

Wayne Jamison Timberfallers

ASSESSMENTS

Delegation of authority to issue Notices and Orders of Assessment

Authority to issue Notices and Orders of Assessment is properly delegated to collection auditors even in the absence of written documentation of the Director's delegation. Efficient use of agency Director's time outweighs value of creating specific written documentation memorializing the delegation of authority.*In re Wayne Jamison Timberfallers, BIIA Dec., 87 1383 (1988)*

INDEPENDENT CONTRACTORS

Loggers

In light of contracts which did not specifically permit contract cutters to delegate responsibilities to others and which appeared to preclude delegation without authorization, inquiry into whether cutters actually hired others is necessary in order to determine whether essence of the contract was personal labor. When cutter did not hire others, the essence of that contract was personal labor and he was a "worker" under the Act.*In re Wayne Jamison Timberfallers, BIIA Dec., 87 1383 (1988)*

Scroll down for order.

1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
2 prejudicial error was committed and said rulings are hereby affirmed. The two appeals are hereby
3 consolidated for purposes of our final disposition.
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5 The issues presented by this appeal and the evidence presented by the parties are adequately
6 set forth in the Proposed Decisions and Orders. We have granted review in order to (1) reaffirm the
7 finding made in the Proposed Decisions and Orders that collection auditors were delegated the
8 authority to issue Notices and Orders of Assessment of Industrial Insurance Taxes by the Director of
9 the Department; (2) find that the record contains sufficient indication of the actual hours worked by
10 individuals George Steven Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave Moran and
11 Jack Campbell such that Wayne Jamison Timberfallers, Inc. owes industrial insurance taxes based on
12 the actual hours worked by such individuals as shown by the time records of Wayne Jamison
13 Timberfallers, Inc.; and (3) find that for those contracts worked on by George Steven Tuengel, John
14 Holmchuck, Steven Cox, Dan Richmond, Dave Moran, and Jack Campbell it was not proven that
15 personal service was not the essence of the contract and, therefore, these contractors were covered
16 under the Industrial Insurance Act.
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18 We first turn to the issue of "delegation". A. Edward Wheelhouse was appointed collection
19 supervisor within the Industrial Insurance Division of the Department of Labor and Industries in
20 November of 1982. At that time the collection supervisor was issuing Notices and Orders of
21 Assessment of Industrial Insurance Taxes. Mr. Wheelhouse suggested that the authority to issue the
22 Notices and Orders of Assessment be delegated to collection auditors. Soon thereafter his suggestion
23 was implemented. He understood that authority for the change came from the Director of the
24 Department. Mr. Wheelhouse stated that he had issued a memo in November of 1982 telling the
25 collection auditors that they had been delegated the authority to issue the Notices and Orders of
26 Assessments on their accounts. However, he was unable to locate his copy of this memo.
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28 Richard Slunaker was the Assistant Director and supervisor of the Industrial Insurance Division
29 of the Department of Labor and Industries in 1982. He recalls conferring with Mr. Wheelhouse over
30 this delegation of authority. It was his recollection that Mr. Kinville, then the Director of the Department
31 of Labor and Industries, approved the change. Though he recalled that there was a memo issued
32 about the authority to issue the Notices and Orders of Assessments by collection auditors, he could
33 not find it nor recall if it was from himself to Mr. Wheelhouse or from Mr. Kinville to Mr. Wheelhouse,
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1 through himself. The stipulated testimony of Sam Kinville indicates only that he does not have a
2 recollection regarding the authority to issue the Notices and Orders of Assessments.
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4 The two standard legal treatises which address the issue of sub- delegation of authority within
5 an administrative agency agree that the trend in administrative law is away from challenges to
6 technical requirements of sub-delegation. See K. Davis, Administrative Law Treatise] 9 (1958); and
7 F. Cooper, State Administrative Law pp. 91-92 (1965). These experts in administrative law note that
8 the trend away from technicalities in sub-delegation allows an agency head the freedom to address
9 general policy concerns and to supervise the functions of the agency. However, the experts recognize
10 the necessity of an agency review process which protects individuals from possible mistakes made by
11 those acting for the head of the agency.
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16 In Washington the Legislature has expressly authorized the Director of the Department of Labor
17 and Industries to delegate his power to issue Notices and Orders of Assessment. RCW 51.48.120.
18 The Legislature has also created a review process by which the employer can appeal a Notice and
19 Order of Assessment to the Board of Industrial Insurance Appeals. Therefore the rights of individual
20 employers to obtain review of possible mistakes made by collection auditors who issue Notices and
21 Orders of Assessment are protected. Though there was testimony that a memorandum was issued in
22 December of 1982 authorizing collection auditors to issue Notices and Orders of Assessments, this
23 memorandum could not be located. However, even if the delegation was verbal and not memorialized
24 in writing, this was sufficient delegation of this authority to the collection auditors. Clearly, it cannot be
25 said that there was no delegation. This has been the practice of the Department for nearly six years
26 and the employer has not shown that the director did not know that collection auditors were issuing
27 Notices and Orders of Assessments. While verbal delegation might be poor practice, the policy of
28 making efficient use of a government agency director's time through the process of sub-delegation
29 outweighs the bureaucratic value of creating specific written documents memorializing a delegation of
30 authority. Accordingly, the motion to dismiss for improper delegation of the authority to issue Notices
31 and Orders of Assessment, and for lack of jurisdiction, is denied.
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40 We must next turn to the issue of whether George Tuengel, John Holmchuck, Steven Cox, Dan
41 Richmond, Dave Moran, and Jack Campbell were independent contractors for Wayne Jamison
42 Timberfallers, Inc., whose personal labor was the essence of the contract. If so, they were workers
43 within the meaning of RCW 51.08.180. If these men were independent contractors whose personal
44 labor was not the essence of the contract, then they would not be covered under the Industrial
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1 Insurance Act and Wayne Jamison Timberfallers, Inc. would not owe industrial insurance taxes for
