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**I. REPLY TO THE DEPARTMENTS**  
**CHARACTERIZATION OF THE ISSUES**

In addition to the four (4) issues set forth at Page 3 of Respondent's Brief; the respondent argues a fifth issue in footnote #2 which will be addressed herein. The respondent states in footnote #2 that the appellant has waived the claim that interest should be calculated from the date of this court's ruling. That is not accurate. The Appellant did argue this point in its brief on appeal to the Thurston County Superior Court. CABR at 105 Further, at the hearing in front of the IAJ, the Department's own employees admitted they had improperly calculated Leffler's assessments. In addition, the Superior Court removed the 200% penalty finding that the penalty was excessive and not supported by substantial evidence. These changes require this court to direct the Department on remand to not assess interest until the actual sum owed is determined, if any. Mr. Leffler's protest and

appeal of the assessments were well-founded since the Department agrees this matter should be remanded for recalculation. The initial audit calculations included significant sums of money assessed as penalties and interest added onto the principal sum owed by Mr. Leffler. Why should Mr. Leffler be charged with interest on a moving sum (it keeps getting reduced with each appeal) until the Department recalculates and makes a final determination? Once the amount owed is finally determined; then and only then should interest commence accruing.

## **II. REPLY TO DEPARTMENT'S STATEMENT OF THE CASE**

In the Department's statement of the Case at page 9-10, the Department points to that portion of the record where Mr. Leffler used the term "due diligence" in describing his partnership with Mr. Duncan and Mr. Hosford. The Industrial Appeals Judge and the

Department extrapolate from that comment that no partnership agreement was ever reached. CABR at 49.

Mr. Leffler categorically and clearly testified that a partnership had been formed,

A. Bob Hosford was willing to invite Greg Duncan in as a third partner in Choices Building and Development.

Q. Did you form a partnership with Greg Duncan?

A. Yes, we did. We had- - -

Q. What was the percentage of shares?

A. 20 percent, and Bob objected vehemently. He says, that's all I am getting. I have been here a year a half. Why should you invite him in? I says, Bob, because you can't do it, and he can. That's why he is deserving.

Q. So when Greg Duncan came onboard what were the percentages of all the . . . and who were the partners?

A. There were just the three of us.

Q. All right?

A. They each got 20.

Q. All right.

A. Leaving 60 for me, the controlling interest for me because we were still in the due diligence process. We are still in the, me discovering whether they can do it or not,

Q. Did you reduce this agreement in writing?

A. No it wasn't necessary. (Tr. 2-20-07 pgs. 45-46)

What Mr. Leffler was actually describing was the process of increasing Mr. Duncan's and Mr. Hosford's respective shares as they proved themselves. He was

describing a process identical to the real estate business he ultimately turned over to April Robertson. Until Hosford and Duncan proved themselves Leffler wanted to maintain his majority interest in the partnership. *Id.*

The Department also cites on page 10 that portion of the administrative decision which states, “If Mr. Duncan was, indeed, a partner in the business, he would have been competent to sign such checks without Leffler’s permission”. However, Duncan did sign checks. He had a stack of checks with which he could pay supplies, sub-contractors, his girlfriend. . . anyone he chose including himself. The payee line and amount line on all these checks was not filled in. Duncan had total control over who and how much was to be paid. The only limitation was the amount of money in the bank account itself. In fact it was this lack of control that led to the partnership breakup. Leffler found out late in the building project that his partner Duncan, had spent nearly all the money in the account and there wasn’t enough left to complete the project.

### **III. REPLY TO RESPONDENT’S ARGUMENT THAT NO PARTNERSHIP EXISTED**

#### **1. Substantial evidence does not exist to support**

**the Board's finding of fact when the record as a whole is reviewed.**

The Appellant recognizes the substantial evidence rule. However, the existence of some evidence to support a finding does not mean it is substantial evidence. A mere scintilla will not support a court's finding. Further, substantial evidence requires believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed. Hewitt v. Spokane, 66 Wn. 2d 268 (1965).

As previously stated in the Appellant's opening brief, Washington has adopted the Revised Uniform Partnership Act. (See RCW Chapter 25.05, inclusive.) Pursuant to RCW 25.05.0555, whenever two or more persons "carry on as co-owners a business for profit," a partnership is formed, "*whether or not the persons intend to form a partnership.*" (emphasis added). Any agreement to form a partnership (including amendments thereto) does not have to be in writing and can be oral or merely implied. RCW 25.05.005.

