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34441-6-II

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

**WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant**

vs

**STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent**

BRIEF OF APPELLANT

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**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING
THERE TO**

1. **ERROR:** Appellant assigns error to the findings that the citation was served upon the Employer as required by R.C.W. 49.17.120. The Industrial Appeals Judge committed error in refusing to vacate the citation in the Interlocutory Order and again in the Proposed Decision and Order, section "Washington Cedar's Policies and Practices" Findings of Fact Nos. 1 and 7 and Conclusions of Law Nos. 1 and 3.

1.1 **ISSUE:** What constitutes valid service of the WISHA Citation under R.C.W. 49.17.120?

1.2 **ISSUE:** Is service of the citation on a satellite yard where the violation arose sufficient or must the citation be served at the employer's principal place of business or upon the registered agent at the registered office?

2. **ERROR:** Appellant assigns error to the Proposed Decision and Order's failure to use the prima facie elements adopted by the Court of Appeals for WISHA cases. Error is assigned to the Proposed Decision and Order's sections "Issues", "The Inspection", "Washington Cedar's Policies and

Practices", "Decision" and Findings of Fact Nos. 1, 2, 3, 4 and Conclusion of Law No. 2.

2.1 ISSUE: What are the prima facie elements for a WISHA citation?

3. ERROR: The Proposed Decision and Order misstates the law with regard to the first element of the prima facie case for a WISHA violation and the Department failed to prove the first element, contrary to sections "The Inspection", "Washington Cedar's Policies and Practices", "Decision" and Findings of Fact Nos. 1, 2, 3, and Conclusion of Law No. 2, which are all error.

3.1 ISSUE: What is the first element of the prima facie case for a WISHA violation?

3.2 ISSUE: Does WAC 296-155-24510 apply when the Department does not allege that the employer violated any of the hardware requirements of that section, but merely alleges an employee's failure to wear fall protection?

4. ERROR: The Proposed Decision and Order misstates the law regarding to the second element of the prima facie case for a WISHA violation contrary to sections "The Inspection", "Washington

Cedar's Policies and Practices", "Decision" and Findings of Fact Nos. 1, 2, 3, and Conclusion of Law No. 2, which are all error.

4.1 Is the second element of the prima facie case that the employer did not meet the cited standard, or can the Department delete the words "...according to the following requirements" from WAC 296-155-24510 to avoid having to prove the employer violated one of that regulation's enumerated requirements?

5. ERROR: Appellant assigns error to the Proposed Decision and Order sections "The Inspection", "Washington Cedar's Policies and Practices", "Decision" and Findings of Fact Nos. 1, 2, 3, and Conclusion of Law No. 2, as the Department failed to prove the second element of the prima facie case for a WISHA violation (that the cited standard was violated) and the record lacks substantial evidence for such a finding.

5.1 ISSUE: Did the employer meet the standards of the real WAC 296-155-24510?

5.2 ISSUE: If Inspector Sturman's interpretation of WAC 296-155-24510 is legitimate

enough to sustain a charge, did the employer meet the standards of Inspector Sturman's regulation?

6. ERROR: The Proposed Decision and Order misstate the law with regard to the fourth element of the prima facie case, and sections "The Inspection", "Washington Cedar's Policies and Practices", "Decision" and Findings of Fact Nos. 1, 2, 3, and Conclusions No. 2 and 4 are error.

6.1 ISSUE: Is the fourth element of the prima facie case for a WISHA violation that the employer knew, or through the exercise of reasonable diligence could have known of the violation?

6.2 ISSUE: Where the Board makes no finding about the employer's knowledge of the violative condition, should the matter be remanded?

7. ERROR: The Proposed Decision and Order's section entitled "Washington Cedar's Policies and Practices", the section entitled "Decision", Finding of Fact No. 1 and 6 and Conclusion of Law No. 2 do not make findings that Washington Cedar had knowledge of the hazardous condition, and such findings would not be supported by substantial evidence in the record.

7.1 ISSUE: Is there substantial evidence in the record to show the employer knew or with reasonable diligence could have known of the violative condition?

8. ERROR: The Proposed Decision & Order, Findings of Fact 2 and 3, and CONCLUSION OF LAW 2 constitute errors of law in failing to require the Department to prove as a necessary element the particular steps the Employer should have taken to avoid the citation and further error is assigned as the record lacks substantial evidence of any attempt by the Department to set forth what particular steps by the employer would have allowed the employer to avoid the citation.

8.1 ISSUE: Does Inspector Sturman's interpretation of WAC 296-155-24510, the "duty to ensure", constitute a general duty which requires the Department specify the particular steps the employer should have taken to avoid the citation along with the steps' feasibility and utility?

9. ERROR: The Proposed Decision & Order, Finding of Facts 5 and Conclusions of law 4 and discussion entitled The Repeat Factor in the

section entitled "The calculations Used in the Citation and Notice" constitute errors of law in misstating the elements for a repeat violation.

9.1 ISSUE; What are the elements the Department must prove for a repeat violation?

9.2 Does R.C.W. 49.17.180(1) authorize repeat penalties for employee violations such as the violation alleged in the citation or only for violations by employers?

10. ERROR: The Department failed to prove with a preponderance of the evidence that any of the alleged repeats were of a substantially similar hazard, and the Proposed Decision and Order sections entitled "Issues", "The Inspection", "The Calculations Used in the Citation and Notice" "Washington Cedar's Policies and Practices", "Decision" and Findings of Fact No. 5 and Conclusion of Law Nos. 2 and 4 are not supported by substantial evidence from the record.

10.1 ISSUE: Is there substantial evidence of repeat violations where the Board relies exclusively on nondescript orders sustaining convictions of WAC 296-155-24510 regardless of

whether the alleged priors involved substantially similar hazards?

10.2 Does the Department have the burden of proving a substantially similar hazard existed for each alleged prior, and did it meet that burden?

11. ERROR: The Proposed Decision & Order, sections "Issues", "The Inspection", "The Calculations Used in the Citation and Notice" "Washington Cedar's Policies and Practices", "Decision" and Findings of Fact No. 2, 3 4 and Conclusion of Law Nos. 2 and 4 constitute errors of law regarding the defense of infeasibility.

11.1 ISSUE: What is the proof required for the affirmative defense of infeasibility?

12. ERROR: The Employer proved with a preponderance of the evidence that the Department's interpretation of WAC 296-155-24510 was infeasible and the Decision and Order are in error for not sustaining this defense.

12.1 Did the Employer prove the Inspector's interpretation of WAC 296-155-24510 is infeasible?

12.2 Did the Employer prove that it used an alternative safety means other than that required

by the Department's interpretation of WAC 296-155-24510, to wit, implementing the real WAC 296-155-24510 and its effective safety program?

13. ERROR: WAC 296-155-24510 is Unconstitutionally vague as interpreted by Inspector Sturman, and The Proposed Decision & Order, sections "Issues", "Decision" and Findings of Fact No. 2, 3 4 and Conclusion of Law Nos. 2 and 4 constitute errors of law in upholding the Constitutionality of Inspector Sturman's interpretation of WAC 296-155-24510 as creating a "duty to ensure" that employees comply with rules

13.1 Does Inspector Sturman's interpretation of WAC 296-155-24510 provide sufficient precision to advise persons of ordinary intelligence how to ensure employees are complying with safety rules?

13.2 Does Inspector Sturman's interpretation of WAC 296-155-24510 provide sufficiently specific standards to avoid arbitrary enforcement?

14. ERROR: The repeat factoring of penalties constitute exceeds the enabling authority of R.C.W. 49.17.180(1) and the Proposed Decision & Order, sections "Issues", "The Inspection", "The

Calculations Used in the Citation and Notice", "Decision" and Findings of Fact No. 2, 3 4 and 5 and Conclusion of Law Nos. 2 and 4 constitute errors of law in upholding the repeat penalties when there is not substantial evidence to find that Appellant violated any safety regulation but only evidence of an employee violation.

14.1 ISSUE: Does R.C.W. 49.17.180(1) only provide authority to assess enhanced, repeat penalties for employer violations or can such enhanced penalties be assessed against an employer for employee violations as well?

II STATEMENT OF THE CASE

This matter involves a citation for an alleged violation of the Washington Industrial Safety and Health Act (hereinafter "WISHA"). The Department of Labor & Industries (hereinafter "Department") alleges that Washington Cedar & Supply Co., Inc. (hereinafter "Employer", "Appellant" or "Washington Cedar") failed to ensure use of fall protection. The Employer denies these allegations, questions the prima facie case, raises affirmative defenses, and makes

certain Constitutional challenges and challenges the Department's reading of the cited regulation.

Washington Cedar & Supply Co., Inc. is a roofing materials distributor, and, as such, delivers roofing materials to the job site where the materials are stacked upon the roof. Each delivery truck has two or three employees. One is on the roof stacking the materials while the other is operating the conveyor from below.

Washington Cedar maintains its thorough safety program in its SAFETY POLICY AND PROCEDURE MANUAL and its SAFETY INCENTIVE PROGRAM, copies of which were admitted as Exhibits Nos. 14 and 10, respectively. While there are rules pertaining to all aspects of work safety, the rule applicable to fall protection is contained in Chapter 12, FALL PROTECTION, and in the SAFETY INCENTIVE PROGRAM. The Program reads in pertinent part:

ALL EMPLOYEES are required to wear harnesses & lifelines whenever on the roof. There are no exceptions.

