

NO. 46419-5-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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CHEHALIS SHEET METAL & ROOFING,  
Appellant,

v.

STATE OF WASHINGTON DEPT OF LABOR & INDUSTRIES,  
Respondent.

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BRIEF OF APPELLANT

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WSBA #36909

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## **I. ASSIGNMENT OF ERROR**

### **A. Findings of Fact:**

Appellant assigns error to Finding of Fact 3 of the Superior Court's Findings of Fact, Conclusions of Law, and Judgment. CP 73-76.

### **B. Conclusions of Law:**

Appellant assigns error to Conclusion of Law numbers 2, 5, 6, 8, and 9 of the Superior Courts Findings of Fact, Conclusions of Law, and Judgment. CP 73-76.

### **C. Issues pertaining to Assignments of Error**

1. Was the Superior Court's finding of a violation of former WAC 296-155-505(6)(a) supported by substantial evidence?
2. If a violation of WAC 296-155-505(6)(a) was supported by substantial evidence, was the fine amount of \$1,800.00 appropriate in this case?

## **II. STANDARD OF REVIEW**

When reviewing a superior court decision resulting from an appeal from the Board, review is limited to an "examination of the record to see whether substantial evidence supports the findings made after the superior

court's de novo review, and whether the court's conclusions of law flow from the findings." *Bennett v. Department of Labor & Industries*, 95 Wn2d 531, 534 (1981).

This court's review of whether the trial court's conclusions of law flow from the findings is also de novo. *Watson v. Department of Labor & Industries*, 133 Wn. App. 903, 909 (2006) (citing *Ruse*, 138 Wn.2d at 5). However, this court does not reweigh or rebalance the competing testimony and inference, or apply a new burden of persuasion, for doing that would abridge the right to a trial by jury. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002).

Substantial evidence is defined as quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Harrison Memorial Hospital v. Gagnon*, 110 Wn.App. 475, 485 (2002).

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

#### ***A. Factual History***

On December 16, 2010, Mr. Rustin Gilbert, a heating, ventilation, and air conditioning (HVAC) repair professional, fell off the roof of a building at Taholah High School situated in Grays Harbor County, Washington. Certified Board Record, Transcript (hereinafter cited as

“BR TR”) pages 14-18. Mr. Gilbert was at Taholah High that day to replace an old compressor located on the roof of the school. BR TR 11. On the day of the fall, Mr. Gilbert was acting as an employee of Appellant Chehalis Sheet Metal and Roofing (hereinafter “Chehalis” or “Appellant”). *Id.*

Mr. Gilbert worked for Chehalis from July 2010 until February 12, 2011 (BR TR 6, 18), at which time he was terminated for performance issues. BR TR 76-77. At the time of his employment with Chehalis, Mr. Gilbert had extensive training in HVAC repair and service having completed a two-year degree in the field in addition to ten (10) years of working experience in HVAC service and repair. BR TR 22-24. In his ten years of working experience, Mr. Gilbert had worked for HVAC companies as well as owned and operated HVAC companies. BR TR 23. Throughout his working experience, Mr. Gilbert had also been trained- and trained others- in safety issues relevant to his profession. BR TR 22-24. Specifically, Mr. Gilbert had training on hoisting HVAC units and other equipment onto roofs. BR TR 24. Mr. Gilbert’s understanding of a safe way to hoist an HVAC compressor onto a roof was to use a crane, a shackle, and lifting straps. BR TR 24. Considering his background and training, Mr. Gilbert believed he did not need any extra

training in how to safely hoist an HVAC compressor up onto a roof. BR TR 25.

About one month prior to the incident at issue, Mr. Gilbert travelled to Tahola High to diagnose what was wrong with the unit. BR TR 13, 25. Mr. Gilbert recalled writing down what was needed to perform the installation of the new compressor on an invoice, specifically that the installation required “two techs or a crane.” BR TR 26. While he recalled writing the information down on the invoice, when Mr. Gilbert was later shown the invoice, he acknowledged nothing was written upon it. BR TR 30-31.

