Walkenhauer & Associates

SAFETY AND HEALTH

Multiple citations

A citation for failing to provide adequate shower facilities at an asbestos removal project must be vacated where the employer is also cited for failure to require workers to shower before entering uncontaminated area since the inadequate or absent shower facility necessarily resulted in workers' failure to shower. The issues are whether the two violations allegedly committed by the employer arose out of the same incident; the violations address the same hazard; and the violation of the first standard logically incorporates a violation of the second standard. ***….In re Walkenhauer & Associates*, BIIA Dec., 91 W088 (1993)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 93-2-00135-3.]

Reassumption of jurisdiction by Department

The Department must complete its redetermination within 30 days from when the appeal is filed with the Department from the Citation and Notice. Any redetermination order issued after the 30-day period is invalid and the appeal proceeds to the Board of Industrial Insurance Appeals as a direct appeal from the Citation and Notice. *Citing Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513 (1993) ***….In re Walkenhauer & Associates*, BIIA Dec., 91 W088 (1993)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court in Skagit County, Cause No. 93-200135-3. Legislative changes to RCW 49.17.140 allow the parties to agree to extend the time to complete redetermination for an additional 45 days.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WALKENHAUER & ASSOCIATES INC.	)	**DOCKET NO. 91 W088**
CITATION & NOTICE NO. 111356275	)	**DECISION AND ORDER**

APPEARANCES:

Employer, Walkenhauer & Associates, Inc., by
Joseph H. Walkenhauer, President, and
Porter Law Offices, by
Frederick E. Porter, withdrawn, and
Peters, Fowler, and Enslee, P.S., by
Douglas E. Peters, withdrawn

Employees of Walkenhauer & Associates, Inc., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
James M. Hawk, Assistant

This is an appeal filed by the employer, Walkenhauer & Associates, Inc., on September 9, 1991, from a Corrective Notice of Redetermination issued by the Department of Labor and Industries on August 27, 1991. The Corrective Notice of Redetermination affirmed in substance a Citation and Notice issued April 15, 1991, alleging primarily violations of Chapter 296-62 WAC, Safety Standards for Carcinogens. The violations included: (1) a grouped willful (as modified), proposed penalties $14,000; (2) a grouped serious and a serious, proposed penalties $1,000; and (3) four general, proposed penalties $0. **AFFIRMED AS MODIFIED**

PROCEDURAL MATTERS.

We deem this action to be a direct appeal from the Citation and Notice issued by the Department dated April 15, 1991. Our state's Supreme Court has established a mandatory jurisdictional requirement within which the Department must complete the redetermination process. The Erection Co. v. Dep't. Labor & Indus., 121 Wn.2d 513 (1993). The mandatory jurisdictional requirements established by the Court require that the Department complete its redetermination within thirty days from when the appeal is filed with the Department from the Citation and Notice. Any redetermination order issued after the thirty day period is invalid and the appeal proceeds to the Board of Industrial Insurance Appeals as a direct appeal from the Citation and Notice. So as to conform the alleged violations to the evidence, there being no showing of prejudice to the employer, we deem the

Citation and Notice to be amended such that violation 01-1a, code violation WAC 296-62-07719(3)(a), is changed to code violation WAC 296-62-07719(2)(b) as per the Corrective Notice of Redetermination dated August 27, 1991. Similarly, violation 01-1b, WAC 296-62-07719(2)(b) is deemed changed to WAC 296-62-07719(3)(f)(iv). In re Jeld-Wen of Everett, BIIA Dec., 88 W144 (1990).

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on March 29, 1993, in which the Department's Corrective Notice of Redetermination dated August 27, 1991 was affirmed as modified. Although affirmed as modified, the substance of the March 29, 1993 Proposed Decision and Order vacated all alleged violations except general violation WAC 296-62-07709(2)(a), with total penalty assessed reduced from $15,000 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.

Walkenhauer and Associates, Inc., a Yakima based corporation, is principally engaged in the business of removing asbestos, a known hazardous material and carcinogen. On January 19, 1991, Walkenhauer and Associates (hereafter Walkenhauer) was removing asbestos from a school boiler in Sedro Woolley, Washington when the Department of Labor and Industries conducted an inspection of Walkenhauer's work practices. Following the inspection, the Department cited Walkenhauer for ten alleged violations of Chapter 296-62 WAC, Safety Standards for Carcinogens.

Following a lengthy hearing, our industrial appeals judge affirmed a general violation of WAC 296-62-07709(2)(a), identified herein as 3-5 relating to the lack of initial personal air monitoring, but otherwise determined that the Department of Labor and Industries had not proven the remaining alleged safety violations. In large measure, we agree with the findings and conclusions of our judge. However, we disagree with our judge's proposed decision in that we find the Department has proven that Walkenhauer violated WAC 296-62-07719(2)(b) relating to shower facilities. In doing so, we affirm as a willful violation the safety violation identified herein as 1-1(a), code violation WAC 296-62-07719(2)(b).

