Apex Roof Systems

SAFETY AND HEALTH

Burden of proof

The Department has the burden of proof that the penalty calculation is correct. **….*In re Apex Roof Systems,* BIIA Dec., 13 W0200 (2015)**

Penalties

The Department has the burden of proof that the penalty calculation is correct. **….*In re Apex Roof Systems,* BIIA Dec., 13 W0200 (2015)**

Standard of review

The Board's review of the Department's decision in a WISHA appeal is based on a preponderance of the evidence. **….*In re Apex Roof Systems,* BIIA Dec., 13 W0200 (2015)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: APEX ROOF SYSTEMS, LLC	**)**	**DOCKET NO. 13 W0200**
	)	
CITATION & NOTICE NO. 316736628	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Apex Roof Systems, LLC, per
Kent DeAvilla, Owner

Employees of Apex Roof Systems, LLC,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Richard Becker

The employer, Apex Roof Systems, LLC (Apex), filed an appeal with the Board of Industrial Insurance Appeals on December 24, 2013 from a Department of Labor and Industries Corrective Notice of Redetermination No. 316736628 (Corrective Notice) dated December 11, 2013. In this Corrective Notice, the Department alleged that Apex committed willful violations of WAC 296-155-24611(1)(a) and WAC 296-155-24611(2)(a) and general violations of WAC 296-155-110(6)(d) and (e) and WAC 296-155-110(9)(b). In its Corrective Notice the Department assessed an $18,000 penalty for violation of WAC 296-155-24611(1)(a) and no penalty for the other violations. The Corrective Notice is **AFFIRMED.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on February 25, 2015, in which the industrial appeals judge modified the Department Corrective Notice dated December 11, 2013.

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

We agree that a preponderance of the evidence supports the violations alleged in the Corrective Notice. We do not agree with the reduction of the penalty from $18,000 to $5,000. We agree with the Department that the evidence supports the Department's use of a probability rating of 3 to calculate the penalty. We conclude that the Department's Corrective Notice in which it assessed $18,000 penalty should be affirmed.

In its Petition for Review, the Department correctly states that the industrial appeals judge should not have reduced the penalty. But the Department incorrectly states that the employer has a burden to present evidence demonstrating that the Department arbitrarily calculated the penalty. It is the Department's burden to show the penalty was appropriate after consideration of the factors in RCW 49.17.180(7).[1]

The Department incorrectly argues that the Washington Court of Appeals' *Danzer*[2] decision states that the Board must apply the abuse of discretion standard when it reviews WISHA penalties assessed by the Department. *Danzer* does not support the Department's argument. *Danzer* states that under RCW 49.17.150(1), substantial evidence is the standard of review courts must apply when reviewing Board decisions regarding WISHA issues.[3] This standard of review does not apply to the Board's review of the Department's decisions. Under RCW 49.17.140(3), our review of the Department's WISHA citations and notices are to be handled as appeals in industrial insurance cases. The burden of proof in industrial insurance cases is a preponderance of the evidence. Therefore the burden of proof for the employer is not an abuse of discretion, but rather the standard is whether a preponderance of the evidence supports the citation and penalty. We must determine whether there is sufficient evidence in the record to affirm the Department's citation and resulting penalty.[4]

Penalty Calculation – Probability Rating

In calculating the penalty, the Department gave "due consideration" to the factors in RCW 49.17.180(7): the number of affected employees, the gravity of the violation, the size of Apex's business, the good faith of Apex, and the history of Apex's previous violations.[5]

The evidence demonstrates the Department correctly calculated the penalty with a probability rating of 3. The rule regarding probability states that:

> A probability rate is a number that describes the likelihood of an injury, illness, or disease occurring, ranging from 1 (lowest) to 6 (highest).
>
> – When determining probability, WISHA considers a variety of factors, depending on the situation, such as:
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> ■ Frequency and amount of exposure.

