

GT Drywall, Inc.

ASSESSMENTS

Equitable powers

Because RCW 51.12.070(5) is only one of the criteria to be met by a contractor seeking exemption from responsibility of a subcontractor's premiums, the satisfaction of subsection (5) does not allow for the application of "equitable estoppel" to dispose of the obligation to meet other criteria for the prime contractor exception under RCW 51.12.070. ...*In re GT Drywall, BIIA Dec., 10 11537 (2011)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 11-2-00562-7.]

Prime contractor liability (RCW 51.12.070)

When the Department has assessed premiums against the prime contractor for work done by a subcontractor, reliance by the prime contractor on the Department of Labor and Industries' website that the subcontractor is in "good standing" is not synonymous with "compliance" with all of the requirements of RCW 51.12.070.

When a prime contractor is liable for the premiums assessed for the work of a subcontractor, the prime contractor discount rate cannot be applied to the work performed by the subcontractor. ...*In re GT Drywall, BIIA Dec., 10 11537 (2011)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 11-2-00562-7.]

BOARD

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

1 **IN RE: GT DRYWALL INC**) **DOCKET NO. 10 11537**
2 **FIRM NO. 950,029-01**) **DECISION AND ORDER**
3 _____)

4 **APPEARANCES:**

5 Firm, GT Drywall, Inc., by
6 AMS Law, P.C., per
7 Aaron K. Owada

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
Nancy A. Kellogg, Assistant

10 The firm, GT Drywall, Inc., filed an appeal with the Board of Industrial Insurance Appeals on
11 February 8, 2010, from a Department of Labor and Industries Notice of Assessment dated
12 January 6, 2010; in which the Department affirmed its prior Notice of Assessment No. 0496387,
13 issued on September 21, 2009. In the September 21, 2009 Notice of Assessment, the Department
14 ordered payment of taxes due and owing in the amount of \$2,626.47, covering the audit of Angel
15 Jimenez Drywall for the second and third quarters of 2008. The Department Notice of Assessment
16 is **AFFIRMED**.

17 **DECISION**

18 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
19 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
20 Order issued on September 29, 2010, in which the industrial appeals judge reversed and remanded
21 the Department Notice of Assessment dated January 6, 2010. Contested issues addressed in this
22 order include subcontractor satisfaction of RCW 51.12.070, prime contractor discount rate for
23 subcontractor post-audit premium assessments, and equitable estoppel.

24 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
25 no prejudicial error was committed. The rulings are affirmed.

26 In Washington, with respect to RCW 51.12.070, a prime contractor is liable for a
27 subcontractor's premiums "**unless** it protects itself from liability by ensuring that its subcontractors
28 meet all of the exception's requirements." *Lee's Drywall Company, Inc., v. Department of Labor &*
29 *Indus.*, 141 Wn. App. 859, 869 (2007) (applying the pre-2004 amendments to RCW 51.12.070),
30 *citing Littlejohn Construction Company. v. Department of Labor & Indus.*, 74 Wn. App. 420, 428
31
32

1 (1994). We agree with our industrial appeal judge that GT Drywall failed to satisfy all requisite
2 provisions of RCW 51.12.070.

3 **Principal Place of Business.**

4 RCW 51.12.070(2) requires that the subcontractor has a principal place of business that
5 would be eligible for a business deduction for internal revenue service tax purposes other than that
6 furnished by the contractor for which the business has contracted to furnish services.

7 The first determination is whether there is a principal place of business. Because that
8 "place" must be eligible for a deduction under the IRS codes, the Board must look to the IRS for a
9 definition.

10 Pursuant to 26 USCS § 280A - Disallowance of certain expenses in connection with
11 business use of home:

12 [t]he term "principal place of business" includes a place of business which is used by
13 the taxpayer for the administrative or management activities of any trade or business
14 of the taxpayer if there is no other fixed location of such trade or business where the
15 taxpayer conducts substantial administrative or management activities of such trade or
16 business.

16 There is sufficient evidence to establish that Mr. Jimenez conducted the administration
17 and/or management of Angel Jimenez Drywall from a living room desk in his apartment, a dwelling
18 unit shared with two brothers. By definition, the apartment would be a principal place of business.

19 The second determination is whether the principal place of business would be eligible for a
20 business deduction for internal revenue service tax purposes.

21 According to the Internal Revenue Service, 26 USCS § 280A,

22 (a) General rule. Except as otherwise provided in this section, in the case of a
23 taxpayer who is an individual or an S corporation, no deduction otherwise
24 allowable under this chapter [26 USCS §§ 1 et seq.] shall be allowed with respect
25 to the use of a dwelling unit which is used by the taxpayer during the taxable year
26 as a residence.

