

NO. 34886-1-II

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

BD ROOFING, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES2

A. Does substantial evidence support the Board’s finding that the Department established a prima facie case for repeat serious violation 1-1a (employer failure to ensure that employees used fall protection safety equipment), including the employer’s constructive knowledge of the violative conduct?2

B. Does substantial evidence support the Board’s finding that BD Roofing failed to prove all the elements of the affirmative defense of unpreventable employee misconduct?2

III. STATEMENT OF THE CASE2

A. The Inspection.....2

B. Testimony At The Hearing5

C. The Citation7

D. The Repeat Violations.....7

E. The Proposed Decision And Order8

F. Post-Hearing Appeals9

IV. LEGAL STANDARDS.....10

A. Standard Of Review10

B. WISHA Must Be Liberally Construed To Further Worker Health And Safety.....11

V. ARGUMENT12

A.	The Board Correctly Held That The Department Established Its Prima Facie Case For Repeat Serious Violation 1-1a, Including Proof Of BD Roofing's Constructive Knowledge.....	12
B.	Substantial Evidence Supports The Board's Finding That BD Roofing Failed To Prove Effective Enforcement Of Its Safety Program And Thus Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct.....	18
VI.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Aluminum Co.</i> , 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).....	11
<i>Asarco v. Puget Sound Air Pollution Control Auth.</i> , 51 Wn. App. 49, 56, 751 P.2d 1229 (1988).....	12
<i>Austin Bldg. Co. v. Occupational Safety & Health Review Comm'n</i> , 647 F.2d 1063, 1068 (10 th Cir. 1981)	15
<i>Aviation West Corp. v. Dep't of Labor & Indus.</i> , 138 Wn.2d 413, 424, 980 P.2d 701 (1999).....	11
<i>Brock v. L.E. Myers Co., High Voltage Div.</i> , 818 F.2d 1270 (6 th Cir. 1987), <i>cert. denied</i> , 484 U.S. 989, 108 S. Ct. 479.....	19, 20, 21, 23
<i>Inland Foundry v. Dep't of Labor & Indus.</i> , 106 Wn. App. 333, 336, 24 P.3d 424 (2001).....	11
<i>Kaiser Aluminum v. Pollution Control Hearings Bd.</i> , 33 Wn. App. 352, 354, 654 P.2d 723 (1982).....	12
<i>Lee Cook Trucking & Logging v. Dep't. of Labor & Indus.</i> , 109 Wn. App. 471, 477, 36 P.3d 558 (2001).....	12
<i>Legacy Roofing, Inc. v. Dep't of Labor & Indus.</i> , 129 Wn. App. 356, 119 P.3d 366 (2005), <i>review denied</i> , 156 Wn.2d 1028, 133 P.3d 473 (2006).....	19, 22, 24
<i>Martinez Melgoza v. Dep't of Labor & Indus.</i> , 125 Wn. App. 843, 847, 848, 106 P.3d 776, (2005), <i>review denied</i> , 155 Wn.2d 1015 (2005)	10
<i>Stute v. P.B.M.C.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	11

Washington Cedar & Supply Co., Inc., v. Dep't of Labor & Indus.,
119 Wn. App. 906, 912, 83 P.3d 1012 (2003)..... passim

Statutes

RCW 49.17.010 11

RCW 49.17.050(2)..... 11

RCW 49.17.120(5)..... 18, 19, 23

RCW 49.17.120(5)(iv) 21

RCW 49.17.150 10

RCW 49.17.180(6)..... 13

Regulations

WAC 296-155-24505(1)..... 7

WAC 296-155-24510 7, 8

Other Authorities

In re Exxel Pacific, Inc.,
1998 WL 718040 (Wash. Bd. Ind. Ins. App. (1998))..... 13

In re General Security Services Corp.,
1998 WL 960837 (Wash. Bd. Ind. Ins. App.1998)) 14

In re Jeld-Wen of Everett,
1990 WL 205725 (Wash. Bd. Ind. Ins. App. (1990))..... 19, 21

Mark A. Rothstein, *Occupational Safety and Health Law*,
§ 105 at 159, 4th ed. (1998)..... 14

Sec. of Labor v. Kokosing Constr. Co., Inc.,
OSHRC Dckt. No. 92-2596; 1996 WL 749961 (OSHRC, Dec. 20,
1996) 15

I. INTRODUCTION

This case was initiated when the Department of Labor and Industries (Department) issued a citation to BD Roofing (BD Roofing) under the Washington Industrial Safety and Health Act (WISHA) for repeat serious safety violations of the Washington Administrative Code (WAC).¹ BD Roofing appealed to the Board of Industrial Insurance Appeals (Board). After a full evidentiary hearing, the Board issued a Proposed Decision and Order affirming the repeat serious violation for failing to ensure that workers wore fall protection safety equipment, and vacating the violation for failing to have a site specific fall protection plan on site.² BD Roofing then petitioned for review. On February 3, 2005, the Board denied the petition for review, making the Proposed Decision and Order the final order of the Board.³

BD Roofing sought judicial review in the Superior Court of Pierce County. The Superior Court affirmed the Board's decision, but modified the number of repeat violations from eight (8) to seven (7) and reduced the

¹ Certified Appeal Board Record (CABR), p. 22.

² CABR, Proposed Decision and Order, p. 27. A copy of the Proposed Decision and Order is attached as Appendix A.

³ CABR, p. 1.

penalty to \$18,900.⁴ Now BD Roofing, in its third attempt to overturn the Board's decision, appeals to this Court.

II. STATEMENT OF THE ISSUES

- A. **Does substantial evidence support the Board's finding that the Department established a prima facie case for repeat serious violation 1-1a (employer failure to ensure that employees used fall protection safety equipment), including the employer's constructive knowledge of the violative conduct?**
- B. **Does substantial evidence support the Board's finding that BD Roofing failed to prove all the elements of the affirmative defense of unpreventable employee misconduct?**

III. STATEMENT OF THE CASE

A. The Inspection

On October 29, 2003, Larry Adams, a Department Compliance Safety and Health Officer, observed four to five BD Roofing employees on a roof located at 7024 27th Street W., University Place, Washington. The workers were tearing off old roofing material, and, although they were wearing harnesses, the harnesses were not attached to the roof with lanyards and anchors.⁵ In the course of the inspection, Mr. Adams did not climb up to look at the roof. However, BD Roofing's safety officer and representative,

⁴ Clerk's Papers at 23, a copy of the Superior Court Order is attached as Appendix B.

