

Handwritten notes and a signature in the top left corner.

RECEIVED

JUL 24 2006

OFFICE OF ATTORNEY GENERAL
TACOMA GENERAL SERVICES UNIT

34441-6-II

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

**WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant**

vs

**STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent**

REPLY BRIEF OF APPELLANT

**Jerald A. Klein
Attorney for Appellant
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630
WSBA No 9313**

TABLE OF CONTENTS

I. STANDARD OF REVIEW.....1

II. ARGUMENT IN REPLY.....2

 A. Purpose of WISHA.....2

 B. Invalid Service of the Citation and Notice.....3

 C. Department failed to prove its prima facie case for a WISHA violation of WAC 296-155-24510.....4

 1. Failure to prove the prima facie case for a serious WISHA violation.....4

 2. Interpretation of WAC 296-155-24510 does not impose a "duty to ensure" that employees wear safety gear.....5

 3. The Employer's duties were met for WAC 296-155-24510 "according to the following requirements"..11

 4. Division Three's COBRA ROOFING Decision explains this rule.....13

 5. Finding of Fact No. 3 states that Washington Cedar did ensure the equipment was in the delivery truck15

 6. No proof of knowledge.....16

 7. KAISER ALUMINUM is applicable if the Inspector's "duty to ensure" is legitimate.....18

 8. Infeasibility of the "duty to ensure".....20

9. Enhanced penalties under R.C.W.
49.17.180(1) are available only
when the employer violates the
standard repeatedly.....22

D. The "duty to ensure" is
Unconstitutionally vague.....23

E. Attorneys fees.....24

F. Conclusion.....24

APPENDIX

PROPOSED DECISION AND ORDER, CABR, Documents,
pages 61-71.....A-1

Exhibit No. 1, CABR, Exhibits No. 1,A-12

Exhibit No. 13, CABR Exhibits No. 13.....A-13

WAC 296-155-24510.....A-14

TABLE OF AUTHORITIES

TABLE OF CASES

BLANKENSHIP vs KALDOR, 114 Wa.App. 312
(Div. III, 2002).....4

BUCKLEY COMPANY, INC. vs SEC. OF LABOR,
507 F2d 78, 80 (Cir 3, 1975).....3, 4

COBRA ROOFING vs LABOR & INDUS.,
157 Wn.2d 90, 98 (2006).....22, 24

COBRA ROOFING vs LABOR & INDUS.,
122 Wash App. 402
(Div.III, 2004).....13, 14, 15

DANZER vs. LABOR & INDUS.
104 Wn. App. 307,
(Div.2, 2000).....1, 16

ESTATE OF JONES, 152 Wn.2d 1 (2004).....,15

GIBSON vs BERRYHILL, 411 U.S. 564, 569,
93 S.Ct. 1689, 1693 (1973).....1

HEGWINE vs LONGVIEW FIBRE CO.,
132 Wn. App. 546, 560 (Div II, 2000).....12

KNOWLES vs HOLLY,
82 Wn.2d 694, 702 (1974).....11, 12

LABOR & INDUS. vs KAISER ALUMINUM,
111 Wa.App.771, 782 (Div.III, 2002)....7, 8
10, 18, 19, 20

RIOS vs LABOR & INDUS, 145 Wn.2d 483,
499-500 (2002).....21

SMITH vs KING, 106 Wn.2d 443, 451 (1986).....16

STATE vs ECKBALD,
152 W2d 515, 518 (2004).....23

WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS.,
 119 Wn. App. 906
 (Div.II, 2004).....4, 5, 8, 9, 10, 16

STATUTES

R.C.W. 49.17.010.....2
 R.C.W. 49.17.020 (4) and (5).....3
 R.C.W. 49.17.020 (7).....21
 R.C.W. 49.17.110 (2003).....7
 R.C.W. 49.17.120(2003).....3, 8
 R.C.W. 49.17.120(5)(2003).....7
 R.C.W. 49.17.180(1).....7, 22, 23
 R.C.W. 49.17.180(6).....6

REGULATIONS AND RULES

WAC 296-155-200(2) and (3).....12
 WAC 296-155-24510.....5, 6, 7, 11, 12, 13,
 15, 20, 21
 WAC 296-800-12005.....12

I. STANDARD OF REVIEW

One of the primary issues before the Court is the standard of review for factual issues made or adopted by the Board of Industrial Insurance Appeals in WISHA cases. In the past, attorneys and Courts have relied on this Court's decision in *DANZER vs LABOR & INDUS.* for the appropriate standard for substantial evidence. 104 Wn.App. 307, 319 (Div. II, 2000). This court held:

This Court must determine whether there is substantial evidence to support the Board's findings and whether the Board's conclusion of law is appropriate based on those facts. RCW 49.17.150(1);... Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.

DANZER, supra at 319. The requirements of rationality and fair-mindedness are necessary components of due process. *GIBSON vs BERRYHILL*, 411 U.S. 564, 569, 93 S.Ct. 1689, 1693 (1973). The rationality of Board findings is if concern herein for the second and fourth elements of the prima facie case: whether the cited standard was met and whether the employer had knowledge of the violation.

II. ARGUMENT IN REPLY

A. PURPOSE OF WISHA

The Respondent claims that the purpose of WISHA is to protect the safety and health of all workers. The Legislature stated WISHA's purpose and it is set forth in the Act:

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.

R.C.W. 49.17.010(2006). Actually, due to the success of Washington Cedar's safety program, its industrial insurance experience factor and the underlying claims have substantially dropped. CABR Exhibit 13. However, the burden the Legislature sought to diminish with WISHA has been replaced by a new litigation burden imposed by the Department's excessive penalties. The Department's excessive penalties and unending litigation frustrate the purposes of WISHA by imposing burdens on employers that diminish resources otherwise available for safety.

B. INVALID SERVICE OF CITATION

The Respondent asserts that the service statutes and Court Rules should not apply because RCW 49.17.120 requires service on the employer. This argument does not make sense because the undisputed facts and finding of the Board is that the citation was not served on the Employer but upon the Employer's satellite yard in Gorst. CABR Documents, page 71, Finding of Fact No. 7. These two, the employer in Auburn and the Gorst yard Manager in Gorst, are separated geographically and legally. The yard manager and workers at Gorst are employees under WISHA. R.C.W. 49.17.020(5)(2006). The interests of employees are substantially different from those of employers under WISHA because of the legal distinction between employer and employees. This was the basis for the decision in the OSHA case of BUCKLEY COMPANY vs SEC OF LABOR, 507 F2d 78 (Cir 3, 1975), discussed in both briefs. As explained in BUCKLEY, the fear was that the shop manager would cover up the citation for fear of being fired by the employer. Id. at 80.

Service of the citation on any satellite yard is bad, but service on the yard that allegedly caused the violation is calculated to result in a cover up. Cover ups preclude the employer from taking corrective steps to improve safety. Id. Appellant's Brief explains the prejudice of illegal service, as Employer's must develop counter-cover up procedures. Respondent did not address this prejudice.

While this author could not find a Board significant decision on point, the Courts have interpreted the services rules and statutes for summons and complaints as mandating compliance regardless of a defendant's actual knowledge or lack of prejudice. *BLANKENSHIP vs KALDOS*, 114 Wash. App. 312, 318 (Div. III, 2002).

C. DEPARTMENT FAILED TO PROVE CASE

1. FAILURE TO PROVE THE PRIMA FACIE

CASE FOR A SERIOUS WISHA VIOLATION

The Proposed Decision and Order does not use the prima facie elements for WISHA violations established by this Court in *WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS.*, 119 Wash. App, 906, 914

(Div. II, 2004). Appellant cited the WASHINGTON CEDAR case in its summary judgment motion. CABR documents, page 207. Appellant cited the WASHINGTON CEDAR case in its trial brief. CABR, Documents, page 498. Appellant again cited the WASHINGTON CEDAR case in its petition for review to the Board. CABR, Documents, page 14.

Respondent also briefed and argued the application of the prima facie elements established by this Court in the WASHINGTON CEDAR case. However, the Industrial Appeals Judge and the Board ignored the WASHINGTON CEDAR case and simply held that the Department had the burden of proof, citing the board's prior decision of OLYMPIC GLASS. CABR, Documents, page 68.