2 their labor.
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4 One of the leading cases in this state on that subject is White v. Department of Labor and
5 Industries, 48 Wn.2d 470 (1956). Under White there are three prongs to the test for determining when
6 a contract is one, the essence of which is not personal labor, so that the independent contractor is not
7 covered under RCW 51.08.180. White delineates: (1) those who must of necessity own or supply
8 machinery or equipment to perform the contract; (2) those who obviously cannot perform the contract
9 without assistance; or (3) those who of necessity or choice employ others to do all or part of the work
10 which they have contracted to perform. The testimony of witnesses on behalf of the Department
11 indicates that in the audit process a distinction is drawn based on the third prong of the White test.
12 Those contractors who actually employed others to do all or part of the work were excluded from the
13 audit and therefore no premium was due for the hours for which they billed Wayne Jamison. The
14 recent Court of Appeals case of Massachusetts Life Insurance v. Department of Labor and Industries,
15 51 Wn. App. 159 (1988), indicates that White stands for the proposition "that the Act does not cover an
16 independent contractor when the contracted parties contemplate that the labor will be done by others
17 in whole or in part". Massachusetts Life Insurance, supra, at 165.
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19 The above cited authorities convince us that George Tuengel, John Holmchuck, Steven Cox,
20 Dan Richmond, Dave Moran, and Jack Campbell could be considered independent contractors whose
21 personal labor was not the essence of the contract only if it could be shown that their contract with
22 Wayne Jamison Timberfallers, Inc. contemplated that all or part of the work would be performed by
23 others. The problem then becomes one of proof. If the employer can show that in any case it was
24 contemplated that the work would be done by others then it cannot be said that the essence of the
25 contract was the personal labor. However, if the nature of the relationship spelled out in the contract is
26 not dispositive of that issue, we, and the Department, can only look to the actual behavior of the
27 parties. Stated another way, if the contract does not prove that it was contemplated by the parties that
28 the labor would be done completely or in part by others, then there must at least be a showing that the
29 labor was indeed performed completely or in part by others.
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31 With this in mind, we can analyze the contracts Mr. Jamison entered into on behalf of Wayne
32 Jamison Timberfallers, Inc. with George Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave
33 Moran and Jack Campbell. The record indicates that Mr. Jamison would assign specific tracts or
34 strips of land to these gentlemen (hereinafter referred to as contract cutters). He indicated he entered
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1 into nearly identical written contracts with most of the contract cutters he used for each of these strips
2 of timber. See, e.g., Exhibit 4. The auditor in this matter, June Karlson, testified that she relied upon
3 this sub contract with the contract cutters to determine whether Jamison had direction and control of
4 the cutters. She indicated that paragraph 7 of the sub contracts allowed Wayne Jamison to terminate
5 the contracts at any time without penalty or obligation. Also, paragraph 9 of the contracts allowed
6 Jamison to change the scope of the work performed and the terms and conditions of the contract if
7 done in writing and with signatures. She testified that she determined that this language gave
8 Jamison the power to direct and control the contract cutter and had the effect of allowing him to fire the
9 contract cutter as he would any other employee.
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14 Perhaps most detrimental to the employer's theory of the case is paragraph 8 which indicates
15 that "contractors shall not assign this agreement or sub contract all or any part of the work without the
16 consent of Wayne Jamison Timberfallers, Inc." Exhibit 4. We would consider this language to nullify
17 the assertions made by Mr. Jamison that it was contemplated and required that the contract cutters
18 work with other people. Construing this language in a light most favorable to the employer, we do not
19 find that the contract is dispositive as to whether or not the contract cutters and Wayne Jamison had
20 contemplated that others could perform all or part of the work.
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25 In spite of this, we would still be willing to consider those contracts in which contract cutters
26 actually hired others to do part of the work, as contracts in which personal labor was not the essence
27 of the contract. Before doing so, however, we would require definite and specific proof of contracts for
28 specific strips of land where the contract cutters actually had others working all or part of the time.
29 Nowhere in the record can we find the specificity which we would require before determining that, in
30 any particular situation, the contract cutter was operating under a contract for which personal labor
31 was not the essence of the contract. Therefore the Department orders must be upheld at least insofar
32 as providing that George Steven Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave
33 Moran, and Jack Campbell were independent contractors with Wayne Jamison Timberfallers Inc.,
34 whose personal labor was the essence of their contracts.
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40 Finally, the employer challenged the method used by the Department of Labor and Industries to
41 assess premiums based on assumed hours pursuant to WAC 296-17-350. The records by Wayne
42 Jamison Timberfallers, Inc. contained in the time book, Exhibit 13, the check register, Exhibit 15, as
43 well as the recognized standard in the industry of man-days equalling six hours of work, are sufficient
44 to allow actual hours to be used for calculating the industrial insurance taxes owed for each contract
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1 cutter. Thus, it is unnecessary to rely upon assumed hours. Therefore we are remanding this matter
2 to the Department to recalculate the taxes owed, using Jamison's records and the appropriate
3 industrial insurance tax rates in effect at the time the labor was performed.
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5 The Proposed Decision and Order concluded that the employer owed premiums with a
6 reduction for six hour man-days reported for timberfallers who assisted each independent contractor
7 and with a reduction for six hour man-days reported by Mr. Tuengel for the use of his bulldozer. The
8 employer, however, had the opportunity at hearing to present the specific number of hours that could
9 be so reflected and failed to do so. We will therefore not direct the Department to make such
10 reductions in premiums.
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15 **FINDINGS OF FACT**

