

Western Gold Shake

COVERAGE AND EXCLUSIONS

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

Corporate officers, elected and empowered by the articles of incorporation or by-laws, who are also directors and shareholders, are excluded from the mandatory coverage of the act pursuant to RCW 51.12.020(8)(1987), provided that they have voluntarily assented to such status. Analysis of *New West*, concerning 1979 version of RCW 51.12.020, is equally applicable to 1987 version as changes were only technical and there are no substantive distinctions between the two versions of the statute. ...***In re Western Gold Shake, BIIA Dec., 89 3349 (1990)*** [dissent] [*Editor's Note: See later statutory amendments, Laws of 1991, ch. 246, § 4 (effective January 1, 1992) and 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. 90-2-02907-4.*]

DEPARTMENT

Rules

WAC 296-17-349 (effective April 1, 1988), which purports to limit the corporate officer exemption to officers "who are in a position similar to a proprietor to direct and control the business," is beyond the authority of the Department. The Legislature had the opportunity to adopt language remarkably similar to that of WAC 296-17-349 and determined not to do so. An administrative agency does not have the power to make rules which, rather than applying legislative enactments, attempt to amend or change them.***In re Western Gold Shake, BIIA Dec., 89 3349 (1990)*** [dissent] [*Editor's Note: See later statutory amendments to RCW 51.52.020(8), Laws of 1991, ch. 246, § 4 (effective January 1, 1992).*]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: WESTERN GOLD SHAKE)** **DOCKET NO. 89 3349**
2)
3 **FIRM NO. 550,218-00)** **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Firm, Western Gold Shake, Inc., By
8 Daniel J. Tighe

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10 Department of Labor and Industries, By
11 The Attorney General, per
12 Yvonne K. Dickson, Paralegal, and Nancy Hovis and Penny Allen, Assistants

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14 This is an appeal filed by the firm on August 2, 1989, from an Order and Notice Reconsidering
15 Notice and Order of Assessment of the Department of Labor and Industries dated July 27, 1989,
16 which affirmed Notice and Order of Assessment No. 73186 dated July 14, 1989, which demanded
17 payment of \$229,518.98 in unpaid industrial insurance taxes for the period April 1, 1987 through
18 December 31, 1988. The order is **REVERSED AND REMANDED**.

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21 **DECISION**
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23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the firm to a Proposed Decision and Order issued
25 on May 21, 1990 in which the order of the Department dated July 27, 1989, was affirmed.

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27 The Board has reviewed the evidentiary rulings in the appeal record and finds that no
28 prejudicial error was committed and said rulings are hereby affirmed.

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30 The issue in this appeal is whether the corporate officer/director/shareholder exclusion of RCW
31 51.12.020(9) or RCW 51.12.020(8) prohibits the Department from assessing industrial insurance taxes
32 for certain employees of Western Gold Shake.

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34 We note the Industrial Appeals Judge, as well as the parties, assumed that the issues in this
35 appeal are controlled by RCW 51.12.020(8) in its present form. However, that section as amended by
36 Laws of 1987, ch. 316, § 2, p. 1122 (SHB 677), took effect on July 26, 1987. The assessment in this
37 case covers the period April 1, 1987, through December 31, 1988. The portion of the assessment
38 from April 1, 1987 through July 25, 1987 is therefore controlled by the 1979 version of RCW
39 51.12.020(9).

1 Former RCW 51.12.020 provided in pertinent part:

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3 The following are the only employments which shall not be included within
4 the mandatory coverage of this title:

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7 (9) Any executive officer elected and empowered in accordance with the
8 articles of incorporation or bylaws of a corporation who at all times during
9 the period involved is also a director and shareholder of the corporation.
10 Any officer who was considered by the Department to be covered on and
11 after June 30, 1977, shall continue to be covered until such time as the
12 officer voluntarily elects to withdraw from coverage in the manner provided
13 by RCW 51.12.110. However, any corporation may elect to cover such
14 officers who are in fact employees of the corporation in the manner
15 provided by RCW 51.12.110.

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17 Laws of 1979, ch. 128,] 1, p. 488.

