

FILED  
Court of Appeals  
Division III  
State of Washington  
11/8/2018 1:21 PM

No. 362191

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

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PERRENOUD ROOFING, INC.

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

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**BRIEF OF APPELLANT  
PERRENOUD ROOFING, INC.**

---

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b>	<b>1</b>
<b>II.</b>	<b>ASSIGNMENTS OF ERROR</b>	<b>1</b>
<b>III.</b>	<b>FACTS</b>	<b>2</b>
<b>IV.</b>	<b>STANDARD OF REVIEW</b>	<b>3</b>
<b>V.</b>	<b>ARGUMENT</b>	<b>4</b>
	<b>1. THE TRIAL COURT IN ERROR</b>	<b>4</b>
	<b>2. THE TRIAL COURT IN ERROR</b>	<b>6</b>
	<b>3. THE TRIAL COURT IN ERRED</b>	<b>9</b>
<b>VI.</b>	<b>CONCLUSION</b>	<b>11</b>

## TABLE OF AUTHORITIES

### Cases

<i>San Juan County v. No New Gas Tax</i> 160 Wn.2d 141, 164, 157 P.3d 831 (2007).....	3
<i>Malang v. Dep't of Labor &amp; Indus.</i> 139 Wn. App. 677, 683, 162 P.3d 450 (2007).....	3
<i>Ruse v. Dep't of Labor &amp; Indus.</i> 138 Wn.2d 1, 5, 977 P.2d 570 (1999).....	3
<i>Dougherty v. Department of Labor and Industries for State</i> 112 Wn.App. 322, 327, 48 P.3d 390, (2002) .....	4
<i>Weeks v. Washington State Patrol</i> 96 Wash.2d 893, 895-96, 639 P.2d 732 (1982).....	4
<i>Hernandez v. Department of Labor and Industries</i> 107 Wn.App. 190, 26 P.3d 977, (2001).....	5, 6
<i>Matter of Saltis</i> 94 Wn.2d 889, 895-896, 621 P.2d 716, (1980) .....	5, 6, 8
<i>Cont'l Sports Corp. v. Dep't of Labor &amp; Indus.</i> 128 Wash.2d 594, 602, 910 P.2d 1284 (1996) .....	5, 6
<i>Crosby v. Spokane County</i> 137 Wash.2d 296, 302, 971 P.2d 32 (1999).....	5
<i>Parker v. Denny</i> , 2 Wash. Terr. 176, 177, 2P. 351 (1883) .....	6
<i>Fisher Bros. Corp. v. Des Moines Sewer Dist.</i> 97 Wash.2d 227, 230, 643 P.2d 436 (1982).....	6
<i>In re Santore</i> 28 Wash.App. 319, 327, 623 P.2d 702 review denied, 95 Wash.2d 1019 (1981) .....	7

*Fay v. Northwest Airlines, Inc.*  
115 Wash.2d 194, 198-99, 796 P.2d 412 (1990)  
(citing *In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980)) ..... 7, 9, 11

*Petta v. Dep't of Labor & Indus.*  
68 Wn.App. 406, 409, 842 P.2d 1006 (1992)  
(citing *Saltis*, 94 Wn.2d at 896)) ..... 7

*Black v. Department of Labor and Industries of the State of Wash.*  
131 Wn.2d 547,555, 933 P.2d 1025, (1997) )) ..... 8, 10

*Vasquez v. Dep 't of Labor & Indus.*  
44 Wn.App. 379, 382-83, 722 P.2d 854 (1986) ) ..... 11

### Rules

CR 12(b)(6)..... 3

### Statutes

RCW 49.17.150..... 1, 4, 6, 7, 8, 9, 10

RCW 49.17.150(1)..... 10

RCW 49.17.140(3)..... 4

RCW 51.52.110..... 5, 8, 10

### Other

The Territorial Code of 1881..... 6

**APPENDIX**

PERRENOUD ROOFING, INC.

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Court of Appeal, Division III

Case No. 362191

A. ....	2
B. ....	2
C. ....	2
D. ....	2
E. ....	2, 8
F. ....	3
G. ....	3
H. ....	3
I. ....	3

## **I. INTRODUCTION**

1. This is an appeal of the state court's dismissal of the Appellant's appeal of a decision from the Washington State Board of Industrial Appeals (hereafter "Board"). The dismissal was made upon the motion of the Department of Labor and Industries (hereafter "Department") alleging noncompliance with RCW 49.17.150, due to perfection of the appeal occurring more than 30 days from the date of the Board's decision.

It is undisputed that the Appellant timely filed its appeal with the Spokane County Superior Court and completed perfection of the appeal more than 30 days of the Board's decision due to a late mailing to the Board.

It is also undisputed that the Department received actual Notice of the Appeal and filed a Notice of Appearance.

It is further undisputed that the Department filed its motion to dismiss 20 days after the Appellant perfected the appeal with Notice being given to the Board of the appeal.

## **II. ASSIGNMENTS OF ERROR**

The Appellant has raised the following errors:

2. The trial court in error applied a "Strict Compliance" standard in dismissing for lack of jurisdiction the Appellant's Department of Labor and Industries appeal due to a late perfection of Notice of Appeal pursuant to RCW 49.17.150.
3. The trial court in error failed to apply the "Substantial Compliance" standard in dismissing for lack of jurisdiction the Appellant's Department of Labor and Industries appeal for a late perfection of Notice of Appeal pursuant to RCW 49.17.150.
4. The trial court in error failed to find a lack of prejudice to the Department of Labor and Industries appeal for a late perfection of Notice of Appeal

### **III. FACTS**

On August 9, 2017 the Board of Industrial Insurance Appeals (hereafter "Board") issued its decision in this matter. (CP 81-90)

On August 22, 2017 the Notice of Appeal of the Board's decision was filed with this Superior Court. (CP 79-80), (See attached Appendix "A").

On September 12, 2017 the Department of Labor and Industries (hereafter "Department") filed a Notice of Appearance with the Spokane County Superior Court; (CP16-17) (See attached Appendix "B")

The case was assigned to Judge Triplet and a Motion for disqualification was filed by PERRENOUD ROOFING, INC., which resulted in the reassignment to Judge Clary on October 3, 2017.

Due to the request for reassignment, on November 1, 2017, a request for a copy of the record was requested from the Board of Industrial Appeals. (CP 95)

On October 20, 2017 the Spokane County Superior Court issued a scheduling Order indicating the Appellant's Brief and the Transcript of Record to be filed by November 28, 2017. (See attached Appendix "C").

On November 8, 2017 the Board of Industrial Appeals mailed a letter requesting a copy of the Notice of the Appeal, to verify the appeal (CP 97)

Also, on November 8, 2017, a letter was mailed to the Board of Industrial Appeals with a copy of the Notice of Appeal filed in this Superior Court. (CP99) (See attached Appendix "D")

On November 17, 2017, a confirmation letter was sent by the Board of Industrial Appeals indicating the Certified Appeal Board Record would be mailed to the Superior Court. (CP 101) (See attached Appendix "E")

The Department of Labor and Industries filed its motion for dismissal on November 29, 2017, three months after receiving the Notice of Appeal, 20 days after Notice of Appeal was sent to the Board of Industrial Appeals, and three days after receiving Notice the Certified Record was being sent to the Spokane County Superior Court. (CP 45-46) (See attached Appendix "F")

The Spokane County Superior Court entered its Order Dismissing the Appellant's case on February 6, 2018, (CP19) (See attached Appendix "G")

On February 12, 2018 the Appellant filed a Motion for Reconsideration. (CP 20)

On July 11, 2018 the Spokane County Superior Court entered its Order denying the Appellants Motion for Reconsideration. (CP 24), (See attached Appendix "H")

On July 18, 2018 Notice of Appeal to this Court was filed by the Appellant. CP 25), (See attached Appendix "I")

#### **IV. STANDARD OF REVIEW**

This Court reviews de novo a trial court's CR 12(b)(6) dismissal of a cause of action. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). The general civil standard of review applies to appeals of superior court decisions in industrial insurance cases. *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). Review by the Court of Appeals is limited to "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence is that sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *Id.* at 5.

