

Apex Roof Systems

SAFETY AND HEALTH

Burden of proof

The Department has the burden of proof that the penalty calculation is correct.*In re Apex Roof Systems*, BIIA Dec., 13 W0200 (2015)

Penalties

The Department has the burden of proof that the penalty calculation is correct.*In re Apex Roof Systems*, BIIA Dec., 13 W0200 (2015)

Standard of review

The Board's review of the Department's decision in a WISHA appeal is based on a preponderance of the evidence.*In re Apex Roof Systems*, BIIA Dec., 13 W0200 (2015)

Scroll down for order.

1 In its Petition for Review, the Department correctly states that the industrial appeals judge
2 should not have reduced the penalty. But the Department incorrectly states that the employer has
3 a burden to present evidence demonstrating that the Department arbitrarily calculated the penalty.
4 It is the Department's burden to show the penalty was appropriate after consideration of the factors
5 in RCW 49.17.180(7).¹
6
7

8 The Department incorrectly argues that the Washington Court of Appeals' *Danzer*² decision
9 states that the Board must apply the abuse of discretion standard when it reviews WISHA penalties
10 assessed by the Department. *Danzer* does not support the Department's argument. *Danzer* states
11 that under RCW 49.17.150(1), substantial evidence is the standard of review courts must apply
12 when reviewing Board decisions regarding WISHA issues.³ This standard of review does not apply
13 to the Board's review of the Department's decisions. Under RCW 49.17.140(3), our review of the
14 Department's WISHA citations and notices are to be handled as appeals in industrial insurance
15 cases. The burden of proof in industrial insurance cases is a preponderance of the evidence.
16 Therefore the burden of proof for the employer is not an abuse of discretion, but rather the standard
17 is whether a preponderance of the evidence supports the citation and penalty. We must determine
18 whether there is sufficient evidence in the record to affirm the Department's citation and resulting
19 penalty.⁴
20
21

22 **Penalty Calculation – Probability Rating**

23 In calculating the penalty, the Department gave "due consideration" to the factors in
24 RCW 49.17.180(7): the number of affected employees, the gravity of the violation, the size of
25 Apex's business, the good faith of Apex, and the history of Apex's previous violations.⁵
26
27

28 The evidence demonstrates the Department correctly calculated the penalty with a
29 probability rating of 3. The rule regarding probability states that:
30
31

32 A probability rate is a number that describes the likelihood of an injury, illness,
33 or disease occurring, ranging from 1 (lowest) to 6 (highest).
34

35 – When determining probability, WISHA considers a variety of factors,
36 depending on the situation, such as:
37

- 38 ■ Frequency and amount of exposure.
39
40
41
42

43 ¹ *In re Richard A. Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996); *In re Cam Construction*, BIIA Dec., 90 W060
44 (1992).

45 ² *Danzer v. Department of Labor & Indus.*, 104 Wn. App. 307 (2000), review denied, 143 Wn.2d 1020 (2001).

46 ³ *Danzer* at 319.

47 ⁴ *Castle* at 2-3.

⁵ RCW 49.17.180(7); *Danzer* at 320; *Castle* at 2-6.

- 1 ■ Number of employees exposed.
- 2 ■ Instances, or number of times the hazard is identified in the
- 3 workplace.
- 4
- 5 ■ How close an employee is to the hazard, that is, the proximity of
- 6 the employee to the hazard.
- 7
- 8 ■ Weather and other working conditions.
- 9 ■ Employee skill level and training.
- 10 ■ Employee awareness of the hazard.
- 11 ■ The pace, speed, and nature of the task or work.
- 12 ■ Use of personal protective equipment.
- 13 ■ Other mitigating or contributing circumstances.⁶
- 14
- 15

16 The industrial appeals judge concluded that the Department failed to present sufficient
17 evidence to support a probability rating of 3. She stated that the Department failed to present
18 evidence regarding the weather conditions or sufficient information regarding the workers' positions
19 on the roof. We disagree with this conclusion. The admitted photographs show the weather
20 conditions and workers close to the roof edge. One photograph shows a worker with his back
21 facing the roof and another photograph shows a worker with his side facing the roof edge.

22 The industrial appeals judge also determined that the Department should have presented the
23 workers as witnesses or asked the inspector, Mr. Olson, what the workers told him regarding
24 various factors such as their skill level; how often they worked close to the roof edge; how much
25 time they worked while on their knees; and whether Apex's owner, Mr. DeAvilla, actually functioned
26 as a safety monitor. However, the evidence demonstrates that the roof was too large to qualify for
27 a monitor-only fall protection-system. Even if the roof was not too large, Apex did not present
28 evidence that Mr. DeAvilla wore the requisite monitor's clothing or limited his activity to monitoring.⁷
29 In addition, the photographs demonstrate that he was not doing an adequate job keeping the
30 workers out of the zone of danger, close to the roof edge. Mr. Olson testified that he saw workers
31 several feet from the roof edge. The industrial appeals judge did not find Mr. Olson's testimony
32 credible, and the photographs are inadequate regarding the workers' proximity to the roof edge.
33 We find Mr. Olson's testimony credible because it is consistent with the photographs showing
34 workers less than six feet from the edge.
35
36
37
38
39
40
41
42
43
44

45
46 ⁶ WAC 296-900-14010.

