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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent

AMENDED
BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR
AND ISSUES PERTAINING THERETO

ERROR B1. The Proposed Decision & Order, section Citation Item No. 1-1a, and Conclusion of Law No. 2 and Finding of Fact No. 2 constitute errors of law in failing to identify the first element for a prima facie charge for a serious WISHA violation, with regard to Citation 1, 1a.

ERROR B2. The Proposed Decision & Order, section Citation Item No. 1-1a and Finding of Fact 2 and Conclusion of Law No. 2 constitute errors of law in interpreting WAC 295-155-24510 as to requiring employers to "ensure" that employees wear their safety gear.

ERROR B3: The record does not contain substantial evidence that the requirements of the cited standard of WAC 296-155-24510 were not met, contrary to Finding of Fact No. 2 and Conclusion of Law No. 2.

ERROR B4: The proposed Decision and Order, section Citation Item No 1-1a and Finding of Fact 2 and Conclusions of law No. 2 constitute errors of law in identifying the third element for a

prima facie charge for WISHA violation with regard to Citation 1, Item 1a by failing to require a showing that the employees had access to the violative "condition".

ERROR B5: The record does not contain substantial evidence that the employees had access to a dangerous condition, with regard to Citation No. 1, Item 1a contrary to Finding of Fact No. 2.

ERROR B6: The Proposed Decision & Order, section Citation Item No. 1-1a and Finding of Fact 2 and Conclusion of Law No 2 constitute errors of law in failing to identify the fourth element for a prima facie charge for WISHA violation as knowledge of the violative "condition" with regard to Citation 1, Item 1a.

ERROR B7: The record does not contain substantial evidence that the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence, with regard to Citation 1, Item 1a, and Findings of Fact 2 and 9 are not supported by any evidence in the record.

ERROR B8: The Proposed Decision & Order, section Citation Item No. 1-1a and Finding of Fact

4 and conclusion of Law 2 constitute errors of law in stating what constitutes a prima facie charge for a repeat of a WISHA violation with regard to Citation 1, Item 1a.

ISSUE B: Is there substantial evidence in the record to sustain any prima facie element for Citation 1, Item 1a?

ERROR C1: The Proposed Decision & Order, section Citation Item No 1-1b and Finding of Fact 5 and Conclusion of Law No. 4 constitute errors of law in stating what constitutes a prima facie charge for WISHA violation of WAC 296-155-24505.

ERROR C2: The Proposed Decision & Order, section Citation Item No 1-1b and Finding of Fact 5 and Conclusion of Law No. 4 constitute errors of law in mis-identifying the five elements for a prima facie charge for WISHA violation, with regard to Citation 1, Item 1b by failing to require a showing of what hazard was ommitted from the fall protection work plan, that employees had access to some hazardous condition, that the employer knew of the hazardous paperwork and that the paperwork error caused a substantial

probability of death or serious physical injury.

ERROR C3: The record does not contain substantial evidence that the requirements of the cited standard of WAC 296-155-24505(2) pertaining to fall protection work plans were not met, thus Finding of Fact No. 5 and 6 should be vacated.

ISSUE C: Is there substantial evidence in the record to sustain any prima facie element for Citation 1, Item 1b (paperwork error)?

ERROR D1: The Proposed Decision & Order, section Citation Item No, 2-1, finding of Fact 8 and Conclusion of Law 5 constitute errors of law in stating what constitutes a prima facie charge for WISHA violation with regard to Citation 2, 1.

ERROR D2: The Proposed Decision & Order, section, Decision, makes an error of law in misapplying the scope provision of WAC 296-155-24501 to the alleged safety meetings violation, thus Conclusion of Law No. 5 and Finding of Fact No.8 make legal error in implying that the cited regulation, WAC 296-155-110(5) applies to these deliver persons.

ERROR D3: The record does not contain

substantial evidence that the cited standard of WAC 296-155-101(5) applies to employers with widely dispersed employees

ISSUE D: Is there substantial evidence in the record to sustain any prima facie element for Citation 2, Item 1 (meetings)?

ERROR E1: The Board and IAJ made errors of law and prejudicial evidentiary errors in not allowing the Employer to show the affirmative defenses of "unpreventable employee misconduct" or "infeasibility".

ISSUE E: Did the Board and IAJ commit prejudicial error in excluding the Employer's evidence on the affirmative defenses of employee misconduct and infeasibility and in refusing to allow the Employer to make a record.

ERROR F1: WAC 296-155-24510 is vague as interpreted by Inspector Adams.

ISSUE F1: Is the "duty to ensure" compliance by employees Unconstitutionally vague?

ERROR F2: The Board denied due process in preventing the Employer from answering the charges

ISSUE F2: Did the Board and IAJ deny the

Employer due process in refusing to allow the
Employer to present evidence about its defenses?

ISSUE G: Should fees be awarded?

II. STATEMENT OF THE CASE

This case involves a Washington Cedar & Supply Co. deliveryman who was retrieving excess roofing materials left over from a completed roof installation. The deliveryman was using his safety harness and lifeline, but in order to reach a couple of bundles at a far dormer, he unhooked his harness rather than install another, closer safety ring in the newly installed roof. CABR TRANSCRIPT (2/24/04) page 55 line 25 through page 56 line 46. After retrieving the two bundles, he re-hooked his line, resuming full safety compliance. CABR, Transcript 2/17/04 pg 55, lines 5-11. Inspector Adams of the Department's Safety Compliance Division cited Washington Cedar for no fall protection, no fall protection work plan and not having enough safety meetings.

Washington Cedar appealed on the basis that it fully complied with the cited fall protection statute, WAC 296-155-24510, that a fall protection

work plan was prepared and that it holds the required monthly safety meetings, and raised other issues and defenses.

Washington Cedar has been here before.

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119 Wn. App. 906 (Div.II, 2004). It is embarrassing to be here again on a WISHA matter, however, this time the Department is overreaching. Citation 1, 1a is a fall protection citation based entirely on the mistake of the employee, Jason Stewart, who unhooked his belt for five minutes to retrieve two bundles. There is no allegation that Washington Cedar caused an employee to leave the yard without safety gear as was the case in the prior matter. WASHINGTON CEDAR, supra at 916. In this case, Mr. Stewart was wearing his gear and tied off correctly for all but five minutes, and after retrieving the bundles, he re-hooked his line. CABR, Trans. 2/17/04, pg. 55, lines 5-12. Of the millions of regulations an employer must abide by, the Department cited the most inapplicable, WAC 296-155-24510, the hardware requirements section. At trial, the Department

stipulated that the citation was not for any violation of the hardware requirements, CABR Transcript (2/24/04) pg 37, line 45. The Board made a finding of fact that the citation was not for any hardware violation, but for an employee being on the roof without being tied off. proposed Decision and Order, CABR, Documents, page 120. This is not a WISHA violation because only employer mistakes can be the basis for WISHA citations. R.C.W. 49.17.120; 130; WASHINGTON CEDAR, supra at 914.

Citation 1, 1b alleged no fall protection work plan, however, the inspector took a photo of the plan. Exhibit No. 1, photos 4 & 5. Exhibit No. 14 shows the form work plan. Inspector Adams admitted that all of the items listed as missing from the plan were actually in the work plan. CABR, Transcript, 2/17/04, pg 105, lines 35-49. There were no extraordinary hazards because the roof was installed, thus no open skylights or vent holes. Whatever the alleged paperwork error was, it could not have caused "death or serious physical injury", the requisite showing for

element five of the prima facie case. WASHINGTON CEDAR, supra at 914.

The third citation was for not having weekly safety meetings. The Department cited the construction worker rule rather than the normal rule of monthly meetings. WAC 296-155-110(5) rather than WAC 296-800-13025. Washington Cedar employees never engage in construction. CABR, Transcript, 2/24/04 pg. 33, line 17-27. Regardless of which rule applies, Washington Cedar deliverymen hold safety meetings almost every hour when they meet to fill out the work plan before each delivery. CABR, Transcript 2/24/04, pg. 65, line 47 through pg 66, line 3; and Transcript, 2/17/04, pg 112, lines 25-49.

There have been many changes at Washington Cedar since the October 18, 1999 inspection of Washington Cedar deliverymen at a rambler in Puyallup. WASHINGTON CEDAR, supra at 909. The safety program improvements resulted in a steadily declining experience factor as injuries decreased. CABR, Transcript, 2/17/04 pg 129-130. The experience factor went from 1.4272 in 2002 down to

.9926 in 2004. Id. at 130, lines 7-22. Exhibits 4 through 14 and the accompanying testimony show a highly effective safety program.

III. ARGUMENT

A. Standard of Review

The B.I.I.A. has filed its Certified Appeal Board Record (hereinafter termed "CABR") with the Superior Court Clerk who in turned filed the record herein. The record includes three (3) bundles of documents. First is the pre-trial motions, along documents and pleadings filed at the B.I.I.A. level. (hereinafter referred to as "Documents"). Second, the record includes the trial transcripts for the hearings on February 17 and 24, 2004 and the pre-trial hearings on January 5, 2004. Third, the record contains a packet of exhibits that were submitted at the hearing. These three packets constitute the record.

The Employer takes exception to and requests review of essentially all findings and conclusions of the Board. The Employer has assigned 27 evidentiary errors from the record. These matters involve separate standards of review.

Review of the issues pertaining to subject matter jurisdiction is de novo. LEE COOK TRUCKING vs LABOR & INDUS., 109 Wn.2d 471, 482 (Div.II, 2001). Thus, whether delivery people are subject to the construction regulations pertaining to the requisite number of safety meetings involves a de novo interpretation of WAC 296-155-24501.

Review of issues of law, such as definitions found in the WISHA statute, are reviewed de novo. WASH. CEDAR & SUPPLY vs. LABOR & INDUS., 119 Wash. App. 906, 917 (Div.II, 2004) (reviewing definition of "serious"). The BRIEF OF RESPONDENT claims that the Department's interpretations deserve deference, however, this is only true where the interpretation requires the agency's special expertise in the relevant field. WILLOWBROOK FARMS vs DEPT. OF ECOLOGY, 116 Wash. App. 392, 397 (Div., III, 2003). Thus, for an example, Appellant contends that RCW 49.17.180(1) which authorizes enhanced penalties for "repeat" offenses only applies to violations by employers and not to violations by employees as in this case. The definition of "employer" does not need

the Department's expertise. It is the courts job to decide what the law is. WILLOWBROOK FARMS, supra at 397.

The Department's interpretation of statute or regulation is reviewed under an error of law standard, which allows this Court to substitute its own interpretation of the statute or regulation for that of the B.I.I.A. or the Department. COBRA ROOFING vs LABOR & INDUS., 122 Wn. App. 402, 409 (Div.III, 2004). Courts must ensure that the Department and B.I.I.A. are interpreting the regulations consistently with the enabling statute. Id.

Issues of fact are reviewed to see that they are supported by "substantial evidence". DANZER vs LABOR & INDUS., 104 Wn.2d 307, 319 (Div., II, 1999). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Id. This Court reviews the findings of fact to determine whether they are supported by substantial evidence in the record, and, if so, whether they support the B.I.I.A's conclusions of

law. ISLAND FOUNDRY vs LABOR & INDUS., 106 Wn. App. 333, 340 (Div.III, 2001). A finding of fact must be supported by more than a scintilla of evidence and will not be upheld if it is based solely on speculation or conjecture. ROGERS POTATO, vs COUNTRYWIDE POTATO, 119 Wn. App.815, 820 (Div.III, 2003).

For an example, the finding that the paperwork violation caused a substantial probability of death or serious injury is not supported by any causal nexus. Thus, the issue before this Court is whether there is substantial evidence in the record to support a finding that the alleged paperwork errors caused a substantial probability of death or serious injury, or whether such probability had another, superseding cause such as failure to wear safety gear.

Most of the issues in this appeal involve the applying of the law to the facts, which issues are reviewed de novo. PORT OF SEATTLE vs HEARINGS BOARD, 151 Wn.2d 568, 588 (2004). As explained by the Supreme Court, mixed questions of law and fact, are subject to de novo review, meaning the

court must determine the correct law independent of the agency's decision and then apply the law to established facts de novo. Id. All issues herein present mixed questions of law and fact. See APPELLANT'S BRIEF.

If a regulation was "duly adopted", then this Court reviews Constitutional challenges to regulations using the "...beyond a reasonable doubt..' standard. INLAND FOUNDRY vs LABOR & INDUS., 106 Wn. App. 333, 339 (Div., III, 2001). In this case, a regulation would be "duly adopted" if it was adopted by the Director using the rule making procedures of the Administrative Procedures Act as required by his enabling authority at R.C.W. 49.17.040, (2003). A regulation is unconstitutionally vague if persons of common intelligence must necessarily guess its meaning and disagree as to its application. INLAND FOUNDRY, supra at 339.

2. No deference to the Department's interpretations

One of the key issues in this case is the proper interpretation of WAC 296-155-24510. The

Employer interprets this regulation as being a list of hardware standards because of the wording: "...according to the following requirements." The Respondent interprets the WAC as requiring the Employer to be a guarantor or surety that "ensures" its employees comply with safety rules generally. Respondent focuses on the first 37 words of WAC 296-155-24510 and ignores the bulk of the regulation as meaningless.

An unambiguous regulation is interpreted from its plain meaning, only. *CANON vs DEPT. OF LICENSING*, 147 Wn2d. 41, 57 (2002). Deference should be given to the Department's interpretation of WAC 196-155-24510 only if this Court finds the regulation to be ambiguous. *MADER vs HEALTH CARE AUTH.*, 149 Wn2d 458, 473 (2003). As explained by the Supreme Court:

If a regulation is unambiguous, intent can be determined from the language alone, and we will not look beyond the plain meaning of the words of the regulation.

MADER, supra at 473. If WAC 296-155-24510 is not ambiguous, it must be given its plain meaning.

MADER supra at 473. The plain meaning of

...according to the following requirements is that the following requirements contain the duties employers must obey and not the unexplained, inarticulate mandates of Inspector Adams's duty to ensure.

Another reason why this court should not give deference to the Respondent's interpretations is because this matter is penal rather than remedial. None of the penalties will be turned over to Jason Stewart or any other employee to remediate injuries. There were no injuries. Giving deference to the Department in a solely penal matter invites interpretations that are contrived to maximize penalties for the Department.

