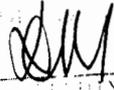


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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

DEPARTMENT OF LABOR & INDUSTRIES
Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This case presents many legal issues pertaining to the Department's prima facie case for alleged violations of the Washington Industrial Safety and Health Act (hereinafter WISHA). These issues run deep. For an example, this Court must decide if the Board's factual issues may be based upon "substantial evidence" from the record as a whole, or may Board findings ignore exonerating, superseding evidence. RCW 49.17.150. This Court is called upon to interpret whether RCW 49.17.180(1), 49.17.120 and 49.17.130 only apply to violations caused by employers or whether the Department can sanction employers for employee mistakes as well. And this Court must decide if an employer can have constructive knowledge of an alleged violation when the employee is in another city in full compliance with all safety regulations.

II. CLARIFICATION OF THE ISSUES

Respondent's brief identifies five issue statements. Brief of Respondent (hereinafter "RB") at page 2 and 3. These five statements are broad conclusions which put all elements of

each citation at issue. Appellant concurs that all five elements of each citation's prima facie proof are at issue herein, as well as the elements of each affirmative defense, but would draw the Court's attention to the assignments in Appellant's Brief for a precise clarification of the issues in this appeal.

III. STATEMENT OF THE CASE

Respondent's Brief omits key facts upon which this appeal turns.

For example, the Statement omits to mention that the Inspector watched the employee rehook his safety harness to the lifeline and continue working in full compliance with WAC 296-155-24510.

As stated by the Inspector:

- A. I'm -- he was attached to something on the ridge line. I did not get up on the roof and did not visually inspect the anchor, he was attached to what appeared to be an anchor on the roof.

CABR Transcript (2/17/04) page 62, lines 35-39.

Thus, the employer did ensure that the workers wore their gear. The Industrial Appeals Judge claimed WISHA does not recognize the defense that compliance is economically "infeasible". See CABR Documents page 126 (proposed Decision & Order, at

11). Washington's Supreme Court recognizes the defense of economic infeasibility. *RIOS vs LABOR & INDUS.*, 145 Wn.2d 483, 498-99 (2002). So does the Board of Industrial Insurance Appeals. In re *LONGVIEW FIBRE CO.*, BIIA Docket No. 98 W0524.

Furthermore, the Statement neglects to mention that the Inspector testified that the fall protection work plan prepared by the employees contained all the wording required by the WAC. CABR Transcript (2/17/06) page 105, lines 39-49. The work involved retrieving unused roofing materials from a finished roof which meant that there were no unusual safety hazards like open sky lights or carpenter's electrical cords. Thus, the Respondent claims that a Washington Cedar official conceded that the plan was not filed out correctly, but this is not true: Mr. Hedlund merely said that he preferred checks to lines, not that the substance of the plan was inadequate. CABR Transcript (2/24/06) page 73, lines 28-31. Furthermore, the Statement failed to mention that the paperwork "error" did not create a substantial probability of death, as required for a showing of the fifth element of the prima facie case.

Likewise, Respondent fails to mention that Inspector Adams agreed that the employees had daily safety meetings when they filled out the fall protection work plans at the start of each delivery. CABR Transcript (2/17/06) page 112, lines 29-39. Thus, Washington Cedar had more than weekly meetings and Citation 2 (lack of weekly safety meetings) should be vacated.

IV. SUMMARY OF ARGUMENT

The first element of the fall protection citation is whether the regulation applies to the alleged facts. Respondent's Brief does not try to argue with Appellant's application of the Supreme Court's four rules for regulatory construction. Instead, Respondent tries to show inconsistencies between WISHA provisions. This Reply shows that the WISHA provisions actually support Appellant's argument that employers are not to be punished for the acts of employees.

Respondent skips the assignment of error that there is no finding that an employee's non-compliance constitutes a "condition" as required by element three.

Respondent does argue that element four

(employer's knowledge of the violation) can be proven from prior violations. This reply shows why the alleged priors can not serve as substantial evidence that the employer could have known of Mr. Stewart's alleged violation because Mr. Stewart had promised to always comply and was on a finished roof that should have had anchors. These facts and the dramatic improvement in the Employer's experience rating eliminated any rational nexus between Mr. Stewart's behavior on January 23, 2003 and the alleged prior of other employees at other yards.

The Respondent argues for the applicability of enhanced penalties under RCW 49.17.180(1), but does not take issue with Appellant's argument that RCW 49.17.180(1) only authorizes enhanced penalties for "employer" violations of standards, not employee violations as herein. See Appellants Amended Brief, pages 36-39.