Mr. Gilbert was nervous about the job at Tahola High School the whole week before he actually went out there. BR TR 31. Because of his nervousness, Mr. Gilbert broached the subject of the job needing two techs and a crane several times with Chehalis Service Manager, Mr. David Mills. BR TR 31. Mr. Gilbert believed that he had told Mr. Mills he needed another tech or a crane to do the job. *Id.* Mr. Mills, however, testified that Mr. Gilbert never informed him that he needed another tech or a crane to perform the Tahola job. BR TR 80. It was uncontroverted that it is the job of the tech (Mr. Gilbert) to provide the information to

Chehalis that there is a hazard at a particular job site or if assistance is needed elevating a compressor. BR TR 88.

Q. (By Assistant Attorney General): “So, the actual – the person who is on site, the employee, is responsible then of doing the hazard analysis and relying (*sic*) the information to the dispatcher?”

A. (By Mr. Mills) “Correct.”

Chehalis changes compressors on the ground as well as on roofs. BR TR 88. Mr. Mills confirmed that there was nothing written by Mr. Gilbert on the invoice concerning needing another tech or a crane and that Mr. Gilbert was trained on how to properly fill out an invoice. BR TR 80, 89. Mr. Mills testified that had it been relayed to him that the compressor was on the roof, then it would have been his (Mr. Mill’s) job to provide the tech the extra manpower or equipment needed. BR TR 88. Mr. Gilbert himself believed he did not need any extra training in how to safely hoist an HVAC compressor up onto a roof. BR TR 25.

Mr. O’Hagan, the safety inspector for the Department, also acknowledged that “because of his (Gilbert’s) experience, he had a good idea of what he would need to do the job.” BR TR 70. Mr. Mills testified that the only time Mr. Gilbert relayed any concerns to him about safety or the need for additional help on this job was via radio on the day of the installation as Mr. Gilbert was already heading up to perform the work.

BR TR 80. According to Mr. Mills, during that conversation Mr. Gilbert told Mr. Mills that the compressor was on a roof and he needed help getting it up there. BR TR 91. Mr. Mills told Mr. Gilbert that everyone had been dispatched and asked him how we can get it on the roof. *Id.* Mr. Gilbert replied that there was a maintenance man who worked there and maybe he could help him. *Id.* Mr. Gilbert told Mr. Mills that he would ask the maintenance man for help. *Id.* Mr. Mills did not hear back from Mr. Gilbert after that conversation. *Id.*

Mr. Gilbert testified on direct examination that just before the Tahola School job, he had a service call at a residence just five miles away. BR TR 12. While at the residence, Mr. Gilbert actually met the maintenance man for the Tahola School District and apparently informed him he was going to the school to do a job. *Id.* After he finished the residential job, Mr. Gilbert proceeded to the school. BR TR 13. After conducting some set-up work, Mr. Gilbert “waited and waited” but “this maintenance man was nowhere to be found.” BR TR 14. When asked why he was waiting for the maintenance man, Mr. Gilbert replied that “I thought he would give me a hand taking the compressor up the roof.” *Id.*

However, on cross examination, Mr. Gilbert indicated that he didn’t know that the maintenance man was going to help him at the time

of the installation. BR TR 26. Rather, he was “told that later.” *Id.* He testified that he was only told that the maintenance man at the school would have helped him out “as I laid in the emergency room” after the accident. BR TR 32.

Mr. Brings Yellow, the maintenance man at issue, testified as well at the hearing. He indicated he met Mr. Gilbert at his mother-in-law’s home prior to Mr. Gilbert going to the Tahola School job. BR TR 73. According to Mr. Brings Yellow, Mr. Gilbert never asked for any assistance but that if he had, there was a forklift available for his use. BR TR 74.

After arriving at the Tahola School on December 16, 2010 to install the compressor, Mr. Gilbert testified that he tried to contact his dispatcher and service manager numerous times. BR TR 16. However, due to poor cell reception he couldn’t get ahold of anyone. *Id.* After having “waited and waited” for the maintenance man to show up, and having other jobs to attend to, Mr. Gilbert decided to attempt an installation of the compressor by himself. BR TR 14. It is uncontroverted that the roof height measurement was eight feet and two inches (8’2”). Mr. Gilbert “took it one step at a time up the extension ladder.” BR TR 15. He “carried it up as safely as I could at waist level one step at a time

up the extension ladder.” BR TR 37. Prior to having brought the new compressor up, Mr. Gilbert had removed the old compressor and the housing. *Id.* While removing the old compressor, Mr. Gilbert pulled it out at an awkward angle and spilled oil onto the surface of the roof. BR TR 38. As Mr. Gilbert was attempting to put in the new compressor, his knee slipped on the spilled oil. BR TR 15, 38. Mr. Gilbert then slid down the roof, over the edge, and landed on his feet. BR TR 16. The compressor slid down behind him and struck him in the back of the head and shoulder. *Id.* At that point, he loaded his tools and travelled to the local fire department to receive medical attention. *Id.*

