

FILED
Court of Appeals
Division II
State of Washington
5/29/2019 3:15 PM

NO. 53020-1-II

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

VALENTINE ROOFING, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

Valentine Roofing, Inc., endangered its employees by violating fall protection regulations. The Department of Labor & Industries' inspector saw three of Valentine's workers working on the roof of a house without proper fall protection. Asking this Court to reweigh the evidence, Valentine insists that no work was actually being performed at the jobsite and that its workers were merely reinstalling fall protection equipment at that time. But substantial evidence, including the inspector's eyewitness testimony corroborated by several photographs, shows otherwise, and the Board of Industrial Insurance Appeals and the superior court properly affirmed the WISHA citations the Department issued. This Court should affirm as well.

II. ISSUE

WAC 296-155-24611 requires the use of fall protection when workers work at a height. Although there is an exemption for the initial installation of a safety anchor or final removal after the project is completed, the Department's inspector saw Valentine's workers working on a roof without fall protection and while performing tasks other than the installation or final removal of a safety anchor. Does substantial evidence support the Board's finding that Valentine violated WAC 296-155-24611?

III. STATEMENT OF THE CASE

A. The Department's Inspector Observed Three Workers Installing Foam Insulation with Screw Guns on a Roof Without Fall Protection

In September 2016, Department safety compliance officer Allen Johnson saw three Valentine employees working on the upper roof of a house on Bainbridge Island. AR 214-15, 224, 273, 309, 452 (admitting in Request for Admission No. 14 that Valentine Roofing employees performed work activities at the worksite). The workers were installing a new roof. AR 313. The upper roof was flat and was more than 10 feet above the ground. AR 214-15, 223-24. Valentine does not contest that the upper roof was more than ten feet above the ground. AR 36 (FF 3). There was also a lower garage roof. AR 239. Johnson observed them installing foam insulation with screw guns. AR 224.

Johnson took photographs, documented his observations, and then asked the workers to come down. AR 217-18. Johnson then telephoned the Valentine office. AR 218-19. He walked around the back of the house and saw an extension ladder leading up to the lower garage roof and a blue self-supporting ladder leaning up from the lower garage roof to the upper roof. AR 247-48, 256-57. The blue ladder was in a closed position. AR 247-48. He also observed an unguarded skylight on the upper roof, with a

distance of over four feet from the skylight to the level below. AR 240, 244, 459.

Johnson took additional photographs of the skylight, the blue ladder, and a pile of roofing materials stacked on the lower garage roof next to the blue ladder. AR 214-15, 440-47, 456-61; App. 1 at 1-7. The blue ladder was not long enough to obtain a three-foot side rail extension above the landing surface and was not secured at the top. AR 251-52, 460. He observed that all three employees had access to edge of the upper roof, the unguarded skylight, and the unsecured ladder. AR 229, 238-40. He observed no way for the employees to descend from the upper roof to the garage roof unless they used the blue ladder, as there was no other ladder reaching to the upper roof. AR 256-57, 279.

Johnson did not see a guardrail system on the roof or anything else to prevent the workers from getting too close to the edge of the roof or the skylight. AR 229-31, 240-41. Valentine employee Jorge Alberto Portillo testified that there were two skylights on the upper roof. AR 310-12.

Although Johnson did not climb onto the roof, this was due to Department policies that prohibit their inspectors from putting themselves in dangerous situations. AR 221-22. Johnson measured the height of the upper roof to be thirteen feet, five inches in the front and fifteen feet, six inches in the back. AR 223-24. He estimated the rectangular skylight to be

three feet by four feet, at least eight feet above the interior floor, and incapable of holding up a 200 pound person with a safety factor of four (i.e., 800 pounds). AR 240-44.

B. Based on Unsafe Work Conditions, the Department Issued a Citation, and the Board Affirmed

Based on his observations and experience, Johnson concluded that all three workers were at risk and exposed to potentially severe bodily harm from falling off the roof, through the skylight, and from using the improperly deployed or secured blue ladder that was leaning between the two roof levels. AR 222-23, 231, 245-50.

The Department alleged that Valentine committed the following specific violations:

Item 1-1a: repeat serious violation of WAC 296-155-24611(1)(a) which requires that the appropriate fall protection system is provided, installed, and implemented according to regulation when employees are exposed to fall hazards of ten feet or more to the ground or lower level while engaged in roofing work on a low pitched roof.

Item 1-1b: repeat serious violation of WAC 296-155-24609(4)(d) which requires that the appropriate fall protection system is provided, installed, and implemented according to regulation when employees are exposed to fall hazards of four feet or more to the ground or lower level when on a working surface and are exposed to the danger of falling through an installed skylight that is not capable of sustaining the weight of a 200 pound person with a safety factor of 4. This rule requires standard guardrails on all exposed sides of the skylight in accordance with WAC 296-155-24615(2) or covering the

skylight in accordance with WAC 296-155-24615(3). Alternatively, this rule allows use of personal fall arrest equipment as an equivalent means of fall protection when worn by all employees exposed to the fall hazard.