18 The current RCW 51.12.020 provides in pertinent part:

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20 The following are the only employments which shall not be included within
21 the mandatory coverage of this title:

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24 (8) Any officer of a corporation elected and empowered in accordance with
25 the articles of incorporation or bylaws of a corporation who at all times
26 during the period is also a director and shareholder of the corporation.
27 However, any corporation may elect to cover such officers who are in fact
28 employees of the corporation in the manner provided by RCW 51.12.110.

29
30 RCW 51.12.020(8).

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32 The 1987 version of RCW51.12.020(8) differs from the 1979 version in only two respects. A
33 sentence was deleted which stated "Any officer who was considered by the Department to be covered
34 on and after June 30, 1977, shall continue to be covered until such time as the officer voluntarily elects
35 to withdraw from coverage in the manner provided by RCW 51.12.110." This deletion is not relevant
36 to the appeal before us. In addition, the word "executive" was deleted.

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38 The term "executive" was not defined in the former RCW 51.12.020 and was deleted as a
39 technical change in SHB 677 requested by the Department of Labor and Industries in 1987. House
40 Bill Report, Commerce and Labor Committee (February 9, 1987). See also Senate Bill Report,
41 Commerce and Labor Committee (March 30, 1987). Larson defines "executive" to include such work
42 as "policy making, hiring and firing, and negotiation of important contracts". 1C A. Larson, Workmen's
43 Compensation Law, § 54.21(d) at 9-232 (1988). The effect of the technical deletion of "executive" at
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1 the Department's request is not entirely clear. Since the Department itself characterized its deletion as
2 technical, it does not appear that there is any real substantive distinction between the two versions of
3 the statute. If anything, the deletion of "executive" supports our interpretation of the corporate
4 officer/director/shareholder exclusion articulated in In re New West Manufacturing, Inc., BIIA Dec., 88
5 3634 (1989). We therefore conclude that the analysis used in New West is equally applicable here.
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9 In New West, we discussed in detail the scope of the exclusionary provision of the 1979 version
10 of RCW 51.12.020(9) and the history and development of the industrial insurance laws relating to
11 coverage for corporate officers. Our holdings from that case, as they apply to this case, can be
12 summarized as follows:
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- 14 1. The Legislature intended to exclude from mandatory coverage any and all
15 corporate officers who are elected and empowered by the articles of
16 incorporation or bylaws and who are also directors and shareholders of
17 the corporation. New West, at 11.
18
- 19 2. If a person is a corporate officer/director/shareholder in name only and
20 therefore not "empowered" or if he has not voluntarily agreed to become a
21 corporate officer, he is not excluded from mandatory coverage. New
22 West, at 16.
23
- 24 3. RCW 51.04.060, which prohibits agreements to waive the benefits of Title
25 51, cannot preclude employers from utilizing the exclusion provided by
26 RCW 51.12.020(9) (1979) and RCW 51.12.020(8) (1987). New West, at
27 21.
28
- 29 4. The Department has no authority to question the internal management of
30 a corporation in opposition to the desires of the shareholders of the
31 corporation. New West, at 25-26.
32
- 33 5. The Department has no authority to disregard the corporate existence
34 simply to assess industrial insurance taxes. New West, at 26.
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36 Rather than restate all the reasoning supporting these holdings, we incorporate the reasoning of New
37 West by reference.
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39 We turn, then, to the facts of this particular case. Western Gold Shake, Inc. is a shake
40 manufacturing company. An accountant, Ronald Wikander, referred Steve Dziubak to a lawyers'
41 typing service for preparation of the corporate papers. These included articles of incorporation which
42 were originally filed with the Secretary of State on June 17, 1987, and the bylaws. At the time of
43 incorporation, there were fifteen directors and shareholders of the corporation. As expressed in the
44 articles, the corporation's purpose was to "engage in all activities related to Cedar Shake
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1 Manufacturing and to engage in any business, trade or activity which may lawfully be conducted by a
2 corporation under the Washington Business Corporation Act." Exhibit 2.
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4 The articles of incorporation authorized the firm to issue 50,000 shares of common stock with a
5 par value of \$1.00 per share. The bylaws provided for the company's management by a
6 three-member board of directors. Although the bylaws were not formally changed, the corporation
7 identified each shareholder as a director. In addition, the bylaws established four offices within the
8 corporate structure -- president, vice president, secretary and treasurer. Under the terms of a 1987
9 agreement in lieu of an organizational meeting of directors, the Board of Directors adopted the bylaws
10 and named Lawrence Bowers as president, Steve Dziubak as secretary and treasurer, and identified
11 thirteen other individuals [Jeffrey L. Bowers, John D. Deskins, Mark Dragoo, Bob Dziubak, Kevin
12 Gallanger, Chris Kelly, Bill Plute, Craig Skinner, Steve Smith, Steve Sumner, Gene Swor, Bobby
13 Turpin Jr., and Bobby Turpin Sr.] as vice presidents. A 1988 corporate renewal identified twenty-one
14 directors.
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16 The firm had an average of six to fifteen individuals involved at any one time. The firm owns no
17 property. Steve Dziubak explained that a person became a member of the corporation if he was
18 needed and was approved by the other corporate shareholders/officers/directors. Prospective
19 participants were given the option of private insurance coverage or industrial insurance; all chose to be
20 covered with private insurance instead of industrial insurance.
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22 Each shareholder held one vote and paid \$1.00 per share. When members left the corporation,
23 the firm bought the share for \$10.00. Mr. Dziubak noted he and Lawrence Bowers may have initially
24 held 2,000 shares each, since they had invested that much money in the corporation. When the
25 corporation repaid the investment, Mr. Dziubak stated he and Mr. Bowers reduced their share
26 ownership to one share each. The firm held meetings, which were attended by a majority of
27 participants, at the millsite. Its corporate records were kept by the firm's accountant although Mr.
28 Dziubak maintained the meeting minutes. According to Mr. Wikander, the corporation was not in
29 business long enough to pay dividends.
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31 We disagree with our Industrial Appeals Judge's determination that the election not to be
32 covered by industrial insurance was not voluntarily given by the participants in the company and that
33 only Mr. Dziubak and Mr. Bowers were properly empowered officers, shareholders, and directors of
34 the corporation. As we stated in New West:
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1 It is important to note that the officers and directors of this corporation are
2 the shareholders. Thus, any criticism of the action of the officers and
3 directors is not well-founded since the acts of the officers and directors
4 constitute the actions of the corporation through its shareholders. Where
5 the directors are the shareholders, they are the corporation. Steeple v.
6 Max Krumer Company, 121 Wash. 47, 208 Pac. 444 (1922); 2 W.
7 Fletcher, Private Corporations § 395 (Perm.Ed.1982).

