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Division II
State of Washington
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NO. 53020-1-II

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

VALENTINE ROOFING, INC.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF APPELLANT VALENTINE ROOFING, INC.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES 2

A. Whether the Board's Decision and Order affirming the fall protection violations is supported by substantial evidence when the Employer established an exemption from using fall protection during the installation and disassembly of their anchor points? 2

B. Whether the Board's Decision and Order is supported by substantial evidence when the Department failed to present any evidence establishing employee exposure to the alleged violative conduct? 2

IV. STATEMENT OF FACTS 3

V. ARGUMENT 7

A. Standard of Review 7

B. The Department bears the burden of proving all elements of a WISHA violation 8

C. The Board's determination that the employees were not exempt from using fall protection during the installation and disassembly of their anchor points is not supported by substantial evidence 9

D. The Board's determination that the Department established employee exposure to the fall hazards is not supported by substantial evidence. 11

E. The Board's determinations that employees were exposed to the blue ladder hazards are not supported by substantial evidence. 17

VI. CONCLUSION 19

TABLE OF AUTHORITIES

STATE CASES

Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002) 7

Dep't of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 44, 109 P.3d 816 (2005) 7

Erection Co. v. Dep't of Labor & Indus., 160 Wn. App. 194, 202, 248 P.3d 1085 (2011) 7

Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) 12

J.E. Dunn Nw., Inc., v. Dep't of Labor & Indus., 139 Wn. App. 35, 42, 156 P.3d 250 (2007) 7

Kokosing Constr. Co., Inc., 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) 12

Mid Mountain Contractors, Inc. v. Dep't of Labor and Indus., 136 Wn. App. 1, 5, 146 P.3d 1212 (2006) 11

Mowat Constr. Co. v. Dep't of Labor & Indus, 148 Wn. App. 920, 925, 201 P.3d 407 (2009) 7, 8

RGM Construction Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) 12

Rockwell International Corp, 80 OSAHRC 118/A2, 9 BNA OSHC 1092 12

Secretary of Labor v. Fastrack Erectors, 21 BNA OSHC 1109 (No. 04-0780, 2004) 15

Secretary of Labor v. Fishel, OSHRC Docket No. 97-102 15

Secretary of Labor v. Tricon Industries, Inc., 24 BNA OSHRC 1427 (No. 11-1877, 2012) 15

SuperValu, Inc. v. Dep't of Labor & Indus., 158 Wn.2d 422, 433, 144 P.3d 1160 (2006) 8

The Quadrant Corporation v. Growth Management Hearings Board, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005) 7

STATE STATUTES

RCW 49.17.150 7
RCW 49.17.150(1) 7
RCW 49.17.180(6) 8

WASHINGTON ADMINISTRATIVE CODE

WAC 263-12-115(2)(b) 8
WAC 296-155-24605(4)(a) 8, 9
WAC 296-155-24609 9
WAC 296-155-24609(4)(d) 6, 9
WAC 296-155-24611 9
WAC 296-155-24611(1)(a) 5, 9
WAC 296-875-40050(1) 17
WAC 296-876-40030(2) 6, 17
WAC 296-876-40050(1) 6

I. INTRODUCTION

On December 15, 2016, the Respondent, Department of Labor and Industries ("Department") issued Citation and Notice of Assessment No. 317942223 ("Citation") against the Petitioner, Valentine Roofing, Inc. ("Employer") for alleged violations of the Washington Industrial Safety and Health Act ("WISHA"), which contained two repeat serious violations, two serious violations, and one general violation. (CABR 143-49).[1] The Employer timely appealed the Citation. (CABR 139).

Thereafter, the Department held an informal conference and issued Corrective Notice of Redetermination No. 317942223 ("CNR"), which affirmed the Citation. (CABR 125-29). The Employer timely appealed the CNR to the Board of Industrial Insurance Appeals ("Board"). (CABR 122-23).

