

NO. 704516

---

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

---

PERFORMANCE ABATEMENT SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondent.

---

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

---

ROBERT W. FERGUSON  
Attorney General

Paul Weideman  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3820

*[Handwritten Signature]*  
 STATE OF WASHINGTON  
 COURT OF APPEALS, DIVISION I  
 2014 JAN 22 AM 11:37

ORIGINAL

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
	A. Lead Exposure Can Cause Serious Health Problems In Humans, Including Neurological, Reproductive, And Developmental Damage.....	3
	B. PAS Workers Scraped Lead Paint From Walls And Removed Lead-Contaminated Materials From The Armory’s Rifle Range And Were Exposed To Airborne Lead Concentrations At More Than Ten Times The Permissible Exposure Limit.....	4
	C. PAS Workers Washed Their Hands In Buckets And Tubs With No Running Water.....	7
	D. PAS Provided Showers For Its Workers, But The Showers Did Not Always Function Properly.....	9
	E. A WISHA Hygienist Observed No Hand Washing Facilities With Clean And Tepid Water At The Armory Worksite And The PAS Foreman Told The Hygienist That He Was Filling Buckets With Water For Workers To Wash Their Hands.....	12
	F. The Department Cited PAS For A Serious Violation Of WAC 296-155-17619(5)(a) And The Board And Superior Court Affirmed The Department’s Citation.....	16
IV.	STANDARD OF REVIEW.....	18
V.	SUMMARY OF THE ARGUMENT.....	20
VI.	ARGUMENT.....	21

A. When Workers Are Exposed To Lead, Employers Must Provide Adequate Hand Washing Facilities With Clean And Tepid Wash Water To Protect Their Workers From Ingesting Lead.....	21
B. Substantial Evidence Supports The Board’s Finding That PAS Workers Were Not Given Access To Adequate Hand Washing Facilities With Clean, Tepid Wash Water In Violation Of WAC 296-155-17619(5)(a).....	25
C. PAS Is Not Entitled To Leeway In Complying With WAC 296-155-17619(5)(a) Where The Regulation Is Clear That Employers Must Provide Adequate Hand Washing Facilities With Clean and Tepid Water To Its Workers.....	30
1. WISHA’s Specific Duty Clause Requires Employers To Comply With Health And Safety Regulations And Employers Do Not Have Leeway To Substitute Their Own Judgment For A Regulation’s Specific Requirements.....	30
2. PAS Did Not Comply With WAC 296-155-17619(5)(a) By Providing Showers Because Showers Are A Separate Requirement Under WAC 296-155-17619(3) .....	33
D. Because Substantial Evidence Exists That Exposure To Lead Can Cause Serious Physical Harm And Death, The Board Correctly Concluded That The Violation Was Serious.....	35
1. Lead Is A Systemic Poison And Exposure Can Cause Neurological, Reproductive and Developmental Problems.....	37
2. The Court Of Appeals Has Rejected The Argument That An Otherwise Serious Violation Can Be Reduced To A General Violation When An Employer Believes That It Has Provided Equal Or	

Greater Protection Than That Imposed By The Regulation.....	40
VII. CONCLUSION .....	44

## TABLE OF AUTHORITIES

### Cases

<i>Adkins v. Aluminum Co. of Am.</i> , 110 Wn. 2d 128, 750 P.2d 1257, modified, 756 P.2d 142 (1988).....	35
<i>Aviation W. Corp. v. Dep't of Labor &amp; Indus.</i> , 138 Wn. 2d 413, 980 P.2d 701 (1999).....	22
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn. 2d 801, 828 P.2d 549 (1992).....	36, 44
<i>Dep't of Fisheries v. Gillette</i> , 27 Wn. App. 815, 621 P.2d 764 (1980).....	19
<i>Elder Demolition, Inc. v. Dep't of Labor &amp; Indus.</i> , 149 Wn. App. 799, 207 P.3d 453 (2009).....	18, 23
<i>Erection Co. v. Dep't of Labor &amp; Indus.</i> , 160 Wn. App. 194, 248 P.3d 1085 (2011).....	19, 23
<i>Express Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 151 Wn. App. 589, 215 P.3d 951 (2009).....	36, 44
<i>Fox v. Dep't of Ret. Sys.</i> , 154 Wn. App. 517, 225 P.3d 1018 (2009).....	19, 30
<i>Harrison Mem'l Hosp. v. Gagnon</i> , 110 Wn. App. 475, 40 P.3d 1221 (2002).....	19, 30
<i>Holland v. Boeing Co.</i> , 90 Wn.2d 384, 583 P.2d 621 (1978).....	19
<i>In Re Dyno Battery, Inc.</i> , BIIA Dec., 08 W0065, 2010 WL 4267698 (2010).....	38
<i>In re Marriage of Greene</i> , 97 Wn. App. 708, 986 P.2d 144 (1999).....	40

<i>J.E. Dunn Nw., Inc. v. Dep't of Labor &amp; Indus.</i> , 139 Wn. App. 35, 156 P.3d 250 (2007).....	18, 19, 23
<i>Lee Cook Trucking &amp; Logging v. Dep't of Labor &amp; Indus.</i> , 109 Wn. App. 471, 36 P.3d 558 (2001).....	passim
<i>Martinez Melgoza &amp; Assocs., Inc. v. Dep't of Labor &amp; Indus.</i> , 125 Wn. App. 843, 106 P.3d 776 (2005).....	18
<i>Mowat Constr. Co. v. Dep't of Labor &amp; Indus.</i> , 148 Wn. App. 920, 201 P.3d 407 (2009).....	passim
<i>Potelco, Inc. v. Dep't of Labor &amp; Indus.</i> , 166 Wn. App. 647, 272 P.3d 262 (2012).....	20, 36
<i>Rogers Potato Serv., LLC v. Countrywide Potato, LLC</i> , 152 Wn.2d 387, 97 P.3d 745 (2004).....	19
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	20
<i>Supervalu, Inc. v. Dep't of Labor &amp; Indus.</i> , 158 Wn.2d 422, 144 P.3d 1160 (2006).....	22, 40
<i>Tokarz v. Ford Motor Co.</i> , 8 Wn. App. 645, 508 P.2d 1370 (1973).....	19, 27

**Federal Cases**

<i>Phoenix Roofing, Inc. v. Dole</i> , 874 F.2d 1027 (5th Cir. 1989) .....	40, 42, 43
<i>Sec'y of Labor v. Thomas Indus. Coatings, Inc.</i> , 21 BNA OSHC 2283, 2007 WL 4138237 (2007) .....	passim

**Statutes**

RCW 49.17 .....	1
RCW 49.17.010 .....	21, 22

RCW 49.17.040 .....	22
RCW 49.17.060(1).....	22
RCW 49.17.060(2).....	22, 31
RCW 49.17.150(1).....	18
RCW 49.17.180(6).....	37
RCW 70.270.010(2).....	3, 38

**Regulations**

29 § C.F.R 1926.51(f)(1) .....	32
29 § C.F.R 1926.51(f)(3) .....	32
WAC 296-155-140.....	passim
WAC 296-155-140(2).....	13, 24, 33
WAC 296-155-140(2)(a) .....	4, 24, 43
WAC 296-155-17607(1).....	3
WAC 296-155-17619.....	passim
WAC 296-155-17619(3).....	21, 25, 33
WAC 296-155-17619(3)(a) .....	4, 34, 41
WAC 296-155-17619(5).....	24, 25, 34
WAC 296-155-17619(5)(a) .....	passim
WAC 296-155-17650(2)(a) .....	3

**Rules**

RAP 10.3(a)(6).....	36, 44
---------------------	--------

## I. INTRODUCTION

This is a substantial evidence case arising from an employer's appeal of a citation under the Washington Industrial Safety and Health Act (WISHA), RCW 49.17. The Department of Labor and Industries cited Performance Abatement Services, Inc., (PAS) for a serious violation of WAC 296-155-17619(5)(a) for failing to provide adequate hand washing facilities with clean water to workers removing lead from a worksite. The site's foreman filled up buckets for workers to wash their hands, and workers washed their hands at times in buckets and tubs of standing water. Lead is a systemic poison that can cause neurological, reproductive, and developmental damage. The Board of Industrial Insurance Appeals and the superior court affirmed the Department's citation.