B. Department failed to prove its prima facia case for a WISHA violation of WAC 296-155-24510

1. Element one of the prima facie case for Citation 1, item 1a

The prima facie case for a violation of WISHA is the same as for a violation of its Federal analogue, OSHA, which is:

...the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were

not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.

CARLISLE EQUIPMENT vs SEC. OF LABOR, 24 F.3rd 790, 792 (6th Cir, 1994). If the Secretary of Labor or Washington's Department of Labor & Industries seeks to cite a "serious" violation, then it must also show:

(5)...there is a substantial probability that death or serious physical harm could result from the violative condition.

COLLINS CONST. vs. SEC. OF LABOR, 117 F.3rd 691, 694 (2nd Cir, 1997). This statement of the prima facie case was adopted by Division II of the Court of Appeals in WASHINGTON CEDAR & SUPPLY CO. INC. vs LABOR & INDUS, 119 Wash. App. 906, 914 (Div, II, 2004).

The first element is whether the cited standard applies to the facts. WASHINGTON CEDAR, supra at 914. The cited standard was WAC 296-155-24510. See citation, CABR, Documents, page 136. This regulation reads:

WAC 296-155-24510 Fall restraint, fall arrest systems. When employees are exposed to a hazard of falling from a location 10 feet or

more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed and implemented according to the following requirements.

The requirements that follow are specifications for the safety equipment, such as length of the life line, and type of metal finish on the hardware. However, Citation 1, Item 1a does not allege that the Employer violated one of the requirements of WAC 296-155-24510, but instead alleges:

No fall protection with a fall of 10 feet or more. The employer did not ensure that when employees were exposed to a hazard of falling from a location greater than 10 feet in height that fall protection was provided, installed, and implemented according to the standards.

Citation 1, Item 1a. See CABR, Documents, page 136. This recitation does not state a violation because it fails to mention any of the numerous hardware requirements enumerated in

WAC 296-155-24510. The Employer's duty is to:

...ensure that fall restraint, fall arrest systems or positioning systems are provided, installed, and implemented according to the following requirements.

WAC 296-155-24510 (2003). The regulation does

not require employers to ensure an employee is "protected", but only that the fall protection system is "...provided, installed and implemented..." and only to the exhaustive but not limitless duties listed as "...the following requirements."

This standard would apply if the citation had alleged that the Employer violated one of the numerous hardware requirements listed in that section. This was not the case. In fact, the Department stipulated that it had not cited the employer for any deficiency with the fall arrest hardware. CABR, Transcript (2/24/04) page 37, line 45 to page 38, line 9. Thus, the cited standard, a hardware standard, does not apply to the facts as alleged by the Department and the Department has failed to show element one of its prima facie case.

The Board's order clarified this by finding:

The Department stipulates that it has not cited the employer for any deficiency with the fall restraint hardware. 2/24/04 Tr. at 37. The citation is based upon the observation of an employee of Washington Cedar on a roof, approximately 17 feet from the ground, working without being tied off.

Proposed Decision and Order, CABR, Documents, 120, lines 5-12. Thus, the Board misapplied this hardware standards regulation in order to convict the employer for what in fact was an employee safety violation.

The first element of the Department's prima facie case is that "... (1) the cited standard applies;...". WASH. CEDAR vs LABOR & INDUS., 119 Wash. App. 906, 914 (Div. II, 2004). If the cited regulation is read as a whole, then it becomes apparent that it is a hardware regulation and does not apply to situations where the Department stipulates the hardware requirements have been met. CABR, Transcript, (2/14/04) page 37, line 45. On the other hand, if a prosecutor is allowed to cut-n-paste regulations to gain a conviction, then the words "...according to the following requirements." may be omitted and the requirements themselves may be omitted and the Inspector may add a period after the word "implemented" and thereby change the regulation to make it apply by changing the duty of employers to a "duty to ensure" that employees comply with safety

regulations.

Courts interpret the meaning of agency rules using the rules of statutory construction. *MADER vs HEALTH CARE AUTH.* 149 Wn2d 458, 472 (2003).

Our Supreme court uses four primary rules of construction for rules and statutes. These include:

1. reading rule as a whole for its plain meaning
2. ejusdem generis
3. a rational, sensible interpretation
4. an unambiguous regulation is interpreted from its plain meaning, only

The first rule of construction is considering the rule as a whole. *SEATTLE MONORAIL AUTH.*, 155 Wn2d 612 (2005). This is done by considering the rule as a whole, giving effect to all provisions and to related regulations. *SEATTLE MONORAIL AUTH.*, 155 Wn2d. 612, 627 (2005). Each word of a rule is to be given meaning and no portion rendered meaningless, nor shall any language be deleted. *STATE vs ROGGENKAMP*, 153 Wn.2d 614, 624 (2005). If, after this inquiry, the rule can reasonably be interpreted in more than one way,

then it is ambiguous and resort to other rules of construction may apply Id.

Obviously, the Board's interpretation does not consider the rule as a whole, but instead cuts out 95% of the rule. See Proposed Decision and Order, CABR, Documents, pg 120. The Board's interpretation makes the hardware specifications meaningless and completely ignores the phrase:

...according to the following requirements. WAC 296-155-24510. On the other hand, the interpretation offered by Washington Cedar requires that the regulation be read as a whole and that each provision be given its normal, proper value in the regulation. When the regulation is read as a whole, the words "...according to the following requirements" limit the employers duty to the specified requirements.

Furthermore, considering other provisions of WISHA regulation support Washington Cedar's interpretation and contradict Inspector Adams's interpretation. For an example the section on personal protective and life saving equipment

assigns specific but different duties to employees and employers. WAC 296-155-200. Employees must:

- (2) Construction personnel shall comply with plant or job safety practices and procedures, peculiar to particular industries and plants, relating to protective equipment and procedures when engaged in construction work in such plants or job sites.

WAC 296-155-200(2). Employers have a much different duty:

- (3) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates a need for using such equipment to reduce the hazards to the employees.

WAC 296-15-200(3)(2004). As shown in Exhibit No. 4, page 3 under paragraph entitled FALL PROTECTION the Employer's rule on wearing fall protection is that it is mandatory without exception. Thus, these related provisions show that WISHA requires employees to wear the safety gear and also require that employers provide the safety gear and require its use, but no where does WISHA requires employers to ensure that employees are wearing their safety gear, which is the duty

illegally imposed by the Board. Proposed Decision and Order, CABR, Documents, page 120, lines 5-15.

Another important consideration is the Act itself. WISHA specifically defines "employer" and "employee" so that it may treat the categories separately. R.C.W. 49.17.020 (4) and (5), respectively. Employees are delegated specific duties, including:

Each employee shall comply with the provisions of this chapter and all rules, regulations, and orders issued pursuant to the authority of this chapter which are applicable to his own actions and conduct in the course of his employment.

R.C.W. 49.17.110 (2004). The employer:

Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.

R.C.W. 49.17.060(1). Furthermore, under the section authorizing citations, the only time a citation may be issued is if "...the director or his or her authorized representative believes that an employer has violated a requirement..." R.C.W. 49.17.120 (emphasis added). Thus, WISHA does not allow the punishing of anyone for employee violations such as alleged of Mr. Stewart in the

citation. Only employer violations may be the basis of a citation.

Thus, considering the regulation read as a whole and reviewing the related statutes and regulations, the intent is clear that this regulation does not apply to employee violations as alleged of Mr. Stewart.

The rule of ejusdem generis states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms. ESTATE OF JONES, 152 Wn.2d 1, 11 (2004). Applying this rule to WAC 296-155-24510, the terms "provided, installed, and implemented" are in sequence with the specific hardware requirements such as safety lines being protected against cuts and abrasions, or that hardware have a corrosion resistant finish. WAC 296-155-24510. Thus, even if the Board or IAJ were allowed to edit out the words "according to the following requirements", the rule of ejusdem generis would still limit the employers obligation to provide, install and implement to purchasing and maintaining the right equipment and providing

it to the employees. Another rule, WAC 296-155-200(3), requires that employers require their employees to wear the safety gear, but this regulation was never at issue as Washington Cedar does require its employees to wear safety gear on all structures. Exhibit No. 4, page 3.

The third rule of construction is that rules and regulations are to be given a rational, sensible interpretation. *MADER vs HEALTH CARE AUTH.*, 149 Wn2d. 458, 472 (2003). The Board's interpretation is irrational because it penalizes employers solely on the basis of acts or omissions of employees. Thus, two separate employers can have identical safety programs, but the one with a happy employee gets no penalty and the one with a troubled employee gets penalized. For that matter, an employer can have a perfect safety program, yet still be penalized when employees incur violations as part of a labor action to force the employer to increase wages. The penalty serves no deterrent value because there is no mens rea for the employer to stop.

The fourth rule of construction used by the

Supreme Court is that an unambiguous regulation is interpreted from its plain meaning, only. CANON vs DEPT. OF LICENSING, 147 Wn2d. 41, 57 (2002). The Respondent requested deference for its interpretation of WAC 196-155-24510, but deference could be granted only if this Court finds the regulation to be ambiguous. MADER vs HEALTH CARE AUTH., 149 Wn2d 458, 473 (2003). The meaning of

...according to the following requirements is that the following requirements contain the duties employers must obey and not the unexplained, inarticulate "duty to ensure".

2. WAC 296-155-24510 does not impose a "duty to ensure"

The Board's order claims the standard applies, but fails to study the regulation and simply uses conclusive statements that acts of an employee violated the standard. Proposed Decision and Order, CABR, page 120, lines 5-24. The Board's only reference to a standard is to WAC 296-155-24510(1)(b) which is a wholly inapplicable standard for "fall restraint", a safety system not used by anyone except roofers

on a flat roof. WAC 296-155-24510(1)(b) was never mentioned in the citation, in discovery, in the trial nor in any of the Department's pleadings. Although the Board knew the Department had stipulated the citation was not for any hardware violation, the IAJ understood the cited standard was inapplicable and so just made one up and not knowing the difference between fall restraint and fall arrest, guess the wrong system. Regardless, the Board's decision is erroneously based on its conclusion of law that WAC 296-155-24510 applies to facts alleging only an employee violation, which it does not.

The regulation does not require employers to ensure an employee is "protected", but only that the fall protection system is "...provided, installed and implemented..." and only to the exhaustive but not limitless duties listed as "...the following requirements." The reason why WAC 296-155-24510 does not require Employers to ensure that their employees are always protected by the safety gear is because the duty to actually use the provided, installed and

implemented safety gear belongs to the employee.

WAC 296-155-105(3):

Employees shall apply the principles of accident prevention in their daily work and shall use proper safety devices and protective equipment as required by their employment or employer.

WAC 296-155-105(3); R.C.W. 49.17.110.

Division III interpreted WAC 296-155-24510 to mean:

Numerous subsections of the regulation govern how the employer will minimize or eliminate the hazard.

COBRA ROOFING vs LABOR & INDUS. 122 Wn. App. 402, 414 (Div.III, 2004) (on appeal to the Supreme court)., thus rejecting the Department's suretyship theories.

3. The real standards of WAC 296-155-23510 were met.

Besides the legal issue of interpreting WAC 296-155-24510 to know what the standard is, there is a factual issue of whether the Department showed with a preponderance of the evidence that the standard was not met. The Board found:

The standard has been violated. The Washington Cedar employee was exposed to the hazard from which the standard was designed to protect.

Proposed Decision and Order, CABR page 120, lines 19-21. The testimony from Inspector Adams shows that the employee was in his gear:

Q. At all times you observed him, he had his full body harness on?

A. Yes, I believe so.

CABR, Transcript, (2/17/04) page 65, lines 31-33.

And that he re-hooked his lifeline before being arrested:

Q. The fact that Mr. Stewart was wearing his gear and went back to hookup his life line before you stopped him, doesn't that suggest that normally the employees are tied off?

A. It suggests that he's aware of the requirements to wear fall protection up to ten feet and the fact that he had the harness on.

And the employee attached an anchor. CABR, Transcript (2/17/04) page 111, line 47 and Transcript (2/17/04) page 112, line 9. The employee was properly attached to an anchor, but to reach the last couple of bundles at a far dormer, the employee unhooked his lanyard and made two trips to the far dormer before hooking himself up to the lifeline. CABR Transcript (2/17/04) pages 58, lines 39-45; Transcript (2/17/24) page

62, line 43.

Thus, the evidence shows that Washington Cedar did provide the correct gear, gave it to the employees to use with appropriate training, the employee knew he was suppose to implement the safety gear and did implement the safety gear for all but a few seconds. Thus, Washington Cedar met the cited standard and also ensured that its employee wore the safety gear as well.

4. The fourth element is that there existed a "condition"

The third element of the prima facie case is that the employee had access to the "violative condition." WASHINGTON CEDAR & SUPPLY vs. LABOR & INDUS., supra at 914. The employees had access to make the delivery, but the Department needed to show a dangerous condition, such as the unguarded machinery as in DANZER. DANZER vs LABOR & INDUS., 104 Wash. App. 307, 325 (Div II, 2000).

Webster's defines condition as an "existing state" and the term "condition which exists" in R.C.W. 49.17.180(6) connotes permanent, abiding circumstances. RANDOM HOUSE WEBSTERS, Unabridged

2d (1998). The transitory nature of an employee getting upon a roof and at some point unhooking safety gear in violation of company rules would never constitute a "condition". At any time the employee could come down or put on her gear, thus eliminating the "condition." Thus, the Proposed Decision and Order misstates the law because it fails to require the Department to show a condition for the third element. WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119 Wash. App 906, 914 (Div, II, 2004).

5. The Department failed to show any "condition"

Under WISHA, it is the employees duty to comply with all safety rules that apply to their job. R.C.W. 49.17.110. Inspector Adams observed:

Q. (By Mr. Klein) Doesn't WISHA require that employees comply to all safety rules that apply to their employment?

A. Yes

Q. Would you agree with me that the direct cause of the hazardous condition was the employee's decision not to be in compliance with company rules and the Department's rules that required them to be tied off?

A. I would agree that the -- their cause of the citation, the hazard effect, that

the employee was not tied off.
Transcript (2/17/04), page 87, line 41 to pg 88,
line 5. Thus, there was never a "condition" but
only the temporary failure of an employee to
comply with company rules. The Inspector
testified as to the temporary nature of the
noncompliance when he observed:

WITNESS: I don't know. I don't remember. I
don't have any recollection of him
looking me in the eye. I just
know that after a couple of trips
he put on his rope which could have
coincided with my arrival or not,
I'm not sure.

