Castle, Richard (Olympia Glass Co.)

SAFETY AND HEALTH

Burden of proof

In appeals filed under WISHA, the Department of Labor and Industries has the burden of proving the existence of a violation and the appropriateness of the resulting penalty assessment. ***….In re Richard Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

Burden of proof – failure to abate

The Department must prove three elements to establish a prima facie case of failure to abate. First, the original citation must have become a final order; second, the condition on reinspection must be identical; and third, the condition on reinspection must be in violation of WISHA. ***….In re Richard Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

Penalties

The Board will review the appropriateness of penalty assessments based on due consideration of the statutory factors contained in RCW 49.17.180(7) and will reject a penalty based on a Department policy that ignores those factors. ***….In re Richard Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Thurston County Cause No. 96-2-04313-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RICHARD A. CASTLE, ET UX, DBA OLYMPIA GLASS CO.	)	**DOCKET NO. 95 W445**
CLAIM NO. 115380990	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Olympia Glass Co., by
Richard A. Castle

Employees of Olympia Glass Co.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lori A. Oliver, Assistant

This is an appeal filed with the Board of Industrial Insurance Appeals by the employer, Olympia Glass Co., on November 15, 1995, from Corrective Notice of Redetermination No. 115380990, issued by the Department of Labor and Industries on October 30, 1995. This notice affirmed Citation and Notice No. 115380990, dated September 12, 1995, but reduced the total penalties assessed to $1,000. **AFFIRMED AS MODIFIED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 Olympia Glass Co., to a Proposed Decision and Order issued on June 14, 1996, that affirmed an October 30, 1995 Corrective Notice of Redetermination order.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds no prejudicial error was committed. Accordingly, these rulings are affirmed.

DECISION

This appeal concerns the appropriateness of a citation and $1,000 penalty for Olympia Glass's refusal to abate a citation for its failure to adopt a written accident prevention program. Olympia Glass maintains that any penalty for its failure to comply with the Department's rule requiring employers to enact accident prevention plans is inappropriate because this rule is frivolous and, therefore, should not be enforced. It also argues the Department's penalty is inappropriately high because it is based solely on a Department policy instead of the facts of this particular case.

While Olympia Glass's first argument has no legal merit, its second argument is essentially correct. We lack the legal authority to declare a Department rule void or to preclude the Department from enforcing a rule based on our opinions of its merit. However, the Department is required to assess all penalties based upon the factors listed in RCW 49.17.180(7). The Department has admitted it fined Olympia Glass $1,000 because this is the minimum penalty it assesses for any failure to abate citation. This is a tacit admission that the fine it imposed on Olympia Glass was not based upon the relevant statutory factors. Based on our review of this record and consideration of the governing factors, we have determined a $500 penalty is appropriate because this citation involves a violation of low gravity by a small employer.

We believe the industrial appeals judge imposed incorrect legal standards in affirming the Corrective Notice of Redetermination. He upheld the citation and the resulting penalty based upon his determination that, (1) the Department had acted appropriately in issuing the failure to abate citation, and (2) the Department policy requiring a $1,000 penalty for this citation is reasonable. This reasoning ignores the governing law and imposes an evidentiary burden on the employer that is not authorized by statute. Further, under the reasoning in the Proposed Decision and Order, unless an employer can show the Department's penalty calculation is unreasonable, or arbitrary, it should be affirmed. However, in appeals filed under the Washington Industrial Safety and Health Act (WISHA), it is the Department who has the burden of proving both the existence of a violation and the

appropriateness of the resulting penalty. WAC 296-12-115(2)(b). An employer is not required to prove the Department acted arbitrarily in order to prevail in an appeal. Our decision on appeal must determine whether there is sufficient evidence in the record to affirm the Department's citation and the resulting penalty.

We start by examining whether this record supports a conclusion that Olympia Glass did not abate a citation for failing to develop a written accident prevention plan. Neither this Board nor any Washington appellate decision has issued a decision that describes the Department's burden of proof in a failure to abate case. We, therefore, will adopt the evidentiary standard applied by federal courts in these cases. The Department must prove three elements to establish a prima facie case of failure to abate when the original citation was unappealed. "First, the original citation must have become a final order, . . . Second, the condition on reinspection must be identical . . . [third] the condition on reinspection [must be] in violation of the [WISHA] Act". Mark Rothstein, *Occupational Safety and Health,* 3d ed, at 345, 347.