2. INTERPRETATION OF WAC 296-155-24510

The first element of the Department's prima facie case for a WISHA violation is whether the cited standard applies to the alleged facts. WASHINGTON CEDAR & SUPPLY vs LABOR & INDUS., 119 Wash. App, 906, 914 (Div. II, 2004). Appellant's Brief argues that the Supreme Court's rules for interpreting regulations mandate that WAC

296-155-24510 be interpreted as a hardware requirements section and that Inspector Sturman's interpretation that the section imposes on employers a duty to ensure that employees wear their safety gear is incorrect. See BRIEF OF APPELLANT, pages 31-38. Respondent does not respond to Appellant's analysis using the four Supreme Court rules for interpretation. Instead, the Respondent pretends that Appellant's argument is that only employees can violate WISHA. This is nonsense.

Respondent claims that the knowledge requirement in the definition of "serious" in RCW 49.17.180(6) suggests that employers can be held liable for employee violations because "Obviously an employer knows of violations that it commits." BRIEF OF RESPONDENT, page 22. Respondent's claim is absurd. For an example, WAC 296-155-24510 allows employers to only implement safety hardware with a "corrosion resistant finish" WAC 296-155-24510(2)(a)(vii)(2006). An employer lacking sufficient diligence could use a silver painted O-ring rather than one of stainless steel

or zinc plating. The employer lacking diligence could be in violation of WAC 296-155-24510 depending on the Department's proof of knowledge: e.g. whether the employer used "reasonable diligence" in relying on a manufacturer's warranties. Respondent's claim that RCW 49.17.180(1)'s knowledge requirement suggests the Legislature intended employers to be liable for employee mistakes demonstrates that the Department has no real understanding of the enormous detail and complexity of the real duties imposed upon employers and probably explains why the Department wants to add to employers the duties WISHA has delegated to employees. RCW 49.17.110.

Respondent also claims that the statutory employee misconduct defense (RCW 49.17.120(5)) suggests employers can be penalized for employee mistakes. BRIEF OF RESPONDENT, page 23. Here again, the Respondent just does not seem to understand employer duties under the regulations. The case of LABOR & INDUS. vs KAISER ALUMINIUM, demonstrates how an employee mistake can contribute to an accident, but that the employer's

liability is limited to its duty to provide the proper tools (angle iron versus manufacturer's device) and that an employer is not to be penalized for the employee's mistake. 111 Wash. App. 771 (Div.III, 2002). As explained by Division III:

The relevant Washington Administrative Code section requires only that the employer provide adequate safety hardware.

KAISER ALUMINUM, supra at 776. In its defense, Kaiser Aluminum showed that the employee did not use the safety devices properly. Id. But there was no attempt to cite the employer for the employees failure to properly brace up the bucket. Id. Thus, use of the statutory employee misconduct defense or the affirmative defense of infeasibility are ways for an employer to show that its acts were not the cause of the alleged violation. No where in WISHA nor the cases can it be shown that employee's acts can be the basis for penalizing the employer. R.C.W. 49.17.120. (only "employer" violations are citeable).

Surprisingly, the Respondent cites the WASHINGTON CEDAR case, referring to our debut as

"WASHINGTON CEDAR I". 119 Wash. App 906 (Div II, 2004). Apparently, the Respondent has forgotten how it won the case by proving not that Bill Fisher was on a roof without gear but that Washington Cedar had swapped out Bill's truck for routine maintenance without retrieving Bill's safety gear and putting it into the new truck. WASHINGTON CEDAR I, supra at 916. Employers have a duty to provide the safety gear and Washington Cedar did not provide (or rather, inadvertently took away) the gear before Fisher left for a delivery on that fateful October afternoon in 1999. The employer's act in WASHINGTON CEDAR I was in removing the employee's safety gear. Clearly, it was an employer action that later formed the basis for the WISHA citation under WAC 296-155-24510. But the facts in WASHINGTON CEDAR I are very different from the facts herein. The undisputed facts in the case at bar are that:

... Mr. Sturman ... caused Mr. Lindberry to put on the fall protection gear that Washington Cedar ensured was in Mr. Lindberry's delivery truck, ...

Proposed Decisions and Order, CABR, Documents, pg 70. Mr. Honeycutt explained the new procedure

that required a "triple-check system" to ensure that if the safety gear is "...not on the truck, the truck doesn't leave." CABR, Transcripts, (8/10/04) page 11, lines 7-23. Thus, in the case now before the Court, there is no act nor omission of Washington Cedar that caused the alleged violation, only an employee mistake.

The statutes the Respondent offers this Court and the case of WASHINGTON CEDAR I, actually support the Appellant's position that the Department must allege some act or omission of the Employer that violates the cited standard, WAC 296-155-24510 to prove element one of its prima facie case. WASHINGTON CEDAR I, supra at 914. Both the knowledge requirement in RCW 49.17.180(6) and the statutory employee misconduct defense are drafted to protect employers from citations due to employee error, and although it is sometimes hard to prove causation between the employer's equipment and the employees use of the equipment as in KAISER ALUMINUM, WISHA and the Court have always protected employers who abide by the real employer regulations. KAISER ALUMINIUM,

supra.

3. ACCORDING TO THE FOLLOWING
REQUIREMENTS

In order to sustain Inspector Sturman's interpretation of WAC 296-155-24510, the Respondent must omit the following words from the real regulation:

...according to the following requirements. WAC 296-155-24510(2006). See Brief of Respondent, page 24. The employer's duties to provide, install and implement fall protection equipment are restricted to the enumerated "following requirements." KNOWLES vs HOLLY, 82 Wn2d 694, 702 (1974). The phrase "according to" is actually a restrictive term. Id. Phrases such as "according to" or "pursuant to" are qualifying words which restrict the application to the specified provisions. Id. The KNOWLES court went on to explain:

This interpretation also is indicated by the familiar rule of statutory construction - that where there is a conflict between one statutory provision which deals with a subject in a general way and another which deals with the same subject matter in a specific manner, the latter will prevail.

KNOWLES, supra at 702. In other words, the specific hardware requirements prevail over the general terms implement and provide in WAC 296-155-24510. Thus, the language of "according to the following requirements" is clear in restricting "provide" and "implement" to the hardware requirements and does not extend to usage issues which are covered in the core rules. See WAC 296-800-12005 (Employees must ...Apply the principles of accident prevention in their daily work and use proper safety devices...). Clear language should be applied as written. HEGWINE vs LONGVIEW FIBRE CO., 132 Wn. App. 546, 560 (Div, II, 2006).

The real regulation that deals with an employers obligations regarding an employees use of equipment is WAC 296-155-200(3) which reads:

- (3) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates a need for using such equipment to reduce the hazards to the employees.

WAC 296-155-200(3)(2006). The Employer was not cited for a violation of this regulation because

it had established a rule requiring employees to always wear their safety gear whenever on any roof. CABR, Transcript (8/10/04) page 7, line 13 through page 8, line 26. Furthermore, Washington Cedar supervises employees and enforces its rules CABR Transcript (8/10/04) page 14, lines 14-26, and page 18, lines 18-25 (discipline). Thus, there is no real "duty to ensure" employees are wearing safety gear, but instead a duty to have rules and require employees obey them. The duties under WAC 296-155-24510 are to ensure the "following requirements" are met with regard to those hardware specifications.

4. COBRA ROOFING

Respondent claims that Appellant misrepresents what Division III stated in its COBRA ROOFING decision. COBRA ROOFING SERVICE, INC. vs LABOR & INDUS. 122 Wn. App. 402 (2004). Division III held that:

Regarding the "following requirements," the regulation governs in great detail three types of safety systems: "fall restraint protection," such as guardrails, safety belts and harnesses, warning lines, and safety monitors, WAC 296-155-24510(1); "fall arrest protection," such as body harnesses, safety nets, and catch platforms, WAC

296-155-24510(2); and "positioning device systems" such as "a body belt or body harness system rigged to allow an employee to be supported on an elevated vertical surface, such as a wall, and work with both hands free while leaning," WAC 296-155-245103; WAC 296-155-24510(3).

Id. at page 412. No where does Division III mention any obligation to ensure that employees wear their safety gear. Id. The Court held the

[n]umerous subsections of the regulation govern how the employer will minimize or eliminate the hazard.

Id. at 414. Therefore it is the "numerous subsections" that govern how the employer is to eliminate the hazard, and the Department has stipulated that Washington Cedar has not violated the standards in those subsections. EXHIBIT No. 1 para. 2, CABR Documents, page 204.

The Respondent cites a 1973 OSHA case footnote about an employer's responsibility to thwart hazardous conduct, but this is a far cry from ensuring employee conduct. The employer can make rules, encourage good behavior, sanction bad behavior, but ultimately it is up to the employee to actually wear the safety gear on the roof and that is why WISHA has delegated that

responsibility to the employee. RCW 49.17.110.

