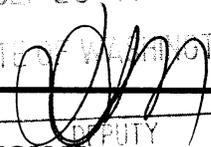


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COURT OF APPEALS
DIVISION II

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NO. 34009-7-II

STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

WASHINGTON CEDAR AND SUPPLY CO., INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
State of Washington,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. NATURE OF THE CASE.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. STATEMENT OF THE CASE3

 A. The Department’s Issuance Of The WISHA Citation3

 B. Washington Cedar’s Appeal To The Board of Industrial Insurance Appeals5

 C. Washington Cedar’s Appeal To Superior Court8

IV. SUMMARY OF ARGUMENT.....8

V. STANDARD OF REVIEW.....11

VI. ARGUMENT14

 A. The Washington Industrial Safety And Health Act (WISHA) Is Remedial Legislation Effectuating A Clear Legislative Purpose.....14

 B. Substantial Evidence And Well-Settled Law Establish That The Board Correctly Determined That Washington Cedar Was In Repeat Violation Of WAC 296-155-24510 When Its Employee Was Working While Exposed To An Approximately 17 Feet Fall Hazard Without The Use Of Any Fall Protection Equipment15

 1. The Department Proved A Repeat Serious Violation Of The Fall Protection Regulation15

 2. Enforcing Fall Protection Rules Is An Employer Duty Under WAC 296-155-2451018

 3. Washington Cedar’s Conclusory Argument That Only Its Employees And Not Washington Cedar As Employer Violated WAC 296-155-24510 Ignores

	The Regulation’s Plain Language Requirement That An “Employer Shall Ensure That . . . [Fall Protection] Systems Are . . . Implemented.”	25
4.	Washington Cedar Knew, Or Should Have Known, That Its Employees Have A Habit Of Failing To Use Fall Protection Equipment As Required By Both Company Rules And State Law	28
5.	The Department Established That The Current Violation Was A “Repeat” Of Prior Violations Of WAC 296-155-24510	30
C.	Substantial Evidence And Well-Settled Law Establishes That The Board Correctly Determined That Washington Cedar Violated WAC 296-155-24505 Because Its Work Safety Plan At The Work Site At Issue Did Not Describe The Fall Protection Hazards Specific To That Work Site	31
D.	Substantial Evidence And Well-Settled Law Establishes That The Board Correctly Determined That Washington Cedar Committed A General Violation Of WAC 296-155-110(5) Because It Did Not Hold “Crew Leader-Crew” Safety Meetings On At Least A Weekly Basis	33
E.	The Board Did Not Abuse Its Discretion In Rejecting Irrelevant Evidence Or Evidence Not Offered In Compliance With The Rules Of Evidence.....	37
1.	The Board Properly Excluded Irrelevant Evidence About The Technical Specifications Of Washington Cedar’s Fall Protection Hardware	39
2.	The Board Did Not Abuse Its Discretion In Its Other Evidentiary Rulings, And No Evidentiary Ruling Was A Constitutional Due Process Violation	40
F.	WAC 296-155-24510 Is Not Unconstitutionally Vague	46

G. Washington Cedar Fails To Establish Grounds For An Award Of Attorney Fees.....	47
VII. CONCLUSION	47

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Company of America</i> 110 Wn.2d 128, 750 P.2d 1257 (1988).....	15
<i>Bancker Const. Corp. v. Reich</i> 31 F.3d 32 (2 nd Cir. 1994).....	44
<i>Brock v. L.E. Myers Co.</i> 818 F.2d 1270, (6th Cir. 1987) <i>cert. denied</i> , 484 U.S. 989, 108 S. Ct. 479 (1987).....	24
<i>Callecod v. Washington State Patrol</i> 84 Wn. App. 663, 929 P.2d 510 (1997).....	12
<i>Cf. Nat'l Realty & Constr. Co., Inc. v. Occupational Safety & Health Rev. Comm'n</i> 489 F.2d 1257, n.36 (D.C. Cir. 1973).....	28
<i>City of Pasco v. PERC</i> 119 Wn.2d 504, 833 P.2d 381 (1992).....	13
<i>Cobra Roofing Services, Inc. v. Dep't of Labor & Indus.</i> 122 Wn App. 402, 97 P.3d 17 (2004) <i>aff'd in part and reversed in part</i> 157 Wn.2d 90, 135 P.3d 913 (2006).....	passim
<i>Cowiche Canyon Conservancy v. Bosley</i> 118 Wn.2d 801, 828 P.2d 549 (1992).....	34
<i>Cox v. Spangler</i> 141 Wn.2d 431, 5 P.3d 1265, 22 P.3d 791 (2000).....	38
<i>Dep't of Labor & Indus. v. Kaiser Aluminum & Chemical Corp.</i> 111 Wn. App. 771, 48 P.3d 324 (2002).....	41, 42
<i>Fria v. Dep't of Labor & Indus.</i> 125 Wn. App. 531, 105 P.3d 33 (2004).....	45

<i>Inland Foundry v. Dep't of Labor & Indus.</i> 106 Wn. App. 333, 24 P.3d 424 (2001).....	46
<i>Lee Cook Trucking and Logging v. Dep't of Labor & Indus.</i> 109 Wn. App. 471, 36 P.3d 558 (2001).....	passim
<i>Longview Fibre Co. v. Dep't of Ecology</i> 89 Wn. App. 627, 949 P.2d 851 (1998).....	46
<i>Maplewood Estate, Inc. v. Dep't of Labor & Indus.</i> 104 Wn. App. 299, 17 P.3d 621 (2000).....	35
<i>Multicare Med. Ctr. v. Dep't of Social & Health Services</i> 114 Wn.2d 572, 790 P.2d 124 (1990).....	12
<i>Robles v. Dep't of Labor & Indus.</i> 48 Wn. App. 490, 739 P.2d 727 (1987).....	45
<i>Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Serv.</i> 82 Wn. App. 495, 919 P.2d 602 (1996).....	35
<i>Seay v. Chrysler Corp.</i> 93 Wn.2d 319, 609 P.2d 1382 (1980)	38
<i>Sintra, Inc. v. City of Seattle</i> 131 Wn.2d 640, 935 P.2d 555 (1997)	38
<i>State v. Cooper</i> 156 Wn.2d 475, 128 P.3d 1234 (2006).....	20
<i>State v. Sullivan</i> 143 Wn.2d 162, 19 P.3d 1012 (2001).....	46
<i>Stute v. P.B.M.C., Inc.</i> 114 Wn.2d 454, 788 P.2d 545 (1990)	14
<i>Superior Asphalt Concrete v. Dep't of Labor & Indus.</i> 84 Wn. App. 401, 929 P.2d 1120 (1996).....	13

<i>Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.</i> 119 Wn. App. 906, 83 P.3d 1012 (2004) review denied, 152 Wn.2d 1003 (2004).....	8
<i>Washington Cedar I</i>	passim
<i>William Dickson Co. v. Puget Sound Air Pollution Control Auth.</i> 81 Wn. App. 403, 914 P.2d 750 (1996).....	12

Statutes

RCW 4.84.340(3)	47
RCW 49.17.....	14
RCW 49.17.060(1).....	41
RCW 49.17.150(1).....	12
RCW 49.17.180	20
WAC 155-110(5)	36
WAC 263-12-115(4).....	38
WAC 296-155-005(1).....	34, 35
WAC 296-155-110	5, 34, 36
WAC 296-155-110(5).....	passim
WAC 296-155-200(2).....	26
WAC 296-155-24505.....	passim
WAC 296-155-24505(2).....	4, 5
WAC 296-155-24505(2)(a)	32
WAC 296-155-24510	passim

WAC 296-800-35040	15, 30
WAC 296-900-14020.....	15

Other Authorities

<i>American Heritage Dictionary</i> 681 (1970).....	47
Occupational Safety and Health Act (OSHA).....	15
Washington Industrial Safety and Health Act (WISHA).....	1

Rules

RAP 10.3(a)(5).....	34
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I. NATURE OF THE CASE

This case presents an employer's appeal from a citation issued by the Department of Labor and Industries (Department) charging the employer, Washington Cedar and Supply Co., Inc. (Washington Cedar), for violations of the following worker safety regulations promulgated under the Washington Industrial Safety and Health Act (WISHA): (1) a repeat, serious violation of WAC 296-155-24510, a fall hazard protection regulation; (2) a repeat, serious violation of WAC 296-155-24505, a regulation requiring a written fall protection work plan to identify all fall hazards in the work area; and; (3) a general violation of WAC 296-155-110(5), a regulation requiring "crew leader-crew" safety meetings on at least a weekly basis.

Washington Cedar challenges numerous aspects of the decisions of the Board of Industrial Insurance Appeals (Board) and the trial court that upheld the citation. Washington Cedar's primary argument is a novel, unsupported theory that WISHA employers whose workers go on roofs and other high places are not responsible for most of the actions of, or the safety of, their employees. There is, however, no basis in law or fact for this or Washington Cedar's other claims that it did not violate the regulations for which it was cited, nor is there any merit to its arguments that the violations were not "repeat," "serious" violations, that it was prevented from presenting supporting evidence for its would-be affirmative defenses, or that one of the

cited standards is unconstitutionally vague. The decisions below should therefore be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

Consistent with its shotgun approach to this matter, Washington Cedar alleges some 17 errors with respect to the decisions below. In fact, the issues in this case are much simpler than Washington Cedar would have the Court believe.

1. Does substantial evidence and well-settled law support the decision of the Board and Trial Court that the Department properly cited Washington Cedar for a repeat, serious violation of WAC 296-155-24510, the WISHA regulation requiring employers to ensure that employees use fall protection equipment when performing work on a roof that exposes them to a hazard of falling from a distance of ten feet or higher?

2. Does substantial evidence and well-settled law support the decision of the Board and Trial Court that the Department properly cited Washington Cedar for a serious, repeat violation of WAC 296-155-24505, the WISHA regulation requiring a fall protection work plan to identify all fall hazards in the work area?

3. Does substantial evidence and well-settled law support the decision of the Board and Trial Court that the Department properly cited Washington Cedar for a general violation of WAC 296-155-110(5), the

WISHA regulation requiring “crew leader-crew” safety meetings on at least a weekly basis?

4. Did Washington Cedar establish that the Board abused its discretion in any evidentiary decisions, including evidentiary decisions that involved the employer’s alleged attempt to establish the affirmative defenses of infeasibility of compliance with a Department regulation?

5. Did Washington Cedar fail to establish beyond a reasonable doubt that WAC 296-155-24510 is unconstitutionally vague?

III. STATEMENT OF THE CASE

A. The Department’s Issuance Of The WISHA Citation

The citation at issue in this appeal was issued as the result of a Department inspection on January 23, 2003. CABR Adams at 13.¹ At that time, Department inspector, Larry Adams discovered a Washington Cedar employee working on a roof at a height of approximately 17 feet without the required fall protection at a job located at 4529 South Alder Street in Tacoma; Mr. Adams observed the employee wearing a fall restraint harness, but the harness was not tied off to a lanyard tied to a roof anchor. CABR Adams at 13, 20-21, 45; Ex. 1. Mr. Adams also

¹ All references to testimony contained in the certified appeal board record (CABR) will be to the small typewritten numbers on the lower right side of the page preceded by the name of the witness. All references to exhibits will be to the exhibit number as designated by the Board. All references to pleadings and other documents made a part of the certified appeal board record will be to the large machine numbers stamped on the lower right side of the page.

determined that the fall protection work plan in the employees' possession contained the job site address and a signature of one of the workers, but had no information specific to the hazards faced by those employees at that site. CABR Adams at 23-24, 26; Ex. 1. Additionally, after reviewing documentation provided by the employer, Mr. Adams discovered that Washington Cedar did not hold weekly crew safety meetings. CABR Adams at 37-41; Ex.1.

As a result of Mr. Adams' inspection, the Department issued a citation listing three violations of WISHA regulations, and assessed a penalty for the repeat, serious violation of the fall protection violation WAC 296-155-24510.² CABR Adams at 19; Ex. 2. Mr. Adams determined that the fall protection violation was a "serious" WISHA violation because a fall off a roof from a height of 10 feet or above could result in severe and possibly permanent disability to a person's legs, back, and/or neck. CABR Adams at 22; Exhibit 2; *see* RCW 49.17.180(6) *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 481, 36 P.3d 558 (2001) (defining "serious" violation). Additionally, the violation was a "repeat" because this employer had received prior citations for the same or substantially similar

² For purposes of the citation, the work plan violation of WAC 296-155-24505(2) was grouped with the violation of WAC 296-155-24510, with no additional penalty assessed.

hazard which had become final within the three years preceding issuance of the citation. CABR Adams at 31-36; Ex. 3.

Mr. Adams further determined that he had observed a repeat serious violation of WAC 296-155-24505(2). CABR Adams at 22; Ex. 3. A failure to properly develop and implement a work plan that identifies all fall hazards in the specific work area could directly lead to workers failing to implement required fall protection, and that in turn could lead to serious injury if a worker were to fall more than 10 feet from a roof. CABR Adams at 25-26. Regarding the weekly safety meeting provision of WAC 296-155-110, Mr. Adams determined that this was a “general” violation, and he did not assess a penalty. CABR Adams at 37-38.

B. Washington Cedar’s Appeal To The Board of Industrial Insurance Appeals

Washington Cedar appealed the Citation and Notice to the Board, and a hearing was held. Following the hearing, on August 20, 2004, a Proposed Decision and Order affirmed all of the citations issued by the Department. CABR at 116. The Industrial Appeals Judge (IAJ) determined that Washington Cedar was properly cited for a violation of WAC 296-155-24510 (failure to ensure implementation of fall protection equipment) because its employee was in fact working at a height in excess

of 10 feet without the use of any fall protection equipment, and Washington Cedar reasonably should have known of this hazardous condition based on past actions of both this particular employee and other employees. CABR at 120-124, 131-132.

The IAJ also determined that Washington Cedar was properly cited for a violation of WAC 296-155-24505 because there was no identification or documentation by Washington Cedar personnel of specific fall hazards at the work site, and because a Washington Cedar supervisor conceded that the written fall protection work plan form was not filled out correctly. CABR at 127, 131-132; CABR Hedlund at 73.

Additionally, the IAJ determined that the Department properly cited Washington Cedar for a violation of WAC 296-155-110(5) because, as Washington Cedar conceded, it did not hold the required crew leader-crew safety meetings on a weekly basis. CABR at 128, 131-132; CABR Hedlund at 125; Ex. 8.

Further, the IAJ agreed also with the Department's penalty assessment, except that the judge found that the proper repeat multiplier for the penalty was "six" rather than the "seven" utilized by Mr. Adams in his penalty assessment. CABR at 129-130; Exs. 2, 3. Thus, the judge modified the penalty amount (which is not at issue in Washington Cedar's

appeal to this Court) by reducing the total penalty assessed from \$2,100 to \$1,800. CABR at 130.

Addressing the employer's affirmative defense of employee misconduct, the IAJ determined that Washington Cedar's safety program in effect as of the time of the Department inspection was deficient. CABR at 121-124, 131-132. First, the judge in part determined that the type of violations in question were foreseeable to Washington Cedar, as it was aware of prior violations by its employees of the same fall protection provisions. CABR at 121, 131; CABR Hedlund at 136-137. Next, the judge concluded that the evidence of numerous prior violations was evidence that this employer did not adequately communicate the provisions of its safety program. CABR at 122, 131. Further, evidence exposed that Washington Cedar did not always follow its own written discipline program, and in fact did not even follow the program with the worker caught by Mr. Adams while not wearing fall protection. CABR at 122; CABR Hedlund at 57; Ex. 11. The judge ultimately determined that Washington Cedar failed to establish that in practice it effectively enforced its safety program. CABR at 131-132.

Also addressing the employer's affirmative infeasibility defense to the fall protection citation, the IAJ determined that Washington Cedar failed to establish the impossibility of compliance with the literal

requirements of the fall protection safety regulation, and that this standard, not economic impracticality as suggested by Washington Cedar's argument, is the standard to be applied. CABR at 125-126, 131-132.

Washington Cedar petitioned the 3-member Board seeking review of the IAJ's proposed decision. CABR at 2-113. The Board denied review and adopted the IAJ's proposed decision as its final decision. CABR at 1.