Transcript (2/17/04) page 55, lines 5-11.

6. The fourth element of the prima
facie case is that the employer
had knowledge of the condition

The B.I.I.A. applied the wrong legal standard
in deciding whether the Department had proven the
requisite "knowledge". The correct standard
according to the Court of Appeals is:

...(4) the employer knew or, through the
exercise of reasonable diligence, could have
known of the violative condition;

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119
Wn. App. 906, 914 (Div.II, 2004). Although the
Department may have shown through prior violations

that other employees have violated WISHA, that could not put the Employer on notice that Mr. Stewart (the employee involved) would violate a safety standard. Division II requires knowledge of "the violative condition" which means the Employer knew or could have known that Mr. Stewart was violating the safety standard. The record shows that the employer did not have actual knowledge of the infraction. TRANSCRIPT (2/24/04) page 52, lines 17-41. Mr. Stewart had been disciplined at a prior time, but in the discipline process, Mr. Stewart evidenced remorse and understanding of his mistake. TRANSCRIPT (2/24/04) page 54; Exhibit No. 11. The increased enforcement measures demonstrated by the Employer precluded the Employer's foreseeing of a violation by the contrite Mr. Stewart. WASHINGTON CEDAR & SUPPLY, supra at 916. There is no rational connection between a prior violation by another employee that occurred three years ago and a current violation by Mr. Stewart and "substantial evidence" of an employer's knowledge can not be based upon the B.I.I.A.'s speculation, but must be

rational. DANZER, supra at 319.

7. No showing of knowledge

In the case of WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., the Court of Appeals held that:

We agree that the evidence of similar past violations was sufficient to support a finding that Washington Cedar was on notice that its employees were not complying with its safety requirements.

119 Wash. App. 906, 916 (Div II, 2004). Implicit in this holding is the converse rationale that evidence of past safety compliance should rationally lead to a finding that an employer was not on notice that an employee was not complying with the safety requirements. The record of company safety inspections proved that the employees were in compliance. CABR, Transcript (2/24/04) page 103, line 51 to page 104, line 35. See EXHIBIT no. 9. The priors alleged by the Department were all two years old. EXHIBIT no. 3. Thus, using the correct legal standard of what a reasonable employer would know using reasonable diligence to discover violations and rational thinking leads to a finding that the employer did not have knowledge of any violation.

This case involved a unique circumstance in that the employee failed to install a second anchor for fear of harming the weather tightness of the new roof. In the mind of the employee, customer service won out over his compliance with the safety rules. Normally, the delivery people are delivering materials to a bare roof and are never confronted with the dilemma of having to chose between customer service and safety. A normal, diligent employer would reasonably presume that a new roof would have sufficient anchors to cover the entire roof, since the roofers would have had to use them. This was Mr. Hedlund's assumption. CABR, Transcript, 2/24/04, pg 116, line 41. Washington Cedar could not have anticipated that a new roof would be missing an anchor.

8. The alleged violation was not a "repeat"

The Board made an error of law in adding enhanced penalties for alleged "repeat" violations. R.C.W. 49.17.180(1) is the enabling authority for the Department to assess enhanced penalties for alleged WISHA violations.

This statute reads:

Violations--Civil penalties (1) Except as provided in RCW 43.05.090, any employer who willfully or repeatedly violates the requirements of RCW 49.17.060, of any safety or health standard promulgated under the authority of this chapter, or any existing rule or regulations governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 may be assessed a civil penalty not to exceed seventy thousand dollars for each violation. A minimum, penalty of five thousand dollars shall be assessed for a willful violation.

R.C.W. 49.17.180(1)(2000). No where in the above statute does it authorize the Department to impose on employers a "repeat" penalty for violations by its employees. This clear and unambiguous language manifests the legislative intent to delegate specific responsibilities to specific parties. For an example, R.C.W. 49.17.110 says:

Each employee shall comply with the provisions of this chapter and all rules, regulations, and orders issued pursuant to the authority of this chapter which are applicable to his own actions and conduct in the course of his employment.

R.C.W. 49.17.110(2000). Likewise, the Act defines both the term "employee" and the term "employer" so there could be no confusion about who is responsible, or liable, for what. R.C.W.

49.17.020(4) and (5).

Construction of a statute is a question of law, which this court reviews de novo under the error of law standard. CITY OF PASCO vs PUBLIC EMPLOYMENT RELATIONS COMM'N, 110 Wn2d 504, 507 (1992). Review begins with the plain language of the statute. LACEY NURSING CENTER, INC. vs DEP'T OF REVENUE, 128 Wn.2d 40, 53 (1995). If a statute is unambiguous, the Court determines legislative intent from the language of the statute alone. WASTE MGMT. vs UTILS. & TRANS. COMM'N, 123 Wn2d 621, 629 (1988). If the language is clear and unambiguous, we apply its plain language. CHILDRENS HOSP. & MED. CTR. vs DEP'T OF HEALTH, 95 Wn. App. 858, 868 (1999).

R.C.W. 49.17.180(1) is clear and unambiguous that only employer violations can lead to enhanced penalties. Throughout the Act, the terms "employer" and "employee" maintain their distinct definitions and the terms are never used interchangeably. Subsection .180(1) is expressly directed at acts of employers.

Furthermore, the wording used in R.C.W.

49.17.180(1) shows it was directed at employer violations only. The subsection describes the mens rea of "willfully" for particularly egregious employer violations, but an employee would never "willfully" violate a safety regulation because it would mean an intentional disregard for his own safety. The subsection just does not make any sense if it is interpreted to include employee violations like the ones cited in this case.

C. Department failed to prove its prima facie case for a WISHA violation of WAC 296-155-24505

1. Prima facie case for a violation of WAC 295-155-24505

Because the Department cited the paperwork violation, WAC 296-155-24505 as a "serious" violation, it had the duty to prove all five elements of its prima facie case:

(1) that the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119

Wash. App. 906, 914 (Div., II, 2004).

The Employer met the requirements of the cited standard. The actual fall protection work plan prepared by the employees at their safety meeting before beginning work is shown in photos 4 and 5 of Exhibit 1. Exhibit 14 is a form copy. The work plan clearly states:

Full body harness - checked out and in good condition

This is the harness worn by Mr. Stewart in photos 1 and 2 in Exhibit 1.

Furthermore, the work plan identifies all hazards in the work area. Transcript (2/24/04) page 69, lines 15-25. Exhibit 14. Page two of the work plan lists all of the hazards common to every delivery site and the workers documented their cognition of each hazard with a mark. The two employees then initialed the front of the form and the worker filling out the form signed it. The reason there were no openings in the roof or other hazards of note was because the roof had been completed and the employees were simply there to download excess material. After their

safety meeting, the employees began work, with Mr. Pope on the truck running the conveyor and Mr. Stewart on the roof.

On cross examination, Inspector Adams agreed that all the work hazards he listed in his citation as needing to be in the fall protection work plan, actually were in the work plan of Washington Cedar. Transcript (2/17/04) page 105, lines 39-49. Inspector Adams was not sure if there were any fall hazards other than those identified in the fall protection work plan. Transcript (2/17/04) page 109, lines 29-51. The work plan completed by the workers satisfies WAC 296-155-24505(2).

The other elements of the Departments prima facie case do not appear to have been proven either. In particular, there does not appear to be substantial evidence, or any evidence, that the alleged paperwork errors caused a substantial probability of death or serious injury. WASHINGTON CEDAR , supra at 914. The paperwork requirement of WAC 296-155-24505 helps remind workers of hazards, but the actual, proximate

cause of injuries is the act or omission of neglect itself, such as not wearing safety gear or reaching into the unguarded lathe. In order for the Department to establish a "serious" violation, it must prove that the alleged paperwork error itself caused "substantial probability of death or serious injury." WASHINGTON CEDAR, supra at 914.

D. Department failed to prove its prima facie case for a WISHA violation of WAC 296-155-110(5).

For a general duty violation such as the Department's citation for not having enough safety meetings, the Department must show:

that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.

CARLISLE EQUIPMENT vs SEC. OF LABOR, 24 F.3rd 790, 792 (6th Cir, 1994); WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119 Wash. App 906, 914 (2004).

The first element for this general violation is whether the standard applies. The standard of WAC 296-155-110 is not within the fall protection subsection of WAC 296-155-245, and therefore, is

not covered by the scope provision of WAC 296-155-24501 which includes "material handling covered under Chapter 296-155 WAC." Instead, the cited standard is part of the general provisions for construction work covered in WAC 296-155.

The scope of these general standards only covers:

The standards included in this chapter apply throughout the state of Washington, to any and all work areas subject to the Washington Industrial Safety and Health Act (chapter 49.17 RCW), where construction, alteration, demolition, related inspection, and/or maintenance and repair work, including painting and decorating is performed.

WAC 296-155-005(1). "Materials handling" is not covered by the general construction standards such as the cited standard of WAC 296-155-110.

The appropriate standard for non-construction workers is WAC 296-800-13025 which requires monthly safety meetings. Exhibit 8 shows that the Employer had at least monthly safety meetings of its whole division. Furthermore, Inspector Adams pointed out that the employees have hourly safety meetings when each crew gets together to prepare the fall protection work plan at the beginning of each delivery. Transcript (2/17/04) page 112,

lines 29-39. Inspector Adams explained:

- Q. What are you suggesting with this WAC?
- A. The crew type teams would conduct a safety inspection at the beginning of the week, and then at the job -- at the beginning of each job and weekly thereafter. So if they had crews going out to these jobs making deliveries, these crews could have a weekly safety meeting, and then they -- they've got to complete their fall protection work plan, That's a safety meeting in itself.

Transcript (2/17/04) page 112, lines 29-39.

Therefore, the Employer not only has monthly safety meeting, but hourly safety meeting as each crew meets to discuss and complete the fall protection work plan. Exhibits 1 and 14.

Transcript (2/24/04) page 45, lines 13-17 (that work plan is completed on every delivery). Thus, the Employer met the cited standard as well as the applicable standard.

The proposed Decision and Order does not offer legal analysis other than to set out the wrong standard verbatim and make determinative statements that the wrong standard was not met. Thus, there is no analysis of whether the violative condition was known to the employer or

whether the employees had access to the violative condition. These elements point out that there is no violative "condition" as required by WASHINGTON CEDAR & SUPPLY, for a prima facie case.

WASHINGTON CEDAR & SUPPLY, supra at 914. This type of violation, if there is any violation, would be de minimus because it has no direct relationship to safety. R.C.W. 49.17.180.

E. The Board and IAJ erred in not allowing the Employer to show the affirmative defense of "unpreventable employee misconduct" or "infeasibility"

All rulings upon objections to the admissibility of evidence before the Board are to be made in accordance with the rules of evidence in the superior courts. WAC 263-12-115(4). "Relevant evidence" for superior courts means evidence having any tendency to make the existence of any fact that is of consequence to the determination or the action more probable or less probable than it would be without the evidence. ER 401. Relevant evidence is admissible. ER 402.

The Employer's theory of the case is that WAC

296-155-24510 is a hardware standard and that it had complied with that standard. Furthermore, that it had a highly effective safety program and fully satisfied the statutory elements of the "employee misconduct" defense. R.C.W. 49.17.120(5). The Employer also tried to show that compliance with Inspector Adams's interpretation of WAC 296-155-24510 was infeasible. However, the IAJ sustained all objections to this evidence and went so far as to order the Employer not to make a record of this evidence. Transcript (2/24/04) page 49, lines 27-51 and CABR Transcript (2/17/04) page 67, line 29 through page 70, line 35. Furthermore, the IAJ, excluded Exhibits 6 and 7, the documentation of training of the employees., CABR Transcript (2/24/04) page 85, line 15 through page 90. Testimony about the company requiring completion of the fall protection work plan was excluded. CABR Transcript (2/17/04) page 48, line 47 through page 48, lines 5. Testimony about the company rule that safety gear always be worn was excluded. CABR Transcript (2/17/04) page 50, lines

25 through 51. The IAJ and board rejected evidence about the employees knowledge of the safety rules, which evidence would have shown the second element of the "employee misconduct" defense. CABR Transcript (2/17/04) page 54, line 19 through page 55 line 19. The evidence also tended to show effective enforcement because the employee went back into compliance. Testimony about alternatives the employee could have used, such as installing another anchor was excluded although this showed why installing another anchor in the new roof was infeasible. CABR Transcript (2/17/04) page 59, lines 15-23; answer in colloquy at page 59, line 29 through page 60, line 23. Likewise, the employees explanation was put into colloquy and forgotten CABR (2/17/04) page 63, lines 1-28

The employer sought to prove compliance with the real WAC 296-155-24510 as an alternative means of complying with Inspector Adam's interpretation to establish the defense of "infeasibility" but all such testimony was excluded. CABR Transcript (2/17/04) page 66, line 23 through page 72, line

41. Testimony that the employee's temporary noncompliance could not be a hazardous "condition" was excluded. CABR Transcript (2/17/04) page 83, line 25 through page 84, line 38. Testimony about the employees duty to wear safety gear was relevant to all issues and defenses, but was excluded. CABR Transcript 2/17/04, page 88, lines 7-9. In colloquy, the Inspector acknowledged that it was the employee's duty to wear his safety gear, Transcript 2/17/04 page 88, lines 19-21.

Testimony about the infeasibility of the Department's interpretation of WAC 296-155-24510 was excluded. CABR Transcript (2/24/04) page 67, lines 1 through page 68, line 21. Testimony about daily safety meetings was excluded. CABR Transcript (2/24/04) page 76, lines 9-21. Exhibit No. 9 were the safety inspection records which were excluded, although they proved the defense of "employee misconduct". See CABR Transcript, (2/24/04) page 98, line 1 through page page 99, line 31. Testimony about the company's safety inspections was excluded. CABR Transcript (2/24/04) page 100, line 29 through page 102, line

35. Testimony showing an absence of any direct nexus between the work plan and an injury was excluded. CABR Transcript (2/24/04) page 113, lines 47-61.

Almost all of the Employer's testimony was excluded as irrelevant although it directly responded to the citations. The one-sidedness of the rulings left an abiding impression of bias.