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[1] *In re Richard A. Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996); *In re Cam Construction*, BIIA Dec., 90 W060 (1992).
[2] *Danzer v. Department of Labor & Indus.*, 104 Wn. App. 307 (2000), review denied, 143 Wn.2d 1020 (2001).
[3] *Danzer* at 319.
[4] *Castle* at 2-3.
[5] RCW 49.17.180(7); *Danzer* at 320; *Castle at 2-6.*

- Number of employees exposed.
- Instances, or number of times the hazard is identified in the workplace.
- How close an employee is to the hazard, that is, the proximity of the employee to the hazard.
- Weather and other working conditions.
- Employee skill level and training.
- Employee awareness of the hazard.
- The pace, speed, and nature of the task or work.
- Use of personal protective equipment.
- Other mitigating or contributing circumstances.[6]

The industrial appeals judge concluded that the Department failed to present sufficient evidence to support a probability rating of 3. She stated that the Department failed to present evidence regarding the weather conditions or sufficient information regarding the workers' positions on the roof. We disagree with this conclusion. The admitted photographs show the weather conditions and workers close to the roof edge. One photograph shows a worker with his back facing the roof and another photograph shows a worker with his side facing the roof edge.

The industrial appeals judge also determined that the Department should have presented the workers as witnesses or asked the inspector, Mr. Olson, what the workers told him regarding various factors such as their skill level; how often they worked close to the roof edge; how much time they worked while on their knees; and whether Apex's owner, Mr. DeAvilla, actually functioned as a safety monitor. However, the evidence demonstrates that the roof was too large to qualify for a monitor-only fall protection-system. Even if the roof was not too large, Apex did not present evidence that Mr. DeAvilla wore the requisite monitor's clothing or limited his activity to monitoring.[7] In addition, the photographs demonstrate that he was not doing an adequate job keeping the workers out of the zone of danger, close to the roof edge. Mr. Olson testified that he saw workers several feet from the roof edge. The industrial appeals judge did not find Mr. Olson's testimony credible, and the photographs are inadequate regarding the workers' proximity to the roof edge. We find Mr. Olson's testimony credible because it is consistent with the photographs showing workers less than six feet from the edge.

[6] WAC 296-900-14010.
[7] WAC 296-155-24611 through WAC 296-155- 24623.

We agree with the industrial appeals judge it would have been helpful to know the experience levels of the three workers and how often and in what manner they worked close to the roof edge. It is probably less likely for someone to accidentally back off the roof on their hands and knees rather than feet, but there still is a fall risk. Only one of the six photographs shows a worker kneeling. Several photographs show workers standing close to the roof edge. Even though it would have been helpful to know more about the circumstances, a preponderance of the evidence demonstrates that the Department reasonably rated the probability, the likelihood of a fall from the roof at level 3 on the 1-6 probability scale. The evidence addresses several factors in the rule regarding probability of injury such as weather; number of employees exposed; and their proximity and access to the hazard. The rule also states that other mitigating or contributing factor should be considered. Here, contributing factors include Apex's failure to develop and document a site safety plan, and failure to document a walk around safety inspection and a worker safety meeting.

We agree with the Department's use of a probability rating of 3 to calculate the $12,000 base penalty. The Department correctly multiplied the probability rating of 3 with a severity rating of 6 to calculate the gravity. (Gravity = severity x probability).[8] The Department used a severity rating of 6 because a 25-foot fall from the roof onto concrete would probably result in death or permanent severe disability.[9] The Department correctly adjusted the base penalty.[10] The base penalty was first reduced 60 percent due to Apex's small work force (60 percent of $3,000 = $1,800).[11] The base penalty was not adjusted with a good faith rating because Apex had an average good faith (effort) rating.[12] The Department correctly multiplied the adjusted base penalty by ten because the serious violation was willful and Apex had a prior fall protection violation. ($1,800 x 10 = $18,000).[13] Therefore, the Department correctly assessed an $18,000 penalty. The Corrective Notice should be affirmed.

