Prime contractor liability (RCW 51.12.070)

A firm involved in tree planting and tree thinning contracted directly with landowners and subcontracted with a second firm. The second firm had many claims filed but had not paid industrial insurance taxes. In light of the contractual arrangement, and the fact that the second firm performed the actual work, the Board concluded that the firm was responsible as a prime contractor. *Citing Littlejohn Construction v. Department of Labor & Indus.*, 74 Wn. App. 420 (1994). *...In re Sylvia Reforestation, BIIA Dec., 93 5150 (1994)*
BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SYLVIA REFORESTATION, INC.  )    DOCKET NO. 93 5150
)    
FIRM NO. 295,370-00 )    DECISION AND ORDER

APPEARANCES:

Employer, Sylvia Reforestation, Inc., by
Paul Doumit

Department of Labor and Industries, by
The Office of the Attorney General, per
Byron Brown and Scott Johnson, Assistants

This is an appeal filed by the employer, Sylvia Reforestation, Inc., on October 7, 1993, from an
order and notice of the Department of Labor and Industries dated September 28, 1993. The
Department order dated September 28, 1993, affirmed a Department notice and order of assessment
of industrial insurance taxes number P117026, issued on June 18, 1993, which assessed industrial
insurance taxes due and owing to the State Fund from Sylvia Reforestation, Inc., in the amount of
$53,142.74. AFFIRMED.

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 of Labor and Industries to a
Proposed Decision and Order issued on June 6, 1994, in which the order of the Department dated
September 28, 1993, was reversed and the matter remanded to the Department, determining that
Sylvia Reforestation, Inc. is not a party primarily and directly responsible for the payment of premiums
within the meaning of RCW 51.12.070.

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.

Two issues are presented in this appeal: 1) Is Sylvia Reforestation, Inc. (Sylvia) primarily and
directly responsible for industrial insurance premiums for work performed by employees of Grey Eagle
Reforestation (Grey Eagle) under the provisions of RCW 51.12.070? 2) Did the Department of Labor
and Industries use the appropriate method to calculate the number of hours subject to industrial
insurance taxes?

Sylvia has been involved in tree planting and pre-commercial thinning of trees for
approximately 18 years. Sylvia contracted directly with landowners for tree planting and thinning
contracts. For the last ten years, Sylvia entered into subcontracts with other companies for performance of the tree planting and tree thinning contracts. In 1991, Sylvia entered into a subcontract for thinning and planting trees with Grey Eagle.

Grey Eagle came to the attention of the Department of Labor and Industries audit division when the Department determined that Grey Eagle had 16 industrial injury claims filed. However, Grey Eagle had not filed any quarterly reports with the Department. The Department conducted an audit of Grey Eagle for the period of April 1, 1991 through December 31, 1991.

The Department audit discovered that Grey Eagle maintained very poor records of the hours worked by its employees. Unable to determine the number of hours worked by employer records, the Department applied the provisions of WAC 296-16-350(6) and used the state minimum wage to establish the number of hours subject to industrial insurance taxes. The Department also determined that Sylvia was primarily and directly responsible for the payment of premiums for industrial insurance taxes due from Grey Eagle Reforestation under the provisions of RCW 51.12.070. RCW 51.12.070 provides that:

> The provisions of this title shall apply to all work done by contract; the person, firm, or corporation who lets a contract for such work shall be responsible primarily and directly for all premiums upon the work. The contractor and any subcontractor shall be subject to the provisions of this title and the person, firm, or corporation letting the contract shall be entitled to collect from the contractor the full amount payable in premiums and the contractor in turn shall be entitled to collect from the subcontractor his proportionate amount of the payment.

Our industrial appeals judge determined that the provisions of RCW 51.12.070 did not apply to the contractual relationship between Sylvia and Grey Eagle. The industrial appeals judge, therefore, determined that Sylvia was not primarily and directly responsible for payment of the premiums assessed by the Department against Grey Eagle. We disagree with our industrial appeals judge's analysis of the facts and the law of this case.

In *Littlejohn Construction v. Department of Labor & Indus.*, 74 Wn. App. 420 (1994), the court applied RCW 51.12.070 to facts similar to those presented in this appeal. Littlejohn Construction (Littlejohn) was a wood frame building construction company. Littlejohn contracted with general contractors to perform production framing and other responsibilities on multi-unit apartment projects. Littlejohn hired independent subcontractors to do much of the framing work. Each subcontractor hired framing crews to construct the frames. The issue before the court was whether Littlejohn owed
premiums for the framing crew members which were employed by its subcontractors. The court determined that because the work of the framing crew members was done under a contract between the subcontractor for which they worked and Littlejohn, the work was clearly covered by RCW 51.12.070.

The controversy in Littlejohn focused on the phrase in the statute, "lets a contract." Littlejohn argued that it was not a person, firm, or corporation who "lets a contract" within the definition of RCW 51.12.070. Littlejohn argued that it functioned as a middle man or subcontractor in the framing work and was not a person who let a contract under the provision of RCW 51.12.070. Littlejohn believes RCW 51.12.070 only authorizes the Department to assess premiums primarily and directly against the original contract lettor, and not against Littlejohn, a subcontractor.

