NO. 31290-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JUDE I. DOTY,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR & INDUSTRIES

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 464-7740

TABLE OF CONTENTS

Appendices

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

Child labor laws protect this state's vulnerable children from the "crippling effects of child employment." *See Prince v. Massachusetts*, 321 U.S. 158, 168, 166 S. Ct. 438, 88 L. Ed. 645 (1944). Jude Doty violated several child labor laws when he brought his 11-year-old son and his 13-year-old son to work on construction sites and to work with heavy equipment, and when he directed his 13-year old to work at a height of 22 feet above ground level. The Department of Labor and Industries cited Doty for these violations, and the Director of the Department affirmed the citations.[1]

The Director found that Doty had his 13-year old and 11-year old work in a variety of construction jobs, including using heavy equipment such as backhoes. She found that they worked in furtherance of Doty's business, displaced other workers, and provided an appreciable benefit to his business. These findings are verities because Doty has not assigned specific error to these findings. The Director thus correctly determined that Doty employed the children under the Department's regulation defining the word "employ," as "to engage, suffer, or permit to work[.]" WAC 296-125-015(2).

Because the children performed dangerous work, the Director

[1] Appendix A contains the final order. Appendix B contains relevant statutes. Appendix C contains relevant regulations.

found that serious physical harm or death was imminent and classified the violations as "serious." This finding goes to the question of the penalty amount, not whether Doty violated the child labor laws. And substantial evidence shows that the violations are serious.

This Court should affirm.

II. ISSUES

1. Did the Department exceed its rule making authority when it promulgated the definition of "employ" as "to engage, suffer, or permit to work" when RCW 49.12.121 gives the Department broad authority to adopt special rules for the protection of the safety, health, and welfare of minor employees?

2. Does substantial evidence support the determination that Doty employed Zachary and Stephen Doty when he permitted them to work in a commercial construction business, when they acted in furtherance of the business, provided an appreciable benefit to business, and displaced adult labor on the project?

3. Did Doty present sufficient argument to this Court regarding his constitutional and home-based education claims to permit review? If so, does the application of Washington's child labor laws to parent employers violate any fundamental right to parent or any homeschool statute?

4. Does substantial evidence support the findings that death or serious physical harm was imminent because of the workplace conditions, when expert opinion established such a threat?

III. STATEMENT OF THE CASE

A. Doty Permitted His 13-Year-Old and 11-Year-Old Sons To Work For His House Moving Business

1. Doty's Sons Worked for Doty's House Moving and Construction Business

Doty operated a house moving and construction business in Yakima for several years. Administrative Record (AR) 175-76; Finding of Fact (FF) No. 6.[2] He is a sole proprietor who employs workers. AR 175, 189, 214-18; FF 6. For several months, he relocated houses from a hospital property to three different sites. AR 177-79; FF 6.

Neighbors, contractors, co-workers, city officials, and multiple Department investigators observed Doty using his two sons, 13-year-old Zachary and 11-year-old Stephen, in his commercial enterprise. AR 147-51, 153-54, 261-62, 269-71, 279, 281, 283, 290-94, 309-10. Doty admitted that he wanted to train his sons in the construction and house moving industry. AR 166-67, 170, 462; FF 7. He and his spouse homeschooled the boys. AR 461; FF 6. Both Zachary and Stephen worked on the project on a recurring basis. Zachary worked on the project from April 2002 through January 2003, and Stephen worked from November 2002 through January 2003. AR 147-48. Doty admitted that their work

[2] The Director's decision is found at AR 704-25. A copy is also found in the clerk's papers at CP 637-60. Because the clerk's papers do not contain the complete administrative record, this brief will cite to the administrative record filed with the Court.

was necessary to the work at the job sites. AR 204.

2. The 13-Year Old Worked on Top of a Moving House That Was 22 Feet Above the Ground

In January 2003, the Department investigated reports that Doty had permitted his son to work on top of a moving house. AR 308. A videotape shows 13-year-old Zachary on the top of a house that Doty was moving down a street. *See* AR 309-10; AR Vol. 4 (videotape); FF 8. The roof of the house was approximately 22 feet above the ground. *See* AR 153, 310; FF 9. No fall protection was in place to prevent Zachary from falling. AR 126, 294; *see* FF 8. With or without fall protection, WAC 296-125-030(28) prohibits all minors from performing work more than ten feet above ground or floor level.

Doty had Zachary ride on the top of houses to push low-hanging telephone wires, cables, traffic lights, and other obstacles out of the way. AR 153, 183-84; FF 8. Doty explained that he had Zachary ride on the roof to lift wires and cables because it is "profitable" to have someone act as a spotter. AR 184. This is because he has to pay if he breaks a wire when moving a house. AR 185.

Although Doty's expert disagreed, the Department's safety expert opined that Zachary was exposed to serious physical harm or death when performing this work. FF 9; AR 126-28; *see also* AR 406. First, he could

fall the 22 feet to the moving ground below. AR 128, 309-10; FF 9. Second, the communication wires Zachary lifted were under high voltage wires, creating the risk for induced voltage and the possibility for electrical shock. AR 126; FF 9.

3. The 11-Year Old and 13-Year Old Acted as Outside Helpers While They Moved the House

Zachary and Stephen also acted as outside helpers (spotters) to guide moving houses. AR 186, 190, 269; FF 14. Doty had spotters (including his sons) walk in front of the moving house looking for obstacles. AR 188. The spotters would watch to make sure the moving house did not hit any signs or cars, and would watch for cars coming on side streets. AR 186. Doty would have to pay if a sign was clipped. AR 186. Doty would have two spotters, one on each side of the road. AR 188. Doty would have Zachary act as a spotter on one side of the road. AR 186. Doty would pay the other spotter for his work. AR 189. Doty would also have Stephen act as spotter. AR 190. When he had Zachary or Stephen act as a spotter, Doty did not need to have another worker to perform this task. *See* AR 188-89. This work was "beneficial." AR 186.

WAC 296-125-030(2) prevents all minors from working as an outside helper on public roads. This work is dangerous because it presents the hazard of being hit by another vehicle. AR 127.

4. The 11-Year Old and 13-Year Old Operated and Worked Near Heavy Equipment, Such as Backhoes

House moving involves the use of heavy equipment such as bulldozers, backhoes, and tractors. AR 198; FF 7. Both Zachary and Stephen operated and worked near heavy equipment. AR 148-50, 198, 269-70, 277; FF 7, 10. WAC 296-125-030(17) prohibits all minors from operating or working near bulldozers, backhoes, and tractors.

Doty testified that Zachary used a bulldozer or a backhoe to smooth out dirt at a dump site. AR 198. The hospital project also required leveling the dirt. *See* AR 197-98. A subcontractor would do this work if Doty and Zachary did not. AR 197-98. Zachary used the backhoe to move dirt as necessary on the job site. AR 205-06.

Zachary used the backhoe to scrape mud off the road, and Tim Erickson, a co-worker on the jobsites, noted that it is a routine task on a construction site to clean mud from the job site's entrance. AR 148. Erickson also saw Zachary using the bulldozer to level ground for a road for the cement trucks. AR 148. Erickson did this same work. AR 149.

Zachary would use the front load tractor to move equipment and would assist in pulling machinery out when it became struck. AR 147, 200, 209. Doty agreed that Zachary's work with the heavy equipment, the bulldozer, the track hoe, and backhoe was "productive." AR 224.

Doty characterized Zachary as skilled with the equipment and did not feel he needed to be nearby when he operated the equipment. AR 209. A neighbor saw Zachary using a backhoe alone at a job site. AR 283.

Stephen also operated heavy equipment. AR 148. Although Doty contended that Stephen only operated the machinery a little, Erickson observed Stephen operating the backhoe on multiple occasions. AR 148-49, 198; *see* AR 150. Doty conceded that Stephen probably used the front loader tractor to move equipment. AR 200.

Zachary collaborated with other workers on the site. *See* AR 290. On January 30, 2003, Doty asked equipment operator George Nix to work on a ramp that was too steep. AR 289. Nix needed another operator to use another backhoe to move the dirt from the pile created by Nix's backhoe. AR 290. Doty had Zachary use the backhoe to move the dirt. AR 290.

Zachary did not operate equipment in a safe manner. AR 148. When using the backhoe to help Nix, Zachary operated the backhoe too quickly in the soft dirt. AR 290; FF 10. The backhoe rolled over on its side. AR 290; FF 10. He was not wearing a seatbelt. AR 290; FF 10. Upon seeing the rolled-over backhoe, Doty had Zachary operate a bulldozer to reposition the backhoe on its wheels. AR 290. Doty refused to operate the bulldozer and told Nix that he would have Zachary use it since Zachary knew more about using it than Doty. AR 290.

On another occasion Erickson witnessed Zachary hitting a temporary power line with a backhoe because he was not paying attention to where he was driving. AR 148. He also saw him run out in front of cars with the backhoe. AR 148.

5. The 11-Year Old and 13-Year Old Performed the Same Construction Tasks as the Adult Employees

Doty admitted that the boys performed a wide variety of construction-related tasks. AR 180, 195, 196, 201-03. In addition to the heavy equipment tasks, they included getting equipment, building cribbing, operating equipment to lift up houses, setting chains on the houses, hammering nails, sawing, and drilling. AR 180, 195-96, 201-03. Doty asked them to do tasks that he needed to have done on site and the same things other workers would do. AR 181, 203; *see* AR 148-49. The work they did benefited the construction project. AR 226-27.

Erickson observed both boys working over the course of several months performing various construction-related tasks. AR 147-49. Erickson observed them performing tasks that he and other workers would perform. AR 149. The boys were not playing, observing, or practicing; they were working. AR 148-49.

6. Working on a Construction Site Exposed the Boys To Imminent Serious Physical Harm or Death

Work on a construction site is dangerous. AR 298-99. Both boys

worked in proximity to heavy equipment, such as backhoes and bulldozers. FF 7; AR 149, 154, 198, 269-70, 277. Although Doty's expert, Carl Plumb, did not think the construction practices were that dangerous, the Department believed that death or serious physical harm was imminent from Doty's practices. *See* AR 126-28, 315, 320, 342, 406, 417; FF 9-11, 13-19. Mary Miller, a child labor expert, explained that construction is dangerous for minors and the rate of injuries at construction sites is much higher than is true of minors working in any other industry. AR 298-99. She stated that working near heavy equipment exposes the minors to the possibility of being crushed, dismembered, or maimed, and that Doty's practices could result in serious injury or death to both boys. AR 299.

Dan Mcmurdie, a safety expert, outlined several dangers the boys faced, including the risk of roll-overs when operating equipment and dangers from backing vehicles on the work site. AR 127-28. According to Mcmurdie, all the exposures to the different types of construction hazards had the substantial probability of resulting in serious physical harm or death. AR 128.

Finally, Richard Ervin, employment standards expert, stated that Doty's practices could result in immediate and irreparable injury to the children. AR 335, 417. According to Ervin, the children were in

imminent danger. AR 406.

B. The Department Found Doty Committed 25 Serious Violations of the Child Labor Laws

On January 28, 2003, the Department cited Doty, alleging he violated several laws by permitting his sons to work on construction sites, to work in the proximity of heavy equipment, and to work more than 10 feet above ground level. *See* AR 320; FF 2; WAC 296-125-030(17), (28), -033(4). Doty did not contest that his sons did the work alleged in these citations. AR 165-75; FF 20-21. The Department also issued an order of immediate restraint on January 28. AR 322; RCW 49.12.390.

The next two days, despite the restraint order, Doty had Zachary perform construction work. AR 261-65, 270-71, 294-95. Zachary tipped over the backhoe tractor on January 30, 2003. AR 290.

On January 31, 2003, the Department cited Doty again for allowing Zachary and Stephen to work at construction sites, to operate bulldozers and backhoe tractors, and allowing Zachary to act as an outside road helper while moving a house. AR 326-27; FF 5; WAC 296-125-030(2), (17), -033(4). Doty did not contest that his sons did the work alleged in these citations. AR 165-75; FF 20-21.

The Department found 25 serious violations of the child labor laws. AR 320, 326-27. It assessed a $25,000 penalty. AR 320, 327. Doty

appealed. FF 1. The administrative law judge affirmed. AR 3-23.

C. The Director Determined That Doty Had Employed His Sons in the House Moving Business

Doty appealed to the Director. AR 768. The Director's final order affirmed the citations. AR 724.[3]

1. The Director Found That Doty Permitted His Sons To Work in the House Moving Business

The Director made numerous findings outlining the work the boys performed on site. FF 7, 8, 10-18, 26, 27. Doty did not dispute that the boys performed the work. FF 20, 21. The Director found that the boys were not there to play or watch. FF 27. The Director found that Doty permitted his sons to perform activities in furtherance of the house moving business at the construction sites, such as operating heavy equipment or earth-moving equipment. FF 10, 12, 26. The Director found that the work Zachary performed on top of the houses was profitable for the business. FF 26. She found that Doty did not have to pay subcontractors to smooth out dirt when Zachary did so. FF 26. The work Zachary did with the equipment was productive. FF 26. The Director found that "the Appellant admitted that Zachary and Stephen performed tasks that other workers on-site would do, tasks necessary for the construction site." FF 27.

---

[3] The Director's designee, Judy Schurke, issued the order. AR 702. For convenience, she is referred to as the Director. *See* RCW 49.12.005(2), .400.

The Director found that the work performed by the boys benefited the business, furthered the goals of the business, and displaced labor:

> The evidence shows that Zachary and Stephen's work was an appreciable benefit to the Appellant's business. They performed tasks that furthered the construction process or the goals of the business. They worked next to and with other workers on the job sites, thus displacing labor that other workers would perform. They operated under the Appellant's direction and control. He characterized their work as productive . . . . The Appellant did not have to pay others to do the task that Zachary and Stephen could do. The labor the boys performed was not solely for their benefit, it was also for the benefit of the business.