Respondent's Brief argues that the fall protection work plan citation is supported by substantial evidence of some missing fall hazard that was not identified in the plan, but refuses to disclose to the Court what the allegedly

missing fall hazard was. Respondent's Brief does not attempt to refute that there is no showing of knowledge nor any showing of a "substantial probability of death or serious injury" due to the alleged paperwork error. Respondent relies instead on its argument that the employees should have used an "X" rather than a line in completing the form, but makes no attempt to explain how either mark would create a possibility of death, nor how the Employer could have known Mr. Stewart was making the wrong pencil mark while completing the fall protection work plan.

The parties both briefed the issue of the penalty calculations with regard to the legal issue on whether the frequency or duration of Mr. Stewart's non-compliance should be a factor in determining "probability"

Respondent does not address the infeasibility argument except to join the IAJ in trying to contradict the Supreme Court and the Board about the existence of the defense of economic infeasibility.

Respondent's answers Appellant's argument that the "duty to ensure" has no guidelines and

therefore is Unconstitutionally vague by observing that employees do not need guidelines on how to wear their safety gear. This red herring is misleading because the Department is not trying to enforce the employees duty to wear their safety gear but the mythical duty on employers to ensure that employees wear their gear. Ensuring that someone else complies with a standard is not itself a standard and exactly how an employer ensures that an employee in another town is complying with a safety standard is a secret the Department has not disclosed.

V. STANDARD OF REVIEW

The standard of review of factual determination of the Board of Industrial Insurance Appeals in WISHA matters is slightly different than review of APA factual determinations. For WISHA matters the Board's findings must be supported by "...substantial evidence on the record considered as a whole..." RCW 49.17.150(1). Furthermore, the substantial evidence must be sufficient to persuade a fair-minded, rational person of the truth of the

declared premise. DANZER vs LABOR & INDUS., 104 Wash. App. 307, 319 (Div.II, 2000). The additional scrutiny is due to the fact that the Board is not composed of judges. RCW 51.52.010 (Members can be lawyers and currently two of the Members are members of the bar as well). Thus, a review court can not just find something that supports a Board finding, but must consider the entire record, including the exculpatory evidence. Furthermore, the evidence must be rationally supportive of the finding: there must be a logical nexus between the substantial evidence and the finding. DANZER, supra

VI. ARGUMENT

A. Purpose of WISHA

The actual purpose of WISHA is set forth in the purpose section of the ACT and reads:

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act.

RCW 49.17.010. The penal side of WISHA, the fines and unending, vexatious litigation, actually

frustrate the stated purposes of WISHA by detracting from resources available for safety.

Respondent claims that WISHA is remedial, but this case does not involve any of the remedial remedies available, such as abatement. This case is purely penal: none of the penalties will go to remedy for an employee's injury. Actually there were no injuries in this matter. Respondent asks for deference, but granting deference to an agency in a strictly penal matter is inappropriate because it invites the type of unreasonable "interpretations" that are likely to result in more money, such as the "duty to ensure". WHIDBEY ISLAND MANOR vs DSHS, 56 Wa. App. 245, 255 (1989).

B. The prima facie elements.

Proof of a serious WISHA violation requires:

...that (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 of, 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.

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS, 119 Wash. App. 906, 914 (Div.II, 2004).

1. No prima facie proof.

Respondent's Brief makes the astonishing misstatement that the Inspector saw the employee on the roof without fall protection equipment. Brief of Respondent, page 16. Respondent cites to page 13, lines 20-21, of the Transcript of Inspector Adams testimony but this page says nothing to support Respondent's flight of fantasy. The transcript of testimony of Inspector Adams provides many references to the fact that he observed the employee wearing his full body harness, that he had his lifeline and that there was an anchor in the ridge. CABR Transcript (2/17/04) page 20, line 49 (safety harness); page 55, lines 5-11 (employee re-hooks rope to harness as Inspector watches from below); page 62, lines 35-43 (employee's rope hooked to anchor in the ridge). Furthermore, Inspector Adams offered into evidence the photos in Exhibit # 1 photo 2 which shows the employee wearing his fall protection gear and properly tied off to the anchor. CABR Transcript (2/17/04) page 18, lines 25-35. Exhibit #1, photo 1 shows the employee in gear but with his rope unhooked, while

Exhibit 1, photo 2 shows the employee rehooked and in full compliance with all safety regulations.

