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NO. 53180-1-II

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

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Appellant,

v.

OSTROM MUSHROOM FARM CO.,

Respondent.

**OPENING BRIEF OF RESPONDENT
OSTROM MUSHROOM FARM CO.**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES2

 a. Did the Superior Court correctly reverse the Board’s Decision and Order for lacking substantial evidence when the record establishes that Ostroms provided emergency eyewash stations that were functional, readily accessible, and within 50 feet from anywhere where its employees’ eyes could be exposed to concentrated Verticide?.....2

 b. Is the Board’s affirmation of the Citation’s penalty supported by substantial evidence when it is not defensible because there was no failure to abate and the penalty is unreasonable?2

III. STATEMENT OF FACTS2

 a. Citation & Notice No. 3168958952

 b. Citation & Notice No. 3179405724

 c. Testimony of Ostroms’ employees6

IV. ARGUMENT9

 A. Standard of Review.....9

 B. The Department bears the burden of proving all elements of a serious WISHA violation.....10

 C. The Board’s Decision and Order is not supported by substantial evidence because when Ostrom stopped using paraformaldehyde, there was no longer any need to use the portable eye wash units11

 1. The Board’s determination that the Department established the conditions on reinspection were identical is not supported by substantial evidence12

 2. The conditions on reinspection were not in violation of WISHA13

 D. The Department’s FTA penalty calculation is not defensible because there was no Failure to Abate and because the penalty is not reasonable16

V. CONCLUSION18

TABLE OF AUTHORITIES

STATE CASES

Cam Construction, 90 W060 (1992)17

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

Dep't of Labor & Indus. v. Gongyin, 154 Wn.2d 38, 44,
109 P.3d 816 (2005)9

Erection Co. v. Dep't of Labor & Indus., 160
Wn. App. 194, 202, 248 P.3d 1085 (2011)9

J.E. Dunn Nw., Inc., v. Dep't of Labor & Indus.,
139 Wn. App. 35, 42, 156 P.3d 250 (2007)9

Mowat Constr. Co. v. Dep't of Labor & Indus.,
148 Wn. App. 920, 925, 201 P.3d 407 (2009)9, 10

*The Quadrant Corporation v. Growth Management
Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005)9

Richard Castle (Olympia Glass Co.), BIIA Dec.,
95 W445 (1996) citing Mark Rothstein, *Occupational
Safety and Health*, 3d ed, at 345, 34711

*Washington Cedar & Supply Co., v. Dep't of
Labor & Indus.*, 119 Wn. App. 906,
914, 83 P.3d 1012 (2004)10

STATE STATUTES

RCW 49.17.1509

RCW 49.17.150(1)9

RCW 49.17.180(6)10

RCW 49.17.180(7)17

WASHINGTON ADMINISTRATIVE CODE

WAC 263-12-115(2)(b)10, 16

WAC 296-307-039305, 8, 9, 10, 11

WAC 296-800-150303

I. INTRODUCTION

On August 8, 2016, the Appellant, the Department of Labor and Industries (“Department”), issued one failure to abate serious violation, for an alleged failure to provide an emergency eyewash, and one serious violation, for an alleged failure to provide personal protective equipment, against the Respondent, Ostrom Mushroom Farm Co. (“Ostroms”), in WISHA Citation and Notice Number 317940572. (CABR 163-67).¹ On October 13, 2016, the Department issued Corrective Notice of Redetermination Number 317940572 (“CNR”), which affirmed the violations. (CABR 156-59). On October 17, 2016, Ostroms timely appealed the CNR to the Board of Industrial Insurance Appeals (“Board”). (CABR 153-54).

After hearings were held on July 19, 2017 and July 20, 2017, Industrial Appeals Judge Tom M. Kalenius (“IAJ”) issued a Proposed Decision and Order vacating the CNR. (CABR 54-63). Thereafter, the Department filed a timely Petition for Review of the IAJ’s Proposed Decision and Order, and the Employer filed a timely Response to the Department’s Petition for Review. (CABR 18-26; 27-43). On December 19, 2017, the Board issued an Order Granting Petition for Review. (CABR 12).

