

COURT OF APPEALS  
DIVISION II

NO. 35296-6-II

07 JUN 18 PM 1:41

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON  
BY sun  
DEPUTY

---

DIAMACO INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES,

Respondent,

---

Appeal from Superior Court of Grays Harbor County

---

**APPELLANT'S OPENING BRIEF**

---

Aaron K. Owada, WSBA #13869  
Attorney for Appellant

The Law Offices of Aaron K. Owada  
4405 7<sup>th</sup> Ave. SE, Suite 205  
Lacey, WA 98503  
(360) 459-0751

## TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. ASSIGNMENT OF ERROR	1
A. The Board erred in its evidentiary rulings by allowing a witness to speculate on the mental process of the Employer’s Superintendent and other workers.	
B. The Board erred by concluding that the Employer “willfully” violated the lead standards.	
II. ISSUES	1
A. Issues Pertaining to Assignments of Error No. 1	
Where the Board allowed a witness to speculate on the motivations of the Employer’s Superintendent and other workers in violation of ER 602, did the Board err in its evidentiary rulings?	
B. Issues Pertaining to Assignments of Error No. 2	
In addition to allowing speculative evidence, did the Board err by concluding that the Employer “willfully” violated lead standards when it had taken steps to be in compliance with the lead standards?	
III. STATEMENT OF CASE	
A. Procedural Background	1
B. Factual Background	2

IV.	ARGUMENT	
A.	Standard of Review	8
B.	The Board should not have allowed Mr. Howell's testimony because it was speculative.	9
C.	Because the Employer made some attempts to be in compliance with the lead standards, and did not have a deliberate intent or plain indifference, the Board erred in affirming the "willful" classification.	11
V.	CONCLUSION	21

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Atlantic Battery Co.</i> , 16 BNA OSHC 2131, 2139 (No. 90-1747, 1994)	18
<i>Gary Concrete Prods., Inc.</i> , 15 BNA OSHC 1051,1052, 1991-93 CCH OSHD	10
<i>Hern Iron Works</i> , 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD & 30,046, p. 41,256-57 (No. 89-433, 1993)	16
<i>F.X. Messina Construction Corp. v. OSHRC</i> , 505 F. 2d 701 (1 <sup>st</sup> Cir. 1974)	20
<i>Hester v. BIC Corp.</i> , 225 F.3d 178 (2d Cir. 2000)	13
<i>IGC Contracting Co.</i> , 13 OSHC 1318 (1987)	19
<i>Johnson Controls</i> , 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD & 30,018, p.41,142 (No. 90-2179, 1993) (citing <i>Brock v. Morello Bros. Constr.</i> , 809F.2d 161, 164 (1 <sup>st</sup> Cir. 1987))	17
<i>Kent Nowlin Construction Co. v. OSHRC</i> , 593 F.2d 368 (10 <sup>th</sup> Cir. 1979)	19
<i>National Steel &amp; Shipbuilding Co. v. OSHRC</i> , 607 F. 2d 311 (9 <sup>th</sup> Cir. 1979)	18
<i>Propellex Corp.</i> , 18 BNA OSHC 1677, 1684, 1999 CCH	

OSHD & 31,792, p. 46,591 (No. 96-0265,1999).	17
<i>Secretary of Labor v. Aquashop Waterproofing &amp; Painting Corp.</i> , 13 OSHC 2024 (1988)	19,20
<i>Secretary of Labor v. B&amp;B Plumbing, Inc.</i> NO. 99-0401	17,18
<i>Secretary of Labor v. Spaulding Lighting Inc.</i> , 13OSHC 1847 (1988)	20
<i>St. Joe Minerals Corp. v. OSHRC</i> , 647 F.2d 840 (8 <sup>th</sup> Cir. 1981)	19
<i>United States of America v. Georgia Thomson</i> , Case No. 06-CR-20, US District Court, Eastern District of Wisconsin(June 19, 2006)	12
<i>Universal Auto Radiator Manufacturing Co. v. Marshall</i> 631 F. 2d 20 (3 <sup>rd</sup> Cir. 1980)	19
<i>Valdak Corp.</i> , 17BNA 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)	16,17
<i>Visser v. Packer Engineering Association, Inc.</i> , 924 F.2d 655, 659-60 (7 <sup>th</sup> Cir. 2000)	12
<i>Western Waterproofing Co., Inc v. Marshall</i> , 576 F.2d 139 (8 <sup>th</sup> Cir. 1978)	19

