State Roofing & Insulation

ASSESSMENTS

Piece Work

In an assessment appeal, the Board found equitable estoppel where the employer relied to its detriment on Department representations and past practices on determinations of average rate of compensation for piece workers and where the employer would suffer if the Department were allowed to repudiate or contradict its prior acts, practices, and policies. ***….In re State Roofing & Insulation,* BIIA Dec., 89 1770 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 91-2-01375-4.]

BOARD

Equitable powers

Because the courts have applied equitable estoppel against the state, if there is no question or doubt as to the extent of the Board's jurisdiction in a particular case, the Board may apply the doctrine under the principle of stare decisis in the same manner as it applies other principles of law. Estoppel will apply in proper circumstances against the Department, in its role as a taxing agency, and reliance, if reasonable, may be placed upon both the silence and non-action of the state where it ought to speak, as well as upon affirmative statements and actions. ***….In re State Roofing & Insulation,* BIIA Dec., 89 1770 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 91-2-01375-4. The Board has refined its interpretation of applying equity under stare decisis to explain that cases with similar facts are precedent and need not involve nearly identical facts in order to allow the Board to reach an equitable decision. In so doing the Board is not creating an equitable remedy, but following precedent. *In re Lyle Applegate*, BIIA Dec., 18 16730 (2019).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STATE ROOFING & INSULATION, INC.	)	**DOCKET NO. 89 1770**
	)	
FIRM NO. 372,995-00	)	**DECISION AND ORDER**

APPEARANCES:

Firm-petitioner, State Roofing & Insulation, Inc., by
Preston, Thorgrimson, Ellis & Holman, per
Charles R. Bush

Department of Labor and Industries, by
The Attorney General, per
Christa L. Thompson, Christine A. Tilton, Timothy A. Brewer and
Maureen Mannix, Assistants and
Yvonne Dickson, Paralegal

This is an appeal filed by the employer, State Roofing & Insulation, Inc. on May 4, 1989 from an Order and Notice Reconsidering Notice and Order of Assessment of the Department of Labor and Industries dated April 20, 1989 which affirmed a Notice and Order of Assessment of Industrial Insurance Taxes No. 67064 dated December 30, 1988 which assessed industrial insurance taxes against the employer in the amount of $122,731.74 for the period from July 1, 1986 through June 30, 1988. **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 employer, State Roofing & Insulation, Inc., to a Proposed Decision and Order issued on July 23, 1990 in which the Department Order and Notice Reconsidering Notice and Order of Assessment dated April 20, 1989 was affirmed.

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 employer, State Roofing & Insulation, Inc. (State Roofing), argues the Department should be equitably estopped from collecting a portion of industrial insurance taxes assessed for a two year period, the third quarter of 1986 through the second quarter of 1988. Our Industrial Appeals Judge held this Board lacks the authority to grant State Roofing the equitable relief requested, and affirmed the Department's actions. We hold the Board does have authority to grant equitable relief of the type

sought by State Roofing and that the Department is estopped from assessing and collecting a portion of the taxes assessed for the period in question.

Lance Smith and his brother, Brad Smith, bought the business then known as State Roofers as 50/50 partners from their uncle in 1976. The business has grown, is now incorporated and specializes primarily in residential shake roofing application, although the firm also performs commercial-type roofing and applies residential roofs of varying materials. The firm purchased a shake mill in 1979 which produces shakes strictly for its own use. The firm focuses on the portion of the east Puget Sound area circumscribed by Marysville on the north and Federal Way on the south.

The "piece workers" rule [1] is used to calculate the worker hours upon which State Roofing pays industrial insurance premiums for a substantial number of its workers. Certain roofers within classification 0507 are compensated by the square, in other words based upon the number of shake bundles installed, five bundles equaling 100 square feet. Likewise, certain shake mill workers within classification 1005 are compensated based upon the number of bundles of shakes produced. The hours attributable to a particular piece worker are calculated by dividing the worker's compensation by the "average rate of compensation for the applicable classification" rounded down to the nearest half dollar, based upon "records of the department as compiled for the preceding fiscal year." WAC 296-17-350(6). Under this rule, it can readily be seen that hours upon which an employer must pay

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[1]WAC 296-17-350 reads in relevant part:F

> (6) Piece workers. For employees whose compensation is based upon the accomplishment of a number of individual tasks whether computed on the number of pounds, items, pieces, or otherwise who are not subject to any federal or state law or rule which requires the reporting of actual hours worked, the employer shall for purpose of premium calculation assume each two dollars of earnings of each employee as representing one worker hour: Provided, That if the average rate of compensation for the applicable classification is at least $3.00 but less than $3.50 per worker hour the assumed amount shall be $3.00 of earnings as representing one worker hour, and on a progressive basis, if the average compensation is at least $3.50 but less than $4.00 the assumed amount shall be $3.50 of earnings as representing one worker hour, and so forth. The records of the department as compiled for the preceding fiscal year ending June 30, shall be the basis for determining the average rate of compensation for each classification: . . .