On March 29, 2018, the Board issued a Decision and Order that affirmed as modified the CNR by affirming the failure to abate serious

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

violation and vacating the serious violation. (CABR 2-20). Ostroms timely appealed the Board's Decision and Order to Thurston County Superior Court.

After oral argument, the Superior Court reversed the Board's Decision and Order because it found that it lacked substantial evidence. Thereafter, the Department timely appealed the Superior Court's Decision to this Court.

II. ISSUES

- A. **Did the Superior Court correctly reverse the Board's Decision and Order for lacking substantial evidence when the record establishes that Ostroms provided emergency eyewash stations that were functional, readily accessible, and within 50 feet from anywhere where its employees' eyes could be exposed to concentrated Verticide?**
- B. **Is the Board's affirmation of the Citation's penalty supported by substantial evidence when it is not defensible because there was no failure to abate and the penalty is unreasonable?**

III. STATEMENT OF FACTS

a. Citation & Notice No. 316895895:

In 2013, the Department, through Compliance Safety & Health Officer Dominique Damian ("CSHO Damian"), conducted an inspection at Ostroms' mushroom farm in Lacey, Washington. (Tr. 8/1/17, p. 73-74). This inspection was based on a referral that Ostroms' employees were exposed to a chemical known as formalin. (Tr. 7/19/17, p. 73). The Department conducted an inspection and learned that formalin was not being used; rather, a chemical known as "paraformaldehyde"² was being used. (Tr. 7/19/17, p. 84). In 2013,

² Paraformaldehyde is a powdered form of formaldehyde that is commonly used in mushroom farms to kill diseases, especially diseases that are in an area that you cannot get to with a spray-type product. (Tr. 8/1/17, p. 16).

Ostroms was using paraformaldehyde because it had a severe outbreak of Coprinus, which was spreading through the facility. (Tr. 8/1/17, p. 16).

CSHO Damian described the “cooking” process for paraformaldehyde, which involved the night crew heating up formaldehyde on a tin pan on a hot plate in a room for two hours unoccupied by any employees. (Tr. 7/19/17, p. 84-85).

Ms. Damian’s inspection resulted in the Department issuing Citation and Notice No. 316895895 against Ostroms. (Tr. 7/19/17, p. 74; Exhibit 8). Violation Item 1-3 contained a violation of WAC 296-800-15030 for not providing an emergency eyewash station where employees were exposed to corrosives, strong irritants, or toxic chemicals, including Verticide. (Exhibit 8, p. 4). Paraformaldehyde was not among the chemicals cited in the Violation Item 1-3. (Exhibit 8, p. 4).

CSHO Damian discussed paraformaldehyde with Mike Lasseter, Ostroms’ director of farm operations. (Tr. 8/1/17, p. 5, 17). The Department was unsure whether paraformaldehyde could be used in Washington. (Tr. 8/1/17, p. 17). The Department, however, suggested that Ostroms use portable eyewash stations where paraformaldehyde was used. (Tr. 8/1/17, p. 17). Mr. Lasseter agreed to put portable eyewash stations on push carts if they continued to use paraformaldehyde. (Tr. 8/1/17, p. 17). Ostroms purchased two portable eyewash stations specifically for paraformaldehyde use. (Tr. 8/1/17, p. 17-18).

CSHO Damian observed and took photographs of Ostroms’ portable eyewash stations. (Tr. 7/19/17, p. 75, 81-82). CSHO Damian marked Violation

1-3 as abated because Ostroms purchased and received the portable eyewash stations, even though the use of portable eyewash stations were strictly related to the use of paraformaldehyde. (Tr. 7/19/17, p. 75).

