

NO. 37082-4-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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ELDER DEMOLITION,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR  
AND INDUSTRIES,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 20 PM 1:13  
STATE OF WASHINGTON  
BY DEPUTY

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Appeal from Superior Court of Pierce County

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

Elder Demolition, respectfully asserts that the Board of Industrial Insurance Appeals erred in concluding that Elder Demolition committed “serious” violations because the Department failed to offer substantive evidence that employees were exposed to serious hazards. Additionally, the Board of Industrial Insurance Appeals erred in concluding as a matter of law that Items 1-1a, 1-1b and 1-1c were “willful” violations as set forth in Finding of Fact No. 18 and Conclusion of Law 5.

## **II. ISSUES**

- A. Where there was no substantive testimony demonstrating that any workers were exposed to a serious hazard, did the Board err as a matter of law by concluding that the Department established all prima facie elements of a “serious” violation under RCW 49.17.180(6)?
- B. Where the Industrial Appeals Judge imputed knowledge of lead based paint to the manager, did the Board err by concluding as a matter of law that violation Item 1-1(a) through 1-1(c) were “willful” violations?

## **III. PROCEDURAL BACKGROUND**

This is an administrative review of a WISHA citation issued by the Department of Labor & Industries. After an

administrative hearing, Industrial Appeals Judge Richard J. Mackey issued a Proposed Decision & Order on September 26, 2006. The Employer filed a Petition for Review, but the Board of Industrial Insurance Appeals denied the Petition and adopted the Proposed Decision & Order as a final order of the Board on November 20, 2006. The Employer filed an appeal to the Cowlitz County Superior Court. The Superior Court affirmed the Board's Proposed Decision and Order on October 25, 2007. An appeal was then filed by the Employer to this Court on November 20, 2007.

#### **IV. STATEMENT OF FACTS**

##### **A. Port of Kalama Project**

In October 2004 the Port of Kalama started a WSDOT project to renovate its grain operations. Historically, rail cars were "tipped" up to unload its cargo of grain. This method of removing grain from the cars, however, was discontinued several years ago and the tipper has not been in operation in recent years.

After receiving a grant from the Washington State Department of Transportation (WSDOT), the Port of Kalama contracted with Hollinger Construction, a general contractor, to renovate the Port. This demolition project included removal

of the rail car tipper. Hollinger hired Elder Demolition to engage in the demolition work. Even though work started on October 12, 2004, the contract was not signed by JD Elder until October 20, 2004 and October 26, 2004 by a representative from Hollinger Construction. Exhibit 23. As noted in Exhibit 23, provision 2 on the second page provides liquidated damages of \$2,000.00 per day the work was delayed beyond the time fixed for completion or the extension date. The completion date set forth in the Subcontract was December 31, 2004. However, after lead was discovered, the completion date was extended and no liquidated damages were imposed on either Hollinger or Elder Demolition after lead was discovered on site.

Mark Wilson, a representative from the Port testified that it is common for the completion date to be extended and for additional funds to be allocated for environmental hazard issues that are discovered during construction that were not anticipated at the start of a project. Moreover, for the grain project, Mr. Wilson testified that good cause was presented to extend the completion date and provide additional funding for a lead abatement contractor to remove lead to allow the demolition to continue.

**B. Lead was Not Part of the Project**

On or about October 12, 2004, Elder Demolition foreman Josh Malone contacted the Hollinger superintendent and asked if they were dealing with lead at the project. Rick Vroom, a Hollinger representative, reviewed the contract documents and noted that lead was not covered in the scope of the contract. He advised Al Kackman:

“To my knowledge there is no lead paint in the project. I am sending an e-mail to the Owner asking the question.”

Exhibit 10, e-mail dated October 12, 2004 at 1:44 PM.

At 3:06 PM on October 12, 2004, Al Kackman sent an e-mail back to Rick Vroom and stated:

“By law the owner of the property must provide us with a copy of the hazardous material survey for the entire building before we start work. If it is all right with you I will have Josh ask for this document and review it for the information on the paint in the rail tipper pit. If this information does not exist, or denotes the presence of lead paint, we will proceed according to the applicable regulations.

I will have Josh Malone pull a sample of the paint and bring it home with him tonight, so we can have it analyzed if the survey does not address it.”

*See Exhibit 10.*

Josh Malone took a paint sample and bagged it up and provided it to a delivery driver to give to Al Kackman. Mr. Malone had no knowledge when it was actually delivered to Mr. Kackman, whether it was delivered to him in person or left at Mr. Kackman's work station, or when Mr. Kackman first saw the sample.

Mr. Kackman testified that prior to the start of the project he had a conversation with Mark Wilson. During this conversation, he was advised that there were no hazardous materials that they were dealing with for this project. There was specifically no discussion of paint or lead based paint on the tipper.

Mr. Kackman is not an industrial hygienist and he does not have any background in that area. Kackman at page 33, line 39. Under the belief that no lead was present at this jobsite, Mr. Kackman testified that he talked to Mr. Wilson and requested a letter from the Port indicating that lead was not present. Mr. Kackman believed at that time that such a letter from the Port indicating that lead was not present was a legal alternative to a good faith hazardous material survey. At page 38, line 47 through page 39, line 37, Mr. Kackman testified as follows:

Q. Now, at the time of this project, did you

think it was necessary to treat the paint as if it were a trigger task when you first began to torch, or when Elder Demolition first began to torch cut on the paint?

A. No.

Q. And at that point in time, did you believe that the lead standards applied to the Port of Kalama project?

A. No.

Q. Did you substitute your judgment for that of any lead regulation or lead standard?

A. No.

Q. Is that because you didn't realize that the lead standards applied to this situation?

A. No.

Q. And do you now understand that you either have to treat the paint as if it contained lead or wait until a good faith survey is provided in writing?

