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COURT OF APPEALS

NO. 34946-9-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE COLLECTOR

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BD ROOFING CONSTRUCTION, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent,

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Appeal from Superior Court of County

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error No. 1**

Where the Employer significantly revamped its safety program after being cited by the Department for eye protection violations, the Board erred by concluding those prior violations precluded the Employer from establishing "employee misconduct" set forth in RCW 49.17.120(5).

## **II. ISSUES**

### **A. Issues Pertaining to Assignments of Error No. 1**

Where the Employer significantly revamped its safety program after being cited by the Department for fall protection violations, did the Board err by concluding those prior violations precluded the Employer from establishing "employee misconduct" set forth in RCW 49.17.120(5)?

## **III. STATEMENT OF THE CASE**

### **A. FACTUAL BACKGROUND**

This is a WISHA violation involving one serious citation for two employees not wearing proper eye protection when using pneumatic air guns and for not keeping the base of a ladder free from debris. For the serious eye protection violation, the Department issued this as a five time repeat violation.

The Department issued the citation pursuant to WAC 296-155-350(3). That section requires:

(3) Personal protective equipment. Employees using hand and power tools and exposed to the hazard of falling, flying, abrasive, and splashing objects, or exposed to harmful dusts, fumes, mists, vapors, or gases shall use the particular personal protective equipment necessary to protect them from the hazard. All personal protective equipment shall meet the requirements and be maintained according to Parts B and C of this chapter.

Prior to the current Citation, BD had a series of WISHA citations all resulting in serious violations of the Washington Industrial Safety and Health Act. However, learning the error of its ways, BD diligently adopted a comprehensive safety program and began to vigorously enforce its Safety Program.

The exhibits offered and admitted demonstrated that BD at the time of the inspection on January 26, 2003, prepared an Accident Prevention Program and further developed a Safety Program that addressed the need for eye protection. CABR Duschel<sup>1</sup> transcript at page 116, line 3 – page 117, line 12.<sup>2</sup> The undisputed testimony was that the new training program was communicated to the employees in both English and Spanish for non-native English speaking workers.

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<sup>1</sup> The correct spelling is “Duschel”. However, Mr. Bruce Hunter Duschel is spelled as “Dochel” in the transcript dated April 1, 2004.

<sup>2</sup> “CABR” refers to the Certified Appeal Board Record which was submitted from the Board to the Superior Court, and further transferred to this Court. Transcripts of the hearing, exhibits and pleadings are all contained in the CABR.

The uncontested testimony demonstrated that inspections were performed to ensure that the new safety program was being followed. Mr. Duschel testified that his company spent around \$100,000 to create and implement a new safety program to identify and rectify the deficiencies that had previously been found in previous inspections. Duschel at page 117, line 12.

Because much of his workforce is Hispanic, BD hired three translators to ensure that safety was being followed. Duschel at page 117, line 24.

Finally, the Exhibits clearly demonstrate that appropriate disciplinary action was taken when employees were found not to be wearing eye protection when using a pneumatic air gun. Prior to January 27, 2003, BD took approximately 10 to 15 disciplinary actions against its employees for not complying with the safety rules.

While the Employer agrees that it has had a prior history of WISHA violations, the Employer, through the owner, Bruce Duschel, testified that it had taken a new approach, invested large sums of money into training and implementing its safety program. The Employer clearly testified that it was motivated to develop a safety program to ensure that the need to follow safety rules was clearly imbedded and established in the minds and working practices of its employees.

Not only did BD take concrete measures to enforce safety, it also has an Experience Modification Rate of .6001. Duschel at page 120, line

22. That is, where 1.0000 represents the industry average, BD is nearly 40% below the industry average for industrial claims for worker injuries.

