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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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DIAMACO, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This case arose when, the Department of Labor and Industries (Department) cited Diamaco, Inc. (Diamaco) for multiple willful violations of safety and health regulations under the Washington Industrial Safety and Health Act (WISHA). Diamaco was performing extensive work at the Wishkah Bridge in Aberdeen, Washington, including a seismic retrofit and the repair of deteriorated portions of the bridge.

Diamaco's work on the Wishkah Bridge included torch-cutting of metal structures coated with a lead-based paint.[1] Despite the company's (1) many years of experience removing lead-based paint, (2) prior knowledge that the work on the Wishkah Bridge required removal of lead-based paint, and (3) promise to fully protect workers from the serious health hazards of exposure to lead,[2] Diamaco failed to implement the mandatory lead-in-construction sections of the Washington Administrative Code (WAC).[3] As a result, Diamaco exposed its employees to lead levels many times the

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[1] Certified Appeals Board Record (CABR), Transcript, 9/13/04, Christian, p. 27. The CABR was not separately numbered in the clerk's papers. Throughout this brief, therefore, the CABR transcripts are referred to by date and the last name of the testifying witness and the page number. Documents in the CABR will be referred to by the stamped page number on the lower right-hand corner of the page, except that exhibits will be referred to by the exhibit number assigned by the Board of Industrial Insurance Appeals.

[2] CABR, Transcript, 9/27/04, Zylstra, pp. 8. 9; Transcript, 9/21/04, Dahl, pp. 93-94; Exhibit 1.

[3] CABR, Proposed Decision and Order, pp. 60-62. A copy of the Proposed Decision and Order, which was adopted by the Board as the final order of the Board, is attached to this brief as Appendix A.

permissible exposure level.[4] Excessive lead exposure - even short term exposure - can cause anemia, kidney problems, and peripheral and central nerve system problems, such as loss of feeling, slow nerve conduction, and paralysis. Even before the WISHA inspection Diamaco learned that one of its employees had been taken to the hospital with an apparent case of lead poisoning.[5]

Diamaco appealed its citation to the Board of Industrial Insurance Appeals (Board). Before the Board, Diamaco acknowledged that it had violated the safety standards for which it had been cited, but argued that the violations were not willful. The Board disagreed and affirmed the citation in its entirety. As the Board explained:

> The Board has held that "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 The Erection Co. II*, BIIA Dec. 88 W142, 11 (1990). Based on the entire record, . . . it would be hard to find a better example of both prongs of this test.[6]

Diamaco then sought judicial review in the Grays Harbor County Superior Court. Affirming the decision of the Board, the Court found that "there is overwhelming evidence in the record to support the determination

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[4] "The [exposure for the] journeyman iron worker was 5,930 micrograms per cubic meter, which is 148 times the permissible exposure limit, and the [exposure for the] apprentice was 2,689 micrograms per cubic meter, which is 67 times the permissible exposure limit." CABR, Transcript, 9/13/04, Christian, p. 19.

[5] CABR, Transcript, 9/21/04, Howell, p. 55.

[6] CABR, Proposed Decision and Order, p. 52 (adopted by the Board as the Board's final order. CABR, p. 1).

by the Board that Diamaco's violation of the lead-in-construction WISHA standards set forth in Violations 1 through 5 was willful."[7] Diamaco makes the same arguments to this Court that the Board and the trial court rejected.

II. COUNTER-STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's findings – based on two independent rationales, intent and manifest indifference -- that Diamaco's admitted violations of the lead-in-construction regulations were willful?

2. a. Did the Board properly admit testimony that Diamaco's project superintendent stated that he did not implement the WISHA lead-in-construction regulations because "it would be way more expensive to do all the lead monitoring, the lead testing, the masks, and all that"?

b. If the Board improperly admitted the above testimony, was such error harmless given the overwhelming evidence that Diamaco (i) knew of the hazards associated with lead exposure, (ii) knew that it was legally required to protect its workers from these hazards and knew how to do so, (iii) repeatedly chose to disregard safety, deciding instead to expose its workers to lead on a nearly-continuous basis, and (iv) once cited, devised an "explanation" for its violations that not even Diamaco's own expert witness could support?

III. COUNTER-STATEMENT OF THE CASE

A. The Wishkah Bridge Project Lead-Health-Protection-Program

The Washington Department of Transportation (DOT) was responsible for preparing the plans and specifications for the Wishkah Bridge project, and putting it out to bid.[8] The project consisted of replacing the grated metal bridge deck and doing a seismic retrofit by replacing rivets

[7] Clerk's Papers, Decision and Order, filed 8/03/06.
[8] CABR, Transcript, 9/21/04, Dahl, pp. 72-73.

with high-strength bolts and adding stiffening plates at key locations.[9] Because the bridge had been painted with lead-based paint in the past, the specifications included a requirement that the contractor prepare and submit a lead-health-protection program.[10]

Diamaco submitted the low bid (approximately 1.7 million dollars)[11] and prepared a formal lead-health-protection program as required.[12] When Diamaco's bid was accepted, the specifications became the contract.[13] The lead-health-protection program requirement was specifically discussed at the pre-construction conference with DOT personnel attended by Diamaco's general manager, Doug Zylstra; Diamaco's project superintendent, A.J. Smith; and Matt Williams, another Diamaco employee.[14]

Diamaco, a general contractor, performs work for public entities at the state, county and city levels. Most of the company's work is repair, rehabilitation or retrofit.[15] The company had extensive experience working with lead-based paint. Prior to bidding on the Wishkah Bridge project, Diamaco had worked on 25 to 30 bridges,[16] at least three of which - the Ship Canal Bridge, the Medeau Bridge, and the Fremont Bridge - involved lead-

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[9] CABR, Transcript, 9/21/04, Dahl, p. 71.
[10] CABR, Transcript, 9/21/04, Dahl, p. 79.
[11] CABR, Transcript, 9/27/04, Zylstra, p. 29.
[12] CABR, Lead-Health-Protection Program, Exhibit 1.
[13] CABR, Transcript, 9/21/04, Dahl, p. 73.
[14] CABR, Exhibit 13, Transcript, 9/21/04, Dahl, pp. 93-94.
[15] CABR, Transcript, 9/27/02, Zylstra, pp. 8, 9.
[16] CABR, Transcript, 9/27/04, Zylstra, pp. 8, 9.

based paint.[17] Diamaco General Manager Zylstra was the project administrator when the company worked on the Ship Canal Bridge, and the general manager when the company worked on the Medeau Bridge.[18] Diamaco had also worked on other projects involving lead-based paint, including the Salish project and the Holly Park project.[19]

Diamaco based its lead-health-protection program for the Wishkah Bridge project on the program the company had first used for the Fremont Bridge, then later for the Medeau Bridge, with modifications by Mr. Zylstra to fit the Wishkah Bridge requirements.[20] Despite General Manager Zylstra's allegedly limited training in lead-health-protection standards (he could not remember if he had ever had training on the WISHA lead-in-construction standards, although he did remember receiving training in the HUD safety guidelines for handling lead),[21] he did not seek help from an Industrial Hygienist or any other knowledgeable person before he modified the previous program to adapt it for the Wishkah Bridge project. General Manager Zylstra explained his modifications to the previous programs:

> The heading was modified, because the project identifies it is for Wishkah and the owner is Washington State Transportation. The first paragraph mentions removing lead-based paint at the top of floor beams and at slip critical

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[17] CABR, Transcript, 9/27/04, Zylstra, pp. 9, 13.
[18] CABR, Transcript, 9/27/04, Zylstra, p. 9.
[19] CABR, Transcript, 9/27/04, Zylstra, p. 57.
[20] CABR, Transcript, 9/27/04, Zylstra, pp. 13, 36.
[21] CABR, Transcript, 9/27/04, Zylstra, p. 14.

> connection areas, which would be fairly specific to the Wishkah project, although I believe that the same work would have been done at the Fremont project. On the third page in the project execution procedures, there is a bullet item talking about several methods of removal and mentions the Schmidt Blasting Recovery System. I believe that would be specific to this project. I believe that is it.[22]

At the Board hearing, Industrial Appeals Judge Pearson asked General Manager Zylstra the following questions regarding Mr. Zylstra's understanding of the need for a lead health protection program:

> Q. (Judge Pearson): So at that time, did you understand that the paint would be or could be disturbed while they were working on the project?
>
> A. (Zylstra): Yes.
>
> . . . .
>
> Q. (Judge Pearson): What did you understand as to why the lead health protection program was required by the contractor?
>
> A. (Zylstra): I would think that the owner is required to put that in there to be sure that they are making us aware that the lead is there. That protects them to some degree I would imagine from anybody being harmed dealing with the lead.
>
> Q. (Judge Pearson): And given that knowledge, you chose to modify the previously existing health protection program without doing additional research into the requirements?
>
> A. (Zylstra): That is correct.[23]

In the lead-health-protection program for the Wishkah Bridge project, as revised by Mr. Zylstra, Diamaco promised DOT, *inter alia*, that Diamaco would take the following legally required measures: (1) fully

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[22] CABR, Transcript, 9/27/04, Zylstra, p. 61.
[23] Transcript, 9/27/04, Zylstra, p. 61.

comply with worker safety requirements; (2) perform an initial assessment to determine whether any employee's exposure to lead exceeded the "action level"; (3) establish an air-monitoring program; (4) notify employees in writing if air-monitoring showed that their exposure exceeded the permissible exposure limit (PEL); (5) provide employees with appropriate respirators (including *supplied-air* respirators when required); (6) provide full-body work clothing, gloves, hats, shoes, goggles and other appropriate protective equipment; (7) provide changing areas where workers could leave contaminated protective clothing and equipment; (8) launder or dispose of contaminated protective clothing and equipment; (9) provide adequate hand and face-washing facilities; (10) forbid the consumption of food, beverages, or tobacco products on the workplace; and (11) institute a medical surveillance program for all employees who are or may be exposed to lead "at or above the action level for more than 30 days in any consecutive 12 months."[24] A copy of the WISHA lead-in-construction regulations was attached to Diamaco's lead-health-protection program.[25]

General Manager Zylstra gave a copy of the program and the WISHA regulations to Diamaco's Superintendent, A.J. Smith. Although General Manager Zylstra testified that Superintendent Smith was responsible for implementing the lead-health-protection program, before the WISHA

[24] CABR, Exhibit 1, pp. 1-3.
[25] CABR, Transcript, 9/27/04, Zylstra, p. 50.

inspection, Mr. Zylstra never once discussed the program with Superintendent Smith, and never once inquired of Superintendent Smith whether the program was being implemented.[26]

B. Conditions On The Worksite Before The January 21, 2003 WISHA Inspection

1. The Observations And Testimony Of The DOT Engineers

Robert Rudy, Jeff Young, and James Skinner, transportation engineers working for DOT, were on the Wishkah Bridge worksite at various times during January 2003. Before the WISHA inspection on January 21, 2003, all three of them personally observed Diamaco employees torch-cutting areas with lead paint without wearing respiratory protection.[27]

Engineer Rudy, who rotated between shifts, observed Diamaco's workers cutting steel rivets, removing a substructure ("stringers") between the floor beams, and removing portions of the existing steel deck with torches.[28] Some of the workers were wearing filtered respirators, some were not.[29] He was concerned enough to write several e-mails informing the

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[26] CABR, Transcript, 9/27/04, Zylstra, p. 32.

[27] Torch cutting on metal coated with a lead-based paint is a "trigger task" which requires employers to implement the full panoply of lead protective measures set forth in the WISHA regulations. CABR, Transcript, 9/13/04, Christian, pp. 27, 28. See the discussion on pages 19, 21, 22 below.

[28] CABR, Transcript, 9/14/04, Rudy, p. 8.

[29] CABR, Transcript, 9/14/04, Rudy, pp. 9, 39, 40. A filtering respirator simply filters the ambient air, while the required supplied-air respirator carries its own air supply that is provided to the employee. CABR, Transcript, 9/13/04, Christian, p. 61. See the explanation on pp. 19-20 of this brief.

project engineer about the lack of respiratory protection.[30] Engineer Rudy also spoke to project Superintendent Smith twice, the first time about Diamaco's failure to ensure that its employees used respirators, and the second time about the initial monitoring required by the lead-health-protection program.[31] The conversations took place several days after work had begun in early January 2003 on the deck removal. In response, Superintendent Smith claimed that he was working on the lead-health-protection program, still getting things together.[32]

When asked directly about initial monitoring, Superintendent Smith replied that it was scheduled, but had not yet taken place.[33] As Engineer Rudy later testified, "[Superintendent Smith] gave an indication that it wasn't a mystery, that he knew – he knew it needed to be done, it just wasn't being done, and that is why I raised the question."[34]

Engineer Young, who was on site one Saturday in January, before the date of the inspection, also observed Diamaco employees cutting steel with torches but wearing no respiratory protection.[35] He discussed this with Superintendent Smith at lunch. Engineer Young testified, "[I] asked [Mr. Smith] if Diamaco had a lead program for this project, and he said yes,

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[30] CABR, Transcript, 9/14/04, Rudy, p. 10.
[31] CABR, Transcript, 9/14/04, Rudy, pp. 10 – 20.
[32] CABR, Transcript, 9/14/04, Rudy, p. 12.
[33] CABR, Transcript, 9/14/04, Rudy, p. 16.
[34] CABR, Transcript, 9/14/04, Rudy, pp. 16, 17.
[35] CABR, Transcript, 9/14/04, Young, p. 45.

and I explained to him the situation with another contractor on the Morah Bridge [a separate project with which Mr. Young was familiar] that was fined for their lack of adherence to their plan."[36] According to Engineer Young, Superintendent Smith did not seem to be alarmed by the suggestion that Diamaco might be fined for lack of compliance with its lead program.[37]

Engineer Skinner, who worked on night shift during this period, observed workers cutting lead-painted steel members and rivets using torches, abrasive wheels, and sand blasting without any respiratory protection whatsoever.[38] Although Engineer Skinner discussed the lack of respiratory protection with some of the workers, they continued to work without respirators.[39] Because Diamaco had not provided the required on-site hand-washing facilities that it had promised, Engineer Skinner, like the other workers, had to resort to hand wipes and paper towels.[40] There were no hand-washing facilities on site until after the job was restarted following a shut down by the Department.[41]

2. The Observations And Testimony Of The Ironworkers

The most detailed testimony about conditions on the worksite before the WISHA inspection came from two journeyman ironworkers, Ron

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[36] CABR, Transcript, 9/14/04, Young, p. 46.
[37] CABR, Transcript, 9/14/04, Young, p. 47.
[38] CABR, Transcript, 9/14/04, Skinner, p. 55.
[39] CABR, Transcript, 9/14/04, Skinner, p. 56.
[40] CABR, Transcript, 9/14/04, Skinner, p. 67.
[41] CABR, Transcript, 9/14/04, Skinner, p. 56.

Howell and Erik Olson. Ironworker Howell worked on the Wishkah Bridge project from mid-August, 2002 until February 2003[42]. When removal of the deck began, Howell was in charge of the night shift.[43]

Although it was known that the Wishkah Bridge paint contained lead, Diamaco failed to give its employees blood tests to establish blood lead levels until after the WISHA inspection.[44] Ironworker Howell asked Superintendent Smith about this several times, as far back as November and December of 2002. Mr. Smith replied that following the rules was not cost-effective:

> Q. And did Mr. Smith give you any indication of why the blood testing wasn't being provided?
> A. The indication that I got from AJ was, it wasn't cost effective.
> 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. . . .[45]

When Ironworker Howell asked Superintendent Smith about furnishing personal protective equipment, Mr. Smith's answer was similar – "It was not cost-effective."[46]

> Q. And did you discuss specific kinds of PPE?

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[42] CABR, Transcript, 9/21/04, Howell, p. 7.
[43] CABR, Transcript, 9/21/04, Howell, p. 8.
[44] CABR, Transcript, 9/21/04, Howell, p. 9.
[45] CABR, Transcript, 9/21/04, Howell, p. 9; *see infra* Part IV.D for discussion of Diamaco's ER 602 objection and Diamaco's argument under that objection.
[46] CABR, Transcript, 9/21/04, Howell, p. 13.

A. I told him a clean room was required, a dirty room, coveralls or Tyvek suits. We had none of that. . . .
Q. Well, was there a locker room kind of thing?
A. It was just a dry shack, where we hang our clothes.
Q. And dry shack, to someone who doesn't work in your business, is that a trailer?
A. Yes.
Q. And what is it? Pegs on the wall to hang your clothes?
A. Yes.
Q. Is there a shower in there?
A. No.
Q. Clothes washing facilities?
A. No.[47]

Ironworker Howell was forced to bring his work clothes home to launder them.[48] When the subject of personal protective equipment (PPE) came up in bar conversations, Superintendent. Smith thought it was funny - "he was pretty humored about it."[49]

Ironworker Howell sometimes worked within five feet of the torch cutting and rivet removal, and at one point, he was using a cutting torch himself. He was never offered a respirator, and never told to use one.[50] While working on the bridge, he sometimes smoked, and other workers ate, drank or smoked while working.[51] Ironworker Howell received no training at all – no training about lead, no training about the use of respirators, no training about a medical surveillance program, no training about the WISHA

[47] CABR, Transcript, 9/21/04, Howell, p. 12.
[48] CABR, Transcript, 9/21/04, Howell, p. 16.
[49] CABR, Transcript, 9/21/04, Howell, p. 13.
[50] CABR, Transcript, 9/21/04, Howell, pp. 13, 14.
[51] CABR, Transcript, 9/21/04, Howell, p. 15.

lead standards, no training about engineering controls to reduce lead exposure, no training about the methods to use to clean lead from his body.[52] In fact, Superintendent Smith suggested the workers sign blank safety meeting forms, so Diamaco could create records for mandatory meetings that were never actually held.[53]

Billy Joe "B.J." Willaford was one of the workers Ironworker Howell supervised. Mr. Willaford was sent home one night because he was ill. When Ironworker Howell told Superintendent Smith about Mr. Willaford's illness the next morning, he told him that "three of us suspected it might be lead poisoning, but we weren't sure."[54] After being told that Mr. Willaford might be suffering from lead poisoning, Superintendent. Smith coldly responded to the effect that "it was B.J.'s own fault."[55]

A couple of days after this incident, Superintendent. Smith provided a few half-face negative-pressure *filtering* respirators for the workers (but never, before the WISHA inspection, the half-face *supplied-air* respirators that were legally required). Even then Diamaco failed to supply enough respirators for all the employees.[56] Ironworker Howell, for example, never

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[52] CABR, Transcript, 9/21/04, Howell, p. 15.
[53] CABR, Exhibit 8, Transcript, 9/21/04, Howell, p. 55.
[54] CABR, Transcript, 9/21/04, Howell, p. 20.
[55] CABR, Transcript, 9/21/04, Howell, p. 55, Exhibit 8.
[56] CABR, Transcript, 9/21/04, Howell, p. 52.

got one. He also never received any protective clothing.[57] Furthermore, according to Ironworker Howell, no one was ever disciplined for not wearing a respirator.[58] Mr. Howell, who was a union steward, complained about the lack of safety equipment to his union business agent.[59]

Ironworker Olson confirmed many of the statements made by Mr. Howell. Mr. Olson worked on the Wishkah Bridge project in late December 2002 and January 2003. He did torch work – cutting, burning, welding and rigging.[60] When the paint started to burn off, it created a cloud plume - sometimes a half-foot column of smoke.[61] Before Ironworker Olson began work, he received no training on lead hazards; indeed, like Ironworker Howell, Mr. Olson received no training at all.[62] He was not even told there was lead on the site, and did not find out about it until his foreman returned from vacation.[63] Half-face, purple-cartridge respirators were furnished to the workers on the second day. (Again, these were not the supplied-air respirators mandated by the regulations, and there were not enough respirators to go around.)[64]

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[57] CABR, Transcript, 9/21/04, Howell, p. 21.
[58] CABR, Transcript, 9/21/04, Howell, p. 61.
[59] CABR, Transcript, 9/21/04, Howell, p. 57.
[60] CABR, Transcript, 9/21/04, Olson, p. 112.
[61] CABR, Transcript, 9/21/04, Olson, p. 124.
[62] CABR, Transcript, 9/21/04, Olson, p. 113.
[63] CABR, Transcript, 9/21/04, Olson, p. 113.
[64] CABR, Transcript, 9/21/04, Olson, p. 114.

Ironworker Olson testified that Diamaco did not require its employees to wear the respirators, and that he observed workers doing cutting and other torch work in and near the cloud plumes without them,[65] even when Superintendent Smith was present.[66] Mr. Olson was never fit-tested for a respirator and received no training on how to use this critical safety equipment.[67] He had to change cartridges on the respirator often because half-way through the shift he could begin to smell and taste the dust.[68]

Ironworker Olson was not furnished with protective clothing and wore his own rain gear, rain pants, a Filson jacket and gloves when working.[69] Other workers did torch cutting without wearing protective cutting jackets. Ironworker Olson brought up the lack of personal protective equipment with Superintendent Smith, but Smith told Olson "he didn't see anywhere where they required that."[70] Personal protective equipment was, of course, required by Diamaco's own lead-health-protection plan.

