

Ledcor Industries

SAFETY AND HEALTH

Order on agreement of parties

In an employer's appeal from a WISHA citation, the Board will decline to enter an order on agreement of parties if the employees of the employer object to the entry of the order and the objection is made in good faith and not for an improper purpose.*In re Ledcor Industries*, BIIA Dec., 91 W058 (1993)

Scroll down for order.

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

1 **IN RE: LEDCOR INDUSTRIES**) **DOCKET NO. 91 W058**
2)
3 **CITATION AND NOTICE NO.**)
4 **111450060**) **ORDER ON REMAND FROM SUPEROR COURT**
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6 **APPEARANCES:**

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8 Employer, Ledcor Industries, by
9 Preston Thorgrimson et al, per
10 William T. McKay

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12 Employees of Ledcor Industries, by
13 International Brotherhood of Electrical Workers No. 46 and
14 International Association of Bridge, Structural and Ornamental
15 Iron Workers Local No. 114, by
16 Schwerin, Burns, Campbell and French, per
17 Cheryl A. French

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19 Department of Labor and Industries, by
20 Office of the Attorney General, per
21 Elliott S. Furst, Assistant

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23 This is an appeal filed by the employer, Ledcor Industries (Ledcor), on March 15, 1991, from
24 Citation and Notice No. 111450060 issued by the Department of Labor and Industries (Department) on
25 February 21, 1991. In its Citation and Notice, the Department alleged that Ledcor had committed two
26 willful, two serious, and two general repeat violations of regulations promulgated under the authority of
27 the Washington Industrial Safety and Health Act (WISHA). The Citation and Notice assessed
28 penalties in the sum of \$50,780.00 and set an abatement date of February 13, 1991 for all violations.

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30 The Department and Ledcor proposed to settle the appeal by requesting the Board to enter an
31 Order on Agreement of Parties which would modify the Citation and Notice to: reduce each of the two
32 alleged willful violations to serious violations and reduce each of the associated penalties; vacate the
33 first of the alleged serious violations; reword the second alleged serious violation and increase the
34 penalty therefor; affirm each of the two alleged general repeat violations; and, thus, assess a total
35 modified penalty of \$10,900.00. This proposed settlement is opposed by employees of Ledcor
36 through two unions and their counsel.
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1 On June 5, 1992, this Board entered its Order Denying Motion to Enter Order on Agreement of
2 Parties. The case was referred to our mediation and hearing process for further proceedings. The
3 Department and Ledcor sought interlocutory review of our June 5, 1992 order in the Superior Court for
4 Thurston County, Cause Nos. 92-2-00624-1 and 92-2-00616-0. On January 6, 1993, the Honorable
5 Richard A. Strophy entered an Agreed Order remanding this matter to the Board and ordering in part:
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9 4. . . . On remand, the Board shall consider the justification of the
10 employer and the Department for entering into the agreement, and it shall
11 consider the bases for the Unions' objection to that agreement as it relates
12 to the facts of the case and the law relating to enforcement of penalties
13 and assessments of penalties, or classification of violations. The Board's
14 representative shall allow or direct Ledcor and the Department to present
15 facts and arguments supporting Board approval of the settlement and
16 shall allow or direct the Unions to have the opportunity to rebut or impeach
17 opposing arguments or evidences.
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19 5. The Board shall issue Findings of Fact and Conclusions of Law as to
20 each determination ordered in Paragraph No. 4, above. If the Board finds
21 that the Agreement is in accordance with the law and the facts, the Board
22 shall issue an order in conformity with the agreement. If the Board finds
23 that the agreement is not in accordance with the law and the facts, the
24 Board shall schedule further proceedings.
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26 Pursuant to the court's order, this Board, en banc on March 5, 1993, heard evidence and
27 argument in favor of, and in opposition to, the proposed settlement. After careful consideration of the
28 court's order, the evidence presented, the arguments of counsel, and the records and files herein, we
29 decline to enter the Order on Agreement of Parties requested by the Department and Ledcor in their
30 proposed settlement.
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33 Major points of disagreement of the employees with the proposed settlement concern the
34 proposed reduction of the two alleged violations, now characterized as "willful", to "serious" violations
35 with associated lesser total penalties. The employees contend that each of these same two alleged
36 violations are supportable under the facts and the law and properly characterized as "willful". One of
37 these charged violations alleges that Ledcor allowed equipment to come within 10 feet of an
38 energized electrical power line rated 50 kv or below, in violation of WAC 296-155-525(2)(e)(i). The
39 other of these relates to the attendant fatality accident and charges that Ledcor moved equipment
40 involved in an immediate or probable fatality accident prior to release of the equipment by the
41 Department's safety inspector, in violation of WAC 296-24-020(3)(b).
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1 Ledcor and the Department argued that the proposed settlement reached between them is
2 founded in part on the risk that one or both of these violations may be vacated or reduced to "serious"
3 should Ledcor be afforded a full hearing on the merits. The unions, however, presented actual prima
4 facie evidence at the March 5, 1993 proceeding which was supportive of each of these two violations
5 as cited under respective sections of the Washington Administrative Code and also supportive of the
6 characterization of each of the alleged violations as "willful" under RCW 49.17.180. In addition, the
7 unions presented further offers of proof argued to be supportive of the violations as cited. Therefore,
8 in response to the Superior Court's directive, we cannot find that the agreement between Ledcor and
9 the Department is in accordance with the law and the facts, even when considering only the actual
10 evidence presented. The Superior Court order indicates we should also give attention to additional
11 circumstances surrounding the proposed settlement, including the other justifications for, and bases of
12 opposition to, the proposed settlement as raised by the parties. The Department expressed a belief
13 that the total penalty assigned in the proposed settlement may be greater than the amount found if the
14 case were fully heard. It argues the proposed settlement might therefore better deter future violations.
15 The unions responded with evidence and additional offers of proof to the effect that the "willful"
16 characterizations, which the Department would abandon in the proposed settlement, provide an
17 additional economic deterrent beyond any specified penalty. This is due to the disadvantage in
18 competitive bidding for major construction contracts which inheres in having a history of "willful"
19 violations.