A. I do understand that now.

Q. Did you understand that at the time the project first began and when you were working with the Port on this project?

A. No.

Before starting work, Mr. Kackman asked if there was a hazardous material survey. When he was advised that there was none on the site, he was advised that Mr. Wilson would write a letter indicating that no hazardous materials were on

the site. Kackman at page 18, lines 1-4.

In the meantime, Mr. Kackman asked Josh Malone to get a paint sample so that it could be tested. Even though he did not believe that any hazardous materials were on site, he asked for the sample to be taken to reassure the employees that there was no lead on site. Kackman, page 26, lines 1-3.

He testified, however, that after the project was shut down by WISHA, he later learned that the project could not continue until he actually received a hazardous material survey. Kackman, page 39, lines 23 – 39.

Mr. Kackman testified that the paint sample that he requested Josh Malone to take was left on his planning desk and that he intended to drop the paint sample off to the laboratory. However, with a busy schedule, he remembered while driving on a bridge that he had forgotten to drop the sample off. At that time, he relied on the representations made by the Port that the project would not involve any hazardous material.

Mr. Kackman further testified that a liquidated damages provision is common in the construction industry. Moreover, because the completion date is routinely extended, he was not concerned about the liquidated damages provision when the paint became an issue.

Mr. JD Elder testified that he is the owner of Elder Demolition. He had no active role in this project as it was a small project and his company had many other projects in 2004.

Mr. Elder further testified that liquidated damages are common contractual provisions in the construction industry, and that he had never been assessed a penalty for liquidated damages for not completing a job on time. He also testified that it is common for the completion date to be extended and additional funds to be allocated for hazardous material removal. In fact, pursuant to the request set forth in Exhibit 11, additional funds and time to complete were provided. No liquidated damages were imposed because of the delay for lead issues in this project.

After the project began on October 12, 2004, three employees of Elder Demolition began torch cutting operations on the tipper. However, it is not clear when the torch cutting on paint actually began. Josh Malone testified that in places there was no paint, in other places, his crew torch cut on areas that contained paint. For work performed prior to October 22, 2004, there was no testimony regarding the length of material cut, the thickness of the steel, the amount of time it took to cut through, the amount of paint involved in the torch cutting, or the color of the paint. Exhibits 27, 28, and 30 however, show

areas where orange color paint was torch cut, but no other details were provided. Exhibit 29 shows other portions of the tipper that were torch cut as of October 18, 2004, but it does not appear that those portions had any paint on the areas where torch cutting actually took place.

No air samples were taken prior to October 22, 2004. Mr. Josh Malone testified that the conditions were not the same when Ms. Drapeau performed air monitoring sampling on October 22, 2004, as compared to the torch cutting conditions when torch cutting took place the week prior. In particular, Mr. Malone testified that good ventilation was provided in the first week as compared to the air monitoring sample that was performed on October 22, 2004.

Exhibit 30 shows a positive lead wipe sample. Ms. Cheryl Christian, an expert called by the Department, however, testified that the lead wipe test is a qualitative test that does not provide the “quantity” of lead. Lead as low as .5% can be detected, but the color metric test does not give a specific percentage of lead. A quantitative test is necessary to determine the actual percentage of lead in the substance.

Additionally, Ms. Christian specifically agreed to the following points:

- Subcontractors customarily rely on reasonable

representations made by general contractors.

- If there is no lead at a project, a contractor can safely believe that its employees will not be exposed to lead over the PEL.
- WAC 296-155-17609(2)(b) contains the language:

*where the employer has any reason to believe that an employee performing the task may be exposed to lead in excess of the PEL...*

- This phrase in this section means that if an employer has any reason to believe that exposure may be over the PEL, the employer must perform an exposure assessment and implement the interim protective measures.
- But, if an employer has no reason to believe that the employees will be exposed to lead in excess of the PEL, then the exposure assessment and interim protection measures are not required.

### **C. Citations Issued by the Department**

The Department issued one willful violation against Elder Demolition, 14 “serious” violations, and 5 “general” violations. The citations may be summarized as follows:

1-1(a) WAC 296-155-17607(1) “Willful” \$18,000.00

The Employer did not prevent employees from being exposed to lead at concentrations greater than 50 micrograms per cubic meter of air over an 8 hour TWA.

Five workers performed torch cutting on lead based paint using inadequate safe work practices and personal protective equipment and at times no respiratory protection during the 1<sup>st</sup> week of demolition at United Harvest LLC located in Kalama , WA.

1-1(b)WAC 296-155-17609(1)(a)

The Employer did not initially determine if any employee may be exposed to lead at or above the AL while workers were using oxygen plasma cutting torches to cut out old rail car tipper equipment at the United Harvest grain handling facility in Kalama from 10/12/04 to 10/18/04.

1-1c WAC 296-155-775(9)

The Employer did not sample for hazardous materials (lead paint) before starting demolition work. A crew of five workers were using 2 oxygen plasma cutting torches and burned several hundred linear feet of lead based paint without using personal protective equipment. A paint sample taken on 10/12/04 was not analyzed until 10/19/04 and consequently five workers developed serious blood lead levels ranging from 41 to 71 ug/dl.

“Serious” violations:

2-1a WAC 296 155-17609(2)(e)(i) [Respiratory Protection]

The Employer did not use appropriate respirator until initial trigger tasks were tested and could establish that air monitoring was less than 2,500 ug/m3.

2-1b WAC 296-155-17613(3)(a) [Respiratory Protection]

The Employer did not ensure that workers used at a minimum a half face supplied air respirator in positive pressure mode.

**This Item was vacated by the IAJ.**

2-2a WAC 296-155-17609(2)(c)(i) “Serious” .....  
[Personal Protective Equipment]

The Employer did not ensure that proper personal protective clothing was worn during the initial trigger task.

