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COURT OF APPEALS
NOV 14 2012 PII 1:12 No. 35245-1-II
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Chapparral Reforestation , Inc.

v.

Department of Labor and Industries, State of Washington

BRIEF OF APPELLANT

WILLIAMS, WYCKOFF & OSTRANDER, PLLC
Wayne L. Williams, WSBA# 4145
PO Box 316
Olympia, Washington 98507
(360) 528-4800

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No. 2 The trial court erred in failing to find that this action was barred by laches.

No. 3 The trial court erred in affirming the Order of the Board of Industrial Insurance Appeals dated May 2, 2005.

Issues Pertaining to Assignments of Error.....1

No. 1 Did the Superior Court err in affirming the decision of the Board of Industrial Insurance Appeals (Board) decision which, in turn, affirmed a Department of Labor and Industries’ Order dated February 19, 2004, which was entered more than four years after this Court affirmed an Order directing the Department of Labor and Industries (Department) to enter a new order?

No. 2 Did RCW 51.16.190 bar the Department from entering an assessment Order, when that order was entered more than three years after this Court directed it to enter a new Order, and more than 12 years after the period for which premiums are attempted to be collected?

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A. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in failing to find that this action was barred by RCW 51.16.190.

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court err in affirming the decision of the Board of Industrial Insurance Appeals (Board) decision which, in turn, affirmed a Department of Labor and Industries' Order dated February 19, 2004, which was entered more than four years after this Court affirmed an Order directing the Department of Labor and Industries (Department) to enter a new order?

2. Did RCW 51.16.190 bar the Department from entering an assessment Order, when that order was entered more than three years after this Court directed it to enter a new Order,

and more than 12 years after the period for which premiums are attempted to be collected?

3. Where the passage of time has prevented the employer from checking or refuting the Department's calculations, and its own financial hard times, and how it prevents it from paying the assessments, should laches bar this action?

B. STATEMENT OF THE CASE

This matter began when the Department issued an Order in December of 1992. An appeal followed which went through the Board of Industrial Insurance Appeals, the Thurston County superior Court, and this court. On January 11, 1999, this court entered its decision which should have resolved the matter. (Appendix A 18-21). At that time, this court affirmed a Board Order directing the Department to perform some recalculations and enter a new Order. The Department ignored this directive for the next five years. Finally, in 2004, The Department issued a new Order which has now wound its way through the Board of Industrial Insurance Appeals, the Thurston County Superior Court, and has now arrived, again, on your doorstep. A more detailed history follows.

The Department entered a Notice and Order of Assessment, on December 17, 1992, which assessed premiums against Chapparral Reforestation, Inc. (Chapparral). Chapparral was an employer of workers covered by the Industrial Insurance laws, Title 51 RCW. That Order was affirmed on November 8, 1993. An appeal to the Board of Industrial Insurance Appeals (hereinafter "Board") followed and the Board entered an Order Denying Petition for Review on June 14, 1995, (Docket Number 94 0041). Chapparral appealed the Board's decision to the Thurston County Superior Court. (CP 3-5) An appeal through the courts followed, and this Court of Appeals' opinion became the decision terminating review on January 11, 1999. (CP 16-19)

In response, the Department did nothing. The Department did not comply with the Board's June 14, 1995 Order (affirmed by this Court of Appeals) which determined that the Department's November 8, 1993 Order was incorrect and was reversed. The Department did not comply with the Board's instructions ". . . to delete only that portion of the assessment, including interest and penalties, which is based upon Form 1099s found in the firm's records, which made supplemental payments to certain individuals (most of whom have a last name of Tolento) for

their hours as crew drivers, and to thereupon reissue the corrected Notice and Order of Assessment consistent with the findings herein." (Emphasis supplied) (Final Order p. 15, Conclusion of Law No. 7) Appendix p. A 17

Since the previous Order was reversed and no new Order was entered, there was no Order in existence for five years. Then, on February 19, 2004, the Department finally issued another Order. By 2003, Chapparral no longer had any records regarding the employees involved in the original audit. (Certified Appeal Board Record; p. 27, l. 41 through p. 28, l. 7) That Order was appealed to the Board and given Docket No. 04 12532. The Board took judicial notice of its prior Decision and Order and of this Court's previous decision.¹ (Certified Appeal Board Record; Testimony of Steve Benefield, p. 20, l. 2-40) The Board reversed the new Department Order and directed a recalculation to be made. That decision was appealed by Chapparral to the Superior Court. (CP 3-5)

On July 27, 2006, the Superior Court heard arguments and affirmed the decision of the Board of Industrial Insurance Appeals. (RP 1-14) (CP 28-29) On August 18, 2006,

¹ We have attached the previous Board decision as Appendix A-1 through A-17. We have attached this Court's previous decision as Appendix A-18 through A-21.

Chapparral Reforestation properly filed a Notice of Appeal with this court, and in that manner, this matter came before this court. (CP 30-33; 35-36)

C. SUMMARY OF ARGUMENT

Because the Department of Labor and Industries failed to comply with this Court's Order dated January 11, 1999, the statute of limitations in RCW 51.16.190 should bar this action. The failure of the Department to comply with this Court's Order for almost five years, should invoke the Doctrine of Laches to prevent the Department from making its assessment, and from attempting to collect premiums and penalties from Chapparral Reforestation.

D. ARGUMENT

Under the circumstances of this case, collection of any premiums is obviously barred by RCW 51.16.190(1)(2), which provides as follows:

- (1) 'Action' means, but is not limited to, a notice of assessment pursuant to RCW 51.48.120, an action at law pursuant to RCW 51.16.150, or any other administrative or civil process authorized by this title for the determination of liability for premiums, assessments, penalties, contributions, or other sums, or the collection of premiums, assessments, penalties, contributions, or other sums.
- (2) Any action to collect any delinquent premium, assessment, contribution, penalty, or other sum due

to the department from any employer subject to this title shall be brought within three years of the date any such sum became due.