5. FAILURE TO CITE A SPECIFIC STANDARD

The Respondent asserts that it is fine if the citation fails to cite a specific hardware requirement that the Employer is alleged to have violated, despite the clear language of COBRA ROOFING that the:

[n]umerous subsections of the regulation govern how the employer will minimize or eliminate the hazard.

122 Wn. App. 402, at 414 (2004). The Respondent claims the citation uses "umbrella language" because none of the following requirements were implemented. However, the Department stipulated that the Employer did not violate any of the hardware standards contained in WAC 296-155-24510. CABR Documents, page 204; CABR Exhibits No. 1. Furthermore, the unchallenged finding that Washington Cedar ensured the fall protection gear was in Mr. Lindberry's truck and that Lindberry used the safety equipment in front of Inspector Sturman after the inspection is a verity. ESTATE OF JONES, 152 Wn.2d 1, 8 (2004). CABR, Documents page 70, Finding No. 7. Thus, Washington Cedar

complied with all employer duties under WAC
296-155-24510.

6. KNOWLEDGE

The fourth element of the Department's prima facie case is that the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. WASH. CEDAR & SUPPLY vs LABOR & INDUS., 119 Wash. App. 906, 914 (Div.II, 2004). Because the Board ignored this court's decision about what constitutes prima facie proof, there is no finding about knowledge. CABR, Documents pages 61-71. The lack of a finding on a material fact is presumed to be due to a lack of evidence on the issue. SMITH vs KING, 106 Wn.2d 443, 451 (1986). There was no substantial evidence to support a finding that the employer knew or could have known of the violation.

Substantial evidence must be rational. DANZER vs LABOR & INDUS., 104 Wn2d 307, 319 (Div.II, 2000). It is not rational to suggest that the prior violations by other employees from other yards would put Mr. Honeycutt on notice that

Mr. Lindberry could violate the rule to always wear safety gear whenever on the roof. There is just no causal connection, or nexus, between the actions of other employees at other yards up to 5 years prior with the acts of Mr. Lindberry on May 12, 2003. To claim that there is some rational connection between the priors and Mr. Lindberry is mere speculation and not based upon anything in the record as required for substantial evidence. R.C.W. 49.17.150(2006).

Furthermore, the record must be considered as a whole. R.C.W. 49.17.150(2006). Mr. Lindberry seldom went on the roof because he was the driver. CABR Transcript (8/9/04) page 19, lines 43-45. When he was inspected by company safety inspectors, Lindberry was always compliant with the safety rules. CABR Transcript (8/10/04) page 15, lines 14-17. Furthermore, the small number of prior citation compared to the employers volume of 25,000 deliveries every year substantiates Mr. Honeycutt's testimony that his safety program has been highly effective. CABR Transcript (8/10/04) page 32, lines 15-25. Thus, there is just no

evidence that the employer knew or could have known of Lindberry's violation.

7. KAISER ALUMINUM

Division III held in KAISER ALUMINUM that for a general duty violation, the Department must prove the steps necessary to avoid citations in the future. LABOR & INDUS. vs KAISER ALUMINUM, 111 Wash. App. 771, 782 (Div., III, 2002). Appellant does not believe the "duty to ensure" really exists and is just a cut-n-paste fantasy of the Inspector. But if the "duty to ensure" does exist, then it must be a general duty because there are no specifics on how to comply.

The current metamorphosis of the "duty to ensure" contains two duties: "First, the employer must purchase or otherwise provide its employees with equipment that comports with the rule's technical requirements." BRIEF OF RESPONDENT, page 24. Apparently this duty was complied with. CABR Documents, page 204, Stipulation Regarding Citation. "Second, the employer must ensure that the approved equipment is provided to and used ("installed and implemented") by its employees."

BRIEF OF RESPONDENT, page 24. This second phase does not provide specifics on how to "ensure" that an employee uses the equipment and so is a general duty. KAISER ALUMINUM holds that:

...the Department must specify the particular steps the employer should have taken to avoid the citation. The Department must demonstrate the feasibility and likely utility of those measures. DONOVAN, 645 F.2d at 829. The Department must also show that the proposed measure will not result in greater hazard. Id. at 830.

LABOR & INDUS. vs KAISER ALUMINIUM, 111 Wash. App. 771, 782 (Div, III, 2002). Nothing in the record indicates the Department ever specified the steps necessary to "ensure" employees use the provided safety gear.

Just because of Washington Cedar's success in reducing injuries as demonstrated by the drop in its experience factor, it would be reasonable to infer that it already is taking the steps necessary to ensure compliance. CABR Exhibit no. 13. However, it is manifestly unfair for the Department to cite Washington Cedar for violating its "duty to ensure" when the Department itself can not articulate how the employer could comply. This is the regulatory abuse which Division III

sought to eliminate. KAISER ALUMINUM, supra at 782.

8. INFEASIBLE

The Respondent has mis-characterized the issues on appeal regarding the affirmative defense of infeasibility. Appellant is not saying that the real regulation is infeasible. Appellant fully complied with all of the requirements of the real WAC 296-155-24510. CABR, Documents, page 204, Stipulation Regarding Citation.

Appellant's defense is that it is impossible and/or infeasible to constantly watch its deliverymen make their deliveries to ensure 100% compliance with safety rules. Appellant does everything possible to ensure compliance by its employees but the "duty to ensure", if it exists, is not a standard of behavior that an employer can abide by like Appellant's full compliance with the hardware requirements of the real WAC 296-155-24510. The "duty to ensure" has no guidelines to comply with nor any specifications to adhere to for employers. The "duty to ensure" is not a safety standard at all: it is a

penalty imposed on employers for behavior of employees, without regard to an employer's safety program, knowledge, or any exonerating behavior of the employer. Since there are no guidelines to the "duty to ensure" it was easy to prove that the "duty to ensure" standards were infeasible and that the employer selected alternative means of compliance through its existing highly effective safety program. CABR, Transcript (8/10/04) pages 9-20. Mr. Honeycutt testified that he always complies with the real WAC 296-155-24510 but that it would be impossible to comply with Inspector Sturman's regulation. CABR Transcript (8/10/04) page 34 line 19 through page 36 line 20. Even Inspector Sturman agreed that it would be impossible to have 24 hour supervision. CABR Transcript (8/9/04) page 76, lines 15-37.

The Respondent provided some hair raising public sector jingoism in suggesting that the defense of infeasibility does not contemplate economics. All safety and health standards must be economically feasible. R.C.W. 49.17.020(7); RIOS vs LABOR & INDUS., 145 Wn.2d 483, 499-500

(2002). Mr. Honeycutt testified that a tag along supervisor is not used in the delivery industry. CABR Transcript (8/10/04) page 34, lines 19-23. Mr. Honeycutt also stated that the negative economic impact of a regulation that required a tag along supervisor would put the employer out of business. CABR Transcript (8/10/04) page 35, lines 1-6.

9. ENHANCED "REPEAT" PENALTIES

Appellant raised two issues contesting the applicability of R.C.W. 49.17.180(1) for purposes of imposing "repeat" penalties. BRIEF OF APPELLANT, pages 45-47. First, the statute only authorizes repeat penalties for "employer" violations and not for employee violations as in this case. Second, the incident herein was not "substantially similar" to the hazard in the prior matters. Respondent is correct that the Supreme Court recently made the second issue moot by holding that repeat penalties are available when the Department shows the repeat was of the same type of hazard. COBRA ROOFING vs LABOR & INDUS. 157 Wn.2d 90, 98 (2006). The first issue was not

decided by the Supreme Court and remains an issue in this case.

Respondent did not respond to Appellant's argument that R.C.W. 49.17.180(1) only applies to employer violations and not to situations where the employee violates the standard as herein.

D. THE "DUTY TO ENSURE" IS VAGUE

The Supreme Court has held that:

A statute is vague if either it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent arbitrary enforcement.

STATE vs ECKBALD, 152 W2d 515, 518 (2004).

Appellant understands the real WAC 296-155-24510 and is not saying the real WAC is vague. The "duty to ensure" is Unconstitutionally vague because there are no guidelines on how to ensure compliance by employees. Two different employers, both with identical perfect safety programs, one with a happy employee and the other with an employee who is going through bankruptcy will be treated differently under the "duty to ensure". The employer with a unhappy employee will be penalized for her employee's violation.

The other reason why the "duty to ensure" is Unconstitutionally vague is because it allows for arbitrary enforcement. There are no standards by which to avoid penalizing the employer with the perfect safety program.

E. ATTORNEYS FEES

Respondent is correct that the Supreme Court has held recently that attorneys fees are not awardable for WISHA appeals under the Equal Access to Justice Act. COBRA ROOFING vs LABOR & INDUS., 157 Wn2d 90, 100-101 (2006).