8
9 New West, at 24.

10 The Department lacks the authority to contest the election of the officers and directors, as the
11 validity of the election can be effectively questioned only by the corporation or its shareholders.
12 Baggot v. Turner, 21 Wash. 339, 58 Pac. 212 (1899); 2 W. Fletcher, Private Corporations, § 365
13 (Perm.Ed.1982). Furthermore, a corporation may alter, amend, or repeal bylaws, and may waive
14 bylaws expressly or impliedly. Bay City Lumber Co. v. Anderson, 8 Wn.2d 191, 111 P.2d 771
15 (1941). We therefore conclude the Department has no grant of authority to question the internal
16 management of this corporation. While the Department's objections, if lodged by directors, officers,
17 or shareholders of this corporation, might be valid concerns, we do not believe, nor has any
18 authority been cited, that the Department has the power to raise these issues in opposition to the
19 desires of the shareholders of the corporation.

20 While there may be situations where we will find the requirements of the corporate
21 officer/director/shareholder exclusion are not met, this is not one of them. Articles of incorporation
22 were filed. Shareholders paid for their stock, held meetings, and selected directors and officers.
23 Mr. Dziubak's testimony leads to no other conclusion than that the workers who were also
24 officers/directors/shareholders voluntarily consented to their status. They are entitled to the
25 exclusion from mandatory coverage which the Legislature created in 1979 and reinforced in 1987.