27 . . .

28 (c) Exceptions for certain business or rental use; limitation on deductions for such use.
29 (1) Certain business use. Subsection (a) shall not apply to any item to the extent
30 such item is allocable to a portion of the dwelling unit which is **exclusively used**
31 **on a regular basis.**

32 (Emphasis added.)

30 The record is insufficient with respect to the proposition that the living room office space in
31 Mr. Jimenez' apartment was used exclusively on a regular basis for the Angel Jimenez Drywall
32 business. For that reason, GT Drywall did not establish by a preponderance of the evidence that

1 the RCW 51.12.070(2) exception is available with respect to Angel Jimenez Drywall, during the
2 audit periods in question. Further, there is insufficient proof that Angel Jimenez Drywall had any
3 other location that would qualify as a principal place of business and be eligible for a home office
4 tax deduction for IRS purposes.

5 **Maintaining of Records.**

6 Although the industrial appeals judge addressed, with specificity, RCW 51.12.070(2) - the
7 "principal place of business" element, we expand our discussion to include the failed satisfaction of
8 RCW 51.12.070(3). Subsection (3) requires that: "the subcontractor maintains a separate set of
9 books or records that reflect all items of income and expenses of the business." The audit clearly
10 revealed that for the second and third quarter of 2008, Mr. Jimenez (Angel Jimenez Drywall) failed
11 to maintain accounts that reflected more than just a minor percentage of the subcontractor's
12 transactions; that he failed to record large cash disbursements; and that he failed to maintain and/or
13 provide time cards, payroll deductions, or schedules of hours worked. Bottom line: Mr. Jimenez did
14 not maintain books and records that reflected all items of income and expense. The appellant, GT
15 Drywall, did not prove otherwise.

16 **Equitable Estoppel.**

17 We disagree with our industrial appeals judge with respect to the application of "equitable
18 estoppel" to RCW 51.12.070(5). The satisfaction of the subsection's requirement does not negate
19 the necessity of compliance with all other subsections in order to qualify for the exemption.

20 As a preliminary matter, we recognize that in Washington:

21 Three elements are required to establish equitable estoppel: (1) an admission,
22 statement, or act inconsistent with the claim afterwards asserted; (2) action by the
23 other party on the face of such admission, statement, or act, and (3) injury to such
24 other party resulting from allowing the first party to contradict or repudiate such
admissions, statements, or acts.

25 *Harbor Air Service Inc., v. Board of Tax Appeals*, 88 Wn.2d 359, 366 (1977).

26 On the other hand, the application of *Lee's Drywall Company, Inc.*, dictates a determination
27 that RCW 51.12.070(5) is but **one** of the criteria to be met by a contractor seeking exemption from
28 responsibility of a sub-contractor's premiums. The Department's rule provides as follows:

29 The subcontractor has an industrial insurance account in **good standing** with the
30 department or is a self-insurer. For the purposes of this subsection, a contractor may
31 consider a subcontractor's account to be in good standing if, within a year prior to
32 letting the contract or master service agreement, and at least once a year thereafter,
the contractor has verified with the department that the account is in good standing
and the contractor has not received written notice from the department that the
subcontractor's account status has changed. Acceptable documentation of

1 verification includes a department document which includes an issued date or a dated
2 printout of information from the department's internet web site showing a
3 subcontractor's good standing. The department shall develop an approach to provide
4 contractors with verification of the date of inquiries validating that the subcontractor's
5 account is in good standing.

6 (Emphasis added.)

7 "Good standing," then, is defined by the following:

8 **What does "in good standing" mean?** For someone's account to be in good
9 standing, they must:

10 (a) Be registered with the department of labor and industries for industrial insurance
11 coverage with the state fund;

12 (b) Have a certificate of coverage, also known as a liability certificate, that has not
13 been revoked or canceled;

14 (c) Have submitted all reports and supplements required by the department within
15 the past year; and

16 (d) Be current with all payments due to the state fund, or are current with an
17 approved written payment agreement with the department regarding all unpaid
18 amounts due the state fund.

19 WAC 296-17-31004(4).

20 "Good standing" does not mean that the requisite reporting and payments are accurate. Of
21 course, that determination cannot be made until/if the Department performs an audit. Any
22 suggestion that the Department's web site representation as to a subcontractor's "good standing" is
23 synonymous with "compliance" is misplaced. Similarly, the Department's web site verification that a
24 contractor's "account is current" status is not synonymous with "compliance." In fact, as Exhibit
25 No. 4 reveals that although an "account is current," the Department instructs that employers "are
26 liable for premiums found later to be due." That caveat clearly advises the prime contractor
27 (GT Drywall) that the "account is current" status is only as accurate as the reports filed by the
28 subcontractor (Angel Jimenez Drywall), as may later be determined. More so, there is insufficient
29 evidence to support the proposition that information contained on the Department's web site is an
30 "admission, statement, or act inconsistent with the claim afterwards asserted," as anticipated by
31 *Harbor Air Service Inc., v. Board of Tax Appeals*.

