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OF THE STATE OF WASHINGTON  
DIVISION TWO  
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NO. 34886-1-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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BD ROOFING, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent,

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Appeal from Superior Court of Pierce County

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**APPELLANT'S OPENING BRIEF**

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Aaron K. Owada, WSBA #13869  
Attorney for Appellant

The Law Offices of Aaron K. Owada  
4405 7<sup>th</sup> Ave. SE, Suite 205  
Lacey, WA 98503  
(360) 459-0751

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## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error No. 1

Where the Department presented no evidence to demonstrate that the Employer had either knew of the safety violations, or could have known with the exercise of due diligence, as required by RCW 49.17.180(6), the Board erred by affirming the citation against BD Roofing.

### B. Assignments of Error No. 2

Where the Employer established all elements of Employee Misconduct set forth in RCW 49.17.120, and the Department offered no evidence to controvert those facts, the Board erred by not finding that BD Roofing established employee misconduct as an affirmative defense.

### C. Assignments of Error No. 3

Where the parties stipulated that the base penalty should be \$21,600, the Board erred by starting with a base penalty of \$24,300 and by affirming the violation with a penalty of \$21,600 instead of \$18,900.

## II. ISSUES

### A. Issues Pertaining to Assignments of Error No. 1

Where the Department presented no evidence to demonstrate that the Employer had either knew of the safety violations, or could have known with the exercise of due diligence, as required by RCW 49.17.180(6), did the Board err by affirming the citation against BD Roofing?

### B. Issues Pertaining to Assignments of Error No. 2

Where the Employer established all elements of Employee Misconduct set forth in RCW 49.17.120, and the Department offered no evidence to controvert those facts, did the Board err by

not finding that BD Roofing established employee misconduct as an affirmative defense?

- C. Where the parties stipulated to a base penalty of \$21,600, did the Board err by increasing the base penalty to \$24,300 without any evidence to justify this change?

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL BACKGROUND.**

This is an appeal arising from a Citation issued by the Department of Labor & Industries pursuant to the Washington Industrial Safety and Health Act, Ch. 49.17 RCW.

On August 27, 2004, the Employer filed a Motion in Limine requesting that the Department be prohibited from providing testimony that exceeded or supplemented the responses provided by the Department to the Employer's First Set of Interrogatories and Requests for Production. See Employer's Motion in Limine, filed herein.

On August 30, 2004, the Board heard oral arguments on the Employer's motion. The Board ruled as follows:

With respect to the issues of any facts that were not disclosed in the interrogatories, my ruling would be as follows: The Department will be precluded from admitting any facts that were not in the inspection report or disclosed, but, Mr. McLean, as I am not privy to the inspection, you will have to raise those objections at the time they are given, the information is given. I will rule on them at that time. Failure to raise will deem waiver.

08/30/04 TR at pg 10.<sup>1</sup>

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<sup>1</sup> "TR" refers to the trial transcripts associated with this matter.

The appeal was heard by the Board of Industrial Insurance Appeals who issued a Proposed Decision & Order on December 6, 2004. CABR 22 – 28. 2 The PR & O affirmed the Department’s violations.

The Employer timely filed a Petition for Review, CABR at pages 2 – 19. The Board denied the Petition for Review and adopted the Proposed Decision & Order without review. CABR at page 1.

**B. FACTUAL BACKGROUND**

The facts of the present matter are fairly straightforward. On October 29, 2003, Department Safety Inspector Larry Adams initiated a safety inspection at 7024 27<sup>th</sup> Street West, in University Place, Washington. 08/30/04 TR at pg 16. Mr. Adams stated that he noticed four or five individuals working on a roof at the inspection site. Mr. Adams stated that the individuals appeared to be doing “tear off” work at the site and, while the workers appeared to be wearing harnesses, did not appear to Mr. Adams to be anchored through the use of a lanyard. 08/30/04 TR at pgs 16-17.

The Department offered several photographs as Exhibit 1 A-F which show the inspection site but do not show anyone working on the roof. Mr. Adams acknowledged that the employees were not on the roof at the time that he took these photographs. 08/30/04 TR at pg 20.

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2 CABR refers to the Certified Appeal Board Record.