Item 2-1: serious violation of WAC 296-876-40050(1) which requires employers to ensure self-supporting ladders are not used as single ladders or in the partially closed position.

Item 2-2: serious violation of WAC 296-876-40030(2) which regulates getting on and off ladders at upper levels that are not long enough to obtain a three-foot side rail extension above the landing surface, requiring (1) such ladders be secured at the top to a rigid support that will not deflect; (2) a grasping device to assist in mounting and dismounting the ladder; and (3) confirmation that the ladder deflection under a load would not, by itself, cause it to slip off its support.

AR 29.

The Department grouped the two fall protection violations together, both of which were repeat serious violations, and assessed a penalty of \$21,000. AR 32, 145. The Department also classified the two ladder violations as serious and assessed penalties of \$4,200 for each item. AR 144, 146. The Department assessed a total penalty of \$29,400.

Following a hearing, the Board affirmed all of the Department's citations and upheld the assessed penalty. AR 6, 25-40. Among its findings, the Board found:

4. Under Citation Item 1-1a, on September 14, 2016, three employees of Valentine Roofing, Inc., were performing roofing activities on a flat roof more than 10

feet above the ground and were not tied into or otherwise using an appropriate fall protection system. As a result, all of these employees were exposed to the hazard of falling more than 10 feet from a roof to the ground.

5. A substantial probability existed that if the Valentine Roofing, Inc., employees exposed to the hazard described in Finding of Fact No. 4 were injured, their injury would result in serious physical harm, including death or permanent disability.

6. Under Citation Item 1-1b, on September 14, 2016, employees of Valentine Roofing, Inc., were performing roofing activities on a flat roof more than 10 feet above the ground and more than 4 feet above the next lower level roof or interior floor level and were not tied into or otherwise using an appropriate fall protection system. As a result, the employees were exposed to the hazard of falling through a skylight to the interior of the home or down to the lower level of the garage roof.

7. A substantial probability existed that if the Valentine Roofing, Inc., employees exposed to the hazard described in Finding of Fact No. 5 were injured, their injury would result in serious physical harm, including death or permanent disability,

8. No credible evidence supports application of an exemption to the regulatory requirements of requiring installation and implementation of an appropriate fall protection system.

....

17. Under Item 2-1, on September 14, 2016, employees of Valentine Roofing, Inc., used a self-supporting ladder as a single ladder to provide access from the lower roof to the upper roof.

18. A substantial probability existed that if the Valentine Roofing, Inc., employees exposed to the hazard

described in Finding of Fact No. 17 were injured, the injury would result in serious physical harm, including death or permanent disability.

....

25. Under Item 2-2, on September 14, 2016, employees of Valentine Roofing, Inc., made use of a ladder to access an upper level that was not long enough to extend at least three feet above the upper level and further failed to secure the ladder at its top, provide any grasping device, or make certain that the ladder's deflection under a load would not cause it to slip.

26. A substantial probability existed that if the Valentine Roofing, Inc., employees exposed to the hazard described in Finding of Fact No. 25 were injured, the injury would result in serious physical harm, including death or permanent disability.

AR 36-38.

Valentine appealed to superior court, and the superior court affirmed the Board's decision. CP 2-3, 93-95. Valentine then appealed to this Court. CP 97-98.

IV. STANDARD OF REVIEW

In an appeal under the Washington Industrial Safety and Health Act (WISHA), the court directly reviews the Board's decision based on the record before the agency. RCW 49.17.150(1); *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014); *J.E. Dunn Northwest, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007); *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*,

129 Wn. App. 356, 363, 119 P.3d 366 (2005). Valentine misstates the standard of review by arguing that the Board decision is “contrary to the substantial weight of the record.” Opening Brief of Appellant (AB) 2. The Board’s findings of fact are conclusive when substantial evidence supports them when viewed in light of the whole record. RCW 49.17.150(1); *Coluccio*, 181 Wn. App. at 35. Evidence is “substantial” when it is enough to persuade a fair-minded person of the truth of a declared premise. *Coluccio*, 181 Wn. App. at 35. Under substantial evidence review, appellate courts do not reweigh the evidence. *Potelco, Inc. v. Dep’t of Labor & Indus.*, 194 Wn. App. 428, 434, 377 P.3d 251 (2016). Instead, courts view the evidence in the light most favorable to the prevailing party at the Board—here, the Department. *Id.*

Washington courts liberally construe WISHA to achieve its stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Coluccio*, 181 Wn. App. at 35-36. Courts give “great weight” to the Department’s interpretation of statutes and regulations within its areas of special expertise. *Coluccio*, 181 Wn. App. at 36; *Dep’t of Labor & Indus. v. Slauch*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013); *accord Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). The courts review questions of

statutory interpretation de novo. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 910, 83 P.3d 1012 (2003).