#### STATE CASES

<i>Adkins v. Aluminum Company</i> , 110 Wn.2d 128, 147 (1988)	10
<i>Martinez Melgoza &amp; Associates v. Department of Labor &amp; Industries</i> , 125 Wn.App. 1004	9
<i>R.L. Alia</i> , Docket No. 86 W024 (October 16, 1987)	18
<i>The Erection Company</i> , BIIA Docket No. 88 W142	18

#### STATE STATUTES

RCW 49.17.150 (1)	9
RCW 49.17.180 (6)	10
RCW 49.17.180 (1)	19
RCW 49.17.190	19

#### WASHINGTON ADMINISTRATIVE CODE

WAC 293-155-176	2
-----------------	---

## **I. ASSIGNMENTS OF ERROR**

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

The Board erred in its evidentiary rulings by allowing a witness to speculate on the mental process of the Employer's Superintendent and other workers.

### **B. Assignments of Error No. 2**

The Board erred by concluding that the Employer "willfully" violated the lead standards.

## **II. ISSUES**

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

Where the Board allowed a witness to speculate on the motivations of the Employer's Superintendent and other workers in violation of ER 602, did the Board err in its evidentiary rulings?

### **B. Issues Pertaining to Assignments of Error No. 2**

In addition to allowing speculative evidence, did the Board err by concluding that the Employer "willfully" violated lead standards when it had taken steps to be in compliance with the lead standards?

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

### **A. PROCEDURAL BACKGROUND.**

This matter comes before the Court on an appeal from safety violations issued by the Department of Labor & Industries under the

Washington Industrial Safety and Health Act (WISHA). An appeal was timely filed before the Board of Industrial Insurance Appeals. The Department alleged five serious/willful violations against Diamaco under the lead in construction standards set forth in WAC 296-155- 176 et seq. Additionally, the Department alleged nine serious violations with monetary penalties, and one serious violation with no monetary penalty.

The Employer does not challenge the Board's finding that Diamaco was in violation of the safety standards cited. Rather, Diamaco challenges the Board's conclusion that the five serious violations (Citations 1-1 through 1-5) should be classified as "willful" violations.

The Department's citation for the five "willful" violations was \$129,000.00. See Exhibit 3 (first page) of the Certified Appeal Board Record.

## **B. FACTUAL BACKGROUND**

Diamaco had a contract with the Washington State Department of Transportation (WSDOT) to seismically retrofit the Wishkah Bridge. There were two phases of the Wishkah Bridge. See Exhibit 9 contained in the "Exhibits" section of the Certified Appeal Board Record (CABR)<sup>1</sup>. First, seismic retrofitting of the super structure took place between July 2002 and January 7 or 8, 2003. Christian September 13, 2004 page 32. Second, Phase 2 began when the Diamaco employees began to remove the

---

<sup>1</sup> The CABR also includes the transcript of witnesses and are identified by witness name and date.

steel grated deck. In Phase 1, most of the rivets were done with a rivet buster, a hydraulic jack with a chisel. Some cutting took place. However, a significant amount of cutting took place in Phase 2.

Once Phase 2 began, WSDOT field engineers were at the site and asked Mr. AJ Smith, Diamaco's site superintendent, about the initial monitoring. **Before the WISHA Compliance Officer arrived at the job site, Mr. Smith indicated that he had made arrangements to get an industrial hygienist out to the job site.** The hygienist arrived at the job site on January 21, 2003, the same day as the WISHA Compliance Officer arrived. Christian, September 13, 2004 at page 132, line 1 – page 133, line 24.

