US Attachments, Inc.

SAFETY AND HEALTH

Burden of proof

In an appeal from a Corrective Notice of Redetermination alleging a failure to abate, whether the abatement date was unreasonable is an affirmative defense. The burden of proof is on the employer to establish that the abatement date was unreasonable. ***….In re US Attachments, Inc*., BIIA Dec., 09 W1101 (2010)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: US ATTACHMENTS INC.	**)**	**DOCKET NO. 09 W1101**
	)	
CITATION & NOTICE NO. 313568792	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, US Attachments, Inc., by
Dale Art Nason, Sales and Operations Manager

Department of Labor and Industries, by
The Office of the Attorney General, per
Bourtai Hargrove, Assistant

The employer, US Attachments, Inc., filed an appeal with the Board of Industrial Insurance Appeals on November 17, 2009, from Corrective Notice of Redetermination No. 313568792 of the Department of Labor and Industries dated November 5, 2009. In this order, the Department alleged a violation of WAC 296-800-17005 for failure to abate violation Item 1-1 of Citation and Notice No. 313044463, issued May 5, 2009, where the employer is alleged to have failed to have a written chemical hazard communication program for employees who are exposed to welding fumes. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on July 26, 2010, in which the industrial appeals judge affirmed the Department order dated November 5, 2009. We granted review in order to: (1) Admit two exhibits that were earlier rejected during the hearing process; and (2) discuss the contested issues of this appeal in light of our significant decision, *In re Olympic Glass Co.*, BIIA Dec. 95 W445 (1996) and the newly admitted exhibits. Like our industrial appeals judge, we conclude that the employer failed to abate the lack of a written chemical hazard communication program cited within Citation and Notice No. 313044463, issued May 5, 2009; and that the Department correctly calculated the penalty to be assessed for the failure to abate that earlier violation.

Preliminary Evidentiary Considerations

We have reviewed the evidentiary rulings in the record of proceedings and affirm them except that we admit into evidence Exhibit Nos. 1 and 7. We specifically conclude that the rejection of other exhibits offered by the parties was correct.

Exhibit No. 1 is a written "Training Profile" of Zhengkun Liu, an industrial hygienist employed by the Department. Mr. Liu conducted both the initial inspection of the employer's premises that resulted in the issuance of a citation and notice (Exhibit No. 2), as well as the inspection that resulted in the issuance of this failure-to-abate citation and notice. When Exhibit No. 1 was offered by the Department during the June 14, 2010 hearing, the employer offered no objection to its admission. However, later in that proceeding our industrial appeals judge gave the employer another chance to object. The employer's hearsay objection was then sustained. Following the rejection of Exhibit No. 1, the Department's attorney asked that she be allowed to lay a foundation for its admission. She was not permitted to do so. We believe she should have been permitted to lay such a foundation. We note that the document was an integral part of the Department's foundation to show that Mr. Liu had sufficient training and expertise to be considered an expert witness. However, it is not necessary for us to remand this appeal to permit the Department to present this evidence because the record already contained sufficient foundation for the admission of Exhibit No. 1. We admit this exhibit and consider it in rendering our decision.

Exhibit No. 7 was one of four documents offered by the employer that were rejected as impermissible hearsay. The firm's sole witness, Mr. Dale A. Nason, its sales and operations manager at the time of both inspections, was the individual who prepared most of that document. The exhibit consists of a letter sent by Mr. Nason to an employee of the Department that indicates that he is sending with the letter two sets of documents that the Department requested he provide. The remainder of the exhibit contains the second of the two sets of documents referenced in the letter. They are four pages of lined yellow paper with handwritten material on the front of each page. There is also a bright pink "sticky-note" attached to the first of the four pages that contains some handwriting by a different person.

Mr. Nason testified that this four-page document is a draft of the employer's chemical hazard communication program, which he prepared in response to the Department's initial citation regarding the lack of such a program. He testified that the writing on the pink sticky-note was written by his secretary, who is no longer employed with the company.