Mr. Adams stated that he had begun to conduct an opening conference at the inspection site. Mr. Adams also testified that he had spoken initially with Spencer Ross, identified as the Vice President of BD Roofing, but that Mr. Ross had requested that BD's safety representative be present before the inspection proceed further. 08/30/04 TR at pgs 24-25. BD's safety representative Joan Nelson arrived at the site and immediately asked that Mr. Adams discontinue the inspection. 08/30/04 TR at pg 25. Mr. Adams testified that he was refused entry when Ms. Nelson asserted that since *no management officials had been present at the site, the initiation of the inspection was not proper.* (Emphasis added) 08/30/04 TR at pg 25. Mr. Adams complied with Ms. Nelson's demand. 08/30/04 TR at pg 26. Mr. Adams later conducted a closing conference, via telephone, with Ms. Nelson. 08/30/04 TR at pg 26. Mr. Adams informed Ms. Nelson that the Department was going to issue a citation based on the information that it had already obtained. 08/30/04 TR at pg 26. The Employer was subsequently cited for two separate, though grouped safety violations. Citation 1 Item 1a states that the Employer violated WAC 296-155-24510 for failing to ensure that employees working at heights of greater than 10 feet were protected from fall hazards. Citation 1 Item 1b was issued based on the alleged failure of the Employer to ensure that a fall protection work plan was created for this project. Both violations were classified as Repeat Serious by the Department.

During his Board testimony, Mr. Adams acknowledged that the employees he observed were wearing harnesses, but did not observe lanyards on the employees. 08/30/04 TR at pg 26. Mr. Adams admitted that he did not climb up onto the roof during this inspection thus could not personally verify if there were anchors on the roof. 08/30/04 TR at pgs 26-27. Mr. Adams relied on a statement subsequently received to form his belief that there were no anchors on the roof. 08/30/04 TR at pg 27. Mr. Adams admitted on cross examination that the statement that he had relied on in forming his opinion that there were no anchors on the roof actually states that there were three different sets of anchors on the roof. 08/30/04 TR at pg 40.

Mr. Adams was also questioned on direct examination regarding, "who was in charge at the site". 08/30/04 TR at 22. The Employer's hearsay objection was sustained by the IAJ. 08/30/04 TR at 22 and 23. As mentioned above, Mr. Adams was subsequently told by Ms. Nelson that the inspection was not proper because no management official had been at this site.

Near the end of Mr. Adams' direct testimony, it was determined that the initial penalty calculation were erroneous. The Department had originally calculated the penalties for this citation to total \$28,800. *See*, Exhibit 2. However, after reevaluating the mathematics involved in the original penalty calculation, it was determined that there should be no modification for the "good faith" portion of the penalty calculation. 08/30/04 TR at pg 37. The parties eventually stipulated that the proper

calculation of the gross penalty should be \$21,600. 08/30/04 TR at pg 37. This calculation was agreed via stipulation. 08/30/04 TR at pg 38.

On cross examination, Mr. Adams acknowledge that he was familiar with the so-called "HECK" acronym as it applies to the issuance of serious safety violations. 08/30/04 TR at pgs 38-39. Mr. Adams admitted that the "H" stands for the existence of a hazard at a work-site and that a serious citation should not be issued absent such a hazard. 08/30/04 TR at pg 39. Mr. Adams agreed that without an Exposure a serious citation should not be issued. 08/30/04 TR at pg 39. Likewise, without an applicable Code provision there can be no citation for a serious safety violation. 08/30/04 TR at pg 39. Finally, the Employer must have Knowledge of the exposure and hazard for a serious citation to be issued. 08/30/04 TR at pg 39.

Mr. Adams also acknowledged that he was uncertain whether the building at the inspection would be considered a low pitched roof, and that knowledge of the pitch of a roof is necessary in judging a safety monitoring program. 08/30/04 TR at pgs 39-40. Mr. Adams admitted that since he did not climb onto the roof, he could be uncertain how close any of the individuals came to the edge of the roof. 08/30/04 TR at pg 40. Mr. Adams admitted that the employees would not need to be tied off if the employees were utilizing a safety monitoring program. 08/30/04 TR at pg 40. In addition to Mr. Adams' testimony, the Department had also identified Joan Nelson as a witness. Due to the Board's granting of the Employer's Motion in Limine, Ms. Nelson was generally prohibited from

presenting testimony that exceeded the information contained in the very limited discovery responses previously provided by the Department. Neither Mr. Adams nor Ms. Nelson provided admissible testimony regarding the Employer's affirmative defense of unpreventable employee misconduct.