Kevin Dahl, an Assistant Project Manager for WSDOT, was at the job site on a weekly basis. His job was to ensure that paper programs, such as the Lead Health Protection Plan (LHPP), were provided by Diamaco as required by the contract. He further indicated that safety was a "concerted effort" between WSDOT and the employer. He agreed, like the other field inspectors, that if WSDOT observed a serious safety hazard, WSDOT had authority to shut the job down. Dahl, September 21, 2004, page 106, and page 108.

It is undisputed that the WSDOT field engineers who were at the job site on a daily basis never shut the project down based on concerns for lead hazards, even though they have attended lead awareness training courses themselves. As testified by Robert Rudy, he didn't know if there was an imminent hazard or not. Robert Rudy, September 14, 2004, page

30, lines 2 – 16.

In Citation Item 1-1, the Department alleged that Diamaco willfully violated the WISHA standards that require an initial monitoring to take place when a “trigger task” takes place. The Department asserted that two trigger tasks were required: grinding and torch cutting. For each of these tasks, the Department argued that the Employer must assume that the task will generate 2,500 micrograms of lead per cubic meter over an 8 hour TWA (time weighted average). In re-cross examination of the WISHA compliance officer, however, Mr. Christian agreed that grinding is not a trigger task where the employer must assume that the exposure will be at 2,500 micrograms per cubic meter for an 8 hr. TWA. Christian, September 13, 2004 at page 178, lines 14 – 17.

Once the initial monitoring is conducted, the Employer must utilize the results to determine the appropriate respiratory protection, PPE and other safety related items. The Department agreed that 1-2 through 1-5 are all triggered by the initial monitoring for a trigger task.

It is also undisputed that the Diamaco provided half face respirators at the site. Although one employee testified that AJ Smith orally required the employees to wear the respirators when cutting on the steel, another employee testified that some employees didn't wear their respirators when cutting. There is no dispute, however, that the employees wore gloves, some kind of rain gear, or outer garments, such as coveralls. Additionally, on the second day of cutting, AJ Smith provided half face respirators to all employees who were cutting.

Mr. Christian also agreed that he did not consider either Mr. Zylstra or Mr. Smith as subject matter experts in the Lead in Construction standards or respiratory protection. Christian, September 13, 2004 at page 140, lines, 12 – 15.

For Item 1-1 in the Proposed Decision and Order, the IAJ stated at page 5 as follows:

“Mr. Christian classified the violation as willful. He found that the contract specified lead was going to be disturbed by the project, required the employer to develop, submit, and implement a lead health protection program, and referred the contractor to the applicable provision of the WAC. This requirement was then discussed at a pre-construction conference attended by Mr. Zylstra, Mr. Smith, and another Diamaco employee. Diamaco produced a written lead health protection program that Mr. Christian felt properly addressed many of the issues including performance of a timely exposure assessment.

“Mr. Christian had discussed these concerns with Mr. Zylstra at the closing conference and Mr. Zylstra stated that they had mistakenly believed that they believed the thirty day window, applicable to the requirement to conduct blood testing, applied to all the requirements of the regulation...”

Mr. Christian agreed that he never asked Mr. Smith if he had even read the Lead Health Protection Plan, Exhibit 1. Christian, September 13, 2004 at page 143, lines 21- 23. Moreover, there was no testimony that Mr. Smith was even aware of the provisions of the Contract between Diamaco and WSDOT.

Additionally, just because an Employer has a Lead Health Protection Plan, it does not by itself create the basis for a “willful

violation.” Christian, September 13, 2004 at page 148, lines 4 – 8.

In Item 1-2, the IAJ stated, “Mr. Christian classified the violation as willful. He based this conclusion on the notice provided in the contract language and meetings discussed above and upon the requirement for a respiratory program. Even with clear notice of the potential airborne health hazard, Diamaco did not provide appropriate respirators for all workers requiring them.”

In Item 1-3, the IAJ stated that the violation was also “willful because of the notice discussed above in relation to the contract language, pre-construction conference, and Diamaco’s lead health program. Mr. Christian felt this showed Diamaco failed to provide the equipment with full knowledge of the hazard and of the required personal protective equipment.”