FF 28. The Director rejected Doty's arguments that the child labor laws exempted him because he was a parent. CL 10. She also rejected Doty's arguments that pre-1942 workers' compensation case law that required emancipation and fixed compensation applied, noting the Legislature had acted to depart from the common law by enacting RCW 49.12.121. CL 11, 12. WAC 296-125-015(2)'s definition of employ "to engage, suffer, or permit to work" controls. CL 9, 12, 13.

The Director noted Doty's argument that he was training the boys; therefore, they were not his employees. CL 14. The Director said it was the Department's position that training is covered under the child labor laws if it is also employment. CL 14. She said that the evidence showed there was an appreciable benefit rendered to Doty because both Zachary and Stephen performed labor that was an advantage to the commercial

activity. CL 14; WAC 296-125-043(4). She therefore determined that Doty was their employer under WAC 296-125-015 and -043. CL 14.

2. The Director Found That Serious Physical Harm or Death Was Imminent

In numerous findings, the Director outlined the great danger the boys were in and found that serious physical harm or death was imminent. FF 9-11, 13-19. She concluded that the violations were serious. CL 17. She observed the high level of danger the children were in because of their age:

> [T]he practices by the Appellant of having his 11 year-old and 13 year-old engage in activities known by law to be inherently dangerous for children shows that serious physical harm or death was imminent. Children 11 and 13 years of age are generally inexperienced at exercising sound and independent judgment necessary for work in inherently dangerous activities, as Zachary demonstrated when he rolled over the backhoe he was operating. The risk of harm is heightened when the children are especially young as in the case here.

CL 17.

D. The Superior Court Affirmed the Director

Doty appealed to superior court. CP 3-9. Doty did not claim that any of the findings of fact were not supported by substantial evidence in his trial brief, reply, and oral argument to the superior court, and disputed only the legal conclusion that he was the employer of his sons. CP 482-92,

583-88; RP (8/15/12).[4]

The superior court affirmed the Director, holding that the Department had the authority to promulgate its definition of "employ" and that the regulation was constitutional. CP 686-95.

IV. STANDARD OF REVIEW

A. Administrative Procedure Act Standards Govern

Appeals of child labor citations are governed by the Administrative Procedure Act, RCW 34.05 (APA). RCW 49.12.400. Under the APA, Doty has the burden to prove the invalidity of the agency order. RCW 34.05.570(1)(a). At the appellate level, the court reviews the decision of the Director. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 404, 858 P.2d 494 (1993). Although Doty claims that some of the factual findings are "erroneous," *e.g.*, App's Br. 27, 31, 33, this is not the standard the court uses to review findings. Under the APA, factual findings are reviewed for substantial evidence. RCW 34.05.570(3)(e); *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006). Where there is substantial evidence, the court does not substitute its judgment for that of the fact-finder even though the court might have resolved a factual dispute differently. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081

[4] In the amended petition for judicial review, he alleged generally that the decision was not supported by substantial evidence, raising allegations about the seriousness of the violations. CP 712. But he did not support his allegations with argument or citation to the record at the hearing or in his briefing to the superior court.

(2006). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), *amended*, 909 P.2d 1294 (1996). The court reviews findings in the light most favorable to the prevailing party. *See In Re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). When reviewing factual issues, the substantial evidence standard is "highly deferential" to the agency fact finder. *See Chandler v. Ins. Comm'r*, 141 Wn. App. 639, 648, 178 P.3d 275 (2007). "When an agency determination is based heavily on factual matters that are complex, technical, and close to the heart of the agency's expertise, we give substantial deference to agency views." *Id.*

This case concerns the question of whether Doty employed Zachary and Stephen. Questions regarding the existence of an employment relationship are mixed questions of law and fact. *See Smick v. Burnup & Sims*, 35 Wn. App. 276, 279, 666 P.2d 928 (1983); WAC 296-125-015(2).

B. Most of the Findings of Fact Are Verities on Appeal

Doty assigns error to portions of findings of fact nos. 9-11, 13-15, and 19. He assigns error to no other finding, or the remaining portions of the above findings. Unchallenged findings of fact are verities on appeal. *Edelman v. State*, 160 Wn. App. 294, 303, 248 P.3d 581 (2011). He generally asserts, "[t]he findings are replete with assumptions or

presuppositions that Mr. Doty employed his children. These findings (or their assumptions or presuppositions) are error." App's Br. 5. This statement is not sufficient to assign error to any of the findings.

A party is required to assign error to specific findings "with a reference to the finding by number." RAP 10.3(g); *see also* RAP 10.3(a)(4). RAP 10.3(h) requires that party contesting an order under the APA "*shall* set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error." *See Patterson v. Super. of Pub. Instruction*, 76 Wn. App. 666, 676, 887 P.2d 411 (1994) ("Error assigned to administrative orders must comply with RAP 10.3."); *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 54-55, 308 P.3d 745 (2013). It certainly is not apparent which findings are contested. In the administrative appeal and in the superior court, Doty did not contest any of the factual events underlying the Department's citations. *See* AR 165-75 (Doty); AR 758 (Doty appeal to Director that took exceptions to conclusions of law only); CP 482-92, 583-88 (trial briefs do not contest factual findings); CP 483 (brief defers to findings of fact in Director's order). He may now not raise new issues. *See* RCW 34.05.554 ("Issues not raised before the agency may not be raised on appeal . . . ."); RAP 2.5(a); *Buecking v. Buecking*, __ Wn.2d __, 316 P.3d 999, 1006-07 (2013);

Kittitas County, 176 Wn. App. at 55.

Even assuming Doty's blanket assignment of error is somehow acceptable, he has abandoned any challenge because he has not contested specific factual findings in his brief. *See Kittitas County*, 176 Wn. App. at 55. Where a party purports to assign error to a finding of fact but fails to present clear argument as to how the finding is not supported by substantial evidence, the finding is a verity. *See Lint*, 135 Wn.2d at 531-33. Because of his failure to assign error and present argument regarding these findings, the appellate court may only review the legal conclusions regarding whether Doty employed his children. *See Kittitas County*, 176 Wn. App. at 55.

C. The Court Gives Due Deference to the Expertise of the Department in Employment Relations and Also Interprets the Child Labor Laws Liberally To Further Their Purposes

Questions of law are considered de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46-47, 959 P.2d 1091 (1998). Under the APA, the appellate court may review to determine whether the agency erroneously interpreted or applied the law. RCW 34.05.570(3)(d). The appellate court gives due deference to an agency's expertise in interpreting the law that it administers. *See City of Redmond*, 136 Wn.2d at 46.

Child labor laws are remedial and the court interprets remedial

laws liberally to advance their purposes. RCW 49.12.010, .121; *see Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 405, 924 P.2d 13 (1996). The court interprets child labor laws to effect their purpose in protecting minors "'from conditions of labor which have a pernicious effect on their health and morals.'" *Kness v. Truck Trailer Equip. Co.*, 81 Wn.2d 251, 254-55, 501 P.2d 285 (1972) (quoting Laws of 1913, ch. 174, § 1).

V. ARGUMENT

A. The Department Did Not Exceed Its Rule-Making Authority in Defining "Employ" as To Engage, Suffer, or Permit To Work

RCW 49.12.121(1) gives broad rule making authority to the Department to promulgate rules protecting minor employees:

> The department may at any time inquire into wages, hours, and conditions of labor of minors *employed* in any trade, business, or occupation in the state of Washington and *may adopt special rules for the protection of the safety, health, and welfare of minor employees.* However, the rules may not limit the hours per day or per week, or other specified work period, that may be worked by minors who are emancipated by court order.

(Emphasis added.)

RCW 49.12.121 governs the "labor of minors *employed* in any trade, business, or occupation in Washington." The child labor laws are included in RCW 49.12, the Industrial Welfare Act. RCW 49.12.005(3) generally defines "employer" as "*any* person, firm, corporation . . . or

other business entity who engages in any business . . . and employs one or more employees . . . ." RCW 49.12.005(4) defines "employee" as an "employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise." "Employ" is not defined in RCW 49.12.005 or RCW 49.12.121. The Department defines employ in WAC 296-125-015(2) as including "to engage, suffer or permit to work":

> "Employ" means to engage, suffer or permit to work, and includes entering into any arrangement, including a contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales except when a minor is working in house-to-house sales for her or his parent or stepparent. The term "employ" does not include newspaper vendors or carriers, the use of domestic or casual labor in or about private residences, agricultural labor as defined by RCW 50.04.150, or the use of voluntary or donated services performed for an educational, charitable, religious, or nonprofit organization and without expectation or contemplation of compensation for the services performed.

Doty argues that the Department lacked authority to promulgate this definition of employment. App's Br. 19-23. However, it was well within the authority of the Department to define "employ" as RCW 49.12.121 authorizes the Department to promulgate child labor rules.

1. The Child Labor Laws Exempt Parent Employers in Limited Circumstances Only

Doty claims that he acted as a parent, not an employer. *E.g.*, App's Br. 14; AR 464. However, the child labor laws exempt parent employers

only in limited circumstances. RCW 49.12.005, .121, .320; WAC 296-125-015. RCW 49.12.005(3)'s definition of employer applies to "any person" who employs an employee, without exception for parent employers. "Washington courts have consistently interpreted the word 'any' to mean 'every' and 'all.'" *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 884-85, 64 P.3d 10 (2003) (construing term "any employee" in Minimum Wage Act). For decades, the Department's regulations have not generally exempted parent employers. *See* WAC Vol. 1. Suppl. 6 (1970) (defining employ in former WAC 296-125-015 as "to engage, suffer or permit to work"); CP 671-82.[5] The Legislature has not acted to change this, thus acquiescing to the Department's regulations. *See Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003).

In 1989, the Legislature enacted the house-to-house sales statute with an express exemption for parent employers. RCW 49.12.320(1). By making an express exemption for parent employers for house-to-house sales, the Legislature understood that parent employers were covered under RCW 49.12.121. Strikingly, in RCW 49.12.320(1), the Legislature chose to use the language "engage, suffer, or permit to work" to define

[5] Note employment does not include domestic or casual labor about a private residence. RCW 49.12.185.

"employ" consistent with WAC 296-125-015, thus showing its approval of this language. It is also significant that the Legislature did not extend the exemption for parent employers beyond house-to-house sales to other employment under RCW 49.12.121 despite the opportunity to do so.

In 1991, the Legislature attempted to enact a law to modify the Department's regulations to conform with federal standards. Laws of 1991, ch. 303, § 1. Federal law exempts parent employers in nonhazardous employment, but does not exempt parent employers in hazardous employment. 29 U.S.C. § 203(l); 29 C.F.R. § 570.122; 29 C.F.R. § 570.126. But the Governor vetoed the provision to adopt federal regulations. One reason was to retain stronger Washington laws. Veto Message, Laws of 1991, ch. 303. The Legislature did not override the veto. *See Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998) (to determine legislative intent, the court considers intent of Governor when he or she vetoes a section).

Washington courts have long recognized the importance of protecting children from dangerous work. A 1914 case involving a parent employer describes Washington's policy in child labor laws as:

> To prevent persons of immature judgment from engaging in hazardous occupations; to prevent employment and overwork of children during the period of their mental and physical development; and to prevent, so far as the law is able to prevent it, competition between weak and under-

> paid labor and mature men who owe to society the obligations and duties of citizenship.

Hillestad v. Indus. Ins. Comm'n, 80 Wash. 426, 431, 141 Pac. 913 (1914) (child illegally worked for parent under Rem. & Bal. Code, § 6570, predecessor to the current RCW 26.28.060).[6]

2. WAC 296-125-015 Defines "Employ" and Has the Force and Effect of Law

RCW 49.12.121 regulates child employment, thus changing the standards from the common law. To the extent that the common law required proof of a specific agreement, emancipation, and compensation to determine whether an employment relationship exists in the context of parent employers, these standards no longer apply.[7] WAC 296-125-015(2) finds employment when an individual has "engaged, suffered, or permitted [a minor] to work[.]" Properly promulgated rules have the "force and effect of law." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 848, 50 P.3d 256 (2002) (internal quotations omitted). The common law operates only in the absence of other law. *See Roberts v. Johnson*, 91 Wn.2d 182, 183, 588 P.2d 201 (1978). Doty argues that the Department

---

[6] The primary focus of *Hillestad* was the question of whether the child was entitled to workers' compensation benefits after an accident. The Court said no, under the test for workers' compensation coverage then in effect, but went on to note that the child also was not covered was because it would have been illegal employment under Rem. & Bal. Code, § 6570. *Hillestad*, 80 Wash. at 430. (The workers' compensation test in effect in *Hillestad* does not apply to present-day evaluations of employment under the child labor laws.)

[7] This is not the common law, but former workers' compensation law, as is discussed below in Part A.3.

did not have authority to promulgate WAC 296-125-015(2), citing to *Manor*, 131 Wn.2d 439. *See* App's Br. 19, 21-23. But under *Manor*, the Department can promulgate rules that differ from the common law if the Department has the authority to engage in rule-making, as here. *See Manor*, 131 Wn.2d at 453-54; RCW 49.12.121.

In *Manor*, the Court considered a regulation that established which entities would be considered an employer for the purposes of workers' compensation coverage. 131 Wn.2d at 453-54. The *Manor* Court stated, "[i]t is plainly within the authority of the Department to designate which entities shall be considered employers for the purposes of Title 51." 131 Wn.2d at 454. The *Manor* Court's use of the workers' compensation WAC definition of "employer" meant that someone who would not be an employee at the common law was a covered employee. *Manor*, 131 Wn.2d at 443-44, 453-54. The rule in *Manor* abrogated the common law. Thus, under *Manor*, administrative regulations trump the common law.

Doty argues that *Manor* does not apply because it involved RCW Title 51, the Industrial Insurance Act, and not RCW 49.12, the Industrial Welfare Act. App's Br. 22-23. It is correct that the *Manor* Court said that the question of what entities shall be considered employers (regarding parent-subsidiaries) was limited to the RCW Title 51 context, and did not alter the common law otherwise regarding parent-subsidiaries. *Manor*, 131

Wn.2d at 454. But the Court in *Manor* did not purport to say that the only time the Department can promulgate rules that are different from the common law is when it involves RCW Title 51. Rather the Court's decision recognizes the broad scope given agencies when the Legislature grants them rule-making authority to promulgate rules. This approach is consistent with the national approach: "Courts holding that administrative regulations have the 'force and effect of law' have equated or compared the force and effect to that of a statute, so that a rule may alter the common law." 2 Am. Jur. 2d Administrative Law § 238 (2d ed. 2010) (footnotes omitted). Here the Department had broad rule-making authority under RCW 49.12.121 and could properly promulgate a rule defining "employ." *See Wingert*, 146 Wn.2d at 848. It did not exceed its statutory authority in defining "employ."