⁵ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 16.

Joan Nelson, did, and informed Mr. Adams that there were no anchors installed on the roof.⁶ Ms. Nelson testified:

So then I went up the ladder and looked on the roof, and was too nervous to go from the ladder onto the roof, because it was not stable in my opinion, because it was to a gutter that was loose and supported by one nail, and Jose went up onto the roof and held up the four anchors that had come with the roofing material, and they had just been left laying on the roof, and he held them up so that I could take photographs of them, and I was upset with the crew, because I had told them over and over, and not just on this site but others, that they need to be using the anchors, that they need to be tied off, that the lanyards had to be adjusted correctly, that ladders had to be secured, because they were creative in how they were attaching ladders from the ground to the roof or from roof to roof.⁷

Based on the fact that the BD Roofing employees had removed shingles from half the roof by the time of the inspection, Mr. Adams estimated they had been working half a day.⁸

As Mr. Adams approached the site, the workers climbed off the roof. Mr. Adams spoke to the worker in charge of the site, Diego Valentino.⁹ When Mr. Adams asked to see the site specific fall protection work plan,

⁶ CABR, Transcript, 8/30/04, Testimony of Larry Adams, pp. 27, 28.

⁷ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, pp. 52, 53. Ms. Nelson was allowed to testify to the facts she observed on the worksite, but her subsequent comments were objected to on the grounds that they had not been furnished to BD Roofing in discovery. Therefore, the Industrial Appeals Judge kept the opinion testimony in colloquy. All of the testimony of Ms. Nelson described in this Department's Brief of Respondent was admitted in the Board proceedings, and the admission of the testimony is not challenged in the company's appeal.

⁸ CABR, Transcript, 8/30/04, Testimony of Larry Adams, pp. 43, 44.

⁹ CABR, Transcript, 8/30/04, Testimony of Larry Adams, pp. 27, 28.

Mr. Valentino could not produce one. Instead, he completed a site specific fall protection work plan in front of Mr. Adams and posted it.¹⁰

The roof was 20 feet in height, as specified in the fall protection work plan completed by Mr. Valentino.¹¹ Photographs taken by Mr. Adams, which were introduced into evidence, show a two-story building with a ladder leaning against it.¹² Mr. Adams estimated the pitch of the roof was 4-12 to 5-12.¹³ There were no safety lines, cones, or barricades around the perimeter of the roof. The lack of such safety lines or barricades is clearly seen in the photographs.¹⁴ There was also no employee wearing a high visibility or orange vest, which is required of a safety monitor.¹⁵ BD Roofing's Safety Officer, Joan Nelson, confirmed the employees were not using a safety monitor system.¹⁶

An opening conference was held with Spencer Ross, the vice-president of BD Roofing, who came to the site after the Compliance Officer had arrived.¹⁷ During the opening conference, Mr. Ross received a

¹⁰ CABR, Transcript, 8/30/04, Testimony of Larry Adams, pp. 18, 19.

¹¹ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 19.

¹² CABR, Transcript, 8/30/04, Ex. Nos. 1A and 1B.

¹³ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 39. The pitch of the roof, and the lack of safety lines or barricades is relevant when the employer claims, as BD Roofing did at first, that it was using the safety line and monitor system of fall protection. CABR, Transcript, 8/30/04, Testimony of Larry Adams, pp. 39, 40.

¹⁴ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 43; Ex. Nos. 1A through 1E.

¹⁵ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 43.

¹⁶ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 43.

¹⁷ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 25.

telephone call and stopped the conference, asking Mr. Adams to wait until BD Roofing's Safety Officer arrived.¹⁸ When Joan Nelson, the Safety Officer, arrived, she asked Mr. Adams to leave, whereupon Mr. Adams promptly left the site.¹⁹

A couple of days later, Mr. Adams called Ms. Nelson for a closing conference over the telephone. He informed her that the Department would not pursue a warrant for a more thorough inspection, but that he would recommend the Department issue fall protection violations to BD Roofing based on the information he already had.²⁰

B. Testimony At The Hearing

Joan Nelson, who was no longer employed with BD Roofing at the time, testified at the hearing. Ms. Nelson testified the BD Roofing workers on the crew involved in this inspection spoke Spanish and most of them could not read.²¹ As a result, she was forced to rely on Jose Suarez, the comptroller for BD Roofing, to translate for her.²² She testified she did not know if the workers understood the safety regulations. One crew never had a violation, but the others chose to disregard the safety regulations unless management officials, Bruce Duschel or Jose Suarez, told them to follow the

¹⁸ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 26.

¹⁹ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 26.

²⁰ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 26.

²¹ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, pp. 60, 61, 63.

²² CABR, Transcript, 8/30/04, Testimony of Joan Nelson, p. 52.

rules on a particular project.²³ When asked if she saw any improvement in the safety program during the six months she worked for BD Roofing, Ms. Nelson replied: "Some, but it was minimal. It was frustrating, because management wasn't really supporting. They were giving lip service to a lot of it, looking for documentation."²⁴ She elaborated as follows on that statement:

It was very frustrating. Anything that I would try to implement would be put off to the side. Either it costs too much for certificates, or it cost too much to put two more anchor points on a roof, or they just wanted the daily visit documentation for the records, so that if they were to come to an appeal, they would have the documentation. Well, it was just really frustrating trying to get the safety program implemented, the training across. It felt like throwing a bucket of water into the wind.²⁵

Ms. Nelson finally resigned. As her reason for resignation, she stated, "The safety issues of the morning had been frustrating, frayed islets for anchorages, wanting to reuse a lanyard that had been used to tow a pick-up truck, trying to have a safety meeting and Jose redirecting it into something else, and then having a \$72 paycheck for the week when I am on salary."²⁶

Bruce Duschel, the President of BD Roofing, testified the crew members on site the day of the WISHA inspection had received safety

²³ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, pp. 64, 65.

²⁴ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, p. 68.

²⁵ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, p. 69.

