department of Labor and Industries, by
The Office of the Attorney General, per
Nancy A. Kellogg, Assistant

The firm, GT Drywall, Inc., filed an appeal with the Board of Industrial Insurance Appeals on February 8, 2010, from a Department of Labor and Industries Notice of Assessment dated January 6, 2010; in which the Department affirmed its prior Notice of Assessment No. 0496387, issued on September 21, 2009. In the September 21, 2009 Notice of Assessment, the Department ordered payment of taxes due and owing in the amount of $2,626.47, covering the audit of Angel Jimenez Drywall for the second and third quarters of 2008. The Department Notice of Assessment is AFFIRMED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on September 29, 2010, in which the industrial appeals judge reversed and remanded the Department Notice of Assessment dated January 6, 2010. Contested issues addressed in this order include subcontractor satisfaction of RCW 51.12.070, prime contractor discount rate for subcontractor post-audit premium assessments, and equitable estoppel.

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

(1994). We agree with our industrial appeal judge that GT Drywall failed to satisfy all requisite provisions of RCW 51.12.070.

**Principal Place of Business.**

RCW 51.12.070(2) requires that the subcontractor has a principal place of business that would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services.

The first determination is whether there is a principal place of business. Because that "place" must be eligible for a deduction under the IRS codes, the Board must look to the IRS for a definition.

Pursuant to 26 USCS § 280A - Disallowance of certain expenses in connection with business use of home:

[The term "principal place of business" includes a place of business which is used by the taxpayer for the administrative or management activities of any trade or business of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.

There is sufficient evidence to establish that Mr. Jimenez conducted the administration and/or management of Angel Jimenez Drywall from a living room desk in his apartment, a dwelling unit shared with two brothers. By definition, the apartment would be a principal place of business.

The second determination is whether the principal place of business would be eligible for a business deduction for internal revenue service tax purposes.

According to the Internal Revenue Service, 26 USCS § 280A,

(a) General rule. Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter [26 USCS §§ 1 et seq.] shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

... (c) Exceptions for certain business or rental use; limitation on deductions for such use. (1) Certain business use. Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis.

(Emphasis added.)

The record is insufficient with respect to the proposition that the living room office space in Mr. Jimenez' apartment was used exclusively on a regular basis for the Angel Jimenez Drywall business. For that reason, GT Drywall did not establish by a preponderance of the evidence that
the RCW 51.12.070(2) exception is available with respect to Angel Jimenez Drywall, during the audit periods in question. Further, there is insufficient proof that Angel Jimenez Drywall had any other location that would qualify as a principal place of business and be eligible for a home office tax deduction for IRS purposes.

**Maintaining of Records.**

Although the industrial appeals judge addressed, with specificity, RCW 51.12.070(2) - the "principal place of business" element, we expand our discussion to include the failed satisfaction of RCW 51.12.070(3). Subsection (3) requires that: "the subcontractor maintains a separate set of books or records that reflect all items of income and expenses of the business." The audit clearly revealed that for the second and third quarter of 2008, Mr. Jimenez (Angel Jimenez Drywall) failed to maintain accounts that reflected more than just a minor percentage of the subcontractor's transactions; that he failed to record large cash disbursements; and that he failed to maintain and/or provide time cards, payroll deductions, or schedules of hours worked. Bottom line: Mr. Jimenez did not maintain books and records that reflected all items of income and expense. The appellant, GT Drywall, did not prove otherwise.

**Equitable Estoppel.**

We disagree with our industrial appeals judge with respect to the application of "equitable estoppel" to RCW 51.12.070(5). The satisfaction of the subsection's requirement does not negate the necessity of compliance with all other subsections in order to qualify for the exemption.

As a preliminary matter, we recognize that in Washington:

Three elements are required to establish equitable estoppel: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the face of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admissions, statements, or acts.


On the other hand, the application of *Lee's Drywall Company, Inc.*, dictates a determination that RCW 51.12.070(5) is but one of the criteria to be met by a contractor seeking exemption from responsibility of a sub-contractor's premiums. The Department's rule provides as follows:

The subcontractor has an industrial insurance account in **good standing** with the department or is a self-insurer. For the purposes of this subsection, a contractor may consider a subcontractor's account to be in good standing if, within a year prior to letting the contract or master service agreement, and at least once a year thereafter, the contractor has verified with the department that the account is in good standing and the contractor has not received written notice from the department that the subcontractor's account status has changed. Acceptable documentation of
verification includes a department document which includes an issued date or a dated printout of information from the department’s internet web site showing a subcontractor’s good standing. The department shall develop an approach to provide contractors with verification of the date of inquiries validating that the subcontractor’s account is in good standing.

(Emphasis added.)