## V. ARGUMENT

Modern courts, in the absence of serious prejudice to other parties, are to allow appeals to proceed. *Dougherty v. Department of Labor and Industries for State*, 112 Wn.App. 322, 327, 48 P.3d 390, (2002). With this spirit in mind, the appeal courts in civil appeals have treated the error of filing a timely notice of appeal with the Court of Appeals instead of with the trial court may be cured by filing a notice in the right place after the 30-day filing period has elapsed. *Weeks v. Washington State Patrol*, 96 Wash.2d 893, 895-96, 639 P.2d 732 (1982).

In this case, no prejudice was asserted by the Department nor was prejudice found by the Superior Court.

First alleged error:

1. **The trial court in error applied a “Strict Compliance” standard in dismissing for lack of jurisdiction the Appellants Department of Labor and Industries appeal due to a late perfection of Notice of Appeal.**

The trial court in error applied strict compliance for the perfection of the Notice of Appeal under RCW 49.17.150 in granting the motion for dismissal.

RCW 49.17.150 in relevant part states:

Appeal to superior court-Review or enforcement of orders.

(1) Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside. Such appeal shall be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board. The board shall thereupon transmit a copy of the notice of appeal to all parties who participated in 1 proceeding before the board, and shall file in the court the complete record of the proceedings....

RCW 49.17.150 requires filing in superior court, within thirty days following the board's order, a written notice of appeal and a notification letter to the Board. The 30-day deadline for filing

with the board is not addressed in the statute. However, this issue of strict compliance was addressed by this court regarding RCW 51.52.110, which has similar requirements in *Hernandez v. Department of Labor and Industries*, 107 Wn.App. 190, 26 P.3d 977, (2001). In *Hernandez*, this court held at page 195:

Previously, only strict compliance with all statutory procedures could secure superior court jurisdiction. See, e.g., *Lidke v. Brandt*, 21 Wash.2d 137, 150 P.2d 399 (1944); *Rybarczyk v. Dep't of Labor & Indus.*, 24 Wash.App. 591, 602 P.2d 724 (1979); *Smith v. Dep't of Labor & Indus.*, 23 Wash.App. 516, 596 P.2d 296 (1979). But that changed with *In re Saltis*, 94 Wash.2d 889, 896, 621 P.2d 716 (1980). **Substantial compliance with the terms of RCW 51.52.110 is now sufficient to invoke the superior court's appellate jurisdiction. *Saltis*, 94 Wash.2d at 895-96, 621 P.2d 716. *Emphasis Added***

In *Matter of Saltis*, 94 Wn.2d 889, 895-896, 621 P.2d 716, (1980) the court clearly stated its position by holding:

As noted by the Court of Appeals in *In re Saltis*, supra, 25 Wash.App. at 219, 607 P.2d 316, "the test for legal sufficiency ... is ... whether the notice was reasonably calculated to reach the intended parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1949); *Thayer v. Edmonds*, 8 Wash.App. 36, 42, 503 P.2d 1110 (1972). In cases considering the court's general jurisdiction, we have stated that "substantial compliance" with procedural rules is sufficient, because "delay and even the loss of lawsuits (should not be) occasioned by unnecessarily complex and vagrant procedural technicalities:"

(T)he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as "the sporting theory of justice."

The standard now applicable in Washington is substantial compliance, which is generally defined as actual compliance with the "substance essential to every reasonable objective" of a statute. *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wash.2d 594, 602, 910 P.2d 1284 (1996). The courts have also found that noncompliance is not substantial compliance. *Crosby v. Spokane County*, 137 Wash.2d 296, 302, 971 P.2d 32 (1999). In this case the appellant has meet the minimum requirement for substantial compliance with the service requirements that the party

to be served (Board) must receive actual notice of the appeal to superior court, or service by a method reasonably calculated to succeed. *Saltis*, supra at 895-96.

Additionally, the court in *Hernandez*, supra at 196-187 stated:

But in every case where substantial compliance has been found, there has been some actual, even if ineffective, compliance with the statute. Petta, 68 Wash.App. at 409, 842 P.2d 1006 (citing Pub. Employment Relations Comm'n, 116 Wash.2d at 928, 809 P.2d 1377). Here, there was no attempt to serve the Board until after the motion to dismiss was made. This is not substantial compliance. It is no compliance. Petta, 68 Wash.App. at 409-10, 842 P.2d 1006. Ms. Hernandez did not then substantially comply with the statute.

Contrary to the facts of *Hernandez*, the appellant in this case did fully perfect its appeal prior to the Department filing its motion to dismiss.

**2. The trial court in error failed to apply the “Substantial Compliance” standard in dismissing for lack of jurisdiction the Appellants Department of Labor and Industries appeal for a late perfection of Notice of Appeal pursuant to RCW 49.17.150.**

The doctrine of substantial compliance in appellate matters has been long standing Washington law since territorial days. The Territorial Code of 1881 directed that “An appeal or writ of error shall not be dismissed for any informality or defect in the notice or service thereof...” Code of 1881, §466. *Parker v. Denny*, 2 Wash. Terr. 176, 177, 2P. 351 (1883). The court holding that certain formal defects in the notice of appeal may be overlooked under "substantial compliance". In *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wash.2d 227, 230, 643 P.2d 436 (1982) the court characterized "substantial compliance" as:

"satisfaction of the 'spirit' of a procedural requirement."

“Substantial compliance has been found where there has been compliance with the statute albeit with procedural imperfections.” *Cont'l Sports Corp.*, supra at 603. In this case, the procedural requirements have been met with the only "procedural imperfection" being a delayed perfection

of the Notice of Appeal by a late mailing to the Board of Industrial Appeals. The affect being only a delay in the record being transmitted to the Superior Court.

In *In re Santore*, 28 Wash.App. 319, 327, 623 P.2d 702, review denied, 95 Wash.2d 1019 (1981) the court found that "substantial compliance" has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute. The actual objectives of RCW 49.17.150 have been substantially complied with in this case. There is no dispute that the Notice of Appeal was timely filed with the Spokane County Superior Court. The issue is the delayed perfection as to the Board of Industrial Appeals which took place 20 day prior to the Department of Labor and Industries filed its motion to dismiss. Additionally, the Department of Labor and Industries received actual notice, as the Notice of Appeal was mailed to the assistant attorney general assigned to handle the case and a Notice of Appearance filed.

Substantial compliance is sufficient to invoke appellate jurisdiction of the superior court. *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 198-99 796 P.2d 412 (1990) (citing *In re Saltis*, 94 Wn.2d 889, 621 P.2d 716 (1980)). "Substantial compliance occurs when the Director of the Department (1) receives actual notice of the appeal to the superior court or (2) the notice of appeal was served in a manner reasonably calculated to give notice to the Director." *Petta v. Dep't of Labor & Indus.*, 68 Wn.App. 406, 409, 842 P.2d 1006 (1992) (citing *Saltis*, 94 Wn.2d at 896).

In this case, the time line indicates that on August 9, 2017 the Board issued its decision in this matter. (CP 81-90)). On August 22, 2017 a timely Notice of Appeal was filed with the Spokane County Superior Court and served on the Department by serving the assistant attorney general assigned to handle the case for the Department. (CP 79-80)) Shortly thereafter on September 12, 2017 the Department filed a Notice of Appearance with the Spokane County Superior Court (CP16-17)). The Department had actual notice of the appeal with Notice being mailed to the assistant

attorney general assigned to handle the case for the Department, within by mail 13 days of the Board's decision. When it was discovered the Board was not mailed a copy of the Notice of Appeal, they were notified by mail on November 8, 2017, thus fully complying with all filing requirements and perfecting the appeal. (CP 99)). Following perfection of the appeal, the Department filed its motion for dismissal on November 29, 2017. (See Appendix "E", (CP 45-46))

Although not raised as an issue by the Department, the Supreme Court in *Black v. Department of Labor and Industries of the State of Wash.*, 131 Wn.2d 547,555, 933 P.2d 1025, (1997) addressed on point the issue of service on the director through the attorney general by stating:

We follow Vasquez and find that service on the assistant attorney general assigned to handle the case is reasonably calculated to give notice to the interested party, the Department. This result is consistent with "the distinct preference of modern procedural rules [...] to allow appeals to proceed to a hearing on the merits in the absence of serious prejudice to other parties." *Hoirup v. Empire Airways, Inc.*, 69 Wash.App. 479, 483, 848 P.2d 1337 (1993). We note there was no prejudice here.