PAS asks this Court to reweigh the evidence to determine that it complied with WAC 296-155-17619(5)(a) when it provided showers, which were not operational at times, and its claimed other means of hand washing at the worksite, including "sprayers." Additionally, it asks this Court to reduce the citation from a serious violation to a general violation.

Well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, ample evidence supports the Board's finding that PAS did not provide access to adequate hand washing facilities. The Department's industrial hygienist did not

observe any hand washing facilities on multiple visits to the worksite. PAS's foreman told the hygienist that he was filling up buckets for workers to use to wash their hands. PAS's safety supervisor stated that there was a "set of buckets" for hand washing at the site. A worker testified that he washed his hands in a tub of standing water that was filled at the beginning of the day and emptied at the end of the day. Another worker testified that he and other workers washed their hands in buckets. Standing water is not clean and was not adequate to protect PAS workers.

Finally, because inadequate hand washing facilities can cause workers to ingest lead and can expose others to lead and because serious physical harm can result from lead exposure, the Department correctly cited PAS for a serious violation. This Court should affirm the superior court.

## II. ISSUES

1. Does substantial evidence support the Board's finding of fact 5 that "PAS employees were not given access to hand washing facilities which met the requirements of WAC 296-155-140 in violation of WAC 296-155-17619(5)(a)" where the Department hygienist testified that he observed no hand washing facilities on his multiple visits to the worksite, where PAS's foreman stated that he filled buckets for workers to wash their hands, where one worker testified that he washed his hands in a tub of standing water, and where another worker testified that he and other workers washed their hands in buckets?

2. Does substantial evidence support the Board's finding that the lack of access to hand washing facilities "could include serious physical harm" where there was testimony that lead is a systemic poison that can cause neurological, reproductive, and developmental harm?

### III. STATEMENT OF THE CASE

#### A. Lead Exposure Can Cause Serious Health Problems In Humans, Including Neurological, Reproductive, And Developmental Damage

Lead is a systemic poison that affects multiple organs in the human body. BR Bannick 73; *see also* RCW 70.270.010(2); WAC 296-155-17650(2)(a).<sup>1</sup> Lead exposure can cause neurological and reproductive damage and can affect blood formation in adults. BR Bannick 73. Workers exposed to lead at work can bring the contamination home to their families. *See* BR Crane 19, 43. Lead exposure can affect a child's development. BR Bannick 73.

Because of lead's dangers, employers in Washington must assure that they do not expose employees to lead at concentrations greater than the permissible exposure limit of 50 micrograms per cubic meter of air averaged over an 8-hour period. *See* WAC 296-155-17607(1); *see also* BR Bannick 59; BR Hansen 62. Workers can be exposed to lead through the air or by ingestion. BR Bannick 66, 72, 74, 79-80.

---

<sup>1</sup> The certified appeal board record is cited as "BR." Witness testimony is cited by the witness's name and page number.

Workers who remove lead from worksites “potentially have lead materials on their hands.” *See* BR Bannick 80. By regulation, employers must provide “adequate hand washing facilities” for employees who are “exposed to lead.” WAC 296-155-17619(5)(a); *see also* BR Bannick 80. Such facilities must provide clean and tepid wash water, soap or similar cleansing agents, and hand towels. WAC 296-155-140(2)(a); *see also* BR Bannick 78. Additionally, if there are “employees whose airborne exposure to lead” exceeds the permissible exposure limit, the employer must provide “shower facilities, where feasible.” WAC 296-155-17619(3)(a).

**B. PAS Workers Scraped Lead Paint From Walls And Removed Lead-Contaminated Materials From The Armory’s Rifle Range And Were Exposed To Airborne Lead Concentrations At More Than Ten Times The Permissible Exposure Limit**

In March 2011, PAS began to remove lead and asbestos from the old armory building in Bellingham, which is owned by Western Washington University. BR Crane 6, 11, 39. Several workers removed lead from the site, including Arnoldo Cantu, Lauro Santiago, and Mynor Arita. BR Cantu 9; BR Santiago 104; BR Arita 41-42; BR Crane 11; Ex. 2 at 3. The workers scraped lead paint off walls using “razor scraper blades,” wire brushes, scrapers, and “sharp objects.” BR Crane 12; BR

Cantu 10, 16-17. Earnest Crane was PAS's on-site foreman. BR Crane 6; BR Cantu 11, 24; BR Bannick 51.

PAS's abatement work at the armory lasted multiple weeks. *See* BR Arita 42; BR Cantu 12. Cantu recalled performing lead abatement work for about two to three weeks. BR Cantu 12. Arita stated that he worked at the site for at least a few weeks. BR Arita 42. He thought he worked there for about three months although he did not remember very well. BR Arita 42.<sup>2</sup>

The armory consists of a first floor, a second floor, and a basement. *See* Ex. 3; BR Crane 8, 27, 30. PAS workers performed abatement work on all three floors. BR Crane 40. The "main floor" of the armory was the second floor, and armory's main entrance from the street was on the second floor. BR Crane 32-34; BR Hansen 67. Workers performed little abatement work on the second floor. *See* BR Crane 30. On the first floor, workers removed lead paint chips from the ceiling, walls, and floor. BR Crane 29, 47.

In the basement, Cantu, Santiago, and Arita scraped lead paint from the walls and removed lead-contaminated materials from a former rifle range. BR Crane 7, 12, 18, 41; BR Cantu 17, 24; BR Arita 42; BR Santiago 104. The work in the rifle range lasted one or two days. *See* BR

---

<sup>2</sup> Without citation to the record, PAS states that it "was only on site for less than one month." App. Br. 5.

Crane 19; BR Arita 44-45; BR Cantu 19; BR Santiago 104; BR Hansen 82.

On March 11, Cantu, Santiago, and Arita removed sand containing lead bullets from the rifle range. BR Cantu 22, 24, 34; BR Crane 19; BR Arita 42, BR Santiago 104-05; *see also* BR Hansen 82. The sand had been placed into “gunnysack-type bags.” BR Cantu 22. The workers shoveled sand that had leaked through holes in the bags into boxes. BR Cantu 22; BR Santiago 105. The bulk sample of lead taken from the sand revealed lead levels of about 1700 micrograms per cubic meter. BR Hansen 60.

Also, on March 11, Cantu wore a lead monitoring device for 430 minutes. BR Bannick 63; BR Crane 18-19, 23; *see also* BR Cantu 12-13, 21; Ex. A to Ex. 1; Ex. 2 at 4.<sup>3</sup> This monitoring revealed that the airborne lead concentration that day was 520 micrograms per cubic meter, more than 10 times the permissible exposure limit. BR Bannick 60, 63, 102; BR Hansen 61; Ex. A to Ex. 1; Ex. 2 at 5-6. PAS’s safety supervisor, Gary Hansen, called this an “unusually high” concentration and stated that he did not recall “ever seeing an air sample that high” during his 23-year tenure with PAS. BR Hansen 51, 70.