A period well over five years passed after the original Notice and Order of Assessment was reversed and remanded, and before the Department issued its new Notice and Order of Assessment.

The premiums at issue were assessed for time periods from 1990 through 1992. The Department admitted it should have issued an amended Notice and Order of assessment in May, 1995. (Board Record, Exhibit 1, page 1) Even if the three year statute were tolled during the time this matter was first winding its way through the Board and the courts, it most certainly was not tolled after this Court's decision became final, and before the Department issued its February 2004 Order.

Dolman v. Department of Labor and Industries, 105 Wn.2d 560, 716 P.2d 852 (1986) might be thought to provide some guidance. However, in this case, it does not. In the normal case, issuance of a Notice and Order of Assessment begins the collection action. But, in this case, that Notice and Order of Assessment was reversed and remanded to the Department and nothing happened for a period of five years. Tolling a statute of limitations is in tension

with the legislative policy of finality that a statute of limitations represents. Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App 655, 37 P.3d 309, 314 (2001)

Consistent with the statute's purpose that after a period of three years, an employer ought to be free to go about their business without fear the Department is going to take some action, the Department should be barred from now attempting to collect those 1990 through 1992 premiums.

The Department should also be barred by laches from attempting to collect the amount it alleges is due. Buell v. Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972), stands for the proposition that laches will bar a governmental cause of action, where the agency knew of the action, unreasonably delayed commencing the action and damaged the defendant as a result. That is exactly what happened here. Because of the Department's delay, Chapparral Reforestation was denied a farm labor contractor's license to do business in Washington in 2003 and 2004. Chapparral also has no way in which to check or refute the Department's new calculations and due

to its own hard times, has no way to pay the assessments, if they are affirmed.

Ms. Patricia Caudillo is the President of Chapparal Reforestation. (Caudillo Test. p. 4, ll. 9 – 13) Ms. Caudillo testified as follows:

Q. Were you given a farm labor contractor license in the year 2003?

A. No.

Q. And did the Department refuse to give you that license on the theory that there was some amount you then owed?

A. That was my understanding, yes.

Q. And did they give you a farm labor contractor license in 2004?

A. No. I did not even attempt it because this has not been cleared up yet at this point in time.

Q. Does your firm have \$165,048.25 to pay the assessment?

A. No, it does not.

Q. What would the effect of having to make a payment like that be?

A. They would shut us down completely. We've had a bad couple of years regarding some other contracts, and we've been struggling for the last two or three years, two years. And, basically, we'd have to shut the doors. (Caudillo Test. p. 8, l. 45 through p. 9, l. 27)

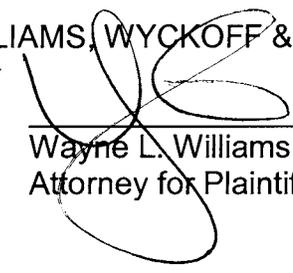
Shutting the doors would leave the 25 to 65 people they employ on a seasonal and full-time basis out of work.
(Caudillo Test. p. 6, ll. 5 – 21)

E. CONCLUSION

For these reasons, we request this court to reverse the Superior Court Decision and to hold the Department legally barred and equitably estopped from entering or enforcing its February 19, 2004 Order and Notice of Assessment.

DATED this 5th day of December, 2006.

WILLIAMS, WYCKOFF & OSTRANDER, PLLC



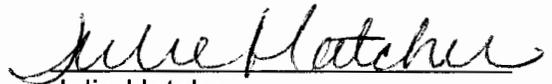
Wayne L. Williams, WSBA# 4145
Attorney for Plaintiff

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STATE OF MISSOURI
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DECLARATION OF MAILING

I, Julie Hatcher, hereby declare, under the penalties of perjury of the State of Washington, that a true and correct copy of Brief of Appellant was mailed on this 5th day of December, 2006, to each of the following:

James A Johnson
Assistant Attorney General
Office of the Attorney General
P.O. Box 40121
Olympia, Washington 98504-0121


Julie Hatcher

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

FA

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401
(360) 753-6824

In re: CHAPPARAL REFORESTATION

Docket No. 94 0041

Firm No. 571,794-00

ORDER DENYING PETITION
FOR REVIEW

On April 12, 1995, a Proposed Decision and Order was entered in the above-entitled appeal by Industrial Appeals Judge RICHARD J. MACKEY, copies of which were duly mailed and communicated to the parties and their representatives of record.

A Petition for Review of said Proposed Decision and Order was filed on May 25, 1995 by the Employer _____, as provided by RCW 51.52.104.

Pursuant to RCW 51.52.106, the Board has considered the Proposed Decision and Order and Petition or Petitions for Review and declines to review the Proposed Decision and Order and therefore denies the Petition or Petitions for Review filed herein, and the Proposed Decision and Order is the final order of this Board.

Any party aggrieved by this order must, within thirty (30) days of the date the order is received, file an appeal to superior court in the manner provided by law. The statutes governing the filing of an appeal are contained on the "Notice to Parties" which accompanied the Proposed Decision and Order.

Dated this 14th day of June, 1995.

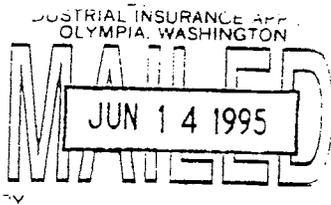
BOARD OF INDUSTRIAL INSURANCE APPEALS

S. Frederick Feller

S. FREDERICK FELLER Chairperson

Frank E. Fennerty, Jr.

