

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

1 **IN RE: MOUNTAIN TERRACE**)
2 **BUILDERS INC.**)
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6 **FIRM NO. 225,355-01**)
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DOCKET NO. 18 10226

**ORDER VACATING PROPOSED DECISION
AND ORDER AND REMANDING FOR FURTHER
PROCEEDINGS**

The Department issued a Notice of Assessment and argues that the firm is barred from questioning the correctness of the assessment due to its failure to make its records available for inspection. Our industrial appeals judge agreed with the Department and dismissed this appeal on the grounds that the firm failed to present its records for inspection, in violation of RCW 51.48.040. We vacate the Proposed Decision and Order and remand the appeal for further proceedings because RCW 51.48.040 contains no time limit within which a firm must comply, and the firm's one-time failure to produce records at an initial meeting does not constitute a "refus[al] to allow adequate inspection" by the Department under RCW 51.48.040. The Proposed Decision and Order of July 16, 2018, is vacated, and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

In August 2017, the Department initiated an audit of Mountain Terrace Builders, LLC (the "Firm") with respect to the third quarter of 2016 through the second quarter of 2017. The Department's auditor, Tyler Manser, sent the Firm an initial contact letter that contained a questionnaire and requested the Firm to produce numerous records at their first meeting, which was held on October 3, 2017. Mike Kempinski, the Firm's owner, and Jenny Perez, the Firm's bookkeeper, met with Mr. Manser at the Department's offices at this initial meeting. The Firm did not bring any of the requested records. Mr. Kempinski acknowledged his failure to produce records at this meeting, explaining that he first he wanted to find out what triggered the audit before opening up the Firm's books to the Department.

There is some dispute as to what transpired next. Mr. Manser claims that Mr. Kempinski flatly refused to provide any records or to cooperate with the audit going forward. Mr. Kempinski claims that after he explained why he didn't bring the records, Mr. Manser asked him and Ms. Perez to leave and told them that he would be sending them a "big fine."¹ There was no further contact between the parties for two weeks.

¹ 6/5/18 Tr. at 47-48.

1 On October 17, 2017, the Department sent the Firm a subpoena, commanding Mr. Kempinski
2 to appear at the Department's Tumwater office on November 6, 2017, at 2 p.m., and directing him to
3 produce numerous records with respect to the Audit Period. The subpoena stated that if the
4 requested documents were received before the stated deadline, Mr. Kempinski's attendance would be
5 waived. The Department sent the subpoena by certified mail, but does not have any proof of when
6 the Firm received it. Both Mr. Kempinski and Ms. Perez testified that they did not become aware of
7 the subpoena until the morning of November 6, 2017. Ms. Perez emailed Mr. Manser that morning,
8 stating that she was gathering the requested documents and would email them to Mr. Manser before
9 2 p.m. deadline. She also asked Mr. Manser to come to the Firm's office to inspect the records that
10 Ms. Perez was unable to email to him that day. Mr. Manser responded that the subpoena was the
11 "final deadline to conduct the audit."² Next, Mr. Kempinski called Mr. Manser shortly before 2 p.m.,
12 asking if Ms. Perez could email Mr. Manser the documents in lieu of appearing in person, or to
13 reschedule his appearance to another day. Mr. Manser declined this request. Ms. Perez testified
14 that had Mr. Manser provided another opportunity or deadline (other than the subpoena) to supply
15 records, she would have done so.

16 On November 21, 2017, the Department issued a Notice and Order of Assessment against
17 the Firm in the amount of \$227,407.67 with respect to the audit period that is the subject of this
18 appeal.

19 RCW 51.48.040 provides:

- 20 (1) The books, records and payrolls of the employer pertinent to the administration of
21 this title **shall always be open to inspection by the department or its traveling
22 auditor**, agent or assistant, for the purpose of ascertaining the correctness of the
23 payroll, the persons employed, and such other information as may be necessary
24 for the department and its management under this title.
- 25 (2) Refusal on the part of the employer to submit his or her books, records and payrolls
26 for such inspection to the department, or any assistant presenting written authority
27 from the director, shall subject the offending employer to a penalty determined by
28 the director but not to exceed two hundred fifty dollars for each offense and the
29 individual who personally gives such refusal is guilty of a misdemeanor.
- 30 (3) Any employer who **fails to allow adequate inspection** in accordance with the
31 requirements of this section is subject to having its certificate of coverage revoked
32 by order of the department and **is forever barred from questioning in any
33 proceeding in front of the board of industrial insurance appeals** or any court,

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² Exhibit 1.

