
ENGROSSED SUBSTITUTE SENATE BILL 5068

State of Washington

62nd Legislature

2011 Regular Session

By Senate Labor, Commerce & Consumer Protection (originally sponsored by Senators Conway, Prentice, and Kohl-Welles; by request of Department of Labor & Industries)

READ FIRST TIME 02/17/11.

1 AN ACT Relating to the abatement of violations of the Washington
2 industrial safety and health act during an appeal; and amending RCW
3 49.17.140.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 49.17.140 and 1994 c 61 s 1 are each amended to read
6 as follows:

7 (1) If after an inspection or investigation the director or the
8 director's authorized representative issues a citation under the
9 authority of RCW 49.17.120 or 49.17.130, the department, within a
10 reasonable time after the termination of such inspection or
11 investigation, shall notify the employer by certified mail of the
12 penalty to be assessed under the authority of RCW 49.17.180 and shall
13 state that the employer has fifteen working days within which to notify
14 the director that the employer wishes to appeal the citation or
15 assessment of penalty. If, within fifteen working days from the
16 communication of the notice issued by the director the employer fails
17 to notify the director that the employer intends to appeal the citation
18 or assessment penalty, and no notice is filed by any employee or
19 representative of employees under subsection (3) of this section within

1 such time, the citation and the assessment shall be deemed a final
2 order of the department and not subject to review by any court or
3 agency.

4 (2) If the director has reason to believe that an employer has
5 failed to correct a violation for which (~~a citation has been issued~~
6 ~~within the period permitted in the citation for its correction, which~~
7 ~~period shall not begin to run until the entry of a final order in the~~
8 ~~case of any appeal proceedings under this section initiated by the~~
9 ~~employer in good faith and not solely for delay or avoidance of~~
10 ~~penalties~~) the employer was previously cited and which has become a
11 final order, the director shall notify the employer by certified mail
12 of such failure to correct the violation and of the penalty to be
13 assessed under RCW 49.17.180 by reason of such failure, and shall state
14 that the employer has fifteen working days from the communication of
15 such notification and assessment of penalty to notify the director that
16 the employer wishes to appeal the director's notification of the
17 assessment of penalty. If, within fifteen working days from the
18 receipt of notification issued by the director the employer fails to
19 notify the director that the employer intends to appeal the
20 notification of assessment of penalty, the notification and assessment
21 of penalty shall be deemed a final order of the department and not
22 subject to review by any court or agency.

23 (3) If any employer notifies the director that the employer intends
24 to appeal the citation issued under either RCW 49.17.120 or 49.17.130
25 or notification of the assessment of a penalty issued under subsections
26 (1) or (2) of this section, or if, within fifteen working days from the
27 issuance of a citation under either RCW 49.17.120 or 49.17.130 any
28 employee or representative of employees files a notice with the
29 director alleging that the period of time fixed in the citation for the
30 abatement of the violation is unreasonable, the director may reassume
31 jurisdiction over the entire matter, or any portion thereof upon which
32 notice of intention to appeal has been filed with the director pursuant
33 to this subsection. If the director reassumes jurisdiction of all or
34 any portion of the matter upon which notice of appeal has been filed
35 with the director, any redetermination shall be completed and
36 corrective notices of assessment of penalty, citations, or revised
37 periods of abatement completed within a period of thirty working days.
38 The thirty-working-day redetermination period may be extended up to