Respondent's forgetfulness regarding the facts of this case preclude it from addressing the legal issues. For an example, because Respondent mistakenly claims the employee was not wearing his safety gear, Respondent assumes the employer knew this. If Respondent were to use the real, documented facts, then it would have to agree that the employer could not have knowledge because "knowledge" that Mr. Stewart was not in his gear is false. Logically, the employer can not have "knowledge" of something that is false. Knowledge is an essential element of the Department's prima facie case. WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS, 119 Wash. App. 906, 914 (Div.II, 2004). So is the prima facie element that the standard was not met. Id. In this case, the employer showed that the standard was met, both the real standard of WAC 296-155-24510 in that the hardware requirements were met and in Inspector Adams's interpretation of a duty to ensure. Washington Cedar ensured Stewart would be tied off and he was for all but five minutes.

CABR Transcript (2/17/04) page 55, lines 5-11, (rehooked line); CABR Transcript (2/17/04) page 62, lines 35-39 (attached to anchor); CABR Transcript (2/17/04) page 84, lines 43-47 (total time of noncompliance was five minutes). The real facts show that Washington Cedar met its duty: both the real WAC 296-155-24510 and that of Inspector Adams. Id. (prima facie element two).

2. Interpretation of the WAC.

Appellant's amended brief uses the Supreme Court's rules of construction to show that WAC 296-155-24510 is a hardware requirements standard and can not be read as any "duty to ensure". AMENDED BRIEF OF APPELLANT, (hereinafter "AB") pages 21-27. To avoid the necessary result of using the Supreme Court's rules of construction, Respondent must misquote the cited regulation by omitting the language

...according to the following requirements
See RB at 19. Of course, the phrase "according to" restricts the term "provided, installed and implemented" to the hardware requirements.
KNOWLES vs HOLLY, 82 Wn.2d 694, 702 (1974) (see AB pages 24-25 on ejusdem generis). Respondent's

interpretation depends on cutting up the cited regulation. Respondent does not address the interpretive analysis except to assert that a reading of other sections of WISHA suggests that there is no distinction between employer duties and employee duties, implying the employer can be sanctioned for both. See RB pages 20-23.

The first WISHA provision which Respondent claims supports its theory that employer responsibilities and employee responsibilities should be mixed up together is RCW 49.17.180(6), the definition of "serious". RB, page 20. The definition excuses employers from employee mistakes when the employer did not know of the violation. RCW 49.17.180(6). Respondent's red herring is that if only employee's can commit WISHA violations the "could have known" language would be meaningless. RB page 20.

Washington Cedar has never said that only employees commit WISHA violations. Most employer violations deal with conditions in the work place and do not involve any employee error, such as short circuited equipment. WISHA excuses employers from such conditions when the employer

did not know of the short and could not have known with the exercise of reasonable diligence.

WASHINGTON CEDAR & SUPPLY, supra, at 914.

There's nothing superfluous about the knowledge requirement in RCW 49.17.180(6) and it shows WISHA's intent not to punish employers when they do not know of the violative condition, whether caused by employee error or any other cause. RCW 49.17.180(6) is consistent with Appellant's argument that employers are not responsible for employee errors and does not support Respondent's theory that employers can be liable for errors caused by employees.

Second, Respondent argues that employers can be cited for violations of WISHA and that, if not, the statutory employee misconduct defense would be meaningless. (RCW 49.17.120(5)). RB pages 21-25. This argument makes no sense whatsoever. Nobody is arguing that employers can not be cited for a violation of WAC 296-155-24510. Appellant's argument is that RCW 49.17.120 and/or 130 only allow employer's to be cited for employer violations because that is what those statutes actually say. RCW 49.17.120 and 130. In the

case before the Court, the Department is alleging an employee caused this violation. There is nothing in the citation and nothing in the record to suggest the employer caused the violation. The employee misconduct defense might be useful if the Department had alleged the employer caused the violation by failing to provide equipment, but the only allegation herein is that an employee failed to use the already provided, installed and implemented equipment for five minutes. There is no need for the statutory employee misconduct defense because the Department cited Washington Cedar for the wrong regulation: WAC 296-155-24510 simply does not apply. WASHINGTON CEDAR & SUPPLY, supra at 914. (prima facie element one).

3. Plain Language Requirement

Respondent argues in an expressive and vehement manner that the plain language of WAC 296-155-24510 requires the employer to provide, install and implement the fall protection, rather than provide, install and implement according to the following requirements. See RB at 25. Despite Respondent's flamboyant rhetoric, the regulation itself refutes Respondent's theory.