2-2b WAC 296-155-17615(1)(a) [Personal Protective Equipment]

The Employer did not ensure that coveralls or similar full body work clothing was worn when employees are exposed to lead above the PEL.

**This Item was vacated by the IAJ.**

2-2c WAC 296-155-17615(1)(b) [Personal Protective Equipment]

The Employer did not ensure that gloves, hats and shoes or disposable shoe coverlets were provided and used when exposure to lead is above the PEL.

**This Item was vacated by the IAJ.**

2-3 WAC 296-155-17611(1) [Work practices for lead]

The Employer did not implement engineering and work practice controls to reduce lead exposure below the PEL.

2-4 WAC 296-155-17611(2)(c) [Work practices for lead]

The Employer did not ensure that a competent person conduct frequent and regular inspections of job sites.

2-5a WAC 296-155-17609(2)(c)(iv) [Training on lead]

The Employer did not provide specific lead hazard or respiratory protection training until an exposure assessment was performed demonstrating that lead exposures were below the PEL.

2-5b WAC 296-800-17030 [Training on lead]

The Employer did not ensure that the employees were provided effective information on hazardous chemicals in their work area at the time of initial job assignment.

2-6 WAC 296-155-17619(3)(a) [Personal Hygiene: handwashing, showers]

The Employer did not ensure that shower facilities were provided to workers exposed to lead above the PEL.

2-7a WAC 296-155-17609(2)(e)(iv) [Personal Hygiene: handwashing, showers]

The Employer did not ensure that handwashing facilities were provided for workers performing trigger tasks.

**This Item was vacated by the IAJ.**

2-7b WAC 296-155-17619(5)(a) [Personal Hygiene: handwashing, showers]

The Employer did not ensure that adequate handwashing facilities were provided and used while performing trigger tasks.

**This Item was vacated by the IAJ.**

2-7c WAC 296-155-140(2)(a)  
[Personal Hygiene: handwashing, showers]

The Employer did not ensure that clean tepid water was provided to employees.

**This Item was vacated by the IAJ.**

2-7d WAC 296-155-140(5)(c)(ii) [Personal Hygiene: handwashing, showers]

The Employer did not ensure that washing facilities were provided as close as practical to the highest concentration of employees and that they are located within 200 feet horizontally of all employees.

**This Item was vacated by the IAJ.**

2-8a WAC 296-155-17609(2)(e)(ii) [Personal Protective Equipment]

The Employer did not ensure that change areas were provided during trigger task activities.

2-8b WAC 296-155-17619(2)(a) [Personal Hygiene: handwashing, showers]

The Employer did not provide clean change areas for employees whose airborne exposure to lead was above the PEL.

**This Item was vacated by the IAJ.**

2-9 WAC 296-155-17619(2)(c) [Personal Hygiene: handwashing, showers]

The Employer did not ensure that employees did not leave the workplace wearing any protective clothing that is required to be worn during the workshift.

2-10 WAC 296-842-18005 [Respiratory Protection]

The Employer did not ensure that employees had a proper seal around their respirators as they had facial hair that prevented a seal between the respirator and the face.

2-11 WAC 296-155-17611(2)(a) [Work practices for lead]

The Employer did not establish and implement all elements of a written lead compliance program.

2-12 WAC 296-155-17617(1)

The Employer did not ensure that all surfaces were maintained as free as practicable of accumulations of lead.

**This Item was vacated by the IAJ.**

2-13a WAC 296-155-17609(2)(e)(v) [Biological monitoring]

The Employer did not provide biological monitoring or, blood sampling for lead and zinc protoporphyrin levels for workers performing trigger tasks for lead.

2-13b WAC 296-155-17621(1)(a) [Biological monitoring]

The Employer did not make the initial medical surveillance results to employees.

**This Item was vacated by the IAJ.**

2-13c WAC 296-155-17621(2)(a) [Biological monitoring]

The Employer did not make available biological monitoring results in the form of blood sampling or analysis for lead and zinc protoporphyrin levels for each employee.

**This Item was vacated by the IAJ.**

2-14 WAC 296-842-12005(1) [Respiratory Protection]

The Employer's worksite specific written respirator program did not cover all of the required elements listed in Table 3 of the standard.

## V. ARGUMENT

**A. Standard of Review**

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

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

(Emphasis added).

The Board's conclusions must also be based on its findings of fact. *Martinez Melgoza & Associates v. Department of Labor & Industries*, 125 Wn. App 1004. Based on this standard, for the reasons set forth below the Employer respectfully asserts that there was no substantial evidence in the record.

**B. The Department Has the Burden of Proving all prima facie elements under RCW 49.17.180(6) to cite a "serious" WISHA Violation.**

Washington was granted authority by the federal government to administer the Occupational Safety and Health Act as a state plan administrator. As such, the Washington State Department of Labor & Industries has statutory authority to issue a serious citation and levy a monetary penalty for serious violations of a WISHA safety or health code.

However, the ability to issue a serious citation is not without limit. Not only must the Department establish that an employee was exposed to a serious hazard (one that could cause serious bodily injury or death), the Department must also establish that the cited Employer either knew, or should have known of the presence of the violation. In relevant part, RCW 49.17.180(6) declares:

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

(Emphasis added).

As WISHA is required to be as effective as the federal OSHA counterpart, Washington courts will consider decisions interpreting OSHA to protect the health and safety of all workers. *Adkins v. Aluminum Company*, 110 Wn.2d 128, 147 (1988). Federal case law is similar to RCW 49.17.180(6). In order to prove that an Employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the Employer either knew of the

violative conditions or could have known with the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD. In a significant decision, the Board held in *Olympia Glass Company*, 95 W445 (1996), that, the Department bears the burden of proof in WISHA cases. The Board declared:

[I]n appeals filed under the Washington Industrial Safety and Health Act (WISHA), it is the Department who has the burden of proving both the existence of a violation and the appropriateness of the resulting penalty. WAC 296-12-115(2)(b). An employer is not required to prove the Department acted arbitrarily in order to prevail in an appeal. Our decision on appeal must determine whether there is sufficient evidence in the record to affirm the Department's citation and the resulting penalty.