FRANK E. FENNERTY, JR. Member



c: DEPARTMENT OF LABOR AND INDUSTRIES
CHAPPARAL REFORESTATION
WAYNE L WILLIAMS, ATTY
KAREN M DINAN, AAG

RECEIVED

JUN 20 1995

Consultant

Appendix A-1

CERTIFICATE OF SERVICE BY MAIL

I certify that I have this day served the attached Order upon the parties to this proceeding and their attorneys or authorized representatives, as listed below, by mailing to each a true copy thereof by delivery to Consolidated Mail Services for placement in the United States mail, postage prepaid.

EM1
CHAPPARAL REFORESTATION

519 SE 116TH AVE
VANCOUVER WA 98684

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WAYNE L WILLIAMS, ATTY
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OFFICE OF THE ATTORNEY GENERAL

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VANCOUVER WA 98660-3007

Dated at Olympia, Washington 06/14/95

BOARD OF INDUSTRIAL INSURANCE APPEALS
State of Washington

By: Patricia Burnett Latsch

PATRICIA B. LATSCH

Executive Secretary

Appendix A-2

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

1 In re: CHAPPARAL REFORESTATION) Docket No. 94 0041
2)
3 Firm No. 571,794-00) PROPOSED DECISION AND ORDER
4 _____)

5 INDUSTRIAL APPEALS JUDGE: Richard J. Mackey

6 APPEARANCES:

7 Employer, Chapparral Reforestation, Inc., by
8 Rolland, O'Malley, Williams & Wyckoff, P.S., per
9 Wayne L. Williams, Attorney at Law, and by
10 Patricia Caudillo, President of Chapparral Reforestation, Inc.

11 Department of Labor and Industries, by
12 The Attorney General, by
13 Karen M. Dinan and Karen M. Williams, Assistants, and by
14 Steven Moore, Revenue Office, Department of Labor and Industries

15 This is an appeal filed by the employer, Chapparral Reforestation,
16 Inc., on January 3, 1994 from an order of the Department of Labor and
17 Industries dated November 8, 1993, which affirmed Notice and Order of
18 Assessment No. 0117037 dated December 17, 1992, which assessed Chapparral
19 Reforestation, Inc., industrial insurance taxes, including interest and
20 penalties, due and owing the State Fund which accrued for the period 1st
21 quarter 1990 through 1st quarter 1992, for a total assessment of
22 \$124,527.62. **Reversed and Remanded.**

23 ISSUES

24 ~~1. Whether the Department correctly used classification 0101,~~
25 ~~rather than classification 0301, and moved other hours into class 5004,~~
26 ~~in computing industrial insurance taxes for certain work done by~~
27 ~~Chapparral Reforestation, Inc.~~

28 2. Whether the Department should be estopped to deny that
29 classification 0301 is available for vegetation control work by this
30 employer since the Department previously approved that classification for

1 vegetation control performed by Northwest Green Trees, Inc., which was
2 the corporate predecessor of Chapparral Reforestation, Inc.

3 3. Whether Manual Caudillo, Jr., was properly determined to be an
4 employee of Chapparral Reforestation, Inc., during the audit period.

5 4. Whether the Department properly used Form 1099's in computing
6 the premium assessment in the case of certain payments made to foremen
7 for their work as crew as drivers.

8 DECISION

9 The employer contends that classification 0101, used by the
10 Department in computing industrial insurance taxes for Chapparral
11 Reforestation, Inc., during the audit period, is incorrect and that the
12 Department should have used the classification reported by the firm
13 (class 0301) for its workers engaged in vegetation control. Further, the
14 employer contends the Department incorrectly assessed taxes for certain
15 workers based on Form 1099's, when in fact these persons were foremen who
16 received a supplemental payment for their previously underpaid time as
17 crew drivers. Finally, the firm contends that Manual Caudillo, Jr., was
18 incorrectly determined by the audit to be an employee of Chapparral
19 Reforestation, Inc.

20 ~~Patricia Caudillo, the president of Chapparral Reforestation, Inc.,~~
21 was called as witness by the employer. Ms. Caudillo testified that in
22 the late 1980s a corporation in which she was an officer (Northwest Green
23 Trees, Inc.) encountered some insurance difficulty following an accident
24 that resulted in a death, and a new corporation, Chapparral Reforestation,
25 Inc., was formed with herself as the president. Chapparral Reforestation,
26 Inc., was incorporated in 1989 and began work in February 1990. The
27 employees were the same workers who had previously been employed by

1 Northwest Green Trees, Inc., and the work was the same. During the
2 months December through May the majority of the work is tree planting.
3 In addition, 12 months of the year during the last four years, the firm
4 does vegetation control and right-of-way clearing under power lines for
5 the Bonneville Power Administration (BPA) (as shown in Exhibit Nos. 6a,
6 6b, and 6c). Industrial insurance taxes are estimated and included as
7 part of the bid price when the firm bids on its contracts for work. When
8 the firm prepared bids for BPA vegetation control, they assumed
9 classification 0301 would apply because Northwest Green Trees, Inc., had
10 been audited by the Department and given that classification for doing
11 the same kind of work.

12 Ms. Caudillo also testified that during the audit period of 1st
13 quarter 1990 through 1st quarter 1992 the corporation made payments to
14 Manual Caudillo, Jr., to purchase equipment, particularly a 1987 Ford
15 pickup. Mr. Caudillo had his own business, but it was in difficulty.
16 Ms. Caudillo does not recall, and was unable to state for certain,
17 whether Chapparral Reforestation, Inc., made payments to Mr. Caudillo for
18 any purpose other than equipment purchase. Also, during the audit period
19 payments were made to a number of individuals whose last name is Tolento,
20 and Form 1099's were issued for these payments. Ms. Caudillo testified
21 that these individuals (five or six persons) were foremen who drove the
22 crews and then supervised them on the firm's contract jobs. The
23 Form 1099's payments were for the foremen's driving time to make up a
24 deficiency in the wage previously paid them for this work following
25 directions from a government agency.