The court, in Littlejohn, held that:

Essentially, "to let" means "to select a contractor". It does not mean "to select the general or prime contractor". Presumably, a contractor higher up the chain selected Littlejohn as a framing subcontractor to do a portion of the construction project. Similarly, Littlejohn selected its crew leads as subcontractors to supply the labor for framing. Thus, "a person, firm, or corporation who lets a contract" includes Littlejohn because Littlejohn contracted for the work of the framing crew members.

Littlejohn, at 427 (footnote omitted.)

Our review of this record convinces us that the relationship between Sylvia and Grey Eagle is analogous to the situation involving Littlejohn and its subcontractors. Sylvia obtained a contract from landowners for reforestation work. Sylvia then subcontracted the actual performance of the contracts to Grey Eagle. Grey Eagle then became a subcontractor, and under the analysis of the Littlejohn case, Sylvia was the person who let the contract. Thus, Sylvia, under the provisions of RCW 51.12.070, is primarily and directly responsible for all premiums upon the work performed by the subcontractor, Grey Eagle.

The second issue raised in this appeal focuses on the Department's method of calculating the number of hours subject to industrial insurance taxes. Grey Eagle failed to present sufficient records to the Department during the audit to allow the Department to determine the number of hours worked by Grey Eagle employees. In order to determine the number of hours subject to industrial insurance taxes, the Department utilized the provisions of WAC 296-17-350(6) to estimate the hours worked.

Sylvia presented the testimony of a former Department auditor, Mr. Ralph Reed. Mr. Reed testified that, prior to 1989, the Department utilized the hourly wage of $12.50 as the average wage
figure for reforestation workers. Mr. Reed then recalculated the assessment, using the $12.50 per
hour figure. Mr. Reed's recalculated assessment indicated that Grey Eagle owed the sum of
$22,986.25.

We believe the Department applied the appropriate procedures as set out in WAC 296-17-350(6) in determining the number of hours subject to industrial insurance taxes. We are unable to
accept Mr. Reed's alternate assessment. There are no facts presented in this record which indicate
the number of hours worked by the employees of Grey Eagle. Mr. Reed's assessment is a
hypothetical assessment using a hypothetical wage of $12.50 per hour. While Sylvia could have
presented evidence to show the actual wage paid to the workers to be used in determining the number
of hours subject to industrial insurance taxes, no such evidence was presented. Sylvia has not shown
that the Department audit is incorrect.

After consideration of the Proposed Decision and Order and the Petition for Review filed by the
Department of Labor and Industries, together with the Firm's Response to Department's Petition for
Review, and a careful review of the entire record before us, we are convinced that the Department
order and notice reconsidering notice and order of assessment dated September 28, 1993, which
affirmed the Department notice and order of assessment of industrial insurance taxes number
P117026, dated June 18, 1993, which assessed industrial insurance taxes for the second, third, and
fourth quarter of 1991, against Sylvia Reforestation, Inc., in the sum of $53,142.74, is correct and is
affirmed.

**FINDINGS OF FACT**

1. On June 18, 1993, the Department of Labor and Industries issued a notice
and order of assessment which assessed industrial insurance taxes due
and owing the State Fund from Sylvia Reforestation, Inc. for the period
April 1, 1991 through December 31, 1991, in the sum of $53,142.74. On
July 2, 1993, the firm, Sylvia Reforestation, Inc., filed a protest and request
for reconsideration to the notice and order of assessment dated June 18,
1993.

On September 28, 1993, the Department issued an order and notice
reconsidering notice and order of assessment wherein it adhered to he
provisions of its notice and order of assessment of industrial insurance
taxes dated June 18, 1993. On October 7, 1993, Sylvia Reforestation,
Inc., filed a Notice of Appeal with the Board of Industrial Insurance
Appeals from the Department order dated September 28, 1993. On
November 5, 1993, the Board issued an order granting the appeal,
assigning Docket 93 5150, and directing that proceedings be held on the
issues raised by the Notice of Appeal.
2. During the second, third, and fourth quarters of 1991, Sylvia Reforestation, Inc., contracted with land owners, including Rayonier Timberlands Operating Co., Green Crow, and the Campbell Group, to do reforestation work.


4. Grey Eagle Reforestation failed to pay industrial insurance taxes for employees engaged in the reforestation work. Grey Eagle Reforestation did not keep adequate records of the hours worked for the employees employed in the reforestation work.

5. The Department used the provision of WAC 296-17-350(6) to compute the hours subject to industrial insurance taxes for each employee of Grey Eagle Reforestation.

CONCLUSIONS OF LAW

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

2. The Department of Labor and Industries correctly utilized the provision of WAC 296-17-350(6) to compute the hours subject to industrial insurance taxes for each employee of Grey Eagle Reforestation.

3. Sylvia Reforestation, Inc., is primarily and directly responsible to the Department of Labor and Industries for all industrial insurance taxes owed on the work performed by Grey Eagle Reforestation under the subcontract with Sylvia Reforestation, Inc., pursuant to RCW 51.12.070.

4. The Department’s order and notice reconsidering notice and order of assessment of the Department of Labor and Industries dated September 28, 1993, wherein the Department adhered to the provisions of its notice and order of assessment of industrial insurance taxes dated June 18, 1993, which assessed industrial insurance taxes due and owing to the State Fund from Sylvia Reforestation, Inc., in the amount of $53,142.74 is correct and is affirmed.

It is so ORDERED.

Dated this 23rd day of November, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ S. FREDERICK FELLER Chairperson

/s/ FRANK E. FENNERTY, JR. Member

/s/ ROBERT L. MCCALLISTER Member