(Emphasis added).

Federal case law has interpreted statutes substantially similar to RCW 49.17.180(6). The Occupational Safety and Health Review Commission has provided guidance with regard to the Department's requirement to affirmatively establish the "knowledge" element necessary to support a safety and health citation. *See e.g., Secretary of Labor v. Donohue Industries, Inc.*, Docket No. 99-0191 (2003). In *Donohue*, the Commission explicitly recognize that, "Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations".

*Donohue, citing Trinity Indus., Inc., v. OSHRC*, 206 F.3d 539, 542 (5<sup>th</sup> Cir. 2000). “To prove the knowledge element of its burden, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of the non-complying condition”. *Donohue*, 206 F.3d at 542.

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

Furthermore, in a significant decision, the Board held in *Olympia Glass Company*, 95 W445, that, the Department bears the burden of proof in WISHA cases. The Board declared:

[I]n appeals filed under the Washington Industrial Safety and Health Act (WISHA), it is the Department who has the burden of proving both the existence of a violation and the appropriateness of the resulting penalty. WAC 296-12-115(2)(b). An employer is not required to prove the Department acted arbitrarily in order to prevail in an appeal. Our decision on appeal must determine whether there is sufficient evidence in the record to affirm the Department's citation and the resulting penalty.

If any one element of HECK is missing, the

Department's citation must be vacated.

**1. Hazard**

As noted in RCW 49.17.180(6), in order to establish a "serious" violation, the Department must demonstrate that there was a hazard capable of causing serious bodily harm or death. **The Department did not prove that employees were actually exposed to lead over the PEL for work conducted prior to the day of inspection.**

The Department freely admits that it took no air sampling, nor did it have any air sampling data for the work actually performed during the first week of operations. This is critical as the Department only alleged that the alleged violations took place during the first week of operations. Although the Department took air monitoring samples on October 22, 2004, the conditions were not the same.

This is essential because the Department's own expert agreed that testing conditions must be representative of the activity alleged to produce the overexposure. Ms. Christian agreed that ventilation, the material being cut, the amount being torched and the content of lead based paint must be similar to provide any opinion as to whether the sampling on October 22, 2004 was representative of the activities that took place during the week of October 12, 2004.

As previously noted, the Department bears the burden of proof to establish the underlying violations. Clearly, the Department must prove by a preponderance of the evidence that the workers were exposed to lead above the PEL in order to demonstrate that they were exposed to a hazard. If the Elder Demolition employees were doing work substantially similar to the work activities and working conditions on the 12<sup>th</sup> as they were on the 22<sup>nd</sup>, then the Department could establish by circumstantial evidence that the workers would also have been exposed to lead above the PEL during the week of October 12, 2004. However, since the conditions and material was different, and the Department has provided no evidence that the material contained lead based paint, the degree or amount of lead, and the amount of time that employees were actually torch cutting, the Department cannot establish that employees were exposed over the PEL for an 8 hour TWA.

Accordingly, the Department has failed to meet its burden that there was a serious hazard as required by RCW 49.17.180(6).

## **2. Exposure**

Similar to the arguments above, if there is no proven hazardous condition, there can be no Employee exposure to a hazardous condition. It is the Department's burden to prove a hazard and employee exposure to a hazard to prove a WISHA

violation, and the Department failed to document and persuasively testify to be vacated because of a failure to prove employee exposure.

### 3. Code

The Employer concedes that the WAC code provisions cited by the Department are appropriate for the nature of the work being performed, and that such WAC regulations were indeed required to be followed by Elder Demolition.

### 4. Knowledge

Knowledge is a necessary element of RCW 49.17.180(6). As set forth under RCW 49.17.180(6) and federal case law interpreting OSHA statutory requirements, the Department of Labor & Industries must establish that either Elder Demolition had actual knowledge of the lead exposure violations, or that it failed to meet its duty of care in exercising due diligence in order to establish constructive knowledge of the violation. As noted above, RCW 49.17.180(6) declares:

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

**the presence of the violation.**

Under federal law, 29 USC 666(k) requires the Secretary of Labor is required to prove the employer had either actual or constructive knowledge of the violation in order to establish a violation. In almost exactly the same language as its state counterpart, 29 USC 666(k) declares:

(k) Determination of serious violation

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

In interpreting WISHA regulations in the absence of state decisions, Washington courts look to the federal Occupational and Health Administration (OSHA) regulations and consistent federal decisions. *WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries*, 137 Wn. App. 592, 604 (2007). *Inland Foundry Co. v. State of WA Dept. of Labor & Industries*, 106 Wn. App. 333, 427 (2001).

Proving employer knowledge is a strict obligation of the

Department as part of its *prima facie* case. *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6<sup>th</sup> Cir.) *cert. denied*, 484 U.S. 989 (1987). *See also, Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32, 053, p.48,003 (No. 96-1719, 2000) (Secretary bears burden of proof on actual or constructive knowledge). The Review Commission and courts have consistently held that knowledge is an essential element of the Secretary's burden of proof. *See Secretary of Labor v. Milliken & Co.*, 14 BNA OSHC 2079, 2080, 2082-2084 (Rev. Comm. 1991) *affirmed sub nom, Secretary of Labor v. OSHRC and Milliken & Co.*, 947 F.2d 1483, 1484 (11<sup>th</sup> Cir. 1991), *Secretary of Labor v. General Electric Company*, 9 BNA OSHC 1722, 1728 (Rev. Comm. 1981). This obligation cannot be ignored or shifted away from the Department.

