

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BRADSHAW DEVELOPMENT, INC.,)
DBA ANYTIME FITNESS YAKIMA)
CITATION & NOTICE NOS. 317960141 &)
317959774)

DOCKET NOS. 20 W0126 & 20 W0156

PROPOSED DECISION AND ORDER

William R. Strange, Industrial Appeals Judge — Bradshaw Development, dba Anytime Fitness (Anytime) is a company that operates several fitness centers in the Yakima area. On June 15, 2020, and July 15, 2020, the Department of Labor and Industries performed inspections at several of Anytime's business locations. Based on those inspections, the Department issued citations to Anytime for alleged violations of WAC 296-800-14035. The Department determined that the violations were willful and issued Citations and Notices assessing penalties of \$9,639 for the June 15, 2020 alleged violation, and \$28,917 for the July 15, 2020 alleged violations. On July 9, 2020, Anytime appealed Citation and Notice No. 317959774, issued on June 25, 2020; on August 13, 2020, Anytime appealed Citation and Notice No. 317960141, issued on July 23, 2020. Anytime contends that it did not violate WAC 296-800-14035 as alleged, and that if it did so the violations were not willful. It seeks to have the Citations and Notices vacated or modified. Here, I determine that the Department did not present legally sufficient evidence in support of its Citations and Notices. Citation and Notice No. 317959774, issued on June 25, 2020, and Citation and Notice No. 317960141, issued on July 23, 2020, are **VACATED**.

DISCUSSION

WAC 296-800-14035 states: "Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work." As of June 15, 2020, Emergency Proclamation 20-25.4, issued May 31, 2020, was in effect; as of July 15, 2020, the Proclamation had been extended through August 6, 2020, under Emergency Proclamation 20-25.6, issued July 7, 2020. During these periods of time indoor fitness activities were not allowed in Yakima County. By its own terms, WAC 296-800-14035 applies only to businesses where employees are working. Ann Soiza, the Department's Assistant Director charged with managing DOSH, testified that the Department's authority was limited to situations involving an employee/employer interaction. In other words, the Department cannot issue citations to businesses simply because they are open in violation of the Emergency Proclamation; it can only do so when employees work at the businesses. Here, the Department had the burden to prove that there were employees working at the Anytime locations where the violations are alleged to have occurred.

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3 Citation and Notice 317959774, issued June 25, 2020

4 Violation 1-1: Selah Location

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6 Stacia Johnson is a safety and health compliance inspector for the Department of Labor and
7 Industries. She arrived at Anytime's Selah location with her supervisor, Steve Yunker, on
8 June 15, 2020. She observed a sign indicating that the business was open. The entry door to
9 Anytime's Selah location was not open to the public, but only to members possessing a key card.
10 Ms. Johnson testified that when a customer opened the door with her key card, Mr. Yunker "grabbed
11 the door" and the two followed the customer inside. Once inside, Ms. Johnson saw a number of
12 people using gym equipment and what, according to her, "appeared to be" two employees. She did
13 not testify how she identified these persons as being employees. They did not identify themselves
14 as employees, and she did not describe them wearing any uniforms or name tags that would indicate
15 that they worked at the gym. An unnamed individual called to request that a manager come to the
16 business. The manager entered the gym and informed the inspectors that he would not authorize an
17 inspection. The three then exited the gym and spoke in the parking lot. Ms. Johnson did not ask the
18 manager whether any of the people inside the gym at the time were employees. She based her
19 citation on the fact that she saw people entering the gym and thought that there were "approximately
20 three employees" inside the establishment.
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28 RCW 49.17.070 states that an inspector "**shall** obtain consent from the owner, manager,
29 operator, or his or her on-site person in charge of the worksite when entering any worksite located
30 on private property to carry out his or her duties under this chapter." (Emphasis added). A DOSH
31 inspector can, of course, observe work activities visible from a location that is open to the public, but
32 it is mandatory that the inspector obtain consent before entering private property. In this case, the
33 inspectors saw nothing from outside the building that would indicate there were employees working
34 inside. The inspectors gained entrance to the facility without Anytime's consent by following a gym
35 member through a locked door. RCW 49.17.070(3) does allow inspectors to enter private property
36 without express consent for a limited purpose. That section states: "**Solely for the purpose of**
37 **requesting the consent required by this section**, the director or his or her authorized
38 representative shall, in a safe manner, enter a worksite at an entry point designated by the employer
39 or, in the event no entry point has been designated, at a reasonably recognizable entry point."
40 (Emphasis added.) Giving the inspectors the benefit of the doubt that the locked member entry door
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was a "reasonably recognizable entry point," their purpose upon entry was strictly proscribed. They were authorized only to seek consent for an inspection; they were not authorized to gather evidence of safety violations. Consequently, nothing the inspectors saw inside Anytime's Selah location on June 15, 2020, can be used to support the issuance of a citation. RCW 49.17.070(3) must be given this meaning; otherwise, the requirement that the Department obtain consent prior to conducting an inspection on private property would be a nullity. But even were it permissible for DOSH to use the observations that Ms. Johnson made while inside Anytime, those observations fail to establish that there were employees working at the location. Ms. Johnson testified that some individuals "appeared" to be employees, but provided no objective information that would raise that conclusion to a level above a hunch. That Ms. Johnson was speculating that the people she saw in the gym were employees is borne out by her uncertainty about their number. First, she said she thought there were two employees, but later testified that she thought there were three. The fact is, there is no evidence that anyone inside the Anytime gym in Selah on June 15, 2020, was an employee.