Mr. Michael O’Hagan, a safety inspector with the Department of Labor and Industries, responded to conduct an investigation due to the report of an injury on the job. BR TR 45. He initially met with a Mr. David Pyles, manager at Chehalis for an “opening conference.” BR TR 46. Mr. Pyles and Mr. O’Hagan discussed why Mr. O’Hagan was there and discussed safety programs at Chehalis. BR TR 47. Mr. O’Hagan received all the safety program material at Chehalis. BR TR 48. Mr. O’Hagan then interviewed Mr. Mills and Mr. Gilbert. He also visited the job site at Tahola High School in January of 2011. BR TR 45. Mr. Mr. O’Hagan took pictures while he was at the job site. BR TR 50.

Eventually, Mr. O'Hagan issued two citations: (1) a violation of WAC 296-876-40025<sup>1</sup> (failure to keep both hands free while climbing a ladder) and (2) a violation of former WAC 296-155-505(6)(a)<sup>2</sup> (working on a roof at a height greater than four feet without the protection of a railing or equivalent protection). Board Record (hereinafter cited as "BR") Ex. 2.

Mr. O'Hagan considered the potential issue of "unpreventable employee misconduct" as part of his investigation. BR TR 53. He determined that Chehalis did have a written safety program, but he "didn't find evidence of a disciplinary program that was effective in practice" nor evidence "of ensuring that the proper equipment was available and ready to be used for the job" nor "enough concrete information that would build a solid defense for it." *Id.* Mr. O'Hagan indicated that "if he's (the employee) got all the equipment to do the job there with him, to do it safely and correctly, then that opens that door (to

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<sup>1</sup> "Climbing and descending.

- (1) You must have both hands free to hold on to the ladder.
- (2) You must face the ladder when climbing or descending.
- (3) You must keep ladders free of oil, grease, or other slippery materials.
- (4) You must keep the area around the top and bottom of ladders clear.
- (5) You must make sure single-rail ladders are not used"

<sup>2</sup> Former WAC 296-155-505 was repealed by WSR 13-04-073, filed 2/4/13, effective 4/1/13. Later promulgation, see WAC 296-155-24601 through 296-155-24624.

unpreventable employee misconduct defense). But if he doesn't have all of the equipment to do the job safely and correctly, then it leaves holes that defense doesn't work." *Id.*

Regarding a job hazard analysis, Mr. O'Hagan testified that one was required for this particular job and that Mr. Gilbert was qualified to conduct it- at least initially. BR TR 56. However, Mr. O'Hagan testified that in his opinion while Gilbert can do the initial assessment, "the company can look at his initial assessment and make a documented determination as to how they are going to do the job." *Id.* Mr. O'Hagan testified that he had no evidence that Chehalis conducted the second step of the job hazard analysis. *Id.*

Regarding the first violation, transporting the compressor up the ladder, Mr. O'Hagan testified that carrying the compressor up the ladder was a violation because "[h]e wasn't able to maintain his points of contacts when getting—taking this heavy unit up the ladder to the roof. You are not supposed to carry things up a ladder." *Id.* Mr. O'Hagan's understanding of the requirement was that one is "supposed to maintain, if the wording is correct, 3 (three) points of contact at all time." BR TR 57. When asked whether carrying a compressor up a ladder would allow an individual to maintain a 3-point contact, Chehalis objected on

grounds of speculation. *Id.* The objection was sustained. *Id.* Mr.

O'Hagan testified that carrying the unit up the ladder was another basis for this citation:

“Q: Okay. So are you allowed to carry things up a ladder or not?

A: (By O'Hagan) No.”

BR TR 57. Mr. O'Hagan calculated the penalty for the citation.