There were no hand-washing facilities on site, but there was a cold water hose hook-up at the Harbor Tool Rental, a full city block from the

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[65] CABR, Transcript, 9/21/04, Olson, p. 124.
[66] CABR, Transcript, 9/21/04, Olson, p. 115.
[67] CABR, Transcript, 9/21/04, Olson, p. 114.
[68] CABR, Transcript, 9/21/04, Olson, p. 116.
[69] CABR, Transcript, 9/21/04, Olson, p. 116.
[70] CABR, Transcript, 9/21/04, Olson, p. 129.

bridge.[71] The first week, all the workers had for hand-cleaning was one container of citrus wipes.[72] Ironworker Olson and other workers cleaned their hands with the hand wipes. As Mr. Olson testified:

> Q. When you spoke with Mr. Smith, what did you tell him?
> A. That we needed hand wash facilities. You know, we need to be able to wash our hands before we eat and be able to clean up, you know.
> Q. And what was his response?
> A. Basically, just kind of shrugged it off for a little while.
> Q. How long do you mean when you say, "a little while"?
> A. Probably a week. I finally called - I called the [union's] business agent, Dave Johnson. And Dave Johnson talked to him about it. And then he got — they ended up getting them. They were cold water. They were made by Honey Bucket. They were just basically a reservoir that was pumped by your foot, out onto your hands into a sink area.[73]

As with various other safety measures, the workers did not get warm or hot water to wash their hands until after the WISHA inspection.[74] Before then, workers often drank bottled water while working and smokers went to the edge of the bridge to smoke while work was going on.[75] Without hand-washing facilities, they could not wash their hands before drinking or

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[71] CABR, Transcript, 9/21/04, Olson, p. 119.
[72] CABR, Transcript, 9/21/04, Olson, p. 120.
[73] CABR, Transcript, 9/21/04, Olson, p. 121.
[74] CABR, Transcript, 9/21/04, Olson, p. 121.
[75] CABR, Transcript, 9/21/04, Olson, pp. 124, 125.

smoking. Like Ironworker Howell, Ironworker Olson did not receive his legally-required blood test until after the WISHA inspection[76].

On several occasions, Superintendent Smith had his children down for a weekend. Ironworker Olson testified that one Saturday on a date before the WISHA inspection, one of Mr. Smith's sons began to go toward the dry shack where the workers stored their contaminated work clothing. "And he started heading for that and started up the stairs, and his dad yelled at him to 'Stay out of there. There was lead in there.'"[77] Unfortunately, Superintendent Smith did not exercise the same caution with his own employees.

C. The January 21, 2003 WISHA inspection and Department follow-up.

On January 20, 2003, project Superintendent Smith called General Manager Zylstra to tell him that someone had gone home with lead poisoning.[78] In response to that telephone call, Mr. Zylstra instructed Superintendent Smith to get Health Risk Associates out to the site the next day, and he would meet them there. General Manager Zylstra had visited his company's $1.7 million project site only once before, despite the fact that the

[76] CABR, Transcript, 9/ 21/04, Olson, pp. 121, 122.
[77] CABR, Transcript, 9/21/04, Olson, p. 128.
[78] CABR, Transcript, 9/27/04, Zylstra, p. 33.

project had been underway for months.[79] The next day was January 21, 2003, the day the WISHA inspection began.

On January 21, 2003, Bruce Christian, an industrial hygiene compliance inspector for the Department, began an investigation of the Wishkah Bridge worksite.[80] The Department had received two complaints, one from the Blood Lead Registry reporting a very high blood-lead level of an employee, and the other from a union representative.[81] At the time of the inspection, Diamaco was in the deck-removal-and-replacement phase of the job, cutting off deteriorated metal decking and replacing it with new material. The workers were cutting the metal with a torch.[82]

Inspector Christian held an opening conference with Superintendent Smith and did a walk-around inspection accompanied by Mr. Smith and an employee representative. During the inspection Inspector Christian took wipe samples and bulk samples of paint from material that had been cut from the bridge, and interviewed witnesses.[83] The bulk sampling indicated lead in the bridge's paint in concentrations ranging from 9 to 39 percent.[84] Superintendent Smith acknowledged that the paint contained lead, stating, "[t]his is a specified lead job," and readily furnished Mr. Christian with

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[79] CABR, Transcript, 9/27/04, Zylstra, p. 20.
[80] CABR, Transcript, 9/13/04, Christian, p. 13.
[81] CABR, Transcript, 9/13/04, Christian, p. 14.
[82] CABR, Transcript, 9/13/04, Christian, p. 17.
[83] CABR, Transcript, 9/13/04, Christian, p. 18.
[84] CABR, Transcript, 9/13/04, Christian, p. 23.

copies of Diamaco's lead-protection and respiratory-protection plans. These documents were in binders on Superintendent Smith's desk at the project site.[85]

During the walk-through, Superintendent Smith also showed Inspector Christian the areas where torch-cutting had been done, and described the methods Diamaco had used. When asked if Diamaco had done an exposure assessment or air monitoring, project Superintendent Smith said no.[86] Superintendent Smith indicated that employees used the half-face *negative-pressure, filtering* respirators stored on site.[87]

Pursuant to WISHA safety standards, the minimum respiratory protection for workers performing a "trigger task" such as torch cutting, is a half-face *supplied-air* respirator, not the half-face *negative-pressure, filtering* respirators that some employees were using.[88] A filtering respirator simply filters the ambient air, while a supplied-air respirator carries its own air supply that is provided to the employee. Inspector Christian did not see any supplied-air respirators on site,[89] and there is no evidence that any such respirators were ever on Diamaco's project site prior to the inspection.

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[85] CABR, Transcript, 9/13/04, Christian, p. 23.
[86] CABR, Transcript, 9/13/04, Christian, p. 50.
[87] CABR, Transcript, 9/13/04, Christian, p. 60.
[88] WAC 296-155-17613
[89] CABR, Transcript, 9/13/04, Christian, p. 61.

The next day, the Department instructed Diamaco to stop work until it could come into compliance with the lead and respiratory programs. When Inspector Christian returned to the site, he took air samples from the air surrounding a journeyman and an apprentice iron worker who were cutting iron on the bridge. The results showed the journeyman iron worker was exposed to 5,930 micrograms per cubic meter, 148 times the "permissible exposure limit," and the apprentice was exposed to 2,689 micrograms per cubic meter, 67 times the permissible exposure limit.[90]

Lead exposure leads to adverse peripheral and central nervous system effects – such as loss of feeling, slow nerve conduction, or paralysis. It can disrupt heme synthesis, which can cause anemia. It can also have significant impact on the filtering structures of the kidney.[91] An individual's reaction to lead exposure varies with the individual's susceptibility. Usually, the harmful effects of lead exposure begin to show up when an individual is exposed to between 50 and 60 micrograms per deciliter. The harmful physiological effects of lead exposure, especially on the central nervous system, may not be reversible once the damage is done. [92]

Inspector Christian learned that for at least two weeks before the WISHA inspection, Diamaco had been routinely torch-cutting and grinding

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[90] CABR, Transcript, 9/13/04, Christian, p. 19.
[91] CABR, Transcript, 9/ 13/04, Christian, p. 53.
[92] CABR, Transcript, 9/13/04, Christian, p. 55.

on material coated with lead-based paint – activities that release lead into the air (the deck-removal phase of the project began on January 7 or 8).[93] Even prior to the deck-removal phase, Diamaco employees had been cutting, though not as regularly, on the decking and underlying support beams for the decking material.[94]

Under the WISHA lead-in-construction standard, the activities that Diamaco's employees were performing are called "trigger tasks."[95] Until an initial exposure assessment is done and air monitoring has been completed, an employer whose workers are engaging in a trigger task must treat the exposure as if it were above 2,500 micrograms per cubic meter,[96] and provide, at a minimum, (1) half-face, *supplied air* respirators; (2) personal protective clothing – including full body work clothing, gloves and shoes; adequate hand-washing facilities; (3) a change area with separate storage facilities for protective work clothing and street clothing to prevent cross-contamination; (4) appropriate biological monitoring (blood lead and zinc protoporphyrin levels); and (5) employee training on lead hazards and the acceptable methods of controlling lead hazards.[97] After the initial assessments have been completed, the employer may adjust the protection up

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[93] CABR, Transcript, 9/13/04, Christian, p. 27.
[94] CABR, Transcript, 9/13/04, Christian, p. 27.
[95] CABR, Transcript, 9/13/04, Christian, p. 37.
[96] CABR, Transcript, 9/13/04, Christian, p. 66.
[97] CABR, Exhibit 3, see the sections of the Washington Administrative Code cited in Exhibit 3.

or down, depending on the results.[98] The actual exposure at the Wishkah Bridge site far exceeded the presumed exposure of 2,500 micrograms per cubic meter.

Inspector Christian determined that Diamaco failed to implement any of these protective measures[99] despite the fact that all of them, except the training requirement, were contained in Diamaco's own lead-health-protection program.[100] According to General Manager Zylstra, when a representative of Health Risk Associates confronted project Superintendent Smith on Jan. 21st about his failure to implement the lead safety regulations, Superintendent Smith said that he thought the project was somehow exempt based on a non-existent 30-consecutive-days-exposure trigger:

> A. (Zylstra): When Mr. Kelly came to the job site and started going through this, he said, "Have you done this? Have you done that? "And A.J. Smith said no. He said, "I didn't think we had to, because we are not exposing the workers for more than 30 consecutive days in a 12-month period," something to that effect."[101]

This is the only evidence in the record regarding Superintendent Smith's alleged misunderstanding of the regulations, a "misunderstanding" first expressed months into the project and only after a professional hygienist advised Mr. Smith of some of Diamaco's numerous violations of WISHA

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[98] CABR, Transcript, 9/13/04, Christian, p. 28.
[99] Diamaco did not contest the factual basis of the violations. CABR, p. 6.
[100] CABR, Exhibit 1.
[101] CABR, Transcript, 9/27/04, Zylstra, p. 49.

standards. Superintendent. Smith did not use this excuse when talking to Inspector Christian,[102] and Mr. Smith did not testify at trial.[103]

Only after the Department imposed the work stoppage did Diamaco finally implement the protective measures required by the WACs and by Diamaco's own lead-health-protection program. Workers whose blood was tested after the WISHA inspection showed elevated or toxic levels of lead and zinc protoporphyrin. For example, Ironworker Howell had such toxic levels for lead and zinc that he had to be taken off the job.[104] Attached to this brief as Appendix C is a summary of the results of blood-testing and diagnosis for five Diamaco employees which shows the extent that they had been poisoned by lead during their work at the Wishkah River Bridge Project[105].

Inspector Christian returned to the site on two or three other occasions, interviewed additional witnesses, and interviewed Superintendent Smith and General Manager Zylstra. After holding a closing conference,

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[102] CABR, Transcript, 9/13/04, Christian, p. 58.

[103] Diamaco also did not raise its "misunderstanding" excuse when it appealed the citation. Instead, Diamaco simply argued that its agent, Mr. Smith, was responsible for the violations. *See* CABR, Exhibit 14. The Board's industrial appeals judge incorrectly rejected this party admission.

[104] CABR, Exhibit 5, *see New Patient Evaluation* of Ronald Howell by Rex Bolin, M.D.

[105] CABR, p. 134. The summary is based on the medical evaluations contained in CABR, Exhibit 5.

Inspector Christian recommended that a citation including five willful violations of lead-health-protection regulations, be issued to Diamaco.[106]

D. Procedural History

1. The Citation and Diamaco's appeal to the Board

The Department cited Diamaco for five willful and ten serious violations of the WISHA safety standards set out in the Washington Administrative Code.[107] Diamaco appealed to the Board. Before hearings began at the Board, the Department agreed to vacate duplicate or redundant sub-sections of the violations, but the substance of the citation was unchanged.[108] Because Diamaco concedes that it committed all of the violations for which it was cited, challenging only the willfulness element of the charges (and the accompanying increase in penalties), the Department's brief will not set forth the exact wording of the citation charges or describe their elements.

2. The Board's Decision

After conducting hearings and considering pleadings filed by the parties, the Board's Industrial Appeals Judge (IAJ) affirmed the citation in its entirety. Specifically, the IAJ determined that citation Items 1 through 5

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[106] CABR, Transcript, 9/13/04, Christian, p. 40.

[107] A full copy of the citation is found in CABR, Exhibit 3, and attached to this brief as Appendix B.

[108] CABR, Transcript 9/13/04, p. 4.

were properly characterized as willful violations, and that this was not a close question. The IAJ begins his analysis as follows:

> The Board has held that "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 The Erection Co. II*, BIIA Dec. 88 W142, 11 (1990), citing *R.L Alia*, Dckt. No. 86 W024 (10/16/87). Based on the entire record, *I find it would be hard to find a better example of both prongs of this test.*[109]

The IAJ separately analyzed the culpable knowledge and state of mind of Superintendent Smith and that of General Manager Zylstra:

> Diamaco's contention that Mr. Smith's failure to comply with the lead-in construction standards was due to his misunderstanding of the regulations rests on one reported comment by Mr. Smith . . . which occurred under circumstances that raise grave questions regarding its truthfulness. [M]r. Smith admitted that he was aware of the lead health protection plan and he was aware the paint contained lead. Mr. Smith could not have avoided seeing workers cutting on metal covered with this lead-containing paint and the clouds of smoke that the cutting created and Mr. Olson testified he saw workers cutting without respirators in the presence of Mr. Smith. Mr. Rudy, Mr. Howell, and Mr. Olson all testified that they had spoken with Mr. Smith regarding his previous failures to comply with lead safety requirements. During these conversations, Mr. Smith never raised the issue of a thirty-day window before protection must be provided. Nevertheless, he had continued to have workers cut on lead containing paint without the protections provided for in the standards.[110]

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[109] Proposed Decision and Order, CABR, p. 52 (emphasis added). A copy of the Proposed Decision and Order is attached hereto as Appendix A.

[110] Proposed Decision and Order, CABR, p. 54.

Based in part on this evidence, the IAJ concluded that Superintendent Smith had intentionally violated the applicable WISHA regulations:

> I must reject the possibility that Mr. Smith mistakenly believed that he was not required to follow the applicable standards and conclude that he knew the requirements of the WAC and voluntarily and intentionally disregarded them. These voluntary actions support a finding of willfulness for these violations.[111]

In addition to Superintendent Smith's *intentional* actions, the IAJ explained that General Manager Zylstra's actions independently provided a basis for characterizing the violations as willful under the *indifference* prong of the willfulness standard:

> When he elected to address the clear and recognized hazard presented to his workers by the lead on the bridge by submitting a recycled lead health protection program on his own, with no training, and without consulting the applicable regulations, Mr. Zylstra's voluntary action constituted plain indifference to the regulations. [G]iven the nature of the project and Diamaco's experience in this kind of work, it is inconceivable that Mr. Zylstra was not aware that some torch cutting on metal covered by lead based paint would be required in both phases of the contract. He was present when the requirement for a lead health protection program was discussed at a pre-construction meeting on November 21, 2001, approximately 7 or 8 months before the commencement of work on the initial phase of the project. This had provided him with ample notice and time to research, develop, and implement an adequate lead health protection program before Diamaco began work on the bridge.[112]

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[111] Proposed Decision and Order, CABR, p. 57.
[112] Proposed Decision and Order, CABR, pp. 57, 58.

The IAJ specifically found that Diamaco "voluntarily and intentionally disregarded" the regulations at issue.[113] The IAJ also found that "[b]y not familiarizing himself with the applicable WISHA regulations and ensuring that they were incorporated in the lead health protection program, Mr. Zylstra, Diamaco, Inc.'s, general manager, demonstrated plain indifference to the regulations . . ."[114]

Thereafter, Diamaco petitioned the Board for review of the Proposed Decision and Order.[115] On March 24, 2005, the Board denied the Petition for Review, making the Proposed Decision and Order the final decision of the Board.[116]

3. Diamaco's Superior Court appeal

Diamaco then sought judicial review in the Grays Harbor County Superior Court. Affirming the Board's decision in all respects, the Court held that "there is overwhelming evidence in the record to support the determination by the Board that Diamaco's violation of the lead-in-construction WISHA standards set forth in Violations 1 through 5 was willful."[117]

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[113] Proposed Decision and Order, CABR, pp. 2-11.
[114] Proposed Decision and Order, CABR p. 59.
[115] CABR, pp. 2-11.
[116] CABR, p. 1.
[117] Clerk's Papers, Decision and Order, filed 8/03/06.

IV. ARGUMENT

A. Standard Of Review

Judicial review of the Board's findings 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, 124 P.3d 304 (2005).

Legal issues are reviewed *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 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 WISHA regulation must be accorded an interpretation which furthers worker health and safety. *Stute v. P.B.M.C.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990).

The Department is required to adopt occupational health and safety standards that 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).

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). 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 has 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).

C. Substantial Evidence Supports The Board's Finding That Diamaco Willfully Violated Multiple WISHA Safety Standards

1. Plain indifference to safety requirements is sufficient by itself to establish a willful violation

Although Washington statutes do not define the term "willful",[118] the test for a willful violation is well established in case law. A willful violation is "a voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute or regulations." *National Steel and Shipbuilding v. OSHRC,* 607 F.2d 311, 313-17 (9th Cir. 1979). This is the definition which has been used by the majority of the federal circuits, the Occupational Safety and Health Review Commission (OSHRC), and, in Washington, by the Board in WISHA cases.[119] *In re The Erection Company (II),* BIIA Dec., 88 W142 (1990), 1990 WL 255020; *In re Cam Construction,* BIIA Dec., 90 W060 (1992), 1992 WL 52455.

A *failure to act* may, under some circumstances, constitute willful conduct. The failure to comply with a safety standard is "willful if done

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[118] RCW 49.17.180 sets a minimum penalty of five thousand dollars for a willful violation, but does not define the term "willful violation."

[119] The Board first endorsed this definition of a willful violation in *Tri-State Construction, Inc.,* Dckt. No. W-2868 (May 6, 1985), and *Ford Construction Company,* Dckt. No. W-2859 (June 28, 1985).

knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement." *United States v. Dye Construction Co.,* 510 F.2d 78, 81 (10th Cir. 1975).

The principal reason for the enhanced penalties for a willful violation[120] is not the degree of danger of the violation, but the "particularly improper state of mind" with which the safety standard has been violated. *Nat'l Steel,* 607 F.2d at 315-16, n. 6. But "an employer need not harbor malicious motives or possess a 'specific intent' to violate a provision of the Act in order to commit a willful violation." *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1423 (D.C. Cir. 1983). Plain indifference to safety requirements is sufficient to establish a willful violation. *Ensign-Bickford*, 717 F.2d at 1422-23.

Violations have been held to be willful when an employer substitutes other protective measures for the safety measures required by the regulation, and consciously disregards the actual legal requirements. In *Western Waterproofing Col, Inc. v. Marshall*, 576 F.2d 139 (8th Cir.), cert. denied, 439 U.S. 965 (1978), the employer failed to install toeboards, and failed to lash the scaffold to the building as required by the regulations because it believed that the suspension system was tight enough to prevent

[120] RCW 49.17.180 states that a minimum penalty of five thousand dollars shall be assessed for a willful violation.

lateral movement and make the scaffold safe for employee use. The Eighth Circuit ruled that the employer's decision not to follow applicable safety standards constituted willful conduct:

> [W]e need not decide whether or not Western did in fact believe that their actions met the underlying purpose of the standards through other means. Western's management personnel were well aware of the scaffolding standards for which they were cited. Western's officials substituted their own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act. The regulations allow no such unbridled discretion.

Id. at 143. See also *Williams Enterprises, Inc.*, 13 OSHC 1249, 1987 OSHD (1987), 1987 WL 89134 (O.S.H.R.C.); *In re Cam Construction,* BIIA Dec., 90 W060 (1992), 1992 WL 52455; *In re: Robert Colf dba Colf Construction*, Dckt. No. 96 W318 (November 23, 1998), 1998 WL 902100.

OSHRC has held that the Secretary of Labor does not have to prove that the employer *knew* that it was violating a specific standard or the Act in general. In *John W. Eshelman & Sons*, 9 OSHC 1396, 1981 OSHD (1981), 1981 WL 18867 (O.S.H.R.C), the employer alleged that the Secretary had failed to prove that it had knowledge of either the Act or of an appropriate specific standard under the Act, and that its failure to

remove a forklift with defective brakes from service therefore could not be willful. Citing several prior OSHRC decisions, the Commission held:

> The Commission has found a violation to be willful when it is marked by careless disregard of a standard or of employee safety. (citations omitted) Therefore, once careless disregard of employee safety has been established, the Secretary need not prove additionally that an employer knew that it was violating the Act.

John W. Eshelman & Sons, at *4. Proof of employer knowledge of the Act or a specific standard has continued to be one of the most effective ways of proving that the employer's conduct was marked by "careless disregard of" or "plain indifference to" employee safety and health. Rothstein, *Occupational Safety and Health Law* (Fourth Edition) § 315.

