

8-0900-8859-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Penalty
Assessments Against Charles Westman,
D.V.M., d/b/a Westwood Veterinary
Clinic.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde, commencing at 11 a.m. on Friday, June 10, 1994 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing dated May 23, 1994.

Paul G. Zerby, Assistant Attorney General, 500 Capitol Office Building, 525 Park Street, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Health (Department). Charles Westman, D.V.M. (Respondent), 8649 Scandia Trail, Forest Lake, Minnesota 55025, was present at the hearing, appearing on his own behalf. The record closed at the conclusion of the hearing on June 10, 1994.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health (Commissioner) will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Judith Ball, Acting Director, Radiation Control, Minnesota Department of Health, 925 Delaware Street, S.E., Minneapolis, Minnesota 55459-0040, telephone (612) 627-5039, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issues in this case are whether or not the Department properly cited the Respondent for violations of departmental rules governing sources of

ionizing radiation and, if so, whether the nonforgivable administrative penalty of \$1,150 imposed on the Respondent for the violations is appropriate.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Charles Westman is a self-employed veterinarian having a solo practice in Forest Lake, Minnesota. He became a veterinarian in 1973. He has worked as a sole practitioner for the last eleven years. Before that, he worked at three different clinics. Throughout his professional career he has worked primarily with horses.

2. Margaret A. Shaw is a radiation specialist for the Department. She is responsible for surveying x-ray equipment in facilities throughout the State for compliance with federal and state rules governing x-ray equipment. She develops inspection reports, writes administrative penalty orders and makes penalty calculations, among other things. Ex. 1.

3. On March 8, 1994, Shaw conducted a survey of Respondent's facilities. At the time of her survey inspection, Shaw learned that Respondent's routine practice was to hold a radiographic tube by hand when taking x-rays in the field in violation of departmental rules prohibiting the use of hand-held radiographic or fluoroscopic imaging devices. She also discovered that the size of the field of the hand-held unit Respondent used was greater than the size of the film cassette (image receptor), thereby subjecting the individual responsible for holding the cassette to primary beam radiation in violation of departmental rules relating to collimation.¹ Furthermore, Respondent had no collimators in use with his radiographic device.

4. Shaw also discovered that the kilovolt peak (kVp) calibrations on the hand-held d

5. Following her inspection, Shaw discussed with her supervisor the propriety of proceeding with an administrative penalty order with respect to the violations found. It was determined that she should proceed and, on April 19, 1994, Shaw and her peers met to discuss her inspection and the amount of any penalty assessments that should be levied.

1. Collimation means restricting the useful beam to an appropriate area. Minn. Rules, pt. 4730.0100, subp. 37. A collimator is a mechanism connected to the housing of an x-ray tube which controls the dimensions of

the primary radiation beam. Collimators are either cones, diaphragms, or variable-aperture beam-limiting devices. Minn. Rules, pt. 4730.0100, subp. 38.

6. Before the peer meeting (forum), Shaw believed that Respondent's practice of holding the radiographic tube was a serious violation and that a nonforgivable base penalty of \$5,000 should be required. In addition, she believed that the base penalty should be increased by 25% due to the "willfulness" of the violation, by another 10% due to the number of violations found during her inspection, and another \$250, being the cost of two kVp calibration checks Respondent had not performed.

7. The forum concluded that Respondent's practice of hand holding an x-ray device and the excessive scope of its beam were both serious violations of departmental rules and, with the other violations, warranted a gross penalty of \$10,000. The forum rejected Shaw's proposal to set the nonforgivable penalty at \$5,000. It determined that, given the size of Respondent's operation, the base nonforgivable amount should be \$1,000, increased by \$150 for his failure, for two years, to have the kVp calibration on the hand-held device checked. In the forum's view, checking the kVp calibration would cost approximately \$75 annually.

8. The forum also determined that the forgivable and nonforgivable base penalties should be adjusted upward by 40 percent because Respondent had been indifferent to rules pertaining to ionizing radiation and that it should be increased further for the number of Respondent's rule violations.