26 The Department recently promulgated WAC 296-17-349, which became effective April 1,
27 1988. Since the assessment in this matter covered the period April 1, 1987 through December 31,
28 1988, the portion of the assessment from April 1, 1988 through December 31, 1988, should be
29 considered in light of WAC 296-17-349. The pertinent portion of the rule provides:

30 The underlying intent of the corporate officer exemption is to exclude from
31 coverage only those officers meeting the two prong test of share
32 holder [sic] and director who are in a position similar to a proprietor to
33 direct and control the business. In applying this exemption, the
34 department will consider corporate officers exempt from coverage
35 when they are elected and sit on the corporation's board of directors
36 and are in a position similar to a proprietorship to direct and control the
37 business.

1 WAC 296-17-349.
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3 We agree that the corporate officer exemption applies only to officers who are "empowered"
4 officers, and also shareholders and directors, but we must recognize the "cardinal rule of
5 administrative law that an agency by its rulemaking authority may not amend or nullify a statute under
6 the guise of interpretation." State v. Dodd, 56 Wn.App. 257, 260, 783 P.2d 106 (1989) review denied
7 114 Wn.2d 1019 (citations omitted).
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10 The inquiry is whether the Department's rule conflicts with RCW 51.12.020(8). The statutory
11 language exempts from mandatory coverage "any officer of a corporation elected and empowered in
12 accordance with the articles of incorporation or bylaws of the corporation". The Department has
13 determined that "empowered" means being "in a position similar to a proprietorship to direct and
14 control the business".
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17 Washington law, with respect to the powers of individual directors of corporations, has long
18 recognized that "the power to do particular acts and the general authority to manage the corporate
19 affairs is vested in the trustees or directors, and their acts are binding only when done as a board and
20 at a legal meeting." Trethewey v. Green River Gorge, Inc., 17 Wn.2d 697, 727, 136 P.2d 999 (1943).
21 As we observed in New West, the Legislature declined to define "empowered" in the statutory
22 provision. As noted at page 9:
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27 The decision not to include a definition was reached after the House Labor
28 Committee considered a proposed substitute to HB 92 which would have
29 defined a corporate officer as "a shareholder who is an active and direct
30 participant in the management and policy- making functions of the
31 corporation." Like the original version of HB 92, this proposed substitute
32 would have provided a withdrawal mechanism rather than a straight
33 exemption from mandatory coverage. Bill Analysis, K. Wiitala, House of
34 Representatives Labor Committee (January 30, 1979). The Legislature
35 chose not to adopt this proposed definition.
36

37 To determine whether WAC 296-17-349 conflicts with RCW 51.12.020(8), the legislative intent must
38 be considered. Since the Legislature had the opportunity to adopt language remarkably similar to that
39 of the WAC and determined not to, we find that the WAC provision is beyond the authority of the
40 Department. Administrative agencies do not have the power to make rules which, rather than applying
41 legislative enactments, attempt to amend or change them. See State Employees v. Personnel Board,
42 54 Wn.App. 305, 308, 773 P.2d 421 (1989).
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1 Because the articles of incorporation for Western Gold Shake, Inc. were not filed until June 17,
2 1987, and the assessment period commenced April 1, 1987, we must consider whether the
3 employees during that interim period were covered by industrial insurance. The record is not clear
4 regarding whether Western Gold Shake operated before incorporation. Mr. Dziubak stated the mill
5 commenced operation in 1987 and was in the shake business during April 1, 1987 through December
6 31, 1988. He also observed the mill did not operate before incorporation and was not a continuation of
7 an "old" business. It appears, however, that the firm was active before the articles of incorporation
8 were actually filed with the Secretary of State. See, e.g., Initial Filing Report, dated May 8, 1987.
9 Exhibit No. 8. In light of this record, we find the Department's assessment of premiums for employees
10 during the period April 1, 1987 through June 16, 1987 was appropriate. The corporate officer
11 exclusion does not apply to work performed by employees prior to the date the corporation became a
12 legal entity.

13 After consideration of the Proposed Decision and Order and the Petition for Review filed thereto,
14 and a careful review of the entire record before us, we are persuaded the Department's Notice and
15 Order of Assessment which assessed industrial insurance taxes and penalties for the period April 1,
16 1987 through December 31, 1988, is incorrect and should be reversed in part. This matter is
17 remanded to the Department with instructions to issue an order finding that no industrial insurance
18 taxes are due for the officers, who were also directors and shareholders of the corporation, for the
19 period June 17, 1987 through December 31, 1988, but assessing industrial insurance taxes due for
20 those employees for the period April 1, 1987 through June 16, 1987.

