

NO. 46419-5-II

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

CHEHALIS SHEET METAL & ROOFING,

Appellant, Cross-Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent/Cross-Appellant.

**BRIEF OF RESPONDENT/CROSS-APPELLANT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Chehalis Sheet Metal & Roofing allowed its worker to climb a ladder without using both hands and work on a roof without a guardrail for fall protection. The Board of Industrial Insurance Appeals found that Chehalis violated work place safety regulations under the Washington State Industrial Safety & Health Act (WISHA) for this conduct.

Substantial evidence supports the Board's findings. The evidence establishes that Chehalis' employee carried a heating, ventilation, and air condition (HVAC) unit up a ladder without both hands free. Also, besides a photograph showing no rail, the employee's testimony that he slid off the roof shows there was no rail in place to stop a fall.

The Department of Labor & Industries did not abuse its discretion in setting the penalty amount for these violations when the evidence showed that Chehalis took no steps to create a safe work place by providing training and safety equipment.

This Court should affirm the Board's decision, which is reviewed directly by the Court. The trial court correctly decided that substantial evidence supported the Board's findings as to the fall protection violation having occurred, but incorrectly determined that substantial evidence did not support that the ladder violation occurred.

II. ASSIGNMENTS OF ERROR

1. The Department assigns error to the superior court's finding of fact 4, which determined that the Board's findings of fact 3 through 5 were not supported by substantial evidence.¹
2. The Department assigns error to the superior court's conclusions of law 3, 4, and 7 because the Board's findings of fact were supported by substantial evidence.

III. COUNTERSTATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that a Chehalis employee was climbing a ladder without both hands free in violation of WAC 296-876-40025 when the employee testified he carried an HVAC unit up a ladder?
2. Does substantial evidence support the Board's finding that Chehalis did not protect the roof with a railing or equivalent under WAC 296-155-505(6)(a) when the worker testified he slid off the roof and a photograph documents that a railing was not in place?
3. Did the Department abuse its discretion in assessing the penalty amount when it considered the factors related to the job site, including no provision of safety equipment, training, or hazard assessment by the employer?

IV. COUNTERSTATEMENT OF THE CASE

A. Chehalis Provided No Safety Equipment and No Training to Its Employee

¹ Although the Department assigns error to the superior court's findings, it is the findings of the Board that are reviewed. RCW 49.17.150; *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007) (court reviews Board decision directly). The findings of fact of the superior court are irrelevant. *See Campbell v. Dep't of Soc. & Health Serv.*, 150 Wn.2d 881, 898-99, 83 P.3d 999 (2004) (in review of administrative decisions, findings of superior court are not reviewed).

Chehalis provides service, maintenance, repair, and reconstruction of heating and cooling systems. BR Gilbert 5; BR Mills 85.² Chehalis hired Ruston Gilbert, in July of 2010. BR Gilbert 6. Gilbert had ten years of experience working HVAC service. BR Gilbert 7, 19-24. When Gilbert was hired by Chehalis, he was assigned a van and provided tools to perform his job duties. BR Gilbert 8. Chehalis provided no safety equipment with his assigned van. BR Gilbert 8-9. Chehalis did not provide any job training or orientation to Gilbert. BR Gilbert 7-10, 17. Gilbert testified that the training he received was informal and “they just told me, here is your service tickets, go repair stuff.” BR Gilbert 8. Chehalis did not provide guidance or supervision to ensure workers performed their work safely and it relied on its employees to conduct hazard assessments for each jobsite. BR Mills 89, 99.

Gilbert attended only one documented safety meeting during his employment with Chehalis. BR Mills 96-97. Gilbert indicated that the “safety meetings” “were more of a service tech meeting about how profitable we were” BR Gilbert 9-10. David Mills, Gilbert’s supervisor, testified that there were regular safety meetings on Tuesdays but that they were not mandatory. BR Mills 86. Topics presented at the

² The certified appeal board record is cited as “BR”. Citations to the hearing and deposition transcripts will be listed with BR followed by the name of the witness and the page number of the transcript.

safety meetings while Gilbert worked for Chehalis included, blasting, lockout/tagout, confined spaces, and steel erection. BR Mills 97-98. None of these topics applies to the work that Chehalis performs. BR Mills 97-98.

B. Chehalis's Employee Carried an HVAC Unit Up a Ladder and Slid Off a Roof

On December 16, 2010, Gilbert was installing a 150-pound HVAC compressor for the Tahola High School. BR Gilbert 11. Gilbert had been to the school about a month before to diagnose the problem and submit an invoice of what was needed for the repair. BR Gilbert 13, 25. Chehalis relies on what its employees write on the invoice to inform it of what safety equipment is needed. BR Mills 78, 80. On the back of the invoice, Gilbert wrote that he needed a crane or a second person to install the unit because it was located on a roof. BR Gilbert 25-26.³

Gilbert was nervous about the job and testified that he mentioned to Mills a number of times that he would need help or a crane. BR Gilbert 28-31. He knew that Chehalis did not own a crane so one would need to be rented if he did not have the assistance from another worker. BR Gilbert 41. Mills recalled Gilbert requesting assistance the day of the HVAC installation; however, all other employees had been

³ Chehalis contests this fact, however, it did not present any evidence that the invoice did not contain a request for additional help and the original invoice was never produced.

dispatched and could not provide assistance. BR Mills 91. Mills testified that he told Gilbert to ask for assistance from the school's maintenance man. BR Mills 91. Gilbert testified that it was not until after the accident that Mills told him he was supposed to have the maintenance man provide assistance with the installation of the HVAC unit. BR Gilbert 17.

On the day of the HVAC installation, Gilbert went to Chehalis' Olympia Office to pick up the HVAC unit. BR Gilbert 8, 27. He and another worker carried and placed the pallet with the HVAC unit bolted to it into Gilbert's van. BR Gilbert 14.

When Gilbert arrived at the school, no one was present to assist him and no crane was on site to lift the HVAC unit. BR Gilbert 13-14. Gilbert was unable to reach his supervisor to determine whether additional assistance or equipment would be sent to assist in lifting the HVAC unit. BR Gilbert 16. He waited awhile for help to arrive but was concerned about meeting his service calls for the day, so he proceeded with the installation alone. BR Gilbert 17, 35. Gilbert propped a 28 foot extendable fiberglass extension ladder against the building. BR Gilbert 15. He went onto the roof, which was not a flat roof, but sloped. BR Gilbert 15; BR O'Hagan 64-65.

Gilbert removed the old HVAC unit and dropped it off the edge of the roof. BR Gilbert 15-16. While removing the old compressor, oil

spilled onto the roof, which Gilbert attempted to clean. BR Gilbert 15, 38. The surface of the roof was slick from both the oil and moisture in the air. BR Gilbert 15.

