

Irmer, Susan

PENALTIES (RCW 51.48.017)

Failure to submit medical reports

In determining the amount of the penalty to be assessed for violating the provisions of WAC 296-15-070(3) the factors that should be considered include, at a minimum, (1) whether the employer intended to mislead the Department by withholding records, (2) the content and significance of the records withheld, and (3) whether the employer had previously been found in violation of Department rules.*In re Susan Irmer, BIIA Dec., 89 0492 (1990)* [Editor's Note: WAC 296-15-070 was repealed (WSR 98-24-121); responsibilities for filing reports with the Department can be found in various sections of WAC 296-15.]

Review of penalties (RCW 51.48.080)

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence.*In re Susan Irmer, BIIA Dec., 89 0492 (1990)*

SCOPE OF REVIEW

Penalty assessments

STANDARD OF REVIEW

Penalty assessments

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence.*In re Susan Irmer, BIIA Dec., 89 0492 (1990)*

Scroll down for order.

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

1 **IN RE: SUSAN K. IRMER**) **DOCKET NO. 89 0492**
2)
3 **CLAIM NO. T-087972**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Susan K. Irmer,
8 None

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10 Self-Insured Employer, NE Washington Workers Compensation Coop., by
11 Lukins & Annis, per
12 Edgar L. Annan

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Stephanie Farrell and Donald J. Verfurth, Assistants
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19 This is an appeal filed by the self-insured employer, NE Washington Workers Compensation
20 Coop., on February 9, 1989 from an order of the Department of Labor and Industries dated January
21 25, 1989. The order affirmed an order dated January 6, 1989 that assessed a penalty against the
22 self-insured employer in the amount of \$500.00 pursuant to RCW 51.48.080 for failure to submit all
23 medical reports and other pertinent information in its possession at the time of its request for a
24 determination on this claim as required by WAC 296-15-070(3). The Department order is **REVERSED**
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26 **AND REMANDED.**
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29 **ISSUES**

- 30
31 1. What is the scope of review in an appeal from a penalty assessed by the
32 Department of Labor and Industries pursuant to RCW 51.48.080?
33 2. Was the Department correct in assessing a penalty in the maximum
34 amount of \$500.00?
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36 Based upon the following discussion, we conclude that the question of whether a penalty
37 should be assessed and the amount of the penalty under RCW 51.48.080 are not decisions
38 committed to the discretion of the Director. Our review of such decisions is therefore de novo, and is
39 not limited to determining whether an abuse of discretion has occurred. We also conclude that under
40 the facts of the present case a penalty in the maximum statutory amount is unwarranted.
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43 **DECISION**

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45 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
46 and decision on a timely Petition for Review filed by the Department of Labor and Industries in
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1 response to a Proposed Decision and Order issued on August 8, 1989, in which the order of the
2 Department dated January 6, 1989 (sic) was reversed and this matter remanded to the Department
3 with direction to substitute the sum of \$100.00 for \$500.00 and to otherwise affirm the order.
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5 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
6 prejudicial error was committed and said rulings are hereby affirmed.
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8 The Proposed Decision and Order adequately sets forth the evidence relevant to the issues
9 presented by this appeal. Briefly, that evidence establishes, as is conceded by the employer in its
10 Response to the Department's Petition for Review, that at the time it requested the Department to
11 issue an order closing this claim the employer did not submit to the Department all medical records in
12 its possession. It is therefore apparent that the employer in this case violated the provisions of WAC
13 296-15-070(3), which provides in pertinent part as follows:
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15 . . . All medical reports and other pertinent information in the self-insurer's
16 possession not previously forwarded to the department must be submitted
17 with the request for all determinations.
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19 Thereafter, the Department assessed a penalty against the employer in the amount of \$500.00
20 pursuant to the authority of RCW 51.48.080, which provides as follows:
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22 Every person, firm or corporation who violates or fails to obey, observe or
23 comply with any rule of the department promulgated under authority of this
24 title, shall be subject to a penalty of not to exceed five hundred dollars.
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26 The evidence further establishes that it is the Department's policy to assess a penalty in the
27 maximum amount of \$500.00 in each and every case in which a self-insured employer has failed to
28 submit to the Department all medical records in its possession when requesting a determination from
29 the Department. That is, the Department assessed a penalty in the maximum amount permitted under
30 the statute without investigating the facts of the case, and without giving consideration to such factors
31 as whether the employer intended to mislead the Department, the significance of the medical records
32 not submitted by the employer, or whether the employer in question had previously violated any rule
33 promulgated by the Department.
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35 Stated simply, we conclude that the decision of whether to assess a penalty and the amount of
36 a penalty assessed pursuant to RCW 51.48.080 are not discretionary decisions because the statute
37 does not state that these decisions are discretionary. As we have previously noted, in instances under
38 the Industrial Insurance Act where the legislature has intended to commit a decision to the Director's
39 discretion, it has explicitly so stated. In re Gary J. Manley, BIIA Dec., 66,115 (1986).
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1 Thus, with respect to certain statutory provisions such as RCW51.24.060(3) ("sole discretion"),
2 RCW 51.32.095 ("sole discretion"), RCW 51.36.010 ("solely in his or her discretion"), RCW
3 51.48.100(2) ("at his or her discretion"), and RCW 51.32.250 ("in his or her discretion"), the legislature
4 has clearly enunciated its intent that a particular decision be committed to the discretion of the
5 Department, the Director, or the Director's designee. In such cases, our scope of review is limited to
6 determining whether the exercise of discretionary authority constitutes an abuse of discretion. See In
7 re Johnny Smotherman, BIIA Dec. 87 0646 (1989); In re Armando Flores, Dckt. No. 88 0109 (July 6,
8 1989); In re Gary Manley, BIIA Dec., 66,115 (1986); In re Frank C. Madrid, BIIA Dec., 86,0224-A
9 (1987).