WAC 296-17-350(6).

taxes vary inversely with the average rate of compensation; a lower rate of compensation produces a larger number of hours and a higher rate of compensation produces a lower number of hours upon which premiums will be paid.

State Roofing has used $19.50 as the average rate of compensation amount by which its piece workers' gross compensation is divided, in both the roof work 0507 classification and in the shake mill 1005 classification. During the audit period, the third quarter of 1986 through the second quarter of 1988, the applicable average rates of compensation as determined by the Department were: for roof work classification 0507, $18.50 in 1986, $13.50 in 1987, and $14.00 in 1988; and, for shake mill classification 1005 $11.50 in 1986, $12.00 in 1987, and $12.00 in 1988. State Roofing paid $488,934.59 in industrial insurance taxes during the two-year period subject to the audit. The discrepancy between the higher divisor used by State Roofing and the lower divisor used by the Department in the piece workers rule formula accounts for the lion's share of the additional $122,731.48 which the Department assessed as further due in taxes for the two-year period.

State Roofing asks that we hold the Department is barred under principles of equitable estoppel from collecting the additional assessments related to the piece worker calculations. We view the following facts as relevant to that determination. The average rate of compensation amount used by the prior owner for calculations under the piece worker rule was $19.50. The present owners of State Roofing employed that same amount as the divisor in their own piece workers rule calculations without interruption through the second quarter of 1988. In 1983 the Department conducted an audit of State Roofing which covered the period of the first quarter of 1981 through the fourth quarter of 1982. Exhibit No. 3. That audit report did not criticize State Roofing's use of $19.50 as the average rate of compensation under the piece workers rule for roof workers or for mill workers, nor did the audit staff orally criticize the employer for using that rate.

Lance Smith testified that he was aware that the average rate of compensation might change from time to time over the years. However, he did not direct any change in State Roofing's use of the $19.50 divisor over these years. He explained his belief that from 1983 to 1989 the compensation paid in the industry to both mill workers and roof workers has never decreased and, in fact, has generally increased. Mr. Smith also explained that over the years State Roofing has bid on public works contracts. In order to prepare each bid, he has called the Department's Employment Standards-Apprenticeship-Crime Victims Division (ESAC) to obtain the prevailing wage rate required

for such contracts. Although admittedly not able to recall the exact figures, Mr. Smith recalled that the figure provided by ESAC was "always very close" to the $19.50 figure. 3/7/90 Tr. at 43.

In his approximately 18 years in the roofing industry, Mr. Smith has not been aware of a division within the Department other than ESAC from which he could obtain wage rate information. Mr. Smith stated that he has never seen any notice from the Department, formal or informal, either specifically directed to State Roofing or to the industry in general, relating to the average rate of compensation which the Department expects to be used in piece workers rule calculations. Mr. Smith stated that he would have directed a change in the calculations accordingly, had he been apprised of a change in the average rate of compensation. He further noted that he has since learned that the divisor for the roofing classification increased in 1984 to $21.00, which would have resulted in lesser industrial insurance taxes related to that classification had the appropriate divisor been used.

Nancy Smith has been the bookkeeper and office manager for State Roofing since 1978. She prepared Department of Labor and Industries quarterly reports until 1981, when A.D.T. began preparing the reports as part of its payroll service to the firm. The quarterly reports are now prepared by payroll staff at State Roofing. In any event, even when A.D.T. was preparing payroll and quarterly reports, the piece workers rule calculations were made by Mrs. Smith or other State Roofing staff on respective workers' time cards, which contained the gross pay information. In this regard, we note that the 1983 Post-Audit Instructions (Auditor's Comments Sheet) affirmatively indicated to State Roofing that its records were "OK" in the areas of"Availability", "Completeness" and "Accuracy", since the auditor checked the box under "OK" as opposed to "Deficiency". Exhibit No. 3, p. 4.

Mrs. Smith also described the information which State Roofing received from the Department by way of regular quarterly reports. Although substantial information regarding premium rates and proper classifications was provided by these Department reports, no information was supplied to State Roofing regarding the appropriate average rate of compensation to be used under the piece workers rule. This was confirmed by the Department's field auditor, Patrick E. deVries.

