No. 31290-9

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Jude I. Doty,

Plaintiff-Appellant,

v.

Department of Labor & Industries
of the State of Washington and Judy Schurke,
in her capacity as Deputy Director,

Defendant-Respondent.

BRIEF OF APPELLANT

Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Plaintiff-Appellant Doty
1426 W Francis Ave. 2nd Floor
Spokane Washington 99205
(509) 323-5210

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I. Introduction

The Department alleges that Mr. Doty hired his sons to work in employment prohibited or hazardous under WAC 296-125-030 or -033. The parties agree that if Mr. Doty did not "employ" his sons, then he violated neither rule.

By referring to a dictionary's definition of a word used to define the meaning of "to employ" in WAC 296-125-015 rather than referring to the definition of "to employ" in case law, the Department botches its interpretation of the meaning of "to employ" in WAC 296-125-015.

Worse still, the Department lacks the authority to redefine the meaning of "to employ" in its wide manner. Additionally, this ultra vires act of the Department also violates the constitutional rights of Mr. Doty as applied.

The Findings that Mr. Doty violated the child labor laws and that he committed serious violations of the child labor laws are in error. This Court should reverse those findings and remove any fines or assessments against Mr. Doty.

II. Assignments of Error

A. Assignments of Error (AE)

1. The finding that lifting "communication wires" "located under high-voltage distribution wires" created "a potential for induced voltage and the possibility of electrical shock" is error. CP 540 (Finding 9). As no voltage or distance is identified, the Order should omit this finding. See CP 360, lines 5-7.

2. The finding that noted safety expert Carl Plumb failed "to mention the potential for electrical shock due to induced voltage" is error. CP 540 (Finding 9). As expert Plumb explains why induced voltage was speculative, the Order should omit this finding. CP 360, lines 5-7.

3. The finding that noted safety expert Carl Plumb's opinion that using a monitor under former WAC 296-155-24515 would be appropriate is not credible is error. CP 540 (Finding 9). As expert Plumb has evidence for his

opinion, the order should omit this finding. CP 359:18-360:4.

4. The finding that noted safety expert Carl Plumb has an "erroneous belief that lack of a WISHA violation precludes a serious violation of the child labor standards" is error. CP 540 (Finding 9). As expert Plumb does not opine preclusion, the order should omit this finding.

5. The finding that the Doty children did not have "protective equipment" without identifying the allegedly missing protective equipment is error. CP 541 (Finding 10). The order should omit this finding.

6. The finding that refers to a backhoe "on uneven terrain" is error. CP 541 (Finding 10). As the backhoe was "on perfectly level ground," the order should omit this finding. CP 480, line 8.

7. The finding states that when "a backhoe roll-over begins and the operator is not wearing a restraint, like a seatbelt, they [*sic*] are [*sic*] thrown from the seat." CP 541

(Finding 10). The order should omit this erroneous finding. See CP 480, lines 4-7.

8. The findings that "serious physical harm or death was imminent" in Findings 10 & 11 and that "serious harm or death was imminent" in Findings 13 & 14 are error. CP 541-543. The order should omit these findings.

9. The finding that noted safety expert Carl Plumb doubts a statement of Tim Erickson is error. CP 541 (Finding 11). As expert Plumb did not have Erickson's statement and had Doty's contrary statement, the order should omit this erroneous finding. CP 359, lines 1-5 (listing the evidence he reviewed and omitting Erickson's statement); CP 361 (Doty's contrary statement).

10. The finding that the Doty children did not have "safety protection" without identifying the allegedly missing safety protection is error. CP 542 (Finding 14). The order should omit this finding.

11. The finding that the Zachary Doty did not have "safety equipment" without identifying the allegedly missing safety equipment is error. CP 542 (Finding 15). The order should omit this finding.

12. The finding that "Zachary and Stephen's continued exposure to the hazards on the work site demonstrate that death or serious physical harm was imminent from the activities Stephen and Zachary performed" is error. CP 543 (Finding 19). The order should omit this finding.

