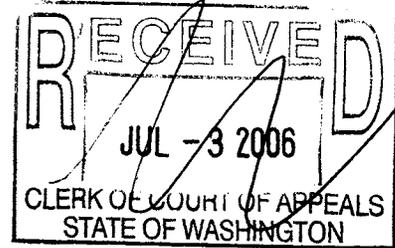


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COURT OF APPEALS

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STATE OF WASHINGTON

BY  NO. 34441-6



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

WASHINGTON CEDAR AND SUPPLY CO. INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	1
III.	STATEMENT OF THE CASE	2
	A. The Department’s Issuance of the WISHA Citation.....	2
	B. Washington Cedar’s Appeal To The Board Of Industrial Insurance Appeals.....	4
	C. Washington Cedar’s Appeal To Superior Court	5
IV.	SUMMARY OF ARGUMENT.....	6
V.	STANDARD OF REVIEW.....	8
VI.	ARGUMENT	9
	A. The Washington Industrial Safety And Health Act (WISHA) Is Remedial Legislation Effectuating A Clear Legislative Purpose.....	9
	B. The Board Correctly Denied Washington Cedar’s Motion To Vacate The Citation Because The Department Served The Citation In A Manner Allowed By Law, And Because Washington Cedar Received Actual And Timely Notice Of The Citation On The very Day That It Was Served.	11
	C. Substantial Evidence And Well-Settled Law Establish That The Board Correctly Determined Both: That Washington Cedar Was In Violation of WAC 296-155- 24510 When Its Employee Was Working At A Height In Excess Of 10 Feet Without The Use Of Any Fall Protection Equipment; And That The Department	

Properly Calculated The Repeat Factor For This Violation.17

1. The Department Proved a Repeat Serious Violation of the Fall Protection Regulation.....17
2. Ensuring Employee Fall Protection is an Employer Duty Under WAC 296-155-2451020
3. Washington Cedar’s Conclusory Argument that Only its employees and Not Washington Cedar as Employer Violated WAC 296-155-24510 Ignores the Regulation’s Requirement that an “Employer Shall Ensure that . . . [Fall Protection] Systems are . . . Implemented.”24
4. Division Three’s *Cobra Roofing* Decision Does Not Support Washington Cedar’s Strained Reading of the Fall Protection Regulation.....25
5. The Department was Not Required to Specify a Particular Subsection in Issuing a WISHA Citation to Washington Cedar for Violating the Fall Protection Regulation at WAC 296-155-24510, Because Washington Cedar Failed to Ensure that *Any* Fall Restraint, Fall Arrest, or Positioning Device System Was Installed and Implemented By Its Employees.27
6. The Department Proved The Employer-Knowledge Element Of The Violation.28
7. Washington Cedar Misplaces Reliance On Division Three’s *Kaiser Aluminum* Decision, Which, Unlike This Case, Involved A “General Duty” Violation.....30
8. Washington Cedar’s Affirmative Defense Of Infeasibility Is Unsupported In The Facts And The Law.34

9. Washington Cedar Was Properly Cited For A Repeat
Violation Of WAC 296-155-24510.....37

D. WAC 296-155-24510 Is Not Unconstitutionally Vague.37

E. Washington Cedar Fails To Establish Grounds For An
Award Of Attorney Fees.....39

VII. CONCLUSION39

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Company</i> , 110 Wn.2d 128, 50 P.2d 1257 (1988)	10
<i>Bancker Const. Corp. v. Reich</i> , 31 F.3d 32 (2nd Cir. 1994)	34
<i>Blankenship v. Kaldor</i> , 114 Wn. App. 312, 57 P.3d 295 (2002)	16
<i>Buckley & Company, Inc., v. Secretary of Labor</i> , 507 F.2d 78 (3d Cir. 1975)	14-16
<i>Callecod v. Washington State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510 (1997)	8-9
<i>Champlin Petroleum Co. v. Occupational Safety & Health Rev. Comm'n</i> , 593 F.2d 637 (5th Cir. 1979)	32
<i>City of Pasco v. PERC</i> , 119 Wn.2d 504, 833 P.2d 381 (1992)	9
<i>Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.</i> , No. 76064-1, 2006 WL 1514351 (Wash. June 1, 2006)	25
<i>Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.</i> , 122 Wn. App. 402, 97 P.3d 17 (2004), <i>aff'd in part and rev'd in part</i> , No. 76064-1, 2006 WL 1514351 (Wash. June 1, 2006)	21, 25-26, 28, 37, 39
<i>Dep't of Labor & Indus. v. Kaiser Aluminum & Chemical Corp.</i> , 111 Wn. App. 771, 48 P.3d 324 (2002)	30-33
<i>Diamond Parking, Inc. v. City of Seattle</i> , 78 Wn.2d 778, 479 P.2d 47 (1971)	13

<i>Diehl v. W. Washington Growth Mgmt. Hearings Bd.</i> , 153 Wn.2d 207, 103 P.3d 193 (2004).....	13
<i>Erection Company v. Dep't of Labor & Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	11
<i>First Fed. Sav. & Loan Assoc. v. Ekanger</i> , 93 Wn.2d 777, 613 P.2d 129 (1980).....	17
<i>Inland Foundry v. Dep't of Labor & Indus.</i> , 106 Wn. App. 333, 24 P.3d 424 (2001).....	38
<i>Lee Cook Trucking v. Dep't of Labor & Indus.</i> , 109 Wn. App. 471, 481, 36 P.3d 558 (2001).....	3, 19, 23
<i>Longview Fibre Co. v. Dep't of Ecology</i> , 89 Wn. App. 627, 949 P.2d 851 (1998).....	38
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000).....	16
<i>Modern Continental/Obayashi v. Occupational Safety & Health Rev. Comm'n</i> , 196 F.3d 274 (1st Cir. 1999).....	33
<i>Multicare Med. Ctr. v. Dep't of Social & Health Services</i> , 114 Wn.2d 572, 790 P.2d 124 (1990).....	9
<i>Nat'l Realty & Constr. Co., Inc. v. Occupational Safety & Health Rev. Comm'n</i> , 489 F.2d 1257 (D.C. Cir. 1973).....	26, 32-33
<i>Santos v. State Farm Fire & Cas. Co.</i> , 902 F.2d 1092 (2d Cir. 1990).....	16
<i>State v. Cooper</i> , 156 Wn.2d 475, 128 P.3d 1234 (2006).....	22
<i>State v. Sullivan</i> , 143 Wn.2d 162, 19 P.3d 1012 (2001).....	38

<i>Stute v. PBMC, Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990)	10, 31
<i>Superior Asphalt Co. v. Dep't of Labor & Indus.</i> , 84 Wn. App. 401, 929 P.2d 1120 (1996).....	9
<i>Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.</i> , 119 Wn. App. 906, 83 P.3d 1012 (2004), <i>review denied</i> , 152 Wn.2d 1003 (2005).....	passim
<i>William Dickson Co. v. Puget Sound Air Pollution Control Auth.</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	8-9

Other Decisions

<i>In re City of Seattle</i> , BIIA Dec., 89 W136 (1991)	32
---	----

Statutes

29 U.S.C. § 651(b)(2)	26
29 U.S.C. § 654.....	31-32
29 U.S.C. § 654(a)(1).....	32
Occupational Safety and Health Act (OSHA) (Title 29 U.S.C.)	10, 14-15, 31
RCW 23B.05.040.....	13-14
RCW 49.17.....	9
RCW 49.17.010.....	10
RCW 49.17.060.....	30-31

RCW 49.17.060(1).....	31, 33
RCW 49.17.060(2).....	21, 31, 33
RCW 49.17.120	11-12, 14, 23
RCW 49.17.120(5).....	23, 36
RCW 49.17.130	11
RCW 49.17.150(1).....	8
RCW 49.17.180	7
RCW 49.17.180(6).....	passim
Washington Industrial Safety and Health Act (WISHA) (Title 49 RCW)	passim

Regulations

Former WAC 296-800-350.....	4
Former WAC 296-800-35040.....	10, 37
WAC 296-155-110(5).....	10
WAC 296-155-200(3).....	24
WAC 296-155-24505(2).....	10
WAC 296-155-24510	passim
WAC 296-800-350.....	4
WAC 296-800-35010.....	13
WAC 296-900-13005.....	13

WAC 296-900-14020..... 4, 10

Court Rules

CR 4 13-14

CR 4(e)(1) 14

Other Authorities

American Heritage Dictionary of the English Language
(4th Ed. 2000) 38

S. Rep. No. 91-1282, 91st Cong., 2d Sess. (Oct. 6, 1970)..... 27

U.S. Code Cong. & Admin. News (1970) 27

I. NATURE OF THE CASE

This case began with an employer's appeal from a citation issued by the Department of Labor and Industries (Department) charging the employer, Washington Cedar and Supply Co. Inc. (Washington Cedar) for a repeat, serious violation of fall protection provisions of Department regulations under the Washington Industrial Safety and Health Act (WISHA). The employer has lost on all issues in all levels of administrative and judicial review below in this case. There is no basis in law or fact for any of the employer's claims that it did not violate the fall protection regulation at WAC 296-155-24510 for which it was cited by the Department, nor are its arguments that the violation was not a repeat violation supportable.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Department serve its WISHA citation in a manner allowed by law, providing Washington Cedar actual and timely notice of the citation?
2. Does substantial evidence and well-settled law support the decision of the Board of Industrial Insurance Appeals that the Department properly cited Washington Cedar for a repeat, serious violation of 296-155-24510, the WISHA regulation requiring employers to ensure that employees use fall protection equipment when performing work on a roof that exposes them to a hazard of falling from a distance of ten feet or higher?

3. Did Washington Cedar fail to establish the affirmative defense of infeasibility of compliance with the WISHA regulations requiring that employers ensure fall protection of their employees?
4. Did Washington Cedar fail to establish beyond a reasonable doubt that the word "ensure" in WAC 296-155-24510 is unconstitutionally vague?

III. STATEMENT OF THE CASE

A. The Department's Issuance Of The WISHA Citation

The citation at issue in this appeal stemmed from a Department inspection performed on May 12, 2003. CABR Sturman at 26.¹ On that date, Department inspector William M. Sturman drove along Bainbridge Island in order to locate and inspect framing construction projects to ensure their compliance with the safety and health standards promulgated under WISHA. CABR Sturman at 26. As Mr. Sturman drove past a new housing construction project on Garibaldi Street, he observed a person standing on a roof who was not wearing any form of fall protection. CABR Sturman at 26-27. Mr. Sturman observed the person long enough to determine that he was not on his way on or off the roof, and was not going to "tie off" or use some other form of fall protection. CABR Sturman at 26-27.

¹ All references to testimony contained in the certified appeal board record (CABR) will be to the small typewritten numbers on the lower right side of the page preceded by the name of the witness. All references to exhibits will be to the exhibit number as designated by the Board. All references to pleadings and other documents made a part of the certified appeal board record will be to the large machine numbers stamped on the lower right side of the page. All references to other documents will be to their designation in the Clerk's Paper's (CP).

Mr. Sturman took a photograph of the person on the roof, who was later identified as Washington Cedar employee Neal Lindberry.² CABR Sturman at 27, 29; Exhibit 2. In addition to Mr. Lindberry, another Washington Cedar employee, Brian Lane, was present at the site, loading a conveyor with roofing materials. CABR Sturman at 28; Exhibit 2.