A partnership is *presumed* if the person receives a share of the profits of a business..." (RCW 25.05.55(3)(c)) (emphasis added). Discussions to

convert a partnership to an LLC or corporation does not terminate a partnership and in fact in this case confirms the existence of a partnership.

The present case falls squarely within these statutory definitions of partnership. First, the partnership is presumed because both Duncan and Hosford were receiving a share of the profits in the form of draws. Second, a partnership can be created orally or even implied. Third, the fact that there were discussions and steps taken to convert the partnership to a LLC or corporation does not terminate the partnership. See attached.

A partnership existed between Mr. Hosford, Mr. Duncan and Mr. Leffler within the meaning of RCW 51.12.020(5) based on the fact that Mr. Hosford and Mr. Duncan exhibited and exercised substantial control of the day to day operations of Choices Building and Development. Mr. Duncan had authority to hire and fire, complete blank checks, and pay employees from check proceeds. All employees were paid cash or by check. (Tr. 3/13/2007, p. 9, l. 17-35). No taxes were withheld from any checks.

There was extensive testimony in the Administrative record that illustrates that Mr. Hosford and Mr. Duncan

held themselves out as partners of Choices Building and Development and not employees. For example, Ann Williams testified, when asked about a conversation she had with Greg Duncan about his capacity in Choices Building and Development was, “He was going to (be) a construction supervisor and he – Mr. Leffler and Mr. Hosford were going into building these houses as partners. I don’t know how much of a partnership, how much was what, and then they would all share in the profits. Rick would finance it, they would build and then he would – and then they would build the house and share in the profits.” Tr. 2/7/07 at 52. Ms. Williams was asked about any conversations with Bob Hosford about his relationship or capacity in Choices Building and Development, which she responded, “He was the actual - -he was doing the actual building, the framing. And again, he was a - - the three of them were partners, and they were all going to share in the profits.” *Id.* Ms. Williams also recalled that Greg Duncan signed documents as the representative for Choices Building and Development.

Mrs. Williams described each of the three partners as having distinctly different roles in the company. Leffler handled the finance, Duncan was the construction

supervisor, and Hosford performed a portion of the construction. Neither Mr. Hosford nor Mr. Duncan ever stated they were employees of Choices Development. (Tr. 2/7/2007, p. 54, l. 47 to p. 55, l.5).

Mr. Robert Williams (Husband to Ann Williams) also was asked to recall any conversations where Mr. Duncan expressed his relationship or capacity with Choices Building and Development, to which he stated, "He said that he was a partner with Rick, he and Bob were partners with Rick and that they would split the profits after the houses were completed." Tr. 2/7/07 at 59

There was also testimony regarding Mr. Leffler, Mr. Hosford and Mr. Duncan bringing in another partner into their business partnership. Mr. Reuben Gonzales testified when asked what discussions did he have with any of the parties regarding his involvement in the partnership, "Well, basically Rick was very adamant on the phone about not having any employees and he wanted me to become a partner in the company. He wanted me to meet with his other two partners so we could all get a feel for each other." Tr. 2/7/07 at 63.

When all the relevant evidence is considered, and "where it appears that the parties have entered into a business relation combining their property, labor, skill

and experience, or some of these elements on the side and some on the other, for the purpose of joint profits, a partnership will be deemed established.” *In re Estate of Thorton*, 81 Wn.2d, 79, 499 P.2d 864 (1972). In the present case when all the evidence is considered, it is overwhelmingly factually evident that a partnership was formed and legally it should be presumed one was formed because the 3 individuals shared in the profits.

The Department’s main support for the argument that substantial evidence exists to support the Board’s decision that there was no partnership between Mr. Leffler, Mr. Duncan and Mr. Hosford was the fact that the partnership was not memorialized by a written agreement. The Appellant Mr. Leffler directs the court to a pertinent portion of the statute governing partnerships . . . Any agreement to form a partnership (including amendments thereto) does not have to be in writing and can be oral or merely implied. RCW 25.05.005. Mr. Leffler did not put the partnership agreement in writing because he did not believe it was necessary as evident by his recollection of a previous partnership, “. . . a written agreement wasn’t necessary with men with integrity. It is not necessary.” Tr. 2/20/07 at 25. The lack of a written partnership

agreement doesn't constitute evidence in support of the Department's position. The absence of a written document requires this court to look at all the direct and circumstantial evidence.

