

Twin Rivers Inn

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

15 Because of the limited scope of review and the additional burden imposed
16 upon a party seeking relief in appeals from discretionary decisions, we are
17 unwilling to conclude that a decision is discretionary absent specific
18 statutory language to that effect. In re Susan K. Irmer, Dckt. No. 89 0492
19 (March 13, 1990). Although RCW 51.48.010 provides that an employer
20 who fails to secure payment of compensation may be liable for a
21 maximum penalty of \$500.00 or double the amount of premiums incurred,
22 whichever is greater, we do not construe that language as indicating a
23 legislative intent that the penalty decision be committed to the
24 Department's discretion. In our view, the use of the word "may" in RCW
25 51.48.101 means no more than that the penalty is not mandatory. We
26 therefore hold that in an appeal from a penalty assessed by the
27 Department pursuant to RCW 51.48.010, the employer is entitled to a de
28 novo review of the penalty assessment. The standard of review in such a
29 case is based on the preponderance of the evidence, and not whether the
30 Department has abused its discretion.
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32 C & R Shingle, at 2-3.

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34 Turning to the facts of this case, there is no dispute that Craig Thiele filed a claim with the
35 Department as a result of an industrial injury he sustained on April 3, 1988 during the course of his
36 employment with Twin Rivers Inn. Additionally, the Department presented undisputed testimony
37 showing that Mr. Thiele's claim costs were not fixed as of the date of hearing and had reached an
38 amount totaling \$22,278.05. Pursuant to the penalty calculation rule, WAC 296-17-470, the
39 Department estimated the cost of Mr. Thiele's injury to be \$28,737.00 and assessed that amount as a
40 penalty.
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42 The evidence reflects some confusion concerning the date upon which the Department
43 established industrial insurance coverage for Twin Rivers Inn. However, for the purposes
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1 contemplated by RCW 51.48.010, it is reasonable to infer that the employer did not secure the
2 payment of compensation until at least April 25, 1988, when it filed a Master Business Application with
3 the state.
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5 It is clear, therefore, that the employer has violated RCW 51.48.010, which provides as follows:
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7 Every employer shall be liable for the penalties described in this title and
8 may also be liable if any injury or occupational disease has been
9 sustained by a worker prior to the time he or she has secured the payment
10 of such compensation to a penalty in a sum not less than fifty percent nor
11 more than one hundred percent of the cost of such injury or occupational
12 disease.
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14 Thus, pursuant to RCW 51.48.010, the employer "may . . . be liable" for a penalty of not more than
15 \$28,737.00 and not less than \$14,368.50. In addition, the director may waive the penalty in whole or
16 in part pursuant to RCW 51.48.100(1).
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18 In determining the appropriate amount of the penalty, the factors set forth in C & R Shingle
19 apply equally here:
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- 21 1. Whether the employer intended to avoid the burdens of the Industrial
22 Insurance Act;
- 23 2. The amount of taxes incurred prior to the employer's registering with the
24 Department;
- 25 3. Whether the employer had a good faith basis for believing it was not
26 subject to the provisions of the Industrial Insurance Act.
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28 C & R Shingle, at 3. The Department may, of course, wish to consider other criteria as well.
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30 There is nothing in the record which would suggest that the Department considered these or
31 other factors in deciding the appropriate penalty amount. From the tenor of Exhibit No. 6, it seems
32 likely that once the Department had determined the estimated total claim costs under WAC 296-17-
33 470, it proceeded to assess that maximum penalty amount without further ado.
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35 The employer's particular circumstances may very well mitigate against a penalty. The
36 Bruyeres purchased the inn in March of 1988. They had never previously done business in
37 Washington and possessed little business experience. They were under the impression that the
38 former owner would transfer any necessary licenses, including whatever was required for workers'
39 compensation coverage, into their names. When they happened to learn otherwise, they made timely
40 efforts to meet all legal requirements. The period of time between Mr. Thiele's injury and filing of the
41 Master Business Application was relatively brief (about 22 days) and during this time the employer
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1 was actively trying to meet all legal requirements. Upon receiving Department communications
2 requesting premium payments, the employer promptly fulfilled its responsibilities of reporting and
3 paying premiums for the brief period during which the business was in operation, March 1988 through
4 May 1988. The premiums actually owed amounted to the rather minimal sum of \$52.73. Finally, the
5 Bruyeres encouraged the injured worker to seek workers' compensation, suggesting that they had no
6 intention of avoiding the burdens of the Industrial Insurance Act.
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10 In any event, the Department does not appear to have considered any of the factors necessary
11 to properly evaluate the appropriate amount of the penalty under the range allowed in RCW
12 51.48.010. The matter should therefore be remanded to give the Department the opportunity to do so.
13 On remand, the Department can also take the opportunity to determine whether a penalty waiver,
14 pursuant to RCW 51.48.100(1), is indicated, in whole or in part.
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18 **FINDINGS OF FACT**

