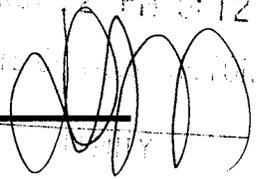


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COURT OF APPEALS

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NO. 34752-1-II

STATE OF WASHINGTON
BY 

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

PILCHUCK CONTRACTORS, INC.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

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

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Appendix A

Proposed Decision and Order

Appendix B

Decision and Order

I. NATURE OF THE CASE

Employer Pilchuck Contractors, Inc. (Pilchuck) appeals to this Court under the Washington Industrial Safety and Health Act (WISHA) review provisions at RCW 49.17.150. This is the third time that the WISHA Citation by the Department of Labor and Industries (Department) for traffic flagging violations has been reviewed by an independent review entity. The Department prevails if the findings of the Board of Industrial Insurance Appeals (Board) are supported by substantial evidence in the record, and the Board and superior court conclusions flow from those findings. RCW 49.17.150(1); *see also William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

As a threshold matter, the Employer's brief is defective, lacking any identification of the particular findings of the Board which it contends are erroneous. This defect is further compounded by the Employer's Argument section, which offers only a scant citation of legal standards, but no "reference

to the relevant parts of the record” and nothing that can be considered legal analysis of the issues presented. For these reasons, this Court should reject the appeal as failing to present issues and argument required by RAP 10.3(a)(5) and RAP 10.3(g). Simply put, the Employer’s brief does little more than recite some of the evidence with no analysis or explanation why the Employer might be asking an appellate court to find error.

Ignoring these shortcomings and construing the Employer’s brief generously, Pilchuck’s brief might be understood to challenge whether substantive evidence supports the Board’s determinations that Pilchuck committed a serious violation of the WISHA flagging rule and that the violation was not excused as a result of unpreventable employee misconduct. Pilchuck cannot prevail under the substantial evidence standard, and the Board’s decision should be affirmed, as it was by the superior court.

II. COUNTERSTATEMENT OF ISSUES

1. Where An Appellant's Brief Seeks Review Of An Administrative Adjudication But Fails To Assign Error To Any Particular Findings Of The Board As Erroneous And Where The Appellant's Argument Fails To Discuss The Record, Making No Showing Of Any Erroneous Findings Or Conclusions, Should The Court Dismiss The Appeal For Failing To Present An Appellate Argument?
2. Does Substantial Evidence Support the Board's Determination Of A "Serious" Violation Per RCW 49.17.180(6), Including That Pilchuck Knew Or Could Have, With Reasonable Diligence, Known, Within The Meaning Of RCW 49.17.180(6), Of The Violation.¹
3. Does Substantial Evidence Support The Board's Determination That Pilchuck's September 10, 2003 Violations Were Not The Result Of Unpreventable Employee Misconduct?²

¹ Certified Appeal Board Record (CABR) 81, Findings of Fact (FF) 2 through 7. (The CABR contains the record made before the Board and includes testimony taken, evidence submitted, the parties' briefs and Board notices. The CABR was submitted by Appellant with the Clerk's Papers. Citations to the Board's transcripts are indicated by "TR" followed by the date of the testimony, the witness's name, and the appropriate page and line numbers.)

² CABR 81, FF 8.

III. COUNTERSTATEMENT OF THE CASE

A. Procedural History

The Department, pursuant to its responsibilities under WISHA, ch. 49.17 RCW, opened a safety inspection on September 10, 2003 at a Pilchuck work site located near the intersection of Meridian and 144th in Puyallup, Washington.³ As a result of the inspection, the Department determined that Pilchuck was in violation of Washington Administrative Code (WAC) safety regulations regarding flagging and traffic control operations.⁴ The Department issued Citation No. 306427535 to Pilchuck on November 4, 2003.⁵ The Citation identified the regulations that Pilchuck had violated and assessed penalties in accordance with Department regulations and policies.⁶

On November 12, 2003, Pilchuck filed an appeal from the Citation, which was sent to the Board on January 16, 2004.⁷ In a proposed decision and order (PD&O) issued on February 28, 2005, the Board's Industrial Appeals Judge (IAJ)

³ CABR 80, FF 1.

⁴ CABR 80, FF 1.

⁵ CABR 80, FF 1.

⁶ CABR 80, FF 1.

⁷ CABR 93-97.

affirmed the Department's Citation in whole.⁸ In the proposed decision, the IAJ explained regarding the evidence on the flagging citation, inter alia, that:

WAC 296-155-305 regulates how flagging is to be conducted. The exhibits, together with Ms. Case's testimony, render it clear that each of the violations alleged was committed by employee's [sic] of Pilchuck. There is no testimony disputing the observations of Ms. Case . . . The employer's argument that it had no knowledge of the flagger violations is weakened because it failed to meet requirements that would have provided it notice.⁹

Pilchuck filed a Petition for Review (PFR) of the PD&O to the full Board on March 29, 2005, asking the Board to review *de novo* its IAJ's decision.¹⁰ The Board granted review, and issued a Decision & Order that corrected Findings of Fact contained within the PD&O relative to the penalties, but otherwise affirmed the Department's Citation in whole.¹¹

Included in this final order of the Board were the following findings of fact:¹²

⁸ CABR 72-82 (a copy of the proposed decision is attached in Appendix A).

⁹ CABR 79.

¹⁰ CABR 7-28.

¹¹ CABR 1-4 (a copy of the Board's Decision and Order is attached in Appendix B).

¹² CABR 1-4.

2. On September 10, 2003, flaggers working for Pilchuck Construction, Inc., at the Meridian job site in Puyallup, were exposed to oncoming traffic. This grouped violation (Items 1-1 (a and b)), respectively, exposed flaggers to the risk of being struck by traffic and suffering injuries requiring hospitalization.

....

4. The employer did not ensure that the flaggers used hand paddles to direct traffic, exposing them to the risk of being struck by a car.

....

6. The employer failed to ensure that workers were wearing high visibility vests correctly. One flagger had not closed his vest to provide 360 degrees of visibility. The other was not wearing an appropriate vest (Item 2-1).

7. Pilchuck failed to conduct an orientation with the new flagger on September 10, 2003 (Item 2-2).

8. Pilchuck did not have a traffic control plan at the Meridian job site (Item 2-3).

....

10. None of the violations assessed were the result of unpreventable employee misconduct.

Pilchuck then sought judicial review in Pierce County Superior Court.¹³ On March 28, 2006, the Superior Court affirmed the Board's decision and upheld all of the cited violations.¹⁴ This appeal followed.¹⁵

B. Counterstatement of Facts

On September 10, 2003, a WISHA Compliance Safety and Health Officer, Susan Case opened an inspection of a flagging and traffic control operation being conducted by Pilchuck near the intersection of Meridian East and 144th Street East in Puyallup, Washington.¹⁶ Ms. Case conducted the inspection because, while driving through the area, she observed an individual performing flagging work without using a flagger paddle, standing in the middle of the road and exposed to traffic hazards.¹⁷

In addition to the safety inspector training Ms. Case had received from the Department, she was also a certified flagger

¹³ Clerk's Papers (CP) 1-2.

¹⁴ CP 39-42.

¹⁵ CP 43-47.

¹⁶ TR 11/8/04, Case, p.8 [8-21].

