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NO. 33727-4

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

CLERK


INTERSTATE BRANDS CORPORATION,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

REPLY BRIEF OF APPELLANT
INTERSTATE BRANDS CORPORATION

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I. SUMMARY OF ARGUMENT

The Department continues to argue that the most important words in the regulation – “corrosives, strong irritants, or toxic chemicals” – should be ignored in determining whether an employer is required to provide an emergency eyewash facility in the workplace pursuant to WAC 296-800-15030. This flawed argument is based on a deliberate misreading of the plain wording of the regulation and invites legal error. The Washington Supreme Court has long held that regulations shall be construed so that no word shall be “superfluous, void, or insignificant.” *See, e.g., City of Kent v. Beigh*, 145 Wn.2d 33, 40-41, (2001)(quoting *Martin v. Dep’t of Soc. Sec.*, 12 Wn.2d 329, 332 (1942).

WAC 296-800-15030 requires an emergency eyewash facility only if an employee’s eyes are exposed to “corrosives, strong irritants or toxic chemicals.” It is undisputed that the Department’s witness testified that he did not know what these terms meant or whether such conditions were present at the inspected IBC facility when a citation was issued for a violation of WAC 296-800-15030. Instead, the Department’s witness testified that an emergency eyewash facility needs to be installed whenever the material safety data sheet (MSDS), prepared by the manufacturer of any chemical, recommends that an employee “flush the eyes” if an employee gets the chemical in his eyes. To justify this approach as a basis for issuing

a citation under WAC 296-800-15030, the Department misstates the law and misrepresents its own regulation by asserting that this interpretation is set forth in an advisory Note and that the Note is a mandatory rule on which to base a citation for non-compliance. This is legal error. An advisory Note is not, and never has been, a mandatory element of a rule, let alone the rule itself. Rather, a Note simply provides guidance or useful information to the regulated community. Moreover, the Note at issue here does not say what the Department claims it says.

During the proceedings below, the Department contended that the terms “corrosive, strong irritant and toxic chemical” were not defined and could be ignored. Now, without explanation or apology, the Department argues for the first time on appeal that these terms are defined in WAC 296-800-370 and that the chemicals in question fell within these new-found definitions. However, these are the very same definitions that Dr. Halvorsen, IBC’s expert, used to conclude that the chemicals at issue are not “corrosives, strong irritants, or toxic chemicals.” Tr. I, 113:20-24; Tr. I, 116:10-16; Tr. I, 137:4-5. Moreover, the Department argued below that it was unnecessary to a violation that the chemicals meet such definitions and proffered no evidence to rebut Dr. Halvorsen’s expert testimony.

Finally, the Department concedes that in order to prove employee “exposure” under WAC 296-800-15030, it must show that it is reasonably predictable that an employee has been, is, or will be in the zone of danger (Brief of the Department, 38). That is, the Department agrees that it must show that it is reasonable predictable that an employee’s eyes will come in contact with a corrosive, strong irritant, or toxic chemical. Dr. Halvorsen not only testified that the chemicals present at the worksite did not meet the definitions of a corrosive, strong irritant or toxic chemical, but also, based on the quantities involved and how the chemicals at issue are used in the workplace, employee “exposure” to eye splashes does not exist. The Department did not provide any evidence to the contrary. In fact, the compliance officer and Mr. Lundeen admitted that they did not see employees use these chemicals, did not interview employees on their usage of these chemicals, and, as a consequence, their testimony has no relevance to the reasonable predictability determination.

For these reasons, the Department failed to establish that IBC was obligated to provide an emergency eyewash facility pursuant to WAC 296-800-15030.

II. ARGUMENT

A. The Department Has the Burden of Proving the Presence of a Corrosive, Strong Irritant, or Toxic Chemical in the Workplace.

At the hearing before the Industrial Insurance Appeals Judge, Department representative Michael A. Lundeen testified that if a MSDS for a chemical recommends “flushing of the eyes,” an employer is required to provide an emergency eyewash facility in the workplace under WAC 296-800-15030. Tr. I, 136:21-26; Tr. I, 137:1-13. In the Department’s brief to the Superior Court, the Department argued that “WAC 296-800-15030 requires emergency eyewash facilities for any chemical with a MSDS that requires flushing of the eyes.” CP at 73. At oral argument, the Department underscored its position by arguing that “[t]he definitions of corrosive, strong irritant, or toxic chemicals . . . are not before the Court today and are not at issue.” (Tr. 25:21-23) At page 38 of the Department’s brief to this Court, the Department goes on to say that “if the MSDS [for any chemical used in the workplace] . . . requires flushing of the eyes, . . . an emergency eyewash is required.” In other words, the Department takes the unreasonable position that the most important words in the regulation – “corrosives, strong irritants, or toxic chemicals” – are meaningless and may be ignored in determining whether an employer is required to provide an emergency eyewash facility in the workplace pursuant to WAC

296-800-15030. This is legal error. The Washington Supreme Court has long held that “[a] statute should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *See, e.g., City of Kent v. Beigh*, 145 Wn.2d 33, 40-41, (2001)(quoting *Martin v. Dep’t of Soc. Sec.*, 12 Wn.2d 329, 332 (1942)).¹

B. The Department’s Argument That IBC Can Be Cited for a Violation of WAC 296-800-15030 Based on an Advisory Note Is Also Legal Error.

The Department argues that IBC can be cited for a violation of WAC 296-800-15030 based solely on language in an informational Note appended to the regulation. Specifically, the Department argues at page 38 of its brief to this Court that “[t]he “Note” expressly provides if the MSDS . . . requires flushing of the eyes, then the chemical is to be considered by the employers as “corrosives, strong irritants or toxic chemicals” and an emergency eyewash is required.” The Department made this same argument before the Industrial Insurance Appeals Judge, the Board of Industrial Insurance Appeals, and the Superior Court. This argument is erroneous for four reasons.

¹ The Department argues that this Court should give deference to its interpretation of WAC 296-800-15030. This argument is fatally flawed. Indeed, Washington Courts have long held that agency interpretation of an ambiguous regulation is given deference as long as the interpretation is reasonable. *See, e.g., McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992). Here, however, there is no ambiguity. Rather, the Department has simply ignored the mandatory language of the regulation. Thus, the issue of whether Department’s interpretation is reasonable and therefore deserving of deference does not exist here.

First, the Note does not state that an employer must install an emergency eyewash facility if a MSDS recommends “flushing of the eyes.” In fact, there is no such discussion in the Note.

Second, the Department has expressly advised the regulated community that its Notes are simply useful information. In the Introduction to its Safety and Health Core Rules, the Department explains that a rule is organized by title and WAC number. CP at 117.² The Introduction states that each rule has a section entitled “Your Responsibility” and that this section provides “an overview of rule obligations and requirements.” *Id.* The Introduction also states that each rule has a section entitled “You Must” and that this section provides “the requirements of the rule.” *Id.* The Introduction also states that “you’ll come across other information . . . in the form of icons and visual aids and one of these icons is a “Note,” which provides “additional information.” *Id.* at 119. By its very terms, the Note is limited to information and does not list “obligations” or “requirements”.

In the present case, the Note following Core Rule WAC 296-800-15030 consists entirely of guidance to the regulated community. Indeed, there is no mandatory language in the Note that places any legal obligation on an employer. The Note simply provides information telling an employer that a review of an “MSDS or similar document” will assist in

² For the convenience of the Court, pertinent portions of the Introduction to the Core Rules are attached as Exhibit A.

determining the chemical nature of the substance and the first aid treatment. The Notes in the Core Rules are consistently used in this informational manner. For example, the Note in 296-800-17015 informs the reader that documents can be obtained from a manufacturer's website. The Note in 296-800-16050 provides the name and address of a commercial publisher of safety reference books. The Note in WAC 296-800-11045 states that you can check the Center of Disease Control web site to find published guidelines and information on safe handling and protection from specific biological agents.

