

Bergen Brunswick Drug Co. (Amerisource Bergen Corp.)

SAFETY AND HEALTH

Penalties

SCOPE OF REVIEW

Safety and Health

The authority to assess penalties under WISHA lies exclusively with the Department of Labor and Industries. The Board lacks authority to increase the penalty on its own motion.*In re Bergen Brunswick Drug Co. (Amerisource Bergen Corp.)*, BIIA Dec., 08 W1080 (2010)

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

1 **IN RE: BERGEN BRUNSWIG DRUG CO.) DOCKET NO. 08 W1080**
2 **DBA AMERISOURCE BERGEN)**
3 **CORP.)**
4 **CORRECTIVE NOTICE OF)**
5 **REDETERMINATION NO. 311850770) DECISION AND ORDER**

6 **APPEARANCES:**

7 Employer, Amerisource Bergen Corp., per
8 Mike Murphy, by
9 Perkins Coie, LLP, per
Michael L. Hall

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Dustin J. Dailey, Assistant

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14 The employer, Amerisource Bergen, Corp., filed an appeal with the Board of Industrial
15 Insurance Appeals on October 27, 2008, from a Corrective Notice of Redetermination of the
16 Department of Labor and Industries dated October 15, 2008. In Corrective Notice of
17 Redetermination No. 311850770, the Department alleged a serious violation of WAC 296-800-
18 11005 (Item 1-1); and a general violation of WAC 296-800-13020(1) (Item 2-1); and imposed a
19 penalty of \$2,100 for Item 1-1 and no penalty for Item 2-1. The Department's Corrective Notice of
20 Redetermination No. 311850770, is **AFFIRMED**.

21 **DECISION**

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. The employer filed a timely Petition for Review of a Proposed Decision and
24 Order issued on October 21, 2009, in which the industrial appeals judge affirmed as modified the
25 Corrective Notice of Redetermination No. 311850770 dated October 15, 2008. The employer
26 withdrew the appeal to Item 1-2 of the Corrective Notice of Redetermination No. 311850770 at
27 hearing on July 29, 2009. All contested issues are addressed in this order.

28 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
29 no prejudicial error was committed. The rulings are affirmed.
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1 We have granted review because we disagree with the penalty assessment determined by
2 our industrial appeals judge. We otherwise agree with the Proposed Decision and Order. We will
3 set forth those facts necessary to explain our decision.

4 As noted by the industrial appeals judge in the Proposed Decision and Order, Bergen
5 Brunswig Drug Co., DBA Amerisource Bergen Corp., (Amerisource Bergen) is a pharmaceutical
6 distribution warehouse. Its workers were required to take orders and "pick" products from metal
7 shelving units to prepare for shipment to retail outlets. The chief contention raised by the
8 Department's citation of WAC 296-800-11005 is that workers were exposed to a hazard by climbing
9 the metal shelving units to retrieve product. WAC 296-800-11005 is a general duty standard
10 requiring employers to maintain a workplace free from recognized hazards that are causing, or are
11 likely to cause, serious injury or death. The hazard in this case is a falling hazard from climbing
12 shelves not intended for climbing. Photographic Exhibits 1 through 5 and 12 depict the shelving
13 units in question.

14 The inspection on April 10, 2008, giving rise to the Corrective Notice of Redetermination in
15 this appeal, resulted from an employee complaint. The complaint was based on the assertion that
16 employees were required to climb the metal shelving units to retrieve product from the higher
17 shelves. We agree that the testimonial evidence demonstrates that employees did climb the
18 shelving units as alleged by the Department and as visualized in Exhibit 12.

19 The dispute giving rise to our review is the meaning and/or importance associated with the
20 history of this practice as indicated by prior safety inspections conducted at the same workplace.
21 The Department of Labor and Industries conducted two earlier inspections at Amerisource Bergen
22 on March 13, 2006, (Exhibit 10) and on October 15, 2007, (Exhibit 11). Both inspections resulted in
23 no citations. Amerisource Bergen argued at hearing and in its Petition for Review that because no
24 citations were issued the Department had determined that there was no recognized hazard putting
25 employees at risk for serious injury or death. The industrial appeals judge rejected that argument
26 and so do we. However, the industrial appeals judge determined that these inspections provided
27 the foundation to increase the penalty determined by the Department.