C. Washington Cedar's Appeal To Superior Court

Washington Cedar filed a petition for judicial review in Pierce County Superior Court. CP at 1. After review on November 2, 2005, the Court entered Findings of Fact, Conclusions of Law and an Order affirming the Board's decision and again upholding the citation. CP at 2. Washington Cedar now appeals to this Court, raising arguments that it has lost at every stage of these proceedings and many of which have been rejected in its prior appeals from prior citations. *See, e.g., Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 83 P.3d 1012 (2004), *review denied*, 152 Wn.2d 1003 (2004) (*Washington Cedar I*).

IV. SUMMARY OF ARGUMENT

The Department is responsible for enforcing WISHA. In this role, the Department enacts rules that protect workers from unsafe working

conditions, and inspects employers to ensure that they use safe work practices. One of the rules the Department enacted requires that when employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that a fall protection system is provided, installed and implemented. WAC 296-155-24510. Another rule requires that employers identify fall protection hazards and then develop and implement a written fall protection work plan for each area where employees are assigned and where fall hazards of 10 feet or more exist. WAC 296-155-24505. A third rule requires that employers conduct a crew leader-crew safety meeting at the beginning of each job and at least weekly thereafter. WAC 296-155-110(5).

In the instant case, substantial evidence in the record supports the finding that Washington Cedar failed to ensure that one of its employees installed and implemented a fall protection system according to the requirements of WAC 296-155-24510 when its employees were working on a roof where the fall distance was greater than 10 feet, and that, based on prior actions of this and other employees, Washington Cedar should have known that this would happen. Washington Cedar's employee was wearing a fall restraint harness, but the harness was not tied off to a lanyard tied to a roof anchor, thus leaving the employee exposed to a fall hazard. Washington Cedar failed to show that its failure was due to an isolated

incident of employee misconduct, or that complying with the standard's literal requirements was impossible or would have precluded performance of the work. No evidence is before this Court, nor can any reasonable argument be advanced, that it was impossible for Washington Cedar to ensure its employees install and implement fall protection systems while working on roofs.

Next, substantial evidence supports the determination that Washington Cedar failed to properly develop and implement a work plan per WAC 296-155-24505 that identified all fall hazards in the specific work area that the Department inspected on January 23, 2003. The Department's inspector, Mr. Adams, was shown a document that did not describe the fall protection hazards specific to that work site; instead, the form simply had a vertical line down through the far right column, with no specific items checked or added. CABR Adams at 23; Exhibit 1 (5th photograph). Washington Cedar's yard manager, Rick Hedlund, conceded that his employees did not fill out this work plan form correctly. CABR Hedlund at 73.

In addition, substantial evidence supports the determination that the Department correctly cited Washington Cedar for a general violation of the crew leader-crew meeting regulation, WAC 296-155-110(5). Washington Cedar's yard manager, Rick Hedlund, conceded during his

testimony that he did not hold safety meetings on a least a weekly basis with his crew. CABR Hedlund at 125.

Regarding the Board's evidentiary decisions, Washington Cedar fails to establish a manifest abuse of discretion where most of the rulings were dictated either by the Employer's reliance on an absurd interpretation of WISHA, or by the employer's failure to establish the necessary foundation for the offered evidence's admission.

Finally, Washington Cedar fails to establish beyond a reasonable doubt that the word "ensure" in WAC 296-155-24510 is unconstitutionally vague. The clear meaning of WAC 296-155-24510 is that an employer with workers exposed to a fall hazard of 10 feet or higher must ascertain and "make certain" that its employees possess *and utilize* an accepted fall protection system.

Both the Board and the Superior Court affirmed the Department citations and an assessment of a civil penalty. The Department requests that this Court do the same.

V. STANDARD OF REVIEW

Under WISHA, the Legislature enacted a "substantial evidence" standard of review for appeals to superior court, a standard that requires great deference to the Board "with respect to questions of fact":

The findings of the board or [its Industrial Appeals Judge] where the board has denied a petition or petitions for review with respect to questions of fact, if supported by *substantial evidence on the record considered as a whole, shall be conclusive.*

RCW 49.17.150(1) (emphasis added).

“Substantial evidence” has been defined as “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *William Dickson Co. v. Puget Sound Air Pollution Control Auth.*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The appellate court applies the “substantial evidence” standard directly to the record created by the administrative agency. *See, e.g., Callecod v. Washington State Patrol*, 84 Wn. App. 663, 670, 929 P.2d 510 (1997). “Agency findings of fact will be upheld if supported by evidence that is substantial when viewed in light of the whole record before the court.” *William Dickson Co.*, 81 Wn. App. at 411. Finally, “[t]he appellate court gives deference to factual decisions [rendered by agencies].” *Id.*

Rules of statutory construction “apply to the interpretation of administrative rules and regulations.” *Multicare Med. Ctr .v. Dep’t of Social & Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990). Substantial deference should be given to the Department’s interpretation of the law under WISHA. *Lee Cook Trucking & Logging*, 109 Wn. App. at 477-478 (WISHA case where Department and Board interpretations

were accepted by the Court of Appeals); *Cobra Roofing Services, Inc. v. Dep't of Labor & Indus.*, 122 Wn App. 402, 409, 97 P.3d 17 (2004), *aff'd in part and reversed in part*, 157 Wn.2d 90, 135 P.3d 913 (2006) (WISHA case where Department and Board interpretations were accepted by the Court of Appeals and Supreme Court). “[T]he agency’s interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.” *City of Pasco v. PERC*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *see also Superior Asphalt Concrete v. Dep’t of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996) (“we accord substantial weight to the agency’s legal interpretation to the extent it falls within the agency’s expertise in a special area of the law”). And, as noted in the first section of the Department’s argument immediately below, WISHA and the Department’s regulations are remedial and must be liberally construed to protect workers.³

³ Without any support in any state or federal health and safety regulation case law, Washington Cedar asserts conclusorily and nonsensically (1) that, on the rationale that no expertise bears on construing the WISHA statutes and regulations at issue in this case, no deference is due Department’s interpretation here (AB at 10); and (2) that WISHA and the Department regulations are “penal,” not remedial. These wholly unsupported propositions are absurd and must be rejected.

VI. ARGUMENT

A. **The Washington Industrial Safety And Health Act (WISHA) Is Remedial Legislation Effectuating A Clear Legislative Purpose**

This case is about clearly written, uncomplicated and basic industrial safety provisions under RCW 49.17, the Washington Industrial Safety and Health Act (WISHA). Generally, employers are required to ensure that employees working on a roof at a height of 10 feet or more above the ground use fall protection devices. WAC 296-155-24510. A violation of this regulation can be determined by quick and simple observations by a Department inspector. In addition, employers are required to identify fall protection hazards and then develop and implement a written fall protection work plan for each area where employees are assigned and where fall hazards of 10 feet or more exist. WAC 296-155-24505. Another regulation requires that employers conduct crew leader-crew safety meeting at the beginning of each job and at least weekly thereafter. WAC 296-155-110(5).

WISHA is remedial legislation designed to protect the health and safety of all workers. *See* RCW 49.17.010 Accordingly, any language in a safety standard that the Department has adopted under RCW 49.17 must be accorded an interpretation to further these purposes. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). In the instant case, the relevant

WISHA rules are WAC 296-155-24510, WAC 296-155-24505(2), WAC 296-155-110(5), and former WAC 296-800-35040.⁴

Further, the Occupational Safety and Health Act (OSHA) mandates that the Department be “as effective as” its federal counterpart. Thus, in determining what constitutes a WISHA violation, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

B. Substantial Evidence And Well-Settled Law Establish That The Board Correctly Determined That Washington Cedar Was In Repeat Violation Of WAC 296-155-24510 When Its Employee Was Working While Exposed To An Approximately 17 Feet Fall Hazard Without The Use Of Any Fall Protection Equipment

1. The Department Proved A Repeat Serious Violation Of The Fall Protection Regulation

The initial substantive issues on appeal in this matter are whether the Board correctly upheld: (1) the validity of the Department’s citation to Washington Cedar for a fall protection violation under WAC 296-155-24510, and (2) the validity of the Department classifying the violation as a “repeat” violation. CABR at 131-32. The WISHA regulation that the

⁴ Former WAC 296-800-35040 addressed reasons of increasing civil penalty amounts, including but not limited to “repeat violations,” where an employer “has been cited one of more times previously for a substantially similar hazard.” This rule was recently recodified at WAC 296-900-14020. However, there were no material changes to the issues that Washington Cedar raises and this brief will refer to the rule as it existed at the time of the inspection and the citation.”

Department charged Washington Cedar with violating establishes the following:

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 devices systems are provided, installed and implemented* according to the following requirements. . . .

WAC 296-155-24510 (emphasis added). Technical equipment requirements follow in sub-sections of the rule. *See* App. A.

To establish a *prima facie* case of a violation under WISHA, the Department must establish the following five elements:

(1) 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 I, 119 Wn. App. at 914.

A review of the record before this Court demonstrates that substantial evidence supports the conclusion that the Washington Cedar employee was working at a height in excess of 10 feet without the use of any fall protection. The Department's inspector, Larry Adams, testified that he observed a Washington Cedar employee without fall protection equipment and estimated the fall distance at approximately 17 feet. CABR Adams at

13, 20-21, 45; Ex. 1. The employer did not present any evidence to rebut Mr. Adam's testimony, thus there is no factual dispute.

Additionally, it was established without dispute that on multiple prior occasions Department inspectors have cited Washington Cedar for violations of the same fall protection safety provision. Ex. 3. Moreover, on January 9, 2003, just two weeks before the Department's inspection on January 23, 2003, the same Washington Cedar employee was discovered by his employer working on a roof without the use of required fall protection at another job site. CABR Hedlund at 126-28; Ex. 11. As explained below in subsequent subsections of this argument, these undisputed facts establish both the employer-knowledge element of the instant violations (*see infra* VI.B.4 (employer knowledge)) and the repeat nature of the violation (*see infra* VI.B.5 (repeat violation)).

Further, the evidence (and common logic) establishes that if the Washington Cedar employee were to have fallen from this roof – a distance to the ground of approximately 17 feet – there was a substantial probability of serious injury, disability, or death. CABR Adams at 45; Exs. 1, 2; *see Lee Cook Trucking & Logging*, 109 Wn. App. at 482 (holding that the “substantial probability” language in RCW 49.17.180(6) “refers to the likelihood that, should harm result from the violation, that harm *could* be death or serious physical harm”).

Thus, it was established that the fall protection standard applies, as an employee was exposed to a fall hazard of more than 10 feet. A requirement of the WISHA standard, to ensure that fall protection is *installed and implemented*, was not met by the employer, and the employee was exposed to a violative condition when the employee failed to use his fall protection equipment. Based upon numerous prior citations, Washington Cedar knew that its employees have a habit of failing to use fall protection equipment as required by both company rules and state law, and that this failure could lead to a fall resulting in a serious physical harm. A *prima facie* case was clearly established by the Department. *See Washington Cedar I*, 119 Wn. App. at 916.

In its efforts to avoid the clear *prima facie* evidence presented by the Department and to avoid the clear language of the controlling fall protection regulation, Washington Cedar advances clearly flawed statements of the evidence and the law. None of Washington Cedar's contentions or arguments has any merit.

2. Enforcing Fall Protection Rules Is An Employer Duty Under WAC 296-155-24510

Washington Cedar argues that the rule in question establishes a duty for *employees to follow* safety rules, but does not establish a duty for *employers to enforce* fall protection rules. AB at 15-31. This novel,

strained, unsupported and ultimately conclusory argument has no merit. In fact, WAC 296-155-24510 creates a specific duty for employer Washington Cedar to comply with the regulation promulgated under WISHA. *See* RCW 49.17.060(2). The plain language of WAC 296-155-24510 expressly establishes “the *employer shall ensure* that fall restraint, fall arrest systems or positioning devices systems are provided, installed and *implemented . . .*” (Emphasis added.)

Washington courts have consistently upheld citations issued to employers for violations of WAC 296-155-24510, thus implicitly if not expressly recognizing that ensuring employee compliance with this regulation is an employer’s duty. Washington Cedar ignores the fact that one of the leading cases in this area of law is this Court’s recent affirmation of one of this very employer’s prior citations under this basic safety rule. *Washington Cedar I*, 119 Wn. App. at 909 (“The Department of Labor and Industries (L&I) cited Washington Cedar and Supply (Washington Cedar) for failing to ensure that its employees were wearing fall restraints when they delivered materials onto the roof of a construction site . . . and finding no error in the Board's decision, we also affirm.”); *see also Cobra Roofing Services, Inc. v. Dep’t of Labor & Indus*, 157 Wn.2d 90, 135 P.3d 913 (2006) (court determined that Department properly cited an employer’s

fall protection safety violation under WAC 296-155-24510 as a repeat offense).

Washington Cedar's argument attempting to distinguish between "employer" and "employee" violations of WISHA standards also renders superfluous at least two statutory provisions, a result to be avoided wherever possible. *E.g., State v. Cooper*, 156 Wn.2d 475, 483, 128 P.3d 1234 (2006). First, RCW 49.17.180 provides that a "serious violation" exists:

if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

RCW 49.17.180(6).

Obviously an employer knows of violations that it commits. The only purpose of this statute is to excuse violations where employers "did not, and could not with the exercise of reasonable diligence, know of the presence of [a] violation" *committed by an employee*. Washington Cedar effectively concedes as much. AB at 39-44. If Washington Cedar were correct that only "employees" can commit WISHA violations, the "could have known" language of RCW 49.17.180(6) would be rendered meaningless.

The illogic of Washington Cedar’s argument that only employees can violate WISHA (and that employers are never responsible for actions of their individual employees) is also demonstrated by juxtaposing this theory that Washington Cedar has created against the affirmative defense of unpreventable employee misconduct that the Legislature has provided to employers in RCW 49.17.120(5). This law provides:

(5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

(i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;

(ii) Adequate communication of these rules to employees;

(iii) Steps to discover and correct violations of its safety rules; and

(iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5).

Washington Cedar argues that only employees can commit a violation of WAC 296-155-24510. *See, e.g.*, AB at 29-30. But why then, would RCW 49.17.120 allow an *employer* to defend a citation for a violation of this rule by arguing that the violation was the result of “unpreventable employee misconduct?” Obviously, this statute makes sense only if employees commit WISHA violations, in the first place, and

employers who have direct knowledge or constructive knowledge (*see infra* VI.B.4) are responsible for those violations, in the second place. Washington Cedar's argument renders RCW 49.17.120(5) meaningless and for this reason as well must be rejected. *See, e.g., Lee Cook Trucking & Logging*, 109 Wn. App. at 481.

By attempting to blame its employees for its own violations, what Washington Cedar is truly trying to establish is the affirmative defense of unpreventable employee misconduct. Of course, the firm does not actually argue that this defense applies, nor could it. Unpreventable employee misconduct requires a showing of:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5). Washington Cedar does not cite this statute – which establishes the *only* means under which an employer with an adequate, fully-communicated, and effectively-enforced safety program may escape responsibility for violations committed by an employee. Nor is there evidence in the record to support such a defense. As the IAJ observed in

the Board's Proposed Decision and Order, evidence of repeated violations of the same safety provisions, coupled with ineffective enforcement and retraining, establishes ineffective enforcement of Washington Cedar's written safety program. CABR at 121, 131.

First, while not conclusive as a matter of law, the significant number of prior citations issued by the Department to Washington Cedar for violations of the fall protection rules established under WAC 296-155-24510 believes any contention that Washington Cedar effectively enforced its safety rules. Ex. 3; *See also Washington Cedar I*, 119 Wn. App. at 911-913 (evidence of prior violations is evidence that the instant employee conduct was foreseeable and preventable). In addition to the fall protection violation discovered by Mr. Adams on January 23, 2006, the Department documented five additional prior violations of WAC 296-155-24510 which had become final within the three years preceding the instant violation and citation. Ex. 3.⁵ Moreover, on January 9, 2003, just two weeks before the Department's inspection on January 23, 2003, the same Washington Cedar employee was discovered by his employer working on a roof without the use of required fall protection at another job site. CABR Hedlund at 126-28; Ex. 11. Thus, the incident on January 23, 2003 was not

⁵ Three additional violations of WAC 296-155-24510 were established in *Washington Cedar I*.

isolated; Washington Cedar was on notice of a foreseeable, on-going problem of ineffective enforcement of its safety program.⁶

Next, substantial evidence in the record demonstrated that Washington Cedar failed to institute and enforce elements of its own written safety program. For example, Chapter 1, Section 4 of the employer's safety program establishes that a safety committee will oversee aspects of the company's safety program. Ex. 5. However, according to Washington Cedar's yard manager the employer did not have a company safety committee. CABR Hedlund at 122-124. Additionally, Chapter 1, Section 11 of Washington Cedar's written program mandates that after an employee receives disciplinary action for a safety violation, he or she will be required to undergo further training and testing to verify knowledge of the company's safety rules. CABR Hedlund at 130; Ex. 5. However, Washington Cedar's yard manager conceded that following Mr. Stewart's January 9, 2003 fall protection violation, he was not put

⁶ To establish this affirmative defense, the employer must show that the conduct of its employees in violating the employer's safety policies was:

[i]diosyncratic and unforeseeable . . . we emphasize that the employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its employees must demonstrate that *program's effectiveness in practice as well as in theory.*

Brock v. L.E. Myers Co., 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S. Ct. 479 (1987).

through any further training or testing. CABR Hedlund at 129. Washington Cedar's yard manager also conceded that following Mr. Stewart's January 9, 2003 fall protection violation, the designated lead person on the crew, Mr. Pope, was not required to perform further training and testing, although per employer policy, Mr. Pope should have been disciplined along with Mr. Stewart. CABR Hedlund at 130-131.