Third, the Department's argument demonstrates a fundamental misreading of its own regulation and Note. A material safety data sheet (MSDS) is a requirement in WAC 296-839-30005, which is derived from its federal counterpart the Hazard Communication Standard, 29 C.F.R. 1910.1200 (HAZCOM). These standards require the manufacturer of chemicals to prepare a written summary of each chemical to be given to industrial users of the chemical. The summary must include the physical properties of the chemical, such as its pH, its properties as a potential irritant or as a potential toxic. Based on this technical information in a MSDS, an industrial user or employer can assess the chemical and determine whether it is a corrosive, strong irritant, or toxic chemical.

These standards also require the manufacturer of a chemical to list “emergency and first aid procedures” in the MSDS. WAC 296-839-30005, table 8; 29 C.F.R. § 1910.1200(g)(2)(x). The manufacturer selects the range of first aid and/or emergency treatments and may recommend “flushing of the eyes.” There are many different ways to “flush the eyes.” Some employers use small hand held bottles of saline solution; others use portable flushing stations and others have plumbed eyewash stations. The various recommendations to flush have no bearing on the physical properties of the chemical as a corrosive, strong irritant, or toxic chemical. For example, by definition a corrosive must “destroy living tissue by chemical action.” Flushing of the eyes with water does not destroy living tissue. In essence, the physical properties of the chemical and the appropriate first aid are two mutually exclusive issues. The Department has ignored this distinction and has attempted to convert the recommendation of a manufacturer into a legal requirement to provide a specific type of eyewash equipment.

Fourth, the Department’s argument, if accepted, impermissibly expands the scope of the regulation to require an emergency eyewash facility for safe and harmless chemicals. Both Dr. Halvorsen and Mr. Lundeen testified that virtually all material safety data sheets for chemical substances recommend flushing of the eyes. Tr. II, 115:13-21; Tr. II, 131:3-47; Tr. I, 146:20-26. The material safety data sheets for

harmless substances such as powdered sugar, sandbox sand, lemon juice, and powdered milk recommend flushing of the eyes should an employee's eyes come in contact with the chemical substance. Tr. II, 131:49-51 to 132:1-45. Given that the vast majority of material safety data sheets recommend flushing of the eyes, then virtually every place of employment in the State of Washington would be required to provide an emergency eyewash facility in the workplace. Even an office where powdered milk or sugar is available for coffee service, an emergency eyewash facility would be required. The Washington Supreme Court has repeatedly held that it will "avoid readings of [regulations] that result in unlikely, absurd, or strained consequences." *See, e.g., Glauback v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).

Finally, Dr. Halvorsen testified that when exposed to harmless substances such as powdered sugar, "flushing of the eyes" can be accomplished simply with an eyewash solution contained in a First Aid cabinet, a garden hose, or even a sink in a restroom. Tr. II, P. 143-144. He testified this is precisely what IBC has made available to its employees. He also testified that because IBC employees are not exposed to "corrosives, strong irritants, or toxic chemicals," IBC was not required to provide an

emergency eyewash facility in the workplace and that existing methods for flushing of the eyes at the IBC worksite were adequate. *Id.*³

C. The Department's Arguments Concerning the Definitions in WAC 296-800-370 are Legally and Factually Incorrect.

Before the Industrial Insurance Appeals Judge, the Board of Industrial Insurance Appeals, and the Superior Court, the Department offered no expert testimony to prove that IBC has a corrosive, strong irritant, or toxic chemical in the workplace. The Washington Supreme Court has long held that “expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson.” *Berger v. Sonneland*, 144 Wn.2d 91, 110 (2001)(quoting *Harris v. Groth*, 99 Wn.2d 438, 439 (1983)). The essential element in the present case is whether IBC has a corrosive, strong irritant or toxic chemical in the workplace. This essential element involves a scientific and technical analysis that can only be established by expert testimony. IBC established that it does not have such chemicals in the work place through the testimony of Dr. Halvorsen, an expert in chemicals with

³ WAC 296-800-15030 states that an emergency eyewash facility is a facility that “irrigates and flushes both eyes simultaneously while the user holds their eyes open,” contains an “on-off valve that activates in one second or less and remains on without user assistance until intentionally turned-off,” and “delivers at least 0.4 gallons (1.5 liters) of water per minute for fifteen minutes or more.”

over 40 years of experience in chemical safety. This expert testimony was un rebutted.

For the first time on appeal, the Department attempts to apply the 2005 definitions in WAC 296-800-370 to the facts in the records. These arguments are made without the benefit of technical expertise and without regard to the plain meaning of the terms – corrosive, strong irritant and toxic chemicals. The arguments are frivolous. The Department cites regulatory definitions that were not promulgated until after issuance of the citation, and it ignores the actual wording in such definitions and the evidence in the record.

First, the Department offers the Court the wrong set of regulatory definitions. They offer the definitions published in 2005, which is after the issuance of citation and after the hearing of this case. The citations were issued on March 24, 2003, and the definitions that were in effect at the time of the citations and hearing were as follows:⁴

Corrosive

As used in first aid, WAC 296-800-150, is a substance that causes destruction of living tissue by chemical action, including acids with a pH of 2.5 or below or caustics with a pH of 11.0 or above.

⁴ For the convenience of the Court, a copy of the regulatory definitions in effect as of 1/1/03 is attached as Exhibit B.

Strong Irritants

As used in first aid, WAC 296-800-150, is a chemical that is not corrosive, but causes a strong, temporary inflammatory effect on living tissue by chemical action at the site of contact.

Toxic chemical

As used in first aid, WAC 296-800-150, is a chemical that produces serious injury or illness when absorbed through any body surface.

The Department's entire argument ignores the existence of the definition of a "strong irritant."

Second, the Department argues, without evidentiary support in the record, that battery acid is a corrosive, and strong irritant. This argument is frivolous, ignoring the plain meaning of these technical terms and ignoring the evidence in the record. The WISHA regulation states by definition that a strong irritant "is not a corrosive." Dr. Halvorsen testified that an irritant is not a corrosive. Tr. II, 122:11-12.

Third, the Department argues that Safety Kleen and Brake Wash are corrosives. Again, the Department advances a frivolous argument ignoring the plain meaning of the technical terms and the evidence in the record. By definition, a corrosive destroys living tissues and has a pH of either less than 2.5 or greater than 11.0. The expert testimony from Dr. Halvorsen and the

Department's own Exhibits 13 and 16 indicate that these chemicals do not destroy living tissue and do not have pH's. All of the evidence in the record demonstrates that they are not corrosives. Tr. II, 125:41-45; Tr. II, 126:5-23; Tr. II, 129:27-49; Tr. II, 130:1; Tr. II, 143:13-17.

Even assuming that the Court were to allow the Department to belatedly and erroneously cite the 2005 WAC definitions, the Department's argument still lacks any factual basis. Dr. Halvorsen, an expert in chemicals who has over 40 years of experience in chemical safety, testified as to what constitutes a corrosive, strong irritant, and toxic chemical under federal OSHA and general industry standards. They are the exact same definitions that are in WAC 296-800-370 in effect at the time.

Indeed, WAC 296-800-370 defines "corrosive" as "[a] substance that, upon contact, causes destruction of living tissues by chemical action, including acids with a pH of 2.5 or below or caustics with a pH of 11.0 or above." Dr. Halvorsen testified that a corrosive is a chemical that will damage tissue and also has a pH of less than two for acids and have a pH of 11 or greater for bases. Tr. II, 122:3-31. This is precisely the same as the definition in WAC 296-800-370.

WAC 296-800-370 defines "Irritant" as a "substance that will induce a local inflammatory reaction upon immediate, prolonged, or repeated contact with normal living tissue." Dr. Halvorsen testified that an

irritant is a chemical that will cause an inflammatory condition upon contact. Tr. II, 122:35-43. Moreover, he stated that the “draise test” is generally used to determine the strength of an irritant. Tr. II, 122:35-49 123:1-27. Under the draise test, a small amount of a chemical is placed in the eye of a rabbit and then the reaction is evaluated after various time periods, starting with one hour, twenty-four hours, forty-eight hours, and seventy-two hours. Tr. II, 123:5-15. The chemicals are then given one of the following four ratings: (1) practically non-irritating, (2) slight irritating, (3) moderately irritating, and (4) severely irritating. A severely irritating rating is the equivalent to a “strong” irritant rating. Tr. II, 123:9-27. Dr. Halvorsen’s testimony sets forth the same definition for a strong irritant as the one in WAC 296-800-370.