In *Trinity Industries, Inc. v. Occupational Safety and Health Review Commission*, 206 F.3d 539, (5<sup>th</sup> Cir. 2000). The Fifth Circuit of the US Court of Appeals held that under 29 USC 666(k), the Secretary has the initial burden of proving all *prima facie* elements. With regards to the requisite element of knowledge, the court held at page 542:

“To prove the knowledge element of its burden, the Secretary must show that the employer knew of, or with exercise of reasonable diligence could have known of the non-complying condition.”

In *Trinity*, the Secretary alleged that a contaminant was above the Permissible Exposure Levels. However, because the employer demonstrated that it had made measurements and determined that the concentration was not excessive, the burden was on the Secretary to show that the employer's failure to discover the excessive concentration resulted from a failure to exercise reasonable diligence.

To impute knowledge to an employer of an alleged hazard, the hazard must be specifically known to the employer—"it is not enough to find that a condition contravening that standard existed in the employer's workplace. In federal OSHA cases, the Secretary must also prove that the employer either knew or could have known with the exercise of reasonable diligence of the **noncomplying condition.**" (emphasis added) *Dunlop v. Rockwell International*, 540 F.2d 1283 [4 OSHC 1606] (6<sup>th</sup> Cir. 1976); *Alsea Lumber Co.*, 511 F.2d 1139 [2 OSHC 1649] (9<sup>th</sup> Cir. 1975); *Prestressed Systems, Inc.*, OSHRC Docket No. 16147 [9 OSHC 1864]; *Scheel Construction Co.*, 76 OSAHRC 138/B6, 4 BNA OSHC 1825. From jobsite to jobsite the potential hazards can vary greatly and, for those various potential hazards, there can be multiple means of protective measures available. That is why initial jobsite walkarounds are

conducted to identify specific hazards that can be addressed with specific protective measures.

Where the safety violation was committed by a lead or supervisory worker, the knowledge element is not automatically imputed to the Employer. Under agency laws, the knowledge and actions of those in supervisory position can be imputed to their employers. However, knowledge is not automatically imputed to the Employer as the Secretary seeking to impute a supervisor's acts or omissions must show that the supervisor's conduct was reasonably foreseeable and thus preventable by the employer. *Brennan v. Occupational Safety and Health Review Commission*, 511 F.2d 1139 (9th Cir. 1975). The Ninth Circuit has expressly held:

“A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” *Id.* at 1142.

“The Secretary has at least the initial burden of establishing a prima facie case of employer knowledge before the burden of going forward shifts to the employer.” *Id.* at 1143.

**“Not requiring the Secretary to establish that an employer knew or should have known of the existence of an employee violation would in effect make the employer strictly and absolutely liable for all violations and would render meaningless the statutory requirement for employee compliance. *Id.* at 1145.**

“A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced system regime... Congress intended to require elimination only of preventable hazards.” *Id.* at 1145.

(Emphasis added).

The Ninth Circuit’s holding in *Brennan* has been adopted by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 10<sup>th</sup> Circuit Courts of Appeal. *Capital Electric Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982) the court held:

“In a case where the presence or absence of a violation essentially turns on alleged omissions by a supervisor, the burden of disproving unpreventable employee misconduct rests with the Secretary of Labor.” *Id.* at 129.

“When a standard requires an experienced, highly trained employee to make a judgment as to what equipment is necessary, the fact that the employer relies on the employee’s judgment does not amount to the forbidden practice of shifting responsibility for

compliance from the employer to the employee.” *Id.* at 131.

“There is little an employer can do to insure that the employee makes the proper judgment beyond providing adequate training and equipment, and explaining how to perform the job and what general hazards to avoid.” *Id.* at 131.

In *Pennsylvania. Power & Light Co. v. Occupational Safety & Health Review Commission*, 737 F.2d 350 (3rd Cir. 1982), the Court held:

“The prevailing view among the circuits is that the employer’s knowledge or ability to discover a violation is an element of the Secretary’s case-in-chief.” *Id.* at 358.

“The participation of the company’s own supervisory personnel may be evidence that an employer could have foreseen and prevented a violation through the exercise of reasonable diligence, but it will not, standing alone, end the inquiry into foreseeability.” *Id.* at 358.

“Employers should be encouraged to develop work rules that will reasonably respond to their particular working conditions and safety needs. An employer’s safety rules should be evaluated with that end in mind, and not with the myopic view toward literal conformance with OSHA regulations.” *Id.* at 358.

In *L.R. Wilson & Sons, Inc. v. Occupational Safety & Health Review Commission*, 134 F.3d 1235 (4th Cir. 1998), the Court held:

Burden-shifting was found to be in direct contravention of previous rulings and the court reversed the Commission's decision finding imputed knowledge of a violation due to a "lead man" position cannot place the burden of "good faith efforts squarely on the employer. *Id.* at 1240.

Finally, in *W.G. Yates & Sons Construction Co., v. Occupational Safety & Health Review Commission*, 459 F.3d 604, 609 (5th Cir. 2006) ), the Court held:

"A supervisor's knowledge of his own rogue conduct cannot be imputed to the employer; and consequently the element of employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor."