- 19 1. On December 13, 1988, the Department of Labor and Industries issued
20 Notice and Order of Assessment of Industrial Insurance Penalties No.
21 20060179 to Steven and Susan Bruyere, DBA Twin Rivers Inn, alleging
22 that an industrial insurance penalty was owed due to an accident resulting
23 in injuries to an employee prior to the employer securing payment of
24 compensation. Pursuant to RCW 51.48.010, a penalty was assessed at
25 100% of cost and/or pension reserves established for the accident
26 occurring on April 3, 1988 in the sum of \$28,737.00. On January 9, 1989
27 the employer filed a protest and request for reconsideration of the
28 December 13, 1988 order. On January 25, 1989 the Department issued
29 an order affirming the December 13, 1988 order. The employer filed a
30 notice of appeal on February 24, 1989. The Board of Industrial Insurance
31 Appeals entered an order on March 9, 1989 granting the appeal, assigning
32 Docket No. 89 0684 and directing that further proceedings be held.
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- 34 2. On March 1, 1988 Steven and Susan Bruyere, by purchase, became the
35 owners and sole proprietors of Twin Rivers Inn, an existing business
36 operation within Washington state.
- 37 3. On April 3, 1988 Craig Thiele suffered an injury in the course of his
38 employment with Twin Rivers Inn. Craig Thiele filed a claim for industrial
39 insurance benefits as a result of this injury. The claim was allowed by the
40 Department
- 41 4. On April 25, 1988, Steven and Susan Bruyere, DBA Twin Rivers Inn, filed
42 a Master Business Application at the Washington Department of
43 Licensing. That application included requests for Class A, C, E, and F
44 liquor licenses, tax registration, cigarette retailer license, trade name
45 registration, and industrial insurance coverage for employees. The
46 application indicated that Twin Rivers Inn would employ one individual
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1 subject to industrial insurance coverage and that that individual would not
2 begin working before May 1, 1988.

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4 5. On May 20, 1988 the Department mailed a "Certificate of Coverage" to
5 Twin Rivers Inn which was dated March 1, 1988.
- 6 6. As of November 28, 1988, the actual amount of benefits paid to and on
7 behalf of Craig Thiele as a result of his April 3, 1988 industrial injury at
8 Twin Rivers Inn was \$22,278.05. His claim remained open and no award
9 for permanent partial disability had yet been determined.
- 10 7. In December 1988 the Department established a cost and/or pension
11 reserve fund for Craig Thiele's industrial injury in the amount of
12 \$28,737.00.
- 13 8. The Department assessed \$28,737.00 in penalties pursuant to RCW
14 51.48.010 because Mr. Thiele sustained an injury prior to the employer
15 securing payment of compensation. This amount was assessed without
16 consideration of the facts and circumstances particular to the violation.

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18 **CONCLUSIONS OF LAW**

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20 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
21 and subject matter to this appeal.
- 22 2. Craig Thiele suffered an injury on April 3, 1988 during the course of his
23 employment with Twin Rivers Inn. On that date Twin Rivers Inn was an
24 employer and Craig Thiele was an employee or worker as those terms are
25 defined by the Industrial Insurance Act.
- 26 3. On April 3, 1988 Twin Rivers Inn had not secured payment of industrial
27 insurance compensation for its workers as is contemplated by RCW
28 51.48.010. RCW 51.48.010 permits the assessment of a penalty ranging
29 from not less than fifty percent nor more than one hundred percent of the
30 cost of the injury. In determining the amount of the penalty, the
31 Department should have considered the facts of this particular case,
32 including but not limited to the following factors: (1) whether the employer
33 intended to avoid the burdens of the Industrial Insurance Act; (2) the
34 amount of the taxes incurred prior to the employer's registering with the
35 Department; and (3) whether the employer had a good faith basis for
36 believing that it was not subject to the provisions of the Industrial
37 Insurance Act at the time of the injury.
- 38 4. The order issued by the Department on January 25, 1989, affirming a
39 Notice and Order of Assessment No. 20060179 issued by the Department
40 on December 13, 1988, which assessed a penalty of \$28,737.00 (100% of
41 the cost established for the injury) as a result of an injury to an employee
42 which occurred before the employer had secured payment of
43 compensation is incorrect and is reversed. This matter is remanded to the
44 Department with direction to evaluate the facts of this particular case, in
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light of this decision, and to determine the appropriate penalty amount pursuant to RCW 51.48.010 and RCW 51.48.100(1).

It is so ORDERED.

Dated this 8th day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member