13. The findings are replete with assumptions or presuppositions that Mr. Doty employed his children. These findings (or their assumptions or presuppositions) are error. CP 534-547 (*passim*). The order should omit these findings.

14. The judgment's failure to identify Mr. Doty as a married man in his separate capacity is error. CP 700. Under argument not conceded, the judgment should

identify Mr. Doty as a married man in his separate capacity.

B. Issues Pertaining to Assignments of Error

1. Mr. Doty did not employ his children. AE 13.

2. Although the Department's claims about "induced voltage" are speculative, noted safety expert Carl Plumb does mention them. AE 1-2.

3. Noted safety expert Carl Plumb has evidence to support using a monitor under former WAC 296-155-24515. AE 3

4. The Department misstates the use of WISHA by noted safety expert Carl Plumb. AE 4.

5. The Department alleges a lack of "protective equipment," "safety protection," or "safety equipment" without identifying what these are. AE 5, 10, & 11.

6. The Department misstates the danger of using a backhoe on level ground. AE 6-7.

7. The Department alleges the imminency of serious physical harm, serious harm, or death in an arbitrary and capricious manner. AE 8 & 12.

8. Noted safety expert Carl Plumb does not doubt a statement by Tim Erickson of which expert Plumb is unaware. AE 9.

9. The Department has no authority to re-define employment away from the common-law definition. AE 13

10. The Department's considering Mr. Doty as an employer of his children violates his constitutional rights as applied. AE 13

11. Under argument not conceded, the Department's allegations do not constitute a serious violation. AE 1-12.

12. Under argument not conceded, the judgment should identify Mr. Doty as a married man in his separate capacity. AE 14.

III. Statement of the Case

As part of the home schooling of Mr. Doty's sons, Zachary Doty and Steven Doty, he involved them in "vocational training." CP 366:17-21. Mr. Doty had a business moving houses. CP 367. Zachary Doty, one of his sons, was "riding on top of a moving house on a public arterial" moving "at a very slow pace" which was "approximately walking speed." CP 367.

During the move, traffic was "blocked off ahead and behind by city police" with "two pilot cars, one ahead and behind as the house is being moved" and with "certified flaggers present as well." CP 367.

When Zachary rode the house down the street "at a very slow pace," "he was simply acting as a spotter of any obstacles that may come into contact with the house" during the move. CP 367. Zachary assisted "in moving such obstacles so the house can pass by." CP 367.

During the move, Zachary had "good communication" with the ground crew. CP 367. Moreover, no event during the move occurred that "created an unreasonable risk of serious harm." CP 367.

Sometimes Zachary and Steven Doty walked along with the house, "simply acting as spotters." CP 367. While doing so, they "were usually on the sidewalk." CP 367.

Because moving a house occurs at "a very slow pace" "under the circumstances described above," the involvement of Zachary and Steven Doty did "not create a substantial risk of serious harm." CP 367.

"The Director of the Department of Labor and Industries entered her Order in the Jude Doty matter, Citation Nos. ES-5-001-03 and ESCL-010R5, on August 31, 2004." CP 701. Mr. Doty petitioned for judicial review on September 27, 2004 and amended his petition for judicial review on December 6, 2006. CP 701.

The Department ordered Mr. Doty to pay civil fines of $1,000 per violation for twenty-five (25) violations totaling $25,000. CP 556:8-9.

IV. Summary of Argument

The Department alleges that Mr. Doty employed his sons and that this employment was a serious child labor violation under two separate regulations. The parties agree that if Mr. Doty did not "employ" his sons, then he did not violate either regulation. Compare CP 583-584.

In applying WAC 296-125-015, the Department refers to a dictionary's definition rather than referring to the definition of "to employ" in case law. This error leads the Department to botch its interpretation of "to employ." See CP 19 (Conclusion 9).

The Department's attempt to redefine "employ" was an act it had no authority to perform. This ultra vires act of the Department also violates Mr. Doty's constitutional rights as applied.