The regulation reads:

WAC 296-155-24510 Fall restraint, fall arrest systems. When employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall ensure that fall restraint, fall arrest systems or positioning device systems are provided, installed and implemented according to the following requirements.

WAC 296-155-24510. The requirements that follow are specifications for the safety equipment, such as length of the life line, and type of metal finish on the hardware. Respondent stipulated that it had not cited the employer for any hardware deficiency. See Proposed Decision and Order, CABR Documents page 120, lines 5-7.

The Department wants to cut and paste WAC 296-155-24510 by taking out all the subsections, leaving only the first thirty seven words. But the Court of Appeals has held that it is those subsections that govern how the employer will minimize or eliminate the hazard. COBRA ROOFING vs LABOR & INDUS., 122 Wn. App. 402, 414 (Div.III, 2004). Furthermore, the wording

....according to the following requirements. limits the duty to provide, install and implement to the exhaustive but not limitless hardware

requirements. KNOWLES vs HOLLY, 82 Wn2d 694, 702 (1974) (words like "according to" restrict the former words to items similar to the latter terms) The Supreme Court's interpretive rule of ejusdem generis discussed in Appellant's Amended Brief at page 25-26 is similar in restricting the terms provided, installed and implemented to the hardware requirements.

4. No proof of knowledge.

The Industrial Appeals Judge and the Department make the truly perverse argument that Washington Cedar should be punished for having a highly effective safety program which promptly disciplines employees when ever a safety violation occurs. See Proposed Decision and Order, CABR page 120, lines 23-25. The employee involved in the current citation, Jason Stewart, was caught without gear on January 9, 2003 and disciplined by the yard manager, Rick Hedlund. CABR Transcript (2/24/04) page 53, line 5 through page 54, line 51. However, the employee gave his word to Mr. Hedlund that the employee would comply with the safety rules. CABR Transcript (2/24/04) page 146, lines 5-33. Based upon his years as a manager,

Mr. Hedlund knew he could accept the promise and allowed Mr. Stewart to continue to work. Id.

This is exactly the type of increased enforcement that this Court of Appeals said would preclude a finding of "knowledge". WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS, 119 Wn.App. 906, 916 (Div.II, 2004). As stated by this Court regarding prior violations:

Thus, absent changes in the safety program or increased enforcement measures, the employer should anticipate continued violations.

WASHINGTON CEDAR, supra at 916. Conversely, Mr. Hedlund's increased enforcement combined with Mr. Stewart's promise to comply, precluded Mr. Hedlund from anticipating the current violation. Id. CABR Transcript (2/24/04) page 146, lines 21-33.

Substantial evidence for WISHA adjudications from the Board of Industrial Insurance Appeals is different from that of trial courts because of the enabling statute. RCW 49.17.150. Specifically, substantial evidence must be based "...on the record considered as a whole...." RCW 49.17.150. The IAJ should have considered Mr. Hedlund's increased enforcement in response to Mr. Stewart's

first violation, not just the violation itself.

Likewise, the nexus between the alleged priors from previous years involving other employees is too remote to constitute "rational" substantial evidence. DANZER vs LABOR & INDUS, 104 Wn. App. 307, 319 (Div.II, 2000)

5. No repeat authority.

The Amended Brief of Appellant explains why there can not be enhanced "repeat" penalties where the citation only alleges an employee mistake and not an employer violation. See AB pages 36-39. Respondent does not dispute that it acted ultra vires in assessing repeat penalties. See RB page 30. Instead, Respondent argues that the current citation and previous citation were similar which is in response to an argument raised at the Board but dropped herein due to the holding in COBRA ROOFING vs LABOR & INDUS. 157 Wn.2d 90 (2006).

C. FALL PROTECTION WORK PLAN

As with the fall protection citation, for a violation of WAC 296-155-24505(2)(a) the Department must prove:

...that (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 of, 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.

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS, 119

Wash. App. 906, 914 (Div.II, 2004).

The Department can not prove that the standards were not met because Inspector Adams admitted that all the elements necessary in a work plan were in Washington Cedar's plan. CABR Transcript (2/17/04) page 39-49. The actual work plan is found as the last two pages of CABR Exhibit No. 1 and a clearer copy is found as CABR Exhibit No. 14. The Department complains because the employees drew a line through the items on page two of the form rather than using individual checks, but Washington Cedar was never cited for using lines rather than checks.