F. Constitutional issues

1. WAC 296-155-24510 as interpreted by Inspector Adams is Unconstitutionally vague

A penal statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. O'DAY vs. KING COUNTY, 109 Wn2d 796, 810 (1988). The vagueness of the word "ensure" in WAC 296-155-24510 if used to require an employer to ensure conduct of an employee, precludes an employer from knowing what conduct on her part will satisfy the regulation's requirements. An employee's violation may occur independent of anything done by her employer. If we assume inspector Adams's interpretation, then

the regulation is invalid on its face because there is inadequate notice to employers what conduct on their part could lead to an employee's failure to implement safety devices. STATE vs PLEWAK, 46 Wash App. 757, 760 (Div.II, 1987).

2. The Board's refusal to allow the Employer an opportunity to respond to the charges violated the Employer's due process rights. ROBLES vs LABOR & INDUS. 48 Wn. App. 490, 495 (Div.II, 1987).

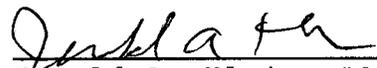
G. Attorneys fees

Appellant requests costs and attorneys fees pursuant to R.C.W. 4.84.350, as a qualified party whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed. The Department's interpretation of WAC 296-155-24510 was unjustified.

H. Conclusion

Appellant requests this Court vacate and dismiss the three citations, with prejudice.

RESPECTFULLY SUBMITTED: January 12, 2006



Jerald A. Klein, #9313
Attorney for Wash. Cedar

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: WASHINGTON CEDAR & SUPPLY CO.,) DOCKET NO. 03 W0166
2 INC.)
3)
4 CITATION & NOTICE NO. 306050873) PROPOSED DECISION AND ORDER

5
6 INDUSTRIAL APPEALS JUDGE: Thomas W. Merrill

7
8 APPEARANCES:

9
10 Employer, Washington Cedar & Supply Co., Inc., by
11 Law Office of Jerald A. Klein, per
12 Jerald A. Klein

13
14 Employees of Washington Cedar & Supply Co., Inc.,
15 None

16
17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 David I. Matlick, Assistant

20
21
22 The employer, Washington Cedar & Supply Co., Inc., filed an appeal with the Department of
23 Labor and Industries' Safety Division on April 16, 2003. The Department transmitted the appeal to
24 the Board of Industrial Insurance Appeals on April 30, 2003. The employer appeals Citation and
25
26 Notice No. 306050873 issued by the Department on April 10, 2003, alleging the following violations:
27
28 Item 1-1a, a repeat serious violation of WAC 296-155-24510 with a penalty of \$2,100; Item 1-1b, a
29
30 repeat serious violation of WAC 296-155-24505(2) with the penalty grouped with Item 1-1a; and
31
32 Item 2-1, a general violation of WAC 296-155-110(5) with no penalty assessed; for a total proposed
33
34 penalty of \$2,100. The Citation and Notice is **AFFIRMED AS MODIFIED**.
35
36

37
38 PROCEDURAL AND EVIDENTIARY MATTERS

39
40 Pre-hearing Motions and Filings. On December 4, 2003, Washington Cedar & Supply Co.,
41
42 Inc. (Washington Cedar) filed a Motion to Dismiss and a Motion for Summary Judgment. On
43
44 January 16, 2004, the motions were denied.
45
46
47

1 On February 17, 2004, on the morning of hearing, Washington Cedar hand-delivered its
2
3 Motion in Limine. The motion was denied on February 17, 2004.

4
5 On February 17, 2004, on the morning of hearing, Washington Cedar hand-delivered its Trial
6
7 Brief.

8
9 Colloquy. All matters placed in colloquy will remain in colloquy; except the testimony
10
11 contained in the February 24, 2004 transcript from page 134, line 39 through page 135, line 45.

12
13 Exhibits. Rulings were deferred on Board Exhibit Nos. 6, 7, and 9. Board Exhibit Nos. 6 and
14
15 7 are rejected. Board Exhibit No. 9 is admitted for demonstrative purposes. Board Exhibit No. 13
16
17 was marked but not offered. It will not be considered.

18
19 **ISSUES**

- 20
21 1. Did Washington Cedar & Supply Co., Inc., commit the alleged violations
22 contained in Citation and Notice No. 306050873?
23
24 2. Did the Department properly calculate the penalty for any such
25 violation?
26

27 **EVIDENCE PRESENTED**

28
29 The following witnesses testified in this matter: Larry Adams, Safety and Health Compliance
30
31 Officer with the Department of Labor and Industries; Khan Trinh, Policy Manager Underwriter with
32
33 the Department of Labor and Industries; Kim Lensegrav, Claims Manager 3 with the Department of
34
35 Labor and Industries; Delbert Jensen, Workers' Compensation Adjudicator 3, with the Department
36
37 of Labor and Industries; and Rick Hedlund, Manager, Auburn store of Washington Cedar & Supply,
38
39 Co., Inc. Of the fifteen marked Board Exhibits, Nos. 1-5, 8, 9, 11, 12, 14 and 15 were admitted and
40
41 considered.

42
43 **DECISION**

44
45 Washington Cedar & Supply Co., Inc., initially challenged the subject matter jurisdiction of
46
47 the Board, arguing that the cited code provisions did not apply to it because it only delivered roofing.

1 materials and performed no construction. The argument is without merit. See *Washington Cedar &*
2
3 *Supply Co., Inc. v. Department of Labor & Indus.*, 119 Wn. App. 906 (2004) (affirming the repeat
4
5 serious violations of *Washington Cedar & Supply Co., Inc.*, for failing to ensure that its employees
6
7 were wearing fall restraint gear when they delivered material onto the roof of a construction site.)¹
8
9 Washington Cedar argues that this case is distinguishable because the employees were retrieving
10
11 roofing materials. That argument is without merit. WAC 296-155-24501, et seq., applies to
12
13 safeguard all employees at a work place where fall hazards of ten feet or more exist, regardless of
14
15 which employer sent its employees to the work site and regardless of whether the work is actual
16
17 construction or delivery (or removal) of materials used in such construction.

18
19 Larry Adams, Safety and Health Compliance Officer with the Department of Labor and
20
21 Industries, opened an inspection at a work site at 4529 S. Alder St., Tacoma, Washington, on
22
23 January 23, 2003 following his observation of an employee of Washington Cedar up on the roof
24
25 carrying roofing material. Mr. Adams observed the employee, Jason Stewart, wearing a fall
26
27 restraint harness without having the harness tied off to a lanyard tied to a roof anchor. He
28
29 estimated the height of the roof to be approximately 17 feet from the ground to the roof eaves. He
30
31 observed a document at the work site that did not describe the fall protection hazards specific to
32
33 that work site. During his investigation, Mr. Adams learned that Washington Cedar did not conduct
34
35 weekly safety meetings. On April 10, 2003, the Department issued Citation and Notice No.
36
37 306050873 to Washington Cedar & Supply Co., Inc., alleging a repeat serious violation of
38
39 WAC 296-155-24510, a repeat serious violation of WAC 296-155-24505(2), and a general violation
40
41 of WAC 296-155-110(5).

42
43
44
45
46 ¹ Washington Cedar presents essentially the same arguments in this case that it made in *Washington Cedar & Supply*
47 *Co., Inc. v. Department of Labor & Indus.*, 119 Wn. App. 906 (2004), and the unpublished portion of that decision,
Docket No. 29666-7-II (2004). Washington Cedar raises as different in this case the argument that the affirmative
defense of impossibility or infeasibility applies.

1 **Burden of Proof**

2
3 It is the Department's initial burden to present sufficient evidence to establish a prima facie
4 case that the alleged violations occurred, and to establish that the corresponding assessed
5 penalties were correct. WAC 263-12-115(2)(b). Washington Cedar is cited for an alleged repeat
6 serious violation of WAC 296-155-24510 and an alleged repeat serious violation of
7 WAC 296-155-24505(2). The Department must establish for each serious violation alleged (1) the
8 cited standard applies; (2) the requirements of the standard were not met; (3) employees were
9 exposed to, or had access to, the violative condition; (4) the employer knew or through the exercise
10 of reasonable diligence, could have known, of the violative condition; and (5) "there is a substantial
11 probability that death or serious physical harm could result" from the violative condition.
12
13 *Washington Cedar & Supply Co., Inc. v. Department of Labor & Indus.*, 119 Wn. App. 906, 914
14
15 (2004); citing *D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 694 (2nd Cir. 1997).
16
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24

25 For a repeat violation, the Department must show that the employer has previous violation(s)
26 of any similar safety or health standard promulgated under the authority of RCW 49.17. A penalty
27 may be assessed for each violation. RCW 49.17.180(1); *Washington Cedar & Supply Co. Inc. v.*
28 *Department of Labor & Indus.*, 119 Wn. App. 906, 918 (2004).
29
30
31
32

33 **Citation Item No. 1-1a**
34 **Repeat Serious Violation of WAC 296-155-24510**

35 WAC 296-155-24510 provides, in part:
36
37

38 When employees are exposed to a hazard of falling from a location 10 feet
39 or more in height, the employer shall ensure that fall restraint, fall arrest
40 systems or positioning device systems are provided, installed, and
41 implemented according to the following requirements.
42

- 43 (1) Fall restraint protection shall consist of . . . :
- 44 (b) Safety belts and/or harness attached to securely rigged restraint
- 45 lines.
- 46
- 47

1 WAC 296-155-24510(1). The remainder of WAC 296-155-24510(1) sets forth the technical
2 specifications for the fall restraint system hardware.
3

4
5 The Department stipulates that it has not cited the employer for any deficiency with the fall
6 restraint hardware. 2/24/04 Tr. at 37. The citation is based upon the observation of an employee of
7 Washington Cedar on a roof, approximately 17 feet from the ground, working without being tied off.
8 Board Exhibit No. 1 (first two photographs) contains two photographs showing the employee
9 working on that roof without being tied off to a lanyard and anchor. These photographs are not in
10 dispute.
11
12
13
14
15

16
17 The cited standard applies. A Washington Cedar employee is on a roof without being
18 secured by a fall protection system. The standard has been violated. The Washington Cedar
19 employee was exposed to the hazard from which the standard was designed to protect.
20 Washington Cedar knew, or reasonably should have known, of the violative condition from the
21 employee's prior violation, and multiple violations by other employees. Rick Hedlund conceded that
22 a fall from the roof probably would result in serious injury or death to the employee. 2/24/04 Tr. at
23 143. He also read from the third page of Washington Cedar's "Safety Incentive Program" that
24 failure to use the fall protection system provided "may even possibly be a life threatening situation."
25 2/24/04 Tr. at 42; Board Exhibit No. 4 at 3.
26
27
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31
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33

34
35 The Department has met its prima facie burden. Washington Cedar was properly cited for
36 serious violation of WAC 296-155-24510.
37

38
39 Washington Cedar argues that it should not be held in violation because there were no
40 deficiencies with the fall protection hardware. That argument is without merit. WAC 296-155-24510
41 requires that the employer not only provide hardware with the correct specifications, but that the
42 employer "shall ensure" that the proper hardware is installed and implemented. Regardless of the
43
44
45
46
47

1 proper specifications of the hardware, the employer still must ensure that its employees utilize that
2 hardware to be secure while working on the roof.
3

4
5 Washington Cedar argues that the employee misconduct defense applies. The test,
6 however, is unpreventable, unforeseen employee misconduct. *In re Jeld-Wen of Everett*, BIIA
7 Dec., 88 W144 (1990). Washington Cedar has had knowledge that its employee, Mr. Stewart,
8 previously violated this provision against working on a roof without being secured to a lanyard and
9 anchor. Washington Cedar has knowledge that other employees have worked on a roof without
10 being secured to a lanyard and anchor. Board Exhibit No. 3 includes seven other instances where
11 Washington Cedar employees have been found on a roof without having been secured.² Board
12 Exhibit No. 12 includes four instances where Washington Cedar employees have fallen from a roof.
13
14
15
16
17
18
19
20
21 Clearly, the conduct of its employees has been foreseeable to Washington Cedar.

22
23 Q. It is your understanding, Mr. Hedlund, that from time to time,
24 whether it's been a Department inspector or one of your in-house
25 inspectors, Washington Cedar employees have been seen or
26 observed to be working without their required fall protection, the fall
27 protection required by your own safety program; correct?

28
29 A. Correct.

30
31 Q. So you know that that occurs frequently, right?

32
33 A. Yes, which I don't like.
34

35
36 2/24/04 Tr. at 136-137. Washington Cedar has the duty to ensure compliance with
37 WAC 296-155-24510.
38

39
40 Washington Cedar had a full-time safety inspector and managers conducting inspections
41 who could have done more inspections. Board Exhibit No. 8 includes references to more
42
43
44
45

46
47 ²All appear to be after the 1999 date of violation in *Washington Cedar & Supply Co., Inc. v. Department of Labor & Indus.*, 119 Wn. App. 906 (2004); which also involved repeat serious violation based upon two prior fall protection violations.

1 inspections being done. Clearly, the conduct of its employees has not been unpreventable by
2
3 Washington Cedar.

4
5 Had the conduct of its employee been unforeseen, unpreventable employee misconduct,
6
7 pursuant to RCW 49.17.120(5), still requires the employer to show the existence of (1) a thorough
8
9 safety program including work rules designed to prevent the violation, (2) adequate communication
10
11 of these rules to employees, (3) steps to discover violations of its safety rules, and (4) effective
12
13 enforcement of its safety program. *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990).

14
15 Washington Cedar's safety program is deficient. It does not prevent violation as evidenced
16
17 by the repeated violations. There is inadequate communication.³ There is ineffective enforcement.

18
19 Washington Cedar's Safety Incentive Program applies to random safety inspections of the
20
21 jobsite, and includes that inspections are rated on a scale of 0-3. A "0" results in a written warning
22
23 and the deduction of \$50 from the \$150 quarterly bonus. A "1" is the equivalent of two verbal
24
25 warnings. A "2" results in a verbal warning. Four verbal warnings are the equivalent of a "0"
26
27 finding. Two "0" findings within the same quarter are required for loss of the full \$150 bonus, and
28
29 "may also be subject to suspension without pay." Board Exhibit No. 4 at 1.

30
31 Mr. Stewart was not disciplined for poor random safety inspection ratings. His first fall
32
33 protection violation, on January 9, 2003, was designated a warning. The warning was not
34
35 designated verbal or written. Board Exhibit No. 11. Mr. Stewart's second fall protection violation
36
37 resulted in a verbal warning. 2/24/04 Tr. at 57: "So I [had] probably spoken to him to not do it
38
39 again."