During the Employer's case, five witnesses presented testimony. The first witness, current BD Roofing Employee Enrique Covelli testified regarding the company's overall safety protocols. Through Mr. Covelli's testimony, Exhibits 4, 5, and 6, were admitted. These exhibits represent BD's site specific safety plan in English, the same site specific plan in Spanish and BD's Accident Prevention Program, respectively.

The next witness providing testimony was Spencer Ross, Vice President of Residential at BD Roofing. Mr. Ross testified that he responded to the inspector's presence at this work-site to his close proximity. 08/31/04 TR at pg 16. Mr. Ross testified that he received a phone call from Joan Nelson instructing him not to talk with the safety inspector, Mr. Adams. 08/31/04 TR at pg 17. Mr. Ross also testified his recollection of the weather conditions at the inspection site. He stated that the site was "very windy". 08/31/04 TR at pg 17. The basis for Mr. Ross' recollection is that BD Roofing was forced to file a claim with its insurance carriers due to the fact that some debris had blown into a car parked near the site, causing damage. 08/31/04 TR at pg 17. Mr. Ross stated his belief that the site specific fall protection plan had been posted

at this job site as well, but had been blown off of its posting area by the high winds. 08/31/04 TR at pg 19. Mr. Ross based this belief on a conversation with employee Diego Valentine and on the fact that a nail remained in the post were the employees had claimed to have posted the site specific work plan. 08/31/04 TR at pg 20. According to Mr. Ross, this method of posting was consistent with the company's practices. 08/31/04 TR at pg 20.

Mr. Ross also testified that he was familiar with the documents contained in Exhibits 4 through 6. Mr. Ross specifically testified that the site specific fall protection plans, contained in Exhibits 4 and 5, were in place at the time of this inspection. 08/31/04 TR at pg 18. Additionally, Mr. Ross testified that the Accident Prevention Program, contained in Exhibit 6, was also in effect on the date of the inspection.

Mr. Jose Suarez provided testimony on behalf of the Employer as well. Mr. Suarez related his recollection of events at this inspection site. Mr. Suarez testified that Mr. Adams had already left the site by the time that Mr. Suarez arrived. 08/31/04 TR at pg 24. Mr. Suarez testified that he asked the employees at this site for the whereabouts of the site specific plan and the crew showed him a column to which they said the plan had been affixed. 08/31/04 TR at pg 24. Mr. Suarez also stated that the conditions at this work site were very windy. 08/31/04 TR at pg 24. Finally, Mr. Suarez testified that he was aware of the safety training that new employees receive at BD Roofing. 08/31/04 TR at pgs 24-25. Mr. Suarez asserted that any employee that needed safety training in Spanish

would be provided the appropriate training in Spanish. 08/31/04 TR at pg 25. Mr Suarez stated that he was familiar with the crew working at this job site and stated that the primary language of these employees was Spanish. 08/31/04 TR at pgs 22-23.

The Employer next called BD Roofing President, Bruce Duschel. Mr. Duschel expressed his familiarity with the documents contained in Exhibits 4 through 6 and that all were in effect on the date of the inspection. 08/31/04 TR at pgs 26-27. Mr. Duschel testified that his role as President of BD Roofing requires him to have full understanding of the safety training procedures of his employees. 08/31/04 TR at pg 27. He testified that each new employee is indoctrinated into the companies safety program by the safety director. 08/31/04 TR at pg 28. Mr. Duschel stated that this indoctrination policy was in effect on the date of the inspection. Mr. Duschel stated that his safety director is given the authority to hire and fire employees for violations of the company's safety rules and that this policy was in effect on the date of the inspection. 08/31/04 TR at pgs 28-29. Additionally, Mr. Duschel stated that his safety inspector conducts daily inspections of the company's job sites and that this practice was implemented and in effect, on the date of the inspection. 08/31/04 TR at pg 29.