10 In Madrid, we had before us a claimant's appeal from the Director's decision not to assess a
11 penalty for alleged unreasonable delay in payment of benefits pursuant to RCW 51.48.017. In that
12 case, the employer argued that the decision under RCW 51.48.017 was vested solely within the
13 Director's discretion. We disagreed.

14 Unlike RCW 51.48.080, the statute at issue in Madrid establishes a particular amount for the
15 penalty, rather than a range. Nonetheless, Madrid is instructive insofar as it establishes factors to be
16 considered in determining whether delay of benefits is "unreasonable", so as to require the imposition
17 of a penalty. Those factors, as listed in Madrid, are whether the employer has a genuine doubt from a
18 medical or legal standpoint as to the liability for benefits and whether the employer acted on a good
19 faith belief that no payment was due.

20 According to Sidney Willuweit, a disability claims adjudicator for the self-insurance section of
21 the Department, the Department had not, as of June 19, 1989 when he testified, finalized a draft of
22 written guidelines for the assessment of penalties. Thus, no written guidelines were in effect when the
23 decision in this case was made by the Department. It would, of course, be most helpful if the
24 Department would establish written criteria for evaluating the amount of the penalty to be imposed.
25 However, the failure of the Department to establish such guidelines does not somehow make the
26 decision a discretionary one, in the absence of specific legislative authority.

27 Absent such specific statutory language, we are unwilling to conclude that the decisions under
28 RCW 51.48.080 and WAC 296-15-070(3) are discretionary, particularly in light of the limited scope of
29 review and the additional burden imposed upon a party seeking relief in appeals from discretionary
30 decisions. We therefore hold that in an appeal from a penalty assessed by the Department pursuant
31 to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the
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1 assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of
2 the evidence.
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4 While, as the employer's Response to the Petition for Review concedes, the evidence in the
5 present case establishes that the Department was correct in assessing a penalty, the evidence does
6 not support the imposition of a penalty in the maximum amount permitted by the statute. By its very
7 terms, the statute in question allows a range of penalties to be assessed for violation of any rule
8 promulgated by the Department. The legislature therefore intended that the amount of the penalty
9 assessed bear some relationship to the violation giving rise to the assessment. Thus, the facts of
10 each case must be examined.
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12 In our opinion, in determining the amount of a penalty to be assessed for violating the
13 provisions of WAC 296-15-070(3), the factors that should be considered include, at a minimum, (1)
14 whether the employer intended to mislead the Department by withholding medical records at the time
15 that a determination was requested, (2) the content and significance of the medical records not
16 submitted to the Department, and (3) whether the employer in question had been previously found to
17 be in violation of Department rules.
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19 In the present case, there is no indication that the employer intended to mislead the
20 Department or to deny benefits to the claimant. Further, the Department concedes that the records
21 which the employer failed to submit, which included chart notes, laboratory reports and other records,
22 would not likely have affected the Department's determination on the claim, and did not affect the
23 benefits received by the claimant. While we agree with the Department that it is necessary that the
24 Department have in its possession all medical records pertinent to a claim at the time a determination
25 is requested, we believe the significance of any records not submitted must be considered in
26 determining the amount of a penalty to be imposed. Finally, there is no indication in the record before
27 us that the employer in this case has previously been found to be in violation of any Department rule.
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29 We note that Mr. Willuweit initially recommended a penalty of \$250.00, after considering one of
30 the factors listed above, i.e., whether this was a repeat violation. Based on his determination that this
31 was a first offense, he considered \$250.00 a reasonable penalty.
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33 Considering all of the factors we have listed above, we agree with Mr. Willuweit that the
34 assessment of a penalty in the amount of \$250.00 is most commensurate with the nature and
35 magnitude of the employer's violation of WAC 296-15- 070(3).
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1 After consideration of the Proposed Decision and Order, the Department's Petition for Review
2 filed thereto, the Employer's Response to the Petition for Review, and a careful review of the entire
3 record before us, we hereby enter the following Findings of Fact and Conclusions of Law.
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6 **FINDINGS OF FACT**