WAC 296-800-370 defines “toxic chemical” as “[a] chemical that produces serious injury or illness when absorbed through any body surface.” Dr. Halvorsen testified that toxic chemicals can be absorbed through three body surfaces. Tr. II, 123:31-52; Tr. II, 124:1-31. He testified about absorption through oral exposure, which he called LD50 - oral. He also testified about absorption through the skin, which he called LD50 dermal, and absorption through inhalation, which he called LC50. *See also Exhibit 21, at Toxics.* His testimony is entirely consistent with the definition of a toxic chemical as defined in WAC 296-800-370.

Thus, Dr. Halvorsen, applying the same definitions as those set forth in WAC 296-800-370, concluded that ZEP Brake Wash and Safety Kleen Premium Solvent are not corrosives, strong irritants, or toxic chemicals.⁵ The Department did not produce any evidence during the proceedings to refute Dr. Halvorsen's expert testimony. In fact, Mr. Lundeen testified that he did not know what constitutes a corrosive, strong irritant, or toxic chemical and that the Department does not even consider those terms in determining whether an employer was obligated to provide an emergency eyewash facility. Tr. I, 113:20-24; Tr. I, 116:10-16.

In conclusion, the Department failed to produce any evidence in the record below to show that IBC had a "corrosive, strong irritant, or toxic chemical" in the workplace as those words are defined in WAC 296-800-370.

D. In Order to Prove Employee "Exposure" Under WAC 296-800-15030, the Department Has to Show That It Is Reasonably Predictable That an Employee Has Been, Is, or Will Be in the Zone of Danger, and the Department Failed to Meet Its Burden of Proof.

Before the Industrial Insurance Appeals Judge, the Board of Industrial Insurance Appeals, and the Superior Court, IBC pointed out that the Washington Supreme Court's decision in *Adkins v. Aluminum Co. of*

⁵ Federal OSHA and general industry definitions of a corrosive, strong irritant, and toxic chemical are the same as those found in WAC 296-800-370. The Department's argument about the federal OSHA and general industry definitions for these terms is based on a misunderstanding of the terms.

America, 110 Wn.2d 128 (1998) set forth the correct legal standard for establishing employee “exposure” under WAC 296-800-15030. The Department repeatedly opposed this and argued that it simply has to show that it is theoretically possible for an employee’s eyes to come in contact with a chemical substance in order to meet its burden of proof regarding exposure. Now, the Department has rightly changed its position and concedes that *Adkins* did indeed establish the correct legal threshold for establishing employee exposure under WAC 296-800-15030 (Brief of the Department, 38).

In *Adkins*, the Washington Supreme Court held that the Department has to show that it is “reasonably predictable” that an employee has been, is, or will be in the zone of danger. The zone of danger is where an injury could occur. *See, e.g., Fabricated Metal Products Inc.*, 18 BNA OSHC 1072 fn.7 (OSHRC 1997) (concluding that the zone of danger is the where an injury could occur). Indeed, if an injury could not occur, employees are not in any “zone of danger.” Thus, the Department had the burden to show that it is reasonably predictable that a mechanic’s eyes will come in contact with a corrosive, strong irritant, or toxic chemical.⁶

⁶ The Department’s reliance on this Court’s decision in *Lee Cook Trucking & Logging v. Dep’t of Labor & Indus.*, 106 Wn.App. 471, 481 (2001) is clearly misplaced. Indeed, in *Lee Cook* this Court examined whether the underlying violation was properly characterized as a “serious” violation under RCW 49.17.180(6). RCW 49.17.180(6) states, in relevant part, that a “serious” violation “shall be deemed to exist in a work place

In applying the *Adkins* standard for establishing employee exposure under WAC 296-800-15030 to the facts in this case, IBC presented evidence that no employee has ever gotten battery acid, Safety Kleen, or Brash wash in his or her eyes. This is strong evidence that it is not reasonably predictable that an employee's eyes will come in contact with any of these three chemical substances. *See, e.g., S. Dakota Beverly Enterps. Inc.*, 2005 BNA OSHC Slip Op. 8 (No. 01-202, 2005) (recognizing that no prior injuries is relevant in determining employee exposure); *Fabricated Metal Products Inc.*, 18 BNA OSHC 1072, 1074 (No. 1997) (no

if there is a substantial probability that death or serious physical harm could result from a condition that exists" in the workplace. This Court held that the phrase "substantial probability that death or serious physical harm could result" referred to likelihood that any harm resulting from violation would be death or serious physical harm, rather than requiring proof of a substantial probability that harm would result from a violation. *Id.* at 482. This Court was not presented with the issue of whether the Department is required to show the likelihood that harm would result in order to establish employee exposure. In fact, this particular question was addressed, as conceded by the Department, by the Washington Supreme Court in *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128 (1998).

The Department is also simply wrong in arguing that whether it is "reasonably predictable" that an employee has been, is, or will be in the zone of danger is not the same as whether there is a "realistic potential" that an employee's eyes would come in contact with a chemical substance. The substantive analysis is the same. Both weigh the likelihood of an employee's eyes coming in contact with a corrosive, strong irritant, or toxic chemical. *See, e.g., Rios v. Washington Dep't of Labor & Indus.*, 145 Wn.2d 483 (2002) (explaining that the Department promulgates standards to regulate significant risks of harm); *Aviation West Corp. v. Washington Dep't of Labor & Indus.*, 138 Wn.2d 413, 433 (1999) (stating that common sense dictates that it would generally not be "reasonably necessary or appropriate" under the enabling clause of the Washington Industrial Safety and Health Act to regulate an *insignificant* risk). *See also Armour Food Co.*, 14 BNA OSHC 1817, 1821 (Docket No. 86-247, 1990) (opining that the mere fact that it is not impossible for an employee to come into contact with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard); *Rockwell Int'l Corporation*, 9 BNA OSHC 1092 (No. 12470, 1980) (concluding that the Secretary's contention that employees might insert their hands inside the danger zone is highly improbable and wholly speculative). In short, the Department is fruitlessly trying to argue form over substance here.

prior injuries is a strong indicia of no exposure); *Ormet Corp.*, 14 BNA OSHC 1292 (No. 88-1203, 1989)(the fact that no prior injuries had been sustained indicated no exposure); *Skydyne, Inc.*, 11 BNA OSHC 1753, 1755 (No. 80-5422, 1984) (no prior injuries is evidence of no exposure).

Dr. Halvorsen testified that there is no potential for a mechanic's eyes to come in contact with battery acid. Tr. II, 133:27-51; Tr. II, 134:1-19. Moreover, Mr. Lundeen agreed. Tr. II, 120:6-10. 13. Ms. Hawks also testified that there was no realistic exposure to battery acid. Thus, the mechanics are not in any "zone of danger" when working with the batteries. Therefore, employees are not exposed to battery acid.

All of the witnesses testified that the batteries were fully encapsulated and that the battery acid posed no exposure hazard. Tr. II, 133:27-51; Tr. II, 134:1-19; Tr. II, 120:6-10; Tr. I, 59:18-20. The Department tries to ignore this evidence and speculates that batteries might explode.

The Department did not offer any evidence of an explosion, or the factors causing an explosion, or why the battery charge process could cause an explosion. Moreover, the compliance officer did not know how or whether a flammable substance evolved in the battery charging process, did not know of any ignition source in the workplace, the ventilation in the

work area and did not know the procedure at the work place to insure safe charging of batteries. Tr. I, 59:22-26; Tr. I, 63:1-26.

