Longview Fibre Co.

SAFETY AND HEALTH

Feasibility defense

If an employer wishes to argue that compliance with a safety standard is infeasible, it has the burden of proof of this affirmative defense. An employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection. ***….In re Longview Fibre Co.,* BIIA Dec., 98 W0524 (2000)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LONGVIEW FIBRE COMPANY	)	**DOCKET NO. 98 W0524**
	)	
CITATION & NOTICE NO. 302169248	)	**DECISION AND ORDER**

APPEARANCES:

Employer, Longview Fibre Company,
Law Office of William L. Dowell, per
William L Dowell

Employees of Longview Fibre Company, by
Association of Western Pulp & Paper Workers, Local 153, per
Robert Farmer

Department of Labor and Industries, by
The Office of the Attorney General, per
Susan E. Thomsen, Assistant

The employer, Longview Fibre Company (Longview Fibre), filed an appeal with the Board of Industrial Insurance Appeals on December 7, 1998, from a Citation and Notice of the Department of Labor and Industries dated November 17, 1998. The Citation and Notice alleged a serious repeat violation of WAC 296-79-220(6); a serious violation of WAC 296-79-220(2); a serious violation of WAC 296-24-11005(4)(a); and a serious violation of WAC 296-79-220(5)(a), for total penalties of $8,000. **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 timely Petitions for Review filed by Local 153 of the Association of Pulp and Paper Workers, and by the Department, to a Proposed Decision and Order issued on May 10, 2000, which affirmed, as modified, the Citation and Notice. In accord with the parties' stipulation, our judge vacated Item 2-3. Furthermore, the parties had stipulated Item 1-1 was not a repeat violation. Accordingly, our judge limited his decision regarding this item to whether it should be affirmed as a serious violation. He determined the Department had not met its evidentiary burden with regard to

this violation, and he therefore vacated it. He thereafter affirmed Items 2-1 and 2-2 in the Citation and Notice, with a total penalty assessed of $1,600.

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

We reaffirm our discussion in the accompanying Decision and Order issued in the companion appeal, Docket No. 98 W0423, regarding the inappropriate consolidation of these two appeals. We also note that the general description of the Department's lockout/tagout rules and of Longview Fibre's specific lockout/tagout procedures contained in our companion Decision and Order is also relevant to this decision. *See In re Longview Fibre Co.,* Dckt. No. 98 W0423, at 3-5. We hereby incorporate that summary into this decision, and limit our discussion here to the facts germane to this appeal.

We have some additional procedural and evidentiary issues specific to this appeal that require additional rulings. Robert Farmer, representing Longview Fibre's employees, attached two documents to his Petition for Review. First, he submitted a diagram of the piping near the Nos. 1 and 2 Refined Reject Tanks in the employer's Longview plant. Second, he attached a copy of a handwritten statement Mr. Farmer authored and signed on January 23, 2000.

We have numbered these documents as Exhibit Nos. 24 and 25 in this proceeding, and have rejected them both. Exhibit No. 24, the diagram, is a duplicate of the document already admitted as Exhibit No. 5 in this proceeding. It is accordingly rejected as cumulative.

Exhibit No. 25, the statement by Mr. Farmer, is rejected as untimely. We will not admit documents attached to a Petition for Review unless they are admissible under the relevant civil and evidentiary rules. Pursuant to WAC 263-12-125 and WAC 263-12-115(4), our proceedings are governed by the Washington Superior Court Civil Rules and Rules of Evidence. Once a hearing has been concluded, additional evidence can be only admitted as specified in CR 59. This rule

limits the evidence that can be introduced post-hearing to newly discovered evidence that a party could not have reasonably discovered and produced during the hearing itself. Mr. Farmer's note is not newly discovered evidence, and is, therefore, rejected.

Our industrial appeals judge committed an error in his penalty calculation. The parties stipulated Item 2-3 should be vacated. They further stipulated that if Item 1-1 was affirmed as a serious violation, the appropriate penalty was $1,600. Our judge vacated this item, and affirmed Items 2-1 and 2-2. He concluded the Department had intended to group Items 2-1, 2-2, and 2-3 together, for a total penalty of $1,600. He reached this conclusion based on his assumption that the Department had originally assessed total penalties of $4,800 in its Citation and Notice. This assumption is incorrect. The Department clearly had assessed total penalties of $8,000 in its Citation and Notice, and it had not grouped the penalties for Items 2-1, 2-2, and 2-3 together. The Department had assessed the penalties for each of these three items at $1,600. This is clearly established by the evidence in our file. The November 17, 1998 Citation and Notice is in our file. Additionally, the penalty worksheets for all four items were admitted as Exhibit Nos. 8 through 11. A review of these documents will indicate there is no factual basis in our record for faulting the Department's calculations or for concluding it had intended to group any of these citations.