In Item 1-4, the IAJ did not comment on the Department’s theory for willful, because the WISHA Compliance Officer provided no additional testimony. The Department also presented the same reason for 1-5 as to its theory to support the “willful” classification.

Mr. Christian testified that Items 1 - 2 through 1-5 were all based on actions to be taken after the initial monitoring results have been obtained. Christian, September 13, 2004 at page 149, line 12 – page 150, line 4.

Mr. Christian further testified that for purposes of the willful violations, there was no data upon which Diamaco could rely on. The following testimony took place at page 150, lines 10 – 16:

Q. And so, therefore, Diamaco did not willfully disregard any results which had not yet even been taken; isn't that true?

A. It is true they had no results.

Q. And you have no evidence whatsoever that suggests that they intentionally chose not to take the initial monitoring; isn't that true?

A. I have no direct evidence.

In the Discussion portion of the "willful" classification, the IAJ concluded that Mr. AJ Smith, the project superintendent, "must have known that something was terribly wrong in an area over which he had been given exclusive control. This knowledge could only have been reinforced when the consultant from Health Risk Associates, with Mr. Zylstra present, inquired about Mr. Smith's implementation of the lead health protection program. Given the overwhelming evidence that Mr. Smith had allowed workers to disturb lead based paint without the protections provided for in the lead health protection program and the related WAC provisions, and the apparent injury to a worker caused by that action, Mr. Smith's only two options at that time were to admit that he had knowingly and willfully exposed the worker to injury or to say that he did not understand the requirements. In those circumstances, Mr. Smith reportedly stated that he did not think that he had to implement the program because they were not exposing the workers for more than a thirty-day period."

The IAJ further stated at page 30 of the Proposed Decision and Order, “Mr. Smith was repeatedly indifferent to these notifications. There is no evidence that any of these WISHA requirements were *fully complied* with until after the Department inspection.”

The undisputed testimony, however, indicated that workers were provided respirators, and other personal protective equipment (face shields, gloves, thick leather welding coats) for the torch cutting operations. Howell at page 46, lines 1 – 35. Handiwipes were also provided for cleaning. Howell at page 40, line 43. Even Mr. Howell agreed that the people who were suppose to wear respirators wore them. At page 53, lines 15 – 17, he was unequivocally asked the question, “Did you see people working without them?” His answer was, “No.” Mr. Howell did not file any grievances regarding unsafe working conditions. Howell at page 37, lines 17 – 25.

There is no dispute that much of the torch cutting operations took place in the second phase which began on January 7, 2003. It was reported to Mr. Smith that a worker went home sick about a week later. Prior to the WISHA inspection that occurred on January 21, 2003, Mr. Zylstra directed Mr. Smith to contact Health Care Associates.

#### **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 there was not substantial evidence in the record to establish that Diamaco "willfully" violated the lead standards.

**B. THE DEPARTMENT HAS THE ULTIMATE BURDEN OF PROOF IN ASSESSING A SERIOUS CITATION.**

Washington was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan administration. As such, the Washington State Department of Labor & Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code. However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited employer either knew, or

should have known of the presence of the violation. In relevant part,

RCW 49.17.180(6) declares:

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

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6).

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD.

**C. ER 602 precludes a witness from speculating on the motive or intent of the Employer.**

The State called Mr. Ronald Howell as a witness to testify about his conversations with Mr. AJ Smith. Beginning at page 9, line 19, in direct examination, Mr. Ronald Howell was asked by the Assistant Attorney General:

Q. Can you be a little more specific?

A. He said it would be way more expensive to do all the lead monitoring, the lead testing, the masks, and all that.

Q. So this was a in a conversation during which you had asked about the blood testing?

A. Mm-hmm.

Q. You have to say yes or no.

A. Yes.

...

Q. And can you recall, as best you can, Mr. Smith's exact words?

A. Not his exact words, no.

Q. But if I understand you correctly, he was telling you that these things weren't getting done to save money?

A. That's the bottom line that I got out of it.

Mr. Owada: Your honor, I have to object, then, as to what Mr.