Witnesses on both sides – Dr. Halvorsen, Mr. Lundeen and Mr. Teske – agreed that such explosion is not reasonably predictable. Mr. Teske testified that in his 30-year career as a mechanic, a battery has never exploded. Tr. II, 27:47-51; Tr. II, 28:1-3. Dr. Halvorsen testified that in his 40-year experience in chemical safety, he has never known of a battery that is used at the IBC depot to explode. Tr. 134:1-30. The Department’s own representative – Mr. Lundeen – testified that in his own experience, he has never known a battery to explode.⁷ In sum, the Department’s argument for exposure is based on wild speculation, and there is no evidence to support a finding of exposure. *See Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994) (finding that OSHA must show a significant risk of harm); *Armour Food Co.*, 14 BNA OSHC 1817, 1821 (Docket No. 86-247, 1990)(opining that the mere fact that it is not impossible for an employee to come into contact with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard); *Rockwell Int’l Corporation*, 9 BNA OSHC 1092 (No. 12470,

⁷ At page 28 of the Department’s brief to this Court, the Department argues that there is employee exposure to battery acid because IBC requires mechanics to wear face shields, safety glasses or safety goggles, and rubber gloves when working with batteries. This argument is legally wrong. The use of this protective equipment makes it even more remote that any exposure could occur.

1980) (concluding that the Secretary's contention that employees might insert their hands inside the danger zone is highly improbable and wholly speculative).

The Department further argues that the Review Commission decisions in *Cagle's Inc.*, No. 98-485 1999 WL 956195 (O.S.H.R.C.A.L.J. Oct. 15, 1999) and *Duro-Last, Inc.*, No. 02-285, 2002 WL 1767144 (O.S.H.R.C.A.L.J. July 29, 2002) are inapposite here. Nothing could be further from the truth. In *Cagle's Inc.*, the judge found that because the ammonia was in a completely enclosed tank, employees were not "in a zone of danger." Just like the tank in *Cagle's Inc.*, the batteries at IBC's garage were completely encased.

In *Duro-Last, Inc.*, the judge concluded that because there was "no evidence that employees added electrolyte acid to the batteries," there was no evidence that employee's eyes would come in contact with the electrolyte acid. *Duro-Last, Inc.*, 2002 WL 1767144 at *4. Here, Mr. Teske testified that mechanics do not fill batteries with battery acid or electrolyte. And the Department did not present any evidence to refute this testimony.

Regarding the allegations that employees' eyes were exposed to Safety Kleen and Brake Wash, Dr. Halvorsen testified that based on the quantity and how Safety Kleen is used in the sink to remove grease from

various vehicle parts, it is not reasonably predictable for a mechanic's eyes to come in contact with Safety Kleen. Tr. II, 134:34-51; Tr. II, 135:1-7. He also testified that based on the quantity and how Brake Wash is used to dust off brakes and other components of the trucks, it is not reasonably predictable for a mechanic's eyes to come in contact with the Brake Wash. Tr. II, 134:35-41; Tr. II, 135:9-15. Thus, the mechanics are not in any "zone of danger" when working with Safety Kleen or Brake Wash. Therefore, employees are not exposed to Safety Kleen or Brake Wash.

In its brief to this Court, the Department argues that that Mr. Lundeen testified that applying Safety Kleen and Brake Wash creates a splash hazard. However, Mr. Lundeen admitted that he did not personally visit the IBC facility. Tr. I, 109, 20-23. Moreover, he testified that he did not know the condition in which Safety Kleen and Brake Wash are used, nor did he know the frequency in which Safety Kleen and Brake Wash are used at the facility. Tr. I, 127, 7-12. Furthermore, he admitted that he did not know the condition in which Safety Kleen is distributed through the brush when a part is being cleaned, nor did he know how much of the Brake Wash is used when a part is being cleaned. Tr. I, 135:16-25; Tr. I, 122:2-3. Because he did not know the conditions in which Safety Kleen and Brake Wash are used at the facility, he had no basis to determine that it is reasonably predictable that an employee's eyes would come in contact

either with Safety Kleen or Brake Wash. As such, his testimony on this issue is completely speculative.

The Department also mischaracterizes the testimony of Mr. Teske. Regarding the use of Safety Kleen, Mr. Teske did not testify that some parts are almost at eye level when being cleaned. Nor did he testify that employees “lean over the sink” to clean the parts. In fact, Mr. Teske testified that he does not know of anyone ever getting Safety Kleen in his or her eyes. Tr. 2, 43:1-3. The Department has invented facts to try and bolster its argument for exposure.

Regarding the use of Brake Wash, Mr. Teske did not testify that there is a splash hazard “when the can is tipped and the liquid is transferred from the 5-gallon container to the smaller container.” Tr. II, 12:9-17. Nor did he testify that there is a splash hazard “when the employee actually sprays the Brake Wash onto a brake part in sufficient quantity, not to ‘dust’ it but to remove the accumulated grease and dirt.” In fact, he testified that his eyes have never come in contact with the Brake Wash. Tr. II, 38:33-37. Once again, the Department has invented facts to try and bolster its argument for exposure.

In conclusion, the evidence clearly shows that it is not reasonably predictable that an employee’s eyes would come in contact with battery acid, Safety Kleen, or Brake Wash. Thus, employees are not in any “zone

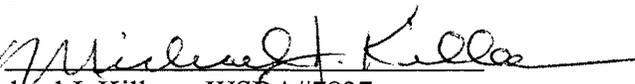
of danger,” and there was no employee “exposure” under WAC
296-800-15030.

III. CONCLUSION

For all the foregoing reasons, IBC respectfully requests that this
Court vacate Citation 1, Item 1 alleging a violation of WAC
296-800-15030.

RESPECTFULLY SUBMITTED this 12th day of July, 2006.

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CERTIFICATE OF SERVICE

I, Mary J. Fabrizio, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

1. I am over the age of 18 years and not a party to the within cause.
2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688.
3. On the 12th day of July, 2006, I caused to be served via e-mail and First Class U.S. Mail the attached REPLY BRIEF OF APPELLANT INTERSTATE BRANDS CORPORATION on Respondent's attorneys at the following address:

Nancy A. Kellogg
Assistant Attorney General
4224 6th Avenue S.E.
P.O. Box 40121
Olympia, WA 98504-0121
e-mail: nancyk@atg.wa.gov

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STATE OF WASHINGTON
BY M. FABRIZIO

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

Executed this 12th day of July 2006, at Seattle, Washington.

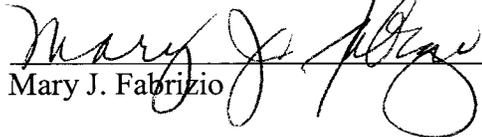

Mary J. Fabrizio

Exhibit A

Washington Department of Labor & Industries
“Introduction to the Core Rules”

(WAC 296-800-100)

Introduction

WAC 296-800-100

How is each rule organized?

The following 2 pages illustrate how the rules are organized.

1. **Title:**

Indicates the rule topic.

2. **Wac Numbers:**

Washington Administrative Code (WAC) numbers have been assigned to each rule.

3. **Summary:**

This is a place holder that tells you where you are, which will either be summary, introduction, or rule.

4. **Your responsibility:**

Provides an overview of rule obligations and requirements.

5. **You must:**

Provides requirements of the rule.

6. **Tab icon:**

Provides a graphic description of the rules within a topic area.

Introduction

WAC 296-800-100

- 1
- 2
- 3
- 4
- 5
- 6

Accident Prevention Program

WAC 296-800-140

Summary

YOUR RESPONSIBILITY:

To establish, supervise and enforce an Accident Prevention Program that is effective in practice

You must

- Do a hazard assessment for PPE
WAC 296-800-14005 Page 140- 2
- Document your hazard assessment for PPE
WAC 296-800-14015 Page 140- 3
- Select appropriate PPE
WAC 296-800-14020 Page 140- 3
- Provide PPE to your employees
WAC 296-800-14025 Page 140- 4



<http://www.lni.wa.gov/wisha>

140-1

09/01

Introduction

WAC 296-800-100

How is each rule organized? (Continued)

You'll come across other information in the Core Rules Book in the form of icons and visual aides. The following is a list of these icons and visual aides:

Bulleting:

Bullets are used to organize and break up information into manageable pieces.

Note:

Provides additional useful information.

Helpful Tool:

These are optional aides such as forms and checklists to help you follow the rule.

Definition:

Terms that are defined within the text of a rule.

Link:

Internet website addresses that may be of interest and assistance.

Exemption:

Circumstances where the rule doesn't apply.

WISHA phone number & website:

Located at the bottom of each page for easy reference.