Additionally, in *In re Saltis*, supra, the relevant inquiry was whether service on the assistant attorney general assigned to represent the Department is reasonably calculated to give timely notice of an aggrieved worker's appeal to the Department which is the interested party under RCW 51.52.110. Although we are dealing with RCW 49.17.150 the *Saltis*, court reasoning at page 895 is applicable when the court found:

"the requirement of notice contained in RCW 51.52.110 is a practical one meant to ensure that interested parties receive actual notice of appeals of Board decisions."

As to the delay in notifying the Board, there was no prejudice to the Department. The procedural effect of mailing a copy of the Notice of Appeal to the Board of industrial Appeals, is simply that the Board then mails a copy of the Notice of Appeal to the Department and forwards a copy of the hearing record to the Superior Court. In this case, a copy of the Notice of Appeal was

mailed directly to the Department of Labor and Industries' attorney, as such they received actual notice. The notice was received by the Department of Labor and Industries as soon as, or earlier, as if no delay in the mailing to the Board of Industrial Appeals had occurred. The only effect of the delayed mailing to the Board of Industrial Appeals was a delay in the Board's mailing of its certified appeal record to the Superior Court. However, at the time of the Department of Labor and Industries' Motion to Dismiss for the Delayed perfection the Superior court had received the record.

PERRENOUD ROOFING, INC., has substantially complied with the "spirit" of the appeal by filing all required documents and serving all required parties pursuant to RCW 49.17.150.

**3. The trial court in error failed to find a lack of prejudice to the Department of Labor and Industries appeal for a late perfection of Notice of Appeal.**

In this case, actual Notice was delivered to the Department, the other party in interest, through its attorney of record and Notice was perfected with the Board prior to the Department's motion to dismiss.

RCW 49.17.150 requires filing in superior court, within thirty days following the Board's order, a written notice of appeal praying that the order be modified or set aside. That specifically complies within the stated deadline. The notification letter received from the Board only indicates a 30-day deadline for filing with the Superior court.

RCW 49.17.150 further states that the appeal will be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and the Board.

In this case, all requirements of RCW 49.17.150 were fulfilled thus perfecting the Notice of Appeal. Upon perfection of the Notice of Appeal, the Spokane County Superior Court had proper jurisdiction over the Appeal of the Board's decision, as it is acting in its appellate capacity of limited statutory jurisdiction. *Fay*, supra at 197.

The effect of the Board receiving the copy of the Notice of Appeal pursuant to RCW 49.17.150(1) is twofold:

The board shall thereupon transmit a copy of the notice of appeal to all parties who participated in proceedings before the board and shall file in the court the complete record of the proceedings.

The actions of mailing a copy of the Notice of Appeal directly to the assistant attorney general assigned to handle the case resulted in no delay to the Department in receiving Notice of the Appeal due to a delayed transmission by the Board of the Notice of the Appeal.

The *Black* court, supra at 558, confirmed notice to the Attorney General is notice to the Department by holding:

We hold service of notice of appeal under RCW 51.52.110 on the assistant attorney general assigned to represent the Department of Labor and Industries in the matter is reasonably calculated to result in notice to the Department.

Although the *Black* court, supra dealt with RCW 51.52.110, the same reasoning would be applicable to RCW 49.17.150.

As stated above, the only procedural effect of the late mailing to the Board would be a delay in the filing of the Certified Appeal Board Record being mailed to the Spokane County Superior Court. However, in this case the Board sent notice to all parties that the Certified Record was being sent to the Spokane County Superior Court prior to its Motion to Dismiss. As such, there is an absence of prejudice to the Department. Further evidence of a lack of prejudice is that the Department's reply brief was not due until January 4, 2018, pursuant to the Court's Scheduling order.

The Court of Appeals has held that placing envelopes in the mail within the statutory 30-day deadline has been held to constitute substantial compliance even if the envelopes are received

after the expiration of the 30-day deadline. *Vasquez v. Dep 't of Labor & Indus.*, 44 Wn.App. 379, 382-83, 722 P.2d 854 (1986).

It is anticipated the Department may cite to *Fay v. Northwest Airlines, Inc.*, supra as a basis for the Court to deny this appeal. However, Fay is distinguishable in that Fay served the director two months late, immediately after the adverse party filed a motion to dismiss. In this case, the Department was timely served and filed a notice of Appearance, and the motion to dismiss was filed 20 days after perfection of the appeal and the Superior Court having jurisdiction, and after notification the Certified Record was being transmitted to the Spokane County Superior Court. Further the Departments motion to dismiss was filed prior to the appellants brief deadline of November 28, 2017, as ordered by the Superior Court's briefing schedule.

## **VI. CONCLUSION**

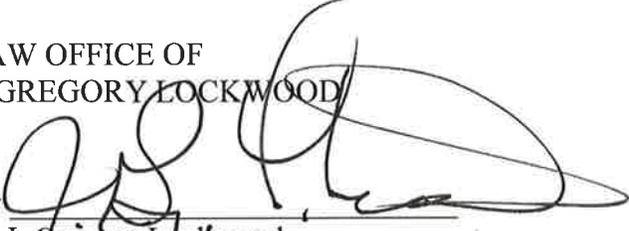
The Appellant's delay in mailing Notice of the Appeal to the Board resulted in a delayed perfection of the appeal. However, no prejudice occurred with the Department, as they were sent actual notice, filed a Notice of Appearance, and were given notice that the Certified Record was being transmitted to Spokane County Superior Court prior to their filing the Motion to Dismiss. Further, the Spokane County Superior Court had set a briefing schedule prior to the Department's Motion to Dismiss in which all parties had sufficient time to file their respective briefs.

It is respectfully requested the Court grant the Appellant's Appeal and remand this mater for trial, as the Appellant had perfected its appeal and no prejudice to the Department had occurred.

Dated this, 9<sup>th</sup> day of November 2018.

LAW OFFICE OF  
J. GREGORY LOCKWOOD

By

  
J. Gregory Lockwood,  
WSBA #20629  
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Vickie Fulton, do declare that on November 9<sup>th</sup>, 2018, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

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U.S. Mail  
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 Hand Delivery  
 Electronic Delivery

Board of Industrial Appeals  
2430 Chandler Ct SW  
P.O. Box 42401  
Olympia, WA 98504-2401

U.S. Mail  
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DATED November 9, 2018.

  
Vickie Fulton

# Appendix "A"

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AUG 22 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE**

PERRENOUD ROOFING, INC.

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

NO.

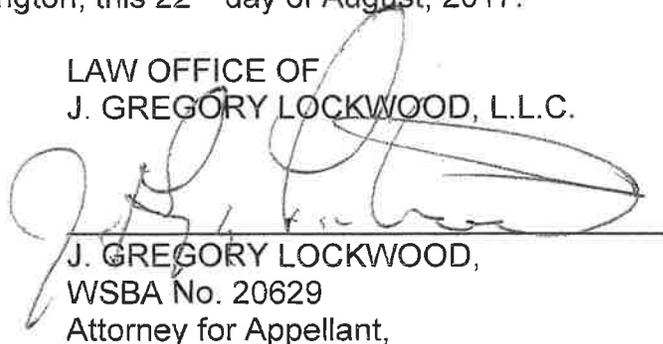
NOTICE OF APPEAL RE:

BOARD OF INDUSTRIAL  
APPEAL'S ORDER DATED  
AUGUST 9, 2017  
Docket No. 16 W1037

Appellant, PERRENOUD ROOFING, INC., a Washington corporation, seeks review by the Spokane County Superior Court of the Board of Industrial Appeal's Decision and Order Dated August 9, 2017, a copy of which is attached hereto.

DATED at Spokane, Washington, this 22<sup>nd</sup> day of August, 2017.

LAW OFFICE OF  
J. GREGORY LOCKWOOD, L.L.C.