Of course, this language exceeds WAC 296-155-24510, (the cited regulation) which only requires safety gear when the fall hazard exceeds

ten feet. WAC 296-155-24510.

The Employer's Yard Manager, Mr. Honeycutt testified that along with the rules, Washington Cedar provides the training and equipment designed to prevent this type of violation. Each employee undergoes a thorough training session after he is hired, which is followed up with mandatory safety meetings. See EXHIBIT 10; CABR Transcript (8/9/04) page 71 line 33. Mr. Honeycutt explained that Washington Cedar provides each employee with full body safety harnesses, used to secure themselves to the roof and repeated training in its use. CABR Transcript (8/10/04) page 40 line 23 through page 41 line 4. Use of the safety equipment is covered in the mandatory safety meetings.

Mr. Honeycutt explained how he takes steps to discover and correct violations through surprise inspections by the safety compliance officers. CABR Transcript (8/10/04) page 14, lines 21-26. These surprise inspections are random and often. CABR Transcript (8/10/04) page 14, lines 24-26.

Effective enforcement is accomplished through both sanctions for violations and rewards for

compliance. As explained in the MANUAL, Chapter 1, Rule 11.0, the first violation warrants at least a verbal reprimand, the second a written reprimand, a third violation warrants suspension. CABR Transcript (8/10/04) pg 18, lines 4-25. A disregard of the safety rules is grounds for termination. CABR Transcript (8/10/04) page 18, lines 23-26. However, if the employee follows the safety rules, he is rewarded with a monetary bonus. See EXHIBIT No. 10, pages 3-5; See also the discipline of Mr. Davis, EXHIBIT No. 15.

The employee who committed the infraction was Neal Lindberry. Mr. Lindberry testified that he normally was the driver and seldom went up on the roof. CABR Transcript (8/9/04) page 19, lines 43-51. Mr. Lindberry acknowledged that Mr. Honeycutt and other management officials were always on the workers to wear their safety gear. CABR Transcript (8/9/04) page 20, line 27. Mr. Honeycutt testified that he himself inspected Mr. Lindberry during the company's random, safety inspections and that Mr. Lindberry was always in compliance with the safety rules. CABR Transcript

(8/10/04) page 15, lines 11-17. The incident herein was the first safety violation for Mr. Lindberry. CABR Transcript (8/10/04) page 19, lines 5-7. Mr. Lindberry quit shortly after the inspection and discipline from Mr. Honeycutt. CABR Transcript (8/10/04) page 19-20.

The Employer believes that it is doing everything possible to ensure that its employees are complying with the safety rules, and should not be liable for violations due to an employee's mistake such as this. Considering that the Employer makes around 25,000 deliveries every year, its safety record is excellent. CABR Transcript (8/10/04) page 32, lines 18-19. Having a tag-along supervisor watch over each delivery crew would be economically infeasible. CABR Transcript, (8/10/04) page 34, lines 2 through page 36, line 6. Furthermore, the Employer has fully complied with the standards of the cited regulation. Exhibit No. 1. The success of the Employers safety program is shown in the substantial drop in its experience factor from 2003 to 2004, due to the extraordinary decline in

injuries. Exhibit No 13. Mr. Honeycutt attributed this substantial drop to the effectiveness of the Company's safety program. CABR Transcript (8/10/04) page 71, lines 1-12. Imposing penalties on this safety successful employer is unfair, arbitrary and capricious.

III. ARGUMENT

A. Standard of Review

1. Review of Board's Decision

The B.I.I.A. has filed its Certified Appeal Board Record (hereinafter termed "CABR") with the Superior Court Clerk who in turned filed the record herein. The record includes two (2) bundles of documents. First is the pre-trial motions, with documents and pleadings filed at the B.I.I.A. level. (hereinafter referred to as "Documents"). Second, the record includes the exhibits in numeric order, followed by the transcripts beginning with the April 7, 2004 hearing to dismiss for insufficient service of the Citation, followed by the July 19, 2004 summary judgment hearing, plus the trial transcripts taken August 9 and 10, 2004.

The Employer takes exception to and requests review of all findings and conclusions pertaining to the first, second and fourth elements of the prima facie case. The Employer questions the legal interpretation of the cited regulation and whether substantial evidence supports the board's findings. The Employer also seeks review on its affirmative defenses and Constitutional issues. These issues involve separate standards of review.

Review of issues of law, such as definitions found in the WISHA statute, are reviewed de novo. WASH. CEDAR & SUPPLY vs. LABOR & INDUS., 119 Wash. App. 906, 917 (Div.II, 2004) (reviewing definition of "serious"). The BRIEF OF RESPONDENT claims that the Department's interpretations deserve deference, however, this is only true where the interpretation requires the agency's special expertise in the relevant field. WILLOWBROOK FARMS vs DEPT. OF ECOLOGY, 116 Wash. App. 392, 397 (Div., III, 2003). Thus, for an example, Appellant contends that RCW 49.17.180(1) which authorizes enhanced penalties for "repeat" offenses only applies to violations by employers

and not to violations by employees as in this case. The definition of "employer" does not need the Department's expertise. It is the courts job to decide what the law is. WILLOWBROOK, at 397.

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

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

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

Most of the issues in this appeal involve the applying of the law to the facts, which issues are reviewed de novo. PORT OF SEATTLE vs HEARINGS BOARD, 151 Wn.2d 568, 588 (2004). As explained by the Supreme Court, mixed questions of law and fact, are subject to de novo review, meaning the court must determine the correct law independent of the agency's decision and then apply the law to established facts de novo. Id. All issues present mixed questions of law and fact.

If a regulation was "duly adopted", then this Court reviews Constitutional challenges to regulations using the "...beyond a reasonable doubt..' standard. INLAND FOUNDRY vs LABOR & INDUS., 106 Wn. App. 333, 339 (Div., III, 2001).

In this case, a regulation would be "duly adopted" if it was adopted by the Director using the rule making procedures of the Administrative Procedures Act as required by his enabling authority at R.C.W. 49.17.040, (2003). Of course, Inspector Sturman's interpretation of WAC 296-155-24510 was never "duly adopted". A regulation is unconstitutionally vague if persons of common intelligence must necessarily guess its meaning and disagree as to its application. INLAND FOUNDRY, supra at 339.

2. No deference to the Department's interpretations

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

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

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

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

MADER supra at 473. The plain meaning of

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

B. Invalid Service of the Citation

The Industrial Appeals Judge, Lyle O. Hanson (hereinafter referred to as "IAJ") reaffirmed the April 7, 2004 decision of a former Industrial Appeals Judge refusing to vacate the citation for failure to serve the Employer as required by law. The IAJ held in Finding of Fact No. 1:

On August 28, 2003, the Department of Labor and Industries issued Citation and Notice No. 306351933 to Washington Cedar & Supply Co., Inc. (hereafter Washington Cedar), alleging that it had committed one repeat serious violation of WAC 296-155-24510 on May 12, 2003, at its worksite at Garibaldi Street on Bainbridge Island, Washington

Finding of Fact No. 1. However, in the last sentence of the section entitled, Evidence Presented, the IAJ clarifies that

The Department served the Citation and Notice that is the subject of this appeal by mailing it to Mr. Honeycutt at the employer's Gorst yard. Mr. Honeycutt testified that Leo C. Brutsche, whose office is in Auburn, was Washington Cedar's registered agent for service of process.

Proposed Decision and Order, page 7. From these findings, the IAJ concluded that:

The Department properly served its Citation and Notice on Washington Cedar in accordance with the provisions of R.C.W. 49.17.120.

Conclusion of Law, No. 3.

The Board should have vacated the citation because the citation was never served properly and the six month statute of limitations ran out. WITT vs PORT OF OLYMPIA, 126 Wn.App. 752, 758 (2005).

The Employer's assertion is based upon R.C.W. 49.17.120 which provides:

(1) If upon inspection or investigation

the director or his or her authorized representative believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard..... the director shall with reasonable promptness issue a citation to the employer.

.....

(4) No citation may be issued under this section or RCW 49.17.130 after the expiration of six months following a compliance inspection, investigation, or survey revealing any such violation.

Here, the inspection was on May 12, 2003 and the citation was issued on August 28, 2003, but was not issued to the Employer but to one of its satellite yards and received by an employee, John Spellinger. See Affidavit of Dorothy Lantz, CABR Documents, 192 to 194. The Department had the burden of proof of proper service but failed. WITT vs PORT OF OLYMPIA, supra at 758.

The statutory authority for issuing citations requires that the director issue the citation to the employer. R.C.W.49.17.120. Civil rules of procedure apply in this board matter, including CR 4 governing service of process. WAC 263-12-125 Applicability of court rules. CR 4 incorporates the service requirements set forth in R.C.W. 23B.05.040. CR 4(d)(2). This statute reads:

Service on corporation (1) A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

R.C.W. 23B.05.040(2003). According to the public records of the Secretary of State, available on the web, the Employer's registered agent and registered address are:

Leo C. Brutsche
1400 W. Main St.
Auburn, WA 98071

This was established with the testimony of Mr. Honeycutt. TRANSCRIPT, (8/10/04) pages 5-6. The citation was not served upon the Employer as required by law, but upon the yard accused of the violation. CABR, Transcript, (8/10/04) pages 5-6. This is insufficient service of process. WITT vs PORT OF OLYMPIA, 126 Wn.App. 752, 758 (2005).