9. Based on the forum's determinations, Shaw prepared a Penalty Summary providing as follows:

PENALTY SUMMARY

| Recommended penalty: | Forgivable | + | Nonforgivable | = | TOTAL |
|---------------------------------|--------------|---|----------------|---|-------------|
| I. Base penalty: | \$6000.00__ | + | \$666.67_____ | = | \$6666.67__ |
| <hr/> | | | | | |
| II. Adjustments to base penalty | | | | | |
| A. Willfulness | \$2400.00__ | + | \$266.66 _____ | = | \$2666.66 |
| B. History | \$0000.00 __ | + | \$000.00 _____ | = | \$0000.00 |
| C. Number | \$ 600.00 __ | + | \$ 66.67 _____ | = | \$ 666.67 |
| D. Economic Benefit | \$ 0.00 __ | + | \$150.00 _____ | = | \$150.00__ |

Recovery_of_MDH _____

E. Other
Factors _____ + _____ = _____

TOTAL
CALCULATED PENALTY \$9000.00 ___ + \$1150.00 ___ = \$10150.00

TOTAL
ASSESSED PENALTY \$8850.00 ___ + \$1150.00 ___ = \$10,000.00

10. On April 25, 1994, the Director of the Environmental Health Division issued and mailed an administrative penalty order to the Respondent. It provided for a gross penalty of \$10,000. Most of that penalty (\$8,850) was forgivable if Respondent demonstrated, within 30 days, that corrective steps had been taken. The \$1,150 balance was nonforgivable. Respondent was instructed to pay the nonforgivable portion of the penalty within 30 days.

Ex.
7. Respondent appealed the administrative penalty order by letter dated May 16, 1994 and this hearing w

11. As required by statute, a plan governing the exercise of the Commissioner's administrative penalty authority and cease and desist authority was promulgated on November 8, 1993. Under the Plan, violations of Minn. Rules, pt. 4730.1210, are considered serious violations. Plan at 27.

12. Since at least 1983, Departmental rules have prohibited x-ray tubes to be held by the operator. Minn. Rules, pt. 4730.2400, subp. 3A (1983).

13. By the time of the hearing on June 10, 1994, Respondent had corrected all the violations Shaw found at the time of her inspection on March 8, 1994.

14. Since 1993, the Department has inspected 206 veterinary facilities. Although a large number of those facilities--perhaps as many as half--use x-ray equipment like that used by Respondent, all of them have stands for using those devices and no cases were found where the veterinarians were holding them by hand.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Health have statutory authority to consider the Respondent's appeal from the administrative penalty order under Minn. Stat. §§ 144.991, subd. 5, and 14.50 (1992).

2. The Respondent received timely and proper notice of the hearing and the charges against him.

3. The Department has complied with all relevant, substantive and procedural requirements of law, and this matter is properly before the Administrative Law Judge.

4. The Department has the burden of proof to establish, by a preponderance of the evidence, that the Respondent violated rules relating to ionizing radiation and is subject to the penalty proposed under Minn. Rules, pt. 1400.8603 C. (1993).

5. Under Minn. Rules, pt. 4730.1210, subp. 2D, the use of hand-held radiographic or fluoroscopic imaging devices is prohibited. A violation of that rule is a serious violation under the Plan adopted pursuant to Minn. Stat. § 144.99, subd. 7 (1993).

6. Respondent was in violation of Minn. Rules, pt. 4730.1210, subp. 2D (1993), on March 8, 1994, but Respondent's violation was not willful.

7. Under Minn. Rules, pt. 4730.2050, subp. 2B(3), the field of an x-ray beam cannot exceed the field of the image receptor by more than two percent of the distance of the x-ray tube to the film SID in the x-ray film cassette's smallest dimension.

8. Violations of Minn. Rules, pt. 4730.2050, subp. 2B(3) (1991), result in an immediate risk to public health and are subject to a cease and desist order by the Commissioner of Health under Minn. Stat. § 144.99, subd. 6 (1993).

9. Penalties assessed by the Commissioner of Health for violations of rules pertaining to ionizing radiation generally must be forgiven if appropriate corrective action is taken under the statute within 31 days. Minn. Stat. § 144.99, subd. 4 (1992).

10. Under Minn. Stat. § 144.991, subd. 4(b), the Commissioner may, in the case of a serious violation, issue a corrective order with a penalty that will not be forgiven even if corrective action is taken.

11. Except as noted in Conclusion 13, the Department complied with the provisions of Minn. Stat. §§ 144.99, subd. 4 and 144.991, subd. 1 (1993), in determining the forgivable and nonforgivable penalties assessed against the Respondent.

12. The Department properly considered the gravity of Respondent's violations, his history of past violations, the number of his violations, and the economic benefit he gained by failing to comply with departmental rules in calculating the penalty imposed upon Respondent, and, except as noted in

Conclusion 13, the nonforgiveable penalty amount is reasonable for purposes of Minn. Stat. § 144.991, subd. 5(c) (1993).

13. Because the Respondent's rule violations were not willful, the nonforgivable portion of the penalty assessed fo

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That a nonforgivable penalty of \$883.34 be assessed against Respondent for violation of the Department's ionizing radiation rules and that the Division's administrative penalty order be amended accordingly.