¹⁷ TR 11/8/04, Case, p.8 [8-21]; p.12 [11-12]; p.14 [15-19]; Exhibits 3, 4.

at the time of the September 10, 2003 inspection.¹⁸ As such, Ms. Case was very knowledgeable about the requirements and regulations related to flagging and traffic control operations.¹⁹

During the inspection Ms. Case observed two employees performing flagging operations.²⁰ One employee, Raymond Ellsworth, was standing in the middle of the roadway with a posted speed limit of 35 miles per hour (mph) trying to direct traffic.²¹ In addition, Mr. Ellsworth was not using a sign paddle, which made him less visible to vehicular traffic and increased the likelihood that, if drivers did see him, they would not realize he was trying to direct traffic, or they would simply ignore him.²² Finally, Mr. Ellsworth's high-visibility vest was

¹⁸ TR 11/8/04, Case, p.6 [26]; p.7 [1-25].

¹⁹ The flagger certification requires eight hours of class room training, in which the WISHA flagging and traffic control regulations are taught as well as the Manual on Uniform Traffic Control Devices (MUTCD) requirements. TR 11/8/04, Case, p.6 [26]; p.7 [1-25]. Following the training, Ms. Case was required to take and pass a written test in order to receive the certification. TR 11/8/04, Case, p.6 [26]; p.7 [1-25]. Ms. Case scored 100 percent on the written test. TR 11/8/04, Case, p.6 [26]; p.7 [1-25].

²⁰ TR 11/8/04, Case, p.14 [15-26]; p.17 [2-4]; p.19 [1-12].

²¹ TR 11/8/04, Case p.14 [15-26]; p.16 [23-25]; p.17 [13-14]; p.18 [2-26].

²² TR 11/8/04, Case, p.14 [15-26]; p.15 [15-17]; p.17 [21-24]; p. 23 [11-18]; Exhibits 3, 4, 6, 7.

not closed, thereby not providing him with the 360 degrees of retroreflectivity protection required by the rules.²³

Standing in the middle of the road, Mr. Ellsworth was exposed to the hazard of being struck by a car traveling approximately 35 mph.²⁴ Mr. Ellsworth was also made less visible to vehicular traffic by the fact that he did not have the required sign paddle and his vest was not closed, making him even more susceptible to not being observed by drivers and being hit by a car.²⁵ Being hit by a car traveling at speeds up to 35 mph could reasonably be expected to result in serious bodily injury and/or permanent impairment.²⁶

The second employee, Lon Wilke, was not wearing a Class II type vest, which is required when individuals are performing flagging operations.²⁷ In order to classify as a Class II type vest, the vest must have retroreflective tape going all around the body (360 degrees) and over the shoulders.²⁸ In addition, the vest must have at least 212 square inches total of

²³ TR 11/8/04, Case, p.18 [20-26]; p.19 [1-2].

²⁴ TR 11/8/04, Case, p.14 [22-26]; p.15 [12-17].

²⁵ TR 11/8/04, Case, p.14 [24-26]; p.15 [12-17].

²⁶ TR 11/8/04, Case, p.15 [12-17].

²⁷ TR 11/8/04, Case, p.19 [11-12]; p.25 [6-26]; p.26 [1-15].

²⁸ TR 11/8/04, Case, p.25 [19-25].

retroreflective tape.²⁹ Not wearing a Class II vest resulted in Mr. Wilke being less visible to vehicular traffic and placed him at risk of being hit by traffic.³⁰

During the course of the inspection, Ms. Case asked Pilchuck for documentation establishing that the flaggers had been provided with a safety orientation prior to beginning work on September 10, 2003.³¹ Employers are required to provide a safety orientation to flagging personnel so as to instruct the flaggers 1) where they should be standing during their flagging operations, 2) what to do in the event of an emergency, 3) how to communicate with each other and with other crew members, and 4) how to identify any hazards they may confront during their flagging duties.³² Pilchuck was unable to provide any documentation, either on site or at any time before the Department issued the Citation, establishing that these employees had been provided the necessary training and orientation.³³

²⁹ TR 11/8/04, Case, p.25 [19-25].

³⁰ TR 11/8/04, Case, p.26 [7-15].

³¹ TR 11/8/04, Case, p.27 [6-21].

³² TR 11/8/04, Case, p.27 [22-26]; p.28 [1-2].

³³ TR 11/8/04, Case, p.27 [22-26]; p.28 [1-2].

While on site, Ms. Case also requested a copy of the company's traffic control plan.³⁴ Employers are required to have traffic control plans for jobs of greater than one day.³⁵ The purpose of the traffic control plan is to establish the traffic control requirements (such as lane closure, signage and signals) for each phase of a project.³⁶ Even though the company had been working on this job for more than two weeks, the company did not have the plan on site.³⁷

At hearing the Department also presented the testimony of Dan McMurdie, Safety Program Manager for WISHA Policy and Technical Services unit at that time.³⁸ Mr. McMurdie has extensive experience with the flagging and traffic control requirements, both WISHA and the Manual on Uniform Traffic Control (*see* footnote 17), and was personally responsible for drafting a 1999 statutory amendment to ch. 49.17 RCW regarding flagger safety.^{39, 40} As a result of the statutory

³⁴ TR 11/8/04, Case, p.28 [21-26].

³⁵ TR 11/8/04, Case, p.29 [1-20].

³⁶ TR 11/8/04, Case, p.29 [1-20].

³⁷ TR 11/8/04, Case, p.29 [4-13].

³⁸ TR 11/12/04, McMurdie, p.4, [10-12].

³⁹ TR 11/12/04, McMurdie, pp.19-21.

amendment, the Department, through Mr. McMurdie, developed regulations to ensure flagger safety, codified in WAC 296-155-305. Following the adoption of the regulations, Mr. McMurdie was responsible for training Department staff on the proper application of the WISHA traffic control regulations in conjunction with the MUTCD requirements.⁴¹

Mr. McMurdie was also a certified flagger and had received the traffic control supervisors' training course, a 24 hour course taught by Evergreen Safety Council.⁴² The traffic control supervisors' training course was more thorough than the certified flagger course, and the course covered in more detail how to set up a work zone as well as the responsibilities of a traffic control supervisor.⁴³

With respect to the September 10, 2003 inspection of Pilchuck, Ms. Case consulted with and obtained guidance from Mr. McMurdie to ensure Pilchuck was properly cited for the

⁴⁰ The statutory amendment required the Department to write regulations to improve flagger safety. TR 11/12/04, McMurdie, p.21 [7-25].

⁴¹ TR 11/12/04, McMurdie, p.8 [13-25].

⁴² TR 11/12/04, McMurdie, p.16 [1-15].

⁴³ TR 11/12/04, McMurdie, p.18 [16-26].

identified violations.⁴⁴ Mr. McMurdie was of the opinion that the Department's Citation correctly cited Pilchuck for violations of WAC 296-155-305.⁴⁵

At hearing, Donald Smith testified on behalf of Pilchuck. As of the date of the Department's inspection, Mr. Smith was the foreman at the job site and a heavy equipment operator for Pilchuck.⁴⁶ As the foreman at the job site, it was Mr. Smith's responsibility to ensure the provisions of the traffic control plan were being followed.⁴⁷ Mr. Smith, however, did not hold a traffic control card, nor was he a certified flagger or certified flagger supervisor.⁴⁸ Mr. Smith stated that the project in question had been ongoing for approximately two months at the time of the inspection.⁴⁹ Mr. Smith acknowledged that Pilchuck did not have a traffic control plan on site the day of the inspection.⁵⁰ As a result, he was not able to show the flaggers the traffic control plan or train the flaggers on the

⁴⁴ TR 11/12/04, McMurdie, p.24 [14-26]; p.25 [5].