47 ⁷ WAC 296-155-24611 through WAC 296-155- 24623.

1 We agree with the industrial appeals judge it would have been helpful to know the
2 experience levels of the three workers and how often and in what manner they worked close to the
3 roof edge. It is probably less likely for someone to accidentally back off the roof on their hands and
4 knees rather than feet, but there still is a fall risk. Only one of the six photographs shows a worker
5 kneeling. Several photographs show workers standing close to the roof edge. Even though it
6 would have been helpful to know more about the circumstances, a preponderance of the evidence
7 demonstrates that the Department reasonably rated the probability, the likelihood of a fall from the
8 roof at level 3 on the 1-6 probability scale. The evidence addresses several factors in the rule
9 regarding probability of injury such as weather; number of employees exposed; and their proximity
10 and access to the hazard. The rule also states that other mitigating or contributing factor should be
11 considered. Here, contributing factors include Apex's failure to develop and document a site safety
12 plan, and failure to document a walk around safety inspection and a worker safety meeting.

13 We agree with the Department's use of a probability rating of 3 to calculate the \$12,000 base
14 penalty. The Department correctly multiplied the probability rating of 3 with a severity rating of 6 to
15 calculate the gravity. (Gravity = severity x probability).⁸ The Department used a severity rating of 6
16 because a 25-foot fall from the roof onto concrete would probably result in death or permanent
17 severe disability.⁹ The Department correctly adjusted the base penalty.¹⁰ The base penalty was
18 first reduced 60 percent due to Apex's small work force (60 percent of \$3,000 = \$1,800).¹¹ The
19 base penalty was not adjusted with a good faith rating because Apex had an average good faith
20 (effort) rating.¹² The Department correctly multiplied the adjusted base penalty by ten because the
21 serious violation was willful and Apex had a prior fall protection violation. (\$1,800 x 10 = \$18,000).¹³
22 Therefore, the Department correctly assessed an \$18,000 penalty. The Corrective Notice should
23 be affirmed.

24 **FINDINGS OF FACT**

- 25 1. On April 10, 2014, an industrial appeals judge certified that the parties
26 agreed to include the amended Jurisdictional History in the Board record
27 solely for jurisdictional purposes.

28
29
30
31
32
33
34
35
36
37
38
39
40
41
42 ⁸ There is a gravity chart at the end of WAC 296-900-14010 with gravity ratings from 1-36 and accompanying penalties
43 from \$100 to \$7,000.

44 ⁹ WAC 296-900-14010.

45 ¹⁰ The base penalty is adjusted up or down by factors set forth in WAC 296-900-14015 and WAC 296-900-140.

46 ¹¹ WAC 296-900-14015.

47 ¹² WAC 296-900-14015 Table 5.

¹³ WAC 296-900-14015; WAC 296-900-14020.

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
2. On March 27, 2013, Ryan Olson, a safety and compliance officer with the Department of Labor and Industries was driving to a worksite in Auburn, Washington when he spotted individuals working on a flat roof, at least 24 feet high, without fall protection. The workers were placing a single ply membrane to a roof surface on a building at 116 Clay St. N.W., Auburn, Washington. The workers included three employees of Apex Roof System (Apex) and the owner of Apex. Mr. Olson inspected the worksite.
3. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(1)(a) when it permitted three employees to work on the building roof with no form of fall protection. Apex did not insure fall protection was provided, installed, or implemented.
4. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(2)(a) when it failed to have a fall protection plan at the jobsite as required by WAC 296-155-24611(2)(a).
5. The severity of the hazard in violation of WAC 296-155-24611(1)(a) was 6 on a scale of 1 to 6, with 6 being the most severe. Apex employees were exposed to a hazard of falling 25 feet from the roof onto concrete, and sustaining serious physical harm including the possibility of fractures, paralysis, or death.
6. The probability of an injury occurring due to the hazard in violation of WAC 296-155-24611(1)(a) was 3 on a scale of 1 to 6, with 6 being the most likely to occur. Three Apex employees worked on the roof with no fall protection close to the edge of the roof.
7. The base penalty for a violation of WAC 296-155-24611(1)(a) is \$4,500. The base penalty is determined by multiplying the severity rating with the probability rating.
8. On March 27, 2013, Apex had between 1 and 25 employees resulting in a 60 percent reduction of the base penalty.
9. Because Apex had been cited for a fall protection violation in 2010, Apex had an average good faith rating that resulted in no adjustment to the base penalty.
10. Because the violation of WAC 296-155-24611(1)(a) was a willful violation and Apex had a prior fall violation, the adjusted base penalty is multiplied by ten. The Department correctly calculated an \$18,000 penalty for the violation of WAC 296-155-24611(1)(a).
11. On March 27, 2013, Apex committed a general violation of WAC 296-155-110(6)(d) when it did not ensure that the crew leader documented who attended the safety meeting prior to the commencement of the job at 116 Clay St. N.W., Auburn.