J. GREGORY LOCKWOOD,  
WSBA No. 20629  
Attorney for Appellant,

NOTICE OF APPEAL RE: BOARD OF  
INDUSTRIAL APPEAL'S ORDER  
DATED AUGUST 9, 2017 - 1

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10 Office of the Attorney General  
11 West 1116 Riverside Avenue, Suite 100  
12 Spokane, Washington 99201  
13 (509)456-3123  
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15 CERTIFICATE OF SERVICE

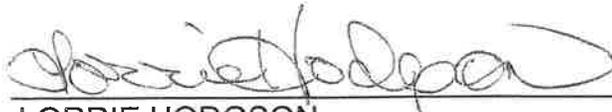
16 I, LORRIE HODGSON, do declare that on August 22, 2017, I caused to be  
17 served a copy of the foregoing document to the following listed party(s) via the  
18 means indicated:

19 Pamela V Thomure, AAG  
20 Office of the Attorney General  
21 West 1116 Riverside Avenue,  
22 Suite 100  
23 Spokane, Washington 99201

24     X      
25 \_\_\_\_\_  
\_\_\_\_\_

U.S. MAIL  
FACSIMILE  
HAND DELIVERY  
ELECTRONIC  
DELIVERY

26 DATED this 22<sup>nd</sup> day of August, 2017.

27   
28 \_\_\_\_\_  
29 LORRIE HODGSON

30 NOTICE OF APPEAL RE: BOARD OF  
31 INDUSTRIAL APPEAL'S ORDER  
32 DATED AUGUST 9, 2017 - 2

33 Law Office of  
34 J. Gregory Lockwood, PLLC  
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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: PERRENOUD ROOFING ) DOCKET NO. 16 W1037  
2 INCORPORATED )  
3 )  
4 CITATION & NOTICE NO. 317938531 ) DECISION AND ORDER  
5

6 Ivan V. Dunken, a compliance officer for the Division of Safety and Health of the Department  
7 of Labor and Industries, observed an employee of Perrenoud Roofing, Inc., (Perrenoud) on the roof  
8 of a house who did not appear to be wearing required fall protection equipment. He stopped and  
9 conducted an inspection, and as a result, the Department issued citations for two serious repeat  
10 violations, one serious violation, and one general violation of the Washington Industrial Safety and  
11 Health Act (WISHA). A monetary penalty was assessed against Perrenoud totaling \$17,600.

12 Perrenoud challenges all four of the safety violation allegations. It contends that one or more  
13 of the alleged violations happened because of unpreventable employee misconduct. Our industrial  
14 appeals judge determined that Perrenoud satisfied the first three of the four tests of the defense, but  
15 he affirmed the corrective notice of redetermination (CNR) because he found it did not prove that its  
16 enforcement of its safety program was effective in practice. We also affirm the CNR but we conclude  
17 that the employer did not establish any of the four prongs of the unpreventable employee misconduct  
18 defense. We have granted review in order to discuss our reasoning and to address Perrenoud's  
19 contention that we should declare that the statutes and administrative regulations that govern alleged  
20 WISHA violations are unconstitutionally vague.

21 **DISCUSSION**

22 We first summarily dispose of Perrenoud's argument that our industrial appeals judge erred  
23 by not addressing the constitutional issues it raised. We are an administrative agency that performs  
24 quasi-judicial administrative functions. In *Bare v. Gorton*, 84 Wn.2d 380 (1974), and again in *Yakima*  
25 *County Clean Air Authority v. Galscam Builders, Inc.*, 85 Wn.2d 255 (1975), the Washington Supreme  
26 Court unambiguously declared that administrative tribunals are without jurisdiction to adjudicate  
27 constitutional questions. We have declined to address constitutional issues many times for that  
28 reason.<sup>1</sup> We need not further address Perrenoud's argument concerning our jurisdiction.

29 Perrenoud does not deny the occurrence of the safety violations cited in the Department's  
30 CNR. For that reason, we accept as accurate Mr. Dunken's description of the events of November 7,

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<sup>1</sup> *In re Mary Propst*, BIIA Dec., 92 2186 (1993); *In re Harry S. Reese, M.D.*, BIIA Dec., 00 P0044 (2001); and *In re James*  
*V. Gersema*, BIIA Dec., 01 20636 (2003).

1 2015. Angel Gomez, who was Perrenoud's lead worker at the construction site, was the person  
3 Mr. Dunken observed on the roof of the house that, as measured by the safety inspector, was 10 feet  
4 high. The pitch of the roof was 6/12. Mr. Gomez was wearing a safety harness, but it was not  
5 attached to an anchor point.  
6

7 Mr. Dunken concluded that Perrenoud was in violation of WAC 296-155-24609(7)(a) because  
8 it did not ensure that employees use an appropriate fall protection system when exposed to fall  
9 hazards of four feet or more while working on a roof that has a pitch greater than 4/12. Mr. Gomez  
10 told Mr. Dunken that he understood that fall protection was required only when work was being done  
11 on roofs that were at least 10 feet high.  
12

13 In support of citing for repeat violations Mr. Dunken said that under CNR No. 317606903 the  
14 Department cited Perrenoud for a fall protection violation on January 7, 2015, and under CNR  
15 No. 316957448, the Department cited the employer for a fall protection violation on June 24, 2014.  
16

17 During his observation, Mr. Dunken saw Mr. Gomez use a pneumatic nail gun while he was  
18 not wearing safety glasses. He determined that Perrenoud violated WAC 296-155-350(3) because  
19 it did not ensure that Mr. Gomez wore eye protection while he was using a tool that created a hazard  
20 of exposure to flying debris. The Department previously cited Perrenoud on April 29, 2016, for  
21 violating eye protection rules.  
22

23 Mr. Dunken noted that another Perrenoud worker, Elmer Otuc, was working on the ground  
24 while he was not wearing a hardhat. The safety officer concluded that Mr. Otuc was exposed to the  
25 potential hazard of falling or flying objects if the nail gun Mr. Gomez was using fell or if the pieces of  
26 plywood Mr. Otuc was handing up to Mr. Gomez fell. The Department cited Perrenoud for a violation  
27 of WAC 296-155-205(3) for failing to ensure that Mr. Otuc was wearing a hardhat.  
28

29 After he came down from the roof so Mr. Dunken could conduct an opening conference with  
30 him, Mr. Gomez explained that he forgot to tie off and to wear his safety glasses that he had left in  
31 his truck along with the anchor point that should have been attached to the roof. Mr. Gomez also  
32 acknowledged that he did not have a current first-aid card. WAC 296-155-120(2) requires employers  
33 to ensure that all crew leaders, supervisors, or persons in direct charge of one or more employees  
34 have a valid first-aid certificate.  
35

36 On March 4, 2016, the Department cited Perrenoud for the safety violations Mr. Dunken  
37 observed. After the business requested reconsideration of the citation and notice, the Department  
38 issued the CNR at issue in this appeal on April 29, 2016.  
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In order to satisfy the first prong of the unpreventable employee misconduct defense, Perrenoud had to prove that it had a thorough safety program that included work rules, training, and equipment designed to prevent safety hazards. The record established that the work rules contained in the employer's safety program were in accord with WISHA standards. Nathan Perrenoud, the president of the roofing business, asserted that the employer provides its workers with fall protection, hardhats, and other needed safety equipment, but Mr. Gomez testified that he and other workers had to purchase their own fall protection systems. Perrenoud failed to prove that it has a thorough safety program because it does not provide its workers with fall protection equipment, which is a vital piece of equipment for workers engaged in the roofing business.

The second prong of the unpreventable employee misconduct defense required Perrenoud to prove that it adequately communicated its work rules to its employees. Despite the fact that Perrenoud employed multiple workers who spoke only Spanish, its safety program was written only in English. Mr. Gomez said that he reads the work rules to new, Spanish-speaking employees, but Mr. Gomez is unable to read English and he conceded that he found it difficult to communicate the rules to other workers. Mr. Perrenoud said that the business employs workers who speak both Spanish and English and that they are available to assist Spanish-speaking employees understand safety rules if the workers report that they have had difficulty in understanding the rules. The president of the company added that he found it useful to rely on spouses of new workers, who might be bilingual, to help the workers understand safety rules. He also testified that safety matters are discussed in weekly safety meetings and that he personally had shown and narrated a video on how to use safety gear during at least one safety meeting. Mr. Perrenoud did not say whether he understands Spanish.

Perrenoud's means of communicating its safety rules to its employees is far from adequate. Perrenoud does not test workers on their knowledge of safety rules. Per the record, Spanish-speaking workers who do not understand the safety program, which is written in English, receive assistance in doing so from bilingual employees only if the workers report that they are unable to understand the written safety program. Perrenoud's reliance on the spouses of its workers to aid the workers in understanding the rules is unreasonable because it has no assurance that the spouses understand English, or that, even if they do understand English, they assist the workers in understanding the safety rules.