Howell got out of it. If that's not exactly what Mr. Smith had said, then it's just pure speculation on Mr. Howell's part, and I move to strike those portions.

JUDGE PEARSON: I'll overrule the objection.

ER 602 declares:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Word for word, ER 602 provides the same language of Rule 602 in the Federal Rules of Evidence. The testimony of Mr. Howell regarding Mr. Smith's perceptions or beliefs is speculative. "Rule 602, Fed. R.Evid, requires that a witness give testimony based on perception from the five senses – not from some sixth sense." *United States of America v. Georgia Thomson*, Case No. 06-CR-20, US District Court, Eastern District of Wisconsin (June 19, 2006).

As held in *Visser v. Packer Engineering Association, Inc.*, 924 F.2d 655, 659-60 (7<sup>th</sup> Cir. 2000), lay assertion cannot be "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from the witness's experience; a witness is not competent to describe motivation because such testimony is too much like psychoanalysis, for

which the lay witness is not qualified to make. Naked speculation regarding an employer's motivation for an adverse employment decision is barred by ER 701(b). *Hester v. BIC Corp.*, 225 F.3d 178 (2d Cir. 2000).

The Board erred by allowing a lay witness to speculate on the mental thought process of Mr. Smith. The Department originally identified Mr. Smith as a witness, but chose not to call him. Instead, the Department offered Mr. Howell's opinion that Mr. Smith chose not to follow the lead procedures to save money. Mr. Howell's opinion clearly goes into the internal mental thought process and constitutes pure speculation as to Mr. Smith's intent because he could not recall the exact words that Mr. Smith had said. Thus, Mr. Howell's impression is of a mental process that was never expressed, never established by the State, and never adopted as a motivation by Diamaco. The Board erred by allowing this testimony, and further erred by relying on it to conclude that the Diamaco "willfully" violated the lead standards.

At page 11, line 21 of the State's case in chief, the Assistant Attorney General asked:

Q. And do you have a recollection of when you first might have brought this up to him?

A. I don't remember an exact date?

Q. Would it have been before the State began the inspection?

A. Yes.

Mr. OWADA: Objection, leading.

JUDGE PEARSON: Overruled.

In order to establish that the conversation took place before the inspection, and after hearing that Mr. Howell did not recall exactly when the conversation with Mr. Smith took place, the State clearly asked a question that suggested that the conversation took place before the inspection.

At page 17, line 1 (regarding the statements made by other witnesses to Mr. Smith provided on page 16, line 49), the State asked Mr. Howell:

Q. And what was Mr. Smith told about this?

MR. OWADA: Objection, hearsay.

MR. HALL: It goes to notice.

JUDGE PEARSON: Hmm?

MR. HALL: It goes to notice. It's not for the truth of the matter. It shows someone may be sick from lead. I'm not saying he was sick from lead.

MR. OWADA: It's still hearsay. It can only be used for the truth

of the matter asserted.

MR. HALL: The issue is whether the violation was willful. The fact that Mr. Smith was told that someone had lead poisoning and did nothing, it matters not whether that person actually did have lead poisoning. It goes to Mr. Smith's state of mind.

MR. OWADA: Your honor, the person who spoke it can certainly come in and testify. Otherwise, it's ranked [sic] hearsay.

JUDGE PEARSON: I will overrule the objection as not being offered for the truth of the matter asserted.

At page 20, line 41 of Mr. Howell's testimony, the state asked:

Q. During your conversation, when Billy Joe Willaford and his departure were discussed with Mr. Smith the morning after he left, did anyone give any indication that the departure might have been due to lead?

A. Yes.

Q. Can you tell us what was said?

A. I sent – I told AJ I'd sent BJ because he was ill. ***Three of us suspected it might have been lead poisoning, but we weren't sure.***

The line of questioning as to what was said to Mr. Smith by others was objected to as hearsay. The statements were clearly out of court statements that further contained the speculation of others who were not

called to testify. Moreover, Mr. Howell never provided any testimony that he specifically advised Mr. Smith that he had sent Mr. Willaford home because of lead. Rather, that was a subjective opinion that was not specifically shared with Mr. Smith. The only testimony provided by Mr. Howell was that he told Mr. Smith that he had sent Mr. Willaford home because he was ill. He did not state that he sent him home because he was sick from lead exposure. The Board erred by not sustaining the Employer's objections along these lines.

