

Amos Hammer Cutting

COVERAGE AND EXCLUSIONS

Corporate officers (RCW 51.12.020(a) (1979); RCW 51.12.020(8) (1987)(1992))

Under the 1991 amendments to RCW 51.12.020(8), in order to be excluded from coverage a corporate officer must be a bona fide officer, voluntarily elected, and must exercise substantial control in the daily management of the corporation. **...*In re Amos Hammer Cutting*, BIIA Dec., 05 14484 (2006)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 06-2-00915-8.]

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

1 **IN RE: AMOS HAMMER CUTTING, INC.) DOCKET NO. 05 14484**
2)
3 **FIRM NO. 907,614-00) DECISION AND ORDER**
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5 APPEARANCES:
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7 Firm, Amos Hammer Cutting, Inc., by
8 Edwards & Hagen, per
9 David L. Edwards
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11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 James S. Johnson, Assistant
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15 This is an appeal filed by the firm, Amos Hammer Cutting, Inc., on April 27, 2005, from a
16 Notice and Order of Assessment of the Department of Labor and Industries dated April 21, 2005.
17 In this Notice and Order of Assessment, the Department affirmed a prior Notice and Order of
18 Assessment No. 0389210 dated March 3, 2005, in which the Department determined that the firm
19 owed the State Fund \$35,429.69 for unpaid taxes, plus penalties and interest. The Department's
20 Notice and Order of Assessment is **AFFIRMED**.
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24 style="text-align:center">**DECISION**
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26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
27 and decision on a timely Petition for Review filed by the firm to a Proposed Decision and Order
28 issued on February 9, 2006, in which the industrial appeals judge affirmed the Order and Notice of
29 Assessment of the Department dated April 21, 2005.
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32 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
33 no prejudicial error was committed. The rulings are affirmed.
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35 Amos Hammer Cutting, Inc. (Amos Hammer) has petitioned for review of a Department
36 Notice and Order of Assessment in which the Department determined that the firm owed to the
37 State Fund \$35,429.69 in unpaid taxes, plus penalties and interest. The amount of unpaid taxes
38 was based on the actual hours worked by employees Allen Stigall, Greg Coates and Michael Lorton
39 in 2004.
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42 We agree with our industrial appeals judge's determination that Amos Hammer improperly
43 excluded these employees from workers' compensation coverage as corporate officers, pursuant to
44 RCW 51.12.020(8). Although the industrial appeals judge, in the Proposed Decision and Order,
45 correctly resolved this appeal, he does not discuss the Legislature's significant 1991 amendment of
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1 the corporate officer exclusion. The leading Board decision, *In re New West Manufacturing*, BIIA
2 Dec., 88 3634 (1989), interpreted and applied the 1979 version of the exclusion. We have granted
3 review to discuss the additional requirements of the amended corporate officer exclusion.
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5 The *New West* decision interpreted former RCW 51.12.020 (Laws of 1979, ch. 128, § 1, p.
6 488), which excluded from mandatory Title 51 coverage:
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8 . . . (9) Any executive officer elected and empowered in accordance with
9 the articles of incorporation or bylaws of a corporation who at all times
10 during the period involved is also a director and shareholder of the
11 corporation. Any officer who was considered by the Department to be
12 covered on or after June 30, 1977, shall continue to be covered until such
13 time as the officer voluntarily elects to withdraw from coverage in the
14 manner provided by RCW 51.12.110. However, any corporation may
15 elect to cover such officers who are in fact employees of the corporation in
16 the manner provided by RCW 51.12.110.
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18 In *New West*, the Department contended that the statute was properly interpreted as requiring
19 "active involvement in the management of a corporation and substantial ownership of stock before
20 the exemption for corporate officers/directors/shareholders can apply." To adequately address this
21 argument, the *New West* decision included an in-depth discussion of the legislative history of the
22 1979 statute. The Board majority noted that the Legislature had declined to curb the potential for
23 corporate officers "in name only" and "without any real equity or proprietary interest in the
24 corporation." The Legislature had explicitly rejected defining a corporate officer as "a shareholder
25 who is an active and direct participant in the management and policy-making functions of the
26 corporation." The Board majority did not adopt the Department's interpretation, having concluded
27 that the Legislature debated these issues and rejected language that would limit the application of
28 this exclusion.
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35 Although the majority's interpretation of the 1979 statute was legally sound, the Board in
36 *New West* recognized that it was lacking in terms of public policy. The majority acknowledged that
37 it is
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39 odd that workers who would otherwise be subject to the Act can
40 be excluded from coverage by virtue of the fact they are elected
41 corporate officers and directors and retain a nominal, single share
42 of stock in the corporation. The workers of *New West* who each
43 hold a share of stock valued at \$1.00 are certainly not 'owners' of
44 the corporation in any meaningful sense. However it is not our
45 function to question the wisdom or social utility of an exclusion
46 from mandatory coverage which the Legislature has clearly seen
47 fit to permit. If the Legislature is troubled by such a business
relationship fitting within the corporate officer exclusion of