As stated in Finding of Fact No. 7:

Washington Cedar's registered agent for service of process is Leo C. Brutsche, whose office is in Auburn. The Department served Washington Cedar with the Citation and Notice that is the subject of this appeal by mailing it to the employer in care of its Gorst address.

Proposed Decision and Order, Finding No. 7.

In a similar situation involving the Federal

analogue to WISHA, the Third Circuit Court of Appeals ruled that service on the shop supervisor was insufficient service. BUCKLEY COMPANY, INC. vs SEC. OF LABOR, 507 F2d 78, 80 (Cir. 3, 1975). The court pointed out how service on the shop manager invited a cover up, which would prevent the corporate officers from even knowing about the citation. Id. at 81. This observation points out the prejudice to the Employer in not requiring the Department to follow the service requirements. If the Department can serve anyone, the Employer must employ counter-cover up measures such as the re-routing of mail. The loss of time and effort in such measures would detract from the resources available for safety.

The Department argued that because the Employer had actual notice, that should be sufficient. This argument was specifically rejected by the Court of Appeals in BLANKENSHIP vs KALDOR, 114 Wash. App. 312, 318 (Div. III, 2002). As the Court said: "...actual notice does not constitute sufficient service." Id. In effect, the Department may not turn Mr. Honeycutt into

their process server, no matter how trustworthy and diligent he may be.

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

The Proposed Decision and Order does not set forth what constitutes a prima facie case.

Instead, Finding of Fact No. 2 states:

On May 12, 2003, William M Sturman, whom the Department of Labor and Industries employed as a safety compliance officer, observed Neil J. Lindberry, an employee of Washington Cedar, standing on the roof of new housing construction on Garibaldi Street on Bainbridge Island, Washington, without wearing any form of fall protection gear. The roof of the house on which Mr. Lindberry was standing was more than 10 feet and less than 20 feet from the ground level of the site.

Finding of Fact No. 2. From this the IAJ makes the following conclusion of law:

On May 12, 2003, Washington Cedar committed a repeat serious violation of WAC 296-155-24510.

Proposed Decision and Order, Conclusion No. 2.

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

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

WASH. CEDAR & SUPPLY vs LABOR & INDUS., 119 Wn. App. 906, 914 (Div.II, 2004) (citing D.A. COLLINS CONSTR. CO. vs SEC'Y OF LABOR, 117 F.3d 691, 694 (2nd Cir. 1997)). To establish a violation, the Department has the burden to prove each element by a preponderance of the evidence. Id. citing CARLISLE EQUIPMENT vs SEC. OF LABOR, 24 F.3rd 790, 792 (6th Cir, 1994).

1. First element of the prima facie case for a serious WISHA violation

The Proposed Decision and Order does not analyze whether the cited standard applies to the alleged facts, nor are there any Findings or Conclusions on this legal issue. Impliedly, the IAJ agrees with the Department that full compliance with the hardware requirements of WAC 296-155-24510 is not enough for an Employer. But whether the IAJ believed the first 37 words of WAC 296-155-24510 creates a separate, independent,

legal and enforceable regulation that the Employer must "ensure" employee compliance cannot be ascertained from the Decision. Construction of WAC 296-155-24510 was one of the primary issues at both the summary judgment hearing and the trial.

The first element of the citation is that WAC 296-155-24510 be applicable to the alleged facts. CARLISLE EQUIPMENT, supra, at 792. This regulation reads:

WAC 296-155-24510 Fall restraint, fall arrest systems. When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed and implemented according to the following requirements.

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

The employer did not ensure that a worker on the roof, exposed to a fall hazard exceeding 10 feet, was protected by a fall protection system.

Citation 1, Item 1. This recitation does not

state a violation because it fails to mention any of the numerous hardware requirements enumerated in WAC 296-155-24510. The Employer's duty is to:

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

WAC 296-155-24510 (2003). The regulation does not require employers to ensure an employee is "protected", but only that the fall protection system is "...provided, installed and implemented..." and only to the exhaustive but not limitless duties listed as "...the following requirements." The reason why WAC 296-155-24510 does not require Employers to ensure that their employees are always protected by the safety gear is because the duty to actually use the provided, installed and implemented gear belongs to the employee. R.C.W. 49.17.110; WAC 296-155-105(3).

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

WAC 296-155-105(3) (2001).

Of course, Washington Cedar requires that employees always wear their full body harnesses

whenever on the roof and provides those harnesses and life-lines. TESTIMONY (8/10/04) PAGES 7-8, EXHIBIT No 10, page 5, FALL PROTECTION. Thus a fair reading of WAC 296-155-23510 shows it does not apply to the facts alleged by the Department, so the Department can not prove element one of its prima facie case. WASHINGTON CEDAR, at 914.

Recently, Division III of the Court of Appeals interpreted WAC 296-155-24510 in the case of COBRA ROOFING SERVICE, INC. vs LABOR & INDUS. 122 Wn. App. 402 (2004). In COBRA ROOFING, Division III held that:

Regarding the "following requirements," the regulation governs in great detail three types of safety systems: "fall restraint protection," such as guardrails, safety belts and harnesses, warning lines, and safety monitors, WAC 296-155-24510(1); "fall arrest protection," such as body harnesses, safety nets, and catch platforms, WAC 296-155-24510(2); and "positioning device systems" such as "a body belt or body harness system rigged to allow an employee to be supported on an elevated vertical surface, such as a wall, and work with both hands free while leaning," WAC 296-155-24510(3); WAC 296-155-24510(3).

Id. at page 412. No where does Division III mention any obligation to ensure that employees wear their safety gear. Id.

The COBRA ROOFING Court held that the

[n]umerous subsections of the regulation govern how the employer will minimize or eliminate the hazard.

Id. at 414. Therefore it is the "numerous subsections" that govern how the employer is to eliminate the hazard, and the Department has stipulated that Washington Cedar has not violated the standards in those subsections. EXHIBIT No. 1 para. 2. In fact, Inspector Sturman's artificial interpretation completely cuts out all of the very subsections that Division III holds govern how employers eliminate the hazards.

2. Interpretation of WAC 296-155-24510 does not impose a "duty to ensure" employees wear safety gear.

In 296-155-24510 the wording...

...according to the following requirements.

limits the employer's duties to the following hardware requirements with regard to providing and implementing fall protection equipment for its employees. The real regulation is attached in the Appendix. No where in any of the "following requirements" does it say that an employer must ensure that its employees are

wearing their safety gear. The employees duty to wear safety gear has been assigned by WISHA to the employees R.C.W. 49.17.110(2004). Likewise, the Department's regulations assign to employees the duty to wear the safety gear. WAC 296-800-120 and WAC 296-155-200(2). The cited regulation is actually a hardware requirements regulation which Washington Cedar fully performed.

Exhibit No. 1. is a stipulation between the parties to the effect that Washington Cedar satisfied its obligations with regard to the hardware requirements of WAC 296-155-24510. Thus, a fair reading of the cited regulation, WAC 296-155-24510 leaves the Court with no choice but to vacate Citation 1, item 1, the fall protection citation. See Exhibit No. 1 in the Appendix.

The first element of the Department's prima facie case is that "... (1) the cited standard applies;...". WASH. CEDAR vs LABOR & INDUS., 119 Wash. App. 906, 914 (Div. II, 2004). If the cited regulation is read as a whole, then it becomes apparent that it is a hardware regulation and does not apply to situations where the

Department stipulates the hardware requirements have been met. Exhibit No. 1. On the other hand, if the Inspector is allowed to cut-n-paste regulations, then the words "...according to the following requirements." may be omitted and the requirements themselves may be omitted and the Inspector may add a period after the word "implemented" and create his "duty to ensure".

Courts interpret the meaning of agency rules using the rules of statutory construction. *MADER vs HEALTH CARE AUTH.* 149 Wn2d 458, 472 (2003). Our Supreme court uses four key rules of construction for rules and statutes. These are:

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

The first rule of construction is considering the rule as a whole. *SEATTLE MONORAIL AUTH.*, 155 Wn2d 612 (2005). This is done by considering the rule as a whole, giving effect to all provisions and to related regulations. *SEATTLE MONORAIL*

AUTH., 155 Wn2d. 612, 627 (2005). Each word of a rule is to be given meaning and no portion rendered meaningless, nor shall any language be deleted. STATE vs ROGGENKAMP, 153 Wn.2d 614, 624 (2005). If, after this inquiry, the rule can reasonably be interpreted in more than one way, then it is ambiguous and resort to other rules of construction may apply Id.

Obviously, Inspector Sturman's interpretation does not consider the rule as a whole, but instead cuts out 95% of the rule. Inspector Sturman's interpretation makes the hardware specifications meaningless. Inspector Sturman's interpretation must ignore the essential language

...according to the following requirements. from the cited regulation or his "duty to ensure" evaporates. On the other hand, the interpretation offered by Washington Cedar requires that the regulation be read as a whole and that each provision be given its normal, proper value in the regulation. When the regulation is read as a whole, the words "...according to the following requirements" limit the employers duty to the

specified requirements.

Furthermore, considering other provisions of WISHA regulation support Washington Cedar's interpretation and contradict Inspector Sturman's interpretation. For an example the section on personal protective and life saving equipment assigns specific but different duties to employees and employers. WAC 296-155-200. Employees must:

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

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

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

WAC 296-15-200(3)(2004). As noted earlier, Exhibit No. 10, page 5 under paragraph entitled FALL PROTECTION the Employer's rule on wearing fall protection is that it is mandatory without exception. Thus, these related provisions show

that WISHA requires employees to wear the safety gear and also requires that employers provide the safety gear and require its use, but no where does WISHA requires employers to ensure that employees are wearing their safety gear.

