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 51.52.070 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, BIA Dec., 98 W1057 (1999)
BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE:   U.S. ENGINE, INC. ) DOCKET NO. 98 W1057

) )
CITATION & NOTICE NO. 115207029 ) DECISION AND ORDER

APPEARANCES:

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

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

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

The employer, U.S. Engine, Inc., filed an appeal with the Board of Industrial Insurance
Appeals on January 16, 1998, from Corrective Notice of Redetermination No. 115207029 issued by
the Department of Labor and Industries dated December 24, 1997. The order modified Citation
and Notice No. 115207029 and assessed a total penalty of $540. **AFFIRMED AS MODIFIED.**

**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 Department to a Proposed Decision and
Order issued on November 24, 1998, in which the order of the Department dated December 24,
1997, was affirmed as modified.
The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed. We have granted review to address the Department's Petition for Review contesting the vacation of all violations except Item No. 1-2. The Department does not challenge the reduction of the penalty of violation Item No. 1-2 to $270. After reviewing the Board's record, we agree with the Department that the only issue on appeal concerned Item No. 1-2 so that other violation items must be affirmed.

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

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

The worker, beneficiary, employer, or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such appeal is taken **other than those specifically set forth in such notice of appeal** or appearing in the records of the department. (Emphasis added.)

As discussed above, the record shows that the employer was objecting only to violation Item No. 1-2 of the Corrective Notice of Redetermination. This was confirmed on the record between the parties. They did not expand the issues to include other violation items. The Department met its burden of introducing evidence with regard to the only issue on appeal, violation Item No. 1-2. Under RCW 51.52.070, it did not have to introduce evidence on violation items that were not appealed and not put at issue by the parties. Therefore, we affirm the other violation items contained in the Corrective Notice of Redetermination, and we affirm violation Item No. 1-2 with the reduced penalty of $270.

**FINDINGS OF FACT**

1. On October 9, 1997, a Department of Labor and Industries inspector conducted an inspection of the firm, U.S. Engine, Inc. On November 7, 1997, the Department issued Citation and Notice No. 115207029 alleging serious violations of WAC 296-24-29419(1), 296-24-088(3), and 296-24-23515(4) and assessed a penalty of $600; serious violation of WAC 296-24-20515 and assessed a penalty of $540; repeat violation of WAC 296-24-060(2) with no penalty; and general violations of WAC 296-24-73505(1), 296-24-045(1), 296-24-75011(3)(d), 296-24-75011(1)(b), 296-24-75011(4), 296-24-56531(1) and 296-24-040(1)(a)(iv) with no penalty. Following a timely appeal from the employer on November 12, 1997, the Department reassumed jurisdiction over the matter on November 18, 1997. On December 24, 1997, the Department issued Corrective Notice of Redetermination No. 115207029, that modified a November 7, 1997 Citation and Notice of Assessment as follows: violations of WAC 296-24-29419(1), 296-24-088(3), and 296-24-23515(4) were modified from serious to general violations without a penalty; serious violation of
WAC 296-24-20515 was affirmed with a penalty of $540; repeat violation of WAC 296-24-060(2) was affirmed with no penalty; and
general violations of WAC 296-24-73505(1), 296-24-045(1),
296-24-75011(3)(d), 296-24-75011(1)(b), 296-24-75011(4),
296-24-56531(1) and 296-24-040(1)(a)(iv), were affirmed with no penalty. On January 9, 1998, the Board received the employer's appeal from the December 24, 1997 Corrective Notice of Redetermination.

2. U.S. Engine only appealed violation Item No. 1-2 of the Corrective Notice of Redetermination in which the Department alleged a violation of WAC 296-24-20515. This remained the only issue on appeal during the hearing at the Board.

3. On October 9, 1997, U.S. Engine violated WAC 296-24-20515 at their place of business in Auburn, Washington, because they had an unguarded wheel on a sander.

4. When considering the severity of injury and probability of injury the appropriate base penalty for this serious violation of WAC 296-24-20515 was $1,800.

5. U.S. Engine was entitled to credits of $720 for the size of the company, $180 for the history of the company and $630 for the excellent good faith of the company. These credits set the final penalty for the violation at $270.

CONCLUSIONS OF LAW

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

2. Since the only issue raised by the parties in this appeal involved violation Item No. 1-2 of the Corrective Notice of Redetermination, the Department was not required to present evidence with regard to the remaining violation items of the Corrective Notice of Redetermination.
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