Our judge's conclusion that the total penalty amount in this Citation and Notice was $4,800 was apparently based on an error in the Historical/Jurisdictional Facts. *See* Historical/Jurisdictional Facts, at 2. We note this document, prepared by one of our employees, should never be considered for substantive purposes. We prepare this document for parties solely so we can establish our jurisdiction to hear their appeals. Our judge erred by relying on this document for the calculation of the total penalty amount in the citation. We note the Historical/Jurisdictional Facts summary of each item in the citation correctly listed the penalty assessed, but an error by one of

our employees resulted in the listing of an incorrect total penalty. We hereby correct this document to reflect the correct total penalty amount contained in the original Citation and Notice.

Accordingly, we have determined the Department did **not** intend to group the penalties for Items 2-1 and 2-2. Our review of the file indicates there was no dispute regarding the Department's penalty calculations. Accordingly, for the reasons stated below, we have affirmed Items 1-1, 2-1, and 2-2 as serious violations, for a total penalty amount of $4,800.

DECISION

This appeal concerns a Citation and Notice issued after a "red top" lockout/tagout was erroneously implemented in Longview Fibre's Longview plant on July 13, 1998. On that date, two pipe fitters, Tim Courser, and Julie Ledgett, were directed to install a blank in a line near the No. 2 Refined Reject Tank. These pipe fitters began to work on the line after a "red top" lockout had already been implemented. All the parties acknowledged a "red top" lockout was necessary because the employees working in that area were preparing the tank so it could be safely entered by an employee.

The "red top" lockout/tagout procedure Longview Fibre has designed to prepare this tank for entry is detailed in Exhibit No. 15. This process specifies a number of valves that an operator must close, lock, and tag. Unfortunately, on July 13, 1998, Gary Doane, a washline operator, did not close the valve specified in Step 16 of this procedure. *See* Exhibit No. 15. Mr. Doane proceeded to lock and tag this valve even though it remained in the open position, under which material could flow through the line. James Taft, a Longview Fibre foreman who is Mr. Doane's supervisor, did not check to ensure the valve had been closed prior to signing the tag Mr. Doane had placed there. Mr. Taft's failure to verify the valve was closed was contrary to Longview Fibre's tagout/lockout policies. It also was contrary to his on-the-job training during the course of his employment with Longview Fibre.

Some time after the "red top" was purportedly implemented, Mr. Courser and Ms. Ledgett were instructed to remove a spectacle blank in a line so that a "complete" blank could be reinstalled at the same place. Blanks are metal parts inserted in a line. A spectacle blank is shaped like a donut or spectacle and is not designed to completely stop the flow of material through a line. A "complete" blank is solid metal designed to stop this flow. Part of preparing the No. 2 Refined Reject Tank involved substituting a "complete" blank for the spectacle blank to protect the employee in the tank. Unfortunately, the spectacle blank that these two employees had been directed to remove had become plugged. Since the line was plugged, the employees did not notice the open valve until the material had been partially dislodged. Suddenly, product began flowing through the line and out the opened line. Mr. Courser and Ms. Ledgett were sprayed with product from the reject line. Fortunately, neither employee sustained any serious injury.

Longview Fibre admitted the "red top" was improperly implemented. No one has assigned error to our industrial appeals judge's decision to affirm Items 2-1 and 2-2 in the Citation and Notice. Our review of the evidence indicates his Proposed Decision and Order with regard to these two citations was entirely correct. We will not discuss these items further in this decision.

The only issue before us now is whether our judge's decision to vacate Item 1-1 was correct. Both the Department and Longview Fibre's employees argue this decision was incorrect and this item should be affirmed as a serious violation of WAC 296-79-220(6). This rule requires that after the lockout/tagout has been completed, but before the anticipated repair task or other work has begun, the equipment or piping shall be tested to ascertain that it "has been made inoperative or the flow of material has been positively stopped." The Department has the burden of proof on this issue. A serious violation requires the Department to establish an employer has violated the cited rule, and that the violation caused a substantial risk of serious physical harm or death to employees. *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996); RCW 49.17.180(6).

Our industrial appeals judge vacated Item 1-1 because he believed the Department had the evidentiary burden of proving how the employer could have complied with this rule. He also concluded the Department had not shown how Longview Fibre could have implemented the rule.

Our judge incorrectly recited the parties' evidentiary burdens in this situation. Additionally, he did not correctly interpret the record in this proceeding. We have concluded Longview Fibre violated this testing requirement, and therefore affirm Item 1-1 as a serious violation.

