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

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BD ROOFING CONSTRUCTION, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR AND INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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ROB MCKENNA  
Attorney General

BOURTAI HARGROVE  
Assistant Attorney General  
WSBA #22706  
Labor & Industries  
P.O. Box 40121  
Olympia, WA 98501-0121  
360-586-7719

PM 12/5/06

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## I. INTRODUCTION

This is an appeal of a Corrective Notice of Redetermination which the Department of Labor and Industries (Department) issued to BD Roofing Construction, Inc. (BD Roofing) under the Washington Industrial Safety and Health Act (WISHA) for two violations of the Washington Administrative Code (WAC): a repeat serious violation of WAC 296-155-350(3) for failing to ensure that employees wore eye protection when using pneumatic staple guns, and a general violation of WAC 296-155-480(2)(i) for failing to ensure that the bottom rung of the ladder used by employees was free of debris. BD Roofing has never contested the facts underlying the violations. Instead BD Roofing has only raised the affirmative defense of unpreventable employee misconduct.<sup>1</sup>

The Board of Industrial Insurance Appeals (Board) found the violation for failing to ensure that employees used proper protective eyewear was the fifth such violation by BD Roofing within the past three years, and, stated that BD Roofing had not established the affirmative defense of unpreventable employee misconduct because the company “failed to show that it was effectively enforcing protective eyewear

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<sup>1</sup> As set out in greater detail below, BD Roofing raises the employee misconduct defense with respect to its eye protection violation. It concedes the validity of the ladder violation; indeed, this portion of the Corrective Notice of Redetermination is unmentioned in the Appellant’s Opening Brief.

standards with its employees.”<sup>2</sup> The Pierce County Superior Court upheld the Board’s ruling on the citation.

The sole issue BD Roofing raises in its Opening Brief is whether the Board erred in rejecting the affirmative employee misconduct defense that BD Roofing raised.<sup>3</sup> In this brief, the Department argues that (1) the Board correctly concluded that BD Roofing failed to prove that it effectively enforced its safety program, thus failing to prove the affirmative defense of unpreventable employee misconduct, and (2) that the record amply supports this conclusion.

## **II. STATEMENT OF THE ISSUE**

Does substantial evidence support the Board’s determination that BD Roofing failed to prove the fourth element of the affirmative defense of unpreventable employee misconduct – effective enforcement of its safety program in practice and not just in theory?

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

### **A. The WISHA Inspection**

On January 27, 2003, William Sturnman, a WISHA Compliance officer, inspected a BD Roofing worksite at 6902 94<sup>th</sup> Street in

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<sup>2</sup> Certified Appeals Board Record (CABR), Proposed Decision and Order, pp. 13, 14. A copy of the Proposed Decision and Order is attached as Appendix A.

<sup>3</sup> Appellant’s Opening Brief (AB), p. 1.

Gig Harbor, Washington.<sup>4</sup> As he approached the site, Mr. Sturnman saw two workers using pneumatic staple guns to install roofing materials. The workers were not wearing eye protection as required by WISHA standards – their glasses were on top of their heads.<sup>5</sup> After he stopped his car, Mr. Sturnman was able to take photographs that illustrated the violation.<sup>6</sup> Mr. Sturnman also took a photograph of a pile of construction debris that almost obscured the first rung of the ladder the workers were using to access the roof.<sup>7</sup> The debris is shown on the photograph entered into evidence as Exhibit No. 4.

The lead worker on the site was Victor Vasquez, one of the workers using a pneumatic staple gun without eye protection.<sup>8</sup> Mr. Vasquez spoke Spanish, and when it became evident there was a language barrier, the workers called for their supervisor, Rafael Gonzales, who was fluent in English.<sup>9</sup> Mr. Sturnman conducted an opening conference and a walk-around inspection, with Mr. Gonzales acting as an interpreter. During the inspection, Mr. Sturnman requested information from BD Roofing about its safety program, including its disciplinary

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<sup>4</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 8.

<sup>5</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 13.

BD Roofing does not dispute the fact that its workers were not wearing eye protection at the Gig Harbor site.

<sup>6</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 13; Exhibit Nos. 1 and 2.

<sup>7</sup> CABR, Transcript, 4/2/04, Testimony of William Sturnman, p. 24.

<sup>8</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 16.

<sup>9</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, pp. 9, 10.

program. Counsel for the Department inquired about the information he received:

Q. (Hoffman): Was there any other additional information provided to you regarding disciplinary actions during those conversations with Mr. Gonzales?

A. (Sturnman): Well, Victor was identified as the lead worker and I was told that they really did not want to discipline him because he's one of their best hands.<sup>10</sup>

When Mr. Sturnman returned to his office, he learned that the Department had previously cited BD Roofing on four previous occasions for failing to ensure that its workers wore eye protection equipment as required by WAC 296-155-350(3). All four prior citations had become final within the past three years.<sup>11</sup> The four prior citations plus the present violation made a repeat factor of five,<sup>12</sup> which Mr. Sturnman used when calculating the penalty for the violation of WAC 296-155-350(3).<sup>13</sup>

A closing conference was held by telephone the day after the inspection.<sup>14</sup>

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<sup>10</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 19.

<sup>11</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, pp. 18, 19. *See also* BD Roofing's responses to the Department's Requests for Admission, Exhibit No. 6.

<sup>12</sup> A "repeat violation" is a substantially similar violation which became final within three years of the current inspection. WAC 296-900-14020. The penalty may be increased by multiplying the base penalty by the total number of repeat violations, including the present violation. BD Roofing does not contest the penalty calculation.

<sup>13</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 23.

<sup>14</sup> CABR, Transcript, 4/1/04, Testimony of William Sturnman, p. 66.

**B. Testimony At The Hearing**

Rafael Gonzales, the BD Roofing supervisor who was called to the worksite to translate for William Sturnman on January 27, 2003, testified he issued a safety violation report after the WISHA inspection against Victor Vasquez for failing to wear safety goggles.<sup>15</sup> It was marked “first offense”, and Mr. Gonzales testified the fine for a first offense is \$25.