Page numbers:

Located at the bottom of each page, includes the 3 numbers representing the WAC section followed by a page number for easy reference. (140-1 is an example.)

Issue Date:

Located on the book's title page and below every page number.

Exhibit B

WAC 296-800-370
(as of 1/1/03)

WAC 296-800-36005 Comply with standards national organizations or of federal agencies when referenced in WISHA rules. You must:

- Use the following to be in compliance with WISHA rules:

- The edition of the standard specified in the WISHA rule or

- Any edition published after the edition specified in the WISHA rule.

Note: The specific standards referenced in the WISHA rules are available:

- For review at your local department of labor and industries office.

- See <http://www.wa.gov/lni/pa/direct.htm>

- Through the local library system

- Through the issuing organization.

[Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. 01-11-038, § 296-800-36005, filed 5/9/01, effective 9/1/01.]

WAC 296-800-370 Definitions.

Abatement Action Plans

Refers to your written plans for correcting a WISHA violation.

Abatement date

The date on the citation when you must comply with specific safety and health standards listed on the citation and notice of assessment or the corrective notice of redetermination.

Acceptable

As used in **Electrical**, **WAC 296-800-280** means an installation or equipment is acceptable to the director of labor and industries, and approved:

- If it is accepted, or certified, or listed, or labeled, or otherwise determined to be safe by a nationally recognized testing laboratory; or

- With respect to an installation or equipment of a kind which no nationally recognized testing laboratory accepts, certifies, lists, labels, or determines to be safe, if it is inspected or tested by another federal agency, or by a state, municipal, or other local authority responsible for enforcing occupational safety provisions of the National Electrical Code, and found in compliance with the provisions of the National Electrical Code as applied in this section;

OR

- With respect to custom-made equipment or related installations which are designed, fabricated for, and intended for use by a particular customer, if it is determined to be safe for its intended use by its manufacturer on the basis of test data which the employer keeps and makes available for inspection to the director and his/her authorized representatives. Refer to federal regulation 29 CFR 1910.7 for definition of nationally recognized testing laboratory.

Accepted

As used in **Electrical**, **WAC 296-800-280** means an installation is accepted if it has been inspected and found by a nationally recognized testing laboratory to conform to specified plans or to procedures of applicable codes.

USING STANDARDS FROM NATIONAL ORGANIZATIONS AND FEDERAL AGENCIES

WAC 296-800-360 Rule. Your responsibility: To use the safety and health standards from national organizations and federal agencies, when directed to by WISHA rules.

[Statutory Authority: RCW 49.17.010, [49.17].040, and [49.17].050. 01-11-038, § 296-800-360, filed 5/9/01, effective 9/1/01.]

Access

As used in material safety data sheets (MSDSs) as Exposure Records, WAC 296-800-180 means the right and opportunity to examine and copy exposure records.

Affected employees

As used in WISHA appeals, penalties and other procedural rules, WAC 296-800-350 means employees exposed to hazards identified as violations in a citation.

Analysis using exposure or medical records

• An analysis using exposure records or medical records can be any collection of data or a statistical study. It can be based on either:

- Partial or complete information from individual employee exposure or medical records or
- Information collected from health insurance claim records

• The analysis is not final until it has been:

- Reported to the employer or
- Completed by the person responsible for the analysis

ANSI

This is an acronym for the American National Standards Institute.

Approved means:

• Approved by the director of the department of labor and industries or their authorized representative, or by an organization that is specifically named in a rule, such as Underwriters' Laboratories (UL), Mine Safety and Health Administration (MSHA), or the National Institute for Occupational Safety and Health (NIOSH).

• As used in Electrical, WAC 296-800-280 means acceptable to the authority enforcing this section. The authority enforcing this section is the director of labor and industries. The definition of acceptable indicates what is acceptable to the director and therefore approved.

Assistant director

The assistant director for the WISHA services division at the department of labor and industries or his/her designated representative.

ASTM

This is an acronym for American Society for Testing and Materials.

Attachment plug or plug

As used in the basic electrical rules, WAC 296-800-280 means the attachment at the end of a flexible cord or cable that is part of a piece of electrical equipment. When it is inserted into an outlet or receptacle, it connects the conductors supplying electrical power from the outlet to the flexible cable.

Bare conductor

A conductor that does not have any covering or insulation.

Bathroom

A room maintained within or on the premises of any place of employment, containing toilets that flush for use by employees.

Biological agents

Organisms or their by-products.

Board

As used in WISHA appeals, penalties and other procedural rules, WAC 296-800-350 means the board of industrial insurance appeals.

Certification

As used in WISHA appeals, penalties and other procedural rules, WAC 296-800-350 means refers to an employer's written statement describing when and how a citation violation was corrected.

CFR

This is an acronym for Code of Federal Regulations.

Chemical

Any element, chemical compound, or mixture of elements and/or compounds.

Chemical agents (airborne or contact)

A chemical agent is any of the following:

• Airborne chemical agent which is any of the following:

- Dust - solid particles suspended in air, generated by handling, drilling, crushing, grinding, rapid impact, detonation, or decrepitation of organic or inorganic materials such as rock, ore, metal, coal, wood, grain, etc.

- Fume - solid particles suspended in air, generated by condensation from the gaseous state, generally after volatilization from molten metals, etc., and often accompanied by a chemical reaction such as oxidation.

- Gas - a normally formless fluid that can be changed to the liquid or solid state by the effect of increased pressure or decreased temperature or both.

- Mist - liquid droplets suspended in air, generated by condensation from the gaseous to the liquid state or by breaking up a liquid into a dispersed state, such as by splashing, foaming or atomizing.

- Vapor - the gaseous form of a substance that is normally in the solid or liquid state.

• Contact chemical agent which is any of the following:

- Corrosives - substances that in contact with living tissue cause destruction of the tissue by chemical action.

- Irritants - substances that on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction.

- Toxicants - substances that have the inherent capacity to produce personal injury or illness to individuals by absorption through any body surface.

Chemical manufacturer

An employer with a workplace where one or more chemicals are produced for use or distribution.

Chemical name

The scientific designation of a chemical in accordance with one of the following:

- The nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC)

- The Chemical Abstracts Service (CAS) rules of nomenclature

- A name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

Circuit breaker

• Is a device used to manually open or close a circuit. This device will also open the circuit automatically and with-

out damage to the breaker when a predetermined overcurrent is applied. (600 volts nominal or less)

- Is a switching device capable of making, carrying, and breaking currents under normal circuit conditions, and also making, carrying for a specified time, and breaking currents under specified abnormal circuit conditions, such as those of short circuit. (Over 600 volts nominal)

Citation

Refers to the citation and notice issued to an employer for any violation of WISHA safety and health rules. A citation and notice may be referred to as a citation and notice of assessment but is more commonly referred to as a citation.

Combustible liquid

A combustible liquid has a flashpoint of at least 100°F (37.8°C) and below 200°F (93.3°C). Mixtures with at least 99% of their components having flashpoints of 200°F (93.3°C) or higher are not considered combustible liquids.

Commercial account

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means an arrangement in which a retail distributor sells hazardous chemical(s) to an employer, generally in large quantities over time, and/or at costs that are below the regular retail price.

Common name

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means any designation or identification such as:

- Code name
- Code number
- Trade name
- Brand name
- Generic name used to identify a chemical other than by its chemical name.

Compressed gas

A gas or mixture of gases that, when in a container, has an absolute pressure exceeding:

- 40 psi at 70°F (21.1°C)
- OR
- 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F (21.1°C)

Compressed gas can also mean a liquid with a vapor pressure that exceeds 40 psi at 100°F (37.8°C)

Conductor

A wire that transfers electric power.

Container

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means any container, except for pipes or piping systems, that contains a hazardous chemical. It can be any of the following:

- Bag
- Barrel
- Bottle
- Box
- Can
- Cylinder
- Drum
- Reaction vessel
- Storage tank

Correction date

The date by which a violation must be corrected. Final orders or extensions that give additional time to make corrections establish correction dates. A correction date established by an order of the board of industrial insurance appeals remains in effect during any court appeal unless the court suspends the date.

