City of Seattle

SAFETY AND HEALTH

General duty standards (WAC 296-24-073)

An employer violated general safe workplace standards where workers were exposed to traffic hazards in reversible lane operation which required workers to maneuver cones from rear bumper of moving truck. To establish a violation of general duty standards, the Department must establish three elements: (1) employer failed to provide a workplace free from hazard; (2) the hazard is recognized; and (3) the hazard is likely to cause death or serious physical injury. **….*In re City of Seattle*, BIIA Dec., 89 W136 (1991)**

Penalties

The Department's penalty worksheet is appropriate for calculating penalties, and a serious violation requires some monetary penalty which may be reduced by the employer's attempts to avoid inherent hazards. **….*In re City of Seattle*, BIIA Dec., 89 W136 (1991)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In re: CITY OF SEATTLE	**Docket No.** 89 W136
Citation and Notice No. 436346	DECISION AND ORDER

APPEARANCES:

Employer, City of Seattle, by
R. James Pidduck, Jr. and Barry Fairfax

Employees of City of Seattle, by
Public Service and Industrial Employees Local 1239, by
John L. Masterjohn

Department of Labor and Industries, by
Office of the Attorney General, per
Shawn Ruth, Paralegal, Aaron Owada and Ron Lavigne, Assistants

This is an appeal filed by the employer, City of Seattle, on December 14, 1989, with the Safety Division, Department of Labor and Industries, and transmitted to the Board of Industrial Insurance Appeals on December 22, 1989, from a Corrective Notice of Redetermination No. 436346 issued on November 30, 1989. The Corrective Notice of Redetermination affirmed Citation and Notice No. 436346, which alleged serious violations of WAC 296-24-073(4)(a) and 296-24-073(2) and a general violation of WAC 296-155-120, but modified the penalty assessed for the two serious violations from $600 for each violation to $240 each. Affirmed as modified.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer and the Department to a Proposed Decision and Order issued on May 13, 1991 in which the Corrective Notice of

Redetermination was modified to find "nonserious" violations of WAC 296-24-073(4)(a) and 296-24-073(2) and to reduce the total penalty from $480 to -0-.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The employer appealed the Corrective Notice of Redetermination arguing, in the alternative, that the City of Seattle complied with the general safety standards set forth in WAC 296-24-073(2), and (4)(a), or that the general standards did not provide the City with adequate notice that it was, or may have been, committing safety violations in its reverse lane crew operation on the First Avenue South bridge.

Citation and Notice No. 436346 included a charge that the City of Seattle violated WAC 296-155-120(1)(b) because the senior person at the worksite did not have proof of first aid training. Corrective Notice of Redetermination No. 436346 did not address that violation. At the hearing, the Department moved to vacate the violation of WAC 296-155-120(1)(b), and our industrial appeals judge granted the motion. Unfortunately, the Proposed Decision and Order failed to indicate that that element of the Citation had been vacated.

There is no significant dispute between the parties regarding the facts which led to the issuance of this Citation. The City of Seattle, in conjunction with the Department of Transportation (then known as the Highway Commission), developed a reversible lane system for peak traffic hours on the First Avenue South bridge. The operation establishes three lanes dedicated to southbound traffic and one lane to northbound, through placement of fluorescent orange traffic cones and

vertical plastic pylons at designated points on the bridge each workday evening.

Two workers stood or crouched on a platform coated with traction enhancing covering on the back of a City truck. The platform is approximately fourteen (14) inches above the roadway to allow placement and recovery of the lane marking devices. One worker would hand a cone to the other, who placed it on the roadway while the truck moves forward at two or three miles per hour. In order to place the cone, the worker on the platform leans out past the side of the truck. To place or remove the vertical pylons, the truck stops and the worker gets off. The removal process involves the same basic technique. One worker reaches out and from a sitting or squatting position on the platform while holding onto the back of the truck, picks up the cone and hands it to the other worker for placement in the bed of the truck. During the "coning" process, a motorcycle police officer follows the truck. During removal, the officer moves to the front of the truck.