The Department needed to prove that the alleged paperwork error was itself a "hazardous condition", that the employer knew about the paperwork error and that the paperwork error caused a substantial probability of death or serious physical injury. WASHINGTON CEDAR, supra

at 914. The Department only offered proof that Washington Cedar had fully complied with WAC 296-155-24505. See AB pages 39-42.

In a futile attempt to save the work plan citation, the Department alleges that a work plan violation can create a substantial probability of death or serious injury because its purpose is to require actual consideration of safety hazards. RB at 32. However, the Department offered no proof that the safety hazards were not considered independent of the work plan and offered no proof of any hazards not identified in the work plan. The only way the Department could prove the paperwork error was "serious" is to have proven that a paperwork omission lead to a worker violation, and there was no such proof. WASHINGTON CEDAR, supra at 914. In short, there is no unidentified hazard and if there was, there is no nexus between the unidentified hazard and any employee violation.

D. SAFETY MEETINGS

Only certain construction rules apply to Washington Cedar's delivery people. Whether certain rules apply depends on their scope. Fall

protection rules do apply because their scope provision includes "material handling". WAC 296-155-24501. The rules regarding safety meetings do not because the scope of safety meetings for the construction industry does not include "material handling". WAC 296-155-005(1). Furthermore, workers of employers whose primary business is other than construction, are exempt from the safety meetings requirements for the construction industry provided they comply with the core rule requirements of WAC 296-800-130. WAC 296-155-110(1). The core rules require monthly meetings which Washington Cedar documented in Exhibit No. 7.

Washington Cedar does have safety meetings at each job site for the purpose of completing the fall protection work plan. Inspector Adams conceded that this satisfies the weekly meeting requirement. CABR Transcript (2/17/04) page 112, lines 29-39. Respondent tries to argue this admission away by saying the work plan had lines rather than checks (RB at 37), but the citation does not say anything of the sort and of course the cited regulation says nothing about using

checks versus lines. WAC 296-155-110(5).

E. EVIDENTIARY RULINGS

1. Hardware Requirements

Today, Respondent claims that the theory of its case is based upon the first thirty seven words of the real WAC 296-155-24510 with a period added after the thirty seventh word. Today, Respondent's Brief clearly deletes the thirty eighth word, and all words thereafter, whenever it cites WAC 296-155-24510. However, during the trial, the Respondent was not clear what its theory was and Appellant had no choice but to attempt proving Washington Cedar's compliance with the real WAC 296-155-24510.

F. CONSTITUTIONAL ISSUES

Respondent defends Inspector Adams interpretation of WAC 296-155-24510 by asserting that the word "ensure" is not Unconstitutionally vague. Respondent does this by confusing the employee's duty to actually wear fall protection with the alleged "duty to ensure". RB at 47. Respondent steadfastly refuses to identify any standards or guidelines on how a court or agency can judge whether an employer has ensured

compliance. Guidelines are what would make the alleged duty Constitutional. O'DAY vs KING COUNTY, 109 Wn2d 796, 811 (1988).

Washington Cedar believes it not only complied with the real WAC 296-155-24510 but fully complied with Inspector Adams "duty to ensure" by having a successful safety program. Today, Respondent argues that Inspector Adams "duty to ensure" means that the employees "possess and utilize" the fall protection. RB at 47. If so, then this Court must reverse because Mr. Stewart did possess and utilize his fall protection gear. See photos in Exhibit No. 1.

The truth of the matter is that there are no standards to the "duty to ensure" and when the Department tries to make up standards ("possess and utilize"), the Department just proves how arbitrary the "duty to ensure" really is. See COBRA ROOFING vs LABOR & INDUS., 157 Wn.2d at 104 (2006) (Justice Chamber's dissent).

G. ATTORNEYS FEES

The Department alleges that attorneys fees are no longer available under the Equal Access to Justice Act. COBRA ROOFING vs LABOR & INDUS.,

157 Wn.2d 90 (2006). However, the Supreme Court split on the issue of fees with the four Justices in the majority opposed to EAJA fees for WISHA cases and the three justices of the Sanders dissent plus Justice Johnson being in favor of EAJA fees for WISHA Court appeals. Id. Justice Chambers did not address the issue. Thus, Appellant requests fees under the EAJA.

VII. CONCLUSION

The Supreme Court's rules of construction provide the Rosetta Stone employer's need to understand the Department's regulations. This Court should uphold the Supreme Court's rules of construction and protect all parties from the vagary of vigilante Inspectors. Appellant requests the Superior Court's Order, and the Board's Order Denying Petition For Review and adopted Proposed Decision and Order be vacated and the citations dismissed with prejudice.

