

Sylvia Reforestation

ASSESSMENTS

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)**

Scroll down for order.

1 contracts. For the last ten years, Sylvia entered into subcontracts with other companies for
2 performance of the tree planting and tree thinning contracts. In 1991, Sylvia entered into a
3 subcontract for thinning and planting trees with Grey Eagle.
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6 Grey Eagle came to the attention of the Department of Labor and Industries audit division when
7 the Department determined that Grey Eagle had 16 industrial injury claims filed. However, Grey Eagle
8 had not filed any quarterly reports with the Department. The Department conducted an audit of Grey
9 Eagle for the period of April 1, 1991 through December 31, 1991.
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12 The Department audit discovered that Grey Eagle maintained very poor records of the hours
13 worked by its employees. Unable to determine the number of hours worked by employer records, the
14 Department applied the provisions of WAC 296-16-350(6) and used the state minimum wage to
15 establish the number of hours subject to industrial insurance taxes. The Department also determined
16 that Sylvia was primarily and directly responsible for the payment of premiums for industrial insurance
17 taxes due from Grey Eagle Reforestation under the provisions of RCW 51.12.070. RCW 51.12.070
18 provides that:
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22 The provisions of this title shall apply to all work done by contract; the
23 person, firm, or corporation who lets a contract for such work shall be
24 responsible primarily and directly for all premiums upon the work. The
25 contractor and any subcontractor shall be subject to the provisions of this
26 title and the person, firm, or corporation letting the contract shall be
27 entitled to collect from the contractor the full amount payable in premiums
28 and the contractor in turn shall be entitled to collect from the subcontractor
29 his proportionate amount of the payment.
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31 Our industrial appeals judge determined that the provisions of RCW 51.12.070 did not apply to the
32 contractual relationship between Sylvia and Grey Eagle. The industrial appeals judge, therefore,
33 determined that Sylvia was not primarily and directly responsible for payment of the premiums
34 assessed by the Department against Grey Eagle. We disagree with our industrial appeals judge's
35 analysis of the facts and the law of this case.
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39 In Littlejohn Construction v. Department of Labor & Indus., 74 Wn. App. 420 (1994), the court
40 applied RCW 51.12.070 to facts similar to those presented in this appeal. Littlejohn Construction
41 (Littlejohn) was a wood frame building construction company. Littlejohn contracted with general
42 contractors to perform production framing and other responsibilities on multi-unit apartment projects.
43 Littlejohn hired independent subcontractors to do much of the framing work. Each subcontractor hired
44 framing crews to construct the frames. The issue before the court was whether Littlejohn owed
45 framing crews to construct the frames. The issue before the court was whether Littlejohn owed
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1 premiums for the framing crew members which were employed by its subcontractors. The court
2 determined that because the work of the framing crew members was done under a contract between
3 the subcontractor for which they worked and Littlejohn, the work was clearly covered by RCW
4 51.12.070.
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7 The controversy in Littlejohn focused on the phrase in the statute, "lets a contract." Littlejohn
8 argued that it was not a person, firm, or corporation who "lets a contract" within the definition of RCW
9 51.12.070. Littlejohn argued that it functioned as a middle man or subcontractor in the framing work
10 and was not a person who let a contract under the provision of RCW 51.12.070. Littlejohn believes
11 RCW 51.12.070 only authorizes the Department to assess premiums primarily and directly against the
12 original contract letter, and not against Littlejohn, a subcontractor.
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15 The court, in Littlejohn, held that:
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18 Essentially, "to let" means "to select a contractor". It does not mean "to
19 select the general or prime contractor". Presumably, a contractor higher
20 up the chain selected Littlejohn as a framing subcontractor to do a portion
21 of the construction project. Similarly, Littlejohn selected its crew leads as