Because Washington Cedar cannot show unpreventable employee misconduct, the mere fact that its employees for whom it is responsible, rather than Washington Cedar as employer, failed to use fall protection does not insulate the firm from liability under WISHA.

3. Washington Cedar's Conclusory Argument That Only Its Employees And Not Washington Cedar As Employer Violated WAC 296-155-24510 Ignores The Regulation's Plain Language Requirement That An "Employer Shall Ensure That . . . [Fall Protection] Systems Are . . . Implemented."

Washington Cedar argues that WAC 296-155-24510 requires that an employer purchase and provide its employees with approved fall protection hardware, but that the regulation does not require that an employer "ensure" that the equipment be installed and implemented by its employees. AB at 15-31, 36-39. This interpretation is contrary to the plain language of the regulation, which expressly requires "*the employer shall ensure that fall restraint, fall arrest systems or positioning devices*

systems are provided, installed and implemented” WAC 296-155-24510 (emphasis added).⁷

WAC 296-155-24510 establishes multiple employer duties. First, the employer must purchase or otherwise provide its employees with equipment that comports with the rule’s technical requirements. Second, the employer must ensure that the approved equipment is provided to *and used* (“installed and implemented”) by its employees. Washington Cedar goes on for many pages in its opening brief (*see* AB at 15-31, 36-39) in attempting to construct an argument for an interpretation to the contrary, but the Department can find in the Washington Cedar brief neither a logical construct nor any semantical or grammatical basis for Washington Cedar’s ultimately indecipherable “interpretation.”

This Court should reject this employer’s illogical assertion that a WISHA rule, adopted under remedial legislation designed to protect the health and safety of all workers, would require employers to purchase equipment according to specific requirements, but not ensure that the equipment actually be used when its employees are exposed to potentially

⁷ A related argument is Washington Cedar’s strained contention that its responsibility is limited to “providing hardware,” while the firm’s employees are responsible for actually *using* the equipment. *See* AB at 15-31, 36-39.

Again, the firm ignores the plain language of the cited standard, which requires employers to “ensure that fall restraint device systems are provided, installed *and implemented*” AB at 17 (citing WAC 296-155-24510). *See also* AB at 22 (quoting WAC 296-155-200(2), which provides that “[t]he employer is responsible *for requiring the wearing of appropriate personal protective equipment* in all operations where there is an exposure to hazardous conditions . . .”).

dangerous conditions. The Department did not cite Washington Cedar for a failure to purchase proper fall protection equipment. The Department cited the employer because the Department determined that the employer failed to *ensure* that its employees actually *use* that equipment, a serious safety hazard. The evidence is clear and un rebutted that Washington Cedar failed to ensure that its employee installed and implemented fall protection.⁸

Washington Cedar cites to *Cobra Roofing Services, Inc v. Department of Labor & Industries*, 122 Wn. App. 402, 97 P.3d 17 (2004) (*aff'd in part and reversed in part*, 157 Wn.2d 90, 135 P.3d 913 (2006)) and claims that Division Three held in that case that WAC 296-155-24510 does not establish an employer obligation to ensure that employees wear or implement fall protection safety gear. AB at 28-29. This is either a gross misreading, or an intentional misstatement, of Division Three's holding; the employer in *Cobra Roofing* *did not even contest* that it violated the regulation, but rather contended that the Department did not establish that the employer's admitted violation was a repeat of a previous violation. Division Three ultimately held that Cobra Roofing was properly cited by the Department for a repeat violation. *Id.* at 415⁹; *cf. Nat'l Realty & Constr.*

⁸ As the Department explains *above at pages 21-22*, Washington Cedar's argument as well would render the unpreventable employee misconduct defense meaningless.

⁹ This holding was affirmed in *Cobra Roofing, Services, Inc. v. Dep't of Labor & Indus.*, 157 Wn. 2d at 96-98.

Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 489 F.2d 1257, n.36 (D.C. Cir. 1973)¹⁰:

4. Washington Cedar Knew, Or Should Have Known, That Its Employees Have A Habit Of Failing To Use Fall Protection Equipment As Required By Both Company Rules And State Law

Another argument advanced by Washington Cedar is that the Department failed to establish that Washington Cedar knew or could have known of the violative condition. AB at 33-34.¹¹ The Appellant argues that to meet this element of the *prima facie* case for a serious violation, the

¹⁰ “This is not to say that an employer's statutory responsibility for a hazard vanishes, or is even diminished, because the hazard was directly caused by an employee. The Act provides ‘that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.’ 29 U.S.C. § 651(b)(2). *An employer has a duty to prevent and suppress hazardous conduct by employees, and this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence.*”

The committee does not intend the employee-duty (to comply with the occupational safety and health standards promulgated under the Act) provided in section 5(b) to diminish in anyway the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. *Final responsibility for compliance with the requirements of this act remains with the employer.*”

Id., citing S.Rep.No.91-1282, 91st Cong., 2d Sess., 9 (Oct. 6, 1970), U.S.Code Cong. & Admin. News 1970, p. 5177 (emphasis added).

¹¹ Yet another argument by Washington Cedar is that, because here the employee's risky behavior exposing him to a 17-foot fall did not go on for an extended period of time, no violative “condition” occurred. AB at 31-33. Washington Cedar relies on an unsupportable paraphrasing of the definition of the word “condition” from a standard dictionary and cites no case law authority that would support this transitory-violations-are-exempt theory that would strip safety regulations of much of their effectiveness. Washington Cedar's illogical, unsupported and unsupportable theory should be rejected.

Department must prove that Washington Cedar had direct or actual knowledge that the employee in question, Mr. Stewart, was working without use of fall protection at the time of the Department's inspection. AB at 34. However, this argument was rejected the last time this employer appeared before this Court. *Washington Cedar I*, 119 Wn. App. at 916 ("We agree that the evidence of similar past violation was sufficient to support a finding that Washington Cedar was on notice that its employees were not complying with its safety regulations"). The same result is again supported by the evidence and thus warranted.

Washington Cedar has known for years that its employees have a habit of failing to use fall protection equipment as required by both company rules and state law. CABR at 121-22, 131. At the time of the inspection at issue before this Court, not only was Washington Cedar aware of the prior fall protection violation and documented similar repeats in *Washington Cedar I*, but the Department documented final citations regarding five additional prior similar repeats of fall protection violations. Ex. 3. And in fact, Washington Cedar knew that that Mr. Stewart had violated the fall protection safety standard at another job site on January 9, 2003, *just two weeks prior* to his failure to utilize fall protection on January 23, 2003. CABR Hedlund at 126-127. Thus substantial evidence supports the conclusion that Washington Cedar was on notice of the violative condition,

that is, its employees' tendencies generally and Mr. Stewart's tendencies specifically, to work without fall protection, creating an exposure to a potentially serious fall hazard.

5. The Department Established That The Current Violation Was A "Repeat" Of Prior Violations Of WAC 296-155-24510

Finally, relying once again on its mistaken argument that only employees, not employers, can violate this fall protection rule, Washington Cedar argues that the Department did not establish that the current violation was a "repeat" of prior violations of WAC 296-155-24510. AB at 36-39. As the Department explains above in this brief, this argument is contrary to substantial evidence and well-settled law. *See* discussion *supra* VI.B.2., 3.

Former WAC 296-800-35040 allows the Department to multiply an adjusted base penalty by the number of "repeat violations." "A violation is a repeat violation if the employer has been cited one or more times previously for a substantially similar hazard." *Id.* In recent decisions, Washington Courts have adopted a broad interpretation of repeat violations, in line with the broad remedial purpose of WISHA. *Cobra Roofing, Services, Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d. at 96-98; *Washington Cedar I*, 119 Wn. App. at 918.

In the instant case, the Department produced exhibits that documented that five prior citations issued to Washington Cedar for fall

protection violations under WAC 296-155-24510 became final in the three-year period before the current citation at issue. Ex. 3. Thus, substantial evidence supports the Board's finding (CABR at 130) that Washington Cedar was properly cited for a repeat serious violation.

C. Substantial Evidence And Well-Settled Law Establishes That The Board Correctly Determined That Washington Cedar Violated WAC 296-155-24505 Because Its Work Safety Plan At The Work Site At Issue Did Not Describe The Fall Protection Hazards Specific To That Work Site

In addition to the repeat serious fall protection violation discussed above, the Board also affirmed a repeat serious violation of WAC 296-155-24505 for Washington Cedar's failure to properly develop and implement a work plan that identified all fall hazards in the specific work area. CABR at 131-32.

WAC 296-155-24505 provides, in part:

(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.

In the instant case the Department's inspector, Mr. Adams, observed a document at the work site that did not describe the fall protection hazards specific to that work site; the form simply has a vertical

line down through the far right column, with no specific items checked or added. CABR Adams at 23; Ex. 1 (5th photograph). Washington Cedar's yard manager, Rick Hedlund, conceded that his employees did not fill out this work plan form correctly. CARB Hedlund at 73.¹²

Washington Cedar also attempts to minimize its violation by terming the regulation a "paperwork" rule, suggesting that a work plan violation can never be a "serious" violation because the "paperwork" violation itself does not cause a fall from a roof. AB at 39-42. Washington Cedar apparently misses the point of the work plan requirement. The important primary purpose of the work plan regulation is to ensure that Washington Cedar's employees identify the specific fall hazards in the work area. In other words, the rule requires actual consideration of safety hazards at the specific job site. As Mr. Adams explained, "[i]f you do not identify the hazards, you are prone to incur them, you can have an accident." CABR Adams at 26.

The Board affirmed the Department's designation of this work plan violation as "repeat serious." CABR at 131-32. Substantial evidence

¹² Washington Cedar argues that the underlying form in Exhibit 14, the improperly completed work plan document, actually demonstrates that Washington Cedar, as employer, fully complied with the work plan requirement. AB at 40. However, providing its employees with a pre-printed form, without any of the critically tailored information filled in, does not meet the requirement for identifying all hazards in each specific work area. WAC 296-155-24505(2)(a). In conceding that his employees did not fill out this work plan form correctly, Mr. Hedlund conceded that the rule's hazard identification requirement was not met. CABR Hedlund at 73.

supported the Board's findings. First, the Department established a prior violation of this same regulation within the past three years. Ex. 3. Further, a failure to make any attempt to identify the danger points or specific hazards of a work site directly leads to a higher likelihood of an accident. Since the hazard in this instance is a fall from a roof, it is likely that, should harm result from the violation, that harm could be serious physical harm. *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 482, 36 P.3d 558 (2001).

Accordingly, substantial evidence supports the Board's decision to affirm this citation, and no error of law was established. However, the Department reasonably (and to Washington Cedar's benefit) decided that no additional penalty would be assessed. Rather, the Department grouped this violation for penalty purposes with Washington Cedar's violation of the fall protection regulation found at WAC 296-155-24510.

D. Substantial Evidence And Well-Settled Law Establishes That The Board Correctly Determined That Washington Cedar Committed A General Violation of WAC 296-155-110(5) Because It Did Not Hold "Crew Leader-Crew" Safety Meetings On At Least A Weekly Basis

Washington Cedar argues that the Department, in applying the crew leader-crew opening and weekly meeting requirement of WAC 296-155-110(5), invoked an inapplicable meeting regulation, and that, in any event, Washington Cedar's employees met often enough (daily) to meet

the regulation.¹³ AB at 42-45. Washington Cedar's arguments are, once again, without support in the law and the facts.

WAC 296-155-100 establishes mandatory provisions for employer's accident prevention programs. WAC 296-155-110 requires, in pertinent part, the following:

(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's meeting requirement applies:

to any and all work places subject to the Washington Industrial Safety and Health Act (RCW 49.17), 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.

WAC 296-155-005(1) (emphasis added).

Washington Cedar evidently contends that because its employees are "material handlers" who deliver roofing materials to, and unload or retrieve roofing materials at, construction sites, it does not participate in

¹³ Washington Cedar also argues that any violation of the safety meetings requirement is de minimis. AB at 45. Washington Cedar cites no authority for its implausible claim. Therefore, the argument should be rejected. RAP at 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments that are not supported by citation to legal authority will not be considered on appeal).

any of the activities enumerated in WAC 296-155-005(1). AB at 42-43. This contention is contrary to both plain language and Legislative intent. Rather, the significant and guiding language in WAC 296-155-005(1) is “any and all workplaces,” and the rule applies wherever employees are present at a work site where a listed activity, such as construction, is occurring. Further, the rule directs that *all industries* must comply when performing work at such a site.

Courts will uphold an agency’s interpretation of an administrative regulation if “it reflects a plausible construction of the language of the statute and is not contrary to legislative intent.” *Seatoma Convalescent Ctr. v. Dep’t of Soc. & Health Serv.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996). To determine the underlying purpose and intent of both WAC 296-155-005(1) and WAC 296-155-110(5), this Court will examine the regulations’ subject matters as shown in the text as a whole. *Maplewood Estate, Inc. v. Dep’t of Labor & Indus.*, 104 Wn. App. 299, 305-06, 17 P.3d 621 (2000). The purpose of WAC 296-155 is set forth in under WISHA, RCW 49.17. The purpose of WISHA is to create and maintain safe and healthy working conditions for “every man and woman working in the state of Washington.” RCW 49.17.010.

Based upon WISHA’s overall intent and purpose to promote worker safety, the Department and the Board properly construe

WAC 296 -155-110(5) as requiring compliance by all industries at a work site where construction is being performed. This Court should accordingly hold that when Washington Cedar employees delivered roofing materials to the construction site at issue, Washington Cedar was required to comply with safety regulations of WAC 155-110(5).

Substantial evidence in the record supports the Board's determination that the Department correctly cited Washington Cedar for a general violation of WAC 296-155-110.¹⁴ Washington Cedar's yard manager, Rick Hedlund, conceded during his testimony that he did not hold safety meetings on a least a weekly basis with his crew. CABR Hedlund at 125. At times, a month would pass without such a meeting being held. *Id.* Ex. 8. This Court should affirm the Board's conclusion that the Department met its burden with respect to this general violation. CABR at 128, 132.

As noted, Washington Cedar further contends that the evidence shows that Washington Cedar employees "met" every day when they arrived at each construction site to deliver roofing materials, and therefore that there could be no violation of WAC 296-155-110(5). AB at 43. Washington Cedar goes as far as to argue that the Department Inspector, Mr. Adams, conceded that such a meeting took place. AB at 44 (citing

¹⁴ No penalty was assessed by the Department for this general violation.

CABR Adams at 112). Yet in so doing Washington Cedar misconstrues both Mr. Adams' testimony and the requirement of WAC 296-155-110(5).

The "meeting" that Washington Cedar alleges to have taken place was related to the employees' supposed development of the cite-specific work plan, as required under WAC 296-155-24505. But as explained *supra* at VI.C, the work plan at issue did not describe, as required, the fall protection hazards specific to that work site. Rather, the form simply had a vertical line down through the far right column, with no specific items checked or added. CABR Adams at 23; Ex. 1 (5th photograph). Washington Cedar's yard manager, Rick Hedlund, conceded that his employees did not fill out this work plan form correctly. CARB Hedlund at 73. Thus, Washington Cedar did not establish that a meeting took place; instead, its employees quickly and impermissibly drew a line through a pre-printed form and proceeded to begin work without complying with the requirements of WAC 296-155-110(5).