Mr. Lasseter testified that after purchasing the portable eyewash stations, Ostroms was informed that it could not use paraformaldehyde; therefore, Ostroms ceased its use. (Tr. 8/1/17, p. 18; *see also* Tr. 7/19/17, p. 86). The unopened portable eyewash stations were placed in Mr. Lasseter's office because they were not being used, as Ostroms had no reason to use the portable eyewash stations after that time because it already had three permanent eyewash stations at its farm. (Tr. 8/1/17, p. 18-19).

b. Citation & Notice No. 317940572:

On May 6, 2016, the Department, through former Compliance Safety & Health Officer Brent Olson ("CSHO Olson"), conducted another inspection at Ostroms' Lacey mushroom farm. (Tr. 7/19/17, p. 7). CSHO Olson testified that during his inspection, he observed one large drum and a gallon jug of Verticide, although he did not personally observe Verticide being used. (Tr. 7/19/17, p. 12). CSHO Olson also testified that he never saw the verticide being removed from the manufacturer's drum. (Tr. 7/19/17, p. 54).

CSHO Olson concluded that Verticide was a corrosive chemical, although he could not recall why during his testimony. (Tr. 7/19/17, p. 18). CSHO Olson also testified that he observed two portable eyewash stations in boxes in Mr. Lasseter's office. (Tr. 7/19/17, p. 25; Exhibit 6).

When CSHO Olson asked if Ostroms had an eyewash, he was shown the eyewash in Exhibit 4. (Tr. 7/19/17, p. 60). CSHO Olson never tested the

water to see if it flowed at the required rate, nor did he test the water to see if it flowed at the required temperature. (Tr. 7/19/17, p. 60). CSHO Olson also observed the eyewash contained in Exhibit 5, which was in a different location than the eyewash shown in Exhibit 4. (Tr. 7/19/17, p. 58). Significantly, CSHO Olson was unaware of when the yellow pipe was plumbed at Ostroms' facility. (Tr. 7/19/17, p. 60). Nevertheless, CSHO Olson also testified that he did not observe any eyewash stations that met the requirements of WAC 296-307-03930 during his inspection. (Tr. 7/19/17, p. 11).

As a result of CSHO Olson's inspection, the Department issued Citation and Notice No. 317940572 against Ostroms. (Exhibit 1). Violation Item 1-1 alleged a failure to abate serious violation of WAC 296-307-03930 for an alleged failure to provide an emergency eyewash where there is a potential for employees' eyes to be exposed to corrosives – specifically, Verticide. (Tr. 7/19/17, p. 11-12, 29; Exhibit 1, p. 2). However, CSHO Olson testified that he did not have any observations of Verticide being used or mixed. (Tr. 7/19/17, p. 12, 54).

CSHO Olson classified Violation Item 1-1 as a failure to abate serious violation because Ostroms was previously cited for a violation of WAC 296-307-03930, in Violation Item 1-3 of Citation and Notice No. 317940572, and he determined that the hazard was never abated because the portable eyewash stations that Ostroms bought during the Department's previous inspection were still in Mr. Lasseter's office. (Tr. 7/19/17, p. 25, 29-30, 35).

However, CSHO Olson was aware that Ostroms purchased the portable eyewash units because of their use of paraformaldehyde, not Verticide. (Tr.

7/19/17, p. 56). CSHO Olson did not see Ostroms using paraformaldehyde during the entire course of his investigation. (Tr. 7/19/17, p. 57). In fact, Mr. Lasseter told CSHO Olson that Ostroms stopped using paraformaldehyde. (Tr. 7/19/17, p. 58). CSHO Olson further testified that there are different kinds of eyewash stations available, besides portable eyewash stations, for employers to use that are still in compliance with the regulations. (Tr. 7/19/17, p. 59).

c. Testimony of Ostroms' employees:

Verticide it is a cleaning agent, like a soap, specifically used for cleaning mushroom farms. (Tr. 8/1/17, p. 6-7). Verticide is sent to Ostroms in either 55-gallon drums, or 1-gallon containers, both in a concentrated state. (Tr. 7/20/17, p. 10-11). As of May 6, 2016, Ostroms had multiple functioning eyewash stations. (Tr. 7/20/17, p. 27, 57; Tr. 8/1/17, p. 19).