Mr. Sturman approached the employees, identified himself, and proceeded to collect information for purposes of his inspection. CABR Sturman at 29. Among other things, Mr. Sturman learned that Mr. Lindberry was Washington Cedar's "lead driver" at the site. CABR Sturman at 29. As he continued his inspection, Mr. Sturman determined that the fall distance from the lower eave of the roof on which Mr. Lindberry was standing to the ground was 13.5 feet. CABR Sturman at 31. Mr. Sturman determined that the fall protection violation he observed was a "serious" WISHA violation because a fall off a roof from a height of 10 feet or above could result in serious injuries including serious cuts, bruises, and compound fractures possibly requiring hospitalization. CABR Sturman at 35, 43; *see* RCW 49.17.180(6); *Lee Cook Trucking v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 481, 36 P.3d 558 (2001) (defining "serious" violation).

² During the proceedings at the Board, Mr. Lindberry testified that he was in fact working for Washington Cedar during the incident in question, and that while he was normally in compliance with fall protection rules, he did not wear his fall protection gear on that date because he did not feel that he needed it to be safe. CABR Lindberry at 4-5, 9, 17-20.

As a result of Mr. Sturman's inspection, the Department issued a citation, with a penalty assessed for Washington Cedar's serious violation of the WISHA fall protection standard, WAC 296-155-24510. CABR Sturman at 33-34. Further, Mr. Sturman determined that Washington Cedar's penalty should be increased because of the firm's numerous prior violations of the same regulation, under citations that had become final within the three years immediately preceding his May 12, 2003 inspection. CABR Sturman at 52; *see* WAC 296-900-14020 (formerly WAC 296-800-350). Specifically, evidence established that in the three year period prior to May 12, 2003, eight citations issued to Washington Cedar for fall protection violations of WAC 296-155-24510 had become final as a matter of law. Exhibits 3-9. Accordingly, under the applicable rules Washington Cedar's \$300 adjusted base penalty was multiplied by 9, resulting in a final penalty of \$2,700. CABR Sturman at 55.

B. Washington Cedar's Appeal To The Board Of Industrial Insurance Appeals

Washington Cedar appealed the Citation and Notice to the Board of Industrial Insurance Appeals (Board), and hearings were held before a Board-appointed Industrial Appeals Judge (IAJ). After holding hearings, the IAJ issued a Proposed Decision and Order that upheld the citation and penalty issued by the Department. CABR 61-72. In this order, the IAJ first

affirmed a prior interlocutory order denying a motion by Washington Cedar to vacate the citation due to allegedly-improper service. CABR 61. The IAJ further determined that the Department had established that Washington Cedar violated the fall protection provisions of WAC 296-155-24510, and additionally established the existence of nine final determinations within the three-year period prior to May 12, 2003 in which Washington Cedar had also violated WAC 296-155-24510. CABR 65, 67-68, 70-71. The IAJ observed that the significant number of prior citations issued by the Department to Washington Cedar for violations of the same fall protection rules belied the firm's contention that it effectively enforced its safety rules. CABR 69.

Washington Cedar filed a petition for review to the three-member Board, but the Board denied review. CABR at 1. Consequently, the IAJ's Proposed Decision and Order became the Decision and Order of the Board.

C. Washington Cedar's Appeal To Superior Court

Washington Cedar filed a petition for judicial review in Kitsap County Superior Court. CP 2. After review, the Court entered Findings of Fact, Conclusions of Law and an Order affirming the Board's decision and again upholding the citation. CP 12. Washington Cedar now appeals to this Court, raising arguments that it has lost at every stage of these proceedings and most of which have been rejected in its prior appeals from prior citations. *See, e.g., Washington Cedar & Supply Co., Inc. v.*

Dep't of Labor & Indus., 119 Wn. App. 906, 83 P.3d 1012 (2004), *review denied*, 152 Wn.2d 1003 (2005) (*Washington Cedar I*).

IV. SUMMARY OF ARGUMENT

The Department is responsible for enforcing WISHA. In this role, it enacts rules that protect workers from unsafe working conditions, and inspects employers to ensure that they and their employees use safe work practices. One of the rules the Department enacted requires that when employees are exposed to a hazard of falling from a location 10 feet or more in height, the employer shall “ensure” that a fall protection system is provided, installed and implemented. WAC 296-155-24510.

In the instant case, the Department served its WISHA citation for a violation of WAC 296-155-24510 in a manner allowed by law. Nothing in the controlling statute or Department rule governing the service of citations restricts the manner of service to only the employer’s registered agent or to the employer’s principal place of business. The civil rules do not apply to WISHA judicial review. Moreover, the evidence is clear that a Washington Cedar management officer with authority to contest a Department assessment received actual notice, allowing for a timely appeal of the citation at issue *the same day* the notice and citation was served on Washington Cedar’s Port Orchard yard.

Next, substantial evidence in the record supports the finding that Washington Cedar failed to ensure that its employees installed and implemented a fall protection system according to the requirements of WAC 296-155-24510 when its employees were working on a roof where the fall distance was greater than 10 feet. Accordingly, the Department issued a citation and validly assessed a penalty. RCW 49.17.180 and rules promulgated by the Department confirm the Department's authority to issue a citation and assess penalties of this nature.

Further, Washington Cedar fails to establish the affirmative defense of infeasibility of compliance with WAC 296-155-24510, because actual infeasibility, not high economic cost, is the basis of the defense. No evidence is before this court, nor can any reasonable argument be advanced, that it was impossible for Washington Cedar's employees to install and implement a fall protection system while working on a roof.

Finally, Washington Cedar fails to establish beyond a reasonable doubt that the word "ensure" in WAC 296-155-24510 is unconstitutionally vague. The clear meaning of WAC 296-155-24510 is that an employer with workers exposed to a fall hazard of 10 feet or higher must ascertain and "make certain" that its employees possess *and utilize* an accepted fall protection system.

Both the Board and the Superior Court affirmed the Department citation and the assessment of a civil penalty. The Department requests this Court do the same.

V. STANDARD OF REVIEW

Under WISHA, the Legislature enacted a “substantial evidence” standard of review for appeals to superior court, a standard that requires great deference to the Board “with respect to questions of fact”:

The findings of the board or [its Industrial Appeals Judge] where the board has denied a petition or petitions for review with respect to questions of fact, if supported by *substantial evidence on the record considered as a whole, shall be conclusive.*

RCW 49.17.150(1) (emphasis added).

“Substantial evidence” has been defined as “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *William Dickson Co. v. Puget Sound Air Pollution Control Auth.*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The appellate court applies the “substantial evidence” standard directly to the record created by the administrative agency. *See, e.g., Callecod v. Washington State Patrol*, 84 Wn. App. 663, 670, 929 P.2d 510 (1997). “Agency findings of fact will be upheld if supported by evidence that is substantial when viewed in light of the whole record before the court.” *William Dickson*

Co., 81 Wn. App. at 411. Finally, “[t]he appellate court gives deference to factual decisions [rendered by agencies].” *Id.*

Rules of statutory construction “apply to the interpretation of administrative rules and regulations.” *Multicare Med. Ctr. v. Dep’t of Social & Health Services*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990). Substantial deference should be given to the Department’s interpretation of the law under WISHA. “[T]he agency’s interpretation of the statute is accorded great weight in determining legislative intent when a statute is ambiguous.” *City of Pasco v. PERC*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992); *See also Superior Asphalt Co. v. Dep’t of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996) (“we accord substantial weight to the agency’s legal interpretation to the extent it falls within the agency’s expertise in a special area of the law”). And, as noted in the first section of the Department’s argument immediately below, WISHA and the Department’s regulations must be liberally construed to protect workers.

VI. ARGUMENT

A. **The Washington Industrial Safety And Health Act (WISHA) Is Remedial Legislation Effectuating A Clear Legislative Purpose**

This case is primarily about a clearly written, uncomplicated and basic industrial safety provision under Chapter 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA). Generally, employers are

required to ensure that employees working on a roof at a height of 10 feet or more above the ground use fall protection devices. WAC 296-155-24510. A violation of this regulation can be determined by quick and simple observations by a Department inspector.

WISHA is remedial legislation designed to protect the health and safety of all workers. *See* RCW 49.17.010. Accordingly, any language in a safety standard that the Department has adopted under Chapter 49.17 must be accorded an interpretation to further these purposes. *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). In the instant case, the relevant WISHA rules are WAC 296-155-24510, WAC 296-155-24505(2), WAC 296-155-110(5), and former WAC 296-800-35040.³

Further, the Occupational Safety and Health Act (OSHA) mandates that the Department be “as effective as” its federal counterpart. Thus, in determining what constitutes a WISHA violation, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

³ Former WAC 296-800-35040 addressed reasons of increasing civil penalty amounts, including but not limited to “repeat violations,” where an employer “has been cited one or more times previously for a substantially similar hazard.” This rule was recently recodified at WAC 296-900-14020. However, there were no material changes to the issues that Washington Cedar raises, and this brief will refer to the rule as it existed at the time of the inspection and the citation.

B. The Board Correctly Denied Washington Cedar's Motion To Vacate The Citation Because The Department Served The Citation In A Manner Allowed By Law, And Because Washington Cedar Received Actual And Timely Notice Of The Citation On The Very Day That It Was Served

WISHA authorizes the Department to issue citations and assess penalties against employers for safety violations. RCW 49.17.120; RCW 49.17.130; RCW 49.17.180; *Erection Company v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 517, 852 P.2d 288 (1993). In the instant case, the Board correctly denied a Washington Cedar motion to vacate the Department's citation for improper service. CABR 139-140.

Washington Cedar argues that the Board erred in denying its motion to vacate the citation because notice of the citation was not served on the employer's registered agent at the employer's registered main address. Brief of Appellant (AB) at 21-22. However, Washington Cedar fails to establish as a matter of law that the Department may *only* serve WISHA citations on the agent and at that address. Instead, no statute under WISHA (Title 49 RCW) or rule promulgated under authority of the Act establishes such a requirement. Rather, the applicable law allows the Department to serve notice of the WISHA citation by mail to the address of the store or "yard" involved in the violation. Additionally, it is undisputed that Washington Cedar did receive actual notice of the citation, and in response filed a timely appeal.

First, Washington Cedar's argument is not supported by the plain

language of either the controlling statute or Department rules. RCW 49.17.120, which governs the manner and timing of how the Department must serve notice of alleged violations of WISHA safety rules, states the following:

(1) If upon inspection or investigation the director or his or her authorized representative believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard promulgated by rule adopted by the director, or the conditions of any order granting a variance pursuant to this chapter, the director shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the statute, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

* * *

(4) No citation may be issued under this section or RCW 49.17.130 after the expiration of six months following a compliance inspection, investigation, or survey revealing any such violation.

RCW 49.17.120

Nothing in this statute restricts the manner of service to only the employer's agent registered with the Secretary of State, or at the employer's principal place of business. Cf. AB 21-22. Similarly, the Department rule governing the service of citations following citations does not contain a requirement that citations be mailed to the registered agent or to a principal

place of business. *See* WAC 296-800-35010.⁴

Washington Cedar argues that CR 4 and RCW 23B.05.040 require service on the registered agent. However, and as expressly recognized by the Board in its order denying Washington Cedar's motion, "CR 4 primarily applies to filing and service of a summons and compliant to commence a civil action within the Superior Courts of the State of Washington." CABR 139. Such matters, unlike the instant matter, are within the original jurisdiction of the courts. In contrast, "CR 4 would be inapplicable to communication of an administrative determination of violation and corresponding penalty to the employer... ." CABR 139. This is because the Legislature chose to establish all rights and responsibilities in these administrative proceedings under Title 49 RCW (WISHA). The presence of specific service statutes and rules accordingly control over a general civil rule. *See generally Diamond Parking, Inc. v. City of Seattle*, 78 Wn.2d 778, 791, 479 P.2d 47 (1971) (specific statute controls over general); *see also Diehl v. W. Washington Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 212-16, 103 P.3d 193 (2004) (statutory provisions controlling service in administrative matters control, and civil rules for court proceedings do not apply in this context).