26 Chess Trethewey, an attorney in Salem, Oregon, who formerly
27 represented Northwest Green Trees, Inc., and now represents Chapparral

1 Reforestation, Inc., was called as a witness by the employer.
2 Mr. Trethewy testified that Northwest Green Trees, Inc., was audited by
3 the Department of Labor and Industries in the late 1980s. As a result
4 of that audit, Northwest Green Trees, Inc., was authorized the use of
5 class 0301 for certain vegetation control activities. Mr. Trethewy
6 relies on the terms of the Department's May 1988 audit report (Exhibit
7 No. 2) for a statement of what the Department authorized in future
8 reporting by Northwest Green Trees, Inc. However, he also states his own
9 understanding that class 0301 would be applied to activities relating to
10 vegetation control.

11 Peter Glennie, an accountant in Independence, Oregon, was called as
12 a witness by the employer. Mr. Glennie was the accountant for Northwest
13 Green Trees, Inc., during the period in which that company was audited
14 by the Department (1986 and 1987). He understood the company was
15 authorized to use class 0301. Chaparral Reforestation, Inc., was formed
16 in late 1989, but no work was done in the last quarter of 1989 (Exhibit
17 No. 8). Beginning with the 1st quarter 1990 the firm began reporting
18 work done under class 0301 (Exhibit No. 9). Mr. Glennie testified that
19 the firm had selective vegetation control contracts with BPA in early
20 1990 and 1991, and the work was then done May through early December.
21 Now this work is done all year long. Mr. Glennie helped prepare the bids
22 for the contracts performed during the audit period here of 1st quarter
23 1990 through 1st quarter 1992. One of the factors that went into the
24 company's cost for purpose of bidding was the anticipated industrial
25 insurance premiums. He always assumed that class 0301 would be used for
26 selective vegetation control work. If class 5004, or any class with a
27 higher premium than class 0301, were now applied to this work, there

1 would be a substantial decrease in the firm's profit. Quantity of
2 herbicide was not a factor in bidding, as the herbicides were furnished
3 by Bonneville Power. Since vegetation control was a recurring need on
4 a four or five year cycle, the contracts employed were often the same as
5 those used previously for the same locations. Mr. Glennie does not fill
6 out the time records for the employees of Chapparral Reforestation, Inc.,
7 but uses the time cards that are given him to make the quarterly reports.
8 In determining what classification to use, he goes by what crew did the
9 work. The company has one crew which does only the BPA jobs. He
10 understands that in 1990 and 1991 the selective vegetation control for
11 BPA was done in the months May through early December, but now is done
12 all year long. From December through May the firm does reforestation.

3 Ronald Secrist, who is employed by the Department of Labor and
14 Industries as a litigation appeals specialist, was called as a witness
15 by the Department. Mr. Secrist testified a firm is classified by the
16 information they give on their application when they apply for industrial
17 insurance coverage, and by information obtained by inquiry, claims
18 experience, or audit from the Department. When a firm is assigned a
19 classification they are not guaranteed to retain it since changes in the
20 way of doing things may affect the hazards of the business. Mr. Secrist
21 also stated his understanding of activities included in class 0101 and
22 0301.

23 Steven Moore, who is employed by the Department of Labor and
24 Industries as a revenue officer, was called as a witness by the
25 Department. In the summer of 1992 Mr. Moore performed an audit of
6 Chapparral Reforestation, Inc., using records and information provided by
27 the firm. He testified the firm described itself as doing tree planting

1 and thinning, and selective vegetation control. The firm did not state
2 how it went about doing the work. Mr. Moore examined BPA contracts and
3 determined that vegetation control was done using "chain saws and other
4 devices," but found nothing indicating chemical spraying was part of the
5 contracts. The firm's time cards also contained no reference to chemical
6 spraying. Based on that, Mr. Moore concluded that classification 0301
7 was not appropriated for the business activity. He removed class 0301
8 entirely and placed all the worker hours which were supported by
9 documents into class 0101. Mr. Moore testified there were a lot of
10 missing time records, and most of the records did not indicate what the
11 worker did. In the absence of any indication of what they did, they were
12 assigned to classification 5004, as required by Departmental regulations.
13 This is the classification which applies to the tree thinning and
14 planting activities of the firm. He understands that tree planting work
15 is seasonal.

16 Mr. Moore also testified there were several instances discovered in
17 the audit where workers had not been reported properly and no hours had
18 been kept, so the Department computed the hours by the piece worker rule.
19 That is, the gross wages paid were divided by the state minimum wage to
20 arrive at the hours worked. In this category there were some driver's
21 who were issued Form 1099's, and an issue of an independent contractor
22 that arose. Regarding the latter, Mr. Moore testified the audit revealed
23 Manuel Caudillo, Jr., who was doing business as Prineville Loppers, was
24 an unlicensed contractor. Mr. Moore found the Chapparral Reforestation,
25 Inc., check register indicated checks to Mr. Caudillo annotated
26 "subcontractor advance" and "advance." He found no contract document
27 between Mr. Caudillo and the firm. As Mr. Caudillo had no license to

1 operate as a reforestation firm, the audit considered him a worker of
2 Chapparral Reforestation, Inc., and applied the piece worker rule to the
3 hours in class 5004. Mr. Moore does not recall if he checked to
4 determine whether Mr. Caudillo was a licensed contractor in Oregon. No
5 workers were interviewed in the audit, and the employer was not present
6 for most of the audit. Mr. Moore stated he gave the firm an opportunity
7 to submit additional information, but received none as of November 1992
8 when he left the case. Exhibit No. 7 is Mr. Moore's audit report dated
9 October 26, 1992. Mr. Moore did not prepare the Notice and Order of
10 Assessment and is unable to explain the premiums and penalties noted in
11 that order.