After a hearing was held on September 26, 2017, Industrial Appeals Judge Adam E. Torem issued a Proposed Decision and Order affirming the CNR.[2] (CABR 25-42). After the Employer timely filed a Petition for Review of the Board's Proposed Decision and Order, the Board issued an Order Denying Petition for Review on March 12, 2018. (CABR 6). As a result, the Proposed Decision and Order became the Decision and Order of the Board. (CABR 6).

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[1] The Certified Appeal Board Record (CABR) is referenced in the Clerk's Papers. References throughout this brief will be contained in the CABR. The Transcripts are referenced and supplemented to the CABR. Hereinafter transcripts will be referred to by "Tr." with the date, page number(s), and line number(s).

[2] The Employer stipulated to the general violation occurring, so it is not contested in this appeal. (Tr. 9/26/17, p. 198).

The Employer timely appeal the Board's Decision and Order to Kitsap County Superior Court. After oral argument on December 13, 2018, The Honorable Jennifer Forbes issued Findings of Fact, Conclusions of Law and Judgement, which affirmed the Board's March 12, 2018 Decision and Order. (CABR 93-95). The Employer then timely appealed the Order to this Court.

As such, the Employer respectfully appears before this Court for review to reverse Board's Decision and Order as it is contrary to the substantial weight of the record.

II. ASSIGNMENTS OF ERROR

The Employer respectfully asserts that the Board and the Superior Court erred in affirming the CNR and the penalties therein; the Board erred in making Findings of Fact Numbers 4 – 32; and the Board erred in making Conclusions of Law Numbers 2 – 6 and 8. The Employer further assigns error to all adverse evidentiary rulings against the Employer.

III. ISSUES

A. Whether the Board's Decision and Order affirming the fall protection violations is supported by substantial evidence when the Employer established an exemption from using fall protection during the installation and disassembly of their anchor points?

B. Whether the Board's Decision and Order is supported by substantial evidence when the Department failed to present any evidence establishing employee exposure to the alleged violative conduct?

IV. STATEMENT OF FACTS

On September 14, 2016, the Employer engaged in the removal of torch-down roofing and the installation of PVC roofing on a zero-pitch roof on Manzanita Road in Bainbridge Island. (Tr. 9/26/17, p. 118, 119). The project consisted of the house and the garage, an upper level and a lower level, with the garage being 4 feet lower than the house. (Tr. 9/26/17, p. 120). Jorge Portillo, the crew leader, and Jose Chavez and Jesus Urias performed the work at the project. (Tr. 9/29/17, p. 118).

On that same date, Allen Johnson, a former Compliance Safety and Health Officer ("Mr. Johnson"), performed a "drive up" inspection of the project, wherein he was canvassing neighborhood after neighborhood making sure work was being performed safely. (Tr. 9/26/17, p. 21, 24). After he stopped at the Employer's project, he noticed the employees were wearing full harnesses, but they were not hooked up to fall protection. (Tr. 9/26/17, p. 24). Therefore, he pulled into an easement near the house and started taking pictures approximately 40 feet away. (Tr. 9/26/17, p. 69-70). He only observed the employees on the roof for "minutes." (Tr. 9/26/17, p. 34). Mr. Johnson then ordered the employees off the roof, and the employees complied. (Tr. 9/26/17, p. 27).

Mr. Portillo testified that he, along with Mr. Urias and Mr. Chavez, were removing and re-installing safety anchors during the "minutes" that Mr. Johnson was taking photographs. (Tr. 9/26/17, p. 127; Exhibit 5). Mr. Portillo also testified that the safety anchors had to be removed to install the new PVC membrane before re-installing the safety anchors, as there was no

insultation underneath. (Tr. 9/26/17, p. 128). Mr. Portillo opined that they were approximately 15 to 16 feet away from the perimeter of the roof at that time. (Tr. 9/26/17, p. 123, 144).