---

<sup>3</sup> The two exhibits attached to Exhibit 1 are not clearly labeled. Exhibit A to Exhibit 1 consists of three pages, including an analysis report of total lead from NVL Laboratories, Inc. (page 1); a chain of custody sample log from NVL Laboratories, Inc. (page 2); and PAS’s air sampling sheet from March 11, 2011 (page 3). *See* BR Bannick 60-61; BR Crane 22. Exhibit B to Exhibit 1 consists of nine letters that PAS sent to workers to inform them of their lead exposure on March 11, 2011. *See* BR Hansen 77.

Because the permissible exposure limit is based in an eight-hour time-weighted average, the fact that Cantu wore the device for 430 minutes meant that it was a good representative sample of the airborne lead concentration in the rifle range that day. BR Bannick 63. Because of this high reading, PAS informed nine workers, including Cantu, Santiago, and Arita that they had been exposed to airborne lead concentrations greater than the permissible exposure limit. *See* Ex. B to Ex. 1; BR Bannick 70; BR Hansen 73.

**C. PAS Workers Washed Their Hands In Buckets And Tubs With No Running Water**

At times, Cantu washed his hands in a tub while he was performing lead abatement work. BR Cantu 13. There was no running water in the tub. BR Cantu 13. The tub was filled with water at the beginning of the day and emptied at the end of the day. BR Cantu 13-14. He also used the tub to clean off equipment.<sup>4</sup> BR Cantu 29.

Arita testified that he and other workers washed their hands in buckets of water. BR Arita 43. He also testified that an on-site shower did not have water:

Q: Now, during the time you were working with lead, were there times that you needed to wash your hands?

---

<sup>4</sup> Cantu apparently did not wash his respirator in the tub stating, "Usually we get with the respirator into the shower." BR Cantu 29.

A: Wash my hands?

Q: Or wash your hands or any other part of your body?

A: There was a shower. There was a bucket of water there, and we washed our hands there.

Q: Were there times that there was no water in the shower?

A: Okay. There was a shower, but there was no faucet key in the shower, so there's just a bucket of water.

Q: And so you would wash your hands in the bucket?

A: Yes.

Q: Would others do that, too?

A: Yes also.

Q: And then would there be some point in the day when the bucket was emptied?

A: Okay. Inside there was like a water sprayer in that area. Okay. Sometimes we wash our hands there with the water because we remove and take out wood and metal and we use that water sometimes to wash our hands.

Q: In the bucket?

A: No. Inside the area. Then after that, we went to the shower.

Q: But sometimes the shower did not have water, is that correct? You said - - I'm sorry.

A: There was no water.

BR Arita 42-43.

Santiago testified that there was a bucket of soap and water on site, which was filled with a hose. BR Santiago 109-110. When asked whether there was a facility “for washing” on the second floor, Santiago stated that there was “a bucket with water.” BR Santiago 110. He also described a 3 foot by 3 foot by 1 foot “tub.” BR Santiago 110. The tub was filled with clean water by a hose with a sprayer on it, which the workers called a Hotsy. BR Santiago 110. He used the sprayer at times to wash his hands. BR Santiago 110-11. The water was removed from the tub and placed into a 55-gallon container. BR Santiago 111. The workers emptied this water by hand into the 55-gallon container. BR Santiago 111. The workers did not use the water in the 55-gallon container to wash their hands. BR Santiago 111.

Cantu believed that there was a hand washing facility at the building’s front entrance with a foot pump for running water, and soap and towels. BR Cantu 31, 34. He did not recall when this was put there but stated that “[i]t was there when I started working there.” BR Cantu 34.

**D. PAS Provided Showers For Its Workers, But The Showers Did Not Always Function Properly**

During PAS’s work in the rifle range on March 11, the contaminated area was enclosed in Visqueen. BR Crane 12-13, 18; BR Cantu 22-23, 25. A negative air pressure filtered the air in the contained

area. BR Crane 12-13. Outside of the contained area, there was a three-stage decontamination (“decon”) area consisting of a clean room, a shower, and a dirty room. BR Santiago 105; *see also* BR Cantu 22-23, 25, 28-29; BR Crane 12, 15, 21. A tub or trough of water was connected to the shower area. BR Cantu 13, 28-29; *see also* BR Santiago 108.

To enter the contained rifle range, workers removed their street clothes in the clean room and changed into full-body Tyvek suits, full-face respirators, rubber boots and gloves in the dirty room. BR Cantu 17-19, 23-25, Crane 17; BR Santiago 105-06; BR Arita 45-46. When leaving the contained area, the workers were expected to shower and then change into clean clothes in the clean room. *See* BR Crane 20-21; BR Santiago 107-09; BR Cantu 26-27.

There was conflicting testimony about the use and functionality of the rifle range’s shower on March 11. Crane, the foreman, testified that the shower worked. BR Crane 19. Santiago testified that he showered when he left the contaminated area and that the shower worked that day. BR Santiago 107-08. Cantu also testified that he showered when he left the contaminated area and that the shower had running water. BR Cantu 14, 29-30. But sometimes he had to wash himself using the tub of water because the shower did not provide enough water:

Q: So what would you use the tub full of water for that was next to the, next to the shower?

A: Well, to clean.

Q: Clean up what?

A: To clean yourself. Sometimes you can't get enough water out of those.

Q: Out of the shower?

A: Yeah.

BR Cantu 29. Arita testified that he only washed his hands when he left the rifle range. BR Arita 46. He stated that the shower "didn't have water." BR Arita 45. That shower did not function on multiple days. *See* BR Arita 45.

There was also differing testimony about the number of showers at other locations on the worksite. Crane testified that there were two showers in the basement—one next to the rifle range and one next to the boiler room—when PAS workers were performing work in the rifle range. BR Crane 10-11, 15, 46; Ex. 3 p. 2. After workers completed the work in the rifle range, the shower next to the rifle range was moved to a different floor. BR Crane 27, 29; *see also* BR Crane 47; Ex. 3, p. 3. Crane also stated that there was a "three-stage shower decon" in the main hallway next to the main entrance on the second floor. BR Crane 33-34. Additionally, there was a "three-stage shower with a base tub" in the main

hallway by the stairs on the second floor. BR Crane 30-31; Ex.3, p. 4. According to Crane, there was a water hose in the tub. BR Crane 31. Crane said that there was at least one shower set up every day while PAS performed lead abatement. BR Crane 31.

Cantu believed there was more than one shower on the worksite but he could not specifically recall. BR Cantu 28. He did not state when during the project this shower was set up. *See* BR Cantu 28. Santiago testified that there were showers set up in other locations at all times so that workers could take showers after working in a containment area. BR Santiago 109, 112.

**E. A WISHA Hygienist Observed No Hand Washing Facilities With Clean And Tepid Water At The Armory Worksite And The PAS Foreman Told The Hygienist That He Was Filling Buckets With Water For Workers To Wash Their Hands**

On March 17, 2011, certified industrial hygienist Christian Bannick inspected the armory worksite. BR Bannick 36, 48-50. By this date, the abatement work in the rifle range was complete and the showers at that location were no longer present. BR Bannick 56, 82.

On that date, Bannick walked around the entire worksite with Crane and Gary Hansen, PAS's safety supervisor. BR Bannick 51, 53, 91; BR Hansen 65-66, 68; *see also* BR Crane 36-37. He looked for hand washing facilities that provided clean and tepid water that employees

could use to wash their hands at breaks and at the end of the day. *See* BR Bannick 78. Hand washing facilities have clean water, a cleaning agent, and clean towels. WAC 296-155-140(2). He did not see hand washing facilities anywhere on the worksite. BR Bannick 78, 91.