²⁶ CABR, Transcript, 8/30/04, Testimony of Joan Nelson, p. 71.

orientation. On cross-examination, however, he admitted he had no personal knowledge that the crew members had received the safety orientation, and even admitted he did not remember the names of the crew members.²⁷

C. The Citation

In Item 1-1a, BD Roofing was cited with a repeat serious violation of WAC 296-155-24510 for failing to ensure that employees exposed to a fall hazard of 10 feet or more were protected from fall hazards, in that four to five employees were observed working on a roof, and the employees were not using lanyards to attach themselves to an anchorage point.

In Item 1-1b, BD Roofing was cited for a repeat serious violation of WAC 296-155-24505(1) for failing to ensure that a Fall Protection Work Plan was completed for the worksite, in that no such work plan was available when requested.²⁸

D. The Repeat Violations

Eight prior citations received by BD Roofing for violations of the same WAC standards, which had become final orders during the three years prior to this inspection, were introduced into evidence.²⁹ Some of these prior citations also addressed violations of WAC 296-155-24505(1), failure to ensure that a fall protection work plan was completed for the worksite. Only

²⁷ CABR, Transcript, 8/31/04, Testimony of Bruce Duschel, p. 31.

²⁸ CABR, Ex. No. 2.

²⁹ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 33. Ex. Nos. 3A, 3B, 3C, 3D, 3E, 3F, 3G and 3H.

one of these prior eight citations was solely for a violation of WAC 296-155-24505(1) (failure to complete a fall protection work plan), and did not also include a violation of WAC 296-155-24510 (failure to use fall protection equipment).³⁰ Each repeat violation multiplies the final penalty. Thus, in an example given by Mr. Adams, if the final penalty for a violation is \$1,000, and there are two prior violations of the same regulation, the two prior violations would be added to the current violation, and the penalty would be multiplied by three, becoming \$3,000.³¹ For this case, the parties, assuming eight prior violations, stipulated that the adjusted gross penalty would be \$21,600.³²

E. The Proposed Decision And Order

In the Proposed Decision and Order, the Board's Industrial Appeals Judge (IAJ) recommended the Board affirm the fall protection violation - the violation of WAC 296-155-24510 - and vacate the fall protection work plan violation.³³ On the affirmed fall protection safety equipment violation, the IAJ rejected BD Roofing's affirmative defense of unpreventable employee misconduct. The IAJ found that BD Roofing had demonstrated the first three required elements of this affirmative defense, but had failed to prove

³⁰ CABR, Ex. No. 3C.

³¹ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 34.

³² CABR, Transcript, 8/30/04, Judge Gebhardt, p. 37.

³³ CABR, Proposed Decision and Order, p. 28.

the fourth required element - that it effectively enforced its safety program.³⁴

The IAJ explained:

Although this employer has a policy giving the safety director authority to terminate employees on the discovery of safety violations, there was no demonstration by this employer of a progressive disciplinary program designed to correct the unsafe behavior and how such a program has been implemented absent an inspection by the Department of Labor and Industries. Without being able to prove such enforcement, the employer cannot prevail on this defense.³⁵

F. Post-Hearing Appeals

BD Roofing petitioned the Board for review. The Board denied the Petition for Review, making the Proposed Decision and Order the final order of the Board.³⁶ BD Roofing then sought judicial review in the Pierce County Superior Court. On April 28, 2006, the Superior Court affirmed the Board's order, but modified it as follows, "Because the violation of 1-1b was vacated, there were only seven (7) repeat violations, not eight (8), and the penalty should therefore be reduced to \$18,900."³⁷

BD Roofing now appeals, challenging the Superior Court's order affirming Violation 1-1a.

³⁴ CABR, Proposed Decision and Order, p. 26.

³⁵ CABR, Proposed Decision and Order, p. 26.

³⁶ CABR, p. 1.

³⁷ Clerk's Papers at 17. The Department did not appeal this ruling. There is no longer a penalty issue in this case. It appears that BD Roofing's Brief of Appellant, in addressing the penalty issue has inadvertently restated an argument made in its Superior Court briefing. Appellant's Opening Brief at 24-25.

IV. LEGAL STANDARDS

A. Standard Of Review

Review in this matter is governed by RCW 49.17.150. Under WISHA, the Board's findings of fact must be affirmed if they are supported by substantial evidence.

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 is evidence in sufficient quantum to persuade a fair-minded person that a finding is true. *Martinez Melgoza v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 847, 848, 106 P.3d 776, (2005), *review denied*, 155 Wn.2d 1015 (2005). BD Roofing challenges only whether substantial evidence supports the Board's determination, and does not challenge any particular findings, or lack thereof, by the Board.

An appellate court reviews statutory interpretation issues *de novo*. *Washington Cedar & Supply Co., Inc., v. Dep't of Labor & Indus.*, 119 Wn. App. 906, 912, 83 P.3d 1012 (2003).

B. WISHA Must Be Liberally Construed To Further Worker Health And Safety

The purpose of WISHA and the regulations promulgated under it is to assure safe and healthful working conditions for every man and woman working in the state of Washington. RCW 49.17.010. “WISHA is to be liberally construed to carry out this purpose.” *Inland Foundry v. Dep’t of Labor & Indus.*, 106 Wn. App. 333, 336, 24 P.3d 424 (2001). Accordingly, any safety standard under Ch. 49.17 RCW must be accorded an interpretation which furthers worker health and safety. *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990).

The Department is required to adopt occupational health and safety standards which are at least as effective as those promulgated by the United States Secretary of Labor under the federal Occupational Safety and Health Act (OSHA). RCW 49.17.050(2). “Thus, [WISHA rules] can be more protective, although not less, of worker safety than rules promulgated under OSHA.” *Aviation West Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999). In determining what constitutes a WISHA violation, Washington courts often consider decisions interpreting parallel federal OSHA regulations that likewise protect the health and safety of workers. *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 147, 750 P.2d 1257 (1988).

Washington courts grant substantial deference to the Department's interpretation of WISHA and those sections of the Washington Administrative Code promulgated under it. *Lee Cook Trucking & Logging v. Dep't. of Labor & Indus.*, 109 Wn. App. 471, 477, 36 P.3d 558 (2001). When a statute or regulation is ambiguous, courts defer to the interpretation of the agency responsible for administering and enforcing it. In fact, an agency's interpretation of a statute it is required to administer is presumed valid. *Kaiser Aluminum v. Pollution Control Hearings Bd.*, 33 Wn. App. 352, 354, 654 P.2d 723 (1982). Thus the Department's interpretation of WISHA and its interpretation of the regulations the agency adopted to implement the statute, are of considerable importance in determining their meaning. *See Asarco v. Puget Sound Air Pollution Control Auth.*, 51 Wn. App. 49, 56, 751 P.2d 1229 (1988).