Despite the efforts made by the Employer, the Board summarily concluded that the Employer's safety program was not effective in practice because it was a repeat violation. No mention or consideration was given to the Employer's change of policies, implementation of a new safety program, training employees, conducting daily on site inspections, and taking appropriate disciplinary action when violations were found. Based on the Erection Company case, BIIA Dec., 88 W142 (1990), the IAJ concluded in the Proposed Decision and Order that:

“Since BD has repeatedly been cited for previous violating the eye protection standards, it could not have been effectively enforcing the rules and accordingly the employee misconduct defense has not been established.”

PD&O at page 4, lines 37 – 41, CABR page 11.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW.**

The standard for judicial review of a WISHA citation is set forth in RCW 49.17.150(1). In relevant part, this section declares:

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

(Emphasis added).

The Board's conclusions must also be based on its findings of fact. *Martinez Melgoza & Associates v. Department of Labor & Industries*, 125 Wn. App 1004. Based on this standard, for the reasons set forth below the Employer respectfully asserts that the substantial evidence in the record does not support the violation.

**B. As a matter of law, the Board's Decision respectfully fails to address whether the Employer satisfied the statutory elements for employee misconduct as they existed at the time of the citation, not the previous history.**

In 1999, the legislature amended RCW 49.17.120 and codified the statutory criteria for employee misconduct. The specific elements to establish this defense is set forth in RCW 49.17.120(5)(a). In relevant part, it declares:

(5)(a) No citation may be issued under this section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:(i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;(ii) Adequate communication of these rules to employees;(iii) Steps to discover and correct violations of its safety rules; and(iv) Effective enforcement of its safety program as written in practice and not just in theory.

The first prong of employee misconduct is the development of a thorough safety program. This was established after BD Roofing spent over \$100,000 to develop a new safety program after receiving the prior safety citations. The WISHA Compliance Officer agreed that this prong was established. Sturman, page 56, lines 4 – 12.

The next prong is adequate communication. The undisputed testimony is that BD hired three Spanish speaking interpreters to assure that the safety rules would be communicated to its employees. Not only were there live interpreters, the Safety Program was also written in Spanish to further ensure that the rules and expectations were communicated to the employees. The WISHA Compliance Officer also agreed that the second prong of employee misconduct was established. Sturman, page 56, line 13 – page 57, line 13.

Moreover, the State also agreed that the Employer established the third prong of employee misconduct by stating, “I didn’t see a lack of supervisory observation at all here.” Sturman, at page 59, lines 6 – 7.

Although the statute requires that the program be “effective in practice”, the statutory requirement makes no provision that an employer’s prior citation history serves as any basis to deny the affirmative defense. Rather, it clearly states that no citation may be issued if there is unpreventable misconduct “*that led to the violation.*” The testimony offered by the Employer clearly satisfies the burden of production for each of the statutory elements laid out in RCW 49.17.120(5)(a). As this evidence was not rebutted by the Department, the Employer has made a prima facie showing demonstration of unpreventable employee misconduct.

It is overly simplistic to conclude that because citations had occurred in the past, the Employer is forever relegated to repeat violations regardless of the steps he takes to address safety. The IAJ respectfully erred by not considering the steps BD took to adequately address safety. Even the most comprehensive safety program may lead to safety violations if the relevant employees choose to ignore their company's policies. While the furtherance of worker safety is certainly a noble endeavor, the fault for each and every safety violation must be weighed separately, and liability should not be automatically imposed on the Employer.

Absent any voluntary improvements made to its Safety Program, the Employer would readily agree that a series of repeat violations with no attempt to correct any deficiencies would create the inference that the Employer simply lacked any desire to be in compliance with worker safety rules. However, where the Employer has taken definitive steps to create an exemplary program for the benefit of its workers, the Board should have factually made the determination that the Employer failed to meet the statutory elements for employee misconduct.

Here, the Board failed to analyze the improvements BD made to its safety program to determine whether BD had: (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. Had the Board considered the undisputed evidence, there is no question that each and every element was satisfied by BD.