12 The Department has been directed by the Legislature to classify all
13 occupations or industries based upon risk of injury to workers, to fix
14 rates of premiums, and to collect the premiums owed (RCW 51.16.035;
15 Washington State School Director's Association v. Department of Labor &
16 Indus., 82 Wn.2d 367 (1973)). The burden of proof in an appeal to prove
17 taxes imposed are incorrect is upon the employer (RCW 51.48.131).

18 The first issue in this appeal is whether the Department correctly
19 determined that the vegetation control work of the employer is a
20 class 0101 activity rather than a class 0301 activity. Under rules
21 promulgated by the Department, class 0301 includes the business activity
22 of chemical spraying (WAC 296-17-510). The class description also
23 includes landscaping but is silent regarding land clearing or any
24 activity probably involving use of chain saws. On the other hand, class
25 0101 expressly includes land clearing which is not otherwise classified
26 (WAC 296-17-501). The Department does not deny that class 0301 pertains
27 to control of vegetation by use of herbicides; however, the firm gave the

1 auditor no records indicating work with herbicides. Ms. Caudillo has
2 testified that the firm does use herbicides in vegetation control work,
3 and offers a photograph (Exhibit No. 6c) in support of her testimony.
4 The firm would have the Department employ the 0301 class for all this
5 work, even though the entire photographic evidence (Exhibit Nos. 6a, 6b,
6 and 6c) plainly indicates that the vegetation control done by Chapparal
7 Reforestation, Inc., includes the use of chain saws. While care must be
8 used in drawing broad conclusions from the photographs, they certainly
9 show more chain saws (with workers in their vicinity) than they do
10 chemical spraying equipment. In the reclassification action the
11 Department interpreted its rules for classifying risks. An
12 administrative agency is given considerable deference in the
13 interpretation of its own rules (Pacific Wire Works v. Department of
14 Labor & Indus., 49 Wn. App. 229 (1987)). The distinction in risk which
15 the Department has made between an activity of land clearing
16 (particularly if it involves use of chain saws), and an activity of
17 chemical spraying, is probably reasonable. In any event, the employer
18 here has not advanced any evidence showing it to be unreasonable or
19 arbitrary. On the record here, this industrial appeals judge is
20 persuaded that the Department was correct in determining that vegetation
21 control undertaken with chain saws is better described by class 0101
22 (land clearing) than by class 0301 (chemical spraying).

23 There is also some evidence that the tree planting work (class 5004)
24 is seasonal, usually done from December to May. The firm would have us
25 conclude that all work done outside that seasonal window is necessarily
26 vegetation control. Yet, the seasons of work do not neatly correlate
27 with calendar quarters used in the notice and order of assessment, nor

1 (as stated by the firm's accountant, Mr. Glennie) were the firm's hours
2 necessarily reported in the quarter in which they were actually incurred
3 due to some delays in obtaining information from remote job sites. Since
4 the firm has offered no evidence (either at the audit or here on appeal)
5 of the work hours actually employed in vegetation control, Chapparal
6 Reforestation, Inc., has not met its burden to show, by a preponderance
7 of the evidence that the reclassification of documented vegetation
8 control work hours into class 0101, and of undocumented hours into
9 class 5004, was incorrect.

10 This brings us to the issue of whether, the above notwithstanding,
11 the Department should be estopped in equity from denying application of
12 class 0301 to the vegetation control activity of the employer. Where (as
13 here) there is no doubt as to the extent of the Board's jurisdiction, the
14 Board may apply the doctrine of equitable estoppel under the principle
15 of stare decisis just as the Board applies other principles of law.
16 Since our courts have found that equitable estoppel is applicable against
17 the State, the doctrine may be applied where the circumstances are
18 appropriate, and within those situations and guidelines set out by our
19 courts (In re State Roofing & Insulation, Inc., BIIA Dec., 89 1770
20 (1991)). Estoppel consists of three elements: (1) an admission,
21 statement, or act inconsistent with a claim later asserted; (2) action
22 by the other party on the faith of such admission, statement, or act; and
23 (3) injury to such other party resulting from allowing the first party
24 to contradict or repudiate such admission, statement or act (Harbor Air
25 Serv., Inc. v. Board of Tax Appeals, 88 Wn.2d 359, 366-67 (1977)). The
26 State can be estopped where a party has acted to his or her detriment in
27 reliance upon the State's commitment, but estoppel will not lightly be

1 invoked against the State to deprive it of the power to collect taxes
2 (Revenue v. Martin Air Conditioning, 35 Wn. App. 678, 682-683 (1983)).
3 The Board in State Roofing found equitable estoppel where the employer
4 relied to its detriment on Department representations and past practices
5 on determinations of average rate of compensation for piece workers, and
6 where the employer would suffer if the Department were allowed to
7 repudiate or contradict its prior acts, practices, and policies.