V. ARGUMENT

A. **The Board Correctly Held That The Department Established Its Prima Facie Case For Repeat Serious Violation 1-1a, Including Proof Of BD Roofing's Constructive Knowledge**

The Board held, that with the observations of Mr. Adams, the Department proved a prima facie case for Violation 1-1a, the fall protection violation.³⁸ BD Roofing disagrees, alleging, in its Opening Brief that the Department failed to present evidence that BD Roofing

³⁸ CABR, Proposed Decision and Order, p. 24.

knew, or could have known with the exercise of reasonable diligence, of the presence of the violative condition or practice.³⁹ Employer knowledge of the hazard is one of the elements the Department must establish to prove that a violation is serious. *See* RCW 49.17.180(6).

In WISHA cases, the Department has the burden of establishing a prima facie case. For a prima facie case in which the violation of a specific regulation is alleged, the Department must show that (1) the specific standard applies; (2) there was a failure to comply with the standard; and (3) the employees had access to the hazard. *In re Exxel Pacific, Inc.*, 1998 WL 718040 (Wash. Bd. Ind. Ins. App. (1998)) (Significant Decision), at 8.

To prove a *serious* violation, such as that at issue in the present appeal, the Department must also show there is a substantial probability that death or serious physical harm could result from a condition which exists, or from practices which are used in the work place, and that the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition or conduct. RCW 49.17.180(6); *Washington Cedar*, 119 Wn. App. at 911. Employer “knowledge” thus need not be actual; constructive knowledge is sufficient to prove that a serious violation occurred.

³⁹ Appellant’s Opening Brief, p. 14.

The Board has consistently held that “employer knowledge” in this context means knowledge of the hazardous conduct or condition, and does not require knowledge of a specific incident. In other words, it is not necessary that a management official be present, or observe the violation in order to impute knowledge to the employer. *In re General Security Services Corp.*, 1998 WL 960837 (Wash. Bd. Ind. Ins. App.1998)) (Significant Decision). In *General Security*, the most likely hazard to which the employees were exposed was an armed assault at the courthouse entrance by an irate or mentally unstable person. Obviously, the employer could not know if, and when, a specific assault might occur, but because of the past history of such assaults, the employer was well aware of the hazard itself. *General Security*, at 12. Based on these facts, the Board found that the employer had knowledge of the hazard and the violations were “serious”.

The Occupational Safety and Health Review Commission (OSHRC) has adopted a similar definition. Constructive knowledge has been found where the hazard was in plain view, where the employer failed to discover readily apparent hazards, where there were inadequate safety instructions, where safety rules were not enforced, where there were prior instances of employee misconduct, and where the employer had received written complaints from employees before the OSHA inspection. Mark A. Rothstein, *Occupational Safety and Health Law*, § 105 at 159, 4th ed. (1998).

In an early case in which employer knowledge was an issue, the Occupational Safety Health Review Commission (OSHRC) found constructive knowledge when the hazard (uncovered rebar) was in plain view. *Sec. of Labor v. Kokosing Constr. Co., Inc.*, OSHRC Dckt. No. 92-2596; 1996 WL 749961 (OSHRC, Dec. 20, 1996). “The conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing’s crews in the area warrant a finding of constructive knowledge.” *Id.* at 3. *See also Austin Bldg. Co. v. Occupational Safety & Health Review Comm’n*, 647 F.2d 1063, 1068 (10th Cir. 1981) (the employee welding in a precarious spot was easily observable and a diligent foreman checking the safety of his workers would have discovered the hazardous conduct).

In this case, the employer is a roofing company, clearly aware of the fall hazards faced by its employees when they work on roofs every day. Fall protection is, or should be, the focus of BD Roofing’s safety efforts. Indeed, Chapter 7 of BD Roofing’s Accident Prevention Plan is devoted to describing the various methods of fall restraint, fall arrest and positioning device systems designed to prevent employees from falling.⁴⁰ The generic fall protection work plan, designed to be filled in for the individual worksites, has check lists for the type of roof (including the

⁴⁰ CABR, Ex. No. 6.

pitch of the roof), the type of work being done, the method of fall protection to be used, and the methods of inspecting and installing the fall protection equipment to be used.⁴¹ Moreover, fall protection was emphasized at every safety meeting, according to Joan Nelson, the Safety Coordinator for BD Roofing. She testified that on the day of the inspection she asked the crew why they were not tied off, because she had just discussed the subject with them at a safety meeting, and every safety meeting she had with them was about fall protection.⁴²

BD Roofing was also aware of the propensity of its employees to ignore the safety regulations and work without fall protection equipment. The company had received *seven* prior citations for failure to ensure that employees wore fall protection equipment within the past three years.⁴³ In *Washington Cedar*, this Court found 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” and upheld the Board’s conclusion that the employer should have been aware of the violation. *Washington Cedar*, 119 Wn. App. at 916. The evidence is even more compelling here, where BD Roofing had

⁴¹ CABR, Ex. No. 4.

⁴² CABR, Transcript, 8/30/04, Testimony of Joan Nelson, pp. 51, 52.

⁴³ CABR, Ex. Nos. 3A through 3H.

overwhelming evidence (in seven citations) that its safety program had failed and employees were ignoring the regulations.

In addition, the violation here was easily observable. It took place in plain view on an open roof. *Four* or *five* employees were in violation, and one of those employees was the lead worker, Diego Valentino.⁴⁴ A diligent foreman, or safety officer checking the safety of the workers, would have discovered the hazardous conduct. In fact, the WISHA compliance officer was able to observe the violation from a distance as he drove past the site.⁴⁵

The testimony of Joan Nelson, former BD Roofing safety officer, is substantial evidence in and of itself of BD Roofing's lack of reasonable diligence and hence constructive knowledge. Ms. Nelson testified she could not be sure that workers understood the safety regulations, that many workers commonly disregarded the safety rules, that management was worried primarily about costs of implementation and did not really support safety, and that management was only giving lip service and creating a mere paper record for appeal purposes.⁴⁶

BD Roofing not only had knowledge of the hazard, it had knowledge of the prior hazardous conduct of its workers, and, if it had

⁴⁴ CABR, Transcript, 8/30/04, Testimony of Larry Adams, p. 17.