Gilbert then removed the new HVAC unit from the pallet and “carried it at waist level,” one step at a time, up the extension ladder. BR Gilbert 37. To move this object up the ladder, he did not have both hands free to hold onto the ladder. BR O’Hagan 56. The HVAC was to be installed over the top of a housing that was approximately 12 inches high. BR Gilbert 38-39; BR Ex. No. 1. While placing the HVAC onto the housing unit, Gilbert’s knee slipped out from under him in the area of the oil spill. BR Gilbert 15, 38-39. He slipped off the roof and landed on his feet on the ground. BR Gilbert 16, 38. The HVAC he was installing slid down off the roof and struck him in the back of the head. BR Gilbert 16, 38.

C. The Department Cited Chehalis for Violating Ladder and Fall Protection Regulations

Michael O’Hagan, a Department safety inspector, was assigned to conduct an inspection following Gilbert’s injury. BR O’Hagan 45. He inspected the site after the injury. BR O’Hagan 45; BR Ex. No. 1. As part of his inspection, Inspector O’Hagan interviewed Gilbert, Mills, others at the company, and reviewed Chehalis’ safety programs. BR O’Hagan 47-

50. Inspector O'Hagan testified that Mills was unsure of what equipment was in Gilbert's vehicle for him to use on the job. BR O'Hagan 53. In addition, Chehalis needed to conduct a written job hazard analysis for the school job, because an effective written hazard analysis ensures that an employee has the right equipment to do the job safely. BR O'Hagan 55-56. Chehalis did not conduct a job hazard analysis for the installation of the HVAC at the school. BR O'Hagan 56.

Inspector O'Hagan testified that Chehalis violated the ladder regulation WAC 296-876-40025 because when Gilbert carried the compressor up the ladder he was not able to maintain three points of contact while climbing. BR O'Hagan 56.

Inspector O'Hagan also testified that Chehalis violated the fall protection regulation WAC 296-155-505(6)(a), which requires guardrails or means of protecting workers at heights greater than four feet. BR O'Hagan 62. The inspector observed no rail or other means of protection at the worksite. BR O'Hagan 50. A photograph taken by the inspector shows no rail or other protection. BR Ex. No. 1. Gilbert identified the photograph as the work site where he performed the HVAC installation. BR Gilbert 12. He did not say that a rail was in place on the day of the accident. BR Gilbert 12, 14-15, 26. Nothing stopped him when he fell off the roof. *See* BR Gilbert 16.

The Department cited Chehalis under WAC 296-876-40025 for allowing an employee to carry equipment while climbing a ladder and under WAC 296-155-505(6)(a) for allowing an employee to work at a height of eight feet without fall protection. The total penalty for both violations was \$3,600. When determining the penalty, the Department considered the probability of an incident occurring as well as Chehalis' size, history, and faith. BR O'Hagan 58-60. For both the ladder violation and the fall protection violation the Department determined that the probability of an injury occurring was three out of six. BR O'Hagan 60. The Department rated Chehalis' good faith and history as average for both violations. BR O'Hagan 60, 65.

D. The Board Found That the Chehalis Employee Did Not Have Both Hands Free on the Ladder and That the Roof Did Not Have a Railing

Chehalis appealed the citations to the Board. BR 32. The hearings judge affirmed the violations. BR 21-23. The hearings judge found that the employee did not have his hands free on the ladder:

On December 16, 2010, a Chehalis Sheet Metal & Roofing employee used a ladder to carry a 150-pound compressor onto the roof of a building occupied by the Tahola School District, and he did not keep both hands free while climbing a ladder.

BR 22 (Finding of Fact (FF) No. 3). The hearings judge also found that Chehalis did not make sure the roof was protected by a railing:

On December 16, 2010, a Chehalis Sheet Metal & Roofing employee, was working on the roof of a building occupied by the Tahola School District, the roof had a height greater than 4 feet, and the employer did not assure the edge of the roof was protected by a railing or equivalent.

BR 22 (FF 6). The hearings judge affirmed the Department's penalty calculation.

Chehalis petitioned the three-member Board for review of the decision. BR 3. The Board denied the petition and adopted the proposed decision of the hearings judge on July 10, 2012. BR 2.

E. The Superior Court Affirmed the Fall Protection Citation but Reversed the Ladder Citation

Chehalis appealed to the Grays Harbor County Superior Court. CP 1-2. The Superior Court reversed the Board's decision as to the ladder violation of WAC 296-876-40025 and affirmed the Board as to the fall protection violation of WAC 296-155-505(6)(a). CP 64-67. Chehalis and the Department both appealed. CP 77, 82.

V. STANDARD OF REVIEW

Review in this matter is governed by RCW 49.17.150. In a WISHA appeal, this Court directly reviews the Board's decision based on the record before the agency. *J.E. Dunn Nw, Inc.*, 139 Wn. App. at 42. The Board's findings of fact are conclusive if they are supported by substantial evidence when viewed in light of the record as a whole.

Mowat Constr. Co. v. Dep't of Labor & Indus., 148 Wn. App. 920, 925, 201 P.3d 407 (2009).

Chehalis asserts that this Court reviews the trial court's findings for substantial evidence. App. Br. at 1-2. However, it is the Board's findings that are reviewed. *J.E. Dunn Nw, Inc.*, 139 Wn. App. at 42. Chehalis is incorrect that the superior court's standard of review in a WISHA appeal is de novo and mistakenly cites workers' compensation law in which the superior court's review is de novo. App. Br at 1-2 (citing *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 627 P.2d 104 (1981)). In a WISHA appeal, the superior court, like the appellate court, reviews the Board's findings for substantial evidence. RCW 49.17.150(1); *J.E. Dunn Nw, Inc.*, 139 Wn. App. at 42.

Chehalis failed to assign error to the Board's findings of fact and they are verities on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

The findings of the Board are supported by substantial evidence. Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr. Co.*, 148 Wn. App. at 925.

Under the substantial evidence standard of review, the court will not reweigh the evidence. *City of Bellevue v. Raum*, 171 Wn. App. 124,

151, 286 P.3d 695 (2012), *review denied*, 176 Wn.2d 1024 (2013). Rather it views the evidence in the light most favorable to the prevailing party at the Board, here the Department. *See Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014).

The court interprets WISHA's statutory provisions and regulations in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Elder Demolition, Inc. v. Dep't of Labor and Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009) (citing RCW 49.17.010). This Court gives great deference to the Department's interpretation of WISHA. *See Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478 n.7, 36 P.3d 558 (2001).

The amount of a penalty is reviewed under an abuse of discretion standard. *See Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 326-327, 16 P.3d 35 (2000).