⁴⁵ TR 11/12/04, McMurdie, p.27 [1-8].

⁴⁶ TR 11/12/04, Smith, p.38 [22-25]; p.39 [20-25].

⁴⁷ TR 11/12/04, Smith, p.49 [9-13].

⁴⁸ TR 11/12/04, Smith, p.39 [18-19]; p.50 [14-18].

⁴⁹ TR 11/12/04, Smith, p. 40 [16-18].

⁵⁰ TR 11/12/04, Smith, p.51 [1-20].

content and requirements of the written plan on September 10, 2003.⁵¹ In addition, Mr. Smith stated that there had been a change in the personnel handling the traffic control.⁵² One of the flaggers who had worked part of the morning on September 10, 2003 had to leave because of an emergency and was therefore replaced with a flagger from the union hall part way through the morning.⁵³

Jennifer Richards, a safety consultant, also testified on behalf of Pilchuck. Ms. Richards is a certified flagger and certified flagger supervisor and, among other things, teaches the flagger certification course.⁵⁴ As a result, Ms. Richards was familiar with the requirements of WAC 296-155-305.⁵⁵ Ms. Richards testified that it is an employer's obligation, Pilchuck here, to ensure that flaggers are wearing high visibility vests and using flagger paddles.⁵⁶ Ms. Richards also testified that if an employer does not have a traffic control plan on site

⁵¹ TR 11/12/04, Smith, p.51 [1-20].

⁵² TR 11/12/04, Smith, p.44 [3-11].

⁵³ TR 11/12/04, Smith, p.44 [3-11].

⁵⁴ TR 12/1/04, Richards, p.6 [16-25]; p.7 [1-18].

⁵⁵ TR 12/1/04, Richards, p.14 [3-18].

⁵⁶ TR 12/1/04, Richards, p.14 [3-18]; p.15 [1-8].

for projects longer than one day, the employer is not in compliance with the WISHA requirements.⁵⁷

IV. ARGUMENT

A. Standard of Review

This case involves judicial review of an administrative adjudication by the Board in a WISHA appeal. In WISHA appeals the Board's findings of fact are "conclusive" as long as they are "supported by substantial evidence on the record considered as a whole." RCW 49.17.150(1); *Inland Foundry Co., Inc. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Pilchuck does not assign error to any specific Board finding and argues only that there is not substantial evidence to support the Board's determinations that: 1) Pilchuck committed a serious WISHA violation (including the "constructive knowledge" element), and 2) the serious violation did not result from unpreventable employee misconduct.

"Substantial evidence" is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared

⁵⁷ TR 12/1/04, Richards, p.15 [9-18].

premise.” *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999) (citations omitted). The substantial evidence standard is a “deferential” one; “[e]vidence will be viewed in the light most favorable to...‘the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact-finder’s views regarding the credibility of witnesses, and the weight to be given reasonable but competing inferences.”” *City of University Place v. McGuire*, 144 Wn.2d 640, 652-53, 30 P.3d 453 (2001) (citations omitted). In this case the Board is, per *McGuire*, “the highest forum that exercised fact-finding authority.” This Court should thus, per *McGuire*, view the evidence in the light most favorable to the Department and must “accept[] the fact-finder’s views [here, the Board’s views] regarding the credibility of witnesses.”⁵⁸

The Board’s conclusions of law are reviewed in the context of its findings of fact. More specifically, the conclusions must be affirmed if they are supported by the findings. *See Inland Foundry*, 106 Wn. App. at 340;

⁵⁸ Pilchuck’s Brief of Appellant incorrectly focuses on evidence and inferences that arguably support its position (AB at 2-14).

Washington Cedar & Supply Co. v. Dep't of Labor & Indus., 119 Wn. App. 906, 83 P.3d 1012, *review denied*, 152 Wn.2d 1003, 101 P3d 866 (2004).

These standards are considered in the context of liberal construction of the Act to effect its overarching purpose, protecting workers:

The stated purpose of WISHA is "to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington". As a remedial statute, WISHA will be liberally construed to carry out this purpose.

Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988). Finally, because the Department administers the WISHA program and possesses expertise in interpreting WISHA regulations, its interpretation is entitled to "substantial weight." *Lee Cook Trucking & Logging v. Dep't of Labor & Indus.*, 109 Wn. App. 471, 477, 36 P.3d 558 (2001).

Further, the Occupational Safety and Health Act (OSHA) mandates that the Department be "as effective as" its federal counterpart. In determining what constitutes a WISHA violation, Washington courts consider decisions interpreting parallel OSHA

provisions to protect the health and safety of workers. *Adkins*, 110 Wn.2d at 147.

B. Appellant’s Appeal Should Be Dismissed For Failure To Comply With RAP 10.3.

RAP 10.3 specifies the formal structure of an appellant’s brief and contains important provisions related to assignments of error and the issues on review. Tegland, *Washington Practice: Rules Practice*, RAP 10.3, at 24-70 (6th ed. 2002). RAP 10.3(a) sets forth the requirements for the content of appellant’s brief and provides that the appellant’s brief should include, among other things, assignments of error and issues pertaining thereto and an argument section. *Id.* RAP 10.3(a)(5) provides that the appellant’s brief should present “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” *Id.* RAP 10.3(g) requires a brief to contain separate assignments of error for each finding of fact a party contends was improperly made, with reference to the finding by number. *Id.*

As is stated above in Part I, the Employer's brief is defective, lacking any identification of the particular findings it contends were erroneous. Pilchuck does not assign error to any specific Board finding and the argument section of Appellant's brief merely cites a few legal rules/standards, does not cite relevant parts of the record, and contains no real legal analysis. Pilchuck offers only the bare conclusions it wishes the Court to reach with no rationale as to why the Court should do so. Given these defects, the Court should decline review in this matter and affirm the Board's decision.

C. Substantial Evidence Supports The Board's Determination That Pilchuck Knew Or Could Have, With Reasonable Diligence, Known The Cited Violations Were Occurring

Pilchuck's Brief of Appellant appears to argue⁵⁹ that there is no evidence that Pilchuck knew or, with reasonable diligence, could have known of the violative flagging

⁵⁹ Pilchuck presents no actual argument in the body of the "argument" section of its Brief of Appellant. *See* AB at 14-17. But reading Pilchuck's assignments of error and issue statements (AB at 1) together with the second and third subheadings in the Argument section of Pilchuck's brief (AB at 15-16), it appears that Pilchuck wants this Court to consider whether substantial evidence supports the determinations of the Board on the constructive knowledge element of the serious violation charge and on Pilchuck's affirmative defense claiming unpreventable employee misconduct.

conditions for which it was cited. Substantial evidence supports the Board's determination, however.

In order to prove that a serious violation occurred, the Department must prove: (1) the standard applies to the cited conditions; (2) the employer violated the terms of the standard; (3) the employer's employees were exposed or had access to the violative conditions; and (4) *the employer knew of the violative conditions or could have known with the exercise of reasonable diligence* (the "could have known" alternative of the fourth element of the standard is sometimes referred to as a "constructive knowledge" test). *Secretary of Labor v. Gary Concrete Products*, 1991 O.S.H.D. (CCH) ¶ 29,344, 15 O.S.H.Cas. (BNA) 1051, 1991 WL 100580 (May 16, 1991) at *1⁶⁰; *see also Washington Cedar*, 119 Wn. App. at 914, 916.