E. The Board Did Not Abuse Its Discretion In Rejecting Irrelevant Evidence Or Evidence Not Offered In Compliance With The Rules Of Evidence

Washington Cedar provides a long laundry list of alleged errors by the Board in rejecting evidence. But Washington Cedar provides scant description of the context of these Board discretionary evidentiary rulings,

and very little authority for its challenges. None of Washington Cedar's evidentiary challenges has any merit.

The Board rules on the admissibility of evidence in the same manner as a trial court. WAC 263-12-115(4). Under that standard, a reviewing court gives the Board substantial discretion to admit or refuse evidence. *Seay v. Chrysler Corp.*, 93 Wn.2d 319, 324, 609 P.2d 1382 (1980). Evidentiary rulings are reviewed under the manifest abuse of discretion standard. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). This occurs only when an agency applies the wrong legal standard or when it takes a view no reasonable person would take. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000).

Washington Cedar's allegation that "[a]lmost all of the Employer's testimony was excluded as irrelevant," AB at 49, is a gross exaggeration. Furthermore, Washington Cedar provides no discussion regarding *why* its offered evidence was rejected, and even alleges, without any support for the attack, that the Board's rulings "left an abiding impression of bias." AB at 49. In actuality, most of the rulings were dictated by the Employer's reliance on an absurd interpretation of WISHA. *See* discussion of Washington Cedar's implausible theories *supra*. In other instances, Washington Cedar misunderstands the basis of the Board's rulings. Ultimately, the Board's

rulings were matters of judicial discretion; Washington Cedar fails to establish that the Board abused that discretion.

1. The Board Properly Excluded Irrelevant Evidence About The Technical Specifications Of Washington Cedar's Fall Protection Hardware

Washington Cedar's assignments of error regarding evidentiary rulings are primarily based upon its erroneous theory that WAC 296-155-24510 requires an employer to only purchase approved hardware, but does not require that the employer ensure that the hardware is actually and properly used. AB at 45-49.¹⁵ However, and as discussed *supra* VI.B.2.,3. and 5, this strained and clearly flawed interpretation is contrary to the express, plain language of the regulation requiring employers ensure use of fall protection equipment. WAC 296-155-24510. The Department did not cite Washington Cedar for failure to purchase proper equipment. The Department cited the employer because the Department discovered the employer failed to *ensure* that its employees actually *used* that equipment while working on a roof. Accordingly, the Industrial Appeals Judge quite correctly ruled during the hearings that evidence offered by Washington Cedar regarding the technical specifications of the equipment had "absolutely no possibility of relevance." CABR Hedlund at 49.

¹⁵ See, e.g., CABR Adams at 67-70; CABR Hedlund at 49, 66-72.

2. The Board Did Not Abuse Its Discretion In Its Other Evidentiary Rulings, And No Evidentiary Ruling Was A Constitutional Due Process Violation

Washington Cedar's other assignments of error do not constitute grounds for reversible error. For example Exhibits 6 and 7 (*see* AB at 46), each of which contained multiple documents signed by individuals who did not testify and which presumably were offered to support the affirmative defense of isolated and unpreventable employee misconduct, were rejected following Department objections on foundational and hearsay grounds. CABR Hedlund 85; CABR at 117. Ex. 9, which Washington Cedar states was excluded, AB at 48, actually was admitted for demonstrative purposes over foundation and hearsay objections by the Department. CABR at 117. Additionally, questions by Washington Cedar's counsel designed to elicit the same information more than one time for the record (AB at 49) were properly rejected as "asked and answered." *See, e.g.*, CABR Adams at 48; CABR Hedlund at 113.

Further, the Board sustained an objection to a question asked by Washington Cedar's counsel that referenced the prior testimony of the Department's inspector, Mr. Adams. *Cf.* CABR Hedlund at 76 *with* AB at 47. The Board properly determined that the question lacked foundation, as the question mis-characterized the testimony of Mr. Adams. *Id.*

Moreover, Washington Cedar's counsel attempted to ask the Department inspector to provide suggestions for modifications of the Employer's written safety program. CABR Adams at 50-51. Relying upon *Dep't of Labor & Indus. v. Kaiser Aluminum & Chemical Corp.*, 111 Wn. App. 771, 782, 48 P.3d 324 (2002), Washington Cedar contended that the Department was required to establish specific particular steps Washington Cedar should have taken to avoid the citations *Id.*

Contrary to Washington Cedar's contention at AB at 47, the Department's objection to the question was properly sustained, because the Department has no such burden when violations of specific standards are at issue. *Kaiser Aluminum* is an appeal involving general duty clause citations. See RCW 49.17.060(1). In contrast, the citations issued to Washington Cedar in the instant case were specific health and safety standards. See RCW 49.17.060(2). No error can be predicated upon the assertion that the Department was required to meet standards for establishing a general duty violation.

It is settled law that the burden on the Department is different when prosecuting a case involving a violation of the general duty clause, as opposed to a case alleging a violation of a specific standard. To prove a violation of the general duty clause, L&I must "show the employer failed to render the workplace free of (1) a *hazard*, which (2) was *recognized*,

and (3) caused or was *likely to cause* death or serious injury”. *Kaiser Aluminum*, 111 Wn. App. at 780. As part of this burden, L&I “must specify the particular steps the employer should have taken to avoid the citation [and] must demonstrate the feasibility and likely utility of those measures.” *Id.* at 782.

In contrast, L&I carries a lighter burden when it seeks to enforce a specific health and safety standard, such as the requirement in the instant case to ensure employees install and utilize fall protection equipment. To prove the violation of a specific safety standard, L&I must show that “(1) 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; [and] (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.” *Washington Cedar I*, 119 Wn. App. at 914.

Next, Washington Cedar objects at AB 47-48 to the rejection of evidence that purportedly was offered to support the affirmative defense of infeasibility of compliance. CABR Hedlund at 67-68. However, review of the evidence offered establishes that Washington Cedar misunderstands the applicable standard for this defense. Actual infeasibility - - i.e., that the work would have been impossible to perform if the employer had

complied with the cited standard - - not high economic cost, is the basis of the defense. *See* discussion below in this section.

Apparently recognizing (though not expressly admitting) that it, as employer, is generally responsible for an employee violation unless it can prove infeasibility where there is, as here, a violation of a specific regulation, Washington Cedar attempts to assert the affirmative defense of infeasibility. AB at 47-48. In would-be support of its infeasibility argument, the employer appears to allege that the misbehavior of its employees is so pervasive that the *only* way it can enforce its own rules (and Washington's safety standards) would be to have an economically infeasible "tag-along" supervisor. AB at 47-48; CABR Hedlund at 67-68. Washington Cedar did not include argument or citation to authority regarding the infeasibility defense in its Brief of Appellant; however, based upon colloquy contained within the administrative record, Washington Cedar presumably asserts that if it could establish economic infeasibility it need not comply with WISHA's regulations. *Id.*

The Board correctly held that Washington Cedar's economic infeasibility theory is not supported by law. CABR at 125-126, 131-132. As the Board explained, the appropriate test for the affirmative infeasibility of compliance defense is found in *Bancker Const. Corp. v.*

Reich, 31 F.3d 32 (2nd Cir. 1994), which states in relevant part the following:

“[t]he cited employer bears the burden of showing that compliance with the standard’s literal requirements was impossible or would have precluded performance of the work.” [Citations omitted] The employer also must show that it used alternative means of protection not specified in the standard or that alternative means were unavailable.

Bancker, 31 F.3d at 34. The *Bancker* opinion establishes that actual infeasibility - - i.e., that the work would have been impossible to perform if the employer had complied with the cited standard - - not high economic cost, is the basis of the defense. *Id.* In the instant case there is no evidence before this court, nor can any reasonable argument be advanced, that it was impossible for Washington Cedar’s employees to properly tie off while working on the roof if the firm had attempted to implement an enforcement system that actually worked. There is even less evidence that Washington Cedar, per the words of *Bancker*, “used alternative means of protection not specified in the standard or that alternative means were unavailable.” *Bancker*, 31 F.3d at 34. The firm’s infeasibility defense thus fails to meet both prongs of the correct legal test for such a theory. Washington Cedar’s argument is also contrary to common sense. Other affected employers manage to comply with WISHA’s requirement that Washington employers “ensure” that their workers install and *implement* fall protection equipment

when exposed to the significant hazard of falling ten feet or more. Washington Cedar offers no explanation for its contention that, in contrast to all of these employers, it alone should be excused from compliance with the standard because it is apparently too busy to meet its statutory responsibility. The fact is that Washington Cedar has repeatedly, under the evidence in this case and under the evidence in *Washington Cedar I*, simply failed in its duty to ensure employee compliance with WISHA standards. This case is no different from the firm's numerous other violations, particularly those affirmed in *Washington Cedar I*, the case that it previously lost in the Court of Appeals while making arguments essentially identical to those it now makes.

Finally, purporting to rely on a case that held that the Board's *ex parte* consideration of evidence outside the record violated due process, Washington Cedar makes an illogical leap to claim that the Board's performance here of its gate-keeping function over the admission of evidence at open hearing was likewise a due process violation. AB at 50 (citing *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 494-95, 739 P.2d 727 (1987)). Washington Cedar's reliance on *Robles* is misplaced, and neither authority nor logic nor common sense supports Washington Cedar's "naked casting into the constitutional sea." *Fria v. Dep't of Labor & Indus.*, 125 Wn. App. 531, 535, 105 P.3d 33 (2004) ("such naked

castings into the constitutional sea do not command judicial consideration and discussion”) (internal quotation marks and internal citations omitted).

In summary, Washington Cedar was given a full and fair hearing at the Board. The Board’s evidentiary rulings were within both reason and the Board’s discretion, and thus do not constitute reversible error.

F. WAC 296-155-24510 Is Not Unconstitutionally Vague

Washington Cedar’s conclusory vagueness attack on WAC 296-155-24510 (AB at 49-50) is likewise without any merit. Statutes are presumed constitutional. *State v. Sullivan*, 143 Wn.2d 162, 180, 19 P.3d 1012 (2001). Similarly, “[a] duly adopted regulation is presumed constitutional.” *Inland Foundry v. Dep’t of Labor & Indus.*, 106 Wn. App. 333, 339, 24 P.3d 424 (2001) (citing *Longview Fibre Co. v. Dep’t of Ecology*, 89 Wn. App. 627, 632, 949 P.2d 851 (1998)). The party raising a vagueness challenge bears the heavy burden of proving unconstitutionality beyond a reasonable doubt. *Id.* A statute or regulation does not have to satisfy impossible standards of specificity. *Inland Foundry v. Dep’t of Labor & Indus.*, 106 Wn. App. at 339.

Washington Cedar has failed to establish that the word “ensure” contained within WAC 296-155-24510 is vague. A person of common intelligence does not have to guess at the word’s meaning. “Ensure” means “[t]o make sure or certain, to guarantee.” *American Heritage*

Dictionary 681 (1970). The clear meaning of WAC 296-155-24510 is that an employer with workers exposed to a fall hazard of 10 feet or higher must ascertain and “make certain” that its employees possess *and utilize* an accepted fall restraint system. The rule creates an unambiguous duty for employers to protect their employees from fall hazards.

G. Washington Cedar Fails To Establish Grounds For An Award Of Attorney Fees

Finally, Washington Cedar seeks an award of attorney fees under RCW 4.84.340(3) the Equal Access to Justice Act (EAJA). AB at 50. However, even if Washington Cedar were to substantially prevail in its appeal, EAJA attorney fees may not be awarded in WISHA appeals. *Cobra Roofing, Services, Inc. v. Dep’t of Labor & Indus.*, 157 Wn.2d at 101.

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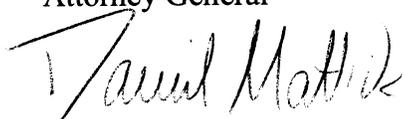
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VII. CONCLUSION

Washington Cedar's assignments of error are wholly without merit. The factual determinations in the Board's decision are supported by substantial evidence, and the conclusions of law by the Board and Superior Court are correct. For the reasons expressed above, the Department asks that the Court affirm the Superior Court decision affirming the Board's affirmance of the Department's WISHA citation.

RESPECTFULLY SUBMITTED this 25th day of September, 2006.

ROB MCKENNA
Attorney General



DAVID MATLICK
Assistant Attorney General
WSBA No. 22919
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APPENDIX A

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WACs > Title 296 > Chapter 296-155 > Section 296-155-110

[296-155-105](#) << [296-155-110](#) >> [296-155-115](#)

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 for 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:

(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 shall be 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 follow the requirements of subsection (5)(a) and (b) of this section by attending the prime contractors or 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.

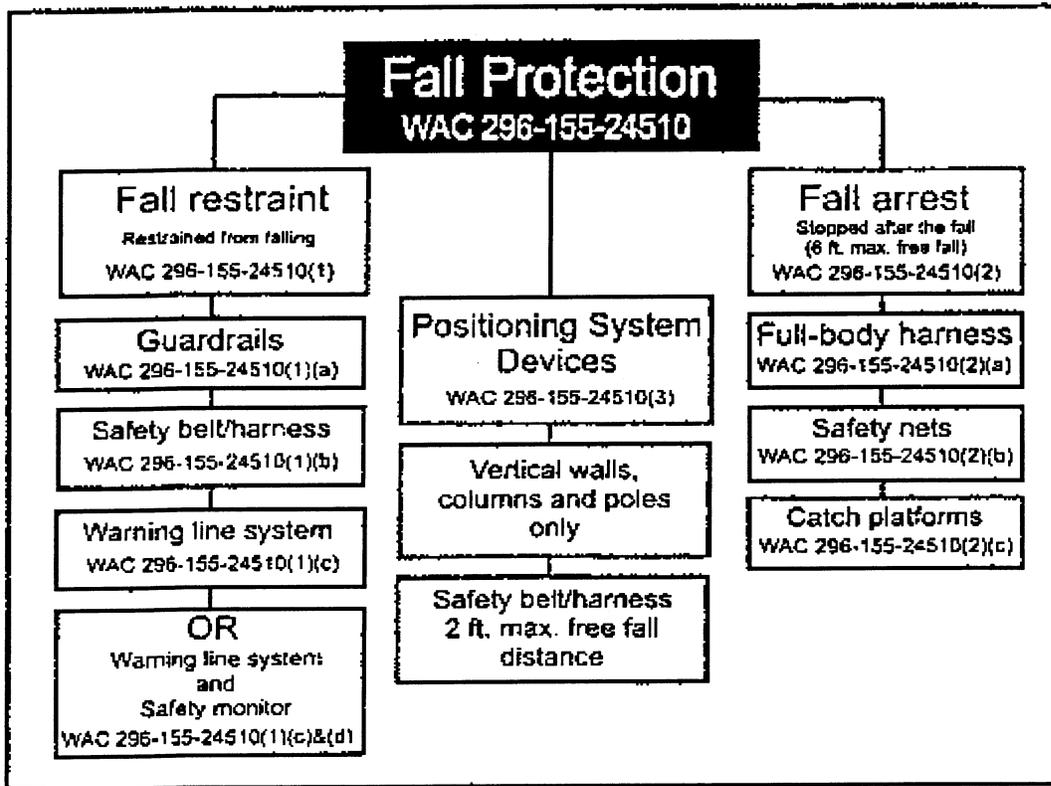
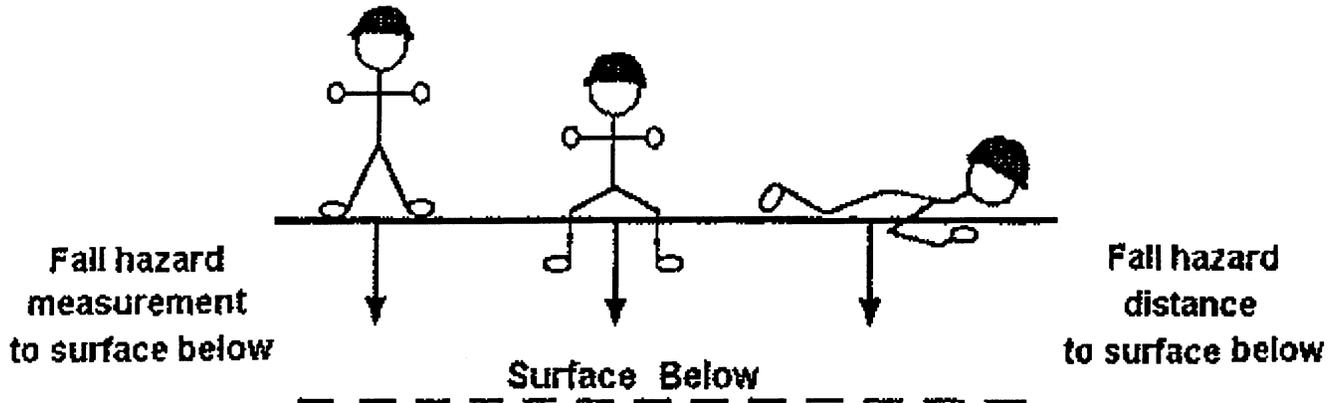
[Statutory Authority: RCW 49.17.010, [49.17].040, and[49.17].050 . 01-11-038, § 296-155-110, filed 5/9/01, effective 9/1/01; 08-078, § 296-155-110, filed 4/4/00, effective 7/1/00. Statutory Authority: Chapter 49.17 RCW. 94-15-096 (Order 94-07), § 296-155-110, filed 7/20/94, effective 9/20/94; 92-09-148 (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.]