BR TR 58. He calculated a severity of four (4) and a probability of three (3). BR TR 59-60. These two numbers are then multiplied to find the gravity. In this case the gravity equaled twelve (12). The computer program then assessed a base penalty. In this case it was \$3,000.00. BR TR 60.

The next step was to consider extra factors like good faith, size of the company, and history of violations. Regarding good faith, Mr. O'Hagan assessed an “average” rating for good faith because “[t]here’s a little animosity at the beginning and that’s kind of normal. That’s kind of why its average.” BR TR 69. When asked other than the company’s unhappiness in having Mr. O'Hagan visit their office whether they had fully complied and provided him everything he wanted, Mr. O'Hagan stated: “Yes.” BR TR 69.

Regarding the second violation, Mr. O'Hagan testified that the violation was for "the employer not ensuring a means of providing for safety of the employee, such as a personal fall protection system to ensure that the employee would not fall from a roof." BR TR 63. He explained that while fall protection standards kick in at ten (10) feet, and this incident was below the ten foot level, former WAC 296-155-505(6)(a) "talks about working at elevations greater than four (4) feet to ensure that safety rails or other means of protection are provided to employees working to prevent them from falls." BR TR 63.

Mr. O'Hagan then described how the severity and probability factors were assessed on this violation as well. BR TR 63-65. Regarding probability, Mr. O'Hagan testified that to make this determination he considers "the surface conditions, the angle of the surface, it wasn't a flat location, the type of work that was being done...." BR TR 64. Considering the surface conditions, Mr. O'Hagan relayed that "it was sloped and it was wet with the residue from the oil and moisture in the air." BR TR 65. However, regarding this factor, Mr. O'Hagan acknowledged on cross examination that spilled oil on the roof was not something an employer could anticipate before one conducts a safety assessment. BR TR 68.

**B. Procedural History**

On January 31, 2011 the Department of Labor and Industries Division of Occupational Safety and Health issued two citations to Chehalis in response to its investigation of Mr. Gilbert's fall at Tahola High. The first violation, listed as 1-1, was an alleged violation of WAC 296-876-40025 (failure to keep both hands free while climbing a ladder). BR, Ex. 2. The second violation, listed as 1-2, was an alleged violation of former WAC 296-155-505(6)(a) (working on a roof at a height greater than four feet without the protection of a railing or equivalent protection). *Id.* Each violation was determined to be a "serious violation,"<sup>3</sup> and each carried a penalty of \$1,800.00 for a total penalty of \$3,600.00. *Id.*

Chehalis appealed the issuance of the violations and a hearing was held before the Board of Industrial Insurance Appeals of the State of Washington (hereinafter "Board") on March 19, 2012. The Department called two witnesses- Inspector Michael O'Hagan and the injured worker, Mr. Ruston Gilbert. Chehalis also called two witnesses- Mr.

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<sup>3</sup> See RCW 49.17.180(6): "...a serious violation shall be deemed to exist in a workplace 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 workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

David Mills and John Brings Yellow. The witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. Industrial Appeals Judge Wayne B. Lucia made findings of fact and conclusions of law. Judge Lucia determined that “Chehalis...committed a serious violation of WAC 296-876-40025, when it permitted one of its employees to carry equipment up a ladder while not keeping both hands free to climb the ladder” and that “Chehalis...committed a serious violation of WAC 296-155-505(6)(a), when it permitted one of its employees to work on a roof at a height greater than 4 feet above the ground when the edge of the roof was not protected by a railing or equivalent.” BR 22. Judge Lucia also upheld the cited penalty of \$1,800 for each violation. *Id.* Chehalis properly petitioned for review before the Board as provided by RCW 51.52.104. BR 2. The petition was denied and Judge Lucia’s Proposed Decision and Order became the Decision and Order of the Board. *Id.*

Pursuant to RCW 49.17.150, Chehalis appealed to the Superior Court for a trial de novo. CP 1-2. On February 20, 2014, the trial was held before the Honorable Gordon L. Godfrey in Grays Harbor County Superior Court. CP 74. A memorandum decision was made by Court Commissioner Stephen Olson on March 3, 2014.