1 On the date of Mr. Dunken's inspection, Perrenoud employed 15 roofers who worked at  
2 separate sites in crews of three or four. Mr. Perrenoud contended that a company manager conducts  
3 unannounced inspections at each work site one to three times per day. He said four managers are  
4 available to do so, himself; Greg Chapman, who is a production manager; and Joe Gipson and Kevin  
5 Edwards, who are sales representatives. Mr. Perrenoud said that Mr. Chapman is instructed to  
6 inspect worksites any time he is on location. He did not say how often that happened. He stated that  
7 the sales representatives had similar instructions but he acknowledged that Mr. Gipson and  
8 Mr. Edwards are not often at worksites. No manager inspected the work site Mr. Dunken visited on  
9 November 7, 2015, because, as Mr. Gomez noted, that was a Saturday and Mr. Perrenoud;  
10 Mr. Chapman; Mr. Gipson; and Mr. Edwards do not work on weekends.

11 Mr. Gomez said that Perrenoud did not normally keep a written record of the results of  
12 unannounced inspections. Mr. Perrenoud acknowledged that the business recorded the results of  
13 such inspections only three times in the 10 full months of 2015 that preceded Mr. Dunken's inspection.

14 Perrenoud failed to prove that it took adequate steps to discover and correct safety violations.  
15 The employer failed to establish the third prong of the unpreventable employee misconduct  
16 affirmative defense.

17 Perrenoud's disciplinary program calls for a verbal warning for a first safety violation, deduction  
18 of one-half of a worker's daily pay for a second violation, and termination of employment for a third  
19 violation. In order for punitive action to be stepped-up, the safety violation must mirror the violation  
20 for which the employee was previously disciplined. Other instances described in the record suggest  
21 that Perrenoud's disciplinary program was not effective in practice. Standing alone, the fact that  
22 Mr. Gomez, the roofing company's lead worker at the site, was the worker who committed the  
23 repeated violations of the fall protection and safety glasses rules, is sufficient to establish that the  
24 disciplinary program failed to meet the fourth prong of the unpreventable employee misconduct  
25 defense.

26 In order for the Department to cite an employer for a repeat safety violation the violation need  
27 not be for a violation of exactly the same rule, rather the formerly cited violation should be for the  
28 same type of hazard.<sup>2</sup> Here, for example, the prior violations on which the Department relied only  
29 had to concern hazard related to falls from heights and not specifically WAC 296-155-24609(7)(a).

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<sup>2</sup> *In re Cobra Roofing Services*, BIIA Dec., 00 W0760 (2002).

1 The same is true regarding the prior citation for Mr. Gomez's failure to wear safety glasses.  
2 Perrenoud did not produce any evidence that it did not commit the prior safety violations.

3  
4 The Department calculated the penalties as follows:

5  
6 Item No. 1.1 WAC 296-155-24609(7)(a):

7 The violation was **serious** (3 on a scale of 3) because had Mr. Gomez fallen  
8 while he was not wearing fall protection equipment, he could have been seriously  
9 injured or killed;

10 The **probability** that Mr. Gomez would have been injured because of the fall  
11 protection violation was 2 on a scale of 3 because the pitch of the roof was steep;

12 By multiplying the seriousness of the violation by the probability that it would  
13 result in a serious injury or death, the Department calculated the **gravity** of the  
14 violation at 12;

15 The **base penalty** for a violation that has a gravity of 12 is \$6,000;

16 The Department did not adjust the base penalty based on Perrenoud's **good**  
17 **faith**, which was average; it reduced the base penalty by \$4,200 based on  
18 Perrenoud's **size** because the roofing company employed fewer than  
19 25 workers; the Department added \$600 to the base penalty because  
20 Perrenoud's **history** regarding safety matters was poor—a repeated violation  
21 automatically means an employer has a poor history;

22 The **adjusted base penalty** of \$2,400 was multiplied by five because Perrenoud  
23 had two prior violations of fall protection rules—it resulted in a **total penalty** of  
24 \$12,000.

25  
26 Item No. 1.2 WAC 296-155-350(3):

27 The violation was **serious** (3 on the scale of 3) because Mr. Gomez could have  
28 sustained a serious injury because of his failure to wear safety glasses while he  
29 operated a nail gun;

30 The **probability** was 2 on the scale of 3 because Mr. Gomez had to use the nail  
31 gun on a large number of plywood sheets on the roof.

32 The **gravity** was 6, which resulted in a base penalty of \$6,000.

33 The Department used the same calculations regarding good faith, size, and  
34 history as it used in calculating the penalty for Item No. 1.1, which meant that it  
35 did not adjust the penalty based on **good faith**, it deducted \$1,400 based on  
36 Perrenoud's **size** and it added \$200 based on the businesses **history**. The  
37 **adjusted base penalty** of \$800 was multiplied by 2 due to the one prior violation.  
38 The **total penalty** was \$4,800.

39  
40 Item No. 2.1 WAC 296-155-205(3):

41 The violation was **serious** (1 on the scale of 3);

1 The **probability** was 2 on the scale of 3 because Mr. Otuc had to assume an  
2 awkward position in order to hand pieces of plywood to Mr. Gomez, thus leaving  
3 him in a vulnerable position to avoid a falling object;

4 The **gravity** was 2, which resulted in a base penalty of \$2,000;

5 No adjustment was made for **good faith**, Perrenoud's **size** reduced the penalty  
6 by \$1,400, and its **history** increased the penalty by \$200. Thus, the **adjusted**  
7 **base penalty** and the **total** penalty was \$800.  
8

9 Item No. 3.1 WAC 296-155-120(2):

10 The Department did not assess a penalty because of Mr. Gomez's failure to have  
11 a valid first-aid card because it was a general violation of safety rules.

12 The **total penalty assessed** was \$17,600.

13 The Department proved that Perrenoud committed each of the violations for which it cited the  
14 roofing business; it accurately calculated the penalties, including the enhanced penalties for repeated  
15 safety violations; and it properly determined that the violations were not caused by unavoidable  
16 employee misconduct.  
17

18 **DECISION**

19 The employer, Perrenoud Roofing, Incorporated, filed an appeal with the Board of Industrial  
20 Insurance Appeals on May 4, 2016. The employer appeals Corrective Notice of Redetermination  
21 No. 317938531 issued by the Department on April 29, 2016. In this corrective notice, the Department  
22 alleged that Perrenoud committed two serious repeat violations, one serious violation, and one  
23 general violation of the Washington Industrial Safety and Health Act. It assessed a penalty against  
24 Perrenoud of \$17,600. The corrective notice of redetermination is correct and is affirmed.  
25

26 **FINDINGS OF FACT**

- 27 1. On September 14, 2016, an industrial appeals judge certified that the  
28 parties agreed to include the Jurisdictional History in the Board record  
29 solely for jurisdictional purposes.
- 30 2. On November 7, 2015, Ivan V. Dunken, an inspector for the Division of  
31 Safety and Health of the Department of Labor and Industries, inspected  
32 the worksite of Perrenoud Roofing, Inc. (Perrenoud), located in Spokane  
33 County at 5007 N. Atlantic St. in Spokane, WA.
- 34 3. At the time of the inspection, the lead worker for Perrenoud at the  
35 worksite, Angel Gomez, was working on the roof of the new residential  
36 construction while the lanyard of the safety harness on his fall protection  
37 equipment was not tied off to an anchor point.
- 38 4. The eave of the roof on the house on which Mr. Gomez was working was  
39 10 feet high.  
40