The 55-gallon drum and the 1-gallon containers of concentrated verticide are stored in different areas. (Tr. 8/1/17, p. 8). The location of where the 55-gallon drums are stored is marked on Exhibit 18, as eye wash no. 3. (Tr. 8/1/17, p. 8). The 55-gallon drum is put on a spill pallet. A forklift is used to pick up the drum and spill pallet and bring it over to the green "x" on Exhibit 18, where a hand pump is used to put the concentrated Verticide into a large plastic tank on wheels that is filled with water. (Tr. 8/1/17, p. 14). This location is within 50 feet of a permanently plumbed eyewash station that is next to the chill room and marked as eyewash #2 on Exhibit 18, also shown in Exhibit 17. (Tr. 8/1/17, p. 11).

Moreover, the area where Ostroms transferred the Verticide from the 55-gallon drum into the 250-gallon tank had an eyewash station right across

the hallway, approximately 15 feet away. (Tr. 7/20/17, p. 41-42; Tr. 8/1/10, p. 10).

The 1-gallon containers of Verticide are stored in the chemical storage shed, which is located on the orange dot with the red circle on Exhibits 15 and 18. (Tr. 8/1/17, p. 8; *see also* Tr. 7/20/17, p. 57-58). The concentrated Verticide is mixed with water in the area with a yellow “x” on Exhibit 15, and this is the only area where the 1-gallon containers of concentrated Verticide are mixed. (Tr. 7/20/17, p. 10-15; Tr. 8/1/17, p. 8-9 (green “x”)). A permanent eyewash station is less than 50 feet of this location. (Tr. 7/20/17, p. 10-13; Exhibits 5 and 15). It was not mixed in the in the area with the yellow X on it in Exhibit 18, as if May 2016, because that area holds citric acid used to bleach the crops to make them whiter. (Tr. 8/1/17, p. 9).

Concentrated Verticide is never used when it is applied at Ostroms’ Lacey farm. (Tr. 7/20/17, p. 30). Once the Verticide is diluted, it is used throughout Ostroms’ facility. (Tr. 7/20/17, p. 29-30). The MSDS does not state that Verticide constitutes a hazard after its been diluted with water. (Tr. 7/19/17, p. 62; Exhibit 2). Indeed, CSHO Olson conceded to such. (Tr. 7/19/17, p. 62).

Based on the Verticide’s MSDS, Ostroms determined that it does not carry the same hazard once it has been diluted from concentration. (Tr. 7/20/17, p. 29). After all, Exhibit 2, page 1 states, “The health hazards given on the Material Safety Data Sheet apply to this product in its concentrated form (as supplied) and may differ significantly at use dilution. The signs and symptoms of over exposure apply only to negligence in handling or misuse of

the concentrated product and not to the routine exposure to the product, under normal conditions of use.” (Exhibit 2, page 1; see also Tr. 7/20/17, p. 29-30).

The undisputed testimony from Ostroms’ employees was that there was a permanently installed eyewash station within 50 feet in all locations where Verticide is in its concentrated form and diluted with water. (Tr. 7/20/17, p. 10; Tr. 8/1/17, p. 10).

After the parties rested, the IAJ issued a Proposed Decision and Order that found that Ostroms provided emergency eye washing facilities that were functional and readily accessible for an employee’s eyes that were required for the dilution of chemicals used on May 6, 2016. (CABR 62). Thus, the IAJ determined that Ostroms did not commit a serious failure to abate violation of WAC 296-307-03930, and the conditions on re-inspection, on May 6, 2016, were not identical to the conditions on October 25, 2013, as the conditions on re-inspection were not in violation of WISHA. (CABR 62). On review, however, the Board reversed the Proposed Decision and Order by speculating that the CSHO’s testimony and photographic exhibits established that Ostroms failed to provide emergency eyewash stations. (CABR 5-8).

The Superior Court, however, reversed the Board’s Decision and Order and vacated the Department’s citation. Specifically, the Superior Court concluded that the Board’s Decision and Order lacked substantial evidence in the record because the Department failed to establish that Ostroms’ employees were potentially exposed to corrosives, strong irritants, or toxic chemicals, such as Verticide, without the required emergency eyewash stations within 50 feet

of where Verticide was stored, mixed, or used, as required by WAC 296-307-03930. The Department appealed the Superior Court's decision to this Court.

