

FILED
Court of Appeals
Division II
State of Washington
6/7/2019 8:45 AM

NO. 53180-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OSTROM MUSHROOM FARM COMPANY,

Respondent,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Appellant.

BRIEF OF APPELLANT,
DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA #29737
Office Id. #91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR.....2

 1. The Department previously cited Ostrom under WISHA in 2014 for failing to provide adequate emergency eyewash stations in areas where its workers were exposed to Verticide. The Department inspected Ostrom again in 2016 and found that Ostrom mixed pure Verticide with water but did not have an eyewash station within 50 feet of any mixing stations. Does substantial evidence show that Ostrom failed to abate the hazard?2

 2. WAC 296-900-14020 authorizes the Department to assess a penalty based on a failure to abate a hazard by multiplying the base penalty amount of the violation by the number of days that the employer did not abate the violation. WAC 296-900-14010 directs the Department to calculate a penalty amount based on the severity and the probability of harm. The Department assessed a penalty based on those factors and Ostrom failed to show that it applied them incorrectly. Should the penalty have been affirmed?.....3

IV. STATEMENT OF THE CASE3

 A. Ostrom Has Used Verticide—a Corrosive Chemical—at Its Jobsite for at Least 25 Years3

 B. The Department Cited Ostrom in 2014 for Failing To Provide Eyewash Stations Within 50 Feet of All Areas Where Its Workers Are Exposed To Corrosive Chemicals5

C.	The Department Inspected Ostrom in 2016 and Found That It Continued To Use Verticide but Had Not Installed Eyewash Stations	6
V.	STANDARD OF REVIEW.....	10
VI.	ARGUMENT	12
A.	Ostrom Failed To Abate the Hazard Because As of 2016 It Had Still Failed To Provide Adequate Emergency Eyewash Stations	12
1.	The first element of a serious violation is met because the parties agree that WAC 296-307-03930 applies.....	14
2.	Substantial evidence establishes that Ostrom did not have adequate emergency eyewash stations at its facility at the time of the 2016 inspection	15
3.	Ostrom’s employees mixed concentrated Verticide and were thus exposed to that hazard	22
4.	There is substantial evidence that Ostrom had both actual and constructive knowledge of the violative working conditions	24
5.	There is substantial evidence that serious physical harm could result from the violative condition	26
B.	The Department Correctly Issued Violation 1-1 From This Citation as a Failure To Abate Because Ostrom Had Violated Eyewash Laws in 2014, Never Abated the Hazard, and Was Again Found in Violation During This Inspection.....	26
C.	The \$30,000 Penalty for Violation 1-1 Is Correct Because the Department’s Assessed Penalty Is Reasonable and Supported by the Law	28
VII.	CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Co. of Am.</i> , 110 Wn.2d 128, 750 P.2d 1257, 1268, clarified on denial of reconsideration, 756 P.2d 142 (1988).....	23
<i>BD Roofing, Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 98, 161 P.3d 387 (2007).....	25
<i>Dep't of Labor & Indus. v. Slauch</i> , 177 Wn. App. 439, 312 P.3d 676 (2013).....	11
<i>Erection Co. Inc. v. Dep't of Labor & Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085, 1088 (2011).....	24, 25
<i>Frank Coluccio Const. Co. v. Dep't of Labor & Indus.</i> , 181 Wn. App. 25, 329 P.3d 91 (2014).....	2, 10, 11, 19, 20
<i>In re Gen'l Sec. Servs. Corp.</i> , No. 96 W376, 1998 WL 960837, *12 (Wash. Bd. Indus. Ins. App. Dec. 15, 1998).....	24
<i>J.E. Dunn Northwest, Inc. v. Dep't of Labor & Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007).....	11
<i>Legacy Roofing, Inc. v. Dep't of Labor & Indus.</i> , 129 Wn. App. 356, 119 P.3d 366 (2005).....	11
<i>Mowat Const. Co. v. Dep't of Labor & Indus.</i> , 148 Wn. App. 920, 201 P.3d 407, 409 (2009).....	15
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	11
<i>Potelco, Inc. v. Dep't of Labor & Indus.</i> , 194 Wn. App. 428, 377 P.3d 251, review denied, 186 Wn.2d 1024, 383 P.3d 1014 (2016).....	11, 19

<i>Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.</i> , 7 Wn. App. 2d 10, 432 P.3d 404 (2019).....	25
<i>SuperValu, Inc. v. Dep't of Labor & Indus.</i> , 158 Wn.2d 422, 144 P.3d 1160 (2006).....	13, 26
<i>Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2003).....	12

Statutes

RCW 49.17.150(1).....	10, 11, 15
RCW 49.17.180(4).....	27, 28
RCW 49.17.180(6).....	24, 25

Regulations

WAC 296-307-03930.....	2, 7, 13, 14, 15, 16, 17, 26
WAC 296-900-14010.....	3, 28, 29
WAC 296-900-14015.....	29
WAC 296-900-14020.....	3, 27, 29
WAC 296-900-180.....	27, 28

I. INTRODUCTION

Employers cannot repeatedly expose workers to the same harms that the workplace safety enforcement agency, the Department of Labor and Industries, directed them to stop. Two years after the Department cited Ostrom in 2014 for exposing its employees to Verticide—a highly corrosive chemical—without providing adequate emergency eyewash stations, Ostrom had still failed to install emergency eyewash stations and thus had failed to abate that hazard. Ostrom purchased eyewash station kits in 2014 after the first citation, and represented to the Department that it would install them. But when a Washington Industrial Safety and Health Act (WISHA) inspector visited Ostrom again in May 2016, Ostrom’s managers told him that Ostrom had continued to use Verticide but had not installed the eyewash stations, and had instead stored the kits in a manager’s office. An Ostrom’s managers confirmed that Ostrom had no eyewash stations anywhere on the jobsite. When Ostrom appealed the citation for failing to abate the hazard, the managers offered a different story, insisting that Ostrom had had eyewash stations since 2014 and thus did not need the eyewash kits. But the Board of Industrial Insurance Appeals (Board) gave greater weight to inspector’s testimony about what the Ostrom managers said at the initial visit than to the managers’ later assertions. And it committed no error in doing so.

The Board properly affirmed the Department's citation to Ostrom for its failure to abate the hazard of exposing its employees to Verticide without adequate emergency eyewash stations. Substantial evidence supports the Board's decision and the superior court erred when it reversed the Board's decision. This Court should reverse the superior court and affirm the Board and Department.

