Original

NO. 35245-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHAPPARAL REFORESTATION, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

While government should not make mistakes, it does, and the question of how to deal with them arises.

The Department of Labor and Industries (Department) issued an industrial insurance tax assessment to Chapparal Reforestation, Inc. (Chapparal) in 1992. An earlier series of appeals regarding this assessment culminated in 1999 with this Court affirming an order of the Board of Industrial Insurance Appeals (Board) that had directed the Department to revise the assessment.

The Department did not comply with the Board's order until 2004. The issue before this Court is whether the Board erred when it did not dismiss the revised assessment but instead ordered the Department to recompute the revised assessment to remove any possibility that the delay would prejudice Chapparal.

II. COUNTERSTATEMENT OF ISSUES

1. Did the Board err in deciding that RCW 51.16.190, the Industrial Insurance Act's statute of limitations regarding tax assessments, does not bar the Department from issuing the revised assessment?
2. Did the Board err in determining that laches did not bar the Department from pursuing the revised assessment?

3. Did the Board err in providing a remedy less than dismissal of the entire assessment for the Department's delay in complying with its earlier order?

III. COUNTERSTATEMENT OF THE CASE

A. The Record to be Reviewed

The record for this appeal consists of the certified record of the Board regarding the 2004 appeal (CABR); a transcript of the hearing the Board conducted on January 24, 2005 (Tr.); the exhibits admitted at the Board's hearing (Ex.); the clerk's papers (CP); and the superior court report of proceedings (RP).[1]

B. The Original Department Assessment and the First Round of Appeals by Chapparal

Chapparal employed workers between January 1, 1990 and March 31, 1992. Chapparal reported some worker hours to the Department in certain risk classifications and paid industrial insurance premiums based on those hours and risk classes. Appendix A at 14-15, Finding of Fact (FF) 2. The Department audited Chapparal and determined that Chapparal had: (1) incorrectly classified some of the hours reported, resulting in underpayment of premiums, (2) failed to report the hours of Manuel Caudillo, resulting in underpayment of premiums, and (3) failed to report

[1] For consistency with the Brief of Appellant, the Board's 1995 decision is attached as Appendix A, pages 1-17, and this Court's 1999 decision is attached as Appendix A, pages 18-21. *See* Brief of Appellant at 4, fn 1.

the driving hours for certain other workers, also resulting in underpayment of premiums. Appendix A at 15, FF 2. The Department issued an assessment to Chapparal for unpaid industrial insurance premiums, penalties and interest. Appendix A at 14, FF 1.

Chapparal appealed to the Board. Appendix A at 14, FF 1. Chapparal challenged all three portions of the assessment. Appendix A at 3-4. After hearings, the Board decided the Department was correct regarding the risk classification of the reported hours and correct regarding the hours added for Manuel Caudillo, but incorrect about the driving hours its assessment had added. Appendix A at 16-17, Conclusions of Law (CL) 3, 4, and 7. The Board reversed the assessment, and remanded the matter to the Department to delete the portion of the assessment related to the driving hours, and "reissue the corrected Notice and Order of assessment" consistent with the Board's findings. Appendix A at 17, CL 7.

Chapparal appealed to Thurston County Superior Court, which affirmed the Board. CABR at 47. Chapparal then appealed to this Court, which on January 11, 1999 affirmed the Board. Appendix A at 18-21. Chapparal did not seek further review, so this Court issued its mandate on March 31, 1999. CABR at 47.

C. Revision of the Assessment by the Department and the Second Round of Appeals by Chapparal

The Department did not immediately issue a revised assessment, and took no action to collect the assessment from Chapparal until January 2003. Tr. at 7. At that time, Chapparal applied for renewal of its farm labor contractor license, and was denied the license because of past due premiums. Tr. at 7; Ex. 2. This led to the Department discovering it had not yet complied with the Board's order. The Department issued a revised assessment on February 19, 2004. CABR at 39-40.