State Roofing also called as its witnesses two Department employees: Miriam Moses, an industrial statistician with the Prevailing Wage Section of the ESAC Division; and, Gary Griesmeyer, a research analyst who works with the actuarial staff in the Industrial Insurance Division in the setting of industrial insurance premium (tax) rates. We have learned the following from their testimony, as well as the later testimony of field auditor Patrick deVries. None of the Department's employees could identify any statute or adopted rule or regulation other than WAC 296-17-350(6) which would direct an

employer to the particular division of the Department or other source to find out the amount to be used as the average rate of compensation for particular classifications under the piece workers rule. Mr. DeVries indicated that the Department sends out employer bulletins on a quarterly basis and stated that bulletins in 1984 and in 1986 specifically addressed the piece workers rule: "That notice for piecework is noted here and where they should contact the Department, or that they should contact the Department on a yearly basis to be notified of the new rate." 3/7/90 Tr. at 73. Mr. deVries described the bulletin as a folded newsletter on colored paper approximately four pages long. He did not know whether the newsletter was mailed in an envelope nor whether it was mailed to individual employers.

The Department's Industrial Insurance Division in 1986 altered the source from which it obtained the "average rate of compensation" to be used in the piece workers rule calculations, at least with regard to the roof worker classification 0507. Until 1986, the Industrial Insurance Division utilized the prevailing wage rate figure promulgated by the ESAC Division as the minimum wage which must be paid on a public works project. When asked her opinion as to "whether the prevailing wage would be generally on the high side or the low side of the actual average hourly wage", Ms. Moses indicated "(i)t would be on the high side." 3/7/90 Tr. at 13. In 1986, the Industrial Insurance Division began establishing its own average rate of compensation amount from its own records by dividing gross compensation reported by total hours reported in a particular classification by employers. This provided a lower figure than that previously obtained from the ESAC Division. In 1986, the Industrial Insurance Division used an average between the two sources and, then, beginning in 1987 went solely with its own calculations. The results of this change are readily observable by tracking the average rate of compensation amount utilized by the Department from 1983 forward: 1983--$19.50; 1984--$21.00; 1985--$21.00; 1986--$18.50; 1987--$13.50; and 1988--$14.00. Although not directly stated, we believe the inference from the testimony is inescapable that the Industrial Insurance Division changed its source for an "average rate of compensation" precisely due to the belief that the ESAC Division source was on the "high end" and also with knowledge that the resulting average rate of compensation used would be significantly lower under the new method.[2] Had the Department

[2]According to Ms. Moses, the ESAC "prevailing wage rate" equals the "wage rate, plus benefits, should benefits apply." 3/7/90 Tr. at 7. During the period of 1980 through 1989, the wages never decreased except for an update occurring on July 15, 1988 when the wage figure was $18.35 as compared to an update occurring December 1, 1986 when the wage rate was $18.85. However, we note that the benefit portion increased between these two dates from $2.57 to

continued to use the ESAC Division figures, the average rate of compensation would have stayed the same or increased as Mr. Smith believed.

Finally, there is a significant difference in the facts of this case related to the shake mill classification 1005 as distinguished from the roof work classification 0507. Unlike the roof work classification, the proper "average rate of compensation" for the shake mill classification was never $19.50 as far as we are aware. We are not apprised of any change in Department procedures regarding this classification, such as from using the ESAC Division prevailing wage figure to using an "average rate of compensation" calculated by the Industrial Insurance Division from its own records. The "average rate of compensation" amounts used by the Department in the shake mill classification are: 1983 - $12.00; 1984 - $11.50; 1985 - $10.50; 1986 - $11.50; 1987 - $12.00; and 1988 - $12.00. There are no marked fluctuations of the amount used under this classification. We infer from this and the other information provided, that when Mr. Smith called the Department's ESAC Division, he was only requesting information concerning the prevailing wage rate for the roof worker classification 0507 and not for the shake mill classification 1005. Consistent with this, we assume a prevailing wage rate for shake mill workers was not relevant to public works contracts upon which State Roofing bid. In short, the evidence before us does not suggest any other reasons for State Roofing's belief that $19.50 might be the appropriate "average rate of compensation" for shake mill workers in classification 1005 other than the $19.50 rate having been utilized historically by State Roofing without criticism by the Department in its 1983 audit or subsequently, prior to the 1988 audit with which we are now concerned.

We next turn our attention to the matter of this Board's authority to apply principles of equitable estoppel and, then, to whether the doctrine is applicable in the present case.

BOARD AUTHORITY TO APPLY THE DOCTRINE OF EQUITABLE ESTOPPEL

We have previously refused to apply equitable doctrines in In re Isaias Chavez, Dec'd., BIIA Dec., 85 2867 (1987); In re Ronald E. Jamieson, BIIA Dec., 62,551 (1983); and In re Seth E. Jackson, BIIA Dec., 61,088 (1982). In each of these cases we declared that we lack broad equitable powers. In each we considered that granting the equitable relief requested would require that we extend the extent of our jurisdiction and/or that we expand an equitable doctrine beyond the confines of its reach as determined by our courts.

$3.15. Thus the increase in benefits applicable to July 15, 1988 more than offset the decrease in the wage portion. The total "prevailing wage rate" actually increased.