IV. ARGUMENT

A. Standard of Review

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

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

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

The Department bears the initial burden to prove a WISHA violation. WAC 263-12-115(2)(b); *Mowat Constr. Co.*, 148 Wn. App. at 924. To establish a prima facie case of a “serious” violation under WISHA, the Department must prove the following five elements by a preponderance of the evidence: (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to the violative conditions; (4) the employer knew or through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition. RCW 49.17.180(6); *Washington Cedar & Supply Co., v. Dep’t of Labor & Indus.*, 119 Wn. App. 906, 914, 83 P.3d 1012 (2004).

Here, the Board’s Decision and Order is not supported by substantial evidence and was correctly reversed by the Superior Court because Ostrows provided emergency eyewash stations that were functional, readily accessible, and within 50 feet from anywhere where an employees’ eyes could be exposed to concentrated Verticide; thus, it met the requirements of WAC 296-307-03930. Additionally, the Employer did not know, nor could it have known with the exercise of reasonable diligence, of the alleged hazards due to the need to install previously purchased portable eyewash units to avoid alleged serious violations when mixing and transporting Verticide, or to abate

the serious violations in Citation and Notice No. 316895895, as the conditions changed and were abated.

C. The Board's Decision and Order is not supported by substantial evidence because when Ostrom stopped using paraformaldehyde, there was no longer any need to use the portable eye wash units.

Substantial evidence does not support the Board's finding that, as of May 2016, Ostroms failed to abate a hazard associated with a prior violation of WAC 296-307-03930, which alleged Ostroms failed to provide adequate eyewash stations within 50 feet of all areas where its workers mixed and undiluted Verticide. WAC 296-307-03930 requires, in pertinent part, an employer to provide an adequate emergency eyewash stations within 50 feet of where employees are exposed to corrosive, strong irritants, or toxic chemicals.

To establish a prima facie case of failure to abate, the Department must prove the following elements: (1) the original citation must have become a final order; second, the condition on reinspection must be identical; and (3) the condition on reinspection must be in violation of WISHA. *In re Richard Castle (Olympia Glass Co.)*, BIIA Dec., 95 W445 (1996), citing Mark Rothstein, *Occupational Safety and Health*, 3d ed, at 345, 347.

Here, the Superior Court correctly reversed the Board's Decision and Order because the Board's determination that the Department established that

the conditions on reinspection were identical, and that there was a violation at the time of the inspection lacks substantial evidence in the record.

1. The Board's determination that the Department established the conditions on reinspection were identical is not supported by substantial evidence.

The Board's Decision and Order is not supported by substantial evidence because the Department failed to prove the conditions on reinspection were identical. Here, the Department mistakenly alleged that Ostroms did not provide an adequate eyewash station when Verticide was being mixed and issued a failure to abate serious violation. But the failure to abate and install the portable eyewash units was based on Ostroms' prior use of paraformaldehyde, and the portable eyewashes that were purchased for paraformaldehyde use. However, when Ostroms stopped using the paraformaldehyde, there was no longer any need to use the portable eyewash units, as three eyewash units were installed within 50 feet of the locations where concentrated Verticide was mixed and stored.

That is, portable eyewash units and the conditions for their use, in the Department's 2014 inspection, centered on exposing employees to a room of vaporized formaldehyde. After the Department's 2014 inspection, the hazard created by the formaldehyde did not exist, as the vaporization process was not repeated.

Instead, Verticide was used to sanitize Ostroms' Lacey farm, and all of Ostroms' employees testified that it had eyewash stations installed, within 50 feet, of where Verticide is diluted with water in its concentrated form. Although Verticide was used during the first inspection, and the re-inspection, Ostroms had adequate eyewash stations installed where Verticide was mixed during the Department's second inspection. Therefore, Board's Decision and Order is not supported by substantial evidence.