Chapparal appealed the revised assessment to the Board. CABR at 36-40. At the Board's hearing, Steve Benfield of the Department explained that, due to the delay, the Department no longer possessed the records needed to separate: (A) the hours the Department had added in the original assessment for Manuel Caudillo (an addition the Board's original decision had upheld) from (B) the driving hours the Department had added in the original assessment (an addition the Board's original decision had rejected). Tr. at 12, 16. The Department did have records from which it could, with certainty, separate the reported hours from the added hours. Tr. at 15-16. Therefore, the recomputed assessment contained the reported hours reclassified as the Board had approved, Tr. 15-16; Ex. 3,

and the Department's best estimate of the number of hours worked by Manuel Caudillo, Tr. at 12-15; Ex. 3.

The Board determined that it was due to unexcused delay by the Department that records had been lost from which one could determine with certainty the number of hours worked by Manuel Caudillo (i.e., separating his hours from the driver hours the Board had ordered removed from the assessment). CABR at 21-22, FF 8. The Board ordered the Department to remove all the hours added and issue a revised assessment order. CABR at 22, CL 7. This revised assessment was to be based on the number of hours Chapparal had originally reported, reclassified as previously affirmed by the Board. CABR at 22, CL 7.

Chapparal appealed to Thurston County Superior Court, CP at 3-6, which affirmed the Board's decision, CP at 28-29. Chapparal has now appealed to this Court. CP at 30-33.

IV. STANDARD OF REVIEW

Chapparal has appealed from a superior court order. CP at 30-33. In that order the superior court affirmed an order of the Board, reviewing it pursuant to RCW 34.05.570. *See* CP at 28. Chapparal has not assigned error to the nature of the review the superior court undertook.

Courts review Board decisions involving premium assessments under the judicial review provisions of the Administrative Procedure Act,

RCW 34.05.510 – 34.05.598. RCW 51.48.131. This Court reviews the decision of the Board on the Board's record. *Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004). Chapparal bears the burden of proving the invalidity of the Board's action. RCW 34.05.570(1)(a). The Board's findings of fact are reviewed for substantial evidence, meaning evidence sufficient to persuade a fair-minded person of the declared premise. *Probst*, 121 Wn. App. at 293; RCW 34.05.570(3)(e). Findings an appellant has not assigned error to or clearly challenged in the text of its brief are treated as verities. *Noble v. Lubrin*, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003). The Board's legal conclusions are reviewed *de novo*. *Wash. State Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 704, 54 P.3d 711 (2002); RCW 34.05.570(3)(d).

V. SUMMARY OF ARGUMENT

The statute of limitations does not bar the revised assessment in this case because the assessment is not a new action, but a subsequent stage of the action brought in 1992 with the issuance of the original assessment. For the same reason, laches also does not bar the revised assessment as the doctrine applies to new actions. Chapparal did not establish that the delay harmed them. The Board did not act arbitrarily

when it fashioned a remedy to protect Chapparal from the possibility of harm resulting from the delay but did not dismiss the revised assessment.

VI. ARGUMENT

The Board correctly determined that the Industrial Insurance Act's statute of limitations for tax assessments did not work in this case to bar the assessment. The Board correctly decided that revised assessment was not barred under the equitable doctrine of laches. And the Board acted reasonably in providing a remedy less than dismissal of the assessment for the Department's delay in implementing the Board's prior order.

A. RCW 51.16.190 Does Not Bar the Recomputed Assessment.

The Board correctly concluded that the statute of limitations did not bar the Department from issuing the revised assessment because the revised assessment was not a new "action" but a subsequent part of the original assessment "action" brought in 1992. CABR at 14-16.

RCW 51.16.190 establishes the statute of limitations for industrial insurance premium assessments. It states that "[a]n 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." RCW 51.16.190(2). It defines "action" to include "a notice of assessment pursuant to RCW 51.48.120". RCW 51.16.190(1). In *Dolman v Dep't of*

Labor & Indus., 105 Wn.2d 560, 566, 716 P.2d 852 (1986) our Supreme Court addressed the statute of limitations for industrial insurance premium assessments. It said that the statute of limitations begins to run when the premiums are due. *Dolman*, 105 Wn.2d at 566.