Valentine assigns errors to the Board's Findings of Fact 4-32 and Conclusions of Law 2-6 and 8. AB 2. Valentine contends that the Board lacked substantial evidence and that the Superior Court erred in affirming the Board. AB 2, 8. Valentine did not assign error to Findings of Fact 1-3, 33, or 34, nor to Conclusions of Law 1 or 7, which makes the relevant findings verities on appeal. *See AB 2; Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 723, 308 P.3d 686 (2013) (stating that a party's failure to assign error to the findings of fact renders them verities on appeal.).

V. ARGUMENT

The Department's inspector saw Valentine's workers working on a roof without appropriate fall protection. To demonstrate a prima facie serious violation of a safety standard under WISHA, the Department must prove 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*, 119 Wn. App. at 914.

Valentine only contests whether the cited standard was violated and whether there was employee exposure. AB 1-19. As the Department will explain below, there is substantial evidence supporting the Board's decision that these elements were met. Substantial evidence thus supports the Board's finding that Valentine committed WISHA violations for its failure to ensure the safety of its employees.

A. Violation 1-1a: Valentine Violated WAC 296-155-24611(1)(a) by Failing to Ensure That a Fall Protection System Was Implemented for Employees on the Upper Roof

Despite the Board's rejection of its theory on the facts, Valentine tries to avoid citation for a fall protection violation by arguing it was installing an anchor point. The Board found that Valentine did not establish that it qualified for the anchor installation exemption: "No credible evidence supports application of an exemption to the regulatory requirements of requiring installation and implementation of an appropriate fall protection system." AR 37 (FF 8).

Substantial evidence supports this and the Board's finding that Valentine did not ensure that it had provided, installed, and implemented appropriate fall protection while its three employees were on a roof with a fall hazard of 10 feet or more to the ground. AR 31-32, 36-37 (FF 4, 5). The Department's inspector, Johnson, observed three Valentine workers up on a flat roof, performing roofing activities while not tied off or using

appropriate fall protection. AR 214-15. Valentine does not contest that all three of its employees on the roof were not connected to fall protection when Johnson observed them. AB 3, 5. Valentine contends that the only reason they were not tied off when Johnson arrived was that they were merely reinstalling anchor points and not performing any other work on the roof, and they argue that this is an exempt activity. AB 3, 8. This theory is not supported by the law or the facts.

1. The exemption only applies to the initial installation or removal at the end of the project, and neither circumstance is present here

Valentine's argument about anchor points is contrary to the plain language of the exemption to the rule. The fall protection rules allow two limited exemptions from the requirement to ensure that employees use fall protection: fall protection does not have to be used "[d]uring *initial* installment 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.*" WAC 296-155-24605(4)(a) (emphasis added).

Valentine has the burden of proving that this exemption to the rule applies. *Asplundh Tree Expert Co. v. Dep't of Labor & Indus.*, 145 Wn. App. 52, 60, 185 P.3d 646 (2008).

There is no exception for reinstalling an anchor, so during this time period, an employer would have to have the workers tied off to another

anchor, not involved in the reinstallation process, or some other method of fall protection.

There is no evidence that Valentine's employees were doing the "initial" installment of the anchor at the time the inspector observed them working without fall protection. Rather, even under Valentine's version of the facts, the anchor had previously been installed and it was being removed so that it could be reinstalled. AR 318, 344. Portillo also testified that all the PVC for the roof, except for the fascia around the perimeter, had been installed. AR 319. Johnson observed that the Valentine employees were installing foam insulation on the roof. AR 215, 224. As such, there was no evidence that the conduct was the "initial" installment of the anchor and "prior to engaging in any work activity," both of which would be required for the first exemption to apply. *See* WAC 296-155-24605(4)(a).

Additionally, there was also no evidence that Valentine employees were disassembling the anchor "after the work had been completed," as WAC 296-155-24605(4)(a) alternatively requires for the exemption to apply. Even according to Portillo's testimony, Valentine's employees were removing the anchor "to put the new PVC membrane on," and Valentine still needed to install the fascia. AR 318-19. Thus, not only was it not the "initial" installment of the anchor, the work at the jobsite had not been

completed. WAC 296-155-24605(4)(a). Another anchor remained in place during this time. AR 339.

Substantial evidence supports the Board's finding that Valentine did not meet its burden of establishing that either the first or second exemption applies. *See Asplundh Tree*, 145 Wn. App. at 60.