Corrective notice

Refers to a notice changing a citation and is issued by the department after a citation has been appealed.

Corrosive

As used in first aid, WAC 296-800-150, is a substance that causes destruction of living tissue by chemical action, including acids with a pH of 2.5 or below or caustics with a pH of 11.0 or above.

Covered conductor

A conductor that is covered by something else besides electrical insulation.

Damp location

As used in basic electrical rules, WAC 296-800-280 means partially protected areas that are exposed to moderate moisture. Outdoor examples include roofed open porches and marquees. Interior examples include basements and barns.

Department

Those portions of the department of labor and industries responsible for enforcing the Washington Industrial Safety Act (WISHA).

Designated representative

- Any individual or organization to which an employee gives written authorization.
- A recognized or certified collective bargaining agent without regard to written authorization.
- The legal representative of a deceased or legally incapacitated employee.

Director

The director means the director of the department of labor and industries or their designee.

Distributor

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means a business, other than a chemical manufacturer or importer, that supplies hazardous chemicals to other distributors or to employers. See WAC 296-62-054 for requirements dealing with Manufacturers, Distributors and Importers - Hazard Communication.

Documentation

As used in WISHA appeals, penalties and other procedural rules, WAC 296-800-350 means material that you submit to prove that a correction is completed. Documentation includes, but is not limited to, photographs, receipts for materials and/or labor.

Dry location

As used in basic electrical rules, WAC 296-800-280 means areas not normally subjected to damp or wet conditions. Dry locations may become temporarily damp or wet, such as when constructing a building.

Emergency washing facilities

Emergency washing facilities are emergency showers, eyewashes, eye/face washes, hand-held drench hoses, or other similar units.

Electrical outlets

Places on an electric circuit where power is supplied to equipment through receptacles, sockets, and outlets for attachment plugs.

Employee

Based on chapter 49.17 RCW, the term employee and other terms of like meaning, unless the context of the provision containing such term indicates otherwise, means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is personal labor for an employer under this standard whether by way of manual labor or otherwise.

Employee exposure record

As used in material safety data sheets (MSDSs) as exposure records, WAC 296-800-180 means a record containing any of the following kinds of information:

- Environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained;

- Biological monitoring results which directly assess the absorption of a toxic substance or harmful physical agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent or which assess an employee's use of alcohol or drugs;

- Material safety data sheets indicating that the material may pose a hazard to human health;

OR

- In the absence of the above, a chemical inventory or any other record which reveals where and when used and the identity (e.g., chemical, common or trade name) of a toxic substance or harmful physical agent.

Employer

Based on chapter 49.17 RCW, an employer is any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: Provided, That any persons, partnership, or business entity not having employees, and who is covered by the Industrial Insurance Act must be considered both an employer and an employee.

Exit

Provides a way of travel out of the workplace.

Exit route

A continuous and unobstructed path of exit travel from any point within a workplace to safety outside.

Explosive

A chemical that causes a sudden, almost instant release of pressure, gas, and heat when exposed to a sudden shock, pressure, or high temperature.

Exposed live parts

Electrical parts that are:

- Not suitably guarded, isolated, or insulated

AND

- Capable of being accidentally touched or approached closer than a safe distance.

Exposed wiring methods

Involve working with electrical wires that are attached to surfaces or behind panels designed to allow access to the wires.

Exposure or exposed

As used in employer chemical hazard communication, WAC 296-800-170 and material safety data sheets (MSDSs) as exposure records, WAC 296-800-180. An employee has been, or may have possibly been, subjected to a hazardous chemical, toxic substance or harmful physical agent while working. An employee could have been exposed to hazardous chemicals, toxic substances, or harmful physical agents in any of the following ways:

- Inhalation
- Ingestion
- Skin contact
- Absorption
- Related means.

The terms exposure and exposed only cover workplace exposure involving a toxic substance or harmful physical agent in the workplace different from typical nonoccupational situations in the way it is:

- Used
- Handled
- Stored
- Generated
- Present

Exposure record

See definition for employee exposure record.

Extension ladder

A portable ladder with 2 or more sections and is not self-supporting. The 2 or more sections travel in guides or brackets that let you change the length. The size of a portable ladder is determined by adding together the length of each section.

Failure-to-abate

Any violation(s) resulting from not complying with an abatement date.

Final order

Any of the following (unless an employer or other party files a timely appeal):

- Citation and notice;
- Corrective notice;
- Decision and order from the board of industrial insurance appeals;

- Denial of petition for review from the board of industrial insurance appeals; or
- Decision from a Washington State superior court, court of appeals, or the state supreme court.

Final order date

The date a final order is issued.

First aid

The extent of treatment you would expect from a person trained in basic first aid, using supplies from a first-aid kit.

Tests, such as X rays, must not be confused with treatment.

Flammable

A chemical covered by one of the following categories:

- **Aerosol flammable** means an aerosol that, when tested by the method described in 16 CFR 1500.45 yields either a flame projection more than 18 inches at full valve opening or a flashback (a flame extending back to the valve) at any degree of valve opening;

- **Gas, flammable** means:

- A gas that, at temperature and pressure of the surrounding area, forms a flammable mixture with air at a concentration of 13% by volume or less or

- A gas that, at temperature and pressure of the surrounding area, forms a range of flammable mixtures with air wider than 12% by volume, regardless of the lower limit.

- **Liquid, flammable** means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99% or more of the total volume of the mixture.

- **Solid, flammable** means a solid, other than a blasting agent or explosive as defined in 29 CFR 1910.109(a), that is likely to cause fire through friction, moisture absorption, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily. Solid, inflammable also means that when the substance is ignited, it burns so powerfully and persistently that it creates a serious hazard. A chemical must be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

Flashpoint

- The minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested by any of the following measurement methods:

- **Tagliabue closed tester:** (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

- **Pensky-Martens closed tester:** (See American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79)) for liquids with a viscosity equal to or greater than 45 SUS at 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

- **Setaflash closed tester:** (See American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278-78).)

Note: Organic peroxides, which undergo auto accelerating thermal decomposition, are excluded from any of the flashpoint measurement methods specified above.

Flexible cords and cables

Typically used to connect electrical equipment to an outlet or receptacle. These cords can have an attachment plug to connect to a power source or can be permanently wired into the power source. Flexible cords, extension cords, cables and electrical cords are all examples of flexible cord.

Floor hole

An opening in any floor, platform, pavement, or yard that measures at least one inch but less than 12 inches at its smallest dimension and through which materials and tools (but not people) can fall.

Examples of floor holes are:

- Belt holes
- Pipe openings
- Slot openings

Floor opening

An opening in any floor, platform, pavement, or yard that measures at least 12 inches in its smallest dimension and through which a person can fall.

Examples of floor openings are:

- Hatchways
- Stair or ladder openings
- Pits
- Large manholes

The following are NOT considered floor openings:

- Openings occupied by elevators
- Dumbwaiters
- Conveyors
- Machinery
- Containers

Foreseeable emergency

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means any potential event that could result in an uncontrolled release of a hazardous chemical into the workplace. Examples of foreseeable emergencies include equipment failure, rupture of containers, or failure of control equipment.

Ground

As used in Electrical, WAC 296-800-280, a connection between an electrical circuit or equipment and the earth or other conducting body besides the earth. This connection can be intentional or accidental.

Grounded

A connection has been made between an electrical circuit or equipment and the earth or another conducting body besides the earth.

Grounded conductor

A system or circuit conductor that is intentionally grounded.

Ground-fault circuit-interrupter

A device whose function is to interrupt the electric circuit to the load when a fault current to ground exceeds some

predetermined value that is less than that required to operate the overcurrent protective device of the supply circuit.

Grounding conductor

Is used to connect equipment or the grounded circuit of a wiring system to a grounding electrode or electrodes.

Grounding conductor, equipment

A conductor used to connect noncurrent-carrying metal parts of equipment, raceways, and other enclosures to the system grounded conductor and/or the grounding electrode conductor at the service equipment or at the source of a separately derived system.

Guarded

Covered, shielded, fenced, enclosed, or otherwise protected by means of suitable covers, casings, barriers, rails, screens, mats, or platforms to remove the likelihood of being accidentally touched or approached closer than a safe distance.