28 We will address the employer's contention first.

29 The first inspection on March 13, 2006, resulted in no citation because of the representations
30 by the employer that it was taking steps to "remove all stock from top the shelves." There is an
31 attachment to this inspection report in the form of an e-mail from William Fenton dated February 27,
32 2006, that represents an intent to remove product from the top "shelf." We note the singular form of

1 the word shelf here. As we examine the photographic exhibits it does not appear to us that product
2 was stored on the top most shelf of the metal storage units. Clearly, there was product stored on
3 the remaining higher placed shelves.

4 The second inspection on October 15, 2007, resulted in a finding of no violations because
5 the inspector did not observe the alleged climbing of the shelving units.

6 Neither of these two inspections determined there was no safety hazard presented by
7 employees climbing the stock shelves. Implicit in the first inspection was the acknowledgment that
8 the top shelves/shelf would not be used further. The second inspection simply failed to document
9 or to verify the activity giving rise to the hazard. The employer cannot factually use these earlier
10 inspections as a shield to the present citation.

11 We note that Amerisource Bergen did not present any evidence and, consequently, was
12 unable to refute that the hazard existed and that employees actually did climb the metal stock
13 shelves to retrieve product. Amerisource Bergen, through cross examination of the witnesses
14 presented by the Department, established that it did not instruct employees to climb the shelving
15 units. Although the practice of climbing shelves to retrieve product may not be specifically
16 authorized by the employer, it is clear the practice occurred and that Amerisource Bergen was both
17 aware of the practice and made little effort to address the hazard. The Department's citation should
18 be affirmed.

19 Next we address the industrial appeals judge's decision to increase the penalties assessed
20 to Amerisource Bergen.

21 Here we depart from the result reached by the industrial appeals judge in the Proposed
22 Decision and Order. The industrial appeals judge believed that Amerisource Bergen somehow
23 "renege" on its representations to remove product from the top 'shelves' as a result of the first
24 inspection and, presumably, resumed the stocking of the top shelves after the first inspection. The
25 industrial appeals judge, on his own motion, and without an amended citation pursuant to CR15(b),
26 increased the penalty assessed by reducing Amerisource Bergen's good faith level from average
27 good faith to poor good faith. This raised the overall penalty from \$2,100 to \$2,700.

28 We do not view the limited record in front of us in so clear a light as did the industrial appeals
29 judge. Exhibit 10 does indicate that Amerisource Bergen was instituting "administrative controls" to
30 remove stock from "the top shelves." This is the inspector's summary of information related to him.
31 Part of this information was the e-mail we referred to above from William Fenton indicating that
32 product would be removed from the top shelf (singular). The record and exhibits are not clear what

1 was intended as a result of the inspection in March of 2006. For example, there is no indication of
2 what constitutes, "top shelves" (plural). Also, as we examine the photographic exhibits we can see
3 no stock or product on any of the actual top shelf surfaces. Exhibit 12 is instructive as it clearly
4 shows stock coming to the edge of every shelf except the top shelf. We are not confident that
5 Amerisource Bergen reneged on representations made in 2006. In fact, the company may have
6 done exactly what Mr. Fenton's e-mail said. In any event there is too little evidence to disturb the
7 Department's calculation of the penalty as assessed and we would affirm the Corrective Notice of
8 Redetermination No. 311850770.

9 We also question our authority to *sua sponte* increase penalties on appeal in the absence of
10 a properly noticed amendment to the Corrective Notice of Redetermination pursuant to CR 15(b).
11 The issue of increasing the penalties assessed to Amerisource Bergen was raised for the first time
12 in the Proposed Decision and Order. The Department of Labor and Industries did not request an
13 amendment to its Corrective Notice of Redetermination and did not argue for an increase in the
14 penalties at hearing. The matter of the Board's authority involving the review of citations and
15 penalties issued by the Department of Labor and Industries **on appeal** requires a review of the
16 statutory scheme providing for such review.

17 The Occupational Safety and Health Act (OSHA) of 1970, 29 USC § 651 et. seq., is
18 designed to promote safety in the workplace. The Federal act allows individual states and
19 territories to promulgate their own workplace safety plans as long as they are at least as effective
20 as Federal requirements. 29 USC § 667. The Washington state Legislature has elected to develop
21 and implement a state plan in RCW 49.17.010. The purpose of both the Federal and the state plan
22 is to create, maintain, and enhance the industrial and safety health program of the state as it affects
23 working conditions for the people of the state of Washington. The end purpose of both statutory
24 schemes is to preserve the health and safety of every worker.