After consideration of the Board record, the briefing of the parties, and argument, the Superior Court reversed the Board's decision on violation 1-1 (keeping hands on a ladder during ascent) and upheld violation 1-2 (lack of a railing or equivalent protection while 4 feet above the ground). Regarding 1-1, the Superior Court held that the record provided insufficient evidence that Mr. Gilbert had not climbed the ladder properly. CP 65. Specifically, the Court found that Findings of Fact 3 and 4 of the Board's Decision and Order were not supported by substantial evidence and violation 1-1 was therefore dismissed. CP 65, 67.

Turning to violation 1-2, the Superior Court held that sufficient evidence supported Findings of Fact 6 and 7 of the Board's Decision and Order regarding whether or not Chehalis permitted its employee to work on a roof at a height greater than four feet above the ground when the edge of the roof was not protected by a railing or equivalent. CP 66. The Court therefore upheld violation 1-2.

The Court also upheld Findings of Fact 8 of the Board's Decision and Order regarding the proper fine amount for a violation of 1-2 in upholding the Board imposed fine of \$1,800.00. CP 66. 67.

Chehalis filed a Motion for Reconsideration regarding the sole issue of adjustment of the base penalty. CP 68-72. The motion was denied. CP 74.

#### IV. ARGUMENT

1. **L & I did not establish a prima facie case for a violation of WAC 296-155-505(6)(a)**

Violation 1-2 concerns an alleged violation of former WAC 296-155-505(6)(a) which reads as follows:

**“Guarding of open sided surfaces.**

(a) Every open sided floor, platform or surface four feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in subsection (7)(a) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.”

In its memorandum decision, when the Court turned to the issue of whether or not substantial evidence supported the Board’s finding of a

violation of WAC 296-155-505(6)(a), the Court upheld the Board's decision upon a single piece of evidence: Exhibit 1 of the Board Record.

The Court made the following observations:

“A review of the record indicates that not a single witness testified that there was an absence of railings upon this roof. Mr. Gilbert, the technician who worked on the roof, was never asked any questions concerning whether there was a railing on the roof. A photograph was admitted at the hearing, which photo was dated December 23, 2010, less than one week after the incident. This photo reveals that no railing existed.

This Court finds that such evidence is sufficient substantial evidence to support Findings of Fact 6 and 7, that on December 16, 200, a Chehalis...employee was working on the roof of a building occupied by the Taholah School District and the roof had a height greater than 4 feet and the employer did not have a railing or equivalent on the edge of the roof.” CP 65-66.

The photograph the court refers to is almost certainly page two (2) of Exhibit 1 of the Board Record, which depicts two photographs of the building at Tahola High School upon which Mr. Ruston Gilbert attempted

to swap compressors. See BR, Ex. 1 pg. 2. Notably, the pictures depict the building as having no railing along its roofline. Exhibit 1 was first referred to at the initial hearing during Mr. Gilbert's direct examination. BR TR 11-12. The evidence elicited through Mr. Gilbert's review of the photographs concerned only that the pictures depicted the site where Mr. Gilbert did his work on December 16, 2010, that the compressor at issue was located in the unit depicted on the roof of the building in the photograph, and the location where Mr. Gilbert placed his extension ladder (depicted by an 'X' in the photographs). See BR TR at 12, 15.

The Department's second witness, Inspector O'Hagan was also asked about the photographs in Exhibit 1. BR TR 49, 50. Inspector O'Hagan testified that he took the pictures contained in Exhibit 1 as part of his investigation, that the photographs on page two (2) of the Exhibit depicted where this accident/injury occurred, the pitch of the roof, and that the pictures accurately reflected what he saw as part of his investigation. BR TR 49-50. Exhibit 1 was admitted without objection. BR TR 50.

When exactly Inspector O'Hagan visited the job site as part of his investigation is unknown. During his testimony, Inspector O'Hagan testified that he inspected the job site in January of 2011. BR TR 45. However the photographs themselves indicate a "Photo Date/Time" of

“12/23/2010.” See BR Ex. 1, page two (top). It is unknown whether Inspector O’Hagan simply forgot during his testimony precisely when he was at the job site, or whether the photo date indicated on the exhibit is incorrect, or whether either of those two possibilities is correct. Taking the evidence as a whole, Chehalis assumes the photographs were taken sometime between December 23, 2010 and January 31, 2011.