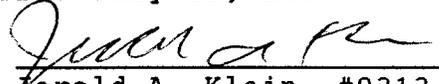
F. CONCLUSION

Respondent's "duty to ensure" is the ultimate impossible standard because it is not a standard at all but a surety penalty on employment. It is vague because there are no guidelines and infeasible because compliance would mean constant supervision of the Employer's deliverymen. Since it penalizes employer's with perfect safety programs but distracted workers, it does not serve the purpose of WISHA to lighten the burden on employers of worker injuries. RCW 49.17.010. Instead, it frustrates WISHA's purpose by forcing

employers to babysit employees with no history of safety violations like Lindberry and draws away economic resources that would otherwise go into safety. Besides, the "duty to ensure" is not a real regulation.

Appellant requests this Court vacate and dismiss the citation, with prejudice.

RESPECTFULLY SUBMITTED: July 21, 2006.



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

APPENDIX

PROPOSED DECISION AND ORDER, CABR, Documents,
pages 61-71.....A-1

Exhibit No. 1, CABR, Exhibits No. 1,A-12

Exhibit No. 13, CABR Exhibits No. 13.....A-13

WAC 296-155-24510.....A-14

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: WASHINGTON CEDAR & SUPPLY) DOCKET NO. 03 W0216
2 CO., INC.)
3)
4 CITATION & NOTICE NO. 306351933) PROPOSED DECISION AND ORDER

5
6 INDUSTRIAL APPEALS JUDGE: Lyle O. Hanson

7
8 APPEARANCES:

9
10 Employer, Washington Cedar & Supply Co., Inc., by
11 Law Office of Jerald A. Klein, per
12 Jerald A. Klein

13
14 Employees of Washington Cedar & Supply Co., Inc.,
15 None

16
17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 David I. Matlick, Assistant

20
21
22 The employer, Washington Cedar & Supply Co., Inc., filed an appeal with the Department of
23 Labor and Industries' Safety Division on September 2, 2003. The Department transmitted the
24 appeal to the Board of Industrial Insurance Appeals on September 15, 2003. The employer
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
appeals Citation and Notice No. 306351933 issued by the Department on August 28, 2003. In the
Citation and Notice, the Department alleged one serious repeat violation of WAC 296-155-24510
and assessed a total penalty of \$2,700. The Citation and Notice is **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

The Interlocutory Order Denying Claimant's (*sic* Employer's) Motion to Vacate dated April 7,
2004, is affirmed.

The August 2, 2004 Interlocutory Order Denying Employer's Motion for Summary Judgment
and Partially Granting Department's Cross-Motion for Partial Summary Judgment is affirmed.

ISSUES

1. Whether on May 12, 2003, an employee of Washington Cedar & Supply Co., Inc. (hereafter Washington Cedar), committed a serious violation of

1 WAC 296-155-24510 in that he failed to wear any form of fall protection
2 equipment while he was in the course of his employment on a roof and
3 was exposed to a hazard of falling more than 10 feet;

- 4
5 2. If the answer to the foregoing issue is affirmative, whether the
6 Washington Cedar employee's failure to wear required fall protection
7 equipment was the result of unavoidable employee misconduct within
8 the meaning of the Washington Industrial Safety and Health Act
9 (WISHA);
10
11 3. Whether in the three years prior to May 12, 2003, Washington Cedar
12 had violated WAC 296-155-24510; and
13
14 4. Whether the Department properly and accurately calculated the factors
15 it was required to take into account in assessing the monetary penalty
16 ordered in the Citation and Notice that is here on appeal.
17

18 EVIDENCE PRESENTED

19 The Inspection

20
21 The Department of Labor and Industries employs William M. Sturman as a safety
22 compliance officer. On May 12, 2003, Mr. Sturman drove along Bainbridge Island in order to locate
23
24 and inspect framing construction projects. The safety officer testified that as he drove past new
25
26 housing construction taking place on Garibaldi Street, he observed a person standing on a roof,
27
28 who was not wearing any form of fall protection. Mr. Sturman stopped his car, took a photograph of
29
30 the person on the roof (Exhibit No. 2), and proceeded to conduct an opening conference with the
31
32 two people at the site, whom the safety officer determined were employed by Washington Cedar.
33
34

35
36 In his testimony, Neil J. Lindberry acknowledged that he was the person shown on the roof
37
38 of the house in Exhibit No. 2. He described the activity in which he was engaged as depositing
39
40 stacks of roofing material on the roof after a coworker, who was on the bed of a flatbed truck,
41
42 transported the stacks to the roof via a conveyor belt. He further acknowledged that he intentionally
43
44 decided to not wear any form of fall protection during the work process that Mr. Sturman observed.
45
46 Mr. Lindberry declared that he believed that fall protection gear would have gotten in his way during
the work process and would have posed a greater safety hazard than not wearing the gear at all.

1 Exhibit No. 2 clearly shows that Mr. Lindberry was standing at the edge of a rooftop that was
2 more than 10 feet above ground level. Mr. Sturman testified that he used a tape measure to
4 ascertain the actual height, which was 13½ feet.
5

6 Washington Cedar ensured that appropriate fall protection equipment was in the truck
7 Mr. Lindberry drove on May 12, 2003. Mr. Lindberry put on the fall protection gear at Mr. Sturman's
8 direction and the safety officer left the location. Mr. Sturman later conducted a closing conference
9 by telephone with Michael A. Honeycutt, who is the manger of Washington Cedar's Gorst yard.
10
11

12 Mr. Sturman prepared an inspection report and on August 28, 2003, the Department issued
13 the Citation and Notice that is the subject of this appeal. The Citation and Notice alleged one
14 repeat serious violation of WAC 296-155-24510 and assessed a penalty in the sum of \$2,700.
15
16

17 The parties stipulated that Washington Cedar "did not violate any of the hardware standards
18 contained in WAC 296-155-24510." Exhibit No. 1.
19
20

21 The Calculations Used in the Citation and Notice

22 The Department uses a standard format in determining the amount of the penalty it assesses
23 for alleged WISHA violations. Pursuant to the format, the severity of the hazard caused by an
24 alleged violation is first rated on a scale of one to six, with six being the most severe hazard. By
25 use of a similar scale of one to six, the probability that the alleged hazard would have actually
26 resulted in an injury is rated. By multiplying the severity rating by the probability rating, the gravity
27 of the alleged violation is determined. The gravity of the alleged violation determines the base
28 penalty the Department assesses.
29
30

31 After the base penalty has been determined, the Department may increase or decrease the
32 amount of the monetary penalty based on the employer's size, i.e., the number of workers the
33 employer employs in the state of Washington, the employer's good faith and the employer's WISHA
34 history. After any adjustment is made in the base penalty based on those factors, the adjusted
35
36
37
38
39
40
41
42
43
44
45
46

1 base penalty is calculated. Finally, if the alleged violation is a repeat violation, the adjusted base
2 penalty is multiplied by the number of prior citations for the same hazard that have become final.
4 Only violations regarding the same hazard that occurred within three years of the inspection at
5 issue are considered.
6
7

8
9 *Severity:* Mr. Sturman testified that regarding fall protection matters, the Department rates
10 the severity of an alleged violation at four if the worker was exposed to a risk of falling less than
11 10 feet. The severity is five if the height of the potential fall was between 10 and 20 feet and the
12 severity is six if the height was 20 feet or more.
13
14

15
16
17 Since the safety officer measured the distance between the ground and the eave of the roof
18 where Mr. Lindberry was standing at 13½ feet, Mr. Sturman rated the severity of the hazard at five.
19 He testified that Mr. Lindberry was exposed to the hazard of sustaining broken bones, including
20 compound fractures, and serious cuts and abrasions.
21
22
23
24

25
26
27 *Probability:* Mr. Sturman noted that the weather on May 12, 2003, was sunny and dry and
28 that no other factors that would have increased the probability that Mr. Lindberry might have fallen
29 from the rooftop existed. Accordingly, he rated the probability of injury at one.
30

31 *Gravity:* By multiplying the severity by the probability, Mr. Sturman calculated the gravity of
32 the alleged violation at five. The *base penalty* for the alleged violation was \$500.
33
34

35 *Good Faith, Size, and History:* Mr. Sturman testified that Mr. Lindberry was reasonably
36 cooperative during his inspection and that the worker donned his fall protection gear at the safety
37 officer's request. He assessed the worker's good faith as average, which did not result in any
38 adjustment to the base penalty.
39
40
41

42
43 Washington Cedar employs 65 workers in Washington. The size of the business resulted in
44 a \$200 deduction from the base penalty.
45
46

1 For WISHA purposes, an employer's history is based on its current workers' compensation
2 rate, which is calculated by comparing the number of hours employees of the company worked and
3
4 the number of industrial insurance claims the workers filed with a state-wide average. The
5
6 statewide average is expressed as the number 1,000. In 2003, Washington Cedar's experience
7
8 factor was 1.3235. Exhibit No. 13. Mr. Sturman testified that the business's experience factor was
9
10 average and it did not result in any adjustment in the base penalty assessed in this case.
11

12
13 After all factors were calculated, the *adjusted base penalty* for the alleged violation that is
14
15 here at issue was \$300.