- 1 5. The pitch of the roof on which Mr. Gomez was working was 6/12.
- 2 6. At the time of the inspection, Mr. Gomez operated a nail gun while he was  
3 not wearing any form of eye protection.
- 4 7. At the time of the inspection, Elmer Otuc, another Perrenoud worker, who  
5 was working on ground level, handed pieces of plywood to Mr. Gomez,  
6 who was on the roof, while Mr. Otuc was not wearing a hardhat and, thus,  
7 while he was exposed to the hazard of falling debris.
- 8 8. At the time of the inspection, Mr. Otuc was also exposed to a hazard that  
9 the nail gun that Mr. Gomez was operating would fall on him while he was  
10 not wearing a hardhat.
- 11 9. On April 4, 2016, the Department of Labor and Industries issued  
12 Corrective Notice of Redetermination No. 317938531 to Perrenoud. Item  
13 No. 1.1 alleged that on November 7, 2015, the roofing business  
14 committed one serious repeat violation of WAC 296-155-24609(7)(a), and  
15 assessed a penalty of \$12,000; Item No. 1.2 alleged that Perrenoud  
16 committed one serious repeat violation of WAC 296-155-350(3), and  
17 imposed a penalty of \$4,800; Item No. 2.1 alleged one serious violation  
18 of WAC 296-155-205(3), and assessed a penalty of \$800; and Item  
19 No. 3.1 alleged one general violation of WAC 296-155-120(2), and did not  
20 assess a penalty.
- 21 10. The Department cited Perrenoud for fall protection safety violations under  
22 Corrective Notice of Redetermination No. 317606903 on January 7, 2015,  
23 and under Corrective Notice of Redetermination No. 316957448 on June  
24 24, 2014.
- 25 11. The Department cited Perrenoud for a violation of eye protection safety  
26 rules under Corrective Notice of Redetermination No. 316957448 on  
27 June 24, 2014.
- 28 12. Perrenoud did not provide its workers with fall protection harness  
29 equipment.
- 30 13. Regarding Item No. 1.1 of the April 4, 2016 corrective notice of  
31 redetermination, the Department correctly determined that the fall  
32 equipment violation created a serious (3 on a scale on which 3 is the most  
33 serious) hazard of serious bodily harm or death because if Mr. Gomez fell  
34 from a height of 10 feet, he could suffer serious bodily harm or be killed.
- 35 14. Regarding Item No. 1.1, the Department correctly rated the probability  
36 that a Perrenoud worker would suffer serious bodily injuries or death at  
37 2 on a scale of 3 because of the height and steep pitch of the roof.
- 38 15. Regarding Item No. 1.1, the Department correctly determined that  
39 Perrenoud's good faith regarding safety matters was average.
- 40 16. Regarding Item No. 1.1, the Department correctly determined that  
41 Perrenoud employed 25 or fewer workers on November 7, 2015.

- 1 17. Regarding Item No. 1.1, the Department correctly determined that  
2 Perrenoud's history regarding fall protection matters was poor because it  
3 had been cited twice before during the preceding two years for fall  
4 protection violations.
- 5 18. Regarding Item No. 1.2 of the April 4, 2016 corrective notice of  
6 redetermination, the Department correctly determined that the hazard  
7 caused by Mr. Gomez's failure to use safety glasses created a serious  
8 (3 on the scale of 3) hazard of serious bodily harm or death because if  
9 the nail gun caused flying debris, Mr. Gomez could suffer serious bodily  
10 harm or be killed.
- 11 19. Regarding Item No. 1.2, the Department correctly rated the probability  
12 that Mr. Gomez would suffer serious bodily injuries or death at 2 on a  
13 scale of 3 because he had to use the nail gun on a large amount of  
14 sheeting.
- 15 20. Regarding Item No. 1.2, the Department correctly determined that  
16 Perrenoud's good faith regarding safety matters was average.
- 17 21. Regarding Item No. 1.2, the Department correctly determined that  
18 Perrenoud employed 25 or fewer workers on November 7, 2015.
- 19 22. Regarding Item No. 1.2, the Department correctly determined that  
20 Perrenoud's history regarding the use of personal protective equipment  
21 by workers who were using power and/or hand tools was poor because it  
22 had been cited once before during the preceding two years for failing to  
23 ensure that its employees who were using hand and/or power tools and  
24 were exposed to the hazard of flying or fall debris used proper personal  
25 protection equipment, including the use of safety glasses.
- 26 23. Regarding Item No. 2.1 of the April 4, 2016 corrective notice of  
27 redetermination, the Department correctly determined that the hazard  
28 caused by Mr. Otuc's failure to wear a hard hat created a serious (1 on  
29 the scale of 3) hazard of serious bodily harm or death because if the nail  
30 gun that Mr. Gomez was using caused flying debris or if the nail gun or  
31 roofing materials fell, Mr. Otuc could suffer serious bodily harm or be  
32 killed.
- 33 24. Regarding Item No. 2.1, the Department correctly rated the probability  
34 that Mr. Otuc would suffer serious bodily injuries or death at 2 on a scale  
35 of 3 because he had to assume an awkward position while he handed  
36 pieces of plywood to Mr. Gomez and was in a vulnerable position.
- 37 25. Regarding Item No. 2.1, the Department correctly determined that  
38 Perrenoud's good faith regarding safety matters was average.
- 39 26. Regarding Item No. 2.1, the Department correctly determined that  
40 Perrenoud employed 25 or fewer workers on November 7, 2015.
- 41 27. Regarding Item No. 2.1 the Department correctly determined that  
42 Perrenoud's history regarding wearing hard hats was poor.

- 1 28. Regarding Item No. 3.1, the Department accurately determined that the  
3 failure of Mr. Gomez to have a valid first-aid certificate did not create a  
4 serious safety hazard.
- 5 29. The Department correctly calculated the total penalty assessed against  
6 Perrenoud for the safety violations it committed on November 7, 2015, at  
7 \$17,600.
- 8 30. Perrenoud did not have a thorough safety program, including work rules,  
9 training, and equipment designed to prevent the safety violations it  
10 committed on November 7, 2015, because Perrenoud did not provide its  
11 workers with necessary safety equipment, including fall protection  
12 equipment.
- 13 31. Perrenoud did not effectively communicate its safety rules to its  
14 employees because it wrote its safety rules only in English even though it  
15 had multiple employees who understood only Spanish and it did not  
16 ensure that anyone who was bilingual interpreted the work rules in  
17 Spanish for those workers.
- 18 32. Perrenoud did not take steps to discover and communicate violations of  
19 its safety rules because it assigned only four management  
20 representatives to conduct unannounced safety inspections at up to five  
21 concurrent worksites and those representatives conducted such  
22 inspections only intermittently and never on weekends when Perrenoud  
23 engaged in roofing work.
- 24 33. Perrenoud did not enforce its safety program effectively in practice  
25 because it had repeated serious safety violations in the two years prior to  
26 November 7, 2015, and its lead worker on that date was the worker who  
27 violated fall protection and personal protection equipment rules.

#### CONCLUSIONS OF LAW

- 1 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
2 and subject matter in this appeal.
- 3 2. On November 7, 2015, Perrenoud committed one serious, repeat  
4 violation of WAC 296-155-24609(7)(a) in that it did not ensure that the  
5 lead worker at its worksite in Spokane County at 5007 N. Atlantic St. in  
6 Spokane, WA., who was exposed to the hazard of a fall of more than four  
7 feet while he was working on a steep-pitched roof, used an appropriate  
8 fall protection system as required by WISHA, and the Department  
9 properly assessed a penalty of \$12,000 for the violation because the  
0 Department cited Perrenoud for fall protection hazards on June 24, 2014,  
1 and on January 7, 2015.
- 2 3. On November 7, 2015, Perrenoud committed one serious, repeat  
3 violation of WAC 296-155-350(3) in that it did not ensure that the lead  
4 worker of its worksite in Spokane County at 5007 N. Atlantic St. in  
5 Spokane, WA., who was exposed to hazards created by flying debris or

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falling materials, used safety glasses as required by WISHA and the Department properly assessed a penalty of \$4,800 for the violation because the Department had cited Perrenoud for an eye protection violation on June 24, 2014.

4. On November 7, 2015, Perrenoud committed one serious violation of WAC 296-155-205(3) in that it did not ensure that one of its workers at its worksite in Spokane County at 5007 N. Atlantic St. in Spokane, WA., who was engaged in work activities on the ground, wore a hard hat while he was exposed to the hazard of flying debris or falling materials as required by WISHA and the Department properly assessed a penalty of \$800 for the violation.
5. On November 7, 2015, Perrenoud committed one general violation of WAC 296-155-120(2) in that it did not ensure that its lead worker at its worksite in Spokane County at 5007 N. Atlantic St. in Spokane, WA., who was in charge of one or more workers, had a valid first-aid certificate as required by WISHA but the Department properly did not assess a penalty for the violation.
6. Perrenoud did not prove that the safety violations its employees committed on November 7, 2015, at its worksite in Spokane County at 5007 N. Atlantic St. in Spokane, WA, were caused by unpreventable employee misconduct, as that affirmative defense is defined in RCW 49.17.120.
7. Corrective Notice of Redetermination No. 317938531 of the Department of Labor and Industries dated April 4, 2016, is correct and is affirmed.