8 Applying the rules from these cases to the instant case, it is
9 apparent from the outset that even if it be assumed that Chapparal
10 Reforestation, Inc., is entitled to rely on representations made by the
11 Department to Northwest Green Trees, Inc., the employer has failed of
12 proof of the first of the three necessary elements required to support
13 estoppel. The particular representations of the Department are contained
14 in the audit report of May 1988 (Exhibit No. 2). That report (on page 1)
15 states the Department's understanding that the vegetation control
16 "involves spraying weeds under power lines to kill them." There is no
17 persuasive evidence of record that the Department authorized class 0301
18 for removing vegetation by chain saw, such as depicted in Exhibit Nos. 6a
19 and 6b. There is no showing that Northwest Green Trees, Inc., or
20 Chapparal Reforestation, Inc., were ever told by the Department of Labor
21 and Industries that they could use class 0301 for other than chemical
22 spraying to accomplish vegetation control. Accordingly, equitable
23 estoppel is not available here since the employer has not established
24 that the Department's interpretation of its rules in the case of
25 Chapparal Reforestation, Inc., is inconsistent with what the Department
26 wrote in its guidance to Northwest Green Trees, Inc.

1 On the matter of the piece work hours of foremen when working as
2 drivers, the record is not a model of clarity. As understood by this
3 industrial appeals judge, the payments recorded on Forms 1099 were for
4 supplemental payments to these supervisors for their driving time. The
5 driving time is paid at less than their supervisory wages and, for
6 whatever reason, was initially paid at less than even the minimum wage.
7 Since the supplemental payments were for hours presumably already
8 recorded once in the firm's records for industrial insurance purposes,
9 it would be improper to use the 1099's for further assessment of premiums
10 as that would result in a double assessment for those driving hours. As
11 the Department has advanced no evidence which tends to show the position
12 of the employer on this matter is incorrect, the employer should prevail
13 on this issue.

14 On the matter of Manual Caudillo, Jr., the evidence is unrebutted
15 that the firm purchased a 1987 pickup truck from Mr. Caudillo and that
16 the firm wrote certain checks to Mr. Caudillo for the purpose of
17 "subcontractor advance" and "advance." The amount paid to Mr. Caudillo
18 for the pickup truck is not in evidence, and the checks annotated as an
19 advance are not explained by the firm. In her testimony the president
20 of the firm has not denied that Mr. Caudillo was paid for work, rather
21 she has concluded by acknowledging that she cannot remember. The check
22 annotations would certainly support a conclusion by an auditor that they
23 were for work. In the absence of any evidence that Mr. Caudillo falls
24 outside the definition of worker contained in RCW 51.08.180(1), either
25 through application of that statute or the alternative six part test in
26 RCW 51.08.195, the employer has not shown the assessment incorrect.
27 While the amount paid for the pickup certainly should not be included in

1 any computation of work hours for which premiums are assessed, in the
2 absence of some evidence of what amount relates to the truck, or even
3 that the Department auditor included that particular amount in the
4 assessment calculations, there is no alternative here to do other than
5 affirm the assessment.

6 The burden of proof here is on Chapparral Reforestation, Inc., and,
7 except in the matter of the supplemental payments to crew drivers, it has
8 not carried that burden. On the evidence of record the Notice and Order
9 of Assessment must be reversed and the matter remanded to the Department
10 to delete that portion of the assessment, penalties and interest, which
11 pertains to the supplemental payments recorded on Forms 1099's as made
12 to crew drivers, and to thereupon reissue a corrected Notice and Order
13 of Assessment.

14 FINDINGS OF FACT

- 15 1. On December 17, 1992, the Department of Labor and
16 Industries issued a Notice and Order of Assessment
17 No. 0117037, which assessed Chapparral Reforestation,
18 Inc., industrial insurance taxes, with interest and
19 penalties, due and owing the State Fund which accrued
20 for the period 1st quarter 1990 through 1st quarter
21 1992, for a total assessment of \$124,527.62. On
22 January 14, 1993, the employer filed with the
23 Department a protest and request for reconsideration of
24 Notice and Order of Assessment No. 0117037, dated
25 December 17, 1992. On November 8, 1993, the Department
26 issued an order which affirmed the Notice and Order of
27 Assessment of December 17, 1992. The Department order
28 of November 8, 1993 was communicated to the employer's
29 attorney of record on January 2, 1994.

30 On January 3, 1994, the employer filed with the Board
31 of Industrial Insurance Appeals a notice of appeal of
32 the Department order dated November 8, 1993. On
33 February 14, 1994, the Board issued an order granting
34 the appeal, under Docket No. 94 0041, and directing
35 that further proceedings be held.

- 36 2. The Department of Labor and Industries conducted an
37 audit of Chapparral Reforestation, Inc., to determine

1 whether the employer was correctly reporting
2 employment, hours and classification of its workers.
3 That audit determined that during the period 1st
4 quarter 1990 through 1st quarter 1992, Chapparral
5 Reforestation, Inc., had incorrectly reported in
6 class 0301 certain workers who performed vegetation
7 control using chain saws and reclassified these workers
8 in class 0101 to the extent that records of their hours
9 were available and assessed premiums accordingly.
10 Worker hours for which there were no supporting records
11 were assessed premiums appropriate to the firm's basic
12 classification, class 5004. Further, certain
13 assessments were made using the piece worker rule
14 (dividing gross amount paid a worker by the state
15 minimum wage to determine hours worked for premium
16 assessment calculation) in the case of Manuel Caudillo,
17 Jr., and certain workers (most of whom have the last
18 name Toronto) who received unexplained payments on
19 Forms 1099's according to the firm's records.

20 3. Chapparral Reforestation, Inc., is engaged in the
21 business of tree planting, and vegetation control and
22 right-of-way clearing. The basic classification
23 applicable to the employer's business, and in
24 particular the activity of tree planting, under
25 regulations issued by the Department of Labor and
26 Industries is class 5004. The activity of vegetation
27 control is performed by workers who use chain saws to
28 cut brush along the right-of-way under power lines
29 pursuant to contracts with the Bonneville Power
30 Administration (BPA). These contracts are silent
31 regarding use of herbicides or chemical spraying for
32 vegetation control, although some chemical spraying is
33 done by employees of the firm in performing the
34 contracts using herbicide provided by BPA. The
35 employer did not maintain any record of the worker
36 hours which pertained to vegetation control by chemical
37 spraying.