Mr. Duschel acknowledged that BD Roofing has received safety citations during inspections occurring previous to the present one. However, based on those experiences, Mr. Duschel stated that he set out to improve BD's safety program. 08/31/04 TR at pgs 29-30. Mr. Duschel

pointed out that he spent upward of \$22,000.00 to reevaluated BD's entire safety program. 08/31/04 TR at pg 30. As a result of these efforts, Mr. Duschel testified that his company's program has improved significantly. 08/31/04 TR at pg 30. The final witness presented by the Employer was safety expert, Mr. Herb Heinold. Mr. Heinold offered testimony regarding his extensive training in the construction industry. Mr. Heinold pointed out that he was one of the individuals making up the Construction Advisory Counsel(CAC). 08/31/04 TR at pg 36. One of the responsibilities of the CAC was to draft the current fall protection standards under which BD is currently being cited. 08/31/04 TR at pg 37. The other individuals making up the CAC at this time were Dr. Silverstein, of Labor and Industries and Robert Dillinger, for the building and trades guilds. 08/31/04 TR at pg 37. Based on Mr. Heinold's background, he was accepted by the Board as an expert witness. 08/31/04 TR at pg 37.

Mr. Heinold testified that he had the opportunity to review Exhibits 4 through 6. Mr. Heinold's testimony was that the documentation embodied in Exhibit 4 met the legal requirements for an adequate site-specific fall protection work plan. 08/31/04 TR at pg 38. Mr. Heinold explained that the basis for his opinion was that the plan explained the nature of the work being done, explains the fall protection systems utilized, the emergency plan in case of injury and provides an area for the applicable employees to sign. 08/31/04 TR at pg 38. Mr. Heinold next posited that the document contained in Exhibit 5 was also an

adequate site-specific plan, assuming that it was merely the Spanish version of the document contained in Exhibit 4. 08/31/04 TR at pg 38.

Mr. Heinold also testified about the adequacy of BD's accident prevention program, contained in Exhibit 6. He testified that he understands the legal requirements of an accident prevention program and knows the legal requirements for a sufficient safety plan. 08/31/04 TR at pg 39. Mr. Heinold stated that his review of BD's accident prevention program convinced him of the programs adequacy. 08/31/04 TR at pg 39.

Finally, Mr. Heinold offered testimony relating to the definition of what constitutes a safety program that is effective in practice. Mr. Heinold testified that once a written safety program is established, the employer must communicate the program to its employees. 08/31/04 TR at pg 46. This communication can occur via new hire orientation, weekly safety meetings or special training sessions. 08/31/04 TR at pg 46. In addition, the Employer must have a disciplinary program to insure that the safety program is actually followed by its employees. 08/31/04 TR at pg 47. Mr. Heinold acknowledge that BD Roofing has a disciplinary program. 08/31/04 TR at pg 47. Mr. Heinold also stated that an employer is required to conduct safety inspections or audits to determine if the program is being followed at minimum of one safety inspection per week. 08/31/04 TR at pg 47. Mr. Heinold offered his opinion that, ultimately, BD Roofing has a safety program that is effective in practice. 08/31/04 TR at pg 47.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW.

The standard for judicial review of a WISHA citation is set forth in RCW 49.17.150(1). In relevant part, this section declares:

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

(Emphasis added).

The Board's conclusions must also be based on its findings of fact. *Martinez Melgoza & Associates v. Department of Labor & Industries*, 125 Wn. App 1004. Based on this standard, for the reasons set forth below the Employer respectfully asserts that there was no substantial evidence in the record that BD Roofing either knew of the fall protection violation, or could have known with the exercise of due diligence. Moreover, the uncontroverted record establishes that BD Roofing exercised due diligence as a contractor and met all elements of employee misconduct. There are no substantial facts in the record to affirm the Department's citation.

##### B. THE DEPARTMENT FAILED TO ESTABLISH ALL ELEMENTS UNDER RCW 49.17.180(6) TO ISSUE A SERIOUS VIOLATION.

Washington was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan

administration. As such, the Washington State Department of Labor & Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited employer either knew, or should have known of the presence of the violation. In relevant part, RCW 49.17.180(6) declares:

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

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6).