When asked about BD Roofing’s disciplinary policy, Mr. Gonzales described a three-step process, but then said, “Now we change everything and we don’t tolerate any violations at all.”<sup>16</sup> On cross-examination, counsel for the Department asked him:

Q. (Hoffman): When you say, “now we changed everything,” what are you talking about? What do you mean?

A. (Gonzales): We are getting on the point that – the company spends a lot of money on training, on the equipment, and we have cases like Victor that we used to have like a three chances. Now with all this effort the company is doing and our laborers or our guys don’t do it. So we decided we are not going to tolerate anymore.

Q. (Hoffman): When did that start?

A. (Gonzales): That was a couple of months – I am not sure, but it’s a couple months ago.

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<sup>15</sup> CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, pp. 77, 78; Exhibit No. 7.

<sup>16</sup> CABR, Transcript, 4/2/04, Testimony of Rafael Gonzales, p. 78.

Q. (Hoffman): Couple months ago? So if you are - we are in March of 2004, that would be about January of 2004?

A. (Gonzales): Something about - I was - yes, something about that.

Q. (Hoffman): *So that effort was not being made prior to January of 2004; is that correct?*

A. (Gonzales): *No, I think we start on this year.*

Q. (Hoffman): So the disciplinary process that you explained was started in January of 2004, correct?

A. (Gonzales): The one that we are not tolerating no more?

Q. (Hoffman): Yes.

A. (Gonzales): Yes.<sup>17</sup>

Bruce Hunter Dochel, the President of BD Roofing, testified that as part of a settlement agreement with the Department, BD Roofing had hired a consultant, a full-time safety inspector, and a translator to restructure the company's safety program.<sup>18</sup> He could not remember exactly when BD Roofing had hired the consultant, Plumb Safety Consulting, but he believed it was in the summer of 2002.<sup>19</sup> Mr. Dochel testified he had been to a work site, and fired an employee for

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<sup>17</sup> CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, pp. 91, 92 (emphasis added).

<sup>18</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Hunter Dochel, pp. 116, 117.

<sup>19</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Hunter Dochel, p. 116.

noncompliance.<sup>20</sup> He responded as follows to questions from BD Roofing's attorney, Mr. Owada:

Q. (Owada): How many times had this occurred prior to January 27, 2003?

A. (Dochel): *2003 I had not visited a site. We had Jose, Rafael and Carl Plum were still fine tuning our safety policy. We were taking – the guys were running rampant and we were restructuring the whole company.*<sup>21</sup>

On cross-examination, the Department's attorney asked Mr. Dochel to explain what he meant by "running rampant".

Q. (Hoffman): And when you said on direct that the guys were "running rampant" prior to January 2003, what did you mean?

A. (Dochel): They had no regard for safety policies or rules or regulations or the laws of this country.<sup>22</sup>

BD Roofing's witnesses did not agree on the substance of the disciplinary program. Rafael Gonzales testified that a first safety violation resulted in a \$25 monetary penalty, a second violation resulted in a one-week suspension, and the third violation resulted in employee termination.<sup>23</sup> However, Jose Suarez, BD Roofing's Comptroller, while agreeing that a first violation resulted in a \$25 monetary penalty, stated

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<sup>20</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Hunter Dochel, p. 118.

<sup>21</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Hunter Dochel, p. 118 (emphasis added).

<sup>22</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Hunter Dochel, p. 126.

<sup>23</sup> CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, pp. 78, 79.

that a second violation resulted in a \$100 to \$150 penalty or a one-week suspension in pay.<sup>24</sup>

Besides conflicting with one another, neither Mr. Gonzales's nor Mr. Suarez's description of BD Roofing's disciplinary policy was consistent with the policy actually contained within the company's written accident prevention program. That document provides for "verbal warnings" to be "given to all employees during the safety orientation . . . at the time they are hired," followed by a "written safety violation" (with no mention of a monetary penalty) "at the time of any violation," and, finally, "termination . . . for a gross safety violation that endangers [the employee's] life or the life of a fellow employee."<sup>25</sup>

The exhibits submitted by BD Roofing show the company did not take consistent disciplinary action when safety violations were found.<sup>26</sup> Seven of the nineteen BD Roofing employees (37%) found violating safety regulations in 2002 were not disciplined.<sup>27</sup> For many safety violations, the fines were nominal. Nine of the Corrective Action Reports

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<sup>24</sup> CABR, Transcript, 4/2/04, Testimony of Jose Suarez, p. 105.

<sup>25</sup> CABR, Exhibit No. 8, pp. 6-7.

<sup>26</sup> CABR, Safety Violation Reports and Corrective Action Reports for 2002, Exhibit Nos. 10 and 11.

<sup>27</sup> CABR, Exhibit No. 11.

for 2002 showed \$25 deductions in pay and one was a warning with no monetary penalty whatsoever.<sup>28</sup>

**C. The Citation**

BD Roofing was cited for the following serious violations:

Citation 1, Item 1, a repeat serious violation of WAC 296-155-350(3) for failing to ensure that two (2) workers using pneumatic staple guns wore safety glasses as required.

Citation 2, Item 1, a serious violation of WAC 296-155-020(7) for failing to ensure that free access was maintained at all times to all exits (free of obstructions), in that the area at the base of the roof access ladder was surrounded by scrap wood, roofing materials, and other construction waste materials.

After BD Roofing's first appeal, the Department re-assumed jurisdiction, and issued a Corrective Notice of Redetermination, affirming Citation 1, Item I, and modifying Citation 2, Item 1, by changing it to a general violation of WAC 296-155-480(2)(i) with no penalty.<sup>29</sup>

Thereafter, BD Roofing appealed to the Board of Industrial Insurance Appeals (Board).

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<sup>28</sup> CABR, Exhibit No. 11.