To the extent the employer argues anything, the Employer's brief appears to focus on the fourth element of the test, i.e., the "could have known" or "constructive knowledge"

⁶⁰ *Gary Concrete Products* is a leading administrative decision under OSHA on the constructive knowledge/reasonable diligence question under the fourth element of this standard. Administrative decisions of the federal Occupational Safety and Health Review Commission are accessible on WESTLAW.

element. Whether an employer was “reasonably diligent” under the “could have known” (or “constructive knowledge”) test requires an analysis of several factors, including a history of violations (*see Washington Cedar*, 119 Wn. App. at 916), as well as considerations such as the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of the violations. *Secretary of Labor v. Stahl Roofing, Inc.*, 2002 O.S.H.D. (CCH) ¶ 32,646, 19 O.S.H.Cas. (BNA) 2179, 2003 WL 440801 (February 21, 2003) at *2. To meet the test for reasonable employer diligence, the employer must have work rules that reflect the requirements of the cited standard and that are clearly and effectively communicated to employees. *Id.*

In the present case, Pilchuck cannot prove that it acted in a reasonably diligent manner such that the violations should be excused on grounds that it could not have known of the violative flagging conditions involving both of the flaggers on

the work site.⁶¹ First, Pilchuck did not have the required written traffic control plan on site the day the inspection occurred.⁶² Even the company's own expert stated that an employer that does not have a traffic control plan on site for projects longer than one day is not in compliance with the WISHA requirements.⁶³

Second, Pilchuck had failed to provide the flaggers with the required safety orientation prior to commencing work on September 10, 2003 or at any other time during the day.⁶⁴ As a result, Pilchuck failed to ensure that the flaggers received the necessary training to assist them in safely performing their flagging duties.

Thus, there is substantial evidence that Pilchuck failed to exercise reasonable diligence. As a result, the Board's decision

⁶¹ Pilchuck makes references in its brief to an inspection conducted by Ms. Case and Ms. Boies two weeks prior to September 10, 2003. *See* AB at 5. Pilchuck claims in its brief that the prior inspection involved a review of flagging activities. *Id.* Contrary to Pilchuck's contention, however, Ms. Case testified that she did not recall that the prior inspection involved a review of flagging activities. TR 11/8/04, Case, p.37 [11-26]. It is therefore not surprising that no flagging violations were issued to Pilchuck for the earlier inspection if no flagging activities were occurring.

⁶² TR 11/8/04 Case, p.28 [21-26]; p.29 [4-13]; CABR 1-4 (Board FF 8).

⁶³ TR 12/1/04, Richards, p.15 [9-18].

⁶⁴ TR 11/8/04, Case, p.27 [6-21]; CABR 1-4 (Board FF 7).

affirming the Department's issuance of the serious flagging violations to Pilchuck should be upheld.

D. Substantial Evidence Supports The Board's Determination That Pilchuck's Violations Did Not Result From Unpreventable Employee Misconduct.

Pilchuck also appears to argue that the violations resulted from unpreventable employee misconduct and should therefore be vacated. Pilchuck's contention that the violations resulted from unpreventable employee misconduct fails for essentially the same reasons that its claim of lack of constructive knowledge fails. The company cannot blame the violation on its employees because the company failed to have required written programs in place, failed to provide employees with the necessary training, and, as a result, the company's program was not effective in practice. The Board's decision rejecting the unpreventable employee misconduct defense is supported by substantial evidence and should be affirmed.

As this Court explained in *Washington Cedar* (119 Wn. App. at 912), in RCW 49.17.120(5)(a), the Washington Legislature codified the standard of *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir.), *cert. denied*, 484 U.S. 989,

108 S. Ct. 479 (1987) (*Brock*), as an amendment to RCW 49.17.120, which now provides:

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)(a).

Unpreventable employee misconduct is an affirmative defense for which the employer bears the burden of proof. *Washington Cedar*, 119 Wn. App. at 911; *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 363, 119 P.3d 366 (2005), *review denied*, 156 Wn.2d 1028 (2006); *Brock*, 818 F.2d at 1276. The Department has the initial burden of establishing a prima facie case that a WISHA violation occurred; the burden then shifts to the employer to rebut the prima facie case, or to establish an affirmative defense. *Legacy*

Roofing, 129 Wn. App. at 363; *see also In re Jeld Wen of Everett*, BIIA Dec., 88 W144 (1990) at 15 (citing *Brock*).

To utilize the defense, the employer must prove that the violation was caused by unforeseeable employee misconduct, rather than by inadequate employer implementation or enforcement of its safety program. *See Jeld-Wen* at 14. While each of the four parts of the above test must be met by the employer in order to meet its burden of proof, *Brock* emphasizes that the employer must show more than a good “paper program;” the employer must establish the company’s program is **“effective in practice as well as in theory.”** *Brock*, 818 F.2d at 1277 (emphasis added). *See also In re John Lupo Construction, Inc.*, BIIA Dec., 96 W075 (1997) at 2.

Thus, in order to prevail in this defense, an employer must demonstrate, among other things, that: (i) all feasible steps were taken to avoid the occurrence of the hazard, and (ii) the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule, the departure from which the employer did not have constructive or actual

knowledge. *General Dynamics Corp., Inc. v. Occupational Safety & Health Rev. Comm'n*, 599 F.2d 453 (1st Cir. 1979); *Horne Plumbing & Heating Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 564, 569 (5th Cir. 1976). This includes the training of employees as to the dangers and the supervision of the work site. *Horne*, 528 F.2d at 569.

In describing the employer's burden of proof with respect to employee misconduct, the *Brock* court cautioned that Congress intended the defense to be very difficult for employers to prove, emphasizing that an employer must be strictly held to its burden of proof on each element of the test. *Brock*, 818 F.2d at 1277. For example:

An instance of hazardous employee misconduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring, training and sanctioning of the employees.

Id. (Citations omitted). *Brock* further notes that the employer's duty includes providing "training, supervision, and disciplinary action designed to enforce the rules." *Id.*

The Board correctly found that Pilchuck's violations did not result from unpreventable employee misconduct. First, the company did not have the required written plan on site the day of the inspection.⁶⁵ As a result, the company was unable to train the flaggers that day on the contents of the written plan. In addition, Pilchuck did not establish that it provided the required safety orientation training on the day of the inspection.⁶⁶ Moreover, Pilchuck did not provide effective enforcement that day, failing to oversee the employees during the course of their work. As a result, Pilchuck's program was not effective in practice. Finally, having been cited for at least one of the identified violations previously, Pilchuck cannot establish that the violations were "idiosyncratic" or "isolated"

⁶⁵ TR 11/8/04, Case, p.27 [6-21]; p.28 [21-26]; p.29 [4-13]; CABR 1-4 (Board FF 8).

⁶⁶ TR 11/12/04, Smith, p.51 [1-20]; CABR 1-4 (Board FF 7).

events.⁶⁷ Pilchuck has failed to establish that the cited violations resulted from unpreventable employee misconduct.