- D. A willful violation must show both a heightened state of awareness of the standard, as well as a deliberate or plain indifference to compliance with the standard. As such, the Board erred by finding that Diamaco "willfully" violated the lead protection standards.**

The federal OSHA Review Commission has defined a willful violation as one which is Acommitted with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *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 (8th Cir. 1996).

"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).

See also *Johnson Controls*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD & 30,018, p. 41,142 (No. 90-2179, 1993) (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1<sup>st</sup> Cir. 1987)).

Under the standard set forth in *Valdak Corp.*, supra, the Commission has distinguished a “serious” violation from a “willful” violation by the state of mind of the employer. According to the cases, it is not enough to show that an employer was aware of conduct or conditions constituting the alleged violation because such evidence is already necessary to establish any violation. A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference. In *Secretary of Labor v. B&B Plumbing, Inc.*, NO. 99-0401 the Commission held:

“There must be evidence of aggravating circumstances apart from mere lack of diligence or adequate care in order to establish a finding of a willful citation. **Simply failing to address a recognized hazard will not support a willful violation.**”

Yet, the IAJ concluded that willful violations were established even though the Employer had taken several steps to be in compliance with the lead standards. Under the lead standards, Diamaco was required to conduct the initial monitoring for trigger task activities.

Once the initial air monitoring is conducted, the Employer must then take appropriate actions set forth in Items 1 - 2 through 1-5. It is axiomatic that because the Employer failed to conduct initial air monitoring, it had no results upon which to make any decisions that are dependent on the results of the initial air monitoring. While this constitutes a violation, it does not establish a heightened state of mind of intending not to comply. Yet, the IAJ nevertheless concluded that Diamaco willfully violated Items 1 - 2 through 1-5 as well. This conclusion is contrary to the holding in *B&B Plumbing, Inc.*, supra.

The Commission has also held that a finding of willfulness is not justified where an employer has made a good faith effort to comply with the Act's requirements, even if the employer's efforts are not entirely effective or complete. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2139 (No. 90-1747, 1994).

The Board has adopted the federal definition of "willful" in *The Erection Company*, BIIA Docket No. 88 W142, a significant decision. In that case, the Board held:

This Board has adopted the following definition of a "willful violation" under WISHA: "a willful violation is one involving voluntary action, done either with an intentional disregard of or plain indifference to the requirements of the statute." *In re R.L. Alia*, Dckt. No. 86 W024 (October 16, 1987). This is the definition set forth by the Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311 (9th Cir. 1979), which is used by the majority of the federal circuits, as well as the Occupational Safety and Health Review Commission.

A number of forums have deliberated on the meaning of "willfulness." The Court of Appeals for the Eighth Circuit, in *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8th Cir. 1981), noted "the legislative history reflects a tension between the stated goal of promoting safe working conditions and the recognized limitation that the Act does not impose strict liability." 647 F.2d at 846, Footnote 11. Originally, the U.S. Senate bill provided only criminal penalties for a willful violation. Today, Washington's version of OSHA, WISHA, provides for criminal penalties where a violation is willful and the violation causes the death of an employee. RCW 49.17.190. Otherwise, civil penalties of up to \$50,000.00 per willful violation may be assessed. RCW 49.17.180(1).

Violations have been upheld as "willful" where an employer's safety program was grossly inadequate. In *IGC Contracting Co.*, 13 OSHC 1318 (1987), the company had no safety program whatsoever. In *Secretary of Labor v. Aquastop Waterproofing & Painting Corp.*, 13 OSHC 2024(1988), the company not only lacked a formal safety program, but the company president also testified he was unaware of the existence of OSHA.