3. The *American Products* Test Does Not Apply

Doty argues that there is no employment relationship under a 1941 workers' compensation case, *American Products Co. v. Villwock*, 7 Wn.2d 246, 109 P.2d 570 (1941), which required fixed compensation, a contract, emancipation, and clear and convincing evidence to show an employment relationship between a parent and child. App's Br. 16. *American Products* was decided in the context of a party trying to avoid a jury verdict by asserting that coverage under workers' compensation was a defense to the

tort liability claim with an injured child. 7 Wn.2d at 260-62. That factual or legal context does not apply here. *American Products* does not apply to child labor cases because child labor and workers' compensation are two different and distinct statutory schemes. *See, e.g., Ledesman v. A.F. Murch Co.*, 87 Wn.2d 203, 205, 550 P.2d 506 (1976) (employment of a minor in violation of RCW 49.12.121 does not prevent application of the Industrial Insurance Act).[8]

Doty cites *American Products* for the proposition that no employment relationship exists unless the child is emancipated and that there needs to be clear and convincing proof of an agreement for compensation. App's Br. 17-18. But these are not requirements under RCW 49.12.121 and WAC 296-125-015(2). To accept Doty's premise that because the parents may be entitled to the earnings of the child, this means that employment relationship can only be established if there is emancipation, would essentially mean that very few parents are employers under the child labor laws. There is no intent for such a result by the Legislature, which has not exempted parent employers generally despite choosing to do so for house-to-house sales. RCW 49.12.121 specifically

---

[8] *American Products* also is no longer good law for workers' compensation purposes. *In re Martin Novak*, No. 93 2291, 1994 WL 364342, *1 (Wash. Bd. Ind. Ins. App. May 26, 1994) (under current Industrial Insurance Act only exception for children is agricultural labor, "[n]o other exception deals with children employed by their parents" and the policy of the Act is 'to embrace all employments . . . .'"); *see* RCW 51.12.010, .020.

discusses the situation when emancipation controls and by choosing to demark when emancipation controls, the Legislature rejected other situations. *See State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988) (inclusion of certain conditions in a statute implies the exclusion of others).

Payment is not required under RCW 49.12.121 and WAC 296-125-015(2) to establish an employment relationship covered under the child labor laws.[9] By acting to regulate an area concerning the safety and welfare of children, the Legislature has expressly acted to change the common law relationship of employer-employee in RCW 49.12.121 and the regulations promulgated under it. Common law rules regarding employment relationships do not apply when modified by statute or regulation. *See Manor*, 131 Wn.2d at 454.

If the Legislature wished to adopt the rule of law enunciated in the 1941 *American Products* case, providing for a different treatment of parents as employers, the Legislature could have done so through its legislation. Instead, in 1973, it enacted RCW 49.12.121, which granted the Department broad rule-making authority and abrogated the common law. *See* Laws of 1973, 2d Spec. Sess., ch. 16, § 15. In 1989, the legislature excluded parent employers for house-to-house sales, but nothing else, in

[9] See discussion Part V.B.1.

RCW 49.12.320. *See* Laws of 1989, ch. 216, § 3. In subsequent amendments, it addressed citations (1991), emancipation of minors (1993), and enforcement (2003), in RCW 49.12.390-.400. *See* Laws of 1991, ch. 303, §§ 3-7; Laws of 1993, ch. 294, § 9; Laws of 2003, ch. 53, § 273. But it did not provide for the test Doty asks in these laws.

Significantly, the Legislature did include a "family member" exclusion in the agricultural labor laws applicable to minors in 1989, but at no time has a similar exclusion been added to child labor governed by RCW 49.12.121. *See* RCW 49.30.010; Laws of 1989, ch. 380, § 83.

RCW 49.12.121 and the rules under it must be liberally construed to serve their purposes. Apply overly limiting workers' compensation case law from 1941 that has been superseded by statute does not serve the purposes of the child labor laws.

4. The Director Properly Used the Dictionary To Define "Work"

WAC 296-125-015(2) defines "employ" in part as "to engage, suffer or permit to *work* . . . ." The term "work" is not defined in the child labor regulations. The ordinary meaning of the term "work" is defined by *Webster's Third New International Dictionary* 2634 (2002) as (1) an activity in which one exerts strength or faculties to do or perform something, or (2) may refer to labor, task, or duty that affords one's

accustomed means of livelihood. CL 9. The Director adopted the first definition of the term "work" because it most advances the child labor statute as it focuses on the labor of a child and would allow for regulation of harmful activities. CL 9. The second definition is unreasonable in this context, and is inconsistent with a liberal interpretation of the child labor laws. CL 9. Doty claims the Department should have used "case law" to define "employ" and should not have used a dictionary to define a term in the rule. *See* App's Br. 1, 10, 20, 39-40. But it is well established that dictionaries may be used to define terms. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). And, as discussed throughout this brief, Doty's "case law" does not apply.

Notably Doty does not object to the Director's adoption of the first definition of work, thus waiving any argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012), *review denied,* 176 Wn.2d 1021 (2013). This Court should defer to the Department's interpretation of its own regulation as the Department is an expert in child labor and because the definition best advances the purposes of RCW 49.12.121. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 86, 11 P.3d 726 (2000).

B. By Performing Work Activities That Undisputedly Benefited

the Business, the 11 year-old and 13 year-old Are Employees

1. **Payment Is Not Required To Establish an Employment Relationship**

Payment is not required to establish an employment relationship under the child labor laws, contrary to Doty's arguments. *Contra* App's Br. 12, 16, 18. RCW 49.12.121, RCW 49.12.005, and WAC 296-125-015 do not require payment or an implied obligation to pay. In order to be exempt under WAC 296-125-015(2), a minor must provide "voluntary or donated services . . . *for an educational, charitable, religious, or nonprofit organization*," and must do so "without expectation or contemplation of compensation for the services performed." (Emphasis added). By specifically including the "educational, charitable, religious, or nonprofit" situation regarding compensation, the Department excluded the for-profit situation. *See Sommerville*, 111 Wn.2d at 535.

Doty does not qualify for the exemption because he operates a for-profit enterprise. FF 26. This is consistent with the Minimum Wage Act, which does not allow a person to work for free for a for-profit organization. RCW 49.46.010, .020, .090.[10] The lack of a general exemption for uncompensated work from the child labor laws furthers the purpose of the law to protect vulnerable children both from physical

[10] However, coverage under the minimum wage laws is not necessary for coverage under the child labor laws, as the statutory schemes involve different exemptions.

hazards and from economic exploitation by adults. As children are vulnerable, they may be induced into providing their labor for free, and it would be a paradoxical result for a child to be deprived of the protection of the law simply because an adult successfully induced the child to provide his or her labor for free. If an individual could then claim the children were not employees because they were not paid, this would allow children to be exploited, which would frustrate the purposes underlying the child labor laws. The Court does not allow the child labor laws to be waived. *See Kness*, 81 Wn.2d at 254 (married minors not exempt under former law and court would not allow minors "to waive the protection afforded and accept the evils forbidden by the regulations intended to protect minors.").

Contrary to Doty's arguments, case law interpreting the Fair Labor Standards Act (FLSA) to require payment is not determinative here. *See* App's Br. 12 (citing *Cotton v. Weyerhaeuser Timber Co.*, 20 Wn.2d 300, 312, 147 P.2d 299 (1944) (interpreting FLSA); *Bowman v. Pace Co.*, 119 F.2d 858, 860 (5th Cir. 1941) (interpreting FLSA)). Under that law, Doty contends "if an obligation to pay is not implied, then the parties are not employer and employee." App's Br. 12. But RCW 49.12.121, WAC 296-125-015(2), and the law on unpaid trainees and interns (discussed below) do not require payment to find someone is employed. To the extent federal

law is different from Washington law, it does not control. *See Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999). The Governor vetoed an attempt to tie Washington child labor laws to federal law. Veto Message, Laws of 1991, ch. 303.

Although this Court need look no further than RCW 49.12.121 and WAC 296-125-015 to determine if payment is required, payment status is not determinative under the state's general wage and hour laws. *See Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 45, 47-49, 169 P.3d 473 (2007) (technicians not paid for complete drive time, but court found covered work).

2. Although Certain Trainees May Be Excluded From the Child Labor Laws, Minors Who Provide an Appreciable Benefit to the Employer Are Not Trainees

Doty repeatedly claims that he was training his children, not employing them. *E.g.*, AR 462; CL 14. Certain trainees are not subject to the child labor laws. FF 24. However, exemptions from coverage of remedial laws are narrowly construed, and no exemption applies here. *See, e.g., Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 301, 996 P.2d 582 (2000). It is often the case where an individual who had no expectation of compensation may be treated as a trainee, but the court later determines he or she was an employee. *E.g., Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013) (unpaid internship

was employment). The fact the individual was uncompensated is not determinative as to whether an employment relationship exists. *See id.*

The Department uses WAC 296-125-043 to determine when a minor trainee is in covered employment. CL 14. Under WAC 296-125-043(4), minimum wage provisions do not apply when a minor student is in a work place for an occupational work experience directly supervised on the premises by a school official or employer under contract with the school "when no appreciable benefit is rendered to the employer by the presence of the children." Here it is uncontested that Zachary and Stephen provided an appreciable benefit to the business, as the Director found. FF 28. Therefore, they are not exempt as trainees under WAC 296-125-043.

The Department has developed an administrative policy to determine whether an employer "benefits" from the work of a claimed trainee. FF 24 (citing Administrative Policy ES.C.2); AR 100. This policy provides six criteria that are considered to determine if the employer benefited from the claimed trainee's labor:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under their close observation; and
4. The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and

5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and
6. The trainees understand they are not entitled to wages for the time spent in training.

FF 24. These criteria were developed from federal cases involving FLSA. AR 103; *see, e.g.*, *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993); *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127 (5th Cir. 1983); *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010); *Glatt*, 293 F.R.D. at 531. This test derives from *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947).

In *Walling*, a railroad held a week-long training course for prospective brakemen, leading the Supreme Court to determine that certain "trainees" were not covered employees under FLSA. The trainees "[did] not displace any of the regular employees, who [did] most of the work themselves, and must stand immediately by to supervise whatever the trainees do." *Walling*, 330 U.S. at 149-50. The trainees' work "[did] not expedite the company business, but may, and sometimes [did], actually impede and retard it." *Id.* at 150. The Court held that FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction . . . the [FLSA] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational

school] at a place and in a manner which would most greatly benefit the trainee." *Walling*, 330 U.S. at 152-53. The Court concluded that "[a]ccepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the Act's meaning." *Id.* After this case, the United States Department of Labor developed the six-part test, which is used by the Department. *Glatt*, 293 F.R.D. at 530; AR 103.[11]

Unlike *Walling*, where the uncontroverted testimony was that the putative employer was not benefitted by the trainees' activities, here Doty did receive a significant benefit. FF 28. This case is more like *Glatt*, a case involving a motion picture distribution company where the interns displaced regular employees by performing routine office tasks. 293 F.R.D. at 533. If the intern had not performed the tasks for free, a paid employee would have been needed. *Id.* The company, like Doty, derived an immediate advantage because of this work. *See id.* Similarly, unlike

---

[11] Some federal circuits follow what is called the "primary beneficiary" test. *E.g.*, *Solis v. Laurelbrook Sanitarium & Sch.*, 642 F.3d 518 (6th Cir. 2011); *Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799 (W.D.N.C. 1995); *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1983). This test has little support in *Walling*. The Supreme Court did not weigh the benefits to the trainees against those of the railroad, but relied on findings that the training program served *only* the trainees' interests and that the employer received 'no immediate advantage' from any work done by the trainees. *Walling*, 330 U.S. at 153. Thus, *Walling* created a narrow exception. *Glatt*, 293 F.R.D. at 532. In any event, this test does not apply here. Washington looks to the six-part test. FF 24. Moreover, Doty does not claim the primary beneficiary test applies and may not belatedly raise it. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Walling, Zachary and Stephen worked independently. FF 7.

3. Applying the Relevant Test to the Uncontested Facts Shows That Doty Employed Zachary and Stephen

Under a remedial interpretation of the child labor laws and applying appropriate deference to the agency, the test for determining whether Doty employed Zachary and Stephen is as follows: First, the primary question is whether Doty engaged, suffered, or permitted them to work. Second, to determine whether they are exempt as trainees is guided by WAC 296-125-043 and the six-part trainee test.

Here, Doty does not properly challenge the relevant findings and, therefore, cannot contest them. *See Lint*, 135 Wn.2d at 532-33; *Kittitas County*, 176 Wn. App. at 55; *Edelman*, 160 Wn. App. at 310. The Director found in multiple findings that Doty permitted Zachary and Stephen to work in multiple instances, on multiple days, performing multiple tasks. FF 8, 10-18. Doty did not dispute that this work occurred. FF 21. The Director found that Zachary's and Stephen's work furthered Doty's business and provided an appreciable benefit to the business. FF 10, 12, 27, 28. She further found that work performed was profitable for the business. FF 26. She found that the children performed work that other workers on the site did, and that Doty would have to pay other workers to perform the tasks if the boys did not do them. FF 26. She found that they

displaced labor. FF 28. She found that the work was for the benefit of the business. FF 28.

Doty does not properly challenge these findings, and, in any event, substantial evidence supports each of them. Ample evidence shows Zachary and Stephen were permitted to perform work of various kinds, including the operation of heavy equipment; that they performed tasks that others would perform on the site, such as spotting and grading; that Stephen and Zachary performed productive work that benefited Doty's business; and that Doty would have needed others to perform the work if the boys had not performed it. *E.g.*, AR 147-50, 165-75, 181, 183-86, 188-90, 197-98, 200, 203-04, 209, 224, 226, 283, 290.