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

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

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

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

R.C.W. 49.17.060(1). Furthermore, under the section authorizing citations, the only time a citation may be issued is if "...the director or his or her authorized representative believes that an employer has violated a requirement..." R.C.W.

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

The rule of ejusdem generis states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms. ESTATE OF JONES, 152 Wn.2d 1, 11 (2004). Applying this rule to WAC 296-155-24510, the terms "provided, installed, and implemented" are in sequence with the specific hardware requirements such as safety lines being protected against cuts and abrasions, or that hardware have a corrosion resistant finish. WAC 296-155-24510. Thus, even if Inspector Sturman were allowed to edit out the words "according to the following requirements", the rule of ejusdem generis would still limit the employers obligation to provide, install and implement to purchasing and maintaining the right equipment and providing it to the employees. Another rule, WAC 296-155-200(c), requires that employers require

their employees to wear the safety gear, but this regulation was never at issue as Washington Cedar does require its employees wear safety gear on all structures. Exhibit 10, page 5, FALL PROTECTION.

The third rule of construction is that rules and regulations are to be given a rational, sensible interpretation. *MADER vs HEALTH CARE AUTH.*, 149 Wn2d. 458, 472 (2003), Inspector Sturman's interpretation is irrational because it penalizes employers solely on the basis of acts or omissions of employees. Thus, two separate employers can have identical safety programs, but the one with a happy employee gets no penalty and the one with a troubled employee gets penalized. For that matter, an employer can have a perfect safety program, yet still be penalized by Inspector Sturman when employees incur violations as part of a labor action to force the employer to increase wages. The penalty serves no deterrent value because employers can not foresee when, where, by whom or how the violation occurs.

The fourth rule of construction used by the Supreme Court is that an unambiguous regulation is

interpreted from its plain meaning, only. CANON vs DEPT. OF LICENSING, 147 Wn2d. 41, 57 (2002). 10% of the Brief of Respondent was devoted to claiming that deference should be given to the Department's interpretation of WAC 196-155-24510, but this is only true if this Court finds the regulation to be ambiguous. MADER vs HEALTH CARE AUTH., 149 Wn2d 458, 473 (2003). The Supreme Court explained:

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

MADER, supra at 473. The Brief of Respondent does not argue nor allege that the cited regulation, WAC 296-155-24510 is ambiguous, so it can not claim deference for the Inspector's interpretation. MADER, supra at 473. A statute or rule is ambiguous only if it is susceptible to two or more reasonable interpretations. UNITED STATES vs HOFFMAN, 154 Wn2d 730, 737 (2005). The interpretation of Inspector Sturman is unreasonable because it would provided a means for employees to extort higher wages by threatening to incur WISHA citations. Thus, WAC 296-155-24510 is not ambiguous and must be given its plain

meaning. MADER supra at 473 The plain meaning of ...according to the following requirements is that the following requirements contain the duties employers must obey and not the unexplained, inarticulate mandates of Inspector Sturman's duty to ensure.

3. The real requirements of WAC 296-155-24510 were met

The second element of the prima facie case is that the Department must show the requirements of WAC 296-155-24510 were not met. WASHINGTON CEDAR & SUPPLY, supra at 914; CARLISLE EQUIPMENT, supra at 792. Division III has held that the regulation is met by complying with the hardware requirements and in this case, the Department has stipulated that the employer did not violate the hardware requirements. Mr. Honeycutt testified the requirements of WAC 296-155-24510 were met.

CABR Transcript (8/10/04) page 9. Honeycutt said:

Yes. We just -- we use all L&I-approved equipment. It all -- it has got -- it actually has a tag -- tags on them that say they are approved by L&I, and all that stuff.

TESTIMONY (8/10/04) page 9 lines 13-16. The IAJ concurred with Washington Cedar on this issue as

the Decision states:

After he observed Mr. Lindberry, Mr. Sturman conducted an inspection of the site, caused Mr. Lindberry to put on the fall protection gear that Washington Cedar ensured was in Mr. Lindberry's delivery truck,...

Proposed Decision and Order, Finding of Fact 3.

Thus, the IAJ is acknowledging that the Employer did ensure Lindberry had his safety gear which the Employer asserts is the limit to its obligation under WAC 296-155-24510, regardless of whose interpretation is used to judge implementation.

4. The fourth element of the prima facie case requires the Department prove the employer knew about the condition.

The Proposed Decision and Order does not address the fourth element of the prima facie case. The fourth element requires that the Department must show that the Employer knew or should have known about the hazardous condition. WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119 Wash. App. 906, 914 (2004). There is no proof whatsoever that the employer knew or could have known that the employee was on the roof without safety gear. The industry standard is that delivery workers make their deliveries without

management supervision. TESTIMONY (8/10/04) page 34, lines 15-23. The employee, Mr. Lindberry, had been inspected by Mr. Honeycutt three or four times between January and May 12th, 2003, and he had always been in compliance with the safety rules. TESTIMONY (8/10/04) page 15, lines 14-17. Inspector Sturman agreed that there was no way for employers to know about non-compliance other than through the type of job site inspections conducted by Washington Cedar:

Q. Okay. How would either Mr. Schumacher or Mr. Honeycutt know whether Mr. Lindberry was in compliance when Mr. Lindberry is out of the yard and making a delivery at some site in Bainbridge Island?

A. They delegate that authority or management to whoever is around the job. he mentioned a sales type person, as well as on this.

Q. So they have some management official or some inspector go to the site and --

A. Yes.

Q. -- and check? And is that industry norm?

A. Yes.

Q. Okay. Do you feel that that's ... personally, do you feel that's a good way for them to know? I, assuming, nobody is a mind reader, of course?

A. They have to have someone they trust to take care of the company's interests. I don't know how other than standing over the worker 24 hours, what else they could do.

Q. That would be ... that would be impossible to do. You couldn't have somebody standing over the worker 24 hours; right?

A. No.

Q. That would not be possible?

A. Not feasible, wouldn't get any work done.

CABR Transcript (8/9/04) page 76 lines 1-37. In this case, there is just no way for this Employer to have had knowledge and the Department failed to prove the Employer had knowledge. Proof of "knowledge" has always been an essential element. THE ERECTION COMPANY, BIIA, 88 W142, pg. 10-11. COLLINS CONST. vs SEC. OF LABOR, 117 F.3rd 691, 694 (2nd Cir, 1997). Finally, there was no showing of any condition that exists, such as the unguarded conveyor as in JEN-WELD, for the Employer to know about. Only the temporary non-compliance by a distant employee.

5. The Department failed to prove that the employer knew about the hazardous condition.

Division II of the Court of Appeals requires as the fourth element of the prima facie case that the Department prove:

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

WASH. CEDAR & SUPPLY vs LABOR & INDUS., 119 Wn. App. 906, 914 (Div, II, 2004). The Court went on to say that evidence of similar past violations was sufficient to support a finding that an employer was on notice that its employees were not complying with its safety requirements. Id. at 916. However, in this case, there was no evidence that the employee had ever engaged in similar unsafe behavior. CABR, Transcript (8/10/04) page 15, lines 3-17. Honeycutt said:

A. Yeah. The second time I know that I inspected him two or three times in that -- in that period of time.

Q. And he was always in his gear and compliant?

A. Yes.

CABR Transcript (8/10/04) page 15, lines 14-17.

This case is very different from the incident reviewed in 2004 by this Court where the employee, Kyle Reynoldson, left the yard without his safety

gear because his employer had switched out his truck for maintenance. See WASH. CEDAR, supra at 916. In this case, all parties agreed that Mr. Lindberry had his safety gear with him and used it after Inspector Sturman arrived at the scene. CABR Transcript (8/9/04) page 30, lines 43-47 and also at page 92, lines 21-25 (Sturman) and (Sturman); CABR Transcript (8/9/04) page 17, lines 35-51 (Lindberry). In this case, there is no way that the Employer could have known about the hazardous condition because Mr. Lindberry had been inspected by the company's random inspection program and he had always been in compliance with the safety rules and also because Mr. Lindberry had his safety gear with him at the delivery site. CABR Transcript (8/10/04) page 15, lines 14-17.

The Industrial Appeals Judge speculated that Mr. Lindberry may have again violated the safety rules after the inspection during the weeks before he quit. This speculation is unsupported by any evidence and contradicts the unanimous testimony that Mr. Lindberry was a driver, not the person who stacks the materials on the roof. CABR

Transcript (8/9/04) page 19, lines 43-51. As stated by Mr. Lindberry:

A. I didn't go up on the roof all that much, because I was a driver.

CABR Transcript (8/9/04) page 19, lines 43-45.

Although the Department offered Exhibits 3-9 to show that the company had received prior citations, the Department offered no evidence that any of the citations were caused by Mr. Lindberry or that any of the citations were due to Mr. Honeycutt's policies. Considering that the employer makes around 25,000 deliveries every year, the small number of citations suggests the employer's program is very effective. CABR Transcript (8/10/04) page 32, lines 15-25. But with regard to the fourth element of the Department's prima facie case, the record lacks substantial evidence sufficient to find that the employer knew or with reasonable diligence, could have known of the hazardous condition.

6. The Department failed to prove the necessary steps the Employer should have taken to avoid the citation.

WAC 296-155-24510 provides specific standards which the Employer was able to prove it had met.