Dated: August 9, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson



FRANK E. FENNERTY, JR., Member

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**Addendum to Decision and Order  
In re Perrenoud Roofing Inc.  
Docket No. 16 W1037  
Citation & Notice No. 317938531**

**Appearances**

Employer, Perrenoud Roofing Incorporated, by Law Office of J. Gregory Lockwood PLLC, per J. Gregory Lockwood

Employees of Perrenoud Roofing Incorporated, None

Department of Labor and Industries, by Office of the Attorney General, per Pamela V. Thomure

**Petition for Review**

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on May 25, 2017, in which the industrial appeals judge affirmed the Department order dated April 29, 2016. The Department filed a response to the petition for review on June 21, 2017.

# Appendix "B"

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**STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT**

PERRENOUD ROOFING, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

Cause No. 17-2-03387-6

NOTICE OF APPEARANCE

TO: CLERK OF THE COURT;  
AND TO: PERRENOUD ROOFING, INC., Plaintiff, by and through attorney, J. GREGORY  
LOCKWOOD:

YOU ARE HEREBY NOTIFIED that ROBERT W. FERGUSON, Attorney General, and  
PAM THOMURE, Assistant Attorney General, without waiving objections as to improper  
service, venue or jurisdiction, hereby appear as the attorneys for the State of Washington  
Department of Labor & Industries, Defendant, in the above-entitled action; and you are notified  
that service of all further pleadings, notices, documents or other papers herein, exclusive of process,

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1 may be had on said defendant by serving the undersigned attorney at the address stated below.

2 DATED this 8<sup>th</sup> day of September, 2017.

3 ROBERT W. FERGUSON  
4 Attorney General

5 *Pam Thomure #30186*  
6 *for*

7 PAM THOMURE  
8 Assistant Attorney General  
9 WSBA No. 17723  
10 Labor & Industries Division

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**STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT**

PERRENOUD ROOFING, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

Cause No. 17-2-03387-6

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused  
the document referenced below to be served as follows:

DOCUMENT: Department's Notice of Appearance

ORIGINAL TO: via United States Postal Service, properly addressed and postage prepaid  
Superior Court Clerk  
Spokane County Superior Court  
1116 West Broadway Avenue  
Spokane, Wa 99260-0350

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COPY TO: via United States Postal Service, properly addressed and postage prepaid

J. Lockwood  
J. Gregory Lockwood PLLC  
421 W. Riverside Ave., Suite 960  
Spokane, WA 99201-0402

COPY TO: via Interoffice Mail

WISHA Appeals  
MS 44604

DATED this 8<sup>th</sup> day of September, 2017, at Seattle, Washington.

  
\_\_\_\_\_  
TIM LAW (ATG)  
Legal Office Assistant



**Bob Ferguson**

**ATTORNEY GENERAL OF WASHINGTON**

Labor & Industries Division

1116 West Riverside Avenue • Suite 1000 • Spokane WA 98201-1106 • (509) 456-3123

September 8, 2017

Superior Court Clerk  
Spokane County Superior Court  
1116 West Broadway Avenue  
Spokane, WA 99260-0350

RE: ***Perrenoud Roofing, Inc. v. DLI (Lead)***  
**Spokane County Cause No. 17-2-03387-6**

Dear Court Clerk:

Please file the enclosed Notice of Appearance and Certificate of Service in the above-referenced matter. Also enclosed are copies to be conformed and a self-addressed, stamped envelope for return to this office. Thank you for your assistance.

Sincerely,

TIM LAW(ATG)  
Legal Office Assistant to  
PAM THOMURE  
Assistant Attorney General  
WSBA No. 17723  
Labor & Industries Division

Enclosures

1. Notice of Appearance
2. Certificate of Service

cc: J. Gregory Lockwood, Attorney for Perrenoud Roofing, Inc. (w/encl.)  
WISHA Appeals, MS 44604

# Appendix “C”



**SUPERIOR COURT OF  
WASHINGTON  
COUNTY OF SPOKANE**

Perrenoud Roofing Inc

Plaintiff/Petitioner

vs.

Dept Of Labor & Industries

Defendant/Respondent

**CASE NO.** 2017-02-03387-6

**Amended BRIEFING SCHEDULE**

**ORDER**

IT IS ORDERED that all parties shall comply with the following schedule:

**SCHEDULE**

	DUE Date
•Appellant's Brief and Transcript of Record	11/28/2017 ✓
•Response Brief	12/21/2017 ✓
•Reply Brief	01/04/2018 ✓
•Oral Argument	02/02/2018 ✓ At 1:30 PM

DATED this 1st day of November, 2017

RAYMOND F. CLARY  
SUPERIOR COURT JUDGE

# Appendix “D”

*Law office of*  
**J. Gregory Lockwood, P.L.L.C.**  
522 W. Riverside Avenue, Suite 420  
Spokane, Washington 99201  
(509) 624-8200 Telephone  
(509) 623-1491 Facsimile

**MEMORANDUM OF TRANSMITTAL**

November 8, 2017

Board of Industrial Appeals  
2430 Chandler Ct SW  
P.O. Box 42401  
Olympia, WA 98504-2401

RE: Perrenoud Roofing v Department of L&I  
Docket No: 16 W1037  
Citation No: 317938531

Dear Sir/Madam:

Enclosed please find a copy of the following document(s) for your records:

1. Notice of Appeal

Thank you, if you have any questions, please do not hesitate to call our office.

Very truly yours,



Lorrie Hodgson  
Paralegal to  
J. Gregory Lockwood

Enclosure



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW, PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • [www.biaa.wa.gov](http://www.biaa.wa.gov)

November 6, 2017

mailed 11/8/17

J. Gregory Lockwood  
Attorney at Law  
421 West Riverside, Ste 960  
Spokane, WA 99201

**In re: Perrenoud Roofing Inc.**

**Docket No: 16 W1037**  
**Safety Report No: 317938531**

I received your letter dated November 1, 2017 in which you request a Certified Appeal Board Record be sent to Spokane County Superior Court in regards to Board Docket No. 16 W1037.

As of this date, we have not received service of your Notice of Appeal to Superior Court. As such, we have not been made legally aware of your case and are currently unable to forward any documents pertaining to your case.

Please refer to WAC 263-12-170, which states in part:

*Upon receipt of a copy of notice of appeal to superior court from a board order, served upon the board by the appealing party....the executive secretary or his or her designee shall certify the record made before the board to the court. Copies of such record (except nonreproducible exhibits) shall be furnished to all parties to the proceedings before the board.*

If you mail the Board a copy of your Notice of Appeal filed under Cause No. 17-2-03387-6 in Spokane County, once we receive this document and confirm that it is an active case, we will start the process of certifying our record and send copies to all active parties and the court. If you have any questions, please contact the Superior Court section at (360) 753-6823.

cc: Office of the Attorney General

# Appendix "E"



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Ct SW, PO Box 42401 • Olympia, WA 98504-2401 • (360) 753-6823 • [www.bifa.wa.gov](http://www.bifa.wa.gov)

November 17, 2017

J Gregory Lockwood Atty  
Law Office of J Gregory Lockwood, PLLC  
421 W Riverside Ste 960  
Spokane WA 99201

In Re: Perrenoud Roofing Incorporated  
Docket No. 16 W1037  
Citation & Notice No. 317938531  
Cause No. 17-2-03387-6

Dear Mr. Lockwood:

On November 17, 2017, we received a copy of your Notice of Appeal to the Spokane County Superior Court. The Certified Appeal Board Record will be sent to the court and parties.

If you have any questions, please contact the Superior Court Section at (360) 753-6823.

c: Office of the Attorney General  
DLI – WISHA PO 4604

*Erin Sauter*  
xt 1236

# Appendix "F"

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STATE OF WASHINGTON  
SPOKANE COUNTY SUPERIOR COURT

PERRENOUD ROOFING, INC.

Petitioner,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

NO. 17-2-03387-6

DEPARTMENT'S MOTION TO  
DISMISS FOR FAILURE TO  
TIMELY SERVE NOTICE OF  
APPEAL AS REQUIRED UNDER  
RCW 49.17.150

The Respondent, Department of Labor and Industries moves this Court for an order dismissing the Petitioner's Notice of Appeal to Superior Court upon the following grounds:

Perrenoud Roofing, Inc. failed to perfect its appeal by not serving the Board of Industrial Insurance Appeals as required by RCW 49.17.150. This motion is based upon the records and files herein and the attached Memorandum of Authorities in Support of Department's Motion to Dismiss, Declaration of Pamela V. Thomure, and the Affidavit of Erin Santos.

DATED this 28 day of November, 2017.