Altogether, Mr. Portillo testified that it took approximately 10-15 minutes to reinstall the safety anchors because you must remove the safety anchors, put down the insulation and covering, and reinstall the safety anchors. (Tr. 9/26/17, p. 130). Mr. Portillo further testified that based on his training and experience, you cannot tie off during the removal of a safety anchor. (Tr. 9/26/17, p. 139). However, Mr. Portillo clarified that in every other moment that the employees would be exposed to any danger, they were tied off, including when they were working around the skylights. (Tr. 9/26/17, p. 143). That is, they were not close to the edge of the roof when they were installing the anchor points. (Tr. 9/26/16, p. 144). The Department presented no facts to dispute this testimony.

Mr. Johnson watched the employees walk to the far right-hand end of the house and come down; however, he could not see how the employees came down from the house because there was a big bundle of roofing material obstructing his view. (Tr. 9/26/17, p. 28, 73). He opined that there was no way for the employees to come down from the house, but to come down using a blue ladder. (Tr. 9/26/17, p. 28). Yet, he did not actually see the employees use the blue ladder. (Tr. 9/26/17, p. 73). The blue ladder was a self-supporting ladder that was in a closed position and leaned up against the wall leading from the lower roof to the upper roof. (Tr. 9/26/17, p. 57-58). Mr. Johnson opined the employees were using that ladder for access, as

he did not observe any other way for the employees to access the upper roof. (Tr. 9/26/17, p. 58). However, Mr. Johnson testified that he did not walk all the way around the house, he did not go on the roof, and he could not see the top of the roof from his vantage point. (Tr. 9/26/17, p. 31, 82).

Mr. Portillo testified that, after Mr. Johnson ordered them to come down from the roof, they went down a 32-foot ladder that was placed on the west side, or the backside, of the house. (Tr. 9/26/17, p. 140). Mr. Portillo further testified that he explained to Mr. Johnson how the employees got down from the roof. (Tr. 9/26/17, p. 140). The employees also used this 32-foot ladder to access the upper portion, or the main residence, of the house. (Tr. 9/26/17, p. 134-25). Mr. Portillo confirmed that the blue ladder, shown in Exhibits 7 and 8, was never used, as it was only at the project site for emergency access. (Tr. 9/26/17, p. 143). Mr. Johnson took no photographs of the back side of the house and no other evidence that there was no extension ladder other than his oral testimony.

As a result of Mr. Johnson's inspection, a Citation was issued. (Tr. 9/26/17, p. 32). The Employer was cited for a violation of WAC 296-155-24611(1)(a), under Item 1-1a, as Mr. Johnson observed three employees on a flat roof over 13-feet high wearing harnesses, but not attached to any fall protection. (Tr. 9/26/17, p. 33). Mr. Johnson opined that the worker closest to the edge of the front of the house was about five feet away. (Tr. 9/26/17, p. 35). However, Mr. Johnson did not take any measurements from the edge of the roof to the location where the employees were standing in his photographs, nor did he know exactly where they were standing on the roof

when he took his photographs. (Tr. 9/26/17, p. 83). In fact, he did not even know how wide the upper and lower levels of the roofs were. (Tr. 9/26/17, p. 84).

The Employer was also cited for a violation of WAC 296-155-24609(4)(d), under Item 1-1b, because there was a skylight on the roof, approximately 3-foot by 4-foot, that Mr. Johnson stated was not guarded. (Tr. 9/26/17, p. 50). Mr. Johnson opined that a fall through the skylight to the floor below would be at least 8 feet. (Tr. 9/26/17, p. 54). However, Mr. Johnson did not know how close the employees got to the skylight while they were working on the roof that day. (Tr. 9/26/17, p. 86). Nevertheless, Mr. Johnson believes that employees would be exposed to a hazard if they were 500 feet from the skylight. (Tr. 9/26/17, p. 87).