Exhibit No. 1, paragraph 2. However, the Proposed Decision & Order suggests that the hardware requirements in WAC 296-155-24510 are irrelevant but that the pertinent part of the WAC is the general duty to "...ensure that fall restraint, fall arrest systems.... are provided, installed, and implemented..." Proposed Decision and Order, Decision, page 7, lines 27-30. If the IAJ is correct, then an additional element should have been required for the Department's prima facie case:

...the Department must specify the particular steps the employer should have taken to avoid the citation. The Department must demonstrate the feasibility and likely utility of those measures. DONOVAN, 645 F.2d at 829. The Department must also show that the proposed measure will not result in greater hazard. Id. at 830.

LABOR & INDUS. vs KAISER ALUMINIUM, 111 Wash. App. 771, 782 (Div, III, 2002). Nothing in the record indicates the Department ever specified the steps necessary to "ensure" compliance.

D. Department failed to prove its prima facie case for a repeat citation.....

1. Prima facie case for a repeat penalty under RCW 49.17.180(1).

The new standard for when repeat penalties may be assessed is:

A repeat violation occurs when WISHA cites an employer more than once in the last 3 years for substantially similar hazard.

WAC 296-800-35040. The new inquiry directs the focus to the specific acts or omissions of the employer for determination of what constitutes a "repeat" and is thus not in conflict with R.C.W. 49.17.180(1) which only allows enhanced penalties for repeated violations of specific "...safety or health standard promulgated under the authority of this chapter...: R.C.W. 49.17.180(1)(2004), and only for violations by the employer. There was no proof that Inspector Sturman's duty to "ensure" was promulgated under the authority of WISHA which calls for APA rule making (R.C.W. 49.17.040) and no proof that the Employer was on the roof without wearing safety gear.

2. The alleged violation of WAC 296-155-24510 was not a "repeat".

The Department failed to show a violation of a duty promulgated by the Director, failed to show a substantially similar hazard and merely showed that an employee violated a safety rule, but not

the employer.

E. The Employer proved its affirmative defense of infeasibility.

1. Proof of infeasibility.

It is an affirmative defense to a WISHA charge that compliance was impossible or infeasible. BANCKER CONST. CORP vs REICH, 31 F3d 32 (2nd Cir, 1994). An employer establishes this affirmative defense by showing (1) that the literal compliance with the safety standard was infeasible under the circumstances and (2) that either an alternative method of protection was used, or that no alternative means of protection was feasible. Id. Literal compliance with the Department's interpretation of all three citations is infeasible under the circumstances.

2. The Employer proved the infeasibility of Inspector Sturman's regulation.

The Proposed Decision and Order does not address the issue of infeasibility/impossibility, although the matter was argued in the Employer's trial brief. CABR 519-20. Furthermore, Mr. Honeycutt testified that he always complies with the real WAC 296-155-24510 but that it would be

impossible to comply with Inspector Sturman's regulation. TRANSCRIPT (8/10/04) page 34 line 19 through page 36 line 20. Even Inspector Sturman agreed that it would be impossible to have 24 hour supervision. TRANSCIRPT (8/9/04) page 76, lines 15-37. The Employer is not suggesting that compliance with the real cited standard of WAC 296-155-24510 is infeasible. Washington Cedar fully complied with the real regulation. Exhibit No. 1. What Washington Cedar is claiming is infeasible is the Department's interpretation of WAC 296-155-24510 as imposing a duty upon employers to "ensure" that employees are complying with the fall protection safety rules. As explained by Inspector Sturman it is impossible to know exactly when an employee is not complying with the safety rules, other than 24 hour surveillance which is impossible:

A. They have to have someone they trust to take care of the company's interests. I don't know how other than standing over the worker 24 hours, what else they could do.

Q. That would be ... that would be impossible to do. You couldn't have somebody standing over the worker 24 hours; right?

A. No.

Q. That would not be possible?

A. Not feasible, wouldn't get any work done
TESTIMONY (8/9/04) page 76, lines 21-37. Thus,
the only way for an employer to "ensure"
compliance (the Department's interpretation of WAC
296-155-24510) is to have a tag-along supervisor,
which is "infeasible". Mr. Honeycutt explained
that the industry standard is that delivery people
make deliveries without being supervised.
Transcript (8/10/04) page 34, lines 19-23. If
Washington Cedar were required to use tag-along
supervisors, it would be put at a serious economic
disadvantage. TESTIMONY (8/10/04) page 34 line 24
through page 35, line 24.

F. Constitutional Issue

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

Recently, the Washington Supreme Court
reviewed the Constitutional vagueness of
Washington seat belt laws. STATE vs ECKBALD, 152
W2d 515, 518 (2004). The Court held:

A statute is vague if either it fails to
define the offense with sufficient precision
that a person of ordinary intelligence can

understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement.

ECKBLAD, supra at page 2. Of course, the real WAC 296-155-24510 provides specific hardware requirements, but Inspector Sturman's theory of WAC 296-155-24510 fails to define the duty to "ensure" with sufficient precision for an ordinary individual to know what conduct on her part will ensure the conduct of her employees.

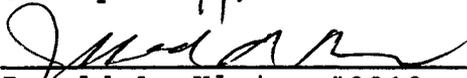
G. Attorneys fees

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

H. Conclusion

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

RESPECTFULLY SUBMITTED: April 29, 2006



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

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: WASHINGTON CEDAR & SUPPLY) DOCKET NO. 03 W0216
2 CO., INC.)
3)
4 CITATION & NOTICE NO. 306351933) PROPOSED DECISION AND ORDER

5
6 INDUSTRIAL APPEALS JUDGE: Lyle O. Hanson

7
8 APPEARANCES:

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

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

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

20
21
22 The employer, Washington Cedar & Supply Co., Inc., filed an appeal with the Department of
23 Labor and Industries' Safety Division on September 2, 2003. The Department transmitted the
24 appeal to the Board of Industrial Insurance Appeals on September 15, 2003. The employer
25 appeals Citation and Notice No. 306351933 issued by the Department on August 28, 2003. In the
26 Citation and Notice, the Department alleged one serious repeat violation of WAC 296-155-24510
27 and assessed a total penalty of \$2,700. The Citation and Notice is **AFFIRMED**.

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34 PROCEDURAL AND EVIDENTIARY MATTERS

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36 The Interlocutory Order Denying Claimant's (*sic* Employer's) Motion to Vacate dated April 7,
37 2004, is affirmed.

38
39 The August 2, 2004 Interlocutory Order Denying Employer's Motion for Summary Judgment
40 and Partially Granting Department's Cross-Motion for Partial Summary Judgment is affirmed.

41
42
43
44 ISSUES

- 45
46 1. Whether on May 12, 2003, an employee of Washington Cedar & Supply
47 Co., Inc. (hereafter Washington Cedar), committed a serious violation of

1 WAC 296-155-24510 in that he failed to wear any form of fall protection
2 equipment while he was in the course of his employment on a roof and
3 was exposed to a hazard of falling more than 10 feet;

- 4
- 5 2. If the answer to the foregoing issue is affirmative, whether the
6 Washington Cedar employee's failure to wear required fall protection
7 equipment was the result of unavoidable employee misconduct within
8 the meaning of the Washington Industrial Safety and Health Act
9 (WISHA);
- 10
- 11 3. Whether in the three years prior to May 12, 2003, Washington Cedar
12 had violated WAC 296-155-24510; and
- 13
- 14 4. Whether the Department properly and accurately calculated the factors
15 it was required to take into account in assessing the monetary penalty
16 ordered in the Citation and Notice that is here on appeal.

17

18 **EVIDENCE PRESENTED**

19

20 **The Inspection**

21

22 The Department of Labor and Industries employs William M. Sturman as a safety
23 compliance officer. On May 12, 2003, Mr. Sturman drove along Bainbridge Island in order to locate
24 and inspect framing construction projects. The safety officer testified that as he drove past new
25 housing construction taking place on Garibaldi Street, he observed a person standing on a roof,
26 who was not wearing any form of fall protection. Mr. Sturman stopped his car, took a photograph of
27 the person on the roof (Exhibit No. 2), and proceeded to conduct an opening conference with the
28 two people at the site, whom the safety officer determined were employed by Washington Cedar.
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36 In his testimony, Neil J. Lindberry acknowledged that he was the person shown on the roof
37 of the house in Exhibit No. 2. He described the activity in which he was engaged as depositing
38 stacks of roofing material on the roof after a coworker, who was on the bed of a flatbed truck,
39 transported the stacks to the roof via a conveyor belt. He further acknowledged that he intentionally
40 decided to not wear any form of fall protection during the work process that Mr. Sturman observed.
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46 Mr. Lindberry declared that he believed that fall protection gear would have gotten in his way during
47 the work process and would have posed a greater safety hazard than not wearing the gear at all.

1 base penalty is calculated. Finally, if the alleged violation is a repeat violation, the adjusted base
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3 penalty is multiplied by the number of prior citations for the same hazard that have become final.
4
5 Only violations regarding the same hazard that occurred within three years of the inspection at
6
7 issue are considered.

8
9 *Severity:* Mr. Sturman testified that regarding fall protection matters, the Department rates
10
11 the severity of an alleged violation at four if the worker was exposed to a risk of falling less than
12
13 10 feet. The severity is five if the height of the potential fall was between 10 and 20 feet and the
14
15 severity is six if the height was 20 feet or more.