296-155-24507 << 296-155-24510 >> 296-155-24515

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.



(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.

(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 manufacturer's 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 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.

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 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.

(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 level 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.

(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 cm^2) 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 a 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
 - (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, [49.17].040, and[49.17].050 . 00-14-058, § 296-155-24510, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040,[49.17.]050 and [49.17.]060. 96-24-051, § 296-155-24510, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 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.]

296-155-24503 << 296-155-24505 >> 296-155-24507

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.

(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, [49.17].040, and[49.17].050 . 00-14-058, § 296-155-24505, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.]050 and[49.17.]060 . 96-24-051, § 296-155-24505, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 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.]

APPENDIX B



Court of Appeals of Washington,
Division 2.
WASHINGTON CEDAR & SUPPLY CO., INC.,
Appellant,
v.
STATE of Washington, DEPARTMENT OF
LABOR & INDUSTRIES, Respondent.
No. 29666-7-II.

Dec. 23, 2003.

Publication Ordered Jan. 28, 2004.

Background: Employer brought action challenging affirmance by Board of Industrial Insurance Appeals of citation issued to employer by Department of Labor and Industries (L & I) for failure to ensure that employees wore fall restraints when they delivered materials onto roof of construction site. The Superior Court, Pierce County, Rosanne Buckner, J., affirmed Board's decision. Employer appealed.

Holdings: The Court of Appeals, Seinfeld, J., held that:

(1) statute authorized partial panel of Board to review citation;

(2) unpreventable employee misconduct defense did not apply; and

(3) evidence supported characterizing offense as repeat, serious violation.

Affirmed.

West Headnotes

[1] Labor and Employment ☞2612
231Hk2612

(Formerly 232Ak31 Labor Relations)

Statute governing Industrial Safety and Health Act appeals, which incorporated procedures for review of industrial insurance appeals by Board of Industrial Insurance Appeals, authorized partial panel of Board to review citation issued to employer by Department of Labor and Industries (L & I) for failure to ensure that employees wore fall restraints when they delivered materials onto roof of construction site. West's RCWA 49.17.140, 51.52.106.

[2] Labor and Employment ☞2612
231Hk2612

(Formerly 232Ak31 Labor Relations)

Court of Appeals reviews whether an employer has

met its burden of establishing an "unpreventable employee misconduct" defense to a Industrial Safety and Health Act violation, as a question of fact, for substantial evidence, i.e., evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. West's RCWA 49.17.120(5).

[3] Labor and Employment ☞2611(3)
231Hk2611(3)

(Formerly 232Ak30 Labor Relations)

Evidence of employer's prior fall protection violations and its failure to enforce elements of its safety program demonstrated that employer had not effectively enforced its safety program, and thus employer failed to meet burden of establishing affirmative defense of "unpreventable employee misconduct" to citation issued by Department of Labor and Industries (L & I) for failure to ensure that employees wore fall restraints when they delivered materials onto roof of construction site. West's RCWA 49.17.120(5)(a)(iv).

[4] Administrative Law and Procedure ☞413
15Ak413

[4] Statutes ☞219(1)
361k219(1)

Court of Appeals reviews an administrative agency's statutory interpretation under an error of law standard, which allows court to substitute its interpretation of the statute for the agency's interpretation, but court gives substantial weight to an agency's interpretation of statutes and regulations within its area of expertise.

[5] Labor and Employment ☞2608(4)
231Hk2608(4)

(Formerly 232Ak9.8 Labor Relations)

Evidence established that employer's failure to ensure that employees wore fall restraints when they delivered materials onto roof of construction site was repeat, serious violation of Industrial Safety and Health Act; site inspector measured fall height of roof, which was not low-pitched, at 16 feet, past violations put employer on notice that employees were not in compliance with safety regulations, serious physical harm could have resulted from fall, and employer's prior citations were also issued for fall protection violations. West's RCWA 49.17.180(6); WAC 296-155-24510; WAC 296-27-

(Cite as: 119 Wash.App. 906, 83 P.3d 1012)

16007(5) (Repealed).

[6] Labor and Employment ☞2573
231Hk2573

(Formerly 232Ak31 Labor Relations)

In construing regulations implementing Industrial Safety and Health Act, Court of Appeals may consider the federal counterpart, Occupational Safety and Health Administration (OSHA), and its judicial interpretation.

****1013 *909** Jerald A. Klein, Seattle, WA, for Appellant.

David Ira Matlick, Atty Gen Ofc, Tacoma, WA, for Respondent.

****1014 PART PUBLISHED OPINION**

SEINFELD, J.

The Department of Labor and Industries (L & I) cited Washington Cedar and Supply (Washington Cedar) for failing to ensure that its employees were wearing fall restraints when they delivered materials onto the roof of a construction site. The Board of Industrial Insurance Appeals (Board) upheld the citation and the superior court affirmed the Board's ruling. Holding that (1) a partial panel of the Board had the power to review the citation; (2) the Board appropriately declined to apply the unpreventable employee misconduct defense; and (3) the L & I inspector correctly categorized the offense as a "repeat serious violation;" and finding no error in the Board's decision, we also affirm.

FACTS

Washington Cedar sells and delivers roofing materials to construction sites in Washington. On October 18, 1999, two ***910** Washington Cedar employees were delivering materials onto a roof at a construction site. The employee standing on the roof was not wearing fall restraints or fall arrest gear.

An L & I inspector arrived at the site and documented the employees' activities. L & I subsequently issued a citation to Washington Cedar for failing to ensure that its employees were wearing fall restraints when working at heights over 10 feet.

The inspector labeled the violation a "repeat violation" based on L & I records showing two prior fall protection violations by Washington Cedar

within three years of the instance at issue. The inspector labeled the violation "serious" because she believed serious physical harm could result if a fall occurred at that height. RCW 49.17.180(6).

Washington Cedar appealed the citation to the Board. An Industrial Appeals Judge (IAJ) initially vacated the citation but on review by the Board, two of the three Board members considered the case and reinstated the citation. A superior court judge affirmed the Board's decision.

DISCUSSION

I. PARTIAL PANEL REVIEW UNDER RCW 49.17.140

[1] On review of the IAJ decision, two of the three Board members signed a Decision and Order upholding Washington Cedar's citation. Washington Cedar argues that RCW 49.17.140 does not permit partial panel review. This is a matter of statutory construction, which we review de novo. *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wash.App. 858, 864, 975 P.2d 567 (1999).

The Board hears two types of appeals: (1) industrial insurance appeals governed by RCW 51.52, and (2) Washington Industrial Safety and Health Act (WISHA) appeals governed by RCW 49.17. In this WISHA appeal, we look to RCW 49.17.140 to determine the required procedure for Board review. Under this statute, the ***911** Board may "make disposition of the issues in accordance with procedures relative to contested cases appealed to the state board of industrial insurance appeals." RCW 49.17.140(3).

This provision incorporates the controlling procedures for Board review under RCW 51.52.106. RCW 51.52.106 allows Board review "by a panel of at least two of the members of the board.... The decision and order of any such panel shall be the decision and order of the board." RCW 51.52.106; *also see* WAC 263-12-155. RCW 49.17.140 therefore permits partial panel review based on the incorporation of review procedures enumerated in RCW 51.52.106.

II. UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

[2] Washington Cedar asserts that the violative conduct of their employees was unpreventable and unforeseeable, and therefore they should not be held accountable. Under RCW 49.17.120(5), there is an

(Cite as: 119 Wash.App. 906, *911, 83 P.3d 1012, **1014)

affirmative defense of "unpreventable employee misconduct" that allows an employer to avoid liability upon the following showing:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- **1015 (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

We review whether Washington Cedar has met its burden as a question of fact under a substantial evidence standard. *Miller v. City of Tacoma*, 138 Wash.2d 318, 323, 979 P.2d 429 (1999). " 'Substantial evidence' is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 712, 732 P.2d 974 (1987).

For help in deciding cases where there is an absence of state law on point, the Board looks to the Occupational *912 Safety and Health Administration (OSHA) and consistent federal decisions. *Adkins v. Aluminum Co. of America*, 110 Wash.2d 128, 147, 750 P.2d 1257 (1988); 29 U.S.C. sec. 651 et seq. In 1990, the Board decided *Jeld-Wen*, and placed the burden of proving the elements of the affirmative defense on the employer. *In re Jeld-Wen of Everett*, Bd. of Indus. Ins. Appeals No. 88 W144 (October 22, 1990); *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1276 (6th Cir.1987).

While there is a significant split among the federal circuit courts as to which party should bear the burden of proof, [FN1] the Board specifically followed the 6th Circuit decision in *Brock*, which emphasized that the employer must show that the safety program is effective "in practice as well as in theory." 818 F.2d at 1277. Washington subsequently adopted a statute laying out the elements of the unpreventable employee misconduct defense that mirrors the language in *Brock*. RCW 49.17.120(5)(iv).

FN1. *Danco Constr. Co. v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1243 (8th Cir.1978); cf. *Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350 (3rd Cir.1984); *Capital Elec. Line*

Builders of Kansas, Inc. v. Marshall, 678 F.2d 128 (10th Cir.1982); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396 (4th Cir.1979); *Central of Georgia R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620 (5th Cir.1978); *Brennan v. Occupational Safety & Health Review Comm'n*, 511 F.2d 1139 (9th Cir.1975).

[3] The Board determined here that Washington Cedar had not met RCW 49.17.120(5)(iv)'s requirement of effective enforcement. It based this decision on evidence showing Washington Cedar's prior fall protection violations and its failure to enforce elements of the safety program. Thus, substantial evidence supports the Board's decision.

Washington Cedar asserts that the Board wrongly interpreted RCW 49.17.120(5) as allowing the unpreventable employee misconduct defense only where the violation is characterized as an "isolated occurrence." But the Board's interpretation of RCW 49.17.120(5) was not this narrow.

[4] We review an agency's statutory interpretation under an error of law standard, which allows us to substitute our interpretation of the statute for the Board's. *St. Francis *913 Extended Health Care v. Dep't of Soc. & Health Serv.*, 115 Wash.2d 690, 695, 801 P.2d 212 (1990). But we give substantial weight to an agency's interpretation of statutes and regulations within its area of expertise. *St. Francis Extended Health Care*, 115 Wash.2d at 695, 801 P.2d 212.

The "isolated occurrence" language stems from agency and judicial interpretation of the "effective enforcement" prong of the unpreventable employee misconduct defense. RCW 49.17.120(5)(iv). The Board and federal courts have concluded that in order for the enforcement of a safety program to be "effective," the misconduct could not have been foreseeable. *Jeld-Wen*, No. 88 W144; *Brock*, 818 F.2d at 1277 (stating that the violation must have been "idiosyncratic and unforeseeable"); *Austin Bldg. Co. v. Occupational Safety & Health Review Comm'n*, 647 F.2d 1063, 1068 (10th Cir.1981); *Mineral Indus. & Heavy Constr. Group v. Occupational Safety & Health Review Comm'n*, 639 F.2d 1289, 1293 (5th Cir.1981).

As a result, the Board has determined that prior citations for similar conduct may preclude the defense because those prior violations provide notice

83 P.3d 1012

(Cite as: 119 Wash.App. 906, *913, 83 P.3d 1012, **1015)

to the employer of the problem, thereby making repeat occurrences foreseeable. But it appears that the existence of prior violations does not absolutely **1016 bar use of the unpreventable employee misconduct defense; it merely is evidence that the employee conduct was foreseeable and preventable.

L & I classified Washington Cedar's two prior final violations as "fall protection" violations. This classification indicates that these violations were similar; therefore, the current citation was not an isolated occurrence. Although this fact may not constitute conclusive evidence that the employee misconduct was foreseeable and preventable, it does provide sufficient evidence to support the Board's conclusion. Further, it was supported by additional evidence that Washington Cedar was not effectively enforcing other elements of its safety program. Thus, Washington Cedar has not shown that the Board erred when it rejected the unpreventable employee misconduct defense.

*914 III. ESTABLISHING A REPEAT, SERIOUS WISHA VIOLATION

[5] Washington Cedar asserts that L & I has not made a prima facie case showing of a WISHA violation nor shown that the violation was "serious" or a "repeat" within the meaning of the regulations.

A. PRIMA FACIE CASE FOR A WISHA VIOLATION

[6] Washington Cedar first argues that L & I has not made a prima facie case for a "repeat serious violation" of WAC 296-155-24510. In construing WISHA regulations, we may consider the federal counterpart, OSHA, and its judicial interpretation. *Adkins*, 110 Wash.2d at 147, 750 P.2d 1257. To demonstrate a prima facie serious violation of a safety standard under OSHA,

the Secretary must prove that (1) 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.

D.A. Collins Constr. Co., Inc. v. Sec'y of Labor, 117 F.3d 691, 694 (2nd Cir.1997) (citations omitted) (quoting 29 U.S.C. sec. 666(k)). To establish a violation of OSHA, the Secretary of

Labor has the burden to prove each element by a preponderance of the evidence. *Carlisle Equip. Co. v. U.S. Sec'y of Labor & Occupational Safety*, 24 F.3d 790, 792 (6th Cir.1994). Washington Cedar asserts that L & I has not proved the first, fourth, or fifth elements by a preponderance of the evidence.

We apply the substantial evidence standard when reviewing the Board's factual determinations. *Miller*, 138 Wash.2d at 323, 979 P.2d 429. Because we give deference to an agency's factual findings in its area of expertise, we will uphold the Board's findings unless they are clearly erroneous. *Ass'n of Rural Residents v. Kitsap County*, 141 Wash.2d 185, 195-96, 4 P.3d 115 (2000).

*915 I. Does the cited standard apply?

Washington Cedar first argues that the standard in WAC 296-155-24510 does not apply here because the fall height did not exceed 10 feet and, even if it did, the low-pitch roof exception applies.

In its Decision and Order, the Board found that Washington Cedar's employee was loading material onto the roof "at a height in excess of 10 feet." Clerk's Papers (CP) at 303. The site inspector's testimony supported this finding, as she measured the fall height at approximately 16 feet. Although Washington Cedar submitted contrary evidence showing that the employees believed the height to be approximately nine feet, the inspector's testimony provides substantial evidence to support the Board's determination.

Washington Cedar also contends that the Board erred in not applying the "low-pitched roof" exception. WAC 296-155-24515; WAC 296-155-24503. A low-pitched roof is defined as one that has "a slope equal to or less than 4 in 12" rise over run. WAC 296-155-24503. WAC 296-155-24515(2)(b) provides an alternative to the requirement that employees working at a height of over 10 feet wear fall restraints when employees are "engaged in roofing on low-pitched roofs less than 50 feet wide;" if this is the case, employees may "elect to use a safety monitor system **1017 without warning lines." WAC 296-155-24515(2)(b).

The L & I inspector testified that she believed the roof at issue was a "5 or 6-pitched roof" and would not qualify for the low-pitched roof exception. Board Report of Proceedings (BRP) at 52. She had

(Cite as: 119 Wash.App. 906, *915, 83 P.3d 1012, **1017)

not measured the pitch of the roof, and neither party submitted conclusive evidence.

The Board concluded that the roof was not low pitched within the meaning of WAC 296-155-24515(2)(b), based on the inspector's testimony and the lack of evidence provided by Washington Cedar. Moreover, WAC 296-155-24515(2)(b) provides an exception only if there is some other safety monitoring system in place, and Washington Cedar did not *916 show that such a system was in place here. WAC 296-155-24515(2)(b). Thus, the Board's rejection of the low-pitch roof exception was not clearly erroneous.