The Employer was further cited for a violation of WAC 296-876-40050(1), under Item 2-1, because Mr. Johnson believed that employees used the blue ladder, which was a self-supporting ladder in a closed position, to come down from the roof, even though he could not see how the employees got down from the roof (Tr. 9/26/17, p. 57-58, 73, 81). However, via impeachment, Mr. Johnson previously admitted in a discovery deposition that he did see the employees come down the self-supporting ladder. (Tr. 9/26/17, p. 77). Contrary to Mr. Johnson's belief, Mr. Portillo confirmed that the blue ladder was never used, as it was only at the project site for emergency access. (Tr. 9/26/17, p. 143).

Finally, the Employer was cited for a violation of WAC 296-876-40030(2), under Item 2-2, because the blue ladder was not 3 feet above the working surface above or secured to the top of a rigid support. (Tr. 9/26/17,

p. 62). However, the employees used a 32-foot ladder to access and exit the upper portion of the house. (Tr. 9/26/17, p. 140).

V. ARGUMENT

A. Standard of Review

The standard of review under WISHA is set forth in RCW 49.17.150(1). In a WISHA appeal, the Court reviews the Board's decision based on the record before the Board. *J.E. Dunn Northwest., Inc. v. Dep't of Labor & Indus*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007). 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. RCW 49.17.150; *Mowat Constr. Co. v. Dep't of Labor & Indus*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince a fair-minded person of the truth of the declared premise. *Mowat Constr.,* 148 Wn. App. At 925. If the Board's findings are supported by substantial evidence, the Court reviews whether those findings support the Board's conclusions of law. *Erection Co. v. Dep't of Labor & Indus.,* 160 Wn. App. 194, 202, 248 P.3d 1085 (2011).

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *Dep't of Labor & Indus. v. Gongyin,* 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." D*ep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005).

B. The Department bears the burden of proving all elements of a WISHA violation.

The Department bears the initial burden to prove all elements of a WISHA violation. WAC 263-12-115(2)(b); *Mowat Constr. Co.*, 148 Wn. App. at 924. To establish a prima facie case of a "serious" violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (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 conditions; (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. RCW 49.17.180(6); *SuperValu, Inc. v. Dep't of Labor & Indus.,* 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

Here, the Board's Decision and Order is not supported by substantial evidence because the Employer did not commit the alleged fall protection violations, as its employees were setting the anchor points for their lifelines during the Department's inspection and, as a result, they were exempt from using fall protection per WAC 296-155-24605(4)(a). Furthermore, substantial evidence does not support the Board's determination that the Department established that any employees were exposed to a fall hazard or a ladder hazard; accordingly, the Board's Decision and Order must be reversed, and the CNR's serious violations must be vacated.

C. The Board's determination that the employees were not exempt from using fall protection during the installation and disassembly of their anchor points is not supported by substantial evidence.

The Board's determination that the employees were not exempt from using fall protection during the installation and disassembly of their anchor points is not supported by substantial evidence. Item 1-1a contains a violation of WAC 296-155-24611(1)(a), which provides that "you must ensure that the appropriate fall protection systems is provided, installed, and implemented... when employees are exposed to fall hazards of 10 feet or more to the ground or lower level while engaged in roofing work on a low pitched roof." Similarly, Item 1-1b contains a violation of WAC 296-155-24609(4)(d), which provides that you must guard floor openings by a fall restraint system "whenever there is a danger of falling through an unprotected skylight opening."

However, employees are exempt from the requirements of WAC 296-155-24611 and WAC 296-155-24609 under WAC 296-155-24605(4)(a) "during the initial installation of the fall protection anchor (prior to engaging in any work activity), or the disassembly of the fall protection anchor after the work has been completed."

Here, Mr. Portillo unequivocally testified that he and his crew were re-setting anchor points for their lifelines during the Department's inspection, and that he and his crew were always tied off to the anchor points except for the short periods of time it took to initially install and reinstall the anchor points. The Employer also introduced evidence establishing that the anchor points, through the patched portions of roof, were installed sixteen

feet from the edge of the roof, as testified to by Mr. Portillo. (Tr. 9/26/17, p. 190-91; Exhibits 28 and 29). Mr. Johnson even agreed that there was no reason for the employees to wear full-body harnesses unless they were going to use them to tie off during the job. (Tr. 9/26/17, p. 88).