21 **FINDINGS OF FACT**

- 22 1. On July 14, 1989, the Department of Labor and Industries issued Notice
23 and Order of Assessment No. 73186 which assessed \$229,519.98 in
24 unpaid industrial insurance taxes and a penalty for the period April 1, 1987
25 through December 31, 1988, against Western Gold Shake, Inc. The firm
26 filed a protest and request for reconsideration on July 20, 1989. On July
27 27, 1989, the Department affirmed Notice and Order of Assessment No.
28 73186.
- 29 On August 2, 1989, the firm filed a notice of appeal with the Board of
30 Industrial Insurance Appeals. On August 15, 1989, the Board issued an
31 order granting the appeal, assigning it Docket No. 89 3349.
- 32 2. On June 17, 1987, Steve Dziubak incorporated Western Gold Shake, Inc.
33 He became the secretary-treasurer, registered agent, and a director of the
34 firm. He initially received 2000 shares of stock in the firm for \$2,000.00.
35 He arranged for most of the contracts for the firm.

- 1 3. At the time of the incorporation, fifteen other individuals became directors
2 and shareholders. They also were named vice-presidents and received
3 one share of stock for \$1.00. A person became a member of the
4 corporation if he was needed and was approved by the other corporate
5 shareholders/officers/directors. When workers wished to leave the firm,
6 they resigned as vice-presidents and directors, and the firm bought their
7 shares for \$10.00.
- 8 4. All prospective participants were given the option of private insurance
9 coverage or industrial insurance; all chose to be covered with private
10 insurance instead of industrial insurance.
- 11 5. Corporate director, shareholder, and officer meetings were held at the mill
12 site irregularly and without written notice.
- 13 6. All the individuals who participated in the company as shareholders were
14 properly empowered officers, shareholders, and directors of Western Gold
15 Shake, Inc., and voluntarily elected to not be covered by industrial
16 insurance.
- 17 7. Western Gold Shake, Inc. operated and had employees between April 1,
18 1987 and June 17, 1987, the date the articles of incorporation were
19 actually filed with the Secretary of State.

CONCLUSIONS OF LAW

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
23 and the subject matter to this appeal.
- 24 2. All of the individuals who participated in the company as shareholders
25 were properly empowered officers, shareholders, and directors of Western
26 Gold Shake, Inc., during the period of June 17, 1987 through December
27 31, 1988 within the meaning of RCW 51.12.020(8) (1987) and RCW
28 51.12.020(9) (1979), which exclude properly empowered officers,
29 shareholders, and directors from mandatory industrial insurance coverage.
- 30 3. None of the individuals who participated in the company as officers,
31 directors and shareholders of Western Gold Shake, Inc. during the period
32 of June 17, 1987 through December 31, 1988 were subject to the
33 mandatory industrial insurance coverage of Title 51 RCW. Any individuals
34 who were employees of this business entity between April 1, 1987 and
35 June 16, 1987, were subject to mandatory industrial insurance coverage.
- 36 4. Notice and Order of Assessment No. 73186, which was affirmed July 27,
37 1989, and which assessed \$229,518.89 in unpaid industrial insurance
38 taxes for the period of April 1, 1987 through December 31, 1988 is
39 incorrect and is reversed in part, and this matter is hereby remanded to
40 the Department with instructions to issue an order finding no industrial
41 insurance taxes are due for the officers of this corporation who were also
42 directors and shareholders for the period June 17, 1987 through
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1 December 31, 1988, but assessing taxes due for any employees working
2 during the period April 1, 1987, through June 16, 1987.

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4 It is so ORDERED.

5 Dated this 15th day of November, 1990.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

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9 /s/ _____
10 SARA T. HARMON Chairperson

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13 /s/ _____
14 PHILLIP T. BORK Member

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17 **DISSENT**

18 I hereby dissent from the majority opinion. I fully concur with the result reached by the
19 Industrial Appeals Judge in his Proposed Decision and Order issued on May 21, 1990, and hereby
20 incorporate that decision as my dissent.
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23 Dated this 15th day of November, 1990.

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27 FRANK E. FENNERTY, JR. Member