2. *Should Washington Cedar have known about the violation?*

Washington Cedar's employees claimed that they did not have fall restraints with them because they left their gear in another truck at the Washington Cedar yard. Washington Cedar argues that under these circumstances, the evidence was insufficient to show that it had direct knowledge of the violation or in any way sanctioned the violative conduct.

L & I responds that repeat citations for the same safety violation should put an employer on notice that it is not effectively enforcing its safety program. Thus, absent changes in the safety program or increased enforcement measures, the employer should anticipate continued violations. L & I also argues that Washington Cedar had the responsibility to ensure that its employees had appropriate safety gear when they left the yard and, if they did not, it should have known that the employees would be violating the safety rules when making their delivery.

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. Because of the discretion we give to the agency as fact finder, we will not disturb the Board's conclusion that the employer should have been aware of the violation.

3. *Do the facts show that serious harm may have resulted?*

Washington Cedar next argues that L & I has not

shown "a substantial probability that death or serious physical harm could result" from the violative condition. RCW 49.17.180(6). But the L & I inspector testified that serious physical harm, including broken or sprained limbs and *917 temporary hospitalization, could result from a fall from a roof over 10 feet in height.

B. CHARACTERIZATION OF THE VIOLATION AS "SERIOUS"

Washington Cedar contends that the Board's categorization of the violation as "serious" was an error of law. We review the Board's interpretation of RCW 49.17.180(6) de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wash.2d 289, 295, 916 P.2d 399 (1996).

Under RCW 49.17.180(6), a serious violation exists if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Washington Cedar argues that the regulation requires assessment of the *likelihood* of an injury resulting from the violation. L & I responds that the appropriate inquiry is how serious the injury could be *if* some harm resulted from the violation.

In a recent case, this court interpreted the language of RCW 49.17.180(6) and determined that "the statute's 'substantial probability' language refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm." *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wash.App. 471, **1018 482, 36 P.3d 558 (2001). This construction of the statute is consistent both with the federal interpretation of OSHA and with L & I's reading of RCW 49.17.180(6). 29 U.S.C. sec. 666(j); *Lee Cook*, 109 Wash.App. at 478, 36 P.3d 558.

L & I introduced evidence that a fall could result in "[b]roken bones, severe strains, sprains, [and/or] short-term hospitalization." BRP at 83. This supports the conclusion that a fall from over 10 feet could result in serious physical harm and, therefore, the violation was "serious" under RCW 49.17.180(6).

(Cite as: 119 Wash.App. 906, *917, 83 P.3d 1012, **1018)

*918 This result also resolves Washington Cedar's claim that the violation was de minimus. A de minimus violation is one that has "no direct or immediate relationship to safety or health." RCW 49.17.120(2). Because a fall here could have resulted in serious physical harm, Washington Cedar's argument that the violation was de minimus fails.

C. CHARACTERIZATION OF THE VIOLATION AS "REPEAT"

Washington Cedar further maintains that it was error to characterize the violation as "repeat" because there is insufficient evidence that prior violations were similar to the current incident.

WAC 296-27-16001(9) [FN2] defines "repeat violation" as one that "has previously been cited to the same employer when it identifies the same type of hazard." L & I has the authority to issue a citation for a repeat violation if it has issued any final safety violations of the same type within three years of the current citation. WAC 296-27-16007(5) . [FN3]

FN2. WAC 296-27-16001 was in effect at the time of the violation and citation, but was repealed, effective August 1, 2000. St. Reg. 00-11- 098.

FN3. WAC 296-27-16007 was in effect at the time of the violation and citation but was repealed, effective August 1, 2000. St. Reg. 00-11- 098.

L & I gave Washington Cedar two final citations within the three years preceding the October 1999 violation. L & I and the Board characterized these as "fall protection violations." CP at 303. L & I also described the violation at issue here as a fall protection violation.

Given the evidence that Washington Cedar committed prior, similar violations and considering the deference we accord the Board's findings, we cannot say that the Board's finding of a repeat violation was clearly erroneous.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

*****UNPUBLISHED TEXT FOLLOWS*****

IV. EVIDENTIARY CHALLENGES

Washington Cedar next raises a number of challenges to the Board's inclusion and exclusion of certain evidence. The Board rules on the admissibility of evidence in the same manner as the superior court. WAC 263-12-115(4). Under those standards, we give the Board substantial discretion to admit or refuse evidence. *Seay v. Chrysler Corp.*, 93 Wash.2d 319, 324, 609 P.2d 1382 (1980).

This court reviews the Board's evidentiary rulings for manifest abuse of discretion. *Sintra, Inc. v. City of Seattle*, 131 Wash.2d 640, 662-63, 935 P.2d 555 (1997). This occurs when an agency applies the wrong legal standard or when it takes a view no reasonable person would take. *Cox v. Spangler*, 141 Wash.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000).

A. HEARSAY CHALLENGE

Washington Cedar claims that the L & I inspector's penalty report contained third party statements and was therefore inadmissible hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). In this case, L & I did not offer the report to prove the truth of third party comments in the document. The IAJ allowed the report for demonstrative purposes only. Thus, the statement was not hearsay and the IAJ did not err in admitting the report.

B. OPINION TESTIMONY CHALLENGE

Washington Cedar next challenges the admission of the L & I inspector's opinion as to the physical harm that could result from a fall from over 10 feet. ER 701 states that lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

The inspector gave a severity assessment to the harm that could result from a 10-foot fall; this indicates a likelihood of significant injury. The inspector based her testimony on her own observations of the violation.

The IAJ overruled Washington Cedar's objection to this testimony, stating that this evidence went to the weight of the inspector's assessment of the penalty. Because the inspector based her testimony on her

(Cite as: 119 Wash.App. 906, *918, 83 P.3d 1012)

own observations and because it was helpful to the IAJ in determining the inspector's ability to assess the penalty, it was not an abuse of discretion to admit it.

C. RELEVANCY CHALLENGES

Washington Cedar makes three challenges based on the relevancy of evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Washington Cedar first challenges the relevancy of questioning Bob Hein, manager of Washington Cedar's Tumwater facility, as to his awareness of "citations from [L & I] for work out of other Washington Cedar yards" as well as the existence of a Washington Cedar safety committee. BRP at 130. [FN4]

FN4. Washington Cedar also raises an issue of character evidence under ER 404(b) in its brief. From the transcript, it does not appear that this objection was preserved.

The IAJ determined that the challenged evidence was relevant because it provided information as to enforcement of the employer's safety program. The program's enforcement is specifically relevant to whether an unpreventable employee misconduct defense applies. It was not an abuse of discretion to admit this evidence.

Washington Cedar next challenges the L & I inspector's testimony about its safety record at other Washington Cedar yards. The Board ruled that this testimony was relevant to Washington Cedar's unpreventable employee misconduct defense and that it could look to Washington Cedar's compliance with the safety program at all Washington Cedar work yards to determine whether Washington Cedar was effectively enforcing the program. In its final Decision and Order, the Board states that the "Tumwater yard is not a separate legal entity. It is a component part of the employer's operation." CP at 301.

Washington Cedar cites the Board's decision in *Clark County*, arguing that the Board should have focused only on the area controlled by the manager directly responsible for the employee's behavior. *In*

re Clark County Public Works, Bd. of Indus. Ins. Appeals No. 96 W322 (March 11, 1998). But *Clark County* is not on point as it does not discuss the unpreventable employee misconduct defense or the scope of the Board's review in determining employer enforcement of a safety program. *Clark County*, No. 96 W322.

Washington Cedar makes a final relevancy challenge to the IAJ's exclusion of Exhibit 12, which contained incentive reports for Washington Cedar's Kent and Port Orchard yards. The IAJ admitted 10 other incentive reports as Exhibit 11.

The trier of fact has the discretion to exclude relevant evidence that would waste the court's time or be cumulative. ER 403. Here, it appears that the IAJ employed ER 403 to limit the admission of "three inches worth" of quarterly incentive reports that Washington Cedar attempted to introduce for demonstrative purposes. BRP at 118. Because the evidence was cumulative, the IAJ did not abuse its discretion in excluding Exhibit 12.

V. CONSTITUTIONAL CHALLENGES

Washington Cedar claims that both WAC 296-155-24510 and RCW 49.17.180 are unconstitutionally vague and, in addition, that RCW 49.17.180 violates double jeopardy protections. L & I asks us to deem these assignments of error waived because Washington Cedar did not raise them below.

Generally, we have the discretion to refuse to review claims of error not raised below. RAP 2.5(a). But a party may raise a manifest error affecting a constitutional right in either a criminal or civil case for the first time on review. RAP 2.5(a); *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999). Under RAP 2.5, an error is "manifest" if it has "practical and identifiable consequences" or caused "actual prejudice" to the defendant. *WWJ Corp.*, 138 Wash.2d at 602-03, 980 P.2d 1257. Because Washington Cedar's citation invokes a monetary penalty, if there was a violation of constitutional due process or double jeopardy protections, the resultant error has caused Washington Cedar actual prejudice.

Although RAP 2.5 provides authority to review these new issues, RCW 49.17.150(1) contains a specific limitation on our review of issues that the appellant failed to raise before the Board: "No

(Cite as: 119 Wash.App. 906, *918, 83 P.3d 1012)

objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." RCW 49.17.150(1). Where a court rule and a statute conflict, we make every effort to reconcile and give effect to both. *Nearing v. Golden State Foods Corp.*, 114 Wash.2d 817, 821, 792 P.2d 500 (1990). Where this is impossible, the nature of the right at issue determines which will govern. *Leslie v. Verhey*, 90 Wash.App. 796, 806, 954 P.2d 330 (1998).

In a recent decision, we discussed the application of RAP 2.5(a) and RCW 49.17.150(1) in the context of a preemption challenge. *Dep't of Labor & Indus. v. Nat'l Sec. Consultants, Inc.*, 112 Wash.App. 34, 47 P.3d 960 (2002). L & I appealed the trial court's application of RCW 51.36.030, claiming that OSHA preempted the state statute, but L & I did not allege an error of constitutional magnitude. *Nat'l Sec. Consultants*, 112 Wash.App. at 37, 47 P.3d 960. We held that RCW 49.17.150(1) barred review because L & I had not shown extraordinary circumstances. *Nat'l Sec. Consultants*, 112 Wash.App. at 37-38, 47 P.3d 960.

Washington Cedar argues that *National Security Consultants* is inapposite because it did not involve the deprivation of a constitutional right. We agree. Further, it is reasonable to reconcile the court rule and the statute by including manifest errors affecting constitutional rights within the statutory exception for "extraordinary circumstances." Thus, under the authority of both RAP 2.5(a) and RCW 49.17.150(1), we will review Washington Cedar's constitutional claims.

A. VAGUENESS CHALLENGE TO WAC 296-155-24510

Statutes and duly adopted regulations are presumed to be constitutional. *City of Seattle v. Eze*, 111 Wash.2d 22, 26, 759 P.2d 366 (1988); *Longview Fibre Co. v. Dep't of Ecology*, 89 Wash.App., 627, 632, 949 P.2d 851 (1998). The party challenging a statute's constitutionality on vagueness grounds has the heavy burden of proving its vagueness beyond a reasonable doubt. *Eze*, 111 Wash.2d at 26, 759 P.2d 366.

A statute is void for vagueness if persons "of common intelligence must necessarily guess at its

meaning and differ as to its application." *Haley v. Med. Disciplinary Bd.*, 117 Wash.2d 720, 739, 818 P.2d 1062 (1991) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). But the "vagueness test does not require a statute to meet impossible standards of specificity." *Anderson v. City of Issaquah*, 70 Wash.App. 64, 75, 851 P.2d 744 (1993). It is sufficient if the statute provides adequate notice of prohibited conduct and prevents arbitrary, discretionary enforcement. *Haley*, 117 Wash.2d at 739-40, 818 P.2d 1062.

WAC 296-155-24510 requires employers to "ensure" that fall restraint systems are "provided, installed, and implemented" when the employee will be exposed to a hazard of falling from more than 10 feet. Washington Cedar claims that the word "ensure" is vague because it does not give employers notice of the level of conduct that may constitute a breach.

The terms "provided, installed, and implemented" provide guidance as to the proper construction of the term "ensure" within the regulation. WAC 296-155-24510. A person of common intelligence would conclude that an employer who provided, installed, and implemented a safety restraint system would have *ensured* that the system was in place. Thus, Washington Cedar has not overcome the presumption that WAC 296-155-24510 is not unconstitutionally vague.

B. VAGUENESS CHALLENGE TO RCW 49.17.180(6)

Washington Cedar also argues that the phrase "serious violation" in RCW 49.17.180(6) is unconstitutionally vague. Under the statute, a violation is serious where "there is a substantial probability that death or serious physical harm could result" from an existing condition or practice. RCW 49.17.180(6).

When a challenged statute does not involve First Amendment rights, our analysis is limited to deciding whether the statute is void for vagueness as applied to the facts of the case. *State v. Groom*, 133 Wash.2d 679, 691, 947 P.2d 240 (1997); *City of Seattle v. Abercrombie*, 85 Wash.App. 393, 400, 945 P.2d 1132 (1997). Here, a Washington Cedar employee was working at a height greater than 10 feet and not wearing any fall restraints, violating

(Cite as: 119 Wash.App. 906, *918, 83 P.3d 1012)

WAC 296-155-24510.

In *Lee Cook*, the court stated that the phrase "serious violation" in RCW 49.17.180(6) was ambiguous and needed judicial construction to determine its meaning. *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wash.App. 471, 476-77, 36 P.3d 558 (2001). After looking to federal law, the *Lee Cook* court construed the statute as providing that a violation is serious if any harm resulting from it is likely to be death or serious physical injury. 109 Wash.App. at 482, 36 P.3d 558.

Although there is an ambiguity as to whether "substantial probability" refers to the likelihood of a serious injury resulting from the violation, or the likelihood of that injury being serious when an injury occurs, the existence of an ambiguity does not necessarily mean that a statute is unconstitutionally vague. "[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Eze*, 111 Wash.2d at 27, 759 P.2d 366.

The statute here provides that a violation will be deemed serious where there is a substantial probability that serious physical harm could result. As applied to the facts of this case, Washington Cedar should have been aware that allowing an employee to work at over 10 feet above the ground without fall restraints could lead to serious physical injury. Thus, Washington Cedar has not met the heavy burden of showing that RCW 49.17.180(6) is unconstitutionally vague as applied.

C. DOUBLE JEOPARDY CHALLENGE

Washington Cedar asserts a violation of its right not to be placed in double jeopardy, pointing to the increase in the monetary penalty based on repeat offenses. RCW 49.17.180(1). The double jeopardy clause applies only where the "clearest proof" shows that the penalty imposed is criminal. *S.A. Healy Co. v. Occupational Safety & Health Review Comm'n*, 138 F.3d 686, 688 (7th Cir.1998) (citing *United States v. Ward*, 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). And the statutes under which Washington Cedar was cited provide for civil penalties only. RCW 49.17.180(7)

Moreover, recidivist penalties for repeat offenders typically do not implicate double jeopardy protections. *Spencer v. Texas*, 385 U.S. 554, 560, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *State v. Williams*, 9 Wash.App. 622, 625-26, 513 P.2d 854 (1973). Penalty increases do not punish the penalized party a second time; rather, they provide a more severe punishment for a subsequent, repeat crime. *Spencer*, 385 U.S. at 560, 87 S.Ct. 648; *Williams*, 9 Wash.App. at 626, 513 P.2d 854.

And finally, RCW 49.17.180 specifically authorizes cumulative punishment. See *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (court's analysis of double jeopardy clause claim is "limited to assuring that the court does not exceed its legislative authorization"). Thus, Washington Cedar has not established a double jeopardy violation.

VI. APPLICABILITY OF WAC 296-155-24510 TO DELIVERY OF MATERIALS

WAC 296-155-24510 requires that employees working at heights over 10 feet wear fall restraints. It applies

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.

WAC 296-155-005(1).

Washington Cedar contends that because its employees were *delivering* construction materials to a construction site and not participating in any of the activities enumerated in WAC 296-155-005(1), the regulation does not apply to them. L & I responds that the guiding language of WAC 296-155-005(1) is "any and all work places" and that the statute applies wherever employees are present at a work site where a listed activity is occurring.