Bannick asked Crane, the foreman, about the absence of such facilities and “how employees were washing their hands.” BR Bannick 78, 93. Crane informed Bannick that he was filling up buckets for workers to wash their hands:

Q: And did you speak to anyone at – in management with PAS about hand washing facilities?

A: Well, when I was walking around with Earnest Crane during the walk-around portion of the inspection the issue of hand washing came up because I didn’t see any hand washing. He told me about the shower set ups for -- that were established for portions of the operation. Then he also said that they were using buckets, that he was filling up buckets for workers to use to wash their hands.

BR Bannick 78. Crane stated that the buckets allowed employees to “wash their hands before they left the job site.” BR Bannick 82.

Bannick observed the buckets that were used for hand washing. *See* BR Bannick 89-90. He recalled seeing them in the basement. BR Bannick 90. He recalled that they were standard 5-gallon buckets. BR Bannick 90. He did not know the water source. BR Bannick 90.

With regard to showers, Bannick recalled seeing “evidence of shower stalls for decon units” on one of the floors. BR Bannick 90, 92.

Bannick understood that there were not always showers on the worksite:

I just remember the discussion with Mr. Crane when we were talking about hand washing. You know he pointed out that for different aspects of the project that they had containment, like, say, the firing or the gun range. But at least when I was on site that whole gun range shower assembly and everything was not in place, right, because that was gone.

So I understood – My understanding was that there were bits and pieces or elements of the project that because of their – because of the hazardous nature of that particular element of the project a decon chamber was required for that piece, but once that piece was done, the thing got disassembled.

And so this idea that there was a shower on place that was operational 24/7 while those workers were there is just not true.

BR Bannick 82; *see also* BR Bannick 92-93.

Crane, the foreman, testified that he pointed out showers to Bannick on the “[s]econd [floor], the firing range, and the basement area.” BR Crane 37. He testified that when he pointed out these showers, Bannick said “Good job.” BR Bannick 37. Hansen recalled that Bannick stated, “That’s even better” when Crane pointed out a shower on the second floor in response to Bannick’s question about hand washing stations. BR Hansen 66. Bannick testified that he did not recall making

these comments but could not state that he did not make the comments.

BR Bannick 91.

On the March 17 walk-through, Hansen, the safety director, observed one shower in the second floor hallway near the main entrance. BR Hansen 66-67; Ex. 3 at 4. He did not observe any other showers on the worksite that day. BR Hansen 68. Hansen did not observe any other facilities where employees could wash their hands except for a set of buckets:

Q: On that particular day did you walk the entire job site?

A: I believe we did.

Q: Did you see any other showers that were in existence on that day?

A: I did not personally observe any other showers that day.

Q: Did you observe any hand washing facilities separate and apart from a shower set up?

A: There was a set of buckets at the bottom of the stairwell in the work that they were doing in the lower floors, and I do not honestly know whether that was the first floor or the basement floor.

BR Hansen 67-68.

Bannick returned to the worksite “at least a couple times” for “additional walkthroughs.” BR Bannick 54, 64. Hansen recalled that

Bannick was at the site on four or five occasions. *See* BR Hansen 68. Bannick never saw any hand washing facilities on the worksite. BR Bannick 91.

**F. The Department Cited PAS For A Serious Violation Of WAC 296-155-17619(5)(a) And The Board And Superior Court Affirmed The Department's Citation**

The Department issued three safety and health citations to PAS, including a citation for a serious violation of WAC 296-155-17619(5)(a).<sup>5</sup> *See* BR Bannick 57, 77, 81. The penalty for the citation was \$400. BR Bannick 81. Bannick recommended this citation because he did not see a hand washing facility on site even though Cantu, Santiago, and Arita and other workers were exposed to lead. BR Bannick 78-80. Bannick testified that the purpose of hand washing facilities is to prevent workers from ingesting lead when they are using their hands for activities like eating and smoking. BR Bannick 79. As he explained, buckets are not adequate hand washing facilities because they do not provide workers with clean water:

[I]f multiple workers are using the hand wash or even one person, it's not providing clean water. There's standing water that's becoming progressively more contaminated depending on the number of individuals that are using it.

---

<sup>5</sup> Because this appeal involves only one of the three citations—the hand washing citation issued under WAC 296-155-17619(5)(a)—this brief focuses only on that citation.

BR Bannick 78. He recommended that the citation be issued as a serious violation because of “the serious nature of the illnesses” that lead ingestion could cause. BR Bannick 81. PAS appealed this citation to the Board. *See* BR 43-44.

After considering the testimony, the industrial appeals judge issued a proposed decision and order affirming the citation. *See* BR 28, 43-44. The judge entered several findings of fact, including findings that PAS did not provide access to adequate hand washing facilities, a condition that could seriously harm the workers:

5. In March 2011, PAS employees were not given access to hand washing facilities which met the requirements of WAC 296-155-140 in violation of WAC 296-155-17619(5)(a).

6. PAS knew or, through the exercise of reasonable diligence, could have known of this condition, the result of which could include serious physical harm

BR 43.

With regard to the presence of showers, the judge observed that the armory was “a work site in constant flux” and “the evidence conflicted as to whether or not showers were even provided.” BR 41. In any case, she reasoned that the provision of showers did not satisfy the regulation’s hand washing requirement:

If the point of having hand washing facilities is, as Mr. Bannick testified, to prevent employee ingestion of lead

during breaks and after hours, the requirement that employees take the time to fully undress and shower before taking minor breaks to use the restroom, get water, or have a cigarette does not meet this need.

BR 41.

PAS petitioned for review of the judge's decision to the three-member Board. BR 4-18. The Board denied PAS's petition for review and adopted the proposed decision and order as its final decision and order. BR 2.

PAS appealed the Board's final decision and order to superior court. *See* CP 52-54. After a bench trial, the superior court affirmed the Board. CP 52-54. PAS now appeals. CP 55-60.

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

In a WISHA appeal, this Court reviews a decision by the Board directly based on the record before the agency. *J.E. Dunn Nw., Inc. v. Dep't of Labor & Indus.*, 139 Wn. App. 35, 42, 156 P.3d 250 (2007); *see also Martinez Melgoza & Assocs., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 106 P.3d 776 (2005). The Board's findings of fact are conclusive if substantial evidence supports them. *Elder Demolition, Inc. v. Dep't of Labor & Indus.*, 149 Wn. App. 799, 806, 207 P.3d 453 (2009); RCW 49.17.150(1).

Substantial evidence is evidence “in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *J.E. Dunn Nw., Inc.*, 139 Wn. App. at 43 (quoting *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978)). This Court views the evidence and its reasonable inferences in the light most favorable to the prevailing party. *Erection Co. v. Dep’t of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011). An inference is a logical conclusion or deduction from an established fact. *Tokarz v. Ford Motor Co.*, 8 Wn. App. 645, 654, 508 P.2d 1370 (1973).

Circumstantial evidence is “as good” as direct evidence. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). On appeal, the reviewing court may affirm findings based entirely on circumstantial evidence. *See Dep’t of Fisheries v. Gillette*, 27 Wn. App. 815, 821-22, 621 P.2d 764 (1980).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep’t of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem’l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Thus, an appellate court will not substitute its judgment for that of the factfinder even though it may have

resolved a factual dispute differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

This Court reviews the Board's finding that a WISHA citation is "serious" under substantial evidence review. *See Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 656-57, 272 P.3d 262 (2012).