2. Applying the exemption would be contrary to WISHA's remedial purposes

Applying the exemption in this situation would not only be contrary the plain language of the rule, it would also endanger workers and lead to absurd results. Employers install roof anchors to be a secure attachment for safety lines. The basis for this exemption is that a worker cannot tie off to the first anchor for the brief moments he or she is installing it. Similarly, a worker cannot tie off to the last anchor for the brief moment he or she is removing it before descending from a roof. These exemptions are not intended to give employers carte blanche to expose employees to fall hazards simply because one or more other employees happen to be installing or removing a roof anchor. Here, the anchor that Portillo alleged to have been removing was neither the first anchor installed nor the last anchor removed. AR 339. In this circumstance, it was Valentine's duty to provide some other source of fall protection. *See* WAC 296-155-24601 (employers must provide and enforce use of fall

protection); WAC 296-155-24607 (fall protection required regardless of height). For example, it could have installed an additional anchor while tied off to the first one, or used some other method of fall protection.

Applying the exemption here would also be contrary to the requirement that WISHA rules be liberally interpreted to protect workers. WISHA is remedial legislation designed to protect the health and safety of all Washington workers. RCW 49.17.010. WISHA statutes and regulations are liberally construed to achieve this purpose. *Coluccio*, 181 Wn. App. at 36. Valentine's reasoning would allow employers to claim an exemption from fall protection rules whenever one of the anchors on a roof is being reinstalled. This places a greater burden on the Department to prove that violators were not reinstalling an anchor and makes it easier for violators to contest citations. But even if an anchor is being reinstalled, the hazard and exposure of a fall from a height do not disappear. Interpreting WAC 296-155-24605(4)(a)'s exception broadly serves only to expand the risk to employees. Allowing Valentine to avoid protecting its employees from these fall hazards would expose the employees to serious injury and death from falls from roofs.

In addition to liberally interpreting WISHA rules to protect workers, courts accord substantial weight to the Department's interpretation of those rules. *Coluccio*, 181 Wn. App. at 36. A court will

uphold the Department's interpretation of a WISHA regulation if it reflects a plausible construction of the language and is not contrary to legislative intent. *Id.*; *Laser Underground & Earthworks, Inc. v. Dep't of Labor & Indus.*, 132 Wn. App. 274, 278, 153 P.3d 197 (2006). Here, while the rule's plain language supports the violation, if there is any ambiguity concerning the meaning of the exemptions, then the Court should uphold the Department's interpretation that the exemption does not apply here.

3. The Board found Valentine's version of events not credible

The evidence established that three Valentine employees performed work on the upper roof without using any form of fall protection. AR 214-15, 222-23, 229-31, 238-39, 442-47, 453. Johnson observed that the Valentine employees were installing foam insulation on the roof. AR 215, 224.

Though Johnson testified that he saw the workers working on the roof, Valentine incorrectly argues that its employees were merely removing and reinstalling a roof anchor and that, therefore, it is exempt from having to comply with the fall protection rules. AR 214-15; AB 8. This argument asks this Court to reweigh the evidence, which is contrary to the role of this Court on review of a Board order. *Potelco*, 194 Wn. App. at 434. Since substantial evidence supports the inspector's testimony, this Court

must accept that testimony as true regardless of whether Valentine has a different story regarding what happened. Under the substantial evidence standard of review, the court will not reweigh the evidence. *Id.* at 434. Rather, the Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Id.*; *Coluccio*, 181 Wn. App. at 35. Credibility determinations are solely for the fact-finder and the court does not disturb them on appeal. *Zavala v. Twin City Foods*, 185 Wn. App. 838, 869, 343 P.3d 761 (2015).

Ignoring that on the substantial evidence standard of review only evidence that supports the Board's finding is considered, Valentine relies on the testimony of crew leader Jorge Portillo to say an anchor point reinstallation was the only work going on. AB 9-10. But the Board adopted the industrial appeals judge's explicit determination that Portillo's testimony regarding what the workers were doing at the time was not credible. AR 6, 31-32, 34, 37 (FF 8). "The testimony provided by Mr. Portillo was not credible in this regard, and when considered in combination with his other testimony regarding the blue self-supporting ladder (discussed further below), I find his version of events wholly implausible." AR 31-32. The Board also adopted the industrial appeals judge's determination that although it was "possible that Mr. Johnson arrived just at the moment the crew was removing or replacing anchor

bolts from the roof surface, I do not find this probable.” AR 6, 31. The Board weighed the witnesses’ interests in providing their testimony: “Mr. Johnson has no reason to lie or be deceitful about this. Mr. Portillo, on the other hand, has clear motivation to testify in the manner he did at hearing.” AR 34. The Court of Appeals has stated that the determination of “whether self-serving testimony should be discounted is a credibility issue for the trier of fact, and we will not review it.” *Watson v. Dep’t of Labor & Indus.*, 133 Wn. App. 903, 910, 138 P.3d 177 (2006). A fact-finder may disbelieve a witness’s self-serving testimony about a fact even though no one presents contrary testimony. *See Ramos v. Dep’t of Labor & Indus.*, 191 Wn. App. 36, 40-41, 361 P.3d 165 (2015). The fact-finder may determine credibility by review of the written record. *Zavala*, 185 Wn. App. at 869.