<sup>29</sup> The Board observed that the recharacterization of Item 2-1 from a serious to a no-penalty general violation may have been generous: "The violation was changed from serious to general and no penalty was assessed for it despite the fact that Board Exhibit Nos. 2-4 show an excessive amount of debris at the bottom of the ladder used to access the roof." CABR, Proposed Decision and Order, pp. 11-12. The Board went on to describe this violation as "obvious." CABR, p. 12.

#### **D. The Decision And Order**

After a full evidentiary hearing, the Board's Industrial Appeals Judge (IAJ) issued a Proposed Decision and Order affirming both violations. The IAJ, in his Findings of Fact, found the violation for failing to ensure that employees used proper protective eyewear was the fifth such violation by BD Roofing within the past three years, and, in his Conclusions of Law, stated BD Roofing had not established the affirmative defense of unpreventable employee misconduct because the company "failed to show that it was effectively enforcing protective eyewear standards with its employees."<sup>30</sup>

BD Roofing petitioned the Board for review. On October 12, 2004, the Board denied the Petition for Review, making the Proposed Decision and Order the Board's final decision and order.<sup>31</sup>

#### **E. BD Roofing's Appeal To The Superior Court**

BD Roofing sought judicial review in the Superior Court of Pierce County. The Superior Court affirmed the Board's Decision and Order in all respects. This appeal followed.<sup>32</sup>

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<sup>30</sup> CABR, Proposed Decision and Order, pp. 13, 14.

<sup>31</sup> CABR, Order Denying Petition for Review, p. 1.

<sup>32</sup> BD Roofing's petition for review, superior court briefing, and opening brief before this Court do not challenge the Board's affirmance of the ladder violation.

#### **IV. LEGAL STANDARDS**

##### **A. Standard Of Review**

Review in this matter is governed by RCW 49.17.150. Under WISHA, the Board's Findings of Fact must be affirmed if they are supported by substantial evidence.

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

RCW 49.17.150(1) (emphasis added). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person that a finding is true. *Martinez Melgoza v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 848, 106 P.3d 776, (2005), *review denied*, 155 Wn.2d 1015 (2005).

An appellate court reviews statutory interpretation issues *de novo*. *Washington Cedar & Supply Co., Inc., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 912, 83 P.3d 1012 (2003).

##### **B. WISHA Is A Remedial Statute And Must Be Liberally Construed To Further Worker Health And Safety**

The purpose of WISHA and the regulations promulgated under it is to assure safe and healthful working conditions for every man and woman working in the state of Washington. RCW 49.17.010. "WISHA is to be liberally construed to carry out this purpose." *Inland Foundry v. Dep't of*

*Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001). Accordingly, any safety standard under Ch. 49.17 RCW must be accorded an interpretation which furthers worker health and safety. *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990).

The Department is required to adopt occupational health and safety standards that are at least as effective as those promulgated by the United States Secretary of Labor under the federal Occupational Safety and Health Act (OSHA). RCW 49.17.050(2). “Thus, [WISHA rules] can be more protective, although not less, of worker safety than rules promulgated under OSHA.” *Aviation West Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999). In determining what constitutes a WISHA violation, Washington courts often consider decisions interpreting parallel federal OSHA regulations that likewise protect the health and safety of workers. *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

Washington courts grant substantial deference to the Department’s interpretation of WISHA and those sections of the Washington Administrative Code promulgated under it. *Lee Cook Trucking & Logging v. Dep’t. of Labor & Indus.*, 109 Wn. App. 471, 477, 36 P.3d 558 (2001). When a statute or regulation is ambiguous, courts defer to the interpretation of the agency responsible for administering and enforcing it.

In fact, an agency's interpretation of a statute it is required to administer is presumed valid. *Kaiser Aluminum v. Pollution Control Hearings Bd.*, 33 Wn. App. 352, 354, 654 P.2d 723 (1982). Thus, the Department's interpretation of WISHA and its interpretation of the regulations the agency adopted to implement the statute, are of considerable importance in determining their meaning. *See Asarco v. Puget Sound Air Pollution Control Auth.*, 51 Wn. App. 49, 56, 751 P.2d 1229 (1988).

## V. ARGUMENT

### A. **Substantial Evidence Supports The Board's Determination That BD Roofing Failed To Prove Effective Enforcement Of Its Safety Program And Thus Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct**

#### 1. **BD Roofing had the burden of proof on all four prongs of the unpreventable employee misconduct defense**

BD Roofing does not contest the fact that the violations occurred, nor does it dispute the affirmance of the ladder violation. Instead, the company asserts that its eye protection violation should be excused because it was the result of "unpreventable employee misconduct."<sup>33</sup> RCW 49.17.120(5) codifies the affirmative defense of "unpreventable employee misconduct", a doctrine that allows an employer to avoid liability for a WISHA violation upon the following showing:

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<sup>33</sup> Appellant's Opening Brief, p 5.

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

RCW 49.17.120(5).

Prior to the adoption of RCW 49.17.120(5), the Board adopted the reasoning of the leading federal case on “employee misconduct”, *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 989, 108 S. Ct. 479, in *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 at 14-15, 1990 WL 205725 (1990). *See Legacy Roofing, Inc. v. Dep’t of Labor & Indus.*, 129 Wn. App. 356, 119 P.3d 366 (2005), *review denied*, 156 Wn.2d 1028, 133 P.3d 473 (2006). *Jeld-Wen* followed *Brock* and held that “unpreventable employee misconduct” is an affirmative defense for which the employer bears the burden of proof. As the Board explained in its analysis of *Brock* and other federal cases, the Department has the initial burden of establishing a prima facie case that a WISHA violation occurred. The burden then shifts to the employer to rebut the prima facie case, or to establish an affirmative defense. *See Jeld-Wen*, at 15; *Washington Cedar*, 119 Wn. App. at 912.

To use the defense, the employer must prove that the violation was caused by unforeseeable employee misconduct, rather than by inadequate enforcement of its safety program. *See Washington Cedar*, 119 Wn. App. at 913. The key element that must be proven by the employer in any “employee misconduct” case is that the enforcement of safety has been **“effective in practice as well as in theory.”** *Brock*, 818 F.2d at 1277 (emphasis added).