We start by restating the legal principles involved. Since there is no relevant Washington precedent, we look for guidance to relevant federal law. In a case such as this one, involving a violation of a particular standard expressed in a rule, the Department is not required to prove compliance with the standard is feasible. *Secretary of Labor v. Rockwell International Corp.*, 17 OSHC 1801 (September 30, 1996). *See also,* M. Rothstein*, Occupational Safety and Health Law* § 107, at 162 (4th ed. 1998). If an employer wishes to argue that compliance with the standard is infeasible, it has the burden of proof on this affirmative defense. *Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC 1218 (August 9, 1991). *See also,* M. Rothstein*, Occupational Safety and Health Law,* § 119, at 183. To prevail,

> an employer must prove that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used, or (b) there was no feasible alternative means of protection.

Secretary of Labor v. Armstrong Steel Erec, Inc., 17 OSHC at 1387, as quoted in *Secretary of Labor v. Rockwell International Corp.,* 17 OSHC 1801 (September 30, 1966)*, at 1807*.

Turning to the facts of this case, the Department unquestionably established Longview Fibre did no testing to ensure its "red top" lockout/tagout had been implemented correctly. While the employer questioned whether it could have complied with this rule, James Taft, one of its

witnesses, volunteered a method that could have been used to comply with its requirements. Longview Fibre certainly did not introduce enough evidence to convince us the testing requirement in the cited rule was infeasible.

To the contrary, the record contains descriptions of several methods that Longview Fibre could have used to test this line. First of all, both Mr. Courser, one of the pipe fitters involved, and Mr. Taft, the foreman involved, agreed a visual inspection of the line could have revealed the relevant valve remained open. However, a visual inspection of a pipe probably is not a sufficient test to verify the flow of material has been stopped. In this case, three different methods to test whether the flow of material in the pipe had stopped were described. Angela Gelencser, the Department inspector, testified this system could have been tested by opening a drain valve on the line or by testing the pressure in the line with pumps. Additionally, Mr. Taft indicated that opening a high-pressure hook-up line on the system would have revealed pressure remained in the line (thereby indicating the valve had been left open). Longview Fibre did not present evidence to establish these means of compliance were infeasible.

There is no question that Longview Fibre's failure to do any testing in this situation placed its employees at risk of serious injury. It is fortunate that the employees involved were not injured.

We conclude Item 1-1 in the Citation and Notice should be affirmed as a serious violation. Based on our careful review of the record in this proceeding, and of the Petitions for Review filed by the employees and by the Department, we have concluded the November 17, 1998 Citation and Notice should be affirmed as modified by the parties' stipulations. Accordingly, Item 1-1 is affirmed as a serious, rather than as a repeat serious violation, and Item 2-3 is vacated. As modified, the Citation and Notice is affirmed with total penalties of $4,800.

FINDINGS OF FACT

1. On August 26, 1998, the Department of Labor and Industries conducted an inspection at the Longview plant of Longview Fibre Company

(Longview Fibre), in Cowlitz County, Washington. The closing conference occurred on October 13, 1998.

On November 17, 1998, the Department issued Citation and Notice No. 302169248 for a repeat serious violation of WAC 296-79-220(6); a serious violation of WAC 296-79-220(2); a serious violation of WAC 296-24-11005(4)(a); and a serious violation of WAC 296-79-220(5)(a); for total penalties of $8,000.

The employer filed its appeal with the Board of Industrial Insurance Appeals on December 7, 1998. The Department transmitted its file to the Board on December 18, 1998. The Board assigned the appeal Docket No. 98 W0524.

2. Longview Fibre is a corporation with a workplace in Longview, in Cowlitz County, Washington, where wood pulp is processed into various end products.

3. On July 13, 1998, two pipe fitters, Tim Courser and Julie Ledgett, were directed to install a blank in a line near the No. 2 Refined Reject Tank in Longview Fibre's Longview plant. The pipe fitters were directed to remove a spectacle blank previously inserted in the line, and to reinstall a blank at the same place. Before the pipe fitters began to work on the line, a "red top" lockout-tagout system had purportedly already been implemented. Longview Fibre has designed a specific "red top" lockout-tagout procedure its employees are required to follow in preparing the No. 2 Refined Reject Tank for entry. Under this specific "red top" procedure, a valve on an 8 inch line from the No. 2 Refined Reject Tank to the No. 5 Blow Tank is required to be closed, tagged, and locked. Gary Doane, a washline operator, did not close this valve prior to proceeding to lock and tag it. James Taft, a Longview Fibre foreman, who is Mr. Doane's supervisor, did not check to ensure the valve had been closed prior to signing the tag Mr. Doane had placed there. Mr. Doane and Mr. Taft failed to properly implement the lockout/tagout procedure Longview Fibre had designated to be used to prepare the No. 2 Refined Reject Tank for entry. As a result, while Mr. Courser and Ms. Ledgett were engaged in removing the plug in the spectacle blank, product suddenly began to flow through the line. As a result, Mr. Courser and Ms. Ledgett were sprayed with product. This product is a hazardous material that can cause serious bodily harm.