32 Ultimately, we find that there is no legal authority to support the position that the requisite
satisfaction of subsection (5) allows for the application of "equitable estoppel," thereby trumping all
other criteria required for prime contractor exemption under RCW 51.12.070. In fact, subsection (5)
is preceded by the word "and," a conjunctive, as opposed to "or," suggesting an alternative.
Subsection (5), being but one element required for prime contractor exemption, is satisfied by

1 accessing the Department web-site to assure that the sub-contractor is in "good standing" (as
2 specifically directed by the statutory language). GT Drywall cannot now use that information, as
3 provided by legislative dictate, to support their "equitable estoppel" argument. It can use that
4 information for the sole purpose to establish one of five elements required for contractor exemption.

5 We make this determination fully aware our prior decision in *In re Interior Drywall Systems*,
6 Dckt. No. 05 17035 (July 26, 2006), referenced throughout this record. *In re Interior Drywall*
7 *Systems* is not on point. Although the Board recognized "reliance" on the Department's web site
8 affirmation of a contractor's compliance, the relevant audit period in *Interior Drywall* predated the
9 2004 amendment to RCW 51.12.070, which added the subsection (5) requirement that a
10 sub-contractor have an industrial insurance account in good standing with the Department,
11 verifiable via the Department's internet web site. Also, in *In re Interior Drywall Systems* the
12 Department had acknowledged that the web site contained inaccurate information during the
13 relevant period. In the current matter, there is no evidence to support the proposition that the
14 Department knew whether its web site was inaccurate with respect to Angel Jimenez Drywall. In
15 fact, it is apparent that the web site was accurate at the time posted, based on information available
16 to the Department prior to its audits of the relevant periods.

17 **Prime Contractor Discount Rate.**

18 Simply stated, we are unaware of any authority to allow the application of a contractor's
19 discount rate to a subcontractor's premium assessment. The work performed by the subcontractor
20 employees determines the premium rates due. If the subcontractor had not qualified for the
21 Department discount rate, there is no statutory mechanism to apply the prime contractor's discount
22 rate for the work performed, should the subcontractor fail to pay its premiums.

23 In its post-hearing brief, GT Drywall relies on *Spicer v. Department of Labor & Indus.*,
24 48 Wn.2d 437 (1956), in which the court ruled that

25 When an employer under the act procures the performance of an integral part of its
26 industrial process by an independent contractor, the act applies for the benefit of the
27 independent contractor's employees who perform the service in question, just as if
28 performed directly for the employer, and the independent contractor is an employer
under the act so far as the labor in question is concerned.

29 *Spicer*, at 439.

30 In that brief, GT Drywall referenced extensive legislative history surrounding the
31 development of RCW 51.08.070 (definition chapter of Title 51 RCW) and RCW 51.12.070.

1 We note that the SHB 250 Synopsis as of March 19, 1981, provides that a contractor and
2 subcontractor will **not** be considered to be in an employer-employee relationship. The new law, as
3 enacted in 1981, is the first appearance of subsections (1)-(4) of RCW 51.12.070.

4 We also note that at the same time, the 1981 Legislature amended RCW 51.08.070 to read
5 For the purpose of this title, a contractor registered under chapter 18.27 RCW or
6 licensed under chapter 19.28 RCW is not an employer of:

7 (1) Any other person, firm, or corporation currently engaging in a business which is
8 registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW.

9 The amended RCW 51.08.070 is seemingly in direct opposition to the employers' reliance on
10 *Spicer v. Department of Labor & Indus.*, 48 Wn.2d 437 (1956), for the proposition that, in
11 2006-2008, the Industrial Insurance Act applies to subcontractor employees as if hired directly by
12 the general contractor.

13 Finally, WAC 296-17-35203 (without any apparent change since 2005), addresses reporting
14 requirements, and availability of the contractor discount, among other things. This provision, too,
15 differentiates between subcontractors and workers.

16 (c) **Can I deduct material installed or finished by subcontractors?** You may
17 deduct material installed or taped by subcontractors **you are not required to report
as your workers.** You may not deduct for material only scrapped or primed and
18 textured by subcontractors.

19 (Emphasis added.)