VI. ARGUMENT

The Board correctly determined that Chehalis committed a serious violation of the ladder regulation, WAC 296-876-40025, and fall protection regulation, WAC 296-155-505(6)(a). Here, the primary dispute is whether there is substantial evidence to support the Board's findings that each violation occurred.

At the Board, to show a serious violation, the Department must show that (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2003); RCW 49.17.180.

Chehalis' employee testified he carried a 150-pound HVAC unit up a ladder. This provides substantial evidence that he did not have his hands free to climb the ladder properly, and the Board properly affirmed the Department's citation for this violation. The Court should therefore reverse the superior court's decision reversing the Board on this violation.

The Department's inspector photographed the roof, upon which the Chehalis employee worked, without a rail and the employee testified that he fell off the roof and the HVAC unit hit him on the head. These facts provide substantial evidence that no rail or other fall protection system was in place to prevent the employee from falling off the roof. The Court should affirm the superior court's determination that substantial evidence

supported the Board's findings that the fall protection regulation was violated.

A. Substantial Evidence Establishes That Chehalis Violated WAC 296-876-40025 When A Chehalis Employee Climbed A Ladder While Carrying Equipment And The Superior Court Erred In Reversing the Board

1. The Ladder Regulation Was Violated

The Department cross-appeals the superior court's decision to vacate the ladder citation. The Board heard testimony, evaluated the evidence, and decided that the Chehalis employee did not have his hands free when he carried the compressor up the ladder. FF 3. Substantial evidence supports the Board's findings of fact 3 and 4 that a Chehalis employee climbed a ladder while not keeping both hands free because a reasonable inference exists that can be drawn from circumstantial facts. *Harrison v. Whitt*, 40 Wn. App. 175, 177, 698 P.2d 87 (1985).

WAC 296-876-40025 requires that while a worker is climbing and descending a ladder he or she "must have both hands free to hold on to the ladder." Here, substantial evidence demonstrates that Gilbert was not able to keep both hands free while carrying an HVAC unit up the ladder at his worksite.

Gilbert did not have safety equipment such as lifting straps or a shackle for this job. BR Gilbert 8, 13, 24. From this evidence, the

fact-finder can infer that the only way to get the HVAC unit to the roof was to carry it. Indeed, Gilbert testified that he picked up the HVAC, carried it out of the van, and took it up the ladder. BR Gilbert 15. “I carried it up as safely as I could at waist level.” BR Gilbert 37. In addition, Gilbert was asked on cross examination:

Q. Did you have any thoughts about *climbing up using two hands* to claim (sic) the ladder, get on the roof with the compressor tied off?

A. I would have, but the compressor is too heavy to rope. It takes two people.

Gilbert BR 37 (emphasis added). A reasonable trier of fact can reasonably infer from this testimony that Gilbert did not, and could not, carry the HVAC and have both hands free while climbing the ladder.

The superior court assumed that Gilbert could have used a backpack to carry the compressor up the ladder and noted there was no testimony that Gilbert carried the HVAC unit in his hands. CP 65. But the superior court did not use the proper standard of review, where inferences are not made in favor of the non-prevailing party at the Board. *See Frank Coluccio Const. Co.*, 181 Wn. App. at 35. There was no evidence that Gilbert had or used a backpack and he testified “I carried it up as safely as I could at waist level,” not that he used other equipment to carry the unit. BR Gilbert 37. A fact-finder is entitled to rely on the

ordinary meaning of carry as “to hold or support while moving.”
Webster’s New World Dictionary 218 (2d coll. ed. 1986).

When describing what he did, Gilbert did not testify that he hooked the HVAC unit to a harness or other lifting device or that he strapped the HVAC to anything else. Indeed, Gilbert testified that in his previous employment, he had used hoists, cranes, or lifting straps, indicating that, when he described carrying the HVAC in this instance, it is unlikely that when he used the term “carried” he meant anything more than carried with his hands. BR Gilbert 24. Taking his testimony as a whole, a fair-minded fact-finder could readily infer, as the Board did, that Gilbert climbed a ladder without both hands free.

Furthermore, Chehalis failed to present any evidence, or elicit any testimony that Gilbert did “carry” the HVAC unit in any other manner so that both of his hands were free while climbing the ladder. Substantial evidence supports the Board’s finding that Gilbert did not have both hands free while climbing the ladder. This in turn supports the conclusion that Chehalis violated WAC 296-876-40025. This Court should reverse the superior court’s decision to the contrary.

2. Chehalis Did Not Argue It Did Not Have Knowledge or that Other Elements Of A Violation Were Not Met at the Board

As discussed, substantial evidence supports the finding that the Chehalis employee did not have his hands free to go up the ladder, and therefore Chehalis violated WAC 296-876-40025. In considering this, the only element that this Court need consider is whether the cited violation occurred. As noted, the elements for a WISHA serious violation are (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. *Wash. Cedar & Supply Co.*, 119 Wn. App. At 914.

At the Board, Chehalis only argued that the Department did not prove that Gilbert did not have his hands free on the ladder. BR 5. Although it cited generally to the elements for a WISHA violation, it provided no argument about the other elements such as knowledge. BR 4 9. RCW 49.17.150(1) only allows a party to raise arguments that were raised at the Board. *See Legacy Roofing Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 361-62, 119 P.3d 366 (2005). At superior court, Chehalis argued that the Department did not establish knowledge. CP 13, 16. This Court should not consider any belatedly raised arguments

regarding knowledge as the Department argued at superior court. CP 47. But even if the Court does consider the issue, knowledge is demonstrated here.

A serious violation of a WISHA regulation exists if the employer knew, or with the exercise of reasonable diligence could have known of the violative condition. RCW 49.17.180(6); *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 206-07, 248 P.3d 1085, review denied, 171 Wn.2d 1033 (2011); *Washington Cedar*, 119 Wn. App. at 914 (2003). Employer knowledge may be actual or constructive.

Constructive knowledge can be based on evidence that the employer failed to establish an adequate program to promote compliance with safety requirements. *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105-06 (2nd Cir. 1996). Constructive knowledge has been found where the hazard was in plain view, where the employer failed to inspect its workplace to discover readily apparent hazards, where there were inadequate safety instructions, and where safety rules were not enforced. See *Erection Co.*, 160 Wn. App. at 206-07; see also, *Kokosing Construction Co.*, 17 BNA OSHC 1869, 1995-1996, CCH OSHD ¶ 31,207, 1996 WL 749961 (O.S.H.R.C.) (December 20, 1996).