Robert Parker, Industrial Hygiene Region One Supervisor for the Department of Labor and Industries, testified to personally conducting the inspection of the Sedro Woolley operation on January 19, 1991. He concluded, after completing his walkthrough of the job, that Walkenhauer had an on-site decontamination facility that failed to incorporate the elements necessary for employees to fully

shower prior to leaving the containment area. Although he admitted on cross-examination that he may have seen a white shower base in the decontamination area, on balance he was convinced that Walkenhauer did not have the facilities necessary for workers to shower and remove asbestos contamination before exiting.

Walkenhauer, through the presentation of its witnesses, came very close to admitting as much. Joseph Walkenhauer, the company president, insisted that the company had shower facilities in keeping with the WAC section at issue here, but nonetheless testified that the workers did not take showers as they left the containment facility. Instead, they wetted their heads with a bucket of water and wiped off with a wet rag before retiring to a nearby motel for complete showers. We regard this as highly indicative of inadequate shower facilities, but note it is but one element of the analysis. Mr. Walkenhauer also admitted that gross asbestos material, after being removed from the boiler and carefully double-bagged, was carried out of containment through the shower area. This created a situation in which the alleged shower area could have possibly become contaminated. Although the fact of contamination was never established, it points to a fundamental weakness in Walkenhauer's case. Either the shower area was just that, a shower area and used for that purpose, or it was a waste load-out area and used for that purpose. We are unable to see how it could be used for both and avoid the contamination that a proper decontamination facility is designed to prevent. Inasmuch as Mr. Walkenhauer testified that the area was used to carry out the gross asbestos material, we conclude that the area was principally a waste load-out area containing an incidental shower base and that Walkenhauer did not have a shower within the meaning of WAC 296-62-07719(3).

The Washington Administration Codes relating to safety standards for carcinogens were not written in the abstract. The fundamental reason for their promulgation was to protect workers from serious injury or death. RCW 49.17.010. Here, they were written to protect workers from inhalation of asbestos fibers. In this light, we note that the record contains much from Walkenhauer about a common sense application of rules and the difficulty in following the WAC sections to the letter. As an example, Walkenhauer cited WAC 296-62-07719(3)(f)(iv), which requires a worker, prior to exiting the containment area, to fully wet his face before removing his respirator. Walkenhauer states that, as a practical matter, it is impossible to accomplish this when wearing a full face respirator of the type used by Walkenhauer's employees because the respirator blocks the water's contact with the skin. The point is understood. However, common sense application of rules works both ways. In the present case, Walkenhauer allowed employees to leave the job site without the workers having showered and

without them having been fully decontaminated. The reasons offered were many: It was too cold; the workers didn't want to shower; one of the workers wasn't feeling well; it would have been, "cruel and unusual punishment". We wish to be clear; all of these reasons are categorically inadequate! If sufficient shower facilities do not exist for workers to decontaminate themselves, work should not begin. In plain language, the employees should not be allowed to enter the containment area if there is any question about their ability to decontaminate upon leaving. In this context, the employer has an affirmative obligation to reasonably anticipate which shower related provisions will be required when a worker, for whatever reason, eventually exits the containment area.

We recognize that circumstances will vary from job to job. Clearly, the Washington Administrative Code provides a skeletal outline of what is required for shower facilities and should be diligently adhered to with the overall emphasis of insuring the safety of the workplace and workers. For example, a particular job may require specific additional precautions like heat for the shower or for the clean room in order for workers to use them when it is cold. Another jobsite may require that mobile showers be brought in. Still another may require privacy screening, additional towels or perhaps greater quantities of hot water so that all workers, regardless of the order in which they leave containment, may completely shower. The objective is to ensure that workers leaving containment are fully decontaminated. In the case at hand, we are persuaded that adequate shower facilities could have been constructed or, in the alternative, mobile facilities brought to the job site such that workers could have showered, thus removing from that person the proven dangerous asbestos fibers. Walkenhauer's failure to have provided adequate shower facilities constitutes a willful violation of WAC 296-62-07719(2)(b).

We next address the question of whether Walkenhauer, having failed to provide shower facilities within the meaning of the above section, also violated WAC 296-62-07719(3)(f)(iv), which states, in relevant part, "The employer shall ensure that employees shower prior to entering the clean room." The Department alleges in violation 1-1(b) that Walkenhauer should be found to have violated this section inasmuch as it allowed workers to leave the containment area without showering. The Department cited Walkenhauer with two separate violations even though it recognized that no shower facilities were present and that it was thus impossible for employees to shower.