⁴ "After an inspection or an investigation, WISHA will mail a citation to you within 6 months following the inspection or investigation." WAC 296-800-35010. WAC 296-800-35010 was recently revised and recodified at WAC 296-900-13005. However, the changes are immaterial to the issues that Washington Cedar raises and this brief will refer to the rule as it existed at the time of the inspection and the citation."

Further, and as the Board noted, even assuming *arguendo* that CR 4 did apply CR 4(e)(1) establishes that whenever a statute provides for service of a notice, service may be made under the circumstances and in the manner prescribed by statute. CABR 139. Pursuant to RCW 49.17.120, service of notice is on “the employer.” The statute does not limit service to the employer’s registered agent.

Washington Cedar also relies upon RCW 23B.05.040 for the proposition that service must be upon a registered agent rather than a cited employer. However, and as was once again recognized by the Board, RCW 23B.05.050 provides that the statute does “not limit or affect the right to serve a corporation in any manner now or hereafter permitted by law.” CABR 139. As discussed above, RCW 49.17.120 does not limit service to a registered agent.

Washington Cedar relies upon the holding in *Buckley & Company, Inc., v. Secretary of Labor*, 507 F.2d 78 (3d Cir. 1975). AB at 23. However, the facts in that case are distinguishable from the facts before the Board in the instant case. In *Buckley*, federal OSHA safety citations were served upon the employer at one of its maintenance shops (the site of a fatality accident) rather than at the employer’s main address. Significantly, it was noted by the court that the shop superintendent to whom the notice was sent may have been considered responsible for the circumstances leading up to the violations,

leaving open the possibility that this individual might attempt to cover up any dereliction of his duties. *Buckley & Company, Inc.*, 507 F.2d at 80-81. The employer did not timely contest the notice, nor did it notify OSHA that it had abated the violations. A follow-up inspection resulted in new citations that, in part, contained additional penalties for a failure to abate the prior violations.

The *Buckley* Court found improper communication under the federal rules. However, the improper communication merely tolled the 15 day period within which the employer had to protest the citation and notice, giving 15 days from *actual communication*. The *Buckley* court did not hold that the first citation was void for lack of jurisdiction; rather, the remedy provided was to allow the employer additional time to respond to the citation.

In the instant matter, the Department received a signed receipt following its service via registered mail at the employer's delivery yard at issue under this citation. See "Affidavit of Dorothy Lantz," CABR 128-130. There is no dispute that a Washington Cedar representative received notice of the Department's action. Further, and in contrast to the facts in *Buckley*, it is clear that a Washington Cedar management officer with authority to contest a Department assessment received actual notice, allowing for a timely appeal of the citation at issue. In fact, the employer's Notice of Appeal is dated August 29, 2003, *the same day* the notice and citation was served on Washington Cedar's Port Orchard yard. CABR 131-134. Thus, there is no true question

before this Court as to the “probability” that notice was received by the appropriate corporate officer, *see Buckley & Company, Inc.*, 507 F.2d at 81, or whether the Department’s method of service was reasonably calculated to provide such notice. Notice was received, and immediately acted upon, by the employer.⁵

Moreover, Washington case law establishes that the defense of insufficiency of process is waived when there has been an opportunity to raise the defense within sufficient time for the service defect to be cured. *See Blankenship v. Kaldor*, 114 Wn. App. 312, 319, 57 P.3d 295 (2002) (“defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.”). *See also Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir. 1990). Applying this “clean hands” doctrine, the facts of this case dictate that Washington Cedar should not be able to raise this asserted defense.

Finally, the facts establish that the employer was not prejudiced in any way by receiving notice at its delivery yard, rather than at its main

⁵ Likewise, Washington Cedar’s suggestion of a “cover-up,” (*see* AB 23) is absurd, since Washington Cedar received the citation within the time allowed by law, confirmed its receipt of the citation, and filed a timely appeal. There is no error.

headquarters. Accordingly, this Court should decline to accept the employer's invitation to elevate form over substance. *See First Fed. Sav. & Loan Assoc. v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) (holding that "whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form"). Washington Cedar's motion to vacate the Department's citation due to allegedly improper service was clearly without merit.

C. Substantial Evidence And Well-Settled Law Establish That The Board Correctly Determined Both: That Washington Cedar Was In Violation of WAC 296-155-24510 When Its Employee Was Working At A Height In Excess Of 10 Feet Without The Use Of Any Fall Protection Equipment; And That The Department Properly Calculated The Repeat Factor For This Violation

1. The Department Proved A Repeat Serious Violation Of The Fall Protection Regulation

The substantive issues on appeal in this matter are whether the Board correctly upheld: 1) the validity of the Department's citation to Washington Cedar for a fall protection violation under WAC 296-155-24510, and 2) the validity of the Department's classifying the violation as a "repeat" violation. The WISHA regulation that the Department charged Washington Cedar with violating establishes the following:

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*

devices systems are provided, installed and implemented according to the following requirements... .

WAC 296-155-24510 (emphasis added). Technical equipment requirements follow in sub-sections of the rule. *See* Appendix A.

To establish a prima facie case of a violation under WISHA, the Department must establish the following five elements:

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

Washington Cedar I, 119 Wn. App. at 914.

Factually there is no dispute that a Washington Cedar employee was working at a height in excess of 10 feet without the use of any fall protection. The Department's inspector, Mr. Sturman, testified that he observed the employee without fall protection equipment and estimated the fall distance at approximately 13.5 feet. CABR Sturman at 26-27, 31; Exhibit 2. Not only did the employer fail to present any evidence to rebut Mr. Sturman's testimony, but the Washington Cedar employee in question expressly testified that he failed to use his fall protection equipment. CABR Lindberry at 4-5, 9, 17-20.

Additionally, it was established without dispute that on multiple prior occasions Department inspectors have cited Washington Cedar for violations of the same fall protection safety provision. Exhibits 3-9. As explained below in subsequent subsections of this argument, these undisputed facts establish both the employer-knowledge element of the instant violations (*see infra* VI.C.6 (employer knowledge) and VI.C.9. (repeat violation)).

Further, evidence (and common logic) established that if the Washington Cedar employee were to have fallen from this roof – a distance to the ground of more than 13 feet – there was a substantial probability of serious injuries including serious cuts, bruises, and fractures possibly requiring hospitalization. CABR Sturman at 35, 43. Even Washington Cedar’s yard manager, Mr. Honeycutt, conceded that a fall from a roof could possibly result in a trip to an emergency room. CABR Honeycutt at 63. *See Lee Cook Trucking*, 109 Wn. App. at 482 (holding that the “substantial probability” language in RCW 49.17.180(6) “refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.”)

Thus, it was established that the fall protection standard applies, as an employee was exposed to a fall hazard of more than 10 feet. A requirement of the WISHA standard, to ensure that fall protection is *installed and implemented*, was not met by the employer, and the employee was exposed

to a violative condition when the employee failed to use his fall protection equipment. Based upon numerous prior citations, Washington Cedar knew that its employees have a habit of failing to use fall protection equipment as required by both company rules and state law, and that this failure could lead to a fall resulting in a serious physical harm. A prima facie case was clearly established by the Department. *See Washington Cedar I*, 119 Wn. App. at 916 and see discussion *infra* VI.C.6.

In its efforts to avoid the clear prima facie evidence presented by the Department and to avoid the clear language of the controlling fall protection regulation, Washington Cedar advances clearly flawed statements of the evidence and the law. None of Washington Cedar's contentions or arguments have any merit.

2. Ensuring Employee Fall Protection Is An Employer Duty Under WAC 296-155-24510

Washington Cedar argues that the rule in question establishes a duty for *employees* to follow safety rules, but does not establish a duty for *employers* to ensure employee compliance with fall protection rules. AB 24-38.⁶ This novel, strained, and ultimately conclusory and indecipherable argument has no merit. In fact, WAC 296-155-24510 creates a specific duty for employer Washington Cedar to comply with the regulation promulgated

⁶ Washington Cedar also relies upon this flawed argument in contending that its prior violations of WAC 296-155-24510 do not establish a "repeat" violation. AB 45-46.

under WISHA. *See* RCW 49.17.060(2). The plain language of WAC 296-155-24510 expressly establishes “the *employer shall ensure* that fall restraint, fall arrest systems or positioning devices systems are provided, installed and implemented... .”

Washington courts have consistently upheld citations issued to employers for violations of WAC 296-155-24510, thus implicitly if not expressly recognizing that ensuring employee compliance with this regulation is an employer’s duty. Washington Cedar ignores the fact that one of the leading cases in this area of law is this Court’s recent affirmation of one of this very employer’s prior citations under this basic safety rule. *Washington Cedar I*, 119 Wn. App. at 909 (“The Department of Labor and Industries (L&I) cited Washington Cedar and Supply (Washington Cedar) for failing to ensure that its employees were wearing fall restraints when they delivered materials onto the roof of a construction site . . . and finding no error in the Board's decision, we also affirm.”); *See also Cobra Roofing Servs., Inc. v. Dep’t of Labor & Indus*, No. 76064-1, 2006 WL 1514351 (June 1, 2006) (Court determined that Department properly cited an employer’s fall protection safety violation under WAC 295-155-24510 as a repeat offense).

Washington Cedar’s argument attempting to distinguish between “employer” and “employee” violations of WISHA standards also renders

superfluous at least two statutory provisions, a result to be avoided wherever possible. *E.g.*, *State v. Cooper*, 156 Wn.2d 475, 483, 128 P.3d 1234 (2006). First, RCW 49.17.180(6) provides that a “serious violation” exists:

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

Obviously an employer knows of violations that it commits. The only purpose of this statute is to excuse violations where employers “did not, and could not with the exercise of reasonable diligence, know of the presence of [a] violation” *committed by an employee*. Washington Cedar effectively concedes as much. AB 39-44. If Washington Cedar were correct that only “employees” can commit WISHA violations, the “could have known” language of RCW 49.17.180(6) would be rendered meaningless.

The illogic of Washington Cedar’s argument that only employees can violate WISHA (and that employers are never responsible for actions of their individual employees) is also demonstrated by juxtaposing this theory that Washington Cedar has created against the affirmative defense

of unpreventable employee misconduct that the Legislature has provided to employers in RCW 49.17.120(5). This law provides that:

(5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

(i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;

(ii) Adequate communication of these rules to employees;

(iii) Steps to discover and correct violations of its safety rules; and

(iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5).

Washington Cedar argues that only employees can commit a violation of WAC 296-155-24510. *See, e.g.*, AB 29-30. But why, then, would RCW 49.17.120 allow an *employer* to defend a citation for a violation of this rule by arguing that the violation was the result of “unpreventable employee misconduct?” Obviously, this statute makes sense only if employees commit WISHA violations, in the first place, employers who have direct knowledge or constructive knowledge (*see infra* VI.C.6) are responsible for those violations, in the second place. Washington Cedar’s argument renders RCW 49.17.120(5) meaningless and for this reason as well must be rejected. *See, e.g., Lee Cook Trucking*, 109 Wn. App. at 481.