Here, Chehalis provided inadequate safety instructions and equipment, safety rules were not enforced, the violative condition was in

plain view, and Chehalis failed to inspect the worksite to discover readily apparent hazards. Before performing the work, Gilbert told Mills that he needed additional equipment or an additional technician to get the HVAC unit onto the roof. BR Gilbert 13, 25 26; BR Mills 80. Mills knew that Gilbert did not have the equipment needed on the day he was to perform the work and did not tell Gilbert not to perform he job should an additional person not arrive to assist him. BR Mills 80, 91. Further, Chehalis provided little to no safety training to Gilbert when he started with the company. BR Gilbert 8. Indeed, Gilbert testified that he did not know that climbing the ladder without both hands free was a violation of WISHA standards. BR Gilbert 41. Nor did Chehalis conduct regular mandatory safety meetings that included safety topics relevant to the work being performed. BR Gilbert 9-10; BR Mills 86, 97-98.

Not only did Chehalis fail to provide training and inadequate safety instructions, but it relied solely on its employees to conduct a hazard assessment of each job and did not take any steps to verify that the hazard analysis was appropriate or that employees had the equipment necessary to perform the job. BR O'Hagan 56. Chehalis failed to inspect the worksite to discover the readily apparent fall hazard and failed to discover that the manner in which Gilbert was performing his work was in violation of safety regulations. It is the *employer's* obligation to inspect the work area,

to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence, not the employees' *Erection Co.*, 160 Wn. App. at 206-07. Significantly, the hazard of the ladder violation was readily observable, which under *Erection Company* is sufficient to find constructive knowledge. *See Erection Co.*, 160 Wn. App. at 206-07.

Despite Chehalis' contention at the superior court (CP 17) that the only way it knew, or could have known, of the violation was through Gilbert, Chehalis cannot rely solely on its employees' assessments to absolve itself of its responsibility for employee safety, especially when it provided no safety training. Ultimate responsibility for an employee's safety rests with the employer. RCW 49.17.060(1); *see Cent. of Georgia R.R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 625 (5th Cir. 1978) (court rejected the employer's argument that its contract with a subcontractor absolved it of responsibility stating, "the Act, not the contract, is the source of responsibility"); *see also Jones v. Halverson-Berg*, 69 Wn. App. 117, 124, 847 P.2d 945 (1993). Additionally, employers must take measures to both discover and correct safety hazards. Thus, Chehalis has a duty to not only ensure its employees are adequately trained to identify hazards, but also to ensure that they have the equipment necessary to do the job safely. Chehalis failed to do either

here, and therefore, did not exercise reasonable diligence, and knowledge may be imputed to it constructively.

Chehalis did not argue below, nor did it present any evidence, that the other elements required to prove a violation were not met. First, WAC 296-876-40025 applies in this instance because it applies to ladder use. Second, as discussed above, the Department established that the requirements of the standard were not met. Additionally, an employee was exposed to this hazard because Gilbert climbed the ladder without both hands free. Finally, the Department established that there was a substantial probability that death or serious physical harm could result. BR O'Hagan 58. Thus, substantial evidence supports the Board's determination that Chehalis violated the roofing regulation, and this Court should reverse the superior court and affirm the Board.

B. Substantial Evidence Establishes That Chehalis Violated WAC 296-155-505(6)(a) When A Chehalis Employee Was Performing Work On An Eight Foot Roof Without Fall Protection

Chehalis has appealed to argue that the superior court erred by affirming the Board's findings that Chehalis violated the fall protection regulation. The Board found that Chehalis did not provide a railing or the equivalent to protect Gilbert when he worked at a height of eight feet. FF 6. This finding is supported by substantial evidence.

WAC 296-155-505(6)(a) requires that every open sided surface four feet or more above the ground be guarded by a standard railing or equivalent.⁴ In view of a photograph showing the work site with no rail, identification of the photograph by the employee with an X where the he worked on the ladder, the lack of any equipment to build a rail, and the employee's testimony that he fell off the roof, substantial evidence supports that Chehalis violated the railing regulation.

Chehalis argues that there is no evidence the work site was the same on the day the photograph was taken as the day that Gilbert fell. App. Br. at 19-21. It asserts that it was speculation that no railing was in place on the day of the accident, positing that a railing could have been temporarily installed. App. Br. at 20. But it is Chehalis who has engaged in speculation and who has ignored the fundamental tenet of a substantial evidence review, that the evidence is viewed in the light most favorable to the prevailing party. *See Frank Coluccio Const. Co.*, 181 Wn. App. at 35.

Inspector O'Hagan testified that after conducting interviews and assessing the job site he determined that Gilbert worked at a height greater than four feet without a guardrail system in place. BR O'Hagan 49-51. Chehalis failed to introduce any evidence to rebut Inspector O'Hagan's or

⁴ After the Department's inspection, the language of WAC 296-155-505 was changed and moved to WAC 296-155-24609. A copy of the WAC existing at the time of the citation is attached as Appendix A.

Gilbert's testimony or to establish that there was a railing or equivalent in place. BR Gilbert 21-39; BR O' Hagan 66-69. Rather, Chehalis merely asserted that Gilbert had committed unpreventable employee misconduct. BR Gilbert 21-39; BR O' Hagan 66-69.

The record documents the lack of a railing, as a photograph shows that one was not in place. BR Ex. No. 1. Gilbert was asked to identify where the ladder was placed at the worksite and he marked an X on the photograph where he worked. BR Gilbert 15. He did not indicate that the photograph was inaccurate because a rail was actually in place at the time of the incident. BR Gilbert 13, 15. A trier of fact could infer from this testimony that this was the job site and that Gilbert would say so if it was different.

The most telling evidence that supports the Board's finding is the fact that Gilbert fell off the roof, and nothing stopped him from falling. BR Gilbert 16. If there were an adequate railing in place, it would have stopped him and the HVAC unit that hit his head. *See* WAC 296-155-505(7). Also, if Gilbert had fall protection such as a harness, it would have stopped him from falling. From this fact, a reasonable fact-finder could infer that there was no railing or other system in place to stop his fall. *See Harrison*, 40 Wn. App. at 177 (a decision

does not rest on speculation or conjecture when it is based upon reasonable inferences drawn from circumstantial facts).

Also, significantly, Gilbert testified that Chehalis did not provide any safety equipment to him. BR Gilbert 9. From this testimony, it may be reasonably inferred that Gilbert did not set up a standard rail when installing the HVAC unit because he was not provided with the equipment to do so. Moreover, Gilbert testified as to the sequence of events in installing the compressor and did not testify that he took the time to install a railing. His testimony is once he ascertained that he would have no help with the project, he “proceeded to remove the compressor and drop it off the roof and start taking the new compressor up the roof.” BR Gilbert 14. Here, viewing the evidence and inferences from that evidence in the light most favorable to the Department, substantial evidence shows no railing or other system was in place.