2 Diamaco knew that the project required compliance with the lead health protection program and underlying WISHA regulations, and despite that knowledge, Diamaco did not follow the plan or the regulations

From the time it first viewed the specifications, Diamaco knew that the Wishkah Bridge Project would involve lead-based paint. The specifications, which became the contract, state that the project has "elements which are coated with paint containing lead,"[121] and warns that:

> All work which disturbs the paint coating may expose workers to health hazards. The Contractor is fully responsible for the protection of all workers on this project from the exposure to lead.

[121] CABR, Washington State Department of Transportation, Contract Provisions and Plans, Exhibit 9, p. 137.

> In accordance with WAC 296-155-176, the Contractor shall develop, implement, and maintain a Lead Health Protection Program (LHPP) for this specific project site to ensure that all workers on this project are protected from the absorption, inhalation, or ingestion of lead in all forms. A copy of the LHPP shall be sent to the Contracting Agency at least 30 days prior to the initiation of the work that disturbs the paint.[122]

These requirements were discussed at the pre-construction conference with DOT personnel attended by General Manager Zylstra, Superintendent Smith, and one other Diamaco employee. [123]

Diamaco had significant past experience working with lead-based paint. Prior to the Wishkah Bridge project, the company had worked on at least five projects that involved lead-based paint - the Ship Canal Bridge, the Medeau Bridge, the Fremont Bridge, the Salish project and the Holly Park project.[124] Because some of the prior lead projects took place when mandatory OSHA or WISHA lead safety regulations were in effect, [125] the company necessarily had experience applying the protective regulations to workers on the jobsite. General Manager Zylstra shared in some of this experience. He had been the project manager or administrator on both the Ship Canal and Medeau Bridge projects, where the project

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[122] CABR, Exhibit 9, p. 137.

[123] CABR, Transcript, 9/21/04, Testimony of Kevin Dahl, p. 94.

[124] CABR, Transcript, 9/27/04, Zylstra, pp. 9, 13, 57.

[125] According to Mr. Zylstra, work on the Ship Canal Bridge was completed approximately nine to ten years before the 2004 hearing, and work on the Medeau River Bridge four to five years before the hearing. CABR, Transcript, 9/27/04, Zylstra, p. 9. The WISHA lead-in–construction regulations date from 10/29/93; the parallel OSHA regulations (which would have been used in Oregon projects) also from October 1993.

superintendents, who were responsible for implementing safety regulations, reported to him. [126] He was certainly familiar with the lead protection program Diamaco had used for the Fremont and Medeau bridges, and reviewed it to determine what modifications were necessary to adapt the program to the Wishkah Bridge site.

Diamaco's lead-health-protection program, as modified by General Manager Zylstra for the Wishkah Bridge project, closely tracks many of the OSHA and WISHA lead-in-construction regulations.[127] In the second paragraph, the company recognizes the regulations and promises to fully comply with them, representing that it will meet or exceed them in all instances.[128] According to Inspector Christian, Diamaco could have avoided being cited for many of the violations he found if it had only followed the requirements of its own lead protection program.[129]

Superintendent Smith's personal knowledge of the lead safety requirements is demonstrated by his statement at the opening conference with Inspector Christian that "this is a specified lead job," and by the fact that Diamaco's lead protection program with the WISHA regulations attached was readily available on his desk.[130] More tellingly,

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[126] CABR, Transcript, 9/27/04, Zylstra, p. 9.
[127] CABR, Transcript, 9/13/04, Testimony of Christian, p. 56.
[128] CABR, Exhibit 1, p. 1.
[129] CABR, Transcript, 9/13/04, Christian, p. 57.
[130] CABR, Transcript, 9/13/ 04, Christian, p. 23.

Superintendent. Smith was repeatedly reminded of the safety requirements by the DOT engineers and the journeyman ironworkers. During the first three weeks of January, Mr. Smith received warnings from: (1) Engineer Rudy about the lack of respirators and the initial monitoring;[131] (2) Engineer Young about the fact that workers were torch cutting steel without wearing respirators; [132] (3) Ironworker Howell about the initial assessment, the tests to establish blood lead levels, the need for personal protective clothing, and the need for proper changing facilities; [133] and (4) Ironworker Olson about the lack of hand washing facilities. Superintendent Smith was thus queried or prodded about almost every one of the measures he should have been taking to protect the workers, but he resolutely refused to act.

Superintendent Smith also knew the workers were being exposed to lead, and that exposure to lead was dangerous. Nothing shows this more clearly than his alarm when his own son approached the contaminated trailer where Diamaco required its workers to change their clothes. He shouted to his son, "Stay out of there. There is lead in there."[134]

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[131] CABR, Transcript, 9/14.04, Rudy, p. 15.
[132] CABR, Transcript, 9/14/04, Young, p. 46.
[133] CABR, Transcript, 9/21/04, Howell, p. 12.
[134] CABR, Transcript, 9/21/04, Olson, p. 128.

3. Superintendent Smith and General Manager Zylstra displayed a total disregard for the regulations and an appalling indifference to the safety of Diamaco's workers.

Although Superintendent Smith kept Diamaco's lead-health-protection plan and the WISHA regulations available on his desk, he did absolutely nothing to implement them - even after he had been repeatedly prodded to do so. As Supervisor, he was in charge of all work at the site, including the implementation of the safety regulations. He also had speaking authority for the company. Thus, his actions were Diamaco's actions and his words were Diamaco's words for the purpose of establishing willfulness. By the same token, Superintendent Smith's inactions were Diamaco's inactions. Because Superintendent Smith did not testify at the hearing, all evidence regarding statements made to and by him is undisputed.

Superintendent Smith's coldhearted indifference to the safety of the workers is revealed in his failure to implement virtually every single protective measure that Washington law and Diamaco's own documents required. It is revealed in his failure to provide the workers with proper respirators, even when they were enveloped in plumes of the lead-based paint they were torch-burning; [135] it is revealed in his failure to provide

[135] CABR, Transcript, 9/21/04, Olson, p. 123.

hand-washing facilities, forcing the workers first to use handi-wipes, then a cold-water hose located a block from the worksite; it is revealed in his failure to provide Tyvex suits or coveralls and other PPE; it is revealed in his failure to provide a clean room and a dirty room, so workers could shower, and avoid taking lead paint dust home on their clothes.

Mr. Smith's words only accentuate the callousness. He thought it was humorous when the subject of personal protective equipment came up in bar conversations.[136] When he heard that B.J. Willaford might be suffering from lead poisoning, he remarked that it was "B.J.'s own fault."[137]

When Mr. Smith was confronted with his failure to furnish required equipment or monitoring, he made excuses which were demonstrably false. A few days after work began on the deck removal (January 7 or 8, 2003) Mr. Smith told Engineer Rudy that he was working on the lead protection plan, still getting things together.[138] Of course, he could not possibly have been involved in writing the lead protection plan, as he had received the completed plan from General Manager Zlystra before the project even started and had had it on his desk for months.

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[136] CABR, Transcript, 9/21/04, Howell, p. 74.
[137] CABR, Transcript, 9/21/04, Howell, p. 55.
[138] CABR, Transcript, 9/14/04, Rudy, p. 12.

Asked in the same conversation about the initial monitoring, Superintendent Smith implied to Engineer Rudy that monitoring was already scheduled and had just not yet taken place.[139] In truth, however, Lead Health Associates was not contacted until later, on January 20, 2003, the day before the WISHA inspection (and then the contact was by Mr. Zlystra, not Mr. Smith),[140] and "initial" monitoring was not begun until the jobsite reopened after the WISHA shut-down.

Similarly, when Ironworker Olson brought up the lack of protective clothing, Superintendent Smith claimed he didn't see anything in the regulations that required protective clothing. He could not have looked very far – the second page of Diamaco's lead protection program and the third page of the WISHA lead-in-construction regulations list the protective clothing required.[141]

The record shows that Superintendent Smith *intentionally* disregarded the regulations time and again; indeed, he openly flouted them. He told Ironworker Howell quite frankly that it was not cost-effective to furnish personal protective equipment[142]. Lead monitoring

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[139] CABR, Transcript, 9/14/04, Rudy, p. 16.
[140] CABR, Transcript, 9/27/04, Zylstra, p.33.
[141] CABR, Exhibit 1, p. 2, WAC 296-155-17652 (5).
[142] CABR, Transcript, 9/12/04, Howell, p. 13.

and lead testing were way too expensive, according to Superintendent Smith.[143].

The evidence is indeed "overwhelming" that Superintendent Smith abdicated his responsibilities and willfully violated virtually every applicable safety standard. His conduct alone supports the Board's decision affirming the citation.

As the Board found, General Manager Zylstra's actions provide an independent basis for characterizing Diamaco's violations as willful.[144] General Manager Zylstra claimed a startling ignorance of the lead safety standards under which Diamaco had worked for years. He took a shockingly cavalier approach to revising a lead health program for the 1.7 million dollar Wishkah Bridge project, making superficial changes to a program used on prior jobs without reading the regulations and without performing additional research. He chose to "update" the lead health protection program without expert assistance, despite knowing that his training was inadequate and, perhaps most startling (or most disingenous), not even fully comprehending the dangers posed by lead.[145]

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[143] CABR, Transcript, 9/12/04, Howell, p. 9.

[144] CABR, Proposed Decision and Order, p. 57.

[145] Zylstra admitted that when he revised the lead program he did not understand the potential impact of the disturbance of lead on Diamaco's workers. CABR, Transcript, 9/27/04, Zystra, p. 61.

General Manager Zylstra's "management" of the project reveals an utter disregard for the WISHA regulations and an appalling indifference to the health and safety of Diamaco's workers. His disdain for the safety regulations is matched only by his total indifference as to whether they were actually implemented. He did not bother to talk to Superintendent Smith about the lead-health program when he first gave it to him, and failed to make a single inquiry (*not even one telephone call*) between the summer of 2002 (when the work on the bridge first began) and January 20, 2003, (the day before the WISHA inspection) to find out whether Superintendent Smith had implemented the program. It is impossible to characterize this conduct as anything other than willful.

4. Diamaco's arguments misread the "willfulness" case law upon which Diamaco purports to rely.

Diamaco offers two arguments why its violations are not willful: (1) it made a "good faith" safety effort.[146] and (2) it misunderstood the applicable law. Neither the facts in this case nor the federal case law upon which Diamaco relies support these arguments.

The case Diamaco cites for the proposition that a finding of willfulness is not justified when an employer has made a good faith effort to comply with the requirements - *Secretary of Labor v. Atlantic Battery*

[146] Appellant's Brief (AB), pp. 16-20.

Company, Inc., 16 BNA OSHC 2131 (No. 90-1747, 1994) - does not help its argument. Atlantic Battery had made three major changes to its workplace to reduce airborne lead levels: it discontinued its pasting and buffing operations, it severely restricted the amount of time that employees engaged in stacking, and it shifted from manufacturing its own batteries toward purchasing partially-manufactured or completed batteries. As a result of these changes, airborne lead sampling conducted by OSHA showed that the workplace was, for the most part, free of excessive airborne lead levels. In these circumstances, the Occupational Safety and Health Review Commission (OSHRC) held that Atlantic Battery's inability to eliminate all of the hazard was not "willfull". *Id.* at *7. Diamaco has done nothing comparable. Indeed, the magnitude of the effort put forth by Atlantic Battery contrasts sharply with Diamaco's refusal to implement *any* of the lead-in-construction regulations.

As an example of its "good faith" Diamaco points out that when Ironworker Olson asked about respirators, Superintendent Smith provided half-face respirators within two days.[147] However, Diamaco does not mention the fact that the respirators were not provided to all the workers who needed them, or that they were not the supplied-air respirators

[147] AB, p. 21.

required by the regulations.[148] Similarly, Diamaco neglects to mention that the primitive hand washing facilities Superintendent Smith provided in response to numerous complaints were inadequate, and *still* did not meet the standards.[149] Diamaco's third example of its alleged "good faith" is that it called Health Risk Associates before the WISHA inspection (albeit, *one day before*, and only after General Manager Zylstra had been informed that the dangers at the Wishkah Bridge site had led to the all-too-predictable result of a worker leaving the job with suspected lead poisoning). These are feeble efforts to say the least, and, when viewed in the light of all of the evidence, they show nothing more than foot-dragging and a refusal to actually read and comply with the regulations.[150]

Diamaco also repeats the excuse that it made below: that it misunderstood the applicable law, and believed there was a 30-day window before the lead protection regulations had to be implemented.[151]

The only evidence suggesting that Superintendent Smith misunderstood the regulations is a single statement by General Manager

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[148] CABR, Transcript, 9/21/04, Olson, p. 113.

[149] CABR, Transcript, 9/13/04, Christian, p. 78.

[150] Diamaco also appears to make a vague and unsupported argument that, if an employer, as here, intentionally fails to act on its threshold responsibility to sample the air to determine the extent of lead exposure, the employer can somehow escape a willfulness determination as to the ensuing violations that relate to lead overexposure. AB 17-18. In easy-to-understand terms, Diamaco essentially contends that if a driver operates his vehicle with his eyes closed, he cannot be legally responsible for hitting anything as he could not have seen it. This cannot possibly be the law of worker safety as liberally construed.

[151] AB, p. 18.

Zylstra. Superintendent Smith himself did not testify and did not claim any such thing in his interview with Department Inspector Christian,[152] or in his conversations with the Engineers, or his conversations with Ironworkers Howell and Olson. Even if Superintendent Smith did claim such a misunderstanding, as the Board pointed out, the timing of that claim - after an employee had gone home with lead poisoning, the WISHA inspection had begun and Lead Health Associates had begun asking questions - raises grave doubts as to its truthfulness.[153]

The WISHA lead-in-construction regulations are not ambiguous or difficult to read, as even General Manager Zylstra and Diamaco's expert witness admitted [154] Diamaco's expert witness, Robert Welch, had never heard of anyone mixing up the requirement to do the initial assessment (air-monitoring) with the requirement for medical surveillance (blood lead level monitoring).

> Q: But getting back to the initial monitoring, just the testing, have you ever heard of anyone mixing up the 30 days period of medical surveillance with the requirement to do that first monitoring?

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[152] CABR, Transcript, 9/13/04, Christian, p. 58.

[153] Proposed Decision and Order, CABR, p. 54.

[154] WAC 296-155-17609 requires an employer to do the initial air monitoring to determine if any employee may be exposed to lead at or above the action level. Several sections and several pages further on in the regulations, WAC 296-155-17621 (1)(b) requires that an employer institute blood lead monitoring for employees who may be exposed at or above the action level for more than 30 days in any consecutive 12 months. Copies of WAC 296-155-17609 and WAC 296-155-17621 are attached as Appendix D and E.

A. (Welch) Not with regard to the lead standard once they understand it, no.
Q. Have you even heard of anyone doing it when they don't understand the lead standard?
A. I haven't heard of anyone.[155]

As the Board pointed out, General Manager Zylstra's alleged misunderstanding of the regulations, by itself,[156] was irrelevant because (1) he had never discussed the regulations with Superintendent Smith, (2) he delegated the responsibility to implement the regulations to Superintendent Smith, and (3) he never checked to see if the regulations had been implemented. "This rendered any opinion he may have had regarding interpretation of the lead-in-construction standards irrelevant because he had not communicated it to Mr. Smith before January 21, 2003, and thus it could not have impacted on Diamaco's actions at the worksite."[157]

Ultimately, the Board "reject[ed] the possibility that Mr. Smith himself mistakenly believed that he was not required to follow the applicable standards . . ." [158] This determination is well supported in both the evidence and the Board's analysis.

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[155] CABR, Transcript, 9/27/04, Welch, pp. 101, 102.

[156] Mr. Zylstra's allegations that both he and Mr. Smith misunderstood the regulations appear to have been formulated after he wrote the letter appealing the citation. In that letter, dated August 7, 2003, he blamed the violations entirely on the misconduct of Mr. Smith, and said nothing about misunderstanding the regulations. Exhibit 14. (Exhibit 14 was erroneously rejected by the IAJ at trial.)

[157] Proposed Decision and Order, CABR, p. 53.

[158] Proposed Decision and Order, CABR, p. 54, 55.

Finally – but significantly – as in most legal contexts, ignorance or misinterpretation of worker safety law is not a defense. *See Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139, 143 (8th Cir. 1978) *cert. denied*, 439 U.S. 965 (1978) (company's conduct may be willful even if company erroneously believes it can meet worker safety requirement in manner not provided for under applicable OSAH regulation).

D. The Board did not commit prejudicial error in admitting the testimony of Ironworker Howell

1. It was not an abuse of discretion to allow a lay witness to paraphrase, based on a one-to-one conversation, the inculpatory declaration of a speaking agent for the employer.

Finally, Diamaco claims that the Board erred by admitting Ironworker Howell's testimony that Superintendent Smith told him that "it would be way more expensive to do all the lead monitoring, the lead testing, the masks, and all that."[159] Diamaco argues that, because Ironworker Howell could not remember Mr. Smith's exact words, or the exact date when they had the conversation, Mr. Howell's testimony should have been rejected as speculative under ER 602.[160] However, Ironworker Howell was not *speculating* about Smith's *motives*, he was recalling

[159] CABR, Transcript, 9/21/04, Howell, pp. 9, 10. Actually, Mr. Howell testified to at least two statements made by Mr. Smith in which Smith said that implementing the regulations was not cost-effective. See CABR, Transcript, 9/21/04, p. 9, and p. 13.

[160] AB 10-13.

Smith's *words.* Even if he could not remember the exact words, Ironworker Howell could remember their import. The standard of review of evidentiary rulings is abuse of discretion. *RWR Management, Inc. v. Citizens Realty Co.,* 133 Wn. App.265.,279, 135 P. 3d 955 (2006). It was not an abuse of discretion for the Board to admit the words of Superintendent Smith, a speaking agent for the company.

2. Even if it was error to admit Ironworker Howell's testimony, it was harmless error

Assuming arguendo that it was an abuse of discretion for the Board to admit Ironworker Howell's testimony about Superintendent Smith's inculpatory statement, any such error was harmless. Erroneous admission of evidence does not require reversal of a decision unless the error was prejudicial. *See generally Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal).

Here, the evidence of Superintendent Smith's willful conduct was varied and overwhelming, as the Department has explained at length above in this brief. The statement Diamaco objects to is only one of several similar statements Superintendent Smith made to the effect that it was not cost-effective to implement the lead safety regulations.[161] Moreover, Superintendent Smith's statements are a small part of the

[161] CABR, Transcript 9/21/04, Howell, pp. 9, 10, 13.

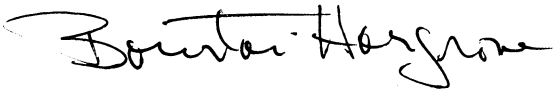
overwhelming evidence of his contempt for the regulations and his appalling indifference to the health of Diamaco's employees.

V. CONCLUSION

The Board's findings and conclusions that Diamaco willfully violated Citation Items 1 through 5 are supported by overwhelming evidence in the record. This Court should uphold the decisions of the Board and the Superior Court, and affirm the Department's citation.

RESPECTFULLY SUBMITTED this 21st day of March, 2007.

ROBERT M. MCKENNA
Attorney General



BOURTAI HARGROVE
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WSBA #22706

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NO. 35296-6

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

DIAMACO, INC., Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent	DECLARATION OF MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 21st day of March 2007, I mailed the Brief of Respondent Department of Labor and Industries to all parties by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Aaron Owada
AMS Consulting
4405 7th Avenue SE, Suite 205
Lacey, WA 98503

DATED this 21st March, 2007.

Judith Sebastionelli
JUDITH SEBASTIONELLI
Legal Assistant 2

BEFORE T' BOARD OF INDUSTRIAL INSUF ICE APPEALS
STATE OF WASHINGTON

IN RE: DIAMACO, INC.	)	DOCKET NO. 03 W0246
	)	
CITATION & NOTICE NO. 305987331	)	PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Allan R. Pearson

APPEARANCES:

Employer, Diamaco, Inc., by
Northcraft, Bigby & Owada, P.C., per
Aaron K. Owada

Department of Labor and Industries, by
The Office of the Attorney General, per
Michael K. Hall, Assistant

The employer, Diamaco, Inc., (Diamaco) filed an appeal with the Board of Industrial Insurance Appeals on August 26, 2003, from a citation and notice dated July 16, 2003. The citation and notice is **AFFIRMED AS MODIFIED.**

PRELIMINARY MATTERS

On August 18, 2004, the Department filed a motion to amend several citations contained in the July 16, 2003 citation and notice. On September 14, 2004, the employer did not object to this motion and Citation 1, Item 4a was amended from an alleged violation of WAC 296-155-17609(2)(3)(iv) to WAC 296-155-17609(2)(e)(iv); Citation 1, Item 4c was amended from an alleged violation of WAC 296-155-140(2)(1) to WAC 296-155-140(2)(a); Citation 2, Item 9c was amended from an alleged violation of WAC 296-155-17619(2)(b) to WAC 296-155-17619(2)(c); and Citation 3, Item 1 was amended from an alleged serious violation to an alleged general violation.

On September 13, 2004, the Department moved to vacate Citation Nos. 1-2(b), 1-3(b), 1-3(c), 1-4(b), and 2-9(b). The motions were granted.