3. Washington Cedar's Conclusory Argument That Only Its employees And Not Washington Cedar As Employer Violated WAC 296-155-24510 Ignores The Regulation's Requirement That An "Employer Shall Ensure That . . . [Fall Protection] Systems Are . . . Implemented"

Washington Cedar argues that WAC 296-155-24510 requires that an employer purchase and provide its employees with approved fall protection hardware, but that the regulation does not require that an employer "ensure" that the equipment be installed and implemented by its employees. AB 29-38. This interpretation is contrary to the plain language of the regulation, which expressly requires "*the employer shall ensure* that fall restraint, fall arrest systems or positioning devices systems are provided, installed and *implemented . . .*" WAC 296-155-24510. (Emphasis added).⁷

WAC 296-155-24510 establishes multiple employer duties. First, the employer must purchase or otherwise provide its employees with equipment that comports with the rule's technical requirements. Second, the employer must ensure that the approved equipment is provided to *and used* ("installed and implemented") by its employees. Washington Cedar

⁷ A related argument is Washington Cedar's strained contention that its responsibility is limited to "providing hardware," while the firm's employees are responsible for actually *using* the equipment. See AB 29-38.

Again, the firm ignores the plain language of the cited standard, which requires employers to "ensure that fall restraint device systems are provided, installed *and implemented . . .*" WAC 296-155-24510 (cited at AB 26). See also AB 33 (quoting WAC 296-155-200(3), which provides that "[t]he employer is responsible *for requiring the wearing of appropriate personal protective equipment* in all operations where there is an exposure to hazardous conditions . . .").

goes on for many pages in its opening brief (*see* AB 29-38) in attempting to construct an argument for an interpretation to the contrary, but the Department can find in the Washington Cedar brief neither a logical construct nor any semantical or grammatical basis for Washington Cedar's conclusory and ultimately indecipherable "interpretation."

This Court should reject this employer's illogical assertion that a WISHA rule, adopted under remedial legislation designed to protect the health and safety of all workers, would require employers to purchase equipment according to specific requirements, but not ensure that the equipment actually be used when its employees are exposed to potentially dangerous conditions. The Department did not cite Washington Cedar for a failure to purchase proper fall protection equipment. The Department cited the employer because the Department determined that the employer failed to *ensure* that its employees actually *use* that equipment, a serious safety hazard. The evidence is clear and un rebutted that Washington Cedar failed to ensure that its employee installed and implemented fall protection.⁸

4. Division Three's *Cobra Roofing* Decision Does Not Support Washington Cedar's Strained Reading Of The Fall Protection Regulation

Washington Cedar cites to *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 97 P.3d 17 (2004) (affirmed in part

⁸ This argument as well would render the unpreventable employee misconduct defense meaningless.

and reversed in part at No. 76064-1, 2006 WL 1514351 (June 1, 2006)) and claims that Division Three held in that case that WAC 296-155-24510 does not establish an employer obligation to ensure that employees wear or implement fall protection safety gear. AB 28-29. This is either a gross misreading, or an intentional misstatement, of Division Three's holding; the employer in *Cobra Roofing* did not even contest that it violated the regulation, but rather contended that the Department did not establish that the employer's admitted violation was a repeat of a previous violation. Division Three ultimately held that *Cobra Roofing* was properly cited by the Department for a repeat violation. *Id.* at 415.⁹ *Cf. Nat'l Realty & Constr. Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, n.36 (D.C. Cir. 1973):

This is not to say that an employer's statutory responsibility for a hazard vanishes, or is even diminished, because the hazard was directly caused by an employee. The Act provides 'that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions.' 29 U.S.C. § 651(b)(2). *An employer has a duty to prevent and suppress hazardous conduct by employees, and this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence.*

The committee does not intend the employee-duty (to comply with the occupational safety and health standards

⁹ This holding was affirmed in *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, No. 76064-1, 2006 WL 1514351 (Wash. June 1, 2006).

promulgated under the Act) provided in section 5(b) to diminish in anyway the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. *Final responsibility for compliance with the requirements of this act remains with the employer.*

Id., *citing* S. Rep. No.91-1282, 91st Cong., 2d Sess., 9 (Oct. 6, 1970), U.S. Code Cong. & Admin. News (1970), p. 5177 (emphasis added).

5. The Department Was Not Required To Specify A Particular Subsection In Issuing A WISHA Citation To Washington Cedar For Violating The Fall Protection Regulation At WAC 296-155-24510, Because Washington Cedar Failed To Ensure That Any Fall Restraint, Fall Arrest, Or Positioning Device System Was Installed And Implemented By Its Employees

Equally curious is the argument by Washington Cedar that the Department improperly cited it under “WAC 296-155-24510” without specifying one of the subsections of that standard. *See, e.g.,* AB 26 (“[t]he requirements [of the subsections of WAC 296-155-24510] are specifications for the safety equipment, such as length of the life line, and type of metal finish on the hardware. However, the citation does not allege that the Employer violated one of the requirements of WAC 296-155-24510 . . .”).

As noted above, WAC 296-155-24510 requires employers to “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 establishes multiple employer duties. The employer must purchase or otherwise provide its employees with fall protection equipment that comports with the rule's technical requirements. But just as importantly, the employer must ensure that the approved equipment is provided to and used ("*installed and implemented*") by its employees.

Washington Cedar apparently believes that the Department was required to specify which of "the following requirements" the firm failed to satisfy. Of course, since its employees were not tied off at the time of the inspection, Washington Cedar had "implemented" *none* of "the following requirements" of WAC 296-155-24510. The Department accordingly cited Washington Cedar under the umbrella language of WAC 296-155-24510, rather than issuing a separate violation for each of the rule's more than one dozen subsections (*i.e.*, distinct means of compliance, none of which Washington Cedar met). A citation of precisely this sort was recently upheld in *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, No. 76064-1, 2006 WL 1514351 (June 1, 2006).

6. The Department Proved The Employer-Knowledge Element Of The Violation

Washington Cedar asserts that the Department did not establish that Washington Cedar knew or should reasonably have known of the violative

condition. AB 39-44. Washington Cedar argues it should be excused from its violation because there was no evidence that it had actual knowledge that *this particular employee* was not using fall protection at *this particular jobsite* at the time of *this particular inspection*. In advancing this argument, however, Washington Cedar simply ignores this Court's holding under Washington Cedar's own recent prior appeal of one of Washington Cedar's numerous previous fall protection violations. *Washington Cedar I*, 119 Wn. App. at 916 ("We agree that the evidence of similar past violations was sufficient to support a finding that Washington Cedar was on notice that its employees were not complying with its safety requirements.").

Washington Cedar thus fails in its attempt to distinguish *Washington Cedar I*. Nowhere in that prior decision is there any support for Washington Cedar's argument at AB 39-44 that employer constructive knowledge (the "should have known" test) cannot be inferred without proof that the employer had direct knowledge that prior violations were committed either: 1) by the same employee or 2) under the supervision of the same supervisor. This Court placed no such illogically narrow limits on its recidivism-logic in its prior published decision against Washington Cedar when this Court relied on evidence of past violations by employees as sufficient evidence on the employer-knowledge element:

L & I responds [to Washington Cedar's no-direct-knowledge-of-violation argument] that repeat citations for the same safety violation should put an employer on notice that it is not effectively enforcing its safety program. Thus, absent changes in the safety program or increased enforcement measures, the employer should anticipate continued violations...

We agree that the evidence of similar past violations was sufficient to support a finding that Washington Cedar was on notice that its employees were not complying with its safety requirements. Because of the discretion we give to the agency as fact finder, we will not disturb the Board's conclusion that the employer should have been aware of the violation.

Washington Cedar I, 119 Wn. App. at 916.

7. Washington Cedar Misplaces Reliance On Division Three's *Kaiser Aluminum* Decision, Which, Unlike This Case, Involved A "General Duty" Violation

Despite the unrefuted evidence in this case demonstrating that it was properly cited, Washington Cedar relies upon *Dep't of Labor & Indus. v. Kaiser Aluminum & Chemical Corp.*, 111 Wn. App. 771, 782, 48 P.3d 324 (2002) to argue that the Department was required to establish as part of its prima facie case specific particular steps Washington Cedar should have taken to avoid the citations. AB 44-46. Washington Cedar's contention is incorrect, as it attempts to add an element to the well-established prima facie test for proving violations of specific WISHA regulations, and confuses the Department's burden in the instant case, where citation was issued pursuant to the "specific duty clause" of RCW 49.17.060,

with the Department's burden in the *Kaiser Aluminum* case, where the citation was issued under the "general duty clause" of RCW 49.17.060.

WISHA imposes two kinds of requirements on employers—a general duty and a specific duty. First, each employer "[s]hall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees." RCW 49.17.060(1) (Emphasis added). This is the general duty clause. Second, employers "[s]hall comply with the rules, regulations, and orders promulgated under this chapter." RCW 49.17.060(2). This is the specific duty clause.

The general duty and specific duty clauses are separate regulatory tools that do not overlap. The Department cannot issue a citation or an order assessing a penalty under the general duty clause unless "no applicable rule or regulation has been adopted . . . covering the unsafe or unhealthful condition of employment at the work place." RCW 49.17.060(1). "RCW 49.17.060 creates a two-fold duty." *Stute v. P.B.M.C., Inc.*, 114 Wn.2d at 457. First, subsection 1 "imposes a general duty on employers to protect only the employer's own employees from recognized hazards not covered by specific safety regulations." *Id.* Second, subsection 2 "imposes a specific duty to comply with WISHA regulations." *Id.* OSHA imposes the same two duties on employers. 29

U.S.C. § 654; *Nat'l Realty & Constr. Co. Inc. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1261 (D.C. Cir. 1973).

Thus, it is settled law that the burden on the Department is different when prosecuting a case alleging a violation of the general duty clause, as opposed to prosecution of a case alleging a violation of a specific standard. To prove a violation of the general duty clause, L&I must “show the employer failed to render the workplace free of (1) a hazard, which (2) was recognized, and (3) caused or was likely to cause death or serious injury”. *Kaiser Aluminum*, 111 Wn. App. at 780, 48 P.3d 324 (2002).¹⁰ As part of this burden, L&I “must specify the particular steps the employer should have taken to avoid the citation [and] must demonstrate the feasibility and likely utility of those measures.” *Id.* at 782.¹¹

¹⁰ Washington’s Board of Industrial Insurance Appeals, the quasi-judicial agency that first considers appeals from WISHA citations issued by L&I, has described a similar standard. See *In re City of Seattle*, BIIA Dec., 89 W136 (1991) (“To establish a violation of the ‘general duty’ standards, the Department must establish three basic elements: 1) the employer failed to provide a workplace free from hazard; 2) the hazard is recognized; and 3) the hazard is likely to cause death or serious physical injury.”).

¹¹ The same burden applies in cases alleging a violation of the OSHA general duty clause in 29 U.S.C. § 654(a)(1). *Champlin Petroleum Co. v. Occupational Safety & Health Rev. Comm'n*, 593 F.2d 637, 640 (5th Cir. 1979) (“To establish a general duty clause violation, the Secretary must prove (1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm. . . . It is the Secretary’s burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred.”).

In contrast, L&I carries a lighter burden when it seeks to prove violation of a specific health and safety standard, such as the requirement in the instant case under WAC 296-155-24510 to “ensure” that employees install and utilize fall protection equipment. To prove the violation of a specific safety standard, L&I must show 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; [and] (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition.” *Washington Cedar*, 119 Wn. App. at 914.¹²

Here, *Washington Cedar* cites to *Kaiser Aluminum* in support of its argument that the Department must prove the feasibility of compliance with the standard. AB 44-46. *Kaiser Aluminum*, however, was an appeal involving general duty clause citations under RCW 49.17.060(1). *Kaiser Aluminum*, 111 Wn. App. at 779-780. In contrast, the citation issued to *Washington Cedar* involved a specific health and safety standard. See RCW 49.17.060(2); WAC 296-155-24510. *Kaiser Aluminum* therefore

¹² Similarly, at the federal level, to “establish a violation of an OSHA standard, the Secretary must show: (a) the applicability of the cited standard; (b) the employer’s noncompliance with the standard; (c) employee access to the violative conditions; and (d) the employer’s actual or constructive knowledge of the violation”. *Modern Continental/Obayashi v. Occupational Safety & Health Rev. Comm’n*, 196 F.3d 274, 279 (1st Cir. 1999).

provides no support for Washington Cedar's contention. No error can be predicated upon the assertion that the Department was required to meet standards for establishing a general duty violation.