The Board determined that Portillo was not credible given the amount of time Johnson observed the employees working not tied off and the fact that Johnson saw no evidence of tie-off lines or ropes. AR 31-32, 229. Under Valentine’s theory, the workers were reinstalling an anchor. But Portillo acknowledged that he was doing work other than reinstalling an anchor at the time the Department inspector observed the violations, and this is shown in Johnson’s photographs. AR 348, 440-47, 456-58.

But even assuming Portillo was reinstalling the anchor point, Valentine's argument has no merit because not all the workers were in the same place. AR 225. There was distance between the workers while they were working, which shows that they were not merely reinstalling the anchor. AR 225. The photos also showed that the three Valentine employees were not all working on the anchor. AR 440-47, 456-58. Another factor was that photos showed additional roofing materials stacked on the lower roof and at least one large piece of rigid insulation leaning up against the upper roof, showing a job that is still in progress. AR 31, 461.

B. Violation 1-1b: Substantial Evidence Supports the Board's Finding That Valentine Violated WAC 296-155-24609(4)(d) by Failing to Guard a Skylight on the Upper Roof

The Department cited Valentine under Item 1-1b for violating WAC 296-155-24609(4)(d), due to Valentine's failure to guard the skylight. Valentine's argument on the application of this rule is the same as above concerning Item 1-1a—that it was merely doing an installation at the time of the inspection—and fails for the same reasons: substantial evidence shows its workers were working on the roof and were *not* merely reinstalling an anchor at the time of the inspection. And they were neither performing an "initial" installation or a removal of the anchors after all the work at the jobsite had been completed.

The unprotected skylight falls under WAC 296-155-24609 in numerous ways. The general applicability of the rule is contained in section (1), which states that it applies to fall hazards of “4 feet or more” when employees are working on a “walking working surface” or where there is a floor opening. WAC 296-155-24609(1); 296-155-24603. Here, both of those conditions applied. The rule also expressly applies to covered skylights that are “not capable of sustaining the weight of a 200 pound person with a safety factor of 4,” which was the type of skylight here. WAC 296-155-24609(4)(d); AR 242-44. Valentine does not dispute the Board’s finding that the upper roof had two skylights that were approximately eight feet above the interior floor level. AR 36 (FF 3).

Valentine makes the same exemption argument that it made for Item 1-1a. And for the same reasons discussed concerning Item 1-1a, its argument is incorrect: substantial evidence supports the Board’s findings that Valentine did not meet its burden of proof for establishing that the exception in WAC 296-155-24605(4)(a) applies here. Again, as determined by the Board, Valentine’s evidence concerning its conduct with the anchors was implausible and not credible. And Valentine provided no evidence that when Johnson arrived at the work site, Valentine was doing its initial installment of the anchor (prior to engaging

in any work activity) or that it was performing disassembly of the anchor after all of the work had been completed. *See* WAC 296-155-24605(4)(a).

C. Violation 2-1: Substantial Evidence Supports the Board’s Finding That Valentine Violated WAC 296-876-40050(1) by Not Making Sure That the Self-Supporting Ladder Was Not Used in a Closed Position

Under WAC 296-876-40050(1), the rule cited in Item 2-1, an employer “must make sure self-supporting ladders are not used as single ladders or in the partially closed position.” WAC 296-876-40050(1). The evidence established that Valentine set up a self-supporting ladder in the closed position going from the garage roof to the upper roof. AR 247-48, 333, 460. And this undisputed evidence also establishes that the ladder was improperly set up as a single ladder. A single ladder is defined, in pertinent part, as a “nonself-supporting portable ladder, nonadjustable in length, consisting of one section.” WAC 296-876-099.

The Board found that Valentine employees “used a self-supporting ladder as a single ladder to provide access from the lower roof to the upper roof.” AR 38 (FF 17). Substantial evidence supports that finding of fact.

Johnson testified that the ladder used was a “self-supporting ladder . . . in a closed position, leaned up against the wall from the lower roof to the upper roof” and that there was no other way that employees could have accessed the upper roof other than using the self-supporting ladder in the

closed position. AR 247-48. Valentine did not dispute that the ladder was not compliant with the safety regulation, and Portillo admitted that it would have been “illegal” for them to actually use it. AR 333. Rather, Valentine argues that its employees did not use the ladder, which was just for “emergency purposes,” and so were not exposed to the ladder hazard. AB 17-18; AR 333. Again, Valentine improperly asks this Court to reweigh the evidence.

