Clark County Public Works

SAFETY AND HEALTH

Penalties

When calculating penalties in the case of a county or other local government, the number of personnel within a specific department headed by an elected official are the number of employees in that department, not the number employed by the larger government entity. *Citing Osborne v. Grant County*, 130 Wn.2d 615 (1996); RCW 36.16.070. **….*In re Clark County Public Works*, BIIA Dec., 96 W322 (1998)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CLARK COUNTY PUBLIC WORKS	**)**	**DOCKET NO. 96 W322**
	)	
CITATION & NOTICE NO. 115306037	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Clark County Public Works, by
Clark County Prosecuting Attorney, per
Richard A. Melnick, Senior Deputy Prosecuting Attorney

Employees of Clark County Public Works,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Penny L. Allen, Assistant

This is an appeal filed by the employer on July 19, 1996, with the Department of Labor and Industries' Safety Division and forwarded to the Board of Industrial Insurance Appeals on November 15, 1996, from a Corrective Notice of Redetermination issued by the Department of Labor and Industries on July 2, 1996. The Corrective Notice of Redetermination changed Item No. 1-1 to 1-2, alleged a serious violation of WAC 296-155-655(11)(a), and assessed a penalty of $1,120. **AFFIRMED.**

DECISION

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 employer to a Proposed Decision and Order issued on December 29, 1997, in which the Corrective Notice of Redetermination issued by the Department on July 2, 1996, was affirmed. We agree with the decision by our industrial appeals judge to affirm the Corrective Notice of Redetermination, but in order to follow the prevailing law on the issue, we must correct a finding of fact and a conclusion of law.

The Department used its penalty worksheet in order to determine the appropriate fine for a violation of the Washington Industrial Safety and Health Act that occurred on December 1, 1995. On that date, employees of the Clark County Public Works Department were performing work on a sewer system in an open trench. One worker was in the trench box, which had no ends, when the trench caved in, injuring the worker. Upon an inspection and the finding of a violation, the Department issued a Citation and Notice. The Department calculated the base penalty by taking into account the severity of the hazard and the probability of the accident occurring. The Department then adjusted the base penalty, giving credit for good faith, size of the business, history, and number of employees directly affected.

There is no argument concerning the number of employees directly affected, and the county was credited with the reduction because of its safety and health programs and good cooperation. The county also received a reduction because it had not been previously cited. The Department did not give a reduction based upon the size of the employer's business, and that is the issue that gave rise to the appeal.

When calculating penalties, the Department makes no adjustment based upon the size of employers who have more than 250 workers. Both the Department and our industrial appeals judge determined that Clark County employed 1,200 workers and, therefore, no reduction should have been given.

RCW 49.17.180(7) provides guidance for penalty adjustment. The code is in accord with the federal law and federal case law, such as *Secretary of Labor v. J.A. Jones Construction Co.,* 15 OSHC 2201 (1993). The Department, in its calculations, must take into account the size of the employer's business, that is to say, the total number of employees. We find the Department and our industrial appeals judge used the wrong number of total employees.

The prevailing law is clear that in the case of a county, and presumably of a city or other local government, the personnel within a specific department, headed by an elected official, are the employees not of the larger governmental entity, but of that particular elected official. *Thomas v. Whatcom County*, 82 Wash. 113 (1914); *Carter v. King County*, 120 Wash. 536 (1922); *Osborne v. Grant County*; 130 Wn.2d 615 (1996); RCW 36.16.070. The county commissioners, not the county, employ the personnel of the Department of Public Works of Clark County for the purposes of industrial safety and health issues. The total personnel employed by the county commissioners in that county at the time of the accident was 580 people. The other 726 employees were not employees of the county,[1] but were employees of the separate elected officials of that county, and may not be counted in the size of the employer's business for the purposes of WISHA calculations.

Since the employees of other county departments may not be counted against the employment figures of the county commissioners, the Department, in its penalty assessment, may take into account only 580 employees. That number exceeds the 250-employee maximum in the penalty assessment worksheet and, therefore, no reduction is possible within that penalty worksheet calculation. We find, therefore, that the wording in the Proposed Decision and Order, Finding of Fact No. 3 is irrelevant and Conclusion of Law No. 2 is incorrect, though the ultimate result is correct.

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

FINDINGS OF FACT

1. On December 1, 1995, the Department of Labor and Industries conducted an inspection at the work site of Clark County Public Works at 4700 N.E. 78th Street, Vancouver, Washington. A closing conference was concluded on April 5, 1996. On May 3, 1996, the Department

[1] Certain consolidated functions like payroll or personnel at a larger administrative level would not change our analysis of the responsible employing entity for industrial safety and health issues.

issued a Citation and Notice alleging a serious violation of WAC 296-155-657(1)(a) with a penalty of $1,120. On May 20, 1996, the employer filed a Notice of Appeal with the Department of Labor and Industries' Safety Division. On May 23, 1996, the Department issued a Notice of Reassumption of Jurisdiction.

On July 2, 1996, the Department issued a Corrective Notice of Redetermination changing the regulation cited to a serious violation of WAC 296-155-655(11)(a) with a penalty of $1,120. On July 19, 1996, the employer filed a Notice of Appeal with the Department of Labor and Industries' Safety Division. On November 15, 1996, the employer's Notice of Appeal was forwarded to the Board of Industrial Insurance Appeals and the Department's records were transmitted to the Board on the same date.

2. On December 1, 1995, Ken Wasella, Safety Compliance Officer for the Department of Labor and Industries, conducted an inspection of the employer's work site at 4700 N.E. 78th Street, Vancouver, Washington. His inspection revealed that the employer had opened a trench approximately 16 feet deep. Prior to the accident, the Vancouver area had had severe and heavy rains. On the date in question, Clark County had one worker in a trench box with no end shields or mud flaps. The trench caved in, sending soil and mud running into the end of the trench box, striking and injuring the worker.

3. In December 1995, the Public Works Department of Clark County was a part of the county government supervised by the county commissioners. The county commissioners were elected officials of the county and had under their direct control 580 people. Five hundred and eighty is the number of employees to be used in the calculation for size of employer's business when the Department makes such a calculation for reduction of the base penalty. Two hundred and fifty employees is the maximum number allowable by the Department for a reduction when making the calculation.

4. The crew involved in the cave-in, which led to the Corrective Notice of Redetermination, was composed of six employees. There were six other employees in road maintenance with some experience who could have performed some of the tasks of the crew.

5. The severity of the injury, which could reasonably be expected to result from the employee's exposure to the hazard presented by the violation, is a 5 on a scale of 1 to 6.

6. The probability of injury occurring as a result of the violation is 1 on a scale of 1 to 6.

CONCLUSIONS OF LAW

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

2. The Public Works Department of Clark County, which employed more than 250 persons on December 1, 1995, exceeded the number of employees for which a reduction of base penalty may be given by the Department in its calculations and, therefore, the employer is not entitled to a reduction of penalty based on size.

3. The Department of Labor and Industries' Corrective Notice of Redetermination No. 115306037 issued on July 2, 1996, alleging a serious violation of WAC 296-155-655(11)(a) and assessing a penalty of $1,120, is correct and is affirmed.

It is so ORDERED.

Dated this 11th day of March, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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S. FREDERICK FELLER Chairperson

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FRANK E. FENNERTY, JR. Member

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JUDITH E. SCHURKE Member