8. Washington Cedar's Affirmative Defense Of Infeasibility Is Unsupported In The Facts And The Law

Apparently recognizing (though not expressly admitting) that it, as employer, is generally responsible for an employee violation unless it can prove infeasibility where there is, as here, the violation of a specific regulation, Washington Cedar attempts to assert an affirmative infeasibility defense. Specifically, it claims that it is impossible for it to ensure that its workers comply with fall protection rules. AB 47-49. The employer offers that the only way that it can enforce its rules would be to have a "tag-along" supervisor, which would be economically infeasible. However, Washington Cedar erroneously cites to *Bancker Const. Corp. v. Reich*, 31 F.3d 32 (2nd Cir. 1994), in support of its economic infeasibility argument. *Bancker* stands for the proposition that:

“[t]he cited employer bears the burden of showing that compliance with the standard's literal requirements was impossible or would have precluded performance of the work.” [Citations omitted] The employer also must show that it used alternative means of protection not specified in the standard or that alternative means were unavailable.

Bancker, 31 F.3d at 34. The *Bancker* opinion establishes that actual infeasibility, not high economic cost, is the basis of the defense. In the

instant case there is no evidence before this court, nor can any reasonable argument be advanced, that it was impossible for Washington Cedar's employees to properly tie off while working on the roof.

Washington Cedar's argument is also contrary to common sense. Scores of employers manage to comply with WISHA's requirement that Washington employers "ensure" that their workers install and *implement* fall protection equipment when exposed to the significant hazard of falling ten feet or more. Washington Cedar offers no explanation for its contention that, in contrast to all of these employers, it should be excused from compliance with the standard because it is apparently too busy to meet its statutory responsibility. The fact is that Washington Cedar has repeatedly, under the evidence in this case and under the evidence in *Washington Cedar I*, simply failed its duty to ensure employee compliance with WISHA standards. This case is no different from the firm's numerous other violations, particularly those affirmed in *Washington Cedar I*, the case that it previously lost in the Court of Appeals while making arguments essentially identical to those it now makes.

By attempting to blame its employees for its own violations, what Washington Cedar is truly trying to establish is the affirmative defense of unpreventable employee misconduct. Of course, the firm does not actually

argue that this defense applies, nor could it: Unpreventable employee misconduct requires a showing of:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

RCW 49.17.120(5). Washington Cedar does not cite this statute – which establishes the *only* means under which an employer may escape responsibility for violations committed by “a troubled employee.” *See* AB 36. Nor is there evidence in the record to support such a defense. As the IAJ observed in the Board’s Proposed Decision and Order, the significant number of prior citations issued by the Department to Washington Cedar for violations of the same fall protection rules belied any contention that Washington Cedar effectively enforced its safety rules. Exhibits 3-9, CABR 69. Because Washington Cedar cannot show unpreventable employee misconduct, the mere fact that its employees for whom it is responsible, rather than Washington Cedar as employer, failed to use fall protection does not insulate the firm from liability under WISHA.

9. Washington Cedar Was Properly Cited For A Repeat Violation Of WAC 296-155-24510

Washington Cedar takes issue with the Board's affirmance of the Department's "repeat" citation, contending that the Department "failed to show a substantially similar hazard." AB 46; *see* WAC 296-800-35040 (repeat violation occurs when employer cited multiple times "for substantially similar hazard"). Our Supreme Court recently held that multiple violations of WAC 296-155-24510 – *with no further evidence of the facts underlying the prior violations* – amounted to a "substantially similar hazard" and were properly cited as repeat violations. *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, No. 76064-1, 2006 WL 1514351 (June 1, 2006).

In *Cobra Roofing* (in which Washington Cedar participated as an amicus), the Supreme Court specifically rejected the contention that the repeat "inquiry directs the focus to the specific acts or omissions of the employer," and instead followed the plain language of the repeat violation regulation: the existence of a "substantially similar hazard." WAC 296-155-24510 specifically addresses the hazard of falling from a height of ten or more feet. Under *Cobra Roofing*, multiple violations of this standard plainly constitute a "substantially similar hazard."

D. WAC 296-155-24510 Is Not Unconstitutionally Vague

Washington Cedar's conclusory, one-paragraph, void-for-vagueness attack on WAC 296-155-24510 (AB 49-50) is likewise without any merit. Statutes are presumed constitutional. *State v. Sullivan*, 143 Wn.2d 162, 180, 19 P.3d 1012 (2001). Similarly, "[a] duly adopted regulation is presumed constitutional." *Inland Foundry v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 339 24 P.3d 424 (2001) (citing *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632, 949 P.2d 851 (1998)). The party raising a vagueness challenge bears the heavy burden of proving unconstitutionality beyond a reasonable doubt. *Id.* A statute or regulation does not have to satisfy impossible standards of specificity. *Inland Foundry v. Dep't of Labor & Indus.*, 106 Wn. App. at 339.

Washington Cedar has failed to establish that the word "ensure" contained within WAC 296-155-24510 is vague. A person of common intelligence does not have to guess at the word's meaning. "Ensure" means "[t]o make sure or certain, to guarantee." *American Heritage Dictionary of the English Language* at 681 (Fourth Ed. 2000). The clear meaning of WAC 296-155-24510 is that an employer with workers exposed to a fall hazard of 10 feet or higher must ascertain and "make certain" that its employees possess *and utilize* an accepted fall restraint system. The rule creates an unambiguous duty for employers to protect their employees from fall hazards.

E. Washington Cedar Fails To Establish Grounds For An Award Of Attorney Fees

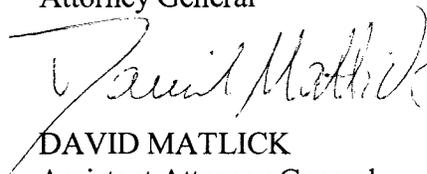
Finally, Washington Cedar seeks an award of attorney fees under the Equal Access to Justice Act (EAJA). However, even if Washington Cedar were to prevail in its appeal, the Supreme Court recently held that EAJA attorney fees may not be awarded in WISHA appeals. *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, No. 76064-1, 2006 WL 1514351 (June 1, 2006).

VII. CONCLUSION

Washington Cedar's assignments of error are wholly without merit. The factual determinations in the Board's Decision and Order are supported by substantial evidence, and the conclusions of law by the Board and superior court are correct. For the reasons expressed above, the Department asks that the court affirm the Kitsap County Superior Court decision affirming the Board's affirmance of the Department's WISHA citation.

RESPECTFULLY SUBMITTED this 3rd day of July, 2006.

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NO. 34441-6

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

WASHINGTON CEDAR & SUPPLY
CO., INC.

Appellant

vs

STATE OF WASHINGTON
DEPARTMENT OF LABOR &
INDUSTRIES

AFFIDAVIT OF
SERVICE AND
MAILING

STATE OF WASHINGTON)
County of Pierce) ss
)

KIMBERLY WILCOX, being first duly sworn, upon oath, deposes and says:

I am a citizen of the United States of America, over the age of 21 years, and competent to be a witness herein.

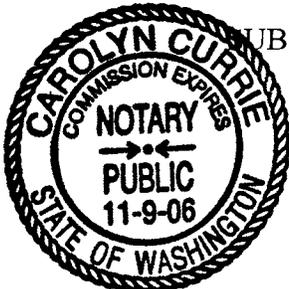
1. On July 3, 2006, David Matlick hand delivered with the Court of Appeals, Division II, the Brief of Respondent.

2. On the same day I mailed a true and correct copy of the brief to:

Jerald A. Klein, Attorney at Law
823 Joshua Green Bldg
1425 Fourth Ave, Ste 823
Seattle, WA 98101-2236

Kimberly Wilcox
KIMBERLY WILCOX, Legal Assistant

SUBSCRIBED AND SWORN to before me this 3rd day of July, 2006.



Carolyn Currie
NOTARY PUBLIC
Commission Expires: 11-09-2006

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COURT APPEALS

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STATE OF WASHINGTON

BY _____

NO. 34441-6

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

WASHINGTON CEDAR AND SUPPLY CO. INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT

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29 U.S.C.A. § 651

▽

Effective: [See Text Amendments]

United States Code Annotated Currentness

Title 29. Labor

■ Chapter 15. Occupational Safety and Health (Refs & Annos)

→ § 651. Congressional statement of findings and declaration of purpose and policy

(a) [FN1] The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

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Page 1

29 U.S.C.A. § 654

C**Effective: [See Text Amendments]**

United States Code Annotated Currentness

Title 29. Labor

Chapter 15. Occupational Safety and Health (Refs & Annos)

→ § 654. Duties of employers and employees

(a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

CREDIT(S)

(Pub.L. 91-596, § 5, Dec. 29, 1970, 84 Stat. 1593.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1970 Acts. Senate Report No. 91-1282 and Conference Report No. 91-1765, see 1970 U.S. Code Cong. and Adm. News, p. 5177.

References in Text

This chapter, referred to in subsecs. (a) and (b), was in the original "this Act", meaning Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 651 of this title and Tables.

Effective and Applicability Provisions

1970 Acts. Section effective 120 days after Dec. 29, 1970, see section 34 of Pub.L. 91-596, set out as a note under section 651 of this title.

CROSS REFERENCES

Civil penalty for willful or repeated violations of duties of employer, see 29 USCA § 666.

Grounds to issue citation to employer, see 29 USCA § 658.

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RCW 23B.05.040
Service on corporation.

(1) A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(2) The secretary of state shall be an agent of a corporation upon whom any such process, notice, or demand may be served if:

(a) The corporation fails to appoint or maintain a registered agent in this state; or

(b) The registered agent cannot with reasonable diligence be found at the registered office.

(3) Service on the secretary of state of any such process, notice, or demand shall be made by delivering to and leaving with the secretary of state, or with any duly authorized clerk of the corporation department of the secretary of state's office, the process, notice, or demand. In the event any such process, notice, or demand is served on the secretary of state, the secretary of state shall immediately cause a copy thereof to be forwarded by certified mail, addressed to the secretary of the corporation at the corporation's principal office as shown on the records of the secretary of state. Any service so had on the secretary of state shall be returnable in not less than thirty days.

(4) The secretary of state shall keep a record of all processes, notices, and demands served upon the secretary of state under this section, and shall record therein the time of such service and the secretary of state's action with reference thereto.

(5) This section does not limit or affect the right to serve any process, notice, or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law.

[1989 c 165 § 43.]

RCW 49.17.010**Purpose.**

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. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

[1973 c 80 § 1.]

Notes:

Industrial insurance: Title 51 RCW.

RCW 49.17.060

Employer — General safety standard — Compliance.

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

[1973 c 80 § 6.]

RCW 49.17.120
Violations — Citations.

(1) If upon inspection or investigation the director or his or her authorized representative believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard promulgated by rule adopted by the director, or the conditions of any order granting a variance pursuant to this chapter, the director shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the statute, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

(2) The director may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(3) Each citation, or a copy or copies thereof, issued under the authority of this section and RCW 49.17.130 shall be prominently posted, at or near each place a violation referred to in the citation occurred or as may otherwise be prescribed in regulations issued by the director. The director shall provide by rule for procedures to be followed by an employee representative upon written application to receive copies of citations and notices issued to any employer having employees who are represented by such employee representative. Such rule may prescribe the form of such application, the time for renewal of applications, and the eligibility of the applicant to receive copies of citations and notices.