25 While a state occupational safety and health scheme must be at least as rigorous as the
26 Federal system, the focus is on the maintenance of safety in the workplace. The enforcement
27 process culminates—in either setting—in a formal citation where violations are alleged against an
28 offending employer. The cited employer's recourse differs in important ways between the Federal
29 system and the state of Washington. 29 USC § 658 gives authority in the secretary of the
30 Occupational Safety and Health Administration to issue citations to employers not complying with
31 properly promulgated safety standards. The employer has fifteen days to formally "contest" the
32 citation which is then forwarded by the OSHA area director to the Occupational Safety Health

1 Review Commission (OSHRC). OSHRC is an independent agency created to hear and resolve
2 disputes of OSHA citations. 29 USC § 659. It is important to note that the OSHRC operates
3 independently of the Occupational Safety and Health Administration. In spite of being a separate
4 and independent agency OSHRC is given statutory authority by Congress to assess, "all civil
5 penalties provided in this section, giving due consideration to the appropriateness of the penalty
6 with respect to the size of the business of the employer being charged, the gravity of the violation,
7 the good faith of the employer, and the history of the previous violations." Title 29 USC 666 (j). In
8 short, the appellate review agency has authority, statutorily granted, to independently assess an
9 appropriate penalty based on the facts.

10 While our state industrial safety and health plan must be at least as rigorous as the Federal
11 plan, that requirement does not appear to extend to the appellate scheme. Clearly, Federal
12 legislation gives authority to determine penalties to both OSHA and OSHRC. In Washington
13 State's Industrial Safety and Health Act, the only authority to issue or determine penalties is given
14 to the director of the Department of Labor and Industries, or his or her authorized representatives.
15 RCW 49.17.180(7). Appeals from citations and penalties issued by the Washington State
16 Department of Labor and Industries are directed to the Board of Industrial Insurance Appeals.
17 RCW 49.17.140(3). The Legislature directs that the Board shall make disposition of the issue(s) on
18 appeal in accordance with the procedures relative to contested cases appealed to the Board of
19 Industrial Insurance Appeals. RCW 49.17.140(3). In other words, we are to apply the procedures
20 we would use in other types of appeals brought before this agency to the appeals brought from
21 citations issued by the Department of Labor and Industries, Division of Occupational Safety and
22 Health (DOSH).

23 The Board of Industrial Insurance Appeals, like OSHRC, is separate and independent from
24 the agency responsible for the primary enforcement of WISHA standards. However, unlike
25 OSHRC, the Board of Industrial Insurance Appeals has not been separately granted authority to
26 assess penalties. Thus, in the absence of a clear statutory mandate, it appears that the Board's
27 authority in regard to an assessment of penalties is appellate only in the sense that on appeal our
28 review would be limited to the correctness of the Department's citations and penalties. We would
29 not undertake a separate determination as to either characterization of the violations or the
30 penalties assessed **except as provided under our rules.**

31 WAC 263-12-125 provides that the Board will follow rules applicable to the superior courts
32 of our state. Civil Rule 15(b) provides that, "(W)hen issues not raised by the pleadings are tried by

1 express or implied consent of the parties, they shall be treated in all respects as if they had been
2 raised in the pleadings." The rule further provides if the objecting party can show prejudice as a
3 result of amending the pleadings the court may grant such continuance to enable the objecting
4 party to meet the evidence giving rise to the amended pleadings. In the case of *In Re Guy F.*
5 *Atkinson*, Dckt No. 04 W0274, (October 16, 2006), we stated that the, "Board has broad power to
6 amend a citation to conform to the evidence under CR 15(b). *In re Basin Paving Co. Inc.*, Dckt.
7 No. 04 W0069 (April 25, 2005). This rule allows us to amend the citation to conform to the evidence
8 during any stage in the proceedings, with or without a motion to amend." *Atkinson*, at 3. However,
9 we also stated in *Atkinson*, "We will amend the citation under CR 15(b) as long as the employer
10 had a fair opportunity to address the issues raised in the amended citation and was not prejudiced
11 in its defense. *In re ABB Power Generation Inc.*, BIIA Dec., 93 W469 (1994)." *Atkinson*, at 3.