V. CONCLUSION

Pilchuck has failed to establish that the Board's decision is not supported by substantial evidence. There is substantial evidence that, if Pilchuck had exercised reasonable diligence, the company could have known of the violations. There is likewise substantial evidence that the company did not meet its burden under the affirmative defense for unpreventable employee misconduct. The superior court's decision affirming the Board's decision should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of November, 2006.

ROB MCKENNA
Attorney General



BETH A. HOFFMAN
Assistant Attorney General
WSBA No. 28719

⁶⁷ TR 11/8/04, Case, p.20 [15-16]; p.22 [1-6, 9-15]; *see also* *Washington Cedar*, 119 Wn. App. at 911-13.

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: PILCHUCK CONTRACTORS, INC.) DOCKET NO. 04 W0058
2)
3 CITATION & NOTICE NO. 306427535) PROPOSED DECISION AND ORDER

4
5 INDUSTRIAL APPEALS JUDGE: Verlaine Keith-Miller

6
7 APPEARANCES:

8
9 Employer, Pilchuck Contractors, Inc., by
10 Northcraft, Bigby & Owada, P.C., per
11 Aaron K. Owada

12
13 Employees of Pilchuck Contractors, Inc., by
14 Laborers Local #440, per
15 None

16
17 Employees of Pilchuck Contractors, Inc., by
18 Operating Engineers Local #302, per
19 None

20
21 Employees of Pilchuck Contractors, Inc., by
22 Operating Engineers Local #612, per
23 None

24
25 Department of Labor and Industries, by
26 The Office of the Attorney General, per
27 Beth A. Hoffman, Assistant

28
29
30 The employer, Pilchuck Contractors, Inc., filed an appeal with the Board of Industrial
31 Insurance Appeals on January 16, 2004, from a November 4, 2003 citation and notice of the
32 Department of Labor and Industries. Citation and Notice No. 306427535 alleged a serious violation
33 of WAC 296-155-305(3), with a proposed penalty of \$800 (Item 1-1a), a repeat serious violation of
34 WAC 296-155-305(8) with no penalty (Item 1-1b), a repeat serious violation of
35 WAC 296-155-305(4)(a), with a proposed penalty of \$800 (Item 1-2) and general violations of
36 WAC 296-155-305(5)(a) (Item 2-1), WAC 296-155-305(9)(a) and (b) (Items 2-2 and 2-3) and
37 WAC 296-155-120(2) (Item 2-4), with no proposed penalties. The total penalty assessed was
38 \$1,600. The Citation and Notice No. 306427535 is **AFFIRMED**.
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ISSUES

1. **Did the Department have any basis for issuing the citations?**
2. **If the alleged violations occurred, were the violations attributable to unpreventable employee misconduct?**

PROCEDURAL MATTERS

The testimony of Jennifer Richards was taken by deposition on December 1, 2004. Pursuant to WAC 263-12-117, this deposition is made part of the record. All objections are overruled.

DISCUSSION

The following discussion of evidence is derived from my review of the testimony of Susan Case, Dan K. McMurdie, Donald M. Smith, Ronald R. Martinez, and Jennifer Richards.

Susan Case is a Safety and Health Specialist III with the Department. In addition, she has twice been tested and certified as a flagger. In September 2003, Ms. Case inspected a Pilchuck Contractors, Inc., (hereinafter, Pilchuck) work site located near the corner of South 144th and Meridian in Puyallup, Washington. Ms. Case had observed a flagging operation. A person was directing traffic without a paddle and was exposed to traffic.

At the work site, the only activity occurring was flagging. Ms. Case arrived at the work site at 12:45 pm. Ms. Case initiated an inspection. She presented her credentials to person performing traffic control and waited for Donald M. Smith, foreman for the site to begin an opening conference. The assistant foreman also participated.

Ms. Case testified that after the inspection opening conference, the employer was cited for a violation of WAC 296-155-305(3) (Item 1-1(a)) because a flagger was standing in the middle of the roadway and was exposed to traffic coming from behind. The speed limit there was 35 miles per hour. The worker, Ray Ellsworth, was not using a sign paddle and did not have his vest closed, causing him to be less visible. These circumstances created a hazard of being struck by traffic.

1 Ms. Case classified this activity as a serious violation of the regulation because of the risk of
2 serious injury such as broken bones requiring hospitalization. Ms. Case noted that Item 1-1(a) was
3 a grouped violation with Item 1-1(b); the penalty assigned 1-1(a) covers both violations. In
4 calculating the penalty, she considered the factors associated with Item 1-1(b). Item 1-1(b) was
5 issued because the employer was in violation of WAC 296-155-305(8), because the flagger was
6 exposed to oncoming traffic from behind without using a mirror or spotter. See Exhibit Nos. 3, 4, 6,
7 7, and 8. Ms. Case characterized this violation as a repeat violation, which would take precedence
8 in setting the penalty.

9 In assessing the amount of the penalty, Ms. Case looked to the severity of the alleged
10 violation, the probability of injury. She assessed a severity level of 5, a probability factor of 1.
11 These two factors, when multiplied, determined the gravity rating of 5. The base penalty based on
12 those factors was \$500. A \$100 deduction for good faith was made because of the employer's
13 cooperation at the job site. There were no further adjustments made for history or company size.
14 The proposed penalty was \$400. Because Item 1-1(b) was considered a repeat violation, the
15 proposed penalty was multiplied by a repeat factor of two ($\$400 \times 2$), for a total penalty assessed of
16 \$800.

17 Ms. Case cited the employer for violating WAC 296-155-305(4)(a) because one of it's
18 workers, Mr. Ellsworth, failed to use a sign paddle when controlling traffic at the job site (Item 1-2).
19 Mr. Ellsworth was at risk because he was less visible to drivers. Ms. Case suggested that drivers
20 might not recognize that Mr. Ellsworth was acting as a flagger. He was exposed to the risk of being
21 struck by a vehicle.

22 The penalty was calculated using the same method as for Item 1-1. This alleged violation
23 was determined to be serious. It was assessed a severity factor of 5, a probability factor of 1, for a

1 gravity rating of 5. The base penalty was \$500, which was reduced by \$100 to account for good
2
3 faith. No deductions were made for history or size. The proposed penalty was \$400. The
4
5 proposed penalty was adjusted by a repeat factor of 2, for a total penalty of \$800.

6
7 Pilchuck was cited for a general violation of WAC 296-155-305(5)(a) for two instances
8
9 regarding personal protective equipment: 1) one flagger failed to close his vest so did not have the
10
11 360-degree retro reflective tape; and 2) one flagger was not wearing the type of vest required for
12
13 flagging (Item 2-1). No penalties were assessed.

14
15 The company was cited for a general violation of WAC 296-155-305(9)(a) for failing to
16
17 conduct an orientation with the flaggers at the beginning of the job to familiarize them with that
18
19 particular job site (Item 2-2). Ms. Case asked the employer representatives to provide written
20
21 documentation of their safety orientations. None were ever provided. Ms. Case explained that
22
23 such orientations are required for the safety of the job site. Such orientations inform flaggers of
24
25 traffic control positions in safe locations, how to communicate with each other or with crew, etc.
26
27 Both Mr. Ellsworth and Mr. Wilke were exposed to this hazard. No penalty was assessed.