16
17 *The Repeat Factor.* The Department produced exhibits that documented that in the
18
19 three-year period before May 12, 2003, Washington Cedar had been cited for violations of
20
21 WAC 296-155-24510 nine times. Exhibit Nos. 3 through 9. Accordingly, Mr. Sturman multiplied the
22
23 adjusted based penalty by nine.

24
25 The total penalty assessed against Washington Cedar was \$2,700.

26 27 **Washington Cedar's Policies and Practices**

28
29 Mr. Honeycutt, the manager of Washington Cedar's Gorst yard, identified Exhibit No. 10 as
30
31 the employer's Safety Incentive Program. Under the program, the business pays \$150 each
32
33 quarter to every employee who complies with applicable safety rules and regulations. Under the
34
35 heading "Fall Protection," the Safety Incentive Program states, in part: "ALL EMPLOYEES are
36
37 required to wear harnesses & lifelines whenever on the roof. There are no exceptions."

38
39 Mr. Honeycutt declared that in order to ensure that the company's employees comply with
40
41 fall protection rules:

- 42 • Use of fall protection is a topic at every bi-weekly safety meeting;
- 43 • The company loads every delivery truck with appropriate safety and fall protection gear;
- 44 • Mr. Honeycutt or Todd Lewis, Washington Cedar's outside sales representative,
45 conducted unannounced checks of delivery sites as often as possible. The manager said
46

1 that since each two-worker team makes multiple deliveries each day, Washington Cedar
2 cannot make frequent spot checks and most occur during winter months, the least busy
3 time of year for the business.

4 Mr. Honeycutt testified that Washington Cedar uses progressive disciplinary measures for
5 violations of safety regulations. It issues a verbal reprimand for a worker's first violation, a written
6 reprimand for a second violation, and a minimum of a three-day suspension for a third violation.
7 Third and subsequent violations may result in termination. See Exhibit No. 14. Mr. Honeycutt
8 testified that he would terminate the employment of a worker who willfully violated safety
9 regulations.

10 At some point in time after Mr. Honeycutt learned about the Department's May 12, 2003
11 inspection, he talked to Mr. Lindberry about the circumstances and emphasized that the worker had
12 to wear safety gear. Mr. Lindberry admitted that he was not wearing fall protection, that he did not
13 like doing so, and that he did not intend to do so every time he worked on a rooftop. Mr. Honeycutt
14 verbally reprimanded Mr. Lindberry for the incident, but he did not require the worker to undergo
15 further training or testing regarding safety matters. Mr. Lindberry voluntarily ended his employment
16 with Washington Cedar about a month after the meeting because: "I just wanted to do something
17 else." 8/9/04 Tr. at 11.

18 Mr. Honeycutt acknowledged that Washington Cedar's Safety Policy and Procedure Manual
19 stated, in part:

20 *Employees who fail to follow safe work practices or who receive*
21 *disciplinary action for a safety violation will be disciplined as provided by*
22 *the yard manager and will be required to undergo further training and*
23 *testing to verify knowledge of safety rules.*

24 Exhibit No. 14, section 11.0.

25 Mr. Honeycutt agreed with Mr. Sturman that a fall from 20 feet would probably cause injuries
26 such as cuts, bruises, and broken bones.

1 The Department served the Citation and Notice that is the subject of this appeal by mailing it
2
3 to Mr. Honeycutt at the employer's Gorst yard. Mr. Honeycutt testified that Leo C. Brutsche, whose
4
5 office is in Auburn, was Washington Cedar's registered agent for service of process.
6

7 **DECISION**
8

9 In this appeal, the Department held the burden of producing a preponderance of the
10
11 persuasive evidence to establish that on May 12, 2003, Washington Cedar violated a fall protection
12
13 provision of WISHA and that the penalty it assessed for the alleged violation was appropriate.
14
15 *In re Olympia Glass Co.*, BIIA Dec., 95 W445 (1996).
16

17 Washington Cedar acknowledged that Mr. Lindberry was not wearing any form of fall
18
19 protection when Mr. Sturman observed him. Uncontested evidence showed that the roof of the
20
21 house on which Mr. Lindberry was standing was more than 10 feet from ground level. The record,
22
23 therefore, established that on May 12, 2003, the business violated WAC 296-155-24510, which
24
provides, in pertinent part:

25
26
27 When employees are exposed to a hazard of falling from a location
28 10 feet or more in height, the employer shall ensure that fall restraint, fall
29 arrest systems or positioning device systems are provided, installed,
30 and implemented
31

32 Washington Cedar questioned whether the hazard to which Mr. Lindberry was exposed
33
34 could have caused a serious injury and whether Mr. Sturman properly assessed the business's
35
36 good faith and its history. However, none of the evidence that the business produced regarding
37
38 those issues persuasively rebutted Mr. Sturman's assessments and the record as a whole clearly
39
40 demonstrated that in this appeal, Washington Cedar's primary focus was to show that
41
42 Mr. Lindberry's conduct constituted unpreventable employee misconduct.
43

44 The Department met its burden of showing that Washington Cedar violated WAC 296-155-
45
46 24510 and that Mr. Sturman properly calculated the severity, probability, and gravity factors that the
Department uses in levying a penalty assessment for a WISHA violation and properly assessed the

1 good faith, size, and history elements of the penalty assessment calculation. The record
2 established that Washington Cedar had violated the provisions of WAC 296-155-24510 nine times
4 in the three-year period prior to May 12, 2003.

6 Washington Cedar bore the burden of proving the defense of unpreventable employee
7 misconduct, since it is an affirmative defense. *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144
8 (1990).

10 In *Jeld-Wen* and in *In re The Erection Company II*, BIIA Dec., 88 W142 (1990), this Board
11 adopted the test set forth by the Occupational Safety and Health Review Commission in *Jensen*
12 *Construction Company*, 7 OSHC 1477 (1979) for establishment of unpreventable employee
13 misconduct. That decision declared:

14 In order to establish the affirmative defense of unpreventable employee
15 misconduct, an employer must show that it has established work rules
16 designed to prevent the violation, has adequately communicated these
17 rules to its employees, has taken steps to discover violations, and has
18 effectively enforced the rules when violations have been discovered.

19 *Jensen*, at 1479.

20 The content of Exhibit No. 14 and the testimony of Mr. Lindberry and Mr. Honeycutt
21 demonstrated that Washington Cedar established work rules intended to prevent violations of fall
22 protection regulations and adequately communicated them to its employees. The record was less
23 clear that the business took steps that were reasonably calculated to effectively discover violations.
24 From the record, a fact-finder could reach no conclusion other than that Washington Cedar did not
25 effectively enforce its rule.