II. ASSIGNMENTS OF ERROR¹

1. The Department assigns error to the superior court's Finding of Fact No. 1.8, which found that the Employer established that the Board of Industrial Insurance Appeal's findings were not supported by substantial evidence.
2. The Department assigns error to the superior court's Conclusion of Law No. 1.11, which concluded that the Board incorrectly determined that Ostrom committed a failure to abate a serious violation of WAC 296-307-03930.
3. The Department assigns error to the court's judgment, which reversed the Board's decision.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. The Department previously cited Ostrom under WISHA in 2014 for failing to provide adequate emergency eyewash stations in areas where its workers were exposed to Verticide. The Department inspected Ostrom again in 2016 and found that Ostrom mixed pure Verticide with water but did not have an eyewash station within 50 feet of any

¹ Although the Department assigns error to the superior court's findings here as a precaution, this Court reviews the Board's decision on appeal, not the superior court's decision. See *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014). The Department did not assign error to the Board's findings or conclusions because it agrees with the Board's decision and its findings.

mixing stations. Does substantial evidence show that Ostrom failed to abate the hazard?

(Assignments 1, 2, 3)

2. WAC 296-900-14020 authorizes the Department to assess a penalty based on a failure to abate a hazard by multiplying the base penalty amount of the violation by the number of days that the employer did not abate the violation. WAC 296-900-14010 directs the Department to calculate a penalty amount based on the severity and the probability of harm. The Department assessed a penalty based on those factors and Ostrom failed to show that it applied them incorrectly. Should the penalty have been affirmed?

(Assignment 3)

IV. STATEMENT OF THE CASE

A. **Ostrom Has Used Verticide—a Corrosive Chemical—at Its Jobsite for at Least 25 Years**

Ostrom grows white mushrooms in trays of dirt under conditions that create mold and mildew and this requires it to use sanitation procedures throughout the plant. AR 206, 441. Ostrom has used the chemical Verticide to sanitize the plant for 25 years or more, and Ostrom has used it at all times relevant to this appeal. AR 339. The Material Safety Data Sheet (MSDS) for Verticide requires that an emergency eyewash station be present when there is the potential for exposure to it in its undiluted form. AR 208, 212-13, 396. Mike Lasseter, the plant manager, and Joseph Cosare, who managed 52 employees, both confirmed that concentrated Verticide requires that there be a nearby emergency

eyewash station. AR 339, 457. Cosare testified that workers should use an eyewash station even after exposure to diluted Verticide. AR 340. Ostrom used Verticide on the foot dips and foot mats and nightly in its diluted form on roughly ninety percent of the floors. AR 348.

Concentrated Verticide arrives at the plant in 55-gallon drums and Ostrom's workers also transport it in one-gallon containers. AR 333. Ostrom then uses the concentrated Verticide in two different ways: first, its workers pour one half ounce of concentrated Verticide into a five-gallon bucket and mix it with water, and then pour it into the foot mats. AR 332-33, 360. Second, the workers hand-pump the concentrated Verticide from the 55-gallon drum into a 250-gallon container, and then mix it with water and spray it throughout the plant. AR 441, 360. Ostrom mixes concentrated Verticide with water at three different locations throughout the plant: the far right, the middle, and the far left of the map, as shown in Exhibits 15 and 18. AR 346-47, 356-57, 381-82, 421, 427, 450.²

Jacqueline Copeland-Gordon, a human resource manager whose job duties also include worker safety, testified that there is a mixing station marked with an "X" on the right side of Exhibit 15. AR 381-82,

² Color copies of Exhibits 15 and 18 are attached for the Court's convenience as Appendix 1.

421. She also testified that there is another mixing station within 15 feet of where the pure Verticide is stored in containers, which is marked with an “O” on Exhibit 15, which is in the middle of the facility. AR 382, 412.

Copeland-Gordon also identified a third mixing station, on the left of the facility, which is marked with a green “X.” AR 381-82.

Another Ostrom manager, Cosare, testified about a mixing station on the left side of the facility. AR 356-57, 421. Cosare explained that at this mixing station, Ostrom mixes pure Verticide in 55-gallon drums into 250-gallon containers which then contain Verticide mixed with water. AR 356-358. This mixing station is in a shed. AR 356-357, 379-80.

B. The Department Cited Ostrom in 2014 for Failing To Provide Eyewash Stations Within 50 Feet of All Areas Where Its Workers Are Exposed To Corrosive Chemicals

Before issuing the citation that lead to the current appeal, the Department issued a citation to Ostrom in 2014 based on a 2013 inspection, admitted as Exhibit 8. AR 406-14. The Department issued one of the violations—violation 1-3—because Ostrom had failed to provide an emergency eyewash station at all areas where employees could be exposed to Verticide. AR 410. Violation 1-3 referenced the hazards posed by exposure to corrosive chemicals, stating:

The employer did not provide an emergency eyewash station where employees are exposed to corrosives, strong irritants, or toxic chemicals as required by this standard.

Employees use chemicals such as Verticide Germicidal Detergent, Liquichlor, Bleach, Pounce 25 WP Insecticide, which require an emergency eyewash station. Employees are exposed to eye burns and corneal damage without an accessible eye wash station.

AR 410. Ostrom informed the inspector that it had purchased emergency eyewash stations and would install them to abate the hazard. AR 268-69. Based on this representation, the inspector marked the hazard associated with violation 1-3 as abated. AR 268-70. Ostrom did not appeal this citation and it became final. AR 7, 284-85.³

C. The Department Inspected Ostrom in 2016 and Found That It Continued To Use Verticide but Had Not Installed Eyewash Stations

The Department performed another inspection in May of 2016, after receiving a report that one of Ostrom's employees had been splashed with Verticide. AR 202. Department Inspector Brent Olson visited the Ostrom facility twice: the first time was in May 6, 2016, the second time was towards the end of the inspection, which closed on July 20, 2016. AR 200-01, 216-17. At the time of his initial visit, Olson did not find anything that would qualify as an eyewash station under the safety rules. AR 213. Olson asked Lasseter if Ostrom had eyewash stations, and Olson reported that Lasseter told him that there were "no eyewash in the area

³ Ostrom conceded that the 2014 citation became final in its response to the Department's petition for review. AR 24.

that they mix or use the chemicals, and that there is no eyewash in the tray line area where the 50-gallon drums are, and no eyewash in the phase two area where the Verticide concentrate is mixed with water.” AR 231.