RCW 51.16.060 defines when industrial insurance premiums become due. It states that "[p]remiums for a calendar quarter, whether reported or not, shall become due and delinquent on the day immediately following the last day of the month following the calendar quarter." RCW 51.16.060.

In this case, what are at issue and what have always been at issue are Chapparal's premiums for the first calendar quarter of 1990 through the first calendar quarter of 1992. According to RCW 51.16.060, whatever premiums Chapparal owed were "due and delinquent" for the first quarter of 1990 as of May 1, 1990 and so on for each successive quarter such that the premiums for last quarter of the assessment were "due and delinquent" as of May 1, 1992. The Department's original assessment was issued in December of 1992. Thus the "action" was "brought" within the three-year time-frame set forth in RCW 51.16.190.

An appeal is not a new action, but a subsequent proceeding in the original action. *Philadelphia Mtg. & Trust Co. v. Palmer*, 32 Wash. 455, 457-60, 73 P. 501 (1903). It follows, then, that where an original

assessment is an "action", a revised assessment order issued to comply with an appellate order regarding that assessment is not a new action but a subsequent proceeding in the original action. This is why the Board could order the Department to revise the assessment in June of 1995, even though it was more than three years after the premiums for the last quarter covered by the assessment had become due. This is why the Court of Appeals could affirm the Board's order in 1999, even though it was nearly seven years after the premiums for the last quarter covered by the assessment had become due. Any other interpretation of RCW 51.16.190 would lead to absurd results, something courts should avoid. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

B. The Board Correctly Decided that Laches Did Not Bar the Department from Issuing the Revised Assessment.

The Board also properly rejected Chapparal's argument that laches barred the Department from issuing the recomputed assessment.

"Laches may be established where the plaintiff (1) knows or reasonably should know of the cause of action, (2) unreasonably delays in commencing the action, and (3) causes damage to the defendant as a result." *Kightlinger v. Public Utility Dist. No. 1 of Clark County*, 119 Wn. App. 501, 512, 81 P.3d 876 (2003), *citing Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972). "Laches is an implied waiver arising from

knowledge of existing conditions and acquiescence in them." *Buell*, 80 Wn.2d at 522.

The Board correctly noted that laches would not apply to the revised assessment because it was not a new action, but a continuation of the original action. Board orders are called orders because that is what they are. They are not advice, they are not suggestions. The Board has the ability to certify disobedience of its orders to the superior court as contempt. RCW 51.52.100. Courts may compel the Department to comply with Board orders. *See Martinez v. Kinville*, 95 Wn.2d 959, 632 P.2d 886 (1981*); Lee v. Jacobs*, 81 Wn.2d 937, 940, 506 P.2d 308 (1973). Thus, the Department is not free to "waive" or otherwise disregard what the Board has instructed it to do. When the Board told the Department to issue a revised order and the courts affirmed that order, the Department had an obligation to do so, and could not implicitly or explicitly waive that obligation.

Additionally, as the Board noted, Chapparal could not establish that the delay resulted in any damage to Chapparal.

Chapparal claims that it does not now have the money to pay the premiums assessed. Appellant's Brief at 7-9. By law, Chapparal was required to pay the assessment before pursuing its original superior court appeal. *See* RCW 51.52.112. Presumably, Chapparal did not do so

because paying the assessment would have been an undue hardship. RCW 51.52.112. Chapparal presented no evidence that it had the money previously but does not have it now such that its inability to pay is the product of the delay.[2]

Chapparal also says it was harmed because it was unable to obtain a farm labor contractor's license. Appellant's Brief at 7. The denial was because Chapparal owed the Department money. Tr. at 8-9. Chapparal presented no evidence that it ever had the money to pay the assessment. That means that even if the Department had issued the revised assessment in 1995 or 1999, Chapparal would have been unable to pay it and Chapparal would still have owed the Department money when it applied for a farm labor contractor license in 2003 and 2004.