- 16 1. On January 16, 1987 the Department issued to Wayne Jamison as
17 proprietor on his and his wife's behalf, a Notice and Order of Assessment
18 of Industrial Insurance Taxes No. 51470 signed by Betty Lott, Collection
19 Auditor for the Department of Labor and Industries, which ordered that
20 taxes were due and owing to the state fund which had accrued between
21 April 1, 1984 through December 31, 1984 in the sum of \$6,706.74 and
22 made demand for payment. On January 28, 1987 Wayne Jamison and
23 his wife filed a protest and request for reconsideration. On April 6, 1987
24 Lynn Conley, an Accounts Auditor with the Department of Labor and
25 Industries, issued an order on behalf of the Department of Labor and
26 Industries, affirming the Notice and Order of Assessment of Industrial
27 Insurance Taxes No. 51470. On April 23, 1987 Wayne Jamison and his
28 wife filed a notice of appeal with the Board of Industrial Insurance Appeals.
29 On May 19, 1987 the Board issued an order granting the appeal and
30 assigned it Docket No. 87 1383.
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32 On January 16, 1987 the Department issued to Wayne Jamison
33 Timberfallers, Inc. a Notice and Order of Assessment of Industrial
34 Insurance Taxes No. 51469, signed by Betty Lott, Collection Auditor for
35 the Department of Labor and Industries, which ordered that taxes were
36 due and owing to the state fund which had accrued between January 1,
37 1985 through March 31, 1986 in the sum of \$38,810.52 and made
38 demand for payment. On January 28, 1987 Wayne Jamison filed a
39 protest and request for reconsideration. On April 6, 1987 Lynn Conley, an
40 Accounts Auditor with the Department of Labor and Industries, issued an
41 order on behalf of the Department of Labor and Industries, affirming the
42 Notice and Order of Assessment of Industrial Insurance Taxes No. 51469.
43 On April 23, 1987 Wayne Jamison Timberfallers, Inc. filed a notice of
44 appeal with the Board of Industrial Insurance Appeals. On May 19, 1987
45 the Board issued an order granting the appeal and assigned it Docket No.
46 87 1384.
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2. Between April 1, 1984 and December 31, 1984 and January 1, 1985 and March 31, 1986, Wayne Jamison Timberfallers, Inc., contracted for the personal labor in the form of falling and bucking of timber on a six hour per day, man-day basis, with the following contract cutters: George Steven Tuengel d/b/a Tuengel Cutting; John Holmchuck; Stephen Cox d/b/a Swede Bushelding; Dan Richmond d/b/a Dan Richmond Construction or Richmond Cutting; Dave Moran d/b/a DMD Cutting; and Jack Campbell d/b/a C&C Cutting.
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3. Between April 1, 1984 and December 31, 1984 and January 1, 1985 and March 31, 1986, contract cutters George Steven Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave Moran, and Jack Campbell provided their personal labor in the form of falling and bucking timber for Wayne Jamison Timberfallers, Inc. on a six hour per man-day basis, as entered in the time book of Wayne Jamison Timberfallers, Inc.
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4. In December of 1982 the Director of the Department of Labor and Industries made a written and/or verbal delegation of authority to collection auditors of the Department of Labor and Industries and asked his designees to issue Notices and Orders of Assessment of Industrial Insurance Taxes, and that delegation continued through 1987.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals.
2. George Steven Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave Moran, and Jack Campbell were independent contractors with Wayne Jamison Timberfallers, Inc. from April 1, 1984 through December 31, 1984 and January 1, 1985 through March 31, 1986, yet their personal labor was the essence of their contracts such that they were workers of Wayne Jamison Timberfallers, Inc. within the meaning of RCW 51.08.180.
3. Wayne Jamison Timberfallers, Inc. owes industrial insurance taxes for the labor of independent contractors George Steven Tuengel, John Holmchuck, Steven Cox, Dan Richmond, Dave Moran, and Jack Campbell performed during the periods April 1, 1984 through December 31, 1984 and January 1, 1985 through March 31, 1986, based upon the actual hours worked by such individuals as shown by the time records of Wayne Jamison Timberfallers, Inc.
4. The order of April 6, 1987 which affirmed a Notice and Order of Assessment of Industrial Insurance Taxes No. 51470 issued on January 16, 1987 to Wayne Jamison and his wife, which demanded the sum of \$6,706.74 for unpaid industrial insurance taxes owed the state fund and accruing between April 1, 1984 through December 31, 1984, is incorrect and is reversed and the matter is remanded to the Department of Labor and Industries to recalculate the amount of industrial insurance taxes owed by Wayne Jamison proprietorship for the labor of George Steven