The Director weighed the relevant facts, considered the totality of the circumstances, and determined that there was employment. With substantial evidence supporting the findings, this Court should affirm.

C. Doty's Arguments That He Is Not the Employer Are Unavailing

1. Doty Did Not Assert That the Economic Dependence Test Applies Below and Has Waived This Argument

Contrary to Doty's arguments, no other "test" requires exclusion of Doty as a parent from the child labor laws. *See* App's Br. 18. Doty argues that the economic dependence test discussed in *Anfinson v. FedEx Ground Package Systems, Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012), applies here.

App's Br. 15. The economic dependence test derives from the federal economic realities test. *See, e.g.*, *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979) (outlining the test). This test determines whether someone was an independent contractor in business for himself or herself or an employee. *Anfinson*, 174 Wn.2d at 871 ("The relevant inquiry is whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.") (internal quotations omitted). The factors used to distinguish employees from independent contractors are different from those used to distinguish employees from trainees. *Compare Real*, 603 F.2d at 754 *with Glatt*, 293 F.R.D. at 532.

But significantly, if Doty wanted to apply the economic dependence or economic realities test, he needed to argue it at the agency level. *See* RCW 34.05.554(1); *Edelman*, 160 Wn. App. at 310.[12] He did not do so.

In any event, the economic reality is that the boys functioned as an integral part of the operation of Doty's business. *See Marshall*, 473 F. Supp. at 477 ("The economic reality is that the trainees functioned as an

[12] RCW 34.05.554(1)(i) allows a new issue to be raised if "[a] change in controlling law [occurs] after the agency action[.]" Although *Anfinson* occurred after the agency action, it is not "controlling" as it addresses the different situation of whether a person works for another or works for himself or herself. *Anfinson*, 174 Wn.2d at 871. If a new issue had been properly raised, the remedy would be remand to the agency for a determination of that issue. RCW 34.05.554(2).

integral part of the operation of Radiology Department without pay" and should be considered employees). Without their work, others would have needed to perform this work. They displaced labor and their work benefitted the business. Doty's suggestion that, under *Anfinson*, Stephen and Zachary were not dependent on him, and were "in business" for themselves, is unsupportable.

Doty again argues that "if children do not receive or expect wages from the parent, any economic dependency cannot be based on an employer-employee relationship." App. Br's at 16. As explained above, receipt or expectation of wages is not determinative. *See infra* Part V.B.1.

2. **Doty's Other Tests Do Not Apply**

Doty incorrectly asserts that the Department used a right to control test. App's Br. 13. The right to control was only one element that the Department considered in looking at the totality of the facts. FF 25. Doty argues that that the direction and control he exerted was that of a father, not that of an employer. App's Br. 13. This is not a valid distinction. A father may act as an employer. The Director determined he was an employer, based on the complete record, and substantial evidence supports the Director's determination. This Court does not reweigh the evidence. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009).

Doty also argues that "[t]he Department's failure to apply the

plentiful case law defining employment is arbitrary and capricious." App's Br. 21. But Doty cites no authority that an agency acts arbitrarily when it follows its own regulation. And the case law is to the contrary, as regulations have the force of law. *See Wingert*, 146 Wn.2d at 848. His unsupported argument should be disregarded. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809.[13]

D. Doty's Inchoate Constitutional and Homeschool Statutory Arguments Should Be Disregarded

Doty raises no constitutional issue or alternative statutory issue that merits consideration by this Court. Doty asserts "the Department's attempts to find violations of WAC 296-125-030 and -033 and to assess fines thereof are in violation of Doty's constitutional and statutory rights," and asks the Court to "enforce Doty's constitutional and statutory rights to instruct his children . . . ." App's Br. 24. Doty fails to support these arguments with adequate authority and argument.

Doty quotes *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), for the proposition that "[t]he liberty interest guaranteed by the Fourteenth Amendment includes freedom [to] 'establish a home and bring up children.'" App's Br. 23. But he provides no analysis

[13] As discussed above, Doty's other arguments about payment under FLSA and the purported common-law test are without merit. *See* Part V.A-B.

or authority as to why this general proposition would mean that the Department cannot enforce child labor laws. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration[.]" *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *quoted in In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). To adequately present a constitutional argument, a party must cite to authority and present argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

Doty cites no authority that employing one's children in a business is something that invokes a liberty interest. The Department is not regulating how Doty "brings up" his children. The Department is properly regulating Doty as an employer in the public realm, not as a parent acting in the private realm. *See Prince*, 321 U.S. at 168-69. In *Prince*, the Court upheld a conviction of the child's custodian for violating a law that prohibited children from selling periodicals in a public place. The statute made it a crime for a parent or custodian to "permit[] . . . such minor to work in violation [of the periodical law]." *Prince*, 321 U.S. at 161. Recognizing the critical need to protect children from the dangers of child employment, the Court held that "legislation appropriately designed to reach such evils is within the state's police power, whether against the parents' claim to control of the child or one that religious scruples dictate

contrary action." *Prince*, 321 U.S. at 169. The Court recognized the need to protect children in the realm of employment:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street . . . .

Prince, 321 U.S. at 168-69 (footnotes omitted). The key in *Prince* is that the state could regulate work in the public realm, regardless of whether there was parental involvement. *Prince*, 321 U.S. at 166, 168-69.

Like the custodian in *Prince*, Doty permitted his children to perform dangerous work activities in the public realm. FF 7-18. The only Washington authority cited by Doty, *Smith*, does not support his position as it recognizes that child labor may be regulated by the state. *Smith*, 137 Wn.2d at 16. "Although the [*Prince*] court acknowledged the parent's constitutionally protected right to child-rearing autonomy, it found a narrow exception necessary in light of the 'crippling effects of child employment,' 'more especially in public places.'" *Id.* (quoting *Prince*, 321 U.S. at 168).

Doty's additional claim that the Department engaged in an ultra vires act that "violates Doty's constitutional rights" should also be ignored as it is unsupported by any authority or argument. *See* App's Br. 1, 10, 40; *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. Doty also cites home based instruction statutes, RCW 28A.225.010 and .020, and argues that under them there is a violation of his rights. App's Br. 24. There is nothing in these statutes that authorizes a parent acting as an employer to violate child labor laws. It would be like a parent under the guise of homeschooling teaching his or her child to drive on the highway at age 11 or 13, which is prohibited under RCW 46.20.024.

E. Substantial Evidence Supports the Findings That Physical Harm or Death Was Imminent, Such That the Violations Were Serious

The Director properly determined that the highly hazardous work that Doty's children performed constituted serious violations of the child labor laws, justifying the imposition of additional penalties. CL 17; RCW 49.12.390(2). The Director may impose penalties for violations of RCW 49.12.121 and the regulations under it, with enhanced penalties for serious or repeat violations. RCW 49.12.390(1)(b), (2). RCW 49.12.390(2) provides that a serious violation occurs if death or serious physical harm is imminent from a work practice:

> a serious violation shall be deemed to exist if death or

> serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

RCW 49.12.390(2). Doty contests that there were serious violations. App's Br. 24.[14]

1. Construction Is a Highly Hazardous Industry, With the Highest Injury Rate for Children

The Director properly determined that the activities in WAC 296-125-030 and -033 were "by their very nature . . . dangerous and pose a substantial risk of harm which could result in serious physical injury or death" and were as a matter of law "serious." CL 17. Doty disputes that the occupations in -030 and -033 are inherently dangerous and involve serious risk to harm to minors, asserting that "[t]hese regulations do not refer to 'serious,' 'harm,' 'injury,' or 'death' in a pertinent way." App's Br. 25. The Director used her expertise to conclude that these activities were inherently dangerous:

> The list of occupation in WAC 296-125-033 and -030 identify work activity which by their very nature are dangerous and pose a substantial risk of harm which could result in serious injury or death. The Department's listing of these occupations and employment activities and strictly

[14] The violations in the January 31, 2003 citation, with the exception of Zachary working as a helper, were repeated violations of the ones specified in the January 28, 2003 citation. CL 18. Doty does not dispute that this would justify the assessment of enhanced fines. CL 18; RCW 49.12.390(2); *see* App's Br. 1-40.

> prohibiting such activities by minors shows these activities are inherently dangerous and involve serious risks of physical harm or death to minors. As a matter of law, such violations are "serious."

CL 17. The agency's "specialized knowledge" may be used to evaluate the evidence. RCW 34.05.461(5). Construction is a "high hazard industry," with injuries for minors in the construction industry much higher than almost all industries. AR 128, 298.

In any event, the Director also concluded that the violations were serious based on the evidence. CL 17. The Director made multiple findings that Doty exposed the children to hazards that made serious physical harm or death imminent. FF 9-11, 13, 15-19. Although Doty disputes particular portions of these findings, the overwhelming evidence supports these findings as outlined by three Department experts. *See* AR 125-29, 297-307, 333-36, 406, 417. Furthermore, as fact finder, the Director may evaluate the evidence, which was replete with examples of the children working in hazardous situations, and find that physical harm or death was imminent. Notwithstanding Doty's attempts to second guess this fact-finding, the Court does not reweigh evidence.

The standard the Director used to determine whether physical harm or death is "imminent" is a civil standard under the child labor laws. Doty cites a criminal case for the proposition that "[o]ne may lawfully use force

in defense of others when one has a reasonable belief that the person being protected is in imminent danger." *State v. Jarvis*, 160 Wn. App. 111, 121, 246 P.3d 1280 (2011) (emphasis omitted); *see* App's Br. 27. He posits that "[t]he Department has (and presents) no evidence that the level of risk to which Doty exposed his sons was so high that a third party would have a lawful basis to use force to defend his sons." App's Br. 27.

The standard in a criminal defense of others case is irrelevant to the question here. The Legislature did not say that there needs to be a level of risk that is equivalent to that needed to justify forceable action in the criminal context. RCW 49.12.390(2). Instead the Legislature said, "a serious violation shall be deemed to exist if death or serious physical harm has resulted or is imminent from a condition that exists" from workplace activities. RCW 49.12.390(2). Imminent means "ready to take place." *Webster's* 1130. The Director made several findings that the dangerous practices of Doty involved imminent harm to Zachary and Stephen—harm that could occur at any time and was "ready to take place." Substantial evidence supports these findings, that the children had multiple exposures to construction hazards on multiple days.

2. This Court Should Reject Doty's Attempt To Reweigh the Facts

Doty raises several factual arguments that improperly ask this

Court to reweigh the facts. The Director found that by riding on top of the house and moving wires out of the way, Zachary was exposed to the hazard of electrical shock. FF 9. Doty contests the Director's finding that lifting "communication wires" could lead to the possibility of electrical shock, pointing to the statement of his expert, Carl Plumb. FF 9; App's Br. 28. The Department's safety expert, Dan Mcmurdie, stated that there was a potential for electrical shock. AR 126-27. The Director considered both expert opinions and rejected Plumb's opinion; this Court should not reweigh the evidence. FF 9; *Fox*, 154 Wn. App. at 527.

The Director found that Zachary had no safety equipment when he was on the roof of the moving house. *See* FF 8 (no harness or other safety equipment, no warning line, no spotters excluded from other duties). Doty appears to argue there was a monitor as defined by the Washington Industrial Safety and Health Act (WISHA). App's Br. 31. No evidence was presented that there was a monitor present that complied with former WAC 296-155-24515(2)(b) even assuming it would be relevant to a child labor violation. Former WAC 296-155-24521(4) required that a monitor be engaged in no other duty while acting as safety monitor, be trained as a monitor, wear distinctive apparel, and be in the position to have a clear, unobstructed view of the worker. There was no such evidence presented.

Citing former WAC 296-155-24515(2)(a), which exempted certain

fall protection provisions "when employees are on a roof only to inspect, investigate, or estimate roof level conditions," Doty appears to argue that Zachary was only "observing." App's Br. 31. First, there was no "observer" exception in WISHA's limited fall protection exception for inspections. Former WAC 296-155-24515(2)(a). Second, Zachary was far more than an "observer." He acted as a spotter and he moved wires and obstacles out of the way as the house moved. AR 153, 183-84; FF 8.

Doty argues that the Director's order should have included more detail about the types of safety protection that Doty failed to provide to Zachary and Stephen. App's Br. 33-34. He cites no authority for the proposition that the APA requires the Director to make findings in exhaustive detail on every point, and none exists. RCW 34.05.461 requires the Director to make "findings on all material issues of fact." This was done.

Doty contests the finding that the backhoe Zachary tipped over was operated "on uneven terrain," pointing to his own statement that it was on "perfectly level ground." App's Br. 34; AR 480. Doty testified that Zachary rode into soft dirt. AR 206; *see also* AR 290 (ground was soft fill and had a slight slope). An inference the fact-finder may draw is that the terrain was not smooth, but rather uneven—certainly uneven enough that a backhoe could tip over, since it is uncontested that it did so. This provides

substantial evidence for the Director's finding.

Doty contests the finding that "[w]hen a backhoe roll-over begins and the operator is not wearing a restraint, like a seatbelt, they are thrown from the seat and the overhead guard can strike and crush the operator." FF 10; App's Br. 35. This finding is supported by substantial evidence, as Mcmurdie states this. AR 127.[15] Notwithstanding Doty's claims, substantial evidence also supports the finding that Zachary hit a temporary electrical pole, as Erickson states it. FF 11; AR 148; App's Br. 35-36.

Doty has highlighted small portions of the findings, but such quibbles are immaterial in view of the substantial evidence supporting the findings about imminent serious physical harm or death.

F. Doty Has Waived His Separate Property Argument

Doty argues that the "judgment entered against Doty in this case should identify the judgment debtor as a married man in his separate capacity." App's Br. 37. He did not raise this issue at the superior court and has waived it. *See* CP 482-92, 538-88; 705-713; RP (8/15/12), (10/19/12); *Buecking*, 316 P.3d at 1006-07. There is no support in the record for the contention that Doty was acting in his separate capacity when he exposed his boys to hazardous employment. In any event, the

[15] Doty characterizes this finding as stating that whenever backhoes roll over, operators are "invariably" thrown from their seat if they have no seatbelts. App. Br. 35. The finding does not say "invariably." FF 10. The fact that when Zachary tipped over the back-hoe, he was not ejected from his seat, does not diminish the roll-over danger.

marital community is responsible for debts incurred during marriage. *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980).