2. The conditions on reinspection were not in violation of WISHA.

Not only did the Department fail to establish that the conditions of the re-inspection were identical to Citation No. 316895895, but the Department also failed to establish that Ostroms failed to use an adequate eyewash station when Verticide was being mixed. Contrary to the Department's assertions, the testimony from Ostroms' employees confirmed that there was a permanently installed eyewash station within 50 feet of all locations where Verticide in its concentrated form was diluted with water. After the concentrated Verticide was diluted with water, the MSDS sheet confirmed that no safety precautions were required. (Exhibit 2). Therefore, even though the record highlights that Verticide is used on approximately 90 percent of the facility's surfaces, it is used in a diluted state, which does pose a serious hazard to employees using the diluted Verticide, as indisputably provided in Exhibit 2.

The Board's determination that the CSHO's inspections and photographs established that Verticide was mixed in areas more than 50 feet from an adequate eyewash is unsupported by substantial evidence. That is, CSHO Olson opined that Exhibit 4 was a storage area for the Verticide drums. (Tr. 7/19/17, p. 22). CSHO Olson also opined that if Ostroms was pouring or using Verticide in this location, there would have to be an eyewash there and he did not observe an eyewash within 50 feet. (Tr. 9/19/17, p. 22).

However, the location of where the drums are stored and mixed are in different locations, and the area where the drums are mixed has an emergency eyewash station within 50 feet. That is, the location of where the 55-gallon drums are stored is marked on Exhibit 18, as eye wash no. 3. The 55-gallon drum is put on a spill pallet, and a forklift is used to pick up the drum and spill pallet and bring it over to the green "x" on Exhibit 18, where a hand pump is used to put the concentrated Verticide into a large plastic tank on wheels that is filled with water. (Tr. 8/1/17, p. 14). This location is within 50 feet of a permanently plumbed eyewash station that is next to the chill room and marked as eyewash #2 on Exhibit 18, also shown in Exhibit 17. (Tr. 8/1/17, p. 11).

The Board's agreement with CSHO Olson's speculative opinions is not supported by substantial evidence because as Mr. Lasseter testified, no chemicals were mixed in that area. (Tr. 8/1/17, p. 19-20). Moreover, although the Department takes issue with the eyewash photographed in Exhibit 4 being modified after the Department's 2016 inspection to include an eyewash station, all Ostroms' employees testified that no chemicals, let alone

Verticide, were mixed in this area. (Tr. 7/20/17, p. 31-32; 46; Tr. 8/1/17, p. 20-21).

Previously, this area just had a shower, which was available to employees that mixed peat moss and got covered with dust. (Tr. 8/1/17, p. 46). Ostroms decided to put an eyewash station there for comfort reasons, as the area was already plumbed. (Tr. 7/20/17, p. 47). As such, contrary to the Department's statements to the contrary, this is not substantial evidence that Ostroms failed to provide an adequate eyewash in this area because no chemicals, let alone Verticide, were mixed in this area.

Instead, as Mr. Cosare testified, Verticide was mixed with water approximately five feet from the functional eyewash station captured in Exhibit 5, which is a different location than where the concentrated Verticide is stored. (Tr. 7/20/17, p. 11-12, 24; see also the yellow highlighted spot in Exhibit 15). This was corroborated by the testimony of Mr. Lasseter. Moreover, once Verticide is applied throughout Ostroms' farm, it is done in a diluted state, as concentrated Verticide is never used when it is applied at Ostroms' Lacey farm. (Tr. 7/20/17, p. 30). The Board ignored the uncontested fact that the Verticide's MSDS does not state that Verticide constitutes a hazard after its been diluted with water. (Tr. 7/19/17, p. 62; Exhibit 2).

The Board also improperly speculated that had Ostroms had adequate eyewash stations where verticide was mixed during the 2014 inspection, it presumably would have appealed the Citation. However, this speculation is not only unsupported by the record, but it is also inaccurate as there are

numerous reasons why an employer would not appeal a Citation, such as the litigation costs far outweigh the Citation's penalties and litigation is very stressful and requires the cooperation of numerous employees as witnesses.