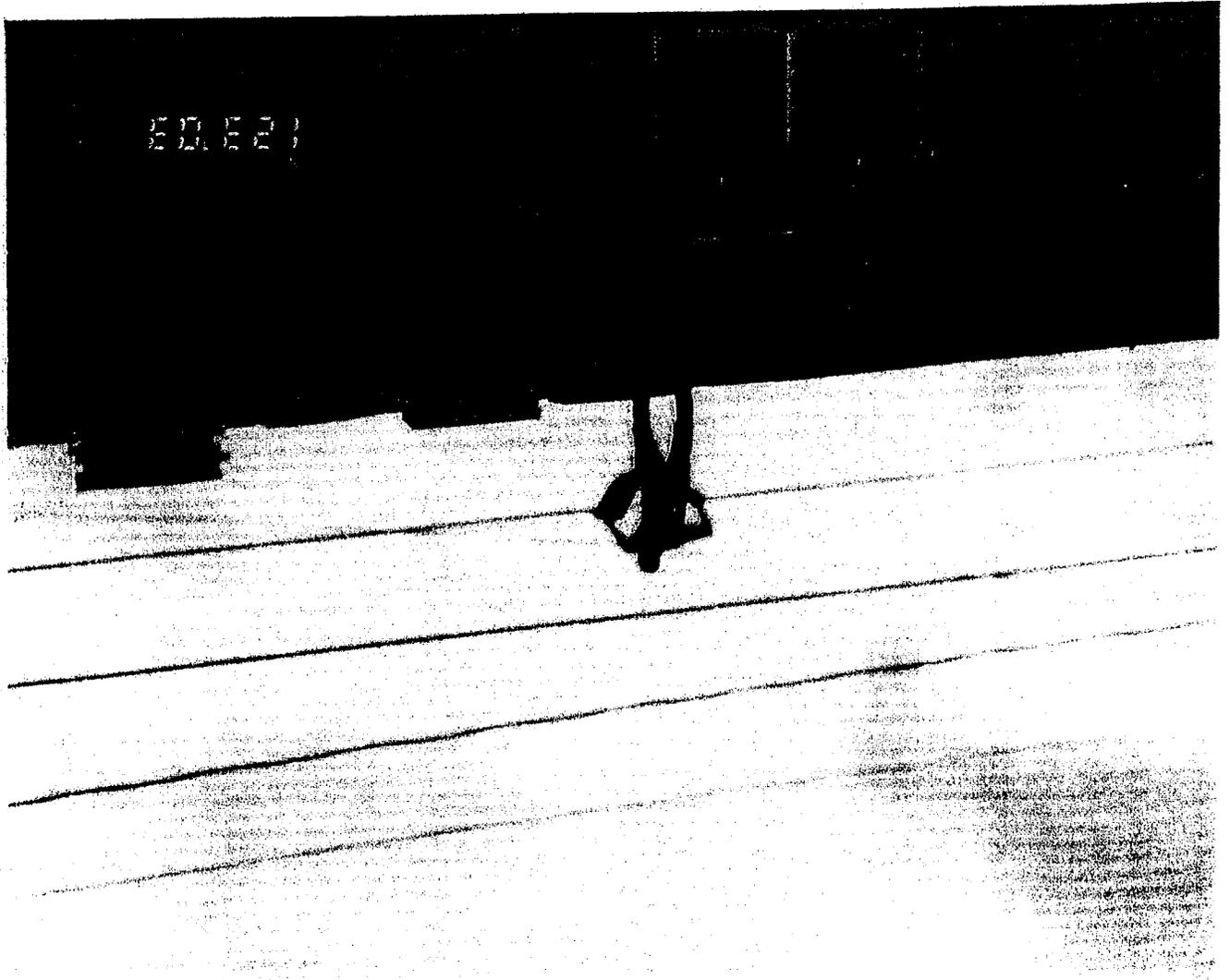
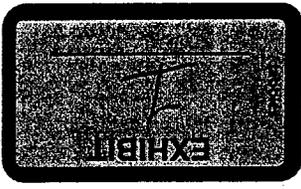
DATED this 22nd day of October, 2006


Gerald A. Klein, #9313
Attorney for Wash. Cedar

APPENDIX

1. Exhibit No. 1

REG. ADM.
 Date 2/17/04
 Exhibit No.
 Docket No. 05W0166
 In re: *Wich. Gas*
 Board of Industrial Insurance Appeals