The Department also directs attention to the fact finder's need to evaluate conflicting testimony and determine credibility. With the exception of Duncan; every fact witness testified in support of the existence of a partnership. There were no findings that these witnesses lacked credibility. Therefore, there is no reason for this Appellate Court to defer to the fact finder's determination of credibility. Mr. Hosford did not even testify and therefore did not deny that a partnership existed. The Department also argues that Mr. Leffler's own testimony was conflicting on the formation of a partnership. On the contrary, Leffler's testimony is taken out of context. As previously stated when Leffler used the term due diligence he was talking about his 60 percent controlling interest in the partnership. The Board confused the testimony about giving up a controlling interest in the partnership with the formation of a partnership. Leffler was not discussing formation, he was discussing increasing Duncan and Hosford's interests in the partnership.

Leffler's intent to increase Duncan and Hosford's share of the partnership is illustrated by the following testimony: ". . . for you [Duncan and Hosford sic] to show me that you know how to run a company and create profits and with those profits you can buy me out. And I says, if you are still around in a year, you will get another ten another five percent for a total of 10 percent, just by being here and sticking it out for a year." (*Tr. 2-20-07 P. 35*).

Mr. Leffler also testified when questioned regarding some notes with initials and percentages on them, "Bob was taking notes on this piece of paper, a partnership meeting that we had where I told him what percentage of ownership that he would be involved with. . . . Larry was at the meeting and that's what the L is. R is 70 is me, Rick. L is Larry, 10 percent, and Bob is 20 percent. That is ownership." *Id at 42*. Mr. Leffler was also questioned regarding the events that brought Mr. Duncan into the partnership, "Bob Hosford didn't know how to do it. So I says, Bob, I guess this, if you don't know how to do it. . . you don't. . . it doesn't seem like we have any choice. We have to invite Greg in as a partner." *Id at 44*. "Bob Hosford was willing to invite Greg Duncan in as a third partner in Choices Building

and Development.” *Id.* Taken in context Leffler’s testimony is clear, and not conflicting, that his relationship with Mr. Hosford and Mr. Duncan was a partnership.

Leffler has previously responded hereinto the Department’s argument that if Mr. Duncan and Mr. Hosford were partners instead of employees they would have had authority to fill out checks by the business. Mr. Duncan and Mr. Hosford did have authority to fill in blank checks including who the payee was and for what amount.

Q. And was the payee line blank?

A. Yep.

Q. And was the amount for the check blank?

A. Yep.

Q. Who filled those in?

A. The person who wanted the money, to get paid for their work. (*Tr.2-20-07 P. 40*)

Q. Did you just leave checks, signed checks lying around at the office that[ Hosford and Duncan sic] could access?

A. Yes.

Q. And that’s how they got access to the checks and wrote their names in on them?

A. Yes. I gave to them. *Id at 55.*

This demonstrates that both Mr. Hosford and Mr. Duncan had authority to not only decide who the checks went to but how much they were for, just as a partner would.

A. **MR. LEFFLER IS NOT RESPONSIBLE FOR PREMIUMS FOR WORK PERFORMED ON HIS COMMERCIAL PROPERTY.**

The Department argues that Mr. Leffler and Mr. Hosford's arrangement to repair the fire damage at the commercial property using Mr. Hosford's company H&H construction did not meet the requirements of RCW 51.08.195 and the 6 part test or the 4 part test of the former RCW 51.08.180(2) (2004). The following examples show that Mr. Leffler indeed substantially met the requirements of the 6 part test of RCW 51.08.195.

At the beginning of 2005, Leffler's accountant issued Hosford a 1099 Miscellaneous form for 2004 reflecting that Bob Hosford and his company, H&H Construction, had been paid \$56,549.79 in miscellaneous compensation, reflecting his compensation as business owner of H&H Construction while doing work in the fire damaged commercial property Mr. Leffler owned. (2/20/2007, Tr. 37, l. 3-19; p. 40, l. 40 to p. 41, l. 5., Ex.#

14). In early 2006, Leffler's accountant prepared and forwarded 1099 miscellaneous income tax forms to amount to Hosford (and H&H Construction) in the amount of \$65,866.81. (See Exhibit 15). No objection was made to using a 1099 Miscellaneous Income form.