On September 27, 2004, the employer moved to dismiss the willful characterization of Citation Nos. 1-1 through 1-5. For the reasons discussed below, the motion is denied.

EXHIBIT A

1/11/05

APPENDIX A

ISSUES

1. Did Diamaco, Inc., commit violations of the Washington Administratve Code provisions alleged in Citation and Notice No. 305987331?

2. If Diamaco, Inc., commited violations of the Washington Administratve Code provision alleged in Citation and Notice No. 305987331, were the violations properly characterized as serious or willful violations?

3. If Diamaco, Inc., commited violations of the Washington Administratve Code provisions as alleged in Citation and Notice No. 305987331, was the penalty of $148,700 properly calculated?

EVIDENCE PRESENTED

Raymond Bruce Christian, an industrial hygiene compliance inspector with the Department of Labor and Industries testified he began an inspection of the Diamaco work site at the Wishkah Bridge in Aberdeen, Washington, on January 21, 2003. The project to perform a seismic retrofit and to repair of deteriorated portions of the metal bridge structure began in June or July 2002 and was to take about one year.

When Mr. Christian arrived, Diamaco had completed the seismic retrofit and had been cutting off deteriorated decking with torches, removing it, and replacing it. Mr. Christian conducted an opening conference with A.F. Smith, the Diamaco project manager, performed a walk around inspection, interviewed several workers, obtained copies of Diamaco's lead health protection program and respiratory protection programs from Mr. Smith, and took samples of paint and material that had been cut off the bridge. These paint samples were found to contain from 9 to 39 percent lead. On January 22, 2003, the Department asked Mr. Smith to stop work until Diamaco came into compliance with the respiratory protection standards.

On January 31, 2003, Mr. Christian took air samples at the site by placing a personal sampling pump on the belt of two workers with a cassette clipped in the worker's breathing zone while they worked. The results showed exposure of one worker to 5,930 micrograms of lead per cubic meter, 148 times the permissible exposure limit (PEL) calculated using a PEL of 40

micrograms per cubic meter. The other worker showed exposure to 2,689 micrograms of lead per cubic meter, 67 times the PEL using the same standard. The PEL is the level of exposure that an employee can experience on a daily basis without suffering ill health effects.

After an employee working on the site had become ill, but before Mr. Christian's initial inspection, Diamaco had contacted Health Risk Associates to take air samples at the site. They were at the worksite and took air samples on January 29, 2003, that showed airborne lead at 3,740 micrograms per cubic meter.

The Washington State Department of Transportation (DOT) was responsible for overseeing the project. The contract specified that there was lead paint on the bridge and that the lead would be disturbed during the project. It directed the contractor to develop and implement a lead health protection program. The minutes of a pre-construction meeting noted that the lead health protection program was discussed.

Diamaco's lead health protection program document specified that the employer anticipated worker exposure to lead based paint and indicated specific steps that would be taken to prevent contamination of the workers and their clothing. The document stated that an initial determination would be made whether any employee's exposure to lead would exceed the action level and provided that, if a reasonable probability existed that any employee may have been exposed, Diamaco would set up an air monitoring program.

Mr. Smith indicated during the initial inspection that he was aware of the lead health protection program, was aware that the paint contained lead, and was aware that the job was a specified lead job. Mr. Zylstra later told Mr. Christian that he had become aware of the presence of lead on the bridge from the contract.

The contract required Diamaco to have a respiratory protection plan. Diamaco had a respiratory protection plan that Mr. Zylstra had obtained from the Association of General Contractors.

The lead-in construction standards contain certain tasks that are generally referred to as "trigger tasks." When trigger tasks are performed the standards require the employer to take specified safety precautions until exposure assessment and air monitoring have been completed. After the required assessment and monitoring have been completed, the standards allow adjustment of the protective measures up or down to correspond with the results obtained by the testing.

Mr. Christian testified that torch cutting of structures that have material with lead in them is a trigger task listed in the standard. When metal coated with materials containing lead is cut with a torch, the heat vaporizes the coating and converts the lead into extremely small droplets that are very easily inhaled.

Diamaco began the deck removal phase on January 7 or 8, 2003. Before that, they had performed the seismic retrofit portion of the project. Mr. Christian testified that torch cutting had been performed by Diamaco employees during the seismic retrofit portion of the project. While Mr. Christian did not observe cutting during his initial inspection, he did observe portions of the bridge that were coated with lead based paint that had been cut and Mr. Smith had indicated that Diamaco had made the cuts.

Item 1-1: Mr. Christian cited Diamaco at Item 1-1 for failing to initially determine if any employees could be exposed to lead at or above the action level. He testified that the WAC required Diamaco to do an exposure assessment as soon as they impacted on lead-containing materials during the seismic retrofit. This would involve air monitoring performed by placing monitors on workers at the site.

On January 21, 2003, Mr. Smith admitted to Mr. Christian that Diamaco had not conducted any air monitoring and had not done an exposure assessment. He gave no reason why it had not been done.

The parties stipulated that Mr. Christian properly characterized the cited violation as having a probability of 2. They also stipulated that, in relation to all of the items with the exception of Item 3-1, Mr. Christian properly characterized the severity of the violations as serious with a severity rating of 6; the employer's good faith was properly rated as average; the size was 27 employees, which resulted in a reduction in the base penalty by $1,200; and the history was properly rated as average. Citation 3-1 was characterized as a general violation and this was not challenged.

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. In spite of ample notification of the potential hazard, Diamaco did not conduct 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 testified that Mr. Smith had never spoken of this type of a belief during the inspection.

Item 1-2: Mr. Christian cited Diamaco at Item 1-2(a) for failing to provide employees performing torch cutting on metal that was coated with lead-containing materials with appropriate respiratory protection. Mr. Christian testified that torch cutting of metal coated with lead-based paint was a trigger task that required the employer to assume an exposure above 2,500 micrograms per cubic meter until a valid exposure assessment was conducted and provide, at a minimum, a half-face supplied air respirator.

Mr. Christian observed half-face, negative pressure, filtering respirators at the worksite on January 21, 2003 but no supplied air respirators. Mr. Smith indicated that the respirators Diamaco had provided were inadequate to satisfy the requirements of the regulation. Mr. Christian did see supplied air respirators at the worksite on January 31, 2003, when he collected air samples.

The parties did not agree on Mr. Christian's characterization of the probability of injury for this citation. Mr. Christian assigned a probability of 5 to this violation because the use of proper respirators was a key element in protecting the workers from the lead hazard in the workplace. The employer's failure to require the employees to wear the proper respirators in an environment with the high airborne exposure to lead resulted directly in a high probability that employees would be injured.

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 protection program. Even with the clear notice of the potential airborne health hazard, Diamaco did not provide appropriate respirators for all workers requiring them.

Item 1-3: Mr. Christian cited Diamaco at Item 1-3(a) for failing to provide workers performing torch cutting on lead containing coatings with appropriate personal protective clothing and equipment. He found the employer had failed to provide coveralls or other similar full-body work clothing, gloves, and shoes or disposable shoe coverlets as required.

Mr. Christian classified the violation as 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.

Mr. Christian observed workers wearing some personal protective equipment while cutting. The workers were wearing welding masks and gloves. The apprentice worker during the sampling visit was wearing Tyvek over his own clothing and the other was wearing heavy coveralls to protect him from the sparks.

When Mr. Christian discussed his concerns regarding this citation with Mr. Smith, Mr. Smith indicated that Diamaco had provided the appropriate personal protective equipment. He also indicated that some employees had brought their own.

The parties did not agree on Mr. Christian's characterization of the probability of injury for this citation. Mr. Christian assigned a probability of 3 to this violation because, with the high exposure to lead demonstrated by the air monitoring, Diamaco's failure to ensure workers used appropriate personal protective clothing and equipment directly raised the probability that employees would be injured when the lead got on their clothing and skin that was later ingested. While elevated, this probability of injury was not as high as that represented by the failure to ensure workers used respirators because of the less direct method by which the lead was introduced to the body.

Item 1-4: Mr. Christian cited Diamaco at Item 1-4(a) for failing to provide workers performing torch cutting on lead containing coatings with appropriate hand washing facilities. Mr. Christian believed that hand washing facilities were first provided approximately three days before his initial inspection.

Mr. Christian testified that hand washing facilities were important when working with lead because lead could get on the worker's hands and then be ingested. He found this violation to be willful for the reasons discussed above.

The parties did not agree on Mr. Christian's characterization of the probability of injury for this violation. Mr. Christian assigned a probability of 3 because, with the high exposure to lead demonstrated by air monitoring, Diamaco's failure to ensure workers had appropriate hand washing facilities resulted in an elevated probability that employees would be injured when the lead got on their hands and later was ingested.

Mr. Christian cited Diamaco at Item 1-4c for alleging that the employer did not provide workers appropriate hand washing facilities in association with a portable toilet on site. This violation was grouped with Item 1-4a for purposes of penalty.

Item 1-5: Mr. Christian cited Diamaco at Item 1-5a for not providing workers performing torch cutting on lead containing coatings with appropriate biological monitoring. Mr. Christian testified that employers in these circumstances were required to test employee's blood levels but that Diamaco did not do so until after the initial inspection.

The parties stipulated that Mr. Christian properly assigned this violation a probability of 2. Mr. Christian testified he classified the violation as willful for the reasons discussed above.

Mr. Christian cited Diamaco at Item 1-5b for failing to provide workers with appropriate biological monitoring of blood lead and zinc protoporphyrin levels. Mr. Christian did not address this citation and no independent penalty was assessed.

Item 2-1: Mr. Christian cited Diamaco at Item 2-1a for failing to include required elements in its written lead health protection program. Mr. Christian stated that the plan did not address the decking removal phase of the project, did not describe each activity where lead would be emitted, what means would be used to achieve compliance, what engineering controls were required, the

plans and studies used to determine the methods to be used to achieve compliance, the technology used to determine the permissible exposure level, the air monitoring data documenting the source of lead emissions, and a detailed schedule for implementation of the program. The Department offered the lead health protection program obtained by Mr. Christian from Diamaco on January 21, 2003, and the document did not contain the specified items.

The parties did not agree on Mr. Christian's characterization of the probability of injury for this violation. Mr. Christian testified that he assigned a probability of 5 because, with the high exposure to lead demonstrated by air monitoring, and the twelve-hour shifts the employees were working, the deck removal portion of the project was where the highest exposures were likely to occur. Diamaco's failure to include this portion of the project in the lead health protection program resulted in a high probability of injury.

Mr. Christian cited Diamaco at Item 2-1b for failing to provide, in their compliance program, for frequent and regular inspection of the job site, materials, and equipment by a competent person. This citation was grouped with Item 2-1a.

Item 2-2: Mr. Christian cited Diamaco at Item 2-2 for failing to include a list identifying the proper type of respirator for each respiratory hazard, fit testing procedures for tight fitting respirators, and procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators in their written respiratory protection program. The Department offered the respiratory protection plan obtained by Mr. Christian from Diamaco and the document did not contain the specified items.

The parties did not agree on Mr. Christian's characterization of the probability of injury for this citation. Mr. Christian assigned a probability of 5 to this violation because, with the severity of the respiratory protection issues at the site, he found Diamaco's failure to implement proper

respiratory protection policies and procedures could result in the improper use of respirators which in turn could lead to exposure.

Item 2-3: Mr. Christian cited Diamaco at Item 2-3 for failing to provide employees using negative pressure face pieces or tight fitting positive pressure respirators with an appropriate qualitative or quantitative fit test. These tests were designed to ensure the mask was fitted properly and protected the worker. The parties stipulated that Mr. Christian properly characterized the violation as having a probability of 2.

Item 2-4: Mr. Christian cited Diamaco at Item 2-4 for failing to ensure that workers wearing tight-fitting face pieces did not have facial hair that was visibly projecting above the skin that came between the sealing surface of the face piece and the face. This kind of hair could have broken the seal and allowed contaminants into the respirator. Mr. Christian testified that a worker had told him that he had used a respirator on site while he had a goatee that clearly would have interfered with the sealing surface. The parties stipulated that Mr. Christian properly characterized the violation as having a probability of 2.

Item 2-5: Mr. Christian cited Diamaco at Item 2-5 for not ensuring that workers who were exposed to hazards that could injure their eyes or face wore appropriate eye protection. Mr. Christian testified he saw a worker cut a piece of steel with a torch with no eye protection on January 31, 2003. The parties stipulated that Mr. Christian properly characterized the violation as having a probability of 1.

Item 2-6: Mr. Christian cited Diamaco at Item 2-6 for failing to ensure that workers did not smoke or consume food or beverages while working in areas where they are exposed to lead above the permissible exposure level. Mr. Christian said this was important to prevent ingestion of lead from the workplace.

Mr. Christian testified that he assigned a probability of 3 to this violation. He based this assignment of elevated probability on the same reasoning discussed above in relation to the danger of ingestion represented in Item Nos. 1-3 and 1-4.

Item 2-7: Mr. Christian cited Diamaco at Item 2-7a for failing to provide employees performing torch cutting on lead containing coatings with appropriate lead related training regarding actions to be taken when a trigger task is undertaken. Mr. Christian testified this training was important to train the workers how to protect themselves when performing these activities. The parties stipulated that Mr. Christian properly assigned a probability of 2 to this violation.

Mr. Christian cited Diamaco at Item 2-7b for failing to provide employees performing torch cutting on lead containing coatings with other appropriate lead related training. This violation was bundled with Item 2-7a for penalty.

Item 2-8: Mr. Christian cited Diamaco at Item 2-8 for not providing employees with other specific lead related training. This training was more specific regarding what was required, discussed the consequences of exposure to lead, and was important to allow workers to protect themselves. The parties stipulated that Mr. Christian properly assigned a probability of 2 to this violation.

Item 2-9: Mr. Christian cited Diamaco at Item 2-9a for failing to provide employees performing torch cutting on lead containing coatings with appropriate change areas. Mr. Christian observed that Diamaco had provided the workers with a "dry shack" where they could change. It was one room with hooks on that wall and did not contain separate areas for contaminated and clean clothing. It was important that the workers separate their work clothes from the clothes they would wear home because lead from the worksite could be taken home if the worker's clothing came into contact with contaminated work clothing. The parties stipulated that Mr. Christian properly assigned a probability of 2 to this violation.

Item 3-1: Mr. Christian cited Diamaco at Item 3-1 for transporting gas cylinders by powered vehicles in a horizontal position. This violation was characterized as general and no penalty was assessed. Mr. Christian testified that he saw Diamaco workers transporting gas cylinders in a horizontal position but did not say if the transportation was by powered vehicles.

The Department presented the testimony of Robert Rudy, a DOT project engineer. Mr. Rudy testified that the lead health protection plan submitted by Diamaco had laid out a detailed plan for protecting the health of the workers based on the results of initial monitoring tests. Diamaco, however, did not follow the plan with respect to the initial monitoring.

The initial portion of the Wishkah Bridge project in Aberdeen involved a seismic retrofit. As part of this portion of the project, Diamaco was required to remove paint from the bridge that contained lead and Diamaco was required to submit a lead containment plan and properly dispose of the residuals. During the initial phase, Diamaco also removed and replaced portions of the bridge. The majority of the removal in this phase was done with rivet busters that mechanically broke the rivets but some rivets were cut with a torch. All of the rivets on the bridge were covered with paint that contained lead and Mr. Rudy saw Diamaco workers cutting some of these rivets with a torch. He recalled one worker wearing a filtered respirator without supplied air while performing this work.

On January 7 or 8, 2003, Diamaco began the second phase of the project. This phase involved removal of decking and the majority of the work to cut the metal that was covered with paint that contained lead was done with torches. When Mr. Rudy observed Diamaco workers cutting this metal, some of the workers wearing respirators and some were not. Those who were wearing respirators were wearing filtered respirators, not those with supplied air.

On January 9, 2003, Mr. Rudy asked Diamaco's iron foreman why none of the crew was wearing respirators while cutting existing steel stringers. A week after his initial conversation with

the iron foreman, Mr. Rudy talked with Mr. Smith about the testing. Mr. Smith was not surprised by the inquiry and did not indicate that he believed that the testing was not required. Mr. Smith said that he was still working on implementation of the lead health protection plan and that he had scheduled an industrial hygienist to come out and do the monitoring.

The Department presented the testimony of Jeffrey Young, a DOT transportation engineer, who had filled in for another inspector for one day in January 2003. Two workers were using torches to cut the steel and were not wearing respiratory protection. Mr. Young spoke with Mr. Smith and asked him if Diamaco had a lead health protection plan for the project and warned Mr. Smith that he had seen a contractor fined for lack of adherence to their plan.

The Department presented the testimony of James A. Skinner, a DOT transportation engineer who worked at the Wishkah Bridge project in Aberdeen, Washington, from July 2002 until February 2003. Mr. Skinner testified that the bridge contained lead and that the contract required the contractor to provide a lead health protection plan. While at the site, he observed Diamaco's workers cutting steel members and rivets with torches in areas where there was lead paint. Some of these workers had no respiratory protection. He discussed this failure to wear respiratory protection with the workers but they did not begin to wear respiratory protection.

Mr. Skinner testified that there was a sink in the changing trailer in January 2003. Hand washing facilities were not available and functioning, however, until after work was stopped.

The Department presented the testimony of Ronald V. Howell, an ironworker for 31 years, who had previously worked on several projects that involved lead and had received training on dealing with lead hazards while working on those jobs. Mr. Howell worked on the Wishkah Bridge project from August 2002 through February 2003. He testified that prior to the removal of the decking there was some cutting but not as much as during the deck removal phase.

Beginning in November and December 2002, Mr. Howell had asked Mr. Smith on several occasions about the blood tests that workers usually got when they began to work on a job that involved lead. He also asked about personal protective clothing and equipment telling Mr. Smith the workers needed a clean room, a dirty room, and coveralls or Tyvek suits

Before the Department inspection, the workers had a room in a trailer where they could hang their clothes. There were pegs on the wall for hanging the clothing, no shower, and no facilities for washing clothes. After the deck removal portion of the project began, workers were provided with Handiwipes to wash their hands. There were some respirators available on the site and some workers were wearing them while cutting. There were not enough respirators for all of the workers and these were half-face respirators with HEPA cartridges. Blood testing was not provided until after the Department inspection.

During the conversations regarding blood testing, Mr. Smith never indicated they were not necessary. In a conversation at lunch at a local bar across from the worksite, Mr. Smith said that blood-testing, lead-monitoring, and protective masks were not cost effective. During conversations in the dry shack regarding clean and dirty rooms, Mr. Smith did not appear to be interested.

While working on the bridge Mr. Howell occasionally smoked and was never told not to. He saw other workers eating or smoking on the bridge while work was going on. He received no training relating to lead or the use of respirators, the engineering controls to address lead, WISHA lead standards, or how to get lead off of his body before beginning work on the job. He used his own clothes while working and took them home to clean them.

While cutting, the workers always wore some personal protective equipment in the form of gloves and face shields. They also generally wore some kind of leather coat, overall, or covering over their clothing from the waist up. The leather coat or covering was usually left at the dry shack.

The face shields were provided but aprons and gloves were not provided. Mr. Smith required workers who were cutting to wear respirators.

About a week after the deck removal portion of the work had begun, a worker became ill. Mr. Smith was informed that some suspected that it was lead poisoning. Shortly thereafter, Diamaco began to provide respirators at the job site.

Mr. Howell participated in a weekly safety meeting on January 14, 2003, where the safety committee addressed the unsafe conditions presented by the presence of paint containing lead. Mr. Smith missed more of the safety meetings than he attended and was not present at the January 14, 2003 meeting. The record was filed in the lunchroom where the meetings were held. After the meeting, Diamaco took no steps to address the issues raised at that meeting until after the Department inspection.

The Department presented the testimony of Kevin E. Dahl, who had been a field engineer and design engineer for DOT in the Wishkah bridge project and was involved with the pre-construction paperwork. He testified that the contract for the project contained provisions regarding lead because the bridge was known to have been painted with lead-based paint. After the bid was awarded, DOT held a pre-construction meeting on November 21, 2001. Mr. Smith, Mr. Zylstra, and a Mr. Williams from Diamaco attended the meeting and Diamaco was advised that the bridge had lead-based paint and that a lead health protection plan would need to be prepared and submitted to DOT thirty days before Diamaco began any work on the bridge that would disturb paint. Diamaco later submitted the lead health protection plan as required.

The Department presented the testimony of Erick R. Olson, a journeyman ironworker, who began working on the Wishkah bridge project at the beginning of the deck removal portion of the project in January 2003. He was involved in torch work in the demolition of the girders and grating before they were replaced with new iron. He testified that workers heated up portions of the metal

with their torches before cutting it to remove the paint and allow for a clean cut. This would create clouds or plumes of smoke around the workers.