## V. SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's findings that PAS did not provide access to hand washing facilities in violation of WAC 296-155-17619(5)(a) and that the violation could cause serious physical harm. The Department's industrial hygienist did not observe any hand washing facilities on multiple visits to the worksite. PAS's foreman told the hygienist that he was filling up buckets for workers to use to wash their hands. PAS's safety supervisor stated that there was a "set of buckets" for hand washing at the site. One worker testified that he washed his hands in a tub of standing water that was filled at the beginning of the day and emptied at the end of the day. Another worker testified that he and other workers washed their hands in buckets.

Because standing water in buckets or tubs becomes contaminated with use, PAS's provision of buckets to its workers for hand washing did not comply with the regulation. Moreover, although PAS argues that it provided "multiple means," including showers for workers to wash their

hands, the Department's hygienist did not observe any of these purported hand washing facilities on multiple visits to the worksite. Although he did see portable showers, showers are not hand washing facilities under WAC 296-155-17619(5)(a) but are a separate and independent health and safety requirement for lead workers under WAC 296-155-17619(3). Additionally, there was substantial evidence that the showers did not always operate properly.

Finally, the Department correctly cited this violation as serious rather than general. Because lead is a systemic poison that can cause neurological, reproductive, and developmental damage, there was a substantial probability that if harm resulted from lead exposure due to inadequate hand washing facilities, that harm to PAS's workers would be "serious physical harm."

## VI. ARGUMENT

### A. **When Workers Are Exposed To Lead, Employers Must Provide Adequate Hand Washing Facilities With Clean And Tepid Wash Water To Protect Their Workers From Ingesting Lead**

WISHA's purpose is to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." RCW 49.17.010. Here, PAS's workers were working with lead, a substance that can cause serious health

consequences, including neurological, reproductive, and developmental damage to adults and children. *See* BR Bannick 66, 72, 73.

The Legislature has authorized the Department to promulgate health and safety regulations under WISHA. RCW 49.17.040. Employers must comply with these regulations under RCW 49.17.060(2), WISHA's "specific duty" clause. Unlike under WISHA's general duty clause, citations under this specific duty clause do not require the Department to prove that a hazard exists.<sup>6</sup> *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433-34, 144 P.3d 1160 (2006). Rather, the specific standards set forth in WISHA regulations presume a hazard, and the Department must show only that the standard in question was violated. *Supervalu*, 158 Wn.2d at 433-34; *Mowat Constr. Co. v. Dep't of Labor & Indus.*, 148 Wn. App. 920, 930, 201 P.3d 407 (2009).

WISHA regulations must meet or exceed standards promulgated under the federal Occupational Safety & Health Act (OSHA). RCW 49.17.010; *Aviation W. Corp. v. Dep't of Labor & Indus.*, 138 Wn. 2d 413, 423-24, 980 P.2d 701 (1999) (stating that WISHA standards can be "more protective, although not less, of worker safety" than OSHA standards).

---

<sup>6</sup> The general duty clause obligates an employer to "furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees." RCW 49.17.060(1). A violation of this clause requires proof that the employer failed to protect the workplace from a recognized hazard. *Supervalu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.3d 1160 (2006).

This Court may consider relevant federal decisions interpreting OSHA when interpreting WISHA. *Erection Co.*, 160 Wn. App. at 204 n.1.

WISHA regulations must be liberally construed in light of WISHA's stated purpose of ensuring safe and healthful working conditions for all Washington workers. *Elder Demolition, Inc.*, 149 Wn. App. at 806. This Court gives great deference to the Department's interpretation of WISHA. *See Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 478 n.7, 36 P.3d 558 (2001).

To make a prima facie case of a serious violation of a specific rule under WISHA, the Department bears the initial burden of proving the following elements:

- (1) the cited standard applies; (2) the requirements of the standard were not met; (3) employees were exposed to, or had access to, the violative condition; (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition; and (5) there is a substantial probability that death or serious physical harm could result from the violative condition.

*J.E. Dunn Nw.*, 139 Wn. App. at 44-45 (internal quotation omitted).

Because of the danger of lead exposure, the Department has promulgated "[h]ygiene facilities and practices" under WAC 296-155-17619 to protect workers from lead exposure. That regulation requires employers to provide hand washing facilities at the workplace when its workers are exposed to any amount of lead:

(5) Hand washing facilities.

(a) The employer shall provide adequate hand washing facilities for use by employees exposed to lead in accordance with WAC 296-155-140.

(b) Where showers are not provided the employer shall assure that employees wash their hands and face at the end of the work-shift.

WAC 296-155-17619(5). WAC 296-155-140 defines “[w]ash water” to include “[c]lean, tepid wash water, between 70 and 100 degrees Fahrenheit.”<sup>7</sup> WAC 296-155-140(2)(a).

---

<sup>7</sup> This regulation reads in its entirety:

(2) Wash water.

(a) Clean, tepid wash water, between 70 and 100 degrees Fahrenheit, shall be provided at all construction sites.

(b) Individual hand towels shall be provided. Both a sanitary container for the unused towels and a receptacle for disposal of used towels shall be provided.

(c) Hand soap, industrial hand cleaner or similar cleansing agents shall be provided. Cleansing agents shall be adequate to remove any paints, coatings, herbicides, insecticides or other contaminants.

(d) The requirements of this subsection do not apply to mobile crews or to normally unattended work locations as long as employees working at these locations have transportation immediately available, within the normal course of their duties, to nearby facilities otherwise meeting the requirements of this section.

(e) Gasoline or solvents shall not be used for personal cleaning.

(f) Wash water areas will be maintained in a dry condition. Slipping or other hazards shall be eliminated from the wash water area before it is acceptable for use.

WAC 296-155-140(2).

WAC 296-155-17619 also requires showers when workers' airborne lead exposure is above the permissible exposure limit:

(3) Showers.

(a) The employer shall provide shower facilities, where feasible, for use by employees whose airborne exposure to lead is above the [permissible exposure limit].

(b) The employer shall assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees.

WAC 296-155-17619(3). This is a separate and independent requirement from the rule requiring adequate hand washing facilities. *Compare* WAC 296-155-17619(3) *with* WAC 296-155-17619(5).

**B. Substantial Evidence Supports The Board's Finding That PAS Workers Were Not Given Access To Adequate Hand Washing Facilities With Clean, Tepid Wash Water In Violation Of WAC 296-155-17619(5)(a)**

Substantial evidence supports the Board's finding of fact 5 that PAS did not give access to hand washing facilities that met the requirements of WAC 296-155-140. PAS argues that the finding is not supported by substantial evidence because it provided "multiple means" for workers to wash their hands. App. Br. 9, 19. Specifically, PAS states that it provided a 3' x 3' x 1' tub on the second floor with a sprayer; a washing station with a foot pump for running water; a shower in the

second floor hallway; and two showers in the basement area. App. Br. 14-16. This argument fails under the substantial evidence standard of review.

Regardless of any other sources of water that PAS may have provided at the worksite, Crane admitted to Bannick that he “was filling up buckets for workers to use to wash their hands.” BR Bannick 78. He filled up buckets so that workers “could wash their hands before they left the job site.” BR Bannick 82. Hansen, the safety director, corroborated PAS’s use of buckets for hand washing. When asked whether he observed any hand washing facilities on the March 17 walkthrough, Hansen testified that there was “a set of buckets” at the bottom of a stairwell. BR Hansen 68.