⁴⁵ CABR, Transcript 8/30/04, Testimony of Larry Adams, p. 16.

⁴⁶ CABR, Transcript 8/30/04, Testimony of Joan Nelson, pp. 64, 65, 69.

been exercising due diligence, it would have observed the crew in open violation of the fall protection standards.

B. Substantial Evidence Supports The Board’s Finding That BD Roofing Failed To Prove Effective Enforcement Of Its Safety Program And Thus Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

BD Roofing asserts that the fall protection violation should be excused because it was the result of “unpreventable employee misconduct.”⁴⁷ RCW 49.17.120(5) codifies the affirmative defense of “unpreventable employee misconduct”, a doctrine that allows an employer to avoid liability for a WISHA violation upon the following showing:

- (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).

Prior to the adoption of RCW 49.17.120(5), the Board adopted the reasoning of the leading federal case on “employee misconduct”, *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270 (6th Cir. 1987), *cert.*

⁴⁷ Appellant’s Opening Brief, p. 16.

denied, 484 U.S. 989, 108 S. Ct. 479, in *In re Jeld-Wen of Everett*, 1990 WL 205725 (Wash. Bd. Ind. Ins. App. (1990)). See *Legacy Roofing, Inc. v. Dep't of Labor & Indus.*, 129 Wn. App. 356, 119 P.3d 366 (2005), *review denied*, 156 Wn.2d 1028, 133 P.3d 473 (2006). *Jeld-Wen* followed *Brock* and held that “unpreventable employee misconduct” is an affirmative defense for which the employer bears the burden of proof. As the Board explained in its analysis of *Brock* and other federal cases, 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. See *Jeld-Wen*, at 15; *Washington Cedar*, 119 Wn. App. at 912.

To utilize the defense, the employer must prove that the violation was caused by unforeseeable employee misconduct, rather than by inadequate enforcement of its safety program. See *Washington Cedar*, 119 Wn. App. at 913. The key element that must be proven by the employer in any “employee misconduct” case is that the enforcement of safety has been “**effective in practice as well as in theory.**” *Brock*, 818 F.2d at 1277 (emphasis added).

In 1999, the Washington State Legislature codified the four elements of the “unpreventable misconduct defense” which were set out in *Brock*. See RCW 49.17.120(5); *Washington Cedar*, 119 Wn. App. at 912.

While an employer must satisfy each of the four parts of the test in order to meet its burden of proof, merely showing a good “paper program” does not demonstrate “effectiveness in practice.” *Brock*, 818 F.2d at 1277.

As the court in *Brock* pointed out, Congress intended this defense to be very difficult for employers to prove. The *Brock* court quoted the legislative history of OSHA to emphasize the strong obligation placed on employers to enforce safety. *Id.* *Brock* then explained that an employer would be strictly held to its burden of proof on each element of the test.

Id. 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.

Brock, 818 F.2d at 1277 (citations omitted).

The employer’s duty includes providing “training, supervision, and disciplinary action designed to enforce the rules.” *Id.* Finally, the employer must show that the conduct of its employees in violating the employer’s safety policies was:

[i]diosyncratic and unforeseeable . . . We emphasize that the employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its

employees must demonstrate that program's *effectiveness in practice as well as in theory*.

Brock, 818 F.2d at 1277 (emphasis added).

This defense has been described by federal courts as the “isolated occurrence”, “isolated incident”, and “isolated misconduct” defense.

Jeld-Wen, at 16. As this Court explained in *Washington Cedar*:

The “isolated occurrence” language stems from agency and judicial interpretation of the “effective enforcement” prong of the unpreventable employee misconduct defense. RCW 49.17.120(5)(iv). The Board and federal courts have concluded that in order for the enforcement of a safety program to be “effective”, the misconduct could not have been foreseeable.

As a result, the Board has determined that prior citations for similar conduct may preclude the defense because those violations provide notice to the employer of the problem, thereby making repeat occurrences foreseeable. But it appears that the existence of prior violations does not absolutely bar use of the unpreventable employee misconduct defense; it merely is evidence that the employee conduct was foreseeable and preventable.

Washington Cedar, 119 Wn. App. at 913 (citations omitted).

In most cases, the mere fact that a Department WISHA inspector observes a violation raises serious questions as to whether the incident is truly “isolated” and therefore, whether the employer’s safety enforcement is effective. Here, a crew of *four* or *five* employees all engaged in the violation. It defies logic to argue that what the inspector saw on this occasion was isolated.

In *Legacy Roofing*, discussing the defense of unpreventable employee misconduct, this Court set a high standard for the quantity and quality of evidence an employer must submit to meet all four of the prongs of the affirmative defense. *Legacy Roofing*, 129 Wn. App. at 363-368. Here, although the evidence presented by BD Roofing on the first three elements of the test did not meet the high standards set in *Legacy Roofing*,⁴⁸ the Board found that BD Roofing had met the first three elements of the defense. The Department has not challenged that finding.

The Board then went on to correctly find that BD Roofing failed to demonstrate that they have effective enforcement of their safety program. Specifically, the Board found that BD Roofing offered no evidence that it had actually implemented a progressive disciplinary program designed to correct the unsafe behavior.⁴⁹

The Accident Prevention Plan submitted by BD Roofing contains a paragraph entitled Disciplinary Policy, which outlines a three-step process,

⁴⁸ BD Roofing offered scant and sketchy evidence about its training and monitoring programs. For example, both Jose Suarez, the company comptroller, and Bruce Duschel, the President of BD Roofing, testified they “understood” that all employees must attend an orientation program on safety. However, neither of them had personal knowledge of the program, they did not describe the contents of the program, and they offered no evidence (such as signed attendance forms) to show that the crew members on this site had actually been trained. On cross-examination, Mr. Duschel admitted he did not know the names of the people on the roofing crew the day of the inspection, and he had not checked the company’s records to see if they had actually received the training. He simply asserted that if they did not have safety training, they would not be working for him. CABR, Transcript, 8/31/04, Testimony of Bruce Duschel, pp. 27, 28, 31; Testimony of Jose Suarez, CABR, Transcript 8/31/04, pp. 24, 25.