During this initial visit, Olson asked Cosare and Lasseter if Ostrom had installed any eyewash stations. AR 220. Cosare and Lasseter responded that they had some eyewash station kits but had not installed them yet. AR 220. Cosare and Lasseter then showed Olson two eyewash kits, which were sitting in Lasseter’s office. AR 220. Olson took a picture of one of the unused eyewash kits, which the Department offered and the Board admitted as Exhibit 6. AR 219-220, 404.

To comply with WAC 296-307-03930, Ostrom needed to provide an eyewash station within 50 feet of each mixing station, because the mixing stations present a risk that an employee could be exposed to undiluted Verticide. AR 339, 457. One of the mixing stations is in the middle of the facility (within 15 feet of the red “O” marked on Exhibits 15 and 18), and it is at least 120 feet away from any of the three eyewash stations that Ostrom alleges it provided its workers. *See* AR 382, 421, 427, 460-61.⁴

⁴ Lasseter marked the map (which was admitted as Exhibit 18) by placing a blue “dot” next to each eyewash station that he alleged was present at the jobsite, and put a number next to each blue dot. AR 437-38. There is not a blue dot anywhere close to the “O” in the middle of the map. *See* AR 427.

A second mixing station is in the far right of the facility. AR 334, 345-46. The inspector did not find an eyewash station within 50 feet of this mixing station at the time of his initial, May 6, inspection. AR 213.

When Olson returned to Ostrom in July 2016, he did find an eyewash station near the second mixing station, which he photographed and which the Department offered and the Board admitted as Exhibit 5. AR 215-17, 403; *see also* AR 335 (explaining where the item shown in Exhibit 5 was located). Olson testified that Ostrom told him about this eyewash station upon his return visit, and that Ostrom offered it as evidence that it had abated the hazard. AR 217. Cosare stated that he did not know when Ostrom installed this eyewash station, and acknowledged that Ostrom could have installed it after the first inspection in May 2016, though Cosare doubted this. AR 342-43. Lasseter, the plant manager, asserted that Ostrom had installed this eyewash station before the first inspection in May 2016, but conceded that he did not know if the eyewash station looked the same at the time of the first inspection in May 2016 as it appeared at the time of the second inspection in July 2016, and he acknowledged that Ostrom had altered the eyewash station around this time. AR 459-460.

The third mixing station is located on the left of the map. AR 356, 381-82, 421, 427. Inspector Olson did not observe an eyewash station

within 50 feet of this mixing station during either his first May or second July inspection in 2016. *See* AR 213, 215-17.

Ostrom offered evidence that there is currently an eyewash station within 50 feet of the mixing station, taking a picture of the eyewash station admitted as Exhibit 17. AR 426-427, 438-39. But while Lasseter asserted that Ostrom had installed the eyewash station in 2012 or earlier, he acknowledged that he did not know when the photograph admitted as Exhibit 17 was taken. AR 438-39. The eyewash station shown in Exhibit 17 appears to be brand new. *See* AR 426.

Ostrom also asserted that it had a third eyewash station, pictured in a photograph admitted as Exhibit 4. AR 402, 421, 459. But Lasseter and Copeland-Gordon acknowledged that the item depicted in Exhibit 4 was not an eyewash station. AR 379, 402, 459. Copeland-Gordon explained that the item depicted in Exhibit 4 was simply a shower, and that, at some time after 2016, Ostrom had converted it into an eyewash station. AR 368-69, 378-79. Copeland-Gordon also noted that Ostrom converted the shower into an eyewash station only “for comfort” and that it was not located near a place where Ostrom mixed pure Verticide with water. AR 368.

Copeland-Gordon testified that she has been familiar with all safety procedures at the plant for at least 10 years, including those

involving Verticide. AR 386-87. Cosare and Lasseter testified that they were familiar with all safety equipment and procedures. AR 336, 460.

Inspector Olson found that Ostrom exposed its employees to a Verticide hazard and that Ostrom did not have any adequate emergency eyewash stations at the time of his inspection. AR 211, 213, 217-18, 230. The Department then issued the citation under appeal here, admitted as Exhibit 1, which found, under violation 1-1, that Ostrom failed to abate the hazard of exposing its employees to Verticide without adequate, emergency eyewash stations.⁵ AR 390-95.

Ostrom appealed the decision to the Board, but the Board affirmed the failure-to-abate citation. CP 4-11.

Ostrom appealed the Board's decision to superior court. CP 1-14. The superior court reversed the Board and vacated the citation. CP 89-92.

The Department then appealed to this Court. CP 93-99.

V. 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.*

⁵ The Department's 2016 citation also asserted a second violation based on Ostrom's failure to ensure that its employees used eye protection. AR 4, 290-295. But the Board vacated this violation and the Department does not challenge that decision on appeal. AR 4. Therefore, the only issue before this Court is whether the violation based on Ostrom's failure to abate the failure to provide adequate eyewash stations was correct.

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). 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, *review denied*, 186 Wn.2d 1024, 383 P.3d 1014 (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. *Frank Coluccio Const. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014); *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 law de novo. *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 911, 83 P.3d 1012 (2003).

VI. ARGUMENT

Two years after the Department cited Ostrom for exposing its employees to a highly corrosive chemical without providing any emergency eyewash stations within 50 feet of all areas where exposure could occur, Ostrom had still failed to install eyewash stations and thus had failed to abate that hazard. The Department properly cited it for this failure and the Board properly affirmed the Department's citation. The superior court erred when it reversed the Board's decision, as substantial evidence supported the Board's findings and the Board's decision flows from its findings. This Court should reverse the superior court and affirm the Board and Department.

