

# Sawyers Motor Sports

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## STANDARD OF REVIEW

### Penalty assessments

The Department's decision to assess a penalty under RCW 51.48.010 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.010, 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 the evidence. *Citing In re C & R Shingle*, BIIA Dec., 88 2823 (1990). ...***In re Sawyers Motor Sports*, BIIA Dec., 90 3344 (1992)** [*Editor's Note*: The Board's decision was appealed to superior court under Franklin County Cause No. 92-2-50196-4.]

Scroll down for order.



1 review should only be whether there was an abuse of discretion. Clearly this is not the law. The only  
2 circumstances in which the Board's review is limited to the "abuse of discretion" standard is when the  
3 relevant statute specifically states that the decision is committed to the discretion, i.e., "sole  
4 discretion", "in his or her discretion", of the Department, the Director, or the Director's designee. There  
5 are countless ways the Department uses its discretion in administering claims and other matters under  
6 the industrial insurance laws. When these decisions are appealed to the Board the standard of review  
7 is not limited to whether there has been an abuse of discretion. Rather, the standard is the  
8 correctness of the decision based on the preponderance of the evidence. In re C & R Shingle, BIIA  
9 Dec., 88 2823 (1990). The use of the word "may" in RCW 51.48.010 means no more than that the  
10 penalty is not mandatory. However, that does not limit our scope of review of a Department order  
11 assessing such a penalty.

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13 Of equal concern was exclusion of evidence regarding the third party action which arose out of  
14 Troy Sawyers' accident. Because the Department has the ability to enforce a lien against any  
15 third-party recovery and thereby recover at least part of its costs of administering the claim, the extent  
16 of its lien recovery is relevant to the propriety of the amount of penalty based on those claim costs.  
17 Therefore it was error to exclude evidence concerning the third party recovery. We recognize that  
18 RCW 51.48.010 is a penalty statute and not a statute solely used for the purpose of recovering claim  
19 costs, but because the amount of the penalty is tied to the Department's costs; the Department's  
20 recovery of some actual costs through its lien rights seems relevant to the determination of the  
21 appropriate penalty.

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23 Unfortunately the only offer of evidence on this issue was that the amount of the Department's  
24 lien was disputed by the claimant. No attempt was made to offer the precise amount of the lien.  
25 Therefore it is impossible to determine if the amount of penalty is incorrect. The employer, as the  
26 appealing party, has the burden of proving the Department order is incorrect. Merely presenting  
27 evidence that a relevant factor used to determine the amount of the penalty is in dispute is not  
28 sufficient evidence on which the Department order should be reversed. We therefore must affirm the  
29 penalty assessment. Based on all the other factual evidence herein, the clear preponderance thereof  
30 is that this employer did not secure industrial insurance coverage until after Troy Sawyers' injury of  
31 December 20, 1988. Thus, the penalty statute was violated. The employer cannot complain about a  
32 penalty assessed at the lowest level of the monetary range provided by the statute, namely, 50% of  
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1 the costs incurred for the claim; no proof was presented that those costs as stated in the Department's  
2 order were incorrect.

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4 Consistent with our discussion herein, proposed Findings of Fact Nos. 1 through 5 and  
5 proposed Conclusion of Law No. 1 are hereby adopted as the Board's final findings and conclusion.  
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7 Proposed Finding of Fact No. 6 is deleted and in its stead the following is entered:  
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9 **FINDINGS OF FACT**

- 10 6. The Department of Labor and Industries was correct in assessing  
11 Sawyers Motor Sports 50% of the claim costs incurred for the injury to  
12 Troy Dodd Sawyers, which occurred prior to the acquisition of industrial  
13 insurance coverage by the firm.  
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15 Proposed Conclusion of Law No. 2 is deleted, and in its stead the following is entered:

- 16 2. The decision of the Department of Labor and Industries issued on  
17 July 17, 1990, by notice and order of assessment of industrial insurance  
18 penalties, assessing Gerald Sawyers and his wife, dba Sawyers Motor  
19 Sports, penalties in the amount of \$ 19,240.00 pursuant to RCW  
20 51.48.010, is correct and is hereby affirmed.  
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22 It is so **ORDERED**.

23 Dated this 1<sup>st</sup> day of April, 1992.  
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25 **BOARD OF INDUSTRIAL INSURANCE APPEALS**

26  
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28 /s/ \_\_\_\_\_  
29 S. FREDERICK FELLER Chairperson

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32 /s/ \_\_\_\_\_  
33 FRANK E. FENNERTY, JR. Member

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36 /s/ \_\_\_\_\_  
37 PHILLIP T. BORK Member  
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