⁴⁹ CABR, Proposed Decision and Order, p. 26.

from a verbal warning, to a written warning, to termination, for safety violations.⁵⁰ In addition, Bruce Duschel, the President of BD Roofing, testified the company's safety director had the authority to fire a worker for ignoring safety rules.⁵¹ However, neither Mr. Duschel nor any of the four other BD Roofing managers who testified mentioned anything further about the company's disciplinary program. BD Roofing presented *no* evidence to show that workers had ever been reprimanded, disciplined, or fired for safety reasons. There is nothing in the record to show that the disciplinary program set forth in the Accident Prevention Program was ever implemented, much less that it was effectively implemented.

The statute requires an employer to show effective enforcement of its safety program *in practice* and not just *in theory*. RCW 49.17.120(5) (emphasis added). As the 6th Circuit Court of Appeals stated in *Brock*, merely showing a good “paper program” does not demonstrate “effectiveness in practice.” *Brock*, 818 F.2d at 1277. Thus BD Roofing had the burden of presenting evidence that it had a fully functioning and effective disciplinary program. Given its history of eight prior violations, this was a crucial element of the company's defense, yet BD Roofing failed to present any such evidence.

⁵⁰ CABR, Ex. No. 6, paragraph 10.0.

⁵¹ CABR, Transcript, 8/31/04, Testimony of Bruce Duschel, p. 28.

In fact, Joan Nelson, former BD Roofing safety officer, testified that BD Roofing's implementation of its safety program was ineffective and half-hearted, at best. Workers commonly disregarded the safety rules, Ms. Nelson could never be sure the workers really understood the rules, and management was clearly more interested in cutting costs and creating a paper record for appeal purposes than in ensuring that the safety program was implemented and enforced.⁵²

In contrast to BD Roofing's complete failure to show that its paper disciplinary program had ever been implemented, Legacy Roofing, in presenting its unpreventable employee misconduct defense, introduced documents into evidence to show that employees caught in violation of the fall protection rules had been fined. *Legacy Roofing*, 129 Wn. App. at 365, 366. However, the Board, and this Court affirming the Board, found Legacy Roofing's disciplinary policy ineffective, because the documentary evidence presented by Legacy Roofing showed inconsistent penalty enforcement and did not show that each employee who was cited for a violation was actually fined. *Id.* at 365.

An employer must satisfy each of the four parts of the unpreventable employee misconduct test in order to meet its burden of proof. Substantial evidence in the record (or rather, here, the lack of

⁵² CABR, Transcript, 8/30/04, Testimony of Joan Nelson, pp. 64, 65, 68, 69.

evidence in the record) supports the Board's finding that BD Roofing failed to demonstrate effective enforcement of its safety program.

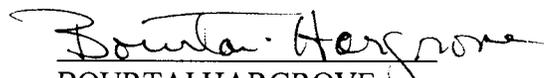
Moreover, this was not an isolated incident of misconduct. Not one employee, but *four* or *five* employees chose to ignore the fall protection regulations, and one of them was the lead worker. Fall protection violations were clearly a recurring problem for BD Roofing. *Seven* repeat violations for failure to ensure that employees wore fall protection equipment were introduced into evidence. As this Court noted in *Washington Cedar*, the Board and federal courts have concluded that prior similar violations make employee misconduct "foreseeable", and an employer's enforcement of its safety program cannot be considered "effective in practice" if it repeatedly fails to prevent foreseeable misconduct. *Washington Cedar*, 119 Wn. App. at 913 (citations omitted).

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court uphold the decision of the Board of Industrial Insurance Appeals affirming Violation 1-1a of the Department's citation with a penalty of \$18,900 as modified by the Superior Court of Pierce County.

RESPECTFULLY SUBMITTED this 18 day of November,
2006.

ROB MCKENNA
Attorney General


BOURTAI HARGROVE
Assistant Attorney General
WSBA # 22706

APPENDIX A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: BD ROOFING) DOCKET NO. 04 W0050
2)
3 CITATION & NOTICE NO. 306625658) PROPOSED DECISION AND ORDER

4
5 INDUSTRIAL APPEALS JUDGE: Judit E. Gebhardt

6
7 APPEARANCES:

8
9 Employer, BD Roofing, by
10 Northcraft, Bigby & Owada, P.C., per
11 Marty D. McLean

12
13 Employees of BD Roofing,
14 None

15
16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Bourtai Hargrove, Assistant

19
20
21 The employer, BD Roofing, filed an appeal with the Department of Labor and Industries'
22 Safety Division on January 26, 2004. The Department transmitted the appeal to the Board of
23 Industrial Insurance Appeals on February 24, 2004. The employer appeals Citation and Notice
24 No. 306625658 issued by the Department on January 22, 2004. In this order, the Department cited
25 the employer as follows:
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27
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CITATION	SEVERITY	WAC 296-155	PENALTIES
1-1a	Repeat Serious	24510	\$24,300
1-1b	Repeat Serious	24505(1)	Included
TOTAL			\$24,300

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36 The Citation and Notice is **AFFIRMED AS MODIFIED**.