40
41 Since a fall protection violation can result in a verbal warning, under Washington Cedar's
42
43 Safety Incentive Program, an employee theoretically could be found in violation of the fall protection
44

45
46 ³ Consider the communication on January 27, 2003, after the two violations by Mr. Stewart and the two violations by
47 Mr. Huff: "Do nothing without a rope on!!! Not a single bundle." Board Exhibit No. 8.

1 system four times before the safety bonus is deducted by \$50. The full bonus theoretically would
2
3 be lost at eight verbal warnings, or at eight fall protection violations, per quarter.
4

5 Washington Cedar's Safety Policy and Procedure Manual has a different disciplinary
6
7 scheme. The first offense of safety procedures results in a verbal warning. The second offense
8
9 results in a letter of reprimand. The third offense could result in suspension without pay or possible
10
11 termination. 2/24/04 Tr. at 58; Board Exhibit No. 5 at 5. Mr. Hedlund stated that five or six
12
13 violations would lead to termination. 2/24/04 Tr. at 105.
14

15 Mr. Stewart was given a warning on January 10, 2003 for a fall protection violation while
16
17 working on a roof on January 9, 2003. Board Exhibit No. 11. The document reflected that
18
19 January 10, 2003 was Mr. Stewart's first warning. Under Washington Cedar's Safety Policy and
20
21 Procedure Manual, this would have been a verbal warning.⁴
22

23 An "Employee Safety Violation Report" (Board Exhibit No. 11 at 2) reflects Mr. Stewart's
24
25 second fall protection violation, on January 23, 2003. No disciplinary action is indicated in this form.
26
27 Under Washington Cedar's Safety Policy and Procedure Manual, he should have received a written
28
29 reprimand.
30

31 Under Washington Cedar's Safety Policy and Procedure Manual, an employee can violate
32
33 the fall protection system at least twice before the employee "could" be suspended without pay.
34
35 Mr. Stewart would have the opportunity of a third violation, because he did not receive his letter of
36
37 reprimand.
38

39 Under Washington Cedar's Safety Policy and Procedure Manual, an employee who violates
40
41 a safe work practice, a fall protection violation, "will be required to undergo further training and
42
43 testing to verify knowledge of safety rules;" (Board Exhibit No. 11 at 5, Section 11.0) and further
44
45
46
47

⁴ There is no reference within the Safety Policy and Procedure Manual stating that violation of manual procedure will result in a deduction from the safety bonus.

AS

1 training is required when "inadequacies in an affected employee's knowledge or use of fall
2 protection systems or equipment indicate that the employee has not retained the requisite
3 understanding or skill." Board Exhibit No. 11 at 63, Section 6.0. Mr. Stewart was not re-trained
4 after either fall protection violation. 2/24/04 Tr. at 129.
5
6

7
8
9 Board Exhibit No. 9 includes inspection reports finding another Washington Cedar employee
10 in violation of the fall protection system. That other employee was found during safety inspections
11 to be working on a roof without being tied off on November 11, 2002 and December 27, 2002. He
12 was not re-trained after either violation. 2/24/04 Tr. at 134-135.
13
14

15
16
17 Washington Cedar's Safety Incentive Program applies to random safety inspections of the
18 jobsite. It is not limited to the employee actually on the roof. The rating of the jobsite should have
19 impacted both employees at the jobsite.
20
21

22
23 Rick Hedlund conceded that Mr. Pope, Washington Cedar's other employee at the worksite
24 on January 23, 2003, was the driver and as such, was the spokesman and lead person at the site
25 (2/24/04 Tr. at 117) and the enforcer of the safety policies and procedures (2/24/04 Tr. at 131).
26
27 Mr. Hedlund stated that Mr. Pope failed his company duty in not correcting Mr. Stewart to hook onto
28 the lanyard and be anchored to the roof. 2/24/004 Tr. at 118. He stated that Mr. Pope had not
29 been trained for the responsibility of being the lead person. 2/24/04 Tr. at 117. He stated that
30 Mr. Pope should have been disciplined. 2/24/04 Tr. at 131.
31
32

33
34
35 Washington Cedar's contentions:
36

37
38
39 Washington Cedar initially argued that the provisions of WAC 296-155-24510 do not apply
40 because WAC 296-155-24515 does not require a fall protection system when the employee is
41 working on a "low-pitch roof." The Court of Appeals in *Washington Cedar & Supply Co., Inc. v.*
42 *Department of Labor & Indus.*, 119 Wn. App. 906 (2004) found, in part, that this exception did not
43
44
45
46
47

1 apply to Washington Cedar because it did not show that it had a safety monitor system in place in
2
3 1999.

4
5 In this case, there is no testimony establishing that the roof met the definition of "low-pitch
6
7 roof" as set forth in WAC 296-155-24503. Mr. Hedlund conceded that Washington Cedar did not
8
9 have a safety monitor system, and only used the fall protection system. 2/24/04 Tr. at 51, 136. As
10
11 this argument does not appear within Washington Cedar's trial brief, I will presume that it has
12
13 conceded the lack of factual basis for continuing this argument.

14
15 Washington Cedar argues that the violation should be excused as de minimus, pursuant to
16
17 RCW 49.17.120(2).

18
19 A de minimus violation is one that has "no direct or immediate
20 relationship to safety of health." RCW 49.17.120(2). Because a fall
21 here could have resulted in serious physical harm, Washington
22 Cedar's argument that the violation was de minimus fails.

23
24 *Washington Cedar & Supply Co., Inc. v. Department of Labor & Indus.*, 119 Wn. App. 906, 918
25
26 (2004). Again, Rick Hedlund conceded that a fall from the roof probably would result in serious
27
28 injury to the employee. 2/24/04 Tr. at 143. He also read from the third page of Washington Cedar's
29
30 "Safety Incentive Program" that failure to use the fall protection system provided "may even possibly
31
32 be a life threatening situation." 2/24/04 Tr. at 42; Board Exhibit No. 4 at 3. There is no factual basis
33
34 for claiming a de minimus violation.

35
36 Washington Cedar argues that infeasibility or impossibility applies to obviate its
37
38 non-compliance with the fall protection standards. It argues that delivery of materials is a minor part
39
40 of its business, offered as a service to its customers. It argues that the cost of monitoring its
41
42 employees better would be economically infeasible.

43
44 It is reasonable to infer that Washington Cedar has invested a significant amount of financial
45
46 resources in procuring and operating trucks specially manufactured with conveyors for the purpose
47
of delivering roofing materials to roof tops. The Auburn store alone has four trucks making

1 approximately eight thousand deliveries of roofing materials per year. 2/24/04 Tr. at 140. Delivery
2
3 is not a minor part of Washington Cedar's business. Mr. Hedlund describes his business as sales
4
5 and delivery. 2/24/04 Tr. at 32.

6
7 Washington Cedar has a full-time safety inspector. 2/24/04 Tr. at 78. Mr. Hedlund and
8
9 assistant managers also do inspections. 2/24/04 Tr. at 32, 36. Board Exhibit No. 8 includes
10
11 references to more inspections needing to be done and going to be done.

12
13 Washington Cedar cites to *Bancker Const. Corp. v. Reich*, 31 F.3d 32 (2nd Cir. 1994) as
14
15 supporting this final argument. That case, however, does not support a theory of economic
16
17 infeasibility.

18
19 It is an affirmative defense to a charge of violating an OSHA standard that
20 compliance was impossible or infeasible. The cited employer bears the
21 burden of showing that compliance with the standard's literal requirements
22 was impossible or would have precluded performance of the work.
23 [citation omitted] The employer also must show that it used alternative
24 means of protection not specified in the standard or that alternative means
25 were unavailable.

26
27 *Bancker Const. Corp.*, at 34. Washington Cedar provides no authority that this OSHA affirmative
28
29 defense would apply to a WISHA fall protection violation. It provides no evidence of impossibility to
30
31 comply with the literal requirements of fall protection. It provides no evidence of an alternative
32
33 means for compliance, and does not establish the absence of an alternative means. Again, the
34
35 affirmative defense is impossibility or infeasibility of performance, not economic impracticability.
36
37 Compliance with the literal requirement of ensuring that employees are secured to lanyards and
38
39 anchors while working on roofs, however, is not impossible, and requiring that employees be tied off
40
41 does not prevent them from working.

42
43 The citation against Washington Cedar for violation of WAC 296-155-24510 has been
44
45 established by a preponderance of the evidence. The violation is a repeat serious violation. Board
46
47 Exhibit No. 3 contains seven prior citations against Washington Cedar for violation of

1 WAC 296-155-24510. Larry Adams did not consider one of the seven in his calculation of repeat
2
3 violations. He stated that the repeat multiplier then should be six instead of the seven he utilized on
4
5 the penalty worksheet. 2/17/04 Tr. at 36.

6
7 **Citation Item No. 1-1b**
8 **Repeat Serious Violation of WAC 296-155-24505(2)**
9

10 WAC 296-155-24505 provides, in part:

- 11
12 (1) The employer shall develop and implement a written fall protection
13 work plan including each area of the work place where the
14 employees are assigned and where fall hazards of 10 feet or more
15 exist.
16
17 (2) The fall protection work plan shall:
18 (a) Identify all fall hazards in the work area . . .
19 (g) Be available on the job site for inspection by the department.
20

21 WAC 296-155-24505.

22
23 On January 23, 2003, Larry Adams observed a document at the work site that did not
24
25 describe the fall protection hazards specific to that work site. The Washington Cedar form simply
26
27 had a vertical line down through the far right column. No specific item was checked. (Board Exhibit
28
29 No. 1, fifth photograph.) Rick Hedlund conceded that the form was not filled out correctly.
30
31 2/24/04 Tr. at 73. He stated that the failure to fill out the form properly should have resulted in a
32
33 reprimand. 2/24/04 Tr. at 74.

34
35 The violation is serious. An employee is at risk of falling when he or she is unaware of where
36
37 the danger points are located. As noted above, Washington Cedar concedes that a fall from a roof
38
39 probably would result in serious injury. Board Exhibit No. 3 includes the repeat violations of
40
41 WAC 296-155-24505.

42
43 The Department has met its burden with regard to Citation Item 1-1b. The penalty is grouped
44
45 with Citation Item 1-1a.
46
47

Citation Item No. 2-1
General Violation of WAC 296-155-110(5)

WAC 296-155-110 provides, in part:

(1) Exemptions. Workers of employers whose primary business is other than construction, who are engaged solely in maintenance and repair work, including painting and decorating, are exempt from the requirement of this section provided:

- (a) The maintenance and repair work, including painting and decorating, is performed on the employer's premises, or facility.
 - (b) The length of the project does not exceed one week.
 - (c) The employer is in compliance with the requirements of WAC 296-800-140 Accident prevention program, and WAC 296-800-130, Safety committees and safety meetings . . .
- (5) Every employer shall conduct crew leader-crew safety meetings as follows:
- (a) Crew leader-crew safety meetings shall be held at the beginning of each job, and at least weekly thereafter.

WAC 296-155-110. WAC 296-800-140 requires that the employer have a written accident prevention program that is effective in practice. WAC 296-800-14020.

The proviso of WAC 296-155-110(1) is not an either/or exemption. Washington Cedar fails to have an accident prevention program that is effective in practice, even though its delivery jobs are typically not over a few hours. It is not exempt from safety meetings at the beginning of each job, and at least weekly thereafter. Washington Cedar concedes that it did not have at least weekly safety meetings. 2/24/04 Tr. at 125; Board Exhibit No. 8. The requirement is for a safety meeting at the beginning of each job.

The Department has met its burden with respect to this general violation. No penalty has been assessed.

Assessment of Penalty

When the Department has grouped multiple items in a violation, the vacation of one item does not necessarily result in elimination of the penalty. If the remaining item supports a penalty,

1 the penalty will be assessed. *In re Tom Whitney Construction*, BIIA Dec., 01 W0262 (2002). In this
2
3 matter, both Citation Item 1-1a and Citation Item 1-1b have been proven. The Department then
4
5 must prove that the proposed penalties for those citation items are correct.
6

7 In assessing a penalty, the relative severity and probability of a violative condition first are
8
9 determined. Severity assessments are based on the most serious injury/illness or disease that
10
11 could reasonably be expected to result from a hazardous condition. Mr. Adams recommended a
12
13 rating of 5 for severity. There is no dispute that if an employee fell from a roof that serious injury
14
15 could result. A rating of 5 is appropriate in this circumstance.
16

17 A probability determination includes identifying the: number and frequency of employees,
18
19 proximity, working conditions/weather, number of instances, skill level/employee awareness,
20
21 pace/speed/nature of task, use of personal protective equipment, and other mitigating or
22
23 contributing circumstances. Mr. Adams recommended a probability of 1. This was based, in part,
24
25 on the number of individuals working on the roof. A rating of 1 is appropriate in this circumstance.
26

27 The resulting "gravity" was a 5 and that corresponds with a \$500 base penalty. The
28
29 adjustments made to the base penalty amount were as follows: no good faith adjustment, an
30
31 adjustment for size based upon a reported workforce of 50 employees at the location, in the amount
32
33 of \$200, and no adjustment made for history. The adjusted based penalty was \$300.
34

35 Washington Cedar argues that its history should be adjusted because two of its 73 existing
36
37 claimants (116 total claims, Board Exhibit No. 12) accounted for the majority of its total claims cost,
38
39 which if factored out would reduce the firm's experience rating. I do not see the change as
40
41 sufficient to rate Washington Cedar as having a "good" history. I will defer to the Department on its
42
43 determination that Washington Cedar should be rated as "average," despite 42 previous
44
45 inspections and 73 claimants filing 116 claims in the past three years.
46
47

1 The repeat violation multiplier is six. The total assessed penalty for Citation Item No. 1-1a,
2 and Citation Item No. 1-1b would be \$1,800. This is accurate and appropriate given the evidence
3 presented at trial.
4
5

6 FINDINGS OF FACT

- 7
- 8
- 9 1. On January 23, 2003, compliance safety and health officer Larry Adams
10 of the Department of Labor and Industries conducted an inspection of a
11 worksite of Washington Cedar & Supply Co., Inc., the employer, at 4529
12 S. Alder St., Tacoma, Washington. On April 10, 2003, the Department
13 issued Citation and Notice No. 306050873 alleging the following
14 violations: Item 1-1a, a repeat serious violation of WAC 296-155-24510
15 with a penalty of \$2,100; Item 1-1b, a repeat serious violation of
16 WAC 296-155-24505(2) with the penalty grouped with Item 1-1a; and
17 Item 2-1, a general violation of WAC 296-155-110(5) with no penalty
18 assessed; for a total proposed penalty of \$2,100.