38 4. The corporate predecessor of Chapparral Reforestation,
39 Inc., was Northwest Green Trees, Inc., a firm whose
40 employees and business was taken over by Chapparral
41 Reforestation, Inc., in late 1989 or early 1990. In
42 May 1988, the Department of Labor and Industries
43 completed an audit of Northwest Green Trees, Inc., and
44 informed that firm in a written report that class 0301
45 was available to that firm for vegetation control
46 involving chemical spraying. Following its
47 incorporation, Chapparral Reforestation, Inc., relied
48 upon the audit report of the Department in the case of
49 Northwest Green Trees, Inc., and Chapparral
50 Reforestation, Inc., did report all worker hours
51 involved in vegetation control under class 0301.

1 5. During the period 1st quarter 1990 through 1st quarter
2 1992, five or six individuals, many of whom have the
3 last name of Tolento, were foremen who supervised work
4 crews of Chapparal Reforestation, Inc., and also
5 received a separate wage for work they performed as
6 crew drivers. Their wage as crew drivers was initially
7 underpaid by the employer and, following direction from
8 a governmental agency, the firm made supplemental
9 payments to them to bring their wage as drivers up to
10 the lawful minimum wage. Form 1099's were issued by
11 the employer in connection with these supplemental
12 payments. Since the hours for these individuals were
13 already once reported, the Form 1099's did not
14 constitute a proper basis for total hours worked for
15 purpose of computing industrial insurance premiums.

16 6. During the period 1st quarter 1990 through 1st quarter
17 1992, Manuel Caudillo, Jr., was employed by Chapparal
18 Reforestation, Inc. Certain payments made to
19 Mr. Caudillo by the firm were annotated in the firm's
20 check register as "subcontractor advance" and
21 "advance." Records of hours and rate of pay for this
22 employment were not maintained by the employer. Also
23 during this period an unknown amount of money was paid
24 to Mr. Caudillo by the firm to purchase from him a 1987
25 Ford pickup. The Department has calculated industrial
26 insurance premiums against the firm for work done by
27 Mr. Caudillo by dividing the gross amount paid to
28 Mr. Caudillo by the state minimum wage.

29 CONCLUSIONS OF LAW

30 1. The appeal was timely filed and the Board of Industrial
31 Insurance Appeals has jurisdiction over the parties and
32 the subject matter to this appeal.

33 2. Vegetation control by use of chain saws is within the
34 purview of class 0101 and WAC 296-17-501 pertaining to
35 land clearing not otherwise classified.

36 3. Equitable estoppel is not available under law where, as
37 here, the employer has not shown that the Department
38 acted inconsistently in permitting the firm's corporate
39 predecessor to use class 0301 for vegetation control
40 involving chemical spraying, and has denied the use of
41 that classification to activities of Chapparal
42 Reforestation, Inc., where the vegetation control work
43 is substantially performed by use of chain saws and
44 only partially, and to an unknown degree, performed by
45 chemical spraying.

46 4. The hours of Manuel Caudillo, Jr., are properly
47 classified under class 5004 pursuant to

1 WAC 296-17-310(9), and the premiums for those work
2 hours were properly calculated as provided in
3 WAC 296-17-350(2) since records were not maintained by
4 the employer.

5 5. The assessment of interest for delinquent industrial
6 insurance taxes assessed Chapparral Reforestation, Inc.,
7 for the period 1st quarter 1990 through 1st quarter
8 1992, is required by RCW 51.48.210.

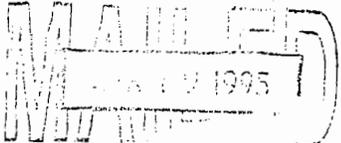
9 6. The assessment of penalties for increased premiums
10 assessed Chapparral Reforestation, Inc., for the period
11 1st quarter 1990 through 1st quarter 1992 is an
12 appropriate exercise of the Director's authority under
13 RCW 51.48.210.

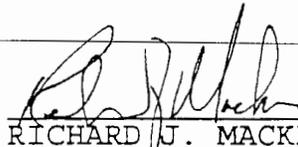
14 7. The order of the Department of Labor and Industries
15 dated November 8, 1993, which affirmed Notice and Order
16 of Assessment No. 0117037 dated December 17, 1992,
17 which assessed Chapparral Reforestation, Inc.,
18 industrial insurance taxes, including interest and
19 penalties, due and owing the State Fund, which accrued
20 during the period 1st quarter 1990 through 1st quarter
21 1992, for a total assessment of \$124,527.62, is
22 incorrect and is reversed. This matter is remanded to
23 the Department with instructions to delete only that
24 portion of the assessment, including interest and
25 penalties, which is based upon Forms 1099's found in
26 the firm's records which made supplemental payments to
27 certain individuals (most of whom have the last name of
28 Tolento) for their hours as crew drivers, and to
29 thereupon reissue the corrected Notice and Order of
30 Assessment consistent with the findings herein.

31 It is so ORDERED.

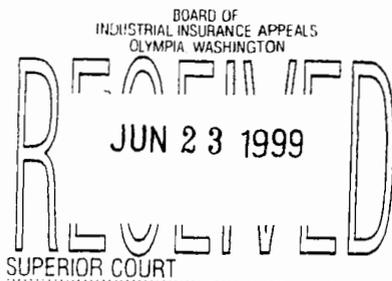
32 Dated this 12th day of April, 1995.