Substantial evidence supports the Board’s determination that Chehalis permitted an employee to work on an unguarded surface over four feet in height. Therefore, this Court should affirm the superior court’s decision affirming the Board for this citation.

C. The Department Did Not Abuse Its Discretion In Setting the Penalty Amounts

The Department appropriately set the penalties here to reflect that Chehalis took no steps to provide a safe work place. RCW 49.17.180(7) gives the Department the authority to set penalties for WISHA violations:

The director, or his authorized representatives, *shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of the previous violations.*

The Legislature charged the Department with the responsibility of interpreting and administering RCW 49.17.180. RCW 49.17.180(7) outlines the factors that the Department must consider in assessing penalties and the Department adopted its interpretation of RCW 49.17.180(7) in WAC 296-900-14015 and WAC 296-900-14010.

The amount of a penalty is reviewed under an abuse of discretion standard. *See Danzer*, 104 Wn. App. at 326-27. Abuse of discretion occurs where a decision “is arbitrary or rests on untenable grounds or untenable reasons.” *Id.* In *Danzer*, the court ruled that the Department’s decision on penalties was not an abuse of discretion because the Department based its determination on the statutory factors and there was substantial evidence to support the determination. *Id.* at 327.

Inspector O'Hagan testified that he took into consideration all of the factors listed in RCW 49.17.180(7). BR O'Hagan 64-65. He explained each of the factors listed in RCW 49.17.180(7) and why he reached the determination for each factor. His explanations comport with WACs 296-900-14010 and 296-900-14015.

1. Substantial Evidence Supports the Finding That the Probability Rating Was Three

The Department appropriately determined that the probability an injury would occur was three out of six. Although Chehalis challenges the probability amount for the fall protection violation, it did not do so at the Board. BR 8-9.⁵ RCW 49.17.150(1) only allows a party to raise arguments that were raised at the Board. *See Legacy Roofing Inc.*, 129 Wn. App. at 361-62. This Court should not consider its argument. In any event, the Department did not abuse its discretion in setting the penalty amount.

Probability is defined as a number that describes the likelihood of an injury occurring, with the number scale ranging from 1 to 6. WAC 296-900-14010. In determining the probability, the Department considers a number of factors that include, but are not limited to: 1) the frequency and amount of exposure; 2) the number of employees exposed;

⁵ It also did not challenge the probability rating for the ladder violation. BR 8-9.

3) the number of times the hazard is identified in the workplace; 4) the proximity of an employee to the hazard; 5) the weather and other working conditions; 6) employee skill level and training; 7) employee awareness of the hazard; 8) the pace, speed, and nature of the work; 9) the use of protective equipment; 10) other mitigating or contributing circumstance. WAC 296-900-14010.

Many facts support a probability rating of three for the fall protection violation. Inspector O'Hagan considered the surface conditions, the angle of the surface, the type of work being done, and how the HVAC unit would be secured. BR O'Hagan 64. Significantly, an injury actually occurred in this case, justifying a probability rating of three. BR Gilbert 16. Gilbert was working on the ladder and on the roof in immediate proximity to the hazard. BR Gilbert 15-16. Moreover, Chehalis did not provide protective equipment to Gilbert on any job site and did not train Gilbert. BR 9. Gilbert asked for assistance and did not receive it. BR Gilbert 14; BR Mills 91.

Chehalis asserts that the Board incorrectly determined that the evidence supports a probability rating of three because the Board failed to consider factors that Chehalis feels justify a lower probability rating. App. Br. at 22. However, not every factor is applied, rather, "depending on the situation" a "variety of factors" are considered.

WAC 296-900-14010. As Chehalis concedes, the Department considers in part the actual conditions at the work site. App. Br. at 23. Chehalis cites to *In re: Hood River Canal Oyster Co.* to support its assertion that the court should lower the probability rating. However, in *Hood River*, the Board did not make its own probability determination based on other factors. Rather, the Board determined that the *Department* was correct in lowering the penalty when it reassumed jurisdiction of the citation. *In re: Hood River Canal Oyster Co.*, No. 08 W0028, 2009 WL 2781048 * 6 (May 20, 2009). Under WISHA, the Department may reassume jurisdiction of a citation and issue a corrective notice of redetermination. RCW 49.17.140(3). This allows the Department to make corrections to any citation issued and reconsider the factors in determining the penalty amount, including the probability. The corrective notice of redetermination then becomes the Department's final decision, not the citation as originally written. RCW 49.17.140(3). Thus, the Department's reconsideration of the probability rating in *Hood River* does not support a contention that the court should weigh other factors in order to lower the probability rating.

Ignoring the broad discretion given to the Department in setting a penalty, Chehalis points to factors that it believes justify lowering the probability factor. It essentially asks that this Court reweigh the evidence

to determine the probability factor. App. Br. at 24-25. But only the Department, not the courts, has the authority to establish penalty amounts. The court may only review the penalty assessment for an abuse of discretion. See *Danzer*, 104 Wn. App. at 326. Chehalis argues that because this situation had only occurred once at the time of the inspection, a lower probability rating is justified. App. Br. 24. But the Department had before it the frequency of the occurrence and decided that the probability should be three. The probability could have been six, but was not, due to the constellation of factors, including the factors Chehalis relies on.

Moreover, a probability rating does not require frequent incidents, rather, “there merely must be a real substantial probability” that a fall will occur. See *Danzer*, 104 Wn. App. at 323. Chehalis appears to confuse the number of times an *incident* has occurred with the Department’s assessment of the number of times a *hazard* is identified. Here, Mills testified that approximately thirty percent of HVAC unit replacements are performed on a roof. Mills BR 90. This demonstrates that a fall protection hazard is identified and present approximately thirty percent of the time. Therefore, the fact that the incident only occurred once, does not justify lowering the probability from three.

Additionally, the skill level and training of Gilbert supports not lowering the probability factor. Namely, Chehalis did not train Gilbert in safety, justifying a higher probability score. BR Gilbert 8; WAC 296-155-110; WAC 296-800-14020. Chehalis argues that Gilbert's skill level and training were high, arguing for a lower rating. App. Br. at 24. But again, the weight of this factor was for the Department to decide. Additionally, while his skill level is considered, in this situation it would not justify a lower probability rating, as a worker's skill level would not negate the fact that he is working on a steep pitched roof without fall protection in slick conditions, carrying heavy equipment. Again, Gilbert's training and skill level was a fact in considering a lower probability rating.