V. Argument

A. Applying the definitions to the alleged employment without deciding between them (Assignment 13)

1. EMPLOYMENT BY SUFFERING OR PERMITTING TO WORK

Even if the Department had authority to define "to employ" as "to suffer or permit to work" in WAC 296-125-015, Mr. Doty did not employ Zachary or Stephen Doty. This definition of "employ" comes from a definitional provision in federal law, 29 U.S.C. § 203.

When "a state statute is 'taken "substantially verbatim" from [a] federal statute, it carries the same construction as the federal law and the same interpretation as federal case law.'" Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, ¶ 29 (2012) (citations omitted). The federal definition is a broad one in order to relieve complainants of needing to prove a contract of employment. Walling v. Sanders, 136 F.2d 78, 81 (6th Cir. 1943). Similarly, parties are employers and employees under this same definition if the first has hired the second

"expressly" or "suffered or permitted him to work under circumstances where an obligation to pay him will be implied." Cotton v. Weyerhaeuser Timber Co., 20 Wn.2d 300, 312 (1944) (citing Bowman v. Pace Co., 119 F.2d 858, 860 (5th Cir. 1941)). If an obligation to pay is not implied, then the parties are not employer and employee.

If an alleged employer is obligated to pay wages to an alleged employee because the alleged employer suffered or permitted the alleged employee to work, then the alleged employer employed the alleged employee under WAC 296-125-015. One seeks in vain for a finding that Mr. Doty was somehow obligated to pay wages to Zachary or Stephen Doty. CP 534-547. Because Zachary or Stephen Doty did not have a right to wages from Mr. Doty, Mr. Doty did not "suffer or permit" Zachary or Stephen Doty to work for him. For this reason, the alleged employment does not meet the suffer-or-permit test for employment.

2. EMPLOYMENT BY EXERCISING DIRECTION AND CONTROL **AS AN EMPLOYER**

Instead of deciding whether Mr. Doty suffers or permits Zachary or Stephen Doty to work by finding out whether they had a right to wages and instead of applying the dictionary definition the Department advanced, the Department asked "whether there is an exercise of direction and control." CP 545. The Department asserts that Mr. Doty exercised "direction and control" over Zachary and Stephen Doty. CP 547. The Department does not identify a basis for the application of this direction-and-control test to the issues at hand. (The Department did not even have the authority to impose this direction-and-control test.)

In any event, Mr. Doty agrees that he exercised "direction and control" over Zachary and Stephen Doty as their father. The Department chose not to directly dispute whether Mr. Doty exercised his "direction and control" over Zachary and Stephen Doty as their father. The facts

that the father operated a for-profit business and the other similar facts from Finding 25 (CP 545) prove—and even suggest—nothing about whether Mr. Doty's exercise of "direction and control" over Zachary and Stephen Doty was as an employer instead of as a father. The Department merely implies without evidence that the direction and control that Mr. Doty exercised over Zachary and Stephen Doty was that of an employer rather than a father. Mr. Doty did not direct or control his sons as an employer. For this reason, the alleged employment does not meet the direction-and-control test for employment.

3. EMPLOYMENT BY ECONOMIC DEPENDENCY **AS AN EMPLOYER**

The test for the exercise of direction or control is the proper test for determining whether someone is an employee or an independent contractor to determine tort liability. See RESTATEMENT (SECOND) OF AGENCY § 220. In the State of Washington, however, the test for the exercise of direction or control is not the proper test in a

context similar to that of Mr. Doty. See Anfinson, 174 Wn.2d at ¶ 34. Instead, the test is whether the employee is economically dependent on the employer. Id. at ¶¶ 26-35. One is an employee rather than an independent contractor if one is economically dependent on the employer.

FedEx Ground did not argue that Anfinson was economically dependent on FedEx Ground as a child of a parent rather than an employee of an employer. Id. The parties in Anfinson simply did not have a parent-child relationship.

The economic dependency test in Anfinson has to do with the employer-employee relationship. An allegedly-employed child who is economically dependent on a parent on the basis of the parent-child relationship is not an employee of the parent under Anfinson. Only a child who is economically dependent on a parent on the basis of the employer-employee relationship is an employee of

the parent under Anfinson.