The Department did not present any evidence that a work safety violation occurred at Anytime's Selah location on June 15, 2020, because there was no evidence that there were any employees working there.

Citation and Notice 317960141, issued July 23, 2020

Violation 1-1: Union Gap Location

Vlad Mischenko is a safety and health compliance inspector for the Department of Labor and Industries. He visited Anytime's business location in Union Gap on July 15, 2020. The gym in Union Gap is located in a mall and has a large parking lot shared with other businesses. There were cars parked outside the gym, but Mr. Mischenko did not know whether any of them were associated with customers or employees of Anytime. He heard a noise coming from inside the gym that he thought was a weight being moved, but did not actually know who or what was making the noise. He did not see anyone enter or leave the premises. He testified that he did not know if there were any employees working at the gym.

The Department did not present any evidence that a work safety violation occurred at Anytime's Union Gap location on July 15, 2020, because there was no evidence that the business was open or that there were any employees working there.

1 Violation 1-2: Selah Location

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3 After leaving Union Gap, Mr. Mischenko drove to Anytime's Selah location. He did not enter
4 the business because the door could only be opened with a key card. Standing outside, he asked a
5 customer if there were any management personnel inside. The customer replied that there were
6 none. Mr. Mischenko resolved to issue a citation because "the place was open and they had people
7 in there working out." Mr. Mischenko testified that he had no evidence that there were employees at
8 the Selah location.
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11 The Department did not present any evidence that a work safety violation occurred at
12 Anytime's Selah location on July 15, 2020, because there was no evidence that there were any
13 employees working there.
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16 Violation 1-3: Summitview Avenue Location

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18 After leaving Selah, Mr. Mischenko went to Anytime's Summitview Avenue location in Yakima.
19 He saw people going in and out of the gym, but he himself did not enter. He asked a person who
20 came out of the gym whether he could conduct an inspection. That person stated he did not have
21 such authority, and did not identify himself as an employee. Most likely, this was a gym patron
22 properly declining to authorize a governmental inspection of someone else's business.
23 Mr. Mischenko then drove away from the Anytime location. Mr. Mischenko testified that he had no
24 evidence that there were employees working at the Summitview location.
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27 The Department did not present any evidence that a work safety violation occurred at
28 Anytime's Summitview location on July 15, 2020, because there was no evidence that there were
29 any employees working there.
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32 Inferences to be Drawn from Wesley Bradshaw's Testimony

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34 When called to testify, Mr. Bradshaw invoked his Fifth Amendment right against
35 self-incrimination in response to certain questions. The Department argues that because this is a
36 civil case I may draw inferences from that fact. However, the Department never actually asked
37 Mr. Bradshaw whether he had employees at the Union Gap, Selah, or Summitview business locations
38 at the time of the inspections or at any other time. Consequently, Mr. Bradshaw never refused to
39 answer such a question and there is nothing from which an inference may be drawn.
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DECISION

Citation and Notice No. 317959774, issued on June 25, 2020, and Citation and Notice No. 317960141, issued on July 23, 2020, are vacated

FINDINGS OF FACT

1. On September 9, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in dockets 20 W0126 and 20 W156 in the Board record solely for jurisdictional purposes.
2. On June 15, 2020, a Department of Labor and Industries safety and health compliance inspector arrived outside the Anytime Fitness business location in Selah, Washington. The inspector did not see anything from outside the business that indicated that there were employees working on the premises. The inspector entered the business through a door that was not open to the public without the consent of the owner. A manager arrived from outside the business location and declined to consent to an inspection.
3. On July 15, 2020, a Department of Labor and Industries safety and health compliance inspector arrived outside the Anytime Fitness business location in Union Gap, Washington. The inspector did not make contact with anyone at that location. The inspector did not observe anything that indicated that the business was open or that there were employees working on the premises.
4. On July 15, 2020, a Department of Labor and Industries safety and health compliance inspector arrived outside the Anytime Fitness business location in Selah, Washington. The inspector did not observe anything to indicate that there were employees working on the premises.
5. On July 15, 2020, a Department of Labor and Industries safety and health compliance inspector arrived outside the Anytime Fitness business location on Summitview Avenue, Yakima, Washington. The inspector did not observe anything to indicate that there were employees working on the premises.
6. With respect to Citation and Notice No. 317959774, the Department did not present any evidence to establish that Anytime Fitness violated WAC 296-800-14035 on June 15, 2020, at its Selah business location.
7. With respect to Citation and Notice No. 317960141, the Department did not present any evidence to establish that Anytime Fitness violated WAC 296-800-14035 on July 15, 2020, at its Union Gap, Selah, or Summitview Avenue, Yakima, business locations.

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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
2. The Department of Labor and Industries failed to present legally sufficient evidence to establish that Anytime Fitness was in violation of WAC 296-800-14035 on June 15, 2020, as required by RCW 51.52.050.
3. The Department of Labor and Industries failed to present legally sufficient evidence to establish that Anytime Fitness was in violation of WAC 296-800-14035 on July 15, 2020, as required by RCW 51.52.050.
4. Citation and Notice No. 317959774, issued on June 25, 2020, and Citation and Notice No. 317960141, issued on July 23, 2020, are vacated.

Dated: December 3, 2020



WILLIAM R. STRANGE
Industrial Appeals Judge
Board of Industrial Insurance Appeals