20 In this appeal, there is no evidence that the prime contractor, GT Drywall, reported the
21 subcontractor as a "worker," and we determine that the subcontractors' employees/workers were
22 **not** those of the prime contractors. Without some other specific statutory authority instructing
23 otherwise, the prime contractors cannot benefit from discounted premium rates for work performed
24 by someone other than its own employees or workers.

25 SUMMARY

26 Based on the record as presented, we determine that GT Drywall, Inc., did not satisfy either
27 RCW 51.12.070(2) or (3). As all five provisions of RCW 51.12.070 must be satisfied, GT Drywall is
28 now responsible for the Angel Jimenez Drywall premium assessments for the relevant period based
29 on these facts alone. Equitable estoppel is not an available defense to GT Drywall's responsibility
30 for the premiums assessed, and GT Drywall's contractor discount rate is not applicable to the
31 assessed premiums. Based on the foregoing, we make the following:
32

FINDINGS OF FACT

1
2 1. On September 21, 2009, the Department of Labor and Industries issued
3 Notice and Order of Assessment of Industrial Insurance Taxes (NOA)
4 No. 0496387, directed to GT Drywall, Inc., in which it requested taxes,
5 penalties, and interest due and owing to the State Fund in the sum of
6 \$2,626.47 for the second and third quarters of 2008. On November 24,
7 2009, the NOA was received by the Building Industry Association of
8 Washington (BIAW), the firm's representative.

9 On November 30, 2009, the BIAW filed a Protest and Request for
10 Reconsideration. On January 6, 2010, the Department issued an Order
11 and Notice Reconsidering Notice and Order of Assessment (received on
12 January 11, 2010), in which it affirmed its September 21, 2009 Notice
13 and Order of Assessment of Industrial Insurance Taxes.

14 On February 8, 2010, the BIAW filed a Notice of Appeal with the Board
15 of Industrial Insurance Appeals. On March 2, 2010, the Board issued an
16 Order Granting Appeal under Docket No. 10 11537, and agreed to hear
17 the appeal.

18 2. For the second and third quarter of 2008, Angel Jimenez Drywall was
19 engaged in the business of installation of drywall, was properly
20 registered with the Department of Labor and Industries under
21 Chapter 18.27 RCW, and had contracted with GT Drywall, Inc., to
22 perform the work of a subcontractor.

23 3. For the second and third quarter of 2008, Angel Jimenez conducted the
24 administration and/or management of Angel Jimenez Drywall from a
25 living room desk in his apartment, a dwelling unit shared with two
26 brothers. The living room office space in Mr. Jimenez' apartment was
27 not used exclusively on a regular basis for the Angel Jimenez Drywall
28 business. As such, that space would not be eligible for a home office
29 tax deduction for IRS purposes.

30 4. For the second and third quarter of 2008, and with respect to Angel
31 Jimenez Drywall, Mr. Jimenez did not maintain books and records that
32 reflected all items of income and expense.

1 5. For the second and third quarter of 2008, and prior to the 2009 audit of
2 Angel Jimenez Drywall, the Department maintained its statutorily
3 required web site, showing that the Angel Jimenez Drywall "account is
4 current," and with instructions that employers "are liable for premiums
5 found later to be due." GT Drywall had accessed that web site, as
6 partial compliance with the requisite elements for assessment
7 exemption for premiums owed by the subcontractor. The web site was
8 accurate at the time the information was posted, and was not an
9 admission, statement, or act inconsistent with a claim afterwards
10 asserted.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. For the second and third quarters of 2008, Angel Jimenez conducted the administration and/or management of Angel Jimenez Drywall from a dwelling unit space that was not used exclusively on a regular basis for the Angel Jimenez Drywall business; and, therefore, would not be eligible for a home office tax deduction for IRS purposes, as anticipated by RCW 51.12.070(2).
3. For the second and third quarters of 2008, and with respect to Angel Jimenez Drywall, Mr. Jimenez did not maintain books and records that reflected all items of income and expense, as anticipated by RCW 51.12.070(3).
4. For the second and third quarters of 2008, GT Drywall failed to establish that Angel Jimenez Drywall satisfied all requisite sections of RCW 51.12.070.
5. For the second and third quarters of 2008, GT Drywall was not entitled to an equitable estoppel defense based on compliance with RCW 51.12.070(5).
6. For the second and third quarters of 2008, GT Drywall was not entitled to application of its premium discount rate, as applied to premiums owed by Angel Jimenez Drywall, under Title 51 RCW and/or Chapter 296-17 WAC.
7. The Department Order and Notice Reconsidering Notice and Order of Assessment of Industrial Insurance Taxes dated January 6, 2010, is correct, and is affirmed.

DATED: January 3, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEEDY Chairperson

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

/s/ _____
LARRY DITTMAN Member