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22 The Department also stated that the proposed settlement furthers efficient use of limited
23 Department litigation resources. Similarly, Ledcor indicated its interest in limiting litigation costs,
24 including attorney fees and the diversion of employee and management resources from the ongoing
25 business of the firm. From their conduct in the March 5, 1993 proceeding, it appears that the
26 attorneys and representatives of the employees are prepared, capable and otherwise motivated to
27 adequately litigate their position at any future hearing, thus leaving the Department free to commit
28 whatever portion of its litigation resources it might consider appropriate to the hearings process.

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30 We assume that direct and indirect costs of further litigation operate so as to provide all parties
31 some motivation to reach an otherwise acceptable settlement if possible. The Department and Ledcor
32 had an opportunity for bilateral settlement of this matter, over any protest of the employees, and
33 thereby the opportunity to avoid further litigation costs, prior to the Department relinquishing its original
34 jurisdiction by transmittal of Ledcor's appeal to the Board where the employees can participate as a
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1 formal party. It is also true that the Department and Ledcor presented their signed agreement to the
2 Board over employee objection to that agreement without having first requested mediation services
3 from the Board to determine if a compromise agreement between all parties could be reached. Each
4 party has expended further resources in litigation in an effort by the Department and Ledcor to obtain
5 the Board's approval of an agreement over the objection of the employees.
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9 We cannot say that litigation costs should be a significant factor in this case in determining
10 whether, based on the law and the facts, an order should issue from this Board on the proposed
11 bilateral agreement between the Department and Ledcor over employee objection. Nor is the
12 Department's reluctance to expend further resources a significant factor in light of the obvious
13 willingness and preparedness of the employees to go forward with evidence in support of the two
14 "willful" violations as alleged in the Citation and Notice.
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18 Finally, Ledcor has asserted that union objection to the proposed settlement is in part
19 collaterally motivated by the propagandistic goal to harm or to gain advantage in dealings with Ledcor,
20 including those involving present and potential Ledcor contractors. Nonetheless, as indicated earlier,
21 the unions presented evidence that the "willful" characterization of violations as cited by the
22 Department promotes economic deterrence against further safety violations. In any event, both
23 Ledcor and the unions agree that their difference over whether two of the violations were properly
24 characterized as "willful" is a significant point of dispute, both factually and legally. The modification
25 which the agreement between Ledcor and the Department would make to the Citation and Notice
26 must be viewed as substantial.
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30 We have a strong interest in ensuring that all parties are fairly and effectively heard in both our
31 mediation and hearings processes once this Board is vested with jurisdiction over a WISHA appeal.
32 We also believe, as stated, in our earlier order of June 5, 1992, that objections made by employees to
33 the entry of an Order on Agreement of Parties in a WISHA appeal "must be made in good faith and not
34 for an improper purpose," Order Denying Motion to Enter Order on Agreement of Parties, at p. 4,
35 l. 27 to p. 5, l. 1.
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39 We have followed the directive of the Superior Court with the belief stated above also in mind.
40 The belief is consistent with that directive. Upon considering the evidence and arguments presented
41 by the parties and our files in this case, we cannot find that the bilateral agreement between the
42 Department and Ledcor is in accordance with the law and the facts as presented to us. Pursuant to
43 RCW 51.52.095(1) we cannot enter or issue an agreed order under such circumstances. We would
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1 further note that the point of disagreement is over substantial, rather than trivial, differences with the
2 proposed agreement, and the objection of the unions is, in fact, founded both upon fact and law.
3 Although the stated justifications for the agreement are not otherwise improper if taken alone, it is
4 likewise true that the unions have presented good faith, proper bases and motivations for their
5 objection to an order in conformity with the agreement.
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9 We do not otherwise comment upon the appropriateness of the agreement proposed by the
10 Department and Ledcor. Nothing in this order should prejudice the merits of Ledcor's appeal from the
11 Citation and Notice issued by the Department. With that understanding, and solely in accordance with
12 the order of the Superior Court, we make the following:
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14 **FINDINGS OF FACT**