> We have repeatedly indicated, however, that this Board lacks any broad equitable powers . . . . The Board applies the law as established by cases such as [Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949, 540 P.2d 1359 (1975) and Ames v. Dep't of Labor & Indus., 176 Wash. 509, 30 P.2d 239 (1934)], not because it holds any equitable power but because it is anticipating the relief which would be granted under the principle of stare decisis upon further appeal to superior court. It is without authority to expand those doctrines to cases presenting dissimilar facts. Jamieson, supra, at 5. No authority has been brought to our attention which would allow us to find that ignorance of the law or illiteracy constitute sufficient excuses for not filing a timely claim as required by RCW 51.28.050. Under these circumstances and for the aforementioned reasons we are unable to extend the principles of Rodriguez and Ames to the facts of this case.

In re Isaias Chavez, Dec'd., supra, at 9.

We have cited State ex rel Pioli v. Higher Education Board, 16 Wn. App. 642, 558 P.2d 1364 (1976) and Tacoma v. Civil Serv. Bd. of Tacoma, 6 Wn.App. 600, 494 P.2d 1380 (1972) when refusing to exercise equitable power. See, e.g., Jamieson, supra, at 5 and Jackson, supra, at 3. Each of these cases which we have previously cited also related to the question of whether the tribunal had jurisdiction over the party or the subject matter of the dispute. The court held that the administrative tribunal could not expand its jurisdiction by equity:

> More important to disposal of this contention is that the Higher Education Personnel Board's jurisdiction is determined by statute, not equity. See Tacoma v. Civil Serv. Bd., supra. Estoppel cannot be used for the purpose of conferring subject matter jurisdiction upon a court. Wesley v. Schneckloth, 55 Wn.2d 90, 346 P.2d 658 (1959); Rust v. Western Washington State College, 11 Wn.App. 410, 523 P.2d 204 (1974). We hold estoppel cannot confer subject matter jurisdiction on an administrative tribunal which has a more restricted scope of authority.

State v. Higher Educ. Personnel Bd., 16 Wn.App. at 646. See also Jones v. Dep't of Corrections, 46 Wn.App. 275, 279, 730 P.2d 112 (1986).

There is no question or doubt as to the extent of our jurisdiction in the present case. Rather, the substantive issue is whether the doctrine of equitable estoppel should be applied against the Department, given the facts we have described. We may apply the doctrine of equitable estoppel under the principle of stare decisis just as we apply other principles of law. In re Isaias Chavez, Dec'd., supra, at 9. Since our courts have found that equitable estoppel is applicable against the State, we may apply the doctrine where the circumstances are appropriate and within those situations and

guidelines set out by our courts. See Shafer v. State of Washington, 83 Wn.2d 618, 622, 521 P.2d 736 (1974) and Finch v. Matthews, 74 Wn.2d161, 171, 443 P.2d 833 (1968).

APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL TO THE FACTS OF THE PRESENT CASE

> Estoppel consists of three elements: (1) an admission, statement, or act inconsistent with a claim later asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Harbor Air Serv., Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67, 560 P.2d 1145 (1977). The State can be estopped where a party has acted to his or her detriment in reliance upon the State's commitment, although the State cannot be estopped because of unauthorized admissions, conduct, or acts of its officers. Estoppel will not lightly be invoked against the State to deprive it of the power to collect taxes.

Revenue v. Martin Air Conditioning, 35 Wn.App. 678, 682-683, 668 P.2d 1286 (1983).

The court in Martin Air Conditioning cited, as an example of the principles we have just quoted, Kitsap-Mason Dairymen's Ass'n v. State Tax Comm'n, 77 Wn.2d 812, 467 P.2d 312 (1970) in which the court distinguished a taxing agency oversight from a change in interpretation of a statute or rule. In that case the court noted:

> This is not a case in which auditors changed their interpretation of a statute or rule. It is one in which they overlooked through ignorance, neglect or inadvertence Kitsap's error in computing the tax. The fact that the oversight only recently has been discovered does not relieve Kitsap of its liability for the correct tax during the audit period now under consideration.
>
> The doctrine of estoppel will not be lightly invoked against the state to deprive it of the power to collect taxes. The state cannot be estopped by unauthorized acts, admissions or conduct of its officers. Wasem's Inc. v. State, 63 Wn.2d 67, 385 P.2d 530 (1963); Bennett v. Grays Harbor County, 15 Wn.2d 331, 130 P.2d 1041 (1942).

Kitsap-Mason Dairymen's Ass'n v. State Tax Comm'n, 77 Wn.2d at 818 (Emphasis supplied).