Willfulness has also been upheld where appropriate safety equipment had not been provided by the employer for the use of its employees. In *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139 (8th Cir. 1978), five employees were working on scaffolds without safety belts, which were not even at the jobsite. In some cases, employers have even removed safety equipment from the worksite. In *IGC Contracting Co., supra*, the foreman ordered removal of all guardrails around airshafts and stairwells, either because he needed the wood for another purpose, or he wanted to avoid possible damage to the walls by safety railing. See also *Universal Auto Radiator Manufacturing Co. v. Marshall*, 631 F.2d 20 (3rd Cir. 1980) (the employer intentionally removed a safety device which it had been ordered to install).

Willfulness may also be established by an employer substituting its own judgment as to whether safety equipment or procedures are required in specific situations. In *Kent Nowlin Construction Co. v. OSHRC*, 593 F.2d 368 (10th Cir. 1979), the contractor

intentionally chose to ignore regulations regarding the deposit and storage of excavated material, rather than close parallel traffic lanes. In another trench case, the foreman consciously decided not to shore a trench because of the attendant difficulty in the presence of a water main pipe. *F.X. Messina Construction Corp. v. OSHRC*, 505 F.2d 701 (1st Cir. 1974). In *Secretary of Labor v. Spaulding Lighting Inc.*, 13 OSHC 1847 (1988), an employer permitted a foreman to continue operating presses without safeguards or restraints for nearly three years after the first safety citation had been issued. The employer in *Secretary of Labor v. Aquastop Waterproofing & Painting Corp.*, 13 OSHC 2034 (1988), did not provide safety instruction to his employees, because he did not believe they needed to be instructed on how to do their jobs.

In the Erection Company case, the Board held that the Department failed to prove that the fall protection violations were “willful” violations because the Employer had taken some steps to protect the employees from fall hazards. Although the Employer’s program was not effective in practice, hence not sufficient to vacating the citation under Employee Misconduct, the Board, nevertheless, held that the employer’s steps were sufficient to vacate the willful characterization.

In our case at bar, it is clear that the Diamaco took steps to address lead. Although those steps may have been inadequate under the regulations, it clearly demonstrates that Diamaco did not deliberately or with plain indifference choose to violate the standards. When the shop steward and union business manager approached AJ Smith about hand washing facilities, the undisputed testimony was that hand washing

facilities were provided before the WISHA compliance officer arrived. When Erick Olsen asked about respirators, AJ Smith provided half face respirators on the second day of the deck removal operation. When WSDOT asked about the initial monitoring, Diamaco made arrangements with Health Risk Associates to come out and conduct testing.

All of these actions clearly demonstrate that Diamaco did not have the heightened awareness to violate the lead standards. While it is undisputed that there was lead based paint on the project, and that Diamaco should have known that its employees would be exposed to lead hazards, such knowledge is required to demonstrate a serious violation. It is not, however, enough to establish that violations were willfully committed.

## **V. CONCLUSION**

The Board erred by allowing the witness to speculate on Mr. Smith's motivations and internal thought process in violation of ER 602. This is prejudicial because it was relied on to establish Mr. Smith's deliberate intent or plain indifference. Additionally, Diamaco misunderstood the lead regulations and had taken steps to be in compliance. Although those steps were inadequate to protect the workers, the Department failed to meet its burden that Diamaco had either a deliberate intent or plain indifference to being in compliance with the lead

standards. The Court should remand this matter to the Board to recalculate the monetary penalties as serious violations without the willful penalty factor of 10.

DATED this 18<sup>th</sup> day of January, 2007.

The Law Offices of Aaron K. Owada

A handwritten signature in cursive script that reads "Aaron K. Owada".

---

Aaron K. Owada, WSBA No. 13869  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I, Michelle Crawford, hereby certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court, via Personal Service, original of the Opening Brief.

And further sent a copy via US Mail to:

Bourtai Hargrove, AAG  
Attorney General's Office  
PO Box 40121  
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on January 18, 2007.



Michelle Crawford

FILED  
COURT OF APPEALS  
DIVISION II  
07 JAN 24 PM 1:41  
STATE OF WASHINGTON  
BY  DEPUTY