A review of the testimony at the Board hearing shows that Exhibit 1 was used to establish a depiction of the location of the injury/accident, a depiction of the pitch of the roof and the compressor housing on top of the roof, the location upon which Mr. Gilbert placed his ladder, and that the Exhibit accurately reflected what Inspector O’Hagan saw at the location when he visited it as part of his investigation. All of that evidence was properly elicited through the witnesses’ review of the photographs. What was *not* elicited through the witnesses’ testimony upon review of the photographs in Exhibit 1 was any evidence that the photographs accurately portrayed the job site on the day of the injury.

Obviously, the roof lines of most buildings, whether residential, commercial, industrial, or otherwise, do not have railings as a fixed and permanent design feature. To comply with former WAC 296-155-505(6)(a), when employees are working on an open-sided structure four-

feet or more above the ground, two options are available: a temporary guardrail can be constructed as outlined in WAC 296-155-24615(2), or Fall Restraint Protection can be utilized, also outlined in WAC 296-155-24615(1).

In this case, no evidence was elicited at the hearing that Mr. Gilbert failed to use fall protection while he was working above the ground. Likewise, as the Superior Court noted, “not a single witness testified that there was an absence of railings upon this roof” and “Mr. Gilbert... was never asked any questions concerning whether there was railing on the roof.” CP 65. The picture admitted in Exhibit 1, page 2 of the Board Record, depicts the job site sometime between one week and one and one-half months after the injury/accident to Mr. Gilbert. No testimony was elicited at the hearing that established that the building was in the same condition as it was on the day of the incident. If guardrails were installed, they would have been a temporary construction, strictly used during the installation of the compressor and then removed. It is an engagement in pure speculation to assume that Exhibit 1 accurately portrays the building as it was on December 16, 2010 while Mr. Gilbert was working.

In order to establish violation 1-2, L & I was required to elicit evidence sufficient to establish a prima facie case of each element of the

violation; the bare assertion that a violation occurred is insufficient. See e.g. *Mark v. Seattle Times*, 96 Wn.2d 473, 486–87, 490, 635 P.2d 1081 (1981) (a mere conclusory statement not supported by facts admissible in evidence could not be considered on motion for summary judgment); *In Re: Christine D. Morey*, 2013 WL 3636420 (Wash.Bd.Ind.Ins.App.) (appealing party failed to present sufficient evidence of an industrial injury when only evidence was claimant’s testimony and she only testified about the diagnosis and treatment, but not the cause of the injury). Inspector O’Hagan’s testimony was purely conclusory and failed to establish facts supporting an actual violation.

The Board's findings must be supported by substantial evidence when considering the record as a whole. RCW 49.17.150(1). Substantial evidence is sufficient evidence that would persuade a fair-minded, rational person that a finding is true. *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847-48, 106 P.3d 776 (2005), review denied, 155 Wn.2d 1015 (2005). Chehalis submits that the Board’s findings on this issue were based solely on conclusory allegations and speculation and insufficient, when considered as a whole, to establish a violation of WAC 296-155-505(6)(a).

2. **If substantial evidence supports a finding that WAC 296-155-505(6)(a) was violated, the trial court erred in upholding a fine of \$1,800.00.**

**(a) Probability Rate**

In upholding the ruling of the Board in regards to penalty of \$1,800.00 for Violation 1-2, the Superior Court incorporated by reference Findings of Fact 7 and 8 of the Board Decision and Order. CP 66; BR 22.

In its decision, the Board found that the probability rate of three (3) was appropriate for each citation. This assessment is not supported by the evidence.

A probability rate “is a number that describes the likelihood of an injury, illness, or disease occurring, ranging from 1 (lowest) to 6 (highest).” WAC 296-900-14010. Inspector O’Hagan testified that he assessed the probability rate by taking in to account “factors such as the surface conditions, the angle of the surface, it wasn’t a flat location, the type of work that was being done, and basically no way to ensure that the unit would have stayed on the roof or a means of securing it so that you know when he falls what else—what are the domino affects so-to-speak. So I calculate all of those into it.” BR TR 65.

Regarding the probability rate assigned in this case, the Board adopted Mr. O'Hagan's assessment of three (3) as proper because it decided that "there was no evidence to the contrary introduced. Considering the record and the law, I do not find any reason to question Mr. O'Hagan's rating." BR 20.