On his first day of work, he observed that cutting had already been performed on areas of the bridge covered with paint. He was not provided a respirator and cut for the entire eleven-hour shift on that day. The only respirators available were those that had been used earlier on sandblasting or epoxy painting. On the second day, they were provided with half-face respirators with purple cartridges. He received no training on their operation and they were not fit-tested until after the Department inspection. He changed the filters about half way through the shift when he could smell or taste contaminants passing through. Even after the respirators were provided, the workers were not required to wear them. Mr. Olson observed workers cutting or doing other work with torches on the bridge without a respirator in the presence of Mr. Smith.

Diamaco provided heavy jackets called cutting jackets and tinted face shields but did not have enough jackets for everyone. Diamaco did not provide any other personal protective clothing or equipment until after the Department inspection. Then they purchased some Tyvek suits.

The worksite had a lunch trailer and a dry shack trailer for clothes and tools. The dry shack was a single room with shelves and hooks for clothing and a couple of chairs.

When they began work, none of the facilities on the site had running water. During the first week of work, Mr. Olson spoke with Mr. Smith regarding the absence of hand washing facilities. When Mr. Smith did nothing for a week, Mr. Olson called the union business agent with his complaint. The union business agent spoke with Mr. Smith and Diamaco then provided a portable hand washing station outside of the lunch shack with cold water. Later, Diamaco provided a sink in the dry shack with hot and cold water.

Before the Department inspection, Mr. Olson told Mr. Smith that in other lead jobs the contractor provided coveralls, gloves, a dirty room to remove the work clothes, hand washing

facilities, and a clean room where workers could put on their street clothes. Mr. Smith said he did not see where they were required to provide those things.

Mr. Olson did not eat, drink, or smoke on the bridge but did observe other workers doing so. He did not have his blood tested until after the Department inspection. At that time most of the workers had their blood tested.

The employer presented the testimony of Doug Zylstra, the general manager for Diamaco. Mr. Zylstra testified that he had augmented the safety program through affiliation with Associated General Contractors who had provided them with assistance in developing appropriate safety programs in a variety of areas and auditing those programs. He did not list the lead health protection program as one of the areas in which they had received assistance.

Mr. Zylstra testified that Diamaco was a general contractor that performed work for public entities that generally dealt with repair, rehabilitation, and retrofit of existing projects. In some years bridge retrofit work was the majority of their work and Mr. Zylstra himself had worked on 25 to 30 bridges. Two or three of those projects involved disturbing lead-based paints.

The Wishkah Bridge project was an approximately 1.7 million dollar project that was divided into two phases. The first was the seismic retrofit and the second was deck removal and repair. Before the Department inspection, Mr. Zylstra had been on the site on two occasions, once for the pre-construction meeting with DOT before work began and again when some stiffener plates were being installed in the retrofit phase of the project.

Mr. Zylstra was aware the project involved lead from the beginning, that the work would or could disturb the lead containing paint, and that the specifications required a lead health protection program. While he declined to state that he was aware of the potential impact of the disturbance of the paint on the workers, he stated that he believed the requirement for the lead health protection

program in the contract was there to protect the DOT from liability if anyone was harmed by the lead.

To satisfy the requirements of the contract, Mr. Zylstra took the lead health protection program used by Diamaco in a previous bridge project, modified the heading and minor portions of the content, and submitted it to DOT before work began in July 2002. He did not know who had written the plan or whether it had been submitted before and he did not do any additional research. He had received no training in the WISHA lead-in-construction standards and did not have any knowledgeable person assist him.

Mr. Zylstra said that, prior to the initial Department inspection, he was never made personally aware that required personal protective equipment was not being worn. He never attempted to speak with Mr. Smith regarding whether the lead health protection program was being implemented and he had assumed that the program was being implemented because Mr. Smith was there when he had printed it out. Mr. Smith, as superintendent, was responsible for following and implementing the program.

When Mr. Zylstra received a call from Mr. Smith telling him that one of the workers was ill with suspected lead poisoning, Mr. Zylstra told Mr. Smith to call Health Risk Associates and arrange for them to go to the site the next day to determine what the problem was. He personally went to the site the first thing the next day, the same day as Mr. Christian's initial inspection.

When Mr. Zylstra arrived at the work site at 7 a.m. on January 21, 2003, he observed a portable hand wash facility on the site and a sink and hot water heater in the dry shack. He did not know if the sink in the dry shack was functional at that time and did not know what facilities had been made available for washing hands before that. He did know that a complete copy of the relevant WISHA regulation related to the removal or disturbance of lead-based paints was in the

safety binder with the lead health protection program in the job trailer and a supplied air respirator was on site that day.

On the morning of January 21, 2003, when the consultant from Health Risk Associates had inquired about implementation of aspects of the lead health protection program, Mr. Smith had stated that he did not think that he had to implement those aspects of the program because they were not exposing the workers for the thirty-day period. At some time after the initial inspection, Mr. Zylstra told Mr. Christian that he believed that the regulations were unclear whether Diamaco was required to perform initial monitoring for lead because the WAC did not require initial monitoring where the exposure would be for less than thirty days and that, as a result, they were not required to perform any initial monitoring.

The employer presented the testimony of Robert H. Welch, the director of training for Prezant Associates. Mr. Welch had extensive experience providing training in the WISHA lead-in-construction standards and testified that he had found the lead-in-construction standards classes to be difficult for many students.

Mr. Welch testified that welding or cutting with a cutting torch that would cause lead fumes was specifically identified as a trigger task that required the employer to assume exposure at more than 2,500 micrograms per cubic meter. As a result, workers were required to use a supplied air or breathable air system that brought safe air to the user from a bottle or compressor.

Mr. Welch testified that it is common for students to confuse the thirty-day window that is applicable only to medical surveillance standard with the standard for conducting initial monitoring, if they do not read carefully. However, if the individuals read the regulation carefully and systematically the only place they could end up is with the correct respirator for the conditions and they would not confuse the thirty-day provision with initial monitoring.

DISCUSSION

The Department has the burden to establish a prima facie case of the violation of industrial safety regulations, exposure of employees to the hazard created by the violation, appropriate classification of the violation, and the attendant penalty assessment. *In re Richard A. Castle, et ux, dba Olympia Glass Co.*, Dckt. No. 95 W445 (November 15, 1996). Before addressing penalty assessment, I will address whether the Department has met its burden in relation to establishing the violation of the cited industrial safety regulations and the exposure of employees to the hazard created by the violations.

WAC 296-155-17603 provides that the lead-in-construction standards apply to all construction work involving alteration, repair, or renovation of structures that contain lead, or materials containing lead. The record shows the Wishkah Bridge project involved repair and renovation of a structure. Mr. Dahl testified that DOT had placed provisions about lead in the contract because the bridge was known to have been painted with lead-based paint in the past. Both Mr. Smith and Mr. Zylstra from Diamaco admitted they were aware of the presence of lead in the paint on the bridge. Samples taken from the paint on the bridge by Mr. Christian demonstrated that the paint contained between 9 and 39 percent lead and repeated air samples showed release of significant levels of lead. This was indisputably a workplace covered by these standards.

It is equally clear that the work to be performed on the bridge was of such a nature that it would immediately and inevitably disturb the lead and contaminate the work environment. The work in both phases of the project involved cutting metal that was covered with lead-containing paint. While the majority of the torch cutting was performed in the second phase, Mr. Rudy testified some rivets were cut off with torches in the initial phase. Mr. Olson testified that, when cutting with a torch, workers would heat up portions of the metal with their torches before cutting it to remove

the paint and allow for a clean cut. This created clouds of smoke around the workers that Mr. Christian testified contained extremely small droplets of lead that are very easily inhaled.

This work exposed the workers to the hazardous environment with exposures above the PEL that the lead-in-construction standards were designed to deal with. Independent air sampling conducted on January 29, 2003, by Health Risk Associates and by Mr. Christian on January 31, 2003, provided readings between 2,689 micrograms of lead per cubic meter and 5,930 micrograms of lead per cubic meter, many times the permissible exposure level of unprotected workers. Given the size and consistency of these results, it is reasonable to conclude that similar readings would have been obtained earlier in the second phase of the project when similar work was being performed.

Item 1-1: Mr. Christian testified that, on January 21, 2003, Mr. Smith admitted that Diamaco had not conducted any testing to determine if any employee may be exposed to lead at or above the action level. The employer offered no evidence to refute this testimony and thus, given the nature of the workplace discussed above, the Department established the violation cited at Citation 1, Item 1, for failure to perform an appropriate initial determination of employee exposure.

Item 1-2a: Mr. Christian testified that, on January 21, 2003, he only saw half-face cartridge equipped respirators at the worksite. Mr. Rudy, Mr. Young, Mr. Olson, and Mr. Skinner testified they saw workers cutting without respirators. Mr. Howell testified that half-face cartridge respirators were provided but that there were not enough for all workers. Mr. Olson, on his first day, cut for eleven hours with no respirator. After that, he was provided with a half-face cartridge respirator.

Mr. Christian and Mr. Welch testified that cutting with a cutting torch that would cause lead fumes was specifically identified as a trigger task that required a supplied air or breathable air system that brought safe air to the user from a bottle or compressor. The employer offered no

evidence to refute this testimony. The Department established the violation cited at Citation 1, Item 2a, for failure to provide appropriate respiratory protection.

Item 1-3a: Mr. Howell testified that Diamaco provided face shields but did not provide aprons and gloves. Mr. Olson testified that Diamaco provided face shields and some cutting jackets but did not provide any other items of personal protective equipment until after the Department's inspection. The employer offered no evidence to refute this testimony.

Until the employer performs an appropriate employee exposure assessment, WAC 296-155-17609(2)(e)(ii) requires the employer to provide appropriate personal protective clothing and equipment in accordance with WAC 296-155-17615. This includes coveralls or similar full-body work clothing, gloves, hats, and shoes or disposable shoe coverlets. The Department established that Diamaco did not provide this work clothing and, given the nature of the work environment discussed above, established the violation cited at Citation 1, Item 3a, for failure to provide appropriate personal protective clothing and equipment.

Item Nos. 1-4a, Item 1-4c: Mr. Skinner testified that hand washing facilities were not available until after work stoppage. Mr. Olson testified that when he began work there was no running water and when hand washing facilities were first provided they had only cold water. The unchallenged testimony of Mr. Skinner and Mr. Olson was adequate to establish the violations cited at Citation 1, Item 4a and Citation 1, Item 4c, for failure to provide appropriate hand washing facilities.

Item Nos. 1-5a, 1-5b: Mr. Howell and Mr. Olson testified that they did not receive any blood tests until after the work stoppage. Given the nature of the work environment and Diamaco's failure to perform the required initial exposure assessment, this unchallenged testimony was adequate to establish the violations cited at Citation 1, Item 5a and Citation 1, Item 5b, for failure to provide appropriate biological monitoring.

Item Nos. 2-1a, 2-1b, 2-2: Diamaco's lead health protection program and respiratory protection plan were admitted as Board Exhibit Nos. 1 and 2. Each of these documents failed to contain information required by their respective WAC provisions. The lead health protection program also did not contain a compliance program that provided for frequent and regular inspections of the job site, material, and equipment by a competent person. This unchallenged evidence established the violations cited at Citation 2, Item 1a; Citation 2, Item 1b; and Citation 2, Item 2, for failure to establish appropriate written lead health protection and written respiratory protection programs.

Item 2-3: Mr. Olson testified that he did not have a fit test of his respirator until after the work stoppage. This unchallenged evidence established the violation cited at Citation 2, Item 3, for failure to provide employees with appropriate fit testing.

Item 2-4: Mr. Christian testified that a worker had told him that he had used a respirator on site while he had a goatee that clearly would have interfered with the sealing surface of the respirator. This unchallenged evidence established the violation cited at Citation 2, Item 4, for failure to ensure workers who wore respirators did not have facial hair that could interfere with the seal of the respirators.

Item 2-5: Mr. Christian testified that, on January 31, 2003, he saw a worker at the Diamaco worksite cut a piece of steel with a torch while the worker was not wearing eye protection. This unchallenged evidence established the violation cited at Citation 2, Item 5, for failure to ensure employees that were exposed to hazards that could injure their eyes used appropriate protection.

Item 2-6: Mr. Howell testified that he smoked on the bridge and that he had seen others eating and smoking on the bridge. Mr. Olson testified he saw workers eat, drink, or smoke on the bridge. Given the given the nature of the workplace discussed above, this unchallenged testimony

established the violation cited at Citation 2, Item 6, for failure to ensure workers did not eat, drink, or smoke in areas where they were exposed to lead above the PEL.

Item Nos. 2-7a, 2-7b, 2-8: Mr. Olson testified that he cut metal on the bridge with a torch and was not provided any training. Given the nature of the work environment and Diamaco's failure to perform the required employee exposure assessment discussed above, this unchallenged testimony was adequate to establish the violations cited at Citation 2, Item 7a; Citation 2, Item 7b; and Citation 2, Item 8, for failure to provide appropriate training.

Item 2-9a: Mr. Christian testified that on January 21, 2003, he observed the workers were provided a one room dry shack where they changed clothes. Mr. Howell and Mr. Olson testified the workers were provided with just one room for changing. Given the contaminated nature of the workplace discussed above, this unchallenged testimony was adequate to establish the violation cited at Citation 2, Item 9a, for failure to provide an appropriate changing area.

Item 2-9c: In regards to the violation cited at Citation 2, Item 9c, the Department offered no evidence. WAC 296-155-17619(2)(c) requires the employer to assure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the work shift. The only evidence in the record regarding protective clothing or equipment that the workers were required to wear during the work shift was the conflicting evidence in the record regarding whether employees were required to wear respirators. While the record shows workers wore their personal clothing home, there is no evidence that the workers ever wore any personal protective clothing or equipment that they were required to wear during work when they went home. As a result, the Department failed to establish a prima facie case for the violation cited at Citation 2, Item 9c, and the item must be vacated.

Item 3-1: Mr. Christian testified that he had seen Diamaco employees transporting a gas cylinder that was not secured and in a horizontal position. Mr. Christian did not testify as to the

method used for transportation of this cylinder. WAC 296-155-400(1)(d) applies to transportation of cylinders by powered vehicles. Without evidence establishing the method of transportation, the Department has failed to establish a prima facie case for the violation cited at Citation 3, Item 1, and the item must be vacated.

The next issues deal with whether the Department established that the penalty assessments corresponding to the remaining citations were correct. The parties stipulated that, in relation to all of the remaining cited violations, Mr. Christian properly characterized the violations as serious with a severity rating of 6, the employer's good faith was properly rated as average, the size was 27 employees which resulted in a reduction in the base penalty of $1,200, and the history was properly rated as average. They also stipulated that the violations cited at 1-1, 1-5, 2-3, 2-4, 2-7, 2-8, and 2-9a had a probability of 2 and that the violation cited at 2-5 had a probability of 1. Independent penalties were not assessed for the violations cited at 1-4c, 1-5b, 2-1b, and 2-7b. This left at issue the probability characterizations on the violations cited at 1-2a, 1-3a, 1-4a, 2-1a, 2-2, and 2-6.

Item 1-2a: On Citation 1-2a, Mr. Christian testified that he assigned a probability of 5 because the use of proper respirators was a key element in protecting the workers from the lead hazard in the workplace. Given the amount of lead in the air, this was persuasive. The violation at Citation 1-2a was properly assigned a probability of 5.

Item Nos. 1-3a, 1-4a, 2-6: On Citations 1-3a, 1-4a, and 2-6, Mr. Christian testified that he assigned a probability of 3 because, with the high exposure in the workplace, Diamaco's failures to ensure workers used appropriate personal protective clothing and equipment, to provide hand washing facilities, and to prevent workers from smoking, eating, and drinking in the workplace directly raised the probability that employees would be injured when lead was ingested. Given the amount of lead being released, this was persuasive and established these violations were properly assigned probabilities of 3.

Item 2-1a: On Citation 2-1a, Mr. Christian testified that he assigned a probability of 5 because the deck removal portion of the project was where the highest exposures were likely to occur. Diamaco's failure to include this portion of the project in the lead health protection program resulted in a high probability of injury. Given the increased cutting during the deck removal phase, this was persuasive and established the violation was properly assigned a probability of 5.

Item 2-2: On Citation 2-2, Mr. Christian testified that he assigned a probability of 5 because of the severity of the respiratory protection issues at the site. Given the amount of lead being released into the air, this was persuasive and established the violation was properly assigned a probability of 5.

The employer's principal challenge to the penalty calculation was to the Department's characterization of Citations 1-1, 1-2a, 1-3a, 1-4a, 1-5a, and 1-5b as willful. The Board has held that "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 The Erection Co. II*, BIIA Dec., 88 W142, 11 (1990) citing *R. L. Alia, Dckt. No. 86W024 (10/16/87)*. Based on the entire record, I find it would be hard to find a better example of both prongs of this test.

The way Diamaco developed its lead health protection program, and its subsequent failure to comply with either their program or the requirements of the WAC, leads to three possible conclusions. One conclusion would be that Diamaco was familiar with the applicable regulations but mistakenly believed that they were not required to follow them. A second possibility would be that Diamaco knew the requirements of the WAC and voluntarily and intentionally disregarded them. The third possibility would be that Diamaco chose not to familiarize itself the regulations and thus did not know what was required.

Diamaco's argument can best be characterized as supporting the first option. Citing *The Erection Co.*, they argued that, while they had some familiarity with the regulations, they

mistakenly believed that they were not required to follow them. As a result, they argue, their tardy and inadequate safety measures could not be considered willful.

In the face of compelling circumstantial evidence to the contrary, Diamaco presented no direct evidence to support their reported misunderstanding. The only management witness, Mr. Zylstra, testified that he printed out the required lead health protection program in Mr. Smith's presence and submitted it. He then assumed that Mr. Smith would be following and implementing the plan. He testified that, before January 21, 2003, he was never informed that protective equipment had not been provided and never spoke with Mr. Smith about the lead health protection program.

Mr. Zylstra placed the entire responsibility for implementation of the lead health protection program and compliance with the lead-in-construction standards prior to Mr. Christian's inspection on January 21, 2003, on Mr. Smith. This rendered any opinion he may have had regarding interpretation of the lead-in-construction standards irrelevant because he had not communicated it to Mr. Smith before January 21, 2003, and thus it could not have impacted on Diamaco's actions at the worksite. When Mr. Zylstra testified that he had told Mr. Christian that the violations were caused by a mistaken reading of the regulations that caused "them" to believe that they did not need to perform initial monitoring where the exposure would be for less than thirty days, he really meant that any misunderstanding that had resulted in violations was really exclusively Mr. Smith's misunderstanding.

Mr. Smith did not testify. As a result, the only way to evaluate his actual understanding of the standard is through circumstantial evidence and second hand reports of comments he made. Diamaco's contention that Mr. Smith's failure to comply with the lead-in construction standards was due to his misunderstanding of the regulations rests on one reported comment by Mr. Smith

regarding this misunderstanding. This comment occurred on January 21, 2003, under circumstances that raise grave questions regarding its truthfulness.

Mr. Howell testified that before January 21, 2003, Mr. Smith had been informed that a worker had taken ill and that it was suspected that he had lead poisoning. Mr. Smith admitted that he was aware of the lead health protection plan and he was aware the paint contained lead. Mr. Smith could not have avoided seeing workers cutting on metal covered with this lead containing paint and the clouds of smoke that the cutting created and Mr. Olson testified he saw workers cutting without respirators in the presence of Mr. Smith. Mr. Rudy, Mr. Howell, and Mr. Olson all testified that they had spoken with Mr. Smith regarding his previous failures to comply with lead safety requirements. During these conversations, Mr. Smith never raised the issue of a thirty-day window before protection must be provided. Nevertheless, he had continued to have workers cut on lead containing paint without the protections provided for in the standards.

Mr. Zylstra testified that, on January 20, 2003, Mr. Smith had called him and told him that a worker was sick with suspected lead poisoning. Mr. Zylstra, who had been at the worksite of the 1.7 million dollar project on only one occasion since the work had begun, directed Mr. Smith to have the consultant from Health Risk Associates on site the next day to determine what the problem was. By 7 a.m. the next day, Mr. Zylstra was at the site, for only the second time since work had begun in July 2002.

This overwhelming circumstantial evidence shows that Mr. Smith 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.

For this misunderstanding to have been applicable to any single requirement such as initial monitoring, it would also have to have extended to all of the many other requirements of the lead-in-construction standards that were violated. To arrive at this conclusion, Mr. Smith would have had to believe that he was absolutely free to expose workers to an unlimited amount of lead without any protection for thirty days. I do not believe that a manager in Mr. Smith's position could entertain such a belief and his reported explanation of the reason for his failure to comply with the lead-in-construction standards was a self-serving and after the fact justification rather than a credible explanation for his failure to protect the workers from a known and serious hazard in the workplace.

Diamaco was not a small and unsophisticated company. While the record was devoid of direct evidence regarding Mr. Smith's background, the company had significant experience in bridge renovation and repair. This was not the first bridge project that they had performed and not the first that had involved disturbing lead-based paints. They demonstrated the ability and resources to perform this 1.7 million dollar bridge renovation and repair project.