Exhibit No. 7 is not hearsay. The letter that is its first page is not offered for the truth of the matter it asserts, but is merely included as part of the exhibit to provide the context for the rest of the exhibit. Furthermore, even if it were hearsay, it (and the rest of the exhibit) would be admissible as an exception to hearsay pursuant to the Uniform Business Records as Evidence Act. *See*

RCW 5.45.020. The handwritten document that comprises the rest of the exhibit is not hearsay. The existence of this document is central to the issues under appeal. Its existence has legal significance independent of its contents and is not hearsay. The safety standard at issue, WAC 296-800-17005, requires that a written chemical hazard communication program exist. The author of the document testified as to its creation, preparation, and location when found. The Department was able to cross-examine him about its existence, preparation, and contents. The original writing is the "best evidence" of its contents and meets the requirements for the admissibility in ER 1001, and those that follow. We believe that rejection of the document was prejudicial to the employer and under the circumstances, its rejection constitutes a material error. Therefore, we admit this exhibit and consider it in rendering our decision below.

Failure to Abate and the *Olympic Glass Company* Elements of Proof

RCW 49.17.120(1) states:

> If upon inspection or investigation the director or his or her authorized representative believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard promulgated by rule adopted by the director, or the conditions of any order granting a variance pursuant to this chapter, the director shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the statute, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

On May 5, 2009, the Department issued a citation and notice (Exhibit No. 2) that cited the firm for several general violations of safety standards promulgated under the authority of WISHA, one of which was a general violation of WAC 296-800-17005. This safety standard requires an employer to "develop, implement, maintain and make available a written Chemical Hazard Communication Program" for employees exposed to welding fumes while fabricating forklift attachment parts. The regulation lists a variety of matters that must be included within the plan. The abatement date for this violation under that citation and notice was June 7, 2009. The firm did not appeal the citation and it became final.

As part of the inspection process, Mr. Liu provided a copy of a sample chemical hazard communication program to Mr. Nason. Later that month, Mr. Nason wrote in longhand some statements and other material to be included in the chemical hazard communication program and gave it to his secretary to type. Mr. Nason testified that the yellow sheets of paper within

Exhibit No. 7 were what he gave to his secretary. The document contains a number of notes in different handwriting that Mr. Nason testified belonged to his secretary, including one on a pink "sticky note" on the first page which was dated May 20, 2009, and stated, "Ask Art (Mr. Nason) about this." On June 1, 2009, the firm laid off approximately half its work force including that secretary, who had not begun to type the program. After the layoff, Mr. Nason took over many of the secretary's typing duties as well as other duties. The draft chemical hazard communication program remained in his former secretary's inbox in the employer's office.

After June 7, 2009, the abatement date for the violation in question, Mr. Liu noticed that the firm had not confirmed the abatement of this violation by sending a copy of the written program to the Department. He contacted the firm on more than one occasion to request that it be sent, but no copy was forthcoming. On July 30, 2009, Mr. Liu conducted the second inspection, which resulted in the issuance of the failure-to-abate citation. Both Mr. Liu and Mr. Nason testified that the latter explained the problem caused by his secretary's layoff. Mr. Nason stated that he found the notes that are part of Exhibit No. 7 and showed them to Mr. Liu, who was not interested in making a copy of them. Mr. Liu testified that he saw a sticky note containing directions to the secretary regarding the preparation of a written program, but that the sticky note was yellow, not pink. Mr. Liu denied ever seeing the material that was a part of Exhibit No. 7. Mr. Liu testified that while the firm had copies of material data safety sheets (MSDS) in a binder, it did not have a written chemical hazard communication program.

As in all WISHA appeals, the burden of proving a prima facie case of all elements of a violation rests on the Department. In *Olympic Glass Company.*, the Board adopted the elements of proof of a failure-to-abate citation that have been applied by the federal courts. The elements are: (1) The original citation must have become final; (2) The condition on reinspection must be identical; and (3) The condition on reinspection must be in violation of WISHA.

The first element is proven by Exhibit No. 2 and the testimony of Mr. Liu, without rebuttal by the firm.