On September 20, 1989, Mike Vosika, a safety inspector for the Department of Labor and Industries, observed the First Avenue South bridge reverse lane crew operation around 5:30 - 6:00 p.m. He noted there was no safety guard for workers on the rear platform of the truck, that employees did not stay within the truck as it moved, and later learned that the senior person did not have evidence of current first aid training. He believed workers came within one or two feet of oncoming traffic when they leaned from the back of the City truck to

place or retrieve cones. He felt this was a risk because the operation was performed while the bridge was used for two-way traffic with a posted speed limit of 35 miles per hour.

The City of Seattle contends it did not violate the general safety standards set forth in WAC 296-24-073, which provide in pertinent part:

> (2) Every employer shall furnish and use safety devices and safeguards and shall adopt and use practices, and means, methods, operations and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees.
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> . . . .
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> (4) No employer shall fail or neglect:
>
> (a) To provide and use safety devices and safeguards.

To establish a violation of the "general duty" standards, the Department must establish three basic elements: 1) the employer failed to provide a workplace free from hazard; 2) the hazard is recognized; and 3) the hazard is likely to cause death or serious physical injury. See Kelly Springfield Tire Co. v. Donovan & OSHA, 11 OSHC 1889, 1891 (5th Cir. 1984).

In this particular instance, the Corrective Notice of Redetermination focused upon the hazard of a worker's falling off the rear platform of the truck while picking up the cones. The City contends the general safety standards did not provide adequate notice to it of the prohibited or required conduct. In the context of the safe workplace or general duty provisions, recognition "refers to

knowledge of the hazard and not to recognition of abatement." M. Rothstein, Occupational Safety and Health Law § 145 at 184 (3rd ed., 1990) (footnote omitted).

A condition or activity is a recognized hazard if the employer knows the dangerous potential or that potential is known generally within an industry, irrespective of probability or foreseeability of hazardous incidents. United Technologies Corp., Pratt & Whitney Aircraft Div., 9 OSHC 1554, 1557-1558 (2d Cir. 1981) (the dangerous potential of storing certain chemicals next to each other was recognized in the industry). Thus, an employer's admitted knowledge of dangerous potential is sufficient to establish a recognized hazard. Continental Oil Co., 8 OSHC 1980, 1981 (6th Cir. 1980) (employer knew the dangerous potential of spilled gasoline).

Barry Fairfax, of the City Engineering Department, described the coning operation. He noted the truck's rear platform rails were covered with an abrasive traction material. He described the platform as 90 inches wide, 14 inches deep and 14 inches above the road surface. The truck operators were advised to travel in the range of two to three miles per hour, with a maximum speed of five miles per hour. The restrictions on the speed of the vehicle, the provision of a police motorcycle escort, and the provision of traction material on the platform are all evidence that the City recognized that there were potential hazards with its coning operation.

That the hazard inherent in the reverse lane crew operation is

liable to cause death or serious physical injury is also apparent. Mr. Vosika expressed concerns regarding a worker being struck by oncoming traffic as he leaned out to place or retrieve a cone. Similarly, a worker is at risk of falling during the operation. If, in fact, a worker fell onto the roadway and possibly into traffic, serious physical injury is likely to result. Accordingly, a serious violation of the general safe workplace standards has been established.

Under RCW 49.17.180(7), when determining the amount of penalty, the Department is required to consider "the number of affected employees of the employer . . ., the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations." The Department's penalty worksheet is an appropriate tool for calculating WISHA penalties. Although the Department's worksheet for calculating penalties for these violations was not admitted into the record, Mr. Vosika described the basis for the penalties assessed.

Because RCW 49.17.180(2) states that a civil penalty shall be imposed for serious violations, the City of Seattle's violations warrant a penalty in some monetary amount. We believe the penalty imposed by the Citation and then the Corrective Notice of Redetermination should be reduced, however.

Mr. Vosika testified that the base penalty amount was calculated by using a "gravity score" for the violation. The gravity score is based upon the severity factor multiplied by the probability factor, with

each being considered on a 1 to 5 scale. He characterized the severity of each violation of the general duty standards as "4", with probability as "3". Multiplication of the factors led to a determination that the gravity of each violation was equal to 12, resulting in a base amount of $2,000.00. The worksheet used in calculating the City of Seattle's penalties allowed the maximum deductions for number of employed exposed, good faith, and history. The resulting initial penalty imposed for each violation was $600.00.