FINDINGS OF FACT

1. On April 10, 2014, an industrial appeals judge certified that the parties agreed to include the amended Jurisdictional History in the Board record solely for jurisdictional purposes.

[8] There is a gravity chart at the end of WAC 296-900-14010 with gravity ratings from 1-36 and accompanying penalties from $100 to $7,000.
[9] WAC 296-900-14010.
[10] The base penalty is adjusted up or down by factors set forth in WAC 296-900-14015 and WAC 296-900-140.
[11] WAC 296-900-14015.
[12] WAC 296-900-14015 Table 5.
[13] WAC 296-900-14015; WAC 296-900-14020.

2. On March 27, 2013, Ryan Olson, a safety and compliance officer with the Department of Labor and Industries was driving to a worksite in Auburn, Washington when he spotted individuals working on a flat roof, at least 24 feet high, without fall protection. The workers were placing a single ply membrane to a roof surface on a building at 116 Clay St. N.W., Auburn, Washington. The workers included three employees of Apex Roof System (Apex) and the owner of Apex. Mr. Olson inspected the worksite.

3. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(1)(a) when it permitted three employees to work on the building roof with no form of fall protection. Apex did not insure fall protection was provided, installed, or implemented.

4. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(2)(a) when it failed to have a fall protection plan at the jobsite as required by WAC 296-155-24611(2)(a).

5. The severity of the hazard in violation of WAC 296-155-24611(1)(a) was 6 on a scale of 1 to 6, with 6 being the most severe. Apex employees were exposed to a hazard of falling 25 feet from the roof onto concrete, and sustaining serious physical harm including the possibility of fractures, paralysis, or death.

6. The probability of an injury occurring due to the hazard in violation of WAC 296-155-24611(1)(a) was 3 on a scale of 1 to 6, with 6 being the most likely to occur. Three Apex employees worked on the roof with no fall protection close to the edge of the roof.

7. The base penalty for a violation of WAC 296-155-24611(1)(a) is $4,500. The base penalty is determined by multiplying the severity rating with the probability rating.

8. On March 27, 2013, Apex had between 1 and 25 employees resulting in a 60 percent reduction of the base penalty.

9. Because Apex had been cited for a fall protection violation in 2010, Apex had an average good faith rating that resulted in no adjustment to the base penalty.

10. Because the violation of WAC 296-155-24611(1)(a) was a willful violation and Apex had a prior fall violation, the adjusted base penalty is multiplied by ten. The Department correctly calculated an $18,000 penalty for the violation of WAC 296-155-24611(1)(a).

11. On March 27, 2013, Apex committed a general violation of WAC 296-155-110(6)(d) when it did not ensure that the crew leader documented who attended the safety meeting prior to the commencement of the job at 116 Clay St. N.W., Auburn.

12. On March 27, 2013, Apex committed a general violation of WAC 296-155-110(6)(e) when it failed to document subjects discussed at the safety meeting.

13. On March 27, 2013, Apex committed general violation of WAC 296-155-110(9)(b) when it did not ensure that the walk-around inspection, conducted at the start of the job at 116 Clay St. N.W. was documented.

14. In the Corrective Notice, the Department assessed no penalty for the general violations or for the willful violation of WAC 296-155-24611(2)(a).

CONCLUSIONS OF LAW

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

2. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(1)(a). The Department correctly assessed an $18,000 penalty for this violation.

3. On March 27, 2013, Apex committed a willful serious violation of WAC 296-155-24611(2)(a), a general violation of WAC 296-155-110(6)(d), a general violation of WAC 296-155-110(6)(e), and a general violation of WAC 296-110-(9)(b).

4. The Corrective Notice of Redetermination No. 316736628 is correct and is affirmed.

Dated: July 30, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
DAVID E. THREEDY Chairperson

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

/s/ _____
JACK S. ENG Member