26 Mr. Honeycutt described the unannounced inspections that he and Todd Lewis performed as
27 occurring "periodically" and as "something that we try to do as much as possible." 8/10/04 Tr. at
28 14. Aside from those inspections, Washington Cedar produced no evidence of any other step it
29 took in an effort to discover violations of WISHA regulations by its employees. The evidence was

1 not persuasive that the periodic inspections that Mr. Honeycutt and Mr. Lewis conducted were
2 effective tools in discovering violations of fall protection rules. It seems evident that, had
4 Washington Cedar truly felt a vested interest in discovering such violations, Mr. Honeycutt or
5 Mr. Lewis would have observed Mr. Lindberry during the deliveries he made after May 12, 2003,
6
7 and before the employee quit his job sometime in June 2003. Mr. Lindberry told Mr. Honeycutt that
8
9 during that period of time, he did not intend to comply with the Department's or with Washington
10 Cedar's own fall protection rules. The business clearly knew that Mr. Lindberry was going to
11
12 continue to violate the regulation. Yet Washington Cedar allowed Mr. Lindberry to continue making
13
14 five to seven deliveries per day without once performing a spot check to see if he was in
15
16 compliance with WISHA regulations. Given those circumstances, a fact-finder can only conclude
17
18 that Washington Cedar did not take steps that were reasonably designed to effectively discover
19
20 violations of safety rules.
21
22
23
24

25
26
27 Moreover, the sanction that Washington Cedar chose to impose against Mr. Lindberry for
28 failure to comply with fall protection regulations demonstrated that the company did not effectively
29 enforce such rules. As a result of the discussion that Mr. Honeycutt had with Mr. Lindberry shortly
30 after May 12, 2003, Mr. Honeycutt had to understand that the employee fully intended to engage in
31 unsafe work practices. The yard manager had to understand that the verbal reprimand that he
32 issued to Mr. Lindberry was not going to change the worker's conduct. In order to effectively
33 enforce fall protection rules under the circumstances, Washington Cedar either had to suspend
34
35 Mr. Lindberry or terminate his employment.
36
37
38
39

40
41 Both the number of prior citations the Department issued to the employer for violations of fall
42 protection rules and its failure to effectively ensure that Mr. Lindberry would comply with such rules
43 after May 12, 2003, belie Washington Cedar's contention that it effectively enforced such rules.
44
45
46

1 Washington Cedar cannot avail itself of the unpreventable employee misconduct defense in
2
3 this appeal.

4
5 The Department's August 28, 2003 Citation and Notice must be affirmed.

6
7 **FINDINGS OF FACT**
8

- 9 1. On August 28, 2003, the Department of Labor and Industries issued
10 Citation and Notice No. 306351933 to Washington Cedar & Supply Co.,
11 Inc. (hereafter Washington Cedar), alleging that it had committed one
12 repeat serious violation of WAC 296-155-24510 on May 12, 2003, at its
13 worksite at Garibaldi Street on Bainbridge Island, Washington. The
14 Citation and Notice assessed a total penalty of \$2,700 against
15 Washington Cedar for the alleged violation. On September 2, 2003,
16 Washington Cedar filed a Notice of Appeal of the Citation and Notice
17 with the Safety Division of the Department. The Department forwarded
18 the Notice of Appeal and transmitted a copy of its file to the Board of
19 Industrial Insurance Appeals on September 15, 2003. On
20 September 16, 2003, the Board issued a Notice of Filing of Appeal,
21 assigned the appeal Docket No. 03 W0216, and ordered that further
22 proceedings be held in the matter.
23
24
- 25 2. On May 12, 2003, William M. Sturman, whom the Department of Labor
26 and Industries employed as a safety compliance officer, observed Neil J.
27 Lindberry, an employee of Washington Cedar, standing on the roof of
28 new housing construction on Garibaldi Street on Bainbridge Island,
29 Washington, without wearing any form of fall protection gear. The roof
30 of the house on which Mr. Lindberry was standing was more than
31 10 feet and less than 20 feet from the ground level of the site.
32
- 33 3. After he observed Mr. Lindberry, Mr. Sturman conducted an inspection
34 of the site, caused Mr. Lindberry to put on the fall protection gear that
35 Washington Cedar ensured was in Mr. Lindberry's delivery truck, and
36 prepared an inspection report that led the Department to issue Citation
37 and Notice No. 306351933 to Washington Cedar on August 28, 2003,
38 alleging one repeat serious violation of WAC 296-155-24510.
39
- 40 4. The severity of an injury created by the safety hazard that resulted from
41 the safety violation was high (rated at five on a scale of one to six), the
42 probability that an injury would occur due to the hazard was low (rated at
43 one on a scale of one to six), yielding a gravity rating of five. The good
44 faith demonstrated by Washington Cedar on May 12, 2003, was
45 average and its history regarding workplace safety was average. The
46 business employed 65 workers. With adjustment for its size, the
appropriate adjusted base penalty for this violation was \$300.

- 1 5. In the three-year period prior to May 12, 2003, the Department had cited
Washington Cedar nine times for violations of WAC 296-155-24510,
which meant that for the May 12, 2003 violation, the Department
appropriately multiplied the adjusted base penalty for the violation by
nine and assessed a total penalty in the sum of \$2,700.
- 4
5
6
7 6. As of May 12, 2003, Washington Cedar had established work rules that
were designed to prevent a violation of WAC 296-155-24510 and it had
adequately communicated those rules to its workers, but it had not taken
steps that were reasonably calculated to discover violations of those
rules and it had not effectively enforced those rules when violations had
been discovered.
- 8
9
10
11
12
13
14 7. Washington Cedar's registered agent for service of process is Leo C.
Brutsche, whose office is in Auburn. The Department served
Washington Cedar with the Citation and Notice that is the subject of this
appeal by mailing it to the employer in care of its Gorst address.
- 15
16
17
18

19 **CONCLUSIONS OF LAW**

- 20
21 1. The Board of Industrial Insurance Appeals has jurisdiction over the
parties to and subject matter of this appeal.
- 22
23
24
25
26
27 2. On May 12, 2003, Washington Cedar committed a repeat serious
violation of WAC 296-155-24510.
- 28
29
30 3. The Department properly served its Citation and Notice on Washington
Cedar in accordance with the provisions of RCW 49.17.120.
- 31
32 4. Citation and Notice No. 306351933, issued by the Department of Labor
and industries on August 28, 2003, is correct and it should be affirmed.

33 It is so **ORDERED**.

34
35 Dated this 12th day of October, 2004.

36
37
38
39
40
41
42
43
44
45
46



Lyle O. Hanson
Industrial Appeals Judge
Board of Industrial Insurance Appeals

MEP/LL

FILED

BOARD OF INDUSTRIAL
INSURANCE APPEALS
RECEIVED

OLYMPIA, WA

04 APR 23 08:03

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

In re:)	
WASHINGTON CEDAR & SUPPLY CO., INC.)	Docket No. 03 W0216
Employer)	
)	STIPULATION
Citation No. 306351933)	REGARDING
)	CITATION

THIS PARTIES HERETO, by and through their respective
counsel, hereby stipulate as follows:

- The citation herein is for an alleged violation of
WAC 296-155-24510 which reads in pertinent part:

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....
- The parties agree that the Employer did not violate
any of the hardware standards contained in
WAC 296-155-24510.

DATED this 19th day of April, 2004.

David I. Matlick

 David I. Matlick # 22919
 Attorney for Department

Jerald A. Klein

 Jerald A. Klein, #9313
 Attorney for Employer

Board of
Industrial Insurance Appeals
 In re WASHINGTON CEDAR
 Docket No. 03 W0216
 Exhibit No. 1
 8-9-04 Date REJ.
 ADM.

JERALD A. KLEIN
 823 Joshua Green Bldg.
 Seattle, WA 98101-2236
 (206) 623-0630

A+12



Worker's Compensation RATE NOTICE

for the Department of Labor & Industries
Olympia, Washington

Effective Date	01/01/2004
Unified Business Identifier (UBI)	173 005 074
Account ID	264,265-00
Experience Period	07/1999 THRU 06/2002

RECEIVED

DEC 23 2003

WA CEDAR & SUPPLY CO. INC

12/03/2003 is date of issue

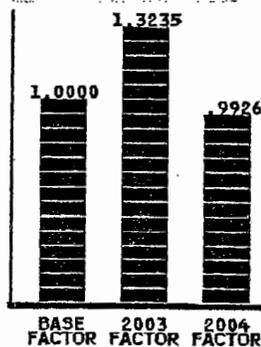
Policyholder

WASHINGTON CEDAR & SUPPLY
PO BOX 1738
AUBURN WA 98071

(These represent base rates)

Class Code	Class Description	Experience Factor EF	Accident Fund (AF)	Med Aid Fund (MA)	Supp Pension SP	YOUR RATE	Payroll Deduction
1101	DELIVERY BY WHSL/RETAIL DISTR	0.9926	0.6527	0.4899	0.0720	A 1.2061	0.27915
2009	BLDG MATERIAL DLRS/LUMBER YARD	0.9926	0.3158	0.3162	0.0720	D 0.6993	0.19295
4904	CLERICAL OFFICE NOC & DRAFTSMN	0.9926	0.0280	0.0252	0.0720	B 0.1248	0.04850
6303	SALES PERSONNEL NOC-OUTSIDE	0.9926	0.0651	0.0572	0.0720	C 0.1934	0.06440

THE GRAPH AT THE RIGHT COMPARES YOUR 2003 AND 2004 EXPERIENCE FACTORS TO A BASE EXPERIENCE FACTOR OF 1.0000. THE LOWER YOUR EXPERIENCE FACTOR, THE LESS YOU WILL PAY. FOR QUESTIONS REGARDING YOUR ACCOUNT, CALL EMPLOYER SERVICES, TEAM 6, AT: (360) 902-4802



Use Rate X Units* of Work When Computing Your Premiums On The Quarterly Report	This Rate X Units* of Work May Be Deducted From Your Employees Payroll.
--	---

* Units and/or Hours

Board of Industrial Insurance Appeals
In re: WASHINGTON C&S
Docket No. 03 W0316
Exhibit No. 13
 8-10-04
ADM. Date REJ.