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16 1. On February 21, 1991, the Department of Labor and Industries issued
17 Citation and Notice No. 111450060, under the authority of the Washington
18 Industrial Safety and Health Act (WISHA), which alleged that the
19 employer, Ledcor Industries (Ledcor), had committed willful violations of
20 WAC 196-24-020(3)(b) and WAC 296-155-525(2)(e)(i), serious violations
21 of WAC 296-155-025(1)(f)(iii) and WAC 296-155-040(4)(c), and general
22 repeat violations of WAC 296-155-400(1)(j) and 296-155-400(1)(i), and
23 which assessed penalties in the total sum of \$50,780.00 and set an
24 abatement date of February 13, 1991 for all violations.
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26 On March 15, 1991, Ledcor filed an appeal with the Safety Division of the
27 Department from Citation and Notice No. 111450060. The Department
28 forwarded the appeal to this Board on April 5, 1991. The appeal was
29 assigned Docket No. 91 W058.

30 The Department and Ledcor submitted a proposed agreement to the
31 Board. Ledcor's employees through two unions, objected to the
32 agreement. The Department and Ledcor requested this Board to issue an
33 Order on Agreement of Parties in this appeal in conformity with the
34 bilateral agreement between the Department and Ledcor. On June 5,
35 1992 this Board entered an Order Denying Motion to Enter Order on
36 Agreement of Parties. The Department and Ledcor sought interlocutory
37 review of this Board's June 5, 1992 order in the Superior Court for
38 Thurston County, Cause Nos. 92-2-00624-1 and 92-2-00616-0. On
39 January 6, 1993, the Honorable Richard A. Strophy, entered an Agreed
40 Order which remanded this matter to the Board to conduct further
41 proceedings and to issue a further order, including Findings of Fact and
42 Conclusions of Law regarding the Order on Agreement of Parties
43 requested by the Department and Ledcor should be entered by the Board.
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- 1 2. The Department and Ledcor entered into their proposed agreement due to
2 perceived risks that one or more of the violations alleged in the Citation
3 and Notice might be vacated or reduced from "willful" to "serious" or lesser
4 violations, that the penalties provided in the Citation and Notice might be
5 reduced, should Ledcor have a full hearing on the merits of its appeal, and
6 in order to conserve and reduce litigation costs and resources.
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- 8 3. The employees and unions, International Brotherhood of Electrical
9 Workers Local No. 46 and the International Association of Bridge,
10 Structural and Ornamental Iron Workers Local No. 114, object to the entry
11 of the presently requested Order on Agreement of Parties in this appeal
12 because the proposed agreement modifies both the penalties and
13 characterization of the violation Nos. 1 and 2 in Citation and Notice no.
14 111450060. This is a significant point of disagreement between Ledcor
15 and the unions, over a substantial, rather than insubstantial or trivial,
16 proposed modification of the Citation and Notice.
- 17 4. The employees' and unions' objection to the proposed settlement is
18 founded upon prima facie evidence supportive of the two "willful" violations
19 as alleged by the Department in its Citation and Notice. The unions
20 believe that, given the facts and the law, the proposed settlement does not
21 best further the interests of employee safety in the work place in that both
22 the characterization of a violation as "willful" as well as assigned penalties
23 have the effect of deterring future safety violations. The unions and their
24 attorneys are willing and able to present their case supportive of the
25 "willful" violations as alleged in the Citation and Notice should hearings be
26 held on the merits of the appeal by Ledcor.
- 27 5. Ledcor alleges that the unions are motivated to object to the proposed
28 settlement in part by union interest in harming Ledcor in its dealings with
29 its existing and potential contractors and with its employees. Ledcor has
30 not shown that the ultimate union goals in opposing the proposed
31 settlement are other than the promotion of a safe work place for workers.
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CONCLUSIONS OF LAW

- 34 1. The Board of Industrial Insurance Appeals has jurisdiction to consider the
35 issues raised in this appeal pursuant to RCW 49.17.140.
- 36 2. The employees and unions, International Brotherhood of Electrical
37 Workers Local No. 46 and the International Association of Bridge,
38 Structural and Ornamental Iron Workers Local No. 114, have a good faith
39 basis to object to the proposed Order on Agreement of Parties in this
40 appeal. Their objection to the entry of the order is not for an improper
41 purpose.
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- 43 3. The Order on Agreement of Parties proposed by Ledcor and the
44 Department is not in conformity with the law and the facts within the
45 meaning of RCW 51.52.095(1), and this Board will not enter an order
46 based on that agreement; further this appeal is referred to our
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mediation/hearing process for the scheduling of further proceedings pursuant to WAC 263-12-093.

It is so ORDERED.

Dated this 1st day of April, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member