1 **the correctness of any assessment** by the department based on any period for
2 which such records have not been produced for inspection.³

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4 Penal provisions such as RCW 51.48.040 are strictly construed.⁴ Our industrial appeals judge
5 observed that the statute requires a firm to "**always**" make its records available on request and found
6 that because the Firm didn't bring records to the first meeting on October 3, 2017, and failed to appear
7 as commanded by the subpoena on November 6, 2017, the Firm was in violation of RCW 51.48.040.

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9 *In re Westcoast Reforestation Co.*⁵ is a Board case involving a firm that failed to provide
10 records to the Department within 30 days of the auditor's request. The Department then issued a
11 Notice and Order of Assessment, which the firm protested for reconsideration. The Department held
12 the assessment in abeyance to reconsider the matter. During the reconsideration period, the firm
13 provided the Department all of the requested records. The Department argued that the firm was
14 forever barred from challenging the assessment under RCW 51.48.040 because the firm did not
15 provide records during the audit itself. We held that the firm materially complied with the statute and
16 stated:
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21 While the employer's compliance with the auditor's request for inspection was
22 delayed and far from exemplary, nonetheless, it did comply. The statute does
23 not contain any time limit for compliance that was violated by the employer.⁶

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25 Thus, we concluded that a firm's previous failure to provide records does not preclude it from
26 providing records at a later date and does not, in and of itself, constitute a violation of RCW 51.48.040.

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28 After the initial October 3, 2017 meeting, the Department did not provide the Firm with another
29 reasonable opportunity to provide records. WAC 296-17-35201 is the Department's rule
30 implementing the record-keeping requirement of RCW 51.48.030, and provides that "[f]ailure to
31 produce the requested records **within thirty days** of the request, or within an agreed upon time
32 period[,] shall constitute prima facie evidence of noncompliance with this rule and shall invoke the
33 statutory bar to challenge found in RCW 51.48.030 and/or 51.48.040."⁷ The Department issued its
34 subpoena on October 17, 2017, with a deadline of November 6, 2017, which gave the Firm less than
35 three weeks to comply. This was not a reasonable period of time, especially in light of the
36 Department's own rule, which provides 30 days.
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45 ³ Emphasis added.

46 ⁴ *Lubich v. Pacific Highway Transport*, 32 Wn.2d 457, 470 (1949).

47 ⁵ Dckt. No. 96 3698 (November 1, 1999).

⁶ *Westcoast* at 4.

⁷ Emphasis added.

1 In addition, we find credible the testimonies of Mr. Kempinski and Ms. Perez that they did not
2 receive the subpoena until the morning of November 6, 2017. While it is true that the Firm did not
3 bring records to the first meeting, as instructed in the initial contact letter, this one-time failure should
4 not constitute a "fail[ure] to allow adequate inspection" under RCW 51.48.040(3). The Firm should
5 be afforded another **reasonable** opportunity to provide records. The subpoena was not a reasonable
6 opportunity. Given that there is no time limit within which to comply with RCW 51.48.040, and the
7 unreasonable deadline in the Department's subpoena, this appeal is remanded for further
8 proceedings so that the Firm can provide records to the Department.
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13 **ORDER**

14 The July 16, 2018 Proposed Decision and Order is vacated and this appeal is remanded to
15 the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by
16 this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new
17 Proposed Decision and Order. The new order will contain findings and conclusions as to each
18 contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may
19 petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final
20 Decision and Order of the Board within the meaning of RCW 51.52.110.
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25 Dated: October 30, 2018.
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27 BOARD OF INDUSTRIAL INSURANCE APPEALS

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29 LINDA L. WILLIAMS, Chairperson

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31 FRANK E. FENNERTY, JR., Member

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33 JACK S. ENG, Member
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**Addendum to Order
In re Mountain Terrace Builders INC.
Docket No. 18 10226
Firm No. 225,355-01**

Appearances

Firm, Mountain Terrace Builders, LLC, by Owada Law PC, per Sean Walsh
Department of Labor and Industries, by Jerry Billings, Litigation Specialist, and by Office of the
Attorney General, per Timothy Kidd

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
and decision. The firm filed a timely Petition for Review of a Proposed Decision and Order issued on
July 16, 2018, in which the industrial appeals judge dismissed the appeal. The Department filed a
response to the firm's Petition for Review.