Once again, we review a challenge to the agency's interpretation of an administrative regulation de novo, applying an error of law standard. *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wash.App. 858, 864, 975 P.2d 567 (1999). We will uphold an agency's interpretation of an

(Cite as: 119 Wash.App. 906, *918, 83 P.3d 1012)

administrative regulation if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Serv.*, 82 Wash.App. 495, 518, 919 P.2d 602 (1996).

To determine the underlying purpose and intent of WAC 296-155-005(1), we must examine the regulation's subject matter as shown in the text as a whole. *Eastlake Cmty. Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 490, 513 P.2d 36 (1973); *Maplewood Estate, Inc. v. Dep't of Labor & Indus.*, 104 Wash.App. 299, 305-06, 17 P.3d 621 (2000). The purpose of WAC 296-155 is set forth in the statute authorizing the WAC, WISHA, and chapter 49.17 RCW. The purpose of WISHA is to create and maintain safe and healthy working conditions for "every man and woman working in the state of Washington." RCW 49.17.010.

Based on the statute's overall intent and purpose to promote worker safety, the Board appropriately construed the regulation as requiring compliance with the WAC when any listed activity was occurring on the premises even if the cited party was not performing a listed activity. WAC 296-155. Thus, when Washington Cedar delivered roofing materials to a site where "construction" was being performed, the WAC required that Washington Cedar comply with the safety regulations in WAC 296-155-24510.

VII. GOVERNING LAW FOR CONTENT OF BOARD'S DECISION

Washington Cedar asserts that RCW 34.05.461(3) requires that the Board identify any findings substantially based on credibility as such in their

Decision and Order. Again, we review this matter of statutory construction de novo on appeal. *Children's Hosp. & Med. Ctr.*, 95 Wash.App. at 864, 975 P.2d 567.

RCW 34.05.461(3) does not apply "[t]o adjudicative proceedings of the board of industrial insurance appeals." RCW 34.05.030(2)(a); *Danzer v. Dep't of Labor & Indus.*, 104 Wash.App. 307, 319 n. 5, 16 P.3d 35 (2000). Rather, RCW 51.52.106 controls the procedures for a Board's final Decision and Order and it does not require the Board to identify findings based on credibility. Thus, Washington Cedar has not shown that the Board's findings were defective in this regard.

VIII. ATTORNEY FEES

Because Washington Cedar has not prevailed on their appeal, we do not consider their request for attorney fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

*****END OF UNPUBLISHED TEXT*****

We concur: HOUGHTON, J., and HUNT, C.J.

119 Wash.App. 906, 83 P.3d 1012, 20 O.S.H. Cas. (BNA) 1489

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Westlaw.

135 P.3d 913

Page 1

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
 (Cite as: 157 Wash.2d 90, 135 P.3d 913)

H

Briefs and Other Related Documents

Supreme Court of Washington, En Banc.
COBRA ROOFING SERVICES, INC., a
 Washington corporation, Petitioner,
 v.

STATE OF WASHINGTON DEPARTMENT OF
 LABOR AND INDUSTRIES, Board of Industrial
 Insurance Appeals, Respondent.

No. 76064-1.

Argued Oct. 18, 2005.

Decided June 1, 2006.

Background: Roofing company sought judicial review of determination by Board of Industrial Insurance Appeals affirming fall protection safety citation, as repeat violation, and ladder safety citation which were issued to company by Department of Labor and Industries inspector, and denial of company's request for attorney fees and costs under Equal Access to Justice Act (EAJA). The Superior Court, Asotin County, William D. Acey, J., affirmed fall protection citation, but found that it was not repeat violation, affirmed ladder citation, and also denied company's request for fees and costs under EAJA. Company appealed and roofing company cross-appealed. The Court of Appeals, 122 Wash.App. 402, 97 P.3d 17, affirmed in part and reversed in part. Roofing company and Department petitioned for review.

Holdings: The Supreme Court, C. Johnson, J., held that:

1(1) fall protection safety violation was a repeat violation;

2(2) attorney fees under EAJA for "judicial review" were limited to court review; and

6(3) attorney fees under EAJA did not apply to

judicial review of agency decisions not authorized by Administrative Procedure Act.

Court of Appeals judgment affirmed in part, reversed in part.

Sanders, J., filed a dissenting opinion in which Alexander, C.J., and J.M. Johnson, J., joined.

Chambers, J., filed a dissenting opinion in which J.M. Johnson, J., joined.

J.M. Johnson, J., filed an opinion concurring in the dissents.

West Headnotes

[1] Labor and Employment 231H ↻2587

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2586 Machines and Equipment; Structures

231Hk2587 k. In General. Most Cited Cases

Labor and Employment 231H ↻2606

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2604 Penalties; Enforcement

231Hk2606 k. Serious, Willful or Repeated Violations. Most Cited Cases

Department of Labor and Industries properly found

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135 P.3d 913

Page 2

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

a violation of the Washington Industrial Safety and Health Act (WISHA), committed by roofing company based on failure to provide adequate fall protection for its employees, to be a "repeat" violation subject to a greater penalty; WISHA unambiguously defined "repeat" with respect to the nature of the hazard and required government to prove only that violations involved same type of hazard, not same underlying conduct. West's RCWA 49.17.180(1); WAC 296-27-16001(9) (1996).

[2] States 360 ↪215

360 States

360VI Actions

360k215 k. Costs. Most Cited Cases

Attorney fees under the Equal Access to Justice Act (EAJA) for "judicial review" were limited to court review, and therefore attorney fees were not available for administrative review before the Board of Industrial Insurance Appeals. West's RCWA 4.84.340, 4.84.350, 4.84.360.

[3] Statutes 361 ↪181(1)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most

Cited Cases

The court's primary duty in interpreting any statute is to discern and implement the intent of the legislature.

[4] Statutes 361 ↪206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

[5] Statutes 361 ↪179

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k177 Constitutional and Statutory Rules and Provisions

361k179 k. Interpretation Clauses and Definitions in Statutes Construed. Most Cited Cases
Application of statutory definitions to terms of art is essential to determining the plain meaning of the statute.

[6] States 360 ↪215

360 States

360VI Actions

360k215 k. Costs. Most Cited Cases

Attorney fees authorized by Equal Access to Justice Act (EAJA) did not apply to judicial review of agency decisions not authorized by Administrative Procedure Act (APA), including Washington Industrial Safety and Health Act (WISHA) decisions; EAJA's language indicated that the legislature specifically limited judicial review to judicial review authorized by APA. West's RCWA 4.84.340, 4.84.350, 4.84.360.

****914** Anastasia R. Sandstrom, Attorney General's Office, Seattle, for Petitioner/Appellant.

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John Henry Guin, Winston & Cashatt, Spokane, Amicus Curiae Inland Northwest Associated General Contractors, Inc.

Jerald A. Klein, Seattle, Amicus Curiae Washington Cedar & Supply Co.

C. JOHNSON, J.

***93 ¶ 1** This case requires us to determine whether the Department of Labor and Industries (Department) properly found a violation of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, to be a "repeat" violation under RCW 49.17.180(1) subject to a

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

greater penalty. We also decide whether attorney fees may be awarded, under Washington's equal access to justice act (EAJA), RCW 4.84.340, .350, and .360, for WISHA decisions appealed to the Board of Industrial Insurance Appeals (Board) and to superior court. The Court of *94 Appeals held the violation was a repeat, applied the EAJA to WISHA appeals in superior court but not to the Board proceeding, and denied attorney fees to **Cobra Roofing Services, Inc. (Cobra)** because the Department's action was substantially justified. We affirm that the violation is a repeat and affirm the denial of attorney fees, but hold that attorney fees are not awardable for WISHA decisions appealed to the Board or to superior court.

Facts

¶ 2 On February 22, 2000, the Department conducted an inspection of the job site where Cobra employees worked on a school remodeling project. The Department observed that three employees working on a multi-level flat roof were not wearing any fall protection equipment or otherwise protected by a fall restraint system. Based on these observations, the Department issued four WISHA citations for safety violations. The inspector cited Cobra for failing to have an adequate fall protection system for employees working at a height of 10 feet or more (WAC 296-155-24510) and other violations that were not appealed to this court and are not before us. The Department doubled the fall protection penalty to \$3,200 on the grounds it was a repeat violation. Clerk's Papers (CP) at 8. The Department had previously cited Cobra on December 13, 1999, for a violation of WAC 296-155-24510, the code provision that governs fall protection systems. CP at 9. The record gives no specific details of the nature of the 1999 violation or the conduct giving rise to that citation.

¶ 3 Cobra appealed the citations to the Board. An industrial appeals judge issued a proposed decision that affirmed the fall protection citation but reversed the repeat penalty.

¶ 4 The Department petitioned the three-member Board for review. Cobra moved for attorney fees.

The Board reversed in part, finding the fall protection citation was a repeat violation. The Board denied attorney fees, concluding the EAJA does not apply to proceedings before the Board.

*95 ¶ 5 Cobra appealed the Board's decision to the superior court. The court affirmed the Board's decision upholding the fall protection decision. However, the court found the fall protection citation was not a repeat violation and reversed the Board on that issue. In response to Cobra's request for attorney fees, the court held the EAJA did not apply to the Board proceedings but did apply to judicial review in superior court. The court initially granted Cobra attorney fees for the appeal to superior court but, on reconsideration, denied them because both Cobra and **915 the Department prevailed on significant issues.

¶ 6 Cobra appealed to the Court of Appeals, assigning error to the denial of attorney fees for its appeals to the Board and superior court.^{FN1} The Department cross-appealed, assigning error to the reversal of the repeat violation issue and the application of the EAJA to superior court appeals of WISHA decisions. The Court of Appeals reversed in part, holding the fall protection violation was a repeat violation. The court affirmed in part, concluding attorney fees were not awardable for proceedings before the Board. The court held attorney fees could be awarded for prevailing in a superior court appeal in a WISHA case but denied the fees on the grounds that the Department prevailed on the contested issues decided by the court. *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wash.App. 402, 97 P.3d 17 (2004).

FN1. The appeal to the Court of Appeals also included a challenge to another citation that is not before us.

¶ 7 Cobra petitioned this court for review to determine whether the fall protection violation was a repeat and whether the EAJA applies to Board proceedings. The Department petitioned for review on the question of whether the EAJA applies to court review of WISHA decisions. We granted review at 154 Wash.2d 1001, 113 P.3d 481 (2005).

135 P.3d 913

Page 4

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

Repeat Violation

[1] ¶ 8 Under RCW 49.17.180(1), the Department may assess enhanced penalties when an employer willfully or *96 repeatedly violates any safety or health standard promulgated under the authority of WISHA or any rule or regulation governing the conditions of employment promulgated by the Department.^{FN2} Former WAC 296-27-16001(9)(1996) defines a “repeat violation” as “any violation of a standard or order when a violation has previously been cited to the same employer when it identifies the same type of hazard.”^{FN3} A “hazard” is “that condition, potential or inherent, which is likely to cause injury, death, or occupational disease.” WAC 296-155-012.

FN2. RCW 49.17.180(1) states:

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, of any existing rule or regulation 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.

FN3. This regulation was repealed, effective August 1, 2000, (Wash.St.Reg.00-11-098), and replaced with WAC 296-800-35040, which establishes that a repeat violation occurs when the employer has been previously cited for a “substantially similar hazard.”

¶ 9 In this case, the Department cited Cobra in 1999 and 2000 for violating the fall protection regulation, WAC 296-155-24510, which states in relevant part,
When employees are exposed to a hazard of falling from a location of 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 regulation's subsections provide specific requirements for compliance with each of the three alternative forms of fall protection.^{FN4}

FN4. The subsections outline safety details for each fall protection method: fall restraint systems include guardrails, safety belts or harnesses, warning lines, and safety monitors; fall arrest systems include full body harnesses, safety nets, and catch platforms; and positioning device systems must not allow employees to free fall more than two feet and must be secured to appropriate anchorages. WAC 296-155-24510(1)-(3).

*97 ¶ 10 Cobra argues that the Department improperly applies a general approach to determine when a repeat violation occurs on the basis that the statute requires the Department to focus on the specific conduct supporting the violation.^{FN5} Unless the Department**916 establishes the conduct supporting the 1999 violation, Cobra maintains that no repeat violation can be found. In support of this approach, Cobra and its amicus curiae contend that Washington's definition of “repeat violation” is ambiguous and ask the court to adopt Maryland's approach from *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 684 A.2d 845 (1996). This Maryland Court of Appeals case interpreted the meaning of a “repeat violation” under Maryland's model of the federal Occupational Safety and Health Act (OSHA) because neither the OSHA nor the Maryland model defined “repeat violations”. The *Bethlehem Steel* test requires the government to prove the violations involve the same standard and the violative elements are substantially similar. Under this approach, Cobra argues the Department would have to prove the violations involved the same violative equipment or practice.

135 P.3d 913

Page 5

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

FN5. In the Court of Appeals, amicus Building Industry Association of Washington argued the 2000 citation was not a repeat because **Cobra** should have been cited for violating the low-pitched roof standard, WAC 296-155-24515. In its petition for review, however, **Cobra** does not challenge the validity of the 2000 citation or the applicability of WAC 296-155-24510.

¶ 11 The Department asserts **Cobra's** position is inconsistent with the language of the regulations and the broad remedial purposes of WISHA. The Department contends the regulations unambiguously focus on the nature of the hazard that could result in injury, not the specific conduct. Additionally, by using the language "same type of hazard," rather than "same hazard," the applicable regulation eliminates the fact-specific inquiry **Cobra** seeks to impose.

¶ 12 We agree with the Department and reject **Cobra's** contention that the Department must prove the similarity of the specific equipment or practice to establish a repeat violation under Washington's regulatory scheme. *98 WISHA unambiguously defines "repeat" with respect to the nature of the hazard and requires the government to prove only that the violations involve the same type of hazard, not the same underlying conduct. The record shows that the Department cited **Cobra** in 1999 for violating the fall protection regulation. When the Department cited **Cobra** again in 2000, the record shows three **Cobra** employees worked on a roof without adequate guardrail systems, fall protection equipment, or fall restraint systems. Regardless of whether **Cobra's** 1999 violation involved the broad fall protection regulation requiring at least one of the three mechanisms or a specific subsection of the same standard, **Cobra** employees were exposed to the hazard of falling from a height of 10 feet or more because they lacked adequate fall protection. Accordingly, in both instances, **Cobra** employees were exposed to the same type of hazard.

¶ 13 We conclude that the Department established the violations involved the same general type of hazard by showing both violations were issued for

exposing **Cobra** employees to the hazard of falling from a height of 10 feet or more. **Cobra** did not present evidence to show that the violations involved different types of hazards. Under Washington's definition of repeat violations, which focuses on the type of hazard, the Department properly determined that **Cobra** employees were repeatedly exposed to the same type of hazard and thus subject to enhanced penalties.

Attorney Fees

[2] ¶ 14 Pursuant to the EAJA, codified at RCW 4.84.340, .350, and .360, **Cobra** seeks attorney fees for its appeals to the Board, the superior court, the Court of Appeals, and this court. The act is intended to provide possible attorney fees for certain individuals and qualified groups who otherwise would be deterred from defending against unjust state agency actions. *Entm't Indus. Coal. v. Tacoma-Pierce Co. Health Dep't*, 153 Wash.2d 657, 667, 105 P.3d 985 (2005). RCW 4.84.350(1) states in relevant part,

*99 Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.

[3][4][5] ¶ 15 Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. Application of statutory definitions **917 to the terms of art is essential to determining the plain meaning of the statute. *J.P.*, 149 Wash.2d at 450, 69 P.3d 318.

¶ 16 RCW 4.84.340 provides the definitions for the EAJA and relies in part on the definitions provided by the Administrative Procedure Act (APA), chapter 34.05 RCW. Specifically, RCW 4.84.340(2) states that "agency action" is "agency

135 P.3d 913

Page 6

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

action as defined by chapter 34.05 RCW". Similarly, RCW 4.84.340(4) states that "judicial review" means "judicial review as defined by chapter 34.05, RCW". The APA does not explicitly define "judicial review" but states that "[t]his chapter establishes the exclusive means of judicial review of agency action." RCW 34.05.510. The APA's definition of "judicial review" includes only judicial review authorized by the APA. However, the APA's provisions governing judicial review do not apply to the adjudicative proceedings of the Board of Industrial Insurance Appeals or to the Department of Labor and Industries where another statute expressly provides for review of adjudicative proceedings. RCW 34.05.030(2)(a), (c).^{FN6}

FN6. WISHA provides separately for review before the Board under RCW 49.17.140 and in superior court under RCW 49.17.150.