Mr. Doty's children did not receive or expect wages from him. CP 7:18-19; CP 480-481. If children do not receive or expect wages from the parent, any economic dependency cannot be based on an employer-employee relationship. Mr. Doty did not have his sons economically dependent on him as an employer. For this reason, the alleged employment does not meet the economic-dependency test for employment.

4. EMPLOYMENT UNDER THE CLASSIC COMMON-LAW TESTS

The common law in the State of Washington provides two related tests for children's employment by their parents.

> [We] now hold that the law of this state is, that the relationship of employer and employee, between parent and child, springs from contract, and that as between parent and child such contract, in order to be valid, must provide that the child shall receive for the labor performed by him a fixed compensation which he may use as he sees fit, and that the proof of such contractual relationship must be clear and convincing.

American Products Co. v. Villwock, 7 Wn.2d 246, 266-267 (1941). This first test requires clear and convincing proof of an agreement to provide "a fixed compensation" and that the child may use this fixed compensation as the child "sees fit." Id.

Unless the child has been emancipated, "the parents are legally entitled to" the earnings of a child, during the child's minority. Villwock at 267 (citations omitted). Emancipation is "the relinquishment by the parent of control and authority over the child, conferring on [the child] the right to his earnings and terminating the parent's legal duty to support the child." Id. To prove emancipation, one must have "evidence that is clear, cogent, and convincing." Id. at 268. Because a parent is legally entitled to the earnings of a child, no employment relationship exists unless the child is emancipated. Villwock at id.

The sons of Mr. Doty were not emancipated. Similarly,

Mr. Doty did not compensate his sons with funds that they could use as they chose and had no agreement for fixed compensation for labor. For these reasons, the alleged employment does not meet the classic common-law tests for parental employment of children.

5. **NO EMPLOYMENT** UNDER ANY OF THESE FOUR DEFINITIONS

Mr. Doty's sons were not his employees. They were not his employees under the suffer-or-permit test of the WAC, not his employees under the direction-and-control test, not his employees under the economic-dependency test, not his employees under either common-law test, the fixed-compensation-with-unrestricted-use test or the emancipation test.

Mr. Doty's sons were simply not his employees. The Order's statements, assumptions, and presuppositions that Mr. Doty employed his sons are error. This Court should recognize that Mr. Doty did not employ his sons.

B. Finding No Authority to Re-Define Employment
(Assignment 13)

"'Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.'" State Human Rights Comm'n v. Cheney Sch. Dist. 30, 97 Wn.2d 118, 125 (1982) (quoting State v. Munson, 23 Wn. App. 522, 524 (1979)) (cited by Kaiser Aluminum v. Labor & Industries, 121 Wn.2d 776, 780 (1993)).

An "agency does not have the power to promulgate rules that amend or change legislative enactments." Green River College v. HEP Board, 95 Wn.2d 108, 112 (1980) (citing Fahn v. Cowlitz County, 93 Wn.2d 368, 383 (1980)).

Agency "action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 148 Wn.2d 887,

905 (2003) (citation omitted).

"'Employee' means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise." RCW 49.12.005(4).

> "Employ" means to engage, suffer or permit to work, and includes entering into any arrangement, including a contract, whether implied, express, oral, or written, with a minor whereby the minor works in house-to-house sales except when a minor is working in house-to-house sales for her or his parent or stepparent. [WAC 296-125-015(2).]
>
> The ordinary meaning of the term "work" is defined in *Webster's Universal Encyclopedic Dictionary* 2130-2131 (2002) as an activity in which one exerts strength or faculties to do or perform something, or may refer to labor, task, or duty that is one's accustomed means of livelihood. The first definition of the term "work" most advances the child labor statute because it focuses on the labor of a child and would allow for regulation of harmful activities. The second definition is unreasonable in this context, and is inconsistent with a liberal interpretation of the child labor laws. The Appellant permitted his boys to work under the first definition of "work." [CP 655 (Conclusion 9).]