I found Diamaco's general manager, Mr. Zylstra, was an intelligent and knowledgeable individual with significant experience in construction management. He allowed Mr. Smith to retain a position of significant responsibility in the organization and had such absolute trust in his capability to ensure compliance with the lead health protection program in a clearly hazardous environment that he did not check on him. Given these factors, the preponderance of the evidence in the record

shows that Mr. Smith was neither illiterate nor stupid. He was a manager with adequate ability and experience to read and understand the lead health protection program and the lead-in-construction standards.

The record shows Mr. Smith had ready access to both the lead health protection program and the lead-in construction standards. Mr. Zylstra testified a copy of the applicable regulations was filed with the lead health protection program at the worksite. If he knew nothing else, Mr. Smith must have known from the lead health protection plan that there were extensive and detailed regulations designed to protect workers from the serious hazards posed by lead in the workplace.

The regulations, while complex, were not that confusing. The employer's expert witness, Mr. Welch, testified that if the individuals read the regulation carefully and systematically the only place they could end up is with the correct respirator for the conditions and they would not confuse the thirty-day provision with initial monitoring.

After work began, Mr. Smith was repeatedly advised that Diamaco was not in compliance with the WISHA lead-in-construction standards. Mr. Howell testified that, beginning in November or December 2002, he had asked Mr. Smith about blood testing and had advised him about the need for a clean room and coveralls. Mr. Olson testified that, before Mr. Christian's inspection, he told Mr. Smith that in other lead jobs the contractor provided coveralls, gloves, a dirty room to remove the work clothes, hand washing facilities, and a clean room where workers could put on their street clothes.

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. After the union business manager was notified and became involved, Mr. Smith eventually provided some hand washing facilities, the record does not show that they had anything but cold water until after the inspection. While Mr. Zylstra testified that supplied air respirators were present at the site on

January 21, 2003, there is no evidence that there were enough for all the workers cutting on the bridge or that they were being used. The cartridge filter respirators that were provided and used were inadequate to meet the requirements of the regulation.

For these reasons, I must reject the possibility that Mr. Smith mistakenly believed that he was not required to follow the applicable standards and conclude that he knew the requirements of the WAC and voluntarily and intentionally disregarded them. These voluntary actions support a finding of willfulness for these violations.

In addition to Mr. Smith's actions, Mr. Zylstra's actions independently provide a basis for characterizing the violations as willful under the other prong of the test articulated in *The Erection Co.* When he elected to address the clear and recognized hazard presented to his workers by the lead on the bridge by submitting a recycled lead health protection program on his own, with no training, and without consulting the applicable regulations, Mr. Zylstra's voluntary action constituted plain indifference to the regulations.

When Mr. Zylstra made this decision, he was aware of the hazard presented by the lead paint on the bridge. The contract provided that during the retrofit portion of the project Diamaco had been required to remove some of the lead paint, capture, and properly dispose of the residue. DOT required Diamaco to prepare and submit a lead health protection program before beginning any work that would disturb the lead. Mr. Zylstra testified that he believed this requirement was there to protect the DOT from liability if anyone was harmed by the lead.

Given the nature of the project and Diamaco's experience in this kind of work, it is inconceivable that Mr. Zylstra was not aware that some torch cutting on metal covered by lead based paint would be required in both phases of the contract. He was present when the requirement for a lead health protection program was discussed at a pre-construction meeting on November 21, 2001, approximately 7 or 8 months before the commencement of work on the initial

phase of the project. This had provided him with ample notice and time to research, develop, and implement an adequate lead health protection program before Diamaco began work on the bridge.

In spite of this unmistakable hazard, Mr. Zylstra made no effort to determine what were the appropriate measures required by the WAC to protect workers from these known hazards. He elected to depart from the practice he had followed in relation to other safety concerns and personally prepared and submited the company's lead health protection program for the project without consulting anyone knowledgeable in the field. He said he did this with no specialized training of experience in dealing with the WISHA lead-in-construction regulations and without making any effort to become familiar with the applicable WISHA requirements. Instead, he took a lead health protection program that had been developed for another project, made minor modifications to it, and submitted it without any knowledge of who had drafted the document or whether it had ever been submitted.

The Board in *In re Robert Colf, DBA Colf Construction*, Dckt. No. 96 W318 (November 23, 1998) dealt with a similar issue. While this has not been recognized as a significant decision, its reasoning is applicable here in light of Diamaco's undisputed knowledge of the danger presented to its workers. In *Colf,* the employer contracted with a welder to weld tube fittings to storage tanks that the employer had previously used to store flammable materials. One of the tanks exploded and injured the welder. The Department cited the employer for willful violations of WAC provisions requiring the employer to thoroughly clean and vent tanks that had been used for flammable materials before welding or cutting the tanks. The Board held;

> Mr. Colf was aware that welding on the tanks, which had contained flammable materials, may be dangerous and that some safety measures were required. By not familiarizing himself with applicable WISHA regulations, and by not insisting that Mr. Hanes be familiar with and follow the regulations, Colf demonstrated plain indifference to the regulations.

Colf at 12.

Like Mr. Colf, Mr. Zylstra was aware that his workers would be performing tasks that could be dangerous and that some safety measures were required. By not familiarizing himself with the applicable WISHA regulations and ensuring that they were incorporated in that lead health protection program, Mr. Zylstra demonstrated plain indifference to the regulations.

FINDINGS OF FACT

1. On July 11, 2003, the Department of Labor and Industries issued Inspection Report No. 305987331, concerning an inspection conducted at 517 East Market Street, Aberdeen, Washington. On July 16, 2003, the Department issued Citation and Notice No. 305987331, in which the Department alleged at Item 1-1, a willful violation of WAC 296-155-17609(1)(a) with a penalty of $18,000; at Item 1-2a, a willful violation of WAC 296-155-17609(2)(e)(i) with a penalty of $39,000; at Item 1-2b, a willful violation of WAC 296-155-17613(3)(a) with a penalty included in Item 1-2a; at Item 1-3a, a willful violation of WAC 296-155-17609(2)(e)(ii) with a penalty of $27,000; at Item 1-3b, a willful violation of WAC 296-155-17615(1)(a) with a penalty included in Item 1-3a; at Item 1-3c, a willful violation of WAC 296-155-17615(1)(b) with a penalty included in Item 1-3a; at Item 1-4a, a willful violation of WAC 296-155-17609(2)(3)(iv) with a penalty of $27,000; at Item 1-4b, a willful violation of WAC 296-155-17619(5)(a) with a penalty included in Item 1-4a; at Item 1-4c, a willful violation of WAC 296-155-140(2)(1) with a penalty included in Item 1-4a; at Item 1-5a, a willful violation of WAC 296-155-17609(2)(e)(v) with a penalty of $18,000; at Item 1-5b, a willful violation of WAC 296-155-17621(1)(a) with a penalty included in Item 1-5a; at Item 2-1a, a serious violation of WAC 296-155-17611(2)(b) with a penalty of $3,900; at Item 2-1b, a serious violation of WAC 296-155-17611(2)(c) with a penalty included in Item 2-1a; at Item 2-2, a serious violation of WAC 296-62-07111 with a penalty of $3,900; at Item 2-3, a serious violation of WAC 296-62-07160 with a penalty of $1,800; at Item 2-4, a serious violation of WAC 296-62-07170(1) with penalty of $1,800; at Item 2-5, a serious violation of WAC 296-800-16050 with a penalty of $200; at Item 2-6 a serious violation of WAC 296-155-17619(1) with a penalty of $2,700; at Item 2-7a, a serious violation of WAC 296-155-17609(2)(e)(vi) with penalty of $1,800; at Item 2-7b, a serious violation of WAC 296-155-17625(1)(a) with a penalty included in Item 2-7a; at Item 2-8, a serious violation of WAC 296-155-17625(2) with a penalty of $1,800; at Item 2-9a, a serious violation of WAC 296-155-17609(2)(e)(iii) with penalty of $1,800; at Item 2-9b, a serious violation of WAC 296-155-17619(2)(b) with a penalty included in Item 2-9a; at Item 2-9c, a serious violation of WAC 296-155-17619(2)(b) with a penalty included in Item 2-9a; at Item 3-1, a serious violation of WAC 296-155-400(1)(d) with no penalty assessed. The total penalty assessed in the citation and notice was $148,700.

On July 18, 2003, the employer received Citation and Notice No. 305987331. On August 7, 2003, the employer filed with the Department of Labor and Industries Safety Division, a Notice of Appeal of Citation and Notice No. 305987331. The Department transmitted the appeal to the Board of Industrial Insurance Appeals on August 26, 2003. The Board assigned the appeal Docket No. 03 W0246.

2. The Wishkah Bridge project was an approximately 1.7 million dollar project that involved the repair and renovation of a structure that contained materials that contained lead. It was divided into two phases. The first phase was a seismic retrofit that began in June or July 2002. The second phase was a deck removal and repair phase that began on January 7 or 8, 2003.

3. The rivets and metal structure of the Wishkah Bridge were covered with paint, some of which contained lead. When cutting with a torch, workers heated portions of the metal with their torches creating clouds or plumes of smoke around them that contained extremely small droplets of lead that was easily inhaled.

4. While the majority of the torch cutting was performed in the second phase of the project, work in both phases of the project involved torch cutting of metal that was covered with paint that contained lead.

5. Prior to January 21, 2003, Diamaco, Inc., did not perform or cause to be performed any testing to initially determine if any employee may have been exposed to lead at or above the action level.

6. Prior to January 21, 2003, Diamaco, Inc., did not provide all workers performing torch cutting on metal coated with paint containing lead with half-mask, supplied air respirators.

7. Prior to January 21, 2003, Diamaco, Inc., did not provide workers performing torch cutting on metal coated with paint containing lead with coveralls or similar full-body work clothing, gloves, hats, shoes, or disposable shoe coverlets.

8. Prior to January 21, 2003, Diamaco, Inc., did not provide workers performing torch cutting on metal coated with paint containing lead with adequate hand washing facilities providing for clean, tepid wash water, between 70 and 100 degrees Fahrenheit.

9. Prior to January 21, 2003, Diamaco, Inc., did not provide workers performing torch cutting on metal coated with paint containing lead with initial medical surveillance consisting of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

10. Prior to January 21, 2003, Diamaco, Inc.'s, written lead compliance program did not include a description of each activity in which lead is emitted, a description of the specific means that will be employed to achieve compliance, and where engineering controls are required engineering plans and studies used to determine methods selected for controlling exposure to lead, a report of the technology considered in meeting the permissible exposure limit (PEL), air monitoring data which documents the source of lead emissions, a detailed schedule for implementation of the program or a provision providing for frequent and regular inspections of job sites, materials, and equipment to be made by a competent person.

11. Prior to January 21, 2003, Diamaco, Inc.'s, written respiratory program did not contain a list identifying the proper type of respirator for each respiratory hazard, fit testing procedures for tight-fitting respirators, and procedures to make sure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators.

12. Prior to January 21, 2003, Diamaco, Inc., did not make sure employees using a negative or positive pressure tight-fitting facepiece respirator passed an appropriate qualitative fit test or quantitative fit test before initial use of the respirator.

13. Prior to July 16, 2003, Diamaco, Inc., allowed an employee to use a respirator with a tight-fitting facepiece that had a goatee that was visibly projecting above the skin that came between the sealing surface of the facepiece and the face.

14. On January 31, 2003, Diamaco, Inc., allowed an employee to cut a piece of steel with a torch with no eye protection.

15. Prior to January 21, 2003, Diamaco, Inc., allowed employees to use tobacco products in areas where they were exposed to lead above the PEL.

16. Prior to January 21, 2003, Diamaco, Inc., did not provide workers, including those performing torch cutting on metal coated with paint containing lead, with training regarding the content of the lead-in-construction standards and its appendices, the specific nature of the operations which could result in their exposure to lead above the action level, respiratory protection, the purpose and a description of the medical surveillance program, information concerning the adverse health effects associated with excessive exposure to lead, the engineering controls and work practices associated with the employee's job assignment, the contents of any compliance plan in effect, that chelating agents should not routinely be used to remove lead from their bodies and should not be used at all except under the direction of a

licensed physician, and the employee's right of access to records under Part B, Chapter 296-62 WAC and Chapter 296-800 WAC.

17. Prior to January 21, 2003, Diamaco, Inc., did not provide workers performing torch cutting on metal coated paint containing lead with clean change areas equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevented cross-contamination.

18. Diamaco, Inc., voluntarily and intentionally disregarded the regulations which are Citation 1, Item 1; Citation 1, Item 2a; Citation 1, Item 3a; Citation 1, Item 4a; Citation 1, Item 4c, Citation 1, Item 5a; and Citation 1, Item 5b; and are found to have been violated. These violations are, therefore willful, and a multiplier of 10 is, therefore, appropriate for Citation 1, Item 1; Citation 1, Item 2a; Citation 1, Item 3a; Citation 1, Item 4a; Citation 1, Item 5a; and Citation 1, Item 5b.

19. By not familiarizing himself with the applicable WISHA regulations and ensuring that they were incorporated in the lead health protection program, Mr. Zylstra, Diamaco, Inc.'s, general manager, demonstrated plain indifference to the regulations which are Citation 1, Item 1; Citation 1, Item 2a: Citation 1, Item 3a; Citation 1, Item 4a; Citation 1, Item 4c, Citation, Item 5a; and Citation 1, Item 5b; and are found to have been violated. These violations are, therefore willful, and a multiplier of 10 is, therefore, appropriate for Citation 1, Item 1; Citation 1, Item 2a; Citation 1, Item 3a; Citation 1, Item 4a; Citation 1, Item 5a; and Citation 1, Item 5b.

20. The violations in Item Nos. 1-1, 1-2a, 1-3a, 1-4a, 1-4c, 1-5a, 1-5b, 2-1a, 2-1b, 2-2, 2-3, 2-4, 2-5, 2-6, 2-7a, 2-7b, 2-8, and 2-9a each posed a substantial probability that death or physical harm could result.

21. With respect to WAC 295-155-17609(1)(a), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. The violation was appropriately designated as a willful violation. With adjustments for its size, and multiplying by a factor of 10, the appropriate penalty for this violation was $18,000.

22. With respect to WAC 295-155-17609(2)(e)(i), the probability of harm was 5. The severity of the potential injury or illness was a 6, yielding a gravity rating of 30. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. The violation was appropriately designated as a willful violation. With adjustments for its size, and multiplying by a factor of 10, the appropriate penalty for this violation was $39,000.

23. With respect to WAC 296-155-17609(2)(e)(ii), the probability of harm was 3. The severity of the potential injury or illness was a 6, yielding a gravity rating of 18. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. The violation was appropriately designated as a willful violation. With adjustments for its size, and multiplying by a factor of 10, the appropriate penalty for this violation was $27,000.

24. For the grouped violations of WAC 296-155-17609(2)(e)(iv), (Item No. 1-4a), and 296-155-140(2)(a), (Item No. 1-4c), the probability of harm was 3. The severity of the potential injury or illness was a 6, yielding a gravity rating of 18. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. The violation was appropriately designated as a willful violation. With adjustments for its size, and multiplying by a factor of 10, the appropriate penalty for this violation was $27,000.

25. For the grouped violations of WAC 296-155-17609(2)(e)(v), (Item No. 1-5a) and WAC 296-155-17621(1)(a), (Item No. 1-5b), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. The violation was appropriately designated as a willful violation. With adjustments for its size, and multiplying by a factor of 10, the appropriate penalty for this violation was $18,000.

26. For the grouped violations of WAC 296-155-17611(2)(b), (Item No. 2-1a) and WAC 296-155-17611(2)(c), (Item No. 2-1b), the probability of harm was 5. The severity of the potential injury or illness was a 6, yielding a gravity rating of 30. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $3,900.

27. With respect to WAC 296-62-07111, the probability of harm was 5. The severity of the potential injury or illness was a 6, yielding a gravity rating of 30. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $3,900.

28. With respect to WAC 296-62-07160, the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $1,800.

29. With respect to WAC 296-162-07170(1), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $1,800.

30. With respect to WAC 296-800-16050, the probability of harm was 1. The severity of the potential injury or illness was a 6, yielding a gravity rating of 6. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $200.

31. With respect to WAC 296-155-17619(1), the probability of harm was 3. The severity of the potential injury or illness was a 6, yielding a gravity rating of 18. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $2,700.

32. For the grouped violations of WAC 296-155-17609(2)(e)(vi), (Item No. 2-7a) and WAC 296-155-17625(1)(a), (Item No. 2-7b), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $1,800.

33. With respect to WAC 296-155-17625(2), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $1,800.

34. With respect to WAC 296-155-17609(2)(e)(iii), the probability of harm was 2. The severity of the potential injury or illness was a 6, yielding a gravity rating of 12. The employer had an "average" history with respect to workplace safety and its good faith was "average." The company

employed 27 workers. With adjustments for its size, the appropriate penalty for this violation was $1,800.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of this appeal.

2. The appropriate standard to be cited in Item No. 1-4a in Citation and Notice No. 305987331 is WAC 296-155-1609(2)(e)(iv).

3. The appropriate standard to be cited in Item No. 1-4c in Citation and Notice No. 305987331 is WAC 296-155-140(2)(a).

4. The appropriate standard to be cited in Item No. 2-9c in Citation and Notice No. 305987331 is WAC 296-155-17619(2)(c).

5. There is substantial probability that death or serious physical harm could result from the violations cited in the Citation and Notice as Item Nos. 1-1, 1-2a, 1-3a, 1-4a, 1-4c, 1-5a, 1-5b, 2-1a, 2-1b, 2-2, 2-3, 2-4, 2-5, 2-6, 2-7a, 2-7b, 2-8, and 2-9a within the meaning of RCW 49.17.180(6).

6. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17609(1)(a), in effect at that time.

7. The penalty assessed for the violation cited in the Citation and Notice as Item No. 1-1 is appropriate and within the Department's authority under RCW 49.17.180.

8. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17609(2)(e)(i).

9. Diamaco, Inc., did not commit a willful violation of WAC 296-155-17613(3)(a) during the inspection period covered by the Citation and Notice.

10. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 1-2a and 1-2b is appropriate for the remaining violation, cited in the Citation and Notice as Item No. 1-2a, and within the Department's authority under RCW 49.17.180.

11. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17609(2)(e)(ii).

12. Diamaco, Inc., did not commit a willful violation of WAC 296-155-17615(1)(a) during the inspection period covered by the Citation and Notice.

13. Diamaco, Inc., did not commit a willful violation of WAC 296-155-17615(1)(b) during the inspection period covered by the Citation and Notice.

14. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 1-3a, 1-3b, and 1-3c is appropriate for the remaining violation, cited in the Citation and Notice as Item No. 1-3a, and within the Department's authority under RCW 49.17.180.

15. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17609(2)(e)(iv).

16. Diamaco, Inc., did not commit a willful violation of WAC 296-155-17619(5)(a) during the inspection period covered by the Citation and Notice.

17. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-140(2)(a).

18. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 1-4a, 1-4b, and 1-4c is appropriate for the remaining violations, cited in the Citation and Notice as Item Nos. 1-4a and 1-4c, and within the Department's authority under RCW 49.17.180.

19. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17609(2)(e)(v).

20. Prior to January 21, 2003, Diamaco, Inc., committed a willful violation of WAC 296-155-17621(1)(a).

21. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 1-5a and 1-5b is appropriate and within the Department's authority under RCW 49.17.180.

22. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17611(2)(b).

23. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17611(2)(c).

24. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 2-1a and 2-1b is appropriate and within the Department's authority under RCW 49.17.180.

25. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-62-07111.

26. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-2 is appropriate and within the Department's authority under RCW 49.17.180.

27. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-62-07160.

28. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-3 is appropriate and within the Department's authority under RCW 49.17.180.

29. CL 2-4 Prior to July 16, 2003, Diamaco, Inc., committed a serious violation of WAC 296-62-07170(1).

30. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-4 is appropriate and within the Department's authority under RCW 49.17.180.

31. On January 31, 2003, Diamaco, Inc., committed a serious violation of WAC 296-800-16050.

32. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-5 is appropriate and within the Department's authority under RCW 49.17.180.

33. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17619(1).

34. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-6 is appropriate and within the Department's authority under RCW 49.17.180.

35. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17609(2)(e)(vi).

36. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17625(1)(a).

37. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 2-7a and 2-7b is appropriate and within the Department's authority under RCW 49.17.180.

38. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17625(2).

39. The penalty assessed for the violation cited in the Citation and Notice as Item No. 2-8 is appropriate and within the Department's authority under RCW 49.17.180.

40. Prior to January 21, 2003, Diamaco, Inc., committed a serious violation of WAC 296-155-17609(2)(e)(iii).

41. Diamaco, Inc., did not commit a serious violation of WAC 296-155-17619(2)(b) during the inspection period covered by the Citation and Notice.

42. Diamaco, Inc., did not commit a serious violation of WAC 296-155-17619(2)(c) during the inspection period covered by the Citation and Notice.

43. The penalty assessed for the grouped violations cited in the Citation and Notice as Item Nos. 2-9a, 2-9b, and 2-9c is appropriate for the remaining violation, cited in the Citation and Notice as Item No. 2-9a, and within the Department's authority under RCW 49.17.180.

44. Diamaco, Inc., did not commit a general violation of WAC 296-155-400(1)(d) during the inspection period covered by the Citation and Notice.