28
29 Pilchuck was cited for a general violation of WAC 296-155-305(9)(b) for failing to have a
30
31 traffic control plan on site for a job that lasted longer than a day. (Item 2-3) No penalty was
32
33 assessed. The last alleged violation concerns a general violation of WAC 296-155-120(2).
34
35 Ms. Case noted that during the course of her investigation, she learned that neither Mr. Ellsworth
36
37 nor Mr. Wilke was trained in first aid. She also noted that when she arrived at the job site that the
38
39 only two workers were present: the two flaggers. The other workers were at lunch. No penalty
40
41 was assessed (Item 2-4).

1 On September 11, 2003, Ms. Case conducted a closing conference. At some point between
2
3 the opening conference and the closing conference, the inspector requested a copy of Pilchuck's
4
5 traffic control plan for the site, which she received. Ms. Case learned from Mr. Smith that no traffic
6
7 control plan was on site. She testified that he was unaware that Pilchuck needed to have the plan
8
9 on site.

10
11 Dan K. McMurdie is a Department safety program manager in WISHA policy and technical
12
13 services. He is also a certified flagger. Part of his duties as program manager includes providing
14
15 guidance to field staff on the proper application of the Washington Administrative Code.
16
17 Mr. McMurdie has a staff of eight technical specialists. Their primary responsibility is to provide
18
19 Departmental interpretation of the regulations and provide guidance to field staff on the proper
20
21 application of those codes. Mr. McMurdie's section is also involved in the WAC promulgation
22
23 process, providing all the technical input to ensure that the standards are technically accurate,
24
25 correct, and at least as effective as federal OSHA. His section is responsible for all written policies
26
27 that are issued by WISHA.

28
29 Mr. McMurdie provides staff training on the proper application of the Washington
30
31 Administrative Codes in conjunction with the Manual on Uniform Traffic Control. He explained that
32
33 if an employer is using a flagger, the employer must implement the requirements of
34
35 WAC 296-155-305. These provisions are supplemented with the MUTC. If there is conflict
36
37 between the two, the requirement of Section 305 applies.

38
39 Mr. McMurdie discussed the inspection with Ms. Case and reviewed the inspection report.
40
41 He believed Ms. Case cited Pilchuck correctly.
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1 Donald M. Smith is a heavy equipment operator foreman for Pilchuck. He has been in the
2
3 construction industry since 1988. Mr. Smith testified that as part of his experience, he had a
4
5 general understanding of safety rules and of their application to traffic control. He does not have a
6
7 traffic control card. He has worked for Pilchuck for over nine years.

8
9 Mr. Smith was on the job site on September 10, 2003, when Ms. Case conducted her
10
11 inspection. He was responsible for the job site on Meridian as well as one about a mile away at
12
13 128th Street and 97th Avenue. Both job sites were related to the same project. Pilchuck was
14
15 contracted to install an eight-inch high pressure gas main. This project had been on going for a
16
17 couple of months before this inspection.

18
19 Mr. Smith recounted that two weeks before the September 10th inspection, the job site at
20
21 128th Street had been the subject of another inspection. Traffic control personnel were also
22
23 working during that inspection, but no violations of the relevant codes was cited.

24
25 When Ms. Case arrived at the Meridian job site, Mr. Smith was at the other job site. He had
26
27 spent time at the job site in question, but did not observe any traffic control violations. He also
28
29 noted that there had been a change in the personnel handling traffic control. One of the flaggers
30
31 was called away because of an emergency and had been replaced with a flagger from the union
32
33 hall.

34
35 Mr. Smith was familiar with the traffic plan and stated that his crew was supposed to follow it.
36
37 When he arrived at the Meridian site and learned that the flaggers were not in compliance with
38
39 regulations, he was surprised. When he was at the site earlier, before the inspection, the flaggers
40
41 were in compliance with regulations. He instructed the individuals to retrieve their paddles.

42
43 He noted that generally, when a flagger is hired to work, he or she comes to the job with the
44
45 appropriate gear and proof of certification for flagging.

46
47

1 Mr. Smith conceded that a traffic control plan was not available at the site, but noted that the
2
3 flaggers would have been provided a verbal explanation of the situation. He admitted that he had
4
5 not had an opportunity to train the replacement flagger on the specific contents of the written traffic
6
7 plan.

8
9 Ronald R. Martinez is the safety director for Pilchuck, whose duties include enforcing
10
11 accident prevention programs, providing employee training, enforcing state regulations.
12
13 Mr. Martinez also performs site audits, inspections, and visiting work sites. According to him, he
14
15 and others in the safety office spend approximately 50 percent of the time in the field with the
16
17 workforce conducting audits.

18
19 Mr. Martinez also explained that he instituted a requirement that tailgate meetings be held
20
21 weekly on job sites to discuss changes in conditions, safety issues, etc. He also instructs foreman
22
23 on the Pilchuck job sites to periodically, throughout the day, conduct their own internal audits on
24
25 sites. He conceded that he was not at the job site at the time of the inspection and had no personal
26
27 knowledge as to the conditions at the work site.

28
29 Jennifer Richards is the safety director with Approach Management Services. As part of her
30
31 job, she performs safety training, fatality and accident investigations, job site audits and assists
32
33 clients with written safety programs. Before working in the safety area, Ms. Richards worked for
34
35 ten years as a carpenter. She has also worked as a flagger, holds a flagger certification card, and
36
37 has been a flagger instructor for about six years.

38
39 Ms. Richards reviewed the traffic control plan prepared by Pilchuck. She believed the plan
40
41 contained the necessary elements to control traffic in a safe manner. She noted that employers are
42
43 required to have a traffic control plan at the job site, that employers are responsible for insuring that
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45 flaggers use stop/slow paddles, high visibility vests, providing a site specific orientation class and
46
47 that flaggers follow the traffic control plan.

1
2
3 **DECISION**
4

5 The Department presented a prima facie case that the employer committed the violations
6 alleged in Citation and Notice No. 306427535. The employer failed to sustain its burden of
7 establishing that no violations had been committed or were the result of employee misconduct. The
8 employer has conceded that no traffic control plan was on site and that no orientation class was
9 conducted for the new flagger.
10

11
12 WAC 296-155-305 regulates how flagging is to be conducted. The exhibits, together with
13 Ms. Case's testimony, render it clear that each of the violations alleged was committed by
14 employee's of Pilchuck. There is no testimony disputing the observations of Ms. Case. The
15 flaggers were exposed to oncoming traffic without a spotter or mirror, at least one of them was
16 directing traffic without using a paddle, neither was wearing protective gear appropriately. The
17 replacement flagger was not wearing the appropriate vest in terms of retro reflective tape, and one
18 had not closed his vest, disrupting the 360-degree visibility required.
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27 The employer argues because it was not cited for flagger violations after an earlier
28 inspection at the other job site, it had no reason to believe the flagging operation at Meridian was
29 performed improperly. That argument is not persuasive. One could assume no flagger violations
30 were cited because none occurred. The evidence establishes that flagger violations did occur two
31 weeks later at the Meridian site. The evidence also establishes that when the new flagger arrived,
32 no traffic control plan was on site, no orientation occurred. In this regard, the employer failed to
33 meet a requirement of Section 305. The employer's argument that it had no knowledge of the
34 flagger violations is weakened because it failed to meet requirements that would have provided it
35 notice.
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1 The employer argues that the individual flagger violations are the result of employee
2 misconduct. Unpreventable employee misconduct is an affirmative defense to an alleged violation
3 that requires the employer to prove that it has:
4

- 5 1. A thorough safety program, including work rules, training, and equipment
6 designed to prevent the safety violation at issue;
- 7 2. Adequately communicated these rules to its employees;
- 8 3. Taken steps to discover and correct violations of its safety rules; and
- 9 4. Effectively enforced its safety program as written in practice and not just
10 in theory.