1 Tuengel, John Holmchuck, Steven Cox, and Dan Richmond during the
2 period April 1, 1984 through December 31, 1984 while performing
3 timberfalling labor for Wayne Jamison proprietorship in accordance with
4 the decision herein.

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6 5. The order of April 6, 1987 which affirmed a Notice and Order of
7 Assessment of Industrial Insurance Taxes No. 51469 issued on January
8 16, 1987 to Wayne Jamison Timberfallers, Inc., which demanded the sum
9 of \$38,810.52 for unpaid industrial insurance taxes owed the state fund
10 and accruing between January 1, 1985 through March 31, 1986, is
11 incorrect and is reversed and the matter is remanded to the Department of
12 Labor and Industries to recalculate the amount of industrial insurance
13 taxes owed by Wayne Jamison Timberfallers, Inc. for the labor of George
14 Steven Tuengel, John Holmchuck, Stevel Cox, Dan Richmond, Dave
15 Moran, and Jack Campbell during the period January 1, 1985 through
16 March 31, 1986, while performing timberfalling labor for Wayne Jamison
17 Timberfallers, Inc., in accordance with the decision herein.

18 It is so ORDERED.

19 Dated this 3rd day of October, 1988.

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21 BOARD OF INDUSTRIAL INSURANCE APPEALS

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23 /s/
24 SARA T. HARMON Chairperson

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26 /s/
27 FRANK E. FENNERTY, JR. Member

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29 /s/
30 PHILLIP T. BORK Member