The Board heard the testimony of Johnson and Portillo concerning Valentine’s use of the ladder: “Upon consideration of all available evidence, I find Mr. Johnson’s version of events to be more credible and more likely to have occurred.” AR 34. The Board determined that Portillo was not credible, “particularly on the rationale offered for bringing, placing, and then not using the blue ladder.” AR 34. The Board concluded that Johnson correctly observed that the only way down from the upper roof was by using the improperly set up self-supporting ladder to climb down to the garage roof and then to descend to the ground. AR 34. As the trier of fact, the Board properly made its determination concerning the credibility of witnesses. Valentine fails to establish otherwise.

As described above, credibility determinations are solely for the fact-finder, and the courts do not disturb them on appeal. *Zavala*, 185 Wn. App. at 869. Also, courts do not review the trier of fact’s determination to

discount self-serving testimony. *Watson*, 133 Wn. at 910. This includes testimony concerning a fact where there is no contrary testimony. *Ramos*, 191 Wn. App. at 40-41. Here, the Board expressly stated that Portillo's testimony concerning the use of the ladder was not credible. AR 34. This Court should not review that determination. *Zavala*, 185 Wn. App. at 869.

Furthermore, even leaving aside that Valentine's evidence on the use of the ladder was not credible, the Department presented evidence that supported the finding that Valentine employees improperly used the ladder. A party may establish any fact by circumstantial evidence. *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). Courts do not differentiate between circumstantial evidence and direct evidence. *Rogers Potato Servs., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Proof of the fact to be established may be by direct or circumstantial evidence, and a finding does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts. *See State Farm Mut. Ins. Co. v. Padilla.*, 14 Wn. App. 337, 339, 540 P.2d 1395 (1975).

Here, Johnson testified that the noncompliant ladder was the only ladder he observed that allowed access to the upper roof, and that he would have seen any other ladder that allowed such access. AR 218, 248, 252-53, 257, 279. He observed that the noncompliant ladder was adjacent

to a pile of roofing supplies. *See* AR 217-18, 247. Johnson has 25 years of experience as a construction superintendent running job sites, and additional training with the Department. AR 212-13. As such, there is virtually no chance he would have missed a ladder that went all the way up to the roof. He testified that he walked from the front of the house around the garage, and came around the back of the house without seeing another ladder that provided access to the upper roof. AR 247.

When Johnson signaled the employees to come down from the roof, they used the noncompliant ladder. AR 218. While he could not see that ladder while the employees were descending, he observed that they first descended to the garage roof, which was the location of the noncompliant ladder. AR 218, 283-84. If there had been a separate ladder that was compliant with the rules, the employees would have used it, particularly since crew lead Portillo testified he believed the ladder to be “illegal.” AR 333. Moreover, as the Board concluded, “If there was any other ladder present on the ground at the job site that day, Mr. Johnson would have noticed it and taken a photograph.” AR 34. Also, the supplies for the upper roof were right next to the noncompliant ladder. AR 346-47. This is substantial evidence that the employees actually climbed the noncompliant ladder, and thus violated the rule.

While substantial evidence supports a determination that Valentine employees used the improperly set up ladder, it was not necessary for the Department to prove that they did so to show a violation of the rule. Under the plain language of the rule, just setting it up in that improper way exposed employees to the hazard. Portillo testified that the ladder was set up that way “only for emergencies in case of need for access.” AR 333. While his testimony was found not credible, even if his testimony had been believed, the conduct would have exposed employees to the hazard. Setting up the ladder that way to use in case of an emergency is essentially the opposite of the rule’s requirement that employers “make sure” self-supporting ladders are *not* used in the closed position. WAC 296-876-40050(1). It defies logic to argue that setting up an unsafe ladder for emergency use is safer than using it in a non-emergency. In any event, substantial evidence supported the finding that Valentine employees used the improperly set up ladder.

D. Violation 2-2: Substantial Evidence Supports the Finding That Valentine Violated WAC 296-876-40030(2) by Not Making Sure That It Secured the Ladders Its Workers Used to Access the Upper Roof

Under WAC 296-876-40030(2), the rule cited in Item 2-2, if a ladder used to access an upper level is not long enough to obtain a three-foot side rail extension above the landing surface, then the employer must

secure the ladder at the top to a rigid support and provide a grasping device to assist in mounting and dismounting the ladder. Here, the evidence established that Valentine had a self-supporting ladder that could not extend at least three feet above the landing surface of the upper roof and that it was not secured. AR 252, 460. Valentine set up the ladder to provide access to the upper roof. AR 143, 460, 468.