Applying the rules from these cases, the court in Martin Air Conditioning found that the Department of Revenue was not estopped from collecting sales taxes on fuel pump-outs or assumptions even though Martin Air Conditioning's practice of refunding the sales tax to the old customer and taking a deduction had been undetected for several years. The court found that the Department of Revenue did not change its policy with respect to application of the particular

Washington Administrative Code provisions which it had promulgated and that Martin Air Conditioning had not in fact relied upon any past interpretations, audit reports or instructions from the Department of Revenue. The evidence presented

> ... a pattern of erroneous reporting done in good faith which went undetected because of mistake or inadvertence on the part of state auditors in failing to catch the error after reviewing the books, or because it was not discoverable from the books. It does not suggest an act, admission, or statement inconsistent with a claim later asserted, on the faith of which another acts. This is not a situation which is proper for the application of the doctrine of estoppel.

Martin Air Conditioning, 35 Wn.App. at 687-688.

We glean from these cases the principle that the doctrine of equitable estoppel should not apply against the taxing agency where reliance is asserted to have been only upon inadvertent oversight or mistake by agency auditors in a prior audit, regardless of whether the error leading to the erroneous reporting by the taxpayer was observable in prior audits.

In the present case, State Roofing was utilizing $19.50 as the average rate of compensation under the piece workers rule for both its shake mill workers and roof workers during the 1983 audit period. The Department's auditors overlooked this during the 1983 audit. It appears that State Roofing's error was discoverable had the auditors viewed the time cards on which the piece worker rule calculations were made by State Roofing's bookkeeper. With regard to the shake mill classification, State Roofing has not suggested anything other than asserted reliance upon the Department's oversight in the 1983 audit. State Roofing had apparently erroneously assumed that it could use the $19.50 divisor for this classification upon purchase of the shake mill in 1979.

Apart from the 1983 audit oversight, there has been no showing that the Department in any way induced State Roofing to use this figure in the shake mill classification. No evidence was presented to show that the Industrial Insurance Division was using the ESAC Division prevailing wage rate in this classification at any time, let alone that the Industrial Insurance Division changed any practice in this regard. We have already inferred from this that Mr. Smith's inquiries of the ESAC Division subsequent to 1983 concerned the prevailing wage rate in the roof workers classification and not in the shake mill classification. A finding that State Roofing somehow relied upon these communications as a basis for its continued use of the $19.50 figure in the shake mill classification would amount to sheer speculation. "Estoppels must be certain to every intent, and are not to be taken as sustained by mere argument or doubtful inference." P.U.D. v. Cooper, 69 Wn.2d 909, 918,

421 P.2d 1002 (1966). See also Chemical Bank v. WPPSS, 102 Wn.2d 874, 905, 691 P.2d 524 (1984) and Pioneer National Title v. State, 39 Wn.App. 758, 760-761, 695 P.2d 996 (1985). We conclude that the doctrine of equitable estoppel does not apply against the Department to prevent its collection of the increased premiums attributable to recalculation utilizing the correct average rate of compensation for piece workers in the shake mill classification.

However, with regard to the roof worker classification, the decisions of our courts applying the doctrine of equitable estoppel direct that an opposite result should adhere. Equitable estoppel may be applied against the state when acting in its governmental as well as in its proprietary capacity "when necessary to prevent a manifest injustice and the exercise of its governmental powers will not be impaired thereby." Finch v. Matthews, supra, 74 Wn.2d at 175.

In Harbor Air v. Bd. of Tax Appeals, 88 Wn.2d 359, 560 P.2d 1145 (1977) the court found in favor of the taxpayer, Harbor Air, under the doctrine of equitable estoppel. Harbor Air agreed to purchase a flight service business, complied with Washington's Uniform Commercial Code -Bulk Transfers Article, included the Department of Revenue as a creditor and gave notice to the Department of Revenue. The Department of Revenue responded that it was unable to locate excise tax returns of the purchased business from January 1, 1972 forward and that an audit was outstanding. Prior to closing on the deal, the business which Harbor Air was purchasing filed tax returns for the periods after January 1, 1972. Subsequent communications from the Department of Revenue gave no indication that there were any anticipated tax deficiencies prior to January 1, 1972 or that the audit would encompass earlier periods. After Harbor Air closed the deal for the agreed purchase price, the Department of Revenue enlarged its audit and sought to collect taxes owing for periods prior to January 1, 1972. The court found that the Department of Revenue could have easily clarified the scope of its audits and prevented Harbor Air's misunderstanding and that Harbor Air would not have disbursed the purchase funds if it had known the scope of the audit. "Permitting the department to collect Executive's [the purchased business] taxes from respondent would result in manifest injustice to respondent and should not be allowed." Harbor Air, 88 Wn.2d at 367.

The Supreme Court later characterized its holding in Harbor Air as follows: "State estopped because it created a predictable misunderstanding by its ambiguous communication." Board of Regents v. Seattle, 108 Wn.2d 545, 553, 741 P.2d 11 (1987).