The Department's failure to apply the plentiful case law

defining employment is willful and unreasoning and done without regard to the attending circumstances or facts. For this reason, the Department's failure to apply the plentiful case law defining employment is arbitrary and capricious.

The Department "is generally authorized to promulgate regulations governing the administration of Title 51 RCW, RCW 51.04.020(1), as well as rules for self-insured employers specifically. RCW 51.14.020(7)." Manor v. Nestle Foods Co., 131 Wn.2d 439, 453 (1997) (*disapproved on different grounds by* Wash. Indep., 148 Wn.2d 887). On the basis of the preceding, the Department argues that it likewise "has the authority to define 'employ' for child labor under RCW 49.12.121." CP 497:21-22.

Such an argument would be incorrect for two reasons. First, the explicit authority cited by Manor states as follows: "The director shall: (1) Establish and adopt rules

governing the administration of this title." RCW 51.04.020(1).

> The director shall adopt rules to carry out the purposes of this section including, but not limited to, rules respecting the terms and conditions of letters of credit and the establishment of the appropriate level of net worth of the self-insurer to qualify for use of the letter of credit. Only letters of credit issued in strict compliance with the rules shall be deemed acceptable. [RCW 51.14.020(7).]

The RCWs that Manor cites provide limited authority for rule-making. They provide authority for rule-making in the area of Title 51 and specific section under Title 51. They provide no authority for rule-making that includes child labor.

Second, the determinations of the Department under these statutes "are limited to the purview of Title 51, and do not and cannot affect the common law or other statutory law governing parents and subsidiaries or employers and employees." Manor, 131 Wn.2d at 454. Manor explicitly limits the scope of the rules that the

RCWs it cites permit.

The rule-making authority that Manor discusses is only within the scope of Title 51 and does not relate to other statutes or to common law. For these reasons, the Department has no authority to redefine the meaning of employment. The attempt of the order to redefine the meaning of employment is error. This Court should reject the Department's attempt to redefine the meaning of employment.

C. Violating Doty's Constitutional Rights as Applied (Assignment 13)

"The liberty interest guaranteed by the Fourteenth Amendment includes freedom [to] 'establish a home and bring up children.'" Custody of Smith, 137 Wn.2d 1, 13 (1998) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

Based on this authority, Mr. Doty has a constitutional right to raise his children.

Chapter 28A.200 RCW is about Home Based

Instruction.

> [All] decisions relating to philosophy or doctrine, selection of books, teaching materials and curriculum, and methods, timing, and place in the provision or evaluation of home-based instruction shall be the responsibility of the parent except for matters specifically referred to in this chapter. [RCW 28A.200.020]

Home based instruction also requires occupational education. RCW 28A.225.010(4) (requiring "instruction in the basic skills of occupational education").

The Department's attempts to find violations of WAC 296-125-030 and -033 and to assess fines therefor are in violation of Mr. Doty's constitutional and statutory rights.

This Court should enforce Mr. Doty's constitutional and statutory rights to instruct his children by reversing those findings and removing any fines or assessments.

D. Not Constituting a Serious Violation, If Any (Assignments 8 & 12.)

1. NO SERIOUS VIOLATION GENERALLY. AE 8 & 12.

A violation, if any, is serious

> if death or serious physical harm has resulted or is imminent from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use by the employer, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. [RCW 49.12.390(2)]

The Department could have at least attempted to promulgate a regulation which identifies work activities "which by their very nature are dangerous and pose a substantial risk of harm which could result in serious injury or death." CP 555. Instead, the Department promulgated regulations which list activities forbidden to minors under 16 (in WAC 296-125-033) and forbidden to all minors (in WAC 296-125-030). These regulations do not refer to "serious," "harm," "injury," or "death" in a pertinent way.

Without any supporting link in the regulations or statute, the Department concludes that the list of "occupations and employment activities" somehow show that "these activities are inherently dangerous and involve

serious risks of physical harm or death to minors." CP 555 (Conclusion 17).

