C & R Shingle

PENALTIES (RCW 51.48.017)

Failure to secure payment of compensation (RCW 51.48.010)

The decision of the Department to assess a penalty for failure to secure the payment of compensation is not discretionary and the Board may review such decision *de novo* based on a preponderance of the evidence standard. In determining the amount of a penalty under RCW 51.48.010 the Department must consider factors including (1) whether the employer intended to avoid the burdens of the Act, (2) the amount of taxes incurred prior to registering with the Department, and (3) whether the employer had a good faith basis for believing it was not subject to the Act. **….*In re Twin Rivers Inn*, BIIA Dec., 89 0684 (1990)**; ***In re C & R Shingle*, BIIA Dec., 88 2823 (1990)**

SCOPE OF REVIEW

Penalty assessments

STANDARD OF REVIEW

Penalty assessments

The Department's decision to assess a penalty under RCW 51.48.010 for failure to secure the payment of compensation is not discretionary. Board review of the Department's penalty assessment is de novo and based on a preponderance of the evidence, as opposed to an abuse of discretion, standard of review. **….*In re Twin Rivers Inn*, BIIA Dec., 89 0684 (1990); *In re C & R Shingle*, BIIA Dec., 88 2823 (1990)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: C & R SHINGLE	**)**	**DOCKET NO. 88 2823**
	)	
FIRM NO. 542,517-00	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Charles E. Loushin et ux dba
C & R Shingle, by
Charles A. Schaaf

Department of Labor and Industries, by
The Office of the Attorney General, per
William R. Bayness, Legal Examiner, and
Kathryn I. Eims and Thomas C. Anderson, Assistants

This is an appeal filed by C & R Shingle on September 27, 1988 from an Order and Notice Reconsidering Notice and Order of Assessment issued by the Department on September 15, 1988, which affirmed Notice and Order of Assessment of Industrial Insurance Taxes No. 62177 issued on June 29, 1988, which determined that taxes were due and owing from the employer to the state fund that accrued between January 1, 1986 through December 31, 1987, in the amount of $1,496.79, and demanded payment of that sum. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on October 17, 1989, in which the order dated September 15, 1988 was reversed and the matter remanded to the Department with directions to delete taxes assessed in regard to bolt cutters, Dan Christensen, Gene Nieshe, and the children of Roberta and Charles Loushin.

The sole issue raised by the Employer's Petition for Review is whether the $500.00 penalty assessed pursuant to RCW 51.48.010 and WAC 296-17-470 should be reconsidered on remand to the Department.

Our industrial appeals judge concluded that the assessment of a penalty pursuant to RCW 51.48.010 is a discretionary decision. Analyzing the penalty decision on that basis, she concluded that a "standard" penalty of $500.00 was not arbitrary and capricious, and therefore affirmed the assessment of the penalty even though her proposed decision significantly reduces the amount of industrial insurance taxes owing. As we have previously stated, in instances under the Industrial Insurance Act where the legislature has intended to commit a decision to the discretion of the

Department, it has explicitly so stated. In re Gary J. Manley, BIIA Dec., 66,115 (1986). Thus, with respect to certain statutory provisions, such as RCW 51.24.060(3) ("sole discretion"), RCW 51.32.095 ("sole discretion"), RCW 51.36.010 ("solely in his or her discretion"), RCW 51.48.100(2) ("at his or her discretion"), and RCW 51.32.250 ("in his or her discretion"), the legislature has clearly enunciated its intent that a particular decision be committed to the discretion of the Department, the Director, or the Director's designee. In such cases, our scope of review is limited to determining whether the exercise of such discretionary authority constitutes an abuse of discretion. In re Johnny R. Smotherman, BIIA Dec., 87 0646 (1989); In re Armando Flores, Dckt. Nos. 87 3913 and 88 0109 (July 6, 1989); In re Frank C. Madrid, BIIA Dec., 86,0224-A (1987).

Because of the limited scope of review and the additional burden imposed upon a party seeking relief in appeals from discretionary decisions, we are unwilling to conclude that a decision is discretionary absent specific statutory language to that effect. In re Susan K. Irmer, Dckt. No. 89 0492 (March 13, 1990). Although RCW 51.48.010 provides that an employer who fails to secure payment of compensation may be liable for a maximum penalty of $500.00 or double the amount of premiums incurred, whichever is greater, we do not construe that language as indicating a legislative intent that the penalty decision be committed to the Department's discretion. In our view, the use of the word "may" in RCW 51.48.010 means no more than that the penalty is not mandatory. We therefore would hold that in an appeal from a penalty assessed by the Department pursuant to RCW 51.48.010, the employer is entitled to a de novo review of the penalty assessment. The standard of review in such a case is based on the preponderance of the evidence, and not whether the Department has abused its discretion.

The Department employee who testified in this case stated that the Department has a standard penalty assessment in cases such as this. Yet, it is clear that the statute in question permits the Department to determine both whether any penalty is to be assessed, and the amount of any penalty assessed up to the stated maximum. Quite obviously, the facts of each case must be examined in determining, first, whether a penalty is to be assessed, and second, the amount of the penalty. At a minimum, the Department should consider factors such as (1) whether the employer intended to avoid the burdens of the Industrial Insurance Act, (2) the amount of taxes incurred prior to the employer's registering with the Department, and (3) whether the employer had a good faith basis for believing that it was not subject to the provisions of the Industrial Insurance Act. The Department, of course, may

develop other criteria for evaluating when and in what amount a penalty should be assessed under RCW 51.48.010.