In determining whether the Department has created a prima facie case for the second element, the condition on reinspection at issue is the requirement for the firm to have a written chemical hazard communication program available to its workers as required by WAC 296-800-17005. The second inspection was at the same worksite as the first. The employer's business was of the same kind during each inspection. Based on the testimony of

Mr. Nason, it is apparent that the firm's ownership had changed in 2008, but that was a year before both inspections. The firm did not present any evidence of a change in the conditions of its business that had any bearing on the nature of its business or the type of chemicals to which its workers may be exposed. The layoff of a large percentage of the employer's workforce is not a material change unless it is accompanied by the cessation of exposure to hazardous chemicals. Thus, we conclude that the great weight of the evidence supports a conclusion that no change in any condition on reinspection had occurred between the two inspections.

As for the third element, the question is whether the existence of the handwritten draft of a chemical hazard communication program, contained within Exhibit No. 7 in the form and location described by Mr. Nason, constituted a condition on reinspection, that is, a violation of the same safety standard as before. Obviously, the presence of a written plan that incorporates all of the necessary matters and its availability to workers would prevent the Department from proving this element. WAC 296-800-17005 does not require that the written program be given to the Department in order for the employer to be in compliance, although the note at the end of the standard seems to indicate that failure to do so when requested could constitute a violation of a different standard in Ch. 296-802 WAC.

The firm and the Department disagree over whether the written material in Exhibit No. 7 actually existed as of July 30, 2009, and if it did, whether it was sufficient to meet the standard. We conclude that the handwritten material within Exhibit No. 7 did exist as of the date of the second inspection and had been prepared in the manner described by Mr. Nason. Nonetheless, the existence of this written material did not fulfill the requirements of WAC 296-800-17005 for two reasons: it was not a complete plan and it was not available to the employees.

As to the completeness of the plan, Mr. Nason himself admitted it was not complete. With some difficulty, we were able to decipher most of the handwritten material in Exhibit No. 7. In doing so, we did not observe that it addressed all of the required elements of a chemical hazard communication program. While the safety standard does not mention legibility of the plan, common sense would dictate that the plan be in a legible form. We read that requirement into the standard.

The **availability** of the written program is stressed by the standard. **WAC 296-800-17005 states in three separate places that the plan must be available to employees.** Even if the written program had been complete and legible, it is clear that it was not available to employees based on the testimony of Mr. Nason as to where he found it. This lack of availability of the plan alone is sufficient to prove a failure to abate the violation in question.

The Proposed Decision and Order discussed a fourth issue, whether the abatement date given to the firm was reasonable. This matter is not listed in *Olympic Glass Company* as an element of proof. We conclude instead that failure to provide a reasonable abatement date is an affirmative defense similar to that of infeasibility. Because it is an affirmative defense, the burden rested on the employer to prove its applicability. The employer complains that the disruption caused by the mass layoff in the middle of the abatement period prevented it from complying within the abatement period. The evidence could be interpreted as an attempt by the employer to raise and prove this affirmative defense.

We conclude that the 60-day abatement period provided to the employer was reasonable in this case. Mr. Nason described the number of duties that he took over after the layoff. Clearly, he had many more duties and much greater demands on his time afterward. However, the crux of this argument essentially is that these duties were more important than addressing identified safety concerns. We believe that it is more important for Mr. Nason and his company to ensure its workers' safety than to dump the company garbage. If a hardship was created, the firm could have contacted the Department to explain the situation and attempt to obtain an extension. Mr. Liu's contact with the employer before beginning the second inspection would have been an ideal time for Mr. Nason to explain the problem and seek an extension of time to abate the violation.

Appropriateness of the Penalty

The firm also requests a reduction in the $500 penalty assessed by the Department and affirmed by the Proposed Decision and Order. *Olympic Glass* discussed the requirements and appropriateness of a penalty assessed in a failure to abate a WISHA citation. In that significant decision, we noted that a failure-to-abate penalty must be set in reference to the same statutory criteria that the Department must review when setting any penalty. RCW 49.17.180(7). Citing an OSHC decision, we stated that a penalty assessed for the failure to abate a violation should bear a reasonable relationship to the amount of the penalty assessed for that violation and the length of time the employer remained noncompliant. In *Olympic Glass Company*, as in this case, the underlying violation was a "general" violation, one unlikely to lead to death or serious physical injury. As such, a lower penalty is warranted. In reviewing the testimony of Mr. Liu, it is clear the Department considered all of the applicable statutory factors when it arrived at the $500.00 penalty, which is **the lowest possible penalty** for a failure-to-abate violation. WAC 296-900-14015. According to WAC 296-900-14020, the base penalty amount for a failure-to-abate citation must be increased by a multiple of between five and ten, depending on the employer's effort to comply.