Federal case law interpreting 29 USC 666(k) makes it clear that Congress never intended the Occupational Safety and Health Act to impose strict liability on an employer. Rather, under the Act, an Employer is required to take reasonable precautions to address workplace safety. When the OSHA Act

was legislated, such strict liability upon the employers was specifically rejected and denounced by Congress:

- *General Electric Company v. OSAHRC*, 540 F.2d 67, 69 (2<sup>nd</sup> Cir. 1976) (“If the employer were a guarantor of the employee’s use [of protective equipment], a serious question would arise as to whether such an interpretation would exceed the legislative requirements.”)
- *Horne Plumbing and Heating Company v. OSAHRC*, 528 F.2d 564, 571 (5<sup>th</sup> Cir. 1976) (“[I]t was error to find Horne liable on an imputation theory for the unforeseeable, implausible, and therefore unpreventable acts of his employees. A contrary holding would not further the policies of the Act, and it would result in the imposition of a standard virtually indistinguishable from one of **strict or absolute liability, which Congress, through section 17(k), specifically eschewed.**”)
- *Dunlop v. Rockwell International*, 540 F.2d 1282, 1291-1292 (6<sup>th</sup> Cir. 1976) (“[I]t was not the **purpose of the Act to make an employer the insurer of the safety of his employees.** The Act is aimed at providing working men and women safe and healthful working conditions ‘so far as possible.’...**The Act asks employers to make a reasonable and diligent effort to comply with safety standards, neither the Secretary, the Commission, nor this Court can hold an employer to a higher standard.**”)

- *Ocean Electric Corporation v. Secretary of Labor*, 594 F.2d 396 (4<sup>th</sup> Cir. 1979) (“[I]mputation of a supervisor’s acts to the Company in each instance would frustrate the goals behind the Act. As the Commission correctly stated: ‘Such a holding would also not tend to promote the achievement of safer work places. **If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts**’”)

The Department of Labor & Industries’ administrative code regarding its burden of proof in WISHA cases is consistent with the above cited federal case law.

As there was no hazard established by the Department to which the employees were exposed to, the Department cannot allege actual knowledge of the cited hazard, nor can it impute constructive knowledge.

- C. A willful violation must show both a heightened state of awareness of the standard, as well as a deliberate or plain indifference to compliance with the standard.**

Under the facts submitted by the Department and theory of “willful” violations propounded by the Department, it is undisputed that no one from management was actually aware that lead was present in the paint. Because the requisite

element of actual knowledge is not established, the Department cannot meet its burden of proof that a willful violation occurred on October 12, 2004.

Both the Board of Industrial Insurance Appeals and the federal OSHA Review Commission have defined a willful violation as one which is “committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *The Erection Company*, BIIA Docket No. 88 W142 and *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD & 30,759, p. 42,740 (93-239, 1995), *aff’d*, 73 F.3d 1466 (8<sup>th</sup> Cir. 1996).

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

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

**(emphasis added).**

The Department provided its theory of why Item 1-1 was issued as a “willful” violation at page 75, lines 3 - 41 of Ms. Drapeau’s testimony:

Q. And, why did you determine that the classification should be willful?

A. Based on the, umm, facts of the case, employee interviews. The Employer's own written program prohibits, umm, torch cutting on lead-based paint, or paint that is – or lead – sealed surfaces that are painted without first test – testing for the presence of lead. They only allow manual demolition of, umm, materials that may contain lead paint. The foreman on the jobsite had questioned the presence of lead on the first day of the job and had been advised by his manager, Al Kackman, to proceed, even though they did not have knowledge of whether or not lead existed.

The issue – part of that issue was that they had three weeks to get that job done, and a sample had been submitted to, uhh, the manager, Al Kackman, and it was not, umm, addressed. I specifically asked Josh Malone if, uhh, he had called Al about the results; and he had. He said four, five times, at least, during that first week to find out what the results are. The sample was actually not submitted until the day after my inspection.”

The Department alleged two points: First, the written program provided knowledge of the correct way to proceed. Secondly, economic reasons allegedly provided the motivation to not comply. In essence, the Department argued that because it only had three weeks to conclude the project, or be faced

with liquidated damages, the Employer deliberately and intentionally chose not to comply with the lead regulations to avoid liquidated damages. The facts do not support either theory. **Moreover, the Department failed to establish the link between not submitting the samples in sooner for testing and intent or plain indifference to complying with the lead standards.**

In *Valdak Corp.*, the Commission set forth two elements necessary for the Secretary to establish a “willful” violation. First, the Secretary must establish that the Employer was “*actually aware*” that a violation was occurring. Second, the Employer must possess the state of mind of conscious disregard or plain indifference to the violation being committed. Alternatively, if the employer does not have actual knowledge of the OSHA standard, the Secretary must establish that even if the Employer was informed that a standard was being violated, that the Employer would still not care.

Although the two elements set forth in *Valdak* are different, it is clear that the second element is dependent on the first. That is, in order to distinguish a serious violation from a “willful” violation, an Employer cannot have a conscious state of mind to disregard the cited standard *unless it actually knows* that a violation is being committed. *See also Johnson Controls*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD &

30,018, p.41, 142 (No. 90-2179, 1993) (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1<sup>st</sup> Cir. 1987)).

Under the standard set forth in *Valdak Corp.*, supra, the Commission has distinguished a “serious” violation from a “willful” violation by the state of mind of the employer. According to the federal cases, it is not enough to show that an employer was aware of conduct or conditions constituting the alleged violation because such evidence is already necessary to establish any violation. The same is true under Washington law. See RCW 49.17.180(6). Rather, the Commission and the Board in *The Erection Company*, BIIA Docket No. 88 W142, have held that a willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference. In *Secretary of Labor v. B & B Plumbing, Inc.*, No. 99-0401 the Commission held:

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

The Commission has also held that a finding of willfulness is not justified where an employer has made a good faith effort to comply with the Act’s requirements, even

if the employer's efforts are not entirely effective or complete. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2139 (No. 90-1747, 1994).