The Department offered no evidence to refute Mr. Portillo's testimony or the veracity of his statements, as Mr. Johnson never went on the roof and was, therefore, unable to see where the workers were on the roof at the time of his inspection, unable to tell what the workers were doing at the time of his inspection, and unable to confirm whether anchor points had been used that day. Clearly, given the above, the Board erroneously stated the Employer provided no detailed testimony about how and when the anchor points had been used or relied upon by its workers.

Furthermore, the Board found it "wholly improbable" that Mr. Johnson arrived when the Employer was removing or replacing anchor bolts from the roof surface because the Department's photographic exhibits show roofing materials stacked on the lower roof, suggesting that the roofing job was still in progress. Yet, the Board failed to recognize that Mr. Johnson failed to inquire on how much work had been completed on the roof at the time of his inspection. (Tr. 9/26/17, p. 83). Nevertheless, as Mr. Portillo testified, the safety anchors had to be removed to install the new PVC membrane before re-installing the safety anchors, as there was no insultation underneath. At that time, the employees were approximately 15 to 16 feet away from the perimeter of the roof.

The Board also stated that Mr. Johnson observed the employees when they were not tied off and observed them long enough to take photographs. However, Mr. Portillo testified that it took approximately 10-15 minutes to reinstall the safety anchors because you must remove the safety anchors, put down the insulation and covering, and reinstall the safety anchors. Yet, Mr. Johnson testified that he only saw the employees working for "minutes" before ordering them to come off the roof. This also undeniably supports Mr. Portillo's testimony.

Clearly, the Board's failure to recognize the Employer's exemption from using fall protection when installing and disassembling their anchors is not only unsupported by substantial evidence, but also in stark contrast to all other evidence in the record.

D. The Board's determination that the Department established employee exposure to the fall hazards is not supported by substantial evidence.

The Board's determination that the Department established that employees were exposed to a fall hazard from the roof's perimeter or the skylight is not supported by substantial evidence because the employees were outside the zone of danger during the brief periods of time that they were not tied off, and it was not reasonably likely that the employees would have entered the zone of danger. To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show that the worker had access to the violative conditions. *Mid Mountain Contractors, Inc. v. Dep't of Labor and Indus.*, 136 Wn. App. 1, 5, 146 P.3d 1212 (2006).

To establish employee access, the Department must show by reasonable predictability that, in the course of the workers' duties, employees will be, are, or have been in the zone of danger. *Id.* The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co.,* 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

The "zone of danger" standard is well established under Federal OSHA cases. With regards to the statutory language, "could cause serious bodily injury or death," the OSHRC held in *Rockwell International Corp, 80 OSAHRC 118/A2, 9 BNA OSHC* 1092, for employee exposure the Secretary must prove more than just the possibility an employee may get injured. The test of whether an employee would have access to the "zone of danger" is "based on reasonable predictability." *Kokosing Constr. Co.*, Inc., 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The inquiry is not whether the exposure is theoretically possible but whether the employee's entry into the danger zone is reasonably predictable. *See, Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (determining that it was not reasonably predictable that an employee would be in the zone of danger presented by the press points of a machine because the record established that there could be exposure to a hazard through inadvertent entry due to a slip and fall, which was highly unlikely and too remote).

In the present case, the Department failed to establish that any employees were exposed to a fall hazard because the employees were outside of the zone of danger and working in a faraway proximity to the roof's perimeter and skylight for the brief period that they were re-installing their safety anchors. Although CSHO Johnson's photographs show the workers wearing harnesses without being tied off, they were installing anchor points at that time. The safety anchors had to be removed to install the new PVC membrane before the employees could re-install the safety anchors, as there was no insulation underneath. Significantly, during this approximately 15-minute period, the employees maintained 15-16 feet from the roof's perimeter and were not exposed to any fall hazards.