1. Administrative Proceedings

¶ 17 At every level of review, Cobra has requested and been denied attorney fees for its proceedings before the Board. "Judicial review", under its ordinary meaning and *100 its limited application under the APA, applies only to a court's review, not administrative proceedings. The Court of Appeals noted that a person reading the "judicial review" section of the APA would necessarily conclude that judicial review means review by a superior court, the Court of Appeals, or the Supreme Court. *Cobra Roofing Serv. v. Dep't of Labor & Indus.*, 122 Wash.App. 402, 418, 97 P.3d 17 (2004). Dictionary definitions of "judicial review" also limit applicability to review by a court. For example, Black's Law Dictionary defines "judicial review" as "[a] court's review of a lower court's or an administrative body's factual or legal findings." BLACK'S LAW DICTIONARY 852 (7th ed.1999).

¶ 18 Cobra argues the EAJA applies to Board proceedings because the Board engages in the initial review of the Department's conduct in place of the superior court. However, the fact that the Board conducts a quasi-judicial act of reviewing the hearing examiner's WISHA decisions does not

render it a court conducting judicial review. In construing the statute's silence with respect to proceedings before administrative agencies, the Washington Court of Appeals recognized that the EAJA authorizes attorney fees only for a court's review of agency action. *See Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wash.App. 1, 19, 979 P.2d 929 (1999) ("The clear implication is that our Legislature did not intend to make fees incurred at the administrative level available under the act."). Because the statute specifically limits its applicability to judicial review and judicial review is generally limited to court review, we affirm the Court of Appeals' ruling that the EAJA does not apply to administrative review before the Board.

2. Superior Court Proceedings

[6] ¶ 19 The Court of Appeals concluded that the EAJA applies to judicial review of WISHA decisions in superior court because nothing in the statute's language specifically precludes its application to agency actions outside the procedural boundaries of the APA. The court held that the APA references provide only definitional guidance. *101 However, this conclusion renders the statute's definitions meaningless. We must construe the statute to give effect to the definitions provided by the legislature. The EAJA's language indicates that the legislature specifically limited judicial review, for purposes of this statute, to judicial review authorized by the APA.

¶ 20 The EAJA's legislative history also supports this conclusion. When the legislature passed an amendment to the definition of "judicial review" in the EAJA, replacing "judicial review as defined by chapter 34.05 RCW" with "review of an agency action in the superior court and courts of appeal," **918 (Laws of 1997, ch. 409, § 501, amending RCW 4.84.340(4)) the Governor vetoed the proposed change. Governor Locke reasoned that this would expand the program to judicial review of all agency actions, not just APA issues, and would extend beyond the evils the legislature intended to eliminate with the EAJA. Laws of 1997, ch. 409 at 2559-61.

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

¶ 21 We conclude that the attorney fees authorized by the EAJA do not apply to judicial review of agency decisions not authorized by the APA. Accordingly, we hold the Court of Appeals erred in concluding the EAJA applies in this case, which involves agency action excluded from the judicial review portions of the APA.

Conclusion

¶ 22 We affirm the Court of Appeals and uphold the ruling that the Department properly issued a repeat penalty. Cobra employees repeatedly worked without adequate fall protection at a height of 10 feet or more and thus were exposed to the same type of hazard. We also affirm the Court of Appeals on the basis that the EAJA does not authorize attorney fees for administrative review before the Board. However, we conclude that the Court of Appeals' application of the EAJA to judicial review of WISHA decisions was erroneous. On this basis, we deny attorney fees *102 requested by Cobra for the appeal to the Court of Appeals and this court.

Concurring: MADSEN, BRIDGE, OWENS, FAIRHURST, JJ.
SANDERS, J. (dissenting).

¶ 23 I agree with the dissent on the merits but not on the scope of attorney fees available under the equal access to justice act (EAJA), RCW 4.84.340, .350, and .360. Both the majority and the dissent conclude the EAJA entitles a qualified party prevailing in a judicial review of an agency action to attorney fees only when the Administrative Procedure Act (APA), chapter 34.05 RCW, authorizes judicial review. I disagree. The reviewing court's source of authority is irrelevant. Any qualified party prevailing in a judicial review of any agency action is entitled to attorney fees under the EAJA.

¶ 24 The plain language of the EAJA entitles a qualified party prevailing in a judicial review of any agency action to attorney fees. "Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other

expenses, including reasonable attorneys' fees." RCW 4.84.350(1). The section defines "[j]udicial review" as "a judicial review as defined by chapter 34.05 RCW." RCW 4.84.340(4).

¶ 25 In fact, chapter 34.05 RCW does not define "judicial review." However, its definitions of "[p]arty to agency proceedings" and "[p]arty to judicial review or civil enforcement proceedings" indicate "judicial review" means review by a court of general jurisdiction but not review by an administrative agency. RCW 34.05.010(12), (13). Chapter 34.05 RCW confirms this common sense interpretation of the meaning of "judicial review" by defining the "relationship between this chapter and other judicial review authority." RCW 34.05.510. This section specifies that chapter 34.05 RCW "establishes the exclusive means of judicial review of agency action" with several exceptions, including, *103 "[t]o the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law." *Id.*

¶ 26 In other words, "judicial review" means judicial review simpliciter. The majority presents no evidence to the contrary. The legislature's failure to enact clarifying language cannot support an interpretation lacking any support in the existing statutory language.

¶ 27 The majority correctly concludes a qualified party prevailing in an agency hearing is not entitled to attorney fees under the EAJA. But its contention the EAJA applies only to judicial review authorized by the APA is untenable.

¶ 28 I dissent.

Dissenting: J.M. JOHNSON, J., ALEXANDER, C.J.

**919 CHAMBERS, J., (dissenting).

¶ 29 Because the majority fails to recognize that the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, contains general, specific, and ultimately extremely diverse regulations, I dissent. In my view, the majority confuses the burden of proof and fails to provide fundamental due process before the imposition of higher penalties is upheld on review for alleged "

135 P.3d 913

Page 8

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

repeat” WISHA violations. Based upon the language of RCW 49.17.060, I would establish an evidentiary standard similar to that established in *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 684 A.2d 845 (1996), which the Department of Labor and Industries (Department) would have to meet before a repeat violation penalty is sustained. I would require the Department to demonstrate that the employer has been previously penalized for violating a substantially similar requirement of the regulation.

¶ 30 It should be axiomatic in a free and democratic society governed by laws that no punishment may be imposed by government for misconduct without fair warning and notice of the precise conduct that is prohibited. The federal Occupational Safety and Health Act *104 (OSHA), 29 U.S.C. §§ 651-78, which is the source of WISHA, is premised upon notice and fair warning of its regulations to employers. *See generally* 29 U.S.C. § 655. Under the United States Constitution, a law or regulation that does not provide fair warning of what it requires or prohibits is void as unconstitutionally vague. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-91, 41 S.Ct. 298, 65 L.Ed. 516 (1921). It is well accepted that occupational safety and health acts “must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.” *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir.1976); *Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 157, 161 (3rd Cir.1978).

¶ 31 The Department may and should impose substantially higher penalties when an employer “willfully or repeatedly violates the requirements ... of any safety or health standard promulgated [by the Department].” RCW 49.17.180(1). The Department has interpreted this to mean it has to prove only that a “repeat” violation involves “the same type of hazard” as the current violation.^{FN1} Former WAC 296-27-16001(9) (1996), *repealed by* Wash. St. Reg. 00-11-098 (Aug. 1, 2000). The Department has defined “hazard” to mean a “condition, potential or inherent, which is likely to cause injury, death, or occupational disease.” WAC

296-155-012.

FN1. In 2000, the Department adopted a slightly different articulation of what constitutes a repeat violation for a “substantially similar hazard” under WAC 296-800-35040. However, the difference between “the same type of hazard” and “substantially similar hazard” does nothing to assist my analysis. Former WAC 296-27-16001(9) (1996), *repealed by* Wash. St. Reg. 00-11-098 (Aug. 1, 2000); WAC 296-800-35040.

¶ 32 The real question for this court is what standard should be applied to determine whether the Department has sustained its burden of showing that the violation is the “same type of hazard” or “substantially similar hazard.” Former WAC 296-27-16001(9); WAC 296-800-35040. That a clear standard is needed is illustrated by this case. The *105 Department issued a “repeat” violation to Cobra. An industrial appeals judge determined that there was insufficient evidence of a repeat offense because the Department failed to present any evidence of the conditions or conduct giving rise to the prior violation. Subsequently, the Board of Industrial Insurance Appeals (Board) reversed, the superior court reversed the Board, and the Court of Appeals reversed the superior court. Reviewing the very same evidence, the industrial appeals judge and the superior court concluded that there was insufficient evidence of a repeat violation, while the Board and Court of Appeals concluded that there was sufficient evidence of a repeat violation.

¶ 33 But despite the need for a standard to determine whether a current violation involves a substantially similar hazard, the majority provides no answer. Instead, the majority reasons that if there is a violation of **920 the same regulation, then there must be a repeat violation. Majority at 915-916. Regrettably, that is not a useful standard since there are general and specific regulations which often times deal with multiple conditions and hazards. Unfortunately, the majority compounds its error by observing that “Cobra did not present evidence to show that the violations involved

135 P.3d 913

Page 9

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

different types of hazards.” Majority at 916. It is the *Department*, not the *employer*, who has the burden of proof in any action involving an alleged violation under WISHA. *Wash. Cedar & Supply Co. v. Dep’t of Labor & Indus.*, 119 Wash.App. 906, 914, 83 P.3d 1012 (2003).

¶ 34 *Cobra* was cited on both occasions under a general regulation requiring adequate fall protection from a location of 10 feet or more in height. WAC 296-155-24510. Most, if not all, of the on-site work performed by any roofing company is from a height of 10 feet or more. Further, as stated above, the relevant regulation is general in nature. There are more specific standards relating to fall hazards. See WAC 296-155-24510, 296-155-24515. Typically, more specific standards supersede general standards. See *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir.1981) *106 (“[OSHA’s] general duty clause applies [only] when there are no specific [safety] standards”). The Department has recognized that there are different risks and hazards associated with work on steep pitched roofs than on low pitched roofs. There are different standards regulating steep pitched roofs, WAC 296-155-24510, and low pitched roofs, WAC 296-155-24515. *Cobra* contends that WAC 296-155-24515 should have applied to the 2000 violation because their employees in that instance were working on a flat roof surrounded with a parapet, making the WAC concerning steep pitched roofs inapplicable.

¶ 35 Regardless of the persuasive force of *Cobra’s* contention, at the very least, the employer is entitled to a standard that assures that enhanced penalties for repeat violations will be for violations of substantially similar requirements of regulations addressing the same hazards, not merely the same code provision that may very well address several different conditions and hazards. In other words, the employer’s prior, specific conduct underlying a given hazard resulting in a citation should be substantially similar to the conduct underlying a subsequent violation involving the same hazard if a repeat violation penalty is to be imposed by the Department.

¶ 36 In sum, I would adopt the approach outlined

in *Bethlehem Steel Corp.*, 344 Md. at 29-36, 684 A.2d 845, as it sets out a fair and reasonable standard and test. In that case, Bethlehem was assessed a civil penalty for a repeat violation of the Maryland Occupational Safety and Health Act (MOSHA) because of faulty electrical equipment. *Id.* at 29-37, 684 A.2d 845. A toaster oven had been supplied to the lunchroom by workers and one sweaty worker sadly was electrocuted while “rest[ing]” on the toaster oven. *Id.* The relevant regulation provided:

(a) *Willful or repeated violations.*-Any employer who willfully or repeatedly violates any provision of this subtitle or any rule, regulation, standard, or order promulgated pursuant to this subtitle may be assessed a civil penalty not to exceed \$10,000.00 for each violation.

*107 *Id.* at 21, 684 A.2d 845.^{FN2} Bethlehem attempted to make a distinction between the regulations applicable to “industrial” electrical equipment and “non-industrial” electrical equipment, specifically, the toaster oven that the employees brought in for their own use. *Id.* at 24-25, 684 A.2d 845. Bethlehem attempted to distinguish the toaster oven from the wiring on a crane and floor mounted motors for which it had previously received citations. *Id.* at 32, 684 A.2d 845.

FN2. The majority attempts to distinguish *Bethlehem* from the facts of this case by arguing that, unlike our relevant statute and code, neither the statute nor the Maryland code define the term “repeat.” However, any distinction made between the Maryland statute and code from our own RCW and WAC is illusory. RCW 49.17.180(1) provides that, “any employer who willfully or repeatedly violates the requirements of RCW 49.17.060[or] of any safety or health standard promulgated under the authority of this chapter ... may be assessed a civil penalty.” As can be seen, RCW 49.17.180(1) neither defines the term “repeat” nor how one is to determine if a requirement of any rule or regulation has been violated.

135 P.3d 913

Page 10

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: 157 Wash.2d 90, 135 P.3d 913)

****921** ¶ 37 Citing federal authority, the Maryland court concluded that in order to sustain a repeated violation penalty, there must be a “ ‘substantial similarity of violative elements between the current and prior violations.’ ” *Id.* at 33, 684 A.2d 845 (quoting *D & S Grading Co. v. Sec’y of Labor*, 899 F.2d 1145, 1147 (11th Cir.1990)). The court recognized that occupational safety and health standards range from those that designate specific means of preventing a hazard or hazards to those that either do not specify the means of preventing a hazard or that apply to a variety of circumstances. “ The universe of OSHA and MOSHA rules and regulations is large and diverse. As the *Pottlatch* Commission noted, safety standards may be quite specific, such as those that require the installation of handrails ... or quite general, such as those that require workplace cleanliness and sanitation.” *Id.* at 35. The *Bethlehem* court used the word “ elements,” and RCW 49.17.180(1) uses a similar word in meaning, “ requirements.” Given the specific language of the Washington statute, RCW 49.17.180, I would articulate the standard as follows: In order to penalize an employer for a repeat violation, the Department must demonstrate that the employer has been penalized for ***108** violating a substantially similar requirement of the regulation in the past.

¶ 38 I agree with the majority's analysis of attorney fees.

J.M. JOHNSON, J. (concurring in dissents).

¶ 39 I agree with Justice Chambers' dissent that both the statutory scheme and applicable constitutional principles of notice and due process require the Department of Labor and Industries (Department) to prove charges alleged to constitute a “repeat” violation. A “repeat” charge may be sustained only where the later violation is proved substantially similar to the first. Since the Department did not meet its burden, I would reverse the violation here.

¶ 40 Having overturned the violation, I agree with Justice Sanders that the (then) prevailing party is entitled to attorney fees under the EAJA.

Concurring in Dissent: J.M. JOHNSON, J.
Wash., 2006.

Cobra Roofing Services, Inc. v. State Dept. of Labor and Industries
157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548

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135 P.3d 913

Page 11

157 Wash.2d 90, 135 P.3d 913, 21 O.S.H. Cas. (BNA) 1548
(Cite as: **157 Wash.2d 90, 135 P.3d 913**)

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NO. 34009-7-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

WASHINGTON CEDAR & SUPPLY
CO., INC.

Appellant

AFFIDAVIT OF
SERVICE AND
MAILING

vs

STATE OF WASHINGTON
DEPARTMENT OF LABOR &
INDUSTRIES

STATE OF WASHINGTON)
County of Pierce) ss
)

Jeffery S. Barge, being first duly sworn, upon oath, deposes and says:

I am a citizen of the United States of America, over the age of 21 years,
and competent to be a witness herein.

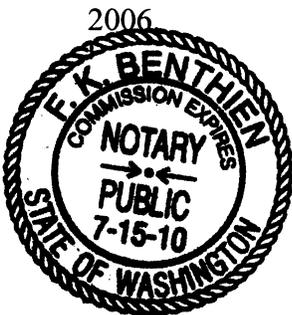
1. On September 25, 2006, I hand delivered to the Court of Appeals,
Division II, the Brief of Respondent.

2. On the same day I mailed a true and correct copy of the Brief to:

Jerald A. Klein, Attorney at Law
823 Joshua Green Bldg
1425 Fourth Ave, Ste 823
Seattle, WA 98101-2236

[Signature]
Jeffery S. Barge, Legal Assistant 2

SUBSCRIBED AND SWORN to before me this 25th day of September,



F. K. Benthien
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