In 1999, the Washington State Legislature codified the four elements of the “unpreventable misconduct defense” which were set out in *Brock*. *See* RCW 49.17.120(5); *Washington Cedar*, 119 Wn. App. at 912. While an employer must satisfy each of the four parts of the test in order to meet its burden of proof, merely showing a good “paper program” does not demonstrate “effectiveness in practice.” *Brock*, 818 F.2d at 1277.<sup>34</sup>

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<sup>34</sup> Contrary to BD Roofing’s suggestion at AB 9, RCW 49.17.120(5) did not “change the required elements for employee misconduct.” Prior to that statute’s enactment, the Board had identified four factors necessary to demonstrate unpreventable employee misconduct:

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

*In re The Erection Company*, BIIA Dec., 88 W142 (1990), quoting *Secretary of Labor v. Jensen Construction Co.*, 1979 WL 8461 (O.S.H.R.C.), 7 O.S.H. Cas. (BNA) 1477, 1979 O.S.H.D. (CCH) P 23, 664. *See also Jeld-Wen* (quoting same passage from *Jensen*). RCW 49.17.120(5) simply put the law that already existed into the WISHA statute., making it entirely appropriate to rely on *Brock*, *Erection Company*, and other cases describing the identical standard.

As the court in *Brock* pointed out, Congress intended the defense of unpreventable employee misconduct to be very difficult for employers to prove. The *Brock* court quoted the legislative history of OSHA to emphasize the strong obligation placed on employers to enforce safety. *Id.* *Brock* then explained that an employer would be strictly held to its burden of proof on each element of the test. *Id.* For example:

An instance of hazardous employee misconduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring, training and sanctioning of the employees.

*Brock*, 818 F.2d at 1277 (citations omitted).

The employer's duty includes providing "training, supervision, and disciplinary action designed to enforce the rules." *Id.* The employer must also show that the conduct of its employees in violating the employer's safety policies was:

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

*Brock*, 818 F.2d at 1277 (emphasis added).

This defense has been described by federal courts as the “isolated occurrence”, “isolated incident”, and “isolated misconduct” defense.

*Jeld-Wen*, at 16. As this Court explained in *Washington Cedar*:

The “isolated occurrence” language stems from agency and judicial interpretation of the “effective enforcement” prong of the unpreventable employee misconduct defense. RCW 49.17.120(5)(iv). The Board and federal courts have concluded that in order for the enforcement of a safety program to be “effective”, the misconduct could not have been foreseeable.

As a result, the Board has determined that prior citations for similar conduct may preclude the defense because those violations provide notice to the employer of the problem, thereby making repeat occurrences foreseeable. But it appears that the existence of prior violations does not absolutely bar use of the unpreventable employee misconduct defense; it merely is evidence that the employee conduct was foreseeable and preventable.

*Washington Cedar*, 119 Wn. App. at 913 (citations omitted).

In most cases, the mere fact that a Department WISHA inspector observes a violation raises serious questions as to whether the incident is truly “isolated” and therefore, whether the employer’s safety enforcement is effective. The extremely limited number of WISHA inspectors in Washington (approximately 100) means that employers can conduct more than 99% of their work without ever being observed by an inspector. Thus, in those rare instances where an inspector personally observes a

violation, the chances that the violation was “idiosyncratic” and “isolated” are infinitesimal.

**2. BD Roofing failed to establish that it had implemented and enforced an effective disciplinary program prior to the WISHA inspection on January 27, 2003**

In its Opening Brief, BD Roofing relies entirely on the fact that it had restructured and strengthened its safety program following its previous four violations in an attempt to reduce violations.<sup>35</sup> The President of BD Roofing, Bruce Dochel, testified that as part of a settlement agreement with the Department, the company had spent \$100,000 to hire a safety consultant, a full-time safety inspector and a translator<sup>36</sup> in an effort to reduce safety violations.

Although the company claims that it made concerted efforts to improve its safety program,<sup>37</sup> testimony at the hearing established that the

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<sup>35</sup> Appellant’s Opening Brief, p. 5; *see also* AB at 2 (“comprehensive safety program” developed after BD Roofing “learn[ed] the error of its ways”).

<sup>36</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Dochel, p. 117. These expenditures were not entirely voluntary, as under the provisions of a settlement agreement with the Department, the money BD Roofing spent to improve its safety program was deducted from the penalties for one of its prior violations. CABR, Transcript, 4/1/04, Testimony of Bruce Dochel, p. 117 (“Whatever I didn’t pay the consultant, I had to pay the State fines.”).

<sup>37</sup> There are gaps and contradictions throughout the testimony and evidence BD Roofing presented on the four elements of the unpreventable employee misconduct. The revised Safety Policies & Procedures Manual written by Plumb Safety Consulting has a date of August 2002. However, there is no date on the Spanish translation of the manual, and BD Roofing presented no testimony to clarify when the safety manual was translated and made accessible to BD Roofing’s Spanish speaking employees such as those present at the Gig Harbor inspection site. CABR, Exhibit Nos. 8 and 9. The language barrier was clearly significant because Mr. Dochel eventually had to hire *three*

new safety program was not fully implemented before the WISHA inspection on January 27, 2003. Mr. Dochel, the president of BD Roofing, testified that in 2003, Jose Suarez, Rafael Gonzales, and the consultant, Carl Plum, were still engaged in fine tuning the new safety policy and restructuring the company.<sup>38</sup> And Rafael Gonzales admitted that the new strict “no tolerance” disciplinary policy was not implemented until January 2004, a full year after the WISHA inspection.<sup>39</sup> As BD Roofing recognized, the disciplinary policy was a crucial element of the company’s safety program; indeed, according to Mr. Dochel, employees were “running rampant” before 2003, with no regard for safety rules and regulations or the “laws of this country.”<sup>40</sup>

BD Roofing presented contradictory evidence on the content of its revised disciplinary program. Although Rafael Gonzales testified that a first safety violation resulted in a \$25 monetary penalty, a second violation resulted in a one-week suspension, and the third violation resulted in

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Spanish language translators. CABR, Transcript, 04/01/04, Testimony of Bruce Dochel, p. 117.