This reasoning ignores numerous factors in determining probability that are, in fact, replete within the record. WAC 296-900-14010 provides that "[w]hen determining probability, DOSH considers a variety of factors, depending on the situation, such as: (i) Frequency and amount of exposure; (ii) Number of employees exposed; (iii) Instances, or number of times the hazard is identified in the workplace; (iv) How close an employee is to the hazard, i.e., the proximity of the employee to the hazard; (v) Weather and other working conditions; (vi) Employee skill level and training; (vii) Employee awareness of the hazard; (viii) The pace, speed, and nature of the task or work; (ix) Use of personal protective equipment; (x) Other mitigating or contributing circumstances." WAC 296-900-14010.

"Determining the severity value and the probability values each requires detailed consideration of many potential factors outlined in the regulations, many of which involve actual conditions at the worksite,

characteristics of the involved or exposed employees, as well as estimations by the Department regarding the potential for death or the potential extent of injury, nature of treatment required and disability potential. WAC 296-800-35022, WAC 296-800-35024, WAC 296-800-35026, and WAC 296-800-35028.” *In Re: Erection Company, Inc.*, Docket No. 02 W0078 (May 3, 2004).

In this case, there are many factors that support a lower probability rating. The evidence shows that this situation appears to have occurred only once and exposed only one employee to injury. While the proximity of the employee to the hazard was close, the number of times the hazard was identified in the workplace was just once. The employee skill level and training was high and the employee himself agreed he was sufficiently trained and knew how to do the job. The employee was also aware of the hazard having testified that he worried about the hazard all week (although he didn't tell anyone else).

Other mitigating or contributing circumstances include that the employee spilled the oil which caused him to slip. That Mr. Gilbert spilled oil on the roof and then slipped in it was a condition Mr. O'Hagan agreed was not something the employer could anticipate. BR TR 68. The

employee's negligence therefore contributed to the probability rate as determined by the Board.

In *In Re: Hood Canal Oyster Co., Inc.*, 2009 WL 2781048 (Wash.Bd.Ind.Ins.App.), a compliance officer had originally assigned a probability rate of five (5) to the penalty. However, upon review the Department reduced the probability rate to four (4) due to the fact that floor openings originally thought by the inspector to constitute a hazard were actually determined to have been behind a locked door and not accessible to employees. The Board found on review that as there was "one less instance of the hazard present on the work site, the Department correctly lowered the probability factor," and thus, the probability rate was lowered one point to four (4). *In Re: Hood Canal Oyster Co., Inc.*, 2009 WL 2781048 (Wash.Bd.Ind.Ins.App.) at 6,

In this case, there are numerous factors in favor of the employer that the court simply failed to consider. Just like in *Hood Canal Oyster Co.* (supra), the court should reduce the probability rate. The probability rate assessed in this case should be one (1). If a factor of one (1) had been assigned as the multiplier of the severity rating of four (4), the gravity would have been four (4) and the base penalty in this case would be \$400.<sup>4</sup>

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<sup>4</sup> See WAC 296-900-14010

**(b) Good Faith**

In determining “good faith,” the Board considers whether the employer: (1) took prompt action to understand and comply with the regulation, (2) cooperated with the investigation, (3) worked with the Department to resolve the problem, and (4) appeared committed to assuring a safe and healthful workplace. *In Re: Potelco, Inc.*, Docket No. 98 W0138 (October 26, 1999); *In Re: Bainbridge Cedar Prod., Inc.*, Docket No. 91 W164 (August 24, 1993); *In Re: Streamline, Inc.*, Docket No. 89 W011 (October 19, 1990). WAC 296-900-14015<sup>5</sup> provides that consideration of the above factors for a base penalty adjustment is mandatory.

The following factors indicate a lack of good faith: (1) conscious disregard of the risks, (2) delay in correcting the violation, (3) deceptive behavior, and (4) willful resistance to compliance. See *In Re: Colf Constr.*, Docket No. 96 W318 (November 23, 1998); *In Re: Olympia Glass Co.*, Docket No. 95 W445 (November 15, 1996); *In Re: Streamline, Inc.*, Docket No. 89 W011 (October 19, 1990). If an employer attempts to substitute its own judgment for the regulator's judgment as expressed in

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<sup>5</sup> “WISHA *will* consider....”

the safety regulation, the Department may consider the violation a willful violation. *In Re: Colf Constr.*, Docket No. 96 W318 (November 23, 1998).