Mr. Leffler also testified that he believed that Mr. Hosford possessed a contractor's license. When asked the question, "Did you have knowledge or understanding whether or not he had a contractor's license independent of yours?" He replied, "yeah, he told me he did." Tr. 2/20/07 at 38. Mr. Hosford was free from control of Mr. Leffler and would come and go as he pleased and would work on the fire damaged building when he wanted. It was during the repair of the fire damage to the commercial property that Leffler and Hosford got to know each other and decided to form a partnership. Mr. Hosford also hired others to do the work on the commercial property (ie his son Matt Hosford) so the assignment wasn't his personal labor it was his expertise as a independent contractor and business owner.

Mr. Leffler testified that H&H Construction was a legitimate independent contractor and he did not hire Hosford as an employee. Therefore Mr. Leffler was

excluded from paying premiums for work on his commercial property.

**B. THIS COURT SHOULD DIRECT THE DEPARTMENT TO WAIVE THE PENALTIES ASSESSED.**

The Department argues that this court should not direct that the penalties be waived because the Appellant cites no authority in its argument for such relief. This is erroneous , In the CABR at p. 106 Mr. Leffler made the following argument:

“The Department’s employees testified during the hearing that penalties and interest can be waived. The Board should consider this testimony and find that the Firm did not willfully fail to pay Labor & Industries assessments. The Firm (Mr. Leffler) in good faith believed that he was involved in a partnership with Bob Hosford and Greg Duncan and that no Labor & Industries premiums were due. The criteria as testified to by the Department’s Auditor to waive penalties and interest is met. This Board should not leave it to the discretion of the Department whether it will impose penalties and interest, but, rather should simply order the Department not to impose anything other than the principal amount of the assessment. The Board has authority to order the Department to waive penalties and interest. Review of the decision to assess a penalty is De Nova and the burden of proof that the assessment money for

penalty is incorrect is simply by a preponderance of the evidence.” Susan Irmer, 89, 0492 (1990) [P-84] Attached as exhibit 1(CABR at 106)

The Department in its Responsive Brief at page 26 states; “third, it [the Department] assessed a penalty of \$27,759 pursuant to RCW 51.48.010 for Mr. Leffler’s failure to secure the payment of compensation” In the Department’s trial brief at page 8 the Department states; “The second penalty of \$27,750.97 was for not being a “registered employer” – that is, not having an open and active Industrial Insurance account with the Department. The amount was determined by using 200% of the premiums the Department determined to be due for four quarters. . . . and RCW 51.48.010 does provide for a penalty of up to 200% of premiums incurred prior to registering with the Department.” CABR at 115

Superior Court Judge Christine Pomeroy ruled that the Department’s assessment of a two hundred percent (200%) penalty was excessive; that the decision is not supported by substantial evidence and was arbitrary and capricious. (CP at 8). Finding of fact #22 of the Board’s Decision and Order stated that the penalties and interest

assessed by the Department were based on incorrect premiums and calculations

The Department's trial brief states the 200% penalty was \$27,759.97 which was imposed pursuant to RCW 51.48.010. The Superior Court's ruling reversing this penalty was not cross-appealed by the Department is now the law of this case.

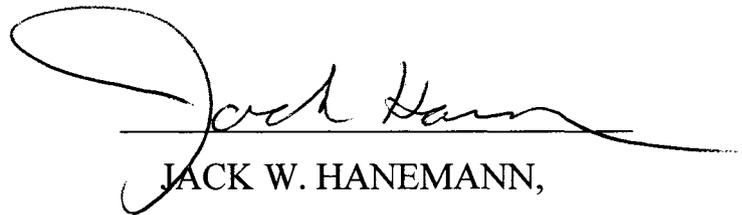
The Superior Court has stricken one penalty (RCW 51.48.010) In addition, the Appellant points out to this court that the Department has conceded that its initial assessments and calculations were in error. It would be a grave injustice to the appellant to permit the Department to assess new penalties when the appellant has been successful in challenging and reducing the total assessment at both the Board and in Superior Court. Even if this court rules that the Department has substantial evidence to support its claim of no partnership then, this court should still order that no penalties be assessed because the amount Leffler owes has been significantly reduced.

