

U.S. Engine

SCOPE OF REVIEW

Safety and Health

The issues in an appeal of WISHA citations are limited by the notice of appeal pursuant to RCW 49.17.140 and RCW 51.32.060 and as confirmed on the record of proceedings. The Department is not required to present evidence on cited violations that were not in dispute.*In re U.S. Engine*, BIIA Dec., 98 W1057 (1999)

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

1 **IN RE: U.S. ENGINE, INC.**) **DOCKET NO. 98 W1057**
2)
3 **CITATION & NOTICE NO. 115207029**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Employer, U.S. Engine, Inc., by
8 Michael Crossan, Owner

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10 Employees of U.S. Engine, Inc.,
11 None

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13 Department of Labor and Industries, by
14 The Office of the Attorney General, per
15 Lori Oliver-Hudak, Assistant
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20 The employer, U.S. Engine, Inc., filed an appeal with the Board of Industrial Insurance
21 Appeals on January 16, 1998, from Corrective Notice of Redetermination No. 115207029 issued by
22 the Department of Labor and Industries dated December 24, 1997. The order modified Citation
23 and Notice No. 115207029 and assessed a total penalty of \$540. **AFFIRMED AS MODIFIED.**
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28 **DECISION**

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30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
31 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
32 Order issued on November 24, 1998, in which the order of the Department dated December 24,
33 1997, was affirmed as modified.
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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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3 no prejudicial error was committed and the rulings are affirmed. We have granted review to
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5 address the Department's Petition for Review contesting the vacation of all violations except Item
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7 No. 1-2. The Department does not challenge the reduction of the penalty of violation Item No. 1-2
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9 to \$270. After reviewing the Board's record, we agree with the Department that the only issue on
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11 appeal concerned Item No. 1-2 so that other violation items must be affirmed.

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13 U.S. Engine's Notice of Appeal refers only to, "the penalty assessment of \$540.00 for
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15 01-24-20515." The Corrective Notice of Redetermination only lists one violation item with a \$540
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17 penalty, and it is identified as 01-2. Under Item No. 1-2 of the Notice, the code violation is
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19 described as 24-20515. Thus, it is clear that U.S. Engine was only appealing violation
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21 Item No. 1-2. The limited nature of this appeal was confirmed on the record in an October 6, 1998
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23 Board conference. The parties agreed that the only issue, "is the question of the serious violation
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25 of WAC 296-24-20515 . . ." 10/6/98 Tr. at 3. During the hearing on the appeal, the Department
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27 only presented evidence regarding Item No. 1-2.

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29 In appeals before the Board involving the Washington Industrial Safety and Health Act
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31 (WISHA), the Department has the burden of initially introducing all evidence in its case in chief.
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33 WAC 263-12-115(2)(b). This rule must be read with reference to other applicable statutes and
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35 rules. RCW 49.17.140 states that the Board shall make disposition of the issues raised in WISHA
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37 appeals in accordance with its procedures involving contested cases. RCW 51.52.070 concerns
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1 the contents of Notices of Appeals to the Board. That section states, in part,

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3 The worker, beneficiary, employer, or other person shall be deemed to
4 have waived all objections or irregularities concerning the matter on
5 which such appeal is taken **other than those specifically set forth in**
6 **such notice of appeal** or appearing in the records of the department.
7 (Emphasis added.)
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9 As discussed above, the record shows that the employer was objecting only to violation
10 Item No. 1-2 of the Corrective Notice of Redetermination. This was confirmed on the record
11 between the parties. They did not expand the issues to include other violation items. The
12 Department met its burden of introducing evidence with regard to the only issue on appeal,
13 violation Item No. 1-2. Under RCW 51.52.070, it did not have to introduce evidence on violation
14 items that were not appealed and not put at issue by the parties. Therefore, we affirm the other
15 violation items contained in the Corrective Notice of Redetermination, and we affirm violation
16 Item No. 1-2 with the reduced penalty of \$270.
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25 FINDINGS OF FACT

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- 27 1. On October 9, 1997, a Department of Labor and Industries inspector
28 conducted an inspection of the firm, U.S. Engine, Inc. On November 7,
29 1997, the Department issued Citation and Notice No. 115207029
30 alleging serious violations of WAC 296-24-29419(1), 296-24-088(3),
31 and 296-24-23515(4) and assessed a penalty of \$600; serious violation
32 of WAC 296-24-20515 and assessed a penalty of \$540; repeat violation
33 of WAC 296-24-060(2) with no penalty; and general violations of
34 WAC 296-24-73505(1), 296-24-045(1), 296-24-75011(3)(d),
35 296-24-75011(1)(b), 296-24-75011(4), 296-24-56531(1) and
36 296-24-040(1)(a)(iv) with no penalty. Following a timely appeal from the
37 employer on November 12, 1997, the Department reassumed
38 jurisdiction over the matter on November 18, 1997. On December 24,
39 1997, the Department issued Corrective Notice of Redetermination
40 No. 115207029, that modified a November 7, 1997 Citation and Notice
41 of Assessment as follows: violations of WAC 296-24-29419(1),
42 296-24-088(3), and 296-24-23515(4) were modified from serious to
43 general violations without a penalty; serious violation of
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1 WAC 296-24-20515 was affirmed with a penalty of \$540; repeat
2 violation of WAC 296-24-060(2) was affirmed with no penalty; and
3 general violations of WAC 296-24-73505(1), 296-24-045(1),
4 296-24-75011(3)(d), 296-24-75011(1)(b), 296-24-75011(4),
5 296-24-56531(1) and 296-24-040(1)(a)(iv), were affirmed with no
6 penalty. On January 9, 1998, the Board received the employer's appeal
7 from the December 24, 1997 Corrective Notice of Redetermination.
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- 9 2. U.S. Engine only appealed violation Item No. 1-2 of the Corrective
10 Notice of Redetermination in which the Department alleged a violation
11 of WAC 296-24-20515. This remained the only issue on appeal during
12 the hearing at the Board.
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- 14 3. On October 9, 1997, U.S. Engine violated WAC 296-24-20515 at their
15 place of business in Auburn, Washington, because they had an
16 unguarded wheel on a sander.
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- 18 4. When considering the severity of injury and probability of injury the
19 appropriate base penalty for this serious violation of
20 WAC 296-24-20515 was \$1,800.
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- 22 5. U.S. Engine was entitled to credits of \$720 for the size of the company,
23 \$180 for the history of the company and \$630 for the excellent good
24 faith of the company. These credits set the final penalty for the violation
25 at \$270.
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27 **CONCLUSIONS OF LAW**

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- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the
30 parties and the subject matter of this appeal.
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- 32 2. Since the only issue raised by the parties in this appeal involved
33 violation Item No. 1-2 of the Corrective Notice of Redetermination, the
34 Department was not required to present evidence with regard to the
35 remaining violation items of the Corrective Notice of Redetermination.
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3. The December 24, 1997 Department of Labor and Industries Corrective Notice of Redetermination No. 115207029 is incorrect. The Corrective Notice of Redetermination is affirmed in all aspects, with the only modification being a reduction in penalty for the serious violation Item No. 1-2, of WAC 296-24-20515, to \$270. The total penalty assessed is \$270.

It is so **ORDERED**.

Dated this 10th day of February, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member

/s/ _____
JUDITH E. SCHURKE Member