A. **Ostrom Failed To Abate the Hazard Because As of 2016 It Had Still Failed To Provide Adequate Emergency Eyewash Stations**

Ostrom failed to abate the hazards found in the 2014 citation and the Department properly cited it for failing to abate that hazard. Substantial evidence supports the Board's finding that Ostrom failed to abate the hazard. To establish a serious violation under WISHA, as the Department assessed here, the Department must prove the following

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

The Department satisfied all five elements here. The standard applies because it is undisputed that Ostrom used Verticide and that Verticide is a hazardous chemical that, under WAC 296-307-03930, required it to have emergency eyewash stations within 50 feet of any area where Ostrom used pure Verticide. Ostrom argues instead that it met the standard by providing adequate emergency eyewash stations. But since substantial evidence supports the Board's finding that Ostrom did not provide adequate eyewash stations, the violation against Ostrom must be upheld. And substantial evidence shows that Ostrom's workers had access to the violative working condition, that the workers could suffer serious injury from exposure to it, and that Ostrom had both actual and constructive knowledge of the violative working conditions.

1. The first element of a serious violation is met because the parties agree that WAC 296-307-03930 applies

WAC 296-307-03930 requires an employer to provide an adequate emergency eyewash station within 50 feet of where employees are exposed to corrosive, strong irritant, or toxic chemicals, or when an MSDS for the chemical states in its first aid section that one is needed.

WAC 296-307-03930 also provides that, to satisfy the requirements of the rule, an emergency washing station must 1) irrigate and flush both eyes simultaneously while the user holds their eyes open, 2) have an on/off switch that activates in one second or less and remains on without user assistance until intentionally turned off, and 3) delivers at least 0.4 gallons of water per minute for 15 minutes or more.

WAC 296-307-03930 applies because, at these mixing stations, Ostrom's employees mixed concentrated Verticide with water, a chemical that requires an emergency eyewash station because its MSDS establishes the need for one in its first aid section. AR 339, 396. Indeed, Ostrom's witnesses agreed that WAC 296-307-03930 applies to the areas where its workers face exposure to concentrated Verticide with water, such as at the mixing stations.⁶ AR 339, 457. The applicable standard—WAC 296-307-03930—therefore applies. Ostrom has never argued otherwise.

⁶ Ostrom does assert that WAC 296-307-03930 does not apply to Verticide that has been diluted with water. The Board did not base its finding that a violation occurred

2. Substantial evidence establishes that Ostrom did not have adequate emergency eyewash stations at its facility at the time of the 2016 inspection

Substantial evidence supports the Board's finding that, as of 2016, Ostrom failed to provide emergency eyewash stations within 50 feet of each area where workers could be exposed to concentrated Verticide as WAC 296-307-03930 requires, and so that Ostrom failed to meet the requirements of that standard. Since this Court does not reweigh the evidence on review of a Board decision and instead reviews it only to determine whether substantial evidence supports the Board's finding, this Court therefore must uphold the Board's finding here. *See Mowat Const. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407, 409 (2009); RCW 49.17.150(1). There are three reasons why substantial evidence supports this finding.

First, the inspector testified without objection that Ostrom's managers told him at the initial conference in May 2016 that Ostrom continued to use concentrated Verticide at the jobsite but did not have any emergency eyewash stations within any of the areas where concentrated Verticide was mixed with water. AR 213, 220, 230-31. The inspector testified further that he asked Ostrom's managers to show him whatever

based on exposure to diluted Verticide and this Court need not decide whether WAC 296-307-03930 would apply in that situation.

eyewash stations they did have and they showed him the unopened emergency eyewash kits that Ostrom had purchased in response to the 2014 citation. AR 219-20. Based on this testimony alone, a reasonable trier of fact could conclude that Ostrom provided no emergency eyewash stations at any time from 2014 through the initial inspection in May 2016 even though Ostrom continued to use concentrated Verticide at its facility throughout that time-period. An employer who exposes its employees to corrosive substances that can cause serious eye injuries yet who provides no emergency eyewash stations has necessarily violated WAC 296-307-03930. And Ostrom's witnesses conceded that Ostrom did have to provide emergency eyewash stations within 50 feet of any area where it mixed pure Verticide with water, which it could only do if it provided at least one eyewash station at the jobsite. *See* AR 339, 457.

Second, even leaving aside the fact that Ostrom's managers admitted to the inspector that they did not have any emergency eyewash stations at the jobsite during the initial conference in May 2016 (AR 213, 219-20), the testimony of Ostrom's own managers establishes that it had at least two Verticide mixing stations at the facility: one marked with a green "X" on the left side of the maps admitted as Exhibits 15 and 18, and one marked with smaller "X" on the far right side of each map. AR 335, 345-46, 356-57, 381-92, 421, 427. And there is substantial evidence that no

eyewash station was installed near either of those mixing stations until some time after the initial inspection in May 2016, which would mean that Ostrom had not abated the hazard found in the 2014 citation as of the date of the inspector's visit in May 2016.

The inspector testified that he personally searched the Ostrom facility in May 2016 and did not find any eyewash stations other than the unused eyewash kits in Lasseter's office. AR 213. The inspector did see the shower depicted in Exhibit 4. AR 215, 402. But both the inspector and Ostrom's witnesses all agreed that the shower depicted in Exhibit 4 was not an adequate emergency eyewash station under WAC 296-307-03930. AR 215, 379, 459. And this shower is not within 50 feet of either of the two mixing stations marked with an "X" on the maps and thus it would not abate those hazards in any event. *See* AR 368, 421, 427.

When the inspector returned to the site in July 2016 towards the end of the inspection process, he found an eyewash station, which he photographed and which the Board admitted as Exhibit 5. AR 215-17, 403. The inspector explained that Ostrom's managers showed him this eyewash station to establish that they had abated the hazards found at the initial conference in May 2016. AR 215-17, 403. This supports the inference that, as of the inspector's first visit in May 2016, Ostrom had not installed any eyewash stations at the jobsite, and Ostrom installed the

eyewash station shown in Exhibit 5 only after that date. And the eyewash station depicted in Exhibit 5 is the only eyewash station that Ostrom alleges was within 50 feet of the mixing station on the right side of the plant. *See* AR 342-43, 459-60. So if it was not present until some time after May 2016, then Ostrom had not abated the hazard from 2014 through May 2016.

Nor did the inspector find an eyewash station anywhere near the mixing station on the left side of the facility during either his initial inspection in May 2016 or his second visit towards the end of July 2016. *See* AR 213-17. Ostrom offered a photograph of an eyewash station—which the Board entered as Exhibit 17—which Ostrom claims was near the mixing station on the left side of the plant before May 2016. AR 426, 438-39. But given that the inspector did not see this eyewash station during either of his two visits, a reasonable trier of fact could conclude that Ostrom did not install this eyewash station until some time *after* the inspector's two visits in 2016, which would mean that Ostrom had not abated the hazard as of May or July 2016. And the eyewash station depicted in Exhibit 17 appears to be new and not something that has been present for years. *See* AR 426. So there is substantial evidence that the hazard was not abated until some time after July 2016.