(4) No citation may be issued under this section or RCW 49.17.130 after the expiration of six months following a compliance inspection, investigation, or survey revealing any such violation.

(5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

- (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
- (ii) Adequate communication of these rules to employees;
- (iii) Steps to discover and correct violations of its safety rules; and
- (iv) Effective enforcement of its safety program as written in practice and not just in theory.

(b) This subsection (5) does not eliminate or modify any other defenses that may exist to a citation.

[1999 c 93 § 1; 1973 c 80 § 12.]

RCW 49.17.130

Violations — Dangerous conditions — Citations and orders of immediate restraint — Restraints — Restraining orders.

(1) If upon inspection or investigation, the director, or his authorized representative, believes that an employer has violated a requirement of RCW 49.17.060, or any safety or health standard promulgated by rules of the department, or any conditions of an order granting a variance, which violation is such that a danger exists from which there is a substantial probability that death or serious physical harm could result to any employee, the director or his authorized representative shall issue a citation and may issue an order immediately restraining any such condition, practice, method, process, or means in the work place. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such danger and prohibit the employment or presence of any individual in locations or under conditions where such danger exists, except individuals whose presence is necessary to avoid, correct, or remove such danger or to maintain the capacity of a continuous process operation in order that the resumption of normal operations may be had without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. In addition, if any machine or equipment, or any part thereof, is in violation of a requirement of RCW 49.17.060 or any safety or health standard promulgated by rules of the department, and the operation of such machine or equipment gives rise to a substantial probability that death or serious physical harm could result to any employee, and an order of immediate restraint of the use of such machine or equipment has been issued under this subsection, the use of such machine or equipment is prohibited, and a notice to that effect shall be attached thereto by the director or his authorized representative.

(2) Whenever the director, or his authorized representative, concludes that a condition of employment described in subsection (1) of this section exists in any work place, he shall promptly inform the affected employees and employers of the danger.

(3) At any time that a citation or a citation and order restraining any condition of employment or practice described in subsection (1) of this section is issued by the director, or his authorized representative, he may in addition request the attorney general to make an application to the superior court of the county wherein such condition of employment or practice exists for a temporary restraining order or such other relief as appears to be appropriate under the circumstances.

[1973 c 80 § 13.]

RCW 49.17.150**Appeal to superior court — Review or enforcement of orders.**

(1) Any person aggrieved by an order of the board of industrial insurance appeals issued under RCW 49.17.140(3) may obtain a review of such order in the superior court for the county in which the violation is alleged to have occurred, by filing in such court within thirty days following the communication of the board's order or denial of any petition or petitions for review, a written notice of appeal praying that the order be modified or set aside. Such appeal shall be perfected by filing with the clerk of the court and by serving a copy thereof by mail, or personally, on the director and on the board. The board shall thereupon transmit a copy of the notice of appeal to all parties who participated in proceedings before the board, and shall file in the court the complete record of the proceedings. Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings and the record of proceedings a decree affirming, modifying, or setting aside in all or in part, the decision of the board of industrial insurance appeals and enforcing the same to the extent that such order is affirmed or modified. The commencement of appellate proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the board of industrial insurance appeals. No objection that has not been urged before the board shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board or hearing examiner where the board has denied a petition or petitions for review with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, the court may order such additional evidence to be taken before the board and to be made a part of the record. The board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact are supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and the judgment and decree shall be final, except as the same shall be subject to review by the supreme court. Appeals filed under this subsection shall be heard expeditiously.

(2) The director may also obtain review or enforcement of any final order of the board by filing a petition for such relief in the superior court for the county in which the alleged violation occurred. The provisions of subsection (1) of this section shall govern such proceeding to the extent applicable. If a notice of appeal, as provided in subsection (1) of this section, is not filed within thirty days after service of the board's order, the board's findings of fact, decision, and order or the examiner's findings of fact, decision, and order when a petition or petitions for review have been denied shall be conclusive in connection with any petition for enforcement which is filed by the director after the expiration of such thirty day period. In any such case, as well as in the case of an unappealed citation or a notification of the assessment of a penalty by the director, which has become a final order under subsection (1) or (2) of RCW 49.17.140 upon application of the director, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the citation and notice of assessment of penalty and shall transmit a copy of such decree to the director and the employer named in the director's petition. In any contempt proceeding brought to enforce a decree of the superior court entered pursuant to this subsection or subsection (1) of this section the superior court may assess the penalties provided in RCW 49.17.180, in addition to invoking any other available remedies.

[1982 c 109 § 1; 1973 c 80 § 15.]

RCW 49.17.180

Violations — Civil penalties.

(1) Except as provided in RCW 43.05.090, any employer who willfully or repeatedly violates the requirements of RCW 49.17.060, of any safety or health standard promulgated under the authority of this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 may be assessed a civil penalty not to exceed seventy thousand dollars for each violation. A minimum penalty of five thousand dollars shall be assessed for a willful violation.

(2) Any employer who has received a citation for a serious violation of the requirements of RCW 49.17.060, of any safety or health standard promulgated under the authority of this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090 as determined in accordance with subsection (6) of this section, shall be assessed a civil penalty not to exceed seven thousand dollars for each such violation.

(3) Any employer who has received a citation for a violation of the requirements of RCW 49.17.060, of any safety or health standard promulgated under this chapter, of any existing rule or regulation governing the conditions of employment promulgated by the department, or of any order issued granting a variance under RCW 49.17.080 or 49.17.090, where such violation is specifically determined not to be of a serious nature as provided in subsection (6) of this section, may be assessed a civil penalty not to exceed seven thousand dollars for each such violation, unless such violation is determined to be de minimis.

(4) Any employer who fails to correct a violation for which a citation has been issued under RCW 49.17.120 or 49.17.130 within the period permitted for its correction, which period shall not begin to run until the date of the final order of the board of industrial insurance appeals in the case of any review proceedings under this chapter initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty of not more than seven thousand dollars for each day during which such failure or violation continues.

(5) Any employer who violates any of the posting requirements of this chapter, or any of the posting requirements of rules promulgated by the department pursuant to this chapter related to employee or employee representative's rights to notice, including but not limited to those employee rights to notice set forth in RCW 49.17.080, 49.17.090, 49.17.120, 49.17.130, 49.17.220(1) and 49.17.240(2), shall be assessed a penalty not to exceed seven thousand dollars for each such violation. Any employer who violates any of the posting requirements for the posting of informational, educational, or training materials under the authority of RCW 49.17.050(7), may be assessed a penalty not to exceed seven thousand dollars for each such violation.

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

(7) The director, or his authorized representatives, shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the number of affected employees of the employer being charged, the gravity of the violation, the size of the employer's business, the good faith of the employer, and the history of previous violations.

(8) Civil penalties imposed under this chapter shall be paid to the director for deposit in the supplemental pension fund established by RCW 51.44.033. Civil penalties may be recovered in a civil action in the name of the department brought in the superior court of the county where the violation is alleged to have occurred, or the department may utilize the procedures for collection of civil penalties as set forth in RCW 51.48.120 through 51.48.150.

[1995 c 403 § 629; 1991 c 108 § 1; 1986 c 20 § 2; 1973 c 80 § 18.]

Notes:

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

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WA ADC 296-800-35040

Page 1

WAC 296-800-35040

Wash. Admin. Code 296-800-35040

WASHINGTON ADMINISTRATIVE CODE
TITLE 296B. (CH. 60-878) LABOR AND INDUSTRIES, DEPARTMENT OF
CHAPTER 296-800. SAFETY AND HEALTH CORE RULES
HOW CIVIL PENALTIES ARE CALCULATED
 Current with amendments adopted through January 4, 2006

296-800-35040. Reasons for increasing civil penalty amounts.

WISHA may **increase** civil penalties by applying a multiplier to an adjusted base penalty. Multipliers may be applied for the following reasons:

Repeat violations:

A violation is a repeat violation if the employer has been cited one or more times previously for a substantially similar hazard.

WISHA cites such violations if the final order for the previous citation was dated no more than three years prior to the employer committing the violation being cited.

The adjusted base penalty will be multiplied by the total number of citations with violations involving similar hazards, including the current inspection.

The maximum penalty cannot exceed \$70,000 for each violation.

Willful violations:

A willful violation is a voluntary action done either with an intentional disregard of, or plain indifference to, the requirements of the applicable WISHA rule(s):

For all willful violations, the adjusted base penalty will be multiplied by 10

All willful violations will receive at least the statutory minimum penalty of \$5,000

The maximum penalty cannot exceed \$70,000 for each violation

For example: When management is aware that employees are resistant to following specific WAC rule(s); employee resistance results in imminent danger situation or a serious violation; and management fails to make efforts that are effective in practice to overcome the resistance, then WISHA will presume that the failure constitutes voluntary action.

Egregious violations:

An egregious violation may be issued for exceptionally flagrant cases involving willful violations. In these cases, WISHA will issue a separate penalty for each instance of an employer failing to comply with a particular rule

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WA ADC 296-800-35040

Page 2

WAC 296-800-35040

Wash. Admin. Code **296-800-35040**

Failure-to-abate violations:

A failure-to-abate violation occurs when an employer who has been cited for a WISHA violation, fails to correct the violation on time (certifying corrected violations is covered in WAC 296-800-35042 through 296-800-35052)

Based on the facts at the time of reinspection, WISHA will:

Multiply the adjusted base penalty by a factor of at least 5, but up to 10, based on the employer's effort to comply

Multiply the adjusted base penalty by the number of calendar days past the correction date.

The maximum penalty cannot exceed \$7,000 per day for every day the violation is not corrected.

Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, and 49.17.060. 03-18-090, S **296-800-35040**, filed 9/2/03, effective 11/1/03. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050. 02-16-047, S **296-800-35040**, filed 8/1/02, effective 10/1/02; 01-23-060, S **296-800-35040**, filed 11/20/01, effective 12/1/01; 01-11-038, S **296-800-35040**, filed 5/9/01, effective 9/1/01.

<General Materials (GM) - References, Annotations, or Tables>

WA ADC **296-800-35040**

END OF DOCUMENT

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296-155-105 << 296-155-110 >> 296-155-115

WAC 296-155-110

Accident prevention program.

(1) Exemptions. Workers of employers whose primary business is other than construction, who are engaged solely in maintenance and repair work, including painting and decorating, are exempt from the requirement of this section provided:

(a) The maintenance and repair work, including painting and decorating, is being performed on the employer's premises, or facility.

(b) The length of the project does not exceed one week.

(c) The employer is in compliance with the requirements of WAC 296-800-140 Accident prevention program, and WAC 296-800-130, Safety committees and safety meetings.

(2) Each employer shall develop a formal accident-prevention program, tailored to the needs of the particular plant or operation and to the type of hazard involved. The department may be contacted for assistance in developing appropriate programs.

(3) The following are the minimal program elements for all employers:

A safety orientation program describing the employer's safety program and including:

(a) How, where, and when to report injuries, including instruction as to the location of first-aid facilities.

(b) How to report unsafe conditions and practices.

(c) The use and care of required personal protective equipment.

(d) The proper actions to take in event of emergencies including the routes of exiting from areas during emergencies.

(e) Identification of the hazardous gases, chemicals, or materials involved along with the instructions on the safe use and emergency action following accidental exposure.

(f) A description of the employer's total safety program.

(g) An on-the-job review of the practices necessary to perform the initial job assignments in a safe manner.

(4) Each accident-prevention program shall be outlined in written format.