16
17 Since the safety officer measured the distance between the ground and the eave of the roof
18
19 where Mr. Lindberry was standing at 13½ feet, Mr. Sturman rated the severity of the hazard at five.
20
21 He testified that Mr. Lindberry was exposed to the hazard of sustaining broken bones, including
22
23 compound fractures, and serious cuts and abrasions.

24
25 *Probability:* Mr. Sturman noted that the weather on May 12, 2003, was sunny and dry and
26
27 that no other factors that would have increased the probability that Mr. Lindberry might have fallen
28
29 from the rooftop existed. Accordingly, he rated the probability of injury at one.

30
31 *Gravity:* By multiplying the severity by the probability, Mr. Sturman calculated the gravity of
32
33 the alleged violation at five. The *base penalty* for the alleged violation was \$500.

34
35 *Good Faith, Size, and History:* Mr. Sturman testified that Mr. Lindberry was reasonably
36
37 cooperative during his inspection and that the worker donned his fall protection gear at the safety
38
39 officer's request. He assessed the worker's good faith as average, which did not result in any
40
41 adjustment to the base penalty.

42
43 Washington Cedar employs 65 workers in Washington. The size of the business resulted in
44
45 a \$200 deduction from the base penalty.

1 For WISHA purposes, an employer's history is based on its current workers' compensation
2 rate, which is calculated by comparing the number of hours employees of the company worked and
3 the number of industrial insurance claims the workers filed with a state-wide average. The
4 statewide average is expressed as the number 1,000. In 2003, Washington Cedar's experience
5 factor was 1.3235. Exhibit No. 13. Mr. Sturman testified that the business's experience factor was
6 average and it did not result in any adjustment in the base penalty assessed in this case.
7

8
9 After all factors were calculated, the *adjusted base penalty* for the alleged violation that is
10 here at issue was \$300.
11

12
13 *The Repeat Factor.* The Department produced exhibits that documented that in the
14 three-year period before May 12, 2003, Washington Cedar had been cited for violations of
15 WAC 296-155-24510 nine times. Exhibit Nos. 3 through 9. Accordingly, Mr. Sturman multiplied the
16 adjusted based penalty by nine.
17

18
19 The total penalty assessed against Washington Cedar was \$2,700.
20

21 Washington Cedar's Policies and Practices

22
23 Mr. Honeycutt, the manager of Washington Cedar's Gorst yard, identified Exhibit No. 10 as
24 the employer's Safety Incentive Program. Under the program, the business pays \$150 each
25 quarter to every employee who complies with applicable safety rules and regulations. Under the
26 heading "Fall Protection," the Safety Incentive Program states, in part: "ALL EMPLOYEES are
27 required to wear harnesses & lifelines whenever on the roof. There are no exceptions."
28

29
30 Mr. Honeycutt declared that in order to ensure that the company's employees comply with
31 fall protection rules:
32

- 33 • Use of fall protection is a topic at every bi-weekly safety meeting;
- 34 • The company loads every delivery truck with appropriate safety and fall protection gear;
- 35 • Mr. Honeycutt or Todd Lewis, Washington Cedar's outside sales representative, conducted unannounced checks of delivery sites as often as possible. The manager said

1 that since each two-worker team makes multiple deliveries each day, Washington Cedar
2 cannot make frequent spot checks and most occur during winter months, the least busy
3 time of year for the business.
4

5 Mr. Honeycutt testified that Washington Cedar uses progressive disciplinary measures for
6 violations of safety regulations. It issues a verbal reprimand for a worker's first violation, a written
7 reprimand for a second violation, and a minimum of a three-day suspension for a third violation.
8
9 Third and subsequent violations may result in termination. See Exhibit No. 14. Mr. Honeycutt
10 testified that he would terminate the employment of a worker who willfully violated safety
11 regulations.
12
13
14
15

16
17 At some point in time after Mr. Honeycutt learned about the Department's May 12, 2003
18 inspection, he talked to Mr. Lindberry about the circumstances and emphasized that the worker had
19 to wear safety gear. Mr. Lindberry admitted that he was not wearing fall protection, that he did not
20 like doing so, and that he did not intend to do so every time he worked on a rooftop. Mr. Honeycutt
21 verbally reprimanded Mr. Lindberry for the incident, but he did not require the worker to undergo
22 further training or testing regarding safety matters. Mr. Lindberry voluntarily ended his employment
23 with Washington Cedar about a month after the meeting because: "I just wanted to do something
24 else." 8/9/04 Tr. at 11.
25
26
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33 Mr. Honeycutt acknowledged that Washington Cedar's Safety Policy and Procedure Manual
34 stated, in part:
35

36
37 *Employees who fail to follow safe work practices or who receive*
38 *disciplinary action for a safety violation will be disciplined as provided by*
39 *the yard manager and will be required to undergo further training and*
40 *testing to verify knowledge of safety rules.*
41

42 Exhibit No. 14, section 11.0.
43

44 Mr. Honeycutt agreed with Mr. Sturman that a fall from 20 feet would probably cause injuries
45 such as cuts, bruises, and broken bones.
46
47

1 The Department served the Citation and Notice that is the subject of this appeal by mailing it
2
3 to Mr. Honeycutt at the employer's Gorst yard. Mr. Honeycutt testified that Leo C. Brutsche, whose
4
5 office is in Auburn, was Washington Cedar's registered agent for service of process.
6

7 **DECISION**
8

9 In this appeal, the Department held the burden of producing a preponderance of the
10
11 persuasive evidence to establish that on May 12, 2003, Washington Cedar violated a fall protection
12
13 provision of WISHA and that the penalty it assessed for the alleged violation was appropriate.
14

15 *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996).
16

17 Washington Cedar acknowledged that Mr. Lindberry was not wearing any form of fall
18
19 protection when Mr. Sturman observed him. Uncontested evidence showed that the roof of the
20
21 house on which Mr. Lindberry was standing was more than 10 feet from ground level. The record,
22
23 therefore, established that on May 12, 2003, the business violated WAC 296-155-24510, which
24
25 provides, in pertinent part:

26
27 When employees are exposed to a hazard of falling from a location
28 10 feet or more in height, the employer shall ensure that fall restraint, fall
29 arrest systems or positioning device systems are provided, installed,
30 and implemented
31

32 Washington Cedar questioned whether the hazard to which Mr. Lindberry was exposed
33
34 could have caused a serious injury and whether Mr. Sturman properly assessed the business's
35
36 good faith and its history. However, none of the evidence that the business produced regarding
37
38 those issues persuasively rebutted Mr. Sturman's assessments and the record as a whole clearly
39
40 demonstrated that in this appeal, Washington Cedar's primary focus was to show that
41
42 Mr. Lindberry's conduct constituted unpreventable employee misconduct.
43

44 The Department met its burden of showing that Washington Cedar violated WAC 296-155-
45
46 24510 and that Mr. Sturman properly calculated the severity, probability, and gravity factors that the
47
Department uses in levying a penalty assessment for a WISHA violation and properly assessed the

1 good faith, size, and history elements of the penalty assessment calculation. The record
2 established that Washington Cedar had violated the provisions of WAC 296-155-24510 nine times
3 in the three-year period prior to May 12, 2003.
4

5
6 Washington Cedar bore the burden of proving the defense of unpreventable employee
7 misconduct, since it is an affirmative defense. *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144
8 (1990).
9

10
11 In *Jeld-Wen* and in *In re The Erection Company II*, BIIA Dec., 88 W142 (1990), this Board
12 adopted the test set forth by the Occupational Safety and Health Review Commission in *Jensen*
13 *Construction Company*, 7 OSHC 1477 (1979) for establishment of unpreventable employee
14 misconduct. That decision declared:
15

16
17 In order to establish the affirmative defense of unpreventable employee
18 misconduct, an employer must show that it has established work rules
19 designed to prevent the violation, has adequately communicated these
20 rules to its employees, has taken steps to discover violations, and has
21 effectively enforced the rules when violations have been discovered.
22

23
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26
27 *Jensen*, at 1479.
28

29 The content of Exhibit No. 14 and the testimony of Mr. Lindberry and Mr. Honeycutt
30 demonstrated that Washington Cedar established work rules intended to prevent violations of fall
31 protection regulations and adequately communicated them to its employees. The record was less
32 clear that the business took steps that were reasonably calculated to effectively discover violations.
33 From the record, a fact-finder could reach no conclusion other than that Washington Cedar did not
34 effectively enforce its rule.
35

36
37 Mr. Honeycutt described the unannounced inspections that he and Todd Lewis performed as
38 occurring "periodically" and as "something that we try to do as much as possible." 8/10/04 Tr. at
39 14. Aside from those inspections, Washington Cedar produced no evidence of any other step it
40 took in an effort to discover violations of WISHA regulations by its employees. The evidence was
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1 not persuasive that the periodic inspections that Mr. Honeycutt and Mr. Lewis conducted were
2 effective tools in discovering violations of fall protection rules. It seems evident that, had
3 Washington Cedar truly felt a vested interest in discovering such violations, Mr. Honeycutt or
4 Mr. Lewis would have observed Mr. Lindberry during the deliveries he made after May 12, 2003,
5 and before the employee quit his job sometime in June 2003. Mr. Lindberry told Mr. Honeycutt that
6 during that period of time, he did not intend to comply with the Department's or with Washington
7 Cedar's own fall protection rules. The business clearly knew that Mr. Lindberry was going to
8 continue to violate the regulation. Yet Washington Cedar allowed Mr. Lindberry to continue making
9 five to seven deliveries per day without once performing a spot check to see if he was in
10 compliance with WISHA regulations. Given those circumstances, a fact-finder can only conclude
11 that Washington Cedar did not take steps that were reasonably designed to effectively discover
12 violations of safety rules.