Third, even leaving all of the other evidence aside, one of Ostrom's witnesses, Copeland-Gordon, testified that there is a third mixing station, located within 15 feet of the "O" drawn on the middle of the maps that were entered as Exhibits 15 and 18. AR 382, 421, 460-61. Ostrom presented no evidence that there is an eyewash station that was even remotely close to being within 50 feet of the "O" on that map. *See* AR 382, 421, 427, 460-61. Thus, even if Ostrom had an eyewash station within 50 feet of the other two mixing stations as of May 2016, it still failed to have an eyewash station within 50 feet of the mixing station in the middle of the map, and for this reason alone failed to abate the hazard.

In arguing on appeal at superior court that the citation should be vacated, Ostrom essentially ignored all of the above evidence, and instead focused on the testimony from its witnesses claiming that Ostrom had installed emergency eyewash stations within 50 feet of the mixing stations identified on the left and right side of Exhibits 15 and 18. *See* CP 28-30. But the issue before this Court is whether substantial evidence supports the Board's findings, not whether there was evidence that also would have supported a different decision. *See Coluccio*, 181 Wn. App. at 35. And this Court does not reweigh the evidence or revisit credibility determinations on appeal. *Potelco*, 194 Wn. App. at 434. To show a lack of substantial evidence, Ostrom would have to establish that no trier of fact could have

reasonably concluded that it had failed to abate the hazard, not that a reasonable trier of fact could have decided the case in its favor. *See Coluccio*, 181 Wn. App. at 35. And Ostrom cannot establish that no reasonable person could have found for the Department here.

Ostrom fails to explain how the Board's decision is unsupported by substantial evidence given the inspector's testimony that Ostrom's managers told him at the initial conference that Ostrom used undiluted Verticide at the jobsite but did not have eyewash stations in the areas where its workers mixed undiluted Verticide with water. *See* CP 28-30. Ostrom offers neither a reason to dismiss the inspector's testimony about what its managers said at that conference nor a reason why a trier of fact could believe that testimony and nonetheless find that Ostrom had abated the hazard. Nor is there any reason to reject the inspector's testimony that he did not find any emergency eyewash stations when he initially toured the plant and only found the eyewash station admitted as Exhibit 5 when he returned to the plant in July 2015. AR 213, 215-17, 403. And there is also no reason to either disregard Copeland-Gordon's testimony that there was a third mixing station near the "O" on Exhibit 15 or ignore the lack of any testimony that there were ever any emergency eyewash stations within the vicinity of that mixing station. AR 381-82, 421, 460-61.

There is substantial evidence that Ostrom failed to abate the hazard and Ostrom's arguments to the contrary lack merit. Ostrom insists that the fact that the emergency eyewash station kits were sitting unused in Lasseter's office does not establish that it failed to abate the hazard, claiming that it purchased the emergency eyewash station kits to abate a different hazard: paraformaldehyde. CP 28-29. Ostrom claims that it decided to stop using paraformaldehyde and that this meant that it did not need to use the emergency eyewash kits it had purchased. CP 28-29. This argument fails for two reasons.

First, leaving aside that the eyewash kits were sitting unused in Lasseter's office, there is substantial evidence that Ostrom failed to provide any adequate eyewash stations, based on the inspector's testimony that Ostrom's managers told him that they had not installed any yet as of May 2016, along with the inspector's testimony that he did not find any eyewash stations during that visit. AR 213-220, 335, 342-46, 381-82, 421, 460-61. Thus, regardless of what led Ostrom to decide to buy the kits in 2014 but not use them, Ostrom failed to abate the Verticide hazard.

Second, the Department issued the 2016 citation based on Ostrom's failure to abate violation 1-3 from the 2014 citation, and violation 1-3 specifically mentions Verticide and does not mention paraformaldehyde. AR 392. And it is undisputed that Ostrom continued

using Verticide after 2014 and through 2016 and onwards. AR 339.

Because Ostrom continued using Verticide after it stopped using paraformaldehyde, it needed to install eyewash stations in any location where it exposed its workers to Verticide. And there is substantial evidence that Ostrom failed to do that.

Ostrom failed to establish that substantial evidence did not support the Board's finding that Ostrom failed to provide emergency eyewash stations and thus failed to abate the hazard found at the 2014 citation. Substantial evidence supports the Board's findings. This Court should affirm.

3. Ostrom's employees mixed concentrated Verticide and were thus exposed to that hazard

Exposure to concentrated Verticide occurs when employees pour the chemical into the five-gallon bucket and when they hand pump it from the 55-gallon drum into the 250-gallon tank. *See* AR 332-334, 360. To establish that this element of a serious violation is met, the Department need not prove that a worker was harmed by having Verticide splashed into his or her eyes—all the Department must prove is that “there must be sufficient evidence showing that employees had access to the violative conditions” and the Department “must demonstrate a *reasonable predictability* that, in the course of their duties, employees will be, are, or

have been in the zone of danger.” *See Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257, 1268, clarified on denial of reconsideration, 756 P.2d 142 (1988) (emphasis in the original).

Here, the inspector testified, and Cosare confirmed, that Ostrom’s workers pour concentrated Verticide into a five-gallon bucket, causing exposure. AR 246-47, 284, 332. Ostrom also exposes its employees to Verticide when it directs them to use a hand pump to transfer the concentrated Verticide from the 55-gallon drum to the 250-gallon tank. AR 451. Ostrom alleges that its employees only mixed concentrated Verticide within 50 feet of an emergency eyewash facility. CP 28-30. But there is substantial evidence that this is not true, as there is substantial evidence that Ostrom did not have any emergency eyewash stations within 50 feet of any of the mixing stations at least as of May 2016, almost two years after the 2014 citation. And Ostrom does not deny either that exposure to pure Verticide occurred or that exposure to pure Verticide would put a worker in the zone of danger, at least without an adequate emergency eyewash station.

Substantial evidence shows that Ostrom exposed its employees to the hazard—pure Verticide—at the three mixing stations on the jobsite and that Ostrom failed to eliminate the hazard by providing emergency eyewash stations within 50 feet of those mixing stations.