(5) Every employer shall conduct crew leader-crew safety meetings as follows:

(a) Crew leader-crew safety meetings shall be held at the beginning of each job, and at least weekly thereafter.

(b) Crew leader-crew meetings shall be tailored to the particular operation.

(6) Crew leader-crew safety meetings shall address the following:

(a) A review of any walk-around safety inspection conducted since the last safety meeting.

(b) A review of any citation to assist in correction of hazards.

(c) An evaluation of any accident investigations conducted since the last meeting to determine if the cause of the unsafe acts or unsafe conditions involved were properly identified and corrected.

(d) Attendance shall be documented.

(e) Subjects discussed shall be documented.

Note: Subcontractors and their employees may, with the permission of the general contractor, elect to fulfill the requirements of subsection (5)(a) and (b) of this section by attending the prime contractors crew leader-crew safety meeting. Any of the requirements of subsections (6)(a), (b), (c), and (7) of this section not satisfied by the prime contractors safety meetings shall be the responsibility of the individual employers.

(7) Minutes of each crew leader-crew meeting shall be prepared and a copy shall be maintained at the location where the majority of the employees of each construction site report for work each day.

(8) Minutes of crew leader-crew safety meetings shall be retained by the employer for at least one year and shall be made available for review by personnel of the department, upon request.

(9) Every employer shall conduct walk-around safety inspections as follows:

(a) At the beginning of each job, and at least weekly thereafter, a walk-around safety inspection shall be conducted jointly by one member of management and one employee, elected by the employees, as their authorized representative.

(b) The employer shall document walk-around safety inspections and such documentation shall be available for inspection by personnel of the department.

(c) Records of walk-around inspections shall be maintained by the employer until the completion of the job.

[Statutory Authority: RCW 49.17.010, [49.17].040, and[49.17].050 . 01-11-038, § 296-155-110, filed 5/9/01, effective 9/1/01; 00-08-078, § 296-155-110, filed 4/4/00, effective 7/1/00. Statutory Authority: Chapter 49.17 RCW. 94-15-096 (Order 94-07), § 296-155-110, filed 7/20/94, effective 9/20/94; 92-09-148 (Order 92-01), § 296-155-110, filed 4/22/92, effective 5/25/92. Statutory Authority: RCW 49.17.040 and 49.17.050. 86-03-074 (Order 86-14), § 296-155-110, filed 1/21/86; Order 74-26, § 296-155-110, filed 5/7/74, effective 6/6/74.]

296-155-180 << 296-155-200 >> 296-155-201

WAC 296-155-200

General requirements for personal protective equipment (PPE).

(1) Supplying personal protective equipment

(a) Personal protective equipment (PPE) must be used wherever physical contact, absorption, or inhalation of a hazard could cause any injury or impairment to the function of any part of the body.

These hazards include:

- Hazardous processes;
- Environmental hazards;
- Chemical hazards;
- Radiological hazards;

OR

- Mechanical irritants.

Note: PPE includes:

- Protective equipment for eyes, face, head, hearing, and extremities;
- Protective clothing;
- Respiratory devices;

AND

- Protective shields and barriers.

(b) PPE must be maintained in a sanitary and reliable condition.

Reference: For requirements on maintaining specific personal protective equipment (PPE), see the following rules.

- Chapter 296-842 WAC, Respirators;

AND

- Chapter 296-817 WAC, Hearing loss prevention.

(c) If employees provide their own protective equipment, then the employer is responsible to make sure the PPE is:

- Adequate;
- Properly maintained;

AND

- Sanitary.

(d) All personal protective equipment must be of safe design and construction for the work to be performed.

(2) Minimum clothing requirements.

(a) Employers must ensure that employees wear at least:

- A short-sleeved shirt;
- Long pants;

AND

- Shoes that meet the requirements of WAC 296-155-212, Foot protection.

Definition:

A **short-sleeved shirt** covers the top of the shoulder and has material extending down the arm. If a short-sleeved shirt has a

seam at the end of the shoulder, the material must extend down the arm from the seam.

Long pants have legs that extend past the knee when the wearer stands and leaves no exposed skin on the lower leg.

(b) Where there is a danger of contact with moving parts of machinery, or the work process is such that a hazard exists:

- The clothing of employees must fit closely about the body.
- Dangling neck wear, bracelets, wristwatches, rings, or similar articles must not be worn by employees.

Note: For additional related requirements see WAC 296-155-205, Head protection.

(3) The employer must require employees to wear appropriate PPE in all operations where:

- There is an exposure to hazardous conditions;

OR

• WAC 296-155-200, General requirements for personal protective equipment (PPE), indicates a need for using such equipment to reduce the hazards to the employees.

(4) Employees must comply with job safety practices and procedures and PPE requirements that are relevant to the job site.

(5) High visibility garments.

(a) During daylight hours, when employees' duties are performed in close proximity to moving vehicles, employers must make sure that employees wear a high-visibility safety vest, shirt, or jacket that is fluorescent yellow-green, fluorescent orange-red, or fluorescent red in color. This garment must always be worn as an outer garment.

Definition:

For the purpose of this rule, **hours of darkness** means from one-half hour before sunset to one-half hour after sunrise.

(b) During hours of darkness, when employees' duties are performed in close proximity to moving vehicles, the employer must make sure that employees wear, at a minimum, a high-visibility safety vest, shirt, or jacket:

- Designed according to ANSI/ISEA 107-1999 Class 2 specifications;
- Worn as an outer garment;

AND

- Worn to provide three hundred sixty degrees of visibility around the employee.

Note: A high-visibility garment meets Class 2 specifications if the garment:

- Has an ANSI "Class 2" label;

OR

- Has at least seven hundred seventy-five square inches of background material and two hundred one square inches of retroreflective material that encircles the torso and is placed to provide three hundred sixty degrees of visibility around the employee.

Note: • Fading and soiling may degrade the high-visibility characteristics of the garments.

- ANSI/ISEA 107-1999 is available by:
 - Purchasing copies of ANSI/ISEA 107-1999 by writing:
 - American National Standards Institute
 - 11 West 42nd Street
 - New York, NY 10036

OR

- Contacting the ANSI web site at <http://web.ansi.org/>.

OR

- Reading a copy of ANSI/ISEA 107-1999 at any Washington state library.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060, 04-24-089, § 296-155-200, filed 12/1/04, effective 1/1/05. Statutory Authority: RCW 49.17.010, [49.17].040, and[49.17].050 . 01-11-038, § 296-155-200, filed 5/9/01, effective 9/1/01. Statutory Authority: Chapter 49.17 RCW, 94-15-096 (Order 94-07), § 296-155-200, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040 and 49.17.050, 86-03-074 (Order 86-14), § 296-155-200, filed 1/21/86; Order 76-29, § 296-155-200, filed 9/30/76; Order 74-26, § 296-155-200, filed 5/7/74, effective 6/6/74.]

296-155-24503 << 296-155-24505 >> 296-155-24507

WAC 296-155-24505

Fall protection work plan.

(1) The employer shall develop and implement a written fall protection work plan including each area of the work place where the employees are assigned and where fall hazards of 10 feet or more exist.

(2) The fall protection work plan shall:

- (a) Identify all fall hazards in the work area.
- (b) Describe the method of fall arrest or fall restraint to be provided.
- (c) Describe the correct procedures for the assembly, maintenance, inspection, and disassembly of the fall protection system to be used.
- (d) Describe the correct procedures for the handling, storage, and securing of tools and materials.
- (e) Describe the method of providing overhead protection for workers who may be in, or pass through the area below the work site.
- (f) Describe the method for prompt, safe removal of injured workers.
- (g) Be available on the job site for inspection by the department.

(3) Prior to permitting employees into areas where fall hazards exist the employer shall:

- (a) Ensure that employees are trained and instructed in the items described in subsection (2)(a) through (f) of this section.
- (b) Inspect fall protection devices and systems to ensure compliance with WAC 296-155-24510.

(4) Training of employees:

(a) The employer shall ensure that employees are trained as required by this section. Training shall be documented and shall be available on the job site.

(b) "Retraining." When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by subsection (1) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:

- Changes in the workplace render previous training obsolete; or
- Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or
- Inadequacies in an affected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.

Note: The following appendices to Part C-1 of this chapter serve as nonmandatory guidelines to assist employers in complying with the appropriate requirements of Part C-1 of this chapter.

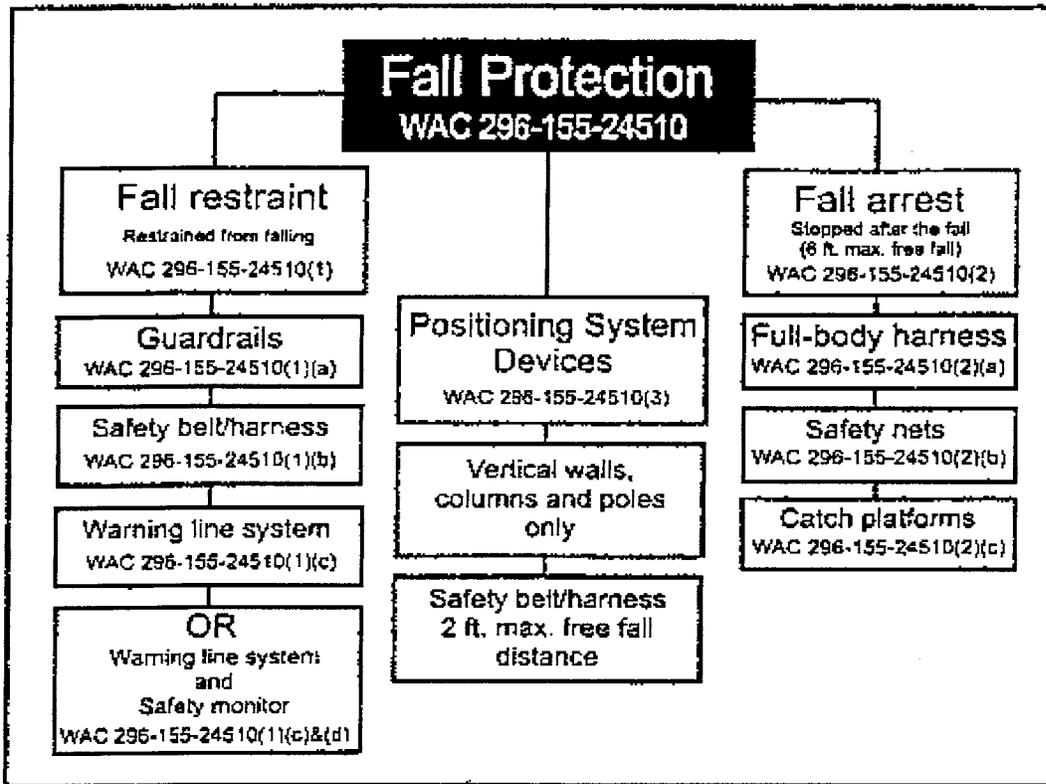
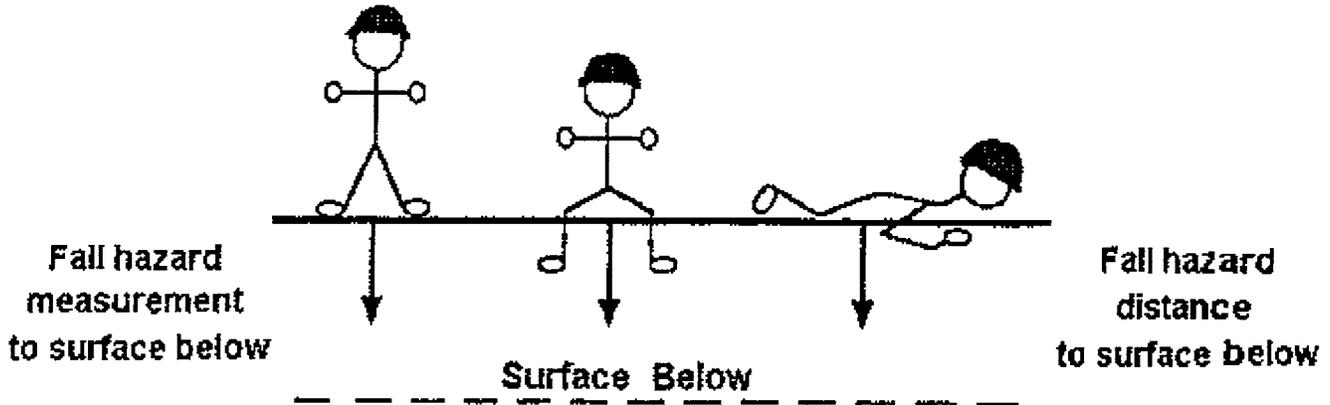
[Statutory Authority: RCW 49.17.010, [49.17].040, and[49.17].050 . 00-14-058, § 296-155-24505, filed 7/3/00, effective 10/1/00. Statutory Authority: RCW 49.17.040, [49.17.]050 and[49.17.]060 . 96-24-051, § 296-155-24505, filed 11/27/96, effective 2/1/97. Statutory Authority: Chapter 49.17 RCW. 95-10-016, § 296-155-24505, filed 4/25/95, effective 10/1/95; 91-03-044 (Order 90-18), § 296-155-24505, filed 1/10/91, effective 2/12/91.]