#### **IV. CONCLUSION**

The Board's decision finding a partnership among Leffler, Duncan and Hosford should be reversed. No

penalties or interest should be assessed and this matter remanded for calculation of premiums due based upon those employees that the appellant concedes that Duncan and Hosford as partners in the partnership hired.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jack Hanemann", written over a horizontal line.

JACK W. HANEMANN,

WSBA #6609

Attorney for Appellant Leffler

**Proof of Service**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

James S. Johnson  
Assistant Attorney General  
P.O. Box 40121  
Olympia, WA 98504-0121

ABC/Legal Messenger

Via Facsimile

Hand delivered by \_\_\_\_\_

STATE OF WASHINGTON  
BY JSJ  
JULY 1 - 10 2009  
COURT OF APPEALS  
DIVISION II

I certify under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this \_\_\_\_ day of May, 2009, at Olympia, WA.

Frank Parascandola  
FRANK PARASCONDOLA  
Paralegal

# Board of Industrial Insurance Appeals

## State of Washington

### Significant Decisions

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See **PENALTIES Failure to submit medical reports**

In determining the amount of the penalty to be assessed for violating the provisions of WAC 296-15-070(3) the factors that should be considered include, at a minimum, (1) whether the employer intended to mislead the Department by withholding records, (2) the content and significance of the records withheld, and (3) whether the employer had previously been found in violation of Department rules. ....**Susan Irmer, 89 0492 (1990)**

See **PENALTIES Review of penalties under RCW 51.48.080**

See **SCOPE OF REVIEW Penalty assessments**

See **STANDARD OF REVIEW Penalty assessment**

The decision to assess a penalty pursuant to RCW 51.48.080 is not committed to the discretion of the Department. In an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full *de novo* review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of evidence. ....**Susan Irmer, 89 0492 (1990)**

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IN RE: SUSAN K. IRMER	)	DOCKET NO. 89 0492
	)	
CLAIM NO. T-087972	)	DECISION AND ORDER
	)	

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#### APPEARANCES

Claimant, Susan K. Irmer,  
None

Self-Insured Employer, NE Washington Workers  
Compensation Coop., by  
Lukins & Annis, per  
Edgar L. Annan

Department of Labor and Industries, by  
The Attorney General, per  
Stephanie Farrell and Donald J. Verfurth, Assistants

This is an appeal filed by the self-insured employer, NE Washington Workers Compensation Coop., on February 9, 1989 from an order of the Department of Labor and Industries dated January 25, 1989. The order affirmed an order dated January 6, 1989 that assessed a penalty against the self-insured employer in the amount of \$500.00 pursuant to RCW 51.48.080 for failure to submit all medical reports and other pertinent information in its possession at the time of its request for a determination on this claim as required by WAC 296-15-070(3). The Department order is reversed and remanded.

#### ISSUES

1. What is the scope of review in an appeal from a penalty assessed by the Department of Labor and Industries pursuant to RCW 51.48.080?
2. Was the Department correct in assessing a penalty in the maximum amount of \$500.00?

Based upon the following discussion, we conclude that the question [2] of whether a penalty should be assessed and the amount of the penalty under RCW 51.48.080 are not decisions committed to the discretion of the Director. Our review of such decisions is therefore *de novo*, and is not limited to determining whether an abuse of discretion has occurred. We also conclude that under the facts of the present case a penalty in the maximum statutory amount is unwarranted.

### 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 of Labor and Industries in response to a Proposed Decision and Order issued on August 8, 1989, in which the order of the Department dated January 6, 1989 (sic) was reversed and this matter remanded to the Department with direction to substitute the sum of \$100.00 for \$500.00 and to otherwise affirm the order.

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

The Proposed Decision and Order adequately sets forth the evidence relevant to the issues presented by this appeal. Briefly, that evidence establishes, as is conceded by the employer in its Response to the Department's Petition for Review, that at the time it requested the Department to issue an order closing this claim the employer did not submit to the Department all medical records in its possession. It is therefore apparent that the employer in this case violated the provisions of WAC 296-15-070(3), which provides in pertinent part as follows:

... All medical reports and other pertinent information in the self-insurer's possession not [3] previously forwarded to the department must be submitted with the request for all determinations.