37
38 **ISSUES**

39
40 The issues raised by this appeal are: (1) whether the Department of Labor and Industries
41 was correct in citing the employer for two repeat serious safety violations of WAC 296-155-24510
42 and 296-155-24505(1); (2) whether the Department of Labor and Industries was correct in the
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1 calculation of penalties totaling \$24,300; and (3) whether this citation could not be issued due to the
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3 affirmative defense of unpreventable employee misconduct.
4

5 **DECISION**
6

7 On October 29, 2003, Larry Adams, a safety and health compliance officer for the
8
9 Department of Labor and Industries, observing four to five workers on a roof located at 7024 27th
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11 Street W., University Place, Washington, tearing off old roofing material. These workers were
12
13 wearing harnesses but were not observed having any lanyards attached to the roof with anchors, or
14
15 no monitors wearing high visibility clothing, no safety lines, cones, or barricades as would be
16
17 required for low pitch roof using a safety monitor system. These workers were employees of
18
19 BD Roofing, and this was a worksite for this employer.
20

21 **Citation 1-1a**
22

23 **WAC 296-155-24510**
24

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

31 (1) Fall restraint protection shall consist of:
32

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34

35 (b) Safety belts and/or harness attached to securely rigged restraint
36 lines.
37

38
39

40 (c) A warning line system as prescribed in WAC 296-155-24515(3) and
41 supplemented by the use of a safety monitor system as prescribed in
42 WAC 296-155-24521 to protect workers engaged in duties between the
43 forward edge of the warning line and the unprotected sides and edges,
44 including the leading edge, of a low pitched roof or walking/working
45 surface.
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47

1 Larry Adams observed four to five employees on a roof tearing off old roofing material and
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3 exiting the roof wearing harnesses with no lanyards attached to the roof. He began to speak with
4
5 Diego Valentine, who identified himself as the lead worker/supervisor on site. Spencer Ross, a vice
6
7 president with the employer, came to the site and Mr. Adams began the opening conference. He
8
9 was asked to stop the conference and to wait for the safety coordinator, Joan Nelson. When
10
11 Ms. Nelson arrived, she asked him to leave the site and Mr. Adams complied. No further inspection
12
13 occurred and the closing conference was conducted by telephone with Ms. Nelson.

14
15 Although Mr. Adams was not in a position to observe if anchors were actually attached to the
16
17 roof, Ms. Nelson had informed him that no anchors were attached. Mr. Adams did admit that he did
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19 not measure the roof to determine the pitch but estimated that it was a 4/12 or 5/12 pitch.

20
21 With the observations of Mr. Adams, the Department proved a prima facie case. The
22
23 employer's defense was unsuccessful in disapproving the prima facie case. A discussion of
24
25 penalties and the affirmative defense will follow.

26
27 **Citation 1-1b**

28
29 **WAC 296-155-24505(1)**

30
31 **Fall protection work plan.** (1) The employer shall develop and
32
33 implement a written fall protection work plan including each area of the
34
35 work place where the employees are assigned and where fall hazards of
36
37 10 feet or more exist.

38 For the few minutes that Mr. Adams was at the worksite there was no fall protection work
39
40 plan available. Mr. Adams observed Mr. Valentine preparing a fall protection work plan prior to
41
42 being asked to leave the worksite by the employer. From this document prepared by Mr. Valentine
43
44 Mr. Adams used the measurements to determine that the pitch of the roof was not a low pitch.

45
46 The observations of Mr. Adams are sufficient for the Department to have proven a prima
47
48 facie case for a violation of the citation. However, Jose Suarez, office manager and comptroller for
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50 the employer, did visit the worksite on October 29, 2003, joining Spencer Ross, vice president of

1 the residential department for the employer, and Joan Nelson, safety coordinator for the employer.
2
3 Mr. Suarez did speak with the crew who showed him the place where they had posted the fall
4
5 protection work plan, he observed a hole for the roofing nail used to post the fall protection work
6
7 plan, and noted that the weather was very windy and that the posted fall protection work plan had
8
9 blown away due to the wind.

10
11 The employer has developed a fall protection work plan which is in both English and Spanish
12
13 as most of its employees at worksites are non-English-speaking and primarily Spanish-speaking.
14
15 (Exhibit Nos. 4 and 5.) The employer requires that this document be completed by the foreman at
16
17 the worksite and signed by each of the employees at the worksite.

18
19 The employer's evidence that a site-specific fall protection work plan was developed at this
20
21 worksite is sufficient to successfully rebut the Department's prima facie case. Consequently, this
22
23 citation must be vacated. Although the employer was persuasive on this occasion, this employer
24
25 may consider a better procedure for posting of the fall protection work plan to avoid similar incidents
26
27 in the future.

28 29 Penalties

30
31 There was significant confusion as to the calculations of the penalties in this case. However,
32
33 Mr. Adams did rate the severity at 6 (in a range of 1 to 6), the probability at 3 (in a range of 1 to 6)
34
35 rendering a gravity of 18 and then calculating the base penalty at \$4,500. The base penalty was
36
37 reduced for size of the employer (reduction of \$1,800) with no reduction or additions for good faith
38
39 or history as they were rated as average. The adjusted penalty was \$2,700.

40
41 The adjusted penalty was increased for repeat violations citing Citation and Notice
42
43 Nos. 303980411, 303979181, 304666464 (cited only for WAC 296-155-24505(1)), 305065997,
44
45 304666852, 304278450, 304148323, and 303218150. (Exhibit No. 3.) With a 9 multiplier the total
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47

1 penalty should have been \$24,300 and not \$28,350. However, as the violation in Citation 1-1b was
2
3 vacated, then the repeat violation in Citation and Notice No. 304666464 cannot be considered.

4
5 Consequently, the appropriate penalty should have been \$21,600 (using an 8 multiplier).
6

7 **Unpreventable Employee Misconduct**
8

9 The employer also raises the affirmative defense of unpreventable employee misconduct.

10
11 This defense is codified in RCW 49.17.120(5)(a) which provides:

12
13 No citation may be issued under this section if there is unpreventable
14 employee misconduct that led to the violation, but the employer must
15 show the existence of:

16
17 (i) A thorough safety program, including work rules, training, and
18 equipment designed to prevent the violation;

19
20 (ii) Adequate communication of these rules to employees;

21
22 (iii) Steps to discover and correct violations of its safety rules; and

23
24 (iv) Effective enforcement of its safety program has written in practice
25 and not just in theory.
26

27 This employer has demonstrated the first three parts of this affirmative defense. BD Roofing
28 should be commended for having developed the safety program (Exhibit No. 6), having developed
29 a fall protection work plan in English as well as Spanish for its Spanish-speaking employees,
30 communicating these rules to the employees through bilingual training, and taking steps, through
31 safety directors and corporate officers, to discover and correct violations to the safety rules.
32
33 However, the employer failed to demonstrate that they have effective enforcement of their safety
34 program. Although this employer has a policy giving the safety director authority to terminate
35 employees on the discovery of safety violations, there was no demonstration by this employer of a
36 progressive disciplinary program designed to correct the unsafe behavior and how such a program
37 has been implemented absent an inspection by the Department of Labor and Industries. Without
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39 being able to prove such enforcement the employer cannot prevail on this defense.
40
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1 Consequently, the Citation and Notice must be affirmed as modified with Citation 1-1a being
2 affirmed and the penalty modified to \$21,600, and Citation 1-1b being vacated.
3
4