As with violation Item 2-1, the Board made the factual finding that Valentine employees used the unsecured ladder: The employees “made use of a ladder to access an upper level that was not long enough to extend at least three feet above the upper level and further failed to secure the ladder at its top, provide any grasping device, or make certain that the ladder’s deflection under a load would not cause it to slip.” AR 38 (FF 25). Mr. Portillo admitted to bringing a blue self-supporting ladder to the work site, and that it was the ladder positioned on the garage roof. AR 311, 333. He even acknowledged that he knew it would be illegal for him or any of his crew to use the ladder as it was positioned on the roof. AR 333. The substantial evidence supporting that finding is the same as discussed above concerning Item 2-1.

As with Item 2-1, the Department did not need to prove that Valentine employees actually climbed up or down the ladder to establish that a violation occurred. The mere fact that an unsecured ladder was

present at the jobsite was enough to put the workers in the zone of danger, which is enough to establish that a violation occurred. WAC 296-876-40050(1); AR 38 (FF 17, 25). But in any event, the Board found that Valentine employees did use it, and substantial evidence supported that finding. AR 38 (FF 17, 25).

E. Substantial Evidence Supports the Board Findings That Valentine Employees Were Exposed to the Violative Conditions

As substantial evidence supports the Board's findings that the Department has established that the cited rules were applicable and violated, the third element for establishing a serious violation is whether employees were exposed to the violative condition. Substantial evidence supports the Board's finding that Valentine employees were exposed to the violative conditions. AR 36-38 (FF 4, 6, 17, 25).

The courts have consistently held that to establish exposure to a violative condition, the Department may show actual exposure or may show access exposure. With access exposure, an employer need only show that the area with the violative condition was accessible to the employees. *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988); *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 5-6, 146 P.3d 1212 (2006). "To determine whether a worker is exposed to a hazard in violation of WISHA, the Department must show

that the *[worker]* has access to the violative conditions.” *Mid Mountain*, 136 Wn. App. at 5 (emphasis in original). The Court of Appeals went on to state that access is shown where there is a “reasonable predictability that, in the course of [the workers’] duties, employees will be, are, or have been in the zone of danger.” *Mid Mountain*, 136 Wn. App. at 5 (quoting *Adkins*, 100 Wn.2d at 147) (alteration and emphasis in original). Here, substantial evidence supports the Board’s findings of exposure.

Concerning Item 1-1a, all three Valentine employees were working on the upper roof without fall protection and had access to the unguarded edge of the roof. There was nothing that prevented the employees from walking to any edge of the roof. AR 233, 241, 440-47, 456-47. Johnson estimated that the employees he observed were approximately five feet from the edge of the roof. AR 225. The photographs support that the employees were close to the edge of the roof. AR 440-47, 456-58. Valentine disputes the inspector’s visual estimate (AB 13-14), but the Board rejected Valentine’s arguments that its workers were far enough away from roof edges so as not to be in danger while not tied off. AR 32. As Valentine employees were installing a new roof, it was not only reasonably predictable that they would be working near the edge of the roof, it was a near certainty. AR 313. As Portillo testified, they would be installing fascia around the perimeter. AR 319.

In *Mid Mountain*, the Department cited the employer for not properly protecting workers inside an excavation even though the worker was not in the section of the excavation covered by the cited regulation:

Although [the employee] was not actually in the zone of danger, he was working within close proximity, and it is reasonably likely that he could have walked the short distance and been within the zone of danger. There was nothing to prevent entering the zone of danger. Thus, *Mid Mountain* violated the WISHA safety standards.

Mid Mountain, 136 Wn. App. at 7. Here, because the employees had access to the unguarded roof edges, the Department does not have to establish the distance to the edges. *See Mid Mountain*, 136 Wn. App. at 5; *see also* AR 32, 225, 229, 231.

Valentine again improperly asks this Court to reweigh the evidence on the issue of employee exposure to the lack of fall protection on the roof. *See, e.g.*, AB 8-10. Valentine cites to Portillo's testimony that the employees were 15 to 16 feet away from the edge of the roof at the time Johnson observed them. AB 13. But the Board found Portillo's version of events "wholly implausible." AR 32.

Instead, the Board found that Valentine employees were exposed to the hazard of falling from the roof, and that finding was supported by the substantial evidence discussed above. AR 36-37 (FF 4). Johnson saw Valentine's three employees on the roof on September 14, 2016, and saw

that they were not tied off. AR 214-15, 218. He watched long enough to take pictures of them performing roofing activities with screw guns and long screws in their hands. AR 217-18, 224-25, 345. His pictures show additional roofing materials stacked on the lower roof and at least one large piece of rigid insulation leaning up against the upper roof, suggesting a job that is still in progress. AR 218, 224, 247, 461. Valentine employees had already installed part of the roof but had not completed their work; they still had to finish the perimeter of the roof. AR 319. Johnson saw no evidence of tie-off lines or ropes. AR 226, 229, 238-39. And the Board, weighing the evidence and credibility of the witnesses, did not find Portillo's account credible or probable that Johnson arrived just at the moment the crew was removing or replacing anchor bolts from the roof surface. AR 31-32.