There is sufficient evidence in this record to affirm this failure to abate citation. Although the Department did not introduce any direct evidence that its original citation for Olympia Glass's failure to adopt an accident prevention program had become final, the record supports our reaching this conclusion. The original Citation and Notice, Exhibit 1, is dated December 28, 1994. Mr. Richard Castle, the owner of Olympia Glass, testified that in early January 1995, he got a billing from the Department for the $125 penalty assessed for the five violations in the citation, paid the penalty, and took no further action until another Department inspector contacted him in June to monitor his compliance. It is clear that Mr. Castle did not appeal the underlying citation. The original citation and notice became final during January 1995. It is also undisputed that Olympia Glass had not developed a written accident prevention program as of late August 1995, when it was reinspected by Kenneth Wetzel, a Department employee at the time. Finally, WAC 296-24-040 requires every

Washington employer to have a written accident prevention program tailored to its particular operation. Olympia Glass obviously was operating in clear contravention of this rule, which is authorized by WISHA's safety requirements. Olympia Glass has essentially conceded it failed to appeal or abate the original citation. There is, therefore, sufficient evidence to affirm this citation when considering the entire record and all the permissible inferences therefrom.

We now turn to the second part of the Department's evidentiary burden: the appropriateness of the penalty. Under RCW 49.17.180(7), the Department is required to assess all civil penalties based upon "due consideration" of their appropriateness based upon the following factors: "the number of affected employees of the employer being charged, 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 must apply these factors when assessing penalties in failure to abate cases, much as it would for any WISHA violation. *Long Manufacturing Co.*, 4 OSHC 1154 (1975-76), *aff'd* 554 F.2d 903 (8th Cir. 1977); *George T. Gerhardt Co.*, 4 OSHC 1351 (1976-77).

Mr. Wetzel testified the Department based the penalty in the Corrective Notice of Redetermination solely upon its policy that a $1,000 minimum penalty must be assessed for a failure to abate violation. A penalty based solely upon this "policy" does not appear to include a consideration of the statutory factors listed above. Hence, we cannot sustain a penalty based on a Department policy that ignores these considerations. As the federal Occupational and Health Commission noted, when rejecting a similar penalty in failure to abate case based entirely on an OSHA policy regarding its minimum fine, "[n]either [OSHA] nor this Commission recognizes any such arbitrary approach to the assessment of penalties". *Empire Art Products Co.*, 2 OSHC 1230, at 1231 (1974-75). This Board also finds a penalty based solely on a Department minimum fine policy to be arbitrary. As we have previously stated, "[t]he Department may not set a penalty independent of the statutory criteria". *Port of Seattle*, Dckt No. 93 W058 (June 23, 1994), at 10.

For this reason, we have rejected penalty assessments justified entirely on the basis of Department policies that ignore the relevant legal factors. *In re Cam Construction*, BIIA Dec. 90 W060 (1992).

There is sufficient evidence in this record for us to determine a $500 penalty is appropriate based upon the statutory criteria delineated in RCW 49.17.180(7). As previously mentioned, the underlying citation in this failure to abate case was a general violation of WAC 296-24-040, which requires employers to develop accident prevention plans. A general violation is appropriate when the Department determines an employer has violated a WISHA rule, but the violation does not pose a risk of serious bodily harm to its employees. It is, therefore, axiomatic that a general citation involves a safety violation of reduced gravity. The Department did not assess any penalty for its original violation. Olympia Glass appears to have ignored this violation and Mr. Castle was hostile and extremely uncooperative in his interactions with Mr. Wetzel, the Department inspector who issued the citation currently before us. Mr. Castle repeatedly refused to adopt an accident prevention program, despite being informed the Department would assist him in preparing a plan and that it should not take much time to develop one that would be satisfactory. Indeed, all the Department was requiring of Mr. Castle was for him to write a short outline focusing on the safety issues in his workplace. Mr. Castle's willful resistance and a lack of "good faith" has led to Olympia Glass's recent poor history with the Department (namely, two citations within one year).