5 **FINDINGS OF FACT**
6

- 7 1. On October 29, 2003, an inspection was conducted by Larry Adams, a
8 compliance and safety officer for the Department of Labor and
9 Industries, at the work site of the employer located at 7024 27th
10 Street W., University Place, Washington 98467-3322. On January 22,
11 2004, the Department issued Citation and Notice No. 306625658 citing
12 the employer for repeat serious safety violations of WAC 296-155-24510
13 and 296-155-24505(1), with a total penalty assessed of \$24,300. The
14 Notice of the Appeal filed on behalf of the employer was received by the
15 Department on January 26, 2004. On February 24, 2004, the
16 Department forwarded the notice of appeal to the Board of Industrial
17 Insurance Appeals. On February 25, 2004, the Board issued a Notice of
18 Filing of Appeal and assigned the appeal Docket No. 04 W0050.
19
- 20 2. On October 29, 2003, four to five employees of BD Roofing were
21 observed removing old roofing material from a roof without fall protection
22 and exposing the employees to a fall in excess of 10 feet to the ground
23 below at the employer's work site located at 7024 27th Street W.,
24 University Place, Washington 98467-3322.
25
- 26 3. On October 29, 2003, there was a written site-specific fall protection
27 work plan at the employer's work site located at 7024 27th Street W.,
28 University Place, Washington 98467-3322, where employees were
29 exposed to a fall hazard in excess of 10 feet.
30
- 31 4. For the violation of WAC 296-155-24510, the severity of an accident
32 was very high (rated at 6 on a scale of 1 to 6) and the probability of
33 injury due to the hazard was medium (rated at 3 on a scale of 1 to 6),
34 yielding a gravity rating of 18. The employer has an average history
35 regarding work place safety and average good faith. The employer
36 employed approximately 30 workers. With adjustments for its size, the
37 appropriate adjusted base penalty was \$2,700. The employer had
38 violated this regulation on seven prior occasions and had a repeat factor
39 of eight equaling a total penalty of \$21,600.
40

41 **CONCLUSIONS OF LAW**
42

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the
44 parties to and subject matter of this appeal.
45
- 46 2. BD Roofing committed a repeat serious violation of WAC 296-155-
47 24510 on October 29, 2003.

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3. BD Roofing has not established that the safety violation of WAC 296-155-24510 occurred as a result of "unpreventable employee misconduct," as that term is defined by RCW 49.17.120(5)(a).
 4. Citation and Notice No. 306625658 dated January 22, 2004, is affirmed as modified as follows:

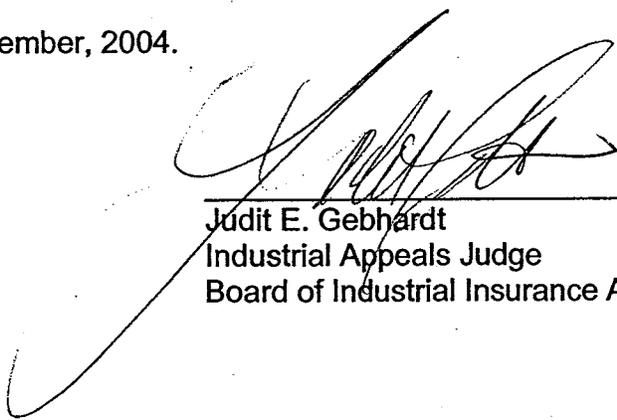
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CITATION	SEVERITY	WAC 296-155	PENALTY	DISPOSITION
1-1a	Repeat Serious	24510	\$21,600	AFFIRMED AS MODIFIED
1-1b	Repeat Serious	24505(1)	-0-	VACATED
TOTAL			\$21,600	AFFIRMED AS MODIFIED

16 It is so ORDERED.

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18 Dated this 6th day of December, 2004.

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Judit E. Gebhardt
Industrial Appeals Judge
Board of Industrial Insurance Appeals

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

EM1

BD ROOFING
6509 LAKEWOOD DR W
TACOMA, WA 98467-3322

EA1

AARON K OWADA, ATTY
NORTHCRAFT BIGBY & OWADA PC
720 OLIVE WAY #1905
SEATTLE, WA 98101-1871

AG1

BOURTAI HARGROVE, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40121
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 12/15/2004
BOARD OF INDUSTRIAL INSURANCE APPEALS

By:


DAVID E. THREEDY

Executive Secretary

In re: BD ROOFING
Docket No. 04 W0050

APPENDIX B

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MAY 26 2006

ATTORNEY GENERAL'S OFFICE
LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

FILED
DIST. CLERK
PIERCE COUNTY
APR 28 2006
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CD Roofing, Inc.

Plaintiff(s)

Cause No: 05-9-05586-6

ORDER

vs. Washington State

Department of Labor Industries
Defendant(s)

The decision of the Board of Industrial
Insurance Appeals is affirmed as modified.
Because the ~~the~~ ^{Dr.} ~~injury~~ ^{injury} was created, there
were only 2 repeat ambulations, not 8, so the
penalty shall therefore be reduced to \$15,900.

DATED 4/28/06

Ann L. Curada

Attorney for Plaintiff(s)
WSBA# 13869

Kathryn J. Nelson
JUDGE KATHRYN J. NELSON

Amelia Bayona
Attorney for Defendant(s)
WSBA# 20006

AMENDED CERTIFICATE OF SERVICE

I, Darlene Langa, certify under penalty of perjury under the laws of the state of Washington, that I caused the documents referenced below to be delivered via the method listed to the following parties:

DOCUMENT(S) **Brief Of Respondent**

COPY TO: *(First Class, Postage Pre-Paid)*
Aaron K. Owada
AMS Consulting
4405 7th Avenue SE, Suite 205
Lacey, WA 98503

FILED
COURT CLERK
06 NOV -9 PM 1:23
BY [Signature]

DATED this 2ND day of November, 2006, at Tumwater, Washington.



DARLENE LANGA
Legal Assistant 2