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working

conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

The Department has failed to meet its burden of proof with regards to Items 1-1a. In terms of Item 1-1a, the fall protection violation, the Department has provided absolutely no evidence that BD Roofing had knowledge of this violation. The Department's own expert, Mr. Adams, agreed that "Knowledge" was one of the criteria that must be established before a serious citation will be issued to an employer. Moreover, both *Gary Concrete Prods* and *Brennan*, cited above, require that the Department establish that the employer knew, or with the exercise of reasonable diligence, should have known, that a violation existed as a part of its prima facie case. Until such a showing is made, the Department is not relieved of its burden of proof with regard to a serious WISHA citation.

The undisputed evidence is that the crew working at this inspection site spoke primarily Spanish. 08/31/04 TR at pgs 22-23. The Department's efforts to secure the testimony of the individual that they assumed to be the employer representative at this inspection, Mr. Valentino, were not successful. 08/30/04 TR at pg 46. There is absolutely no admissible evidence before the Board that Mr. Valentino

understands and speaks English. There is no evidence before the Board that Mr. Adams understands or speaks Spanish. In fact, as noted by the IAJ in the Proposed Decision and Order, the employer has taken great pains to ensure that its safety materials are properly translated into Spanish. See Proposed Decision and Order, pg 5, lines 27-35; pg 4, lines 11-14; See also Board Exhibits 4 and 5. The undisputed evidence is that the Employer's safety representative, Ms. Nelson, asked Mr. Adams to leave the inspection site because no management official had been present when he began his inspection. 08/30/04 TR at pg 25. The evidence relied upon by the inspector in his attempt discern which individual at this inspection site would be considered a management official seems to amount to the inspector's interpretation of Mr. Valentino's non-verbal assertions of this foreign speaking individual. Therefore, the IAJ's acceptance of Mr. Adams' *mere assumption* that Mr. Valentino was a management official at the inspection site is not supported by the factual record before the Board. Absent a management official being present during these alleged violations, the Department cannot establish the necessary element of "knowledge" as required by law.

In terms of the Employer's efforts to discover violations, the undisputed testimony is that BD Roofing conducted safety audits of each of its job sites *on a daily basis*. More to the point, Mr. Duschel testified that this particular work site was inspected on a daily basis. 08/31/04 TR at pg 32. Mr. Heinold, the Employer's expert for safety matters, testified that an employer is only required to conduct safety audits, under the

applicable code provisions, on a weekly basis. The Department offered no testimony or other evidence that disputed this contention. The Employer's actions demonstrate an "exercise of reasonable diligence" to discover the presence of safety violations. Given the lack of evidence demonstrating "knowledge" of the alleged violations on the part of the employer, the Department has failed to establish a prima facie case that the cited standard was violated. Item 1-1a should have been vacated.

**C. THE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT BD ROOFING ESTABLISHED ALL ELEMENTS FOR EMPLOYEE MISCONDUCT AS REQUIRED BY RCW 49.17.120.**

Even if one were to assume that the Employer somehow had knowledge of the existence these safety violations, the wrongful acts leading to the alleged violations were the result of unpreventable employee misconduct.

The Board announced the criteria for establishing that an alleged safety violation was caused by unpreventable employee misconduct in the matter of *Jeld-Wen of Everett*, Docket No. 88 W144(1990). Therein, the Board held that four elements must be established by the Employer to establish the affirmative defense of employee misconduct: 1) an employer must show that it has established work rules designed to prevent the violation; 2) has adequately communicated these rules to its employees; 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered. *Id.* The elements set forth in

*Jeld-Wen*, are codified in RCW 49.17.120(5). In relevant part, that section declares:

- (5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:
  - (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
  - (ii) Adequate communication of these rules to employees;
  - (iii) Steps to discover and correct violations of its safety rules; and
  - (iv) Effective enforcement of its safety program as written in practice and not just in theory.
- (b) This subsection (5) does not eliminate or modify any other defenses that may exist to a citation.