The court in Board of Regents also cited with approval Conversions v. Dep't of Revenue, 11 Wn.App. 127, 521 P.2d 1203 (1974). "The State will be estopped by its silence, coupled with

knowledge of another's detrimental acts in reliance on that silence. Thus, the State's advice that a non-collection taxation hearing is pending coupled with 10 years of subsequent inaction estops the State from later collecting taxes; the taxpayer justifiably assumed that the State's silence implicated a non- collection ruling ..." Board of Regents, supra, 108 Wn.2d at 553. In Conversions, the court returned the case for trial, outlining the requirements for a showing that equitable estoppel should apply against the Department of Revenue: " (1) that the state has previously acted (non-acted) in a manner inconsistent with the claim which it presently asserts; (2) the taxpayer had a right to, and reasonably did, rely on the state's non-action; and (3) the taxpayer has been injured by reason thereof". Conversions, supra, 11 Wn.App. at 135.

From these cases we conclude not only that estoppel will apply in the proper circumstances against a state taxing agency, but also that reliance, if reasonable, may be placed upon both the silence and non- action of the state where it ought to speak or act to prevent the misunderstanding, as well as upon affirmative statements and actions. Board of Regents v. Seattle, supra, 108 Wn.2d at 553-554; Harbor Air v. Bd. of Tax Appeals, supra, 88 Wn.2d at 366-67; and Conversions v. Dep't of Revenue, supra, 11 Wn.App. at 135. With regard to piece worker rule calculations for the roof workers classification 0507, State Roofing has shown that it reasonably relied to its detriment upon affirmative acts and statements, as well as silence and non-action on the part of the Department, which were inconsistent with the Department's recalculations under the piece worker rule for the audit period now under consideration. We do not rely upon the Department's oversight in the 1983 audit.

The Department agrees that the $19.50 figure used by State Roofing in its calculations for the roof workers classification was indeed correct in 1983. The Department also admits that, as Mr. Smith assumed, that figure was derived from the Department's ESAC Division's determination of the prevailing wage rate. Upon contacting the Department in subsequent years, Mr. Smith found that the prevailing wage rate remained close to the $19.50 figure, if anything increasing but never decreasing. The Department's own staff verified that this was in fact true.

In reliance upon this knowledge, Mr. Smith did not initiate any change in calculation of his piece workers' hours in the roof work classification. Given that WAC 296-17-350(6) calls for rounding the average rate of compensation off to the lowest half-dollar, we believe it reasonable that Mr. Smith chose not to explore further the possibility that State Roofing's industrial insurance tax liability might have actually been less for certain periods. In any event, the Department does not here complain that State Roofing paid too much tax for the roof worker classification during any period.

Both Mr. Smith and bookkeeper Nancy Smith testified that they did not receive any communication from the Department which called their attention to a change in the average rate of compensation figure to be used for the roof worker classification or which would alert them to the need to make any further inquiry of the Department than that already being accomplished by Mr. Smith's contacts with the ESAC Division. The Department has not criticized the extent of State Roofing's record keeping nor the regular flow of quarterly reports between State Roofing and the Department. None of these communications contained any information which would have alerted State Roofing to its error. We also note that there has been no suggestion that State Roofing was attempting to avoid its full liability for industrial insurance premiums.

During the audit period in question, State Roofing paid $488,934.59 in industrial insurance taxes. It was only after the Department's subsequent audit that State Roofing learned of its error. Although detailed evidence was not presented on the matter of injury or detriment which State Roofing would suffer from additional taxes, Mr. Smith clearly testified that the roofing business is highly competitive. The obvious inference must follow that, having completed State Roofing's contracts during the audit period, the expense of additional taxes for that period cannot readily be passed on to future customers. Detailed information on this point is wholly unnecessary to clearly convince us that State Roofing would be financially injured by the Department's actions.

We have already indicated that we do not, and could not under the law, rely upon a mere oversight by Department auditors in the 1983 audit. The Department has advanced only two other reasons why it believes equitable estoppel should not adhere related to piece worker calculations in the roof worker classification. Neither of these reasons has merit upon close examination.

First, the Department presented some testimony to the effect that information regarding the proper average rate of compensation, or the source for obtaining this information, was made available by way of employer bulletins. We cannot give any weight to this contention in the present case because the Department's only witness did not have any knowledge as to whether such bulletins were mailed to State Roofing. In addition, the record before us provides little further information other than that the bulletins take the form of newsletters. The Department has not suggested that any authority exists, legal or otherwise, to support the proposition that State Roofing should reasonably be held responsible for reviewing the bulletins if it indeed received them. The fact that such bulletins existed, or that other employers made use of information contained in them, does not significantly detract from

the reliance by State Roofing upon the pattern of more affirmative representations and actions on the part of the Department.