4. There is substantial evidence that Ostrom had both actual and constructive knowledge of the violative working conditions

There is also substantial evidence that Ostrom had both actual and constructive knowledge of the violative working conditions because Ostrom's managers admitted that they knew that Verticide was used at the jobsite and that they knew that it is a chemical that requires an emergency eyewash station. AR 339, 457. *See* RCW 49.17.180(6) (stating that, to prove a serious violation, the Department must show that the employer knew, or through the exercise of reasonable diligence could have known, of the violative condition). "Employer knowledge" in this context means knowledge of the hazardous conduct or condition, not knowledge of a specific incident. *See Erection Co. Inc. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 207, 248 P.3d 1085, 1088 (2011) (knowledge of "violative condition."); *In re Gen'l Sec. Servs. Corp.*, No. 96 W376, 1998 WL 960837, *12 (Wash. Bd. Indus. Ins. App. Dec. 15, 1998).

Cosare and Lasseter testified that they knew that concentrated Verticide is a chemical that requires an emergency eyewash station. AR 339, 457. Copeland-Gordon testified that she has been familiar with all safety procedures at the plant for at least 10 years and that Verticide is included in these procedures. AR 386-87. And Lasseter and Cosare also

testified that they are familiar with all safety equipment and procedures.

AR Cosare at 336, 460.

And even assuming actual knowledge was not shown, Ostrom had constructive knowledge. Constructive knowledge can be found when a violation occurs in plain view. *Pro-Active Home Builders, Inc. v. Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 18, 432 P.3d 404 (2019); *Erection Co.*, 160 Wn. App. at 207; *BD Roofing, Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 98, 110, 161 P.3d 387 (2007). Verticide was used in plain view daily on ninety percent of the floors throughout the facility for all relevant times. AR 457. Ostrom's management knew that its workers mixed concentrated Verticide with water in at least two different places in the facility. AR 345-46, 356-57, 381-82, 450. Ostrom also had notice of the hazards because, as Olson testified, Ostrom had a copy of the MSDS and provided it to Olson during his inspection. AR 207, 396.

Indeed, while Ostrom argues that it provided adequate eyewash stations, it has not argued it did not know of the relevant employment conditions. *See* CP 26-30. Substantial evidence shows that Ostrom had actual or constructive knowledge of the violative working conditions so the fourth element is met. RCW 49.17.180(6).

5. There is substantial evidence that serious physical harm could result from the violative condition

There is also substantial evidence that serious physical harm could result from exposure to Verticide without an adequate emergency eyewash station, which satisfies the fifth element of proving a serious WISHA violation. See *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006). It is undisputed that exposing an employee to concentrated Verticide presents a substantial risk of serious physical harm, at least without an adequate eyewash station. AR 236, 339, 457. The MSDS for Verticide states that severe eye damage is possible from exposure, supporting a finding of a substantial probability of death or serious physical harm. AR 396. The MSDS also instructs to flush eyes immediately with water for at least 15 minutes and to call a physician, if exposed. AR 396. And again, while Ostrom argues that it provided eyewash stations as it had to do under WAC 296-307-03930, there is substantial evidence that it did not do so. And Ostrom does not argue that exposure to concentrated Verticide would not present a substantial probability of serious physical harm if there were no eyewash stations present. CP 28-30.

B. The Department Correctly Issued Violation 1-1 From This Citation as a Failure To Abate Because Ostrom Had Violated

Eyewash Laws in 2014, Never Abated the Hazard, and Was Again Found in Violation During This Inspection

The Department's classification of "failure to abate" for violation 1-1 from the 2016 citation complies with the legal definition of "failure to abate," as the Board correctly found. When there is a final order citing an employer for violating WISHA, RCW 49.17.180(4) authorizes the Department to assess a penalty of up to \$7,000 for each *day* that the employer fails to abate that violation. WAC 296-900-180 defines "[f]ailure to abate" as "a violation that was cited previously which the employer has not fixed." WAC 296-900-14020 directs the Department to assess a penalty based on a failure to abate that is equal to the base amount of the penalty multiplied by the number of days that the employer failed to correct the safety violation.

Here, the Department issued a final 2014 order that found that Ostrom failed to provide eyewash stations within 50 feet of all areas where its workers were exposed to corrosive substances such as Verticide. AR 223, 284-85. And there is substantial evidence that as of May 2016, Ostrom did not have any emergency eyewash stations in place and thus had not abated that hazard. AR 213-220, 335, 342-46, 381-82, 421, 460-61. This means that Ostrom failed to abate the hazard that the Department found in the 2014 citation. The Department therefore properly

calculated the penalty as a failure-to-abate violation under RCW 49.17.180(4) and WAC 296-900-180.

C. The \$30,000 Penalty for Violation 1-1 Is Correct Because the Department's Assessed Penalty Is Reasonable and Supported by the Law

The Department properly calculated the penalty based on the severity of the violation, the probability of harm, and the considerable length of time that Ostrom failed to abate the hazard.

WAC 296-900-14010 sets forth the guidelines for determining penalties for WISHA violations. Under this regulation, the Department calculates the base penalty by determining a severity and a probability factor number, both of which are on a scale of one to three, with three being the highest value. WAC 296-900-14010.

Here, the Department gave the highest severity rating of three because a potential injury from Verticide could result in severe eye damage. AR 239. This is consistent with the MSDS for Verticide, which confirms that severe eye damage could result. AR 239, 396. The Department next determined the probability rating to be one, the lowest probability rating, because Ostrom only used pure Verticide for short durations and in limited ways. AR 239.

The rule next requires the Department to multiply the probability number by the severity number to get a gravity number, with the gravity

number chart then providing the base penalty. WAC 296-900-14010.

Here, the gravity number of three establishes a \$3,000 base penalty.⁷

When an employer fails to abate a previous violation, as Ostrom did here, WAC 296-900-14020 sets forth the standards for increasing adjusted base penalties in failure to abate situations. The rule authorizes the Department to multiply the base penalty amount by the number of calendar days that went by past the original correction date, with a minimum of five days. WAC 296-900-14020. The only cap placed on the maximum penalty is the statutory limit of \$7,000 per day.

WAC 296-900-14020.