G. Doty Is Not Entitled to Attorney Fees

Doty claims attorney fees under the Washington State Equal Access to Justice Act. App's Br. 38. Doty should not prevail on appeal, and, therefore, he should not receive an award of fees on appeal.

Even if he did prevail at the appellate court, he would not be entitled to fees because the Department's position in this case is substantially justified. *See* RCW 4.84.350(1); *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007). Where the state's position on appeal is one that would satisfy a reasonable person, its position is substantially justified, and no fee award is proper, even if a court concludes on appeal that the agency was incorrect. *See Silverstreak*, 159 Wn.2d at 892. Here the Department had a reasonable basis in law and in fact to proceed. *See id.* Doty let his 13-year-old and 11-year-old boys work in his commercial operation on multiple days. Despite being cited for these activities, with an order of immediate restraint, he continued to let Zachary work in his business. AR 322; FF 12. Given the detailed evidence that showed sweeping violations of the child labor regulations, the Director had a reasonable basis to uphold the citations. The Director

had a reasonable basis in law and fact to find an employment relationship given that the regulation establishes an employment relationship when a putative employer engages, suffers, or permits a child to work. WAC 296-125-015(2). Here, the overwhelming evidence is that Doty permitted the children to work in the house moving and construction business. Ample evidence also showed that these children were not acting as uncovered trainees, but rather provided a benefit to the business, furthered the business's interests, and displaced adult labor on the site. The evidence also showed the danger the children were in by their activities on construction sites. Throughout this litigation, the Department is substantially justified in taking action.[16]

VI. CONCLUSION

The Department asks this Court to affirm.

RESPECTFULLY SUBMITTED this 21st day of February, 2014.

ROBERT W. FERGUSON
Attorney General

ANASTASIA SANDSTROM
Assistant Attorney General
WSBA No. 24163
Office Id. No. 91018

[16] Doty also claims fees under 42 U.S.C. § 1983. App's Br. 39. The Court should reject his unsupported claim. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809. This is a review from an order under the APA. No summons and complaint alleging a 42 U.S.C. § 1983 violation was made at superior court. Because it was not raised at the superior court, it is not before this Court. RAP 2.5(a); *Buecking*, 316 P.3d at 1006-07.

Appendix A

BEFORE THE DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES
STATE OF WASHINGTON

In Re: JUDE I. DOTY Appellant.	ORDER OAH Docket No. 2003-LI-0039 (Citation No. ES-5-001-03 & No. ESCL-010R5)

The Director of the Washington State Department of Labor and Industries (Department), Paul Trause, has duly appointed Judy Schurke, Department Deputy Director to make the decision and Order in this appeal. Deputy Director Schurke has considered the Initial Decision and Order dated May 25, 2004 by Administrative Law Judge Chris Blas, and the record in this appeal, including the arguments of the parties. The issues are:
Whether Jude I. Doty violated WAC 296-125-030(2)(17)(28) and 296-125-033(4) per the Department's January 28, 2003 and 31,2003 Citations and Notices of Assessment.

A. Whether Jude I. Doty was the employer of his sons, Zachary and Stephen Doty pursuant to WAC 296-125-015.

B. Whether Jude I. Doty's violations of the child labor regulations were serious.

Being fully advised, the Deputy Director makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Department assessed the appellant with $6,500.00 civil penalty on January 8, 2003 and a $20,000.00 civil penalty on January 31, 2003 alleging violations of the child labor laws under chapter 296-125 WAC. The appellant filed an appeal on February 24 2003.
2. On January 28, 2003, the Department issued to and served on the Appellant Citation number ES-5-001-03 identifying the inspection date as January 8, 2003, the inspection site as 217 South 31st Avenue, Yakima, Washington 90908 and the type of violation as "serious". The following was set forth in the citation:

Violation #	Alleged Code Violations	Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
1	**WAC 296-125-018(1)**	**The employer permitted a minor under the age of 14 [Stephen Doty, DOB 10/07/91] to be employed without an order from a superior court judge, pursuant to RCW 26.28.060**	**02/26/03**	**$500.00**
2	**WAC 296-125-018(1)**	**The employer permitted a minor under the age of 14 [Zachary Doty, DOB 04/09/89] to be employed without an order from a superior court judge, pursuant to RCW 26.28.060**	**02/26/03**	**$500.00**
3	**WAC 296-125-027**	**The employer permitted a minor under the age of 14 [Stephen Doty, DOB 10/07/91] to work during school hours**	**02/07/03**	**$250.00**
4	**WAC 296-125-027**	**The employer permitted a minor under the age of 14 [Zachary Doty, DOB 04/09/89] to work during school hours**	**02/07/03**	**$250.00**
5	WAC 296-125-033(4)	The employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to work on a construction site (serious - imminent danger).	Immediately	$1,000.00
6	WAC 296-125-033(4)	The employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site (serious - imminent danger).	Immediately	$1,000.00
7	WAC 296-125-030(28)	The employer permitted a minor [Zachary Doty, DOB 04/09/89] to work more than ten[10] feet above ground level, and further more, the minor was riding on top of a moving house on a public arterial when the violation was observed (serious - imminent danger).	Immediately	$1,000.00
8	WAC 296-125-030(17)	The employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to work in the proximity of heavy equipment (serious - imminent danger).	Immediately	$1,000.00
9	WAC 296-125-030(17)	The employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work in the proximity of heavy equipment (serious - imminent danger).	Immediately	$1,000.00
10	**WAC 296-125-0200 thru 0220**	**No valid Minor Work Permit**	**02/26/03**	**$0.00**
11	**WAC 296-125-0260 thru 0267**	**No Parent/School Authorization form signed by the school and parent or legal guardian**	**02/26/03**	**$0.00**

Violation#	Alleged Code Violations	Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
			Total	$6,500.00

3. The Department amended the Citation to eliminate the alleged violations highlighted in bold above (violations # 1, 2, 3, 4, 10, and 11). This amendment reduces the civil penalty sought in No S-5-001-03 from $6,500.00 to $5,000.00.

4. Despite being served the January 28, 2003 Amended Notice informing the Appellant that the Department disagreed with his practices and demanding that he immediately abate the practice of permitting his minor sons to work on the construction sites and operating or being in close proximity of heavy equipment, he continued to allow Zachary and Stephen to perform the same activities prohibited by the Department in its citation. The January 31, 2003 Citation assessing twenty more violations then followed.

5. On January 31, 2003, the Department issued another Citation and Notice of Assessment and Order of Immediate Restraint to the Appellant alleging twenty (20) code violations occurring on inspection dates of January 23, 27, 29, and 30, 2003 at the inspection sites of the "Jude Doty Preliminary Short Plat 45th & Summitview Avenue" and 2402 South 16th Avenue and 200 Block of North 78th Avenue. The alleged violations are as follows:

Alleged Code Violations		Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
1	WAC 296-125-030(17)	On January 22, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a work [sic] in the proximity of heavy equipment at the 45th avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
2	WAC 296-125-033(4)	On January 23, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
3	WAC 296-125-033(4)	On January 24, 2003 the employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to work on construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT].	Immediate	$1,000.00

Alleged Code Violations		Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
4	WAC 296-125-030(17)	On January 24, 2003 the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a bulldozer and backhoe tractor at the 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
5	WAC 296-125-033(4)	On January 24, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at 45th Avenue & summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
6	WAC 296-125-030(17)	On January 25, 2003, the employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to operate a bulldozer and backhoe tractor at the 45th Avenue & Summitview [SERIOUS IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
7	WAC 296-125-033(4)	On January 25, 2003, the employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to work on construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
8	WAC 296-125-030(17)	On January 25, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89]to operate a bulldozer and backhoe tractor at the 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
9	WAC 296-125-033(4)	On January 25, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
10	WAC 296-125-030(17)	On January 26, 2003, the employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to operate a bulldozer and backhoe tractor at the 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00

Alleged Code Violations		Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
11	WAC 296-125-033(4)	On January 26, 2003, the employer permitted a minor under the age of 16 [Stephen Doty, DOB 10/07/91] to work on a construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
12	WAC 296-125-030(17)	On January 26, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a bulldozer and backhoe tractor at the 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
13	WAC 296-125-033(4)	On January 26, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at 45th Avenue & Summitview [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
14	WAC 296-125-030(17)	On January 27, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a bulldozer at 2402 South 16th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
15	WAC 296-125-033(4)	On January 27, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89]to work on a construction site at 2402 South 16th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
16	WAC 296-125-030(17)	On January 29, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a bulldozer at 2402 South 16th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
17	WAC 296-125-033(4)	On January 29, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at 2402 South 16th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00

Alleged Code Violations		Description of Alleged Violations	Date by Which Violation Must be Abated	Penalty Assessment
18	WAC 296-125-030(17)	On January 30, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate a backhoe tractor at 200 Block North 78th Avenue **[Zachary Doty rolled this backhoe tractor over during the course of operating It. SERIOUS-IMMINENT DANGER-REPEAT]**	Immediate	$1,000.00
19	WAC 296-125-033(4)	On January 30, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to work on a construction site at the 200 Block North 78th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
20	WAC 296-125-030(2)	On January 30, 2003, the employer permitted a minor under the age of 16 [Zachary Doty, DOB 04/09/89] to operate as an outside helper on the public roadway in the 200 Block North 78th Avenue [SERIOUS-IMMINENT DANGER-REPEAT]	Immediate	$1,000.00
			TOTAL	$20,000.00

6. The Appellant is the father of six children. Two of his sons are Zachariah (hereafter referred to as Zachary) Doty, born 4/9/89 and Stephen Doty, born 10/7/91. The children do not attend public school. Rather, the appellant and his wife school their children at home. The appellant owns and has operated a house-moving business under his own name for the last six years and prior to that operated under the name Doty House Moving. He is a sole proprietor who entered into a venture to move several houses near Yakima's Memorial Hospital (31st Avenue) several blocks to developments at 45th Avenue and Summitview Avenue, 2402 South 16th Avenue, and the 200 Block on North 78th Avenue (within the Yakima City limits).

7. The Appellant wanted to train his sons in the construction and house-moving industry. House moving involves the use of earth-moving equipment or heavy equipment such as bulldozers, backhoes, and tractors. The houses must be set on steel beams. Jacks and timbers (cribbing) are used to raise or elevate the houses. The house is lowered onto a dolly and the dolly is towed by a truck to the desired location. Leveling of the target location or

other preparation of the land may be required with the use of the heavy and earth-moving equipment. Construction of a foundation and preparation of the house from its former foundation must occur. The Appellant directed his children Zachary and Stephen in the performance of driving backhoes, tractors and bulldozers. At times he would be with them on the equipment. At other times he would not be in the proximity watching them operate the equipment.

8. The Appellant permitted his son Zachary to stand, sit, walk, and perform house-moving activities on the rooftop of a house while the house was being moved on January 8, 2003 to the new site. The videotape in evidence shows Zachary moving around on the roof and lifting overhead wires and cables. During the move, Zachary was handling phone and cable lines to ensure that the lines would not be damaged by the house or would obstruct the movement of the house. The house was being moved at a very slow speed via city streets. Zachary was not wearing a harness or other safety equipment. There was no warning line system on the top or at the side of the roof. There were no spotters excluded from other duties watching Zachary and preventing a fall. He did not fall off of the roof and did not incur any injury. There were other times in which Zachary performed work on the rooftop of a moving house. The Department did not cite the Appellant for other violations.

9. Falls from an elevation rank as one of the most common types of accidents that can result in serious bodily harm on a construction site. Zachary was exposed to a fall hazard of over 22 feet, making serious physical harm or death imminent. Many of the wires and cables Zachary lifted were communication wires; however, they were located under high-voltage distribution wires, creating a potential for induced voltage and the possibility of electrical shock, which also made serious physical harm or death imminent. The opinions of the Department experts, Miller, Ervin and Mcmurdie in this regard are more credible than those of Carl Plumb because of the weight of their collective expertise in contrast to Mr. Plumb's, his opinion that it would be appropriate for a monitor to be used under WAC 296-155-24515 without evidence to support it, his failure to mention the potential for electrical shock due to induced voltage, and his erroneous belief that lack of a WISHA violation precludes a serious violation of the child labor standards.

10. The Appellant allowed Zachary to operate heavy equipment or earth-moving equipment in furtherance of the house-moving business without the benefit of protective equipment on the following dates: January 23, 2003; January 24, 2003; January 25, 2003; January 26, 2003; January 27, 2003; January 29, 2003; and January 30, 2003. On January 30, 2003, the Appellant was not in the proximate area when his son Zachary rolled a backhoe he was operating over onto its side and crawled out of it. George Nix was a backhoe operator from another company who was preparing access to the lot for receipt of the house. He observed Zachary operating a backhoe, stockpiling dirt. He observed Zachary "running back and forth in 2nd gear moving the dirt." Mr. Nix motioned for Zachary to slow down. He did not. After the backhoe accident Mr. Nix told the Appellant that Zachary was operating the backhoe with the shovel raised and at a speed too fast for the soft ground conditions. Zachary denied that he was going fast enough to roll the backhoe, and stated that he was only in first gear; however, Mr. Nix checked and found the backhoe lying on its side in second gear. The Appellant also permitted Stephen to operate a backhoe at the construction sites described in the notices on January 25, 2003 and January 26, 2003. According to the Department's experts Ervin and Mcmurdie, backhoe tractors can easily tip over on uneven terrain, especially when operated at speed by an inexperienced operator. When a backhoe roll-over begins and the operator is not wearing a restraint, like a seatbelt, they are thrown from the seat and the overhead guard can strike and crush the operator. Because both Stephen and Zachary were exposed to the hazard of a roll-over accident without protective equipment, serious physical harm or death was imminent.