Thus, the $500 penalty assessed by the Department is the lowest possible amount that is consistent with these regulations. As such, there is no basis in the record for the penalty to be lowered further, and the penalty amount should be upheld by the Board.

The employer correctly notes that the behavior of the employer in *Olympic Glass Company* was abysmal. That company ignored the violation and otherwise exhibited bad faith, including its failure to cooperate and the hostility it directed towards the Department's safety inspector. We even characterized that employer's conduct in failing to abate the violation as willful. Notwithstanding those circumstances, none of which are present here, we lowered that employer's failure to abate penalty from $1,000 to $500. The firm asks: "Is it fair for the penalties to be the same?" While we understand the logic of the employer's position on this point, we note again that the safety standards regarding penalties referred to above do not permit us any latitude to lower US Attachment Inc.'s penalty any further. The employer's argument is one that must be addressed to the Department itself or to the Legislature.

FINDINGS OF FACT

1. On July 30, 2009, a compliance inspector from the Department of Labor and Industries inspected a worksite of US Attachments, Inc. (US Attachments), at 211 Hazel Street, Kelso, Washington. From that inspection, Citation and Notice No. 313568792 was issued to the employer on August 13, 2009, communicated to US Attachments on August 18, 2009, and alleging the employer failed to abate violations of WAC 296-800-17005 (Item 1-1) and WAC 296-800-27020 (Item 1-2). The failure-to-abate allegations arose from Citation and Notice No. 313044463, which had been issued to the employer on May 5, 2009.

   On September 3, 2009, US Attachments filed a Notice of Appeal to Citation and Notice No. 313568792 with the Department's Safety Division. On November 5, 2009, the Department issued Corrective Notice of Redetermination No. 313568792; the employer received it on November 10, 2009; Corrective Notice of Redetermination No. 313568792 affirmed Item 1-1, a general violation having a $500 penalty, and it vacated Item 1-2. On November 17, 2009, US Attachments filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On November 17, 2009, the Board issued a Notice of Filing of Appeal under Docket No. 09 W1101.

2. On April 6, 2009, a compliance inspector from the Department of Labor and Industries inspected a worksite of US Attachments, Inc. (US Attachments), at 211 Hazel Street, Kelso, Washington. Citation and Notice No. 313044463 was issued as a result for several violations, including a general violation of WAC 296-800-17005 for not having a written chemical hazard communication program in place for employees

exposed to welding fumes. Citation and Notice No. 313044463 directed the employer to abate this violation by June 7, 2009.

3. US Attachments did not protest or appeal Citation and Notice No. 313044463.

4. As of June 7, 2009, US Attachments had not abated the violation of WAC 296-800-17005, as it had not made available to its employees a completed written chemical hazard communication program.

5. The proper penalty for failure to abate a general violation of WAC 296-800-17005 is $500, considering the severity of an injury was low (rated 2 on a scale of 1 to 6); the probability of an injury was low (rated 1 on a scale of 1 to 6); yielding a gravity rating 5; deductions from the base penalty were made because the employer had a good history and was small in size (17 employees), which resulted in an adjusted base penalty of $100; the adjusted base penalty was multiplied by 5 because the employer had failed to abate the violation cited in Citation and Notice No. 313044463.

CONCLUSIONS OF LAW

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

2 Citation and Notice No. 313044463 became a final order, within the meaning of RCW 49.17.140.

3. As of June 7, 2009, US Attachments failed to abate the violation of WAC 296-800-17005, cited within Citation and Notice No. 313044463, as required by RCW 49.17.120.

4. The June 7, 2009 abatement date ordered by the Department in Citation and Notice No. 313044463 was a reasonable amount of time, as contemplated by RCW 49.17.120.

5. The $500 penalty the Department assessed US Attachments for its failure to abate the violation of WAC 296-800-17005 is appropriate, within the meaning of RCW 49.17.180.

6. Corrective Notice of Redetermination No. 313568792, dated November 5, 2009, is correct, and is affirmed.

DATED: October 12, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
LARRY DITTMAN Member