At the reassumption conference conducted by Mr. James, the Department reduced the penalty by modifying the probability to "2". Mr. James acknowledged the probability of a fall from the platform was very small in light of the "firm grip bumper" and the City's 23-year history of safe operation. The record amply demonstrates the City's efforts to avoid the hazard inherent in its reverse lane coning procedure. Those efforts justify a finding that the probability of an incident was even lower than that found by the Department. In addition, although the operation could result in serious physical injury, we believe the severity of the violation does not warrant the "4" rating. Instead, the penalty should be based upon a severity rating of "3".

After consideration of the Proposed Decision and Order, the Petitions for Review filed thereto by the City of Seattle and the Department of Labor and Industries, and a careful review of the entire record before us, we are persuaded that the Corrective Notice of

Redetermination is correct to the extent it found a serious violation of WAC 296-24-073(4)(a) and a serious violation of WAC 296-24-073(2). It is incorrect in its penalty assessment, however. We therefore modify the penalty to reflect a gravity factor of "3" [3 (severity) x 1 (probability)]. In addition, we vacate the violation of WAC 296-155-120(1)(b), based on the Department's own motion to vacate.

FINDINGS OF FACT

1. On October 10, 1989, the Department of Labor and Industries issued Citation and Notice No. 436346, pursuant to the Washington Industrial Safety and Health Act, alleging the City of Seattle committed a serious violation of WAC 296-24-073(4)(a), for which a penalty of $600.00 was assessed, a serious violation of WAC 296-24-073(2), for which a penalty of $600.00 was assessed, and a general violation of WAC 296-155-120.

   On October 12, 1989, the employer, City of Seattle, filed a Notice of Appeal with the Department of Labor and Industries. The Department thereafter on November 30, 1989, issued Corrective Notice of Redetermination No. 436346, affirming the serious violation of WAC 296-24-073(4)(a) and reducing the penalty from $600.00 to $240.00, affirming the serious violation of WAC 296-24-073(2) and reducing the penalty from $600.00 to $240.00, for a total penalty assessment of $480.00.

   On December 14, 1989, the employer filed a Notice of Appeal with the Industrial Safety Division of the Department of Labor and Industries. The Department transmitted its file to the Board of Industrial Insurance Appeals on December 22, 1989.

2. The Department moved to vacate the general violation of WAC 296-155-120. The employer did not contest the motion.

3. The City of Seattle, in conjunction with the Department of Transportation, developed a reversible lane system for peak traffic hours on the First Avenue South bridge. The operation involves two workers who stand or crouch on a traction-material-coated platform on the back of a City truck. One worker hands a cone to the other, who places it on the roadway while the truck moves forward at two or three miles per hour. In order to place or remove a cone, the worker leans out over the edge of the truck. To place or remove vertical pylons, the truck stops and the worker gets off.

4. The operation places a worker at risk of falling off the rear platform of the truck. The City recognized the potential hazard and made good faith efforts to avoid it and reduced the probability of an incident by

providing safety devices and safeguards for workers riding on the rear platform.

5. Based upon the penalty factors already considered by the Department, the appropriate penalty for the serious violation of WAC 296-24-073(4)(a) should be calculated upon a gravity rating of "3" with the maximum adjustments for good faith, history, and number of employees exposed.

6. Based upon the penalty factors already considered by the Department, the appropriate penalty for the serious violation of WAC 296-24-073(2) should be calculated upon a gravity rating of "3" with the maximum adjustments for good faith, history, and number of employees exposed.

CONCLUSIONS OF LAW

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

2. Corrective Notice of Redetermination No. 436346, which alleged one serious violation of WAC 296-24-073(4)(a) and one serious violation of WAC 296-24-073(2) is correct and is affirmed with respect to the violations cited. To the extent the Corrective Notice of Redetermination No. 436346 did not address the general violation of WAC 296-155-120, it is incorrect and that violation is vacated.

The penalty assessment in Corrective Notice of Redetermination No. 436346, totalling $480.00, is excessive, and this matter is remanded to assess the penalty for a serious violation of WAC 296-24-073(4)(a) upon a gravity rating of "3" with the maximum adjustments for good faith, history, and number of employees exposed, and to assess the penalty for a serious violation of WAC 296-24-073(2) upon a gravity rating of "3" with the maximum adjustments for good faith, history, and number of employees exposed. As herein modified, the Corrective Notice of Redetermination is affirmed.

It is so ORDERED.

Dated this 22nd day of November, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member