4. On July 13, 1998, Longview Fibre employees did no testing to determine whether the "red top" tagout-lockout had been successfully implemented so as to verify that the flow of material through the line Mr. Courser and Ms. Ledgett were working on had been positively stopped. Longview Fibre's failure to do any testing to verify the "red top" had been successfully implemented violated the provisions of

WAC 296-79-220(6). Longview Fibre's violation of this rule created a substantial risk of serious physical harm or death to its employees.

5. Longview Fibre's violation of WAC 296-79-220(6) was not a repeat serious violation.

6. On July 13, 1998, Longview Fibre did not prevent the flow of material in piping by deactivating and locking out the control system while employees were working on the piping system of the No. 2 Refined Reject Tank, thereby violating provisions of WAC 296-79-220(2). Longview Fibre's failure to comply with the requirements of this regulation created a substantial risk of serious physical harm or death for its employees.

7. On July 13, 1998, Longview Fibre did not use appropriate procedures for the control of potentially hazardous energy, thereby violating the requirements of WAC 296-24-11005(4)(a). Longview Fibre's failure to properly implement this rule created a substantial risk of serious physical harm or death to its employees.

8. On July 13, 1998, Longview Fibre ensured that each person who was exposed to a hazard applied a personal padlock on the control mechanism, in a manner consistent with the requirements of WAC 296-79-220(5)(a), while implementing a "red top" lockout-tagout designed to prepare the No. 2 Refined Reject Tank for entry.

9. For the violation of WAC 296-79-220(6), the probability of an accident was low (rated "two" on a scale of one to six) and the severity of injury due to the hazard was very high (rated as "six" on a scale of one to six), yielding a gravity rating of twelve. The employer had an "average" history regarding workplace safety and its good faith was "good." The company employed in excess of 2,500 employees. With an adjustment for its "good" good faith rating, the appropriate penalty for this violation is $1,600.

10. For the violation of WAC 296-79-220(2), the probability of an accident was low (rated "two" on a scale of one to six) and the severity of injury due to the hazard was very high (rated as "six" on a scale of one to six), yielding a gravity rating of twelve. The employer had an "average" history regarding workplace safety and its good faith was "good." The company employed in excess of 2,500 employees. With adjustment for its "good" good faith rating, the appropriate penalty for this violation is $1,600.

11. For the violation of WAC 296-24-11005(4)(a), the probability of an accident was low (rated "two" on a scale of one to six) and the severity of injury due to the hazard was very high (rated as "six" on a scale of one to six), yielding a gravity rating of twelve. The employer had an "average" history regarding workplace safety and its good faith was "good." The company employed in excess of 2,500 employees. With adjustment for its "good" good faith rating, the appropriate penalty for this violation is $1,600.

CONCLUSIONS OF LAW

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

2. Longview Fibre is an employer, as defined in RCW 49.17.020(4), subject to the provisions of the Washington Industrial Safety and Health Act, RCW 49.17.

3. On July 13, 1998, Longview Fibre committed a serious violation of WAC 296-79-220(6), as defined in RCW 49.17.180(6).

4. On July 13, 1998, Longview Fibre committed a serious violation of WAC 296-79-220(2), as defined in RCW 49.17.180(6).

5. On July 13, 1998, Longview Fibre committed a serious violation of WAC 296-24-11005(4)(a), as defined in RCW 49.17.180(6).

6. On July 13, 1998, Longview Fibre did not commit a serious violation of WAC 296-79-220(5)(a), as defined in RCW 49.17.180(6).

7. Citation and Notice No. 302169248, issued on November 17, 1998, is hereby affirmed as modified. Item 1-1 is modified from a repeat serious to a serious violation, with a total penalty amount of $1,600. Items 2-1 and 2-2 are affirmed as serious violations, with a penalty of $1,600 for

each violation. Item 2-3 is incorrect and is vacated. The November 17, 1998 Citation and Notice is affirmed as modified, with a total penalty amount of $4,800.

It is so ORDERED.

Dated this 27th day of October, 2000.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member