Furthermore, the documentation BD Roofing offered on its “comprehensive” inspection and monitoring program was incomplete. BD Roofing introduced only 26 Safety Violation Reports for the entire year of 2002 - most of them documenting “no violation” inspections”. CABR Exhibit Nos. 10 and 11. For a company working on six different worksites every day (CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, p. 90), the Safety Violation Reports document only one inspection every other week, hardly a comprehensive monitoring program.

<sup>38</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Dochel, p. 118.

<sup>39</sup> CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, p. 91.

<sup>40</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Dochel, p. 126.

employee termination,<sup>41</sup> the comptroller, Jose Suarez, had a different understanding of the program. Mr. Suarez agreed that a first violation resulted in a \$25 monetary penalty but then stated that a second violation resulted in a \$100 to \$150 penalty or a one-week suspension in pay.<sup>42</sup> Neither one described the disciplinary policy actually contained in BD Roofing's Safety Policies and Procedures Manual - a plan that contains five steps, including counseling, oral reprimand, written reprimand, suspension, and termination.<sup>43</sup> Most significant was the fact that *neither* Rafael Gonzales nor Jose Suarez was aware that the manual provided that an employee could be terminated at any time for a gross safety violation that endangered his life or the life of a fellow employee.<sup>44</sup> These contradictions amply demonstrate that BD Roofing did not effectively communicate its safety program to its employees and did not implement the program.

The Safety Violation Reports and Corrective Action Reports from 2002, submitted by BD Roofing in an effort to document its disciplinary program reveal that the company did not take consistent disciplinary

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<sup>41</sup> CABR, Transcript, 4/1/04, Testimony of Rafael Gonzales, pp. 78, 79.

<sup>42</sup> CABR, Transcript, 4/2/04, Testimony of Jose Suarez, p. 105.

<sup>43</sup> CABR, Exhibit No. 8, BD Roofing Safety Policies & Procedures Manual, pp. 6, 7.

<sup>44</sup> CABR, Exhibit No. 8, BD Roofing Safety Policies & Procedures Manual, p. 7.

action when safety violations were found.<sup>45</sup> Seven of the nineteen BD Roofing employees found violating safety regulations in 2002 were not disciplined in any fashion. The Safety Violation Reports with no corresponding Corrective Action Reports are: Safety goggle violations by Cystian on 4/23/02 and 7/26/02; a fall protection equipment violation by Eliasor on 3/26/02; fall protection plan violations by Jose Ramirez and Arnulfo Ramirez on 5/10/02; a hand protection violation by Sarvedor on 4/18/02; and danger sign and fall protection plan violations by Pedro on 4/23/02.<sup>46</sup>

Even when disciplinary action was taken, the fines were nominal. Nine of the Corrective Action Reports for 2002 showed \$25.00 deductions in pay and one was a warning with no monetary penalty.<sup>47</sup> This is the equivalent of a slap on the wrist, certainly not enough to make employees who have “no regard for safety policies or rules or regulations or the laws of this country”<sup>48</sup> take notice, or change their behavior.

In *Legacy Roofing*, discussing the defense of unpreventable employee misconduct, this Court set a high standard for the quantity and quality of evidence an employer must present to meet all four of the

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<sup>45</sup> CABR, Safety Violation Reports and Corrective Action Reports for 2002, Exhibit Nos. 10 and 11.

<sup>46</sup> CABR, Exhibit No. 11.

<sup>47</sup> CABR, Exhibit No. 11.

<sup>48</sup> CABR, Transcript, 4/1/04, Testimony of Bruce Dochel, p. 126.

prongs of the affirmative defense. *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. at 363-68. In presenting its unpreventable employee misconduct defense, Legacy Roofing, like BD Roofing here, introduced documents into evidence purporting to show that employees caught in violation of safety rules had been fined. *Legacy Roofing*, 129 Wn. App. at 365, 366. Nevertheless, the Board, and this Court affirming the Board, found Legacy Roofing's disciplinary policy ineffective, because the documentary evidence showed inconsistent penalty enforcement and did not show that each employee who was cited for a violation was actually fined. *Id.* at 365.

*Legacy Roofing* is directly on point here – the facts in *Legacy Roofing* are almost identical with the facts now before the Court. BD Roofing's Safety Violation Reports and Corrective Action Reports show that numerous employees caught violating a regulation were not fined or otherwise disciplined, and those that were fined were penalized a trifling amount. As a result, BD Roofing's disciplinary program, like Legacy Roofing's disciplinary program, was ineffective.

An employer must satisfy each of the four parts of the unpreventable employee misconduct test in order to meet its burden of proof. Here, substantial evidence in the record supports the Board's determination that BD Roofing failed to demonstrate the fourth prong of

the unpreventable employee misconduct defense - effective enforcement of its safety program.

Furthermore, this was not an isolated incident of employee misconduct. Not one employee, but two employees, violated the regulations governing eye protection, and one of them was the lead worker, Victor Vasquez.<sup>49</sup> Eye protection violations were clearly a continuous problem for BD Roofing. Four previous citations for failure to wear appropriate eye protection were introduced into evidence, making a repeat factor of five, which Mr. Sturnman used for calculating the penalty.<sup>50</sup> As this Court noted in *Washington Cedar*, the Board and federal courts have concluded that prior similar violations can make employee misconduct more “foreseeable”, and the effectiveness of an employer’s enforcement of its safety program can be called into question where the employer repeatedly fails to prevent foreseeable misconduct. *Washington Cedar*, 119 Wn. App. at 913 (citations omitted).

In its Opening Brief, BD Roofing alleges that the Board erred by finding that the prior violations alone precluded BD Roofing from establishing the unpreventable employee misconduct defense set forth in

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<sup>49</sup> CABR, Transcript, 04/01/04, Testimony of William Sturnman, pp. 15, 16.