This repeatedly alleged connection throughout Conclusion 17 (which the Department brings "[as] a matter of law" (!) (CP 555)) finds no anchor in the regulations or statute and floats unconnected to any authority.

Besides, given the Department's repeated use of the word "imminent," one wonders if the Department actually knows what the word means. Compare RCW 9A.16.020(6) (providing that the use of force is lawful to "to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person . . . ."). In that statute, the

> plain meaning of the words "dangerous to any person" connotes a substantial likelihood that a person will come to harm. An action that might potentially pose a danger at some unknown future time, such as C.B.'s failure to comply with the drill here, does not fit within the plain meaning of "dangerous to any

person." [State v. Jarvis, 160 Wn.App. 111, ¶ 18 (2011).]

One "may lawfully use force in defense of others when one has a *reasonable belief* that the person being protected is in *imminent* danger. State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977)." Jarvis, 160 Wn.App. at 19 (applying case law regarding defense of others to RCW 9A.16.020(6)).

The Department has (and presents) no evidence that the level of risk to which Mr. Doty exposed his sons was so high that a third party would have a lawful basis to use force to defend his sons. For this reason, what the Department is doing here is really a redefinition of "imminent" to fit the facts of this case, rather than an attempt to apply a legally-defensible definition of "imminent" to this case.

This Court should reject the Department's position and find that the disputed findings are erroneous.

2. THE DEP'T DOES NOT PROVE INDUCED VOLTAGE. AE 1-2

The Department found that lifting "communication wires" "located under high-voltage distribution wires" created "a potential for induced voltage and the possibility of electrical shock." CP 540 (Finding 9). Noted safety expert Carl Plumb explains that one can only "determine if a danger from 'electrical shock' existed for a person on the roof of a house being moved" if one knows "the voltage of the lines and the distance between those lines and an exposed employee." CP 360:5-7.

Expert Plumb notes that the Department chose not to provide any "evidence pertaining to the voltage of the overhead lines" and chose not to provide any evidence of "the distance the person on the roof was from those lines." CP 360:7-9. Because the Department fails to identify voltage or distance, the claim that induced voltage was somehow a danger is pure speculation.

Noted safety expert Carl Plumb also points to the power company personnel who "are always present on every house move." CP 360:9. The power company personnel can and would "move and handle any and every power line that could pose a hazard." CP 360:9. Because the power company personnel address any realistic concerns of induced voltage, the claim that induced voltage was somehow a threat to Mr. Doty's sons remains pure speculation.

As no voltage or distance is identified, the Order should omit the claim about induced voltage in Finding 9.

This Court should reject the Department's speculative claim that induced voltage was somehow more than a phantom threat to Mr. Doty's sons.

Finding 9 incorrectly alleges that noted safety expert Carl Plumb failed "to mention the potential for electrical shock due to induced voltage." CP 540. As expert Plumb explained why induced voltage was speculative, this

finding was in error. The Order should omit the statement from Finding 9 that Mr. Plumb failed to mention induced voltage.

3. PLUMB HAS EVIDENCE TO SUPPORT A MONITOR. AE 3

Safety requires neither a fall restraint (or fall arrest) system nor a warning line system "when employees are on a roof only to inspect, investigate, or estimate roof level conditions." Former WAC 296-155-24515(2)(a). Noted safety expert Carl Plumb cogently points out that Zachary "was not performing other duties such as roofing or carpentry work which usually is a primary cause a person to lose track of the roof edge and be at risk of falling." CP 359:21-22.

Instead, "Zachary was seated or kneeling on the roof while the house was moved very slowly down the street." CP 359:20. Zachary had "a very specific task of spotting potential obstacles as they approached the house and notifying those below so the house could be slowed and

steps taken to avoid the obstacle." CP 359:22-360:1.

The exception from former WAC 296-155-24515(2)(a) pertains to a worker's observing rather than being engaged in activities. As Zachary was observing, he is within the clear scope of this exception.