Hand-held drench hoses

Hand-held drench hoses are single-headed emergency washing devices connected to a flexible hose that can be used to irrigate and flush the face or other body parts.

Handrail

A single bar or pipe supported on brackets from a wall or partition to provide a continuous handhold for persons using a stair.

Harmful physical agent

Any chemical substance, biological agent (bacteria, virus, fungus, etc.), or physical stress (noise, heat, cold, vibration, repetitive motion, ionizing and nonionizing radiation, hypo- or hyperbaric pressure, etc.) which:

- Is listed in the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) *Registry of Toxic Effects of Chemical Substances* (RTECS) (see Appendix B); or

- Has shown positive evidence of an acute or chronic health hazard in testing conducted by, or known to, the employer;

OR

- Is the subject of a material safety data sheet kept by or known to the employer showing that the material may pose a hazard to human health.

Hazard

Any condition, potential or inherent, which can cause injury, death, or occupational disease.

Hazard warning

As used in Employer Chemical Hazard Communication, WAC 296-800-170 can be a combination of words, pictures, symbols, or combination appearing on a label or other appropriate form of warning which shows the specific physical and health hazard(s), including target organ effects, of the chemical(s) in the container(s).

Note: See definition for physical hazard and health hazard to determine which hazards must be covered.

Hazardous chemical

Any chemical that is a physical or health hazard.

Health hazard

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means any chemical with the potential to

cause acute or chronic health effects in exposed employees. The potential must be statistically significant based on evidence from at least one study conducted under established scientific principles. Health hazards include:

- Chemicals which are carcinogens
- Toxic or highly toxic agents
- Reproductive toxins
- Irritants
- Corrosives
- Sensitizers
- Hepatotoxins
- Nephrotoxins
- Neurotoxins
- Agents which act on the hematopoietic system
- Agents which damage the lungs, skin, eyes, or mucous membranes

See WAC 296-62-054 for more definitions and explanations about the scope of health hazards covered by this part.

See WAC 296-62-054 for the criteria used for determining whether or not a chemical is considered hazardous for purposes of this rule.

Hospitalization

To be sent to, to go to, or be admitted to, a hospital or an equivalent medical facility and receive medical treatment beyond first-aid treatment, regardless of the length of stay in the hospital or medical facility.

Identity

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means any chemical or common name listed on the material safety data sheet (MSDS) for the specific chemical. Each identity used must allow cross-references among the:

- Required list of hazardous chemicals
- Chemical label
- MSDSs

Imminent danger violation

Any violation(s) resulting from conditions or practices in any place of employment, which are such that a danger exists which could reasonably be expected to cause death or serious physical harm, immediately or before such danger can be eliminated through the enforcement procedures otherwise provided by the Washington Industrial Safety and Health Act.

Importer

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means the first business within the Customs Territory of the USA that:

- Receives hazardous chemicals produced in other countries

AND

- Supplies them to distributors or employers within the USA

See WAC 296-62-054 for requirements dealing with Manufacturers, Importer and Distributors - Hazard Communication.

Insulated

A conductor has been completely covered by a material that is recognized as electrical insulation and is thick enough based on:

- The amount of voltage involved

AND

- The type of covering material

Interim waiver

An order granted by the department allowing an employer to vary from WISHA requirements until the department decides to grant a permanent or temporary waiver.

Ladder

Consists of 2 side rails joined at regular intervals by crosspieces called steps, rungs, or cleats. These steps are used to climb up or down.

Listed

Equipment is listed if it:

- Is listed in a publication by a nationally recognized laboratory (such as UL, underwriters laboratory) that inspects the production of that type of equipment,

AND

- States the equipment meets nationally recognized standards or has been tested and found safe to use in a specific manner.

Material safety data sheet (MSDS)

Written or printed material that tells you about the chemical(s), what it can do to and how to protect yourself, others, or the environment.

For requirements for developing MSDSs see WAC 296-62-054—Manufacturers, Importers, and Distributors - Hazard Communication.

Medical treatment

Treatment provided by a physician or by registered professional personnel under the standing orders of a physician. Medical treatment does not include first-aid treatment even if provided by a physician or registered professional personnel.

Mixture

As used in Employer Chemical Hazard Communication, WAC 296-800-170, any combination of 2 or more chemicals (if that combination did not result from a chemical reaction).

Movable equipment

As used in WAC 296-800-35052, a hand-held or non-hand-held machine or device;

- That is powered or nonpowered;

AND

- Can be moved within or between worksites

Must

Must means mandatory.

NEMA

These initials stand for National Electrical Manufacturing Association.

NFPA

This is an acronym for National Fire Protection Association.

Nose

The portion of the stair tread that projects over the face of the riser below it.

Occupational Safety and Health Administration (OSHA)

Passed in 1970 by the U.S. Congress, the Occupational Safety and Health Act (OSHA) provides safety on the job for working men and women. OSHA oversees states (such as

Washington) that have elected to administer their own safety and health program. OSHA requires WISHA rules to be at least as effective as OSHA rules.

Office work environment

An indoor or enclosed occupied space where clerical work, administration, or business is carried out.

In addition, it includes:

- Other workplace spaces controlled by the employer and used by office workers, such as cafeterias, meeting rooms, and washrooms.

- Office areas of manufacturing and production facilities, not including process areas.

- Office areas of businesses such as food and beverage establishments, agricultural operations, construction, commercial trade, services, etc.

Open riser

A stair step with an air space between treads has an open riser.

Organic peroxide

This is an organic compound containing the bivalent-O-O-structure. It may be considered a structural derivative of hydrogen peroxide if one or both of the hydrogen atoms has been replaced by an organic radical.

Outlet

See definition for electrical outlets.

Oxidizer

A chemical other than a blasting agent or explosive as defined in WAC 296-52-60130 or CFR 1910.109(a), that starts or promotes combustion in other materials, causing fire either of itself or through the release of oxygen or other gases.

Permissible exposure limits (PELs)

PELs are airborne concentrations of substances measured by their concentration in the air no matter what amount is breathed by the employee. The permissible exposure limits (PELs) must include the following four categories:

- Permissible exposure limits - Time-weighted average (PEL-TWA) is the time-weighted average airborne exposure to any 8-hour work shift of a 40-hour work week and must not be exceeded.

- Permissible exposure limits - Short-term exposure limit (PEL-STEL) is the employee's 15-minute time-weighted average exposure which must not be exceeded at any time during a work day unless another time limit is specified in a parenthetical notation below the limit. If another time period is specified, the time-weighted average exposure over that time period must not be exceeded at any time during the working day.

- Permissible exposure limits - Ceiling (PEL-C) is the employee's exposure which must not be exceeded during any part of the workday. If instantaneous monitoring is not feasible, then the ceiling must be assessed as a 15-minute time-weighted average exposure which must not be exceeded at any time over a working day.

- Skin notation is the potential contribution to the overall employee exposure by the cutaneous route including mucous membranes and eye, either by airborne, or more particularly, by direct contact with the substance. These substances are identified as having a skin notation in the OSHA and WISHA

PEL tables (29 CFR Part 1910 Subpart Z and WAC 296-62-075, respectively).

Person

Based on chapter 49.17 RCW, one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

Personal eyewash units

Personal eyewash units are portable, supplementary units that support plumbed units or self-contained units, or both, by delivering immediate flushing for less than fifteen minutes.

Personal service room

Used for activities not directly connected with a business' production or service function such as:

- First-aid
- Medical services
- Dressing
- Showering
- Bathrooms
- Washing
- Eating

Personnel

See the definition for employees.

Physical hazard

As used in Employer Chemical Hazard Communication, WAC 296-800-170 means a chemical that has scientifically valid evidence to show it is one of the following:

- Combustible liquid
- Compressed gas
- Explosive
- Flammable
- Organic peroxide
- Oxidizer
- Pyrophoric
- Unstable (reactive)
- Water reactive

Platform

Platform means an extended step or landing that breaks a continuous run of stairs.

Plug

See definition for attachment plug.