1 fifteen additional working days upon agreement of all parties to the
2 appeal. The redetermination shall then become final subject to direct
3 appeal to the board of industrial insurance appeals within fifteen
4 working days of such redetermination with service of notice of appeal
5 upon the director. In the event that the director does not reassume
6 jurisdiction as provided in this subsection, the director shall
7 promptly notify the state board of industrial insurance appeals of all
8 notifications of intention to appeal any such citations, any such
9 notices of assessment of penalty and any employee or representative of
10 employees notice of intention to appeal the period of time fixed for
11 abatement of a violation and in addition certify a full copy of the
12 record in such appeal matters to the board. The director shall adopt
13 rules of procedure for the reassumption of jurisdiction under this
14 subsection affording employers, employees, and employee representatives
15 notice of the reassumption of jurisdiction by the director, and an
16 opportunity to object or support the reassumption of jurisdiction,
17 either in writing or orally at an informal conference to be held prior
18 to the expiration of the redetermination period. Except as otherwise
19 provided under subsection (4) of this section, a notice of appeal filed
20 under this section shall stay the effectiveness of any citation or
21 notice of the assessment of a penalty pending review by the board of
22 industrial insurance appeals, but such appeal shall not stay the
23 effectiveness of any order of immediate restraint issued by the
24 director under the authority of RCW 49.17.130. The board of industrial
25 insurance appeals shall afford an opportunity for a hearing in the case
26 of each such appellant and the department shall be represented in such
27 hearing by the attorney general and the board shall in addition provide
28 affected employees or authorized representatives of affected employees
29 an opportunity to participate as parties to hearings under this
30 subsection. The board shall thereafter make disposition of the issues
31 in accordance with procedures relative to contested cases appealed to
32 the state board of industrial insurance appeals.

33 Upon application by an employer showing that a good faith effort to
34 comply with the abatement requirements of a citation has been made and
35 that the abatement has not been completed because of factors beyond the
36 employer's control, the director after affording an opportunity for a
37 hearing shall issue an order affirming or modifying the abatement
38 requirements in such citation.

1 (4) An appeal of any violation classified and cited as serious,
2 willful, repeated serious violation, or failure to abate a serious
3 violation does not stay abatement dates and requirements except as
4 follows:

5 (a) An employer may request a stay of abatement for any serious,
6 willful, repeated serious violation, or failure to abate a serious
7 violation in a notice of appeal under subsection (3) of this section;

8 (b) When the director reassumes jurisdiction of an appeal under
9 subsection (3) of this section, it will include the stay of abatement
10 request. The issued redetermination decision will include a decision
11 on the stay of abatement request. The department shall stay the
12 abatement for any serious, willful, repeated serious violation, or
13 failure to abate a serious violation where the department cannot
14 determine that the preliminary evidence shows a substantial probability
15 of death or serious physical harm to workers. The decision on stay of
16 abatement will be final unless the employer renews the request for a
17 stay of abatement in any direct appeal of the redetermination to the
18 board of industrial insurance appeals under subsection (3) of this
19 section;

20 (c) The board of industrial insurance appeals shall adopt rules
21 necessary for conducting an expedited review on any stay of abatement
22 requests identified in the employer's notice of appeal, and shall issue
23 a final decision within forty-five working days of the board's notice
24 of filing of appeal. This rule making shall be initiated in 2011;

25 (d) Affected employees or their representatives must be afforded an
26 opportunity to participate as parties in an expedited review for stay
27 of abatement;

28 (e) The board shall grant a stay of an abatement for a serious,
29 willful, repeated serious violation, or failure to abate a serious
30 violation where there is good cause for a stay unless based on the
31 preliminary evidence it is more likely than not that a stay would
32 result in death or serious physical harm to a worker;

33 (f) As long as a motion to stay abatement is pending all abatement
34 requirements will be stayed.

35 (5) When the board of industrial insurance appeals denies a stay of
36 abatement and abatement is required while the appeal is adjudicated,
37 the abatement process must be the same process as the process required
38 for abatement upon a final order.

1 (6) The department shall develop rules necessary to implement
2 subsections (4) and (5) of this section. In an application for a stay
3 of abatement, the department will not grant a stay when it can
4 determine that the preliminary evidence shows a substantial probability
5 of death or serious physical harm to workers. The board will not grant
6 a stay where based on the preliminary evidence it is more likely than
7 not that a stay would result in death or serious physical harm to a
8 worker. This rule making shall be initiated in 2011.

--- END ---