A reasonable inference from Crane’s statements that he “was filling up buckets” is that workers washed their hands in standing water. Cantu’s testimony supports this inference. He stated that he washed his hands in a tub without running water that was filled at the beginning of the day and emptied at the end of the day. BR Cantu 13. This was especially unsafe given that Cantu also testified that he used the tub to clean off equipment. *See* BR Cantu 29. Arita also testified that he and other workers washed their hands in buckets. BR Arita 43. Santiago observed a bucket on the worksite filled with water and soap. BR Santiago 109-10.

And Bannick recalled seeing five-gallon buckets for hand washing. *See* BR Bannick 90.

Buckets or tubs of standing water are not adequate hand washing facilities under WAC 296-155-17619(5)(a) because they do not provide clean water. As Bannick explained, buckets of standing water become contaminated with use and do not comply with the hand washing regulation: “[I]f multiple workers are using the hand wash or even one person, it’s not providing clean water.” BR Bannick 78. The Board agreed, recognizing that it is a reasonable inference that standing water is no longer clean once a worker dips his or her contaminated hands into the water. *See* BR 41.

PAS challenges this inference. App. Br. 20-21. Although it concedes “in the abstract” that “standing water that is used to wash hands results in unclean water,” it asserts, somewhat incongruously, that Bannick’s testimony on this point was only his “opinion.” App. Br. 21.

The Board’s reasoning that buckets of standing water do not provide clean water is not an abstract opinion but, rather, a logical inference. *See Tokarz*, 8 Wn. App. at 654. Unlike a sink with running water, the contaminants will not be washed away but will remain in the water. *See, e.g., Sec’y of Labor v. Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2007 WL 4138237 at \*5 (2007) (agreeing with OSHA

inspector's opinion that there is a "high risk of lead recontamination from ad seriatim dipping" of lead abatement workers' hands into an Igloo cooler filled with water).

PAS had an obligation under WAC 296-155-17619(5)(a) to provide "adequate hand washing facilities" to keep its workers safe from lead. Substantial evidence supports that it provided buckets and tubs of standing water to its workers to wash their hands. These are not "adequate hand washing facilities" under the regulation.

Bannick's testimony provides further substantial evidence that PAS did not provide its workers with access to adequate hand washing facilities with clean, tepid water. Bannick visited the worksite on "at least a couple," and possibly up to five, occasions. BR Bannick 54; BR Hansen 68. He was familiar with the regulation's requirement that an employer has to provide adequate hand washing facilities with "clean" and "tepid" water. BR Bannick 78-79. A hand washing facility with running water, soap, and clean hand towels would have been obvious. *See* WAC 296-155-140. Bannick did not observe hand washing facilities "[a]nywhere" onsite during his walk-throughs. BR Bannick 89, 91.

PAS repeatedly says that it provided "multiple means" for its employees to wash their hands. App. Br. 4, 6, 14, 19. But although Bannick saw "evidence of portable shower stalls," which as explained

below are not “hand washing facilities” under the regulation, Bannick did not see any hand washing facilities anywhere onsite. BR Bannick 89, 91.

Hansen’s testimony corroborated Bannick’s observations. On March 17, Hansen observed only one “shower set up” and no other hand washing facilities apart from a “set of buckets.” *See* BR Hansen 67-68. Hansen’s testimony that he saw only one “shower set up” undermines Crane’s testimony that he pointed out showers to Bannick on the “[s]econd [floor], the firing range, and the basement area.” *See* BR Crane 37; BR Hansen 68. Again, the Board was entitled to give more weight to Bannick’s and Hansen’s observations than to Crane’s.

The Board had the opportunity to weigh Bannick’s personal observations, based on multiple visits to the worksite, against competing testimony that workers had other means of washing hands at the worksite—including “sprayers” and a hand washing facility with a foot pump by the front entrance. Thus, for example, Cantu testified that there was a hand washing station “right as you go into the front door of the building” with a foot pump, soap, towels, and water that “wasn’t cold.” BR Cantu 31, 34. But Bannick specifically testified that there was not a hand washing facility at the front door on any of the multiple days that he was at the worksite. BR Bannick 53-54. The Board was entitled to give greater weight to Bannick’s personal observations, and this Court does

reweigh evidence on substantial evidence review. *See Fox*, 154 Wn. App. at 527.

PAS attempts to minimize Cantu's testimony that he used a tub of water to wash his hands. App. Br. 16. It notes that Cantu "provided no details as to where, when, or how often such a tub was used." App. Br. 16. But this is another improper request to give less weight to a piece of evidence that undermines PAS's theory of the case. *See Fox*, 154 Wn. App. at 527; *Harrison Mem'l Hosp.*, 110 Wn. App. at 486.

**C. PAS Is Not Entitled To Leeway In Complying With WAC 296-155-17619(5)(a) Where The Regulation Is Clear That Employers Must Provide Adequate Hand Washing Facilities With Clean and Tepid Water To Its Workers**

**1. WISHA's Specific Duty Clause Requires Employers To Comply With Health And Safety Regulations And Employers Do Not Have Leeway To Substitute Their Own Judgment For A Regulation's Specific Requirements**

PAS argues that it "should be afforded leeway in deciding how to comply" with WAC 296-155-17619(5)(a). *See App. Br. 21*. For this argument, it relies entirely on federal OSHA cases that differentiate "performance standards" from "specification standards." *See App. Br. 21-23*. Additionally, it argues that, under this case law, the wording of WAC 296-155-17619 gives it leeway to substitute its judgment for the specific requirements of WAC 296-155-17619(5)(a). App. Br. 23.

These arguments lack merit. PAS cites no Washington case to support its argument that an employer has leeway to decide how to comply with a regulation. To the contrary, WISHA's specific duty clause states that employers "[s]hall comply" with WISHA regulations. RCW 49.17.060(2).

In any case, the primary OSHA case that PAS relies on does not support its position. See App. Br. 21-22. In *Thomas Industrial Coatings*, the Occupational Safety Health Commission distinguished "performance standards" that do not identify an employer's specific obligations to protect worker health and safety from "specification standards," which identify such obligations. 2007 WL 4138237 at \*3-4. "Because performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable." *Thomas Indus. Coatings*, 2007 WL 4138237 at \*4.

PAS appears to suggest that WAC 296-155-17619 is likewise a "performance standard" that it may interpret in light of what is reasonable. See App. Br. 22-24. The analysis in *Thomas Industrial Coatings* does not support PAS's theory. The Commission noted that the following regulation is a "performance standard" that does not identify specific obligations:

(f) Washing facilities. (1) The employer shall provide adequate washing facilities for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees. Such facilities shall be in near proximity to the worksite and shall be so equipped as to enable employees to remove such substances.

*Thomas Indus. Coatings*, 2007 WL 4138237 at \*3-4 (quoting 29 § C.F.R. 1926.51(f)(1)).

In contrast, the following regulation is a “specification standard” because it identifies specific obligations that an employer has to protect its workers, including the provision of “running water” and “cleansing agents”:

(3) Lavatories. (i) Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph. (ii) Each lavatory shall be provided with hot and cold running water, or tepid running water. (iii) Hand soap or similar cleansing agents shall be provided.

*Thomas Indus. Coatings*, 2007 WL 4138237 at \*3-4 (quoting 29 § C.F.R. 1926.51(f)(3)).

The regulation at issue in this case, WAC 296-155-17619(5)(a), is a specification standard. Like subsection (f)(3) of the federal rule, it incorporates specific requirements for hand washing facilities that every employer must provide when its workers are exposed to lead, including

clean and tepid water, towels, and soap. Accordingly, under the reasoning of *Thomas Industrial Coatings*, PAS has no leeway to interpret WAC 296-155-17619(5)(a) in light of what is reasonable. *See Thomas Indus. Coatings*, 2007 WL 4138237 at \*4. It must comply with the clear terms of regulation.