11. Based on the eye witness statement of the Appellant's employee Tim Erickson, Zachary hit a temporary electrical wire while operating a backhoe because he was not paying attention. Mr. Plumb doubts that this happened; however, Mr. Plumb was not on the job site. Contact with overhead wires is one of the leading causes of fatalities due to electrical shock for material handling equipment such as backhoes, cranes and front end loaders. Zachary was exposed to this hazard, thus serious physical harm or death was imminent.

12. The evidence shows that the Appellant permitted his sons, Zachary and Stephen to perform activities in furtherance of the house-moving business at both construction sites in the house-moving project. They performed work at these sites on: January 8, 2003;

January 23, 2003; January 24, 2003; January 25, 2003; and January 26, 2003. He permitted Zachary to perform these activities at these described sites on January 27, 2003; January 29, 2003; and January 30, 2003.

13. On January 8, 2003 and January 22, 2003, at the construction sites and in the performance of the activities to prepare or to move the houses, the Appellant permitted his sons Zachary and Stephen to perform activities within a distance close enough such that they could be struck by a backhoe while the backhoes were moving or performing construction-related activities. Although neither boy was struck nor incurred any injury from being in close proximity of such equipment, working near heavy equipment is extremely hazardous and serious harm or death was imminent.

14. Both Zachary and Stephen acted as spotters, without safety protection, to guide the house being moved. This activity created the hazard of both boys being hit by a vehicle. Because of this, serious harm or death was imminent.

15. On January 30, 2003, Department investigator Tony Ramos observed and videotaped Zachary, without safety equipment, walking along the side of a house that was being moved, directing his father who was driving the truck by moving his arms back and forth and walking backwards, standing within two ft. of a reversing backhoe as depicted in the Third Ramos Declaration, Exhibit Nos. A-C. He also observed Zachary jumping on and off the side of the truck as it was moving, directing his father. Mr. Ramos also observed Zachary step on to the chain that was being used to tow the house and jump on it with all his weight as it was stretched out between the heavy vehicles. All of these activities create the hazard of being hit by vehicles causing serious imminent harm or death.

16. Both Zachary and Stephen worked on construction sites where roads were being made, land leveled and sites being excavated and filled. A worker can be hit by moving equipment, including bulldozers, boom trucks, cement trucks, and dump trucks resulting in serious physical harm and death.

17. Zachary and Stephen assisted working with chains to lift equipment out of the mud and to move dollies. Chains snapping on construction sites results in flying objects that can seriously injure people standing nearby.

18. Zachary and Stephen assisted in jacking up the houses. Working with jacks is dangerous work, they can become uneven and break down causing flying parts that can result in serious injury or death.

19. The Department classifies the construction industry as a high hazard industry. It has numerous reports of injuries and deaths resulting from workers falling from heights above 10 feet, accidents involving heavy equipment such as backhoes, and other accidents that occur at a construction site. Statistics gathered by the Department show that young workers, including teenagers, are more likely to be injured in the workplace than older more experienced workers. Zachary's and Stephen's continued exposure to the hazards on the work site demonstrate that death or serious physical harm was imminent from the activities Stephen and Zachary performed.

20. There is no dispute between the parties that on the days described in the Notices, the Appellant permitted: (a) both of his sons, Zachary and Stephen, to perform the tasks of driving the heavy equipment/machinery as described in the notices; (b) his son Zachary to perform activities on the rooftop of a house above 10 feet from ground level while it was being moved; (c) both of his sons, Zachary and Stephen to perform activities necessary to, or in conjunction with the move of the houses at the construction sites listed in the Notices; (d) both of his sons to perform activities or duties in the move of the houses or in conjunction with the move within close proximity of heavy equipment/machinery at the construction sites described in the notice; and (e) his son Zachary to perform the activities as an outside helper on the city streets in conjunction with moving a house as described in the Notices.

21. The parties do not dispute that such activities occurred and the appellant allowed and directed his sons to perform such activities. The Appellant requests that the Department conclude 1) that if Zachary and Stephen were not "working" for their father in an employment relationship, then a specific exemption to the child labor laws is not required, 2) that the activities performed by Zachary and Stephen in their father's business did not create an employment relationship because there was no evidence to show a contractual relationship existed between the Appellant and his sons, and 3) that the Appellant did not violate WAC 296-125-030(2), (17), (28) or 296-125-033(4). In the alternative, the Appellant requests that the Department conclude that 1) the alleged violations of the child labor regulations were not

"serious" and 2) that the penalties be removed for the alleged violations listed on the January 28, 2003 Citation and for the violation of Zachary working as a helper on the January 31, 2003 Citation.

22. In his Amended Petition for Review, the Appellant takes exception to Conclusions of Law Nos. 11, 12, 13, and 16 in the Initial Decision and Order. He asserts that Zachary and Stephen were not "employed" by or "working" for him, thus, there were no child labor violations. Instead, he asserts the boys were learning a trade and were acting as apprentices, were performing the activities for educational purposes as a component of their home schooling, and were not being paid for such activities as an employee would be paid. The Appellant asserts that he had no contractual relationship for work with the boys, and the Department's authority is limited within the parent-child relationship.

23. The Department asserts the Appellant is subject to the child labor laws because he employed his sons Zachary and Stephen, that RCW 49.12.121 does not contain an exemption for minors who are employed by their parents, the children here were performing the type of activities necessary to constitute "work," and that the work they performed is strictly prohibited by the child labor laws.

24. The Department also takes the position that training is subject to the child labor laws if it is also employment. The Department uses its regulations and administrative policies to determine whether a minor's activities are solely educational. Administrative Policy ES.C.2 identifies six criteria to determine whether trainees are also employees:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
2. The training is for the benefit of the trainee; and
3. The trainees do not displace regular employees, but work under their close observation; and
4. The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
5. The trainees are not necessarily entitled to a job at the conclusion of the training period; and

6. The trainees understand they are not entitled to wages for the time spent in the training.

Criteria Nos. 3 and 4 help to demonstrate whether the employer derives an appreciable benefit by the presence of a minor student. If there is no appreciable benefit from the student's work, and the factors are not present, the student is not employed by the employer.

25. When the Department considers whether there is an employment relationship, it examines the conduct of the parties and the surrounding circumstances. It considers such factors as whether the employer is a for-profit business, and whether there is an exercise of direction and control. If a person is performing physical labor or some other kind of work for a business that profits from the activity, the individual would be an employee. Key is whether the work benefits the commercial activity; whether the activity is more than just a learning experience, or a parent teaching skills to a child; whether the minor is contributing to the profit of the business, or the business deriving a material benefit from the minor child; whether there is a contract or payment; and/or whether minors are displacing labor of another worker or performing the work that another laborer would do. The Department also asks whether the minors would be considered employees for reasons stated in the Department's Administrative Policy ES.A.1, addressing the scope and application of the Minimum Wage Act; Administrative Policy ES C.2, addressing employment relationships with trainees and interns, or other applicable laws and regulations.

26. The evidence shows that the Appellant is engaged in a for-profit business with employees. He testified that having Zachary ride on top of houses to push wires and other obstacles out of the way was profitable for the business. The Appellant has to pay if he breaks a wire when he's moving a house. Likewise, he uses paid spotters, one on each side of the road, who would watch to make sure the house that was being moved did not hit any signs or cars. When Zachary or Stephen act as spotters, the Appellant did not have to pay another worker to perform that task. He did not have to pay a subcontractor to grade fill dirt when Zachary used the bulldozer to smooth out dirt at a dump site. Zachary would also use a bulldozer to move fill dirt at the construction site where the houses were being installed. He used a front load tractor/backhoe to move equipment and chains, and he would also assist in

pulling out machinery when it becomes stuck. The Appellant considered all these activities to be productive. He characterized Zachary as skilled with the equipment, and did not feel he needed to be close to him when Zachary operated it.

27. The record shows a number of instances when Zachary was operating equipment such as a backhoe without Mr. Doty's presence. The Appellant said that both Zachary and Stephen performed physical labor related to the activities at the construction site and in his house-moving business. The boys were not there to play or to watch. These tasks were performed in furtherance of the house-moving business and the construction done at the job sites. The Appellant admitted that Zachary and Stephen performed tasks that other workers on-site would do, tasks necessary for the construction site. They would assist in setting chains, run to the truck to get tools, do routine tasks such as sawing, drilling, and hammering. They would help build the flat wood form called cribbing that the houses would be placed on. A number of other witnesses (Ramos, Cunnington, Vickers, Erickson, Nix, Klein, Borchardt) observed Zachary and Stephen perform labor on the construction sites as well. Neighbor Edward Cunnington saw Zachary operating a bulldozer to level a construction site after mud had worked lose after a heavy rain in late January, 2003. The Appellant's employee, equipment operator Tim Erickson saw Zachary working at the site operating the backhoe, bulldozer, and other tasks at Mr. Doty's direction. At least 3 to 4 times a week he also observed both Zachary and Stephen operating the backhoe, pushing and picking up dirt at a job site. He observed Zachary using heavy equipment to do construction-related or house-moving related tasks that needed to be done to complete the projects on time. Mr. Erickson also observed Stephen driving a backhoe from one end of the job site to the other. Stephen would bring eagle block foam forms to assist in creating the forms for basement foundations, he would get chains and other equipment to assist in preparing the houses for moving. The boys were not observing or playing when these tasks were performed, they were working. According to Mr. Erickson, the tasks that Stephen and Zachary did were the type of tasks that Mr. Erickson or other workers would also perform at Mr. Doty's construction sites. Mr. Erickson observed Zachary and Stephen working on the project on a recurring basis from April 2002 through January 2003.

28. The evidence shows that Zachary and Stephen's work was an appreciable benefit to the Appellant's business. They performed tasks that furthered the construction process or the goals of the business. They worked next to and with other workers on the job sites, thus displacing labor that other workers would perform. They operated under the Appellant's direction and control. He characterized their work as productive. After the backhoe rolled over, the Appellant had Zachary operate a bulldozer to put the backhoe back on its wheels. The Appellant told Mr. Nix that he would have Zachary operate the bulldozer because he knew more about operating it than the Appellant did. The Appellant did not have to pay others to do tasks that Zachary and Stephen could do. The labor the boys performed was not solely for their benefit, it was also for the benefit of the business.

29. The Appellant's Amended Petition for Administrative Review of the Initial Decision and Order, dated May 25, 2004, issued June 8, 2004, was received in the Director's office on June 28, 2004.

APPLICABLE LAW

RCW 49.12.010 Declaration.

The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

RCW 49.12.005 Definitions. For the purposes of this chapter:

(3)(a) Before May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the

rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

(5) "Conditions of labor" means and includes the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

RCW 49.12.390 Child labor laws -- Violations -- Civil penalties -- Restraining orders.

(1)(a) Except as otherwise provided in subsection (2) of this section, if the director, or the director's designee, finds that an employer has violated any of the requirements of RCW 49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, a citation stating the violations shall be issued to the employer. The citation shall be in writing, describing the nature of the violation including reference to the standards, rules, or orders alleged to have been violated. An initial citation for failure to comply with RCW 49.12.123 or rules requiring a minor work permit and maintenance of records shall state a specific and reasonable time for abatement of the violation to allow the employer to correct the violation without penalty. The director or the director's designee may establish a specific time for abatement of other nonserious violations in lieu of a penalty for first time violations. The citation and a proposed penalty assessment shall be given to the highest management official available at the workplace or be mailed to the employer at the workplace. In addition, the department shall mail a copy of the citation and proposed penalty assessment to the central personnel office of the employer. Citations issued under this section shall be posted at or near the place where the violation occurred.

(b) Except when an employer corrects a violation as provided in (a) of this subsection, he or she shall be assessed a civil penalty of not more than one thousand dollars depending on the size of the business and the gravity of the violation. The employer shall pay the amount assessed within thirty days of receipt of the assessment or notify the director of his or her intent to appeal the citation or the assessment penalty as provided in RCW 49.12.400.

(2) If the director, or the director's designee, finds that an employer has committed a serious or repeated violation of the requirements of RCW 49.12.121 or 49.12.123, or any rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, the employer is subject to a civil penalty of not more than one thousand dollars for each day the violation continues. For the purposes of this subsection, a serious violation shall be deemed to exist if death or serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(3) In addition to any other authority provided in this section, if, upon inspection or investigation, the director, or director's designee, believes that an employer has violated RCW 49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, and that the violation creates a danger from which there is a substantial probability that death or serious physical harm could result to a minor employee, the director, or director's designee, may issue an order immediately restraining the condition, practice, method, process, or means creating the danger in the workplace. An order issued under this subsection may require the employer to take steps necessary to avoid, correct, or remove the danger and to prohibit the employment or presence of a minor in locations or under conditions where the danger exists.

(4) An employer who violates any of the posting requirements of RCW 49.12.121 or rules adopted implementing RCW 49.12.121 shall be assessed a civil penalty of not more than one hundred dollars for each violation.

(5) A person who gives advance notice, without the authority of the director, of an inspection to be conducted under this chapter shall be assessed a civil penalty of not more than one thousand dollars.

(6) Penalties assessed under this section shall be paid to the director and deposited into the general fund.

WAC 296-125-010 Applicability. This chapter applies to every person that employs one or more minors, or who permits, allows, or suffers one or more minors to work at a site or workplace, on premises, or under work conditions controlled by that employer, except for those employers statutorily exempted, as follows: This chapter does not apply to newspaper vendors or carriers; to domestic or casual labor in or about private residences; to parents or stepparents who employ their own children for house-to-house sales; to agricultural labor as defined by RCW 50.04.150; or, to employers expressly exempted by federal statute from the coverage of state law.

WAC 296-125-030 Prohibited and hazardous employment -- All minors. The following employments and occupations as outlined in subsections (1) through (30) of this section, are prohibited for all minors, provided that exemption will be allowed from subsections (5), (8), (9), (11), (13), (15), (16), and (23) of this section when the minor is participating in a bona fide cooperative vocational education program, diversified career experience program, or work experience program certified and monitored by the office of the superintendent of public instruction or the minor employee's school district; further, exemption from the, same numbered prohibitions will be allowed for any minor involved in an apprenticeship program registered with the Washington state apprenticeship and training council. The state will not grant variances for employments or occupations prohibited by the United States Department of Labor.