<sup>50</sup> BD Roofing admitted the repeat violations in response to the Department’s Requests for Admissions, CABR, Transcript, 4/1/04, p. 5; Testimony of William Sturnman, p. 20. BD Roofing does not take issue with the method under which the penalty was calculated nor with the penalty itself; rather, it simply seeks to have the violation set aside in its entirety. See AB 1 (Assignment of Error), 11.

RCW 49.17.120(5).<sup>51</sup> This is a narrow reading of the Board's Proposed Decision and Order that disregards the actual evidence that the Board considered.

Citing *In re the Erection Company (II)*, BIIA Dec., 88 W142 (1990), in its discussion of the case, the Board did observe that,<sup>52</sup> “[s]ince BD Roofing has repeatedly been cited for violating the eye protection standards, it could not have been effectively enforcing the rules and accordingly the employee misconduct defense has not been established.” However, in its Findings of Fact, the Board cited the repeat violations as evidence (not necessarily the only evidence) that the employer was not effectively enforcing the eye protective wear standards.

Furthermore, the Board determined that the employee misconduct defense had not been established because BD Roofing “failed to show that it was effectively enforcing protective eyewear standards with its employees.” This is certainly a broad enough statement to cover the major deficiencies in BD Roofing's disciplinary program which, as discussed above, are evident from the record.

Although the Board did not make findings of fact on all four of the elements of the unpreventable employee misconduct defense, it did find

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<sup>51</sup> Appellant's Opening Brief, p. 10.

<sup>52</sup> A copy of *In re the Erection Company* is attached to Appellant's Opening Brief.

that BD Roofing failed to prove the fourth element – that it was effectively enforcing its protective eyewear standards. Because an employer must prove *each* element of the defense, the failure to prove one element is decisive and the defense fails. It is not necessary to make findings of fact on the other three elements.<sup>53</sup>

The testimony and evidence in the record show that (1) BD Roofing’s new safety program was still being evaluated and “fine-tuned” in January 2003; (2) the new “no tolerance” disciplinary program was not implemented until a year after the WISHA inspection; (3) BD Roofing’s managers could not accurately describe the disciplinary program contained in the company’s own Safety Policies and Procedures Manual; (4) discipline was inconsistent; and (5) BD Roofing had four prior citations for violations of the same standard, showing that the violation in this case was not an isolated incident.

## VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court uphold the Board and superior court decisions affirming the Department’s citation.

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<sup>53</sup> If the Court determines that findings of fact must be made on all four elements of the unpreventable employee misconduct defense, the proper remedy is to remand the case to the Board for more specific findings of fact. *Cf. State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (where trial court fails to enter proper findings of fact, “that error can be cured by remand”).

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December,

2006.

ROB MCKENNA  
Attorney General

Bourtai Hargrove  
BOURTAI HARGROVE  
Assistant Attorney General  
WSBA # 22706

# APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: B D ROOFING ) DOCKET NO. 03 W0361  
2 )  
3 CITATION & NOTICE NO. 306055781 ) PROPOSED DECISION AND ORDER

4  
5 INDUSTRIAL APPEALS JUDGE: Greg J. Duras

6  
7 APPEARANCES:

8  
9 Employer, B D Roofing, by  
10 Northcraft, Bigby & Owada, P.C., per  
11 Aaron K. Owada

12  
13 Employees of B D Roofing,  
14 None

15  
16 Department of Labor and Industries, by  
17 The Office of the Attorney General, per  
18 Beth A. Hoffman, Assistant

19  
20  
21 The employer, B D Roofing, filed an appeal with the Board of Industrial Insurance Appeals  
22 on July 22, 2003 from Corrective Notice of Redetermination (CNR) No. 306055781 issued by the  
23 Department of Labor and Industries on July 17, 2003. In this CNR, the Department alleged Citation  
24  
25 1 Item 1, which was a repeat serious violation of WAC 296-155-350(3), with an abatement date of  
26  
27 January 28, 2003 and a proposed penalty of \$2,000; and Citation 2 Item 1, which was a general  
28  
29 violation of WAC 296-155-480(2)(i), with an abatement date of May 10, 2003 and a penalty of \$0.  
30  
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32  
33 The CNR is **AFFIRMED**.

34  
35 **ISSUES**

- 36  
37 1. Did B D Roofing commit a repeat serious violation of  
38 WAC 296-155-350(3), by failing to ensure that employees were using  
39 appropriate eye protection while engaged in roofing activities?  
40  
41 2. Did B D Roofing commit a general violation of WAC 296-155-480(2)(i)  
42 by failing to ensure that debris was clear of the base of a ladder, used in  
43 roofing work?  
44  
45

1 EVIDENCE

3 William M. Sturman, a safety and health inspector for the WISHA division of the Department  
4 of Labor and Industries, was driving by the worksite of B D Roofing located at 6902 94<sup>th</sup> Street, Gig  
5 Harbor, Washington, on January 27, 2003. It was approximately 3 p.m. and he saw people working  
6 on the roof. He noticed two men working on the roof using pneumatic stable guns without wearing  
7 protective eyewear. Board Exhibit No. 1 shows these workers. One of the workers was named  
8 Victor Vazquez, but Mr. Sturman did not get the name of the other worker. It appeared that  
9 Mr. Vazquez was the lead worker and when he came down from the roof, Mr. Sturman attempted to  
10 discuss the inspection with him, although they had some difficulty communicating because the  
11 workers spoke Spanish and Mr. Sturman did not. The inspector cited the firm for a WISHA violation  
12 of WAC 296-155-350(3) due to the lack of eye protection, and he considered it a serious violation  
13 due to the potential for eye injuries. When calculating the penalty for that violation, he assigned a  
14 severity of 6, a low probability of 1, for a gravity of 6 with a base penalty of \$1,000. He made a  
15 \$200 adjustment for good faith and a \$400 adjustment for size but nothing for history, and since the  
16 firm had four prior violations, there was a repeat factor of 5 so the total penalty was \$2,000.