Thereafter, the Department assessed a penalty against the employer in the amount of \$500.00 pursuant to the authority of RCW 51.48.080, which provides as follows:

Every person, firm or corporation who violates or fails to obey, observe or comply with any rule of the department promulgated under authority of this title, shall be subject to a penalty of not to exceed five hundred dollars.

The evidence further establishes that it is the Department's policy to assess a penalty in the maximum amount of \$500.00 in each and every case in which a self-insured employer has failed to submit to the Department all medical records in its possession when requesting a determination from the Department. That is, the Department assessed a penalty in the maximum amount permitted under the statute without investigating the facts of the case, and without giving consideration to such factors as whether the employer intended to mislead the Department, the significance of the medical records not submitted by the employer, or whether the employer in question had previously violated any rule promulgated by the Department.

Stated simply, we conclude that the decision of whether to assess a penalty and the amount of a penalty assessed pursuant to RCW 51.48.080 are not discretionary decisions because the statute does not state that these decisions are discretionary. As we have previously noted, in instances under the Industrial Insurance Act where the legislature has intended to commit a decision to the Director's discretion, it has explicitly so stated. *In re Gary J. Manley*, BIIA Dec., 66,115 (1986). [4]

Thus, with respect to certain statutory provisions such as RCW 51.24.060(3) ("sole discretion"), RCW 51.32.095 ("sole discretion"), RCW 51.36.010 ("solely in his or her discretion"), RCW 51.48.100(2) ("at his or her discretion"), and RCW 51.32.250 ("in his or her discretion"), the legislature has clearly enunciated its intent that a particular decision be committed to the discretion of the Department, the Director, or the Director's designee. In such cases, our scope of review is limited to determining whether the exercise of discretionary authority constitutes an abuse of discretion. See *In re Johnny Smotherman*, BIIA Dec. 87 0646 (1989); *In re Armando Flores*, Dckt. No. 88 0109 (July 6, 1989); *In re Gary Manley*, BIIA Dec., 66,115 (1986); *In re Frank C. Madrid*, BIIA Dec., 86,0224-A (1987).

In *Madrid*, we had before us a claimant's appeal from the Director's decision not to assess a penalty for alleged unreasonable delay in payment of benefits pursuant to RCW 51.48.017. In that case, the employer argued that the decision under RCW 51.48.017 was vested solely within the Director's discretion. We disagreed.

Unlike RCW 51.48.080, the statute at issue in *Madrid* establishes a particular amount for the penalty, rather than a range. Nonetheless, *Madrid* is instructive insofar as it establishes factors to be considered in determining whether delay of benefits is "unreasonable", so as to require the imposition of a penalty. Those factors, as listed in *Madrid*, are whether the employer has a genuine doubt from a medical or legal standpoint as to the liability for benefits and whether the employer acted on a good faith belief that no payment was due.

According to Sidney Willuweit, a disability claims adjudicator for [5] the self-insurance section of the Department, the Department had not, as of June 19, 1989 when he testified, finalized a draft of written guidelines for the assessment of penalties. Thus, no written guidelines were in effect when the decision in this case was made by the Department. It would, of course, be most helpful if the Department would establish written criteria for evaluating the amount of the penalty to be imposed. However, the failure of the Department to establish such guidelines does not somehow make the decision a discretionary one, in the absence of specific

legislative authority.

Absent such specific statutory language, we are unwilling to conclude that the decisions under RCW 51.48.080 and WAC 296-15-070(3) are discretionary, particularly in light of the limited scope of review and the additional burden imposed upon a party seeking relief in appeals from discretionary decisions. We therefore hold that in an appeal from a penalty assessed by the Department pursuant to RCW 51.48.080, the appellant is entitled to a full de novo review, and must prevail if the assessment of the penalty or the amount of the penalty is incorrect based upon a preponderance of the evidence.

While, as the employer's Response to the Petition for Review concedes, the evidence in the present case establishes that the Department was correct in assessing a penalty, the evidence does not support the imposition of a penalty in the maximum amount permitted by the statute. By its very terms, the statute in question allows a range of penalties to be assessed for violation of any rule promulgated by the Department. The legislature therefore intended that the amount of the penalty assessed bear some relationship to the violation giving rise to [6] the assessment. Thus, the facts of each case must be examined.