The testimony provided at the Board hearing demonstrates that the BD Roofing has met its burden of proof with regards to each of these four elements. The Board accepted, as Exhibit 6, BD Roofing's Accident Prevention program. Mr. Ross, Mr. Suarez and Mr. Duschel each testified that this program was the same one that was in place on the date of the inspection leading to the present citation. Mr. Duschel acknowledged that his company had safety concerns in the past. However Mr. Duschel pointed out that his company has made great strides to correct that problems that had plagued his company as of 2002. See 08/31/04 TR 29-30. Specifically, Mr. Duschel testified that he spent tens of thousands of

dollars to strengthen this program, based on past safety inspections. 08/31/04 TR at pg 30. The Employer's expert witness, Mr. Heinold, testified that he had reviewed the contents of the safety program, and that it complied with all applicable code provisions given the nature of BD Roofing's work.

In addition, the Board received as Exhibits 4 and 5, the Employer's site specific fall protection program in English and Spanish respectively. Yet again, the Board heard testimony that these particular programs were the same programs that were implemented on the date that the inspection occurred. Further, Mr. Heinold stated that his review of these programs confirmed adequacy under the applicable code provisions.

Conversely, the Department offered absolutely no admissible evidence attacking the adequacy of either the company's accident prevention program or its site specific fall protection plans. Thus, the Employer has met its burden of proof in regards to the first element of employee misconduct.

In terms of communication of the Employer's safety program, the Board heard testimonies from Messrs. Duschel, Ross, Covelli, and Suarez. Mr. Suarez testified that his job duties as safety director requires him to provide safety training to each new employee coming to work for BD Roofing. 08/31/04 TR at pgs 4 -5. Mr. Suarez provided testimony that he was employed by BD Roofing on the date that this inspection occurred. He further testified that he was familiar with the orientation that is given

to each new employee of the company. 08/31/04 TR at pgs 24-25. Mr. Suarez stated that each new employee receives the company's safety training, and if necessary, all such training is provided in Spanish. 08/31/04 TR at pg 25<sup>3</sup>. The President of BD Roofing, Mr. Duschel stated that he was familiar with the company's new hire orientation. He further testified that each and every new hire is indoctrinated into the company's safety plan. 08/31/04 TR at pg 28. Mr. Duschel pointed out that failure to abide by the company's plan could be grounds for dismissal. 08/31/04 TR at pg 28. Finally, Mr. Duschel testified that this new hire orientation was in place on the date of the inspection. Finally, Mr. Duschel stated that the particular employees who were involved in the present inspection received the above-detailed safety orientation. 08/31/04 TR at pg 31.

Mr. Heinold offered his expert testimony relating to the various methods that an employer can utilize to communicate its safety program to its employees. Mr. Heinold testified that BD Roofing could utilize new hire orientation, weekly tool box meeting or through special training sessions, as an effective methods to communicate its safety program to its employees. 08/31/04 TR at pg 46.

Conversely, the Department offered no admissible testimony that the Employer's safety program was not adequately communicated to its employees. No witness providing testimony for the Department even

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<sup>3</sup> Mr. Suarez testified that his native language is Spanish. 08/31/04 TR at pg 25

challenged the assertion that BD communicates its safety plan with its employees. As such, the Employer has met its burden of proof vis-a-vis the second element of the employee misconduct defense.

The various witness testifying on behalf of the Employer also address the methods utilized to insure compliance with the safety program. Mr. Covelli stated that company's safety director inspects each work site at least once a day. 08/31/04 TR at pgs 4 -5. Mr. Duschel testified that the safety director at BD Roofing conducts safety inspection of each site on a daily basis. 08/31/04 TR at pg 29. He further testified that this policy was implemented on the date of the present inspection. 08/31/04 TR at pg 29. Mr. Heinold provided testimony that any such safety audits should be conducted at least weekly in order to be adequate.

Once again, the Department did not provide any testimony challenging the adequacy of the Employer's safety audits. The only admissible evidence in the record establishes that the Employer conducted daily inspections of each of its work sites. Mr. Heinold's testimony further establishes that the Employer would be in compliance if it conducted safety audits on a weekly basis. The Employer has met its burden of proof relating to the third element of employee misconduct.