11 RCW 49.17.120(5)(a); See also *In re Erection Company II*, BIIA Dec., 88 W142 (1990); *In re*
12 *Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990). No evidence was presented that the employer
13 adequately communicated its traffic plan to at least one of the flaggers. In fact, no traffic orientation
14 was conducted for the new flagger. I also question whether the employer took any steps to observe
15 whether the rules were being followed. At the time of the inspection, the only workers present were
16 the two flaggers. The employer has not established employee misconduct and cannot avoid the
17 citations or penalties based on that defense.
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30 FINDINGS OF FACT

- 31 1. On September 10, 2003, Susan Case, a safety and compliance officer
32 with the Department of Labor and Industries issued an inspection report
33 following an inspection of Pilchuck Contractors, Inc., work site located on
34 the corner of Meridian East and 144th St. East in Puyallup, Washington
35 98375. On November 4, 2003, the Department issued Citation and
36 Notice No. 306427535, alleging a serious violation of
37 WAC 296-155-305(3), with a proposed penalty of \$800 (Item 1-1a), a
38 repeat serious violation of WAC 296-155-305(8) with no penalty
39 (Item 1-1b), a repeat serious violation of WAC 296-155-305(4)(a), with a
40 proposed penalty of \$800 (Item 1-2) and general violations of
41 WAC 296-155-305(5)(a), WAC 296-155-305(9)(a) and
42 WAC 296-155-305(9)(b) (Items 2-2 and 2-3) and WAC 296-155-120(2)
43 (Item 2-4), with no proposed penalties. The total penalty assessed was
44 \$1,600. On January 14, 2004, the employer filed a notice of appeal with
45 the safety division.
46
47

1 On December 10, 2003, the Department issued a notice of reassumption
2 of jurisdiction. On December 18, 2003, the Department issued an
3 extension of the reassumption period for an additional fifteen days. On
4 January 14, 2004, the employer filed a notice of appeal with the safety
5 division, requesting that the appeal be forwarded to the Board of
6 Industrial Insurance Appeals.
7

8 On January 16, 2004, the employer's appeal was filed with the Board
9 and the file was transmitted to the Board. On January 20, 2004, the
10 Board issued a notice of filing of appeal, assigning it Docket
11 No. 04 W0058, and directing that proceedings be held.
12

- 13 2. On September 10, 2003, flaggers working for Pilchuck Construction,
14 Inc., at the Meridian job site in Puyallup, were exposed oncoming traffic.
15 This grouped serious and repeat serious violation (Items 1-1 (a and b)),
16 respectively, exposed flaggers to the risk of being struck by traffic and
17 suffering injuries requiring hospitalization. Both were appropriately cited
18 and penalized.
19
- 20 3. The employer did not insure that the flaggers used hand paddles to
21 direct traffic exposing them to the risk of being struck by a car. This
22 repeat serious violation was appropriately cited and penalized
23 (Item 1-2).
24
- 25 4. The employer failed to insure that workers were wearing high visibility
26 vests correctly. One flagger had not closed his vest to provide
27 360-degrees of visibility. The other was not wearing an appropriate
28 vest (Item 2-1).
29
- 30 5. Pilchuck failed to conduct an orientation with the new flagger on
31 September 10, 2003 (Item 2-2).
32
- 33 6. Pilchuck did not have a traffic control plan at the Meridian job
34 site (Item 2-3).
35
- 36 7. Pilchuck failed to ensure that a person with first aid training was on the
37 site during the lunch hour when both flaggers were working (Item 2-4).
38
- 39 8. None of the violations assessed were the result of unpreventable
40 employee misconduct.
41

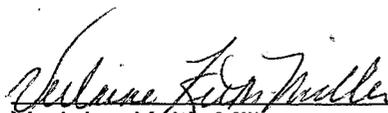
42 CONCLUSIONS OF LAW

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the
44 parties to and subject matter of this appeal.
45
46
47

- 1 2. On September 10, 2003, Pilchuck Contractors, Inc. committed a serious
2 violation of WAC 296-155-305(3) and a repeat serious violation of
3 WAC 296-155-305(8) when it permitted workers to perform flagging
4 while exposed to oncoming traffic and without a mirror or spotter
5 (Items 1-1 (a and b)).
6
7 3. On September 10, 2003, the employer committed a serious violation of
8 WAC 296-155-305(4)(a) when it permitted flagger to perform traffic
9 control without using hand paddles for signaling motorists (Item 1-2).
10
11 4. Pilchuck committed the general violations of WAC 296-155-305(5)(a),
12 (9)(a), (9)(b) and WAC 296-155-120(2) when it failed to ensure that
13 flaggers were attired in the appropriate vests, failed to conduct an
14 orientation familiarizing the new flagger with the job site, failed to have a
15 traffic control plan onsite and failed to have a first aid trained crew
16 member present when the flaggers were working during the lunch hour
17 (Items 2-1, 2-2, 2-3, and 2-4, respectively).
18
19 5. The penalties of \$1,600 assessed against Pilchuck Contractors, Inc., for
20 the serious and repeat serious violations identified in Citation and Notice
21 No. 306427535 reflect appropriate applications of RCW 49.17.180(7)
22 and WAC 296-800-35018 through 35040.
23
24 6. Citation and Notice No. 306427535 is correct, and is affirmed.

25
26 It is so **ORDERED**.

27
28 Dated this 28th day of February, 2005.
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33 Verlaine Keith-Miller
34 Industrial Appeals Judge
35 Board of Industrial Insurance Appeals
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APPENDIX B

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: PILCHUCK CONTRACTORS INC.) DOCKET NO. 04 W0058
2)
3 CITATION & NOTICE NO. 306427535) DECISION AND ORDER

4 APPEARANCES:

5
6 Employer, Pilchuck Contractors, Inc., by
7 Northcraft, Bigby & Owada, P.C., per
8 Aaron K. Owada and Martin D. McLean

9 Employees of Pilchuck Contractors, Inc, by
10 Laborers Local #440, per
11 None

12 Employees of Pilchuck Contractors, Inc, by
13 Operating Engineers Local #302, per
14 None

15 Employees of Pilchuck Contractors, Inc, by
16 Int'l Union of Operating Engineers #612, per
17 None

18 Department of Labor and Industries, by
19 The Office of the Attorney General, per
20 Beth A. Hoffman, Assistant

21 The employer, Pilchuck Contractors, Inc., filed an appeal with the Board of Industrial
22 Insurance Appeals on January 16, 2004, from a citation and notice of the Department of Labor and
23 Industries dated November 4, 2003. In this citation and notice, the Department alleged a serious
24 violation of WAC 296-155-305(3), with a proposed penalty of \$800 (Item 1-1a), a repeat serious
25 violation of WAC 296-155-305(8) with no penalty (Item 1-1b), a repeat serious violation of
26 WAC 296-155-305(4)(a), with a proposed penalty of \$800 (Item 1-2), and general violations of
27 WAC 296-155-305(5)(a) (Item 2-1), WAC 296-155-305(9)(a) and (b) (Items 2-2 and 2-3), and
28 WAC 296-155-120(2) (Item 2-4), with no proposed penalties. The total penalty assessed was
29 \$1,600. The Department Citation and Notice is **AFFIRMED**.