19

20 On April 16, 2003, Washington Cedar & Supply Co., Inc., mailed its
21 appeal from Citation and Notice No. 306050873 to the Safety Division of
22 the Department of Labor and Industries. The Department elected not to
23 reassume jurisdiction and on April 30, 2003, the employer's appeal was
24 transmitted to the Board of Industrial Insurance Appeals. On May 2,
25 2003, the Board issued a Notice of Filing Appeal for the appeal, and
26 assigned Docket No. 03 W0166.

- 27
- 28 2. On January 23, 2003, Washington Cedar & Supply Co., Inc., failed to
29 ensure that its employee implemented its fall protection system while
30 working on a roof that presented a fall hazard of 10 feet or more. The
31 employee, working while wearing a harness but not tied off to a lanyard
32 and anchor, was exposed to that fall hazard. Had the employee fallen
33 from the roof, the employee could have sustained serious physical
34 injury. The violation was serious.
- 35
- 36 3. The severity of the risk from the failure of Washington Cedar to ensure
37 that its employee implemented its fall protection system while working
38 on a roof that presented a fall hazard of 10 feet or more, the subject of
39 Citation Item No. 1-1a, is 5, with a probability factor of 1. The resulting
40 gravity factor of 5 produces an appropriate base penalty for this violation
41 of \$500. Washington Cedar's good faith and inspection history were
42 average. Its size entitled it to an adjustment in base penalty of minus
43 \$200. The adjusted base penalty is \$300.
- 44
- 45 4. The violation under Item 1-1a was repeat serious; therefore, the
46 adjusted base penalty is multiplied by six, for six prior similar violations,
47 for a total penalty of \$1,800.

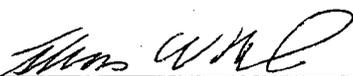
- 1 5. On January 23, 2003, Washington Cedar & Supply Co., Inc., failed to
2 have at the jobsite a fall protection plan that was specific to the hazards
3 of that jobsite. The employee was at higher risk of falling when he was
4 unaware of where the danger points were located. Had the employee
5 fallen from the roof, the employee could have sustained serious physical
6 injury or death. The violation was serious.
7
- 8 6. The failure of Washington Cedar to provide a fall protection plan specific
9 to the hazards of the work area, the subject of Citation Item No. 1-1b,
10 was a repeat serious violation. The penalty for this violation was
11 grouped with Item No. 1-1a.
12
- 13 7. At the time of inspection, Washington Cedar & Supply Co., Inc., did not
14 have an accident prevention program in place that was effective in
15 practice. It did not conduct safety meetings at the beginning of each job,
16 and at least weekly thereafter.
17
- 18 8. The failure of Washington Cedar to conduct sufficient safety meetings,
19 the subject of Citation Item No. 2-1, was a general violation. There was
20 no penalty assessed for this violation.
21
- 22 9. Washington Cedar was aware of frequent violations of fall protection
23 and of repeat violations of fall protection plan requirements. Washington
24 Cedar had a driver at each delivery designated as lead person and
25 enforcer, who could have been trained to ensure compliance with all
26 safety requirements and fall protection plan requirements. Washington
27 Cedar had a full time safety inspector and managers conducting
28 inspections who could have performed more inspections. Washington
29 Cedar's safety program is deficient. It does not prevent violation as
30 evidenced by the repeated violations, and policies and procedures that
31 allow multiple violations prior to sanction. There is inadequate
32 communication. There is ineffective enforcement. Washington Cedar
33 has not retrained employees who have violated fall protection and fall
34 protection plan requirements. The actions of these employees have
35 been foreseeable and preventable.
36
- 37 10. Washington Cedar provides no authority that the OSHA affirmative
38 defense of impossibility or infeasibility, as set forth in *Bancker Const.*
39 *Corp. v. Reich*, 31 F.3d 32 (2nd Cir. 1994), would apply to a WISHA fall
40 protection violation. It provides no evidence of impossibility to comply
41 with the literal requirements of fall protection. It provides no evidence of
42 an alternative means for compliance, nor establishes the absence of an
43 alternative means. Compliance with the literal requirement of ensuring
44 that employees are secured to lanyards and anchors while working on
45 roofs is not impossible, and requiring that employees be tied off does
46 not prevent them from working.
47

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this appeal.
2. The alleged repeat serious violation of WAC 296-155-24510 has been established.
3. A modified penalty of \$1,800 for Washington Cedar & Supply Co., Inc.'s violation of WAC 296-155-24510 is appropriate, and reflects an appropriate application of RCW 49.17.180(7).
4. The alleged repeat serious violation of WAC 296-155-24505(2) has been established. This violation is grouped with the repeat serious violation of WAC 296-155-24510, and no additional penalty is assessed.
5. The alleged general violation of WAC 296-155-110(5) has been established. No penalty for this general violation is assessed.
6. Washington Cedar & Supply Co., Inc., has failed to persuasively assert the affirmative defense of employee misconduct as set forth in RCW 49.17.120(5).
7. The fall protection violations were not de minimus.
8. Washington Cedar has failed to persuasively assert the OSHA affirmative defense of impossibility or infeasibility; nor has it established the elements of that affirmative defense as set forth in *Bancker Const. Corp. v. Reich*, 31 F.3d 32 (2nd Cir. 1994).
9. The Citation and Notice No. 306050873, issued by the Department of Labor and Industries on April 10, 2003, is modified to reduce the penalty assessed for Item 1-1a, and thereby the total penalty assessed, from \$2,100 to \$1,800; and as modified is affirmed.

It is so **ORDERED**.

Dated this 20th day of August, 2004.



THOMAS W. MERRILL
Industrial Appeals Judge
Board of Industrial Insurance Appeals

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

WASHINGTON CEDAR & SUPPLY CO INC PO BOX 1738 AUBURN, WA 98071-1738	EM1
--	-----

EA1

JERALD A KLEIN, ATTY
1425 4TH AVE #823
SEATTLE, WA 98101-2236

AG1

DAVID I MATLICK, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 2317
TACOMA, WA 98401

Dated at Olympia, Washington 8/30/2004
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 
DAVID E. THREEDY
Executive Secretary

In re: WASHINGTON CEDAR & SUPPLY CO INC
Docket No. 03 W0166

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.biia.wa.gov
(360) 753-6824

In re: WASHINGTON CEDAR & SUPPLY CO
INC

Docket No. 03 W0166

Citation and Notice No. 306050873

(Washington Industrial Safety and Health Act)
**ORDER DENYING PETITION
FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **THOMAS W. MERRILL** on **August 20, 2004**. Copies were mailed and communicated to the parties of record.

A Petition for Review was filed by the Employer on **September 21, 2004**, as provided by RCW 51.52.104.

Pursuant to RCW 51.52.106, the Board has considered the Proposed Decision and Order and Petition(s) for Review and denies the Petition(s) for Review. The Proposed Decision and Order becomes the Decision and Order of the Board.

Any party aggrieved by this order must, within thirty (30) days of the date the order is received, file an appeal to superior court in the manner provided by law. The statutes governing the filing of an appeal are contained in the "Notice to Parties" that accompanied the Proposed Decision and Order.

Dated this 11th day of October, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN Chairperson

Frank E. Fennerty Jr

FRANK E. FENNERTY, JR Member

Calhoun Dickinson

CALHOUN DICKINSON Member

c: DEPARTMENT OF LABOR AND INDUSTRIES
WASHINGTON CEDAR & SUPPLY CO INC
JERALD A KLEIN, ATTY
OFFICE OF THE ATTORNEY GENERAL

FILED
DEPT. 18
IN OPEN COURT
NOV - 2 2005
Pierce County Clerk
By _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

WASHINGTON CEDAR & SUPPLY)
CO., INC.,)
Petitioner,)
v.)
STATE OF WASHINGTON)
DEPARTMENT OF LABOR &)
INDUSTRIES,)
Respondent.)

NO. 04-2-12540-1

ORDER

THIS MATTER came on regularly for judicial review on October 20, 2005 and October 26, 2005 before the HONORABLE BEVERLY G. GRANT, Judge of the above-entitled Court. The petitioner, WASHINGTON CEDAR AND SUPPLY CO., INC., was represented by JERALD KLEIN. The respondent, DEPARTMENT OF LABOR AND INDUSTRIES of the state of Washington, was represented by ROB MCKENNA, Attorney General, per DAVID MATLICK, Assistant Attorney General. The court, after reviewing the records, having heard the argument of counsel, and otherwise being fully advised, enters the following:

I. FINDINGS OF FACT

1. This court adopts the Findings of Fact contained within the "Proposed Decision and Order" which was issued on August 20, 2004, and which the final order of the Board

1 of Industrial Insurance Appeals on October 11, 2004 under Board Docket No. 03
2 W0166.

3 **II. CONCLUSIONS OF LAW**

- 4 1. This court has jurisdiction over the parties and the subject matter to this appeal. The
5 Board of Industrial Insurance Appeals issued its order pursuant to applicable statutes
6 and rules, and this appeal was perfected pursuant to statute.
7 2. The record taken as a whole indicates that the Findings of Fact by the Board of
8 Industrial Insurance Appeals are supported by substantial evidence.
9 3. No evidentiary rulings below constitute a reversible error of law.
10 4. No substantive rulings below constitute a reversible error of law.

11 Now, therefore, it is hereby:

12 **ORDERED** that the order of the Board of Industrial Insurance Appeals is **AFFIRMED**.

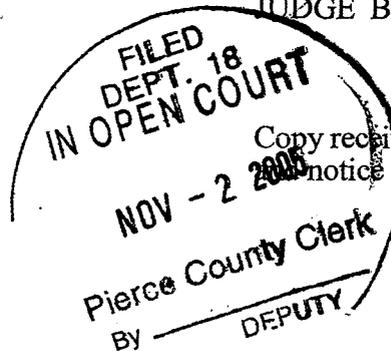
13
14 DONE IN OPEN COURT this 2 ^{November 18/05} day of ~~October~~, 2005.

15
16 *Beverly G. Grant*
17 JUDGE BEVERLY G. GRANT

18
19 Presented by:

20 ROB MCKENNA
21 Attorney General

22 *David Matlick*
23 DAVID MATLICK, WSBA # 22919
24 Assistant Attorney General



Copy received; approved for entry;
notice of presentation waived by:

JERALD A. KLEIN, WSBA # 9313
Attorney for Petitioner

WAC 296-155-24505 (Cont.)

- (e) Describe the method of providing overhead protection for workers who may be in, or pass through the area below the work site.
- (f) Describe the method for prompt, safe removal of injured workers.
- (g) Be available on the job site for inspection by the department.
- (3) Prior to permitting employees into areas where fall hazards exist the employer shall:
- (a) Ensure that employees are trained and instructed in the items described in subsection (2)(a) through (f) of this section.
- (b) Inspect fall protection devices and systems to ensure compliance with WAC 296-155-24510.
- (4) Training of employees:
- (a) The employer shall ensure that employees are trained as required by this section. Training shall be documented and shall be available on the job site.
- (b) "Retraining." When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by subsection (1) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:
- Changes in the workplace render previous training obsolete; or
 - Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or
 - Inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.

Note: The following appendices to Part C-1 of this chapter serve as nonmandatory guidelines to assist employers in complying with the appropriate requirements of Part C-1 of this chapter.

[Statutory Authority: RCW 49.17.010, .040, .050. 00-14-058 (Order 99-43), § 296-155-24505, filed 07/03/00, effective 10/01/00. Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-24505, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-24505, filed 4/25/95, effective 10/1/95; 91-03-044 (Order 90-18), § 296-155-24505, filed 1/10/91, effective 2/12/91.]

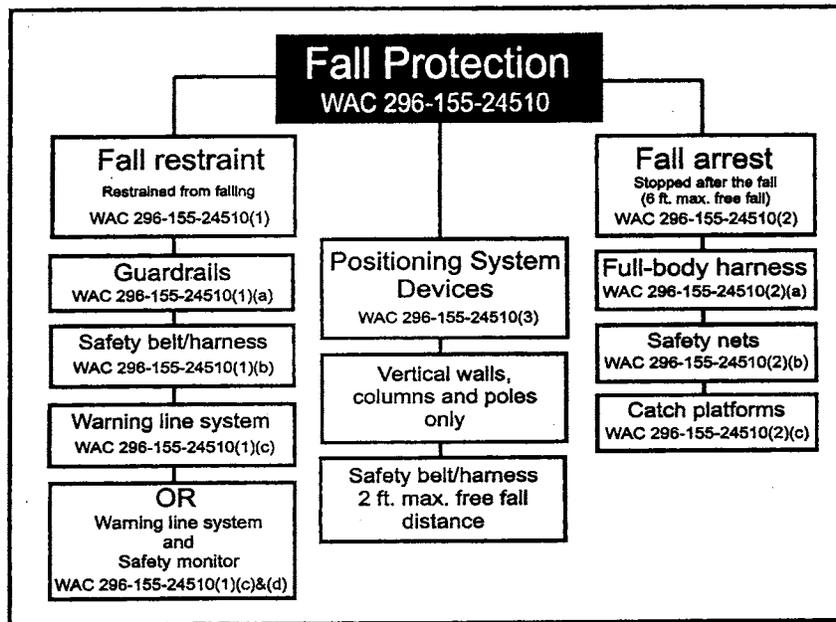
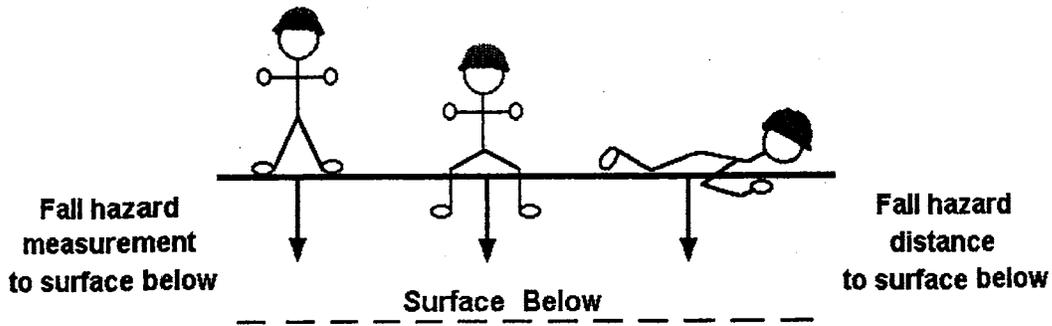
WAC 296-155-24507 Reserved

[Statutory Authority: 96-24-051, (Order 96-05), § 296-155-24507, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-24507, filed 4/25/95, effective 10/1/95.]