Although the Department did not introduce any evidence regarding the severity of the citation before us, we can determine that the failure to do the necessary planning involved in developing an accident prevention plan increases the safety risk to Olympia Glass's few employees. It appears from the record that Olympia Glass is a small glass repair and fabrication shop, with only two employees. One of the employees, James Turner, a glazier, testified his job is very dangerous because it involves cutting glass and working with hazardous chemicals. Although we have no reason to believe Olympia Glass's operations are run in an unsafe manner, we note

that working without a written accident prevention program increases the risk of injuries in the shop. By taking the time to think about the hazards present in his shop and to develop an outline of how he would minimize the resulting accident risk, Mr. Castle would be providing his employees with a safer work place. Thus in determining an appropriate penalty we recognize the severity of the citation is low, (as evidenced by the fact the underlying citation was a general one). We also take into consideration Olympia Glass's poor history and Mr. Castle's bad faith. These factors, taken together, justify some penalty. In view of Olympia Glass's small size, we believe a $500 penalty is appropriate.

The revised penalty amount is not only consistent with the governing statute, but also is reasonably related to the original violation. A penalty for a failure to abate an admitted violation should also bear a reasonable relationship to the amount of the penalty that was assessed in the first place and to the length of time during which an employer remained non-compliant. *Empire Art Products Co., Inc.*, 2 OSHC 1230 (1974-75). Here, although no penalty was assessed, Mr. Castle refused to abate his violation for at least eight months. This is a long period of time in which to willfully remain out of compliance.

We, therefore, affirm the Corrective Notice of Redetermination, but reduce the penalty from $1,000 to $500.

FINDINGS OF FACT

1. On August 25, 1995, safety compliance officer, Dick Wetzel, inspected the worksite of Richard A. Castle, et ux, dba Olympia Glass Co., (Olympia Glass), and conducted the closing conference on that same date.

   On September 12, 1995, the Department of Labor and Industries issued Citation and Notice No. 115380990, that alleged a failure to abate a

December 28, 1994 violation of WAC 296-24-040, and assessed a penalty of $2,000.

The employer filed its Notice of Appeal with the Department on September 18, 1995. The Department reassumed jurisdiction by notice dated September 26, 1995. The Department issued its Corrective Notice of Redetermination on October 30, 1995, which affirmed the violation but reduced the penalties to $1,000.

The employer filed its Notice of Appeal with the Board of Industrial Insurance Appeals on November 15, 1995. The Board issued its Notice of Filing Appeal on that same date, and assigned the case Docket No. 95 W445. The Department transmitted its file to the Board on January 4, 1996.

2. Olympia Glass failed to abate Item 2-4 in Citation and Notice No. 111329801 dated December 28, 1994, from that date through August 25, 1995. Citation and Notice No. 111329801 was unappealed and became final during January 1995. Item 2-4 in that citation was a general violation of WAC 296-24-040, which requires employers to develop written accident prevention programs. Between December 28, 1994 and August 25, 1995, Olympia Glass never developed the written accident prevention plan required by this rule. As of August 25, 1995, Olympia Glass was still in violation of WAC 296-24-24-040 .

3. Olympia Glass is a small employer with two employees. It demonstrated no good faith and a poor history with regards to its September 1995 and December 1994 citations. This failure to abate violation is a violation of low gravity, but the employer willfully refused to abate the underlying citation for at least eight months.

CONCLUSIONS OF LAW

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

2. After due consideration of the factors listed in RCW 49.17.180(7), a penalty of $500 is appropriate for Olympia Glass's failure to abate its December 1994 violation of WAC 296-20-040.

3. Corrective Notice of Redetermination No. 115380990, that affirmed Citation and Notice No. 115380990 and modified the total penalties to $1,000, is affirmed as modified. The total penalties are hereby reduced from $1,000 to $500.

It is so ORDERED.

Dated this 15th day of November, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member