...

(2) Occupations involving regular driving of motor vehicles. Occupations of outside helper or flagger on any public road or highway, work which involves directing moving motor vehicles in or around warehouses or loading/unloading areas including but not limited to loading docks, transfer stations, or landfills, or work which involves towing vehicles...

...

(17) Occupations involving operation or repair, oiling, cleaning, adjusting, or setting up of or working in proximity to earth-moving machines, hoisting apparatus, cranes, garbage-compactors, trash-compactors or other compactors, paper-balers or other balers, or other

heavy equipment including, but not limited to, graders, bulldozers, earth compactors, backhoes, and tractors. Working in proximity shall mean working within the radius of movement of any portion of the machinery where one could be struck or otherwise injured. It shall not include work in proximity to ski-lift apparatus. This prohibition shall not invalidate activities allowed under subsection (2) of this section.

...

(28) All work performed more than ten feet above ground or floor level.

WAC 296-125-033 Prohibited and hazardous employment -- Special restrictions for minors under the age of 16. Employment of minors under age 16 is subject to the following additional restrictions. They are prohibited from working:

...

(4) In occupations connected with transportation, warehouse and storage, communications and public utilities, or construction. (Office work related to these occupations is permitted if none of the minor's work is performed on the transportation media or construction site.)

WAC 296-125-015 Definitions. For the purposes of this chapter:

(1) ...

(2) "Employ" means to engage, suffer or permit to work, and includes entering into any arrangement, including a contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales except when a minor is working in house-to-house sales for her or his parent or stepparent. The term "employ" does not include newspaper vendors or carriers, the use of domestic or casual labor in or about private residences, agricultural labor as defined by RCW 50.04.150, or the use of voluntary or donated services performed for an educational, charitable, religious, or nonprofit organization and without expectation or contemplation of compensation for the services performed.

(3) "Employee" means any minor employed by an employer, including minors who work pursuant to any arrangement, including contract, whether implied, express, oral, or written in house-to-house sales, but does not include newspaper vendors or carriers, domestic or casual labor in or about private residences, minors employed in agricultural labor as defined by RCW 50.04.150, or minors employed for house-to-house sales by their parents or stepparents.

(4) "Employer" means any person, association, partnership, private or public corporation that employs or exercises control over the wages, hours, working conditions, or workplace of a minor, and for purposes of house-to-house sales includes any distributor or other person, association, partnership, private or public corporation that enters into any arrangement, including contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales; but does not include employers of agricultural labor as defined by RCW 50.04.150, employers of newspaper vendors or carriers, employers of casual labor in or about the employers' private residences, parents or stepparents employing their own minor children for house-to-house sales, the state, a state institution, a state agency, a political subdivision of the state, a municipal corporation, or a quasi-municipal corporation.

...

(6) "Minor" means a person under the age of eighteen years.

...

(10) "Workplace" means any worksite, premises, or location where minors work.

WAC 296-125-043 Minimum wages -- Minors. Except where a higher minimum wage is required by Washington state or federal law:

(1) Every employer shall pay to each of his or her employees who have reached their sixteenth or seventeenth year of age a rate of pay per hour which is equal to the hourly rate required by RCW 49.46.020 for employees eighteen years of age or older, whether computed on an hourly, commission, piecework, or other basis, except as may be otherwise provided under this chapter.

(2) Every employer shall pay to each of his or her employees who have not reached their sixteenth year of age a rate of pay per hour that is not less than eighty-five percent of the hourly rate required by RCW 49.46.020 for employees eighteen years of age or older whether computed on an hourly, commission, piecework, or other basis, except as may be otherwise provided under this chapter.

(3) These provisions shall not apply to handicapped minors for whom special handicapped minor work permits have been issued as provided in RCW 49.12.110. The handicapped rate therein shall be set at a rate designed to adequately reflect the individual's earning capacity.

(4) These minimum wage provisions shall not apply when a minor student is in a work place to carry out an occupational training experience assignment directly supervised on the premises by a school official or an employer under contract with a school and when no appreciable benefit is rendered to the employer by the presence of the minor student.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear and decide this matter pursuant to RCW 49.12.400.

2. RCW 49.12.390(2) gives the Department authority to assess a civil penalty of not more than $1,000 against the Appellant when he, as the employer, commits a serious or repeated violation of any Department child labor rule (regulation). RCW 49.12.121 allows the Department to adopt rules (regulations) for the protection of the safety, health, and welfare of minor employees.

3. The Department adopted regulations governing child labor and set them forth in chapter 296-125 WAC. The parties have presented their evidence and arguments with regard to this issue for the record.

4. The scope of this proceeding is to determine whether the Appellant committed the violations of the rules alleged and whether the penalties assessed are authorized by the law. The alleged violations all reference violations of the child labor regulations. The Department used the authority of RCW 49.12.390 as the basis for assessing the civil penalties here.

5. WAC 296-125-030 prohibits certain "employments" and "occupations" for minors. A person who employs a minor in these occupations has committed a violation of the child labor laws. Subsection (2) of this regulation prohibits minors being employed in

occupations of an outside helper. Subsection (17) prohibits minors being employed in occupations involving the operation or working in proximity to earth-moving machines or other heavy equipment. This includes bulldozers, backhoes and tractors. The regulation defines "close proximity" as working within a radius of movement of any portion of the machinery where one could be struck or otherwise injured. Subsection (28) prohibits all work performed more than ten (10) feet above ground or floor level.

6. The child labor regulations permit some minors to work in construction. These are minors who are ages 16 and 17 years old. WAC 296-125-033 (4). Minors under 16 years of age are prohibited from working in occupations connected with construction (except office work).

7. The Findings show that the Appellant's two boys, 13 year- old Zachary and 11 year-old Stephen, were engaged in driving or operating heavy equipment or earth moving machines on the dates asserted. The Findings show the Appellant's son, Zachary, performed tasks within close proximity of heavy equipment or earth-moving machines. The Findings also show Zachary was higher than ten feet above ground level without safety equipment during the movement of at least two houses.

8. Child labor regulations are remedial, and must be interpreted liberally to advance their purposes. *See Peninsula Sch. Dist. No. 401 v. Public Sch. Empl. of Peninsula,* 130 Wn. 2d 401, 405, 924 P.2d 13 (1996); *Inland Foundry Co., Inc. v. Dept. of Labor and Indus.,* 106 Wn.2d 333, 336, 24 P.3d 424 (2001).

9. Under WAC 296-125-015(2): '*employ' means to engage, suffer or permit to work.* The term "work" is not defined in the regulations relating to child labor. The ordinary meaning of the term "work" is defined in *Webster's Universal Encyclopedic Dictionary* 2130-2131 (2002) as an activity in which one exerts strength or faculties to do or perform something, or may refer to labor, task, or duty that is one's accustomed means of livelihood. The first definition of the term "work" most advances the child labor statute because it focuses on the labor of a child and would allow for regulation of harmful activities. The second definition is unreasonable in this context, and is inconsistent with a liberal interpretation of the child labor laws. The Appellant permitted his boys to work under the first definition of "work."

10. RCW 49.12.121 does not contain an exemption for minors who are employed by their parents. Likewise, RCW 49.12.005, definitions, does not exempt parents from its terms. The only statutory exemption for parents is found in RCW 49.12.320(1), for parents who employ their children in house-to-house sales. The Department's regulations parallel the statute in this regard, and also do not exempt minors working for parents when the work is on a construction site, or moving houses. WAC 296-125-010; WAC 296-125-015. Under WAC 296-125-010, to be exempt from Department action, there must be a state statute or federal law stating such exemption. Here no such exemptions exist. This expresses the intent of the Department to make such rules applicable to all child labor relationships including those involving the parent and child, except where the regulation specifically exempts such relationships. Given the legislature's intent not to exempt parents who employ their children in this instance, the Appellant is subject to these laws. The protections of the Industrial Welfare Act cannot be waived. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.2d256 (2002)

11. The Appellant suggests a look to common law to establish the standard of who is an employee. He cites several pre-1942 workers' compensation cases; however, these cited cases do not reflect the current state of workers' compensation law. In *In re: Martin W. Novak*, Dckt. No. 93 2291 (1994), for instance, the Board of Industrial Insurance Appeals declined to follow *American Products Co. v. Villwock*, 7 Wn. 2d 246, 109 P.2d 570 (1941) because the case was no longer consistent with the Industrial Insurance Act. *American Products* also required evidence that was "clear, cogent, and convincing evidence" to establish an employment relationship, a standard that does not apply in workers' compensation cases, or to this case. Additionally, the legislature has acted to regulate an area concerning the safety and welfare of workers, thus expressly acting to change the common law relationship of employer-employee in RCW 49.12.121 and the regulations under it. *Cf. Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P.2d 777 (1942)(common law rules do not apply if modified by statute). Further, the cases cited by Mr. Doty are inapplicable because they are inconsistent with the child labor laws which do not exempt parents from coverage, except for house-to-house sales.

12. The Legislature could have adopted rules such as the ones in the pre-1942 cases cited by the Appellant when it adopted RCW 49.12.121 in 1973, or when it adopted RCW 49.12.390-400 in 1991. It did not. RCW 49.12.320, provides the only specific statutory exemption in RCW 49.12 regarding parents. The language "to engage, suffer, or permit to work" without an exception for parents has been in the regulation since before 1980. This predates the passage of the definition of "employ" for minors in house-to-house sales in 1989. "The Legislature's failure to amend a statute interpreted by an administrative agency constitutes legislative acquiescence in the agency's interpretation of the statute. This is especially true when the Legislature has amended the statute in other respects without repudiating the administrative construction." *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 446 n.2, 932 P.2d 1119 (1997).

13. RCW 49.12.121 directed the Department to adopt "special rules" concerning minor employees. Under this authority the Department adopted WAC 296-125-015 which includes the definition of "employ." "Properly promulgated, substantive agency regulations have the . . . force and effect of law." *Wingert*, 146 Wn.2d at 848. The standards identified in the cases cited by the Appellant are inconsistent with the regulations in WAC 296-125. Status as an employee under RCW 49.12.121 is not contingent upon emancipation. WAC 296-125-015 does not require an employment contract or fixed compensation; however, under the Minimum Wage Act, RCW 49.46, a person cannot agree to work for free for a for-profit business. RCW 49.46.090, .010.

14. The Appellant has argued that he was training the boys; therefore, they were not his employees. The Department's position is that training will be subject to the child labor laws if it is also employment. Under WAC 296-125-043(4), minimum wage provisions do not apply when a minor student is in a work place for an occupational work experience directly supervised on the premises by a school official or employer under contract with the school "where no appreciable benefit is rendered to the employer by the presence of the minor student." WAC 296-125-043(4). The evidence shows that there was an appreciable benefit rendered to the Appellant because both Zachary and Stephen performed labor that was an advantage to the commercial activity. Therefore, the Appellant was their employer under WAC 296-125-015 and WAC 296-125-043(4). The Department's expertise in the area of

employment relations may be used to interpret the statutes it administers to determine whether an employment relationship exists. *See* RCW 34.05.461(5); *See also Everett Concrete Prod., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988).

15. RCW 49.12.390(1)(b) allows for the assessment of a civil penalty of not more than $1,000.00 if the employer has not corrected the violation. Subsection (2) allows a civil penalty of not more than $1,000.00 be assessed without waiting for a correction when the violation is repeated or is a serious violation.

16. The Department has assessed the civil penalty under the claim that "serious" violations have occurred. A "serious" violation exists if death or serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. RCW 49.12.390(2).

17. The list of occupations in WAC 296-125-030 and -033 identify work activity which by their very nature are dangerous and pose a substantial risk of harm which could result in serious physical injury or death. The Department's listing of these occupations and employment activities and strictly prohibiting such activities by minors shows these activities are inherently dangerous and involve serious risks of physical harm or death to minors. As a matter of law, such violations are "serious". Although no death or physical harm occurred here to either Zachary or Stephen, their employment in one or more of the listed occupations in WAC 296-125-030 and -033, described in the Findings of Fact shows serious violations occurred, and death or serious physical harm was imminent. Further, the practices by the Appellant of having his 11 year-old and 13 year-old children engage in activities known by law to be inherently dangerous for children shows that serious physical harm or death was imminent. Children 11 and 13 years of age are generally inexperienced at exercising sound and independent judgment necessary for work in inherently dangerous activities, as Zachary demonstrated when he rolled over the backhoe he was operating. The risk of harm is heightened when the children are especially young as in the case here.

18. The alleged violations in the January 31, 2003 Citation, with the exception of the allegation of Zachary working as a helper, were repeated violations of the ones specified

in the January 28, 2003 Citation. This would justify the assessment of the fines with regard to those violations.

19. The Appellant committed violations of WAC 296-125-033(4), -030(28),-030(17), and -030(2) on the dates and places listed on the Notices.