Finally, the Employer provided evidence that it effectively enforces the rules established by its safety program. In particular, Mr. Duschel detailed that the Employer's safety inspectors have independent authority to hire and fire employees based on safety concerns. 08/31/04 TR at pg 28. Once an employee is fired by the safety director, that

employee cannot thereafter be rehired without the consent of the safety director. 08/31/04 TR at pg 28. Mr. Duschel testified that this policy was in place and enforced, on the date of the inspection. 08/31/04 TR at pg 29. Mr. Duschel further testified that the company's policy, on the date of the inspection, was that an employee could face dismissal for failure to abide by the Employer's safety protocols. 08/31/04 TR at pg 28.

Mr. Heinold also reviewed the Employer's enforcement policies action taken in accordance with the accident prevention program. 08/31/04 TR at pg 46. Mr. Heinold, after reviewing the Employer's accident prevention program, testified that the Employer's disciplinary program was effectively used to enforce the company's safety regulations. 08/31/04 TR at pgs 46-47. Finally, Mr. Heinold testified that, in his expert opinion based on his review of the company's safety program, audits and enforcement, BD Roofing's overall safety protocol was effective in practice. 08/31/04 TR at pg 47.

Once again, the Department has offered no admissible evidence that contradicts the Employer's evidence regarding its disciplinary program. Mr. Heinold's opinion, based on his review of the Employer's materials, convinced him that the Employer *has adequately enforced its safety program*. Given that the Department has provided no admissible evidence to challenge this assertion, the Employer has met its burden of proof with regard to the fourth element of the employee misconduct defense.

Finally, the Employer's evidence that its overall safety program was effective in practice has not been rebutted by any admissible evidence offered by the Department. In fact, the Employer provided the only evidence that spoke to the effectiveness of the Employer's safety program in practice. This evidence demonstrates that the Employer has made a prima facie showing that its safety program is effective in practice. As such, this citation should have been vacated in its entirety. Despite the fact that the Employer provided the only admissible evidence relevant to employee misconduct issue, the IAJ held, as a matter of law, that the defense did not apply.<sup>4</sup> In particular, the IAJ ruled, "Although this employer has a policy of giving the safety director authority to terminate employees on the discovery of safety violations, there was no demonstration by this employer of a progressive disciplinary program designed to correct the unsafe behavior and how such a program has been implemented absent an inspection by the Department of Labor and Industries." See Proposed Decision and Order at pg 5. Several sentences earlier, however, the IAJ noted, "BD Roofing should be commended for having developed a safety program (Exhibit No. 6), having developed a fall protection work plan in English as well as Spanish for its Spanish-speaking employees, communicating these rules to the employees through bilingual training, *and taking steps, through safety directors and*

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<sup>4</sup> The Proposed Decision and Order does not contain a Finding of Fact that the Employer's affirmative defense of employee misconduct has not been established.

*corporate officers, to discover and correct violations to safety rules.* Id at pg 5. (Emphasis added).

Based upon the evidence before the Board, it is clear that there is no support for the IAJ's ruling that the employee misconduct defense is inapplicable as a matter of law. As mentioned throughout, the evidence of record on the issue of employee misconduct can only be construed as establishing that the four elements laid out in *Jeld-Wen* have been met. The Department offered no admissible evidence related to employee misconduct. In fact, the Department did not submit a closing brief contesting the validity of the Employer's employee misconduct defense.

On the other hand, the Employer offered the expert testimony of Mr. Herb Heinold who unequivocally stated that the Employer had met all four of the necessary elements required to establish the affirmative defense of employee misconduct. Mr. Heinold stated that his review of the pertinent materials indicated that the Employer had an effective disciplinary program, and based upon the company's tool box meetings, safety audits and disciplinary action, the safety program was effective in practice. 08/31/04 TR at pg 47. The IAJ agreed that the safety director and corporate officers have taken steps to "discover and correct violations of safety rules".