Finally, the roof conditions support not lowering the probability factor. Chehalis asserts that the fact that Gilbert slipped on oil that he spilled was not foreseeable by the employer. App. Br. at 25. Oil is in HVAC units, it is foreseeable that spills could occur. Moreover, Chehalis cites no authority for the proposition that this had to be foreseeable. WAC 296-900-14010 looks at the actual conditions at the worksite. In any event, inspector O'Hagan testified that he determined regardless of the oil spill, the roof conditions were also slick from moisture in the air, which contributed to the fall. O'Hagan BR 70-71. Therefore, the overall

condition of the surface was appropriately considered in the Department's probability determination.

Given the facts of this case, the Department did not abuse its discretion when it assessed the probability rating at a three, in the middle of the scale. Substantial evidence supports the Board's finding that the penalty calculation was appropriate.⁶

2. Substantial Evidence Supports the Finding that Chehalis Had Average Good Faith

Substantial evidence supports the finding that Chehalis had average good faith and this Court should reject Chehalis' attempt to reweigh the evidence in this regard. In determining good faith, the Department considers several factors: 1) the employer's awareness of the act, 2) the effort before an inspection to provide a safe and healthful workplace, 3) the employer's effort to follow a requirement they have violated, and 4) cooperation during an inspection. WAC 296-900-14015. Inspector O'Hagan rated Chehalis' good faith as average. BR O'Hagan 60. Part of his determination was based on the fact that there were "holes in the information provided" by Chehalis. BR O'Hagan 69. In other words, Chehalis' safety documentation was not as complete as it

⁶ The Department also assessed a probability rating of three for the ladder violation. BR O'Hagan 60. The evidence establishes that Gilbert carried a 150-pound HVAC unit up a ladder without both hands free and that Gilbert was not trained in safely using ladders, which supports a probability rating of three. BR Gilbert 8,41,43.

should be and they provided minimal to no training to employees. Chehalis could not exhibit above average good faith when it provided almost no training to ensure its employees had the knowledge necessary to perform their job safely.

Chehalis asserts that Inspector O'Hagan improperly rated its faith as average because he determined there was some animosity at the beginning of the inspection. App. Br. at 27. First, animosity toward an inspector can be a factor in determining the employer's overall cooperation. While Inspector O'Hagan testified that he was provided everything he asked for, BR O'Hagan 69, that fact, in and of itself, does not establish that an employer was fully cooperative. Second, Inspector O'Hagan testified that he also considered the "holes" in Chehalis' training plans in reaching his determination. BR O'Hagan 69. The mere fact that Inspector O'Hagan considered initial animosity in his faith determination does not justify adjusting the good faith rating above average. Indeed, ample evidence demonstrates that Chehalis did not make significant efforts to provide a safe and healthful working environment.

Here, Gilbert testified that he was not provided safety training and further testified that he was not aware of the ladder safety rules as his prior training did not cover that. BR Gilbert 43. Chehalis also did not conduct safety meetings that were relevant to the work being performed, nor were

they mandatory. BR Mills 86, 96. Indeed, Gilbert attended only one safety meeting in his seven months with Chehalis. BR Mills 96. Inspector O'Hagan further testified that Chehalis ultimately left the hazard assessment up to Gilbert rather than making its own determination of the necessary safety measures and they failed to properly supervise him. BR O'Hagan 70. Indeed, it is ultimately an *employer's* responsibility to ensure that employees are working safely.

Additionally, Chehalis failed to provide Gilbert with the equipment to perform his job safely even though Gilbert told supervisor Mills that he needed assistance for the job, which informed Chehalis of the hazard. BR Gilbert 13, 28-31; BR Mills 91. Chehalis points to testimony in which Mills said that Gilbert did not tell him about the need for another technician or a crane until the day of the installation, essentially asking this Court to accept Mill's version of events. App. Br. at 4. But it was the fact-finder's role to decide whether Mills or Gilbert was credible, not this Court. *See Raum*, 171 Wn. App. at 151. Mills also did not tell Gilbert not to do the work if he did not have the proper equipment and Gilbert did not feel that he could refuse to do the work if he felt it was unsafe. Mills BR 91; Gilbert BR 35.

Because Chehalis made little to no effort to provide a safe and healthful workplace before the inspection by providing little training to

Gilbert, no safety equipment to Gilbert, conducting very few mandatory safety meetings which were not tailored to the work performed, and making no effort to assess the hazards to which Gilbert would have been exposed, supports the Department's rating of average good faith. Therefore, substantial evidence supports the Board's conclusion that the Department appropriately rated Chehalis' faith as average.

VII. CONCLUSION

Substantial evidence supports the Board's finding that Gilbert climbed a ladder without both hands free. Gilbert testified that he carried the HVAC unit up the ladder and no evidence was presented that he carried it with anything other than his hands. Substantial evidence also supports the Board's finding that Chehalis permitted Gilbert to work at a height greater than four feet without a railing or other equivalent fall protection. Gilbert's testimony along with Inspector O'Hagan's photographs and Chehalis' failure to provide safety equipment demonstrate that Chehalis was in violation of the fall protection standard.

The Department asks this Court to affirm the August 6, 2009 decision of the Board. It asks the Court to affirm the superior court as to the fall protection violation and reverse as to the ladder violation.

RESPECTFULLY SUBMITTED this 4 day of November, 2014.

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APPENDIX A

WAC 296-155-500 (Cont.)

“**Standard railing**” means a vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform, or runway to prevent falls of persons.

“**Standard strength and construction**” means any construction of railings, covers, or other guards that meets the requirements of this part.

“**Toeboard**” means a vertical barrier at floor level erected along exposed edges of a floor opening, wall opening, platform, runway, or ramp to prevent falls of materials.

“**Tread depth**” means the horizontal distance from front to back of tread (excluding nosing, if any).

“**Unprotected side or edge**” means any side or edge of a roof perimeter where there is no wall three feet (.9 meters) or more in height.

“**Wall opening**” means an opening at least 30 inches high and 18 inches wide, in any wall or partition, through which persons may fall, such as an opening for a window, a yard arm doorway or chute opening.

“**Work area**” means that portion of a roof where roofing work is being performed.
[Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-500, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-500, filed 4/25/95, effective 10/1/95; 91-24-017 (Order 91-07), § 296-155-500, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-500, filed 1/10/91, effective 2/12/91. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-500, filed 1/21/86. Statutory Authority: RCW 49.17.040, 49.17.050 and 49.17.240. 81-13-053 (Order 81-9), § 296-155-500, filed 6/17/81; Order 74-26, § 296-155-500, filed 5/7/74, effective 6/6/74.]

WAC 296-155-505 Guardrails, handrails and covers.