In support of expert Plumb's reference to a monitor, one also notes the second exception: "Employees engaged in roofing on low-pitched roofs less than 50 feet wide, may elect to use a safety monitor system without warning lines." Former WAC 296-155-24515(2)(b).

Finding 9 alleges, however, that expert Plumb's reference to a monitor under this WAC had no evidence and was not credible. These allegations are erroneous.

This Court should find that expert Plumb had evidence for referring to a monitor under this WAC and was credible.

4. PLUMB'S REFERENCES TO WISHA ARE PROPER. AE 4

Noted safety expert Carl Plumb repeatedly refers to

the WISHA standards in his discussion of the conduct of Mr. Doty's sons. See CP 359:7 and 360:11-13. Similarly, Dan Mcmurdie, from the WISHA Policy and Technical Services Section (CP 146), discusses his background with WISHA in his qualifications (CP 146-147) and also refers to WISHA standards. CP 149:6-8.

The Department alleges that expert Plumb had an "erroneous belief that lack of a WISHA violation precludes a serious violation of the child labor standards." CP 540 (Finding 9).

If expert Plumb thought this preclusion theory that the Department puts in his mouth, he would have no need for page 359, lines 9-13 (discussing the activities of young people on a farm, in an educational setting, and as part of an apprenticeship), page 360, lines 14-22 (discussing safety factors without referring to WISHA), or page 361, lines 1-6 (also discussing safety factors without referring to WISHA).

Merely referring to a lack of violation of WISHA standards does not somehow mean that such lack "precludes a serious violation of the child labor standards." For this reason, Finding 9 (which states to the contrary) is in error. CP 540.

5. THE DEP'T LISTS NO MISSING PROTECTION. AE 5, 10, 11

The order finds that the Doty children did not have "protective equipment" (CP 541 (Finding 10)), that the Doty children did not have "safety protection" (CP 542 (Finding 14)), and that the Zachary Doty did not have "safety equipment" (CP 542 (Finding 15)).

The order fails to support any of these claims by identifying the missing equipment or protection.

Agency "action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." Wash. Indep., 148 Wn.2d 887, 905 (citation omitted).

The order's failure to identify the missing equipment or

protection was willful, unreasoning, and taken without regard to the attending facts or circumstances. For this reason, the order's failure to identify the missing equipment was arbitrary and capricious. Because the order's failure to identify the missing equipment was arbitrary and capricious, these findings in the order are in error. This Court should reject these findings in the order.

6. THE DEP'T MISSTATES THE BACKHOE FACTS. AE 6-7, 9

The backhoe was "on perfectly level ground." CP 480, line 8. The order, however, includes a finding that the backhoe was "on uneven terrain." CP 541 (Finding 10). This finding was in error. This Court should reject this erroneous finding.

The "backhoe does have a roll bar to prevent injury to the driver and it has handles on each side of the seat so that the driver can hold himself in place." CP 480:4-6. Roll-over events do not always mean that operators will be thrown from their seats. Mr. Doty explains that his

"oldest son" avoided being thrown from the backhoe because he "simply grabbed the handles." CP 480:7. Mr. Doty notes that his "son never left the seat." CP 480:7 (emphasis in original).

The order incorrectly includes a finding that when "a backhoe roll-over begins and the operator is not wearing a restraint, like a seatbelt, they [*sic*] are [*sic*] thrown from the seat." CP 541 (Finding 10). The order states incorrectly that, whenever backhoes roll over, their operators are invariably thrown from the seat if they have no seatbelts or similar restraints. As Mr. Doty explains above, the order is simply incorrect. The order should omit this erroneous finding.

Noted safety expert Carl Plumb lists the evidence he reviewed. CP 359:1-5. That list does not include a statement by Tim Erickson. Id. According to the Order, Mr. Erickson alleges that "Zachary hit a temporary electrical wire while operating a backhoe." CP 541

(Finding 11).

Expert Plumb mentions that Mr. Mcmurdie "understood that Zachary Doty hit a temporary electrical wire." CP 360:17. Expert Plumb did not credit this "understand[ing]" because "Mr. Mcmurdie did not provide the source of this assertion." CP 360:20. (One wonders why Mcmurdie omitted the source of this "understand[ing].")