"Good standing," then, is defined by the following:

**What does "in good standing" mean?** For someone’s account to be in good standing, they must:

(a) Be registered with the department of labor and industries for industrial insurance coverage with the state fund;

(b) Have a certificate of coverage, also known as a liability certificate, that has not been revoked or canceled;

(c) Have submitted all reports and supplements required by the department within the past year; and

(d) Be current with all payments due to the state fund, or are current with an approved written payment agreement with the department regarding all unpaid amounts due the state fund.

WAC 296-17-31004(4).

"Good standing" does not mean that the requisite reporting and payments are accurate. Of course, that determination cannot be made until/if the Department performs an audit. Any suggestion that the Department's web site representation as to a subcontractor's "good standing" is synonymous with "compliance" is misplaced. Similarly, the Department's web site verification that a contractor's "account is current" status is not synonymous with "compliance." In fact, as Exhibit No. 4 reveals that although an "account is current," the Department instructs that employers "are liable for premiums found later to be due." That caveat clearly advises the prime contractor (GT Drywall) that the "account is current" status is only as accurate as the reports filed by the subcontractor (Angel Jimenez Drywall), as may later be determined. More so, there is insufficient evidence to support the proposition that information contained on the Department's web site is an "admission, statement, or act inconsistent with the claim afterwards asserted," as anticipated by *Harbor Air Service Inc., v. Board of Tax Appeals.*

Ultimately, we find that there is no legal authority to support the position that the requisite satisfaction of subsection (5) allows for the application of "equitable estoppel," thereby trumping all other criteria required for prime contractor exemption under RCW 51.12.070. In fact, subsection (5) is preceded by the word "and," a conjunctive, as opposed to "or," suggesting an alternative. Subsection (5), being but one element required for prime contractor exemption, is satisfied by
accessing the Department web-site to assure that the sub-contractor is in "good standing" (as specifically directed by the statutory language). GT Drywall cannot now use that information, as provided by legislative dictate, to support their "equitable estoppel" argument. It can use that information for the sole purpose to establish one of five elements required for contractor exemption.

We make this determination fully aware our prior decision in *In re Interior Drywall Systems*, Dckt. No. 05 17035 (July 26, 2006), referenced throughout this record. *In re Interior Drywall Systems* is not on point. Although the Board recognized "reliance" on the Department's web site affirmation of a contractor's compliance, the relevant audit period in *Interior Drywall* predated the 2004 amendment to RCW 51.12.070, which added the subsection (5) requirement that a sub-contractor have an industrial insurance account in good standing with the Department, verifiable via the Department's internet web site. Also, in *In re Interior Drywall Systems* the Department had acknowledged that the web site contained inaccurate information during the relevant period. In the current matter, there is no evidence to support the proposition that the Department knew whether its web site was inaccurate with respect to Angel Jimenez Drywall. In fact, it is apparent that the web site was accurate at the time posted, based on information available to the Department prior to its audits of the relevant periods.

**Prime Contractor Discount Rate.**

Simply stated, we are unaware of any authority to allow the application of a contractor's discount rate to a subcontractor's premium assessment. The work performed by the subcontractor employees determines the premium rates due. If the subcontractor had not qualified for the Department discount rate, there is no statutory mechanism to apply the prime contractor's discount rate for the work performed, should the subcontractor fail to pay its premiums.

In its post-hearing brief, GT Drywall relies on *Spicer v. Department of Labor & Indus.*, 48 Wn.2d 437 (1956), in which the court ruled that

When an employer under the act procures the performance of an integral part of its industrial process by an independent contractor, the act applies for the benefit of the independent contractor's employees who perform the service in question, just as if performed directly for the employer, and the independent contractor is an employer under the act so far as the labor in question is concerned.

*Spicer*, at 439.

In that brief, GT Drywall referenced extensive legislative history surrounding the development of RCW 51.08.070 (definition chapter of Title 51 RCW) and RCW 51.12.070.
We note that the SHB 250 Synopsis as of March 19, 1981, provides that a contractor and subcontractor will **not** be considered to be in an employer-employee relationship. The new law, as enacted in 1981, is the first appearance of subsections (1)-(4) of RCW 51.12.070.

We also note that at the same time, the 1981 Legislature amended RCW 51.08.070 to read

> For the purpose of this title, a contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not an employer of:

1. Any other person, firm, or corporation currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW.

The amended RCW 51.08.070 is seemingly in direct opposition to the employers' reliance on *Spicer v. Department of Labor & Indus.*, 48 Wn.2d 437 (1956), for the proposition that, in 2006-2008, the Industrial Insurance Act applies to subcontractor employees as if hired directly by the general contractor.

Finally, WAC 296-17-35203 (without any apparent change since 2005), addresses reporting requirements, and availability of the contractor discount, among other things. This provision, too, differentiates between subcontractors and workers.