- (1) General provisions. This part applies to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways, runways, ramps, open sided floors, open sides of structures, bridges, or other open sided walking or working surfaces.
- (2) The employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.
- (3) When guardrails or covers required by this section must be temporarily removed to perform a specific task, the area shall be constantly attended by a monitor to warn others of the hazard or shall be protected by a movable barrier.
- (4) Guarding of floor openings and floor holes.
 - (a) Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in subsections (4)(g) and (7) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways. All vehicle service pits shall have a cover or removable type standard guardrail. When not in use, pits shall be covered or guarded. Where vehicle service pits are to be used again immediately, and the service person is within a 50 foot distance of the unguarded pit and also within line of sight of the unguarded pit, the cover or guardrail need not be replaced between uses. Where vehicle service pits are used frequently, the perimeters of the pits shall be delineated by high visibility, luminescent, skid resistant paint. Such painted delineation shall be kept clean and free of extraneous materials.
 - (b) Ladderway floor openings or platforms shall be guarded by standard railings with standard toe boards on all exposed sides, except at entrance to opening, with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

WAC 296-155-505 (Cont.)

- (c) Hatchways and chute floor openings shall be guarded by one of the following:
 - (i) Hinged covers of standard strength and construction and a standard railing with only one exposed side. When the opening is not in use, the cover shall be closed or the exposed side shall be guarded at both top and intermediate positions by removable standard railings;
 - (ii) A removable standard railing with toe board on not more than two sides of the opening and fixed standard railings with toe boards on all other exposed sides. The removable railing shall be kept in place when the opening is not in use and shall be hinged or otherwise mounted so as to be conveniently replaceable.
 - (d) Wherever there is danger of falling through a skylight opening, and the skylight itself is not capable of sustaining the weight of a two hundred pound person with a safety factor of four, standard guardrails shall be provided on all exposed sides or the skylight shall be covered in accordance with (g) of this subsection.
 - (e) Pits and trap door floor openings shall be guarded by floor opening covers of standard strength and construction. While the cover is not in place, the pit or trap openings shall be protected on all exposed sides by removable standard railings.
 - (f) Manhole floor openings shall be guarded by standard covers which need not be hinged in place. While the cover is not in place, the manhole opening shall be protected by standard railings.
 - (g) All floor opening or hole covers shall be capable of supporting the maximum potential load but never less than two hundred pounds (with a safety factor of four).
 - (i) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.
 - (ii) All covers shall be color coded or they shall be marked with the word "hole" or "cover" to provide warning of the hazard.
 - (iii) If it becomes necessary to remove the cover, a monitor shall remain at the opening until the cover is replaced. The monitor shall advise persons entering the area of the hazard, shall prevent exposure to the fall hazard and shall perform no other duties.
 - (h) Floor holes, into which persons can accidentally walk, shall be guarded by either a standard railing with standard toe board on all exposed sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the cover is not in place, the floor hole shall be protected by a standard railing.
- (5) Guarding of wall openings.
- (a) Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:
 - (i) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided;

WAC 296-155-505 (Cont.)

- (ii) The bottom of a wall opening, which is less than 4 inches above the working surface, regardless of width, shall be protected by a standard toe board or an enclosing screen either of solid construction or as specified in subsection (7)(f)(ii) of this section.
 - (b) An extension platform, outside a wall opening, onto which materials can be hoisted for handling shall have standard guardrails on all exposed sides or equivalent. One side of an extension platform may have removable railings in order to facilitate handling materials.
 - (c) When a chute is attached to an opening, the provisions of (a) of this subsection shall apply, except that a toe board is not required.
- (6) 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.
 - (b) Runways shall be guarded by a standard railing, or the equivalent, as specified in subsection (7) of this section, on all open sides, 4 feet or more above the floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toe board shall also be provided on each exposed side.
 - (c) Runways used exclusively for special purposes may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway not less than 18 inches wide.
 - (d) Where employees entering upon runways become thereby exposed to machinery, electrical equipment, or other danger not a falling hazard, additional guarding shall be provided.
 - (e) Regardless of height, open sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards, shall be guarded with a standard railing and toe board.
 - (f) Open sides of gardens, patios, recreation areas and similar areas located on roofs of buildings or structures shall be guarded by permanent standard railings or the equivalent. Where a planting area has been constructed adjacent to the open sides of the roof and the planting area is raised above the normal walking surface of the roof area, the open side of the planting area shall also be protected with standard railings or the equivalent.
- (7) Standard specifications.
 - (a) A standard railing shall consist of top rail, intermediate rail, toe board, and posts, and shall have a vertical height of 42 inches (1.1m) plus or minus 3 inches (8cm)(39-45) inches from upper surface of top rail to floor, platform, runway, or ramp level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this subsection. The intermediate rail shall be halfway between the top rail and the floor, platform, runway, or ramp. The ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard.

WAC 296-155-505 (Cont.)

Note: When employers are using stilts, the top edge height of the top rail, or equivalent member, shall be increased an amount equal to the height of the stilts.

- (b) Minimum requirements for standard railings under various types of construction are specified in the following items:
 - (i) For wood railings, the posts shall be of at least 2 inch by 4 inch stock spaced not to exceed 8 feet; the top rail shall be of at least 2 inch by 4 inch stock and each length of lumber shall be smooth surfaced throughout the length of the railing. The intermediate rail shall be of at least 1 inch by 6 inch stock.
 - (ii) For pipe railings, posts and top and intermediate railings shall be at least 1 1/2 inches nominal OD diameter with posts spaced not more than 8 feet on centers.
 - (iii) For structural steel railings, posts and top and intermediate rails shall be of 2 inch by 2 inch by 3/8 inch angles or other metal shapes of equivalent bending strength, with posts spaced not more than 8 feet on centers.
 - (iv) For wire rope railings, the top and intermediate railings shall be at least 1/2 inch fibre core rope, or the equivalent to meet strength factor and deflection of (b)(v) of this subsection. Posts shall be spaced not more than 8 feet on centers. The rope shall be stretched taut, so as to present a minimum deflection.
 - (v) The anchoring of posts and framing of members for railings of all types shall be of such construction that the completed structure shall be capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail, with a minimum of deflection.
 - (vi) Railings receiving heavy stresses from employees trucking or handling materials shall be provided additional strength by the use of heavier stock, closer spacing of posts, bracing, or by other means.
 - (vii) Other types, sizes, and arrangements of railing construction are acceptable, provided they meet the following conditions:
 - (A) A smooth surfaced top rail at a height above floor, platform, runway, or ramp level of between 39 inches and 45 inches;
 - (B) When the 200-pound (890N) test load specified in subsection (6)(b)(v) of this section is applied in a downward direction, the top edge of the guardrail shall not deflect to a height less than 39 inches (1.0m) above the walking/working level. Guardrail system components selected and constructed in accordance with this part will be deemed to meet this requirement.
 - (C) Protection between top rail and floor, platform, runway, ramp, or stair treads, equivalent at least to that afforded by a standard intermediate rail;
 - (D) Elimination of overhang of rail ends unless such overhang does not constitute a hazard.
- (c) (i) A standard toe board shall be 4 inches minimum in vertical height from its top edge to the level of the floor, platform, runway, or ramp. It shall be securely fastened in place and have not more than 1/4 inch clearance above floor level. It may be made of any substantial material, either solid, or with openings not over 1 inch in greatest dimension.