Expert Plumb also declined to credit Mr. Mcmurdie's "understand[ing]" because "Mr. Doty stated that he has no knowledge what this refers to since no high power lines were ever accessible to contact by the backhoe." CP 361.

The finding that noted safety expert Carl Plumb doubts a statement of Tim Erickson is error. CP 541 (Finding 11). As expert Plumb did not have Erickson's statement and had Doty's contrary statement, the order should omit this erroneous finding.

E. Allowing-under argument not conceded-Judgment Against Mr. Doty in His Separate Capacity Only

The Appellant is Jude I. Doty, a married man. Angela

Doty, the wife of Jude Doty, is not a party to this case.

The Department cited Mr. Doty only and did not cite Mrs. Doty. CP 590, footnote 3 ("Mr. Doty's statement of facts inaccurately states that L&I cited his wife Angela Doty. Trial Br. 1. The final order and record reflects [*sic*] that L&I cited only Mr. Doty. AR 702. 110-11.").

The judgment here does not state in what capacity it is entered against Mr. Doty. CP 700.

Any judgment entered against Mr. Doty in this case should identify the judgment debtor as a married man in his separate capacity. See Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).

The trial court's failure to characterize Mr. Doty as a married man in his separate capacity is error. If this Court keeps any fines or assessments at all, (under argument, not conceded) this Court should have those fines or assessments apply to Mr. Doty as a married man in his separate capacity.

F. Awarding Fees and Other Expenses to Mr. Doty

A "court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees." RCW 4.84.350(1). Under certain circumstances, a court may avoid such an award. Id. "A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought." Id.

In a judicial review of an agency action, a party is a "qualified party" if the party is "an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed." RCW 4.84.340(5)(a). A party is also a "qualified party" if the party is "a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed." RCW

4.84.340(5)(b).

Mr. Doty is entitled to attorney fees and litigation expenses under the Washington State Equal Access to Justice Act in Chapter 4.84 RCW.

The Department is attempting to deprive Mr. Doty of his rights under 42 U.S.C. 1983. Because of such violation, Mr. Doty is also entitled to attorney fees and litigation expenses under 42 U.S.C. 1988.

VI. Conclusion

The Department alleges that Mr. Doty employed his sons and that this employment was a serious child labor violation under two separate regulations. The parties agree that if Mr. Doty did not "employ" his sons, then he did not violate either regulation. Compare CP 583-584.

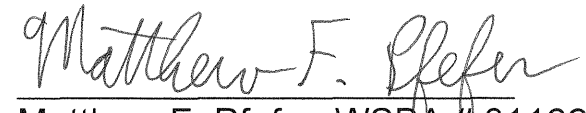
In applying WAC 296-125-015, the Department refers to a dictionary's definition rather than referring to the definition of "to employ" in case law. This error leads the

Department to botch its interpretation of "to employ." See CP 19 (Conclusion 9).

The Department's attempt to redefine "employ" was an act it had no authority to do. This ultra vires act of the Department also violates Mr. Doty's constitutional rights as applied.

The Findings that Mr. Doty violated the child labor laws and that he committed serious violations of the child labor laws are in error. This Court should reverse these findings, remove any fines or assessments against Mr. Doty, and award him costs, fees, and litigation expenses in this matter.

Respectfully submitted this 18th day of November 2013.



Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Plaintiff/Appellant Doty
1426 W Francis Ave, 2nd Floor
Spokane Washington 99205
(509) 323-5210 Voice | (206) 337-6356 Digital Fax/Vm
Matthew@MatthewPfefer.com

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I served this document on Anastasia R. Sandstrom of the Attorney General's Office, at 800 5th Ave Ste 2000 in Seattle WA 98104-3188 by prepaid postal mail on the date below.

Signed this 18th day of November 2013 in Spokane, Washington.

Matthew F. Pfefer, WSBA #31166
CARUSO LAW OFFICES
Attorneys for Appellant