13 Moreover, the sanction that Washington Cedar chose to impose against Mr. Lindberry for
14 failure to comply with fall protection regulations demonstrated that the company did not effectively
15 enforce such rules. As a result of the discussion that Mr. Honeycutt had with Mr. Lindberry shortly
16 after May 12, 2003, Mr. Honeycutt had to understand that the employee fully intended to engage in
17 unsafe work practices. The yard manager had to understand that the verbal reprimand that he
18 issued to Mr. Lindberry was not going to change the worker's conduct. In order to effectively
19 enforce fall protection rules under the circumstances, Washington Cedar either had to suspend
20 Mr. Lindberry or terminate his employment.

21 Both the number of prior citations the Department issued to the employer for violations of fall
22 protection rules and its failure to effectively ensure that Mr. Lindberry would comply with such rules
23 after May 12, 2003, belie Washington Cedar's contention that it effectively enforced such rules.

1 Washington Cedar cannot avail itself of the unpreventable employee misconduct defense in
2
3 this appeal.

4
5 The Department's August 28, 2003 Citation and Notice must be affirmed.
6

7 **FINDINGS OF FACT**
8

- 9 1. On August 28, 2003, the Department of Labor and Industries issued
10 Citation and Notice No. 306351933 to Washington Cedar & Supply Co.,
11 Inc. (hereafter Washington Cedar), alleging that it had committed one
12 repeat serious violation of WAC 296-155-24510 on May 12, 2003, at its
13 worksite at Garibaldi Street on Bainbridge Island, Washington. The
14 Citation and Notice assessed a total penalty of \$2,700 against
15 Washington Cedar for the alleged violation. On September 2, 2003,
16 Washington Cedar filed a Notice of Appeal of the Citation and Notice
17 with the Safety Division of the Department. The Department forwarded
18 the Notice of Appeal and transmitted a copy of its file to the Board of
19 Industrial Insurance Appeals on September 15, 2003. On
20 September 16, 2003, the Board issued a Notice of Filing of Appeal,
21 assigned the appeal Docket No. 03 W0216, and ordered that further
22 proceedings be held in the matter.
23
- 24 2. On May 12, 2003, William M. Sturman, whom the Department of Labor
25 and Industries employed as a safety compliance officer, observed Neil J.
26 Lindberry, an employee of Washington Cedar, standing on the roof of
27 new housing construction on Garibaldi Street on Bainbridge Island,
28 Washington, without wearing any form of fall protection gear. The roof
29 of the house on which Mr. Lindberry was standing was more than
30 10 feet and less than 20 feet from the ground level of the site.
31
- 32 3. After he observed Mr. Lindberry, Mr. Sturman conducted an inspection
33 of the site, caused Mr. Lindberry to put on the fall protection gear that
34 Washington Cedar ensured was in Mr. Lindberry's delivery truck, and
35 prepared an inspection report that led the Department to issue Citation
36 and Notice No. 306351933 to Washington Cedar on August 28, 2003,
37 alleging one repeat serious violation of WAC 296-155-24510.
38
- 39 4. The severity of an injury created by the safety hazard that resulted from
40 the safety violation was high (rated at five on a scale of one to six), the
41 probability that an injury would occur due to the hazard was low (rated at
42 one on a scale of one to six), yielding a gravity rating of five. The good
43 faith demonstrated by Washington Cedar on May 12, 2003, was
44 average and its history regarding workplace safety was average. The
45 business employed 65 workers. With adjustment for its size, the
46 appropriate adjusted base penalty for this violation was \$300.
47

- 1 5. In the three-year period prior to May 12, 2003, the Department had cited
2 Washington Cedar nine times for violations of WAC 296-155-24510,
3 which meant that for the May 12, 2003 violation, the Department
4 appropriately multiplied the adjusted base penalty for the violation by
5 nine and assessed a total penalty in the sum of \$2,700.
6
7 6. As of May 12, 2003, Washington Cedar had established work rules that
8 were designed to prevent a violation of WAC 296-155-24510 and it had
9 adequately communicated those rules to its workers, but it had not taken
10 steps that were reasonably calculated to discover violations of those
11 rules and it had not effectively enforced those rules when violations had
12 been discovered.
13
14 7. Washington Cedar's registered agent for service of process is Leo C.
15 Brutsche, whose office is in Auburn. The Department served
16 Washington Cedar with the Citation and Notice that is the subject of this
17 appeal by mailing it to the employer in care of its Gorst address.
18

19 CONCLUSIONS OF LAW

- 20
21 1. The Board of Industrial Insurance Appeals has jurisdiction over the
22 parties to and subject matter of this appeal.
23
24 2. On May 12, 2003, Washington Cedar committed a repeat serious
25 violation of WAC 296-155-24510.
26
27 3. The Department properly served its Citation and Notice on Washington
28 Cedar in accordance with the provisions of RCW 49.17.120.
29
30 4. Citation and Notice No. 306351933, issued by the Department of Labor
31 and industries on August 28, 2003, is correct and it should be affirmed.
32

33 It is so **ORDERED**.

34 Dated this 12th day of October, 2004.
35
36
37

38 
39 _____
40 Lyle O. Hanson
41 Industrial Appeals Judge
42 Board of Industrial Insurance Appeals
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47

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

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

In re: **WASHINGTON CEDAR & SUPPLY CO
INC**

Docket No. 03 W0216

Citation and Notice No. 306351933

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

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **LYLE O. HANSON** on **October 12, 2004**. Copies were mailed and communicated to the parties of record.

A Petition for Review was filed by the Employer on **November 12, 2004**, as provided by RCW 51.52.104.

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

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

Dated this 1st day of December, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR

Member

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

A-12

2006 FEB 23 AM 11:43

DAVID W. PETERSON

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

WASHINGTON CEDAR & SUPPLY
CO., INC.,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR &
INDUSTRIES,

Respondent.

NO. 04-2-02950-5

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

THIS MATTER came on regularly for judicial review on February 14, 2006 before the HONORABLE M. KARLYNN HABERLY, Judge of the above-entitled Court. The Petitioner, WASHINGTON CEDAR AND SUPPLY CO., INC., was represented by JERALD KLEIN. The respondent, DEPARTMENT OF LABOR AND INDUSTRIES of the state of Washington, was represented by ROB MCKENNA, Attorney General, per DAVID MATLICK, Assistant Attorney General. The court, after reviewing the records, having heard the argument of counsel, and otherwise being fully advised, enters the following:

I. FINDINGS OF FACT

1. This court adopts the Findings of Fact contained within the "Proposed Decision and Order" which was issued on October 12, 2004, and which became the final order of the Board of Industrial Insurance Appeals (Board) on December 1, 2004 under Board Docket No. 03

A-13

1 W0216. The court finds that all the Board's findings of fact were supported by substantial
2 evidence.

3 II. CONCLUSIONS OF LAW

- 4 1. This court has jurisdiction over the parties and the subject matter to this appeal. The Board of
5 Industrial Insurance Appeals issued its order pursuant to applicable statutes and rules, and this
6 appeal was perfected pursuant to statute.
- 7 2. RCW 49.17.120 is the controlling statute for service of a citation and notice under WISHA.
8 CR 4 is not applicable due to the presence of a specific statutory provision. The Board did not
9 err in denying Washington Cedar's motion to dismiss due to invalid service.
- 10 3. The Board did not err in declining to vacate the citation for lack of a "cause of action."
11 Washington Cedar's interpretation of WAC 296-155-24510 is too narrow. The rule
12 establishes a duty for employer's such as Washington Cedar to ensure that its employees
13 install and implement the fall protection systems provided to the employees.
- 14 4. The Board did not err in determining that the Department established a prima facie violation
15 by Washington Cedar of WAC 296-155-24510.
- 16 5. The Board did not err in determining that the instant violation was "serious" as defined by
17 Washington law. Substantial evidence established a substantial possibility of serious physical
18 harm could result if the Washington Cedar employee at issue would have fallen over 16 feet
19 from the roof.
- 20 6. The Board did not err in rejecting Washington Cedar's affirmative Employee Misconduct
21 defense. Substantial evidence in the record, including but not limited to evidence of multiple
22 violations of the same fall protection safety rule, supports the Board's conclusion that
23 Washington Cedar's safety program was not effective in practice. Washington Cedar has
24 failed to take additional steps to address its safety program's deficiencies.
25
26

1 7. The Board did not err in determining that the prior violations of WAC 296-155-24510
2 documented by the Department met the definition of substantially similar hazards, and the
3 Board did not err in affirming the Department's civil penalty calculation.

4 8. Washington Cedar failed to establish that WAC 296-155-24510 is unconstitutionally vague,
5 or that the repeat multiplier established by rule for the civil penalty calculation constitutes
6 unconstitutional double jeopardy.

7 9. The Board did not err or abuse its discretion in allowing the Department's lay inspector to
8 testify regarding the "severity" factor used to calculate the civil penalty.

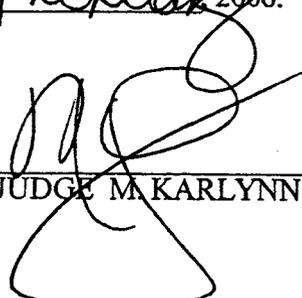
9 10. No evidentiary rulings below otherwise constitute a reversible error of law.