We begin our analysis with the general inquiry of whether alleged violation 1-1(b), the failure to require workers to shower before exiting containment, is duplicative of violation 1-1(a), the failure of Walkenhauer to provide shower facilities. If it is duplicative, it would appear that the second violation

is subsumed into the first. An employer charged with one violation referring to six standards may not properly be found to have committed six violations. Stepter Bros. Lathing, RevComm No. 666 (1974) 2 OSHC 1213.

It is useful to consider the problem from various perspectives to determine whether the second violation discussed herein is necessarily included in the first.

- Do the two violations allegedly committed by the employer arise out of the same incident?
- Do the violations address the same hazard?
- Does the violation of the first standard (adequate shower facilities) logically incorporate a violation of the second standard (failure of workers to shower upon leaving containment)? In other words, by violating the first standard will the second standard, by definition, be violated as well? Are the conditions that gave rise to multiple violations one and the same?

Considering the facts of the case, it appears that each of these questions may be answered in the affirmative. The decision by Walkenhauer to construct less than adequate shower facilities is the operative incident. With that incident, Walkenhauer simultaneously elected to 1) not provide adequate showers and 2) not require the workers to completely shower upon leaving the containment area inasmuch as adequate showers would not be available. Both of the alleged violations address the same hazard: workers leaving the containment area without being fully decontaminated. Assuming that employees do not bring personal shower facilities with them into the containment area, it follows that by violating the first standard a violation of the second standard must occur. The employees will leave containment without showering. Finally, the condition that gave rise to the first violation, lack of adequate showers, also caused the second, leaving without showering.

Although there appears to be no Washington case directly on point, other jurisdictions have addressed questions similar to the matter here. A citation alleging a violation for failure to guard a belt on an air compressor, which referred to the same hazard as an uncontested item from another citation, was vacated because both allegations charge the failure to prevent the same hazard. Turnbull Millwork Co., [RevComm 15047 (1977)] 6 OSHC 1148. Evidence that citations for two violations, spray painting cars in inadequately ventilated areas, required vacation of one violation for spraying cars outside of predetermined spraying area and affirmance of the other violation for failure to provide spraying area with adequate ventilation. Wolf Auto Sales, Inc., [RevCommJ No. 79-5420 (1981)] 9 OSHC 1947. An alleged violation that a portable dockplate was not flush with a truck bed was vacated as duplicative of a charge to secure dock plates during unloading. Lee Way Motor

Freight, Inc., [RevComm No. 10699 (1977)] 4 OSHC 1968. The failure to provide a ground for plug-connected equipment and the failure to provide a three-wire type extension cord for a portable electric tool must be combined into one violation. Bonneville Homes, [RevCommJ No. 5469 (1974)] 2 OSHC 3127.

After consideration of the above, we are persuaded that given the particular facts of this case the alleged violation 1-1(b) relating to the employees' failure to shower upon leaving the containment area, is incorporated into violation 1-1(a) and is, as a result, a duplicate violation that must be vacated. We also note that the Department of Labor and Industries has the burden of establishing all of the elements necessary to prove a violation of a cited standard. In re Savage Industries, Dckt. No. 86 W053 (May 9, 1988). Considering that, together with the entirety of the evidence and applicable WAC sections, we conclude that the Department has not proven the balance of the alleged violations and said violations will not be affirmed.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, the Employer's Response to Petition for Review, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On January 19, 1991, an unscheduled safety inspection by representatives of the

   Department of Labor and Industries occurred at a work site of Walkenhauer & Associates, Inc., at Sedro Woolley Elementary School, 7th and Bennett Avenue, Sedro Woolley, Washington.

   On April 15, 1991, the Department issued Citation and Notice No. 111356275, alleging grouped willful violations of WAC 296-62-07719(3)(a) and WAC 296-62-07719(2)(b); grouped serious violations of WAC 296-62-07723(7) and WAC 296-62-07719(3)(g); a serious violation of WAC 296-62-07715(3)(a); general violations of WAC 296-65-020(1)(e), WAC 296-24-040(1)(a)(vi), and WAC 296-62-07709(2)(a); and which proposed a total penalty of $16,500.

   The employer received the Citation and Notice on April 17, 1991. A notice of appeal was filed on May 1, 1991. On May 17, 1991, the Department issued a Notice of Reassumption of Jurisdiction.