2. The Commissioner issue an order requiring Respondent to pay the nonforgivable administrative penalty within 30 days of his receipt of her order by certified check or money order payable to the Treasurer, State of Minnesota.

Dated this 27th day of June, 1994.

/s/ Jon L. Lunde _____

JON L. LUNDE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped; 2 tapes.

MEMORANDUM

This matter arises under the "Health Enforcement Consolidation Act of 1993", Minn. Stat. § 144.989, and Minn. Stat. § 144.121 and Minn. Rules, pt. 4730.1011 et seq. pertaining to ionizing radiation. Under Minn. Stat. § 144.99, subd. 4, the Commissioner can, among other things, issue orders requiring correction of violations of the ionizing radiation rules and assess monetary penalties for any violation of those rules. The maximum penalty which may be imposed for all violations identified during an inspection or review is

\$10,000. Minn. Stat. § 144.99, subd. 4. Except in the case of repeated or serious violations, any penalty assessed must be forgiven if appropriate corrective steps are taken by the violator within 31 days after receiving an administrative penalty order. For serious violations, a nonforgivable penalty may be imposed by the Commissioner. Minn. Stat. § 144.991, subd. 4(b) (1994).

In determining the amount of a penalty, the Commissioner may consider the following factors:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

Under Minn. Stat. § 144.99, subd. 7, the Commissioner was required to prepare a plan for exercising the administrative penalty authority in § 144.99.

That plan has been adopted and governs violations of statutes and rules pertaining to ionizing radiation, among other things. Under the Plan, the Commissioner's authority to impose administrative penalties has been delegated to departmental program directors.

I.

Respondent admits that he is chargeable with the 15 rule violations Shaw discovered at the time of her inspection on March 8, 1994. Furthermore, he didn't challenge the Department's determination that at least two of the violations were of a serious nature and didn't allege that the Department failed to comply with statutes and rules governing the calculation of the forgivable and nonforgivable penalties assessed against him. He argued, however, that the nonforgivable penalty assessed is excessive and that for a first-time violation he should have received a warning only.

Under Minn. Stat. § 144.991, subd. 5(c), the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the Judge determines that the penalty is unreasonable considering the six factors in § 144.991, subd. 1.

Respondent also argued that the nonforgivable penalty amount is excessive.

That argument goes to the reasonableness of the penalty amount and requires consideration of the statutory factors, the Plan, and the Environmental Health Division's Administrative Penalty Order Penalty Calculation Worksheet (Worksheet). Exs. 5 and 6.

The Environmental Health Division developed the Worksheet to guide staff

in making penalty recommendations to the Director. When forgivable and nonforgivable penalties are proposed for a violation, the Worksheet states that a forgivable and nonforgivable "base penalty" must be calculated for the violation. The ratio of the nonforgivable penalty to the total base penalty is used to adjust the base nonforgivable penalty for willfulness, history of prior violations, number of violations, economic benefits of noncompliance, and other factors as justice may require. Ex. 6 at 10-11. Because no adjustment to the base penalty is made for the gravity of a violation, gravity must have been intended to be the principal factor used to set the base penalty once a determination is made that a nonforgivable penalty is appropriate.

Holding an x-ray device by hand is a serious violation under the Plan. The forum concluded therefore, that a nonforgivable penalty should be assessed.

The nonforgivable penalty recommended by Shaw (\$5,000) was rejected due to the size of Respondent's operation. Considerations of size at that point is not inconsistent with the Worksheet, even though size is not mentioned as a factor that should be considered. The Worksheet states that nonforgivability:

. . . is a tool to be used when it will assist in achieving the goal of compliance. In many instances a forgivable penalty will give the violator adequate incentive to take corrective action. In other cases, where there are serious or repeated violations, failure to respond to departmental requests for compliance or other evidence of recalcitrance, a nonforgivable penalty will be necessary. The decision on forgivability rests on the judgment of department staff as to what is an adequate consequence for noncompliance and an appropriate deterrent for the future.

Ex. 5 at 13.

Although the Worksheet does not mention size, a lower penalty to a smaller enterprise likely would be as effective in achieving compliance as a larger penalty would be to a larger entity. Hence, the Administrative Law Judge is persuaded that the nonforgivable base penalty of \$666.67 is reasonable due to the seriousness of the violation of the rule against hand-holding of x-ray devices and the need for deterrence.²

The base penalty was adjusted upward by 40% for willfulness, by 10% for the large number (15) of violations found, and \$150 for the economic benefits Respondent realized by not complying with departmental rules. The latter two adjustments are consistent with the governing statute and are reasonable. The adjustment for willfulness, however, requires more scrutiny.