WAC 296-155-24510 Fall restraint, fall arrest systems.

When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented according to the following requirements.

WAC 296-155-24510 (Cont.)



- (1) Fall restraint protection shall consist of:
- (a) Standard guardrails as described in chapter 296-155 WAC, Part K.
 - (b) Safety belts and/or harness attached to securely rigged restraint lines.
 - (i) Safety belts and/or harness shall conform to ANSI Standard:
 - Class I body belt
 - Class II chest harness
 - Class III full body harness
 - Class IV suspension/position belt
 - (ii) All safety belt and lanyard hardware assemblies shall be capable of withstanding a tensile loading of 4,000 pounds without cracking, breaking, or taking a permanent deformation.

WAC 296-155-24510 (Cont.)

- (iii) Rope grab devices are prohibited for fall restraint applications unless they are part of a fall restraint system designed specifically for the purpose by the manufacturer, and used in strict accordance with the manufacturers recommendations and instructions.
 - (iv) The employer shall ensure component compatibility.
 - (v) Components of fall restraint systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.
 - (vi) Anchorage points used for fall restraint shall be capable of supporting 4 times the intended load.
 - (vii) Restraint protection shall be rigged to allow the movement of employees only as far as the sides and edges of the walking/working surface.
- (c) A warning line system as prescribed in WAC 296-155-24515(3) and supplemented by the use of a safety monitor system as prescribed in WAC 296-155-24521 to protect workers engaged in duties between the forward edge of the warning line and the unprotected sides and edges, including the leading edge, of a low pitched roof or walking/working surface.
- (d) Warning line and safety monitor systems as described in WAC 296-155-24515 (3) through (4)(f) and WAC 296-155-24520 respectively are prohibited on surfaces exceeding a 4 in 12 pitch, and on any surface whose dimensions are less than 45 inches in all directions.
- (2) Fall arrest protection shall consist of:
- (a) Full body harness system.
 - (i) An approved Class III full body harness shall be used.
 - (ii) Body harness systems or components subject to impact loading shall be immediately removed from service and shall not be used again for employee protection unless inspected and determined by a competent person to be undamaged and suitable for reuse.
 - (iii) All safety lines and lanyards shall be protected against being cut or abraded.
 - (iv) The attachment point of the body harness shall be located in the center of the wearer's back near shoulder level, or above the wearer's head.
 - (v) Body harness systems shall be rigged to minimize free fall distance with a maximum free fall distance allowed of 6 feet, and such that the employee will not contact any lower level.
 - (vi) Hardware shall be drop forged, pressed or formed steel, or made of materials equivalent in strength.
 - (vii) Hardware shall have a corrosion resistant finish, and all surfaces and edges shall be smooth to prevent damage to the attached body harness or lanyard.
 - (viii) When vertical lifelines (droplines) are used, not more than one employee shall be attached to any one lifeline.

WAC 296-155-24510 (Cont.)

Note: The system strength needs in the following items are based on a total combined weight of employee and tools of no more than 310 pounds. If combined weight is more than 310 pounds, appropriate allowances must be made or the system will not be deemed to be in compliance.

- (ix) Full body harness systems shall be secured to anchorages capable of supporting 5,000 pounds per employee except: When self retracting lifelines or other deceleration devices are used which limit free fall to two feet, anchorages shall be capable of withstanding 3,000 pounds.
- (x) Vertical lifelines (droplines) shall have a minimum tensile strength of 5,000 pounds (22.2 kN), except that self retracting lifelines and lanyards which automatically limit free fall distance to two feet (.61 m) or less shall have a minimum tensile strength of 3,000 pounds (13.3 kN).
- (xi) Horizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.
- (xii) Lanyards shall have a minimum tensile strength of 5,000 pounds (22.2 kN).
- (xiii) All components of body harness systems whose strength is not otherwise specified in this subsection shall be capable of supporting a minimum fall impact load of 5,000 pounds (22.2 kN) applied at the lanyard point of connection.
- (xiv) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.
- (xv) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.
- (xvi) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:
 - (A) Directly to the webbing, rope or wire rope;
 - (B) To each other;
 - (C) To a dee-ring to which another snap-hook or other connector is attached;
 - (D) To a horizontal lifeline; or
 - (E) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.
- (xvii) Full body harness systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.

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WAC 296-155-24510 (Cont.)

- (b) Safety net systems. Safety net systems and their use shall comply with the following provisions:
- (i) Safety nets shall be installed as close as practicable under the surface on which employees are working, but in no case more than 30 feet (9.1 m) below such level unless specifically approved in writing by the manufacturer. The potential fall area to the net shall be unobstructed.
 - (ii) Safety nets shall extend outward from the outermost projection of the work surface as follows:

Vertical distance from working levels to horizontal plane of net	Minimum required horizontal distance of outer edge of net from the edge of the working surface
Up to 5 feet	8 feet
More than 5 feet up to 10 feet	10 feet
More than 10 feet	13 feet

- (iii) Safety nets shall be installed with sufficient clearance under them to prevent contact with the surface or structures below when subjected to an impact force equal to the drop test specified in (b)(iv) of this subsection.
- (iv) Safety nets and their installations shall be capable of absorbing an impact force equal to that produced by the drop test specified in (b)(iv)(A) and (B) of this subsection.
 - (A) Except as provided in (b)(iv)(B) of this subsection, safety nets and safety net installations shall be drop-tested at the job site after initial installation and before being used as a fall protection system, whenever relocated, after major repair, and at 6-month intervals if left in one place. The drop-test shall consist of a 400 pound (180 kg) bag of sand 30 ± 2 inches (76 ± 5 cm) in diameter dropped into the net from the highest walking/working surface at which employees are exposed to fall hazards, but not from less than 42 inches (1.1 m) above that level.
 - (B) When the employer can demonstrate that it is unreasonable to perform the drop-test required by (b)(iv)(A) of this subsection, the employer (or a designated competent person) shall certify that the net and net installation is in compliance with the provisions of (b)(iii) and (b)(iv)(A) of this subsection by preparing a certification record prior to the net being used as a fall protection system. The certification record must include an identification of the net and net installation for which the certification record is being prepared; the date that it was determined that the identified net and net installation were in compliance with (b)(iii) of this subsection and the signature of the person making the determination and certification. The most recent certification record for each net and net installation shall be available at the job site for inspection.
- (v) Defective nets shall not be used. Safety nets shall be inspected at least once a week for wear, damage, and other deterioration. Defective components shall be removed from service. Safety nets shall also be inspected after any occurrence which could affect the integrity of the safety net system.

A.26

WAC 296-155-24510 (Cont.)

- (vi) Materials, scrap pieces, equipment, and tools which have fallen into the safety net shall be removed as soon as possible from the net and at least before the next work shift.
 - (vii) The maximum size of each safety net mesh opening shall not exceed 36 square inches (230 cm²) nor be longer than 6 inches (15 cm) on any side, and the opening, measured center-to-center of mesh ropes or webbing, shall not be longer than 6 inches (15 cm). All mesh crossings shall be secured to prevent enlargement of the mesh opening.
 - (viii) Each safety net (or section of it) shall have a border rope for webbing with an minimum breaking strength of 5,000 pounds (22.2 kN).
 - (ix) Connections between safety net panels shall be as strong as integral net components and shall be spaced not more than 6 inches (15 cm) apart.
- (c) Catch platforms.
- (i) A catch platform shall be installed within 10 vertical feet of the work area.
 - (ii) The catch platforms width shall equal the distance of the fall but shall be a minimum of 45 inches wide and shall be equipped with standard guardrails on all open sides.
- (3) Positioning device systems. Positioning device systems and their use shall conform to the following provisions:
- (a) Positioning devices shall be rigged such that an employee cannot free fall more than 2 feet (.61 m).
 - (b) Positioning devices shall be secured to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds (13.3 kN), whichever is greater.
 - (c) Connectors shall be drop forged, pressed or formed steel, or made of equivalent materials.
 - (d) Connectors shall have a corrosion-resistant finish, and all surfaces and edges shall be smooth to prevent damage to interfacing parts of this system.
 - (e) Connecting assemblies shall have a minimum tensile strength of 5,000 pounds (22.2 kN).
 - (f) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.
 - (g) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.
 - (h) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:
 - (i) Directly to webbing, rope or wire rope;
 - (ii) To each other;
 - (iii) To a dee-ring to which another snap-hook or other connector is attached;
 - (iv) To a horizontal lifeline; or

WAC 296-155-24510 (Cont.)

- (v) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.
- (i) Positioning device systems shall be inspected prior to each use for wear, damage, and other deterioration, and defective components shall be removed from service.
- (j) Body belts, harnesses, and components shall be used only for employee protection (as part of a personal fall arrest system or positioning device system) and not to hoist materials.
- (4) Droplines or lifelines used on rock scaling operations, or in areas where the lifeline may be subjected to cutting or abrasion, shall be a minimum of 7/8 inch wire core manila rope. For all other lifeline applications, a minimum of 3/4 inch manila or equivalent, with a minimum breaking strength of 5,000 pounds, shall be used.
- (5) Safety harnesses, lanyards, lifelines or droplines, independently attached or attended, shall be used while performing the following types of work when other equivalent type protection is not provided:
 - (a) Work performed in permit required confined spaces and other confined spaces shall follow the procedures as described in chapter 296-62 WAC, Part M.
 - (b) Work on hazardous slopes, or dismantling safety nets, working on poles or from boatswains chairs at elevations greater than six feet (1.83 m), swinging scaffolds or other unguarded locations.
 - (c) Work on skips and platforms used in shafts by crews when the skip or cage does not occlude the opening to within one foot (30.5 cm) of the sides of the shaft, unless cages are provided.
- (6) Canopies, when used as falling object protection, shall be strong enough to prevent collapse and to prevent penetration by any objects which may fall onto the canopy.

[Statutory Authority: RCW 49.17.010, .040, .050. 00-14-058 (Order 99-43), § 296-155-24510, filed 07/03/2000, effective 10/01/2000. Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-24510, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-24510, filed 4/25/95, effective 10/1/95; 95-04-007, § 296-155-24510, filed 1/18/95, effective 3/1/95; 93-19-142 (Order 93-04), § 296-155-24510, filed 9/22/93, effective 11/1/93; 91-24-017 (Order 91-07), § 296-155-24510, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-24510, filed 1/10/91, effective 2/12/91.]

WAC 296-155-24515 Guarding of low pitched roof perimeters.

- (1) General provisions. During the performance of work on low pitched roofs with a potential fall hazard greater than 10 feet, the employer shall ensure that employees engaged in such work be protected from falling from all unprotected sides and edges of the roof as follows:
 - (a) By the use of a fall restraint or fall arrest systems, as defined in WAC 296-155-24510; or
 - (b) By the use of a warning line system erected and maintained as provided in subsection (3) of this section and supplemented for employees working between the warning line and the roof edge by the use of a safety monitor system as described in WAC 296-155-24521.
 - (c) Mechanical equipment shall be used or stored only in areas where employees are protected by a warning line system, or fall restraint, or fall arrest systems as described in WAC 296-155-24510. Mechanical equipment may not be used or stored where the only protection is provided by the use of a safety monitor.

WAC 296-155-24515 (Cont.)

(2) Exceptions.

- (a) The provisions of subsection (1)(a) of this section do not apply at points of access such as stairways, ladders, and ramps, or when employees are on the roof only to inspect, investigate, or estimate roof level conditions. Roof edge materials handling areas and materials storage areas shall be guarded as provided in subsection (4) of this section.
- (b) Employees engaged in roofing on low-pitched roofs less than 50 feet wide, may elect to use a safety monitor system without warning lines.

Note: See Appendix A to Part C-1--Determining roof widths nonmandatory guidelines for complying with WAC 296-155-24515(2)(b).

(3) Warning lines systems.

- (a) Warning lines shall be erected around all sides of the work area.
 - (i) When mechanical equipment is not being used, the warning line shall be erected not less than six feet (1.8 meters) from the edge of the roof.
 - (ii) When mechanical equipment is being used, the warning line shall be erected not less than six feet (1.8 meters) from the roof edge which is parallel to the direction of mechanical equipment operation, and not less than 10 feet (3.1 meters) from the roof edge which is perpendicular to the direction of mechanical equipment operation.
- (b) The warning line shall consist of a rope, wire, or chain and supporting stanchions erected as follows:
 - (i) The rope, wire, or chain shall be flagged at not more than six foot (1.8 meter) intervals with high visibility material.
 - (ii) The rope, wire, or chain shall be rigged and supported in such a way that its lowest point (including sag) is no less than 36 inches (91.4 cm) from the roof surface and its highest point is no more than 42 inches (106.7 cm) from the roof surface.
 - (iii) After being erected, with the rope, wire or chain attached, stanchions shall be capable of resisting, without tipping over, a force of at least 16 pounds (71 Newtons) applied horizontally against the stanchion, 30 inches (0.76 meters) above the roof surface, perpendicular to the warning line, and in the direction of the roof edge.
 - (iv) The rope, wire, or chain shall have a minimum tensile strength of 200 pounds (90 kilograms), and after being attached to the stanchions, shall be capable of supporting, without breaking, the loads applied to the stanchions.
 - (v) The line shall be attached at each stanchion in such a way that pulling on one section of the line between stanchions will not result in slack being taken up in adjacent sections before the stanchion tips over.
- (c) Access paths shall be erected as follows:
 - (i) Points of access, materials handling areas, and storage areas shall be connected to the work area by a clear access path formed by two warning lines.

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WAC 296-155-24503 (Cont.)

"Self retracting lifeline" means a deceleration device which contains a drum wound line which may be slowly extracted from, or retracted onto, the drum under slight tension during normal employee movement, and which after onset of a fall, automatically locks the drum and arrests the fall.