WAC 296-155-505 (Cont.)

- (ii) Where material is piled to such height that a standard toe board does not provide protection, paneling, or screening from floor to intermediate rail or to top rail shall be provided.
- (d) Floor opening covers shall be of any material that meets the following strength requirements:
 - (i) Conduits, trenches, and manhole covers and their supports, when located in roadways, and vehicular aisles shall be designed to carry a truck rear axle load of at least 2 times the maximum intended load;
 - (ii) All floor opening covers shall be capable of supporting the maximum potential load but never less than two hundred pounds (with a safety factor of four).
 - (A) All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.
 - (B) All covers shall be color coded or they shall be marked with the word "hole" or "cover" to provide warning of the hazard..
 - (C) If it becomes necessary to remove the cover, a monitor shall remain at the opening until the cover is replaced. The monitor shall advise persons entering the area of the hazard, shall prevent exposure to the fall hazard and shall perform no other duties.
- (e) Skylight openings that create a falling hazard shall be guarded with a standard railing, or covered in accordance with (d)(ii) of this subsection.
- (f) Wall opening protection shall meet the following requirements:
 - (i) Barriers shall be of such construction and mounting that, when in place at the opening, the barrier is capable of withstanding a load of at least 200 pounds applied in any direction (except upward), with a minimum of deflection at any point on the top rail or corresponding member.
 - (ii) Screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200 pounds applied horizontally at any point on the near side of the screen. They may be of solid construction of grill work with openings not more than 8 inches long, or of slat work with openings not more than 4 inches wide with length unrestricted.

[Statutory Authority: RCW 49.17.010, .040, .050, 00-14-058 (Order 99-43), § 296-155-505, filed 07/03/2000, effective 10/01/00. Statutory Authority: Chapter 49.17 RCW, 96-24-051, (Order 96-05), § 296-155-505, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-505, filed 4/25/95, effective 10/1/95; 94-15-096 (Order 94-07), § 296-155-505, filed 7/20/94, effective 9/20/94; 91-24-017 (Order 91-07), § 296-155-505, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-505, filed 1/10/91, effective 2/12/91; 90-03-029 (Order 89-20), § 296-155-505, filed 1/11/90, effective 2/26/90. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-505, filed 1/21/86. Statutory Authority: RCW 49.17.040, 49.17.050 and 49.17.240. 81-13-053 (Order 81-9), § 296-155-505, filed 6/17/81; Order 76-29, § 296-155-505, filed 9/30/76; Order 74-26, § 296-155-505, filed 5/7/74, effective 6/6/74.]

WAC 296-155-50503 Roofing brackets.

- (1) Roofing brackets shall be constructed to fit the pitch of the roof.
- (2) Securing: Brackets shall be secured in place by nailing in addition to the pointed metal projections. When it is impractical to nail brackets, rope supports shall be used. When rope supports are used, they shall consist of first grade manila of at least 3/4 inch diameter, or equivalent.

WAC 296-155-50503 (Cont.)

- (3) Crawling boards or chicken ladders.
 - (a) Crawling boards shall be not less than ten inches wide and one inch thick, having cleats 1 x 1 1/2 inches.
 - (i) The cleats shall be equal in length to the width of the board and spaced at equal intervals not to exceed twenty-four inches.
 - (ii) Nails shall be driven through and clinched on the underside.
 - (iii) The crawling board shall extend from the ridge pole to the eaves when used in connection with roof construction, repair, or maintenance.
 - (b) A firmly fastened lifeline of at least 3/4 inch diameter rope, or equivalent, shall be strung beside each crawling board for a handhold.
 - (c) Crawling boards shall be secured to the roof by means of adequate ridge hooks or other effective means.

[Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-50503, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-50503, filed 4/25/95, effective 10/1/95; 91-03-044 (Order 90-18), § 296-155-50503, filed 1/10/91, effective 2/12/91. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-50503, filed 1/21/86.]

WAC 296-155-50505 Reserved.

[Statutory Authority: Chapter 49.17 RCW. 94-15-096 (Order 94-07), § 296-155-50505, filed 7/20/94, effective 9/20/94; 91-24-017 (Order 91-07), § 296-155-50505, filed 11/22/91, effective 12/24/91. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-50505, filed 1/21/86.]

WAC 296-155-510 Reserved.

[Statutory Authority: Chapter 49.17 RCW. 91-24-017 (Order 91-07), § 296-155-510, filed 11/22/91, effective 12/24/91; 89-11-035 (Order 89-03), § 296-155-510, filed 5/15/89, effective 6/30/89. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-510, filed 1/21/86; Order 74-26, § 296-155-510, filed 5/7/74, effective 6/6/74.]

WAC 296-155-515 Ramps, runways, and inclined walkways.

- (1) Width. Ramps, runways and inclined walkways shall be eighteen inches or more wide.
- (2) Standard railings. Ramps, runways and inclined walkways shall be provided with standard railings when located four feet or more above ground or floor level.
- (3) Ramp specifications. Ramps, runways and walkways shall not be inclined more than twenty degrees from horizontal and when inclined shall be cleated or otherwise treated to prevent a slipping hazard on the walking surface.

[Statutory Authority: Chapter 49.17 RCW. 96-24-051, (Order 96-05), § 296-155-515, filed 11/27/96, effective 02/01/97. 95-10-016, § 296-155-515, filed 4/25/95, effective 10/1/95. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-515, filed 1/21/86.]

WASHINGTON STATE ATTORNEY GENERAL

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Transmittal Letter

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Court of Appeals Case Number: 46419-5

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No. 46419-5

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

CHEHALIS SHEET METAL & ROOFING
Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,
Respondent.

DECLARATION
OF MAILING

Grays Harbor County
Superior Court
No. 12-2-00549-1

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent/Cross-Appellant Department of Labor and Industries and this Declaration of Mailing to all parties on record as follows via ABC Legal Messengers and e-mail:

Bradley Drury
Jack W. Hanemann, P.S.
2120 State Ave. NE #101
Olympia, WA 98506

DATED this 4th day of November, 2014.


PEGGY BERTRAND
Legal Assistan

WASHINGTON STATE ATTORNEY GENERAL

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Transmittal Letter

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Case Name: Chehalis Sheet Metal & Roofing v DLI

Court of Appeals Case Number: 46419-5

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