45. Citation and Notice No. 305987331, issued by the Department of Labor and Industries on July 16, 2003, is incorrect and is modified to vacate the Citation Item Nos. 1-2b, that alleges a violation of WAC 296-155-17613(3)(a); 1-3b, that alleges a violation of WAC 296-155-17615(1)(a); 1-3c, that alleges a violation of WAC 296-155-17615(1)(b); 1-4b, that alleges a violation of WAC 296-155-17619(5)(a); 2-9b, that alleges a violation of WAC 296-155-17619(2)(b); 2-9c, that alleges a violation of WAC 296-155-17619(2)(c); and 3-1, that alleges a violation of WAC 296-155-400(1)(d). As modified Citation and Notice No. 305987331, is affirmed, with the total penalty of $148,700 is affirmed.

It is so **ORDERED**.

Dated this 11th day of January, 2005.

Allan R. Pearson
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

DIAMACO INC
40 LAKE BELLEVUE #100
BELLEVUE, WA 98005

EA1

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

EU1

IRON WORKERS LOCAL #86
4550 S 134TH PL #102
TUKWILA, WA 98168-3250

EU2

LABORERS LOCAL #252
TOM FREUDENSTEIN
1742 S MARKET ST
TACOMA, WA 98402-3213

EU3

CARPENTERS LOCAL #131
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AG2

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LABOR & INDUSTRIES
PO BOX 40121
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 1/21/2005
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: David E. Threedy
DAVID E. THREEDY
Executive Secretary

In re: DIAMACO INC
Docket No. 03 W0246

Department of Labor & Industries
WISHA SERVICES DIVISION
PO BOX 44604
OLYMPIA, WA 98504-4604

To:
Diamaco Inc
40 Lake Bellevue Ste 100
Bellevue, WA 98005

Inspection Site:
517 E Market Street
Aberdeen, WA 98520

Inspection Number:	305987331
Inspection Date(s):	01/21/2003-06/27/2003
Issuance Date:	07/16/2003
Optional Report #:	h20237572
Reporting I.D.:	1055340
U.B.I.#:	601006742
CSHO:	B1710

Citation and Notice of Assessment

A copy of this **Citation & Notice of Assessment must be prominently posted immediately** upon receipt at or near each place a violation occurred or at a location where employees normally receive posted information (RCW 49.17.120). It must remain posted until all violations cited therein are corrected, or for three (3) days, whichever period is longer.

SEE ATTACHED NOTICE OF RIGHTS AND DUTIES REGARDING THIS CITATION
Penalties are due within 15 days of receipt of this notification unless appealed.
Make check or money order payable to
DEPARTMENT OF LABOR & INDUSTRIES
Include Inspection Number on remittance.

CERTIFICATION OF ABATEMENT IS REQUIRED FOR ALL VIOLATIONS NOT CORRECTED AT THE TIME OF INSPECTION

NATURE OF ALLEGED VIOLATIONS OBSERVED DURING INSPECTION
UNLESS OTHERWISE NOTED ALL CITATIONS ARE TO TITLE 296 WAC

All 4 envelopes are in the open 2003 Video Tape Drawer

Citation & Notice of Assessment

Employer Copy - White Region Copy - Copy - Grey

APPENDIX B

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 1 Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17609(1)(a)
The employer did not initially determine if any employee may be exposed to lead at or above the action level.

The employer had not performed an exposure assessment or personal air monitoring for lead despite torch cutting of lead based paint coated bridge components. Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 18000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 1 Item 2a Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17609(2)(e)(i)
The employer did not provide to employees performing torch cutting (a "trigger" task under WAC 296-155-17609) on lead containing coatings or paint appropriate respiratory protection as required in accordance with WAC 296-155-17613.

Half-face, air-purifying respirators with high efficiency particulate air (HEPA) filters were provided by the employer during torch cutting operations on a steel structure (Wishkah Bridge) coated with lead containing paint. Torch cutting is a "trigger" task under WAC 296-155-17609(2)(d) and the employer is required to treat employee's as if they are exposed to over 2500 micrograms per cubic meter until monitoring data demonstrates the actual exposure level. Half-face, supplied air respirators are the minimum required by WAC 296-155-17613. Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent. On 31 January 2003 a Diamaco employee was observed to make a cut on a stringer without respiratory protection.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 39000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 2b Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17613(3)(a)
The employer did not provide to employees performing torch cutting on lead containing coatings or paint appropriate respiratory protection as required in accordance with WAC 296-155-17613(3)(a).

Half-face, air-purifying respirators with high efficiency particulate air (HEPA) filter were provided by the employer during torch cutting operations on a steel structure (Wishkah Bridge) coated with lead containing paint. Torch cutting is a "trigger" task under WAC 296-155-17609(2)(d) and the employer is required to treat employee's as if they are exposed to over 2500 microgram per cubic meter until monitoring data demonstrates the actual exposure level.

Half-face, supplies air respirators are the minimum required by WAC 296-155-17613(3)(a). Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent. On 31 January 2003 a Diamaco employee was observed to make a cut on a stringer without respiratory protection.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 1 Item 3a Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17609(2)(e)(ii)
The employer did not provide to employees performing torch cutting (a "trigger" task under WAC 296-155-17609) on lead containing coatings or paint appropriate personal protective clothing and equipment as required in accordance with WAC 296-155-17615.

Employees wore their own personal clothing during cutting operations on a metal structure coated with lead containing paint. Torch cutting is a "trigger" task under WAC 296-155-17609(2)(d) and the employer is required to treat employee's as if they are exposed to over and 2500 micrograms per cubic meter until monitoring data demonstrates the actual exposure level.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 27000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003-06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 3b Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17615(1)(a)
The employer did not provide to employees performing torch cutting (s "trigger" task under WAC 296-155-17609) on lead containing coatings or paint, coveralls or other similar full-body work clothing.

Employees wore their own personal clothing during cutting operations on a metal structure coated with lead containing paint. Torch cutting is a "trigger" task under WAC 296-155-17609(2)(d) and the employer is required to treat employee's as if they are exposed to over 2500 micrograms per cubic meter until monitoring data demonstrates the actual exposure level.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 3c Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17615(1)(b)
The employer did not provide to employees performing torch cutting (a "trigger" task under WAC 296-155-17609) on lead containing coatings or paint, gloves and shoes or disposable shoe coverlets.

Employees wore their own personal clothing during cutting operations on a metal structure coated with lead containing paint. Torch cutting is a "trigger" task under WAC 296-155-17609(2)(d) and the employer is required to treat employee's as if they are exposed to over 2500 micrograms per cubic meter until monitoring data demonstrates the actual exposure level.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must Be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 1 Item 4a Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17609(2)(3)(iv)
The employer did not provide to employees performing torch cutting ("trigger" task under WAC 296-155-17609) on lead containing coatings or paint, appropriate hand washing facilities in accordance with WAC 296-155-17619(5).

Employees were not provided adequate hand washing facilities until approximately 10 days after the deck removal phase of the Wishkah Bridge project started and several months after the overall project started.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 27000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 4b Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17619(5)(a)
The employer did not provide to employees performing torch cutting (a "trigger" task under WAC 296-155-17609) on lead containing coatings or paint, appropriate hand washing facilities in accordance with WAC 296-155-17619(5).

Employees were not provided adequate hand washing facilities until approximately 10 days after the deck removal phase of the Wishkah Bridge project started and several months after the overall project started.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 4c Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-140(2)(1)
The employer did not provide to employees, clean, tepid wash water for hand washing associated with use of a portable toilet.

Employees were not provided hand washing facilities until approximately 10 days after the deck removal phase of the Wishkah Bridge project started.

Air samples for lead taken on 01/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hour shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day torch cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 01/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated: 06/27/2003

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Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 1 Item 5a Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17609(2)(e)(v)
The employer did not provide to employees appropriate biological monitoring (blood lead and zinc protoporphyrin levels) in accordance with WAC 296-155-17621(1). Employees were engaged in torch cutting (a "trigger" task under WAC 296-155-17609) on metal structures coated with lead containing paint.

No biological monitoring was made available to employees despite a reference to providing biological monitoring in the Diamaco Lead Health Protection Program.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 18000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003-06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 1 Item 5b Type of Violation: Willful

***** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION *****
155-17621(1)(a)
The employer did not provide to employees appropriate biological monitoring (blood lead and zinc protoporphyrin levels) in accordance with WAC 296-155-17621(1).

No biological monitoring was made available to employees despite a reference to providing biological monitoring in the Diamaco Lead Health Protection Program.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 2 Item 1a Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

155-17611(2)(b)
The employer did not ensure that their written compliance program (Lead Health Protection Program (LHPP)), include the following elements:

* A description of each activity in which lead is emitted; e.g., equipment used, material involved, controls in place, crew size, employee job responsibilities, operating procedures and maintenance practices;

* A description of the specific means that will be employed to achieve compliance and, where engineering controls are required, engineering plans and studies used to determine methods selected for controlling exposure to lead.

* A report of the technology considered in meeting the PEL;

* Air monitoring data which documents the sources of lead emissions;

* A detailed schedule for implementation of the program, including documentation such as copies of purchase orders for equipment, construction contracts, etc.; and

* Other relevant information.

Department of Labor & Industries
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Inspection Number: 305987331
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Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

The employer's LHPP provided information regarding only one activity at the site (lead-based paint removal at the top of the floor beams and at slip critical connection areas), but not the cutting and removal of the decking, as required by the first bullet above. For the second bullet, the LHPP provides information that was not related to the cutting and removal of the decking. No information is provided for the remaining four bullets.

Date By Which Violation Must be Abated: 06/27/2003
Proposed Penalty: $ 3900.00

Citation 2 Item 1b Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include monetary penalties.

155-17611(2)(c)
The employer's Lead Health Protection Program did not provide for frequent and regular inspections of job sites, materials, and equipment to be made by a competent person.

The employer LHPP includes no information regarding inspections by a competent person.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 2 Type of Violation: Serious

62-07111
The employer did not ensure that their written respiratory protection program included the following provisions:

* A list identifying the proper type of respirator for each respiratory hazard;
* Fit testing procedures for tight-fitting respirators;
* Procedures to make sure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;

The employer's Respiratory Protection Program includes no procedures for the above-required items or a list of respirator types for each respiratory hazard.

Date By Which Violation Must be Abated: 08/18/2003
Proposed Penalty: $ 3900.00

Citation 2 Item 3 Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

62-07160
The employer did not provide all employees using a negative or positive pressure tight-fitting facepiece respirator an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT).

Employees indicated that no fit testing had been conducted prior to respirator use.

Date By Which Violation Must be Abated: 06/27/2003
Proposed Penalty: $ 1800.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 4 Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

62-07170(1)

The employer did not ensure that employees wearing tight-fitting facepieces to be worn during fit testing and respirator use did not have the following:

* Any facial hair that is visibly projecting above the skin (stubble, moustache, sideburns, portions of a beard, low hairline, bangs) that comes between the sealing surface of the facepiece and the face or that interferes with valve function; or

* An employee was issued and used a respirator with a goatee. That employee was later determined to have an elevated blood lead level.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 1800.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 5 Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

800-16050
The employer did not make sure that employees exposed to hazards that could injure their eyes and/or face must use appropriate protection.
Examples of these hazards include:

* Flying particles
* Molten metal

A section of the Wishkah Bridge decking was being removed and an employee was observed to use a cutting torch to cut a metal beam without any eye protection.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 200.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 6 Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

155-17619(1)
The employer did not ensure that in areas where employees are exposed to lead above the PEL, food or beverage is not consumed and tobacco products are not present or used.

Interviewed employees indicated that smoking, eating and drinking occurred on the bridge during the decking removal phase of the project.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 2700.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 2 Item 7a Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******
155-17609(2)(e)(vi)
The employer did not provide to employees performing torch cutting (a 'trigger' task under WAC 296-155-17609) on lead containing coating or paint appropriate lead related training as required by WAC 296-155-17625(1)(a).

No training on the presence, health hazards or control methods related to lead exposure were provided to employees. No training was provided on respiratory protection prior to respirator use.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 1800.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
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Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 7b Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******
155-17625(1)(a)
The employer did not provide to employees performing torch cutting (a 'trigger' task under WAC 296-155-17609) on lead containing coatings or paint appropriate lead related training as required by WAC 296-155-17625(1)(a).

No training on the presence, health hazards or control methods related to lead exposure were provided to employees.

Date By Which Violation Must be Abated: 06/27/2003

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Inspection Number: 305987331
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Issuance Date: 07/16/2003
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Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 8 Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

155-17625(2)
The employer did not ensure that each employee was trained in the following:

a) The content of this standard (WAC 296-155-176) and its appendices;
b) The specific nature of the operations which could result in exposure to lead above the action level;
c) The training requirements for respiratory protection as required by Chapter 296-62 WAC, Part E;
d) The purpose and a description fo the medical surveillance program, and the medial removal protection program including information concerning the adverse health effects associated with excessive exposure to lead (with particular attention to the adverse reproductive effects on both males and females and hazards to the fetus and additional precautions for employees whoa re pregnant);
e) The engineering controls and work practices associated with the employee's job assignment including training of employees to follow relevant good work practices described in Appendix B, WAC 296-155-17652;
f) The contents of any compliance plan in effect;
g) Instruction to employees that chelating agents should not routinely be used to remove lead from their bodies and should not be used at all except under the direction of a licensed physician; and
h) The employee's right of access to records under Part B, Chapter 296-62 WAC and Chapter 296-800 WAC.

No training was provided to employees on any of the above bullet points.

Date By Which Violation Must be Abated: 06/27/2003
Proposed Penalty: $ 1800.00

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Citation and Notification of Penalty

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Inspection Site: 517 E Market Street, Aberdeen, WA 98520

****
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.
****

Citation 2 Item 9a Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******
155-17609(2)(e)(iii)
The employer did not provide to employees performing torch cutting (a 'trigger' task under WAC 296-155-17609) on lead containing coatings or paint, appropriate provide change areas in accordance with WAC 296-155-17619(2).

Employees were provided a single change room with no separation between clothing worn on-the-job site and clothing worn home. Air samples for lead taken on 1/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hours shift, the journeyman's sample results were 5930 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 1/29/2003 and the results were 3740 microgram (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 1800.00

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Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 9b Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

155-17619(2)(b)
The employer did not provide to employees performing torch cutting (a 'trigger' task under WAC 296-155-17609) on lead containing coatings or paint, appropriate provide change areas with separate storage facilities for protective work clothing and street clothing that prevented cross-contamination.

Employees were provided a single change room with no separation between clothing worn on-the-job site and clothing worn home. Air samples for lead taken on 1/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hours shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (67 times the PEL). Both employees spent the bulk of the day cutting decking and beams that were coated with lead containing paint. Diamaco had Health Risk Associates take air samples on 1/29/2003 and the results were 3740 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003 - 06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 2 Item 9c Type of Violation: Serious

****** THIS VIOLATION WAS COMPLIED AT THE TIME OF INSPECTION ******

155-17619(2)(b)
The employer did not ensure that employees performing torch cutting (a 'trigger' task under WAC 296-155-17609) on lead containing coatings or paint, did not leave the work place wearing any protective clothing that is required to be worn during the work shift.

Employees reported wearing their work clothing home at the end of a work shift. Air samples for lead taken on 1/31/2003 by L&I on two ironworkers (journeyman and apprentice) showed that over a 10 hours shift, the journeyman's sample results were 5930 micrograms per cubic meter (148 times the PEL) and the apprentice 2689 micrograms per cubic meter (93 times the PEL). Samples of the metal coating taken during the inspection indicated lead content ranging from 9.1 percent to 39.97 percent.

Date By Which Violation Must be Abated: 06/27/2003

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 305987331
Inspection Dates: 01/21/2003-06/27/2003
Issuance Date: 07/16/2003
CSHO ID: B1710
Optional Inspection Nbr: h20237572

Citation and Notification of Penalty

Company Name: Diamaco Inc
Inspection Site: 517 E Market Street, Aberdeen, WA 98520

Citation 3 Item 1 Type of Violation: Serious

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include monetary penalties.

155-400(1)(d)
The employer did not ensure that when compressed gas cylinders were transported by powered vehicles, they were transported in a vertical position.

An employee was observed to move compressed gas cylinders with a forklift. The cylinders were not secured and were transported in a horizontal position.

UBI Number: 601006742
Mgmt. Official Contacted: AJ SMITH, PROJECT MANAGER
Employer Walkaround Rep.: AJ SMITH, PROJECT MANAGER
Closing Conf. Employer Rep.: DOUG ZYLSTRA, GENERAL MANAGER

ATTENTION EMPLOYER, IF YOU HAVE ANY QUESTIONS OR ARE IN NEED OF CLARIFICATION IN REFERENCE TO THIS CITATION, PLEASE CALL THE HYGIENE COMPLIANCE SUPERVISOR AT (360) 896-2378 - VANCOUVER.

Date By Which Violation Must be Abated:	06/27/2003
Proposed Penalty:	$ 0.00

Michael A. Silverstein
Assistant Director, WISHA SERVICES

NOTICE OF RIGHTS AND DUTIES REGARDING THIS CITATION
Pursuant to the Washington Industrial Safety and Health Act (Chapter 49.17 RCW)

CITATION AND NOTICE OF ASSESSMENT - ABATEMENT - POSTING

The nature and location of a condition or conditions alleged to be in violation of Washington's safety and health standards are described on this citation with references to acceptable standards, rules, regulations and provisions of the Washington Industrial Safety and Health Act.

These conditions must be corrected on or before the date shown for each citation item (date to the right of "Date By Which Violation Must be Abated:"). (RCW 49.17.120).

The Act requires that a copy of the citation(s) be immediately and prominently posted at or near each place a violation referred to in the citation occurred (RCW 49.17.120). It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer (WAC 296-800-35016). A sufficient number of copies of the citation(s) should be prepared to permit posting in accordance with the requirements of the Act.

RIGHTS OF EMPLOYER

Appeal of Citation and Notice of Assessment

This CITATION & NOTICE OF ASSESSMENT shall be deemed to be a final order of the Department and not subject to review by any court or agency unless, within fifteen (15) working days from the receipt of this CITATION & NOTICE OF ASSESSMENT, the employer submits a Notice of Appeal. A Notice of Appeal should be mailed or otherwise delivered to the Assistant Director for WISHA Services Division at PO Box 44604, Olympia, Washington 98504-4604. The term "working day" means a calendar day except Saturdays, Sundays, and all legal holidays as set forth in RCW 1.16.050 (RCW 49.17.140 and 49.17.020(9)).

The employer may appeal any or all of the violation(s) cited, or any or all of the proposed penalties, or any combination of these.

A Notice of Appeal filed pursuant to RCW.49.17.140 should contain the following:
(1) The name and address of the appealing party and representative, if any.
(2) The place where the alleged violation occurred.
(3) A statement identifying the citation (citation number and date of issuance).
(4) The grounds upon which the appealing party considers the order, decision or citation to be unjust or unlawful.
(5) A statement of facts in support of each of the grounds stated.
(6) The relief sought, including the specific nature and extent.
(7) A statement that the person signing the notice of appeal believes there are grounds to support it.

Extension of Abatement Date(s)

If the employer is making a good faith effort to abate the condition(s) in violation of the cited standard(s) but is unable to do so within the time period set for abatement, the employer may apply to the Department, before the abatement date, for an extension (RCW 49.17.140). See WAC 296-800-35056 through 296-800-35072 for rules relating to the extension of abatement dates. An appeal need not be filed to request extension of abatement dates.

RIGHTS OF EMPLOYEES OR REPRESENTATIVES OF EMPLOYEES

An employee or representative of employees may file a Notice of Appeal of the time(s) stated in the citation for the abatement of the alleged violation(s) (RCW 49.17.140). To do so, a Notice of Appeal must be sent to the Office of the Assistant Director for WISHA Services Division, Department of Labor & Industries, PO Box 44604, Olympia, Washington 98504-4604, within 15 working days from receipt of the notice. See the Rights of Employer Section above for the appropriate contents of such Notice of Appeal.

No person shall discharge or discriminate against any employee because such employee has exercised rights guaranteed him/her by the Act.

REASSUMPTION OF JURISDICTION

Upon receipt of a Notice of Appeal, the Department may reassume jurisdiction over all or any part of the subject matter of the appeal. Should jurisdiction over the matter be reassumed, the Department will issue to all affected parties a Notice of Reassumption and Informal Conference. Following a redetermination of the matter, a Corrective Notice of Redetermination will be issued (RCW 49.17.140). Such Corrective Notice shall be issued within 30 working days from the Department's receipt of the appeal notice.

ORDER FINAL IF NOT APPEALED

If a Notice of Appeal is not filed within the 15 working day period, the citation(s) and penalty assessment(s) shall be deemed final and not subject to review by any court or agency (RCW 49.17.140).

Payment of all penalties shown is to be made by check or money order payable to the order of "Department of Labor and Industries." Payment of penalties should be remitted to the WISHA Services Division Management Services/Accounting, PO Box 44835, Olympia, Washington 98504-4835. Interest of 1% per month will be charged on past due accounts per RCW 43.17.240. If the Citation is appealed, interest will not accrue until a final order has been issued.