On the worksheet computing the forgivable and nonforgivable penalties to be imposed upon Respondent, the base nonforgivable penalty was increased by 40% because of the "willfulness" of the violation. The word "willfulness" as used

in P 144.991, subd. 1(1), is not defined in the statute or in the Plan. The word "willful" usually means "done deliberately: not accidental or without purpose: intentional." Webster's_Third_New_International_Dictionary, 2617 (1986). Hence, the words "willful" and "willfully" usually "imply such elements as design, intent, and purpose, deliberation, determination, and premeditation; and they are commonly employed to denote an act which is wrongful or prohibited by law, and also to indicate the intentional and deliberate doing of a wrongful act; the doing of a forbidden act purposely in violation of law." 94 C.J.S., Willful; Willfully at 624-25. The word "willfulness" means "something more than mere carelessness, neglect

2. The Division should consider adopting some guidelines that can be used by

the staff in determining how an enterprise's size will affect the base nonforgivable penalty amount to achieve uniform application. generally defined a willful act as one "done voluntarily with either an intentional disregard of or plain indifference to" statutory requirements. Rothstein,_Occupational_Safety_and_Health_Law, P 315 at 343 (3rd ed. 1993).

In this case, the evidence does not show that Respondent was plainly indifferent to departmental rules or that his violations were, in any way, willful. He persuasively testified that he had no knowledge of the rules he violated. Furthermore, he indicated that in the three clinics where he previously worked, hand-held x-ray devices had been routinely used in the field. He further testified, persuasively, to conversations he had with an x-ray technician concerning the safety of his hand-held unit and his interest in operating safely--which is also evinced by his use of lead aprons and gloves. There is no evidence that his violations were knowledgeable, intentional, or deliberate violations of governing rules. Although he did purchase a dosimeter, he did not make that purchase knowing that the use of dosimeters recently became mandatory. Rather, he purchased a dosimeter because

he saw an ad for one in an advertisement mailed to his office. The forum's conclusion that Respondent must have known about the rules he violated because

he purchased a dosimeter is not justified by the evidence presented.

Evidence

in the record simply fails to establish that the Respondent's violations of the

rules were willful. It follows, therefore, that increasing the base amount of

the nonforgivable penalty for willfulness is unreasonable.

The Worksheet prepared by the Division governing the calculation of forgivable and nonforgivable penalties for "willfulness" permits a penalty increase for negligence, recklessness, or carelessness. It states:

When assessing willfulness, consideration will be given as to whether the violator's behavior was apparently negligent, reckless, or careless, rather than intentionally unlawful. If the behavior is determined to be negligent, reckless, or careless an upward

adjustment of the base fine by twenty-five percent is appropriate.

Ex. 5. at 7-8.

It could be argued that the base amount of the nonforgivable penalty should be increased due to Respondent's negligence. However, the Administrative Law Judge does not believe that he should do so because the Division did not propose an increase in the base nonforgivable penalty due to Respondent's negligence. Furthermore, the propriety of considering negligence under the statute permitting consideration of willfulness is highly questionable. If the Division's consideration of negligence is appropriate, an upward adjustment of every nonforgivable penalty would be required because nearly every violation would be negligent, willful, or deliberate. Including negligence with willfulness, therefore, adds no variable for aggravation or mitigation. By including willfulness, the legislature must have intended to permit the Commissioner to increase a nonforgivable penalty for deliberate violations and perhaps to reduce the penalty for mere carelessness in some situations. The Division should reexamine the manner in which carelessness is lumped with willfulness in its Worksheet and its penalty calculations.

Because the Division failed to show that Respondent's violations were willful, the nonforgivable penalty increase of \$266.67 assessed for Respondent's willfulness should be vacated and a nonforgivable penalty of \$883.34 should be imposed instead of the nonforgivable penalty of \$1,150 assessed by the Division.

The serious violation charged involved Respondent's use of a hand-held x-ray device. This is statutorily prohibited and constitutes a serious violation under the Plan duly

Respondent argued that he should not be penalized because he was the one who used the hand-held x-ray machine. The fact that his exclusive use of that machine would not likely harm others does not excuse the violation. Furthermore, the record shows that other violations did expose third persons to health risks. The person who held the film cassette, for example, was potentially at risk. Under all the circumstances, the Department's failure to give Respondent only a warning was not unreasonable and the penalty proposed by the Division, as adjusted for its failure to establish a "willful" violation, should be affirmed.

JLL