10 11. No substantive rulings below otherwise constitute a reversible error of law.

11 Now, therefore, it is hereby:

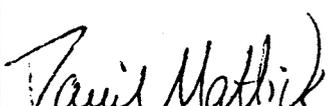
12 **ORDERED** that the order of the Board of Industrial Insurance Appeals, which affirmed
13 one repeat serious violation of WAC 296-155-24510 and assessed a total penalty of \$2,700, is
14 **AFFIRMED.**

15
16 DONE IN OPEN COURT this 23rd day of February 2006.

17
18
19 
20 JUDGE M. KARLYNN HABERLY

21 Presented by:

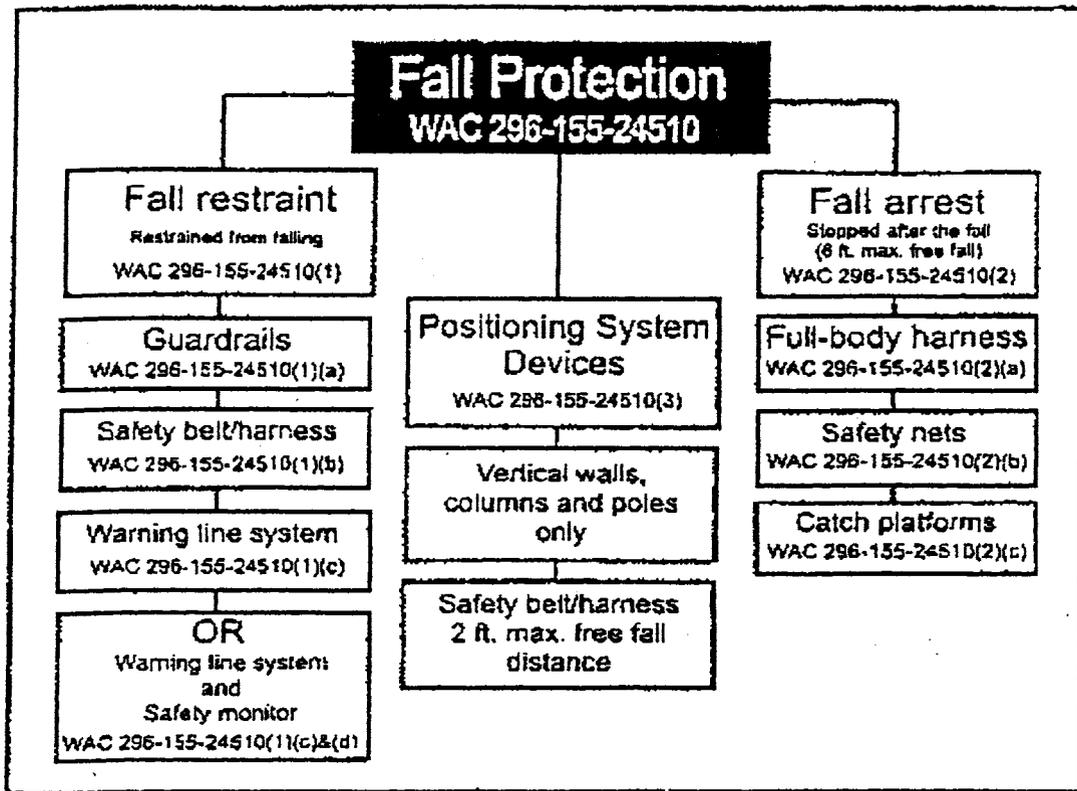
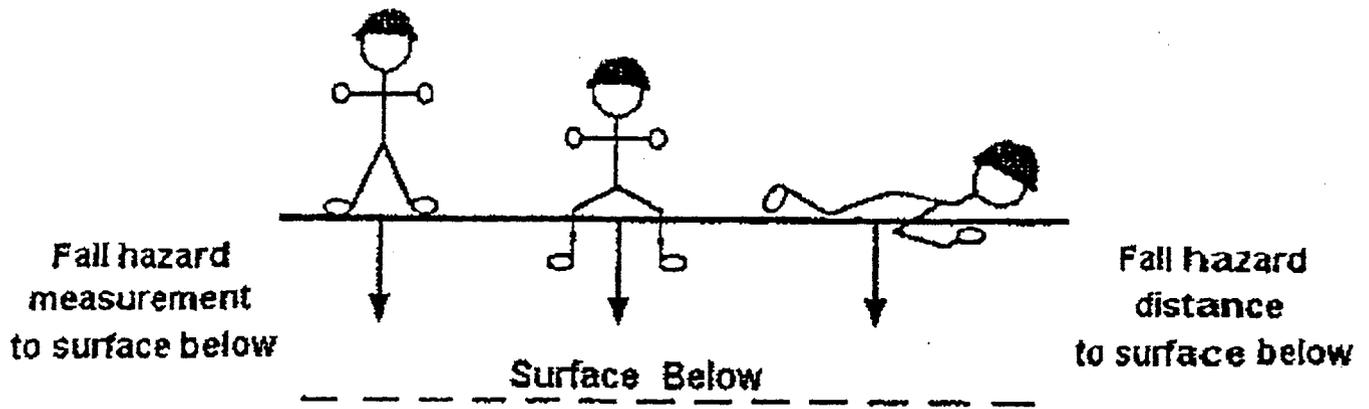
22 ROB MCKENNA
23 Attorney General

24 
25 DAVID MATLICK, WSBA # 22919
26 Assistant Attorney General

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


JERALD A. KLEIN, WSBA # 9313
Attorney for Petitioner

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.

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(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.]

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BOARD OF INDUSTRIAL
INSURANCE APPEALS
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OLYMPIA, WA

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re:)
WASHINGTON CEDAR & SUPPLY CO., INC.) Docket No. 03 W0216
Employer)
Citation No. 306351933) STIPULATION
REGARDING
CITATION

THIS PARTIES HERETO, by and through their respective
counsel, hereby stipulate as follows:

- The citation herein is for an alleged violation of WAC 296-155-24510 which reads in pertinent part:

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....
- The parties agree that the Employer did not violate any of the hardware standards contained in WAC 296-155-24510.

DATED this 19th day of April, 2004.
David I. Matlick # 22919 Attorney for Department
Jerald A. Klein, #9313 Attorney for Employer

Board of Industrial Insurance Appeals
 In re: WASHINGTON Cedar
 Docket No. 03 W0216
 Exhibit No. 1
 8-9-04 Date REJ.
 ADM.

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

A-23



Worker's Compensation RATE NOTICE

for the Department of Labor & Industries
Olympia, Washington

Effective Date	01/01/2004
Unified Business Identifier (UBI)	173 005 074
Account ID	264,265-00
Experience Period	07/1999 THRU 06/2002

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WA CEDAR & SUPPLY CO. INC

12/03/2003 is date of issue

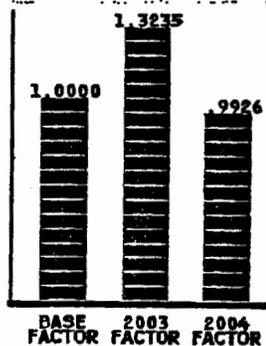
Policyholder

WASHINGTON CEDAR & SUPPLY
PO BOX 1738
AUBURN WA 98071

(These represent base rates)

Class Code	Class Description	Experience Factor EF	Accident Fund (AF)	Med Aid Fund (MA)	Supp Pension SP	YOUR RATE	Payroll Deduction
1101	DELIVERY BY WHSL/RETAIL DISTR	0.9926	0.6527	0.4899	0.0720	A 1.2061	0.27915
2009	BLDG MATERIAL DLRS/LUMBER YARD	0.9926	0.3158	0.3162	0.0720	D 0.6993	0.19295
4904	CLERICAL OFFICE NOC & DRAFTSMN	0.9926	0.0280	0.0252	0.0720	B 0.1248	0.04850
6303	SALES PERSONNEL NOC-OUTSIDE	0.9926	0.0651	0.0572	0.0720	C 0.1934	0.06440

THE GRAPH AT THE RIGHT COMPARES YOUR 2003 AND 2004 EXPERIENCE FACTORS TO A BASE EXPERIENCE FACTOR OF 1.0000. THE LOWER YOUR EXPERIENCE FACTOR, THE LESS YOU WILL PAY. FOR QUESTIONS REGARDING YOUR ACCOUNT, CALL EMPLOYER SERVICES, TEAM 6, AT: (360) 902-4802



<p>Use Rats X Units* of Work When Computing Your Premiums On The Quarterly Report</p>	<p>This Rats X Units* of Work May Be Deducted From Your Employees Payroll.</p>
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* Units and/or Hours

Board of Industrial Insurance Appeals
In re: Washington Cda
Docket No. 03 W0316
Exhibit No. 13
 8-10-04
ADM. Date REJ.

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ACCIDENT PREVENTION and CLAIMS MANAGEMENT

F225-004-000 rate notice 10-01

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DIVISION II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent

AFFIDAVIT OF SERVICE OF THE
BRIEF OF APPELLANT

Jerald A. Klein
Attorney for Appellant
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630
WSBA No 9313

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

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

delivering same to and leaving same with the receptionist between the hours of 8:00 a.m. and 5:00 p.m. on the 19th day of April, 2006.

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

Date: 4/19/06
Place: Tacoma, Washington



Jerald A. Klein, #9313
Attorney for Appellant