25 Mr. Sturman also cited the firm for a violation involving what he called "housekeeping"  
26 because as depicted in the pictures admitted as Board Exhibit Nos. 2, 3 and 4, there was  
27 substantial debris at the base of a ladder the workers used to access the roof. He determined that  
28 there was potential for the workers to slip when they reached the bottom rung of the ladder that was  
29 completely covered with the debris, and so he assigned a serious violation of WAC 296-155-020(7)  
30 and proposed a penalty of \$160. But during a reassumption hearing, it was changed to a general  
31 violation of WAC 296-155-480(2)(i) and the penalty was reduced to \$0. Mr. Sturman held a closing  
32 conference with Rafael Gonzalez when he arrived and employee misconduct was discussed.

1 Mr. Gonzalez said they did not want to discipline Mr. Vazquez because he was one of their best  
3 employees.

4  
5 Bruce Hunter, also known as Bruce Hunter Duschel, is the owner of B D Roofing, and he has  
6  
7 spent 25 years working in the roofing industry. At the time of this inspection in January 2003, his  
8  
9 company did roofing projects mainly in Pierce, King, and Thurston Counties. His firm hired a safety  
10  
11 consultant based upon an agreement with the Department of Labor and Industries in 2002, and  
12  
13 they have spent about \$100,000 on safety to ensure they have a safe working environment for their  
14  
15 employees. Mr. Hunter says his firm disciplines workers for unsafe actions and they have fined and  
16  
17 even fired personnel for such reasons. But he said that Victor Vazquez is one of their leaders in  
18  
19 safety and other performance standards and he has no reason to believe that Mr. Vazquez would  
20  
21 commit the alleged violations.

22  
23 Jose Suarez is the comptroller for B D Roofing. He speaks Spanish and is responsible for  
25  
26 safety at the company. He described the company safety program indicating it has been translated  
27  
28 into Spanish, and he indicated they conduct regular safety meetings. Mr. Suarez said that prior to  
29  
30 the January 2003 inspection, they had several eye protection discussions at their safety meetings  
31  
32 and the subject comes up regularly at their meetings and they have trained their employees on how  
33  
34 to properly wear safety glasses. The company has a safety inspection program and they send out  
35  
36 someone daily to inspect their jobsites. Board Exhibit No. 10 is a copy of their inspection reports.  
37  
38 He also maintains records of disciplinary actions and Board Exhibit Nos. 7 and 11 are such records.

39  
40 Rafael Gonzalez is a supervisor at B D Roofing. He said that the company took disciplinary  
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42 action against Victor Vazquez as a result of the citation on January 27, 2003 because he was not  
43  
44 wearing safety glasses and a report of that action is described in Board Exhibit No. 7. That  
45  
document indicates this was a first offense for Mr. Vazquez and he was fined \$25 because he was  
47  
not using safety glasses. He also considered Mr. Vazquez one of the company's best employees

1 and Mr. Gonzalez spends much of his day on the jobsites, doing inspections. He said the company  
3 now does not tolerate any unsafe actions by employees.

4  
5 DECISION  
6

7 B D Roofing has expended considerable resources to ensure compliance with safety  
8 regulations. But in this case it is apparent that violations were committed. Citation 1, Item 1, was  
9 issued for a repeat serious violation of WAC 296-155-350(3) because B D Roofing did not ensure  
10 that two of its workers who were using pneumatic guns wore safety glasses. Mr. Sturman  
11 witnessed this violation and took a picture of it, admitted as Board Exhibit No. 1, so there can be no  
12 doubt that the violation occurred, and the only remaining question is whether the employee  
13 misconduct defense applies to this violation.  
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21 In order to establish the affirmative defense of employee misconduct, an employer must  
22 show that it has established work rules designed to prevent the violation, it has adequately  
23 communicated those rules to its employees, it has taken steps to discover violations and it has  
24 effectively enforced the rules when violations have been discovered. *In re The Erection Company*  
25 (II), BIIA Dec., 88 W142 (1990). In that case the Board determined that the last element of that  
26 defense was not established because of the number of similar citations the employer had received  
27 for fall protection standards and accordingly the company had not established that it was effectively  
28 enforcing that standard. Similarly, in this case, this was the fifth citation of this type of violation by  
29 the company in a period of a few years. Since B D Roofing has repeatedly been cited for violating  
30 the eye protection standards, it could not have been effectively enforcing the rules and accordingly  
31 the employee misconduct defense has not been established. The penalty assessment calculations,  
32 as outlined above by Mr. Sturman and as presented in Board Exhibit No. 5, are appropriate.  
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45 It is also apparent that Citation Item No. 2-1 on the CNR must be upheld. That violation was  
47 changed from serious to general and no penalty was assessed for it despite the fact that Board

1 Exhibit Nos. 2-4 shows an excessive amount of debris at the bottom of the ladder used to access  
3 the roof. The violation was changed to a violation of WAC 296-155-480(2)(i), which indicates: "The  
4 area around the top and bottom of ladders shall be kept clear." The exhibits show that was  
5 obviously not done in this instance and that citation item number will not be discussed further.  
6  
7

8  
9 The employer also suggests the Department did not follow proper procedures when citing it  
10 for these violations, such as by holding opening and closing conferences. However, Mr. Sturman  
11 met with Mr. Gonzalez and also attempted to speak with Mr. Vazquez. Absent more persuasive  
12 evidence that there was a procedural problem with the inspection, that cannot be considered a  
13 basis for changing the CNR.  
14  
15  
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17