- 7 1. On May 20, 1988, the claimant filed an accident report alleging the
8 occurrence of an industrial injury on March 17, 1988 during the course of
9 her employment with N Washington Workers Compensation Coop. The
10 claim was allowed and benefits provided. On January 6, 1989, the
11 Department of Labor and Industries issued an order assessing a penalty
12 against the self insured employer in the amount of \$500.00 for failure to
13 provide the Department with all medical reports and other pertinent
14 information in its possession on September 9, 1988.

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16 On January 13, 1989, the employer filed a protest and request for
17 reconsideration of the Department's order of January 6, 1989. On January
18 25, 1989, the Department issued an order adhering to the provisions of its
19 order of January 6, 1989.

20 On February 9, 1989, the employer filed a notice of appeal with the Board
21 of Industrial Insurance Appeals from the Department order of January 25,
22 1989. The appeal was assigned Docket No. 89 0492. On February 16,
23 1989, the Board issued an order granting the appeal and directing that
24 proceedings be held on the issues raised by the notice of appeal.

- 25 2. The self-insured employer requested from the Department a final
26 determination on this claim, without submitting all medical reports and
27 other pertinent information in its possession, not previously forwarded to
28 the Department.
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30 3. The medical reports and other pertinent information possessed by the
31 self-insured employer and not submitted to the Department included chart
32 notes, laboratory reports, and other medical records. Had these reports
33 and other pertinent information been forwarded to the Department at the
34 time that the employer requested a final determination, they would not
35 have affected the decision reached by the Department or the benefits
36 received by the claimant.
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38 4. The employer's failure to submit all medical reports and other pertinent
39 information in its possession likely resulted from confusion as to the
40 definitions of those terms and did not result from any intent by the
41 employer to mislead the Department or to deprive the injured worker of
42 benefits.
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44 5. The employer's failure to submit all medical reports and other pertinent
45 information was a first violation of WAC 296-15-070(3).
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1 **CONCLUSIONS OF LAW**

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- 3 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
- 4 and the subject matter of this appeal.
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- 6 2. The self-insured employer violated the provisions of WAC 296-15-070(3).
- 7 Given the range of penalties allowed by RCW 51.48.080, of not more
- 8 than \$500.00, and the factors listed in Findings of Fact Nos. 2-5, a
- 9 penalty of \$250.00 is appropriate for the employer's violation of WAC
- 10 296-15-070(3).
- 11
- 12 3. The order of the Department of Labor and Industries dated January 25,
- 13 1989, which affirmed an order dated January 6, 1989, is reversed and this
- 14 matter is remanded to the Department of Labor and Industries with
- 15 direction to enter an order assessing a penalty in the amount of \$250.00
- 16 against the self-insured employer for failure to comply with the provisions
- 17 of WAC 296- 15-070(3).

18 It is so ORDERED.

19 Dated this 13th day of March, 1990.

20 BOARD OF INDUSTRIAL INSURANCE APPEALS

21

22 /S/

23 SARA T. HARMON CHAIRPERSON

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26 /S/

27 PHILLIP T. BORK MEMBER

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