Under well-established Commission precedent, an employer may defend against an initial showing that its state of mind was one of willfulness by providing evidence that shows that in fact it acted in good faith with respect to the requirements of the standard at issue. This evidence may take one of two forms: first, the employer may seek to establish that it had a good-faith belief that as a factual matter the conditions in its workplace conformed to OSHA requirements, *Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993); second, the employer may introduce evidence to show that it took steps or made efforts to comply with those requirements, *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996), *aff'd*, 122 F.3d 437 (7<sup>th</sup> Cir. 1997). In either case, the test of whether the employer demonstrated good faith is an objective one, *Morrison-Knudsen, Caterpillar*. Where the employer argues that it demonstrated good faith by attempting to comply with the standard, the question is whether the employer's efforts were objectively reasonable even though they were not totally effective in

protecting employees from the hazard. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7<sup>th</sup> Cir. 1997); *Tampa Shipyards*, 15 BNA OSHC at 1541, 1991-93 CCH OSHD at p. 40,104.

Several OSHRC cases provide examples of how an employer's efforts to comply with the standard, while not totally in compliance, precluded a willful violation. In *Mobil Oil Corp.*, 11 BNA OSHC 1700, 1701, 1983-84 CCH OSHD ¶ 26,699 (No. 79-4802, 1983), the Commission held that while guarding a six-foot area around a wax pit with a rope was not as effective or complete as completing the wall which surrounded most of the pit, it was sufficient to counter a willful charge. In *Wright & Lopez, Inc.*, 8 BNA OSHC 1261, 1262, 1266, 1980 CCH OSHD ¶ 24,419, pp. 29,774, 29,777 (No. 76-3743, 1980), the Commission found that where employer had installed partial shoring which did not extend to the bottom of the trench and was in the process of installing additional shoring when the trench collapsed, a violation for inadequately shored trench was found not to be willful although the employer had actual knowledge of the requirements of the standard and was aware that the trench was not properly shored. In *Williams Enterp., Inc.*, 4 BNA OSHC 1663, 1668, 1976-77 CCH OSHD ¶ 21,071, 25,362 (No. 4533, 1976), for a failure to secure a crane counterweight against toppling or

falling on an unstable street surface, the Commission held that the violation was not willful because the employer placed the counterweight on a wooden base which partially but not entirely compensated for the grade of the street.

Mr. Kackman may have not been diligent in assuring that the sample was submitted to the laboratory. However, this fact alone is not sufficient to find that the employer willfully violated the lead standards. Rather, there must be a link that Mr. Kackman was indifferent to sending in the sample or that he deliberately chose not to send in the sample **because he knew that if he sent them in the results would require him to take an action he did not want to take.**

**The only thing that the Department established was that Mr. Kackman failed to submit the sample sooner. It did not provide any aggravating circumstances to show why he did not send the sample in to support a “willful” violation.**

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

This Board has adopted the following definition of a “willful violation” under WISHA: “a willful violation is one involving voluntary action, done either with an

intentional disregard of or plain indifference to the requirements of the statute.” *In re R.L. Alia*, Dckt. No. 86 W024 (October 16, 1987). This is the definition set forth by the Court of Appeals for the Ninth Circuit in *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311 (9<sup>th</sup> Cir. 1979), which is used by the majority of the federal circuits, as well as the Occupational Safety and Health Review Commission.

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

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

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

Willfulness may also be established by an employer substituting its own judgment as to whether safety equipment or procedures are required in specific situations. In *Kent Nowlin Construction Co. v. OSHRC*, 593 F.2d 368 (10<sup>th</sup> Cir. 1979), the contractor intentionally chose to ignore regulations regarding the deposit and storage of excavated material, rather than close parallel traffic lanes. In another trench case, the foreman consciously decided not to shore a trench because of the attendant difficulty in the presence of a water main pipe. *F.X. Messina Construction Corp. v. OSHRC*, 505 F.2d 701 (1<sup>st</sup> Cir. 1974). In *Secretary of Labor v. Spaulding Lighting Inc.*, 13 OSHC 1847 (1988), an employer permitted a foreman to continue operating presses without safeguards or restraints for nearly three years after the first safety citation had been issued. The employer in *Secretary of Labor v. Aquastop Waterproofing & Painting Corp.*, 13 OSHC 2034

(1988), did not provide safety instruction to his employees, because he did not believe they needed to be instructed on how to do their jobs.

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

In the instant case, the Department’s CSHO offered the deliberate indifference theory to establish the “willful” characterization of Item 1-1. In cross examination, Ms. Drapeau specifically stated that the liquidated damages provision created the economic motivation of Elder Demolition not to treat the project as if it had lead based paint. The Department attempts to demonstrate that Elder Demolition *deliberately intended* not to comply with the lead standards for economic gain. Even though the CSHO did not mention any alternative theory, the Department, may nevertheless, attempt to argue that Elder *substituted its judgment* for that of the regulation by not waiting for the hazardous material survey

results before beginning the project after it discovered that there was paint on the areas to be torch cut.

The Department fails to prove the requisite mental element under either theory. First, under the deliberate intent theory, it was uncontroverted that the liquidated damages provision was not a factor that Elder Demolition was concerned of because the completion date is typically extended when potential hazardous materials or environmental issues that are beyond the scope of the contract are raised. The Department appears to rely on the original three week period that was targeted for completion of the demolition phase.

The Department's theory from a factual point does not demonstrate that liquidated damages was a motivating factor. The subcontract clearly was not executed until October 26, 2004, almost two week after the relevant time period in question. That is, at the time Elder was dealing with the paint issue, there were no liquidated damages provision in existence at the time. Moreover, completion dates for these issues are routinely granted, and the Port's representative clearly testified that good cause was shown to extend the completion date. Finally, the WISHA compliance officer testified that she was not an expert in construction contracts. Mr. Kackman testified that liquidated damages was not even an issue in his mind. The threat of liquidated damages as a motivating factor to not

comply with the lead standards was never established by the Department. On this theory, the Department has failed to establish that Elder Demolition deliberately or with plain indifference chose not to comply with the lead standards.