Ultimately, regardless of whether a regulation is denominated a specification standard or a performance standard, the employer still has to follow the regulation's terms. Here, the regulation requires adequate hand cleaning washing facilities that provide clean water. WAC 296-155-17619(5)(a); WAC 296-155-140(2). Substantial evidence supports the finding that PAS did not provide access to such facilities.

**2. PAS Did Not Comply With WAC 296-155-17619(5)(a) By Providing Showers Because Showers Are A Separate Requirement Under WAC 296-155-17619(3)**

PAS argues that showers can be considered hand washing facilities. App. Br. 24. Thus, it contends that it complied with WAC 296-155-17619(5)(a) by providing on-site showers. App. Br. 24.

Contrary to PAS's argument, evidence that there were showers at the worksite is irrelevant to the issue of whether PAS complied with WAC 296-155-17619(5)(a). Under the regulation's plain language, the requirement for "[h]and washing facilities" is separate and independent from the requirement for showers. *Compare* WAC 296-155-17619(3)

*with* WAC 296-155-17619(5). “Hand washing facilities” are required for worksites when there is any exposure to lead whereas “showers” are required, where feasible, when workers are exposed to airborne concentrations of lead greater than the permissible exposure limit. *Compare* WAC 296-155-17619(3)(a) *with* WAC 296-155-17619(5)(a).

There is no language in WAC 296-155-17619 that exempts an employer that has shower facilities at a worksite from the requirement to also provide adequate hand washing facilities. The rule requires showers “where feasible,” but makes no exceptions to the mandatory requirement that employers provide hand washing facilities when its workers are exposed to lead. *See* WAC 296-155-17619(3)(a), (5)(a). If the Department intended the regulation to exempt employers that had showers at the worksite from the requirement that they provide hand washing facilities, it would have stated that. It made no such exemption. Rather, it made the two provisions independent. *See* WAC 296-155-17619(3)(a), (5)(a). If showers could be considered hand washing facilities, the regulation would not have made separate requirements.

As the Board explained, there is a practical difference between hand washing facilities and showers. *See* BR 41. This accounts for the Department’s separate and mandatory requirements. Hand washing facilities allow workers to protect themselves from inadvertent lead

ingestion without having to undress every time they take a short rest break to drink water, eat food, or smoke. *See* BR 41.

Furthermore, PAS's argument is contrary to the rule that WISHA regulations be liberally construed to protect workers. *Adkins v. Aluminum Co. of Am.*, 110 Wn. 2d 128, 146, 750 P.2d 1257, *modified*, 756 P.2d 142 (1988). And it is contrary to the requirement that the Department's interpretation of the rules be given substantial deference. *See Lee Cook Trucking*, 109 Wn. App. at 478 n. 7.

Even though the requirement for hand washing facilities is separate and independent from the requirement for showers, there was substantial evidence in this case that the showers did not always function properly. Arita testified that he and other workers used a bucket to wash at times because the shower was not always functional. BR Arita 42-45. He testified that there was more than one day when the shower was not working properly. BR Arita 45. Cantu testified that he used a tub without running water to wash himself because he could not get enough water out of the shower. BR Cantu 13-14, 29.

**D. Because Substantial Evidence Exists That Exposure To Lead Can Cause Serious Physical Harm And Death, The Board Correctly Concluded That The Violation Was Serious**

PAS assigns error to Board's finding of fact 6, which states in relevant part that the absence of employee access to hand washing

facilities “could include serious physical harm.”<sup>8</sup> App. Br. 10; BR 43. It argues that the Department did not prove that there is a substantial probability that death or serious physical harm could result from this condition. App. Br. 27. These arguments are unavailing.

As a preliminary matter, it is important to clarify that this Court reviews the Board’s finding on the probability of “serious physical harm” under substantial evidence review. *See Potelco*, 166 Wn. App. at 656-57 (employing substantial evidence review to review Board’s finding that employer’s violation of flagging regulations exposed workers “to the risk of being struck by traffic and suffering death or serious injury”). To the extent that PAS advocates a de novo standard by arguing that the “Board should have ruled that Violation 1-2 is not a serious violation,” it is incorrect. *See* App. Br. 26-27.

Under WISHA, a “serious” violation exists if:

[I]f there is a substantial probability that death or serious physical harm could result from a condition which exists,

---

<sup>8</sup> PAS assigns error to finding of fact 6 in its entirety. App. Br. 10. But in its brief it argues only that the portion of the finding of fact 6 relating to serious physical harm is erroneous. *See* App. Br. 26-31; BR 43. Thus, it makes no argument that PAS did not know or could not have known through the exercise of reasonable diligence of the violative condition. *See* BR 43. Accordingly, this portion of the finding regarding knowledge is a verity on appeal and any alleged error with regard to this portion of the finding is waived. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992); *Express Constr. Co. v. Dep’t of Labor & Indus.*, 151 Wn. App. 589, 596, 215 P.3d 951 (2009). Thus, the sole issue on appeal with regard to the seriousness of the violation is whether substantial evidence supports the Board’s finding that the lack of employee access to hand-washing facilities “could include serious physical harm.” BR 43.

or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

RCW 49.17.180(6).

The phrase “substantial probability that death or serious physical harm could result” means the likelihood that *if* harm results from the violation, that harm could be death or serious physical harm. *Mowat Constr. Co.*, 148 Wn. App. at 932; *Lee Cook Trucking*, 109 Wn. App. at 482. “Substantial probability” does not refer to the probability that harm will occur on a particular worksite, in part because the probability of an accident is separately accounted for in the penalty amount. *See Mowat Constr. Co.*, 148 Wn. App. at 932; *Lee Cook Trucking*, 109 Wn. App. at 481-82. Thus, the issue in this case is not how likely it was that PAS workers at this particular worksite would suffer serious physical harm from ingesting lead due to inadequate hand washing facilities. *See Lee Cook Trucking*, 109 Wn. App. at 481. Rather, it is whether serious physical harm could result from ingesting lead due to a lack of access to hand washing facilities.

- 1. Lead Is A Systemic Poison And Exposure Can Cause Neurological, Reproductive and Developmental Problems**

Substantial evidence exists that the absence of employee access to hand washing facilities “could include serious physical harm.” BR 43. Workers who perform lead abatement work “potentially have lead materials on their hands.” BR Bannick 80. They can ingest this lead when using their hands for activities like eating and smoking. *See* BR Bannick 66, 72, 73, 80. Hand washing facilities help remove the lead from workers’ hands. *See* BR Bannick 80. Thus, the lack of access to hand washing facilities at PAS’s work site could have caused workers to ingest lead.

The ingestion of lead can cause serious physical harm. Lead is a systemic poison that affects multiple human organs and can cause neurological and reproductive damage. BR Bannick 73. It can affect blood formation in adults. BR Bannick 73. Through take-home exposure, workers can expose their families, including children. *See* BR Crane 19; BR Bannick 73. Lead is harmful to children’s development. BR Bannick 73; RCW 70.270.010(2).

Thus, substantial evidence exists that if harm resulted from the PAS workers’ inability to adequately remove lead from their hands, the workers could suffer “serious physical harm.” *See Lee Cook Trucking*, 109 Wn. App. at 482; *see also In Re Dyno Battery, Inc.*, BIIA Dec., 08 W0065, 2010 WL 4267698 at \*2 (2010) (affirming the seriousness of a

WISHA violation related to lead monitoring because excessive lead exposure may affect the central nervous system, blood forming mechanism, reproductive organs or fetus, and may cause renal disease or failure with chronic exposures).