During the course of the proceedings before this Board, the Department conceded that it had mistakenly assessed taxes for certain individuals who were neither employees nor workers under the Act. Further, we agree with the determination by our industrial appeals judge that it was error for the Department to assess taxes with regard to the owners' children. In any event, the Department has not petitioned for review of that determination. Thus, the amount of taxes incurred by the employer prior to registering with the Department -- one of the factors to be considered in determining whether and to what extent a penalty is to be imposed -- is significantly less than the Department asserted when it assessed the penalty. Therefore, after recomputing the amount of taxes due from the employer for the relevant period, the Department must determine whether and to what extent a penalty is to be assessed, pursuant to RCW 51.48.010.

After consideration of the Proposed Decision and Order, the Employer's Petition for Review filed thereto, and a careful review of the entire record before us, we hereby enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 29, 1988, the Department of Labor and Industries issued Notice and Order of Assessment of Industrial Insurance Taxes No. 62177, which determined that taxes were due and owing from the employer to the state fund that accrued between January 1, 1986 through December 31, 1987 in the amount of $1,496.79 and demanded payment of that sum. On July 19, 1988, the Department received a protest and request for reconsideration of its Notice and Order of Assessment. On July 26, 1988, the Department issued an order holding its Notice and Order of Assessment in abeyance. On September 15, 1988, the Department issued an order and notice reconsidering Notice and Order of Assessment, which affirmed Notice and Order of Assessment of Industrial Insurance Taxes No. 62177 issued on June 29, 1988.

   On September 27, 1988, the employer filed a notice of appeal with the Board of Industrial Insurance Appeals from the Department Order and Notice dated September 15, 1988; Docket No. 88 2823 was assigned. On October 12, 1988, the Board issued an order granting the appeal and directing that proceedings be held on the issues raised by the notice of appeal.

2. During the period from January 1, 1986 through December 31, 1987, C & R Shingle was owned by Roberta and Charles Loushin, employing truck loaders and a pallet maker. During the period from January 1, 1986

through December 31, 1987, the employer did not have contracts of employment with bolt cutters, Dan Christensen and Gene Nieshe, or with the children of Roberta and Charles Loushin.

3. During the period from January 1, 1986 through December 31, 1987, the children of Roberta and Charles Loushin who worked on the premises of C & R Shingle were less than 15 years of age, required their parents' care and support, and did not have control over their wages.

4. From January 1, 1986 through December 31, 1987, the truck loaders and the pallet maker who worked for C & R Shingle should have been classified under WAC 296-17-53502, classification 1005. The employer kept no record of the hours worked by any worker. The Department correctly computed their hours of work.

5. During the period from January 1, 1986 through December 31, 1987, the employer, C & R Shingle, engaged in this state in work covered by the provisions of Title 51 RCW without securing payment of compensation for the workers described in Finding of Fact No. 4.

6. The Department assessed $1,496.79 in taxes due and owing to the state fund from the employer for the period of January 1, 1986 through December 31, 1987. $500.00 of the $1,496.79 was a penalty assessment pursuant to RCW 51.48.010 for failure to secure payment of compensation for workers covered under Title 51 RCW. This amount was assessed without consideration of the particular facts of this case.

CONCLUSIONS OF LAW

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

2. During the period from January 1, 1986 through December 31, 1987, bolt cutters, Dan Christensen and Gene Nieshe, and the children of Roberta and Charles Loushin were not employees or workers under the Industrial Insurance Act.

3. RCW 51.48.010 permits the assessment of a penalty ranging from zero to a maximum of either $500.00 or "a sum double the amount of premiums incurred prior to securing payment of compensation under this title, whichever is greater." In deciding whether a penalty is appropriate, the Department must consider the facts of each particular case, including, but not limited to, the following factors: (1) whether the employer intended to avoid the burdens of the Industrial Insurance Act, (2) the amount of taxes incurred prior to the employer's registering with the Department, and (3) whether the employer had a good faith basis for believing that it was not subject to the provisions of the Industrial Insurance Act.

4. The Order and Notice issued by the Department on September 15, 1988, which affirmed Notice and Order of Assessment of Industrial Insurance Taxes No. 62177 issued on June 29, 1988 which determined that taxes

were due and owing from the employer to the state fund that accrued between January 1, 1986 through December 31, 1987 in the amount of $1,496.79 and demanded payment of that sum, is incorrect and should be reversed and remanded to the Department with direction to recompute the amount of industrial insurance taxes due from the employer, C & R Shingle, for the period from January 1, 1986 through December 31, 1987, after deleting taxes assessed in regard to bolt cutters, Dan Christensen and Gene Nieshe, and the children of Roberta and Charles Loushin, and to determine after evaluating the facts of the case in light of this decision, to what extent a penalty should be assessed pursuant to RCW 51.48.010.

It is so ORDERED.

Dated this 10th day of April, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member