You can CONTROL YOUR WORKERS COMPENSATION COSTS with:

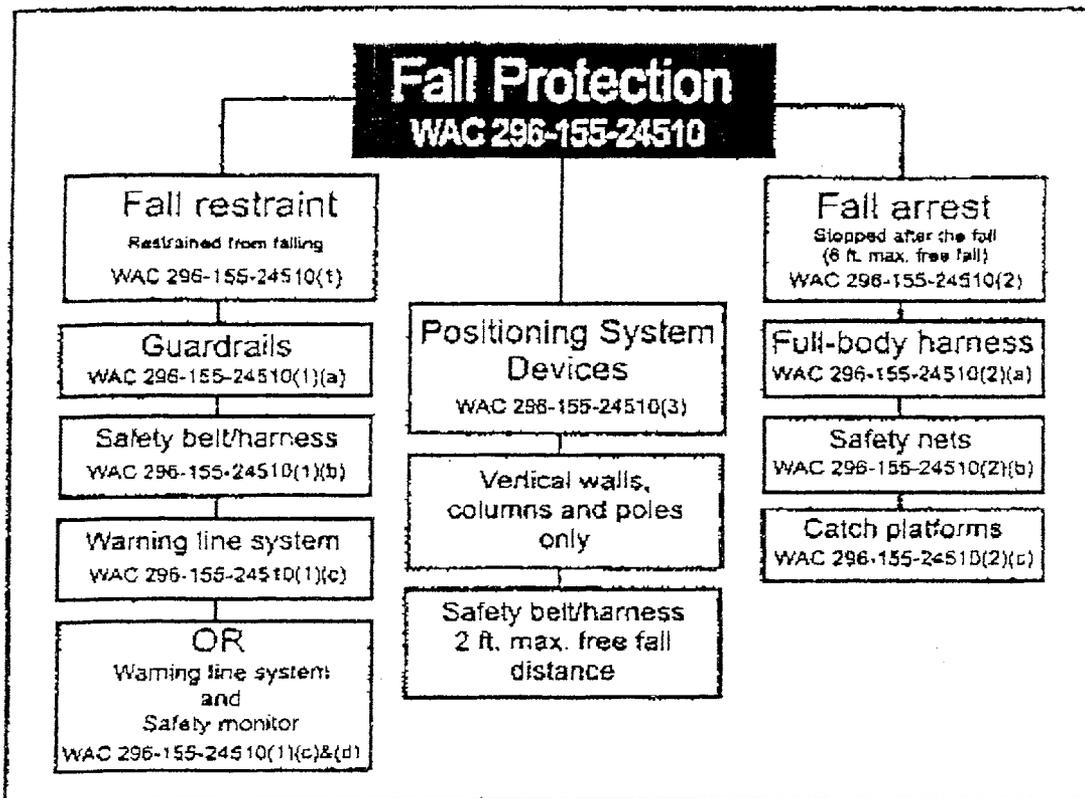
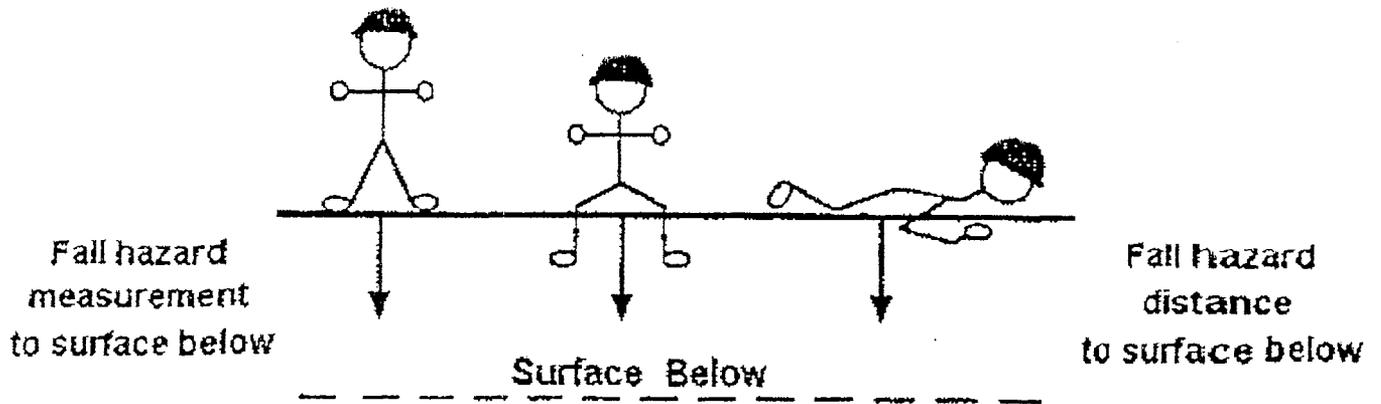
ACCIDENT PREVENTION and CLAIMS MANAGEMENT

F225-004-000 rate notice 10-01

See reverse for more information

CN: 42,794

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.



(1) Fall restraint protection shall consist of:

(a) Standard guardrails as described in chapter 296-155 WAC, Part K.

(b) Safety belts and/or harness attached to securely rigged restraint lines.

(i) Safety belts and/or harness shall conform to ANSI Standard:

Class I body belt

Class II chest harness

Class III full body harness

Class IV suspension/position belt

(ii) All safety belt and lanyard hardware assemblies shall be capable of withstanding a tensile loading of 4,000 pounds without cracking, breaking, or taking a permanent deformation.

(iii) Rope grab devices are prohibited for fall restraint applications unless they are part of a fall restraint system designed specifically for the purpose by the manufacturer, and used in strict accordance with the manufacturer's recommendations and instructions.

(iv) The employer shall ensure component compatibility.

(v) Components of fall restraint systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.

(vi) Anchorage points used for fall restraint shall be capable of supporting 4 times the intended load.

(vii) Restraint protection shall be rigged to allow the movement of employees only as far as the sides and edges of the walking/working surface.

(c) A warning line system as prescribed in WAC 296-155-24515(3) and supplemented by the use of a safety monitor system as prescribed in WAC 296-155-24521 to protect workers engaged in duties between the forward edge of the warning line and the unprotected sides and edges, including the leading edge, of a low pitched roof or walking/working surface.

(d) Warning line and safety monitor systems as described in WAC 296-155-24515 (3) through (4)(f) and 296-155-24520 respectively are prohibited on surfaces exceeding a 4 in 12 pitch, and on any surface whose dimensions are less than 45 inches in all directions.

(2) Fall arrest protection shall consist of:

(a) Full body harness system.

(i) An approved Class III full body harness shall be used.

A-15

(ii) Body harness systems or components subject to impact loading shall be immediately removed from service and shall not be used again for employee protection unless inspected and determined by a competent person to be undamaged and suitable for reuse.

(iii) All safety lines and lanyards shall be protected against being cut or abraded.

(iv) The attachment point of the body harness shall be located in the center of the wearer's back near shoulder level, or above the wearer's head.

(v) Body harness systems shall be rigged to minimize free fall distance with a maximum free fall distance allowed of 6 feet, and such that the employee will not contact any lower level.

(vi) Hardware shall be drop forged, pressed or formed steel, or made of materials equivalent in strength.

(vii) Hardware shall have a corrosion resistant finish, and all surfaces and edges shall be smooth to prevent damage to the attached body harness or lanyard.

(viii) When vertical lifelines (droplines) are used, not more than one employee shall be attached to any one lifeline.

Note: The system strength needs in the following items are based on a total combined weight of employee and tools of no more than 310 pounds. If combined weight is more than 310 pounds, appropriate allowances must be made or the system will not be deemed to be in compliance.

(ix) Full body harness systems shall be secured to anchorages capable of supporting 5,000 pounds per employee except: When self retracting lifelines or other deceleration devices are used which limit free fall to two feet, anchorages shall be capable of withstanding 3,000 pounds.

(x) Vertical lifelines (droplines) shall have a minimum tensile strength of 5,000 pounds (22.2 kN), except that self retracting lifelines and lanyards which automatically limit free fall distance to two feet (.61 m) or less shall have a minimum tensile strength of 3,000 pounds (13.3 kN).