#### 18 FINDINGS OF FACT

- 19  
20  
21 1. On March 18, 2003, The Department of Labor and Industries, WISHA  
22 Services Division, issued an Inspection Report under No. 306055781  
23 regarding an inspection conducted on January 27, 2003, at a worksite of  
24 B D Roofing, the employer, at 6902 94<sup>th</sup> Street, Gig Harbor, Washington  
25 98355. On May 5, 2003, the Department issued Citation and Notice  
26 No. 306055781 alleging Citation Item 1-1, a repeat serious violation of  
27 WAC 296-155-350(3), with an abatement date of January 28, 2003 and  
28 a penalty of \$2,000; and Citation Item 2-1, a serious violation of  
29 WAC 296-155-020(7), with an abatement date of May 10, 2003 and a  
30 penalty of \$160; for a total penalty assessed of \$2,160. On May 13,  
31 2003, the employer filed a Notice of Appeal of Citation and Notice  
32 No. 306055781. On May 28, 2003, the Department issued a notice  
33 reassuming jurisdiction. On June 16, 2003, the parties entered into an  
34 agreement for an extension of the reassumption process for an  
35 additional 15 days. On July 17, 2003, the Department issued a  
36 Corrective Notice of Redetermination (CNR) No. 306055781 that alleged  
37 Citation Item No. 1-1, a repeat serious violation of WAC 296-155-350(3),  
38 with an abatement date complied and a penalty assessed of \$2,000;  
39 and Citation Item 2-1, in which the violation was modified from a  
40 serious violation of WAC 296-155-020(7) to a general violation of  
41 WAC 296-155-480(2)(i), and the abatement dated was changed from  
42 May 10, 2003 to complied, and the penalty was modified from \$160 to  
43 \$0; for a total penalty assessed for all violations changed to \$2,000. On  
44 July 22, 2003, the employer filed a Notice of Appeal with the Board of  
45 Industrial Insurance Appeals from CNR No. 306055781. On July 25,  
46 2003 a transmittal was completed. On July 31, 2003, the Board issued  
47 a Notice of Filing of Appeal, assigned Docket No. 03 W0361, and  
directed further proceedings to be held.

- 1 2. On January 27, 2003, William Sturman, a safety and health inspector for  
3 the Department of Labor and Industries, WISHA Services Division,  
4 conducted an inspection at a worksite of B D Roofing, located at 6902  
5 94<sup>th</sup> Street, Gig Harbor, Washington. As a result of his inspection he  
6 issued Citation and Notice No. 306055781, alleging violations of WISHA  
7 rules.
- 8 3. On January 27, 2003, two B D Roofing employees were working on a  
9 roof located at 6902 94<sup>th</sup> Street in Gig Harbor, Washington, and they  
10 were using pneumatic nail guns but they were not utilizing proper  
11 protective eye wear, that could have resulted in serious injury to their  
12 eyes.
- 13 4. This was the fifth violation since December 2001, by B D Roofing, for  
14 regarding failure to ensure its employees were utilizing proper protective  
15 eyewear.
- 16 5. In calculating the \$2,000 penalty to be assessed for the eyewear  
17 violation, the Department gave proper consideration to the severity of  
18 the violation, the probability, and the employer's good faith, history, and  
19 size.
- 20 6. On January 27, 2003, B D Roofing failed to ensure that the base of a  
21 ladder used by its employees to access the roof was free of debris.
- 22 7. The Department held opening and closing conferences appropriate  
23 under the circumstances during the course of its inspection of this  
24 B D Roofing worksite.
- 25 8. The employer was not effectively enforcing the eye protective wear  
26 standards with its employees as evidenced by the number of recent  
27 citations for violating those regulations.

#### CONCLUSIONS OF LAW

- 28 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
29 parties to and subject matter of this appeal.
- 30 2. On January 27, 2003, B D Roofing committed a repeat serious violation  
31 of WAC 296-155-350(3) at its worksite located at 6902 94<sup>th</sup> Street, Gig  
32 Harbor, Washington, and a \$2,000 penalty was appropriate for that  
33 violation.
- 34 3. On January 27, 2003, B D Roofing committed a general violation of  
35 WAC 296-155-480(2)(i) at it worksite located at 6902 94<sup>th</sup> Street, Gig  
36 Harbor, Washington, for which a \$0 penalty was appropriate.

- 1 4. The employee misconduct defense has not been established in this  
3 case because B D Roofing failed to show that it was effectively  
4 enforcing protective eyewear standards with its employees.  
5 5. The Department conducted this inspection within the procedural laws  
6 and rules under the Revised Code of Washington and Washington  
7 Administrative Code including holding appropriate opening and closing  
8 conferences.  
9  
10 6. The CNR issued by the Department on July 17, 2003 is correct and is  
11 affirmed.

12 It is so **ORDERED**.

13 Dated this 9<sup>th</sup> day of August, 2004.  
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\_\_\_\_\_  
**GREG J. DURAS**  
Industrial Appeals Judge  
Board of Industrial Insurance Appeals

CERTIFICATE OF SERVICE BY MAIL

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

EM1

B D ROOFING  
6509 LAKEWOOD DR W  
TACOMA, WA 98467-3322

EA1

AARON K OWADA, ATTY  
NORTHCRAFT BIGBY & OWADA PC  
720 OLIVE WAY #1905  
SEATTLE, WA 98101-1871

AG1

BETH A HOFFMAN, AAG  
OFFICE OF ATTORNEY GENERAL  
LABOR & INDUSTRIES  
PO BOX 40121  
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 8/17/2004  
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:



DAVID E. THREEDY  
Executive Secretary

In re: B D ROOFING  
Docket No. 03 W0361

**CERTIFICATE OF SERVICE**

I, Darlene Langa, certify under penalty of perjury under the laws of the state of Washington, that I caused the documents referenced below to be delivered via the method listed to the following parties:

DOCUMENT(S) **Brief of Respondent**

ORIGINAL TO: *(First Class, Postage Pre-Paid)*  
Court Clerk  
Washington Court of Appeals (Division II)  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

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06 DEC 11 PM 1:18  
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DIVISION

COPY TO: *(First Class, Postage Pre-Paid)*  
Aaron Owada  
AMS Consulting  
4405 7<sup>th</sup> Avenue SE, Suite 205  
Lacey, WA 98503

DATED this 5<sup>TH</sup> day of December, 2006, at Tumwater, Washington.

  
\_\_\_\_\_  
DARLENE LANGA  
Legal Assistant 2