1 RCW 51.12.020, it, unlike this Board, may take action to change
2 the statute.
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4 *New West*, at 27.

5 In 1991, the Legislature did take action. The amendments are incorporated in the current
6 version of the section, applicable to the present appeal, which provides:
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8 Alternatively, a corporation that is not a "public company" as
9 defined in RCW 23B.01.400(21) may exempt eight or fewer bona fide
10 officers, who are voluntarily elected or voluntarily appointed in accordance
11 with the articles of incorporation or bylaws of the corporation and who
12 exercise substantial control in the daily management of the corporation,
13 from coverage under this title without regard to the officers' performance of
14 manual labor if the exempted officer is a shareholder of the corporation, or
15 may exempt any number of officers if all the exempted officers are related
16 by blood within the third degree or marriage. If a corporation that is not a
17 "public company" elects to be covered under subsection (8)(a) of this
18 section, the corporation's election must be made on a form prescribed by
19 the department and under such reasonable rules as the department may
20 adopt.
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22 RCW 51.12.020(8)(b).
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24 The amended statute incorporates new and significant criteria for determining whether the
25 corporate officer exclusion applies. Now, to qualify for exclusion, the officer must be: (1) "bona
26 fide," (2) "voluntarily elected or voluntarily appointed," and (3) must "exercise substantial control in
27 the daily management of the corporation." RCW 51.12.020(8)(b). Carried-over from the prior
28 statute are the additional requirements that officers must be shareholders of the corporation and
29 elected in accordance with the articles of incorporation or by-laws.
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32 With this legal framework in mind, we turn to the evidence presented. Amos Hammer
33 Cutting, Inc., (Amos Hammer) is a closely-held Washington State corporation. Amos Hammer is in
34 the business of contracting to fall timber and clear-cut right-of-ways. Mark Winningham is the
35 corporation's president and has been majority shareholder since incorporation in 1996. In 2004, he
36 owned approximately 84 percent of the company's stock.
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40 Mr. Winningham testified that the corporate structure of Amos Hammer Cutting gives him the
41 authority to discharge other employees, including officers. He is the sole company employee who
42 cannot be terminated. Mr. Winningham handles contract negotiations and customer relations. He
43 is responsible for signing contracts and determining the number of workers necessary to complete
44 upcoming jobs.
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1 The Amos Hammer office is located in the residence of Mr. Wunningham and his wife.
2 Ms. Wunningham serves as the company's bookkeeper. The corporation is reached by dialing the
3 Wunninghams' home number. The Wunninghams, alone, maintain signature authority on company
4 bank accounts and hold the key to the business's post office box.
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7 Mr. Wunningham was primarily responsible for hiring the corporate officers, each of whom
8 also served as directors and board members. When Mr. Wunningham found a good person he
9 wanted to put them to work right away. Therefore, he did not wait for board action on the
10 appointment before putting them to work.
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13 Each Amos Hammer officer received seven shares of company stock valued at \$100 per
14 share. If a shareholder had paid for the shares, the company would buy back the shares when the
15 shareholder left. In 2004, the officers received their distributive share of income based on
16 percentage of stock ownership, which ranged from \$44,717 for Mr. Wunningham to \$3,162 or less
17 for the other officers.
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20 Mr. Wunningham held regular directors' meetings, where they discussed management
21 issues. Most meetings were held at the tail gate of a pickup. At the summer picnic and the winter
22 Christmas party, which were social gatherings, they discussed company business. The board did
23 not have more than two formal meetings a year.
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26 Michael Rogers and Scott Fritts have served as officers and directors of the corporation for
27 approximately four years. They were elected voluntarily. Each was given seven shares of
28 company stock and understood that they were required to sell the stock back to the corporation
29 should they leave this employment. They were provided with medical, disability, and life insurance.
30 At the corporate Christmas party, they each received a check that Mr. Rogers described as "a
31 bonus." They also were given gift certificates for items they could use in their work. During 2004,
32 all of the Amos Hammer employees, including Allen Stigall, Greg Coates, and Michael Lorton, were
33 given officer/director status and provided with these benefits
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36 While Mr. Wunningham focused on contract negotiations and running the Amos Hammer
37 office, the other officers, including Mr. Stigall, Mr. Coates and Mr. Lorton, each oversaw the timber
38 falling operations in a specific geographic areas. These officers were responsible for lining up a
39 crew and had authority for hiring and firing employees and subcontractors. They were empowered
40 by Mr. Wunningham to make decisions about maintenance, repair, and acquisition of equipment.
41 Mr. Wunningham also authorized his officers to make changes to scope of work and similar onsite
42 work decisions without prior approval. Officers managing jobsites were provided authority by