Given the evidence before the Board, the IAJ's decision is not supported by substantial evidence. In fact, the IAJ's determination that the employee misconduct defense is inapplicable is not supported by any admissible evidence. The IAJ does not indicate, in the Proposed Decision

and Order, the evidence upon which this legal conclusion is based. As demonstrated throughout, the Department offered no admissible evidence that could be construed as rebutting the substantial evidence offered by the Employer on the issue of employee misconduct. Therefore, the IAJ's holding that the employee misconduct defense does not apply is not supported by the factual record before the Board. Item 1-1(a) should be vacated.

**D. WHERE THE PARTIES STIPULATED TO A BASE PENALTY OF \$21,600, THE BOARD ERRED BY INCREASING THE PENALTY TO \$24,300 WITHOUT ANY EVIDENCE TO JUSTIFY THE CHANGE.**

The parties stipulated at the Board hearing that the correct base penalty for the present citations should be \$21,600. 08/30/04 TR at pg 37. The parties reached this figure by taking the adjusted base penalty of \$2,700 and multiplying that sum by the eight prior violations of record. 08/30/04 TR at pg 37. As the current citation is a grouped citation, the previous citations relied upon at reaching the total penalty considered of violations both WAC 296-155-24505(1) and WAC 296-155-24510.

However, in arriving at a penalty calculation in the Proposed Decision and Order, the IAJ stated that the base penalty, including the various "repeat" factors, was \$24,300, rather than the stipulated amount of \$21,600. Proposed Decision and Order at pgs 4-5. The IAJ then stated that since item 1-1(b) was vacated, Citation and Notice No. 304666464

should not be considered in the penalty calculation given that this previous citation involved a violation of WAC 296-155-24505(1) only. See Proposed Decision and Order at pgs 4-5. The IAJ then reduced the total penalty to \$21,600.

Given the fact that the parties stipulated that the base penalty should be considered to be \$21,600 during the Board hearing, it was improper for the IAJ to *sua sponte* increase the base penalty to \$24,300 as a part of the Proposed Decision and Order. Moreover, as correctly noted by the IAJ in the Proposed Decision and Order, since item 1-1(b) was vacated, Citation and Notice No. 304666464 should not be considered as a “repeat violation” in the final penalty calculation. As such, the adjusted base penalty of \$2,700 should have been multiplied by seven, rather than eight, due to the fact that item 1-1(b) was vacated, and since Citation No. 304666464 was excluded as a multiplier. The correct calculation, by utilizing this attorney’s admittedly deficient math skills, appears to yield a penalty amount of \$18,900. In the event that citation item 1-1(a) is affirmed, the penalty calculation should be adjusted to reflect this discrepancy.

V. CONCLUSION

The Board erred by affirming the Citation against BD Roofing as there is no substantial evidence in the record that BD Roofing either knew, or could have known with the exercise of due diligence. As this is a prima facie element required by RCW 49.17.180(6), the Citation should have been vacated.

Even if the Department established knowledge, the Department did not controvert any of the testimony provided by the Employer regarding employee misconduct. As all elements required by RCW 49.17.120(5) were established, and not challenged, the Board erred by not vacating the citation based on the affirmative defense.

Finally, the correct multiplier for the Repeat citation should have been a "7" instead of an "8". Accordingly, the total penalty if the violation is affirmed is \$18,900 ( $\$2,700 \times 7$ ) and not \$21,600 ( $\$2,700 \times 8$ ).

For these reasons, the citation must be vacated.

DATED this 29th day of September, 2006.

The Law Offices of Aaron K. Owada



Aaron K. Owada, WSBA No. 13869  
Attorneys for Appellant

1 **CERTIFICATE OF SERVICE**

2 I, Kris Wambem, hereby certify under penalty of perjury under the laws of the State of  
3 Washington that on this date I filed with the Court, via Personal Service:

- 4 1. Original of the opening brief

5 And a copy via US Mail to:

6  
7 Bourtai Hargrove  
8 Assistant Attorney General  
9 Office of the Attorney General  
10 Labor & Industries Division  
11 P. O. Box 40121  
12 Olympia, WA 98504-0121

13 SIGNED in Lacey, Washington on October 2, 2006.

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15 Kris Wambem

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DEPUTY

The Law Offices of Aaron K. Owada  
4405 7<sup>th</sup> Ave SE Suite 205  
Lacey, WA 98503  
(360)459-0751