In this case, Inspector O'Hagan used a pointedly non-statutory factor to classify Chehalis's good faith as "average." While Mr. O'Hagan acknowledged that Chehalis provided everything he asked for and fully complied, he assessed only an average good faith to Chehalis because there was, according to Mr. O'Hagan, "a little animosity at the beginning and that's kind of normal. That's kind of why it's an average. It's what we normally see." BR TR 69.

While it can be assumed that Chehalis probably wasn't ecstatic to see Mr. O'Hagan show up to investigate safety violations, an employer's unhappiness about being investigated is not a factor for a court to consider. Chehalis would submit that such a method of assessing a penalty by the Department is arbitrary and capricious.<sup>6</sup> Such an assessment is not only unlawful, but discriminatory and contrary to fundamental concepts of fair play and due process and must be reversed as an error of law. Mr. O'Hagan provided no evidence that Chehalis failed to meet the standard of any of the four "good faith" factors listed above. Similarly, there was no

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<sup>6</sup> Reviewing court may reverse an agency decision when the decision is arbitrary and capricious. *Valley Fruit v. State, Dept. of Revenue* (1998) 92 Wn.App. 413, 963 P.2d 886, review denied 137 Wn.2d 1017, 978 P.2d 1098.

evidence introduced indicating the presence of any of the factors of lack of good faith.

A similar scenario can be found in *In Re: General Security Services Corporation*, 1998 WL 960837 (Wash.Bd.Ind.Ins.App.). In that case, a testifying safety compliance officer for the Department cited the lack of safety programs by the employer as well as his own "neutral" feelings about its cooperation with the inspection as his reasons for rating its good faith "fair." *In Re: General Security Services Corporation*, at 13. On review, however, the Board disagreed with the Department's characterization of the employer's good faith as merely "fair." *Id.* The Board found that despite the Officer's "neutral" feeling about the employer's cooperation, the officer said that the employer permitted and cooperated with the inspection. *Id.* There was also no indication in the record that the employer's history of injuries or claims costs was higher than average. In response, the Board reclassified the employer's good faith from "fair" to "good" which reduced the base penalty.

Chehalis would submit that this Court should also reclassify Chehalis's good faith rating from "fair" to "excellent." No evidence was introduced by the Department which would contradict such a

reclassification. An excellent rating would result in a 35% reduction in the base penalty.

## V. CONCLUSION

To make a proper showing that a violation occurred in this case, it was the Department's burden to establish by substantial evidence that the violation occurred. In this case, the Superior Court determined that two photographs taken of the jobsite sometime between one week and one and one-half months after the injury/accident occurred, constituted substantial evidence sufficient to find that the worksite lacked a railing or fall protection. This ruling was made in spite of the fact that no testimony was elicited to establish that the photograph accurately depicted the jobsite as it was on the day of the injury/accident. Appellant Chehalis respectfully submits to the court that any assumption that the photographs depict the job site as it was on December 16, 2010 is pure speculation and insufficient on its own to establish a violation.

In the alternative, if the violation is upheld, Chehalis submits that the Board and Inspector O'Hagan applied the incorrect Probability Rate and failed to apply an adjustment for Good Faith. The Board Record shows that Inspector O'Hagan either ignored multiple factors that were in favor of Chehalis, or simply arbitrarily cherry-picked which factors to

apply. Such methodology for imposing sanctions is improper. This Court should correctly apply all of the factors required to assess a Probability Rate, reduce the Probability Rate to 1, and apply a 35% adjustment for Good Faith pursuant to WAC 296-900-14015.

If the correct probability rate is one (1), the base penalty for each violation is \$400.00. If good faith is adjusted to 'excellent', a 35% reduction would be added to the previously determined 40% reduction for employer size. The total adjustment of the base penalty is 75%. 75% of \$400.00 equals \$300.00. Deducting \$300.00 leaves a final penalty of \$100.00 for each violation.

Respectfully Submitted,



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WSBA #36909

**JACK W HANEMANN PS**

**September 05, 2014 - 4:34 PM**

**Transmittal Letter**

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