The Department's second theory of willful violation is equally unpersuasive. In order to establish a substitution of judgment theory, the Department must first demonstrate that the Employer knew what the correct standard or procedure was. Secondly, the Department must demonstrate that the Employer decided that the correct standard could be substituted by a procedure that is not in compliance with the correct standard.

In applying this standard to the facts of this case, the Department must first establish Elder Demolition knew that the paint was suspect and that it must be tested before torch cutting.

Secondly, the Department must establish that Elder Demolition concluded that it could rely on the Port of Kalama or Hollinger instead of testing the material, even though it knew that testing was required before torch cutting. In our present case, Al Kackman did not actually know that the paint contained lead. In fact, the Department's Compliance Officer conceded in cross examination that she relied on the theory that, "the Employer should have known" that the paint was

suspect and contained lead. The Department's constructive knowledge is sufficient to establish a serious violation, but inadequate to establish the requisite knowledge for a willful violation.

As set forth in the *Valdak* case, the court held:

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

Actual knowledge of the violation is logically a necessary prerequisite of a willful violation. Without knowledge of the violation, the employer could not have the requisite state of mind to have a deliberate indifference or plain indifference to the safety or health code that was allegedly violated.

In our present case, Elder did not actually know that the paint was suspect and that it must be tested or treated as if it contained lead to begin the project.

WAC 296-155-17607(2)(b) declares in relevant part:

***“...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.”

Cheryl Christian, the Department’s expert from Technical Services (formerly known as Policy and Technical Services) testified that if an employer has any reason to believe that an employee may be exposed to lead in excess of the PEL, then the employer must treat the employee as if there will be exposure over the PEL, and further implement the interim protective measures for trigger task activities. Ms. Christian also acknowledged that a subcontractor may rely on the good faith representations made by its general contractor.

Conversely, Ms. Christian also testified that under the highlighted phrase, if an employer has no reason to believe that an employee will be over the PEL for lead, then the employer is not required to treat the employee as if there will be exposure over the PEL and does not need to provide the interim measures.

Ms. Christian acknowledged that the lead in construction standards, Exhibit 60, do not specifically state how an employer is required to “determine” whether lead is at

a job site. In our present case, Mr. Kackman made this determination by asking the Port if the project would involve any hazardous materials. Based on the representations made by the Port and Hollinger, Mr. Kackman had no reason to believe that Elder employees would be exposed over the PEL to lead. Moreover, there is no WISHA regulation that specifically directs the Employer to obtain a Good Faith Survey to determine whether lead may be present at a jobsite.

Under the interpretation provided by Ms. Christian, where Mr. Kackman had no reason to believe that there was lead on the project, Mr. Kackman was not required to treat the employees as if they would be over the PEL and to further provide interim protective measures. The Department will most likely argue that the determination that lead is not present at the project can only be determined by a hazardous material survey result, Ms. Christian acknowledged that the regulations, and no WISHA Regional Directive (WRD) specifically provides this guidance to either employers or to WISHA compliance officers.

Mr. Kackman testified that he did not believe that he had to shut down the project because of the representations made by Mr. Wilson, and further based on his belief that a letter would be coming from the Port that would show that lead was not present or involved in this project. While Mr. Kackman

states that he now understands that his prior interpretation of what was required was in error, he did not have the same understanding of what was required at the time the Department alleges Elder Demolition engaged in willful violations of the Act. Given the complexity of the lead in construction standards, which includes the interpretation from Ms. Christian that interim protective measures are not required if the employer has no reason to believe that the employees will be overexposed to lead, the Department fails to establish that Elder Demolition had the requisite state of mind to willfully violate any lead standard.

Although Mr. Kackman may not have been correct in his good faith belief that a letter stating that lead was not present to support the previous representations that no hazardous materials would be involved in the Port of Kalama project, he nevertheless believed that he was in compliance with the standards at that time. Federal case law clearly holds that a good faith belief, even though it is incorrect, does not demonstrate the requisite state of mind that the employer had the deliberate intent or plain indifference to complying with the applicable safety standard. While it is clear that the Department established a “serious” violation, the Department failed to establish that the serious violation was also committed with a deliberate or plain indifference to the safety standards at

issue. As such, the “willful” classification for Item 1-1a, 1-1b and 1-1c must be vacated.

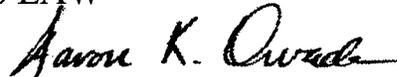
## VI. CONCLUSION

Based on the above, this Court should reverse the IAJ’s proposed decision that affirmed the serious citations against Elder Demolition. The Department failed to provide any substantive evidence that any employee was exposed to a hazard as required by RCW 49.17.180(6).

Additionally, this Court should vacate the “classification” that the Employer willfully violated the lead standards in Items 1-1a, 1-1b and 1-1c. Rather, the Board should affirm these violations as “serious” violations, remove the “willful” classification, and reduce the “willful” multiplier of “10” in the assessment of the monetary penalty for that grouped item.

DATED this 19 day of February, 2008.

AMS LAW



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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

NO. 37082-4-II

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

ELDER DEMOLITION,

Appellant,

v.

WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

DECLARATION  
OF SERVICE  
BY MAIL

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on February 19, 2008, I filed with the Court of Appeals Division II, via US Mail, the original of the following document:

1. **APPELLANT'S OPENING BRIEF**

**ORIGINAL**

and that I further served a copy via US Mail upon:

Margaret Breysse, AAG  
Office of the Attorney General  
Labor & Industries Division  
PO Box 40121  
Olympia, WA 98504-0121

SIGNED in Lacey, Washington on February 19, 2008.

A handwritten signature in cursive script, appearing to read "Lisa Ockerman", written over a horizontal line.

Lisa Ockerman