Rather than considering the statutory elements of employee misconduct set forth in RCW 49.17.120(5), the Board based its sole reliance on the *Erection Company* case. BIIA Dec., 88 W142 (1990), attached as Appendix 1. That case, however, was decided nine years before the statute was amended to specifically include the prima facie elements of employee misconduct.

In the *Erection Company* case, the Employer was cited for both a serious and “willful” violations for fall protection hazards. In concluding that the Erection had a poor history of prior violations, the Board held:

In light of the number of citations The Erection Company has received for violations of fall protection standards, The Erection Company can not avail itself of the "employee misconduct" defense. It is quite clear that although The Erection Company has a ***safety program that is thorough and adequate in theory***, the ***program is not effective in practice***. Unlike the *Horne Plumbing & Heating Co.* case or the *Pennsylvania Power & Light Co.* case, this employer does not have an outstanding safety record. Under these circumstances the employer has not established that its safety rules regarding tying off are effectively enforced. Since the employee misconduct defense asserted by the employer has not

been established, the citation for the alleged violation must be affirmed.

(Emphasis added).

Not only had the legislature specifically changed the required elements for employee misconduct by passing RCW 49.17.120(5), the specific facts between the Erection Company and BD Roofing are clearly distinguishable.

First, unlike in the *Erection Company* case, BD Roofing was not charged with a “willful” violation.

“A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference...” *Hern Iron Works*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD & 30,046, p. 41,256-57 (No. 89-433, 1993) (citations omitted).

**The Secretary must establish that the employer was *actually* aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.” *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD & 31,792, p. 46,591 (No. 96-0265, 1999).**

**(emphasis added).**

*The Erection Company*, BIIA Docket No. 88 W142 and *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD & 30,759, p. 42,740 (93-239, 1995), *aff’d*, 73 F.3d 1466 (8<sup>th</sup> Cir. 1996).

It is with that back drop that the Board concluded that the Erection Company did not establish the employee misconduct defense because it had not effectively demonstrated that it had taken any significant steps to

address fall protection hazards.

In our present case, it is undisputed that BD Roofing clearly took objective and significant steps to revamp its safety program. More importantly, the Department in fact recognized that the first three steps of employee misconduct were clearly established.

Our system of jurisprudence is based on the concept that parties should be punished for what they have done, and not the past act for which penalties have been extracted. To hold otherwise would be to forever declare that an employer can never mend its ways to provide a safe working environment.

Our legislature provided the elements for an employer to establish employee misconduct. BD's experience modification rate of .6001 (40% injury rate claim below the industry average) clearly demonstrates that the safety program was effective.

The board's stated reason for disallowing employee misconduct is a blind application of BD's past and did not take into account all of the actions BD took following those prior violations. The Board concluded that because there were past violations, BD could not create a program that was effective in practice. This totally ignores all of the pro-active steps BD took to come into compliance and to develop a strong safety program. It would clearly be against social policy not to reward an

employer from taking positive steps to promote worker safety. The Board's rationale is not only contrary to RCW 49.17.120(5), it is against public policy as it does not encourage employers to mend the errors of its way.

**V. CONCLUSION**

The Board erred by ignoring all of the steps BD Roofing took to establish an effective safety program. As BD demonstrated all elements necessary for employee misconduct under RCW 49.17.150, the Board erred by not considering the changes it made after being cited for eye protection violations. A blind application of the past without considering significant steps to cure its prior problems is an error of law. Where the Department offered no evidence to rebut the safety program that BD developed, the Court should allow the affirmative defense of employee misconduct and vacate the citation.

DATED this 17<sup>th</sup> day of October, 2006.

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**CERTIFICATE OF SERVICE**

I, Kris Wambem, hereby certify under penalty of perjury under the laws of the State of Washington that on, I filed with the Court, by ABC Legal Messenger, the original of the following document:

- 1. Original of the opening brief:

and a copy via US Mail postage prepaid to:

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SIGNED in Lacey, Washington on October 18, 2006

*Kris Wambem*  
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