RCW 49.17.180 states: "Civil penalties imposed under this chapter shall be paid to the Director for deposit in the supplemental pension fund established by RCW 51.44.033. Civil penalties may be recovered in a civil action in the name of the department brought in the superior court of the county where the violation is alleged to have occurred, or the department may utilize the procedures for collection of civil penalties as set forth in RCW 51.48.120 through 51.48.150."

ABATEMENT

Alleged violations that are not appealed shall be corrected within the abatement period specified in the citation. Written verification of correction must be submitted to the Department and must be posted with the Citation and Notice for at least 3 working days (WAC 296-800-35016). Failure to correct alleged violations within the abatement period may result in a further proposed assessment of penalties (RCW 49.17.140).
A follow up inspection may be made for the purpose of ascertaining that the employer has posted the citation(s) as required by the Act AND has corrected the alleged violations.

Inspection Activity Data

You should be aware that OSHA publishes information on its inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act.The information related to these alleged violations will be posted when our system indicates that you have received this citation, but not sooner than 30 calendar days after the Citation Issuance Date. You are encouraged to review the information concerning your establishment at WWW.OSHA.GOV. If you have any dispute with the accuracy of the information displayed, please contact the Assistant Director for WISHA Services Division at P.O. Box 44604, Olympia, Washington 98504-4604.

In re: Diamaco, Inc.
Citation & Notice No. 305987331
BIIA Docket No. 03 W0246

Attachment to Department's Post-Hearing Brief

Worker	Collection Date	Test	Actual Result**	Diagnosis
Ben Acevedo	1/23/03	ZPP*	**111*** **	"Significant lead exposure"
		Lead	**56**** **	
	1/30/03	ZPP	**115**	
		Lead	**57**	
	2/7/03	ZPP	**186**	
		Lead	**51**	
Daniel Derourin	1/23/03	ZPP	**137**	
		Lead	**44**	
Rory Godinez	1/23/03	ZPP	**137**	
		Lead	25	
Ronald Howell	1/30/03	ZPP	**132**	"Toxic lead exposure"
		Lead	**46**	
	2/7/03	ZPP	**161**	
		Lead	**51**	
Gilbert Ostergard	1/23/03	ZPP	**91**	"Toxic levels of lead and zinc"
		Lead	**67**	
	1/30/03	ZPP	**103**	
		Lead	**65**	
	2/7/03	Lead	**62**	

* As noted in the test results, "Elevated ZPP (zinc protoporphyrin/heme ratio) level may be seen in iron deficiency, as well as hemolytic anemias, sideroblastic anemias, anemias of chronic disorders, **lead poisoning**, among other conditions." (Emphasis added.)

** Abnormally high results in **bold**.

*** Units are μmol/mo; normal result is 23-78.

**** Units are μg/dL; normal result is <40

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EXHIBIT B

WAC 296-155-17609 Exposure assessment.

(1) General.

(a) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.

(b) For the purposes of this section, employee exposure is that exposure which would occur if the employee were not using a respirator.

(c) With the exception of monitoring under subsection (3) of this section, where monitoring is required by this standard, the employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area either for each shift or for the shift with the highest exposure level.

(d) Full shift personal samples shall be representative of the monitored employee's regular, daily exposure to lead.

(2) Protection of employees during assessment of exposure.

(a) With respect to the lead related tasks listed in this subdivision, where lead is present, until the employer performs an employee exposure assessment as required in this section and documents that the employee performing any of the listed tasks is not exposed above the PEL, the employer shall treat the employee as if the employee were exposed above the PEL, and not in excess of ten (10) times the PEL, and shall implement employee protective measures prescribed in subdivision (e) of this subsection. The tasks covered by this requirement are:

(i) Where lead containing coatings or paint are present: Manual demolition of structures (e.g, dry wall), manual scraping, manual sanding, heat gun applications, and power tool cleaning with dust collection systems;

(ii) Spray painting with lead paint.

(b) In addition, with regard to tasks not listed in subdivision (a), where the employer has any reason to believe that an employee performing the task may be exposed to lead in excess of the PEL, until the employer performs an employee exposure assessment as required by this section and documents that the employee's lead exposure is not above the PEL the employer shall treat the employee as if the employee were exposed above the PEL and shall implement employee protective measures as prescribed in subdivision (e) of this subsection.

(c) With respect to the tasks listed in this subdivision, where lead is present, until the employer performs an employee exposure assessment as required in this section, and documents that the employee performing any of the listed tasks is not exposed in excess of 500 $\mu g/m^3$, the employer shall treat the employee as if the employee were exposed to lead in excess of 500 $\mu g/m^3$ and shall implement employee protective measures as prescribed in subdivision (e) of this subsection. Where the employer does establish that the employee is exposed to levels of lead below 500 $\mu g/m^3$, the employer may provide the exposed employee with the appropriate respirator prescribed for such use at such lower exposures, in accordance with Table I of WAC 296-155-17613. The tasks covered by this requirement are:

APPENDIX D

WAC 296-155-17609 (Cont.)

(i) Using lead containing mortar; lead burning;

(ii) Where lead containing coatings or paint are present: Rivet busting; power tool cleaning without dust collection systems; cleanup activities where dry expendable abrasives are used; and abrasive blasting enclosure movement and removal.

(d) With respect to the tasks listed in this subdivision, where lead is present, until the employer performs an employee exposure assessment as required in this section and documents that the employee performing any of the listed tasks is not exposed to lead in excess of 2,500 $\mu g/m^3$ (50xPEL), the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 $\mu g/m^3$ and shall implement employee protective measures as prescribed in (e) of this subsection. Where the employer does establish that the employee is exposed to levels of lead below 2,500 $\mu g/m^3$, the employer may provide the exposed employee with the appropriate respirator prescribed for use at such lower exposures, in accordance with Table I of this WAC 296-155-17613. Protection described in this section is required where lead containing coatings or paint are present on structures when performing:

(i) Abrasive blasting;

(ii) Welding;

(iii) Cutting; and

(iv) Torch burning.

(e) Until the employer performs an employee exposure assessment as required by this section and determines actual employee exposure, the employer shall provide to employees performing the tasks described in (a) through (d) of this subsection with interim protection as follows:

(i) Appropriate respiratory protection in accordance with WAC 296-155-17613.

(ii) Appropriate personal protective clothing and equipment in accordance with WAC 296-155-17615.

(iii) Change areas in accordance with WAC 296-155-17619(2).

(iv) Hand washing facilities in accordance with WAC 296-155-17619(5).

(v) Biological monitoring in accordance with WAC 296-155-17621 (1)(a), to consist of blood sampling and analysis for lead and zinc protoporphyrin levels, and

(vi) Training as required by WAC 296-155-17625 (1)(a) regarding WAC 296-800-170, chemical hazard communication; training as required by WAC 296-155-17625 (2)(c), regarding use of respirators; and training in accordance with WAC 296-155-100.

(3) Basis of initial determination.

(a) Except as provided by (c) and (d) of this subsection the employer shall monitor employee exposures and shall base initial determinations on the employee exposure monitoring results and any of the following, relevant considerations:

WAC 296-155-17609 (Cont.)

(i) Any information, observations, or calculations which would indicate employee exposure to lead;

(ii) Any previous measurements of airborne lead; and

(iii) Any employee complaints of symptoms which may be attributable to exposure to lead.

(b) Monitoring for the initial determination where performed may be limited to a representative sample of the exposed employees who the employer reasonably believes are exposed to the greatest airborne concentrations of lead in the workplace.

(c) Where the employer has previously monitored for lead exposures, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of subdivision (a) of this subsection and subsection (5) of this section if the sampling and analytical methods meet the accuracy and confidence levels of subsection (9) of this section.

(d) Where the employer has objective data, demonstrating that a particular product or material containing lead or a specific process, operation or activity involving lead cannot result in employee exposure to lead at or above the action level during processing, use, or handling, the employer may rely upon such data instead of implementing initial monitoring.

(i) The employer shall establish and maintain an accurate record documenting the nature and relevancy of objective data as specified in WAC 296-155-17629(4), where used in assessing employee exposure in lieu of exposure monitoring.

(ii) Objective data, as described in subdivision (d) of this subsection, is not permitted to be used for exposure assessment in connection with subsection (2) of this section.

(4) Positive initial determination and initial monitoring.

(a) Where a determination conducted under subsections (1), (2) and (3) of this section shows the possibility of any employee exposure at or above the action level the employer shall conduct monitoring which is representative of the exposure for each employee in the workplace who is exposed to lead.

(b) Where the employer has previously monitored for lead exposure, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of (a) of this subsection if the sampling and analytical methods meet the accuracy and confidence levels of subsection (9) of this section.

(5) Negative initial determination. Where a determination, conducted under subsections (1), (2), and (3) of this section is made that no employee is exposed to airborne concentrations of lead at or above the action level the employer shall make a written record of such determination. The record shall include at least

WAC 296-155-17609 (Cont.)

the information specified in subsection (3)(a) of this section and shall also include the date of determination, location within the worksite, and the name and social security number of each employee monitored.

(6) Frequency.

(a) If the initial determination reveals employee exposure to be below the action level further exposure determination need not be repeated except as otherwise provided in subsection (7) of this section.

(b) If the initial determination or subsequent determination reveals employee exposure to be at or above the action level but at or below the PEL the employer shall perform monitoring in accordance with this section at least every 6 months. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are below the action level at which time the employer may discontinue monitoring for that employee except as otherwise provided in subsection (7) of this section.

(c) If the initial determination reveals that employee exposure is above the PEL the employer shall perform monitoring quarterly. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are at or below the PEL but at or above the action level at which time the employer shall repeat monitoring for that employee at the frequency specified in subdivision (b) of this subsection, except as otherwise provided in subsection (7) of this section. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are below the action level at which time the employer may discontinue monitoring for that employee except as otherwise provided in subsection (7) of this section.

(7) Additional exposure assessments. Whenever there has been a change of equipment, process, control, personnel or a new task has been initiated that may result in additional employees being exposed to lead at or above the action level or may result in employees already exposed at or above the action level being exposed above the PEL, the employer shall conduct additional monitoring in accordance with this section.

(8) Employee notification.

(a) Within 5 working days after completion of the exposure assessment the employer shall notify each employee in writing of the results which represent that employee's exposure.

(b) Whenever the results indicate that the representative employee exposure, without regard to respirators, is at or above the PEL the employer shall include in the written notice a statement that the employees exposure was at or above that level and a description of the corrective action taken or to be taken to reduce exposure to below that level.

(9) Accuracy of measurement. The employer shall use a method of monitoring and analysis which has an accuracy (to a confidence level of 95%) of not less than plus or minus 25 percent for airborne concentrations of lead equal to or greater than 30 $\mu g/m^3$.

[Statutory Authority: RCW 49.17.010, .040, .050. 01-11-038 (Order 99-36), § 296-155-17609, filed 05/09/01, effective 09/01/01. Statutory Authority: Chapter 49.17 RCW. 93-22-054 (Order 93-07), § 296-155-17609, filed 10/29/93, effective 12/10/93.]

WAC 296-155-17619 Hygiene facilities and practices.

(1) The employer shall assure that in areas where employees are exposed to lead above the PEL without regard to the use of respirators, food or beverage is not present or consumed, tobacco products are not present or used, and cosmetics are not applied.

(2) Change areas.

(a) The employer shall provide clean change areas for employees whose airborne exposure to lead is above the PEL, and as protection for employees performing tasks as specified in WAC 296-155-17609(2), without regard to the use of respirators.

(b) The employer shall assure that change areas are equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.

(c) The employer shall assure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the work shift.

(3) Showers.

(a) The employer shall provide shower facilities, where feasible, for use by employees whose airborne exposure to lead is above the PEL.

(b) The employer shall assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees.

(4) Eating facilities.

(a) The employer shall provide lunchroom facilities or eating areas for employees whose airborne exposure to lead is above the PEL, without regard to the use of respirators.

(b) The employer shall assure that lunchroom facilities or eating areas are as free as practicable from lead contamination and are readily accessible to employees.

(c) The employer shall assure that employees whose airborne exposure to lead is above the PEL, without regard to the use of a respirator, wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

(d) The employer shall assure that employees do not enter lunchroom facilities or eating areas with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, downdraft booth, or other cleaning method that limits dispersion of lead dust.

(5) Hand washing facilities.

(a) The employer shall provide adequate handwashing facilities for use by employees exposed to lead in accordance with WAC 296-155-140.

(b) Where showers are not provided the employer shall assure that employees wash their hands and face at the end of the work-shift.

[Statutory Authority: Chapter 49.17 RCW. 93-22-054 (Order 93-07), § 296-155-17619, filed 10/29/93, effective 12/10/93.]

WAC 296-155-17621 Medical surveillance.

(1) General.

(a) The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

(b) The employer shall institute a medical surveillance program in accordance with subsections (2) and (3) of this section for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months;

(c) The employer shall assure that all medical examinations and procedures are performed by or under the supervision of a licensed physician.

(d) The employer shall make available the required medical surveillance including multiple physician review under subsection (3)(c) without cost to employees and at a reasonable time and place.

(2) Biological monitoring.

(a) Blood lead and ZPP level sampling and analysis. The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered by subsection (1)(a) and (b) of this section on the following schedule:

(i) For each employee covered by subsection (1)(b) of this section, at least every 2 months for the first 6 months and every 6 months thereafter;

(ii) For each employee covered by subsection (1)(a) or (b) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 μg/dl, at least every two months. This frequency shall continue until two consecutive blood samples and analyses indicate a blood lead level below 40 μg/dl; and

(iii) For each employee who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period.

(b) Follow-up blood sampling tests. Whenever the results of a blood lead level test indicate that an employee's blood lead level exceeds the numerical criterion for medical removal under WAC 296-155-17623 (1)(a), the employer shall provide a second (follow-up) blood sampling test within two weeks after the employer receives the results of the first blood sampling test.

(c) Accuracy of blood lead level sampling and analysis. Blood lead level sampling and analysis provided pursuant to this WAC 296-155-176 shall have an accuracy (to a confidence level of 95 percent) within plus or minus 15 percent or 6 μg/dl, whichever is greater, and shall be conducted by a laboratory approved by OSHA.

(d) Employee notification.

(i) Within five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of their blood lead level; and

WAC 296-155-17621 (Cont.)

(ii) The employer shall notify each employee whose blood lead level exceeds 40 μg/dl that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level exceeds the numerical criterion for medical removal under WAC 296-155-17623(1)(a).

(3) Medical examinations and consultations.

(a) Frequency. The employer shall make available medical examinations and consultations to each employee covered by subsection (1)(b) of this section on the following schedule:

(i) At least annually for each employee for whom a blood sampling test conducted at any time during the preceding 12 months indicated a blood lead level at or above 40 μg/dl;

(ii) As soon as possible, upon notification by an employee either that the employee has developed signs or symptoms commonly associated with lead intoxication, that the employee desires medical advice concerning the effects of current or past exposure to lead on the employee's ability to procreate a healthy child, that the employee is pregnant, or that the employee has demonstrated difficulty in breathing during a respirator fitting test or during use; and

(iii) As medically appropriate for each employee either removed from exposure to lead due to a risk of sustaining material impairment to health, or otherwise limited pursuant to a final medical determination.

(b) Content. The content of medical examinations made available pursuant to subdivision (a)(ii) and (iii) of this subsection shall be determined by an examining physician and, if requested by an employee, shall include pregnancy testing or laboratory evaluation of male fertility. Medical examinations made available pursuant to subdivision (a)(i) of this subsection shall include the following elements:

(i) A detailed work history and a medical history, with particular attention to past lead exposure (occupational and non-occupational), personal habits (smoking, hygiene), and past gastrointestinal, hematologic, renal, cardiovascular, reproductive and neurological problems;

(ii) A thorough physical examination, with particular attention to teeth, gums, hematologic, gastrointestinal, renal, cardiovascular, and neurological systems. Pulmonary status should be evaluated if respiratory protection will be used;

(iii) A blood pressure measurement;

(iv) A blood sample and analysis which determines:

(A) Blood lead level;

(B) Hemoglobin and hematocrit determinations, red cell indices, and examination of peripheral smear morphology;

(C) Zinc protoporphyrin;

WAC 296-155-17621 (Cont.)

(D) Blood urea nitrogen; and,

(E) Serum creatinine;

(v) A routine urinalysis with microscopic examination; and

(vi) Any laboratory or other test relevant to lead exposure which the examining physician deems necessary by sound medical practice.

(c) Multiple physician review mechanism.

(i) If the employer selects the initial physician who conducts any medical examination or consultation provided to an employee by WAC 296-155-176, the employee may designate a second physician:

(A) To review any findings, determinations or recommendations of the initial physician; and

(B) To conduct such examinations, consultations, and laboratory tests as the second physician deems necessary to facilitate this review.

(ii) The employer shall promptly notify an employee of the right to seek a second medical opinion after each occasion that an initial physician conducts a medical examination or consultation pursuant to WAC 296-155-176. The employer may condition its participation in, and payment for, the multiple physician review mechanism upon the employee doing the following within fifteen days after receipt of the foregoing notification, or receipt of the initial physician's written opinion, whichever is later:

(A) The employee informing the employer that they intend to seek a second medical opinion; and

(B) The employee initiating steps to make an appointment with a second physician.

(iii) If the findings, determinations or recommendations of the second physician differ from those of the initial physician, then the employer and the employee shall assure that efforts are made for the two physicians to resolve any disagreement.

(iv) If the two physicians have been unable to quickly resolve their disagreement, then the employer and the employee through their respective physicians shall designate a third physician:

(A) To review any findings, determinations or recommendations of the prior physicians; and

(B) To conduct such examinations, consultations, laboratory tests and discussions with the prior physicians as the third physician deems necessary to resolve the disagreement of the prior physicians.

WAC 296-155-17621 (Cont.)

(v) The employer shall act consistent with the findings, determinations and recommendations of the third physician, unless the employer and the employee reach an agreement which is otherwise consistent with the recommendations of at least one of the three physicians.

(d) Information provided to examining and consulting physicians.

(i) The employer shall provide an initial physician conducting a medical examination or consultation under WAC 296-155-176 with the following information:

(A) A copy of this regulation for lead including all Appendices;

(B) A description of the affected employee's duties as they relate to the employee's exposure;

(C) The employee's exposure level or anticipated exposure level to lead and to any other toxic substance (if applicable);

(D) A description of any personal protective equipment used or to be used;

(E) Prior blood lead determinations; and

(F) All prior written medical opinions concerning the employee in the employer's possession or control.

(ii) The employer shall provide the foregoing information to a second or third physician conducting a medical examination or consultation under WAC 296-155-176 upon request either by the second or third physician, or by the employee.

(e) Written medical opinions.

(i) The employer shall obtain and furnish the employee with a copy of a written medical opinion from each examining or consulting physician which contains only the following information:

(A) The physician's opinion as to whether the employee has any detected medical condition which would place the employee at increased risk of material impairment of the employee's health from exposure to lead;

(B) Any recommended special protective measures to be provided to the employee, or limitations to be placed upon the employee's exposure to lead;

(C) Any recommended limitation upon the employee's use of respirators, including a determination of whether the employee can wear a powered air purifying respirator if a physician determines that the employee cannot wear a negative pressure respirator; and

(D) The results of the blood lead determinations.

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(ii) The employer shall instruct each examining and consulting physician to:

(A) Not reveal either in the written opinion or orally, or in any other means of communication with the employer, findings, including laboratory results, or diagnoses unrelated to an employee's occupational exposure to lead; and

(B) Advise the employee of any medical condition, occupational or nonoccupational, which dictates further medical examination or treatment.

(f) Alternate physician determination mechanisms. The employer and an employee or authorized employee representative may agree upon the use of any alternate physician determination mechanism in lieu of the multiple physician review mechanism provided by subdivision (c) of this subsection so long as the alternate mechanism is as expeditious and protective as the requirements contained in this section.

(4) Chelation.

(a) The employer shall assure that any person whom he retains, employs, supervises or controls does not engage in prophylactic chelation of any employee at any time.

(b) If therapeutic or diagnostic chelation is to be performed by any person in subdivision (a) of this subsection, the employer shall assure that it be done under the supervision of a licensed physician in a clinical setting with thorough and appropriate medical monitoring and that the employee is notified in writing prior to its occurrence.

[Statutory Authority: Chapter 49.17 RCW. 93-22-054 (Order 93-07), § 296-155-17621, filed 10/29/93, effective 12/10/93.]

WAC 296-155-17623 Medical removal protection.

(1) Temporary medical removal and return of an employee.

(a) Temporary removal due to elevated blood lead level. The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to WAC 296-155-176 indicate that the employee's blood lead level is at or above 50 μg/dl; and

(b) Temporary removal due to a final medical determination.

(i) The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a final medical determination results in a medical finding, determination, or opinion that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

(ii) For the purposes of WAC 296-155-176, the phrase **"final medical determination"** means the written medical opinion on the employees' health status by the examining physician or, where relevant, the outcome of the multiple physician review mechanism or alternate medical determination mechanism used pursuant to the medical surveillance provisions of WAC 296-155-176.