ROBERT W. FERGUSON  
Attorney General



PAMELA V. THOMURE, WSBA NO. 17723  
Assistant Attorney General  
Attorneys for Department of Labor & Industries

COPY

1 **PROOF OF SERVICE**

2 I certify that I served a copy of the foregoing document on all parties or their counsel of  
3 record at their listed address above on the date below as follows:

4  Hand-delivered to:

5 The Honorable Richard Clary  
6 Spokane County Superior Court, Dept. 3  
7 1116 W. Broadway  
8 Spokane, WA 99260

9 J. Gregory Lockwood PLLC  
10 421 W. Riverside Ave., Suite 960  
11 Spokane, WA 99201-0402

12 I certify under penalty of perjury under the laws of the state of Washington that the  
13 foregoing is true and correct.

14 DATED this 28 day of November, 2017, at Spokane, Washington.

15 

16 \_\_\_\_\_  
17 GINNY PIKE, Legal Assistant  
18 (509) 625-5493  
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# Appendix "G"



1 This matter came on before the Honorable Richard Clary in open court on January 12,  
2 2018, on the Department of Labor and Industries' Motion to Dismiss for Failure to Timely Serve  
3 Notice of Appeal as Required under RCW 49.17.150. The petitioner, Perrenoud Roofing, Inc.  
4 (Perrenoud) appeared by and through its attorney, J. Gregory Lockwood, and the respondent  
5 Department of Labor and Industries appeared by and through the Attorney General, Robert W.  
6 Ferguson, per Pamela V. Thomure, Assistant Attorney General. The court, having considered  
7 the files and records herein, supporting and opposing affidavits and declarations, memoranda of  
8 authorities, and argument of counsel, and being fully informed, now makes and enters the  
9 following:

### 10 I. FINDINGS OF FACT

- 11 1.1 The Department issued Citation and Notice No. 317938531 on April 4, 2016, citing  
12 Perrenoud for two serious repeat violations, one serious violation, and one general  
13 violation involving of WAC 296-155-24609(07), 296-155-350(3), 296-155-205(3) and  
14 WAC 296-155-120(2), and for which the Department assessed a penalty in the amount  
15 of \$17,600.00.
- 16 1.2 On August 9, 2017, the Board of Industrial Insurance Appeals (Board) issued a Decision  
17 and Order affirming Citation and Notice No. 317938531 dated April 4, 2016.
- 18 1.3 Perrenoud filed an appeal in superior court on August 22, 2017. Perrenoud served a copy  
19 via the United States Postal Service on August 22, 2017, to the Office of the Washington  
20 State Attorney General through Pamela V. Thomure, Assistant Attorney General. The  
21 Attorney General filed a Notice of Appearance on behalf of the Washington State  
22 Department of Labor and Industries on September 8, 2017. Perrenoud served the Board  
23 of Industrial Insurance Appeals with the notice of appeal by sending a copy via the United  
24 States Postal Service on November 8, 2017. The Washington State Department of Labor  
25 and Industries filed its motion to dismiss on November 28, 2017.
- 26 1.4 Perrenoud failed to timely perfect this appeal in that it did not serve the Board of  
Industrial Insurance Appeals within the 30 day time period as required by RCW  
49.17.150.

### II. CONCLUSIONS OF LAW

- 2.1 Perrenoud Roofing, Inc.'s appeal was not timely served on all parties as required by  
RCW 49.17.150. The appeal is dismissed.
- 2.2 The Board's decision and Order issued April 4, 2016, is the final order of the Board.
- 2.3 Perrenoud Roofing, Inc.'s penalty is \$17,600.00

1 Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW the  
2 Court enters the following:

3 **III. JUDGMENT AND ORDER**

4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

- 5 3.1 This appeal is hereby DISMISSED.  
6 3.2 The Department is awarded, and Perrenoud is ordered to pay, a civil penalty in the  
7 amount of \$17,600.00, with a total principal amount of \$17,600.00.  
8 3.3 The Department is awarded, and Perrenoud is ordered to pay, a statutory attorney fee of  
9 \$200.00.

DONE IN OPEN COURT this 6th day of February, 2018

10 **RAYMOND F CLARY**

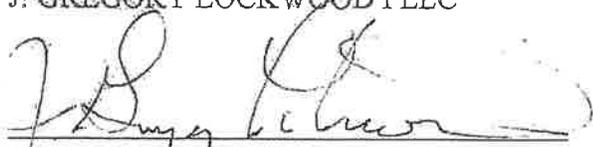
11 ~~HONORABLE RICHARD CLARY~~

12 Presented by:

13 ROBERT W. FERGUSON  
14 Attorney General

15   
16 \_\_\_\_\_  
17 PAMELA V. THOMURE, WSBA No. 17723  
18 Assistant Attorney General  
19 Attorneys for the Department of Labor & Industries  
20 (509) 458-3526

21 Approved as to form but object to content

22 J. GREGORY LOCKWOOD PLLC  
23   
24 \_\_\_\_\_  
25 J. GREGORY LOCKWOOD, WSBA No. 20629  
26 Attorney for Perrenoud Roofing, Inc.

# Appendix “H”

COPY  
Original Filed  
JUL 11 2018  
Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK



**SUPERIOR COURT OF WASHINGTON  
FOR SPOKANE COUNTY**

Perrenoud Roofing, Inc.,

Petitioner,

vs.

Department of Labor and Industries  
of the State of Washington,

Respondent.

No. 17-2-03387-6

Order Denying Petitioner's  
Motion for Reconsideration

***I. PARTIAL PROCEDURAL HISTORY***

February 6, 2018, this court issued its Judgment and Order Dismissing Appeal. (Clerk's Document Side Number 32, hereafter abbreviated "SN"). February 12, 2018, Petitioner moved for reconsideration. (SN 33). April 9, 2018, the court's judicial assistant wrote the parties and requested a response from Respondent on or before April 20, 2018. (SN 34). On April 18, 2018, Respondent submitted its Response to Petitioner's Motion for Reconsideration. (SN 35).

***II. DECISION***

In preparation for oral argument, during oral argument and in rendering its Judgment and Order Dismissing Appeal (SN 32), the court considered all of Petitioner's arguments, including its substantial compliance and lack of prejudice theories. Respondent's points and authorities are correct. Consideration of Petitioner's substantial compliance and lack of

1 prejudice theories is inherent in finding of fact 1.3, as well as finding of fact 1.4 and  
2 conclusion of law 2.1. (SN 32). The court respectfully reaffirms its prior decision.  
3

4 **III. ORDER**

5 It IS HEREBY ORDERED that: Petitioner's Motion for Reconsideration is denied.  
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7 Dated: July 11, 2018.

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9 Raymond F. Clary  
10 Superior Court Judge  
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# Appendix "I"

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

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**SUPERIOR COURT OF WASHINGTON  
COUNTY OF SPOKANE**

PERRENOUD ROOFING, INC.

Petitioner,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

NO. 17-2-03387-6

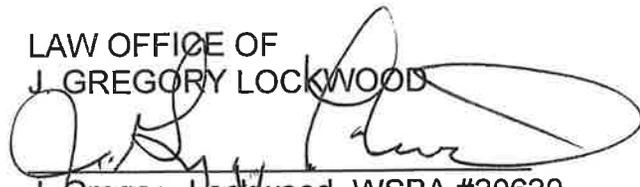
NOTICE OF APPEAL

Petitioner, Perrenoud Roofing, Inc, by and through its attorney seeks an appeal by the State of Washington Court of Appeals, Division III of the decisions issued by Judge Raymond F. Clary, in the Judgment and Order Dismissing Appeal entered on February 6, 2018 and the Order Denying Petitioner's Motion for Reconsideration filed July 11, 2018.

A copy of the above mentioned decisions are attached to this notice

Dated this 18<sup>th</sup> day of July, 2018.

LAW OFFICE OF  
J. GREGORY LOCKWOOD

  
J. Gregory Lockwood, WSBA #20629  
Attorney for Petitioner

NOTICE OF APPEAL - 1

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**LAW OFFICE OF J. GREGORY LOCKWOOD PLLC**

**November 08, 2018 - 1:21 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36219-1  
**Appellate Court Case Title:** Perrenoud Roofing, Inc. v. Dept. of Labor & Industries  
**Superior Court Case Number:** 17-2-03387-6

**The following documents have been uploaded:**

- 362191\_Briefs\_20181108131809D3200670\_1301.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

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- LindsayJ@atg.wa.gov

**Comments:**

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