Secondly, the Department argues that the language of WAC 296-17- 350(6) put State Roofing on notice that it should check with the Department every year to determine the proper average rate of compensation for respective classifications: "The records of the department as compiled for the preceding fiscal year ending June 30, shall be the basis for determining the average rate of compensation for each classification . . . ." (Emphasis supplied) However, State Roofing did check with the Department over the years. Mr. Smith checked with the Department's ESAC Division which was the only source of which he was aware in the Department providing information that would be relevant to the rule. The information he obtained was correct through 1985.

Beginning in 1986, Mr. Smith's source within the Department itself became an incorrect source, not because of some change on Mr. Smith's part, but rather as we have previously explained, because the Industrial Insurance Division changed its own practice. The Division began using its own records, thereby deriving a lower average rate of compensation, rather than the ESAC Division figure. The Department had clearly established a pattern which it should have anticipated might induce employers to rely upon the ESAC Division prevailing wage rate, as the Department itself had done. Likewise, the Department should have reasonably anticipated that employer errors in the calculation of piece worker hours might result if proper notice of the change was not given to employers. WAC 296-17-350(6) is insufficient for this purpose. The rule does not in fact direct employers to contact the Department, let alone a particular division within the Department. The language which we have cited from the provision has not been amended to reflect any change over the years relevant to this particular case.

In the final analysis, we believe that pointing to WAC 296-17- 350(6) underscores more the unreasonableness of the Department's inaction and silence on the subject than any unreasonableness on the part of State Roofing in relying upon the prior pattern established by the Department. We believe the change in practice by the Industrial Insurance Division constituted rule making within the meaning of this state's Administrative Procedure Act, whether considered under the definition of "rule" contained in former RCW 34.04.010(2) or the present RCW 34.05.010(15). The rule making requirements of the Administrative Procedure Act have been, and continue to be, applicable to the Department of Labor and Industries. Former RCW 34.04.010(1) and present RCW 34.05.010(2) and .030. The requirement that regulatory practices and changes of general applicability be made in the

form of published rules so as to properly put affected parties on notice is particularly relevant in the present case. Former RCW 34.04.025-.058 and present RCW 34.05.210-.395.

In Ocosta School Dist. v. Brouillet, 38 Wn.App. 785, 689 P.2d 1382 (1984) the court held that bulletins from the Superintendent of Public Instruction did not suffice to meet Administrative Procedure Act rule making requirements with regard to deductions the Superintendent would take from statutory school district allocations for other revenues available to the districts. The bulletins were held insufficient even though the Superintendent had promulgated a rule under the Administrative Procedure Act designating bulletins as the source of such information. 38 Wn.App. at 787-791. Likewise, policies and practices followed by the Human Rights Commission in choosing tribunal members constituted rule making, subject to the rule making provisions of the Administrative Procedure Act. Milwaukee R.R. v. Human Rights Comm'n, 87 Wn.2d 802, 811- 13, 557 P.2d 307 (1976).

State Roofing has not argued that the Department's piece worker calculations are invalid due to failure to properly adopt and promulgate rules under the Administrative Procedure Act. Rather, we simply note our own belief that the Department's failure to comply with the rule making and promulgation requirements of the Administrative Procedure Act was but another form of its silence and inaction which made State Roofing's reliance upon the former practice of the Department all the more reasonable.

In summary, we hold that, in the circumstances of this case, the Department is estopped from using an average rate of compensation other than $19.50 in piece worker calculations in the roof worker classification 0507 for the audit period in question. The Department is not equitably estopped from using the correct average rate of compensation for piece workers in the shake mill classification 1005. In so holding, we adopt from the Proposed Decision and Order Finding of Fact No. 1 and Conclusion of Law No. 1 and in addition make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

2. Beginning sometime in, or prior to, 1981 and continuing through 1985, the Industrial Insurance Division of the Department of Labor and Industries adopted as a policy and practice the use of the prevailing wage rate promulgated by the Department's Employment Standards-Apprenticeship-Crime Victims Division (ESAC) for roof workers as the "average rate of compensation" which the Industrial Insurance Division would use for calculations regarding the roof work classification 0507 under the piece workers rule, WAC 296-17-350(6). The applicable average rate of compensation thus determined for classification 0507 for

the years 1981 and 1982 was $19.50. Beginning in 1986, the Industrial Insurance Division changed its practice and policy regarding the source of the "average rate of compensation" which it would use for classification 0507 under WAC 296-17-350(6). For the year 1986, the Department averaged the ESAC Division prevailing wage rate figure and a figure which the Department obtained by way of dividing the total gross wages reported to it by employers under classification 0507 by the number of hours the employers reported in the same classification. Thereafter, for years ensuing 1987 through at least June 30, 1988, the Industrial Insurance Division utilized the quotient obtained by dividing the gross wages reported by the number of hours reported to it by employers as the average rate of compensation under WAC 296-17-350(6). The Department did not adopt or promulgate any rule or regulation for publication in the Washington State Register or Washington Administrative Code describing this change, nor did the Department otherwise inform State Roofing & Insulation, Inc. of the change until the Industrial Insurance Division conducted a field audit of State Roofing & Insulation, Inc. after June 30, 1988.