Valentine's argument on exposure is based almost exclusively on federal OSHA cases. AB 12, 15. But because there is controlling precedent for employee exposure in Washington case law, the Board does not need to consider the federal cases on this issue. *See Express Constr. Co. v. Dep't of Labor & Indus.*, 151 Wn. App. 589, 599 n.8, 215 P.3d 951 (2009). If federal administrative cases are considered for guidance, then the analysis must include that the Department is required to adopt safety standards at least as effective as those adopted under the federal

Occupational Safety and Health Act. RCW 49.17.050(2); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013); see 29 U.S.C. § 667(c)(2). This means Washington may have stricter standards. *Afoa*, 176 Wn.2d at 470. The Washington standard is that employee exposure is established when the employees have “access to the violative conditions.” *Adkins*, 110 Wn.2d at 147; *Mid Mountain*, 136 Wn. App. at 5.

In any event, the federal OSHA cases discussed by Valentine also use the reasonable predictability analysis. The OSHA decisions are fact specific, and the cases cited by Valentine are factually distinguishable from the present case. None of the cases that Valentine cites provide for a different outcome here because they involve fact-finders weighing different facts.¹

For these same reasons, the Board’s finding that Valentine employees were exposed to the unguarded skylight is supported by substantial evidence, and the Department does not have to establish how far the employees were from the skylight to establish employee exposure for Item 1-1b. AR 37 (FF 6). Nothing prevented the employees from

¹ See *Tricon Indus. Inc.*, 24 BNA OSHC 1427 (No. 11-1877, 2012) (weighing evidence); *Fastrack Erectors*, 21 BNA OSHC 1109 (No. 04-0780, 2004) (same); *The Fishel Co.*, 18 BNA OSHC 1530 (No. 97-102, 1998) (same); *Fabricated Metal Prods.*, 18 BNA OSHC 1072 (No. 93-1853, 1997) (same); *Kokosing Constr. Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996) (same); *RGM Constr. Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995) (same); *Rockwell Int’l. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1995) (same).

walking to the unguarded skylight. AR 240-41. As such, the employees were exposed to that violative condition. *See Mid Mountain*, 136 Wn. App. at 5.

Similarly, there is substantial evidence supporting that all three employees were exposed to the violative condition of the improperly set up ladder. As discussed above, the Board found that Valentine employees used the ladder to access the upper roof, and that finding was supported by substantial evidence. AR 38 (FF 25). Johnson testified that he did not observe any other ladders that provided access to the upper roof and that he would have seen any other ladder that allowed such access. AR 218, 248, 252-53, 257, 279. As the employees used the improperly set up ladder, they were exposed to that violative condition. *See* AR 283.

And even leaving aside that the courts do not reweigh the Board's findings and thus this Court should not revisit whether Valentine's employees used the ladder, there was still a violation here even if the workers had not actually climbed up or down the ladder. The mere fact that the ladder was at the worksite and that there was nothing preventing the employees from using it is enough to put workers in the zone of danger. AR 249. Because the employees had access to the ladder, exposure to the violative condition has been established. *Mid Mountain*, 136 Wn. App. at 5. This would be true even if there had been an

additional, compliant ladder to the upper roof because the employees still had access to the noncompliant ladder. And indeed, Valentine does not dispute that the employees had access to the ladder, which underscores that this violation put the workers in the zone of danger.

VI. CONCLUSION

Valentine has repeatedly violated safety regulations. Substantial evidence shows that Valentine's employees were working on a roof without proper fall protection, and that they were not merely installing or removing an anchor. Substantial evidence thus supports the Board's findings of fact related to all of the assessed violations. The conclusions of law properly follow from those findings. For these reasons, the violations and penalties should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of May, 2019.

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APPENDIX





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Board of Industrial Insurance Appeals
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 Docket No. 17 W 0012
 Exhibit No. 3
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 In re: VALENTINE
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No. 53020-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VALENTINE ROOFING, INC.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

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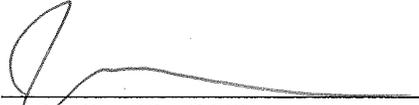
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DATED this 29th day of May, 2019

A handwritten signature in black ink, appearing to read 'JESSICA SPARKS', written over a horizontal line.

JESSICA SPARKS
Legal Assistant

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Superior Court Case Number: 18-2-00879-6

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