C. The Board Did Not Act Arbitrarily by Imposing a Remedy Less Than Dismissal of the Assessment for the Department's Delay

Chapparal's asserts that it "has no way in which to check or refute the Department's calculations . . ." Appellant's Brief at 7.

The record establishes that it was possible to separate with certainty the hours Chapparal had originally reported from the hours the

[2] Additional penalties and interest have not been raised as a potential source of prejudice, with good reason. Late penalties stop accruing three months after premiums are due, so no additional penalties would have resulted from the delay. *See* RCW 51.48.210. And the Department voluntarily waived interest that accrued between the time of the 1995 Board decision and issuance of the revised assessment in 2004. Tr. at 36-27; CABR at 64.

Department's assessment had added. Tr. at 15-16. The problem was that by the time the Department acted in 2004, it was not possible to separate with equal confidence the added hours the Board had previously affirmed from the added hours the Board had previously reversed. Tr. at 16.

In this case, the Board's first order became final and binding on all the parties. The subject of the second appeal to the Board was the order the Board had directed the Department to issue in its first decision. Thus, the subject matter of Chapparal's second appeal was not Chapparal's liability for premiums, but whether the Department's revised assessment accurately did what the Board had told it to do. *See* CABR at 17-18.

The Board decided that "the sole means to assure, without estimate, that the taxes assessed against Chapparal for this audit period are taxes actually due, in accordance with the 1995 final order of the Board in Docket No. 94 0041, is to delete all hours added by the Department audit." CABR at 18. Thus, the Board ordered all added hours to be removed. CABR at 13-14, CL 7.

Just as on occasion courts must fashion a remedy when facing an unusual situation, the Board must also do so. In this case, the Board told the Department to assess premiums for the reported, reclassified hours. This the Department was able to do without the delay causing any problems. The Board also told the Department to assess premiums for

some of the hours it had added, but not others. This the Department could no longer do except by estimating. The Board did not allow the Department to estimate, and so told the Department to remove all added hours so that the Board could be sure all of the hours it had previously directed the Department to remove were removed.

The result of the Board's decision to require the Department to remove all added hours is that anyone including Chapparal can, contrary to Chapparal's assertion, check the Department's calculations.

Under RCW 34.05.570(3)(i), it is this Court's responsibility to review what the Board did and determine whether it was arbitrary and capricious. Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n,* 148 Wn.2d 887, 905, 64 P.3d 606 (2003). In this case, the Board's decision shows that it carefully considered the attending facts and circumstances and fashioned a remedy reasonable for the situation.

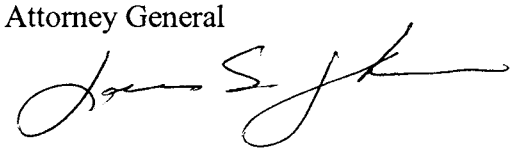
VII. CONCLUSION

Chapparal's appeal invoked the superior court's and this Court's jurisdiction under the judicial review provisions of the Administrative Procedure Act, RCW 34.05.510 through 34.05.598. For the most part, the facts have not been disputed. Where Chapparal has argued that the facts

were different than the Board understood the facts to be, the record contains substantial evidence supporting the Board's understanding. The Board's interpretation and application of the law was correct, and its decision was not arbitrary. Therefore, for the reasons stated, the Department asks this Court to affirm the decisions of the Board and of the Superior Court.

RESPECTFULLY SUBMITTED this 2nd day of February, 2007.

ROBERT M. MCKENNA
Attorney General



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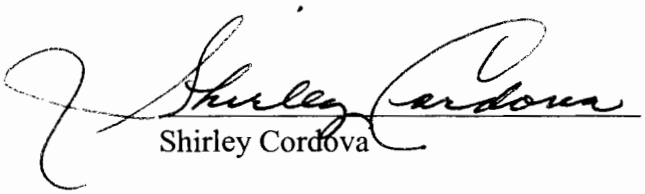
DATED this 2nd day of February, 2007, at Tumwater, Washington.