12 In the present case, the industrial appeals judge did not invoke CR15(b) as a basis for
13 increasing the penalty. We decline to do so because we disagree with the factual analysis as
14 described above. But additionally we do not believe that the use of the earlier inspections as a
15 basis for calculating the penalties in the present Corrective Notice of Redetermination was
16 expressly or impliedly litigated by the parties. Exhibits 10 and 11 give us only a partial record of
17 those earlier events. Amerisource Bergen did not present any responsive evidence because it
18 argued that the earlier inspections constituted a bar of sorts to the present Corrective Notice of
19 Redetermination as the Department issued no citations as a result of those inspections. Because
20 no citations were issued we do not believe that Amerisource Bergen had notice that those
21 inspections could or would be used as a basis to reduce the good faith portion of the penalty
22 assessment resulting in an **increase** in the penalty assessed on appeal. No party argued that the
23 penalties should be increased. Amerisource Bergen did not have a fair opportunity to address the
24 issue raised by the industrial appeals judge in his Proposed Decision and Order.

25 We affirm the Corrective Notice of Redetermination No. 311850770 as issued by the
26 Department without modification.

27 FINDINGS OF FACT

- 28 1. On July 31, 2008, the Department issued Corrective Notice of
29 Redetermination No. 311850770, in which it alleged the following
30 violations: Item No. 1-1, a serious violation of WAC 296-800-11005,
31 with a penalty of \$2,100; and Item No. 2-1, a general violation of
32 WAC 296-800-13020(1) with no penalty. The total proposed penalty
was \$2,100.

1 On August 13, 2008, the Safety Division of the Department of Labor and
2 Industries received a Notice of Appeal filed on behalf of the employer.
3 On September 12, 2008, the Department extended the reassumption
4 period for an additional 15 working days. On October 3, 2008, the
5 Department issued a Notice of Reassumption of Jurisdiction. On
6 October 15, 2008, the Department issued a Corrective Notice of
7 Redetermination No. 311850770 in which all the allegations cited above
8 remained the same, except the abatement date in Item No. 1-1 was
9 amended from August 8, 2008 to October 30, 2008.
10 On October 27, 2008, the employer filed a Notice of Appeal with the
11 Board of Industrial Insurance Appeals. On October 28, 2008, the Board
12 issued a Notice of Filing of Appeal, and assigned the matter Docket
13 No. 08 W1080.

- 14 2. On or about April 10, 2008, Amerisource Bergen employees were
15 exposed to the hazard of having to climb metal storage shelves to
16 retrieve product that had been placed beyond their reach by the
17 employer. These shelves were not designed for climbing, but the
18 employer provided no other reasonable access to the remote storage
19 locations. The employer was aware of this hazard. There was a
20 substantial probability that employees would be injured and that if harm
21 resulted from the violation, it would be serious physical harm. This
22 workplace condition constituted a serious violation of WAC 296-800-
23 11005.
- 24 3. On July 29, 2009, the employer withdrew its appeal of Citation Item
25 No. 2-1, Corrective Notice of Redetermination No. 311850770, a general
26 violation of WAC 296-800-13020(1).
- 27 4. The severity of the hazard in Item 1-1 was 4 on a scale of 1 to 6, with 6
28 being the most severe.
- 29 5. The probability of an injury occurring due to the hazard in Item 1-1 was 3
30 on a scale of 1 to 6, with 6 being the most likely to occur.
- 31 6. Severity times probability equals gravity. The base penalty for a
32 violation with a gravity of 12 in Item 1-1 is \$3,000.
7. The employer's good faith rating is average resulting in no adjustment to
the base penalty in Item 1-1.
8. The employer has between 101 and 250 employees, causing a
20 percent reduction in the base penalty in Item 1-1, or a \$600
decrease.
9. The employer has a good history, causing a 10 percent reduction in the
base penalty in Item 1-1, or a \$300 decrease.
10. The proper assessed penalty for Item No. 1-1, Corrective Notice of
Redetermination No. 311850770 is \$2,100.

1 **CONCLUSIONS OF LAW**

- 2 1. The Board of Industrial Insurance Appeals has jurisdiction over the
3 parties to and the subject matter of this appeal.
4 2. On or about April 10, 2008, Amerisource Bergen committed a serious
5 violation of WAC 296-800-11005. A \$2,100 penalty was assessed for
6 Item 1-1, Corrective Notice of Redetermination No. 311850770.
7 3. Corrective Notice of Redetermination No. 311850770, is correct and is
8 affirmed.

9 Dated: February 1, 2010.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11 /s/ _____
12 THOMAS E. EGAN Chairperson

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

15 /s/ _____
16 LARRY DITTMAN Member