(c) **Can I deduct material installed or finished by subcontractors?** You may deduct material installed or taped by subcontractors you are not required to report as your workers. You may not deduct for material only scrapped or primed and textured by subcontractors.

(Emphasis added.)

In this appeal, there is no evidence that the prime contractor, GT Drywall, reported the subcontractor as a "worker," and we determine that the subcontractors' employees/workers were **not** those of the prime contractors. Without some other specific statutory authority instructing otherwise, the prime contractors cannot benefit from discounted premium rates for work performed by someone other than its own employees or workers.

**SUMMARY**

Based on the record as presented, we determine that GT Drywall, Inc., did not satisfy either RCW 51.12.070(2) or (3). As all five provisions of RCW 51.12.070 must be satisfied, GT Drywall is now responsible for the Angel Jimenez Drywall premium assessments for the relevant period based on these facts alone. Equitable estoppel is not an available defense to GT Drywall's responsibility for the premiums assessed, and GT Drywall's contractor discount rate is not applicable to the assessed premiums. Based on the foregoing, we make the following:
FINDINGS OF FACT

1. On September 21, 2009, the Department of Labor and Industries issued Notice and Order of Assessment of Industrial Insurance Taxes (NOA) No. 0496387, directed to GT Drywall, Inc., in which it requested taxes, penalties, and interest due and owing to the State Fund in the sum of $2,626.47 for the second and third quarters of 2008. On November 24, 2009, the NOA was received by the Building Industry Association of Washington (BIAW), the firm's representative.

On November 30, 2009, the BIAW filed a Protest and Request for Reconsideration. On January 6, 2010, the Department issued an Order and Notice Reconsidering Notice and Order of Assessment (received on January 11, 2010), in which it affirmed its September 21, 2009 Notice and Order of Assessment of Industrial Insurance Taxes.

On February 8, 2010, the BIAW filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On March 2, 2010, the Board issued an Order Granting Appeal under Docket No. 10 11537, and agreed to hear the appeal.

2. For the second and third quarter of 2008, Angel Jimenez Drywall was engaged in the business of installation of drywall, was properly registered with the Department of Labor and Industries under Chapter 18.27 RCW, and had contracted with GT Drywall, Inc., to perform the work of a subcontractor.

3. For the second and third quarter of 2008, Angel Jimenez conducted the administration and/or management of Angel Jimenez Drywall from a living room desk in his apartment, a dwelling unit shared with two brothers. The living room office space in Mr. Jimenez' apartment was not used exclusively on a regular basis for the Angel Jimenez Drywall business. As such, that space would not be eligible for a home office tax deduction for IRS purposes.

4. For the second and third quarter of 2008, and with respect to Angel Jimenez Drywall, Mr. Jimenez did not maintain books and records that reflected all items of income and expense.

5. For the second and third quarter of 2008, and prior to the 2009 audit of Angel Jimenez Drywall, the Department maintained its statutorily required web site, showing that the Angel Jimenez Drywall "account is current," and with instructions that employers "are liable for premiums found later to be due." GT Drywall had accessed that web site, as partial compliance with the requisite elements for assessment exemption for premiums owed by the subcontractor. The web site was accurate at the time the information was posted, and was not an admission, statement, or act inconsistent with a claim afterwards asserted.
CONCLUSIONS OF LAW

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

2. For the second and third quarters of 2008, Angel Jimenez conducted the administration and/or management of Angel Jimenez Drywall from a dwelling unit space that was not used exclusively on a regular basis for the Angel Jimenez Drywall business; and, therefore, would not be eligible for a home office tax deduction for IRS purposes, as anticipated by RCW 51.12.070(2).

3. For the second and third quarters of 2008, and with respect to Angel Jimenez Drywall, Mr. Jimenez did not maintain books and records that reflected all items of income and expense, as anticipated by RCW 51.12.070(3).

4. For the second and third quarters of 2008, GT Drywall failed to establish that Angel Jimenez Drywall satisfied all requisite sections of RCW 51.12.070.

5. For the second and third quarters of 2008, GT Drywall was not entitled to an equitable estoppel defense based on compliance with RCW 51.12.070(5).

6. For the second and third quarters of 2008, GT Drywall was not entitled to application of its premium discount rate, as applied to premiums owed by Angel Jimenez Drywall, under Title 51 RCW and/or Chapter 296-17 WAC.

7. The Department Order and Notice Reconsidering Notice and Order of Assessment of Industrial Insurance Taxes dated January 6, 2010, is correct, and is affirmed.

DATED: January 3, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
DAVID E. THREEDY  Chairperson

/s/  
FRANK E. FENNERTY, JR.  Member

/s/  
LARRY DITTMAN  Member