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1 Mr. Winningham to deal directly with the customer and modify the contract, hire necessary
2 contractors, and oversee subcontractors' work. The officers also were empowered by
3 Mr. Winningham to hire and fire "nonshareholder employees." For the majority of the time,
4 however, the officers were falling timber because that was the work to be done.
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7 We begin our analysis with the RCW 51.12.020(8) requirement that an officer be "bona fide."
8 "Bona fide" is not defined in by statute. "When no statutory definition is provided, words in a statute
9 should be given their common meaning, which may be determined by referring to a dictionary."
10 *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 843 (2003). "Bona fide" is defined as
11 "Made or carried out in good faith; sincere; authentic; genuine." American Heritage® Dictionary of
12 the English Language, 3d ed. (2000).
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15 Pursuant to RCW 51.12.020(8)(c), a new section added in 1991, it is appropriate to
16 determine the status of corporate employees with reference to "Title 23B RCW and to compliance
17 by the corporation with its own articles of incorporation and bylaws." For the purpose of
18 determining Title 51 coverage of an "officer," "substance shall control over form, and mandatory
19 coverage under this title shall extend to all workers of this state, regardless of honorary titles
20 conferred upon those actually serving as workers." RCW 51.12.020(8)(c). The section endorses
21 analysis of an officers' status with reference to the corporation's organization and structure pursuant
22 to Title 23B RCW, with attention to the corporation's adherence to its articles of incorporation and
23 bylaws. In no uncertain terms, RCW 51.12.020(8)(c) emphasizes substance over form and
24 promotes coverage over exclusion.
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27 The evidence fails to demonstrate that Amos Hammer has established a bona fide corporate
28 structure that meaningfully utilizes its officers. RCW 23B.08.400 sets forth guidelines pertaining to
29 officers. It establishes that officers are either described in the corporate bylaws or appointed by the
30 board in accordance with the bylaws. The record is devoid of specific evidence regarding the
31 contents of the corporate by-laws. No records documenting officer appointments were offered.
32 From the evidence presented, we must conclude that most, if not all, of the authority provided to
33 these officers was conferred by Mr. Winningham directly.
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36 RCW 23B.08.400(4) permits the same individual to simultaneously hold more than one office
37 in a corporation. In the case of Amos Hammer, president Mark Winningham was the sole officer
38 assigned an "office."
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41 RCW 23B.08.400(3) directs that the bylaws or the board "shall delegate to one of the officers
42 the responsibility for preparing minutes of directors' and shareholders' meetings and for
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1 authenticating records of the corporation." The record fails to show that any such delegation was
2 made; nor does it demonstrate that directors' or shareholders' meeting minutes were kept.
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4 We also note the lack of specific evidence that the Amos Hammer board members
5 discussed and voted on such corporate issues as benefits, calculation of bonuses, and hiring and
6 firing decisions. Informal discussion may have taken place at the tail gate of a pickup, but a bona
7 fide corporation puts such issues to a documented vote.
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10 Allen Stigall, Greg Coates and Michael Lorton performed significant work for the business of
11 Amos Hammer but were engaged in no significant corporate activity. These employees were
12 foremen on Amos Hammer worksites. They were given substantial authority at the jobsites, but the
13 scope of this authority was limited to seeing that the job was satisfactorily completed. Judging by
14 the limited scope of their activities and authority, these men did not serve as genuine, "bona fide"
15 officers of the corporation.
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18 The remaining statutory requirement for application of the corporate officer exemption is the
19 exercise of "substantial control in the daily management of the corporation." RCW 51.12.020(8).
20 Amos Hammer contends that the officers' substantial authority to control the worksite proves
21 substantial control of daily corporate management. We disagree. An employee's authority over a
22 work site, no matter how broad, is insufficient. Substantial control in this context necessarily means
23 substantial **corporate** control; it is this authority, alone, that sets an officer/director/shareholder
24 apart from an ordinary employee.
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27 Mr. Winningham was the only officer who exercised substantial corporate control. He
28 retained full authority to terminate other officers but he could not be terminated. He was the only
29 officer with bank account signature authority and access to the corporate post office box.
30 Mr. Winningham maintained the majority interest in the corporation and, therefore, his vote on
31 corporate decisions always prevailed. The officers serving as foremen were given a high level of
32 autonomy on the work site, but substantial control of the corporation requires, at least, the ability to
33 vote and potentially prevail in corporate decision-making.
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36 Allen Stigall, Greg Coates, and Michael Lorton were improperly excluded from mandatory
37 Title 51 coverage for the calendar year 2004. We therefore affirm the Department's Notice and
38 Order of Assessment dated April 21, 2005.
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40 **FINDINGS OF FACT**