Indeed, Mr. Portillo testified that they were not close to the edge at any time when they were reinstalling the safety anchors. This distance was exemplified by the photos taken on the worksite on August 2, 2017 at the inspection site, which included the photograph of the patch used for the safety anchors that were 16 feet from the roof's perimeter. (Tr. 9/26/17, p. 190-91; Exhibit 13-45). Moreover, Mr. Portillo testified that at every single moment that they were exposed to any danger, they were tied off. Otherwise, there is no other reason as to why the workers were wearing harnesses during the Department's inspection. Thus, the employees were outside of the zone of danger, and it was not reasonably likely that they would have entered the zone of danger while re-installing their safety anchors.

Although CSHO Johnson testified that he believed the employee closest to the roof's perimeter was about 5 feet away, his belief is pure

speculation. That is, the Board fails to recognize that Mr. Johnson never took any measurements from the edge of the roof to the location where the employees were standing when he took his photographs, nor did he know exactly where the employees were standing on the roof when he took his photographs. (Tr. 9/26/17, p. 83). Indeed, he never even went on the roof, and he could not see the top of the roof from his vantage point. (Tr. 9/26/17, p. 31, 82). Additionally, even though CSHO Johnson testified that it was his belief that the employee closest to the roof's perimeter was about 5 feet away, the Board fails to mention that Mr. Johnson did not testify to the grounds that formed his belief. One would surmise that it was based off his photographs; however, his photographs were taken approximately 40 feet away from ground level.

Additionally, the Board failed to consider that CSHO Johnson's belief that the employee closest to the roof's perimeter being about 5 feet away was likely skewed by the fact that the employees were working on rigid insulation. Rigid insulation is a material that is installed before the membrane that provides rain protection. (Tr. 9/26/17, p. 144). The rigid insulation used at the inspection site was 3 inches thick. (Tr. 9/26/17, p. 144, 145). At the time of the Department's inspection, the rigid insulation installation was completed and covered the entire roof except for the overhangs. (Tr. 9/26/17, p. 145). The employees were standing on rigid insulation when they were reinstalling the safety anchors, which is when CSHO Johnson took his photographs. (Tr. 9/26/17, p. 145-46). This resulted in the employees being elevated off the roof's surface at the time CSHO

Johnson observed the employees on the roof. The Board failed to address this fact and reconcile it with Mr. Johnson's erroneous determination.

Presumably, the Board determined that workers had access to the hazard because there was nothing preventing them from getting closer to the edge of the roof; however, this determination would be without merit because it was not reasonably predictable that, in the course of the employees' duties, they were exposed to the unguarded edge of the roof or the skylight. *See Secretary of Labor v. Tricon Industries, Inc.*, 24 BNA OSHRC 1427 (No. 11-1877, 2012) (determining the Secretary failed to establish that Tricon employees were in the zone of danger when they were no closer than six to seven feet from the unguarded edge because there was no evidence to suggest that it was reasonably predictable that employees had any reason or occasion to wander around the deck, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would come any closer to the edge of the deck); *see also Secretary of Labor v. Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (determining that the record failed to show that the employees were exposed to a fall hazard when the testimony established that employees were never closer than 6 feet from the edge and there was no reason for the employees to be closer than 6 feet from the edge); see also *Secretary of Labor v. Fishel,* OSHRC Docket No. 97-102 (determining that Gussler did not have access to the zone of danger because although he was in close proximity to a trench, there was no reason for Gussler to enter the unsafe portion of the trench).

Likewise, Mr. Portillo testified that they were tied off when they were working around the skylight. Indeed, that is the reason that they had to install a safety anchor near the skylight. (Tr. 9/26/17, p. 143; Exhibit 12). The Department, however, failed to offer any evidence of how close the employees were to the skylight at the time of the inspection, or that the employees were not tied off when they were previously working near the skylight. Clearly, the Board erred in finding a skylight fall protection violation.