In our opinion, in determining the amount of a penalty to be assessed for violating the provisions of WAC 296-15-070(3), the factors that should be considered include, at a minimum, (1) whether the employer intended to mislead the Department by withholding medical records at the time that a determination was requested, (2) the content and significance of the medical records not submitted to the Department, and (3) whether the employer in question had been previously found to be in violation of Department rules.

In the present case, there is no indication that the employer intended to mislead the Department or to deny benefits to the claimant. Further, the Department concedes that the records which the employer failed to submit, which included chart notes, laboratory reports and other records, would not likely have affected the Department's determination on the claim, and did not affect the benefits received by the claimant. While we agree with the Department that it is necessary that the Department have in its possession all medical records pertinent to a claim at the time a determination is requested, we believe the significance of any records not submitted must be considered in determining the amount of a penalty to be imposed. Finally, there is no indication in the record before us that the employer in this case has previously been found to be in violation of any Department rule.

We note that Mr. Willuweit initially recommended a penalty of \$250.00, after considering one of the factors listed above, i.e., whether this was a repeat violation. Based on his determination that this was a first offense, he considered \$250.00 a reasonable penalty. Considering [7] all of the factors we have listed above, we agree with Mr. Willuweit that the assessment of a penalty in the amount of \$250.00 is most commensurate with the nature and magnitude of the employer's violation of WAC 296-15-070(3).

After consideration of the Proposed Decision and Order, the Department's Petition for Review filed thereto, the Employer's Response to the Petition for Review, and a careful review of the entire record before us, we hereby enter the following Findings of Fact and Conclusions of Law.

#### **FINDINGS OF FACT**

1. On May 20, 1988, the claimant filed an accident report alleging the occurrence of an industrial injury on March 17, 1988 during the course of her employment with NE Washington Workers Compensation Coop. The claim was allowed and benefits provided. On January 6, 1989, the Department of Labor and Industries issued an order assessing a penalty against the self insured employer in the amount of \$500.00 for failure to provide the Department with all medical reports and other pertinent information in its possession on September 9, 1988.

On January 13, 1989, the employer filed a protest and request for reconsideration of the Department's order of January 6, 1989. On January 25, 1989, the Department issued an order adhering to the provisions of its order of January 6, 1989.

On February 9, 1989, the employer filed a notice of appeal with the Board of Industrial Insurance Appeals from the Department order of January 25, 1989. The appeal was assigned Docket No. 89 0492. On February 16, 1989, the Board issued an order granting the appeal and directing that proceedings be held on the issues raised by the notice of appeal.

2. The self-insured employer requested from the Department a final determination on this claim, without submitting all medical reports and other [8] pertinent information in its possession, not previously forwarded to the Department.

3. The medical reports and other pertinent information possessed by the self-insured employer and not submitted to the Department included chart notes, laboratory reports, and other medical records. Had these reports and other pertinent information been forwarded to the Department at the time that the employer requested a final determination, they would not have affected the decision reached by the Department or the benefits received by the claimant.

4. The employer's failure to submit all medical reports and other pertinent information in its possession likely resulted from confusion as to the definitions of those terms and did not result from any intent by the employer to mislead the Department or to deprive the injured worker of benefits.

5. The employer's failure to submit all medical reports and other pertinent information was a first violation of WAC 296-15-070(3).

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. The self-insured employer violated the provisions of WAC 296-15-070(3). Given the range of penalties allowed by RCW 51.48.080, of not more than \$500.00, and the factors listed in Findings of Fact Nos. 2-5, a penalty of \$250.00 is appropriate for the employer's violation of WAC 296-15-070(3).
3. The order of the Department of Labor and Industries dated January 25, 1989, which affirmed an order dated January 6, 1989, is reversed and this matter is remanded to the Department of Labor and Industries with direction to enter an order assessing a penalty in the amount of \$250.00 against the self-insured employer for failure to comply with the provisions of WAC 296- 15-070(3). [9]

It is so ORDERED.

Dated this 13th day of March, 1990.

**BOARD OF INDUSTRIAL INSURANCE APPEALS**

/s/  
 SARA T. HARMON Chairperson

/s/  
 PHILLIP T. BORK Member