Here, the Department exercised reasonable discretion in calculating the penalty amount. It found that the violation posed a serious potential injury but relatively little probability of an injury, and it multiplied the base penalty by 10. AR 239-40. It did this even though the rule allowed it to multiply the base penalty amount by the number of days that the violation went uncorrected, which was for a much larger period of time than 10 days, reasoning that using the full length of time that the violation remained unabated would result in an excessive penalty. AR 240. And the Department did not arbitrarily pick a random number for the

⁷ WAC 296-900-14015 also allows the Department to adjust the base penalty amount based on factors such as good or bad faith, but the Department did not make any such adjustments to the \$3,000 base penalty amount. *See* AR 239-40.

penalty amount: it based the penalty amount on the factors identified in the rule, including the severity of the harm, the probability of injury, and length of time that the violation had been left uncorrected, and selected a penalty amount far lower than the maximum available. AR 239-40.

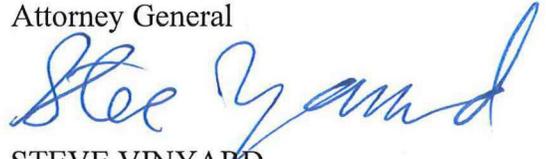
The Court should uphold the penalty amount.

VII. CONCLUSION

The Department properly issued a “failure to abate” violation to Ostrom when it found that Ostrom’s employees mixed concentrated Verticide beyond 50 feet from an emergency eyewash station, which is a violation involving the same hazard as what was issued to Ostrom in 2014. There is substantial evidence that Ostrom failed to abate the hazard given the inspector’s testimony that Ostrom admitted that it had not installed any eyewash stations coupled with the fact that the inspector did not find any eyewash stations during his initial visit of the facility. Though Ostrom’s witnesses claimed that Ostrom had installed eyewash stations before 2016, the Board was not required to accept this testimony and properly affirmed the Department’s citation. The superior court erred when it concluded otherwise. This Court should reverse the superior court and affirm the Board’s decision.

RESPECTFULLY SUBMITTED this 7 day of June, 2019.

ROBERT W. FERGUSON
Attorney General

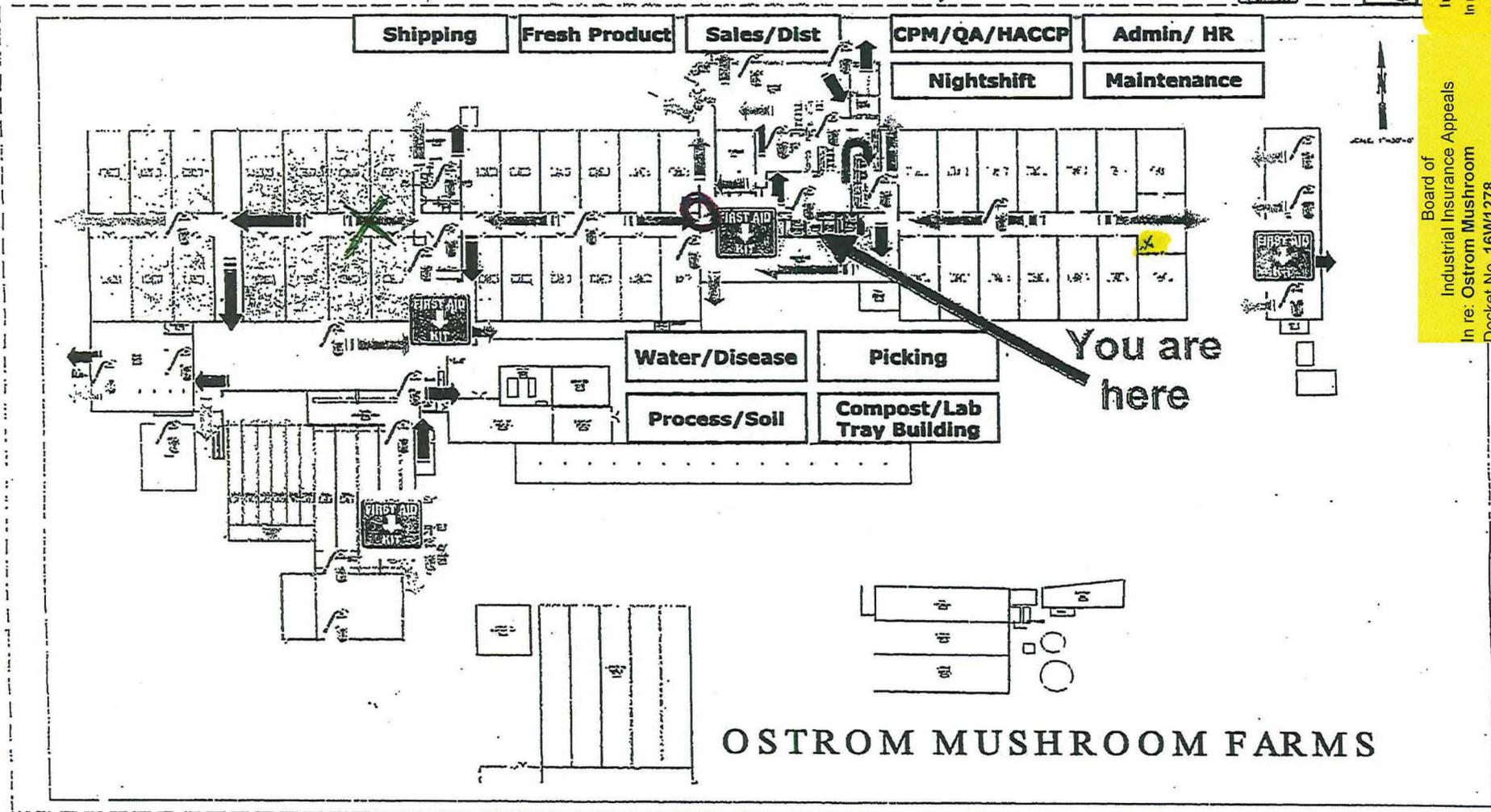


STEVE VINYARD
Assistant Attorney General
WSBA #29737
Office Id. #91022
Labor and Industries Division
7141 Cleanwater Drive SW
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7715