Disregarding the substantial evidence standard of review, PAS argues that the Department did not prove the violation was serious because it did not present certain types of “physical evidence” about the water in the buckets. *See* App. Br. 28. Specifically, it notes that the Department did not present (A) photographs of “standing buckets of water,” (B) photographs of employees using the buckets of water, (C) photographs of contaminated water, (D) water sample results demonstrating that the water was contaminated, or (E) expert testimony about “what amount of lead it takes ‘to contaminate’ a bucket of water.” App. Br. 28. PAS also argues that Bannick’s testimony does not constitute substantial evidence because he did not testify that he saw workers washing their hands in buckets or explain how many times the workers used the water in the buckets before changing the water. App. Br. 28.

These arguments lack merit. First, they misunderstand the “substantial probability” standard, which does not refer to the likelihood that harm will actually occur at a particular worksite. *See Mowat*, 148 Wn. App. at 932; *Lee Cook Trucking*, 109 Wn. App. at 481. Evidence

such as water sample results, expert testimony about how much lead is needed to contaminate a bucket, and the workers' frequency of bucket use before changing the water pertain to the likelihood of harm and, thus, are irrelevant to the "substantial probability" analysis. It was unnecessary for the Department to prove that actual contamination of the water occurred in order for the serious citation to be upheld. *See Supervalu, Inc.*, 158 Wn.2d at 434 ("if the violation concerns a specific standard, it is not necessary to even prove that a hazard exists, just that the specific standard was violated"); *Lee Cook Trucking*, 109 Wn. App. at 481.

Second, all of these arguments pertain to the weight and credibility that a factfinder should give the evidence. But weight and credibility determinations are beyond the scope of appellate review. *See In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

**2. The Court Of Appeals Has Rejected The Argument That An Otherwise Serious Violation Can Be Reduced To A General Violation When An Employer Believes That It Has Provided Equal Or Greater Protection Than That Imposed By The Regulation**

Citing a single Fifth Circuit case, PAS also asserts that the Board should have found that the violation was general, not serious. App. Br. 29-30 (citing *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027 (5th Cir. 1989)). It argues that the violation was not serious because "there is no significant difference between the protection provided by PAS in

providing showers and that which would be afforded by technical compliance” with WAC 296-155-17619(5)(a). App. Br. 30. This argument fails.

First, as explained above, the requirement for hand washing facilities is separate and independent from the requirement for showers. *Compare* WAC 296-155-17619(3)(a) *with* (5)(a). PAS cannot rely on its provision of showers to excuse its failure to provide adequate hand washing facilities.<sup>9</sup> And substantial evidence supports that the showers did not always operate properly.

Second, this Court in *Mowat* has previously rejected the Fifth Circuit’s analysis in *Phoenix Roofing*. In *Mowat*, the Department cited the employer for violating a regulation that required it to “[r]educe employee noise exposure” below a certain decibel level. *Mowat Constr. Co.*, 148 Wn. App. at 923. The employer did not dispute that persistent exposure to noise levels at or above that decibel level could cause permanent hearing loss or that permanent hearing loss is “serious physical harm.” *Mowat Constr. Co.*, 148 Wn. App. at 929. But the employer argued that, even if it violated the noise standard, its violation was not serious because, by

---

<sup>9</sup> PAS states that it was not required to provide showers and that, by doing so, it enhanced the safety of its workers. *See* App. Br. 31. But WAC 296-155-17619(3)(a) requires shower facilities, where feasible, when employees’ “airborne exposure to lead is above the [permissible exposure limit].” Here, on March 11, workers were exposed to airborne lead concentrations at ten times the permissible exposure limit. *See* BR Bannick 60, 63, 102; BR Hansen 61; Ex. A to Ex. 1; Ex. 2 at 5-6.

providing earplugs to its workers, it provided protection “equal to or greater than that imposed by regulation.” *Mowat Constr. Co.*, 148 Wn. App. at 931 (quoting *Phoenix Roofing, Inc.*, 874 F.2d at 1032).

The *Mowat* Court rejected this argument because the proper inquiry under WISHA is not whether the employer provided protection “equal to or greater than that imposed by the regulation.” See *Mowat Constr. Co.*, 148 Wn. App. at 932. Rather, under the substantial probability test, it is “the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Mowat Constr. Co.*, 148 Wn. App. at 932. As the court explained, the provision of earplugs was immaterial:

Although using earplugs may make it less likely that an employee will suffer harm as a result of exposure to excessive noise, the violation is still serious because if the violation of noise standards does cause harm, there is a substantial probability that the nature of the harm will be permanent hearing loss.

*Mowat Constr. Co.*, 148 Wn. App. at 932. Therefore, this Court affirmed the serious violation. *Mowat Constr. Co.*, 148 Wn. App. at 932.

The same reasoning applies here. PAS’s failure to provide access to hand washing facilities with clean water prevented workers from being able to remove lead from their hands. Should harm result from the workers’ inability to clean lead from their hands, the harm could be

serious physical harm because of lead's toxic neurological, reproductive, and developmental consequences.

PAS attempts to distinguish *Mowat* on the facts, noting that its argument “has nothing to do with protective equipment.” App. Br. 31. But this argument misses *Mowat*'s larger point, which is that, under the “substantial probability” test, what matters is the nature of the harm if the employer violates the regulation. See *Mowat Constr. Co.*, 148 Wn. App. at 932. Here, PAS's failure to comply with the regulation exposed its employees to lead, a toxic substance that causes serious harm.

Additionally, even under the reasoning of *Phoenix Roofing*, PAS's violation was “serious.” Here, PAS's conduct was not safer than following the regulations. Contrary to the *Phoenix Roofing* case, in which the Commission determined that the alternative steps taken by the employer equaled or exceeded the protections offered by the regulation, PAS did not offer alternative steps that equaled or exceeded the same level of protection. See *Phoenix Roofing*, 874 F.2d at 1032. Specifically, providing buckets of water for employees to wash their hands and showers that sometimes did not work did not provide the same protection as providing a source of “clean” water for washing. See WAC 296-155-17619(5)(a); WAC 296-155-140(2)(a).

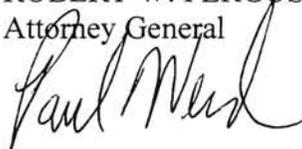
Finally, PAS appears to suggest in a footnote that *Thomas Industrial Coatings* supports a reduction to a general violation. App. Br. 31 n. 12. PAS is incorrect. Here, there is substantial evidence that the workers' lack of access to adequate hand washing facilities at a lead abatement site "could include serious physical harm." See BR 43. That is the question before this Court, and the Commission's decision not to classify a violation in that specific case has no application here.<sup>10</sup>

## VII. CONCLUSION

For the reasons above, the Department asks this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January, 2014.

ROBERT W. FERGUSON  
Attorney General



PAUL WEIDEMAN  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 389-3820

---

<sup>10</sup> In the conclusion to its brief, PAS requests that this Court vacate finding of fact 7, which pertains to the penalty calculation. App. Br. 32. But PAS does not assign error to this finding or argue anywhere its brief that substantial evidence does not support the Board's findings on the factors that support the penalty, including the severity, probability, workplace history rating, and faith rating. Therefore, any argument on this finding is waived. See App. Br. 10; RAP 10.3(a)(6); *Cowiche Canyon Conservancy*, 118 Wn. 2d at 809; *Express Constr. Co.*, 151 Wn. App. at 596.