30 **DECISION**

31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
33 Order issued on February 28, 2005, in which the industrial appeals judge affirmed the citation and
notice from the Department dated November 4, 2003.

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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
2 no prejudicial error was committed. The rulings are affirmed. We agree wholly with the decision of
3 our industrial appeals judge, and we have granted review solely to amend the Findings of Fact
4 relative to the penalties.

5 FINDINGS OF FACT

- 6 1. On September 10, 2003, Susan Case, a safety and compliance officer
7 with the Department of Labor and Industries, issued an inspection report
8 following an inspection of a Pilchuck Contractors, Inc., work site located
9 on the corner of Meridian East and 144th St. East in Puyallup,
10 Washington 98375. On November 4, 2003, the Department issued
11 Citation and Notice No. 306427535, alleging a serious violation of
12 WAC 296-155-305(3), with a proposed penalty of \$800 (Item 1-1a), a
13 repeat serious violation of WAC 296-155-305(8) with no penalty
14 (Item 1-1b), a repeat serious violation of WAC 296-155-305(4)(a), with a
15 proposed penalty of \$800 (Item 1-2), and general violations of
16 WAC 296-155-305(5)(a), WAC 296-155-305(9)(a), WAC 296-155-
17 305(9)(b) (Items 2-2 and 2-3), and WAC 296-155-120(2) (Item 2-4),
18 with no proposed penalties. The total penalty assessed was \$1,600.
19 On November 12, 2004, the employer filed a Notice of Appeal with the
20 safety division.

21 On December 10, 2003, the Department issued a notice of reassumption
22 of jurisdiction. On December 18, 2003, the Department issued an
23 extension of the reassumption period for an additional fifteen days. On
24 January 14, 2004, the Department issued a notice of decision not to
25 reassume jurisdiction because the employer filed a notice with the
26 Department requesting that the appeal be forwarded to the Board of
27 Industrial Insurance Appeals.

28 On January 16, 2004, the employer's appeal was filed with the Board
29 and the file was transmitted to the Board. On January 20, 2004, the
30 Board issued a notice of filing of the appeal, assigning it Docket
31 No. 04 W0058, and directing that proceedings be held.

- 32 2. On September 10, 2003, flaggers working for Pilchuck Construction,
33 Inc., at the Meridian job site in Puyallup, were exposed to oncoming
traffic. This grouped violation (Items 1-1 (a and b)), respectively,
exposed flaggers to the risk of being struck by traffic and suffering
injuries requiring hospitalization.
3. Relative to Item 1-1a and b, the flaggers involved were exposed to
conditions carrying a substantial probability that death or serious
physical harm could result from being hit by a motor vehicle. Thus, the
severity of any injury resulting is a 5 on a scale of 1-6, with 1 being the
lowest and 6 the highest. The probability of this happening is 1 on the
same scale, which provides a base penalty of \$500. The company

1 acted in good faith, in that it immediately addressed the problem, and
2 thus the base penalty is reduced by \$100. The remaining \$400 is
3 doubled because this is a repeat violation, for a total penalty for
4 Items 1-1 a and b of \$800.

- 5 4. The employer did not ensure that the flaggers used hand paddles to
6 direct traffic, exposing them to the risk of being struck by a car.
- 7 5. Relative to Item 1-2, the flagger involved was exposed to conditions
8 carrying a substantial probability that death or serious physical harm
9 could result from being hit by a motor vehicle. Thus, the severity of any
10 injury resulting is a 5 on a scale of 1-6, with 1 being the lowest and 6 the
11 highest. The probability of this happening is 1 on the same scale, which
12 provides a base penalty of \$500. The company acted in good faith, in
13 that it immediately addressed the problem, and thus the base penalty is
14 reduced by \$100. The remaining \$400 is doubled because this is a
15 repeat violation, for a total penalty for Item 1-2 of \$800.
- 16 6. The employer failed to ensure that workers were wearing high visibility
17 vests correctly. One flagger had not closed his vest to provide
18 360 degrees of visibility. The other was not wearing an appropriate
19 vest (Item 2-1).
- 20 7. Pilchuck failed to conduct an orientation with the new flagger on
21 September 10, 2003 (Item 2-2).
- 22 8. Pilchuck did not have a traffic control plan at the Meridian job
23 site (Item 2-3).
- 24 9. Pilchuck failed to ensure that a person with first aid training was on the
25 site during the lunch hour when both flaggers were working (Item 2-4).
- 26 10. None of the violations assessed were the result of unpreventable
27 employee misconduct.

28 CONCLUSIONS OF LAW

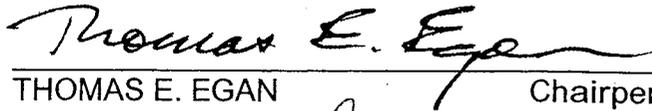
- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the
30 parties to and the subject matter of this appeal.
- 31 2. On September 10, 2003, Pilchuck Contractors, Inc., committed a serious
32 violation of WAC 296-155-305(3) and a repeat serious violation of
33 WAC 296-155-305(8) when it permitted workers to perform flagging
while exposed to oncoming traffic and without a mirror or spotter
(Items 1-1 (a and b)).
3. On September 10, 2003, the employer committed a serious violation of
WAC 296-155-305(4)(a) when it permitted flaggers to perform traffic
control without using hand paddles for signaling motorists (Item 1-2).

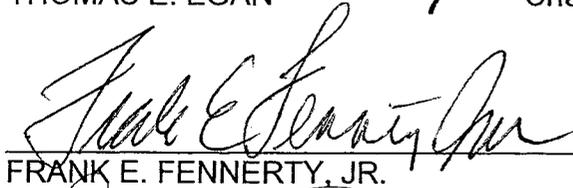
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4. Pilchuck committed the general violations of WAC 296-155-305(5)(a), (9)(a), (9)(b), and WAC 296-155-120(2) when it failed to ensure that flaggers were attired in the appropriate vests, failed to conduct an orientation familiarizing the new flagger with the job site, failed to have a traffic control plan onsite, and failed to have a first aid trained crew member present when the flaggers were working during the lunch hour (Items 2-1, 2-2, 2-3, and 2-4, respectively).
 5. The penalties of \$1,600 assessed against Pilchuck Contractors, Inc., for the serious and repeat serious violations identified in Citation and Notice No. 306427535 reflect appropriate applications of RCW 49.17.180(7) and WAC 296-800-35018 through 35040.
 6. Citation and Notice No. 306427535 is correct and is affirmed.

It is so **ORDERED**.

Dated this 25th day of April, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS


THOMAS E. EGAN Chairperson


FRANK E. FENNERTY, JR. Member


CALHOUN DICKINSON Member

COURT OF APPEALS
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STATE OF WASHINGTON
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NO. 34752-1-II

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

PILCHUCK CONTRACTORS, INC.,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

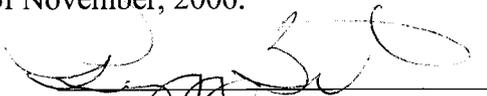
DECLARATION OF
MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief Of Respondent Department Of Labor And Industries to counsel for all parties on the record by depositing with ABC Legal Messenger addressed as follows:

Aaron Owada
The Law Offices of Aaron K. Owada
4405 7th Ave SE, Ste 205
Lacey, WA 98503

DATED this 2nd day of November, 2006.


PEGGY BERTRAND