APPENDIX 1

EMERGENCY EVACUATION EXIT ROUTES AND DESIGNATED ASSEMBLY AREA

Primary routes  Secondary routes 



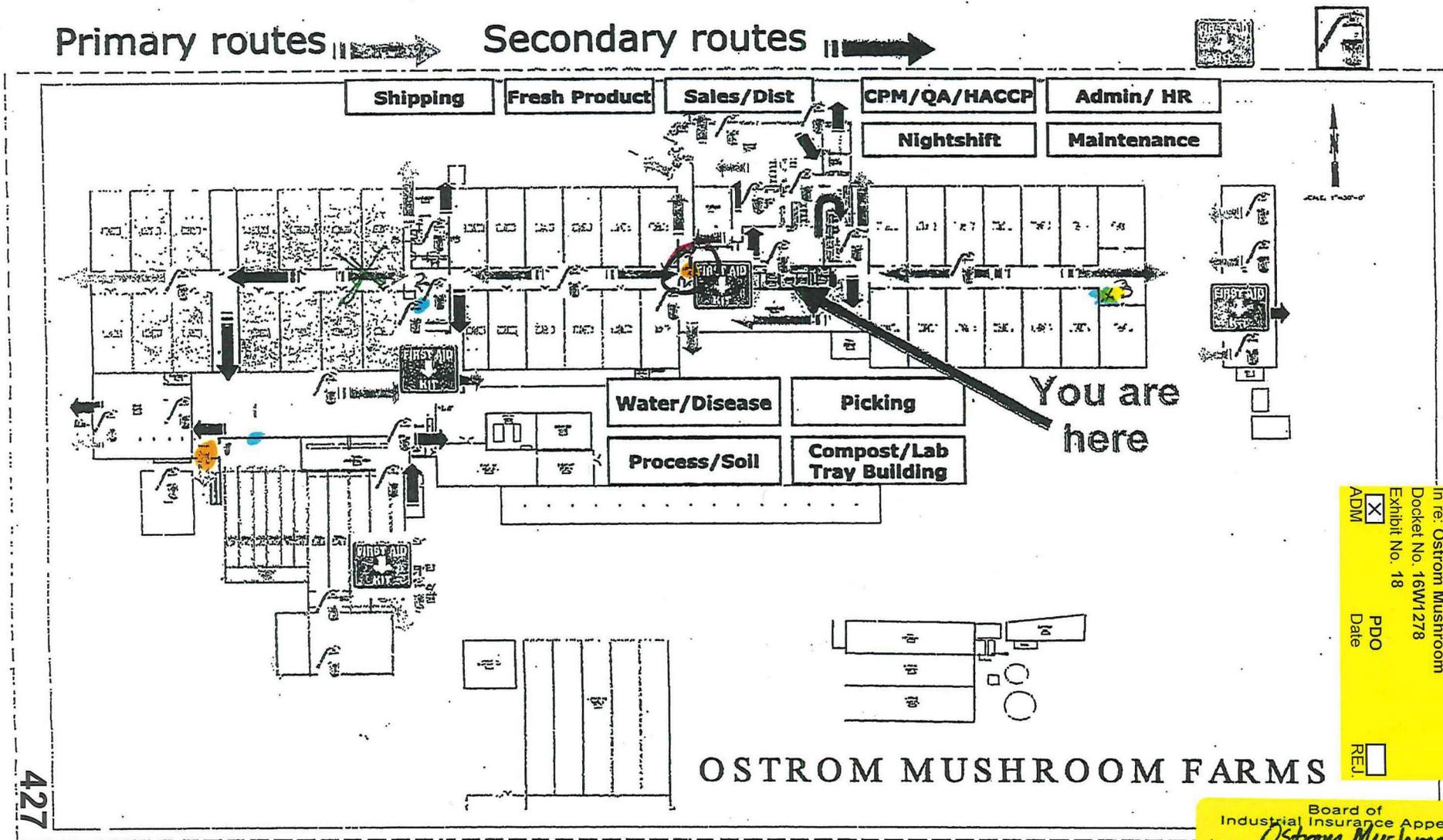
OSTROM MUSHROOM FARMS

Board of Industrial Insurance Appeals
 In re: **421**
 Docket No. **15**
 Exhibit No. **7/20** Date

Board of Industrial Insurance Appeals
 In re: **Ostrom Mushroom**
 Docket No. **16W1278**
 Exhibit No. **15** Date **7/20/17**

ADM REJ.

EMERGENCY EVACUATION EXIT ROUTES AND DESIGNATED ASSEMBLY AREA



427

OSTROM MUSHROOM FARMS

Board of Industrial Insurance Appeals
 In re: Ostrom Mushroom
 Docket No. 16W1278
 Exhibit No. 18
 ADM PDO REJ
 Date _____

Board of Industrial Insurance Appeals
 In re: Ostrom Mushroom
 Docket No. 16W1278
 Exhibit No. 18
 ADM Date 8/1/17 REJ

NO. 53180-1-II

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

OSTROM MUSHROOM FARM
COMPANY,

Respondent,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR
AND INDUSTRIES,

Appellant.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Brief of Appellant, Department of Labor and Industries and this Declaration of Service in the below described manner:

E-Filing via Washington State Appellate Courts Portal:

Derek Byrne
Court Clerk/Administrator
Court of Appeals, Division II

E-Mail via Washington State Appellate Courts Portal:

Aaron Owada
Owada Law, P.C.
aaron.owada@owadalaw.net

DATED this 7th day of June, 2019, at Tumwater, Washington.

At Marshall

AUTUMN MARSHALL
Legal Assistant 3
(360) 586-7737

ATTORNEY GENERALS' OFFICE, L&I DIVISION, OLYMPIA

June 07, 2019 - 8:45 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53180-1
Appellate Court Case Title: Ostrom Mushroom Farm Co., Respondent v. Dept of L & I, State of WA,
Appellant
Superior Court Case Number: 18-2-02047-3

The following documents have been uploaded:

- 531801_Briefs_20190607083551D2815516_1223.pdf
This File Contains:
Briefs - Appellants
The Original File Name was AppBrief.pdf

A copy of the uploaded files will be sent to:

- aaron.owada@owadalaw.net

Comments:

Sender Name: Autumn Marshall - Email: autumn.marshall@atg.wa.gov

Filing on Behalf of: Steve Vinyard - Email: steve.vinyard@atg.wa.gov (Alternate Email: LIOlyCEC@atg.wa.gov)

Address:
P.O. Box 40121
Olympia, WA, 98504-0121
Phone: (360) 586-7707

Note: The Filing Id is 20190607083551D2815516