22 subcontractors to supply the labor for framing. Thus, "a person, firm, or
23 corporation who lets a contract" includes Littlejohn because Littlejohn
24 contracted for the work of the framing crew members.
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26 Littlejohn, at 427 (footnote omitted.)
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28 Our review of this record convinces us that the relationship between Sylvia and Grey Eagle is
29 analogous to the situation involving Littlejohn and its subcontractors. Sylvia obtained a contract from
30 landowners for reforestation work. Sylvia then subcontracted the actual performance of the contracts
31 to Grey Eagle. Grey Eagle then became a subcontractor, and under the analysis of the Littlejohn
32 case, Sylvia was the person who let the contract. Thus, Sylvia, under the provisions of RCW
33 51.12.070, is primarily and directly responsible for all premiums upon the work performed by the
34 subcontractor, Grey Eagle.
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37 The second issue raised in this appeal focuses on the Department's method of calculating the
38 number of hours subject to industrial insurance taxes. Grey Eagle failed to present sufficient records
39 to the Department during the audit to allow the Department to determine the number of hours worked
40 by Grey Eagle employees. In order to determine the number of hours subject to industrial insurance
41 taxes, the Department utilized the provisions of WAC 296-17-350(6) to estimate the hours worked.
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44 Sylvia presented the testimony of a former Department auditor, Mr. Ralph Reed. Mr. Reed
45 testified that, prior to 1989, the Department utilized the hourly wage of \$12.50 as the average wage
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1 figure for reforestation workers. Mr. Reed then recalculated the assessment, using the \$12.50 per
2 hour figure. Mr. Reed's recalculated assessment indicated that Grey Eagle owed the sum of
3 \$22,986.25.
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5 We believe the Department applied the appropriate procedures as set out in WAC 296-17-
6 350(6) in determining the number of hours subject to industrial insurance taxes. We are unable to
7 accept Mr. Reed's alternate assessment. There are no facts presented in this record which indicate
8 the number of hours worked by the employees of Grey Eagle. Mr. Reed's assessment is a
9 hypothetical assessment using a hypothetical wage of \$12.50 per hour. While Sylvia could have
10 presented evidence to show the actual wage paid to the workers to be used in determining the number
11 of hours subject to industrial insurance taxes, no such evidence was presented. Sylvia has not shown
12 that the Department audit is incorrect.
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18 After consideration of the Proposed Decision and Order and the Petition for Review filed by the
19 Department of Labor and Industries, together with the Firm's Response to Department's Petition for
20 Review, and a careful review of the entire record before us, we are convinced that the Department
21 order and notice reconsidering notice and order of assessment dated September 28, 1993, which
22 affirmed the Department notice and order of assessment of industrial insurance taxes number
23 P117026, dated June 18, 1993, which assessed industrial insurance taxes for the second, third, and
24 fourth quarter of 1991, against Sylvia Reforestation, Inc., in the sum of \$53,142.74, is correct and is
25 affirmed.
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30 **FINDINGS OF FACT**

- 31 1. On June 18, 1993, the Department of Labor and Industries issued a notice
32 and order of assessment which assessed industrial insurance taxes due
33 and owing the State Fund from Sylvia Reforestation, Inc. for the period
34 April 1, 1991 through December 31, 1991, in the sum of \$53,142.74. On
35 July 2, 1993, the firm, Sylvia Reforestation, Inc., filed a protest and request
36 for reconsideration to the notice and order of assessment dated June 18,
37 1993.
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39 On September 28, 1993, the Department issued an order and notice
40 reconsidering notice and order of assessment wherein it adhered to the
41 provisions of its notice and order of assessment of industrial insurance
42 taxes dated June 18, 1993. On October 7, 1993, Sylvia Reforestation,
43 Inc., filed a Notice of Appeal with the Board of Industrial Insurance
44 Appeals from the Department order dated September 28, 1993. On
45 November 5, 1993, the Board issued an order granting the appeal,
46 assigning Docket 93 5150, and directing that proceedings be held on the
47 issues raised by the Notice of Appeal.