3. State Roofing & Insulation, Inc. utilized $19.50 as the "average rate of compensation" under WAC 296-17-350(6) for calculation of reportable hours for its piece workers in classification 0507 from 1976 through June 30, 1988. From time to time throughout this period, State Roofing & Insulation, Inc. contacted the Department's ESAC Division in order to obtain prevailing wage rate information for workers in classification 0507 for purposes of meeting requirements for bids on public works contracts. Through these contacts with the ESAC Division, State Roofing & Insulation, Inc. learned that the prevailing wage rate remained close to $19.50 and that the figure increased but never decreased during this same period. Reasonably relying upon this information, State Roofing & Insulation, Inc. believed that $19.50 was acceptable to the Department's Industrial Insurance Division as the "average rate of compensation" for classification 0507 under WAC 296-17-350(6) at all times through June 30, 1988. Throughout this period, State Roofing & Insulation, Inc. was not aware of any division other than ESAC in the Department which it should contact in order to obtain wage rate information for purposes of calculating worker hours in classification 0507 under WAC 296-17-350(6).

4. When the Department in 1986 altered its practice and policy for determining the average rate of compensation for classification 0507 under WAC 296-17-350(6) the Department knew that the average rate of compensation figure would decrease and that employers continuing to compute worker hours in classification 0507 under the piece workers rule in WAC 296-17- 350(6) would incur a greater tax liability for the same total compensation paid a piece worker as compared to the previous practice and policy wherein ESAC Division prevailing wage rate figures had been used. This is true of State Roofing & Insulation, Inc. The amount of industrial insurance taxes for which it would be liable in classification 0507

under the piece worker rule for the period July 1, 1986 through June 30, 1988 under the Department's new practice and policy would be substantially greater than the amount of taxes which it calculated and paid for classification 0507 using $19.50 as the average rate of compensation. The industry in which State Roofing & Insulation, Inc. is involved is highly competitive. State Roofing & Insulation, Inc. would suffer financial loss if held liable for an increase in industrial insurance premiums attributable to piece workers in classification 0507 due to recalculation of reportable hours using an average rate of compensation lower than $19.50 under WAC 296-17-350(6) for the period July 1, 1986 through June 30, 1988.

5. An injury to State Roofing & Insulation, Inc. would result from allowing the Department of Labor and Industries to contradict or repudiate for the period July 1, 1986 through June 30, 1988 its prior acts, practice, and policy of allowing State Roofing & Insulation, Inc. to utilize $19.50, or a higher figure, as the average rate of compensation for piece workers in classification 0507 for calculations under WAC 296-17-350(6). State Roofing & Insulation, Inc. reasonably relied upon the Department's prior allowance, practice, and policy.

6. During the period July 1, 1986 through June 30, 1988, State Roofing & Insulation, Inc. did not reasonably rely upon any admission, statement, or act of the Department when State Roofing & Insulation, Inc. utilized $19.50 as the average rate of compensation to calculate reportable hours of its piece workers under WAC 296-17- 350(6) in the shake mill classification 1005. The applicable average rate of compensation for piece workers in classification 1005 was $11.50 in 1986, $12.00 in 1987, and $12.00 in 1988.

CONCLUSIONS OF LAW

2. The Department of Labor and Industries is equitably estopped from utilizing a figure other than $19.50 as the average rate of compensation under WAC 296-17-350(6) for State Roofing & Insulation, Inc. roof workers in classification 0507 for the period July 1, 1986 through June 30, 1988.

3. The Department of Labor and Industries is not equitably estopped from utilizing $11.50 for 1986, $12.00 for 1987, and $12.00 for 1988 as the average rates of compensation under WAC 296-17-350(6) of State Roofing & Insulation, Inc. shake mill workers in classification 1005 for the period July 1, 1986 through June 30, 1988.

4. The Order and Notice Reconsidering Notice and Order of Assessment of the Department of Labor and Industries dated April 20, 1989 which affirmed a Notice and Order of Assessment of Industrial Insurance Taxes No. 67064 dated December 30, 1988 which assessed industrial insurance taxes against State Roofing & Insulation, Inc. in the amount of $122,731.74 for the period July 1, 1986 through June 30, 1988 is incorrect and is reversed. The Department is directed to recalculate the hours upon

which industrial insurance taxes should be paid for piece workers in classification 0507 for the same period using $19.50 as the average rate of compensation in its calculations under WAC 296-17-350(6). Except for this modification, the new order shall in all other respects reflect the figures used and calculations made when the Department issued its orders dated December 30, 1988 and May 4, 1989.

It is so **ORDERED**.

Dated this 4th day of February, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member