"Shock absorbing lanyard" means a flexible line of webbing, cable, or rope used to secure a body belt or harness to a lifeline or anchorage point that has an integral shock absorber.

"Single action snap hook" means a connecting snap hook that requires a single force to open the gate which automatically closes when released.

"Snap hook" means a self-closing connecting device with a gatekeeper latch or similar arrangement that will remain closed until manually opened. This includes single action snap hooks that open when the gatekeeper is depressed and double action snap hooks that require a second action on a gatekeeper before the gate can be opened.

"Static line" - see horizontal lifeline.

"Strength member" means any component of a fall protection system that could be subject to loading in the event of a fall.

"Steep roof" means a roof having a slope greater than 4 in 12.

"Unprotected sides and edges" means any side or edge (except at entrances to points of access) of a floor, roof, ramp or runway where there is no wall or guardrail system as defined in WAC 296-155-505(7).

"Walking/working surface" means for the purpose of this section, any area whose dimensions are 45 inches or greater in all directions, through which workers pass or conduct work.

"Warning line system" means a barrier erected on a walking and working surface or a low pitch roof (4 in 12 or less), to warn employees that they are approaching an unprotected fall hazard(s).

"Work area" means that portion of a walking/working surface where job duties are being performed.

[Statutory Authority: RCW 49.17.010, .040, .050. 00-14-058 (Order 99-43), § 296-155-24503, filed 07/02/2000, effective 10/01/2000. Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-24503, filed 11/27/96, effective 02/01/97. 99-10-016, § 296-155-24503, filed 4/26/99, effective 10/1/99. 91-03-044 (Order 90-18), § 296-155-24503, filed 1/10/91, effective 2/12/91.]

WAC 296-155-24505 Fall protection work plan.

- (1) The employer shall develop and implement a written fall protection work plan including each area of the work place where the employees are assigned and where fall hazards of 10 feet or more exist.
- (2) The fall protection work plan shall:
 - (a) Identify all fall hazards in the work area.
 - (b) Describe the method of fall arrest or fall restraint to be provided.
 - (c) Describe the correct procedures for the assembly, maintenance, inspection, and disassembly of the fall protection system to be used.
 - (d) Describe the correct procedures for the handling, storage, and securing of tools and materials.

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WAC 296-155-24505 (Cont.)

- (e) Describe the method of providing overhead protection for workers who may be in, or pass through the area below the work site.
 - (f) Describe the method for prompt, safe removal of injured workers.
 - (g) Be available on the job site for inspection by the department.
- (3) Prior to permitting employees into areas where fall hazards exist the employer shall:
- (a) Ensure that employees are trained and instructed in the items described in subsection (2)(a) through (f) of this section.
 - (b) Inspect fall protection devices and systems to ensure compliance with WAC 296-155-24510.
- (4) Training of employees:
- (a) The employer shall ensure that employees are trained as required by this section. Training shall be documented and shall be available on the job site.
 - (b) "Retraining." When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by subsection (1) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:
 - Changes in the workplace render previous training obsolete; or
 - Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or
 - Inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.

Note: The following appendices to Part C-1 of this chapter serve as nonmandatory guidelines to assist employers in complying with the appropriate requirements of Part C-1 of this chapter.

[Statutory Authority: RCW 49.17.010, .040, .050. 00-14-058 (Order 99-43), § 296-155-24505, filed 07/03/00, effective 10/01/00. Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-24505, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-24505, filed 4/25/95, effective 10/1/95; 91-03-044 (Order 90-18), § 296-155-24505, filed 1/10/91, effective 2/12/91.]

WAC 296-155-24507 Reserved.

[Statutory Authority: 96-24-051, (Order 96-05), § 296-155-24507, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-24507, filed 4/25/95, effective 10/1/95.]

WAC 296-155-24510 Fall restraint, fall arrest systems.

When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed, and implemented according to the following requirements.

WAC 296-155-005 Purpose and scope.

- (1) The standards included in this chapter apply throughout the state of Washington, to any and all work places subject to the Washington Industrial Safety and Health Act (chapter 49.17 RCW), where construction, alteration, demolition, related inspection, and/or maintenance and repair work, including painting and decorating, is performed. These standards are minimum safety requirements with which all industries must comply when engaged in the above listed types of work.
- (2) If a provision of this chapter conflicts with a provision of the general safety and health standard (chapter 296-24 WAC), the general occupational health standard (chapter 296-62 WAC), or the safety and health core rules (chapter 296-800 WAC), the provision of this chapter shall prevail. When a provision of this chapter conflicts with a provision of another vertical safety standard applying to the place of work, the provisions of the vertical standard of specific application shall prevail.

[Statutory Authority: RCW 49.17.010, .040, .050, 01-11-038 (Order 99-36), § 296-155-005, filed 05/09/01, effective 09/01/01. Statutory Authority: RCW 49.17.040 and 49.17.050, 86-03-074 (Order 86-14), § 296-155-005, filed 1/21/86. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 42.30 and 43.22 RCW, 80-17-014 (Order 80-20), § 296-155-005, filed 11/13/80; Order 76-29, § 296-155-005, filed 9/30/76; Order 74-26, § 296-155-005, filed 5/7/74, effective 6/6/74.]

WAC 296-155-006 Equipment approval by nonstate agency or organization.

Whenever a provision of this chapter states that only that equipment or those processes approved by an agency or organization other than the department of labor and industries, such as the Underwriters Laboratories or the Mine Safety and Health Administration (MSHA) and the National Institute for Occupational Safety and Health (NIOSH), shall be utilized, that provision shall be construed to mean that approval of such equipment or process by the designated agency or group shall be prima facie evidence of compliance with the provisions of this chapter.

[Statutory Authority: Chapter 49.17 RCW, 94-15-096 (Order 94-07), filed 07/20/94, effective 09/20/94; Order 74-26, § 296-155-006, filed 5/7/74, effective 6/6/74.]

WAC 296-155-007 Incorporation of standards of national organization.

Whenever a provision of this chapter incorporates by reference a national code or portion thereof which has been adopted by and is currently administered by another state agency, compliance with those provisions adopted and administered by such other state agency, if from a more recent edition of such national code, will be deemed to be prima facie evidence of compliance with the provisions of this chapter.

[Order 74-26, § 296-155-007, filed 5/7/74, effective 6/6/74.]

WAC 296-155-008 Incorporation of standards of federal agency.

- (1) Whenever a provision of this chapter incorporates therein provisions of the Code of Federal Regulations (CFR) and changes thereto, or any other regulations adopted by an agency of the federal government, that provision of this chapter shall be construed to mean that compliance with such regulations shall be prima facie evidence of compliance with the provisions of this chapter.
- (2) Whenever a provision of this chapter incorporates therein provisions of the Code of Federal Regulations, the provisions so incorporated shall be those in effect on the date of effectiveness of this chapter, unless the content of the incorporating section specifies otherwise.

[Order 76-29, § 296-155-008, filed 9/30/76; Order 74-26, § 296-155-008, filed 5/7/74, effective 6/6/74.]

WAC 296-155-009 Equipment whether or not owned by, or under control of the employer.

- (1) It is the employer's responsibility to ensure that any defective equipment or tools are not used.
- (2) When any tool or piece of equipment fails to meet the requirements of any safety standard or recognized safe practice, the tool or equipment shall not be used.

[Statutory Authority: RCW 49.17.040 and 49.17.050, 86-03-074 (Order 86-14), § 296-155-009, filed 1/21/86.]

WAC 296-155-105 (Cont.)

- (3) Employees shall apply the principles of accident prevention in their daily work and shall use proper safety devices and protective equipment as required by their employment or employer.
- (4) Employees shall properly care for all personal protective equipment.
- (5) Employees shall make a report, on the day of the incident, to their immediate supervisor, of each industrial injury or occupational illness, regardless of the degree of severity.
[Order 74-26, § 296-155-105, filed 5/7/74, effective 6/6/74.]

WAC 296-155-110 Accident prevention program.

- (1) Exemptions. Workers of employers whose primary business is other than construction, who are engaged solely in maintenance and repair work, including painting and decorating, are exempt from the requirement of this section provided:
 - (a) The maintenance and repair work, including painting and decorating, is being performed on the employer's premises, or facility.
 - (b) The length of the project does not exceed one week.
 - (c) The employer is in compliance with the requirements of WAC 296-800-140 Accident prevention program, and WAC 296-800-130, Safety committees and safety meetings.
- (2) Each employer shall develop a formal accident-prevention program, tailored to the needs of the particular plant or operation and to the type of hazard involved. The department may be contacted for assistance in developing appropriate programs.
- (3) The following are the minimal program elements for all employers:

A safety orientation program describing the employer's safety program and including:

 - (a) How, where, and when to report injuries, including instruction as to the location of first-aid facilities.
 - (b) How to report unsafe conditions and practices.
 - (c) The use and care of required personal protective equipment.
 - (d) The proper actions to take in event of emergencies including the routes of exiting from areas during emergencies.
 - (e) Identification of the hazardous gases, chemicals, or materials involved along with the instructions on the safe use and emergency action following accidental exposure.
 - (f) A description of the employer's total safety program.
 - (g) An on-the-job review of the practices necessary to perform the initial job assignments in a safe manner.
- (4) Each accident-prevention program shall be outlined in written format.
- (5) Every employer shall conduct crew leader-crew safety meetings as follows:

WAC 296-155-110 (Cont.)

- (a) Crew Leader-crew safety meetings shall be held at the beginning of each job, and at least weekly thereafter.
- (b) Crew Leader-crew meetings tailored to the particular operation.
- (6) Crew leader-crew safety meetings shall address the following:
 - (a) A review of any walk-around safety inspection conducted since the last safety meeting.
 - (b) A review of any citation to assist in correction of hazards.
 - (c) An evaluation of any accident investigations conducted since the last meeting to determine if the cause of the unsafe acts or unsafe conditions involved were properly identified and corrected.
 - (d) Attendance shall be documented.
 - (e) Subjects discussed shall be documented.

Note: Subcontractors and their employees may, with the permission of the general contractor, elect to fulfill the requirements of subsection (5)(a) and (b) of this section by attending the prime contractors crew leader-crew safety meeting. Any of the requirements of subsections (6)(a), (b), (c), and (7) of this section not satisfied by the prime contractors safety meetings shall be the responsibility of the individual employers.

- (7) Minutes of each crew leader-crew meeting shall be prepared and a copy shall be maintained at the location where the majority of the employees of each construction site report for work each day.
- (8) Minutes of crew leader-crew safety meetings shall be retained by the employer for at least one year and shall be made available for review by personnel of the department, upon request.
- (9) Every employer shall conduct walk-around safety inspections as follows:
 - (a) At the beginning of each job, and at least weekly thereafter, a walk-around safety inspection shall be conducted jointly by one member of management and one employee, elected by the employees, as their authorized representative.
 - (b) The employer shall document walk-around safety inspections and such documentation shall be available for inspection by personnel of the department.
 - (c) Records of walk-around inspections shall be maintained by the employer until the completion of the job.

[Statutory Authority: RCW 49.17.010, .040, .050, 01-11-038 (Order 99-36), § 296-155-110, filed 05/09/01, effective 09/01/01. Statutory Authority: RCW 49.17.010, .040, .050, 00-08-078 (Order 99-15), § 296-155-110, filed 04/04/00, effective 07/01/00. Statutory Authority: Chapter 49.17 RCW, 94-15-096 (Order 94-07), § 296-155-110, filed 7/20/94, effective 9/20/94; 92-09-148 (Order 92-01), § 296-155-110, filed 4/22/92, effective 5/25/92. Statutory Authority: RCW 49.17.040 and 49.17.050, 86-03-074 (Order 86-14), § 296-155-110, filed 1/21/86; Order 74-26, § 296-155-110, filed 5/7/74, effective 6/6/74.]

WAC 296-155-115 Safety bulletin board. There shall be installed and maintained in every fixed establishment (the place where employees regularly report to work) employing eight or more persons, a safety bulletin board sufficient in size to display and post safety bulletins, newsletters, posters, accident statistics and other safety educational material.

[Order 74-26, § 296-155-115, filed 5/7/74, effective 6/6/74.]

WAC 296-155-120 First-aid training and certification. This section is designed to assure that all employees in this state are afforded quick and effective first-aid attention in the event of an on the job injury. To achieve this purpose the presence of personnel trained in first-aid procedures at or near those places where employees are

Safety Committees / Safety Meetings

WAC 296-800-130

Rules

WAC 296-800-13025

Follow these rules to conduct safety meetings

You must:

IF:	THEN:
You have 10 or less employees OR If you have 11 or more that meet these conditions: <ul style="list-style-type: none">• Work on different shifts and 10 or less employees are on each shift OR <ul style="list-style-type: none">• Work in widely separated locations and 10 or less employees are at each location	You may elect to have a safety meeting instead of a safety committee

You must:

(1) Do the following for safety meetings.

- Make sure your meetings:
 - Are held monthly. You may meet more often to discuss safety issues as they come up.
 - Have at least one management representative.

(2) Cover these topics.

- Review safety and health inspection reports to help correct safety hazards.
- Evaluate the accident investigations conducted since the last meeting to determine if the cause(s) of the unsafe situation was identified and corrected.

—Continued—



Safety Committees / Safety Meetings

WAC 296-800-130

Rules

WAC 296-800-13025 (Continued)

- Evaluate your workplace accident and illness prevention program and discuss recommendations for improvement, if needed.
- Document attendance.
- Write down subjects discussed.



Note:

There are no formal documentation requirements for safety meetings except for writing down who attended and the topics discussed.

Safety Committees
& Safety Meetings



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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent

AFFIDAVIT OF SERVICE OF THE
AMENDED BRIEF OF APPELLANT

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Attorney for Appellant
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WSBA No 9313

I, Jerald A. Klein, certify that I delivered a copy of the AMENDED BRIEF OF APPELLANT to the Respondent at its attorney's address at:

David I. Matlick, AAG
Attorney General's Office
1019 Pacific Ave., 3rd Floor
Tacoma, WA 98402-4411

delivering same to and leaving same with the receptionist between the hours of 8:00 a.m. and 5:00 p.m. on the 23rd day of January, 2006.

I certify under penalty of perjury under the Laws of the State of Washington that the above is true and correct.

Date: 1/23/06
Place: Tacoma, Washington



Jerald A. Klein, #9313
Attorney for Appellant