33 BOARD OF
34 INDUSTRIAL INSURANCE APPEALS
35 OLYMPIA, WASHINGTON
36





RICHARD J. MACKEY
Industrial Appeals Judge
Board of Industrial Insurance Appeals



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHAPPARAL REFORESTATION,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

No. 22396-1-II

UNPUBLISHED OPINION

Filed:

JAN 11 1999

MORGAN, J. – Chapparal Reforestation, Inc., is in the business of controlling vegetation.¹ It owes workers' compensation premiums that vary according to the methods used by its workers. Understandably, the premiums are lower if the workers just spray chemicals, and higher if the workers also use chain saws.

From 1988 to 1992, the Department of Labor and Industries considered the activities of Chapparal's workers to be within risk classification 301, which applies when workers just spray chemicals. In 1992, the Department determined that from and after January 1, 1990, the activities of Chapparal's workers should have been within risk classification 101, which applies

¹ Chapparal's predecessor, Northwest Green Trees, was in the same business. For convenience, we refer to the two as if they were one.

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when workers also use chain saws. As a result, the Department assessed additional premiums and penalties.

Chapparral objected to the assessment. It claimed that the Department had earlier assured its attorney and accountant that risk classification 301 was the proper one, and that the Department was now estopped from asserting otherwise. Chapparral did not claim that its workers were not using chain saws, or that risk classification 101 did not apply when workers used chain saws.

A hearing was held before an administrative law judge, who entered a proposed decision and order. He ruled in part:

[E]ven if it be assumed that Chapparral Reforestation, Inc., is entitled to rely on representations made by the Department to [Chapparral's predecessor], the employer has failed [to prove] the first of the three necessary elements required to support estoppel. The particular representations of the Department are contained in the audit report of May 1988 (Exhibit No. 2). That report (on page 1) states the Department's understanding that the vegetation control "involves spraying weeds under power lines to kill them." There is no persuasive evidence of record that the Department authorized class 0301 for removing vegetation by chain saw, such as depicted in Exhibit Nos. 6a and 6b. There is no showing that [Chapparral's predecessor] or Chapparral Reforestation, Inc., [was] ever told by the Department of Labor and Industries that [it] could use class 0301 for other than chemical spraying to accomplish vegetation control. Accordingly, equitable estoppel is not available here²

The Board of Industrial Insurance Appeals adopted this ruling, the superior court affirmed, and this appeal followed.

A citizen can sometimes estop the government from making a claim.³ To do that, he or she must prove at least three elements: "(1) an admission, statement, or act inconsistent with the

² Administrative Board Record, at 23; Clerk's Papers, at 16.

³ *Harbor Air Serv. Inc. v. Department of Rev.*, 88 Wn.2d 359, 366-68, 560 P.2d 1145 (1977).

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claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act."⁴

Here, the Board of Industrial Insurance appeals found as fact that Chapparal had failed to prove an admission, statement or act by the Department that was inconsistent with the Department's later application of risk classification 101. Thus, the central question on appeal is whether this finding is supported by substantial evidence.⁵

It is. The record is devoid of evidence showing that the Department knew, before 1992, that Chapparal's workers were using chain saws. The record is devoid of evidence that the Department, with such knowledge, ever told Chapparal that it would be, or should be, assigned risk classification 301. Patricia Caudillo, the owner of Chapparal, merely testified that she "assumed the classification of 0301 code."⁶ Michael Glinnie, Chapparal's accountant, admitted on cross-examination that when he spoke with the Department in 1990, he did not know the exact nature of the work being done in the field. Chess Trethewy, the lawyer for Chapparal's predecessor, testified that the Department had said in a 1988 audit report that "class 0301 will be

⁴ *Harbor Air*, 88 Wn.2d at 366-67; see also, *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589-60, 957 P.2d 1241 (1998); *Kramarevsky v. DSHS*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

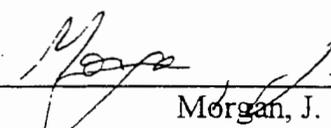
⁵ RCW 34.05.570(3)(e). The Department cites cases holding that equitable estoppel is a "mixed question of law and fact." Assuming that is true sometimes, it is not true here. Whether the Department made representations to Chapparal, and the nature and content of such representations, are pure questions of fact.

⁶ Administrative Board Record, at 17.

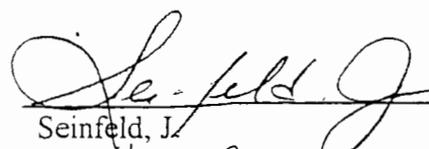
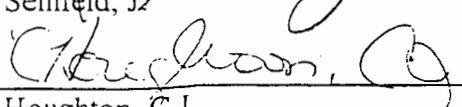
used in the future.”⁷ He did not assert that Chapparal’s workers were then using chain saws or, if they were, that the Department knew they were. Indeed, he even noted that the Department had said, in the same 1988 audit report, that the Department had described vegetation control as “spraying weeds under power lines to kill them.”⁸ Given no more evidence than this, the Board was entitled to find that the Department had not made an admission or statement inconsistent with its later position (or, at the least, that Chapparal had not proven by clear and convincing evidence that the Department had made such an admission or statement). It follows that the Board was entitled to reject Chapparal’s claim of estoppel, and to uphold the Department’s assessment.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Morgan, J.

We concur:


Seinfeld, J.

Houghton, C.J.

CLERK OF SUPERIOR COURT
COUNTY OF OLYMPIA
I, _____, County Clerk and Ex-officio Clerk of the Superior Court of the State of Washington, in _____ County
in the presence of Olympia, do hereby certify that the foregoing
is a true and correct copy of the original of the within
document as filed in my office containing _____
_____ 22 _____ 99

⁷ Administrative Board Record, at 43.

⁸ Administrative Board Record, at 45.

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