Potable water

Water that you can safely drink. It meets specific safety standards prescribed by the United States Environmental Protection Agency's National Interim Primary Drinking Water Regulations, published in 40 CFR Part 141, and 40 CFR 147.2400.

Predictable and regular basis

Employee functions such as, but not limited to, inspection, service, repair and maintenance which are performed

- at least once every 2 weeks

OR

- 4 man-hours or more during any sequential 4-week period (to calculate man-hours multiply the number of employees by the number of hours during a 4-week period).

Produce

As used in Employer Chemical Hazard Communication, WAC 296-800-170, any one of the following:

- Manufacture
- Process
- Formulate
- Blend
- Extract
- Generate
- Emit
- Repackage

Purchaser

As used in Employer Chemical Hazard Communication, WAC 296-800-170, an employer who buys one or more hazardous chemicals to use in their workplace.

Pyrophoric

A chemical is pyrophoric if it will ignite spontaneously in the air when the temperature is 130°F (54.4°C) or below.

Qualified

A person is qualified if they have one of the following:

- Extensive knowledge, training and experience about the subject matter, work or project
- A recognized degree, certificate, or professional standing
- Successfully demonstrated problem solving skills about the subject, work, or project

Railing or standard railing

A vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform, or runway to prevent falls of persons.

Reassume jurisdiction

The department has decided to take back its control over a citation and notice being appealed.

Receptacle or receptacle outlet

As used in basic electrical rules, WAC 296-800-280 means outlets that accept a plug to supply electric power to equipment through a cord or cable.

Record

A record is any item, collection, or grouping of information. Examples include:

- Paper document
- Microfiche
- Microfilm
- X-ray film
- Computer record

Repeat violation

A repeat violation occurs when WISHA cites an employer more than once in the last 3 years for a substantially similar hazard.

Responsible party

As used in employer chemical hazard communication, WAC 296-800-170. Someone who can provide appropriate information about the hazardous chemical and emergency procedures.

Rise

The vertical distance from the top of a tread to the top of the next higher tread.

Riser

The vertical part of the step at the back of a tread that rises to the front of the tread above.

Rungs

Rungs are the cross pieces on ladders that are used to climb up and down the ladder.

Runway

An elevated walkway above the surrounding floor or ground level. Examples of runways are footwalks along shafting or walkways between buildings.

Safety factor

The term safety factor means the ratio of when something will break versus the actual working stress or safe load when it is used.

Serious violation

Serious violation must be deemed to exist in a workplace if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such workplace, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Should

Should means recommended.

Single ladder

A type of portable ladder with one section.

It is distinguished by all of the following:

- It has one section
- It cannot support itself
- Its length cannot be adjusted

Smoking

A person is smoking if they are:

- Lighting up
- Inhaling
- Exhaling
- Carrying a pipe, cigar or cigarette of any kind that is burning

Specific chemical identity

This term applies to chemical substances. It can mean the:

- Chemical name
- Chemical Abstracts Service (CAS) registry number
- Any other information that reveals the precise chemical designation of the substance.

Stair railing

A vertical barrier attached to a stairway with an open side to prevent falls. The top surface of the stair railing is used as a handrail

Stairs or stairway

A series of steps and landings:

- leading from one level or floor to another,
- leading to platforms, pits, boiler rooms, crossovers, or around machinery, tanks, and other equipment
 - Used more or less continuously or routinely by employees, or only occasionally by specific individuals.
 - With three or more risers

Standard safeguard

Safety devices that prevent hazards by their attachment to:

- Machinery

- Appliances
- Tools
- Buildings
- Equipment

These safeguards must be constructed of:

- Metal
- Wood
- Other suitable materials

The department makes the final determination about whether a safeguard is sufficient for its use.

Step ladder

A portable ladder with:

- Flat steps
- A hinge at the top allowing the ladder to fold out and support itself
- Its length that cannot be adjusted

Strong irritant

As used in first aid, WAC 296-800-150, is a chemical that is not corrosive, but causes a strong, temporary inflammatory effect on living tissue by chemical action at the site of contact.

Toeboard

A barrier at floor level along exposed edges of a floor opening, wall opening, platform, runway, or ramp, to prevent falls of materials.

Toxic chemical

As used in first aid, WAC 296-800-150, is a chemical that produces serious injury or illness when absorbed through any body surface.

Toxic substance

Any:

- Chemical substance
- Biological agent (such as bacteria, virus, or fungus)
- Physical stress (such as noise, vibration, or repetitive motion)

A substance is toxic if:

- The latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) *Registry of Toxic Effects of Chemical Substances* (RTECS) lists the substance
- Testing by or known to the employer has shown positive evidence that the substance is an acute or chronic health hazard

• A material safety data sheet kept by or known to the employer shows the material may be a hazard to human health

Trade secret

Any confidential:

- Formula
- Pattern
- Process
- Device
- Information
- Collection of information

The trade secret is used in an employer's business and gives an opportunity to gain an advantage over competitors who do not know or use it.

See WAC 296-62-053 for requirements dealing with trade secrets.

Tread

As used in stairs and stair railings, WAC 296-800-250 means the horizontal part of the stair step.

Tread run

As used in stairs and stair railings, WAC 296-800-250 means the distance from the front of one stair tread to the front of an adjacent tread.

Tread width

The distance from front to rear of the same tread including the nose, if used.

UL (Underwriters' Laboratories, Inc.)

You will find these initials on electrical cords and equipment. The initials mean the cord or equipment meets the standards set by the Underwriters' Laboratories, Inc.

Unstable (reactive)

As used in employer chemical hazard communication, WAC 296-800-170. An unstable or reactive chemical is one that in its pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

Use

As used in employer chemical hazard communication, WAC 296-800-170, means to:

- Package
- Handle
- React
- Emit
- Extract
- Generate as a by-product
- Transfer

Voltage of a circuit

The greatest effective potential difference between any two conductors or between a conductor and ground.

Voltage to ground

The voltage between a conductor and the point or conductor of the grounded circuit. For undergrounded circuits, it is the greatest voltage between the conductor and any other conductor of the circuit.

Voltage, nominal

Nominal voltage is a value assigned to a circuit or system to designate its voltage class (120/240, 480Y/277, 600, etc.). The actual circuit voltage can vary from the value if it is within a range that permits the equipment to continue operating in a satisfactory manner.

WAC

This is an acronym for **Washington Administrative Code**, which are rules developed to address state law.

Water-reactive

As used in Employer Chemical Hazard Communication, WAC 296-800-170, a water-reactive chemical reacts with water to release a gas that is either flammable or presents a health hazard.

Watertight

Constructed so that moisture will not enter the enclosure or container.

Weatherproof

Constructed or protected so that exposure to the weather will not interfere with successful operation. Rainproof, rain-tight, or watertight equipment can fulfill the requirements for weatherproof where varying weather conditions other than wetness, such as snow, ice, dust, or temperature extremes, are not a factor.

Wet location

As used in basic electrical rules, WAC 296-800-280 means:

- Underground installations or in concrete slabs or masonry that are in direct contact with the earth
- Locations that can be saturated by water or other liquids
- Unprotected locations exposed to the weather (like vehicle washing areas)

WISHA

This is an acronym for the Washington Industrial Safety and Health Act.

Work area

As used in employer chemical hazard communication, WAC 296-800-170, a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

Working days

Means a calendar day, except Saturdays, Sundays, and legal holidays. Legal holidays include:

- New Year's Day - January 1
- Martin Luther King, Jr. Day
- Presidents' Day
- Memorial Day
- Independence Day - July 4
- Labor Day
- Veterans' Day - November 11
- Thanksgiving Day
- The day after Thanksgiving Day; and
- Christmas Day - December 25

The number of working days must be calculated by not counting the first working day and counting the last working day.

Worker

See the definition for employee.

Workplace

• The term workplace means:

- Any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all workplaces covered by industrial insurance under Title 51 RCW, as now or hereafter amended.

- As used in Employer Chemical Hazard Communication, WAC 296-800-170 means an establishment, job site, or project, at one geographical location containing one or more work areas.

You

See definition of employer.

Your representative

Your representative is the person selected to act in your behalf.

Chapter 296-824

Title 296 WAC: Labor and Industries, Department of

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