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1. On March 3, 2005, the Department of Labor and Industries issued Notice and Order of Assessment No. 0389210, in which the Department

1 determined that the firm, Amos Hammer Cutting, Inc., owed the State
2 Fund \$35,429.69 for unpaid 2004 taxes, penalties, and interest. On
3 March 10, 2005, the firm filed a Notice of Appeal with the Board of
4 Industrial Insurance Appeals. On March 23, 2005, the Department held
5 its order in abeyance. The Board issued an order on March 28, 2005, in
6 which the Board returned the case to the Department for further action.
7 On April 21, 2005, the Department affirmed the Notice and Order of
8 Assessment. On April 27, 2005, the firm filed a Notice of Appeal with
9 the Board of Industrial Insurance Appeals to the Department order of
10 April 21, 2005. On May 11, 2005, the Board granted the appeal,
11 assigned Docket No. 05 14484, and directed that proceedings be held.

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- 13 2. The firm, Amos Hammer Cutting, Inc. (Amos Hammer), was established
14 as a Washington corporation in 1996. During 2004, Amos Hammer was
15 in the business of falling timber and clear-cutting logging right-of-ways.
- 16
- 17 3. Mark Winningham has served as president of the corporation since its
18 inception. During 2004, his responsibilities included negotiating and
19 signing corporate contracts; obtaining loans necessary for the
20 furtherance of the corporation's business; and appointing, hiring, and
21 firing employees who were corporate officers and directors.
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- 23 4. The Amos Hammer office is located in the residence of Mr. Winningham
24 and his wife. The corporation is reached by dialing the Winningshams'
25 home number. The Winningshams, alone, maintain signature authority
26 on company bank accounts and hold the key to the business's post
27 office box.
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- 29 5. During 2004, Allen Stigall, Greg Coates, and Michael Lorton were Amos
30 Hammer employees identified by the firm as officers, directors, and
31 shareholders. They did not perform functions associated with genuine
32 corporate officers. Rather, these employees served as foremen on
33 Amos Hammer worksites and were given autonomy in that role.
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- 35 6. During 2004, Mark Winningham owned approximately 84 percent of the
36 corporate stock. During 2004, Allen Stigall, Greg Coates, and Michael
37 Lorton, together, did not own sufficient shares of Amos Hammer stock to
38 override Mark Winningham's vote.

39 **CONCLUSIONS OF LAW**

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- 41 1. The Board of Industrial Insurance Appeals has jurisdiction over the
42 parties to and the subject matter of this appeal.
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- 44 2. During 2004, Allen Stigall, Greg Coates, and Michael Lorton did not
45 qualify for an exemption from mandatory coverage pursuant to
46 RCW 51.12.020(8)(b) because they were not bona fide officers of the
47 corporation and did not exercise substantial corporate control in the
daily management of the corporation.

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3. During 2004, Allen Stigall, Greg Coates, and Michael Lorton were workers subject to mandatory coverage of the Industrial Insurance Act, as contemplated by RCW 51.12.010 and RCW 51.12.020.
 4. The Department's Notice and Order of Assessment, dated April 21, 2005, is correct and is affirmed.

9 It is so **ORDERED**.

10 Dated this 19th day of April, 2006.

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13 BOARD OF INDUSTRIAL INSURANCE APPEALS
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17 /s/ _____
18 THOMAS E. EGAN Chairperson
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22 /s/ _____
23 FRANK E. FENNERTY, JR. Member
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27 /s/ _____
28 CALHOUN DICKINSON Member
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