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Yves

*Washington
Center & Supply*

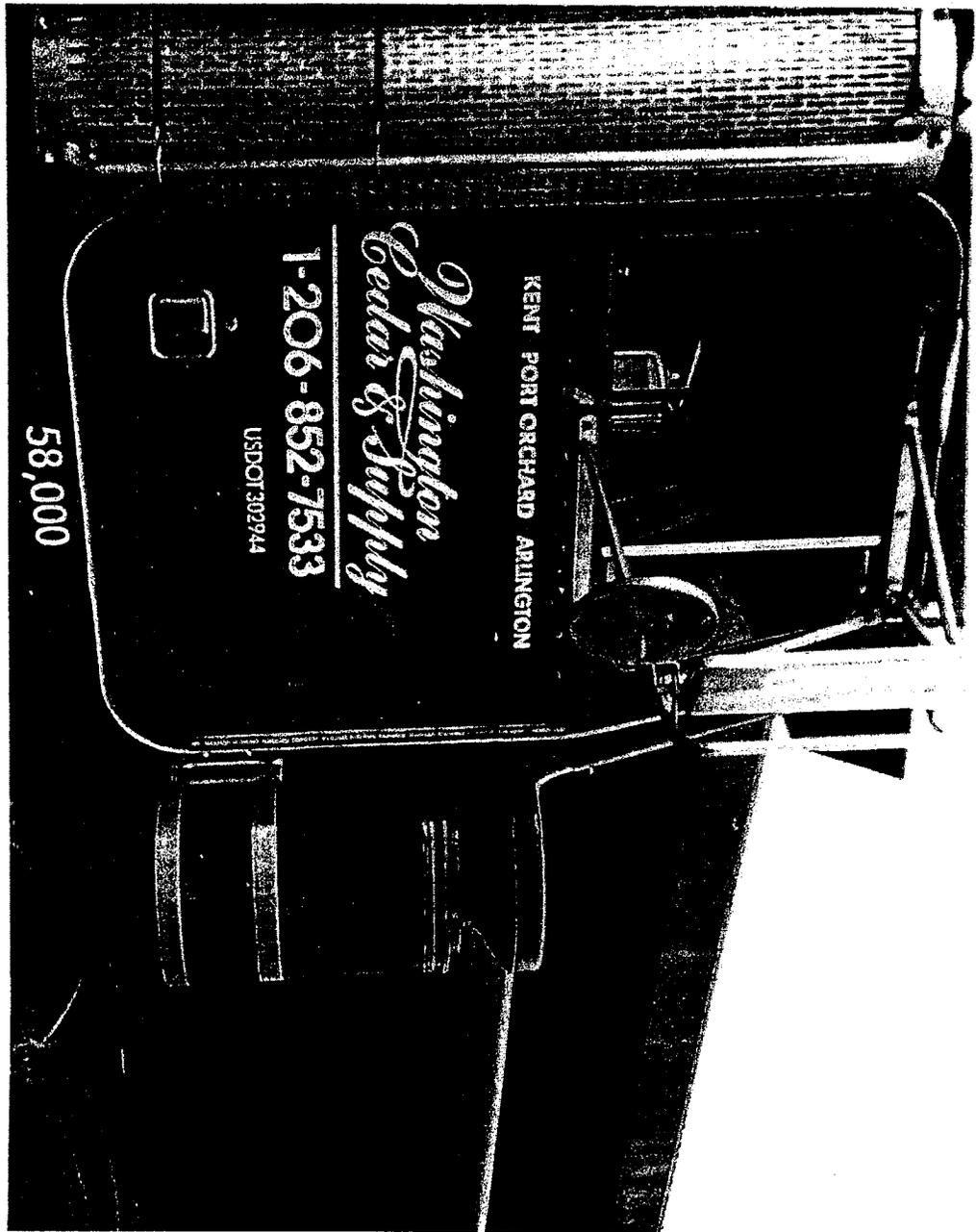
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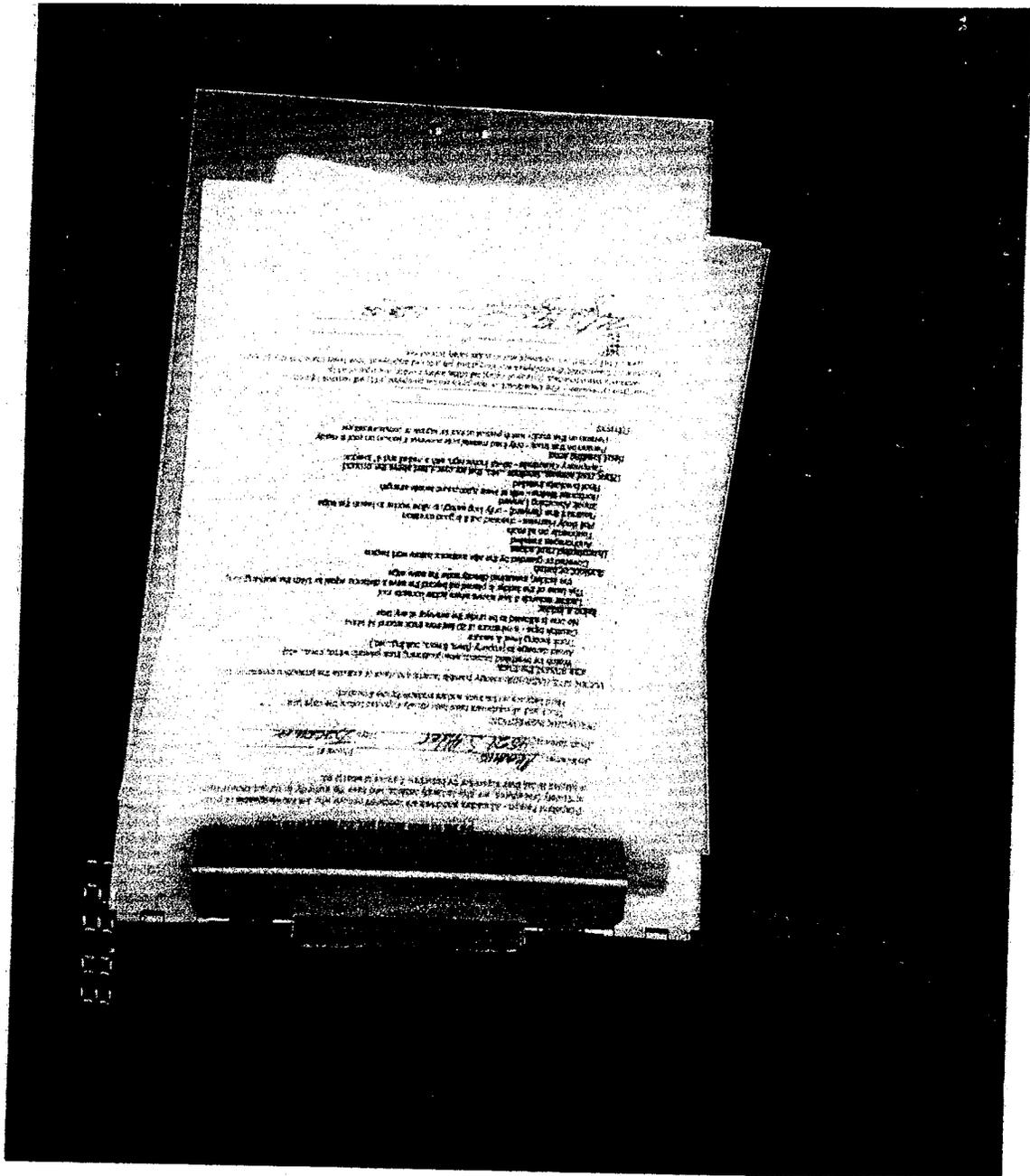
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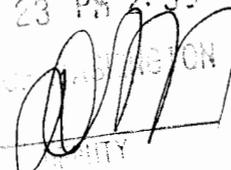




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COURT OF APPEALS

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STATE OF WASHINGTON

BY 
CITY

NO. 34009-7-II

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

DEPARTMENT OF LABOR & INDUSTRIES
Respondent

DECLARATION OF SERVICE OF
REPLY BRIEF OF APPELLANT

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1425 4th Ave.
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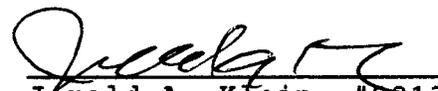
I, Jerald A. Klein, certify as follows:

That I am the attorney for the Appellant herein and make this declaration based upon my personal knowledge of the facts stated herein which are true:

That on October 23²⁰⁰⁶, 2006, I delivered a copy of Appellant's REPLY BRIEF OF APPELLANT to the offices of David I. Matlick, counsel for Respondent Department of Labor & Industries, at his office at 1019 Pacific Ave, 3rd Floor, Tacoma, Washington, tendering same to and leaving same with the receptionist on duty.

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

Date: 10/23/06
Tacoma, Washington


Jerald A. Klein, #9313
Attorney for Wash. Cedar