Finally, the Department takes issue with the testimony of Jacqueline Copeland Gordon, Ostroms' HR Manager. (Tr. 7/20/17, p. 44-45). Namely, the Department mistakenly asserts that Ms. Gordon identified a third mixing station location within 15 feet of the "o" drawn on the middle of Exhibits 15 and 18. The Department, however, did not fully consider Ms. Gordon's testimony. When asked where the Verticide was mixed, Ms. Gordon identified the green "x" on Exhibit 15, as well as, the highlighted "x" on the right side of the map. (Tr. 7/20/17, p. 57-59). Ms. Gordon also testified, in reference to where Verticide was mixed, "it could be someplace else in between here," but "[she] was not sure" and "[she] was not good at reading a map." (Tr. 7/20/17, p. 59-60). Nevertheless, Ms. Gordon also testified that Joe Cosare would have a better understanding of this matter, and she would defer to his understandings of where Verticide is mixed and how Verticide is used. (Tr. 7/20/17, p. 63-64).

Accordingly, the Department failed to establish all elements necessary to support a Failure to Abate.

D. The Department's FTA penalty calculation is not defensible because there was no Failure to Abate and because the penalty is not reasonable.

Pursuant to WAC 263-12-115(2)(b), the Department bears the burden to prove not only the underlying citation violation, but that the resulting

penalty was also appropriate. As noted by the Board in *Olympia Glass, supra*, held:

We now turn to the second part of the Department's evidentiary burden: the appropriateness of the penalty. Under RCW 49.17.180(7), the Department is required to assess all civil penalties based upon "due consideration" of their appropriateness based upon the following factors: "the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations." The Department must apply these factors when assessing penalties in failure to abate cases, much as it would for any WISHA violation. *Long Manufacturing Co.*, 4 OSHC 1154 (1975-76), *aff'd* 554 24 25 F.2d 903 (8th Cir. 1977); *George T. Gerhardt Co.*, 4 OSHC 1351 (1976-77).

In another significant decision, *In re Cam Construction*, 90 W060 (1992), the Board concluded that a willful factor of "ten" was not appropriate and then reduced the monetary penalty from \$35,000.00 to \$21,000.00. The Board concluded that as the trenching violation was a third time repeat that both the repeat factor and an additional factor of "2" for the "willful" characterization was appropriate. Thus, with a base penalty of \$3,500 (with deductions for size, faith and history) the Board multiplied the penalty by 3, and then doubled that amount by 2 because it was a willful violation.

In our present case, the Department calculated the base penalty and provided deductions for size and then multiplied the penalty by 10 because it was a failure to abate. The failure to abate calculation is moot because the Department could not establish all of the prima facie elements for a failure to abate.

However, even if there was a failure to abate, the multiplier of 10 is not based on the facts of the case. As such, as the Board held in *Olympia Glass* the arbitrary multiplier based on “policy” is not reasonable.

V. CONCLUSION

The Superior Court correctly reversed the Board’s Decision and Order because it is not supported by substantial evidence, as the record establishes that the Department not only failed to establish that the conditions of the re-inspection were identical to Citation No. 316895895, but the Department also failed to establish that Ostroms did not have an adequate eyewash station where Verticide was being stored and mixed. Moreover, substantial evidence does not support the Board’s affirmation of the Department’s citation penalty because it is not defensible, as there was no failure to abate the penalty is not reasonable. Accordingly, Ostroms respectfully requests that the Court affirms the Superior Court’s reversal of the Board’s Decision and Order.

RESPECTFULLY SUBMITTED this 5th day of August 2019.

s/ Aaron K. Owada
Aaron K. Owada, Attorney for Respondent
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CERTIFICATE OF SERVICE

I certify that on August 5, 2019, I caused the original and copy of the **Employer's/Respondent's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same, on:

(X) Court of Appeals Electronic Filing and via Facsimile and US Mail, Postage Prepaid:

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DATED this 5th day of August 2019, in Lacey, Washington.

s/ Donna Perkins

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