Overall, Mr. Portillo's testimony unequivocally establishes that they used anchor points to tie off, except for when they had to remove the anchor points to put down the new surface. (Tr. 9/26/17, p. 124). In every other moment that the employees would be exposed to any danger, they were tied off, including when they were working around the skylights. That is, they were not close to the edge of the roof when they were installing the anchor points. Nor was it reasonably predictable that the employees' duties would require them to go to the roof's edge when removing and reinstalling the safety anchors. The Board also failed to acknowledge that the Department offered no evidence to the contrary.

Therefore, given the above, Board's determination that the Department established employee exposure to a fall hazard from the roof's perimeter or the skylight is not supported by substantial evidence and, accordingly, Items 1-1a and 1-1b must be vacated.

E. The Board's determinations that employees were exposed to the blue ladder hazards are not supported by substantial evidence.

The Board's determinations that employees were exposed to the blue self-supporting ladder used in a partially closed position that did not extend at least three feet above the upper landing surface or secured at the top is not supported by substantial evidence because the Department failed to establish that any employees were exposed to the ladder violations. First, Item 2-1 involves an alleged violation of WAC 296-875-40050(1), which requires employers to ensure self-supporting ladders are not used as single ladders or in a partially closed position. Secondly, Item 2-2 involves an alleged violation of WAC 296-876-40030(2), which requires that ladders extend at least three feet above the upper landing surface or be secured at the top by a grasping device and placed in a way to avoid slippage. Both violations involve the blue ladder shown in Exhibits 7 and 8.

Here, Mr. Portillo's testimony clearly establishes that the employees used the 32-foot ladder on the west side, or the backside, of the house to access the upper portion of the roof; as well as, to come down from the upper portion of the roof when ordered to do so by CSHO Johnson. The blue ladder, shown in Exhibits 7 and 8, was never used, nor was it needed for access, as it was only at the inspection site for emergency purposes.

Significantly, CSHO Johnson could not see how the employees came down from the upper portion of the roof because a big bundle of roofing material obstructed his view. He only speculated that the employees used the blue ladder, even though he did not see the employees use the blue ladder.

However, via impeachment, CSHO Johnson previously admitted in a discovery deposition that he did see the employees come down the self-supporting ladder. CSHO Johnson asserted that the blue ladder was the only way the employees could access the upper roof, which is clearly contradicted by Mr. Portillo's testimony.

Nonetheless, the Board mistakenly determined that the blue ladder was the only ladder to access the upper level of the house, as Mr. Johnson did not observe any other way for the employees to access the upper roof, and he would have taken a photograph of another ladder had it been at the jobsite. Again, Mr. Johnson's belief is pure speculation because he did not walk all the way around the house, he did not go on the roof, and he could not see the top of the roof from his vantage point. The Board determined Mr. Johnson to be more credible, even though he offered conflicting, contradictory statement at trial compared to his discovery deposition. The Board determined he did not have any motivation to lie or be deceitful, but he clearly lied or was deceitful in his testimony. Simply put, the Board's determination is not supported by substantial evidence, and clearly contradicted by evidence in the record.

Given the above, The Board's determination that the Department established employee exposure to a ladder hazard is not supported by substantial evidence and, as a result, Items 2-1 and 2-2 must be vacated.

VI. CONCLUSION

The Board's Decision & Order must be reversed, and the serious violations must be vacated because the Board's determinations that the Employer failed to establish that its employees were not exempt from using fall protection during the installation and disassembly of their anchor points, and the Department established employee exposure to any of the serious violations is not supported by substantial evidence.

Respectfully submitted this 29th day of March 2019.

s/ Aaron K. Owada
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CERTIFICATE OF SERVICE

I certify that on March 29, 2019, I caused the original and copy of the **Employer's/Appellant's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division I and that I further served a true and correct copy of same, on:

(X) Court of Appeals, Division II Electronic Filing, Facsimile and U.S. Mail, Postage Prepaid to:

Counsel for Respondent/Washington State Department of Labor and Industries:

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DATED this 29th day of March 2019, in Lacey, Washington.

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