296-155-24507 << 296-155-24510 >> 296-155-24515

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.

(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 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 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.]

Westlaw.

WA ADC 296-800-350

Page 1

WAC 296-800-350
Wash. Admin. Code 296-800-350

WASHINGTON ADMINISTRATIVE CODE
TITLE 296B. (CH. 60-878) LABOR AND INDUSTRIES, DEPARTMENT OF
CHAPTER 296-800. SAFETY AND HEALTH CORE RULES
WISHA APPEALS, PENALTIES AND OTHER PROCEDURAL RULES
Current with amendments adopted through January 4, 2006

296-800-350. Introduction.

This section describes actions WISHA takes during or after inspections, and your related obligation and rights.

Your responsibility: You must follow posting requirements and notify your employees of the information listed in these rules, as indicated.

You must:

wisha inspections and citations

Types of workplace inspections

WAC 296-800-35002.....

Scheduling inspections

WAC 296-800-35004.....

Inspection techniques

WAC 296-800-35006.....

Response to complaints submitted by employees or their representatives

WAC 296-800-35008.....

Citations mailed after an inspection

WAC 296-800-35010.....

Employees (or their representatives) can request a citation and notice

WAC 296-800-35012.....

Posting a citation and notice and employee complaint information

WAC 296-800-35016.....

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WA ADC 296-800-350

Page 2

WAC 296-800-350

Wash. Admin. Code **296-800-350**

civil penalties for violating wisha requirements

Reasons to assess civil penalties

WAC 296-800-35018.....

Minimum penalties

WAC 296-800-35020.....

how civil penalties are calculated

Base penalty calculations - severity and probability

WAC 296-800-35022.....

Severity rate determination

WAC 296-800-35024.....

Probability rate determination

WAC 296-800-35026.....

Determining the gravity of a violation

WAC 296-800-35028.....

Base penalty adjustments

WAC 296-800-35030.....

Types of base penalty adjustments

WAC 296-800-35032.....

Minimum and maximum adjusted base penalty amounts

WAC 296-800-35038.....

Reasons for increasing civil penalty amounts

WAC 296-800-35040.....

certify that violations have been abated

Employers must certify that violations have been abated

WAC 296-800-35042.....

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WA ADC 296-800-350

Page 3

WAC 296-800-350
Wash. Admin. Code **296-800-350**

For willful, repeated, or serious violations, submit additional documentation

WAC 296-800-35044.....

Submitting correction action plans

WAC 296-800-35046.....

Submit progress reports to the department, when required

WAC 296-800-35048.....

WISHA determines the date by which abatement documents must be submitted

WAC 296-800-35049.....

Inform affected employees and their representatives of abatement actions you have taken

WAC 296-800-35050.....

Tag cited moveable equipment to warn employees of a hazard

WAC 296-800-35052.....

requesting more time to comply

You can request more time to comply

WAC 296-800-35056.....

WISHA's response to your request for more time

WAC 296-800-35062.....

Post the department's response

WAC 296-800-35063.....

A hearing can be requested about the department's response

WAC 296-800-35064.....

Post the department's hearing notice

WAC 296-800-35065.....

Hearing procedures

WAC 296-800-35066.....

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WA ADC 296-800-350

Page 4

WAC 296-800-350
Wash. Admin. Code **296-800-350**

Post the hearing decision

WAC 296-800-35072.....

requesting an appeal of wisha citations and corrective notices

Employers and employees can request an appeal of a citation and notice

WAC 296-800-35076.....

Await the department's response to your appeal request

WAC 296-800-35078.....

Department actions when reassuming jurisdiction over an appeal

WAC 296-800-35080.....

Appealing a corrective notice

WAC 296-800-35082.....

Notify employees

WAC 296-800-35084.....

Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, and 49.17.060. 03-18-090, S **296-800-350**, filed 9/2/03, effective 11/1/03. Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050. 01-23- 060, S **296-800-350**, filed 11/20/01, effective 12/1/01; 01-11-038, S **296-800- 350**, filed 5/9/01, effective 9/1/01.

<General Materials (GM) - References, Annotations, or Tables>

WA ADC **296-800-350**
END OF DOCUMENT

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WA ADC 296-800-35010

Page 1

WAC 296-800-35010

Wash. Admin. Code 296-800-35010

WASHINGTON ADMINISTRATIVE CODE
TITLE 296B. (CH. 60-878) LABOR AND INDUSTRIES, DEPARTMENT OF
CHAPTER 296-800. SAFETY AND HEALTH CORE RULES
WISHA INSPECTIONS AND CITATIONS

Current with amendments adopted through January 4, 2006

296-800-35010. Citations mailed after an inspection.

After an inspection or an investigation, WISHA will mail a citation to you within 6 months following the inspection or investigation

The citation will include

A description of any violations found

The amount and type of assessed penalties

The length of time given to correct the violations

If no violations are found, WISHA will normally send you a citation and notice indicating that no violations were found

Note:

. Copies of WISHA safety and health inspection reports can be requested. The request should be mailed to:

DEPARTMENT OF LABOR AND INDUSTRIES
PUBLIC DISCLOSURE UNIT
P.O. BOX 44632
OLYMPIA WA 98504-4632

You can also contact your local labor and industries field office for information on requesting copies of inspection reports (see the resource section of this book).

Statutory Authority: RCW 49.17.010, 49.17.040, and 49.17.050. 01-23- 060, S 296-800-35010, filed 11/20/01, effective 12/1/01; 01-11-038, S 296-800- 35010, filed 5/9/01, effective 9/1/01.

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WA ADC 296-800-35010

Page 2

WAC 296-800-35010

Wash. Admin. Code **296-800-35010**

<General Materials (GM) - References, Annotations, or Tables>

WA ADC **296-800-35010**

END OF DOCUMENT

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296-900-130 << 296-900-13005 >> 296-900-13010

WAC 296-900-13005 Citation and notice.

Definition:

A citation and notice is a document issued to an employer notifying them of:

- Inspection results.
- Any specific violations of WISHA safety and health requirements.
- Any monetary penalties assessed.
- Employer certification of correction requirements.
- WISHA will mail a citation and notice to you as soon as possible but not later than six months following any inspection or investigation.
 - If violations are found, the citation and notice will include:
 - A description of violations found.
 - The amount and type of assessed penalties.
 - The length of time given to correct the violations not already corrected during the inspection.
 - If no violations are found, a notice of inspection results will be sent stating that no violations were found or penalties assessed.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060. 06-06-020, § 296-900-13005, filed 2/21/06, effective 6/1/06.]

296-900-14015 << 296-900-14020 >> 296-900-150

WAC 296-900-14020**Increases to adjusted base penalties.**

• WISHA may increase an adjusted base penalty in certain circumstances. Table 6, Increases to Adjusted Base Penalties, describes circumstances where an increase may be applied to an adjusted base penalty.

Table 6**Increases to Adjusted Base Penalties**

For this circumstance:	The adjusted base penalty may be increased as follows:
<p>Repeat violation</p> <p>When the employer has been previously cited for a substantially similar hazard, with a final order for the previous violation dated no more than 3 years prior to the employer committing the violation being cited.</p>	<ul style="list-style-type: none"> Multiplied by the total number of citations with violations involving similar hazards, including the current inspection. <p>Note: The maximum penalty can't exceed seventy thousand dollars for each violation.</p>
<p>Willful violation</p> <p>An act committed with the intentional, knowing, or voluntary disregard for the WISHA requirements or with plain indifference to employee safety.</p>	<ul style="list-style-type: none"> Multiplied by ten with at least the statutory minimum penalty of five thousand dollars <p>Note: The maximum penalty can't exceed \$70,000 for each violation.</p>
<p>Egregious violation</p> <p>If the violation was willful and at least one of the following:</p> <ul style="list-style-type: none"> The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. The violations resulted in persistently high rates of worker injuries or illnesses. The employer has an extensive history of prior violations. The employer has intentionally disregarded its safety and health responsibilities. The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her 	<ul style="list-style-type: none"> With a separate penalty issued for each instance the employer fails to follow a specific requirement.

duties.

- The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

Failure to abate (FTA)

- Based on the facts at the time of reinspection, will be multiplied by:

Failure to correct a cited WISHA violation on time.

Reference: For how to certify corrected violations, go to Certifying violation corrections, WAC 296-900-60005 through 296-900-60035.

- At least five, but up to ten, based on the employer's effort to comply.

- The number of calendar days past the correction date, with a minimum of five days.

Note: The maximum penalty can't exceed seven thousand dollars per day for every day the violation is not corrected.

[Statutory Authority: RCW 49.17.010, 49.17.040, 49.17.050, 49.17.060, 06-06-020, § 296-900-14020, filed 2/21/06, effective 6/1/06.]

NO. 34441-6

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

WASHINGTON CEDAR & SUPPLY
CO., INC.

Appellant

vs

STATE OF WASHINGTON
DEPARTMENT OF LABOR &
INDUSTRIES

AFFIDAVIT OF
SERVICE AND
MAILING

STATE OF WASHINGTON)

County of Pierce)

) ss
)

KIMBERLY WILCOX, being first duly sworn, upon oath, deposes and says:

I am a citizen of the United States of America, over the age of 21 years, and competent to be a witness herein.

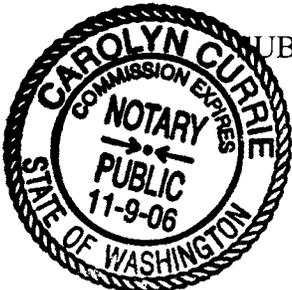
1. On July 3, 2006, I caused the Appendix to the Brief of Respondent to be delivered via ABC Legal Messenger to the Court of Appeals, Division II.

2. On the same day I mailed a true and correct copy of the Appendix to:

Jerald A. Klein, Attorney at Law
823 Joshua Green Bldg
1425 Fourth Ave, Ste 823
Seattle, WA 98101-2236

Kimberly Wilcox
KIMBERLY WILCOX, Legal Assistant

SUBSCRIBED AND SWORN to before me this 3rd day of July, 2006.



Carolyn Currie
NOTARY PUBLIC
Commission Expires: 11/09/2006