   On August 27, 1991, the Department issued a Corrective Notice of Redetermination which modified the basis for the grouped willful violation from WAC 296-62-07719(3)(a) and WAC 296-62-07719(2)(b) to WAC 296-62-07719(2)(b) and WAC 296-62-07719(3)(f)(b),(sic) respectively; vacated WAC 296-62-07719(3)(g) and WAC 296-24-040(1)(a)(vi);

modified the proposed total penalty from $16,500 to $15,000; and, affirmed the Citation and Notice as modified.

On September 5, 1991, the safety division of the Department received a notice of filing of appeal pursuant to the Washington Industrial Safety and Health Act from the Corrective Notice of Redetermination issued August 27, 1991. On September 6, 1991, the Department transmitted the file to the Board of Industrial Insurance Appeals. On September 9, 1991, the Board received the transmittal of the file from the safety division. The appeal was thereafter granted by the Board and assigned Docket No. 91 W088.

2. Walkenhauer & Associates, Inc. is a Washington corporation with a primary business office located in Yakima, Washington. The company was incorporated during 1990, and between 1978 and 1990 the business was operated as a proprietorship.

3. On January 19, 1991, the Department completed an inspection of the employer at a work site located at Sedro Woolley Elementary School.

4. On January 19, 1991, at the work site, the employer committed a general violation of applicable safety standards by failing to perform initial monitoring of employees expected to be exposed to airborne concentrations of asbestos fiber at the action level or excursion limit. Also on that date, the employer committed a willful violation of applicable safety standards by failing to provide adequate shower facilities so that workers could fully decontaminate prior to leaving the containment area.

5. On January 19, 1991, at that work site, the employer did not commit willful violations of applicable safety standards related to:

    a. Failure to ensure workers showered upon exiting a regulated area.

6. On January 19, 1991, at that work site, the employer did not commit serious violations of applicable safety standards related to:

    a. Failure to provide separate waste load-out area, and

    b. Failure to utilize proper respirators during cleanup operation.

7. On January 19, 1991, at that work site, the employer did not commit general violations of applicable safety standards to:

    a. Failure to report correct hours of abatement project,

    b. Failure to provide representative air monitoring, and

    c. Failure to provide adequate warning signs.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter to this appeal, this appeal being a direct appeal from the Citation and Notice No. 111356275, dated April 15, 1991.

2. On January 19, 1991, the employer did commit a general violation of WAC 296-62-07709(2)(a). The appropriate penalty for this violation is $0.

3. On January 19, 1991, the employer did commit a willful violation of WAC 296-62-07719(2)(b) for failing to provide shower facilities which complied with WAC 296-24-12009(3). The appropriate penalty for this violation is $14,000.00.

4. On January 19, 1991, the employer did not commit a willful violation of WAC 296-62-07719(3)(f)(iv).

5. On January 19, 1991, the employer did not commit serious violations of:

   a. WAC 296-62-07723(7), and

   b. WAC 296-62-07715(3)(a).

6. On January 19, 1991, the employer did not commit general violations of:

   a. WAC 296-65-020(1)(e),

   b. WAC 296-62-07709(3)(c), and

   c. WAC 296-62-07721(2)(a).

7. Citation and Notice No. 111356275, issued April 15, 1991, is modified to vacate all alleged violations except for general violation WAC 296-62-07709(2)(a) with $0 penalty and violation WAC 296-62-07719(2)(b), with a $14,000.00 penalty. Citation and Notice No. 111356275 is as modified, affirmed.

It is so ORDERED.

Dated this 7th day of September, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
ROBERT L. McCALLISTER Member

DISSENT

With respect to the majority opinion herein, I must agree in part and dissent in part. Specifically, I wholeheartedly agree that the employer, Walkenhauer & Associates, Inc., failed to provide adequate shower facilities such that workers leaving the containment area could thoroughly

decontaminate themselves. To restate the opinion of the majority, if sufficient shower facilities do not exist for workers to decontaminate themselves, work should not begin. Employees should not be allowed to enter the containment area if there is any question about their ability to decontaminate upon leaving.

I disagree with the majority, however, on the question of whether the Department of Labor and Industries may cite an employer for multiple violations of a single hazard. In the specific case at hand, the Department of Labor and Industries properly cited the employer for a willful violation of WAC 296-62-07719(3)(f)(iv) relating to its failure to require employees to shower upon leaving the containment area. I believe there is a qualitative difference between requiring an employer to maintain proper shower facilities and requiring an employer to ensure that its workers shower before leaving the containment area. From my perspective, it does not appear that the violation of WAC 296-62-07719(3)(f)(iv) is a duplicate violation of WAC 296-62-07719(2)(b) such that the former is subsumed into the latter. Each violation is separate and independent. Walkenhauer & Associates, Inc., should properly have been charged with willful violations of each section.

Dated this 7th day of September, 1993.

/s/
FRANK E. FENNERTY, JR. Member