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Appendix

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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A9

RECEIVED
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Office of the Attorney General
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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
OLYMPIA, WASHINGTON
MAILED
JUN 14 1995
BY

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

AUG 21 1995
OFFICE OF ATTORNEY GENERAL
SEATTLE OFFICE
Time/Int'l: _____
AAG/Divs'n: _____

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.

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CHAPPARAL REFORESTATION

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BOARD OF INDUSTRIAL INSURANCE APPEALS
State of Washington

By: Patricia Burnett Latsch

PATRICIA B. LATSCH
Executive Secretary

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In re: CHAPPARAL REFORESTATION Firm No. 571,794-00	**Docket No.** 94 0041 **PROPOSED DECISION AND ORDER**

INDUSTRIAL APPEALS JUDGE: Richard J. Mackey

APPEARANCES:

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

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

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

ISSUES

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

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

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

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

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

DECISION

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

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

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

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

Chess Trethewy, an attorney in Salem, Oregon, who formerly represented Northwest Green Trees, Inc., and now represents Chapparal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applying the rules from these cases to the instant case, it is apparent from the outset that even if it be assumed that Chapparal Reforestation, Inc., is entitled to rely on representations made by the Department to Northwest Green Trees, Inc., the employer has failed of proof of 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 Northwest Green Trees, Inc., or Chapparal Reforestation, Inc., were ever told by the Department of Labor and Industries that they could use class 0301 for other than chemical spraying to accomplish vegetation control. Accordingly, equitable estoppel is not available here since the employer has not established that the Department's interpretation of its rules in the case of Chapparal Reforestation, Inc., is inconsistent with what the Department wrote in its guidance to Northwest Green Trees, Inc.

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

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

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

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

FINDINGS OF FACT

1. On December 17, 1992, the Department of Labor and Industries issued a Notice and Order of Assessment No. 0117037, which assessed Chapparal Reforestation, Inc., industrial insurance taxes, with interest and penalties, due and owing the State Fund which accrued for the period 1st quarter 1990 through 1st quarter 1992, for a total assessment of $124,527.62. On January 14, 1993, the employer filed with the Department a protest and request for reconsideration of Notice and Order of Assessment No. 0117037, dated December 17, 1992. On November 8, 1993, the Department issued an order which affirmed the Notice and Order of Assessment of December 17, 1992. The Department order of November 8, 1993 was communicated to the employer's attorney of record on January 2, 1994.

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

2. The Department of Labor and Industries conducted an audit of Chapparal Reforestation, Inc., to determine

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

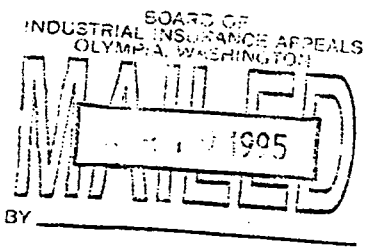
5. The assessment of interest for delinquent industrial insurance taxes assessed Chapparal Reforestation, Inc., for the period 1st quarter 1990 through 1st quarter 1992, is required by RCW 51.48.210.

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

7. The order of the Department of Labor and Industries dated November 8, 1993, which affirmed Notice and Order of Assessment No. 0117037 dated December 17, 1992, which assessed Chapparal Reforestation, Inc., industrial insurance taxes, including interest and penalties, due and owing the State Fund, which accrued during the period 1st quarter 1990 through 1st quarter 1992, for a total assessment of $124,527.62, is incorrect and is reversed. This matter is remanded to the Department with instructions to delete only that portion of the assessment, including interest and penalties, which is based upon Forms 1099's found in the firm's records which made supplemental payments to certain individuals (most of whom have the 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.

It is so ORDERED.

Dated this 12th day of April, 1995.



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

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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.

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

Chapparal 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. Chapparal 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 Chapparal Reforestation, Inc., is entitled to rely on representations made by the Department to [Chapparal'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 [Chapparal's predecessor] or Chapparal 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 here . . . .[2]

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).

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

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[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); *Kramarevcky 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.

[7] Administrative Board Record, at 43.

[8] Administrative Board Record, at 45.