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED:**

1. The January 28, 2003 and January 31, 2003 Citations and Notices of Assessment are affirmed.

2. The Appellant is to pay civil fines of $1,000 per violation totaling $25,000 for all twenty-five (25) violations.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to Judy Schurke, Deputy Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's office. RCW 34.05.010(6). A copy shall also be sent to Barbara Gary, Assistant Attorney General, 900 4th Ave, # 2000, Seattle WA, 98464-1012. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Department, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

DATED this 31st day of August, 2004

JUDY SCHURKE
Deputy Director
Department of Labor and Industries

cc: Jude Doty, Appellant
1011 Prospect Way
Yakima, WA 98908

Raymond Alexander, Appellant Attorney
Hart & Winfree
PO Box 210
Sunnyside, WA 98944

Richard Ervin
Employment Standards Program Manager
PO Box 44510
Olympia, WA 98504-4510

Anastasia Sandstrom, AAG
Office of the Attorney General, Labor & Industries Division
900 Fourth Avenue, Suite 2000 (mailstop TB-14)
Seattle, WA 98164-1012

Barbara Cleveland
Office of Administrative Hearings
919 Lakeridge Way S.W.
P.O. Box 42488
Olympia, WA 98504-2488

Administrative Law Judge Chris Blas
Office of Administrative Hearings
32 North Third St., Suite 320
Yakima WA 98901

BEFORE THE DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES
STATE OF WASHINGTON

In re: Jude I. Doty OAH Docket No. 2003-LI-0039 (Citation Nos. ES-5-001-03 & ESCL-010R5)	CERTIFICATE OF SERVICE

I, Kristi Soper, hereby certify under penalty of perjury pursuant to Washington State law that I served a copy of the foregoing Order upon the following persons via U.S. Mail, certified-return receipt, postage prepaid, on the date below, addressed to:

Jude Doty, Appellant
1011 Prospect Way
Yakima, WA 98908

Raymond Alexander, Appellant Attorney
Hart & Winfree
PO Box 210
Sunnyside, WA 98944

Anastasia Sandstrom, AAG
Office of the Attorney General, Labor & Industries Division
900 Fourth Avenue, Suite 2000 (M/S TB-14)
Seattle, WA 98164-1012

DATED this 3 day of August, 2004.

KRISTI SOPER
Administrative Assistant

Appendix B

RCW 49.12.005
Definitions.
For the purposes of this chapter:

(1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department of labor and industries, or the director's designated representative.

(3)(a) Before May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees but does not include the state, any state institution, any state agency, political subdivision of the state, or any municipal corporation or quasi-municipal corporation. However, for the purposes of RCW 49.12.265 through 49.12.295, 49.12.350 through 49.12.370, 49.12.450, and 49.12.460 only, "employer" also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(b) On and after May 20, 2003, "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, and includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation. However, this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule; and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.

(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise.

(5) "Conditions of labor" means and includes the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are

performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(6) For the purpose of chapter 16, Laws of 1973 2nd ex. sess. a minor is defined to be a person of either sex under the age of eighteen years.

[2003 c 401 § 2; 1998 c 334 § 1; 1994 c 164 § 13; 1988 c 236 § 8; 1973 2nd ex.s. c 16 § 1.]

Notes:
Findings -- Purpose -- Intent -- Effective date -- 2003 c 401: See notes following RCW 49.12.187.
Construction -- 1998 c 334: See note following RCW 49.12.450.
Legislative findings -- Effective date -- Implementation -- Severability -- 1988 c 236: See notes following RCW 49.12.270.

RCW 49.12.121
Wages and working conditions of minors — Special rules — Work permits.

(1) The department may at any time inquire into wages, hours, and conditions of labor of minors employed in any trade, business, or occupation in the state of Washington and may adopt special rules for the protection of the safety, health, and welfare of minor employees. However, the rules may not limit the hours per day or per week, or other specified work period, that may be worked by minors who are emancipated by court order.

(2) The department shall issue work permits to employers for the employment of minors, after being assured the proposed employment of a minor meets the standards for the health, safety, and welfare of minors as set forth in the rules adopted by the department. No minor person shall be employed in any occupation, trade, or industry subject to chapter 16, Laws of 1973 2nd ex. sess., unless a work permit has been properly issued, with the consent of the parent, guardian, or other person having legal custody of the minor and with the approval of the school which such minor may then be attending. However, the consent of a parent, guardian, or other person, or the approval of the school which the minor may then be attending, is unnecessary if the minor is emancipated by court order.

(3) The minimum wage for minors shall be as prescribed in RCW 49.46.020.

[1993 c 294 § 9; 1989 c 1 § 3 (Initiative Measure No. 518, approved November 8, 1988); 1973 2nd ex.s. c 16 § 15.]

Notes:
Effective date -- 1993 c 294: See RCW 13.64.900.

Effective date -- 1989 c 1 (Initiative Measure No. 518): See note following RCW 49.46.010.

RCW 49.12.390
Child labor laws —Violations — Civil penalties — Restraining orders.

(1)(a) Except as otherwise provided in subsection (2) of this section, if the director, or the director's designee, finds that an employer has violated any of the requirements of RCW 49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, a citation stating the violations shall be issued to the employer. The citation shall be in writing, describing the nature of the violation including reference to the standards, rules, or orders alleged to have been violated. An initial citation for failure to comply with RCW 49.12.123 or rules requiring a minor work permit and maintenance of records shall state a specific and reasonable time for abatement of the violation to allow the employer to correct the violation without penalty. The director or the director's designee may establish a specific time for abatement of other nonserious violations in lieu of a penalty for first time violations. The citation and a proposed penalty assessment shall be given to the highest management official available at the workplace or be mailed to the employer at the workplace. In addition, the department shall mail a copy of the citation and proposed penalty assessment to the central personnel office of the employer. Citations issued under this section shall be posted at or near the place where the violation occurred.

(b) Except when an employer corrects a violation as provided in (a) of this subsection, he or she shall be assessed a civil penalty of not more than one thousand dollars depending on the size of the business and the gravity of the violation. The employer shall pay the amount assessed within thirty days of receipt of the assessment or notify the director of his or her intent to appeal the citation or the assessment penalty as provided in RCW 49.12.400.

(2) If the director, or the director's designee, finds that an employer has committed a serious or repeated violation of the requirements of RCW 49.12.121 or 49.12.123, or any rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, the employer is subject to a civil penalty of not more than one thousand dollars for each day the violation continues. For the purposes of this subsection, a serious violation shall be

deemed to exist if death or serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(3) In addition to any other authority provided in this section, if, upon inspection or investigation, the director, or director's designee, believes that an employer has violated RCW 49.12.121 or 49.12.123, or a rule or order adopted or variance granted under RCW 49.12.121 or 49.12.123, and that the violation creates a danger from which there is a substantial probability that death or serious physical harm could result to a minor employee, the director, or director's designee, may issue an order immediately restraining the condition, practice, method, process, or means creating the danger in the workplace. An order issued under this subsection may require the employer to take steps necessary to avoid, correct, or remove the danger and to prohibit the employment or presence of a minor in locations or under conditions where the danger exists.

(4) An employer who violates any of the posting requirements of RCW 49.12.121 or rules adopted implementing RCW 49.12.121 shall be assessed a civil penalty of not more than one hundred dollars for each violation.

(5) A person who gives advance notice, without the authority of the director, of an inspection to be conducted under this chapter shall be assessed a civil penalty of not more than one thousand dollars.

(6) Penalties assessed under this section shall be paid to the director and deposited into the general fund.

[1991 c 303 § 3.]

Appendix C

WAC 296-125-015
Definitions.

For the purposes of this chapter:

(1) "Department" means the Washington state department of labor and industries.

(2) "Employ" means to engage, suffer or permit to work, and includes entering into any arrangement, including a contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales except when a minor is working in house-to-house sales for her or his parent or stepparent. The term "employ" does not include newspaper vendors or carriers, the use of domestic or casual labor in or about private residences, agricultural labor as defined by RCW 50.04.150, or the use of voluntary or donated services performed for an educational, charitable, religious, or nonprofit organization and without expectation or contemplation of compensation for the services performed.

(3) "Employee" means any minor employed by an employer, including minors who work pursuant to any arrangement, including contract, whether implied, express, oral, or written in house-to-house sales, but does not include newspaper vendors or carriers, domestic or casual labor in or about private residences, minors employed in agricultural labor as defined by RCW 50.04.150, or minors employed for house-to-house sales by their parents or stepparents.

(4) "Employer" means any person, association, partnership, private or public corporation that employs or exercises control over the wages, hours, working conditions, or workplace of a minor, and for purposes of house-to-house sales includes any distributor or other person, association, partnership, private or public corporation that enters into any arrangement, including contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales; but does not include employers of agricultural labor as defined by RCW 50.04.150, employers of newspaper vendors or carriers, employers of casual labor in or about the employers' private residences, parents or stepparents employing their own minor children for house-to-house sales, the state, a state institution, a state agency, a political subdivision of the state, a municipal corporation, or a quasi-municipal corporation.

(5) "House-to-house sales" means a sale or other transaction in consumer goods, the demonstration of products or equipment, the obtaining of orders for consumer goods, or the obtaining of contracts for services, in which an employee personally solicits the sale or transaction at a place other than the place of business of the employer or the residence of the employee.

(6) "Minor" means a person under the age of eighteen years.

(7) "School holiday" means a day of a school week on which the school at which a minor employee is enrolled is scheduled to be closed. If a minor employee is not enrolled in school, school holidays shall be determined by the schedule of the public school district in which the minor resides.

(8) "School vacation" means the spring break, winter break, and summer break of the school at which a minor employee is enrolled, or if not enrolled the public school district in which a minor resides.

(9) "Transport" means the conveyance, provision of a means of conveyance, or reimbursement or payment for the cost of conveyance at the direction or under the control of an employer or an employer's agent.

(10) "Workplace" means any worksite, premises, or location where minors work.

[Statutory Authority: Chapters 43.22 and 49.12 RCW, RCW 26.28.060 and 43.17.060. WSR 93-01-068, § 296-125-015, filed 12/11/92, effective 3/1/93. Statutory Authority: RCW 43.22.270 and 1989 c 216. WSR 89-23-003, § 296-125-015, filed 11/3/89, effective 11/20/89; Order 76-15, § 296-125-015, filed 5/17/76; Order 74-9, § 296-125-015, filed 3/13/74, effective 4/15/74; Order 71-5, § 296-125-015, filed 5/26/71, effective 7/1/71; Section B, filed 9/18/63; Rules (part), filed 3/23/60.]

WAC 296-125-043
Minimum wages—Minors.

Except where a higher minimum wage is required by Washington state or federal law:

(1) Every employer shall pay to each of his or her employees who have reached their sixteenth or seventeenth year of age a rate of pay per hour which is equal to the hourly rate required by RCW 49.46.020 for employees eighteen years of age or older, whether computed on an hourly, commission, piecework, or other basis, except as may be otherwise provided under this chapter.

(2) Every employer shall pay to each of his or her employees who have not reached their sixteenth year of age a rate of pay per hour that is not less than eighty-five percent of the hourly rate required by RCW 49.46.020 for employees eighteen years of age or older whether computed on an hourly, commission, piecework, or other basis, except as may be otherwise provided under this chapter.

(3) These provisions shall not apply to handicapped minors for whom special handicapped minor work permits have been issued as provided in RCW 49.12.110. The handicapped rate therein shall be set at a rate designed to adequately reflect the individual's earning capacity.

(4) These minimum wage provisions shall not apply when a minor student is in a work place to carry out an occupational training experience assignment directly supervised on the premises by a school official or an employer under contract with a school and when no appreciable benefit is rendered to the employer by the presence of the minor student.

[Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 89-10-014 (Order 88-32), § 296-125-043, filed 4/24/89, effective 6/1/89; Order 76-15, § 296-125-043, filed 5/17/76.]

WAC 296-125-030
Prohibited and hazardous employment—All minors.

The following employments and occupations as outlined in subsections (1) through (30) of this section, are prohibited for all minors, provided that exemption will be allowed from subsections (5), (8), (9), (11), (13), (15), (16), and (23) of this section when the minor is participating in a bona fide cooperative vocational education program, diversified career experience program, or work experience program certified and monitored by the office of the superintendent of public instruction or the minor employee's school district; further, exemption from the same numbered prohibitions will be allowed for any minor involved in an apprenticeship program registered with the Washington state apprenticeship and training council. The state will not grant variances for employments or occupations prohibited by the United States Department of Labor.

. . . .

(2) Occupations involving regular driving of motor vehicles. Occupations of outside helper or flagger on any public road or highway, work which involves directing moving motor vehicles in or around warehouses or loading/unloading areas including but not limited to loading docks, transfer stations, or landfills, or work which involves towing vehicles. Occasional driving is permissible if: The minor has a valid state driver's license for the type of driving involved; driving is restricted to daylight hours; such driving is only occasional, and is incidental to the minor's employment; vehicle gross weight is under 6,000 pounds; the minor has completed a state-approved driver education course; and seat belts are provided in the vehicle and the minor has been instructed to use them. Occupations involving occasional operation of a bus are prohibited.

. . . .

(17) Occupations involving operation or repair, oiling, cleaning, adjusting, or setting up of or working in proximity to earth-moving machines, hoisting apparatus, cranes, garbage-compactors, trash-compactors or other compactors, paper-balers or other balers, or other

heavy equipment including, but not limited to, graders, bulldozers, earth compactors, backhoes, and tractors. Working in proximity shall mean working within the radius of movement of any portion of the machinery where one could be struck or otherwise injured. It shall not include work in proximity to ski-lift apparatus. This prohibition shall not invalidate activities allowed under subsection (2) of this section.

. . . .

(28) All work performed more than ten feet above ground or floor level.

. . . .

[Statutory Authority: Chapters 43.22 and 49.12 RCW, RCW 26.28.060 and 43.17.060. WSR 93-01-068, § 296-125-030, filed 12/11/92, effective 3/1/93. Statutory Authority: RCW 43.22.270 and 1989 c 216. WSR 89-23-003, § 296-125-030, filed 11/3/89, effective 11/20/89; Order 77-32, § 296-125-030, filed 12/30/77; Order 76-15, § 296-125-030, filed 5/17/76; Order 74-9, § 296-125-030, filed 3/13/74, effective 4/15/74; Order 71-5, § 296-125-030, filed 5/26/71, effective 7/1/71; Section E, filed 9/18/63; Rules (part), filed 3/23/60.]

WAC 296-125-033
Prohibited and hazardous employment—Special restrictions for minors under the age of 16.

Employment of minors under age 16 is subject to the following additional restrictions. They are prohibited from working:

. . . .

(4) In occupations connected with transportation, warehouse and storage, communications and public utilities, or construction. (Office work related to these occupations is permitted if none of the minor's work is performed on the transportation media or construction site.)

. . . .

[Statutory Authority: Chapters 43.22 and 49.12 RCW, RCW 26.28.060 and 43.17.060. WSR 93-01-068, § 296-125-033, filed 12/11/92, effective 3/1/93; Order 76-15, § 296-125-033, filed 5/17/76.]