(xi) Horizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system, which maintains a safety factor of at least two.

(xii) Lanyards shall have a minimum tensile strength of 5,000 pounds (22.2 kN).

(xiii) All components of body harness systems whose strength is not otherwise specified in this subsection shall be capable of supporting a minimum fall impact load of 5,000 pounds (22.2 kN) applied at the lanyard point of connection.

(xiv) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.

(xv) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.

(xvi) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:

- (A) Directly to webbing, rope or wire rope;
- (B) To each other;
- (C) To a dee-ring to which another snap-hook or other connector is attached;
- (D) To a horizontal lifeline; or
- (E) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.

(xvii) Full body harness systems shall be inspected prior to each use for mildew, wear, damage, and other deterioration, and defective components shall be removed from service if their function or strength have been adversely affected.

(b) Safety net systems. Safety net systems and their use shall comply with the following provisions:

(i) Safety nets shall be installed as close as practicable under the surface on which employees are working, but in no case more than 30 feet (9.1 m) below such level unless specifically approved in writing by the manufacturer. The potential fall area to the net shall be unobstructed.

(ii) Safety nets shall extend outward from the outermost projection of the work surface as follows:

Vertical distance from working level to horizontal plane of net	Minimum required horizontal distance of outer edge of net from the edge of the working surface
Up to 5 feet	8 feet
More than 5 feet up to 10 feet	10 feet
More than 10 feet	13 feet

(iii) Safety nets shall be installed with sufficient clearance under them to prevent contact with the surface or structures below when subjected to an impact force equal to the drop test specified in (b)(iv) of this subsection.

(iv) Safety nets and their installations shall be capable of absorbing an impact force equal to that produced by the drop test specified in (b)(iv)(A) and (B) of this subsection.

(A) Except as provided in (b)(iv)(B) of this subsection, safety nets and safety net installations shall be drop-tested at the job site after initial installation and before being used as a fall protection system, whenever relocated, after major repair, and at 6-month intervals if left in one place. The drop-test shall consist of a 400 pound (180 kg) bag of sand 30 ± 2 inches (76 ± 5 cm) in diameter dropped into the net from the highest walking/working surface at which employees are exposed to fall hazards, but not from less than 42 inches (1.1 m) above that level.

(B) When the employer can demonstrate that it is unreasonable to perform the drop-test required by (b)(iv)(A) of this subsection, the employer (or a designated competent person) shall certify that the net and net installation is in compliance with the provisions of (b)(iii) and (b)(iv)(A) of this subsection by preparing a certification record prior to the net being used as a fall protection system. The certification record must include an identification of the net and net installation for which the certification record is being prepared; the date that it was determined that the identified net and net installation were in compliance with (b)(iii) of this subsection and the signature of the person making the determination and certification. The most recent certification record for each net and net installation shall be available at the job site for inspection.

(v) Defective nets shall not be used. Safety nets shall be inspected at least once a week for wear, damage, and other deterioration. Defective components shall be removed from service. Safety nets shall also be inspected after any occurrence which could affect the integrity of the safety net system.

(vi) Materials, scrap pieces, equipment, and tools which have fallen into the safety net shall be removed as soon as possible from the net and at least before the next work shift.

(vii) The maximum size of each safety net mesh opening shall not exceed 36 square inches (230 cm^2) nor be longer than 6 inches (15 cm) on any side, and the opening, measured center-to-center of mesh ropes or webbing, shall not be longer than 6 inches (15 cm). All mesh crossings shall be secured to prevent enlargement of the mesh opening.

(viii) Each safety net (or section of it) shall have a border rope for webbing with a minimum breaking strength of 5,000 pounds (22.2 kN).

(ix) Connections between safety net panels shall be as strong as integral net components and shall be spaced not more than 6 inches (15 cm) apart.

(c) Catch platforms.

(i) A catch platform shall be installed within 10 vertical feet of the work area.

(ii) The catch platforms width shall equal the distance of the fall but shall be a minimum of 45 inches wide and shall be equipped with standard guardrails on all open sides.

(3) Positioning device systems. Positioning device systems and their use shall conform

to the following provisions:

(a) Positioning devices shall be rigged such that an employee cannot free fall more than 2 feet (.61 m).

(b) Positioning devices shall be secured to an anchorage capable of supporting at least twice the potential impact load of an employee's fall or 3,000 pounds (13.3 kN), whichever is greater.

(c) Connectors shall be drop forged, pressed or formed steel, or made of equivalent materials.

(d) Connectors shall have a corrosion-resistant finish, and all surfaces and edges shall be smooth to prevent damage to interfacing parts of this system.

(e) Connecting assemblies shall have a minimum tensile strength of 5,000 pounds (22.2 kN).

(f) Dee-rings and snap-hooks shall be proof-tested to a minimum tensile load of 3,600 pounds (16 kN) without cracking, breaking, or taking permanent deformation.

(g) Snap-hooks shall be a locking type snap-hook designed and used to prevent disengagement of the snap-hook by the contact of the snap-hook keeper by the connected member.

(h) Unless the snap-hook is designed for the following connections, snap-hooks shall not be engaged:

(i) Directly to webbing, rope or wire rope;

(ii) To each other;

(iii) To a dee-ring to which another snap-hook or other connector is attached;

(iv) To a horizontal lifeline; or

(v) To any object which is incompatibly shaped or dimensioned in relation to the snap-hook such that unintentional disengagement could occur by the connected object being able to depress the snap-hook keeper and release itself.

(i) Positioning device systems shall be inspected prior to each use for wear, damage, and other deterioration, and defective components shall be removed from service.

(j) Body belts, harnesses, and components shall be used only for employee protection (as part of a personal fall arrest system or positioning device system) and not to hoist materials.

(4) Droplines or lifelines used on rock scaling operations, or in areas where the lifeline may be subjected to cutting or abrasion, shall be a minimum of 7/8 inch wire core manila

A-19

rope. For all other lifeline applications, a minimum of 3/4 inch manila or equivalent, with a minimum breaking strength of 5,000 pounds, shall be used.

(5) Safety harnesses, lanyards, lifelines or droplines, independently attached or attended, shall be used while performing the following types of work when other equivalent type protection is not provided:

(a) Work performed in permit required confined spaces and other confined spaces shall follow the procedures as described in chapter 296-62 WAC, Part M.

(b) Work on hazardous slopes, or dismantling safety nets, working on poles or from boatswains chairs at elevations greater than six feet (1.83 m), swinging scaffolds or other unguarded locations.

(c) Work on skips and platforms used in shafts by crews when the skip or cage does not occlude the opening to within one foot (30.5 cm) of the sides of the shaft, unless cages are provided.

(6) Canopies, when used as falling object protection, shall be strong enough to prevent collapse and to prevent penetration by any objects which may fall onto the canopy.

[Statutory Authority: RCW 49.17.010, [49.17.040], and [49.17.050]. 00-14-058, § 296-155-24510, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.050] and [49.17.060]. 96-24-051, § 296-155-24510, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 95-10-016, § 296-155-24510, filed 4/25/95, effective 10/1/95; 95-04-007, § 296-155-24510, filed 1/18/95, effective 3/1/95; 93-19-142 (Order 93-04), § 296-155-24510, filed 9/22/93, effective 11/1/93; 91-24-017 (Order 91-07), § 296-155-24510, filed 11/22/91, effective 12/24/91; 91-03-044 (Order 90-18), § 296-155-24510, filed 1/10/91, effective 2/12/91.]

FILED
COURT OF APPEALS

SEP 27 11:05

CLERK

SEATTLE, WASHINGTON

34441-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON CEDAR & SUPPLY CO., INC.
Appellant

vs

STATE OF WASHINGTON, DEPARTMENT OF
LABOR & INDUSTRIES
Respondent

AFFIDAVIT OF SERVICE OF THE
REPLY BRIEF OF APPELLANT

Jerald A. Klein
Attorney for Appellant
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630
WSBA No 9313

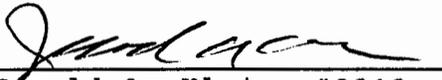
I, Jerald A. Klein, certify that I delivered a copy of the REPLY BRIEF OF APPELLANT to the Respondent at its attorney's address at:

David I. Matlick, AAG
Attorney General's Office
1019 Pacific Ave., 3rd Floor
Tacoma, WA 98402-4411

delivering same to and leaving same with the receptionist between the hours of 8:00 a.m. and 5:00 p.m. on the 24th day of July, 2006.

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

Date: *July 24, 2006*
Place: Tacoma, Washington



Jerald A. Klein, #9313
Attorney for Appellant